RIVKIN RADLER LLP
ATTORNEYS AT LAW

Summer 2023

The Title Reporter

WWW.RIVKINRADLER.COM

New York Court Dismisses Negligence Suit Against Title Company

A trial court in New York has dismissed a negligence action against a title company brought by a developer, ruling that the only entity to which the title company owed a duty was the party with which it contracted.

The Case

After the plaintiff in this case, 311 Clover Avenue Inc. ("311 Clover Avenue"), purchased property known as 18 Locust Avenue in Bayville, New York, it subdivided the property and constructed three homes on each lot. Before construction was completed, the plaintiff entered into a sales contract (the "Sales Contract") with the Barons (the "Purchasers") to sell 16 Locust Avenue (the "Property") with a newly constructed single-family home.

Thereafter, the Purchasers obtained a certificate of title from Abstracts Incorporated ("Abstracts"), a title company acting as an agent for Fidelity National Title Insurance Company. The certificate of title identified that the Property needed to be apportioned and that past due taxes had to be paid as soon as possible.

311 Clover Avenue and the Purchasers subsequently entered into a pre-closing license agreement that provided that the Purchasers could take possession of the Property prior to closing. Abstracts obtained a title insurance policy on behalf of the Purchasers. The title insurance policy insured the Purchasers' fee simple interest in the Property. The closing and transfer of title for the Property took

place in October 2019 and the deed conveying title from 311 Clover Avenue to the Purchasers was filed with the Nassau County Clerk's office.

On December 3, 2020, the Purchasers commenced a lawsuit against 311 Clover Avenue (the "Purchaser Action"). In the Purchaser Action, the Purchasers alleged that their newly constructed home contained various defects that 311 Clover Avenue refused to repair. The Purchasers also alleged that 311 Clover Avenue's failure to timely remit property taxes caused the Nassau County Tax Supervisor to deny its request to apportion 18 Locust Avenue into three parcels with three new homes, resulting in 311 Clover Avenue's failure to deliver clean title in breach of the Sales Contract.

The Purchasers also filed a notice of pendency against 18 Locust Avenue, which included the Property.

The trial court in the Purchaser Action dismissed several causes of action asserted by the Purchasers. It also granted 311 Clover Avenue's motion to vacate the Lis Pendens filed against 18 Locust Avenue, noting that the apportionment had been approved after the filing of the Lis Pendens.

Thereafter, 311 Clover Avenue sued Abstracts for negligence. In its complaint, 311 Clover Avenue contended that:

- The Purchasers hired Abstracts to conduct a title search for the property located at 16 Locust Avenue;
- But for the apportionment of the tax lots, the Purchasers would not have been able to file the Lis Pendens affecting the title to 16 Locust Avenue; and
- The filing of the Lis Pendens on the entire lot caused 311 Clover Avenue to sustain damages, as it was unable to sell its adjacent lot/property and was forced to pay "tremendous interest rates" on its construction loans.

Abstracts moved to dismiss, arguing that it did not owe a duty to 311 Clover Avenue because a title company cannot be held liable for negligent performance by anyone other than the party with whom it is in privity.

In addition, Abstracts contended that 311 Clover Avenue's failure to apportion a tax lot for the Property was identified in the pre-closing document and was specifically excluded from coverage in the final title insurance policy. Given the exception in the policy, Abstracts argued that it could not be held liable for any damages allegedly caused by that failure.

Finally, Abstracts argued that the sole proximate cause of the injuries 311 Clover Avenue complained about arose from 311 Clover Avenue's own negligence.

The Court's Decision

The court granted the motion to dismiss that Abstracts had filed.

In its decision, the court rejected 311 Clover Avenue's negligence claim, finding that its complaint did not identify any legal duty owed by Abstracts to 311 Clover Avenue. In fact, the court noted that even 311 Clover Avenue's complaint conceded that the "only party" that Abstracts had a contractual duty with "was the Purchasers." Explaining that a title company hired by one party is not, absent evidence of fraud, collusion, or other special circumstances, subject to suit for negligent performance by anyone other than the party that contracted for its services, the court dismissed 311 Clover Avenue's complaint for failure to state a valid cause of action.

The case is *311 Clover Avenue Inc. v. Abstracts Incorporated*, No. 608744/2022 (N.Y. Sup. Ct. Nassau Co. April 11, 2023). The authors' firm represents Abstracts Incorporated in this case.

Connecticut Trial Court Finds No Coverage Under Title Insurance Policy

A trial court in Connecticut has granted summary judgment in favor of a title insurer, finding no evidence "that the insured was *forced* to remove or remedy" existing structures in the policyholders' home within the meaning of the title insurance policy.

The Case

The plaintiffs in this case purchased a newly constructed home in New Canaan, Connecticut, for which appropriate permits and approvals had been obtained except as to certain work on the third floor and in the basement.

The plaintiffs sued their title insurer, claiming that their title insurance policy was responsible for some or all of the additional costs they had to incur or would incur in connection with the repair work for the third floor and in the basement.

The title insurer denied liability and identified policy provisions and exclusions that it claimed precluded any determination of legal responsibility. The title insurer moved for summary judgment based on those exclusions. In particular, the title insurer argued:

> Exclusions 1 and 2 exclude coverage for, inter alia, zoning and building code violations. The Claim is based upon alleged construction defects and alleges building code violations and the costs that the Plaintiffs claim to have incurred or will incur in repairing them. . . . There is limited coverage, however, for building permit related claims under Covered Risk 18 of the Policy. Covered Risk 18 provides coverage against actual loss, including any costs, attorney's fees and expenses, resulting from a removal order:
>
> 18. You are forced to remove or remedy Your existing structures, or any part of them – other than boundary walls or fences – because any portion was built without obtaining a building permit from the proper government office. The amount of Your Insurance for this

> Covered Risk is subject to Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A.

According to the title insurer, to trigger the limited coverage under Covered Risk 18, there must be evidence "that the insured was *forced* to remove or remedy the existing structures."

For their part, the plaintiffs argued that they had indeed been "forced" to act:

> Here, Anthony Strazza, who is the former Chief Building Official of the City of Stamford for over 40 years and has obtained all of the requisite certifications required to become a "Certified Building Official," regularly performs work on behalf of the Town of New Canaan as an "approved agency" as contemplated by Section R104.4 of the 2015 International Residential Building Code as adopted by the State of Connecticut as well as the definitions contained in Chapter 2 of "Approved Agency". . . . Accordingly, any instructions given by Mr. Strazza are the functional equivalent of an order given by the Town of New Canaan.

The Court's Decision

The court granted the title insurer's motion, finding the plaintiffs' argument that they were "forced" by some level of governmental compulsion "not convincing."

In its decision, the court explained that the plaintiffs hired Strazza and his company to take appropriate action with respect to permits. That Strazza may have instructed a contractor as to compliance with the building code did "not alter the transaction as being non-governmental in nature," the court said. Simply put, the court added, "[a] non-governmental actor directing a party to comply with applicable law cannot be recharacterized as governmental action or the equivalent of a governmental directive to the property owner."

In summary, the court said that the issue before it was whether the plaintiffs were "entitled to pursue a claim against their title insurance for some or all of the financial injury they claim to have

suffered." The court noted that the plaintiffs hired Strazza "for the purpose of assistance in obtaining permits, which in turn required him to advise them of the work that he believed would be required." Strazza's recommendations "were not Town directives," and there was "no evidence that the Town ever entered any directives coming within the scope of the exception to the exclusion," the court concluded.

The case is *Dixon v. Connecticut Attorneys Title Ins. Co.*, No. FSTCV216050405S (Conn. Super. Ct. March 13, 2023).

Title Insurer Had No Duty to Defend Policyholders Against Claims That Did Not Affect Title, Ohio Appellate Court Decides

An appellate court in Ohio has affirmed a trial court's decision in favor of a title insurer, rejecting the policyholders' contentions that claims against them in an underlying complaint were covered risks under their title insurance policy. The appellate court reasoned that none of the claims asserted against the policyholders in the underlying complaint were claims that affected title and, therefore, they were not covered under the title insurance policy.

The Case

The plaintiff in this case, Sebastian Sanzotta, owned property on 6035 Collins Road in Mentor, Ohio. 6033 Collins Road held an easement on Sanzotta's property for driveway access. The responsibility to maintain that easement rested with the owners of 6033 Collins Road. The Christensens bought 6033 Collins Road in 2014. At that time, a concrete driveway, built by the previous owner, was present on the easement. The Christensens bought a title insurance policy at the time they bought the property.

In April 2019, Sanzotta notified the Christensens of his nuisance and trespass claims arising from the easement. Sanzotta ordered a survey of the property and notified the Christensens of the results on June 12, 2019. The survey showed that part of the concrete driveway on the easement extended beyond the boundary of the easement and onto Sanzotta's property.

On June 21, 2019, the Christensens transferred their property, including the easement, to Richard and Renee Devor. Thereafter, Sanzotta filed a complaint against the Christensens and the Devors alleging "ongoing trespasses and nuisances," and failure "to maintain the Dominant Estate [easement] across Plaintiff's property." Specifically, Sanzotta alleged that improper drainage and grading on the easement and negligent maintenance of the pavement had caused damage to his property. Sanzotta did not sue to quiet title or to terminate the easement.

The Christensens submitted a claim to their title insurer demanding that it defend and indemnify them for the claims alleged in Sanzotta's complaint.

The title insurer denied defense of Sanzotta's claims against the Christensens, asserting that those claims were not covered by the policy's covered risks.

The Christensens filed a third-party complaint against the title insurer seeking a declaration that they were entitled to insurance coverage for Sanzotta's claims, and a claim for bad faith and attorneys' fees. The title insurer filed an answer denying the allegations.

After discovery, the Christensens moved for summary judgment on their declaratory judgment claim against the title insurer. The title insurer opposed the motion and filed a cross-motion for summary judgment on the Christensens' third-party complaint for declaratory judgment.

The trial court denied the Christensens' motion for summary judgment, granted the title insurer's cross-motion for summary judgment, and dismissed the Christensens' entire third-party complaint.

The Christensens appealed. They argued, among other things, that the trial court erred in granting summary judgment because the title insurer had a duty to defend Sanzotta's claim for damages from an encroachment made during the term of the Christensens' ownership of 6033 Collins Road.

The Appellate Court's Decision

The appellate court affirmed.

In its decision, the appellate court explained that Section 2(c) of the title insurance policy insured against loss or damage the insured sustained by reason of "any defect in or lien or encumbrance on the Title" including loss from "[a]ny encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title" to 6033 Collins Road. According to the appellate court, Sanzotta's complaint against the Christensens and the Devors alleged "ongoing trespasses and nuisances," and failure "to maintain the Dominant Estate [easement] across Plaintiff's property." However, the appellate court pointed out, although Sanzotta alleged that tortious conduct took place on the "Land" as described in the policy, he did not allege that any of that conduct affected the title of 6033 Collins Road.

Moreover, the appellate court continued, Sanzotta did not claim any interest in the Christensens' driveway in his complaint – that is, he did not challenge the Christensens' ownership or title. The appellate court added that Sanzotta also did not seek to quiet title – that is, he did not contend that the Christensens had made a claim or had taken action that would be adverse to Sanzotta's ownership or title. According to the appellate court, the "mere claim of an encroachment, without asserting any claim that would affect the title" was not sufficient to require the title insurer to defend the claim.

Accordingly, the appellate court concluded that the title insurer had properly declined to indemnify or defend the Christensens against the Sanzotta claims because they did not satisfy the terms of the Covered Risks as defined by the title insurance policy.

The case is *Sanzotta v. Devor*, No. 2021-L-041 (Ohio Ct. App. Feb. 6, 2023).

Washington Court Rules That Title Insurance Policy Was Void Where Insurer Did Not Receive Premium

A federal district court in Washington has ruled that a title insurance policy was void where the premium payment did not reach the insurance carrier.

The Case

Kiavi Funding, Inc. ("Kiavi") held a deed of trust on property in Everett, Washington, owned by a real estate developer, Tang Real Estate Investments, Inc. ("Tang"). In the fall of 2021, Kiavi agreed to refinance Tang's loan. Tang selected Escrow Services of Washington LLC ("ESW"), owned by Lynn Rivera, to provide closing and escrow services on the refinance. Kiavi gave Rivera the discretion to choose the title insurer and stated its requirement for a preliminary title commitment and a closing protection letter ("CPL").

On September 3, 2021, Rivera obtained a preliminary title commitment and CPL in favor of Kiavi from Ticor Title Company ("Ticor"), as agent for Commonwealth Land Title Insurance Company ("Commonwealth").

On September 13, 2021, Ticor's Sub-Escrow Department sent wiring instructions to Rivera. On September 17, 2021, Rivera issued a "Borrower's Estimated Settlement Statement," which included charges for the title policy and sub-escrow with Ticor, and which were to be paid to Ticor at closing from the total loan amount. Rivera provided the preliminary title commitment, the CPL, and Ticor's wiring instructions to Kiavi.

The loan transaction closed on October 22, 2021, and the deed of trust from Tang to Kiavi was recorded. Rivera then apparently instructed Kiavi to send the loan funds to ESW rather than Ticor. Kiavi questioned the change, asked for confirmation, and asked for a modified CPL, which it did not receive.

Kiavi paid the loan funds and the sum of $931.06 for the title insurance policy by wire transfer to ESW's bank. Although it addressed the wire to "Ticor Title Company, attn: Lynn Rivera," the funds were not wired to Ticor's bank account as Ticor had instructed. Neither Ticor nor Commonwealth received the payment for the title insurance premium. The title insurance policy was issued but was not sent to Kiavi.

On March 10, 2022, Kiavi contacted Rivera for a copy of the title insurance policy and was advised to request the policy from Ticor. On March 11, 2022, Ticor provided a copy of the policy to Kiavi

upon request. After Tang filed a lawsuit (the "Tang Lawsuit") against ESW, Rivera, and Kiavi, Kiavi requested indemnity and defense coverage determinations from Commonwealth under the title insurance policy.

Commonwealth declined to cover Kiavi's claim. Commonwealth contended that although the title insurance policy was issued, the policy was void because it never received payment of the policy premium, and the payment of the premium was a condition precedent to its obligations under the title insurance policy.

Commonwealth and Ticor thereafter filed a lawsuit seeking a declaration that their denial of coverage was proper. They moved for summary judgment.

The Court's Decision

The court granted the summary judgment motion.

In its decision, the court pointed out that the commitment date was September 3, 2021, the proposed insured was LendingHome Funding Corporation (now Kiavi), and the premium was set at $731.06. The court added that Schedule B, Part I-Requirements of Ticor's commitment to Kiavi stated that "[a]ll of the following Requirements must be met," and that the third listed requirement stated: "Pay the premiums, fees, and charges for the Policy to the Company."

The court then ruled that payment of the premium was a "condition precedent" to Commonwealth's liability and obligations under the title insurance policy. According to the court, Kiavi's failure to pay the premium constituted a failure to satisfy a condition precedent, and the title insurance policy was void.

Accordingly, the court concluded that Commonwealth and Ticor had no duty to defend or indemnify Kiavi in the Tang Lawsuit.

The case is *Ticor Title Co. v. Kiavi Funding, Inc.*, No. 22-cv-832 (W.D. Wash. April 25, 2023).

Federal Circuit Court Affirms Dismissal of Plaintiff's Easement Claim Over Federal Land

The U.S. Court of Appeals for the Ninth Circuit, affirming a decision by the U.S. District Court for the Central District of California, has rejected a plaintiff's claim of an easement over a maintenance road on federal land.

The Case

In 1952, the United States initiated an eminent domain action to acquire land in Montecito, California, to build the Ortega Reservoir. At the time the government filed the action, part of the condemned land was owned by Kimball-Griffith L.P.'s predecessors-in-interest, Phillip and Ethyl Cunniff.

In 1955, a federal district court entered a final judgment documenting the taking of the Cunniffs' land (the "1955 Judgment") and specified that the government took the property "subject . . . to existing rights of way in favor of the public or third parties for highways [and] roads . . . on, over, and across said land." The "Decree of Taking" related to the condemnation contained the same "subject to" language.

In 1958, the Cunniffs sold 45 acres of their remaining land to Loma Griffith, *née* Kimball, who later transferred the property to Kimball-Griffith, L.P. Kimball-Griffith's property is directly north of the Ortega Reservoir, and a maintenance road (the "Access Road") runs along the southern edge of Kimball-Griffith's property, just within the boundaries of the federal reservoir land.

In 1989, the federal Bureau of Reclamation ("BOR") granted an easement over the Access Road to the County of Santa Barbara, and the county installed locked gates across the road, blocking public entry.

Over 30 years later, in November 2020, Kimball-Griffith filed a lawsuit asserting the right to use the Access Road based on its purported ownership of "an equitable servitude and covenant running with the land." Kimball-Griffith asserted ejectment and injunctive relief claims against the BOR and its officials, demanding removal of the gates blocking the Access Road; taking and conspiracy-to-commit-a-

taking claims against the county and other local government entities and contractors; and a judicial taking claim against the district court.

The district court dismissed the case in its entirety, and the dispute reached the Ninth Circuit.

The Ninth Circuit's Decision

The Ninth Circuit affirmed.

In its decision, the Ninth Circuit explained that, to succeed on any of its claims, Kimball-Griffith had to establish a property interest in an easement over the Access Road. In particular, the circuit court pointed out that Kimball-Griffith's ejectment claim against the BOR for removal of the gates was premised on Kimball-Griffith's purported right to use the Access Road. Likewise, the circuit court added, establishing an easement interest in the road was a prerequisite to Kimball-Griffith's taking, conspiracy-to-commit-a-taking, and judicial taking claims.

The Ninth Circuit was not persuaded by Kimball-Griffith's contention that the Decree of Taking and the 1955 Judgment preserved an easement for Kimball-Griffith's predecessors, the Cunniffs, and that this easement passed to Kimball-Griffith. The circuit court found no evidence that the Cunniffs had an easement over the road at the time of the eminent domain action as owners of property abutting the road.

The Ninth Circuit explained that, under longstanding California precedent, an owner of property "abutting upon a public street" had a property right in the nature of an easement in the street. Here, however, Kimball-Griffith had not alleged that, at the time of condemnation, the Access Road existed as a "public street."

Because Kimball-Griffith had not plausibly alleged that the Cunniffs had an easement over the Access Road, no easement could have been preserved as an "existing right[] of way" in the eminent domain action, the circuit court ruled. The Ninth Circuit concluded that without allegations supporting a property interest in an easement over the Access Road, all of Kimball-Griffith's claims failed.

The case is *United States of America v. 6.03 Acres of Land in the County of Santa Barbara*, No. 21-56358 (9th Cir. May 10, 2023).

New York Court Upholds Defendant's Claim of Easement Over Adjoining Commercial Property

A New York trial court has ruled that the owner of a commercial condominium unit in a Manhattan building had an easement over an adjoining commercial unit and, therefore, that a demising wall that separated the two units could remain in its existing location.

The Case

The plaintiff in this case, DLK, LLC, owned commercial unit 4 ("Unit 4") in a condominium building in Manhattan (the "Building"). The defendant, Kireland-B LLC ("Kireland"), owned commercial unit 2 ("Unit 2") in the Building. The two units were immediately adjacent to each other. The parties' dispute involved the placement of a demising wall between the two units; the demising wall was in the basement of the Building.

The plaintiff alleged that the wall separating Unit 2 and Unit 4 was incorrectly placed, and that the wall encroached on Unit 2 by an area of at least 4 feet and 10 inches in depth by 27 feet in length to the benefit of Unit 4. The plaintiff alleged that this encroachment deprived it from the use of its property. According to the plaintiff, the alleged encroachment existed for fewer than 10 years and, as a result, adverse possession did not apply. The plaintiff sought a declaration that the demising wall encroached on its premises and sought an order directing Kireland and Medrite Midtown West LLC d/b/a Medrite ("Medrite"), which had previously leased Unit 2, to remove the encroachment. The plaintiff also sought money damages.

In its answer, Kireland asserted that, pursuant to its deed, it was granted an easement permitting it to maintain any encroachments that might exist. Referencing the plaintiff's deed, Kireland also

asserted that the plaintiff took title subject to easements in favor of adjoining units for the continuance of all encroachments of such adjoining units existing as a result of the construction or rehabilitation of the building, and that any such encroachments could remain so long as the building stood. Kireland further asserted that at the time it took title to Unit 2, the demising wall between Unit 2 and Unit 4 had already been erected as part of the construction of the Building. In addition, Kireland asserted that when the plaintiff took title to Unit 4 subject to any encroachments existing at the time of its purchase, the plaintiff waived and/or ratified any alleged encroachment.

Kireland sought a declaration from the court that it was entitled to maintain the demising wall in its present location.

The parties moved for summary judgment.

The Court's Decision

The court granted summary judgment in favor of Kireland.

In its decision, the court explained that an easement appurtenant may be created when the easement:

(1) Is conveyed in writing;

(2) Is subscribed by the creator; and

(3) Burdens the servient estate for the benefit of the dominant estate.

Once created, the court said, an easement appurtenant runs with the land, even if it is not specifically mentioned in the deed. Moreover, the court added, an easement only can be extinguished by abandonment, conveyance, condemnation, or adverse possession.

The court also explained that although a good faith purchaser for value is not bound by an easement that is not properly recorded prior to its purchase of an encumbered property, a purchaser cannot claim the status of good faith purchaser "if it had actual or constructive notice of the easement."

The court pointed out that in the original condominium declaration in this case, dated June 18, 2009, there was one commercial unit located on portions of the basement, ground floor, and second floor. The offering plan and declaration were amended in June 2010 to reflect the subdivision of the commercial unit into four separate commercial units. In August 2010, the sponsor of the condominium leased Unit 2 to Medrite. At the time the Medrite lease was signed, the sponsor was still in the process of constructing portions of the building, including physically subdividing the four commercial units. The demising wall was constructed by the sponsor between August 16, 2010, when the Medrite lease commenced, and February 15, 2011, when Kireland acquired Unit 2, the court said.

The court then ruled that Kireland had met its burden in showing that it possessed an easement encroaching on the plaintiff's unit.

The court reasoned that Kireland's deed, which was conveyed by the sponsor of the condominium, explicitly stated that it was taken "TOGETHER with an easement for the continuance of all encroachments by the Unit on any adjoining Units or Common Elements now existing as a result of the construction or rehabilitation of the Building." In the court's view, it was "undisputed" that at the time Kireland took title to Unit 2, the sponsor retained ownership of Unit 4 and, therefore, had the authority to grant an easement in favor of Unit 2 against Unit 4.

The court noted that the plaintiff's deed, which also was conveyed by the sponsor, after Kireland had taken title to Unit 2, expressly stated that Unit 4 was conveyed "SUBJECT to easements in favor of adjoining Units . . . for the continuance of all encroachments of such adjoining units . . . now existing as a result of the construction or rehabilitation of the Building . . . so that any such encroachments may remain so long as the Building shall stand. Each Unit shall be subject to the aforesaid easements in favor of all other Units." The court ruled that this language regarding the easement was "both broad and clear" and "must be enforced pursuant to its objective intent."

The court reasoned that, given that Units 2 and 4 were adjoining units, that the demising wall encroached on Unit 4 in favor of Unit 2, and that the encroachment due to the demising wall was a result of construction, specifically, subdividing the one commercial unit into four separate commercial units, the encroachment of which the plaintiff complained was "subject to an easement granted by the sponsor to Kireland." Indeed, the court concluded, it was an easement to which the plaintiff had agreed when it took title.

The case is *DLK, LLC v. Kireland-B LLC*, 2023 NY Slip Op 31160(U) (Sup. Ct. N.Y. Co. April 13, 2023).

Appellate Court in New York Upholds Decision Against Plaintiffs Claiming Easement and Adverse Possession

The New York Appellate Division, Second Department, has ruled against plaintiffs claiming a prescriptive easement over a driveway on the defendants' property and claiming that they were the owners of a certain other portion of the defendants' property by adverse possession.

The Case

The plaintiffs and the defendants own adjoining parcels of property in Brooklyn, New York. Each property contained a residence and a separate detached garage in the rear. The plaintiffs acquired their property in 1991 and the defendants acquired their property in 1996. A 17-foot-wide driveway was between the houses. The boundary between the two properties ran through and along the entire length of the driveway, such that seven feet of the driveway's width was on the plaintiffs' property, while the remaining 10 feet of width was on the defendants' property. The deeds and title documents for the properties contained no written easements or other rights-of-way. Nevertheless, the plaintiffs regularly drove their vehicles over part of the defendants' portion of the driveway in order to enter and leave their garage. The plaintiffs also regularly parked some of their seven vehicles on their side of the driveway.

Shortly after the plaintiffs acquired their property, they installed a retractable, rolling fence in a narrow space between the garages. A property survey taken in 2017 showed that the fence encroached approximately five inches onto the defendants' property (the "five-inch strip").

Thereafter, the parties had a dispute over the use of the driveway and on June 20, 2017, the plaintiffs filed a lawsuit seeking a judgment declaring that they had a prescriptive easement, or an easement by necessity, over the driveway on the defendants' property for ingress/egress in and out of their garage and to maneuver their vehicles.

The defendants answered and asserted a counterclaim to compel the plaintiffs to remove the fence on the five-inch strip. In an answer to the counterclaim, the plaintiffs asserted that they owned the five-inch strip by adverse possession.

After discovery was completed, the defendants moved for summary judgment on their counterclaim to compel the plaintiffs to remove the fence. The plaintiffs moved, among other things, for summary judgment declaring that they had a prescriptive easement over the driveway on the defendants' property and that they owned the five-inch strip by adverse possession. Thereafter, the defendants cross-moved for summary judgment declaring that the plaintiffs did not have a prescriptive easement or easement by necessity over the defendants' driveway and that the plaintiffs were not the owners of the five-inch strip by adverse possession.

The Supreme Court, Kings County:

- Denied those branches of the plaintiffs' motion that were for summary judgment declaring that they had a prescriptive easement over the driveway on the defendants' property and that they owned the five-inch strip by adverse possession;
- Granted the defendants' motion for summary judgment on their counterclaim to compel the plaintiffs to remove the fence;

- Granted the defendants' cross-motion for summary judgment declaring that the plaintiffs did not have a prescriptive easement over the driveway on the defendants' property and were not the owners of the five-inch strip by adverse possession; and
- Denied the defendants' cross-motion for summary judgment declaring that the plaintiffs did not have an easement by necessity over the driveway on the defendants' property.

The parties appealed to the Appellate Division, Second Department.

The Appellate Court's Decision

The appellate court ruled in favor of the defendants.

In its decision, the appellate court first found that the trial court had correctly determined that, as a matter of law, the plaintiffs were not the owners of the five-inch strip by adverse possession. The appellate court explained that, under the law as it existed prior to the 2008 amendments to the New York adverse possession statutes, which prior law was applicable to this case, to establish a claim to property by adverse possession, a claimant must prove, by clear and convincing evidence, that possession of the property "was (1) hostile and under a claim of right, (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous for the required period." Additionally, the appellate court said, where, as in this case, the adverse possession was not founded upon a written instrument, the possessor also must establish, in accordance with the law in effect at the relevant time, that the disputed property either was "usually cultivated or improved" or protected by a "substantial" enclosure.

Here, the appellate court found, the evidence demonstrated that, as a matter of law, the fence installed on the five-inch strip did not constitute a substantial enclosure and the five-inch strip was not usually cultivated or improved. Accordingly, the appellate court ruled, the trial court correctly ruled that the plaintiffs were not the owners of the five-inch strip by adverse possession and properly granted the defendants' motion for summary judgment on their counterclaim to compel the plaintiffs to remove the fence from the five-inch strip.

The appellate court next ruled that the trial court correctly decided that, as a matter of law, the plaintiffs did not have a prescriptive easement over the driveway on the defendants' property. The appellate court reasoned that an easement by prescription may be demonstrated by "clear and convincing proof of the adverse, open and notorious, continuous, and uninterrupted use of the subject property for the prescriptive period, which is 10 years." It then observed that even if the plaintiffs established that their use of the driveway on the defendants' property was open and notorious, and continuous, the defendants demonstrated that they permitted that use because they preferred to be "good, accommodating neighbors." The appellate court noted that the plaintiffs described some "minor disputes over the years," but said that this did not negate the "relatively uneventful history between the parties during the 21 years preceding the May 2017 incident," including the plaintiffs' own deposition testimony acknowledging that the parties' relations were generally "neighborly."

Accordingly, the appellate court upheld the trial court's conclusion that the plaintiffs did not have a prescriptive easement over the driveway on the defendants' property.

Finally, the appellate court ruled that the trial court also should have granted the defendants' cross-motion for summary judgment declaring that the plaintiffs did not have an easement by necessity over the driveway on the defendants' property.

The appellate court explained that a party asserting an easement by necessity had the burden of establishing by clear and convincing evidence that there was a unity and subsequent separation of title and that at the time of severance an easement over the servient estate's property was "absolutely necessary." The appellate court explained that the parties' properties were created from one parcel of land in 1925 and 1926. Therefore, the appellate court added, the plaintiffs' testimony as to their driving habits from when they first acquired the property in 1991 was "irrelevant." In any event, the appellate court concluded, in contrast to situations where severance of title rendered a claimant's property landlocked, courts have "repeatedly rejected claims to an easement by necessity over a driveway"

where the sole claimed "necessity" for the easement was the "need" to access off-street parking, as that purported need was "nothing more than a mere convenience."

The case is *Bolognese v. Bantis*, 215 A.D.3d 616 (2d Dep't 2023).

Punitive Damages Claim in Federal Lawsuit for Adverse Possession Meets Amount-in-Controversy Requirement, District Court Decides

A federal district court in the Virgin Islands has denied a defendant's motion to dismiss a lawsuit to quiet title, for adverse possession, and for conversion, concluding that the punitive damages allegations in the plaintiffs' complaint were sufficient to satisfy the amount-in-controversy for purposes of diversity jurisdiction.

The Case

The plaintiffs in this case asserted that, in 2015, Jerome Lake purchased property in the Virgin Islands near property they owned for $300,000. According to the plaintiffs, the fence surrounding their property might encroach on Lake's property "over a span of roughly 50 feet, possibly encroaching as much as roughly 32 feet with the possible encroachment progressively narrowing to an undisputed point."

The plaintiffs asserted that they had continuously occupied their property since the late 1980s and that it had been fenced during the entire time. According to the plaintiffs, in October 2022, Lake surveyed his property for the first time and alleged that the fence surrounding the plaintiffs' property encroached on his property.

The plaintiffs asserted that Lake's agents began excavating his property, destroyed the fence enclosing the plaintiffs' property, and excluded the plaintiffs from the disputed portion. The plaintiffs asserted that they had routinely made improvements to the land enclosed by the fence, including by construction, landscaping, and gardening.

The plaintiffs sued Lake in federal district court in the Virgin Islands, asserting claims to quiet title, for adverse possession, and conversion. Lake moved to dismiss, arguing that the plaintiffs failed to meet the $75,000 amount-in-controversy requirement for federal diversity jurisdiction.

In response, the plaintiffs conceded that the replacement value of the fence they said Lake destroyed did not exceed $75,000. They asserted, however, that the value of the fence was irrelevant because they sought punitive damages in relation to the conversion claim against Lake that they included in their complaint, and that the amount of punitive damages they sought satisfied the amount-in-controversy requirement.

The Court's Decision

The court denied Lake's motion to dismiss, ruling that the plaintiffs met the amount-in-controversy requirement.

In its decision, the court explained that diversity jurisdiction exists in civil actions between citizens of different states "where the matter in controversy exceeds the sum or value of $75,000." The court added that the amount alleged in good faith in a complaint controlled and that dismissal only was warranted if it appeared "to a legal certainty" that the claim really was for less than the jurisdictional amount. Moreover, the court continued, the amount-in-controversy was calculated when the complaint was filed; later events did not increase the amount in controversy and give rise to jurisdiction that did not properly exist at the time of the complaint's filing.

Applying this standard, the court pointed out that, at the time the plaintiffs filed their complaint, the plaintiffs sought punitive damages relating to their claim that Lake intentionally destroyed the fence that existed on the disputed portion of the plaintiffs' property. The court then ruled that the plaintiffs' claim for punitive damages as part of their conversion cause of action satisfied the amount-in-controversy requirement.

The court reasoned that a claim for punitive damages "must be considered" in determining the amount-in-controversy unless the claim was "patently frivolous and without foundation." Here, the court concluded, the punitive damages allegations set forth in the plaintiffs' complaint were "sufficient to satisfy the amount in controversy for purposes of diversity jurisdiction."

The case is *Moses v. Lake*, No. 3:22-cv-0063 (D. Virgin Islands May 23, 2023).

Appellate Court in New York Affirms Decision Granting Relief to Plaintiffs on Their Adverse Possession Claim

The New York Appellate Division, Third Department, has affirmed a trial court's decision in favor of plaintiffs who claimed to own a disputed area of property in Schenectady County in upstate New York through adverse possession.

The Case

The plaintiffs in this case filed their lawsuit seeking, among other things, to quiet title to a tract of land in Schenectady County (the "disputed area") sitting between two parcels owned by the plaintiffs and running perpendicular to property owned by the defendants.

The plaintiffs claimed that they owned the disputed area through adverse possession.

For their part, the defendants contended that they were the rightful owners of the disputed area, relying on a tax map purporting to support that assertion.

The plaintiffs moved for partial summary judgment on their cause of action to quiet title.

The Supreme Court, Schenectady County, granted the plaintiffs' motion, declaring that the plaintiffs had acquired ownership of the disputed area through adverse possession.

The defendants appealed to the Appellate Division, Third Department.

The Appellate Court's Decision

The appellate court affirmed.

In its decision, the appellate court explained that, to demonstrate ownership of the disputed area by adverse possession, the plaintiffs had to show by "clear and convincing evidence" that the character of the possession was "hostile and under a claim of right, actual, open and notorious, exclusive and continuous for the statutory period of 10 years."

The appellate court noted that, in support of their motion for summary judgment, the plaintiffs submitted photographs of the disputed area, an affidavit from Robert T. Simmons, the deeds in their chain of title, and their own affidavits. According to the appellate court, these submissions demonstrated that:

- The disputed area was the former bed of a trolley line that was abandoned in the 1940s;
- In the 1990s, Simmons acquired the two parcels making up the plaintiffs' property, with the disputed area located between the two;
- Simmons built a house on the first parcel, which required removing a large amount of fill to prepare the area for construction;
- Simmons relocated the fill to the disputed area to level it and incorporate it into his lawn, which he cultivated, possessed, and maintained for over 10 years;
- Simmons also constructed a driveway that ran through a portion of the disputed area up to his residence, which he plowed, repaired, and improved for more than a decade;
- Simmons performed these tasks in an open and obvious manner to the exclusion of others and that, when he conveyed his parcels to Christina Francis in January 2006, it was his "intent to convey, and [his] understanding that [he] was conveying, to . . . Francis . . . any and all rights [he] had in and to the entire [l]awn [a]rea and [d]riveway [a]rea, including the [d]isputed [a]rea"; and

- Francis, in turn, conveyed the parcels to the plaintiffs on January 18, 2008 by warranty deed containing the same clause.

The appellate court added that the plaintiffs' affidavits asserted that when the plaintiffs purchased their property from Francis, they understood the conveyance to include the disputed area. Most of the plaintiffs' front lawn – including a portion of the disputed area – was located within a fence, which was erected prior to their acquisition of the property. The plaintiffs contended that they mowed the front lawn, including the disputed area "both within and without the fence," for more than 12 years "without any interruption or any claim by any party that any portion of [the disputed area] was allegedly owned by someone else." The plaintiffs also said that they maintained the fence as needed, permitted their dog to use the area within the fence, and continuously used the driveway that ran through the disputed area.

According to the appellate court, photographs submitted by the plaintiffs in support of their motion corroborated the existence of the driveway and fence.

On this record, the appellate court said, the plaintiffs satisfied their burden on their cause of action to quiet title. It found that Simmons' affidavit made clear that he continually possessed, cultivated, maintained, and used the disputed area, under a claim of right and to the exclusion of others, from 1991 to 2006.

The appellate court then ruled that the manner in which Simmons demonstrated his claim of ownership – by mowing the lawn and constructing and plowing a driveway – "would have been open and notorious to nearby property owners." The appellate court decided that the plaintiffs established that title to the disputed area vested in Simmons by adverse possession in 2001 and then was transferred to the plaintiffs when they purchased their properties.

Accordingly, the appellate court affirmed the trial court's decision.

The case is *Hamil v. Casadei*, 214 A.D.3d 1177 (3d Dep't 2023).

New York Court Denies Defendants' Adverse Possession Claim to "Disputed Area" of Driveway

A trial court in New York has ruled that property owners failed to demonstrate their entitlement to the disputed area of a driveway they owned as cotenants with their neighbors.

The Case

Plaintiff West Mountain Assets LLC ("WMA") and defendants James and Jennifer Dobkowski were the owners of separate properties in a subdivision in the Town of Queensbury in Warren County, New York, known as Northwest Village, Section Two. Specifically, the parties owned neighboring properties, each of which was developed with a single-family residence and each of which abutted a third parcel on which was situated a road that serviced the properties (the "road parcel"). The parties shared ownership of the road parcel as cotenants.

The gravel surface of the road ran generally down the center of the roughly rectangular road parcel but did not occupy its full width. The ends of the defendants' horseshoe-shaped blacktop driveway extended beyond the deeded bounds of their property onto the road parcel and intersected the gravel roadway. The unpaved portion of the road parcel lying between and immediately to either side of the defendants' blacktop driveway was occupied by the defendants.

WMA sued the defendants, alleging, among other things, that the defendants interfered with its use of the gravel road.

In response, the defendants claimed adverse possession of the portion of the road parcel that the defendants occupied, namely, the ends of their blacktop driveway that extended onto the road parcel, and the unpaved portions of the road parcel that were between and immediately to either side of the defendants' blacktop driveway (the "disputed area").

The defendants moved for summary judgment.

The Court's Decision

The court denied the defendants' motion for summary judgment, deciding that they failed to carry their burden to establish their entitlement to judgment as a matter of law.

In its decision, the court explained that, to establish a claim of adverse possession, the occupation of the property must be, among other things, hostile and under a claim of right (i.e., a reasonable basis for the belief that the subject property belongs to a particular party) for the duration of the 10-year prescriptive period. The court added that where, as in this case, property is held by tenants in common, one cotentant's possession of the property is presumed to be by and for the benefit of all other cotenants. Thus, the court said, for one cotentant's possession to be adverse or hostile to another requires the ouster of the other, which may be express or implied.

Here, the court observed, the defendants did not allege that an "express ouster" – which, the court said, generally requires that the ousting cotenant communicate its "intention to exclude or deny the rights of the [other] cotenants" – had taken place.

Next, the court explained that an ouster may be implied by 10 years of "continuous exclusive occupancy," after which the "occupying tenant may then commence to hold adversely" to other cotenants. The court ruled that the defendants established exclusive possession of the disputed area – to the extent that the precise bounds of the disputed area could be discerned – by their immediate predecessors in title. However, the court found, the defendants' proof that the disputed area was possessed "hostilely and under a claim of right" for any 10-year period remained "lacking." The court noted that the defendants took title to their property in September 2013. Thus, the court said, they had not occupied the disputed area under that claim of right for the prescriptive period and could prevail on their claim only if they could tack their own hostile possession to that of their predecessors. In the court's view, they failed to do that.

The case is *West Mountain Assets LLC v. Dobkowski*, 186 N.Y.S.3d 553 (Sup. Ct. Warren Co. 2023).

Plaintiff's Adverse Possession Claim Fails in Connecticut Court

After trial of a lawsuit between abutting property owners of residential property in Norwalk, Connecticut, a court has ruled that the plaintiff failed to demonstrate that she owned disputed property by adverse possession.

The Case

The plaintiff in this case, Mona S. Mulvey, Trustee of the Mona S. Mulvey, Trust ("Mulvey"), owned certain residential property in Norwalk, Connecticut, since 1966. The defendants, Stefan and Ema Palo (together, the "Palos"), owned property in Norwalk since 2020. The two properties abutted one another, with the southerly boundary of the plaintiff's property sharing the northerly boundary of the defendants' property.

There was a stone wall running along the south of the southerly boundary of the plaintiff's property (to the south of the northerly boundary of the defendants' property). The stone wall formed a general trapezoidal area constituting approximately 0.223 acres. The parties' dispute involved this area.

The topography of the area in dispute was a mix of lawn, light woods, and a muddy area straddling the lawn and wooded areas. No activities of any consequence occurred in the muddy area.

According to the plaintiff, as children, back in the 1960s and 1970s, the plaintiff's family members as well as other neighborhood children would engage in play on these properties, including in the disputed area. It was a typical "neighborhood play area." The plaintiff said that her husband and his son and, at their direction during later years, landscapers, regularly mowed their own lawn as well as any lawn in the disputed area. She asserted that they planted and maintained flowerbeds on the property, some of which were also located, in part, in the disputed area; removed fallen tree limbs in the wooded

area; and cleared a path to and through the wooded area to the south of the stone wall to be able to use a small tractor to access a woodpile and for chopping wood.

The plaintiff said that her family never contemplated or employed any real distinction concerning the use of their property, and did not attempt to define property boundary lines at any point during their ownership until 2020. According to the plaintiff, her long time neighbor (the defendants' immediate predecessor in title) never interposed any objection to her family's activities.

The deed by which Mulvey acquired title in 1966 referenced a survey done in 1965. That survey defined the Mulvey property as a matter of record, and it did not include the disputed area within that description.

The defendants did not commission a survey prior to their taking title on June 29, 2020, or at any time thereafter. They did not receive formal notice of the plaintiff's adverse possession claim until approximately four months later, in October 2020, when the plaintiff filed a lawsuit.

The plaintiff claimed title by adverse possession of the disputed property. She asked the court to quiet title to the disputed property. The defendants denied the plaintiff's claim of adverse possession and asked the court to quiet title to the disputed property in their own name.

After a trial, the court issued its ruling on the question of whether the plaintiff had demonstrated adverse possession for the 15 years (as required under Connecticut law) immediately prior to the commencement of her lawsuit, i.e., from October 2005 to October 2020.

The Court's Decision

The court ruled that the plaintiff had not demonstrated that she owned the disputed property by adverse possession.

In its decision, the court explained that the plaintiff fell short of demonstrating her adverse possession claim for two reasons.

First, the court said, there was no "clear and convincing evidence" that the plaintiff possessed the disputed property and that she did so in an open, visible, and exclusive manner, and under a claim of right, during the 15 years before she filed her lawsuit. In the court's view, there was a "marked difference" in the evidence concerning the nature of the plaintiff's possession of areas now in dispute as between 1966 and circa 1985, compared with afterward. In the court's view, the evidence of possession to the extent required to show ownership under a claim of right during this later time "ceased to be clear and convincing."

The second reason the court denied the plaintiff's claim was because of the "uncertain and indeterminate nature of the precise boundary lines" of the property the plaintiff claimed by adverse possession. According to the court, the plaintiff had "not demonstrated with any reasonable certitude" the boundary lines of the property over which she claimed title. The court said that the plaintiff "simply provided the court with a general location survey" that essentially consisted of the surveyor superimposing on the 1965 survey the approximate location of certain items or landmarks as pointed out by the plaintiff's son. The court decided, however, that it could "not identify the boundary lines of property supposedly acquired by adverse possession with any confidence."

Accordingly, the court entered judgment against the plaintiff and in favor of the defendants on the plaintiff's complaint, and in favor of the defendants and against the plaintiff on their counterclaim.

The case is *Mulvey v. Palo*, No. cv 20 6048716S (Conn. Super. Ct. March 28, 2023).