TPS REALTY NEWSLETTER

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Adverse Possession – Mutual Mistake: The parties own adjacent properties fronting on Harriman Road; plaintiff on the north; defendant on the south. Plaintiffs, who seek a determination that they have title by adverse possession to a disputed parcel, testified that when they purchased their property in 1981, a split-rail fence ran along what they believed to be the southerly border of their property; and that they, *inter alia*, have used and improved all the property on their side of the fence, including mowing of grass and mulching of the soil. In 1991/2, they replaced such fence with a chain link fence running on the same line. Plaintiffs commenced this action in 1997 after a survey made at the behest of defendants revealed that the latter fence was on defendants' land. Contrariwise, defendants have testified that the split-rail fence ran for only 20' or 30' in from the road; that the remaining 187' of their property boundary was buried by bushes; and that a large portion of the disputed area was covered with trees and bushes; and were not cultivated or improved by either party.

Citing *Katona v. Low (641 NYS2d 62 [AD])*, this Court held that "'hostile possession' does not require a showing of enmity or specific acts of hostility. All that is required, is a showing that the possession constitutes an actual invasion of, or infringement upon, the owner's rights. Consequently, hostility may be found even though the possession occurred through inadvertence or by mistake." Accordingly, the trial court's finding that "the parties mutual mistake concerning the location of the boundary line between the parties' properties, negated a finding of hostile possession;-" was in error. [Underlines ours.] **Gore v. Cambareri, 755 NYS2d 728 [A.D.2.D.-2003].**

Note: Once plaintiff has proved the elements of adverse possession, a presumption of "hostility" arises; and the burden shifts to defendant to prove that such use was "permissive. **Raanan v. Tom's Triangle, Inc., 758 NYS2d 343. [A.D.2.D.-2003]**

Constructive Notice – Index Error Caused by Misspelled Name: A certain mortgage was mis-recorded in the county clerk's name indices, because of the misspelling of the mortgagor's name in said document. Even though this mortgage held by plaintiff was recorded prior in time to that certain mortgage held by defendant, defendant was not chargeable with constructive notice of plaintiff's mortgage, since this error resulted in a recording outside of the relevant chain of title, which defendant was not obligated to search. *O'Neil v. Lola* Realty *Corp., 34 NYS2d 449 [AD]*). The court reached this conclusion even though the computerized index system maintained by the Monroe County Clerk's Office, could be searched phonetically. **Coco v. Ranalletta, 759 NYS2d 274 (A.D.4.D.-2003).**

Note: Computerized name indicies are usually completely indexed alphabetically through every letter of the family name, and subindexed in the same manner as to the given name.

Cooperatives – Application of "Business Judgment" Rule: The issue before this Court was whether pursuant to its By-Laws [herein (Article III (First) (f)], this cooperative could terminate the tenancy of an apartment owner, if by a two-thirds vote, it determined that "because of objectionable conduct of the part of the Lessee … the tenancy of the Lessee is undesirable." [Underline Ours.] Herein the Co-op Board had found that defendant's conduct over a period of about two years, exemplified by incidents too numerous to mention, did so constitute. Pursuant to its By-Laws, timely

notice having been given to all shareholders; and owners of more than 75% of the outstanding shareholders having been present (except defendant); and those present had voted unanimously in favor of a resolution declaring defendant's conduct to be "objectionable"; and to authorize the Board to terminate defendant's tenancy, and have him removed from the premises.

The Supreme Court denied the cooperative's motion for summary judgment, and dismissed its cause of action that premised ejectment solely on the shareholders vote and notice of termination. That court invoked RPAPL 711(1) ["actions to recover real property], and held that to terminate a tenancy, a cooperative must prove its claim of objectionable conduct by the reasonableness of the evidence to the satisfaction of the court. The Appellate Division reversed (3-2), the majority holding that the "*Levandusky Rule* " [75 NY2d 537] prohibited judicial scrutiny of actions of cooperative boards taken in good faith; in the exercise of honest judgment; and in furtherance of legitimate corporative purposes. [The minority adopted the position of the lower court.]

Unanimously affirming the appellate court's majority opinion, this Court noted that although it applied the "business judgment rule to cooperatives in *Levandusky* as the best rule to balance the competing interests there present; it did not "attempt to fix its boundaries," recognizing that this corporate concept might not comport with every situation encountered by cooperatives and its shareholder-tenants. This Court both rejected defendant's contention that the business judgment rule is inapplicable in this circumstance and conflicts with RPAPL 711(1); and the cooperative's argument that such section is irrelevant to these proceedings; and concluded that the business judgment rule may be applied in this circumstance consistent with the statute. It therefore held that the evidence which is the basis for the shareholder vote, will be reviewed under the business judgment rule, which has the courts' deferring to the findings underlying the shareholders' vote. **40 West 67th Street v. Pullman, 760 NYS2d 745 [Ct. of Ap. – 2003].**

Note: This review is an admittedly an over-simplification of this case; and a careful reading of the entire case is strongly recommended.

Easements – Created by Will: In a Last Will and Testament made in August 1849, testator devised certain lands owned by him "on condition that the lane upon the north side of said farm and now used for passage to and from the lands lying east of the (Basha Mill) creek is to be kept open for the use of all those owning lands along the same and those who may hereafter own any part of lands owned by me."

Citing *Pacelli v. Castano (221 NYS2d 461 [AD])*, this Court found that the subject Will created the above cited appurtenant easement. The Court further found that the easement created, was intended to run with the land; and did not end at the creek; but necessarily included the use of the footbridge over the creek to serve its intended purpose of connecting with the lands on the other side of the creek. **Smith v. Buckley, 753 NYS2d 581 [A.D.3.D.-2003].**

Easements – Limitation of Use: Plaintiffs Higgins and Frank own adjacent properties on the easterly shore of Lake Placid which are encumbered by an easement occupying 20' on each side of their common boundary. This easement derives from a 1900 deed to one Rogers, which specifically granted a right-of-way over plaintiffs' properties to provide lake access to the property then deeded to Rogers which lies on the east side of Ruisseaumont Road, which plaintiffs abut on its west side. Subsequently, the Rogers parcel came into the ownership of Potter and Christie who, after resubdivisions of the Rogers parcel and the addition of adjacent lands, resulted in Potter retaining the bulk of the original Rogers parcel; and Christie having only a small portion thereof. Defendants Douglas are the successors in interest of the Christie parcel; and defendants De Franco are the successors in interest of the Potter parcel. Following the construction by defendants Douglas in May 2000, of a dock in the water at the westerly end of the easement, and a wooden ramp leading thereto, plaintiffs brought this action seeking a RPAPL Article 15 declaration that the easement does not permit the installation

of a dock, and that the Douglas' do not benefit from this easement.

Citing C*ronk v. Tait, (719 NYS2d 386 [AD])*, this Court noted as a general proposition, that where a dominant estate is divided into separate parcels, unless specifically reserved, the rights to an appurtenant easement pass to the subsequent owners of each subdivided parcel, even lacking contiguity, "so long as no additional burden is imposed upon the servient estate by such use. [Underline ours.] It rejected an interpretation of covenant language in the Rogers deed which would limit improvements on the premises thereby conveyed to one family, as an additional limit of the use of the easement to only one family. Determining the extent of an easement, in the absence of specific language of limitations or qualifications, the same must be construed to include "any reasonable use" to which it may be put, provided the same is lawful. (*Martone v. Prislupsky, 705 NYS2d 83)* Construing the easement as one intended for access to the lake for recreational purposes, it found that the construction of a dock was a "reasonable" use incidental to the purpose of the easement. **Higgins v. Douglas, 758 NYS2d 702 [A.D.3.D.-2003].**

Easements – By Prescription or Implication: The contiguous parcels involved in this action, were created in 1862 from a single tract then owned by one Barton, when he sold the northerly 73 acres (now owned by plaintiffs); and retained the remaining 88 acres (now owned by defendant). Although plaintiffs' parcel does not front on a public road, there are no easements of record for ingress and egress to or from it. Apparently during the ensuing period of over 100 years, well prior to the 1960s, mesne prior owners of plaintiff's parcel had traversed the dirt roadway which ran through defendant's parcel to the public road, for logging and recreational purposes, although no evidence was adduced as to this use. Plaintiffs brought this action seeking a declaration that an easement existed in their favor either by "prescription," or by "implication by reason of pre-existing use."

Notwithstanding the obvious necessity of plaintiffs' predecessors in title to use this dirt road, the defendant's uncontested testimony showed that on several occasions between 1969 and 1999, defendants have been asked for, and had given, permission to plaintiffs to actively maintain this road. On this basis, this Court held that the granting of permission to use, negated the hostile or adverse elements of use required to establish an easement by prescription. (*Van Deusen v. McManus, 608 NYS2d 569*).

The Court also dismissed plaintiffs cause of action for an easement "by implication from pre-existing use upon severance title," finding that although two of the three elements required for such use: (a.) Unity and subsequent separation; and (b.) The necessity of the easement for the beneficial enjoyment of the retained land;- had been established; that the third required element, that the claimed easement must, prior to separation, have been so long continued, and so obvious or manifest, to show that it was meant to be permanent;- was lacking. **Beretz, Jr. v. Diehl, 755 NYS2d 122 [A.D.3.D.-2003].**

Note: In our view, the Court's decision regarding the missing element for such an "easement by implication," makes little sense. In effect, the Court has said that to sustain this cause of action, plaintiff must also have introduced evidence to the effect that before the original unified parcel was subdivided, the then owner had to have had the right to use the road over one portion or his land to reach another portion of his land. Such a finding would appear to be implied by the evidence introduced. The Court failed to even consider the issue of an "implied easement by necessity," (*Stock v. Ostrander, 650 NYS2d 416)*, which certainly existed, and operated in plaintiff's favor, soley because it was not raised by plaintiff.

Encumbrances – Scope of Examination: In 1956, plaintiff conveyed a parcel of land to herself and her late husband, retaining a parcel contiguous northerly thereto. This deed also granted a 33' wide right of way "along the Northerly line of [plaintiff's property] extending from the North Westerly corner of said property on Mynderse Street to the North Easterly corner of said property on other lands of [plaintiff]." In 1970, plaintiff conveyed the land upon which the right of way was located, to one Farrell. This 1970 deed excepted from the grant, the parcel conveyed to plaintiff in 1956; recited the liber and page of this 1956 deed as well as a metes and bounds description of plaintiff's

parcel; but did not include the specific language describing the right of way. None of the subsequent conveyances by means of which title became vested in defendant in 1995, contained any reference to the 1956 deed nor the disputed right of way described therein. Defendant asserted as a defense to plaintiff's action to declare her right of way and to enjoin defendant's interference therewith, that he was a purchaser for value without actual or constructive notice of the same. Plaintiff appeals from an adverse lower court decision.

As a general rule, a prospective purchaser need not search every chain of title from a common grantor to discover potential encumbrances on title; outside of their own chain of title. (*Buffalo Academy of the Sacred Heart v. Boehm Bros., 267 NY 242).* Since a conveyance by a common grantor to a dominant landowner, "does not form part of the chain of title to the servient land retained by the common grantor;" an owner of the servient estate is not bound because the encumbrance is not recorded directly in their chain of title. (*Witter v. Taggart, 573 NYS2d 146 [NY])* However, an exception to this rule exists "[w]hen a purchaser has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict…." In such case, a purchaser is presumed to have made inquiry and ascertained the extent of such prior right. (*Kingsland v. Fuller, 157 NY 507, 511)* This Court concluded that the express reference to the 1956 deed by book and page number was sufficient to give rise to a duty of further inquiry on defendant's part to "examine the instrument specifically referenced therein"; which examination, if made, would have revealed the specifics of the right of way involved. Consequently, defendant cannot be said to have been a purchaser for value without notice. Judgment was granted to the plaintiff. **Russell v. Perrone, 754 NYS2d 403 [A.D.3.D.-2003].**

Modification Agreement Deemed an Option: The parties entered into a contract for the purchase and sale of real property, with the Purchaser making a 10% downpayment of $480,000. The contract was made contingent upon Purchaser obtaining the necessary approvals for a proposed residence within 150 days of the contract signing; and provided that in the event Purchaser breached said contract, the Seller would retain the downpayment as liquidated damages. When the necessary approvals were not obtained within this period, the parties entered into a Modification Agreement which provided for an 18 month extension; and provided that within such period, Purchaser was to pay $600,000 to a charitable organization of Seller's choice. Such modification further provided that such payment constituted a non-refundable consideration for the granting of the option; and that failure to make such payment would constitute a default under the contract. On 5-15-2001, (the expiration date of a further 10 day extension,) and without having paid the $600,000, Purchaser notified Seller in writing of its cancellation of the contract; which Seller rejected, citing such non-payment. Action by Seller to retain the downpayment; and by the the charity to compel the payment of this sum.

Citing *Kaplan v. Lippman (552 NYS2d 903 [NY]),* this Court defined an "option contract" as the holding open of an offer, which confers upon the optionee, for consideration paid, the right of purchase at a later date. Accordingly, the within agreement modifying the original purchase and sale agreement, was held to constitute an "option contract;" and that the rule of strict construction pertinent to option agreements, was applicable. Consequently, the May 18 closing date, was "of the essence;" and as the Purchaser failed to close, and failed to pay the $600,000, he was in breach of the contracts, and could not recover his downpayment. Judgment was also rendered in favor of the charity for this sum. **Ittleson v. Barnett, 758 NYS2d 360 [A.D.2.D.-2003].**

New Home Warranty vs. Common Law: The issues raised are whether the statutory warranties provided by the Gen. Business Law, Article 36-B, apply to sales of new houses constructed on land already owned by the home buyer; and when does the common law supercede the new statute. The parties' construction contract provided that the builder (defendant) was to provide the labor and materials in accordance with certain plans and specifications, including roof shingles of a specific type and grade made by Owens Corning. Shingles of another grade and manufacturer were used. Some four years

after the construction, plaintiff-homeowner notified defendant in writing that a significant number of these shingles were blown off due to their defective nature, and required the replacement of all the roof shingles. Later, defendant's unauthorized substitution was discovered; and this action for money damages for breach of contract was brought. Defendant alleged, *inter alia*, that plaintiff's action was time barred because he failed to give the appropriate statutory notice; and did not bring this action within the statutory one year period.

Prior to this statute's enactment in 1988, the general rule was that in contracts for work and services, a duty existed to perform same in a good and workmanlike manner, free from material defects. *Caceci v. Di Canio Construction Corp. (530 NYS2^{d} 771 [NY])* made this applicable to housing contracts; with a six year time limitation applicable thereto. Further, the merger doctrine operated so that all contract obligations "merged" in the delivery of the deed to the buyer. The effect was to extinguish claims based on defective home construction, once the buyer accepted title to the underlying real estate. Article 36-B contains three warranty periods: (a) One year due to failure to construct in a "skillful" manner; (b) a two year limit as to plumbing, electrical, heating, cooling and ventilation systems; (c) Six year limitation respecting construction free from "material defects" [Sec. 777-a (1)]; provides that an action based thereon must be brought within one year of the expiration of the warranty, or within four years after the start of the warranty period, whichever is the later [Sec. 777-a (4)(b)]; and requires as a condition precedent thereto, that written notice be given no later than 30 days after the expiration of the warranty period [Sec. 777-a (4)(a)].

The Court of Appeals in *Fumarelli v. Marsam Development, Inc., (680 NYS2d 440)*, held that these statutory provisions superceded the previous common law rules in circumstances where the "statutory warranties obtain." It concluded that *Fumarelli* is inapposite if a homeowner can demonstrate that the statutory warranties do not apply to his contract with the builder. This Court declined to follow the holding in *Watt v. Irish (708 NYS2d 264 [S.Ct.-Columbia Co.])*, that the statutory warranty provisions did not apply to <u>new</u> homes constructed on the homeowner's land. However, as plaintiff also alleged a breach of contract cause of action, this cause was not affected by the statutory warranty provisions; notice provisions; and limitations. **Gorsky v. Triou's Custom Homes, Inc., 755 NYS2d 197 [S.Ct.-Wayne Co.-2002].**

Relation Back Doctrine – Statute of Limitation: Plaintiffs (former owners of the premises,) brought this action: (a) To void as being fraudulent, the conveyance made by Greenpoint Savings Bank to defendant Cantico (following its acquisition of title through foreclosure); and (b) To nullify as fraudulent, the mortgages subsequently made by Cantico to defendant, Sagamore, and assigned to the North Fork Bank. No effort had been made by Plaintiffs to make North Fork a party defendant until after the running of the applicable statute of limitations against it. Plaintiff now seeks to add North Fork as a party defendant on the basis of the "relation back" doctrine.

This doctrine requires that the movant establish that: (1) both claims arose out of the same conduct, transaction or occurrence; (2) the new party is united in interest with the original defendant, and by reason thereof can be charged with such notice of the institution of the action, that the new party will not be prejudiced in maintaining its defense on the merits, by reason of the delayed commencement; and (3) the new party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against that party as well. (*Austin v. Interfaith Med. Ctr., 694 NYS2d 730 [AD])* Insofar as the first two elements are concerned, it is clear that there is a unity of transactions; and that because of the similarity of interest and subject matter, the defenses of the parties will be the same; and that they will rise and fall together with respect to plaintiffs' claim, and be similarly affected. Thus even though North Fork may be a bona fide holder, as assignee, it takes subject to any defense that would have prevailed against its assignor; and it acquires no greater rights than those of its assignor, Sagamore. Accordingly, Sagamore and North Fork are "united in interest."

As to the third prong of the "relation back" doctrine, New York requires merely mistake; not excusable mistake on plaintiff's part. (*cf. Buran v. Coupal, 638 NYS2d 405)* It is only if plaintiff intentionally decides not to assert a claim against a party known to be potentially liable, that this doctrine which would give them a second chance after the limitations period has expired, would be rejected. Plaintiff's motion to serve an amended complaint was affirmed. **Losner v. Cashline, L.P., 757 NYS2d 91** [A.D.2.D.-2003]

Specific Performance – Attempted Cancellation: This case presents an exemplary example as to the care which counsel must take in their exchange of correspondence respecting possible amendment or extension of contractual closing date, after the execution of the original contract. Pursuant to contract between the parties, the premises were to be delivered "vacant and free of leases or tenancies." This contract gave Seller the right to cancel if he was unable to comply with this requirement, and Buyer was unwilling to waive this provision without abatement of price. It further provided that if it was cancelled, it would "terminate" the contract, without either party having rights against the other, other than the return to Buyer of the downpayment, and reimbursement to him for title costs. A rider to the contract extended to 6-30-1998, the deadline for Seller to remove one remaining tenant. The following correspondence then took place between counsel.

7-10-Buyer: Ready to close, provided tenant was removed; or close with tenant if price reduced. If we do not have a definite date for tenant's removal by 7-16, Buyer would treat "Seller's inability to convey title as a breach of contract," and will seek a return of her downpayment with title fees. 8-3-Buyer: Not having received a response to the 7-10 letter, Buyer's counsel advised Seller's counsel that inasmuch as the Seller could not comply with these contract terms, "the contract has been breached;" and "I will speak with [the buyer] … and discuss how she would like to proceed with this matter." 8-26 – Seller : Stated that "since the contract of sale had expired by its terms, and … 'Seller cannot delivered the premises free and clear of tenancies' … seller 'is formally canceling the contract.' and is returning the buyer's $7,000 downpayment." 8-31- Buyer : Rejected this purported cancellation; and agreed to extend seller's time to remove the tenant, until the end of September. 9-2 – Seller: Reiterated its position that the contract had been cancelled.

After trial, the lower court granted plaintiff (Buyer's) specific performance, holding that defendant (Seller's) purported cancellation of August 26th was ineffective. Affirming, this Court interpreted the 7-10 letter as Buyer's intention to hold Seller in breach if title was not conveyed by 7-16; and the language in the 8-3 letter ["discussing the matter with her client'], as not "constituting a retreat from this position;" but rather as relating only to the possible remedies for this breach. It again quoted language from this letter that "the contract had been breached;" and could not be construed as an offer to waive the tenancy issue. **Formey v. Jones, 758 NYS2d 13 [A.D.1.D.-2003].**

Statute of Limitations - Mortgage Note: In May 1989 plaintiff purchased certain premises which he financed in part by making a first mortgage to Chase Lincoln Bank for $325,000; and a second mortgage to defendant for $375,000. In April 1991, plaintiff defaulted on defendant's mortgage, and defendant by written notice of default, accelerated its mortgage. Upon subsequent default of its mortgage, Chase foreclosed same, and at auction conducted pursuant to the judgment of foreclosure and sale, sold the premises for $435,000. Accordingly, this senior lien was satisfied; and the $58,000 surplus monies were paid to defendant's bankruptcy trustee. Plaintiff brought this action in October 1997 seeking a declaration that the second mortgage note was unenforceable by reason of the running of the statute of limitations.

Citing *Loiacono v. Goldberg (658 NYS2d 138 [AD])*, this Court held that the statute of limitations in a mortgage foreclosure action begins to run from the due date of each unpaid installment, unless the entire debt has been accelerated. Once accelerated by a demand or commencement of an action, the entire sum become due, and the statute begins to run on the

entire sum due on the mortgage. Only by an affirmative act within the statute of limitations period, could such acceleration be revoked. The mere acceptance of the surplus monies from the foreclosure of the first mortgage, is not inconsistent with defendant's insistence that the entire debt be paid; and does not constitute proof of an affirmative act of revocation. **Lavin v. Elmakiss, 754 NYS2d 741 [A.D.3.D.-2003].**

Statute of Limitations – Mortgage Reformation: The six year statutory period within which to commence an action to reform a mortgage to exclude a parcel against one in possession of real property under an instrument of title, commences against such parcel owner, when they received notice of mortgage holder's claim in mortgage foreclosure proceedings, that their parcel was encumbered by the mortgage. It does not commence at the time of the execution of the original mortgage. **Wilshire Credit Corp. v. Ghostlaw, 753 NYS2d 539 [A.D.3.D.-2002].**

Tax Delinquency – Adequacy of Notice: In 1983, appellant acquired certain premises in the Town of Newburgh in Orange County; and at that time, reported her address as at: Blaisdell Road, Orangeburgh, to the appropriate taxing authority. Despite having moved in 1991, they paid all their tax bills (mailed to that address) through 1998, except for 1996. The 1998 bill contained contained the statutory notice of the 1996 delinquency; stated the consequences of the failure to pay same; and where inquiry could be made to ascertain the arreared amounts. In October 1997 the County acquired a default judgment against appellant; and in February 1998, sent a statutory notice of the expiration of the redemption period to appellant at her old address, which she claims never to have received. In June 1998 the subject premises were sold to respondent at public auction; who brought this action to quiet title. Judgment was granted by the supreme court to respondent; affirmed by a divided appellate division (3-2); and unanimously affirmed by this Court.

At issue is whether the Town and County's performance in compliance with various statutory notice procedures, provided appellant with constitutionally adequate notice of the impend-ing, and consequently brought, foreclosure action. Where the names and addresses of in- terested parties are known, due process requires "notice reasonably calculated, under all the circumstances, to apprise" that party of the fore-closure action, in order that they may have the opportunity be appear and be heard. (*Mullane v. Hanover Bk. & Tr. Co. 70 S. CT. 652*. It held that the tax district must conduct a reasonable search of the public record; and cannot rely upon the view that the notice obligation is <u>always</u> satisfied by sending a notice to the address listed in the tax roll, where the notice is returned as "undeliverable." (*Prisco v. County of Greene, 734 NYS2d 280 [AD])* However, notice has been found to be inadequate when it was not sent to the address contained in the tax rolls; or only sent an Expiration Notice to an address shown on its roll, where the owner had notified the Town of a change of address, and tax bills had been sent to that address. However the Court concluded that a "reasonable search of the public record, … does not necessarily require searching the Internet, voting records, motor vehicle records, telephone books or other similar records." It reached this conclusion on its perceived lack of any evidence that such a public record would have revealed appellants current address. Additionally, it found as in-sufficient, appellant's claim, in the absence of her requesting the Town to update her address, that the address on her check in payment of the 1997 tax, and on the envelope in which it was sent, should have put the Town on notice of her change of address. Accordingly, this Court found the notices herein given passed constitut-ional muster. **Kennedy v. Mossafa, 759 NYS2d 429 [Ct. of App.-2003]**

Note: In Mennonite, the U.S. Supreme Court held notice defective, as the taxing district did not check the telephone directory for Mennonite's address.

Title Examination – Duty of Inquiry: In this action to foreclose a mortgage, defendant raised certain defenses, including, *inter alia*, that he was a bona fide purchaser for value without notice of plaintiff's mortgage interest. At a point in time, the owner of two parcels of land in

Brooklyn, executed a mortgage in favor of plaintiff, affecting these parcels, one being No. 1783 – 45th Street. On August 7, 1990, plaintiff executed a release of the No. 1783 premises; and on August 8, the plaintiff's predecessor in title, executed a "spreader" agreement, where by the said mortgage was spread onto the No. 1783 premises. Both the "release" and the "spreader" were recorded on the same day; but were "mistakenly recorded in reverse chronological order;" with the release being recorded after the spreader. The title examination which was conducted on defendant's behalf upon his purchase of the No. 1783 premises, returned the documents above set forth; but erroneously concluded therefrom, that the premises being purchased by defendant were free from plaintiff's encumbrance; and so certified to defendant in the certificate of title issued to him.

Citing *Astoria Fed. S.. & L. Ass'n. v. June (593 NYS2d 250 [AD])*, this Court held that a purchaser who had completed an examination of the basic conveyances comprising the chain of title, must then ascertain whether the property is encumbered by mortgages. Therefore, an intended purchaser must be presumed to have investigated the title, and to have examined every deed or instrument which was properly recorded; and to have known every fact disclosed thereby; or to which an Inquiry suggested by the record would have led. If a purchaser, fails to use due diligence in examining the title, they are chargeable as a matter of law with notice of the facts which a proper inquiry would have disclosed. Accordingly, the Court concluded that as the subject mortgage was properly recorded and indexed, a review of that document would have disclosed plaintiff's interest in the subject property. Judgment was rendered for plaintiff. **Fairmont Funding, Ltd. v. Stefansky, 754 NYS2d 54 [A.D.2.D.-2003.**

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