TPS REALTY NEWSLETTER

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Adverse Possession-Claim of Right: In 1987, defendants installed a fence of property owned by the City of New York, which was adjacent to their property. In 2000, plaintiff (successor to the City,) instituted this action to obtain the removal of said fence. Defendants counterclaimed for judgment alleging that they owned the property by virtue of adverse possession for a continuous period in excess of ten years. Among the elements required for adverse possession, are "hostile possession, under claim of right." An inference of hostile possession will be drawn when the other elements of adverse possession are established. (*Gerlach v. Russo Realty Corp., 695 NYS2d 128 [AD])*

In this instance, this Court found that the inference of hostile possession was rebutted by the admission of one of the defendants that he knew that the subject property belonged to the City when he constructed the fence. The relevant consideration is not when the admission was made, but rather, when the defendants knew that they did not own the subject property. Citing *Giannone v. Trotwood Corp. (698 NYS2d 698 [AD}),* this Court held that admissions established that defendants' possession of the disputed parcel was with knowledge that they did not own the said parcel at the time they constructed the fence. This Court concluded that mere possession, no matter how long continued, affords no title by adverse possession unless under claim of right. **Harbor Estates Lim. Partnership v. May,** 742 NYS2d 347 [A.D.2.D.-2002].

Condominiums–Neighbor's Liability: Plaintiffs' condominium unit was flooded and their personal property sustained water damage as a result of a break in a washing machine hose in the condominium unit directly above theirs which was owned and occupied by defendant at that time. As a result, plaintiffs commenced this action sounding in negligence which was based upon defendant's alleged failure to properly maintain his condominium. Defendant presented evidentiary proof that he had no knowledge, either actual or constructive, of any defect in the washing machine hose or the water shutoff valve for that machine. Further, that he had hired a management company to perform all required maintenance or repairs in his property; and that he had never been advised by such management company of any problems relating to such faulty condition of his washing machine.

Citing *Henness v. Lusins, (645 NYS2d 937*[AD]*),* the Court held that to imply constructive notice of a defect on defendant, requires that the defect "be visible and apparent and it must have existed for a sufficient length of time prior to the [occurrence, for defendant] … to discover and remedy it." Finding that defendant had maintained his premises is a reasonably safe condition; and that he did not have actual or constructive notice of the defect; and that he did not create the allegedly dangerous condition, this appellate court found for defendant, and affirmed the lower court's dismissal of plaintiffs' complaint. **Antich v. McPartland,** 740 NYS2d 728 [A.D.3.D.-2002].

Co-op Board Authority-Business Judgment Rule: Paragraph 7 of the certificate of incorporation of this coop corporation provided that "no shares shall be transferred without the prior consent of the directors." In 1977, eight individuals then constituting all the owners of stock of the corporation, including defendant Knecht, entered into a stockholders' agreement which contained a provision affording each shareholder a right of first refusal whenever any shareholder wished to sell his or her shares. It provided further, that if "*none of the Stockholders elects to purchase the Transferor's shares";* the shares could be sold to a prospective buyer provided that the "*Corporation gives its written consent to the transfer of such prospective purchaser, which consent will not be unreasonably withheld."*[Throughout the corporation's history, all transfers have been subject to this approval.]

Pursuant to the these provisions, a contract was drawn whereby certain shares were to be sold jointly to Knecht and plaintiff; which further provided that if either buyer failed to go forward with the purchase, the Seller had the right to sell to the other. Plaintiff signed the contract as proposed Knecht signed it with alterations which the Seller rejected. Accordingly, the Seller opted to sell only to plaintiff.

On consideration of this proposed sale, the Coop Board approved a sale of the contract as proposed Knecht signed it with alterations which the Seller rejected. Accordingly, the Seller opted to sell only to plaintiff. On consideration of this proposed sale, the coop Board approved a sale to Knecht; but rejected the transfer to plaintiff. This action was brought by plaintiff, a minority shareholder in a cooperative corporation against said corporation; Knecht, a director who was the majority shareholder (the alternate purchaser); and two directors who were not shareholders; for tortuous interference with the consummation of a contract for the sale of shares of stock to plaintiff, pertaining to a certain coop apartment unit. The lower court decided, *inter alia*, that the Board had unreasonably withheld its consent to plaintiff's purchase.

Citing *Sandusky v. One Fifth Ave. Apt. Corp.,(554 NYS2d 807 [NY])*, this Court held that whether the Board's action constituted the "*unreasonable*" withholding of consent to plaintiff, the proper standard of review was the "business judgment" rule. A court must defer to the Board's determination if it was taken in furtherance of the corporation's purposes; was within the scope of the board's authority; and was taken in good faith. It noted further, that such rule is not an "insuperable barrier". Rather, review is permitted of improper decisions, as "when the challenger demonstrates that the board's action … deliberately singles out individuals for harmful treatment." In such circumstances, plaintiff is not required to show that the board members were self- interested; only the Board's good faith is at issue. A showing of unequal treatment is sufficient. (*Bryan v. West 81st St. Owners Corp., 589 NYS2d 323 [AD])*. Finally, interest is not limited to financial self-interest; it is enough if a director is "controlled" by another interested director. While the evidence was insufficient for the granting of summary judgment; this Court sent the matter back for the introduction of further evidence bearing on this issue. **Barbour v. Knecht,** 743 NYS2d 483 (A.D.1.D.-2002).

Cooperative-Nuisance: Plaintiff resides in a coop apartment immediately below defendants'. Two aged water-cooled air conditioning units used by defendants repeatedly leaked into his apartment causing damage to the apartment and to personal property therein. This action was brought by plaintiff for money damages and to enjoin the continuance of this alleged nuisance; (now consolidated) with another action brought by the Coop Board to enjoin the maintenance of these air conditioners which were installed without the permission of the Board.

Citing *Copart Indus. V. Con. Edison Co., (395 NYS2d 169 [AD])*, this Court held that the defendants' air conditioning units resulted in a substantial, intentional and unreasonable interference with plaintiff's use and enjoyment of his apartment; and thereby constituted a *nuisance*. In light of the fact that repeated efforts to repair these units were ineffective, this Court found that only a complete cessation of the use of these units would reliably prevent the reoccurring flooding which damaged plaintiff's property. Finally, the Court found that such cessation would not prevent defendants from air conditioning their premises without their incurring significant economic hardship by the use of another type of air conditioners. **Handler v. 1050 Tenants Corp.,** 744 NYS2d 161 [A.D.1.D.-2002].

Covenants & Restrictions-Partial Extinguishment: Plaintiffs brought this action to enforce a restrictive covenant respecting premises adjacent to theirs, and of which they were beneficiaries, which required that certain lands known as the "Buffer Lands", were to remain "in its natural state." Plaintiffs thereby sought to enjoin defendants from constructing residential structures thereon; and barriers encompassing the said tract. The lower court granted defendants' first counterclaim interposed against plaintiff's complaint, to the extent of allowing them to construct five single-family residences on each of two ten-acre parcels within the 461 acre tract; and to construct a perimeter fence around the same. The lower court found that the enforcement of the covenant to the full extent of the tract as sought, was of "no actual and substantial benefit to plaintiffs."

Reversing the lower court, this Court held that said court was without authority to direct the partial extinguishment of a covenant pursuant to RPAPL 1951(2), in that said statute does not *expressly provide* for the same; nor was there any case law so interpreting that section to so permit. Further, it held that defendants failed to prove that the restrictive covenant was "of no actual and substantial benefit" to plaintiffs; or that there is "*no use whatsoever to which the*

restricted land can be put" by defendants, (*cf. Orange & Rockland Utils. V. Philwold Estates, 52 NY2d 253 at 265; 437 NYS2d 291*). Clearly, this Court said, the property obviously is capable of remaining in its "natural state."

Inasmuch as defendants purchased the property at a substantially reduced price, with full knowledge of the restrictive covenant, any hardship on his part was self created. Accordingly, the decision of the lower court was modified in accordance with the foregoing, and plaintiffs were granted the relief sought to enforce the said covenant against the entire premises. **Eisenberg v. Congel,** 744 NYS2d 281 [A.D.4.D.-2002].

Deed-When Constituting a Mortgage: In this action in the nature of a foreclosure commenced by plaintiffs, it appeared that defendant had made a deed to certain real property; and a bill of sale affecting certain construction equipment; in favor of plaintiffs; in lieu of foreclosure on prior loans between the parties. At issue was whether these instruments transferred ownership of the real and personal property to plaintiffs; or whether this deed, absolute on its face, was in fact a mortgage.

Since the resolution of this issue is essentially a factual one, evidence of the intent of the parties must be established by "clear and conclusive evidence" and "beyond a reasonable doubt." (*Peerless Constr. Co. v. Mancini, 466 NYS2d 497 [AD], lv. den. 471 NYS2d 1028 {NY])* Toward this end, a debtor may show by parol evidence that a transfer purporting to be absolute "was in fact for security." (*Barry v. Colville, 129 NY 302*) Accordingly, this Court found said deed to be a mortgage on the premises. **Liberatore v. Olivieri Development,** 741 NYS2d 371 [A.D.4.D.-2002].

Mechanic's Liens-Actions Continue Liens: In May 1998, appellant-PR Painting Corp. filed a notice of mechanic's lien for work done in petitioner's-Lindt & Sprungli's premises in a mall. Petitioner subsequently obtained a discharge of said lien upon the filing of an undertaking. The RCM Corporation, another company which had performed work in said mall, also filed mechanic's liens that were discharged by the filing of undertakings. Appellant who was named as a defendant in an action commenced by RCM in October 1998 to foreclose its lien against petitioner, and others;- asserted a cross claim to foreclose its lien. In November 1999, pursuant to a notice of motion (which was never served on appellant), RCM's foreclosure complaint was dismissed. PR appeals herein from an order canceling its undertaking premised upon that court's determination that PR's lien had expired by operation of law.

Lien Law 17 provides in part, that when a lienor is made a party defendant in an action to enforce another lien and a lis pendens has been filed in that action, the lien of such defendant is continued. Further, when a lien is discharged by the filing of an undertaking, the lien is shifted to the undertaking; and the filing of a lis pendens is unnecessary; even prohibited by statute. (*White Plains Sash & Door Co. v. Doyle, 262 NY 16*) If appellant's cross claim to foreclose its lien had been dismissed at the same time the RCM complaint was dismissed, then its lien would have lapsed. However, that was not the case. Accordingly, since appellant's lien is still valid; petitioner's application to discharge the undertaking is denied. **Lindt & Sprungli USA, INC. v. PR Painting Corp.,** 740 NYS2d 369 [A.D.2.D.-2002].

Mechanic's Liens–Consent by Adjacent Owner: The parties hereto are owners of adjoining properties. Defendants conducted sand mining on their property without a permit. By reason of this failure to obtain a permit, the N. Y. S. Department of Environment Conservation ordered them to reclaim or restore the affected land. Due to the delays in this restoration, plaintiffs only restored much of the affected land. Subsequently, plaintiffs filed mechanic's liens against defendant, and commenced this action, in effect, to recover in *quantum meruit* and to enforce the liens.

In order to maintain and enforce a mechanic's lien, a plaintiff is required to demonstrate that the defendant (owner) consented to the work performed on its Property [Lien Law Sec. 3]. This consent required by the Lien Law "is not mere acquiescence and benefit, but some affirmative act or course of conduct establishing confirmation." {*Valsen Constr. Corp. v. Long Is. Racquet & Health Club, 645 NYS2d 317* [AD]). Finding that defendant did not consent to the work, but in fact objected to the land restoration, this Court granted defendant's summary judgment dismissing plaintiffs' complaint. **Zimmerman v. Carlson,** 741 NYS2d 118 [A.D.2.D.-2002]. Mortgage Foreclosure-Statute of Limitations: The issue presented here, is the effect of the six year New York and Federal [28 USC 2415(a)] statutes of limitation, on mortgages made by the Federal Government through one of its agencies. Plaintiff loaned funds to defendant and her former husband to acquire certain farm lands. Although default on its repayment occurred in 1986, plaintiff did not commence this foreclosure until 1995.

Citing *Cracco v. Cox (414 NYS2d 404 [AD])*, that Federal Limitation was not held to apply to situations where that government agreed not to pursue a deficiency judgment against the defendant. Further, this Court also held that the Federal Government or its agencies,

were not subject to state statutes of limitation. (*United States v. Summerlin, 60 S.Ct. 1019 [US])*. Similarly, the Federal Government is not subject to the defense of laches. **Farmers Home Administration v. Lyons,** 740 NYS2d 145 [A.D.2.D.].

Rule Against Perpetuities-Option to Purchase: In 1996, the parties hereto entered into a contract to purchase a certain property. When, due to financial problems, plaintiff could not proceed at the closing; defendant completed the purchase in her own name. However, at that time, defendant signed an agreement recognizing that both were purchasers; and giving plaintiff the right to purchase a one-half interest in the property for sum equal to 50% of all monies invested in the premises by defendant. Said agreement finally provided that it was to be "binding on both of us and our heirs and assigns." In 1999, defendant added her husband to the title; and later that year plaintiff sought to exercise her option. When defendant advised plaintiff that the agreement violated the rule against perpetuities (EPTL 9-1.1[b]), plaintiff instituted suit seeking, *inter alia*, a declaration that she had an equitable one-half interest in the property. [9-1.1(b): "Every present or future estate shall be void in its creation which shall suspend the absolute power of alienation … for a longer period than lives in being at the creation of the estate and a term of not more than twenty-one years."] Plaintiff appeals from a judgment of the lower court against her, based upon her violation of the Rule against Perpetuities.

Citing *Carroll v. Eno, (654 NYS2d 368 [AD])* in support; and distinguishing it from *Buffalo Seminary v. McCarthy (451 NYS2d 457 [AD], affd. 460 NYS2d 528 [NY])*; this Court held that the agreement language herein which granted the option to plaintiff, and was binding on "our heirs and assigns", demonstrated an intention to limit the exercise of the option to plaintiff within the measuring lives of the parties; and to provide that if defendant died before plaintiff, her heirs or assigns would have to honor her commitment in the event plaintiff sought to exercise her option. In the event that plaintiff died before exercising the option, it would die with her.

In *McCarthy*, the option itself was granted to the plaintiff therein, "*its successors and assigns."* Accordingly, this Court held that the cited agreement language did not violate the Rule Against Perpetuities; reversed the lower court; and remanded the case for an accounting. **Reynolds v. Gagen,** 739 NYS2d 704 [A.D.1.D.-2002]

Specific Performance-Election of Remedies: A prior action was brought by plaintiff who sought a reduction of the purchase price of the parties' 1996 contract; and specific performance of the said contract, as so reformed. Such action was dismissed on the ground that plaintiff's proper remedy for the defendant-seller's alleged fraudulent mis- representations concerning the building rent roll was not reformation, but rescission or damages. Plaintiff now brings this action for specific performance of the said contract, as written. Plaintiff appeals from the dismissal by the lower court of this second action, without prejudice to a new action for damages.

This Court cited *Prudential Oil Corp v. Phillips Petroleum Co., (418 F.Supp. 254, 257 [S.D.N.Y.])*, which in turn cited, *inter alia, Hill v. McKinley, (4 NYS2d 656 [AD])*, to the effect that for an Election of Remedies to bar the pursuit of alternate relief, "a party must have chosen one of two or more co-existing inconsistent remedies, and in reliance upon that election, that party must also have gained an advantage, or the opposing party must have suffered some detriment." Here, the plaintiff to his advantage, had been able to monitor the value of the building over a considerable period of time. Since the prior action sought reformation of the contract on the premise that it did not represent the parties' actual agreement as written; such a disaffirmance by plaintiff was inconsistent with the relief it now seeks; by now seeking specific performance of that very same contract it originally disavowed. The said dismissal was accordingly affirmed. **331 East 14th St. LLC v. 331 East Corp.,** 740 NY2d 327 [A.D.1.D.-2002].

Statute of Frauds–Condominiums: This is an action to enforce as a final binding contract, a one-page preprinted binder agreement signed by both parties by which a certain condominium unit was to be purchased; which document made several references to the future execution of a "more formal contract." The Binder gave no indication that the premises which were the subject of the transaction, was a Unit in a condominium; that the conveyance was to include the defendant-seller's interest in the common elements; or that the sale was subject to the Condominium Board's right of first refusal. It did provide that it was subject to the approval of defendants' attorney. After the signing of the Binder, the parties entered into further negotiations on the issue of whether the defendants should be responsible for a possible post-closing increase in condominium assessments.

To satisfy the Statute of Frauds, and be enforceable as a final contract, the Binder Agreement must contain those essential terms customarily encountered in a real estate transaction;- to wit: It must identify the parties; properly describe the subject property; and recite all the essential terms of a complete contract; in addition to being signed

by the party sought to be charged. (*cf. Century 21 Volpe Realty v. Jhong Kim, 605 NYS2d 552* [AD]*)* Citing *Jaffer v. Miles (521 NYS2d 472* [AD]*)*, this Court held that where a Binder Agreement contemplates the future execution of a formal contract, and essential terms have been omitted or left for future negotiation, the binder is unenforceable. **Simmonds v. Marshall,** 740 NYS2d 362 [A.D.2.D.-2002].

Tax Foreclosure-No Notice Given to Owner: As of 1994, plaintiff's identity as owner; and its most recent address; were properly listed in the Town of Kent's tax records. Subsequently, in August 1995, the mortgagee holding a mortgage lien on the subject premises, notified the said Town to send tax bills to it. Plaintiff never authorized a change of its address on the Town's records. The subject In-Rem foreclosure proceeding was commenced in 1998, with notice thereof given to said mortgagee; but not to plaintiff. Plaintiff brought this action to set aside the judgment of foreclosure; and the deed subsequently issued to one Reiger.

Pursuant to RPTL 1125, the County must provide actual notice of an In Rem proceeding to all parties "whose right, title, or interest in the property was a matter of public record as of the date the list of delinquent taxes was filed." Citing *Mennonite Bd. of Missions v. Adams, (103 S.Ct. 2706 [US]),* this Court held that due process is no more satisfied by notice to a mortgagee on behalf of an owner, than it is satisfied by notice to an owner on behalf of a mortgagee. The fact that the mortgagee notified the Town of its separate address, neither excused the County from notifying the plaintiff as owner; nor authorized the Town to change the owner's address in its records in the absence of specific authorization of the owner to that effect.. The lower court's order vacating the judgment of foreclosure; and voiding the deed, was affirmed. **West Branch Realty Corp. v. County of Putnam,** 740 NYS2d 135 [A.D.2.D.-2002].

Vendor Purchaser – Allegation of Fraud The contract for the purchase of residential property stated, *inter alia*, that the home was being sold "as is" without warranty as to its physical condition. The agreement further detailed that it was contingent upon several inspections, including one to determine "that the premises are free from any substantial structural, … water or sewer defects." Purchaser was present when defendant whom she chose, conducted the building inspection. At this time, plaintiff inquired about the "causes, status and condition of the mildew odor, severe dampness, structural soundness of the foundation, wetness and pools of water under the carpet: and the reason that the wall paneling was constructed at least one foot away from the foundation walls. The inspection disclaimed liability for "latent or concealed defects which cannot be reasonably discovered without opening up of walls, ceilings and floors." Substantively, the Report indicated no substantial defect in the basement; and no evidence of a major water problem. It did indicate minor signs of seepage likely caused by surface runoff; and recommended exterior regrading. Months after the closing, plaintiff began to experience protracted floods in the basement area; and commenced this action against the broker; and inspector, for damages; and against the Seller for rescission and damages. We deal herewith only as to the allegations of fraud and misrepresentation alleged against the Seller.

This Court found that on this appeal from the granting of summary judgment dismissing plaintiff's complaint, parole evidence could be introduced as to the physical condition of the premises despite the "as is" clause in the contract. However, and citing *Schooley v. Mannon. (659 NYS2d 374 [AD]),* the Court held that plaintiff failed to show that Sellers actively and intentionally concealed latent defects; or made material misrepresentations concerning the condition of the premises. Finally, plaintiff's own observations of the premises, and the inspection report, belied her contention of detrimental reliance upon alleged defendant's statements. **Berger-Vespa v. Rondack Building Inspectors, Inc.,** 740 NYS2d 504 [A.D.3.D.-2002].

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