TPS REALTY NEWSLETTER

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Adverse Possession–"Hostility" Defined: This case provides us with the first reasonable common sense definition we have seen of the adverse possession element of "hostility. The parties hereto each own parcels of land separated by a 16' wide gore strip lying between their properties. Although record title to both the gore strip and lands adjacent easterly thereto is currently in defendant, it did not acquire such record title to the gore strip until 1996.

In mid-1979, plaintiff constructed a parking field partially on his original parcel, and which extended over a portion of the gore parcel. At this time, he also planted, and mowed the resultant lawn, over the remaining portion of the unimproved gore parcel. He has also repaired broken sidewalk slabs; and in the winter, plowed and maintained the parking field. He has continued this use and maintenance well past 1989.

This Court rejected defendant's argument that since he (plaintiff) acknowledged that he did not have legal title to such property, that plaintiff's use and occupation could not have been under a "claim of right,". Such an interpretation, this Court found, "focuses far too much on [plaintiff's] state of mind"; what was known or should have been reasonably known by virtue of deed descriptions, surveys, or title insurance policies. It held, that the element of "hostility" need not be supported by "proof of enmity or literal hostility". All that is required is a showing that "the possession actually infringes upon the owner's rights … such as to give the owner a cause of action in ejectment against the occupier throughout the requisite period". [Citing *Birkholz v. Wells, 708 NYS2d 168.*] Judgment of title by adverse possession in favor of plaintiff granted by the lower court, was affirmed. ***Moore v. City of Saratoga,*** 745 NYS2d 238 [A.D.3.D.- 2002]

Contract–"Firm" Written Commitment: The contract entered into by the parties provided that it was subject to, and conditioned upon, the Purchaser obtaining a "firm written commitment" from a reputable bank or other lending institution licensed to do business in New York. Seller was given the right to cancel the contract on five days written notice to Purchaser if such a mortgage commitment was not obtained within 45 days after the execution of the contract. Purchaser obtained a commitment which was "subject to", *inter alia,* an environment assessment of the property.

Well after the expiration of the 45 day period, Seller served on Purchaser his notice of cancellation of the contract, as no "firm" commitment had been sent to it by the Purchaser; and simultaneously returned the down payment monies to Purchaser. In response, purchaser tendered its purported "firm commitment," and advised that the environment assessment still had not been completed. Seller then took the position that the tendered commitment was not a "firm" one within the terms of the contract; and entered into another contract with a new purchaser. Purchaser (plaintiff) brought this action for specific performance.

This Court reversed the lower court's denial of Seller's cross-motion to dismiss the complaint, holding that the term "firm written commitment" was unambiguous as a matter of law; and that the court should enforce such a contract according to its terms. [*cf. Finkelman v. Wood, 609 NYS2d 655 (AD)*] Accordingly, it granted Seller's cross-motion. **1550 Fifth Ave. Bay Shore, LLC v. 1550 Fifth Avenue, LLC,** 748 NYS2d 601 [A.D.2.D.- 2002].

Note: Clearly, commitment language stating that it was subject to a satisfactory credit report would have had the same infirmity as to "firmness." Some counsel alternatively use the word "unconditional" for the word "firm", which we submit would have the same effect.

Co-operatives–Uniform Commercial Code Compliance: This matter arose out of a long standing dispute between plaintiffs Ryfun and Senich, with their

co-op board, over the lack of repairs and their seeking a reduction of maintenance charges by reason thereof. Ryfun had transferred ownership of the co-op unit to Senich, who lost the lease and stock certificate documents. In a 1996 settlement of an action brought by Senich to reduce the maintenance charges, it was agreed *inter alia*, that replacement documents would be issued to Senich upon her delivering an indemnity agreement to the co-op board. As this was never done, these documents remained in the physical possession of the co-op. In 1999, the co-op board amended its proprietary lease provisions so as to create a new security interest in the co-op shares in the event of unpaid maintenance charges. Upon notice to Ryfun (to which he did not respond), the board exercised its security interest by terminating plaintiff's lease; canceling his shares; and reissuing it to itself. It then commenced a holdover proceeding against Senich.

Reversing the lower court's judgment against plaintiffs, this Court found that the board improperly exercised the security interest, since that retention of collateral for the Ryfun apartment did not comport with, *inter alia*, the notice, accounting and foreclosure sale requirements, and provisions governing disposition of collateral after default, of former UCC 9-504(2), (3) [currently 9-610-16]. It further held that the board took undue advantage of the happenstance that, at that time, the co-op's physical possession of the stock certificate was strictly the result of the pending reissuance of a new certificate.

This Court concluded that the co-op was not in the position of a "secured party in possession" as defined by then UCC 9-505(2) [currently 9-620], citing RPL Sec. 235-b; RPAPL Secs. 751 and 753; and 61 East 72nd St. Corp. v. Zimberg (*556 NYS2d 46* [*AD*]). It further held that the board's conduct failed to comport with the above cited provisions of law. ***Ryfun v. 406 West 46th St. Corp.,*** 746 NYS2d 21 [A.D.1.D.-2002]

Easement–Conditional Use: Pursuant to a 1962 easement agreement, plaintiff's predecessor in title conveyed an easement over a certain portion of plaintiff's property known as the De Lamater Square premises. This agreement provided *inter alia*, that the easement was to be "for so long as the business of dealing in meats, meat products or other food products is carried on…." In view of extensive fire damage to the De Lamater premises, plaintiff brought this action to terminate this conditional grant of this express easement. Defendant appeals from the lower court's grant of summary judgment for the plaintiff.

Although these premises were apparently vacant at the time of the fire, this Court noted that defendant was, at that time, actively seeking a meat-packing tenant. Further, this Court found that despite the fire, there was no evidence that defendant had abandoned its property; and further, that a renting of the pertinent space to a tenant engaged in the "food products" business, would be within the use contemplated by the easement. (*cf. Consolidated Rail Corp'n. v, NASP Equipment Corp, 499 NYS2d 647 [NY]).* This Court reversed the holding of the lower court, finding that there was no "clear and convincing" proof at this time, that the defendant intended to "permanently relinquish all rights" to the easement. Inferentially, this Court concluded that a mere destruction of premises by fire, without more, did not reach the level of such proof. ***450 W. 14th St. Corp. v. 40-56 Tenth Ave., LLC,*** 747 NYS2d 506 [A.D.1.D.-2002].

Note: See disposition of easement requirement that the easement beneficiary was to obtain a specified amount of insurance on the easement premises; and the further limitation as to the beneficiaries of such use. ***Stevens v. Grody*** *(746 NYS2d 510),*

Landlord's Easement by Adverse Use: In this matter of first impression, an owner of commercial property seeks to obtain through adverse possession, an easement of use over a portion of the leased premises. Tenant contends that a landlord is not entitled to such an easement by adverse possession over space in leased property, notwithstanding that all the elements of adversity have been met. Citing *Casey v. Bazan (678 NYS2d 371)* where a tenant had successfully asserted an easement, and the owner sought to defeat it, this Court noted that there was no reason not to apply the same principle in the reverse situation.

Further, although finding that the tenant had not adduced any evidence of permission for the landlord's use; this Court held that even when such use had been permitted for a time; that there were circumstances where the withdrawal of that permission cannot be tolerated. This case represented just such a situation, where "such easement is 'convenient or essential to the beneficial use and enjoyment of the [property]'" (*cf. Lemkin v. Gulde, 205 NYS2d 658, 664 [S.Ct. Nass.Co; Meyer, J)* Judgment was rendered for the landlord. ***Saxon Garage Corp. v. Regency East Apartment Corp.,*** 748 NYS2d 231 [S.Ct.NY Co-2002]

Lis Pendens – Lapsed – Affecting Mortgage Foreclosure: A Notice of Pendency may be filed

pursuant both, to CPLR 6513 and RPAPL 1331, with respect to a mortgage foreclosure action. Such Notice must be filed at least 20 days prior to entry of final judgment; and that failure to do so precludes the entry of such judgment. (*cf. Slutsky v. Blooming Grove Inn, Inc., 542 NYS2d 721 [AD]).* It has been further held that an expired or cancelled Notice of Pendency may not be refiled in the same cause of action, respecting CPLR 6513 (*Matter of Sakow, 741 NYS2d 175 [NY]).*

In ***Queens County Sav. Bk. v. Spinella,* (*749 NYS2d 861* [*S.Ct.Nas.Co.-2002*]**, it was held that for the purpose of prosecuting to final judgment a mortgage foreclosure action, a new Notice of Pendency pursuant to the RPAPL 1331, could be filed after the lapsing of the first such Notice. In so doing, this court declined to follow the holding of the First Department, (See **Campbell**, below) noting that the Second Department had specifically held in *Slutsky, infra*, that such a Notice could be filed for RPAPL purposes to maintain a foreclosure action.

In another matter decided just prior to *Queens County*, the Appellate Division First Department reversed a lower court holding on the same facts, which had permitted the filing of a second Notice; and dismissed the foreclosure action. In so doing, the First Department ignored the position and reasoning of the Second Department in *Slutsky*. ***Campbell v. Smith,*** 747 NYS2d 18. [A.D.1.D.-2002].

Mechanics Liens-Private Leasehold Granted by a Public Benefit Corporation: Petitioner developer obtained a ground lease from the Battery Park City Authority (a public benefit corporation). Several contractors who were unpaid for their work, filed mechanics liens against petitioner's leased land. Petitioner, relying on Pub. Author. Law, Sec. 1973(1), sought to vacate respondents' liens on the ground that legal title to the property is in the State through the Authority. Respondents argue that the ban on asserting liens against publicly owned land does not apply herein, because the Pub. Author. Law, Sec. 1972(8) specifically made the property of the authority susceptible to mechanics liens; and in any event, the lien was filed against petitioner's private leasehold interest rather than on the realty; which is permitted by Lien Law Secs. 2(2) and 2(3).

Prior to the 1992 amendment to the Lien Law [Sec. 2(7)], it had been held that a mechanics lien could not be asserted against the private leasehold interest of a tenant of publicly owned land. (*Cf. TNT Coating, Inc. v. County of Nassau, 495 NYS2d 466 [AD]; lv. den. 502 NYS2d 1036 [NY])* In 1993, the Appellate Division, First Department held in *F. Garofino Electric Co., Inc. v. General Electric Co (593 NYS2d 231),* that while the 1992 amendment [Sec. 2(7)] was intended to afford relief to those who in the past could not perfect liens against private leaseholds on publicly owned land; it did not explicitly hold that such relief was available where the public entity involved was a public benefit corporation, rather than an Industrial Development Agency. Viewing the specific language of the said amendment, this Court interpreted the legislative purpose as granting relief only in situations where legal title was held by an I.D.A. Noting that an authority is often cast in the same role as an I.D.A. (Gen. Munic. Law); the authority in this instance was a public benefit corporation organized pursuant to Sec. 6251, Unconsolidated Laws.

This Court concluded that while all I.D.A.s, are public benefit corporations; not all public benefit corporations are I.D.A.s, such as the Authority herein. It also rejected respondents' Pub. Author. Law argument, finding that there was no mention of mechanics liens in Article 12 of that law. Accordingly, petitioner's motion to vacate and declare respondents' liens null and void, was granted. ***BPC Site 25 Associates, LLC v. A. Liss & Co., Inc.,*** 745 NYS2d 807 (S.Ct. N.Y.Co.- 2002).

Mortgages–Interest of Fractional Assignee: Mortgagee, the holder of a certain 30 year mortgage which bore interest at 9% percent per annum, assigned fractional interests in the mortgage note as collateral security for the investment loans it solicited and obtained. These assignments were entitled: "Mortgage Notes-Mortgage Guarantee", were for a one year period; and bore interest at the rate of 11%. The defendant-investors never came into physical possession of the original mortgage note.

Plaintiff (as assignee,) in this mortgage foreclosure, contends that the holders of these fractional assignments, represent lenders with a guaranteed return on their investment from the mortgagee. As such, plaintiff argues that such assignments do not entitle their holders to the proceeds of any foreclosure sale; but at best, affords them an unperfected security interest in the mortgage note originally given to the mortgagee. Defendant-investors contend that they are entitled to a share of the foreclosure proceeds as holders of a perfected security interest in the mortgage note.

Citing *In re Coronet Capital Co. 142 BR 78,* this court held that a guaranteed return of investment; participation that lasts for a shorter period of time than the underlying obligation; has different payment arrangements between

borrower and lead lender, and the lead lender and participant; and a discrepancy between the interest rate in the underlying mortgage note and the interest rate of the participation; - are the factors indicating an intention to *create a loan instead of a mortgage participation.*" Further, citing UCC Sec. 9-304(1) and *FDIC v. Forte, (463 NYS2d 844 [AD])*, it noted that an assignee must take possession of the mortgage note in order to perfect its security interest in the instrument. ***Came Realty, LLC v. De Maio,*** 746 NYS2d 555 [S.Ct.Rockland Co.-2002].

Tenants in Common–Fiduciary Obligations: Plaintiff, and Garfunkel (not a party), purchased certain premises improved by a large residence, intending to convert it into a "bed and breakfast" inn. To obtain financing, they made a mortgage loan. Some months later (in April 1988), Garfunkel indicated a desire to withdraw from the project. Toward that end, plaintiff entered into an oral agreement with defendant-Feldman, whereby they agreed to complete the project, and share equally in the monthly mortgage payments. In July 1988, Garfunkel conveyed title to her in comon interest, to the defendant Puente, (an entity of which Feldman was the sole shareholder); and Feldman paid her $30,000 for this interest. [This tenancy in common was Puente's sole asset.] Plaintiff has never entered into any partnership or written agreement with either Feldman or Puente.

Neither Feldman, nor Puente, made any payments due on account of said mortgage from June to October 1988; at which time Feldman made a lump sum payment of $6,000, roughly equal to his 50% share of five months' mortgage payments. Despite entreaties by plaintiff that their default would result in foreclosure, neither Feldman nor Puente made any further contributions for mortgage payments. The evidence supports the conclusion that Feldman made a conscious decision not to make any further mortgage payments; and that he knowingly aided and induced Puente not to make any further payments. At the ensuing foreclosure sale, Feldman was the successful bidder for the entire premises, and took title in his name. This appeal followed the trial court's judgment against Feldman, Puente, and others.

A confidential fiduciary relationship exists between co-tenants who ordinarily may not purchase or acquire an adverse title to or encumbrance against the common property without the other's consent; and if a cotenant does so either directly or indirectly, as at a foreclosure sale, he or she is deemed to have done so for the benefit of all cotenants; particularly where the purchaser has essentially invited the foreclosure by defaulting or contriving with others to cause a foreclosure. (*cf. Jemzura v. Jemzura, 369 NYS2d 400 [NY]*) Accordingly, this Court concluded that although only Puente was plaintiff's cotenant; it's conduct, (dictated by Feldman, its sole shareholder and officer,) in abandoning the project and failing to make any further mortgage payments, contributed to the foreclosure; led to Feldman acquiring an adverse title to their common property subsequent to the foreclosure; and thus constituted a breach of Puente's fiduciary duty to plaintiff. (*cf. Birnbaum v. Birnbaum, 541 NYS2d 746 [NY]*) Although Feldman himself, was not a cotenant of plaintiff; by his control of Puente, he became equally responsible for the damages caused by Puente's actions. The trial court's judgment against Feldman and Puente was affirmed. ***Snyder v. Puente De Brooklyn Bealty Corp,*** 746 NYS2d 517 [A.D.3.D –2002]

Time of Essence–Issue of Defective Title: In November 1993, the parties contractually set July 1994 as the closing time. After several bi-lateral extensions, defendants sellers sent plaintiff-purchaser a notice setting the closing on a particular date and time; and in which they advised plaintiff that "if he failed to close, he would be considered in default." Plaintiff did not attend the scheduled closing; but brings this action for specific performance, claiming *inter alia,* that defendants were not prepared to close by reason of existing title problems.

Initially, the court found the language in the above stated notice to be a "clear, distinct and unequivocal notice that time was of the essence." (*cf. Savitsky v. Sukenik, 659 NYS2d 48 [AD])* However, since plaintiff failed to attend said closing despite his claim that he was "ready, willing and able" to perform his contract on the law date; the court held that he was not entitled to bring an action for specific performance (*cf. Goller Place Corp. v. Cacase, 672 NYS2d 923 [AD])*, regardless of whether defendants were able to convey title in accordance with the terms of the contract. In the absence of an anticipatory breach; even where a closing has been set as "time of the essence", a purchaser must be present at the closing to demonstrate his ability to perform in accordance with the contract; and to raise the issue of the sellers' inability to deliver marketable title. ***Zelmanovitch v. Ramos,*** 750 NYS2d 310 [A.D.2.D.-2002].

Title Insurance–Escrow Undertaking: Defendants are members of the law firm that represented Sellers in a

real estate transaction. Since defendants had failed to obtain a "payoff letter" prior to closing, respecting a certain mortgage returned in the title report as open of record, plaintiff required that defendants execute a written undertaking to provide plaintiff's agent with a "payoff receipt" within 30 days of the closing; to forward to plaintiff's agent a satisfaction of such mortgage in recordable form; and to retain the sum of $110,000 for that purpose. Defendants did not perform as required, and plaintiff was required to pay $158, 107.18 to the holder of said mortgage in order to redeem said mortgage from foreclosure; and to satisfy the same. Defendants paid over to plaintiff the full sum held by them in escrow, claiming that such payment satisfied their obligations under the subject escrow agreement. Plaintiff then brought this action to recover the differential between these sums.

The Court held that defendants obligation was not limited to the amount escrowed, in view of their promise to provide plaintiff with a "payoff receipt"; and "satisfaction of mortgage in recordable form"; which obligation was not absolved by their inability to ascertain the payoff figure within the said 30 day period. (*cf. Teitelbaum Holdings v. Gold, 421 NYS2d 556 [NY])* ***Old Republic Title Ins. Co. v. Santangelo & Cohen****, 750 NYS2d 16 [A.D.1.D.-2002]*.

Note: In view of the title industry's experience of extraordinary periods of delay in obtaining satisfactions of mortgages in accurate recordable form, (if at all,) after payment in full of mortgages, counsel for sellers should be aware of their exposure for the costs of legal fees, if the title underwriter seeks to enforce escrow provisions having the same or similar content as the one at issue herein. This risk can be substantially avoided if sellers' counsel will obtain "payoff letters" prior to closing.

Trespass–Assessment of Damages: This is a consolidated appeal from judgments in two actions: (1) Boundary dispute between adjacent owners; and (2) Damages for trespass and conversion of timber.[Action 1 will be discussed in the note following our analysis of Action 2.]

Defendant hired a logger to cut trees on certain lands believed to be his, but which were owned by plaintiff. He brought this action against defendant for damages for trespass, and con-version of their timber. Defendant argues, on appeal, that he may not be held liable because the logger was an independent contractor.

Relying on *Axtell v. Kurey* (*634 NYS2d 847; lv. den. 644 NYS2d 688 [NY])*, this Court rejected plaintiff's reasoning; holding that liability exists where (as here), he "directed the trespass, or such trespass was necessary to complete the contract;" or that he "caused or directed another person to trespass." The Court found that evidentiary support existed for the jury's implicit finding that defendant directed the trespass, in that defendant designated the area from which the trees were to be cut;- trees growing on plaintiff's land, and not on his own. Further, it held that the jury's finding that defendant had "probable cause" to believe that he owned the land from which the trees were cut, was not a defense to his trespass. Rather, (citing *Axtell,*) the Court concluded that while the jury's finding of "probably cause" protected defendant against an assessment of treble damages recoverable for willful, malicious, reckless or bad faith conduct; it did not protect him against the compensatory damages awarded against him herein for negligent trespass and conversion of timber. ***Gracey v. Van Camp,*** 750 NYS2d 400 [A.D.-4.D.-2002].

Note: Action No. 1 was resolved by the Court's holding that the jury was entitled to credit the position of plaintiff's surveyor over that of defendant's surveyor in the exercise of their "fair interpretation" of the evidence; that plaintiff's surveyor was under no obligation to reconcile the variations between "natural monuments" and artificially created points in determining boundaries; nor was the jury mandated to give greater credence to evidence of natural over artificial monument.

T. P. S. ABSTRACT CORPORATION
350 Old Country Road
Garden City, New York, 11530

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