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Standard Exclusion 3(a) Barred Coverage for Insured's Expenses to Defend Breach of Contract Suit, U.S. Court of Appeals for the Eleventh Circuit Affirms

The U.S. Court of Appeals for the Eleventh Circuit, affirming a decision by the U.S. District Court for the Northern District of Florida, has ruled that Standard Exclusion 3(a) of a title insurance policy precluded coverage of fees and costs the insured incurred in defending a breach of contract lawsuit.

The Case

In 2009, the Salas Children Trust (the "Trust") purchased property in Alys Beach, Florida (the "Lot") from a developer, Ebsco Gulf Coast Development, Inc. Camilo K. Salas, III, as trustee of the trust (the "Trustee"), on behalf of the Trust, and Ebsco entered into a purchase and sales agreement (the "Purchase Agreement") for the Lot. The Purchase Agreement contained a clause that required the Trust to build on the Lot within two years of the purchase. If the Trust failed to build on the Lot within the mandatory two-year period, the Purchase Agreement provided Ebsco with a repurchase option and the ability to recover fines and monthly liquidated damages.

After the sale closed, Commonwealth Land Title Insurance Company issued a Florida Owner's Title Policy (the "Policy") to the Trust, providing insurance coverage for the Trust's title to the Lot. The Policy contained a standard exclusion provision ("Standard Exclusion 3(a)") that excluded from coverage "[d]efects, liens, encumbrances, adverse claims or other matters . . . created, suffered, assumed or agreed to by the insured claimant."

The Policy exempted from coverage any losses or damages related to the Declaration of Covenants, Conditions and Restrictions for the Neighborhood of Alys Beach (the "Declaration of Covenants") and also to the warranty deed, both of which were documents specifically identified in Schedule B of the Policy. The Declaration of Covenants and the warranty deed contained the same two-year construction requirement and repurchase option as the Purchase Agreement, but did not contain a liquidated damages provision. Commonwealth knew of the Purchase Agreement when it issued the Policy to the Trust, although the Purchase Agreement was not identified as an exception to coverage in Schedule B of the Policy.

The Trust failed to build on the lot within the mandatory two-year period, and Ebsco sued the Trustee for breach of the Purchase Agreement, the Declaration of Covenants, and the warranty deed (the "Ebsco Lawsuit"). After almost three years of litigation, Ebsco and the Trustee settled. The Trustee, however, incurred nearly one million dollars of fees and costs in defending the Ebsco Lawsuit. During the Ebsco Lawsuit, the Trustee sought defense and indemnification from Commonwealth pursuant to the Policy, but Commonwealth denied coverage.

Seeking to enforce coverage pursuant to the Policy, the Trustee sued Commonwealth in Louisiana state court. Commonwealth removed the action to federal court, and the federal court transferred the action to the U.S. District Court for the Northern District of Florida. The Trustee then filed an amended complaint.

A magistrate judge issued a report and recommendation ("R&R") recommending that the district court grant summary judgment in favor of Commonwealth. The magistrate judge also found that Florida law applied and that Standard Exclusion 3(a) barred coverage.

The district court adopted the R&R in its entirety and entered judgment in favor of Commonwealth.

The trustee appealed to the Eleventh Circuit, arguing, among other things, that the district court erred in concluding that the Policy's Standard Exclusion 3(a) precluded coverage and asserting that the district court should have decided that, by failing to list the Purchase Agreement in Schedule B of the Policy, Commonwealth demonstrated that it was aware of the liquidated damages clause and agreed to insure over that risk.

The Circuit Court's Decision

The Eleventh Circuit affirmed.

In its decision, the Eleventh Circuit rejected the trustee's argument that the district judge erred in concluding that the Policy's Standard Exclusion 3(a) precluded coverage for the liquidated damages and penalties that the Trust incurred. According to the circuit court, the district court, in adopting the R&R, "properly construed" Standard Exclusion 3(a) "as precluding coverage if an insured failed to perform a contractual obligation" that the insured "assumed or agreed to."

The Eleventh Circuit noted that, during his deposition, the Trustee testified that, on behalf of the Trust, he reviewed the Purchase Agreement before signing it, and that he was aware of the liquidated damages clause that imposed penalties if the Trust failed to build on the Lot within the mandatory two-year period. By the Trustee's admission, the Trust "assumed or agreed to" the terms of the Purchase Agreement, the circuit court ruled, and any resultant harm that the Trust suffered, such as being subjected to liquidated damages and penalties, "was by its own doing."

The Eleventh Circuit then found that the "plain language" of Standard Exclusion 3(a) was "clear and unambiguous" and was susceptible to one reasonable interpretation: It excluded coverage for the liquidated damages and penalties that the Trust incurred when it agreed to the terms of the Purchase Agreement and subsequently breached its contractual obligations. The circuit court "reject[ed] any other interpretations."

The Eleventh Circuit next found "unpersuasive" the Trustee's additional argument that Commonwealth's failure to list the Purchase Agreement in Schedule B meant that Commonwealth was aware of the liquidated damages clause and agreed to insure over that risk. In the circuit court's view, the record was clear that, when the Trust executed the Purchase Agreement, "it had actual knowledge that it would incur the penalty of paying monthly liquidated damages to Ebsco if it failed to construct on the Lot within the mandatory two-year period." According to the circuit court, the Trustee failed to present evidence that, despite the Trust's assumption of the liquated damages penalty, Commonwealth agreed to provide coverage for that risk. The circuit court declared that, to adopt the Trustee's position would contravene the purpose of title insurance: "to protect real estate purchasers against title surprises and not to provide a windfall to purchasers who knowingly assume adverse conditions."

The case is *Salas v. Commonwealth Land Title Ins. Co.*, No. 22-12264 (11th Cir. Oct. 18, 2023).

New York Appellate Court Rejects Third-Party Claims Against Agent for Title Insurer

An appellate court in New York, reversing a trial court's decision, has dismissed third-party causes of action for fraudulent concealment and prima facie tort asserted against an agent for a title insurance company, finding that the third-party plaintiff's allegations were insufficient to support its claims.

The Case

On November 18, 2014, Naomi Cohen-Tsedek obtained a judgment from a trial court in Queens, New York, against Steven Browd in the sum of $269,145 (the "subject judgment"). The subject judgment was docketed with the Queens County Clerk on the same date.

At that time, Browd, also known as "Shraga Browd," together with his wife, Sheyna Browd, owned certain real property located in Queens (the "subject premises").

In 2019, Browd, under the name Shraga Browd, and Sheyna Browd sold the subject premises to Hillary Developer, LLC. The subject judgment was not satisfied from the proceeds of the sale.

Subsequently, upon learning that the subject premises had since been sold to a different buyer at a sheriff's auction to satisfy the subject judgment, Hillary filed a lawsuit against, among others, Browd, Sheyna Browd, and Cohen-Tsedek. Hillary asserted that, at the time it purchased the subject premises, it did not know about the subject judgment.

Cohen-Tsedek interposed an answer that included, among other things, third-party causes of action to recover damages for fraudulent concealment and prima facie tort against SSS Settlement Services, LLC, which had acted as the agent for Security Title Guarantee Corporation of Baltimore, the company that had issued Hillary a title insurance policy with respect to its purchase of the subject premises. Cohen-Tsedek alleged that SSS Settlement Services had concealed the existence of the subject judgment.

SSS Settlement Services moved to dismiss the third-party causes of action to recover damages for fraudulent concealment and prima facie tort insofar as asserted against it. Cohen-Tsedek opposed the motion.

The Supreme Court, Queens County, denied SSS Settlement Services' motion, and SSS Settlement Services appealed to the Appellate Division, Second Department.

The Appellate Court's Decision

The appellate court reversed.

In its decision, the appellate court explained that, to state a cause of action to recover damages for fraud, a plaintiff must allege, with the requisite particularity, that:

(1) There was a misrepresentation or a material omission of fact that was false and that the defendant knew to be false;

(2) The misrepresentation was made for the purpose of inducing the plaintiff to rely upon it;

(3) The plaintiff justifiably relied upon the misrepresentation or material omission, and

(4) The plaintiff suffered injury as a result.

The appellate court added that, to sufficiently plead a cause of action to recover damages for fraudulent concealment, a plaintiff must further allege "that the defendant had a duty to disclose the material information."

Applying that standard to this case, the appellate court found that Cohen-Tsedek failed to allege, among other things, any material omission of fact by SSS Settlement Services or that she relied upon any such material omission. Moreover, the appellate court continued, Cohen-Tsedek failed to allege that SSS Settlement Services owed her a duty to disclose the material information.

Next, the appellate court explained that, to state a cause of action to recover damages for prima facie tort, a plaintiff must allege:

(1) The intentional infliction of harm;

(2) Resulting in special damages;

(3) Without any excuse or justification;

(4) By an otherwise lawful act or series of acts.

The appellate court added that, to sufficiently plead prima facie tort, a complaint also must allege "the defendant's malicious intent or disinterested malevolence as the sole motive for the challenged conduct."

Applying that standard here, the appellate court found that Cohen-Tsedek failed to allege that "disinterested malevolence" was the sole motivation for the conduct of which she complained. Indeed, the appellate court pointed out, Cohen-Tsedek alleged that the conduct she challenged by SSS Settlement Services was done for its own pecuniary benefit.

Accordingly, the appellate court concluded that the trial court should have granted SSS Settlement Services' motion to dismiss the third-party causes of action brought by Cohen-Tsedek to recover damages for fraudulent concealment and prima facie tort insofar as asserted against SSS Settlement Services.

The case is *Hillary Developer, LLC v. Security Title Guarantee Corp. of Baltimore*, 2023 N.Y. Slip Op. 04370 (App. Div. 2d Dep't Aug. 23, 2023).

New York Courts Reject Claim to Real Property Based on 40-Year-Old Drafting Error in Deed

An appellate court in New York, affirming a trial court's decision, has rejected a plaintiff's contention that he was the rightful owner of a farm in Saratoga County, New York, based on a drafting error in a deed prepared in 1984.

The Case

As the court explained, in 1954, Frank Pravda Sr., the father of the plaintiff in this case, purchased a 43-acre lot in the Town of Saratoga in upstate New York (the "farm parcel"), as well as a separate 6-acre wood lot in the town (the "wood lot"). He transferred both parcels to himself and his wife, Nellie Pravda, through a recorded warranty deed in 1956. They later conveyed the parcels to the plaintiff's brother, Frank Pravda Jr., who in turn sold the parcels to the plaintiff's other brother, Milton Pravda, in April 1969.

In 1982, Thomas Pravda, the plaintiff's son, moved onto the farm parcel and maintained the property until his death in November 2013. Meanwhile, following discussions between the plaintiff and Milton Pravda, the two agreed that the plaintiff would purchase the wood lot for $1,000, and the sale was completed in 1984.

However, unbeknownst to the parties, the deed that was drafted by Milton Pravda's attorney identified both the wood lot and the farm parcel as part of the conveyance.

In 2012, Milton Pravda died and, by virtue of a residuary bequest in his will, conveyed, among other things, all his real and personal property to Mary Elizabeth Brezinski, who was Milton Pravda's long-term friend and business partner. In turn, Brezinski executed a deed conveying the farm parcel to herself in 2014.

In 2013, Thomas Pravda commenced an adverse possession action against Brezinski, as executor of Milton Pravda's estate (the "first action"). Thomas Pravda died a few months after commencing the action in 2013 and the plaintiff, as the executor of his estate, was named the plaintiff in that action. During the first action, the parties stipulated that, among other things, Milton Pravda was the record owner of the farm parcel from 1969 to 2014 and that Brezinski was the current record holder of the farm parcel, having acquired title after Milton Pravda died in 2012.

In 2016, following a two-day bench trial, the Supreme Court, Saratoga County, dismissed the plaintiff's complaint, deciding that the proof failed to establish that Thomas Pravda had obtained title to the farm parcel by adverse possession. The following year, the plaintiff moved to vacate the order, asserting that newly discovered evidence in the form of his 1984 deed to the wood lot revealed that the conveyance also included the farm parcel, a drafting error of which he lacked any knowledge until 2016. The Supreme Court denied the plaintiff's motion, noting that the claim of right asserted by the plaintiff was not the basis for the relief he sought in the action and, in that respect, failed to establish that Thomas Pravda had adversely possessed the farm parcel.

In 2018, the plaintiff filed suit against Brezinski to quiet title, seeking a judgment that he had rightful title to the farm parcel. In sum and substance, the plaintiff claimed that Milton Pravda conveyed both the farm parcel and the wood lot pursuant to the 1984 deed and, despite the fact that the inclusion

of the farm parcel in that deed was due to a scrivener's error, the passage of 33 years since that error precluded reformation of that deed based upon the statute of limitations. After Brezinski passed away, Mary Gleeson, as administrator of Brezinski's estate ("Gleeson"), was substituted as the defendant in Pravda's action, and she asserted a counterclaim also seeking to quiet title based upon her assertion that she was the rightful title owner of the farm parcel given the conveyance in Milton Pravda's will and given that Brezinski filed a deed to the farm parcel in 2014.

Gleeson moved for summary judgment dismissing the complaint, asserting that she was the rightful owner of the farm parcel. The plaintiff cross-moved for summary judgment, asserting that his title was superior. The trial court granted Gleeson's motion and dismissed the plaintiff's complaint.

The plaintiff appealed to the New York Appellate Division, Third Department, arguing that Gleeson's counterclaim was barred by a six-year statute of limitations and that he was the rightful owner of the farm parcel on account of a drafting error in the 1984 deed.

The Appellate Court's Decision

The appellate court affirmed.

In its decision, the appellate court first rejected the plaintiff's contention that Gleeson's counterclaim was an action seeking reformation of the 1984 deed that was governed by a six-year statute of limitations, thus rendering Gleeson's counterclaim time-barred. The appellate court reasoned that the counterclaim essentially sought "a determination as to which party may assert a superior claim of right based upon the chain of title to their respective deeds," rather than reformation of the plaintiff's 1984 deed, "which admittedly only included the disputed farm parcel on account of a scrivener's error." The appellate court ruled that Gleeson's claim of right was predicated on her possession of the farm parcel pursuant to her deed, and the first challenge to that deed asserted by the plaintiff based upon the 1984 deed arose in the plaintiff's 2018 action.

Accordingly, the appellate court explained, because "an owner who is in possession of real property need not comply with the time limitations in an action to discharge an encumbrance on his [or her] title," the statute of limitations was inapplicable to Gleeson's counterclaim.

Next, the appellate court pointed out that, in support of her summary judgment motion, Gleeson submitted, among other things, the deed from Frank Pravda Jr. to Milton Pravda conveying the farm parcel and wood lot, and the subsequent deed recorded after Milton Pravda's death establishing that Gleeson was the owner of the farm parcel. Moreover, the appellate court continued, Gleeson also provided receipts establishing that Milton Pravda paid taxes on the parcel until his death in 2012, at which point Brezinski assumed that responsibility. Further, Gleeson submitted excerpts from the transcript of the plaintiff's deposition in the first action in which he conceded that he and Milton Pravda had only discussed a purchase of the wood lot and not the farm parcel. Consistent with that representation, Gleeson included a stipulation executed by the plaintiff in the first action acknowledging that Milton Pravda owned the farm parcel until 2012, at which point Brezinski became the rightful owner. In further support of her motion, Gleeson provided a letter from Milton Pravda's attorney to the plaintiff, confirming Milton Pravda's agreement to sell the plaintiff certain real property in the location of the wood lot, and a subsequent correspondence from the attorney to Milton Pravda, which enclosed "a [d]eed of the property that you know as 'Woodlot.'"

The appellate court found that this evidence was sufficient for Gleeson to demonstrate that she possessed rightful title to the farm parcel. The appellate court then declared that, in essence, the plaintiff's sole contention was that he was the rightful owner of the farm parcel on account of a drafting error in the 1984 deed that, as the plaintiff acknowledged, mistakenly included a description of the farm parcel in addition to the wood lot. That argument, the appellate court concluded, was without merit.

The appellate court ruled that the trial court had properly granted summary judgment to Gleeson, and it dismissed the remainder of the plaintiff's complaint.

The case is *Pravda v. Gleeson*, 2023 N.Y. Slip Op. 06176 (N.Y. App. Div. 3d Dep't Nov. 30, 2023).

Easement Continued as a Matter of Law and Had Not Been Extinguished or Terminated, New York Court Decides

A court in New York has ruled that an easement continued to exist as a matter of law, rejecting a property owner's contentions that the easement had been extinguished or terminated based on the doctrines of frustration of purpose and impossibility and that, in any event, the easement had been abandoned by the plaintiff.

The Case

The plaintiff in this case, Peter E. Day, owned real property in the Village of Lake Placid in upstate New York. The defendant, One Main on the Lake, LLC ("One Main"), owned the adjoining parcel. A dispute arose over whether Day had the right under an easement to cross over the rear of the One Main property to access the rear of his property for purposes of parking his motor vehicle (the "ROW"). The parties disagreed about whether the ROW had been terminated based on the doctrines of frustration of purpose and impossibility, and whether Day had abandoned it.

The ROW was set forth in a written agreement by the prior property owners from 1982. Specifically, the 1982 agreement provided a right of ingress and egress across a portion of the rear of the One Main property for the purpose of parking "personal motor vehicles" on the Day property. The agreement further prohibited any temporary or permanent blocking or obstructing of the easement area at any time (apparently, an area 10 feet wide by 29 feet long) (the "no-blocking restriction").

To access the ROW by a motor vehicle, Day had to travel through the adjacent public park. According to information provided by One Main's counsel, in 1982 and for numerous years thereafter, no physical or structural changes or improvements were made to the park or to the gravel road in the park that connected to the rear of the One Main building. In addition, during this period, the village did not object to the prior owners driving their motor vehicles through the park to the rear of the One Main building. According to One Main's counsel, the trees grew, the grass grew and was mowed, the tourists and residents came and enjoyed it, and all was well.

In August 2006, however, the village sought to close the street/pathway that connected to the rear of the One Main building. The village placed boulders at the entrance of the park and legally prohibited the operation of motor vehicles in the park. When Day sought to judicially challenge the village's actions, the court ruled against him and upheld the village's closure of the street/pathway in the park. The village also performed subsequent renovations that made it very difficult to physically drive a motor vehicle such as a car or truck through the park to the rear of the One Main building.

Day engaged in litigation with One Main over his property rights. In January 2013, the parties executed a settlement agreement in which One Main expressly acknowledged the existence of the ROW and its survival. One Main, however, later concluded that a court decision in May 2013 rendered the ROW unenforceable. As such, sometime in late 2013 or 2014, a fence was installed on the One Main property, allegedly blocking access to the ROW.

In 2022, Day apparently sought to have the fence at the One Main property voluntarily removed, as it allegedly blocked the ROW. When his efforts proved unsuccessful, Day allegedly removed the fence himself. He then filed a lawsuit seeking to quiet title and to obtain a declaratory judgment regarding his rights under the 1982 agreement. He sought injunctive relief and asserted a cause of action (intentional nuisance) for monetary damages based on the alleged blocking/obstructing of the ROW by the fence and other items.

In response, One Main asserted affirmative defenses based on the doctrines of frustration of purpose and impossibility, among other things. One Main also asserted counterclaims seeking a declaratory judgment, injunctive relief, and monetary damages based on Day's alleged removal of the fence.

Both sides moved for partial summary judgment. One Main contended that the easement set forth in the 1982 agreement had been terminated because the purpose of the easement had been frustrated and rendered impossible to accomplish. For his part, Day disputed that there were grounds to terminate the easement. One Main also contended that Day had abandoned the easement; Day disagreed with that argument, too.

The Court's Decision

The court ruled that the ROW continued to exist as a matter of law and that it had not been extinguished or terminated, or abandoned by Day.

In its decision, the court reasoned that One Main mistakenly asserted that because Day could not legally drive or physically walk/carry his personal automobile through the park, the purpose of the ROW ceased to exist. According to the court, this argument "erroneously" assumed that the ROW applied "only to automobiles." The court then said that it disagreed that the prior owners intended to use the term "motor vehicle" in such a limited manner.

In the court's opinion, the term "motor vehicle" was "a flexible term for various devices for the transportation of persons or property over or upon the public highways." The court said that although the term "motor vehicle" may be defined more specifically as just "an automobile," this was only one of the several definitions for the term. The court pointed out that the other definitions for "motor vehicle" included "any vehicle powered by a motor, such as a truck or bus" and "[a]ny vehicle propelled by power, other than muscular power, except a traction engine or such motor vehicle as runs only upon rails or tracks." Accordingly, the court decided, the meaning of the term "motor vehicle" was "much

broader than just an automobile" and also could describe those types of motor vehicles that Day desired to physically push or carry through the park, "including small/light motorcycles, electric bikes, mo-peds, and scooters."

The court added that the prior owners certainly could have sought to limit the use of the ROW more narrowly by using the more specific term "automobile" rather than the broader and more flexible term "motor vehicle." The court reasoned that the prior owners elected to use the broader language rather than the more specific language, "thereby evidencing an intent not to limit the ROW to only automobiles."

Moreover, the court continued, even if it were to consider extrinsic evidence, the parties' submissions did not provide any basis to reasonably infer that the prior owners intended to limit the ROW to only automobiles or that they intended to limit such use to only the same types of motor vehicles they owned in 1982.

The court then held that the purpose of the easement had not been completely frustrated or rendered impossible, given that the term "motor vehicle" was not ambiguous in the context presented and that no evidence existed that this "broad term" was intended to apply in a more specific manner, and given that Day demonstrated that he still may transport smaller/lighter motor vehicles to the rear of the One Main building by carrying them down the stairs in the park or, alternatively, by pushing them through other areas of the park to the rear of the One Main building.

Finally, the court rejected One Main's contention that Day had abandoned the ROW.

With respect to that argument, the court observed that a party relying on another's abandonment of an easement by grant must produce "clear and convincing proof of an intention to abandon it." The court noted that the non-use of an easement alone was "insufficient to establish abandonment" no matter how long it continued, and that the acts relied on to support abandonment

must be unequivocal and "clearly demonstrate the owner's intention to permanently relinquish all rights to the easement."

In this case, the court ruled, "no evidence" existed from which one could infer that Day previously had the intention to permanently relinquish all of his rights to the ROW. The court decided that the evidence established that any non-use had been directly related to the actions of others rather than through Day's acquiescence and that, in fact, over the years Day had "zealously sought" to prevent the loss of his rights.

The court concluded that One Main could install a movable gate (even one with a lock if a key was provided to Day) considering the nature of the properties, the history of the ROW, and the potential for theft at the properties based on their location in a commercial area with frequent visits by transient tourists, but that One Main could not maintain, keep, or install a permanent and immovable fence that completely blocked and prevented Day's access to the ROW.

The case is *Day v. One Main on the Lake, LLC*, 2023 N.Y. Slip Op. 34106(U) (N.Y. Sup. Ct. Essex Co. Nov. 22, 2023).

New Jersey Appellate Court Decides That Easement Was for Benefit of Plaintiff, His Wife, and Their Children for as Long as They Own Their Property

In an action to quiet title, an appellate court in New Jersey has reversed a trial court's order finding that the duration of an easement was limited to the lifetimes of the plaintiff and his wife. The appellate court decided that the plaintiff had been conveyed an easement in gross for the benefit of the plaintiff, his wife, and their children for as long as one of them own the property in Toms River, New Jersey.

The Case

The plaintiff in this case, Richard I. Torpey, and his wife purchased property in Toms River, New Jersey, in 1969. Since the 1970s, the plaintiff and his family used one-half of a corner lot as a parking area for their cars and boats.

In 1978, the owner of the corner lot listed that property for sale, and the plaintiff, his wife, and their friends, Gilbert and Doris Wilson, purchased it, with the couples each owning a one-half interest in common and the spouses having a tenancy by the entirety. The couples later added a fence to divide the lot; the plaintiff's area was the "southern area."

In 1999, Doris Wilson sought to sell the Wilson property following her husband's death. She asked the plaintiff to deed over his and his wife's one-half share of the corner lot so she could consolidate the property with property she owned to make it more attractive to potential buyers.

An August 19, 1999 deed conveying the plaintiff's and his wife's fee interest in the corner lot expressly provided that:

> The Grantors Richard I. Torpey and Mary M. Torpey, his wife, hereby reserve[] unto themselves an easement in perpetuity for the use of the southern half of the property, . . . measuring 50' by 60', to use the easement area for access and for light and air.

An amended deed dated December 30, 1999, contained the same easement language. When they executed the amended deed, the plaintiff was sixty-eight years old and his wife was a year or two older.

In June 2000, Doris Wilson sold the combined property, including the corner lot, to Frank and Karen Killian (the Killians). At the time of their purchase, the Killians were advised that there was a perpetual easement on the property. During the 13 years before the Killians sold the property to Geraldine Kerrigan, the plaintiff continuously used the easement area to "park cars and multiple boats" and "kept the easement area neat and groomed."

On September 24, 2013, Kerrigan purchased the property from the Killians. Kerrigan knew of the easement prior to purchasing the property. Kerrigan allegedly "then moved in and removed the fence" demarcating the easement area and eventually permitted her tenants to park cars on the entire corner lot. The plaintiff filed an action to quiet title and for enforcement of the easement in the 1999 deed.

The plaintiff moved for summary judgment, arguing that, as a matter of law, he was entitled to a perpetual easement on the southern half of the corner lot. The trial court determined that the deed granted the plaintiff an easement for his and his wife's natural lives but not one in perpetuity, reasoning that:

- The easement lacked "words of succession normally attendant a conveyance intending to run with the land in perpetuity";
- The easement referenced the plaintiff and his wife, but not "the Torpey family" or "Torpey property";
- Perpetual contracts were disfavored by the law; and
- There was "no evidence that the [plaintiff and his deceased wife] intended the instrument to benefit anyone but themselves."

The plaintiff appealed. Among other things, the plaintiff argued that the magic word "'heir' need not be included to convey an interest in land greater in duration than a life estate."

The Appellate Court's Decision

The appellate court reversed the portion of the trial court's decision finding the duration of the easement limited to the lifetimes of the plaintiff and his wife and ordered entry of a judgment permitting the plaintiff and his children to use the easement until they no longer own the Toms River property.

In its decision, the appellate court agreed with the plaintiff that the term "heir" was no longer required to create a perpetual easement, noting that "many archaic conventions, such as needing a fee

tail to denote something other than a life estate," had been done away with by legislative fiat. The appellate court then found that, without that convention, the deed was "ambiguous in duration, as the term 'unto themselves' and 'in perpetuity'" appeared inconsistent.

Because the language in the deed was ambiguous and subject to different interpretations, the appellate court considered extrinsic evidence to determine the intent of the parties to the easement. In reviewing the extrinsic evidence, the appellate court decided that the intent was to retain an easement for the plaintiff and his family, which included then his wife and his children, for as long as one of them own the property in Toms River. The appellate court noted that, at a hearing, the plaintiff "repeatedly referenced his children and their use of the corner-lot property and his desire that they be able to continue to use the corner-lot property" (although "he never mentioned any grandchildren or other future heirs"). Thus, the appellate court held that the trial court erred by concluding that the easement expired with the passing of the plaintiff and his wife, without regard to their children.

The appellate court ruled that the trial court erroneously relied on "outdated common law" in finding that absent words of succession, including "heir," the easement would last only for the lifetime of the plaintiff and his wife. The appellate court also decided that the trial court misconstrued the plaintiff's testimony in concluding that the plaintiff and the Wilsons had intended the easement to be limited to his and his wife's lifetimes. The plaintiff's testimony and the extrinsic evidence required an interpretation of the 1999 deed such that it granted an easement in gross for Torpey, his wife and their children until they no longer own the Toms River property, the appellate court concluded.

The case is *Torpey v. Kerrigan*, No. A-1922-21 (N.J. App. Div. Oct. 30, 2023).

New York Court Rules That Defendant Did Not Own Leased Property and Thus Could Not Serve Notice to Cure Default on Plaintiff/Lessee

A trial court in New York has ruled that a notice to cure a default served on the lessee of a Brooklyn property by an entity that did not own the property was unenforceable.

The Case

According to the Automated City Register Information System (ACRIS), on April 24, 1973, an entity called Tirob Real Estate Company, Inc., recorded a deed demonstrating ownership of the property located at 2875 West 8th Street in Brooklyn, New York. Then, in December 1985, Tirob Real Estate Company, Inc., conveyed its interest in the property to the Bonomo Trust. Tirob Real Estate Company, Inc., was dissolved in April 1986.

On February 22, 1991, and August 27, 1992, further transfers were made among various Bonomo family members.

On August 28, 1992, 2875 West 8th Street Associates, L.P. (the "plaintiff"), entered into a lease with the Bonomo Trust concerning the rental of space located at 2875 West 8th Street. On September 28, 2015, Tirob Real Estate Company, Inc., conveyed the deed to the property to Tirob Real Estate Partners Ltd. (Tirob).

Tirob, asserting that it was the successor-landlord of the property, served a notice to cure a default on the plaintiff on March 3, 2022, and again on April 7, 2022. The notices alleged one default – the failure to maintain adequate insurance pursuant to the terms of the lease.

The plaintiff filed suit, asserting that Tirob was not the landlord of the property and that it could not serve any notices to cure a default on the plaintiff.

Tirob opposed the plaintiff's motion. It submitted affidavits from various attorneys who argued in favor of Tirob's legal possession of the deed through a valid chain of title. For example, one attorney submitted an affidavit and explained that he was counsel to various defendants and was involved with

many of the deed transfers noted above. He asserted that during 2015, "after initially reviewing the Property's transfers and title myself, I engaged Intercounty Abstract Corp. of Floral Park, New York, to review the chain of title for possible title issues, and they concluded that the December 16, 1985 deed did not effectively transfer title to the Property and that Tirob Real Estate Company, Inc., was thus still its fee owner as of August 2015." To remedy that situation "by deed dated September 1, 2015 (Exhibit J), Tirob Real Estate Company, Inc., transferred the 100% fee interest that it had owned to defendant Tirob."

The attorney acknowledged that Tirob Real Estate Company, Inc., had been dissolved three decades earlier but insisted that the transfer was "simply a corrective action to fix the defects in the December 16, 1985 transfer (Exhibit E) which occurred months before the dissolution. However, even if it was considered to be a later transfer it would be within permissible winding down activities."

The plaintiff moved for summary judgment.

The Court's Decision

The court granted the plaintiff's motion for summary judgment.

In its decision, the court explained that New York Business Corporation Law §1005(a)(1) states that after "dissolution the corporation shall carry on no business except for the purpose of winding up its affairs." Thus, the court continued, other than for the express purpose of winding up affairs, Tirob Real Estate Company, Inc., could not engage in any action, even "corrective action," to fix earlier defects in title.

Further, the court added, although there was no time frame concerning the length of time a corporation can be winding up its affairs, courts have imposed a reasonable time and "the winding up of affairs cannot continue indefinitely."

In this case, the court said, it could "not seriously be argued" that Tirob Real Estate Company, Inc., was still winding up its affairs 30 years after dissolution. This was especially true, according to the

court, since there was no evidence presented at all that Tirob Real Estate Company, Inc., was winding up its affairs in other areas.

The court pointed out that the affidavit of a second attorney who advised the parties in 2015 "merely echoe[d]" the same facts and explanation provided by Tirob's first lawyer. Thus, the court found, rather than providing any legal basis to conclude that Tirob Real Estate Company, Inc., had the authority to transfer the deed to Tirob in 2015, the defendants effectively conceded that Tirob Real Estate Company, Inc., "did not possess title in 2015 and could not have transferred the deed to Tirob."

Finally, the court rejected Tirob's contentions that it owned the property because the plaintiff had admitted that Tirob was the owner by paying rent to Tirob for many years. The court ruled that any payments of rent to Tirob or any other entity could not be a legal "admission" concerning ownership. The court also was not persuaded by Tirob's argument that the plaintiff had admitted in a personal injury lawsuit that Tirob was the owner of the property, holding that the plaintiff did not make any formal and binding judicial admissions in that case.

The court concluded that Tirob failed to raise any question of fact that it was the owner of the property and it granted summary judgment to the plaintiff on its cause of action that Tirob was not the title owner of the property and had no standing to issue any notices of default to the plaintiff.

The case is *2875 West 8th Street Associates, L.P. v. Bonomo*, 2023 N.Y. Slip Op. 33657(U) (N.Y. Sup. Ct. Kings Co. Oct. 17, 2023).

New York Appellate Court Affirms Trial Court Ruling Denying Plaintiff an Easement Entitling Her to Use a Dock

An appellate court in New York, affirming a trial court's decision, has ruled that the plaintiff failed to demonstrate either an implied easement or an easement by prescription entitling her to use a dock.

The Case

Charles W. McCutchen was the owner of several parcels of land totaling 144 acres situated on or near Lake Placid in the Town of North Elba in Essex County, New York, collectively known as Camp Asulykit (the "camp"). As the camp was not accessible by road, McCutchen also owned a lakefront lot to the south with vehicular access, a parking area and a dock from which he and his guests could reach the camp via boat (the "dock lot").

Among the numerous structures at the camp was a lakefront cottage (known as "Miss Margaret's Cottage"). McCutchen allowed Peggy Jean LaBarge, a friend (the "plaintiff"), to use the cottage and to store and launch her kayak from the dock lot to reach it. McCutchen also wanted the plaintiff to be able to use the cottage after his death and, accordingly, he executed a will in 2018 in which he directed that the camp and the dock lot be sold after his death "subject to a life estate for [the plaintiff] in the lake[ ]front cottage . . . , along with the use of the informal canoe landing 75 feet farther to the west," at the camp. The will made no provision for the plaintiff's use of the dock lot.

McCutchen died in September 2020. In September 2021, the executors of his estate, Edward Love and Jack McClow, entered into a contract to sell the camp and dock lot to William R. Berkley for $8,200,000. The contract was contingent, among other things, upon the plaintiff's written agreement to a relocation of the cottage.

No written agreement was executed, however, and, in November 2021, Whiteface Resort Holdings, LLC, filed an action to, among other things, enjoin the sale on the ground that it had a right of first refusal. The executors, Berkley, and the plaintiff were named defendants, and the plaintiff asserted cross-claims seeking a declaration as to the extent of her life estate and injunctive relief barring interference with it. The plaintiff also moved for a preliminary injunction. In May 2022, the trial court granted a temporary restraining order to prevent interference with her use of the dock lot.

The same month, a stipulation was executed in which Whiteface's claims were discontinued, the plaintiff's cross-claims were severed, and the caption was amended to reflect that the remaining claims were those asserted by the plaintiff against the executors and Berkley.

The plaintiff then served an amended pleading alleging that she had either an implied easement or an easement by prescription entitling her to use the dock lot and seeking related declaratory and injunctive relief. The executors and Berkley (collectively, the "defendants") separately moved for summary judgment dismissing the claims. The plaintiff opposed the motions and cross-moved for summary judgment.

The Supreme Court, Essex County, granted the defendants' motions and dismissed the plaintiff's claims. As a result, the court also denied the plaintiff's motion for a preliminary injunction and vacated the temporary restraining order.

The plaintiff appealed to the Appellate Division, Third Department, arguing that, at a minimum, questions of fact existed regarding her easement claims and that a preliminary injunction should therefore have been granted.

The Appellate Court's Decision

The appellate court affirmed.

In its decision, the appellate court explained that it was undisputed that McCutchen permitted the plaintiff to use the cottage and the dock lot during his lifetime, as well as that he wanted her to be able to use the cottage after his death. The appellate court pointed out that although McCutchen's will explicitly directed that the camp and dock lot were to be sold together, it made no provision for the plaintiff's continued use of those properties beyond granting "a life estate . . . in the lake[ ]front cottage . . . , along with the use of the informal canoe landing" at the camp. This "unambiguous language," the appellate court decided, reflected that McCutchen intended to afford the plaintiff a right to use the cottage, but not the dock lot, under a new owner.

The appellate court also noted that the defendants came forward with proof that the use of the dock lot would be nothing more than a convenience to the plaintiff because she could reach the cottage via boat by other means, pointing out that she, among other things, owned a home with deeded access rights to Lake Placid and that she had access to two public boat launches on the lake. Therefore, the appellate court ruled, assuming but without deciding that the grant of a life estate to the plaintiff sufficiently severed ownership between the various parcels at issue to make an easement by implication over the dock lot a possibility, the defendants satisfied their initial burden of showing that such an easement was not intended and that one would not, in any event, be warranted because it was not reasonably necessary to the plaintiff's enjoyment of her life estate.

Finally, the appellate court rejected the plaintiff's claim of a prescriptive easement on the dock lot. The appellate court noted that a prescriptive easement requires proof "that the use of the easement was open, notorious, hostile and continuous for a period of 10 years." The appellate court acknowledged that the plaintiff used the dock lot to access the camp in an open and notorious manner for the requisite period of time but added that although that fact ordinarily would give rise to a presumption of hostility, that was not the case where there was a "close and cooperative relationship between the record owner and the person claiming [use] through adverse possession." The appellate court found that the defendants demonstrated that such a relationship existed between the plaintiff and McCutchen and, indeed, that the plaintiff had acknowledged that she was a "close personal friend" of McCutchen who used and maintained the dock lot with his knowledge and who had his "implied" permission to do so. The appellate court pointed out that the plaintiff failed to come forward with proof indicating that her use of the dock lot was adverse to McCutchen, and it decided that the trial court correctly determined that her claim for a prescriptive easement failed.

Because the defendants were entitled to summary judgment dismissing the claims against them, the appellate court concluded that the plaintiff's contentions regarding the denial of her motion for a preliminary injunction were academic.

The case is *LaBarge v. MJB Lake LLC*, 2023 N.Y. Slip Op. 05301 (N.Y. App. Div. 3d Dep't Oct. 19, 2023).