A Legal Update for the Title Insurance Industry

*By Michael J. Heller, Peter P. McNamara and Matthew V. Spero**

The authors discuss recent court decisions of note involving title insurance.

This article discusses the following:

- A federal district court in Montana has ruled that a conveyance of property by policyholders under a title insurance policy to trusts was a voluntary conveyance to "a separate and distinct entity" and that, as a result, the title insurance policy lapsed.
- A federal district court in California has denied an insured's motion to add a bad faith claim to the lawsuit it filed against its title insurer for breach of contract and negligence.
- An appellate court in Texas, reversing a trial court's decision, has ruled that a Texas trial court had personal jurisdiction over two individual defendants in a lawsuit involving a title insurer that was filed in the Texas trial court.
- The U.S. Court of Appeals for the Eleventh Circuit, reversing a decision by the U.S. District Court for the Northern District of Florida, has ruled that a county ordinance triggered an easement's abandonment clause.
- The Appellate Division, Second Department, has reversed a New York trial court's decision and ruled that the plaintiff did not have an easement by implication over certain property owned by the defendant.

Title Insurance Lapsed When Insureds Conveyed Property to Trusts Via Quitclaim Deeds, Montana Federal Court Rules

A federal district court in Montana has ruled that a conveyance of property by policyholders under a title insurance policy to trusts was a voluntary conveyance to "a separate and distinct entity" and that, as a result, the title insurance policy lapsed.

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THE CASE

As the court explained, William S. Green and his wife Esther W. Green purchased land east of Billings, Montana, in Yellowstone County from the Custer Coulee Cattle Company on April 19, 1989, as joint tenants with the right of survivorship. The Greens also purchased title insurance on the property from then-Chicago Title Insurance Company of Idaho, the predecessor to Chicago Title Insurance Company, on April 26, 1989, with coverage limits of $87,800 (the "Policy").

Among its provisions, the Policy insured against loss or damage by reason of "[l]ack of a right of access to and from the land."

On December 26, 2012, the Greens created two irrevocable trusts—the William S. Green Family Trust and the Esther W. Green Family Trust (the "Trusts")—and quitclaimed their individual, undivided half-interests in the property to their respective Trusts. William S. Green was the designated trustee of both Trusts.

Each quitclaim deed declared that the grantor "does hereby convey, release, remise and forever quit claim unto William S. Green, Trustee . . .," and that each deed "releases all interest acquired by Grantor in and to the subject property from the date hereof through and including the date of recording said deed." The deeds were recorded on December 28, 2012.

The Greens died in the winter/spring of 2018. Shortly thereafter, on April 11, 2018, the Trusts individually conveyed their respective interests in the property via trustee's deeds to a number of individuals (collectively, the "plaintiffs").

The plaintiffs alleged that they subsequently discovered that there was no legal access to the property. On December 13, 2019, the plaintiffs submitted a claim to Chicago Title seeking redress for the lack of legal access under the Policy.

Chicago Title denied the claim on February 3, 2020. In its denial letter, Chicago Title reasoned that the plaintiffs did "not qualify as insureds as defined by the Policy." The Policy defined "insureds" as:

> The insured named in Schedule A, and, subject to any rights or defenses the Company would have had against the named insured, those who succeed to the interest of the named insured by operation of law as distinguished from purchase including, but not limited to, heirs, distributes, devisees, survivors, personal representatives, next of kin, or corporate or fiduciary successors.
>
> Schedule A listed "William S. Green and Esther W. Green, Husband and Wife" as the insureds.

Chicago Title further explained that:

> By the December 28, 2012 conveyances, the Named Insureds transferred their interest in the Property to the Trusts. The Trusts are not named in Schedule A of the Policy as "insureds", nor are they successor insureds under the above-described definition [of "insureds"] because the transfer to the Trusts did not occur by operation of law. Upon conveyance of the Property, the Policy is terminated, but certain insuring provisions continue in favor of the Named Insureds in limited circumstances. Please refer to paragraph 2 of the Policy's Conditions and Stipulations:
>
> 2. CONTINUATION OF INSURANCE AFTER CONVEYANCE OF TITLE
>
> The coverage of this policy shall continue in force as of Date of Policy in favor of an insured only so long as the insured retains an estate or interest in the land, or holds an indebtedness secured by a purchase money mortgage given by a purchaser from the insured, or only so long as the insured shall have liability by reason of covenants of the estate or interest. The policy shall not continue in force in favor of any purchaser from the insured of either (i)

> an estate or interest in the land; or (ii) an indebtedness secured by a purchase money mortgage given to the insured.

Chicago Title concluded that there was no continuation of insurance after conveyance because the Greens did not retain an interest in the property when they voluntarily transferred it to the Trusts via quitclaim deeds that did "not contain any warranties or covenants of title under which the Named Insureds would have liability to the Trusts." Thus, Chicago Title's position was that coverage terminated upon conveyance to the Trusts, and neither the Trusts nor its successors had standing to bring a claim under the Policy.

The plaintiffs filed suit against Chicago Title and moved for summary judgment. They asserted that their claim was erroneously denied because William Green retained both a legal and equitable interest in the property such that the Policy continued in force and subsequent transfers occurred as a matter of law.

Chicago Title cross-moved for summary judgment, asserting that the named insureds voluntarily conveyed their interests in the property to the Trusts and, therefore, that coverage terminated upon the conveyance and the plaintiffs did not succeed to their interests by operation of law.

A magistrate judge found in favor of Chicago Title, and the dispute reached the Montana district court.

THE DISTRICT COURT'S DECISION

The district court adopted the magistrate judge's findings and granted Chicago Title's motion for summary judgment.

In its decision, the district court pointed out that the Policy stated that insurance coverage "shall continue in force" only so long as "the insured retains an estate or interest in the land." The district court noted that the magistrate judge found that by transferring their interests in the property via quitclaim deed to the Trusts, the Greens relinquished any interest or estate they had in the property, despite William Green assuming title to the property as the Trusts' trustee.

The district court agreed with the magistrate judge's analysis and rejected the plaintiff's contention that because William Green, as a named insured under the policy, assumed a trustee's estate in the property, that estate sufficed to continue insurance coverage despite the Greens quitclaiming their entire interests to the Trusts.

The district court acknowledged that trustees are vested with the property estate in a trust and hold legal title to that trust property. However, the district court continued, Montana law "clearly differentiates between a grantee's interest in property and a trustee's interest or estate."

Moreover, the district court pointed out, the Greens expressly quitclaimed their rights in the property to the Trusts, which released "all interest acquired by Grantor in and to the subject property from the date hereof." Thus, the district court noted, "any and all property rights" were transferred to the Trusts as separate and distinct entities with the Greens reserving no interests or estates in the land. The district court concluded that although William Green was named trustee of the trust, "the Greens themselves, the named insureds, retained no interest and the coverage lapsed as a result."

The case is *Green v. Chicago Title Ins. Co.,*

No. CV 20-37-BLG-SPW (D. Mont. Sept. 29, 2021).

California District Court Rejects Insured's Motion to Add Bad Faith Claim to Suit Against Title Insurer

A federal district court in California has denied an insured's motion to add a bad faith claim to the lawsuit it filed against its title insurer for breach of contract and negligence.

THE CASE

As the court explained, in November 2002, Hayward Property, LLC ("HPL") purchased real property in Hayward, California. On December 23, 2002, HPL purchased a title insurance policy from Commonwealth Land Title Insurance Company ("CLTIC") insuring clear title to the property.

In March 2016, a dispute arose between HPL and XPO Logistics Freight, Inc. ("XPO Freight"), the owner of adjoining real property. XPO Freight, insured by Fidelity National Title Group, Inc., CLTIC's parent company, claimed to own land that HPL believed to be encompassed within its property (the "Property in Question").

On October 5, 2016, HPL submitted a notice of claim to CLTIC regarding the property dispute with XPO Freight. In November 2016, CLTIC denied coverage for the claim.

In December 2016, HPL filed a quiet title action against XPO Freight in a California state court (the "XPO Action"). The trial court ultimately determined that XPO Freight held title to the Property in Question.

On October 27, 2017, HPL filed a lawsuit against CLTIC, alleging causes of action for breach of contract and negligence. After the court held an initial case management conference and issued a pretrial scheduling order setting various deadlines, HPL moved for leave to amend its complaint to add a claim against CLTIC for breach of the covenant of good faith and fair dealing. The gist of HPL's proposed claim for breach of the covenant of good faith and fair dealing was that CLTIC conspired with Fidelity and other Fidelity-affiliated entities, including Chicago Title Insurance Company, to deny its title insurance claim. HPL alleged, among other things, that (1) CLTIC and the other Fidelity entities were affiliated; (2) CLTIC and Fidelity knew of both XPO Freight and HPL's policy claims; and (3) CLTIC and Fidelity prioritized XPO Freight's policy and claim to the Property in Question over HPL's policy and claim.

CLTIC opposed HPL's motion for leave to amend, arguing, among other things, that HPL had failed to meet the "good cause" standard of Federal Rule of Civil Procedure 16(b), and the proposed amendment was unduly delayed, prejudicial and largely futile.

For its part, HPL contended that its discovery of new facts constituted good cause to modify the pretrial scheduling order to allow its proposed amendment to its pleadings.

THE DISTRICT COURT'S DECISION

The court denied HPL's motion.

In its decision, the court found that HPL's motion for leave to amend did not show (or attempt to show) that HPL acted with diligence in pursuing discovery regarding CLTIC's alleged bad faith. According to the court, HPL would have been aware of the need for discovery on this issue "from the inception of the ac-

tion" and the parties had more than two and a half years from the inception of the action (or approximately 20 months from the entry of the pretrial scheduling order) to complete fact discovery. The court pointed out, however, that the burden fell on HPL to seek the discovery it deemed essential and, if necessary, to seek judicial intervention.

The court also found that HPL's motion for leave to amend similarly failed to show (or attempt to show) that HPL acted with diligence in seeking leave to amend after discovering the alleged facts underlying the proposed bad faith claim. Indeed, the court continued, HPL did not even contend that it only recently learned of most of the purported facts that it alleged supported its bad faith claim.

The court added that CLTIC "persuasively show[ed]" that the purported facts underlying HPL's proposed bad faith claim were available to HPL "months or years" before it filed its motion. For example, HPL had known since at least October 2018 that Chicago Title issued policies to XPO Freight covering the Property in Question and HPL had long had access to public information regarding the affiliation of CLTIC, Chicago Title, and Fidelity. Its delay in moving for leave to amend did "not constitute diligence," the court ruled.

Accordingly, the court concluded, HPL failed to make the requisite showing of good cause regarding its newly proposed bad faith claim against CLTIC.

The case is *Hayward Property, LLC v. Commonwealth Land Title Insurance Company*, 2021 WL 4927012 (N.D. Cal. 2021).

Texas Appeals Court Agrees with Title Insurer That Trial Court Had Personal Jurisdiction Over Two Individual Defendants

An appellate court in Texas, reversing a trial court's decision, has ruled that a Texas trial court had personal jurisdiction over two individual defendants in a lawsuit involving a title insurer that was filed in the Texas trial court.

THE CASE

As the court explained, Carolyn Shank and Robert Eugene Shank ("Robert Sr.") married in 1977. Robert Sr. had four children from a previous marriage: David, Mark, Douglas and Robert Jr. In 2010, Carolyn Shank and Robert Sr., residents of Kansas, purchased a second home in City of Alamo, Texas.

Robert Sr. died in 2018 and, in 2019, Carolyn Shank entered into a contract to sell the Texas property to two Texas residents. Pursuant to the contract, Carolyn Shank furnished the sellers with a title policy issued by Capital Title of Texas, LLC, which also served as the escrow agent. Carolyn Shank executed an affidavit of heirship identifying David, Mark, Douglas and Robert Jr. as Robert Sr.'s only children. All four children were residents of other states.

Under Texas intestacy laws, Robert Sr.'s undivided 50 percent interest in the property passed upon his death to his four children in equal shares of 12.5 percent. Accordingly, Capital Title contacted the four brothers, informing them about the impending sale, their respective interests in the proceeds, and the need for them to execute a general warranty deed to effectuate the sale. Each brother exe-

cuted the general warranty deed and returned it to Capital Title for recording.

The four brothers also were provided copies of the affidavit of heirship and Robert Sr.'s unprobated will. David and Robert Jr. instructed Capital Title to distribute their shares to Carolyn, meaning Carolyn would receive 75 percent of the sale proceeds and Mark and Douglas would each receive 12.5 percent. Capital Title instead distributed 50 percent of the sale proceeds to Carolyn, while Mark and Douglas each received 25 percent.

Capital Title subsequently informed Mark and Douglas that they had received their brothers' shares in error and requested that they either return the shares to Capital Title or pay them directly to their brothers. After Mark and Douglas denied that request, Carolyn, David and Robert Jr. sued Capital Title, alleging that the company had breached its fiduciary duty to them as the escrow agent and had violated various provisions of the Texas Deceptive Trade Practices-Consumer Protection Act.

Capital Title filed a general denial and a third-party petition against Mark and Douglas for unjust enrichment, alleging that the trial court had specific personal jurisdiction over the brothers. Specifically, Capital Title alleged that the brothers had "engaged in conduct in and/or directed toward Hidalgo County, Texas, having direct contact with business conducted in Hidalgo County and with persons doing business in Hidalgo County in connection with the real estate transaction at issue, and including receipt . . . of proceeds from the transaction."

Mark, a resident of Kansas, and Douglas, a resident of Louisiana, filed a combined special appearance arguing that the court did not have specific personal jurisdiction over them because their involvement in the transaction was incidental.

Capital Title responded that the brothers' involvement in the transaction was more than incidental because they:

- Participated in email and phone correspondence with Capital Title regarding the sale of the property and the distribution of the proceeds;
- Executed a general warranty deed and a document titled "Seller Proceeds Instructions" and returned these documents to Capital Title in Texas;
- Received proceeds from the sale drawn on a Texas bank account; and
- Incurred taxes in Texas from the sale of the property.

The trial court granted the special appearances, ruling against Capital Title, and Capital Title appealed.

THE APPELLATE COURT'S DECISION

The appellate court reversed.

In its decision, the appellate court explained that, under Texas law, Texas courts may exercise personal jurisdiction over a nonresident defendant that "does business" in Texas if the exercise of personal jurisdiction satisfies due process. In these circumstances, due process is satisfied if the nonresident defendant has "minimum contacts" with Texas and exercising jurisdiction comports with traditional notions of "fair play and substantial justice." The appellate court added that, to determine

whether traditional notions of fair play and justice are satisfied, courts consider:

- The burden on the defendant;
- The forum state's interest in adjudicating the dispute;
- The plaintiff's interest in obtaining convenient and effective relief;
- The interstate judicial system's interest in obtaining the most efficient resolution of controversies; and
- The shared interest of the several states in furthering fundamental substantive social policies.

The appellate court then ruled that the contacts that Douglas and Mark had with Texas were sufficient to confer the trial court with specific personal jurisdiction over them as to Capital Title's unjust enrichment claim.

The appellate court found, among other things, that Mark and Douglas purposefully availed themselves of Texas law and profited from their ownership interests in Texas real property when they signed the deed and accepted the proceeds. The brothers also benefitted under Texas' intestacy laws, with their interests in the property having vested immediately upon their father's death approximately a year prior to the sale.

Simply put, the appellate court found, by choosing to participate in the transaction, Mark and Douglas purposefully availed themselves of the privileges and benefits of conducting activities in Texas.

Next, the appellate court noted that Capital Title alleged that if it distributed the proceeds from the sale in error, then Mark and Douglas were unjustly enriched and judgment should lie against them for the overpayment. The appellate court found that, as corresponding parts of the same transaction, there was a substantial connection between Mark and Douglas executing the deed and then accepting the proceeds as consideration for the conveyance.

Finally, the appellate court decided that exercising jurisdiction over Mark and Douglas would not violate traditional notions of fair play and substantial justice. It pointed out that Douglas resided in a neighboring state, and Mark acknowledged in his affidavit that he had traveled to Texas in the past to visit his father at the property. Moreover, the appellate court continued, because Carolyn, David and Robert Jr.'s claims against Capital Title would be heard in Texas, it would be more efficient to litigate all the claims as to all the parties in one court, as opposed to three courts, each in a separate state.

Accordingly, the appellate court decided that the trial court erred when it granted Mark and Douglas' special appearance and found that it should have exercised personal jurisdiction over them as Capital Title contended.

The case is *Capital Title of Texas, LLC v. Shank*, 2022 WL 480253 (Tex. App. Corpus Christi 2022).

County Ordinance Triggered Easement's Abandonment Clause, Eleventh Circuit Decides

The U.S. Court of Appeals for the Eleventh Circuit, reversing a decision by the U.S. District Court for the Northern District of Flor-

ida, has ruled that a county ordinance triggered an easement's abandonment clause.

THE CASE

As the court explained, in the 1990s, the State of Florida initiated eminent domain proceedings against St. Joe Paper Company to take certain properties in Walton County. The suit resulted in a 1996 consent judgment in which the state agreed to exclude from the taking certain parcels of land in exchange for St. Joe's acceptance of land-use and development restrictions. The consent judgment included a specific requirement that the parties record a "permanent public access easement allowing public pedestrian access laterally along the beach" on 75 feet of the beach sand landward of the Gulf of Mexico's mean high water line. The consent judgment bound not only the parties to the eminent domain case—the state of Florida and St. Joe—but also their successors and assigns.

The easement's stated purpose was to "provid[e] to the County, its citizens, employees, guests, invitees, and licensees, a way of passage, on or by foot only, over and upon the Easement Parcels."

The easement also included an abandonment clause, which provided:

> Abandonment. These easements shall continue in effect for so long as the County or its successor or assign shall use the easements for their intended purpose as expressed herein . . . Should the County abandon the use of an easement granted herein for a continuous period of two (2) years or if the County should use or attempt to use an easement granted herein for a purpose not specified herein, all rights hereby grated shall cease and terminate and all of the County's interest in this Easement shall revert to St. Joe. Upon the happening of said abandonment or change in use, St. Joe shall obtain the County's consent that such abandonment has occurred or St. Joe may pursue appropriate legal action to address the abandonment or unauthorized use of the easement and request in such legal action that the easement be terminated. In the event St. Joe successfully proves in such legal action that the County has abandoned the easement for the period of two (2) years or used the easement for a purpose not specified herein, St. Joe shall be entitled to terminate the easement.

The easement further stated that it "fully meets the requirements of Resolution 99-79," a Walton County development order that incorporated the terms of the 1996 consent judgment.

In 2000, St. Joe established the WaterColor Community Association, a homeowner's association. WaterColor's governing declarations affirmed that the consent judgment was binding on the association and all owners. Shortly thereafter, St. Joe recorded a specific plat containing the easement.

In 2017, Walton County enacted an ordinance purporting to "recognize[] and protect[]" the "public's long-standing customary use of the dry sand areas of all of the beaches in the County for recreational purposes" and, more specifically, to "permit[]" members of the public to make the following "uses" of "the dry sand areas that are owned by private entities"; "traversing the beach; sitting on the sand, in a beach chair, or on a beach towel or blanket; using a beach umbrella that is seven (7) feet or less in diameter; sunbathing; picnicking; fishing; swimming or surfing off the beach; placement of surfing or fishing equipment; and building sand creations."

A Flock of Seagirls LLC and Valentines Heights LLC owned separate beachfront lots in the WaterColor community, each of which contained the 75-foot easement. A Flock of

Seagirls sued Walton County in federal district court in Florida, alleging that the ordinance triggered the easement's abandonment clause because it "attempt[ed] to use" the encumbered property for purposes other than a "way of passage, on or by foot only." Valentines filed a similar lawsuit, and the district court consolidated the two cases.

The district court granted summary judgment for the county. The district court acknowledged that by enacting the ordinance, the county had attempted to use the easement for an "expanded purpose." It emphasized, though, that Florida law required that Flock of Seagirls and Valentines show evidence of an intent to abandon, and reasoned that uses that expanded on, or were more comprehensive than, but were consistent with, the purpose of an easement did not evince such an intent.

Because, the district court reasoned, the ordinance contemplated uses that were consistent with (even if broader than) the easement's purpose, the plaintiffs failed to show an intent to abandon and thus had not demonstrated that the county had abandoned the easement.

In support of its holding, the district court also looked to other sources referenced in the easement, including the county's resolution and its incorporated consent judgment, which the district court said narrowed the scope of, and to a degree even invalidated, the abandonment clause.

A Flock of Seagirls and Valentines appealed to the Eleventh Circuit.

THE ELEVENTH CIRCUIT'S DECISION

The circuit court reversed, holding that the ordinance triggered the abandonment clause and that no other source of law—Florida common law, separate provisions in the easement, the county's resolution or the consent judgment—forestalled or limited the abandonment clause's operation.

In its decision, the Eleventh Circuit first examined whether the enactment of the ordinance triggered the terms of the abandonment clause.

The circuit court explained that the easement provided that the county would be deemed to have abandoned the easement if it "should use or attempt to use an easement granted herein for a purpose not specified [t]herein." The circuit court observed that the county's customary-use ordinance "undoubtedly" covered land that included the easement, and set forth the ways that the public could use that land. Accordingly, the circuit court said that it had no trouble concluding that the county's enactment of the ordinance constituted an "attempt to use" the easement—whether or not the county ever actually used the easement.

The Eleventh Circuit then analyzed whether the county's attempted use was "for a purpose not specified" in the easement. It noted that the easement named its purpose explicitly: to "provid[e] to the County, its citizens, employees, guests, invitees, and licensees, a way of passage, on or by foot only, over and upon the Easement Parcels." The circuit court found that certain uses contemplated by the ordinance—sunbathing, picnicking, fishing, swimming and surfing off the beach, placing surfing or fishing equipment and building sandcastles—"plainly entail[ed] purposes other than 'a way of passage.' "

The circuit court then pointed out that the ordinance purported to safeguard "[t]he public's long-standing customary use of the dry sand areas of all of the beaches in the County for *recreational purposes*." In the circuit court's opinion, a "way of passage" referred to a locomotive purpose, not a "recreational" purpose.

According to the circuit court, although pedestrian use of the county's easement for the purpose of "passage" might well entail incidental stopping and although some of the uses set forth in the ordinance—"sitting on the sand," for instance—might fall into this category, others—such as sunbathing, picnicking, fishing, swimming and surfing off the beach and building sandcastles—went "so far beyond incidental stopping" that they could not be deemed "reasonably necessary for the full enjoyment of the easement itself."

The Eleventh Circuit then concluded that the county ordinance constituted an "attempt to use" the easement for "a purpose not specified [t]herein" and that it triggered the terms of the easement's abandonment clause.

The circuit court also rejected the three separate sources of law that the county argued limited the easement's abandonment clause: (1) Florida common law; (2) separate provisions in the easement; and (3) the resolution and the consent judgment.

First, the circuit court disagreed with the county's contention that Florida common law enshrined the public's right to use the dry-sand areas of beaches for recreational purposes whether or not the dry-sand area was on an easement. According to the circuit court, the public's right to "full use of the beaches" was "not absolute or boundless." It reasoned that if Florida's customary-use doctrine ensured the public's unlimited right to use the dry-sand beach area at issue in this case, neither the easement nor the ordinance—both of which aimed (even if inconsistently) to confer usage rights on members of the public—would serve any meaningful purpose.

Next, the Eleventh Circuit said that it was not persuaded by the county's reliance on two provisions in the easement that referred to it as "perpetual"—Paragraph 2, which referred to the county's "perpetual easements and rights-of-way," and Paragraph 3(c), which referred to the "perpetual rights herein granted to the County."

The Eleventh Circuit explained that a "perpetual" easement was merely one that did not expire of its own force—not one that could not be abandoned. Put differently, the circuit court explained that an easement may be "perpetual" or set forth "perpetual rights" and yet also specify "a condition under which the easement will end." It then ruled that the easement at issue in this case contained just such a condition: an "attempt to use" the easement for a purpose not "specified." Accordingly, the circuit court held that the county's reliance on Paragraphs 2 and 3(c) to undermine the abandonment clause's operation was "misplaced."

Finally, the Eleventh Circuit also dismissed the county's argument that it should consider the resolution and the consent judgment, which, respectively, employed the phrases "permanent public pedestrian access" and "permanent public access," as evidence to interpret the easement's terms. The circuit court decided that the "passing references" to "permanent . . . access" in the resolution and

the consent judgment carried the same meaning as "permanent easement." It reiterated that, in the context of easements, "perpetual" and "permanent" specified easements of only potentially unlimited duration and often contained "a condition under which the easement will end." Here, the circuit court concluded, the abandonment clause set forth such a condition.

In summary, the Eleventh Circuit held (1) that the county's ordinance triggered the terms of the easement's abandonment clause, and (2) that neither Florida common law, separate provisions in the easement itself, nor the resolution or consent judgment forestalled or limited the abandonment clause's operation.

The case is *A Flock of Seagirls LLC v. Walton County Florida*, 7 F.4th 1072 (11th Cir. 2021).

New York Appellate Court Finds That Plaintiff Did Not Have Easement By Implication

The Appellate Division, Second Department, has reversed a New York trial court's decision and ruled that the plaintiff did not have an easement by implication over certain property owned by the defendant.

THE CASE

The plaintiff in this case, John Bonadio, owned property ("Lot A") that was situated perpendicular to property owned by his sister-in-law, Elizabeth Bonadio ("Lot B"); the two properties shared a border.

Lot A had a detached two-car garage, the entrance to which faced a driveway situated on Lot B. The plaintiff's father acquired title to both lots in 1953 and used the driveway on Lot B to access the garage on Lot A.

In 1962, the plaintiff's father conveyed title to Lot B to himself and his wife, the plaintiff's mother. Thereafter, in 1985, the plaintiff's father similarly conveyed title to Lot A to himself and the plaintiff's mother.

After the plaintiff's father passed away in 1997, the plaintiff's mother became the sole owner of both lots.

In 2007, the plaintiff's mother conveyed Lot B to the defendant. In 2008, the plaintiff's mother conveyed Lot A to the plaintiff, retaining a life estate for herself. The plaintiff's mother died in 2016.

In 2016, the defendant, intending to sell Lot B, sought to erect a fence on the border of Lot B to prevent the plaintiff, or his tenants, from using the driveway on Lot B to access the garage on Lot A.

The plaintiff subsequently filed a lawsuit seeking a judgment declaring that he had an easement by implication over the driveway on Lot B to allow him to access the garage on Lot A.

The plaintiff moved for summary judgment on his claim for a judgment declaring that there was an easement by implication over Lot B in favor of Lot A, and on his claim for a permanent injunction preventing the defendant from obstructing access to the easement.

The Supreme Court, Queens County, granted summary judgment in favor of the plaintiff, and the defendant appealed.

THE APPELLATE COURT'S DECISION

The Second Department reversed.

In its decision, the Second Department explained that an easement may be implied from pre-existing use upon severance of title when three elements are shown:

- Unity and subsequent separation of title;
- The claimed easement must have, prior to separation, been so long continued and obvious or manifest as to show that it was meant to be permanent; and
- The use must be necessary to the beneficial enjoyment of the land retained.

The appellate court added that, stated another way, "an implied easement will arise upon severance of ownership when, during the unity of title, an apparently permanent and obvious servitude was imposed on one part of an estate in favor of another part, which servitude at the time of severance is in use and is reasonably necessary for the fair enjoyment of the other part of the estate." Moreover, the appellate court observed, an implied easement must be "a reasonable necessity, rather than a mere convenience."

In this case, the Second Department decided that the trial court erred in ruling in favor of the plaintiff because the plaintiff did not establish that the use of the driveway on Lot B was a "reasonable necessity" to the beneficial use of the land and not a mere convenience. The appellate court pointed out that Lot A was a not landlocked and that the plaintiff could access Lot A without using the driveway on Lot B. The appellate court added that, as the plaintiff testified, the home situated on Lot A was rented to one set of tenants, and the parking spaces in the garage were rented to another set of tenants. Because access to off-street parking was "a mere convenience," the plaintiff could not establish that the easement was a reasonable necessity, the appellate court ruled.

Therefore, the Second Department concluded, the plaintiff had no easement by implication based on the preexisting use over the defendant's driveway.

The case is *Bonadio v. Bonadio*, 200 A.D.3d 747, 159 N.Y.S.3d 99 (2d Dep't 2021).