TPS REALTY NEWSLETTER

Volume 2, Number 2 | **Theodore P. Sherris** Counsel | **Brett G. Sherris** Vice-President | July 2003

Adverse Possession Against the City of N.Y.: It is settled law, that adverse possession will not lie against a municipality which holds real property for a public purpose. The City acquired the subject property in 1957 by virtue of an In Rem Tax Foreclosure Proceeding. The three year presumption of public use created by the N.Y.C. Administrative Code, Sec. 11-420 as to realty acquired through such a proceeding, ceased in 1960. Since the City continued to hold such property until 2000 without designating it for a public use, the municipal ownership did not bar defendant, National from establishing its right to title based upon proof that it adversely possessed the property for the requisite statutory ten year period. (*Casini v. Sea Gate Ass'n., 692 NYS2d 676 [AD])*. Judgment was granted to National. **Eller Media Co. v. Bruckner Outdoor Signs, Inc.,** 753 NYS2d 28 [A.D.1.D.-2002].

Note: The criteria whether governmental property is subject to adverse possession, is whether it is held in its proprietary capacity and is alienable; or is held in its governmental capacity and is not intended for sale. (Cf. Lewis of Lyons, 389 NYS2d 674 [AD]. A holding in a proprietary capacity can be changed by a redesignation resolution. (cf. City of Towanda v. Ellicott H.O.A., 449 NYS2d 116 [AD]). It has been held that it is the status of the property at the time of the commencement of the period of adversity, that governs. (Park Acres, Inc. v. City of New York, 36 NYS2d 456, aff''d. 42 NYS2d 236 [AD}).

Dune Line - Establishment of Jurisdictional Line: Petitioner, owner of premises fronting on the Atlantic Ocean, applied to the Town of Southampton for a permit to construct a "sloping rock revetment" in a position shown by his surveyor to be north of the 1998 dune line, to protect his ocean front home from sliding into the ocean. Appealing the trial court's affirmance of the Town's denial of his application, petitioner raises the issue of the Town's lack of jurisdiction to so restrict construction on that portion of his property which lies north of the zoned "Ocean Beach Area."This area is bounded east and west by Town lines; south by the Atlantic Ocean; and north "*by the crest of the primary dune*." The substantial erosion that had occurred since the storms of 1998, had obliterated that area of the dune in the vicinity of his home which had stood between the ocean and his house. Petitioner urges, that since the monumentation which defined the northerly line of the Town's jurisdiction in this area, had disappeared, the pre-1998 dune line should be determinative, since the change was the result of "*avulsion;*" and because there was no evidence in the record from which this line could now be properly identified. Petitioner contends that his proposed improvement is north of the Town's jurisdictional bounds.

This Court rejected Petitioner's argument, holding that it was the location of the "crest" of the dune as of the time of the application for the permit, that governs. This Court suggested as a means of ascertaining this line, using the surveyors' practice of joining the "crest" lines where the dunes still existed, both to the east and west of the points where the continuity of the dunes was interrupted. This Court directed a "jurisdictional hearing" where evidence as to a "reconstructed" crest line could be introduced and considered. **Poster v. Strough,** 752 NYS2d 327 [A.D.2.D.-2002].

Easement Terminated by Merger – Unity of Title Required-Mortgage Exception: In 1984, Paul Pintavalle, and defendants Carnevale purchased premises 285 Lark Street, as tenants in common, by deed which recited that such conveyance was subject to an express easement

granting the residents and owners of adjacent premises (287 Lark Street), and their successors, the right to maintain and repair electric meters at No. 285, as well as the right, *inter alia*, to use a fire escape located between the two buildings. In 1988, defendants purchased No. 287, executing a purchase money mortgage in favor of plaintiff. In 1993, Pintavalle conveyed his interest in No. 285 to defendants.

In 2000, plaintiff iniated a foreclosure of his mortgage on No. 287. During the tendency of this foreclosure, in November 2000, defendants executed a deed conveying No. 287 to themselves by a deed, which stated that defendants "intend[ed] that the easements will merge with the fee of 285 Lark Street thereby terminating the easement." In 2001, after No. 287 was conveyed to plaintiff as the successful bidder at the foreclosure sale, defendants locked the fire escape between the buildings, and blocked plaintiff's access to the electric meters. Plaintiff brought this action to enjoin defendants from interfering with his use of these easements. The supreme court granted defendants' motion for judgment, holding that the express easement granted in the 1984 deed had been extinguished by the "doctrine of merger" by the 1988 deed; that plaintiff had not shown the existence of an easement by necessity; and that the 2000 deed was moot because of the easement's prior termination by merger.

Parties cannot have an easement in their own land. Thus, when both the dominant and servient estates are entirely owned by the same party, the easement is extinguished by the doctrine of merger (*Rocco v. De Marco, 591 NYS2d 569 [A.D.]*). An easement is not extinguished when parties having an interest in both estates, hold title in one of them as a tenant in common with another. They must own the entire title to both lots in fee, if the easement is to be so terminated (*Will v. Gates, 658 NYS2d 900 [NY]).*

In this instance, at the time of the purchase of the dominant estate, defendants only owned a fractional interest in the servient estate. Therefore, at that time (1988), there was no "unity of title"; and the easement was not then terminated by merger. Although defendants did acquire the requisite unity of title (in 1993), that fact is not dispositive in the light of the "mortgage exception to the merger doctrine;" the subject mortgage having been given in 1988 prior to the acquisition of the "unity of title". That exception protects the mortgage on the dominant estate from losing its interest when the lacking "unity" is subsequently acquired. A permanent injunction was granted to plaintiff. **Cowan v. Carnavale,** 752 NYS2d 737 [A.D.3.D.-2002].

Express Easement – Common Ownership Required: Defendants obtained title to five adjacent lots closest to the ocean, in this Far Rockway community, and subsequently built an apartment complex on a portion of same. Plaintiff, a N-F-P corporation of bungalow owners and lessees, brought this action to enjoin defendants from blocking a 40' wide easement for beach access which it claims was granted to the residents of the community in their respective deeds. The trial court granted defendants' judgment dismissing plaintiff's complaint, holding that it failed to prove that the early deeds in the bungalow owners' chains of title, granted them such an easement over a portion of defendants' land. As the basis of their claim, plaintiff sought to rely upon later deeds between subsequent owners which purported to correct the earlier easement descriptions,

The New York rule is that a grantor cannot create an easement benefiting land not owned by the grantor. For an easement to be effective, the dominant and servient properties must have a common grantor. Finding that defendants' predecessors in title did not own the land which the easement was intended to benefit. This Court held that, "a deed with a reservation or exception by the grantor in favor of a third party, a so-called 'stranger to the deed', does not create a valid interest in favor of that third party." (*In re Estate of Thomson v. Wade, 516 NYS2d 614* [NY]) Accordingly, any easement reserved to the bungalow owners in defendant's chain of title, was ineffective to create an express easement in favor plaintiff, an association of owners. **Beachside Bungalow Preservation Ass'n. of Far Rockaway, Inc. v. Oceanview Associates, LLC,** 753 NYS2d 133 (A.D.2.D.-2003).

Limited Liability Company – Individual Liability for Tort: At the closing in November 1997, of a residence which Equity newly-

constructed for plaintiffs, Equity provided plaintiffs with a limited warranty for latent defects caused by defective design, workmanship, materials, and/or installation. After two major rainfalls, plaintiffs were forced to retain the services of an outside contractor to repair the flooding condition. This contractor advised plaintiffs that cause of the problem was that the drainage and septic systems were defective, and it replaced them. Plaintiffs then brought this action against Equity and against the Yaroscak brothers, two of its individual managing members, *inter alia*, for negligence, and breach of contract.

Although members of a limited liability company, such as corporate officers, may be held personally liable if they participate in the commission of a tort in furtherance of company business (*cf. W. Joseph McPhillips, Inc. v. Ellis, 717 NYS2d 743* [AD]); plaintiffs failed to adduce evidence of the commission of fraud or a tort. Plaintiffs' allegations that the drainage and septic systems were improperly constructed, sounded in breach of contract, (rather than on the tort theory of negligence), for which such personal liability would not lie. (*cf. Merritt v. Hooshang Constr., 628 NYS2d 792* [AD]). **Rothstein v. Equity Ventures, LLC,** 750 NYS2d 625 [A.D.2.D.-2002]).

Mortgage Foreclosure – Prior Action Pending: Plaintiff, the most recent assignee of a mortgage made by defendants, commenced this mortgage foreclosure against them. Countering plaintiff's motion for judgment, defendants interposed a cross-motion seeking dismissal of plaintiff's complaint on the ground of "prior action pending." Plaintiff appeals from an order and judgment denying their motion for judgment; and the granting of defendants' cross-motion dismissing plaintiff's complaint pursuant to RPAPL 1301(3). Relying upon *Hitchings v. Village of Sylvan Beach (635 NYS2d 381 [AD])*, this Court concurred with plaintiff's position, that defendants were not entitled to this RPAPL relief, since the prior action was not "pending between the same parties."

The prior foreclosure action was settled by the parties to that action upon the execution of a forbearance agreement. Plaintiff in that action, tendered a stipulation of discontinuance of that action to defendants' attorney, which was never signed by the defendants'; nor filed with the court. Finding that these efforts constituted a *de facto* discontinuance of this prior action, this Court concluded that the same mitigated against the dismissal of this action. (*cf. F.D.I.C. v. 1873 West Ave. Corp.,639 NYS2d 163* [AD]). **Credit-Based Asset Servicing & Securitization, LLC v. Grimmer,** 750 NYS2d 673 [A.D.4.D.-2002].

Mortgage Priority – Unrecorded Judgment Canceling Prior Mortgage: In 1988, defendant Jacene Realty made a mortgage in favor of plaintiff affecting certain real property to guarantee a certain indebtedness. Subsequently, plaintiff commenced a foreclosure of this mortgage. By judgment entered in December 1993, the Supreme Court dismissed the complaint; vacated the lis pendens; and directed that the plaintiff's mortgage be cancelled and discharged of record. Said judgment was entered in the Westchester County Clerk's Office, and the lis pendens was cancelled. However, as this judgment was never recorded in said Clerk's, Division of Land Records, this mortgage was never cancelled or discharged of record. Jacene later conveyed title to defendant Thomas who obtained a mortgage from appellant Columbia Equities. Appellant's title company discovered plaintiff's mortgage as an open item in the Clerk's Division of Land Records; but nonetheless insured title without excepting the mortgage from coverage, on the basis of the Supreme Court's judgment that the mortgage be discharged. [Columbia's mortgage was recorded in November 1995.]

In March 1996, this Court reversed the judgment in that action which had cancelled said mortgage, (*cf. Marcus Dairy v. Jacene Realty Corp., 638 NYS2d 779 [A.D.])*; whereupon plaintiff commenced this action asserting that its mortgage had priority over Appellant's mortgage. The Supreme Court agreed, holding that plaintiff's mortgage had priority over Appellant's since it was first in time; was not discharged of record; *(cf. Da Silva v. Musso, (560 NYS2d 109 [NY]);* and because defendant Thomas was not a good faith purchaser for value; and Appellant knew, or should have known, of the fraudulent transfer of the property; and of Thomas' misrepresentations made in connection therewith.

Affirming the lower court, in this action, this Court cited CPLR 5523 in relevant part: "*A court reversing or modifying a final judgment or order … may order restitution of property or right lost by the judgment or order, except that where the title of a purchaser in good faith and for value would be affected, the court may order the value or the purchase price restored….*" However, this Court rejected as inapplicable the lower court's reliance upon *Da Silva v. Musso (Supra),* [a specific performance case,] which had held that the good faith of a purchaser who acquires property during the tendency of an appeal "is not vitiated by the purchaser's actual knowledge of the appeal." The issue herein is the priority as between two mortgages. If the plaintiff herein was to lose its priority as against the mortgage which was later recorded, it would have no effective remedy of the kind that was afforded by the *Da Silva* interpretation of CPLR 5523, Moreover, the Appellant does have a remedy here;- it is against the title insurance company that insured the Appellant's title without excepting plaintiff's mortgage. **Marcus Dairy, Inc. v. Jacene Realty Corp.,** 751 NYS2d 237 [A.D.2.D.-2002].

Mortgage Satisfaction Fees–R.P.L.Sec. 274-a: In connection with plaintiff's sale of a condominium, his attorney requested a payoff statement from the mortgage holder, defendant North Fork Bank. In response, defendant sent to plaintiff's attorney a "Satisfaction Statement," which, in addition to the outstanding principal and interest, charged plaintiff a $5.00 "Facsimile Fee"; a $25.00 "Quote Fee"; and a $100.00 "Satisfaction Fee" for the preparation of the satisfaction. When the contemplated sale took place, plaintiff paid the above fees to defendant; and subsequently commenced this action pursuant to R.P.L. 274 and Gen. Bus. Law 349 to recover these additional fees. On appeal, the Court held that defendant was prohibited by Sec. 274-a(2)(a) from charging plaintiff for providing the "mortgage related documents" such as the Satisfaction Statement and Facsimile Fee, citing *Negrin v. Norwest Mtge,(700 NYS2d 184 [AD]*), notwithstanding plaintiff's voluntary agreement to pay for the same. As to the Satisfaction Fee, Sec. 274-a was held not to prohibit the payment for such a service as the preparation of the satisfaction document. **Dougherty v. North Fork Bank,** 753 NYS2d 130 [A.D.2.D.-2003].

Party Walls – Removal of One Support Wall: Plaintiff and defendant own adjacent premises in lower Manhattan (New York City), known respectively as 187 and 183 Broadway. In 1868 when the party-wall agreement between the then owners was entered into, it provided that the party wall was to be built so as to run directly over the property line, with a portion of the wall resting on each lot; and that each party would be entitled to use the wall for the support of their building. It provided further, that said wall when built, was to remain a party wall between the said two buildings; that it was not to be considered a conveyance, but only as creating an easement; and to be a "covenant running with the land". Originally, both of these buildings were five stories high, with the common party wall between them. Defendant's building (No. 183) remains a five-story building; plaintiff's building (No. 187) is now two stories high, due to the removal several years ago, of the three floors above the second-story level. Plaintiff resurfaced and maintained the exposed upper three stories of the party wall [which extended variously from 14" to 24" onto plaintiff's property;] at its own expense.

In May 1999, without plaintiff's knowledge or consent, an advertising company erected a large, billboard-type advertising sign thereon, pursuant to an agreement with defendant, who granted them a license which provided for the payment of monthly fees. Becoming aware of this condition, plaintiff commenced this action to permanently enjoin defendant from causing any further signs to be placed on the exposed wall; and to recover damages for the alleged trespass. Defendant interposed affirmative defenses alleging that the subject wall was not a party wall above the second story; and that as the "easement" was extinguished above the second floor, defendant was entitled "to use the wall as and when she pleases."

This Court held that this exposed surface wall is plaintiff's sole property, subject only to defendant's easement to use the same to support her building. Finding that it was plaintiff's prerogative to use the exposed side of the wall for advertising, or putting such wall space to any

other use not interfering with defendant's easement, it concluded that defendant's use of the same for advertising purposes, was beyond the scope of her easement; and constituted a trespass on plaintiff's property as a matter of law. This Court noted the rejection by the Second Dept., in a converse situation, of an attempt by a party in defendant's situation to prevent an owner in plaintiff's position from using the exposed party wall for advertising purposes. (*Mileage Gas Corp. v. Kushner, 281 NYS2d 432*]. In its decision, this Court enunciated as the governing principle, "neither owner may subject a party wall to a use for the benefit of its own property that renders the wall unavailable for similar use for the benefit of the other party." However, this principal does not prevent one of the parties from using its own side of the wall for its sole benefit where such use has no effect on the other's property right's. Conversely, (cf. *5 East 7$^{3rd.}$ Inc. v. 11 East 73rd Corp., 183 NYS2d 605, aff'd. 217 NYS2d 1017* (AD]) an owner in defendant's position was denied the ability to cut an opening in the wall; or to substitute glass brick for ordinary brick.] **Sakele Brothers, LLC v. Safdie,** 752 NYS2d 626 [A.D.-1.D.-2002].

Specific Performance – Contract Limit of Liability: A title examination conducted on behalf of the plaintiff after it entered into a contract with defendant-Buonamicia to purchase certain real property, revealed that the owner of record was the defendant-Cuervo. It appeared that Buonamicia had mistakenly conveyed this parcel to Cuervo as part of an earlier transaction. Plaintiff refused to accept Buonamicia's attempt to cancel the contract (on the ground that she could not convey clear title); and stated its willingness to await the clearance of title. Discovering that Buonamicia had subsequently sold the subject premises to Cuervo, plaintiff commenced this action for specific performance or damages for breach of contract. Buonamicia offered to return to plaintiff the down payment and the cost of the title examination as prescribed in such circumstances. In opposition, plaintiff alleged that as Buonamicia did not make a good-faith effort to deliver clear title; he could not rely on the contractual limitations.

The cited limitation of damages clause, contemplates the existence of a situation beyond the control of the parties, to clear title. Consequently, if a seller is able with a reasonable amount of effort and money to remedy the defects of title, and neglects or refuses to do so, they cannot then limit their damages by setting up self-created or easily scaled barriers to their performance (*cf. Mokar Props. Corp. v. Hall, 179 NYS2d 814* [AD]). The record demonstrated that Buonamicia failed to make such a good-faith effort, thus breaching the terms of the contract. Accordingly, plaintiff was granted judgment against Buonamicia for breach of the implied warranty of good-faith and fair dealing; and the complaint was reinstated against Cuervo insofar as the issue of specific performance was concerned. **3 Brothers Building Supply Corp. v. Buonamicia,** 751 NYS2d 35 [A.D.2.D.-2002].

Tax Title – Bar Claim Action: In this action brought pursuant to RPAPL Article 15, plaintiff adduced evidence establishing his title to a large tract of land which included defendant's 14-acre parcel; and showed that defendant's parcel did not fit into any of the parcels excepted from his deeds. Defendant did not offer any proof to establish his good title to his own parcel.

This Court held that a proponent in an Article 15 action must demonstrate that it has good title, and may not rely upon any infirmity in its opponent's title.(*La Sala v. Teriege, 713 NYS2d767* [AD]). Finding the evidence adduced by plaintiff established the validity of his tax title, judgement was rendered for the plaintiff. **State v. Moore,** 751 NYS2d 321 [A.D.3.D.-2002].

Unjust Enrichment – Elements Required: Defendants successfully interposed the defense of usury in an action brought by plaintiff to foreclose a certain mortgage made by defendant to plaintiffs. Accordingly, the trial court determined that the subject bond and mortgage were null and void, and entered an order canceling & discharging this mortgage of record. On appeal, taken that action, this Court affirmed said judgment. During the tendency of plaintiffs' subsequent applications to this Court and the Court of Appeals for leave to appeal to the Court of Appeals, plaintiffs elected to pay some $10,000 in order to redeem the property

from an impending sale by the Essex County Treasurer. Following the denial of plaintiffs' applications for leave to appeal, plaintiffs brought this action on the theory of "unjust enrichment," to recover these monies paid to the county of treasurer. This appeal follows the lower court's dismissal of plaintiff's complaint which sought such reimbursement.

Citing *Lake Minnewaska Mtn. Houses v. Rekis* (*686 NYS2d 186 [AD]*) this Court held that to prevail on a claim of "unjust enrichment," a plaintiff must show that (1) defendant was enriched (2) at plaintiff's expense, and (3) that it is against equity and good conscience to permit … defendant to retain what is sought to be recovered." Consistent with the necessity to make the above cited (3)rd finding, the courts have generally looked to see if a benefit had been bestowed on the defendant under a mistake of law; if the benefit still remains with the defendant; and/or whether the defendant's conduct was tortuous or fraudulent. (*Kagan v. T-Tel Entertainment, 568 NYS2d 756*) The singular incidental fact that a plaintiff's activity resulted in a benefit for the defendant, has been found to be insufficient to sustain such cause of action.

The plaintiff has the burden of showing that the service was performed for the benefit of the defendant. Here though there is no question the plaintiff's payment worked to the benefit of the defendant by relieving him of the tax burden; it is equally clear that such payment was not made under a mistake of fact or law; but rather, their sole motivation in making such payment was to protect their own mortgage interest in the event they were successful in their appeal. The Court concluded that the benefit to defendant was purely incidental, thus defeating plaintiff's claim of unjust enrichment. **Clark v. Daby,** 751 NYS2d 622, [A.D.3.D.-2002].

A Publication of

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Published Quarter Annually
April, July, October and January