August 2007
Issue 35

Inside this issue

FINKELSTEIN NEWMAN FERRARA LLP

225 Broadway, 8th Fl.
New York, NY 10007
212-619-5400
www.fnfllp.com

BRIDGES OF SCHENECTADY COUNTY

In 1981, Nancy Gold acquired title to property which had an easement giving her neighbor, Carol Majkut, access to a local route by way of a gravel road and bridge situated on Gold's land. Gold believed that the easement had been abandoned when she purchased the parcel, apparently because the bridge was in a state of disrepair.

In 1998, Patrick Di Cerbo purchased Majkut's lot, and in 2002, repaired the bridge and road.

A year later, Gold filed suit in Schenectady County Supreme Court alleging that the easement had been abandoned and/or extinguished by way of adverse possession. Her complaint demanded that the bridge be removed and the effects of construction repaired. At trial, the Supreme Court directed a verdict in Di Cerbo's favor and dismissed the complaint. On appeal, the Appellate Division, Third Department, affirmed.

The AD3 noted that while an easement may be abandoned, clear and convincing evidence must be proffered demonstrating "both an intention to abandon and also some overt act or failure to act which carries the implication that [the easement holder] neither claims nor retains any interest in the easement." Mere disuse will not support such a claim.

At trial, Majkut testified that she had continued to use the bridge as a pedestrian walkway even after the structure had been rendered unsafe for vehicular traffic. She testified decisively in Di Cerbo's favor by indicating that she "never renounced or gave up her right to the easement."

An easement may be extinguished by adverse possession if the owner of the servient estate (in this case, Gold) disavows the easement and excludes the easement holder, who then acquiesces to the exclusion for at least a decade. Even though Gold demonstrated use of the easement for hikes, nature walks and cross-country skiing, and while her family also planted and mowed in its vicinity, those activities were neither inconsistent with the easement nor adverse to the easement holder. Significantly, there was no evidence that Gold had ever erected barriers or prevented the easement's use by others.

As a result, Di Cerbo's rights to the easement could not be readily abridged.

If you have any questions or comments about this article, please contact partner Jonathan H. Newman at 212-619-5400 x 205 or email him at JNewman@fnfllp.com. To join the debate, visit us at www.nyreblog.com.

A WORTHLESS DEED?

Even though the proposition of law was pretty fundamental, and you wouldn't think protracted litigation on the subject would be necessary, a decision released by the Appellate Division, First Department, in the case of *Staine v. Summit Place, Inc.*, caught our eye.

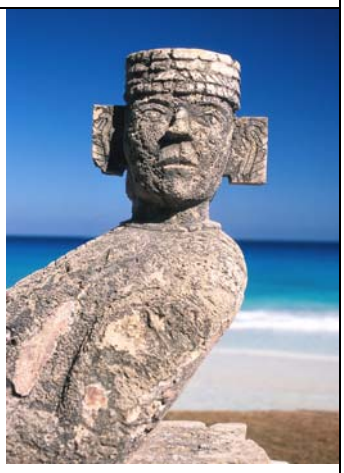
Shelly Staine held a "deed" for a property up in the Bronx, but the person who allegedly transferred his interest in the parcel to her never truly owned the property. So, when a dispute arose as to who was the actual owner, the Bronx County Supreme Court found in her opponent's favor--a party who could establish title.

As the AD1 observed in its decision:

> The party that purportedly conveyed the lot to plaintiff never had record title to that property, and a grantor cannot convey that which it does not own. It is well settled that, "title and estate which passes under a grant or conveyance is commensurate only with that existing in the grantor, although he may undertake to convey, and the deed purports to convey, a larger estate" ....

Talk about punishing a no good deed!

THIS CUERVO AIN'T GOLDEN



The Appellate Term, First Department, has again cautioned regulated tenants about the perils of "overcharging" roommates.

While rent-stabilized tenants may charge their co-occupants a "proportionate" share of the rent, "profiteering" that is, collecting significantly in excess of a legally permissible amount--will subject tenants to eviction, as was demonstrated in the case of *30-40 Associates Corp. v. Cuervo*.

In that particular holdover dispute, Cuervo accepted some "three times the stabilized rent and failed to refund the overcharge."

Faced with those facts, both the Housing Part of the Civil Court of the City of New York, and the Appellate Term, First Department, were of the opinion that the regulated tenancy needed to end. (Cuervo was denied a post-judgment opportunity to correct his statutorily violative conduct.)

Guess who needed some shots after that decision?

If you have any questions or comments about the above articles, please contact partner Lucas A. Ferrara at 212-619-5400 x 211 or email him at LFerrara@fnfllp.com. To join the debate, visit us at www.nyreblog.com.

WILL CHANGE TO ADVERSE POSSESSION LAW MAKE A DIFFERENCE?

Our friends Upstate have been keeping us posted on their efforts to secure changes to the law of "adverse possession." And, it appears that they may have achieved some measure of success.

Here's an e-mail we received from Aaron Robinson (who himself was the recipient of an unfavorable decision in an adverse possession case):

> Dear Mr. Ferrara,
>
> Just a quick note to let you know that both the New York State Senate and Assembly passed parallel bills to preclude a land claim by adverse possession when the claimant knows that another party owns the property. Based on the overwhelming support for this change (The Senate vote was 59 Yes / 2 No and the Assembly vote was unanimous!) it is obvious our lawmakers found the concept as appalling as did the victims.
>
> Denise Pryzbylo of the famed 'Walling v. Pryzbylo' New York State Court of Appeals decision headed the charge of lobbying the lawmakers for the change, together with myself and another potential adverse possession victim. We didn't get the comprehensive changes we initially sought but the change we did get is a matter of ethics and partially closes the door to those unscrupulous people preying on innocent, legitimate, unsuspecting, tax-paying landowners. We just need the Governor's signature to make it the 'law of the land.'
>
> Best regards,
>
> Aaron Robinson

A quick look at the New York State Senate's bill suggests that it may not be the panacea property owners were hoping for. According to the proposed legislation, a person with "actual knowledge" that another holds "title" to property will be unable to assert an adverse possession claim to that parcel. Unfortunately, a key term--"actual knowledge"--is left undefined.

That ambiguity leaves us cause for concern since there may be a distinction which our friends and legislators have overlooked.

Courts may not view someone's "knowledge" or "general awareness" as comparable to having actual or constructive "notice" of another's property interest--the latter being triggered by way of a publicly recorded document or deed.

In our opinion, "actual knowledge" continues to leave the standard too subjective. And, if nothing else, would appear to encourage a blind indifference to the truth. (After all, unless the facts in the property dispute are conceded, who is to say whether a claimant had "actual knowledge" of another's ownership rights?)

Is this a distinction with(out) a difference?

We're not a(d)verse to hearing your reactions.

"SHOCKINGLY FOUL ODORS" GET TENANT EVICTED

Rebecca Rosenbaum will be evicted from a Manhattan condominium for accumulating rotting food and other "matter" which caused a stench to be emitted from her apartment unit.

While a New York County Supreme Court judge did not find these odors to comprise a nuisance, on appeal, the Appellate Division, First Department, reversed. (Rosenbaum apparently didn't come off smelling like a rose.)

The AD1 concluded that the testimony of "neutral" witnesses (such as two firefighters who visited the unit about a month prior to trial) supported the claim that there were "noxious" and "shockingly foul odors" emanating from Rosenbaum's apartment and that the condominium had established an "ongoing, recurring presence of an unacceptable level of odor constituting a nuisance and warranting eviction."

If you have any questions or comments about the above articles, please contact partner Lucas A. Ferrara at 212-619-5400 x 211 or email him at LFerrara@fnfllp.com. To join the debate, visit us at www.nyreblog.com

ONE TOO MANY MOBILE HOMES ....

How many mobile homes are too many?

Well, in the Town of New Baltimore, the answer is two. Apparently, local town codes prohibit more than one mobile home on any parcel of land.

When Thomas Winslow parked two of those beauties on his 4.3 acre property, the Town was none too pleased and cited Winslow for violating the law.

Back in 2004, Winslow sought a variance from the local zoning board and was denied. For some unknown reason, Winslow failed to seek review of that decision.

In June of 2004, the Town sought to compel Winslow's compliance with the law, and an order was issued by the Greene County Supreme Court directing Winslow to remove one of the mobile homes or the Town would be permitted to do so. Once again, Winslow failed to seek review of that determination.

A year later, when the Town sought to enter the property to effect the removal, the Supreme Court granted the request and Winslow appealed that decision.

The Appellate Division, Third Department, concluded that Winslow was precluded from attacking the underlying orders and that the scope of its review was limited to whether the Supreme Court had properly allowed the Town to enter Winslow's property. Finding no irregularity or error, the AD3 affirmed.

"And away she goes!"

If you have any questions or comments about this article, please contact partner Robert Finkelstein at 212-619-5400 x 227 or email him at RFinkelstein@fnfllp.com. To join the debate, visit us at www.nyreblog.com.

FINKELSTEIN NEWMAN FERRARA LLP
225 Broadway, 8th Fl.
New York, NY 10007
212-619-5400
www.fnfllp.com

My, how august you are!

www.nyreblog.com