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Title Insurer Had No Duty to Defend Insured Bank Over Alleged Title Defect

An appellate court in Arkansas, affirming a trial court's decision, has ruled that a title insurer had properly denied coverage to an insured bank in connection with a defect in title of which the bank had been aware.

The Case

As the court explained, John Hardy ("Hardy") and Helen and George Bartmess (together, the "Bartmesses") were business partners in a limited liability company called B&H Resources, LLC ("B&H"). The partnership dissolved in February 2009 and the Bartmesses sold their business interests to Hardy (the "B&H Transaction").

The Bartmesses owned real property in Izard County, Arkansas, including a 377-acre tract known as "Phillips Corner" (the "Phillips Corner Property"). The Phillips Corner Property, among several other properties, was transferred by the Bartmesses to Hardy as part of the B&H Transaction.

The parties' agreement was reflected in two documents:

(1) An LLC Membership Interest Purchase Agreement (the "LLC MIPA") that set forth the terms and conditions relative to the B&H Transaction, and

(2) A Memorandum of LLC Membership Interest Purchase Agreement Affecting Real Estate and Rights Therein (the "Memorandum").

The LLC MIPA contained a provision that created a reversionary interest in the Phillips Corner Property back to the Bartmesses in the event of certain conditions of noncompliance. Because of confidentiality, the LLC MIPA was not to be recorded in the Izard County land records. The Memorandum did not reference the reversionary interest, but it did reference the LLC MIPA, stating that the LLC MIPA "affects real estate and rights in real estate" and that the parties "hereby enter into this memorandum and file it within the mortgage and conveyance records in and for Izard County, Arkansas." In addition, legal descriptions of several pieces of real property, including the Phillips Corner Property, were attached to the Memorandum, and the Memorandum further recited that the Bartmesses agreed to convey to B&H the Phillips Corner Property.

To complete the B&H Transaction, the First National Bank of Izard County (the "Bank") agreed to loan money to Hardy. Danny Moser, the Bank's chief executive officer at the time, was the loan officer for the B&H Transaction. In this capacity, Moser received and was copied on most, if not all, of the correspondence concerning the B&H Transaction between the Bartmesses and Hardy, including the LLC MIPA and the Memorandum.

The Bank loaned Hardy $55,000 (the "$55k Loan") secured by a mortgage dated February 12, 2009, on the Phillips Corner Property. Then, on July 9, 2009, the Bank loaned Hardy $155,000 (the $155k Loan") that also was secured by a mortgage on the Phillips Corner Property.

In connection the loans and mortgages, the Bank purchased title insurance policies from Old Republic National Title Insurance Company. Old Republic issued separate title policies (the "Policies") to the Bank covering the mortgages securing the $55k Loan and the $155k Loan.

Notably, the Memorandum was recorded by the Izard County Circuit Clerk before the Bank's mortgages were recorded by the clerk.

In 2015, Hardy defaulted on the loans, and the Bank filed a foreclosure action. After George Bartmess' death, Helen Bartmess, relying on the Memorandum, asserted a superior interest in all

property on which the Bank held mortgages. Furthermore, Helen Bartmess declared that the Bank had actual notice of her preexisting claim against that property as well as constructive notice of her priority claim at the time of the loan transactions.

In response, the Bank filed a claim for coverage and defense with Old Republic under the Policies. Old Republic refused to defend and denied the Bank coverage, citing the Policies' exclusions. Despite this refusal to defend, the Bank moved forward with the foreclosure proceeding. Ultimately, the Bank reached a settlement with Helen Bartmess, conceding that her interest in the property – by virtue of the Memorandum and the LLC MIPA – was superior to its two mortgages on the same property, and it released its interest in the Phillips Corner Property.

Thereafter the Bank sued Old Republic, alleging breach of the Policies because of Old Republic's failure to provide coverage, its failure to defend the Bank, and its failure to pay the Bank's damages suffered by the loss of its security interest to the property.

Old Republic counterclaimed, seeking a declaration from the trial court that its denial of coverage was proper under the exclusion in paragraph 3(a) in the Policies for "[d]efects, liens, encumbrances, adverse claims or other matters: (a) created, suffered, assumed, or agreed to by the Insured Claimant[.]" Old Republic contended that the terms of the Memorandum and the LLC MIPA had been disclosed to the Bank, and that these documents were in the possession of the Bank prior to the closing of the B&H Transaction. The title insurer further contended that the Bank's handling and recording of the Memorandum resulted in the Memorandum being recorded ahead of the mortgages.

The trial court entered summary judgment in favor of Old Republic, ruling that the Bank had "created, suffered, assumed, or agreed to" the defect in title.

The Bank appealed.

The Appellate Court's Decision

The appellate court affirmed.

In its decision, the appellate court explained that in the weeks prior to the closing of the B&H Transaction, the terms of the Memorandum, the LLC MIPA, and the additional documents related to the partnership dissolution and the real estate transactions had been shared with the Bank. According to the appellate court, the Bank was "involved in the B&H Transaction for months and was informed by letter of the purpose of the Memorandum." Moreover, the appellate court continued, a Bank employee was present for the closing, notarized the documents, and handled the recording of the Memorandum, deed, and mortgages. Thus, the appellate court found, the Bank had the power "to prohibit the Memorandum from having priority over its mortgages."

Accordingly, the appellate court concluded, the defect in title had been "created, suffered, assumed, or agreed to" by the Bank, Old Republic had properly denied coverage under paragraph 3(a) of the Policies, and Old Republic had no duty to defend the Bank.

The case is *First National Bank v. Old Republic National Title Ins. Co.*, 655 S.W.3d 108 (Ark. Ct. App. 2022).

Texas Appellate Court Affirms Decision Rejecting Suit Alleging That Title Company Breached Commitment for Title Insurance

An appellate court in Texas has affirmed a decision by a trial court in Texas rejecting a lawsuit alleging that a title insurance company had breached a commitment for title insurance.

The Case

Sam Higgins purchased a lot on East 16th Street in Austin, Texas (the "Lot") in 1974. A warranty deed recorded in the Travis County records on August 8, 2017, stated that Higgins transferred the Lot to CETA Invest Austin. Thereafter, CETA, an entity owned by Ashley Crawford, entered into an agreement to sell the Lot to Juanita William for $200,000.

On September 20, 2017, William offered to assign her right to purchase the Lot to Houndstooth Capital Real Estate, LLC, a real estate investment company owned by Lincoln Edwards, for $205,000. That same day, Houndstooth, William, and CETA signed an agreement providing for the assignment. The closing was scheduled for September 29, 2017, but was delayed when the escrow agent, Wally Tingley & Associates, P.C. ("Tingley"), discovered a memorandum of purchase and sale agreement from another company in the county records.

According to Edwards, William explained that she had previously assigned purchase contracts on the Lot and a nearby lot, that heirship issues on the neighboring lot had delayed the sale, that the previous assignee had decided not to buy the Lot until it could buy both lots, and that because the Lot had no heirship issues, William had placed her purchase interest back on the market. Edwards also said that Crawford had obtained a release from the previous assignee, and the closing therefore was rescheduled. According to Houndstooth, a Tingley employee assured Edwards that the Lot did not have the heirship issues the other lot had.

The transaction closed on October 6, 2017. Maverick Title of Texas, LLC d/b/a Texas Title, served as the title agent for WFG National Title Insurance Company. In the Commitment for Title Insurance (the "Commitment") signed by representatives of WFG and Maverick, WFG promised to issue a title insurance policy if several specified conditions were met, including resolution to WFG's satisfaction of any "matter that may affect title to the land or interest insured, that arises or is filed after the effective date of this Commitment." Those conditions were in Schedule C of the Commitment, which was countersigned by Tingley. Edwards, on behalf of Houndstooth, initialed that he understood and acknowledged that:

> Neither the Commitment for Title Insurance nor the Owner Title Policy are abstracts of title, title reports or representations of title and should not be relied upon as such and that, although

documents have been signed, money collected and/or disbursed, a final down-date search may be made which could result in an Owner Title Policy not being issued.

Houndstooth delivered $205,000 to an escrow account, and, after the closing documents including the deed from CETA to Houndstooth were executed, Tingley wired the funds to CETA's Bank of America account. Houndstooth later asserted that Tingley represented that Houndstooth would receive its title insurance policy within four to five weeks. Houndstooth was considering selling the Lot, for which it said it received offers ranging from $290,000 to $325,000.

On October 13, 2017, Bank of America alerted Maverick to the possibility of a fraudulent transaction based on the fact that CETA was trying to withdraw all the closing funds from an account that had only recently been opened. Maverick told Houndstooth about the fraud alert. Bank of America eventually stopped payment on the funds that were being withdrawn.

Houndstooth contended that, on October 18, 2017, Maverick informed Houndstooth that no title policy would be issued, the premium paid for the policy would not be returned, the funds that had been placed in escrow would not be returned, and the chain of title was in question.

On October 27, 2017, Higgins, who had purchased the Lot in 1974, signed a Fraud Affidavit stating that the deed conveying the Lot to CETA Invest Austin was a forgery.

Some of the escrow funds were returned to Houndstooth. Bank of America recovered a $5,000 assignment fee for the closing plus $57,740.69 remaining in the CETA account, and it returned the $62,740.69 to Maverick. Thereafter, Maverick sent Houndstooth a check for $62,740.69. The U.S. Secret Service recovered an additional $69,931.66 of the escrow funds and returned that amount to Houndstooth, making the total returned $132,672.35 of the $205,000 that had been transferred.

Houndstooth sued WFG and Maverick. Among the claims Houndstooth asserted was a claim for breach of contract. Houndstooth sought compensatory damages, including lost profits.

In a separate action Houndstooth sued Higgins and Crawford, seeking to adjudicate ownership of the Lot. The agreed declaratory judgment in that case provided that the purported warranty deed conveying the Lot from Higgins to CETA was fraudulent, null and void from its inception, and of no legal effect. The declaratory judgment also provided that all right, title, and interest to the Lot had remained vested in Higgins since he had received title.

WFG and Maverick moved for summary judgment in the case Houndstooth had filed against them. The trial court granted their motions and rendered judgment that Houndstooth take nothing from them on its claims.

Houndstooth appealed. Among other things, Houndstooth contended that the trial court had erred by granting summary judgment on its breach of contract claims against WFG and Maverick because Houndstooth had performed all its obligations under the contract and the title insurance policy should have been issued.

For its part, WFG argued that the Commitment was not a contract but, rather, that it was a form that provided that WFG offered to issue a title insurance policy but that Houndstooth failed to satisfy the conditions of the offer, including by failing to dispose of the Fraud Affidavit to WFG's satisfaction. WFG asserted that Houndstooth had no evidence that Houndstooth could have acquired fee simple title or a sellable interest in the property, that it had satisfactorily disposed of the Fraud Affidavit, or that WFG had breached a valid, enforceable contract.

The Appellate Court's Decision

The appellate court affirmed the trial court's decision on Houndstooth's breach of contract claims against WFG and Maverick.

In its decision, the appellate court explained that the Commitment stated that it was "a legal contract between you and us. The Commitment is not an opinion or report of your title. It is a contract to issue you a policy subject to the Commitment's terms and requirements." The appellate court then

noted that the Texas Insurance Code § 2701.001(a) states that a "commitment for title insurance" means "a title insurance form under which a title insurance company offers to issue a title insurance policy subject to stated exceptions, requirements, and terms." The appellate court added that Texas Insurance Code § 2701.001(b) explains further:

> A commitment for title insurance constitutes a statement of the terms and conditions on which a title insurance company is willing to issue its policy. A title insurance policy or other title insurance form constitutes a statement of the terms and conditions of the indemnity under the policy or form.

The appellate court next pointed out that, consistent with that statutory language, the Commitment stated:

> We, WFG National Title Insurance Company, will issue our title insurance policy or policies (The Policy) to You (the proposed insured) upon payment of the premium and other charges due, and compliance with the requirements in Schedule C. Our Policy will be in the form approved by the Texas Department of Insurance at the date of issuance, and will insure your interest in the land described in Schedule A.

Additionally, Schedule A of the Commitment stated that "[t]he interest in the land covered by this Commitment is: Fee Simple." And Schedule C stated that:

> Your Policy will not cover loss, attorneys' fees, and expenses resulting from the following requirements that will appear as Exceptions in Schedule B of the Policy, unless you dispose of these matters to our satisfaction, before the date the Policy is issued:
>
> * * *
>
> 4. Any defect, lien or other matter that may affect title to the land or interest insured that arises or is filed after the effective date of this Commitment.

The appellate court observed that the Commitment was effective on September 29, 2017, that it was effective for 90 days, and that Schedule C required Houndstooth to dispose to WFG's satisfaction any matter that affected title to the land that arose or was filed after the effective date of the Commitment and before the policy issued. The appellate court then found that Houndstooth had not resolved the issue affecting title to the land raised by the Fraud Affidavit to WFG's satisfaction within the 90 day effective period of the Commitment.

The appellate court was not persuaded by Houndstooth's argument that no parties had contended at the closing that Houndstooth had failed to fulfill its obligation, finding that argument unavailing because the Commitment required Houndstooth to resolve title issues that arose after the Commitment but before the policy was issued. Houndstooth had produced no evidence that it had satisfied this condition, the appellate court noted.

Accordingly, the appellate court concluded, because the condition precedent to WFG's obligation to issue the title insurance policy had not been satisfied, WFG had not breached the Commitment.

The case is *Houndstooth Capital Real Estate, LLC v. Maverick Title of Texas, LLC*, No. 03-21-00093-CV (Tex. Ct. App. Feb. 28, 2023).

Fifth Circuit Court of Appeals Rules That Funds Transfer Fraud Endorsement Covered Escrow Agent's Loss

The U.S. Court of Appeals for the Fifth Circuit, affirming a district court's decision, has ruled that a funds transfer fraud endorsement in a crime protection insurance policy covered an insured escrow agent's claim of loss stemming from a fraudulent routing number that had been supplied to the escrow agent.

The Case

An employee of Valero Title, Inc., an escrow agent, was discussing a loan payoff transaction over e-mail with a lender's employee when a fraudster posed as the lender's employee and sent the Valero employee fraudulent wiring instructions with a fraudulent routing number.

Because the Valero employee did not recognize that these instructions were fraudulent, the Valero employee instructed Valero's bank to wire $250,945.31 to the fraudster. When Valero learned of the loss, it submitted a proof of loss claim to RLI Insurance Company, from which Valero had purchased a crime protection insurance policy.

The policy included a funds transfer fraud endorsement providing that RLI "will pay for loss of funds resulting directly from a fraudulent instruction" that directed a financial institution "to transfer, pay or deliver funds from your transfer account." The policy defined "fraudulent instruction" as "[a] written instruction . . . issued by you, which was forged or altered by someone other than you without your knowledge or consent, or which purports to have been issued by you, but was in fact fraudulently issued without your knowledge or consent."

After RLI determined that the loss was not covered by the funds transfer fraud endorsement, Valero sued RLI. The parties moved for summary judgment.

The U.S. District Court for the Southern District of Texas held that Valero's loss was covered under the policy, and RLI appealed to the Fifth Circuit. RLI argued that because the instruction had been authorized and approved by Valero, it was not "a written instruction . . . issued by you, which was forged or altered by someone other than you without your knowledge or consent."

The Fifth Circuit's Decision

The Fifth Circuit affirmed, upholding the district court's interpretation of the policy.

In its decision, the circuit court reasoned that the instruction Valero had issued to its bank was the same instruction that Valero had received from the fraudster posing as the lender, including the name of the recipient institution, the routing number, the recipient account numbers, the account name, the payment date, and the total amount of payment. The circuit court added, however, that unknown to Valero, the instruction was not the same as the instruction provided by the lender; rather, it had been altered to include different recipient account information. Thus, the Fifth Circuit held, when Valero issued the instruction to its bank, it was a fraudulent instruction that had been "forged or altered by someone other than [Valero] without [Valero's] knowledge or consent."

Therefore, the Fifth Circuit concluded that the district court had correctly decided that coverage had been triggered under the funds transfer fraud endorsement for Valero's claimed loss.

The case is *Valero Title Inc. v. RLI Ins. Co.*, No. 22-20155 (5th Cir. Feb. 1, 2023).

New York Appellate Court Rejects Adverse Possession Claim, Finding Defendant Did Not Show That Retaining Wall Was in "Same Spot" for 10 Years

An appellate court in New York has affirmed a trial court's decision rejecting a defendant's contention that he owned by adverse possession the property on which his retaining wall was situated,

finding that the defendant failed to demonstrate that the retaining wall had been in the same location for the required 10 year period.

The Case

Andrew Elio, in renovating his property, encroached on property owned by David Tedesco. Tedesco sued, seeking damages for trespass and seeking injunctive relief.

Elio stipulated to removing certain encroachments. However, with respect to an L-shaped retaining wall that encroached 28 inches onto Tedesco's property, Elio contended that he owned the 28-inch encroachment area by adverse possession.

After a nonjury trial, the Supreme Court, Putnam County, determined that Elio had failed to prove adverse possession by clear and convincing evidence and it directed him to remove the L-shaped retaining wall at his own expense.

Elio appealed.

The Appellate Court's Decision

The Appellate Division, Second Department, affirmed.

In its decision, the appellate court explained that, to establish his claim of adverse possession, Elio had to prove, by clear and convincing evidence, possession that was:

(1) Hostile and under claim of right;

(2) Actual;

(3) Open and notorious;

(4) Exclusive; and

(5) Continuous for 10 years.

The appellate court ruled that although the evidence at trial demonstrated that the retaining wall was not de minimus and that it had been present for 10 years, Elio failed to establish by clear and

convincing evidence that the L-shaped retaining wall had been "located in the same spot," encroaching on Tedesco's property, for the requisite 10-year period.

The appellate court pointed out that, contrary to Elio's contention, Tedesco had never testified that the L-shaped retaining wall was 20 years old. Rather, the appellate court said, Tedesco had testified that his survey was 20 years old, and that was why it did not indicate the location of the L-shaped retaining wall.

Accordingly, the appellate court concluded, because Elio had not established adverse possession of the 28-inch encroachment area by clear and convincing evidence for 10 years, the Supreme Court had properly directed that he remove the L-shaped retaining wall from Tedesco's property.

The case is *Tedesco v. Elio*, 211 A.D.3d 1072 (2d Dep't 2022).

Deceased Property Owner's Grandson and His Wife Fail in Bid to Claim "Adverse Possession" of Home

The New York Surrogate's Court has rejected an adverse possession claim to a deceased property owner's home by her grandson and her grandson's wife, finding that they had failed to establish "any rights in the property at all."

The Case

When Louise Elliot died on June 30, 2000, she was the sole owner of certain real property in Ozone Park, in Queens County, New York. The Public Administrator of Queens County was appointed the administrator of Elliot's estate on February 13, 2020, almost 20 years after Elliot's death, and subsequently proposed to sell the property.

Derrick Adams, Elliot's grandchild and the son of distributee Annette Adams, and Toinetta Adams, Derrick Adams' spouse, had moved into the property in April 2001, within a year after Elliot's death; they continued to reside there until and after the Public Administrator had been appointed. Prior to their moving into the property, Annette Adams had ousted two of Elliot's other children, Linda Sidberry and Richard Elliot, by claiming that she was the owner of the property.

Derrick and Toinetta Adams objected to the Public Administrator's plan to sell the property. Among other things, they claimed that they were owners of the property by adverse possession.

The Public Administrator asked the Surrogate's Court to dismiss their objections, and moved for summary judgment.

The Court's Decision

The Surrogate's Court granted the Public Administrator's motion.

In its decision, the Surrogate's Court explained that, under New York law, a party seeking to establish title to real property by adverse possession on a claim not based upon a written instrument had to demonstrate that the property at issue had been either "usually cultivated or improved" or "protected by a substantial enclosure." The Surrogate's Court added that the party also had to establish, by clear and convincing evidence, the common law elements of adverse possession, namely, that the possession was "(1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required [10 year] period."

The Surrogate's Court pointed out that the only individual who had asserted a claim of ownership of the property prior to the Public Administrator's proposed sale was Annette Adams. The Surrogate's Court then added that Derrick and Toinetta Adams had taken possession of the premises with her consent and had never asserted an ownership interest against any of Elliot's other distributees.

Accordingly, based on the law and under these facts, Derrick and Toinetta Adams had "not established any rights in the property at all," the Surrogate's Court concluded.

The case is *Estate of Louise Elliot*, No. 18-1995/B (Surrogate's Ct., Queens Co. Nov. 22, 2022).

New York Trial Court's "Adverse Possession" Ruling in Favor of Defendants Is Upheld on Appeal

The Appellate Division, Second Department, has affirmed a trial court's decision dismissing a complaint against companies that had erected a 40-foot high sign that allegedly encroached on the plaintiff's property, agreeing with the trial court's conclusion that the companies had demonstrated their ownership of the property by adverse possession.

The Case

In February 1996, Marjam of Rewe Street, Inc., Marjam Supply of Rewe Street, LLC, and Marjam Supply Co., Inc. (collectively, the "Marjam Companies"), erected a 40-foot high sign advertising their businesses and location on the corner of Vandervoort Street and 2 Rewe Street in Brooklyn, New York.

In 2013, Green Hills (USA), LLC, which had purchased 2 Rewe Street in 2001, had a survey of 2 Rewe Street conducted. According to Green Hills, the survey revealed that approximately 1.2 inches of the post holding the sign and two feet of the sign itself were located within the boundary of 2 Rewe Street (hereinafter, the "disputed property"). Green Hills then sued the Marjam Companies seeking, among other things, damages for trespass.

The Marjam Companies moved for summary judgment dismissing the complaint, contending that they had acquired title to the disputed property by adverse possession. The Supreme Court, Kings County, granted the Marjam Companies' motion, and Green Hills appealed.

The Appellate Court's Decision

The Second Department affirmed.

In its decision, the appellate court explained that under the New York law that was in effect in 2006, the latest that title allegedly had vested in the Marjam Companies by adverse possession, the Marjam Companies had to demonstrate that their possession was hostile and under a claim of right, actual, open and notorious, exclusive, and continuous for the statutory period of 10 years, and that the disputed property had been "usually cultivated or improved" or "protected by a substantial enclosure."

The Second Department noted that the purpose of the hostility requirement is to provide the title owner notice of the adverse claim through the "unequivocal acts of the usurper." The appellate court added that hostility can be inferred "simply from the existence of the remaining four elements, thus shifting the burden to the record owner to produce evidence rebutting the presumption of adversity."

According to the appellate court, the Marjam Companies had established that their possession of the disputed property had been actual, open and notorious, exclusive, and continuous for the statutory period of 10 years. Contrary to Green Hills' contentions, the appellate court continued, the Marjam Companies "alone" had cared for the signpost and sign, establishing their exclusive possession of the disputed property.

The Second Department also found that the Marjam Companies had established that they had improved the disputed property through the erection and maintenance of the sign advertising their businesses.

Finding that Green Hills had not produced evidence rebutting the presumption of adversity, the Second Department concluded that the Supreme Court had properly granted the Marjam Companies' motion for summary judgment dismissing the Green Hills complaint.

The case is *Green Hills (USA), LLC v. Marjam of Rewe St., Inc.*, 208 A.D.3d 1156 (App. Div. 2d Dep't 2022).

New York Appellate Court Upholds Preliminary Injunction Against Defendant in Easement Dispute

An appellate court in New York has upheld a trial court's decision to preliminarily enjoin the defendant from interfering with an easement claimed by the plaintiff.

The Case

Camp Bearberry, LLC, and Rachel Khanna (as trustee) owned adjacent parcels of property in the Chipmunk Lane area subdivision next to Lake Placid in the upstate town of North Elba, in Essex County, New York. Camp Bearberry owned lot 5 and Khanna owned lot 3. Lots 6 and 7 were owned by others. Lots 3, 6, and 7 had access to Chipmunk Lane, but lot 5 did not. Camp Bearberry accessed Chipmunk Lane from an easement to use a common driveway over lots 3, 6, and 7 that had been granted by the original owner in 1980 with an additional triangular-shaped easement over lot 3 that had been added in 1982.

In 2015, the individual who then owned lot 5 (and who was Camp Bearberry's managing member) agreed to release her driveway easement over lots 6 and 7 in exchange for a parking easement and ownership of a strip of vacant land over lot 6. An attorney for the owners of lots 6 and 7 completed the transaction, drafting a deed to that effect. The owner of lot 3 was not involved in the transaction.

In 2018, Khanna purchased lot 3.

During the course of a construction project on lot 3, Khanna contended that a map was discovered with the 2015 deed that depicted the release of the easement over lot 3 in addition to the easements over lots 6 and 7. Camp Bearberry refuted the validity of the map and continued to use the easement over lot 3 until Khanna began to block access in late 2020.

Camp Bearberry filed an action seeking, among other things, a declaration of its easement rights and a permanent injunction against Khanna barring interference with such rights. Camp Bearberry then moved for a preliminary injunction restraining Khanna from blocking or barricading the common driveway and the easement that passed from Chipmunk Lane over lot 3 and to lot 5.

The Supreme Court, Essex County, granted Camp Bearberry's motion for a preliminary injunction, and Khanna affirmed.

The Appellate Court's Decision

The Appellate Division, Third Department, affirmed.

In its decision, the appellate court explained that the deeds submitted by Camp Bearberry from 1980 and 1982 established an easement appurtenant in the form of a common driveway over lots 3, 5, 6, and 7, for the benefit of Camp Bearberry's lot 5. Although Khanna contended that the 2015 transaction resulted in the easement being released over lot 3, the appellate court found that the language of the deed specifically referenced the portion of the easement being released as that "over or through Lot 7 and Lot 6" – with no express reference to lot 3. According to the appellate court, to the extent that the attached map visually depicted the easement over lot 3 as also being released, this differed "from the language of the deed," and the deed itself "govern[ed]."

The appellate court found that Camp Bearberry also demonstrated a danger of irreparable harm and a balance of the equities in its favor. In the appellate court's opinion, the affidavits and photographs submitted by Camp Bearberry demonstrated that Khanna blocked the common driveway in a manner that precluded vehicle access to or from lot 5 by Camp Bearberry, its invitees, and emergency vehicles.

The appellate court acknowledged that Khanna's affidavit discussed several inconveniences associated with the common driveway, but it ruled that these did not constitute proof that Khanna would be harmed by maintenance of the status quo – which had existed from 1980 until Khanna blocked the driveway in 2020.

Accordingly, the appellate court concluded that the Supreme Court had not abused its discretion in granting Camp Bearberry a preliminary injunction.

The case is *Camp Bearberry, LLC v. Khanna*, 212 A.D.3d 897 (3d Dep't 2023).

Trial Court's Finding That Plaintiffs Had "Prescriptive Easement" Over Defendants' Property Is Affirmed by New York Appellate Court

The Appellate Division, Fourth Department, has affirmed a decision by the Supreme Court, Jefferson County, finding that the plaintiffs had a prescriptive easement over a lot owned by the defendants that entitled the plaintiffs to continue to cross the defendants' property to reach the St. Lawrence River.

The Case

In the 1960s, the parents of William Meyers (the "Meyers Parents") acquired a single inland property in Cape Vincent, New York, located across the street from Lot 10, bordering the St. Lawrence River. Also during the 1960s, the father of Faith Berl acquired Lot 11. In 1993, Faith Berl became the owner of Lot 11 and, in 2010, Brian and Faith Berl (the "Berls") became the owners of Lot 10, an unimproved parcel of land. In 2012, William and Eileen Meyers (the "Meyers") became the owners of the inland parcel previously owned by the Meyers Parents.

Pursuant to a 1964 letter agreement (the "Land Agreement") signed by Lionel Radley (who owned all of these properties at the time) and by the father of William Meyers, the Meyers Parents were to obtain a "right of way to the River." The Land Agreement did not specify the location of that right-of-way.

In 1969, Radley executed a deed conveying the inland parcel to the Meyers Parents, but the deed did not mention any right-of-way regarding access to the river.

From 1964 through 2017, Meyers family members repeatedly used Lot 10 to access the river and to engage in recreational activities. They installed, on an annual basis, a seasonal dock and boat hoist at Lot 10's waterfront, at times with the help of Berl family members.

In 2017, however, the Berls sent the Meyers a letter "revoking [the] permission" to use Lot 10 and proposing terms for a new agreement to allow the Meyers to use Lot 10. The Meyers rejected the proposal and thereafter filed a lawsuit, seeking a determination that they had a prescriptive easement with respect to Lot 10.

Following a nonjury trial, Supreme Court, Jefferson County, issued an order and judgment declaring that the Meyers had an easement over and across Lot 10.

The Berls appealed.

The Appellate Court's Decision

The Fourth Department affirmed, holding that the evidence supported the trial court's determination that the Meyers had a prescriptive easement over Lot 10 inasmuch as the use of Lot 10 by Meyers family members had, since 1969, been hostile to the Berls' ownership rights.

In its decision, the Fourth Department explained that, unlike title by adverse possession, the determination of an easement by prescription focuses on a party's use of the property rather than on its possession of the property. The appellate court added that, to establish an easement by prescription, the Meyers had to establish by "clear and convincing evidence" use that was "hostile and under a claim of right; actual; open and notorious; and continuous for the required period" of 10 years. The Fourth Department added that the "hostile and under [a] claim of right" element did not encompass "two distinctly different requirements." Rather, the appellate court continued, the parts of that element "have been viewed as virtually synonymous. Both parts require that the possession be truly adverse to the rights of the party holding record title."

The Fourth Department noted that the Berls had not contested that the Meyers had established by clear and convincing evidence that their use of the property was actual, open and notorious, and continuous for the required period, inasmuch as the Meyers were able to tack on the established use by the Meyers Parents. According to the Fourth Department, the only disputed issue was whether the use of Lot 10 by the Meyers Parents was "hostile and under a claim of right, i.e., adverse." The Fourth Department then agreed with the trial court that the Meyers had established by clear and convincing evidence their use "was hostile and under a claim of right."

The Fourth Department explained that possession or use was hostile when it constituted "an actual invasion of or infringement upon the owner's rights." The Fourth Department then ruled, based on its review of the trial evidence, that the Meyers had established by clear and convincing evidence that the use of Lot 10 constituted an actual invasion of or infringement upon the Berls' rights.

The Fourth Department agreed with the Meyers that the trial court had properly concluded that any provision for a right-of-way in the Land Agreement had been extinguished in 1969 when the deed, which did not include any provision for a right-of-way to access the river, was executed. According to the appellate court, it was "settled law" that, where a contract for the sale of land has been executed by a conveyance, the terms of the contract concerning the nature and extent of property conveyed merged into the deed and any inconsistencies between the contract and the deed were to be explained and governed solely by the deed, which was "presumed to contain the final agreement of the parties."

Finding that none of the exceptions to the merger doctrine applied, the Fourth Department reasoned that even if the Land Agreement granted the Meyers Parents a right-of-way over Lot 10, that express grant of authority had been terminated as of 1969. Moreover, the Fourth Department continued, the Meyers Parents and the Meyers did not thereafter receive any other permission or authority from Radley or the Berls to use Lot 10. Nevertheless, the Meyers Parents and Meyers family members continued to use Lot 10 to access the river and for other activities during the required time

period and indeed for almost five decades following the execution of the 1969 deed under a mistaken, albeit reasonable, belief that they had a legal right to do so, the appellate court said.

In sum, the Fourth Department ruled, the right-of-way set forth in the Land Agreement had been extinguished by the deed, and the Meyers' continued use over the ensuing decades constituted "an actual invasion of or infringement upon the owner's rights." Therefore, the trial court had properly determined that the Meyers had established by clear and convincing evidence that they had a prescriptive easement over and across Lot 10, the Fourth Department concluded.

The case is *Meyers v. Berl*, No. 846 CA 22-00569 (4th Dep't Feb. 3, 2023).

Appellate Court in New York Affirms Decision Denying Nonparties Right to Vacate Default Judgment in Quiet Title Action

The Appellate Division, Fourth Department, has affirmed a decision of the Supreme Court, Erie County, rejecting a motion filed by nonparties to a quiet title action seeking to vacate a default judgment in that action, ruling that the nonparties lacked standing to seek to vacate the default judgment.

The Case

William and Jamie Ullmark (the "Ullmarks"), owners of lakefront property in the upstate town of Hamburg, New York (the "Town"), filed an action seeking to quiet title to an adjacent strip of lakefront property, identified in a 1923 subdivision map as a "Lane." The Cobourn Corporation, formerly known as The Buffalo Mount Vernon Corporation, defaulted and, after the Ullmarks and the Town entered into a stipulation to preserve the Town's easement over the Lane, the Supreme Court, Erie County, granted the Ullmarks a default judgment awarding them sole title to the Lane.

After that judgment was entered, an inland neighbor, Mary E. Maloney, and the prior owners of the Ullmarks' property, Ronald B. Vincent and Sharon E. Vincent (collectively, the "nonparties"), moved to vacate the default judgment and to void the deed issued to the Ullmarks. The nonparties contended

that they had legitimate property interests in the Lane and that the Ullmarks' statements to the contrary, i.e., that no one else had an interest in the Lane or would be affected by their action, were false and untrue.

The trial court denied the nonparties' motion, determining that the nonparties lacked standing to seek vacatur of the default judgment. The nonparties appealed.

The Appellate Court's Decision

The Fourth Department affirmed.

In its decision, the Fourth Department explained that, to seek relief from a judgment or order, movants only had to demonstrate that they had "some legitimate interest" that would be served and that judicial assistance would "avoid injustice."

The Fourth Department then ruled that the nonparties had failed to meet their burden of establishing the existence of an express or implied easement that would have provided them with any legitimate interest in the Lane.

With respect to any express easement, the appellate court continued, the nonparties failed to submit any document affording either Maloney or the Vincents with any express easement on, over, or across the Lane. The appellate court pointed out that a 1932 deed purported to grant all subdivision lot owners an easement over "Beach Lot A" and a "Park," with the intent that those areas would be used for general recreational uses, but the appellate court added that "no mention" was made of the Lane as designated in the 1923 subdivision map, and no deed contained any grant of an easement or right-of-way over the Lane to any of the subdivision owners. In the appellate court's opinion, neither "Beach Lot A" nor the "Park" encompassed the area of the Lane.

With respect to any alleged implied easement, the Fourth Department rejected the nonparties' contention that the Lane constituted a "paper street" or the equivalent of a park, providing access to all neighbors on, over and across the Lane. The appellate court explained that implied easements "are not

favored in the law" and that the burden of proof rests with the party asserting the existence of the facts necessary to create an easement by implication to prove such entitlement by clear and convincing evidence. According to the Fourth Department, the nonparties "did not meet that burden here."

The Fourth Department also decided that the nonparties had failed to establish that the Vincents, as prior owners of the Ullmarks' property, had any legitimate interest in the Lane or that the Vincents had intended to retain an interest in the property after selling it to the Ullmarks and relocating to a different state.

Accordingly, the appellate court concluded that, given that the nonparties had failed to establish any legitimate interest in the Lane, the nonparties did not constitute necessary parties to the quiet title action, and it affirmed the trial court's order.

The case is *Ullmark v. The Cobourn Corp.*, No. 951 CA 22-00106 (4th Dep't Feb. 10, 2023).