Did You Know?

by Theodore P. Sherris

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JOINT TENANCY – TENANCY IN COMMON PRESUMPTION OVERCOME

In September, 1983, decedent executed a deed conveying certain property to herself and her son, as joint tenants with right of survivorship. This deed apparently was never recorded. In May,1985, decedent's attorney was instructed to add the name of Edith Bonanni, to the deed. Decedent died in February, 1995, after which it was discovered that the 1985 deed did not contain any survivorship language. In 1996, petitioner as executor of decedent's estate, filed a petition seeking partition of the premises. Respondent moved for summary judgment dismissing the petition and for a declaratory judgment to establish their status as surviving joint tenants and sole owners of the premises. After hearing, the Surrogate's Court found that the estate had no interest in the real property and granted respondents motion. This appeal ensued.

A disposition of property to two or more persons creates in them a tenancy in common, unless expressly declared to be a joint tenancy. (EPTL 6-2.2[a]). Citing *Matter of Vadney* (612 NYS2d 375 {AD]), this Court noted that In order to overcome this heavy presumption, a "correspondingly high order of evidence is required" demonstrating a clear and convincing intent to create a joint tenancy. In this case, counsel for the decedent testified that he received oral instruction to add Edith Bonanni's name to the deed and "do nothing more". According to him, there were no instructions or discussions about changing the right of survivorship language from the 1983 deed. The failure to have the survivorship included in the 1985 deed, was found to be an inadvertent oversight Accordingly, the Surrogate's decision was affirmed.

In the Matter of the Estate of Elizabeth Bonanni, Dec'd.
673 NYS2d (A.D.3.D.-1998)
Scheiberling, Rogan & Maney for appellant; Biscone & Neir, for respondents

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LENDER'S — DUTY OF INQUIRY

Defendants Gerald and Vita Talandis resided in their marital residence, and separated in 1980. A separation agreement executed between them in April, 1981, awarded exclusive possession of the marital home to Vita, pending its sale. The agreement requires Gerald to provide Vita with a substitute residence in the event of sale. This exclusive possessory right was to exist until the younger of their children reached 18; and Vita had the right after that event to retain the property or sell it and use the proceeds to buy another. A conversion judgment of divorce based upon this separation agreement was granted in October, 1982; and the terms of the agreement were incorporated into the judgment. A year later the agreement was modified by the parties to identify the home on Nelson Road, as the substitute residence; and Gerald made the subject mortgage thereon. None of the agreements was recorded.

Plaintiff now holds the consolidated mortgage, now in default and in foreclosure, upon this Nelson Road residential property solely owned by Gerald. Plaintiff acknowledges that it knew that the parties were divorced at the time it made the mortgages to Gerald; however, it contends that it had no actual notice of the terms of the judgment of divorce which included Vita's right of exclusive possession. By virtue of visits to the home, the plaintiff's officer concedes that Vita was in the premises; but that he made no inquiry of her regarding her visible and open occupancy. The mortgage application filled out by Gerald, indicated that he was not receiving any rent income on this property. While a search of the County Clerk's land records would not have disclosed Vita's interest in the premises; a search through the civil actions index would have found her name, and led the searcher to the fact that a judgment of divorce had been entered. Inquiry into the terms of the divorce would have revealed that Vita had the right of sole possession. Such an interest by Vita would have been inconsistent with an unfettered right of ownership, possession and use by Gerald, the sole holder of title.

The venerable case of *Williamson v. Brown* (15 NY 354), has long been cited to the effect that a mortgagee "may have a duty to ascertain the extent of the interest of a person who is in possession of the property who is not the mortgagor." To generate such a duty of inquiry, the presence of the possessor must be actual, open and visible. Most importantly, the presence must be inconsistent with the title of the apparent owner. (*Holland v. Brown*, 140 NY 344) Mere reliance upon a chain of title search will not suffice where other facts and circumstances are present which, in the exercise of ordinary care, would have alerted the purchaser to the existence of other and prior legal or equitable interests discoverable with reasonable diligence.

The Court found that such conditions existed herein, and as a consequence, plaintiff could not be a bona fide purchaser for value. Vita's cross-motion seeking a ruling that her possessory interest survived the foreclosure and was superior to the mortgage.

Tompkins County Trust Co. v. Talandis
673 NYS2d 301 (S.Ct.-Tompkins Co.)
Harris, Beach & Wilcox, for Plaintiff; Kerrigan & Wallace, for Defendant Vita Talandis

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LIFE ESTATE

In a will dated November 26, 1990, decedent-Carey gave his to his friend Agueli "the right to remain in possession of [Carey's] personal residence … for the balance of [Agueli's] life or for so long as [Agueli] might elect". In addition to several specific bequests of personal property, the fee interest in the house noted above, was put into a trust. Carey died in 1993 survived by Agueli, and appellant was named executor and trustee of his probated Will. In 1994, an agreement was entered into between appellant and Agueli, whereby Agueli agreed to sell his life estate to the estate for $74,500 at the time the premises were sold to a third party, or on 3-1-1995, whichever first occurred. Agueli agreed to vacate the premises on 9-8-1994; and the balance of $23,600 remaining on the $50,000 bequest was to be paid upon his vacating the premises.

Aguelli failed to vacate the house as promised, and a stipulation of settlement of the eviction proceeding brought by the estate, he then agreed to vacate by 5-1-1995. As of his death on 5-21-95, Agueli still resided in the premises. In this proceeding respondent-executor of Agueli's estate contends that the sale of the life estate by Agueli was not conditioned upon his vacating the premises; that he had fully performed his contractual obligations by placing a quitclaim deed renouncing the life estate, in escrow; that Agueli's estate was entitled to the $74,500 for his life estate; and that Agueli's estate was also entitled to the $23,600 balance of the bequest. Concluding that the terms of the 1994 agreement were severable, the surrogate held that Agueli was entitled to the purchase price for the life estate; but not entitled to the balance of the bequest.

This Court reversed the surrogate, holding that the Agueli estate was not entitled to any monies for the sale of his life estate interest; but ordered that the Agueli estate should receive the balance of the cash bequest, which bequest was governed by the terms of the Carey Will. It based its life estate decision upon its interpretation of same. It concluded that the real substance of a life estate consists in the life tenant's right to exclude all others from the possession of the subject property for the duration of his or her own life. (*Matter of Eva S. Cochrane*, 190 NYS 895, affd 194 NYS 924 [AD]) In general terms, such an estate terminates upon the death of the life tenant, although it may terminate earlier by forfeiture or by voluntary surrender. In this case, since there was no unconditional delivery of the deed of relinquishment by Agueli during his lifetime,. the Court concluded that before the contract to sell the life estate was performed, the life by which the life estate was measured had already ended, thus resulting in a complete failure of consideration to support the promise to pay the $74,500.

In the Matter of Robert E. Carey, Deceased
672 NYS2d 131 (A.D.2.D.-1998)
Joseph Deutsch for the Carey Estate; Werner & Saffioti for the Agueli Estate

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MECHANICS LIEN - FORECLOSURE

Plaintiff filed a notice of mechanics lien against certain premises in Queens County against the interest of the defendant-owner, and served a notice of same on defendant by certified mail, return receipt requested, and timely filed proof of such service. Plaintiff timely commenced this action to foreclose said mechanics lien, and filed a Notice of Pendency of action in connection therewith.

The current provisions of Lien Law Sec. 11 do not require an attempt at personal service of the mechanics lien, before resorting to service by registered or certified mail, addressed to an owners last known address, as did the previous provisions of the statute. The plaintiff served the notice of lien on defendants by certified mail, return receipt requested, although Sec. 11 does not require same. While the use of this postal service provides the mailer with the "signature of the addressee or the addressee's agent, the date delivered and the address of delivery, if different from the address on the mailpiece", it restricts the delivery of a letter in a manner not provided for by Sec. 11. Nonetheless, such service would not deprive the owner of timely notice of the lien, and there the Court found that plaintiff properly served defendants.

Since the notice of pendency as filed failed to set forth the time of filing the notice of the lien as required by Sec. 11, the Court found it defective on its face. As an amended lis pendens could not be timely filed, and a corrected notice of pendency may not be filed nunc pro tunc, the Court directed the cancellation of the notice of pendency, and the discharge the mechanics lien.

L & J Plumbing & Heating Co., Inc. v. Gateway Demolition Corp.
671 NYS2d 613 [S.Ct.-Queens Co.-1998]
Scher & Scher for Plaintiff; Easton & Echtman, for Defendant

MORTGAGE FORECLOSURE - EFFECT OF PAYMENT BY SURETY

In June, 1990, plaintiff in action No. 2, commenced this action to foreclose a mortgage in the sum go $3,000,000 executed by defendant McCarthy. Plaintiff's mortgage was secured in part by a surety bond in the amount of $750,000 issued by Galazy Insurance Co., through First Indemnity. Upon McCarthy's default, First Indemnity paid plaintiff $750,000 under the bond. Plaintiff was granted summary judgment and the matter was referred to a referee who determined that the principal sum due on the mortgage was reduced by the amount of the bond payment. Junior lienholders appeal from the holding of the lower court which confirmed the referee's report.

This Court held that a surety paying on a bond at the behest of a creditor is entitled by operation of law to be subrogated the rights and remedies available to the creditor for enforcement of the debtor's obligation. (*Romano v. Key Bank of Central New York*, 455 NYS2d 879 [AD]) Citing *Thomas Goodfellow, Inc. v. Lyons Trans. Lines*, 486 NYS2d 842), it held that a "subrogated claim is not in any way diminished or extinguished by the subrogation." Rather, is merely taken over by another who stands in the shoes of the original claimant.

Further, this Court denied appellant's contention, that the surety's failure to pay McCarthy's entire debt to plaintiff, prevented it from becoming subrogated to plaintiff's rights. In rejecting the application of this general rule to the facts at hand, the Court noted that the rationale of the rule is that equitable subrogation should not impair the senior lienholder's right to proceed against the debtor to recover the entire indebtedness secured by the senior lien. Accordingly, appellant's cannot be heard to complain.

Arbor National Mortgage, Inc. v McCarthy
672 NYS2d 350 (A.D.2.D.-1998)

TIME OF THE ESSENCE - REASONABLENESS OF THE TIME PROVIDED

The contract for the purchase and sale of this cooperative unit set a closing date of April 1, 1997, but did not specify that time was of the essence. The contract was not made subject to the buyers obtaining financing, however they did make an application for same. The contract further provided that in the event the buyers defaulted, the sellers would be permitted terminate the contract, and the buyers would forfeit their $54,500 down payment. Due to delays in obtaining such financing, they were not ready to close by April 1. Accordingly, by letter of March 31, buyer's attorney sought an adjournment of the closing to April 16. As a consequence no one appeared at the scheduled April 1 closing; and sellers attorney by letter of April 2 agreed to the adjournment, but claimed that time was now of the essence.

On April 14th, and for the first time, lender's counsel asked how certain tax liens would be resolved. Buyers advised that such liens had been satisfied years earlier. However, the transmission to the lender by fax of documents satisfactory to them could not be accomplished prior to noon on April 15, at which time the lender advised that the earliest it could now close was April 18.

On April 15 and 16 there was also an exchange of letters by certified mail and fax between buyer's and seller's attorneys, the upshot of which was that (given the lender's position), the buyers stated that they would not be at the April 16 closing; seller then advised buyers that they were in default; buyers then stated that they would be ready, willing and able to close on April 18; and sellers then stated that they would not attend a closing on April 18th, and refused to agree to any other date.

The Court noted that when a contract for sale of real property [*] does not specify that time is of the essence, either party is entitled to a reasonable adjournment (for a legal reason). In granting same, the other party may impose a condition that time be of the essence as to the rescheduled date. However, the effectiveness of this condition, is conditioned on the specificity of the notice and on the reasonableness of the time period. (*Zev. v. Merman*, 536 NYS2d 739 [NY]) Among the factors to be considered are the nature of the contract; the previous conduct of the parties; the presence or absence of good faith; and the possibility of prejudice to either one; as well as the specific number of days provided for the performance. Citing *Liba Estates v. Edryn Corp.* (577 NYS2d 19 [AD]), the Court held that

reasonableness in this case "turns on whether the post-notice time period provided a reasonable time period in which to close especially when the time of the essence provision was unilaterally made by the sellers after the buyers had selected a very short adjourned closing date."

In reversing the lower court, and holding for plaintiff to the extent of order the return of the down payment, with interest, this Court stated that had buyers could have reasonably requested a longer adjournment period, which sellers could not have rejected. It concluded that there were no extensive delays or acts of bad faith on behalf of the buyers; and that the second request for additional time was minimal, and only for the purpose of clearing a last minute glitch in obtaining the financing which the lender had committed to, common to many residential transactions.

Miller v. Almquist
671 NYS2d 746 (A.D.1.D.-1998)
Hartman & Craven for Plaintiffs; Mandel & Mandel for defendants

Note: Since plaintiffs wanted these premises to break through and add to the apartment already occupied by them; and sellers sold the premises to other buyers for a higher price, it might be said, that the buyers were still the losers.