TPS REALTY NEWSLETTER

Volume 1, Number 2. **Theodore P. Sherris** Counsel **Brett G. Sherris** Vice-President July 2002

Anticipatory Breach-Intentional Unequivocal Acts: The terms of sale authorized by Order of the Court at a Chapt. 11 Bankruptcy sale, provided that a bid was to be accompanied by "an irrevocable 10% deposit". A "Successful Bidder" and "Back-Up" Bidder was to be identified for each property in the auction. On being notified that the "Successful Bidder" for the subject parcel, was in apparent default; Appellant-Back-up Bidder indicated that he wished to withdraw his bid. He did not furnish certain financial records required to complete the sale. Although advised by Debtor that his bid was "irrevocable", appellant made no further inquiries concerning the status of the property; did not attend a hearing to deal with the disposition of the property; nor do anything to indicate that he would fulfill his contractual obligations**.**

Under New York Law, an anticipatory breach occurs when a party to a contract repudiates his obligations prior to performance. (*Norcon Power Partners v. Niagara Mohawk Power Corp., 682 NYS2d 664, 667 [NY]*. Finding that appellant's actions were "un-equivocal", the Court citing *DeLorenzo v. Bac Agency, Inc., (681 NYS2d 846, 848 [AD])*, held that the non-repudiating party is entitled to immediately claim damages for the breach when there is "an unqualified and clear refusal to perform with respect to the entire contract." Concluding that Appellant had repudiated the contract, the Court found that the Debtor had no obligation to perform; and that if he elected to treat the contract as breached, he need only show that "he was ready, willing and able to perform.." (*DeForest Radio Tel. & Tel. Co. v. Triangle Radio Supply Col., 243 NY 283, 292, 292).* **In re Randall's Island Family Golf Centers, Inc. 272 Bkrptcy Rpts., 521; [USDC-NY-2002].**

Easement to Light & Air: Plaintiffs-tenants in a multiple dwelling, brought this action against Defendant-landlord, *inter alia,* for a declaration that defendant's sealing of an air shaft, violated their easement to light and air. The Court cited *Lafayette Auvergne v. 10243 Mgt. Corp .(362 NYS2d[NY]),* to the effect that an easement to light and air cannot be created by implication; and found that there was nothing in plaintiff's apartment lease that could be construed as an agreement to create or maintain one. While noting that *Doyle v. Lord (64 NY 432)* stated the law to be that a lessee of an entire building carried with it an easement to an adjoining yard; it refused to extend such rule in favor of an individual lessee, absent an express grant of such an easement as appurtenant to such lease

The English Doctrine which held that a right to the unobstructed passage of light and air adjacent to premises of another owner could be gained by continuous enjoyment of such a privilege for a period of prescription, has generally been rejected in this country. *(Doyle v. Lord, supra).* **Levin v. 117 Limited Partnership, 738 NYS2d 50; [A.D.1.D.-2002].**

Easement or Licenses: At issue are the rights of certain property owners to have access to a private beach area for swimming purposes. Plaintiffs are the owners of certain real property including 100' of beach on the shore of South Long Pond; and defend-ants are the owners of various neighboring parcels, or their invitees. The title to each of the owning parties is traced to common owners, Scholl and Benker. Each of the deed in the respective chains of title, contain the same (or substantially similar) clauses which provided:

"… together with the right to use the private beach located on said South Long Pond and owned by the parties of the first part for swimming and bathing purposes, in common with other owners of beach privileges;" and "… subject to the right of other owners of beach privileges to use

the private beach located on the premises for swimming and bathing purposes."

Plaintiffs contend that the language contained in these deeds did not create an easement over plaintiffs' lands; but a "license" that plaintiffs have now revoked. Citing as well settled law, the Court held that an easement appurtenant is created when such easement is: "(1) conveyed in writing; (2) subscribed by the person creating the easement; and (3) burdens the servient estate for the benefit of the dominant; *114 [AD]).* The use of the words "assigns forever" in connection with the above cited clause, created a license rather than an easement. Contrariwise, and citing *Mondelli v Homik, (732 NYS2d 114 (AD);* the Court stated its satisfaction that the grantors of such deeds intended to create a right to revoke; or that the rights granted were personal in nature. **Stasack v Dooley; 739 NYS2d 478; [A.D.3.D.-2002].**

Lis Pendens-Validity of Refiled Lis Pendens: This case presents the issue of the validity of successive Notices of Pendency of action pursuant to CPLR 6515. Plaintiff entered into a contract with defendant to build a home on property which it sold to plaintiffs. Plaintiffs served a summons and complaint; and much later filed a Lis Pendens in June 2000. While a motion was pending to dismiss this action; and cancel the lis pendens; plaintiff commenced this second action also seeking, *inter alia*, specific performance; and filed a second Lis Pendens in connection therewith. In December 2000, and while the motion to cancel the second Lis Pendens was pending; the Supreme Court dismissed the first cause of action and cancelled the first Lis Pendens on the ground that plaintiffs had failed to file and serve the summons and complaint within 30 days of the filing of the Lis Pendens.

Citing the facts in this case as falling squarely within the parameters of *Isrealson v. Bradley, (308 NY 511, 513, 514, 516 and 517)* , this Court held that a "second Notice of Pendency for the same property cannot be filed when a prior Notice of Pendency has been cancelled for failure to Comply with Statutory requirements." (*cf. Matter of Sakow, ___ NYS2d ___; [NY]),* and relating to the same controversy. **Weiner v. MIKVII-Westchester, LLC, 739 NYS2d 432; [A.D.2..D.-2002].**

Mechanics Lien-Requirement of Extension Order: Petitioner is the owner of a 5.4 acre parcel improved by a two detached single family residences; one in which he lives, and the other which he rents. Planning on developing all or part of these premises for "commercial" use, he negotiated to sell the rented house and lands to GBH Paving, Inc.(GBH) who, with petitioner's consent, engaged other respondents to construct an access road and parking area. When these other respondents were not paid, they filed the mechanics liens at issue herein against the entire premises owned by petitioner; not just against the premises to be sold to GBH. None of the lienors commenced a legal proceeding to foreclose their lien; or to obtain an Order of Extension within one year of the filings. Rather, each of them purported to extend their lien by the filing of a Notice of Extension. Petitioner argues that as respondents did not obtain court orders within the requisite time period extending these liens, that the liens lapsed by operation of law. Accordingly, petitioner has brought on this motion to have the same cancel-led of record. In opposition, respondents contended that the subject property was not of the type described by Lien Law Sec. 17, premises "improved …with a single family dwelling," which would require that a court order be obtained to effect such a cancellation. [Underline ours.] Petitioner appeals from an adverse decision of the lower court.

Finding it an undisputed fact that the property at all times, even during the period of construction, had been used solely for residential purposes; this Court rejected respondents' contention that the property (at least in part), may be characterized as "commercial," based either on the nature of the work performed, or on an intended commercial use that never came to pass. It further rejected respondents' position that the article "a" before the words: "single family dwelling" in the statute, required an interpretation of "only one single family dwelling; *(cf. Matter of Hotel St. George Corp., 207 NYS2d 529, 531);* finding that petition's premises were improved by "at least one such dwelling."

Since the Sec. 17 language must be given an interpretation consistent with Lien Law Sec. 10 (where similar language was used), this Court interpreted the cited Sec. 17 language as applying to property improved with between one and four family residences. Accordingly, it reversed the lower court. **Cook v Carmen S. Pariso, Inc., ano.; 734 NYS2d 553; [A.D.2.D.-2002].**

Mortgage Foreclosures - Retention of Rents: When a mortgagee lawfully takes possession of the mortgaged premises, he (she) "takes the rents" received from the use of the premises, "in the equal character of trustee or bailiff of the mortgagor." (*Hubbell v. Moulson, 53 NY 225, 228);* and the net rental monies received are then "applied in equity as an equitable setoff to the amount

due on the mortgage debt." Accordingly, the Referee should have calculated the net proceeds received in determining the amount due to plaintiff. **Mandel v. Strickland, 735 NYS2d 553; [A.D.1.D.-2002].**

Mortgage Foreclosures - Standing to Bring Action- "Relation Back": A servicing agent (FNB) had standing to bring a fore-closure action by reason of the delegation of authority in the servicing agreement over the subject mortgage. (*Cottege Mgt. Co. v. Belcher, 552 NYS2ds 616).* Citing, *MKW St.Co. v. Meridien Hotels, (584 NYS2d 310),* the Court also held that even if FNB's status as a servicing agent were not sufficient to confer status on it;'- the substitution of plaintiff as assignee, relates back to the original com-mencement of the action for the purpose of the Statute of Limitation. **Fairbanks Capital Corp. v. Nagel; 735 NYS2d 13; [A.D.1.D.-2002].**

Restrictive Covenants - "Clean Hands Doctrine": This action seeks to enforce an easement and restrictive covenant running with the land contained in deeds to certain "dock lots" owned by defendants on Grand Canal in Wantagh, N.Y. Defendants are non-residents of Wantagh; and are alleged to be improperly using their docks for the storage and mooring of boats and as rental marinas in violation of the easements and covenants which benefit plaintiffs, and others. Plaintiff-homeowners in and about the area of the Grand Canal, maintain that defendants' continued maintenance of various obstructions (ie. poles, spires, floats, shacks, huts, fences, etc.) hindered and obstructed the free and direct passage of boats on and along the canal, as well as plaintiffs' right of ingress and egress to and from the aforementioned lots and Grand Canal, thereby depriving plaintiffs of the use, benefit and enjoyment of the easement contained in their deeds.

This Court cited with approval the decision the lower court, to wit: that "where a litigant has himself been guilty of inequitable conduct with reference to the subject matter of the transaction in suit, a court of equity will refuse him affirmative aid." **Mandalay Property Owners Ass'n, Inc. v. Keishuer; 738 NYS2d 677; [A.D.2.D.-2002].**

Specific Performance - Limitation of Liability: A provision contained in a contract of purchase and sale of real property, provided that in the event the Seller was unable to convey title in accordance with the terms of said contract, the Seller's obligation to the Buyer was limited to refunding the amount payable on account of the purchase price; and paying the net costs of examining title. Citing *Mokar Properties Corp. v. Hall (179 NYS2d 814),* this Court held that such a limitation contemplates the existence of a situation beyond the control of the parties; and implicitly requires the Seller to act in good faith.

The Court found that plaintiff (Buyer) had established as a matter of law, that defendant had failed to make a good faith effort to cure the title defects revealed by the title examination. Since Seller's inability to convey marketable title was self-created, it did not bar plaintiff from seeking specific performance. (*cf. S.E.S. Importers v. Pappalardo, 442 NYS2d 453 [NY].* **Naso v. Hague; 734 NYS2d 214; [A.D.2.D.-2002].**

Vendor & Purchaser - Constructive Notice: In December 1996, one Jenkins purported to convey title to certain premises to Stephenson. In June 1997, said Jenkins was determined by Court Order to be an incompetent person, and respondent was named co-guardian of said Jenkins estate; and in that capacity, on 11-24-1997, filed a Lis Pendens in an action to void and s et aside said deed to Stephenson. On this same day, Stephenson conveyed title to Legend Homes, which deed was not recorded until 12-24-1997.

Citing *Goldstein v. Gold, (483 NYS2d 375; aff'd. 495 NYS2d 32 [NY]),* this Court held that a purchaser must record the deed prior to the filing of the Notice of Pendency. He will be charged with constructive notice of the litigation if he fails to record the deed prior to the filing of the Notice of Pendency. Legend failed to record its deed prior to the filing of the Notice of Pendency, and therefore is bound to the same extent as Stephenson would have been, by the judgment determining that Jenkins did not have the capacity to deed the premises to said Stephenson.

This Court affirmed the lower court's finding that at the time of the conveyance to Stephenson, Jenkins was incompetent; and that the transfer was the result of undue influence and fraud. On this basis, this Court reversed the lower court which had found that Legend was a bona fide purchaser for value, without actual or constructive notice of the aforesaid Jenkins competency proceeding. Accordingly, both of said deed were

invalidated. **Jenkins v. Stephenson; 733 NYS2d 723; [A.D.2.D.-2002].**

Vendor & Purchaser - Doctrine of Merger: A contract for the purchase and sale of commercial real property, stated the property taxes to be $14,000 annually. After closing, plaintiff-purchaser discovered that they were in fact, $22,000. Since this was, *inter alia*, an action for breach of contract, unless there was a clear intent expressed in the contract that the property tax provisions were to survive delivery of the deed; such representation was extinguished by the delivery of the deed; and would not survive delivery of the deed. **Crowley Marine Assocs. v N.Y.-Conn. Associates; 738 NYS2d 681; [A.D.1.D.-2002].**

OBITUARY

As the many loyal readers of the **"Rhodes Review"** are now aware, the Jan-Feb 2002 issue published this past January, was its last, ending over ten years of service to the legal community. Its cause was the failing health of Christopher Maffucci, its Editor and Publisher. He died this past April. Chris was a man of impeccable character, integrity and learning; and an attorney who served his clients with honor and dignity.

We who have taken up the publication of this **T.P.S. Realty Newsletter,** dedicate ourselves to the maintaining of his high standards. During these past years, I have considered it a privilege to work with Chris; and be associated in the enterprise known as the **"Rhodes Review."** We all will miss his wise counsel.

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