



Current Developments

By Michael J. Berey

Senior Vice President, Chief Underwriting Counsel – New York
First American Title National Commercial Services

Easements

Two adjoining parcels were conveyed to the Defendant in 2007. One of the parcels had been subject to easements by grant for parking and the use of a septic system by the owner of the other land. In 2010, the County took title to the benefited parcel; the Plaintiff, assuming the land would have the benefit of the easements, purchased the benefited parcel from the County. The deed from the County contained an “appurtenance clause”, stating that the conveyance was “together with the appurtenances...in and to said premises.” The deed did not, however, include a specific reference to the easements. The Plaintiff alleged that without the easements his property could not be used for any commercial purposes and, therefore, his parcel should have the benefit of an implied easement of necessity. The Defendant, still the owner of what had been the servient parcel, asserted that the easements were extinguished by the doctrine of “merger” when he took title to both parcels.

The Supreme Court, Oswego County, held that the easements were extinguished by merger. Further, an appurtenance clause does not pass to the grantee the benefit of extinguished easements, and the deed from the County did not contain any words demonstrating that the easements continued. However, the Court found that “the plaintiff has demonstrated a prima facie case and stated a cause of action for the determination of whether implied easements of necessity exist over defendant’s property.”

According to the Court, “...for an implied easement to be imposed upon a servient estate, the party asserting same must establish: (1) a unity and subsequent severance of title with respect to the relevant parcels; (2) that during the period of unity of title, the owner established a use in which one part of the land was subordinated to another; (3) that such use established by the owner was so continuous, obvious, and manifest that it indicated that it was meant to be permanent; and (4) that such use affects the value of the estate conveyed and that its continuation is necessary to the reasonably beneficial enjoyment of the estate conveyed.”

The Court granted the Defendant’s motion to dismiss the cause of action seeking a determination that an easement by grant continues to benefit

Current Developments

the Plaintiff's parcel, and it denied the Plaintiff's request for a preliminary injunction; it could not be determined whether the Plaintiff was likely to succeed on the merits of the case. However, the Court allowed the Plaintiff to amend its complaint to insert a cause of action for implied easements of necessity, together with causes of action for a permanent injunction and money damages, as originally plead. *Knafelc v. Edwards*, dated January 13, 2013, is reported at 38 Misc.3d 1212 and 2013 WL 203391.

Electronic Filing/New York County

The New York State Supreme Court, New York County – Civil Branch, posted a "Notice to the Bar Regarding Expansion of Mandatory E-Filing" stating the following:

"In a memorandum to the Bar dated Feb. 1, 2013, the Chief Administrative Judge, in accordance with legislation enacted in 2012 (L. 2012, c. 184), announced that the court system anticipates that mandatory electronic filing of litigation documents through the New York State Courts Electronic Filing System ("NYSCEF") will be expanded in certain jurisdictions. It is expected that e-filing will become mandatory in all cases commenced in New York County Supreme Court on or after February 19, 2013 (with the exceptions of election law, Art. 78, matrimonial, and Mental Hygiene Law matters). It is expected that, on and after that date, such cases must be commenced electronically and initiating documents will not be accepted in hard copy form. Personal jurisdiction shall be obtained by service of documents in hard copy form in the normal manner, except that the plaintiff/petitioner must also serve on the defendant/ respondent a Notice of Commencement of Mandatory E-Filed Case (form available on the NYSCEF website (www.nycourts.gov/efile)). Subsequent documents must be e-filed as well.

"Court fees are paid to the County Clerk by credit or bank card (Mastercard, Visa, or American Express) through NYSCEF. There are, however, no separate charges to use NYSCEF, file documents with it, serve documents through it, or print out hard copies from it.

....

"For additional information about e-filing in New York County, see the NYSCEF website or contact the New York County E-Filing Department at 646-386-3610 or newyorkefile@nycourts.gov."

The Notice, dated February 6, 2013, is posted at:

<http://www.nycourts.gov/supctmanh/EF-Mandatory-Notice-213.pdf>

Mortgage Recording Tax/New York State Transfer Tax

New York State's Department of Taxation and Finance has announced that the interest rates to be charged for the period April 1, 2013 – June 30, 2013 on late payments and assessments of Mortgage Recording Tax and the State's Real Estate Transfer Tax will be 7.5% per annum, compounded daily. The interest rate to be paid on refunds of those taxes will be 2% per annum, compounded daily. The notice issued by the Department is posted at http://www.tax.ny.gov/pay/all/int_curr.htm.

Navigable Waters

The Supreme Court, Hamilton County, held that a waterway, known as the Mud Pond waterway (the "Waterway"), in the Town of Long Lake, the Outlet of which is, on average, sixteen feet wide and seventeen inches deep with a minimum width of twelve feet and a depth of four inches, is navigable-in-fact. It granted the Defendant New York State Department of Environmental Conservation's counterclaim for an injunction enjoining the Plaintiff, who claimed title to the Waterway, from posting signs prohibiting trespassing, from prosecuting those using the public right of navigation over the Waterway, and from making incidental use of a 500 foot hiking trail, identified as a "portage", over which canoes and gear are carried to circumvent a bedrock ledge and rapids at a point in the Waterway. The Plaintiffs sought a declaratory judgment that the Waterway was not navigable-in-fact and that they had the right to bar the general public from its use.

Current Developments

The Court found, based on evidence in the record, that the Waterway “has a practical utility for travel and the transport of some materials.” In addition, “...the 500 foot portage is considered a very short portage, and the right to navigate ‘carries with it the incidental privilege to make use, when absolutely necessary, of the beds and banks on riparian lands’” (citation omitted). *Friends of Thayer Lake LLC v. Brown* (Index No. 6803/10), decided February 25, 2013, is posted at:

<http://www.adirondackalmanack.com/wp-content/uploads/2013/02/Shingle-Shanty-decision.pdf>

New York City/Real Estate Taxes

Chapter 4 of the Laws of 2013, enacted on January 30, 2013, extended the real estate tax abatement program for eligible condominium and cooperative unit owners through January 30, 2015. Changes to the program are described on a “Fact Sheet” posted on the Department of Finance’s website at:

http://www.nyc.gov/html/dof/downloads/pdf/coop_condo_abatement/coop_condofact_sheet.pdf

Servicemembers Civil Relief Act

Formerly known as the Soldiers’ and Sailors’ Civil Relief Act, the Act, at 50 U.S.C. App. Sections 501 et. seq., was amended by Public Law 11-154, which was signed into law on August 6, 2012. Among other changes made to the Act, Subsection (b) (“Stay of proceedings and adjustment of obligations”) of 50 U.S.C. App. Section 533 (“Mortgages and trust deeds”) was amended, effective February 2, 2013, to extend from nine to twelve months the period after military service within which an action to foreclose a mortgage on a servicemember’s property, securing an obligation originating prior to his or her military service, can be stayed. On January 1, 2015, the period in which a foreclosure action may be stayed will revert back to three months from the conclusion of military service, the time period which was in effect on July 29, 2008.

Transfer Taxes/City of Yonkers

In addition to New York State’s Real Property Transfer Tax, transfers of real property in the City of Yonkers, in Westchester County, are subject to a local transfer tax. On December 4, 2012, the City of Yonkers adopted General Ordinance No. 17-2012, amending Section 15-62 of the Code of the City of Yonkers, changing the date by which Yonkers’ transfer tax due is payable from thirty days (30) to seven (7) days from the date on which a deed is delivered by the grantor to the grantee. New York State’s Transfer Tax is payable no later than the fifteenth day after the date of delivery.

Michael J. Berey

Senior Vice President

Chief Underwriting Counsel - New York

No. 148; March 7, 2013

mberey@firstam.com