TPS REALTY NEWSLETTER

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Adverse Possession – Decision of a Jury

We submit this case to demonstrate the perils of submitting adverse possession type of litigation to a jury's tender mercies. In this instance plaintiff offered testimony by three witnesses who testified that defendant acknowledged to them that he did not own the disputed premises. Defendant offered proof of nature often found to be sufficient to establish adverse possession;- that he and his family had cut the grass around a shed that he had erected; and gave two area farmers permission to cut and remove hay from the disputed parcel. Citing *Van Valkenburgh v. Lutz, (304 NY 95, 98),* defendant urges that has established by "clear and convincing evidence" his claim of adverse possession.

This conflicting evidence as adduced by the parties, created a credibility issue for a jury's determination.(*Jaquay v. Avery, 664 NYS2d 651[AD])* Accordingly, (citing *Esner v. Janisziewski, 580 NYS2d 551[AD]),* this Court determined that deference must be given to the jury's interpretation of the evidence if there is "present credible evidence sufficient to support that interpretation even if other evidence can be found which would support a contrary conclusion." **Da Costafaro v. De Vito,** 733 NYS2d 817 (A.D.3 D.]

Condominiums – Common Area

The condominium within which defendant owns a unit adopted a Declaration, Art. VII of which states in part, that "*No building …wall or other structure, or change or alteration to the exterior of the Homes shall be commenced erected or maintained upon the Properties … until the plans and specifications … shall have been…approved in writing..by the Board.* Although the Board approved a removable 10'x 12' wooden platform patio; defendant constructed a 10' x 20'patio made of concrete blocks set in a sand base. After trial, that court granted plaintiff (Bd.) a permanent injunction requiring defendant to remove the Defendant has fee ownership only to the unit and the land on which it sits. Property commencing at his exterior walls is in common ownership in which all the condominium owners have an undivided interest. This Court found that defendant's reliance on a line of cases respecting the enforcement of restrictive covenants on property of others, was inapplicable as to lands of common condominium ownership. (*cf. Huggins v. Castle Estates, 369 NYS2d 80 [N.Y.]).*

Further, this Court held that to successfully attack the decision of a Condominium Board, defendant must establish that the Board was not acting within the purposes of the association; the scope of its authority; or not in good faith. *Matter of Levandusky, (554 NYS2d [NY]).* Additionally, this Court rejected the contention of defendant that the standard required to be met by the Board seeking injunctive relief was that of clear and convincing" evidence; rather than that adopted by the court of a "preponderance" of evidence; and granted plaintiff such relief. **Hidden Ridge @ Kutshner's CC HOA, Inc. v. Chasin,***734 NYS2d 292 [A.D.3D-Dec.2001]*.

Cooperative – Valuation-Number of Shares

This dispute concerns the valuation of a cooperative apartment by the assignment of a specified number of shares of stock in the cooperative corporation. to such unit. Initially, when plaintiffs purchased a ground floor to be used for their professional offices, 250 shares were allocated to their unit. Pursuant to the terms of the contract of sale, they were required to pay a monthly professional fee of $300. Subsequently, the board of directors approved the allocation of an additional 75 shares in lieu of the payment of the monthly fee. As the result of the increased in maintenance fee occasioned by this additional amount of shares, and general cost increases, the amounts paid by plaintiffs was far more than it would have been if no

change had been made. Plaintiffs, having acquiesced to this contract (for over 10 years), which they freely entered into, now seek to reform it.

As a condition to reformation, a party "*must establish his right to such relief by clear, positive and convincing evidence" (Amend v. Hurley, 293 NY 587, 595)* Further, the circumstances upon which modification is granted must have been extant at the time the contract was entered into. *"Equity will not relieve a party of his obligations under a contract merely because subsequently, with the benefit of hindsight, it proves to have been a bad bargain."* Accordingly, plaintiffs having acceded to this bargain for this period of time, are estopped now to complain that it was unfair. (*EDPI Assocs. v. N.Y.C. Loft Bd., 642 NYS2d 900 [AD])* Fairness of a bargain is assessed at the time of its making.

Dismissing the plaintiff's complaint, this Court held that plaintiff's failed to show that the agreement they negotiated was unfair at the time of its origin; and having enjoyed the economic advantage of the same for many years, plaintiffs have not established any basis for reformation; and have not been subjected to discriminatory treatment by the Board. **Schultz v. 400 Cooperative Corp'n.,** 736 NYS2d 9 A.D.1.D.-2001]

Mechanics Liens – Filing By Foreign Corporation

The issues raised by this action are whether a mechanic's lien can be validly filed in N.Y. in 2000 by a New Jersey entity which was incorporated there in 1984, but was dissolved in 1990 for failure to pay taxes; and which has never qualified to do business in New York, although it did a significant amount of business here. Further, could such a Notice of Lien be validly filed by such an entity in conformance with Lien Law Sec.9 (1) which requires that the Notice state the lienor's "principal place of business" in this state. [The Notice herein filed by the lienor, did not list a N.Y. address, only specifying a New Jersey address.] Dealing with the Sec. 9 issue first, this Court traced the convoluted court decisions on this issue, as follows. Dealing with the Sec. 9 issue first, this Court traced the convoluted court decisions on this issue, as follows. Bowman's treatise "Mechanics' Liens in New York" (Sec.3.2) sets forth the 1930 case of *John Roberts, Inc. v. Rosenstock, (247 NYS 420-S.Ct.Albany Co.)* for the proposition that if "the corporation is found to be doing business in New York, then it will have a 'principal place of business' here (and) a failure to describe such place in the notice, will invalidate the lien." (Sec.3.2). However, the facts in that case and in *J.C. Constr. Mgmnt. Corp. (698 NYS2d 901-A.D.-2.D.)* which followed it, were instances where the lienor had one or more places of business within this State, in addition to a principal place of business in a foreign state. In other cases where it was found that the lienor was not doing business in N.Y. within the meaning of the statute, and there was "no principal place of business" within the state, the recital of the "principal place" out the state was a sufficient compliance with the statute. Accordingly, this Court quoted with approval the dicta in the decision on re-argument in *Arteourt Realty (243 NYS2d 733),* to the effect that even if a lienor is doing business in N.Y., if it does not in fact have a place of business within the State, the statute does not require that it invent a fictitious one for the purpose of compliance with the statute.

Disposing of the non-applicability of the Business Corp'n. Law (which deals with actions commenced by foreign corporations) to the filing of a mechanics' lien; this Court turned to the issue of whether under the facts of this case, the lienor constituted a "*de facto*" corporation with authority to validly file a lien in N.Y. Noting than such a corporation could validly file such a lien consistent with winding up its affairs; BCL Sec. 1005(a)(1) otherwise prohibits such a filing. Citing *De George v. Yusko, 564 NYS2d 597 (3.D.),* this Court held that a corporation during its delinquency and until it received retroactive *de jure* status, is essentially legally dead, and has no *de facto* status. Accordingly the discharge of the subject lien was granted. **Window Sales, Inc. v. Precision Specialist Metal & Glass, v. Inc.,** 735 NYS2d 724 [S. Ct. NY Co, - Dec. 2001] **.**

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T.P.S. ABSTRACT CORPORATION
350 Old Country Road Garden City, N.Y. 11530
(516) 248 – 6550 (631) 273 - 8000
(212) 936 – 3535 Fax: (516) 742 - 7509
E-Mail: tsherris@tps-abstract.com
Website: www.tps-abstract.com