Money, Dirt and Steel: Fall 2016 Newsletter

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Statute of Limitations for Encroachment on an Easement

Injury to easement versus removal of encroachment distinguished

By: Gilbert "Gib" C. Laite, III

In our 2014-2015 Update we reported on the decision issued by the North Carolina Court of Appeals in *Duke Energy, LLC v. Gray*, 766 S.E.2d 354 (N.C. Ct. App. Dec. 2, 2014) where it was held that an action by Duke Power to remove an encroachment from its power line easement was subject to the six year statute of limitations applicable to claims for injuries to incorporeal hereditaments, N.C. Gen. Stat. § 1-50(a)(3). We offered in our Update that the decision was contrary to the generally understood rule that the twenty year statute applicable to adverse possession or prescription should apply. The Supreme Court agrees and, on August 19, 2016, issued its decision reversing the Court of Appeals and holding the twenty year statute of limitations to apply. *Duke Energy, LLC v. Gray,* No. 108PA14-2 (N.C. S. Ct. August 19, 2016).

The facts of the case were simple. Duke Power owned a power line easement. Defendant built a house on his lot adjacent to the easement which encroached into the easement. Duke filed an action to eject the homeowner from the easement. The defendant asserted that the ejectment action was time-barred by the six (6) year limitation period applicable to injuries to incorporeal hereditaments set forth in North Carolina General Statutes 1-50(a)(3). Duke responded that this statute was not applicable and argued that the twenty (20) year statute for adverse possession found in N. C. Gen. Stat. §1-40 would apply. The trial court found the easement was not real property but an incorporeal hereditament, and, therefore, the 6 year statute applied to bar the claim. The Court of Appeal affirmed In reversing the lower court, the Supreme Court began its analysis by defining incorporeal hereditaments as intangible rights in the law "such as an easement" but then went on to explain that an easement is also an interest in land and therefore also "real property." The Supreme Court then found that Duke did not seek "damages" for injury to the easement but recovery of the real property itself. For these reasons, it found N.C. Gen. Stat. §1-40 to apply and not N.C. Gen. Stat. §1-50(a)(3).

The takeaway from the Supreme Court's decision is simply that, for an action to recover real property, even if the real property right can also be classified as in incorporeal hereditament, the statute of limitations period is twenty years, and that only actions for damages to an incorporeal hereditament are subject to the six year statute.

Condemnation-Eminent Domain

Procedural snafu prevents NCDOT from offering evidence of lower value than deposit

In *Department of Transportation v. Ashcroft Development, LLC*, No. COA 15-1080 (June 7, 2016), DOT filed its condemnation action, and the landowner obtained an order disbursing the deposit as a credit against just compensation without prejudice to further proceedings to determine just compensation. The landowner then filed its answer seeking a determination of just compensation and trial by jury. Subsequently, the landowner filed a Rule 41 Dismissal abandoning its claims for additional compensation. DOT then filed a motion under section 108 to determine whether the closure of a certain access point was a compensable taking. The landowner responded with a motion for judgment on the pleadings, contending that the matter was at an end and that DOT could not try to modify the taking or the damage awarded. The trial court agreed, and our Court of Appeals affirmed. The Court found that, once the landowner filed its dismissal, it abandoned any claim for additional compensation, and the withdrawal of the deposit ended the matter.

Brokerage

Bad faith termination of listing agreement

From time to time sellers become discouraged with their broker's efforts to sell their property and, when they believe they have found a buyer on their own, seek to terminate the listing agreement early. The problem is that a listing agreement is like any other contract, and certain rules of fair play apply. In *Blondell v. Ahmed, No.* COA15-796 (May 17, 2016), our Court of Appeals made clear that good faith applies to the termination of a listing agreement. There, the Owners and Broker entered into an exclusive right to sell listing agreement. Soon thereafter, a Buyer was presented through the Broker, but negotiations for a contract of sale failed. Soon thereafter, the Owners advised the Broker that they wanted to terminate the listing. The Broker prepared a termination form and sent it to the Owners unsigned for their review and signature. The Owners signed it and returned it to the Broker. Sometime thereafter the Buyer and Owners met again without the Broker's knowledge and worked out a tentative purchase agreement resulting in the Buyer presenting a direct written offer to the Owners. With this written offer in hand, but prior to signing it, the Owners inquired of the Broker as to the status of the termination agreement. The Owners did not advise the Broker of the written offer they had in hand. The Broker then signed the termination agreement, and the next day the Owners went under contract with the Buyer. The transaction closed, and the Broker sued for its commission. The trial court granted summary judgment for the Owners based on the termination agreement. The Court of Appeals reversed, finding the listing agreement was not terminated until signed by both parties and that it was a jury issue whether the failure to disclose the in-hand offer prior to the Broker's signing was a breach of the implied duty of good faith by the Owners when the Owners called to inquire about the status of the termination.

Valuation Testimony

Appraisal License Not Required

When one thinks of valuing real property, one naturally thinks of a real estate appraiser. The North Carolina Appraiser Act, N.C. Gen Stat. §93E-1-1 *et. seq*., provides that it is "unlawful" for any person in this State to act as a real estate appraiser or engage in the business or real estate appraisal without first obtaining a registration, license or certification from the North Carolina Appraisal Board. N.C. Gen. Stat. § 93E-1-21. The statute, however, exempts or carves out an exception for witnesses who qualify as experts and are otherwise qualified. N.C. Gen. Stat. 93E-1-3 (f)(3). The courts have made clear that, to be an expert, ?the witness need not be a specialist or have a license from an examining board.? see, *Cochran v. City of Charlotte*, 53 N.C. App 390, 281 S.E.2d 179 (1981). Just recently, the Court of Appeals made this clear for property tax cases *In the Matter of the Appeal of: Old North State Acquisition, LLC*, No. COA15-769 (August 16, 2016). There, the taxpayer appealed the Montgomery County Board of Equalization and Review's valuation of its golf course property. The taxpayer's sole witness was its CEO, an owner and operator of golf courses. He was tendered as an expert in the acquisition and management of golf courses and was allowed to present considerable evidence about the value of the property. After presentation of the taxpayer's case, the Board dismissed the appeal finding that the taxpayer had failed to rebut the presumption of correctness afforded ad valorem tax assessments because the CEO was not a licensed real estate appraiser and therefore, his testimony was not competent. The Court of Appeals found this in error and reversed stating, "Although evidence from a licensed real estate appraiser is surely sufficient, and perhaps the best practice, there is no such

requirement." The Court of Appeals reversed solely on this basis, although gratuitously stating that the CEO could also be found competent as an owner to testify as to the value of his property under the long-standing rule that property owners may testify as to the fair market of their property without being qualified as expert witnesses.

Tax Lien Priority

Federal procedural requirements pre-empt state law

Henkel v. Triangle Homes, Inc., COA15-1123 (20 September 2016), involved a lot in Avery County. In 2008, the Lynches took title to the lot. Thereafter the lot became subject to two federal tax liens and one municipal tax lien. The federal tax liens were recorded in 2011 and 2012. In February of 2013m the Village of Sugar Mountain filed suit to foreclose a $2,500 municipal tax lien. Contrary to the requirements of 26 U.S.C. §7425(a), the IRS was not notified of this action. The Village's action resulted in a default judgment on November 13, 2013 and the judicial sale of the property to the Village as the highest bidder. The day after the Village's tax sale, the federal tax liens were foreclosed with a resulting sale to the plaintiff.

Aware of the Village's proceedings the plaintiff obtained an assignment of the Village's rights under its successful bid. All would have been well and good except that the soon-to-be defendant filed an upset bid and ultimately ended up with a commissioner's deed to the Lot from the resulting resale.

The plaintiff, after the statutory waiting period expired, ended up with a deed from the IRS to the Lot.

Plaintiff filed suit against defendant claiming superior title to the Lot. On cross-motions for summary judgment the trial court entered judgment for the plaintiff finding he held superior title under the federal tax lien foreclosure. Defendant appealed asserting that, under the "pure race" statutes in North Carolina, his deed from the municipal sale was prior in time to the federal tax deed so he should prevail. The Court of Appeals disagreed and affirmed.

The Court of Appeals explained that generally, a municipal tax lien is superior to a federal tax lien and foreclosure of a senior lien extinguishes junior liens. However, certain procedures must be followed to assure this result. Among them is 26 U.S.C. §7425(9a), requiring that a senior lien holder foreclosing on property subject to a federal tax lien must provide the United States with notice of the foreclosure sale. This federal requirement preempts state law. Since no notice was given, the federal liens survived the foreclosure of the municipal lien and resulting deed, and North Carolina's race statute did not apply. Defendant, after receiving his quitclaim deed to the Lot, did have a right to redeem the federal tax lien for 180 days but failed to do so. The plaintiff held superior title.

HOA's - Planned Community Act

By: Gilbert "Gib" C. Laite, III & Wyatt M. Booth

The Planned Community Act (the ?PCA?) was enacted in 1999, and its applicability to developments that pre-date its passage is a frequent issue in our communities and courts. The most recent case is *Kimler v. The Crossings at Sugar Hill Property Owner's Association, Inc*

., 2016 WL 4087607 August 2, 2016 COA15-1301.

The Crossings at Sugar Hill is a residential subdivision developed in the 1990's by Mountain Creek Land Company. The Declaration for the subdivision, which was recorded in 1996, provided that purchasers from the developer of multiple adjoining lots would only be required to pay dues on one lot so long as any exempt lot was not resold or occupied by a dwelling unit. Notwithstanding this rather specific exemption, for some 15 years the homeowner's association ("HOA") billed *all* multiple lot owners for a single lot. When it realized its apparent error, the HOA changed its practice to be consistent with the Declaration's terms, and some of the multiple lot owners objected. The HOA then amended the Declaration, with a 71% approval vote of the lot owners, to clarify that it could bill all multiple lot owners who had not purchased directly from the developer on a per lot basis. In making the amendment, the owners relied on the PCA which provides that a declaration can be amended by a 67% vote of the owners. The problem with this theory was that the PCA was not enacted until 1999, three years after the recording of the Declaration. Nonetheless, the trial court upheld the amendment, and the Court of Appeals affirmed.

Generally, the PCA only applies to planned communities created after 1999. However, the Legislature did provide that certain provision of the PCA would be retroactive and would apply to all communities regardless of the date of creation. Two of these provisions were in play in this case: § 47F-2-103, which provides in part that the declaration is enforceable in accordance with its terms; and § 47F-2-117, which provides that a declaration may be amended by 67% of the votes in the association.

Based on these provisions, the Court of Appeals found the subject declaration could be amended by a 67% vote under the PCA because the Declaration did not expressly prohibit such an amendment. The Court further found that the proposed amendment was also reasonable in that it appeared to merely clarify the original express intent of the Declaration. On its face, this appears to be a fair result as the Court is enabling the original intent of the developer for this community. While some owners will now pay additional assessments for owning multiple lots, this new burden seems to be within the boundaries of their contractual rights under the Declaration.

What is most problematic and troubling about this decision, however, is the potential impact on developers in North Carolina. Most significantly, in its opinion the Court goes ?off-road? into areas of the law that were not at issue in the case. § 47F-1-102(d) states that an association may, by 67% vote, make the PCA applicable to its community; this provision of the PCA was in no way raised by the parties in the case. Nevertheless, the Court ruled that, if an association had adopted the PCA pursuant to § 47F-1-102(d), the declaration amendment provisions of § 47F-2-117 would then apply to the association. The Court continues further in its dicta, in Footnote 4 of the opinion, to state that, even if the original declaration expressly prohibits amendment by the association, the association could set the restriction aside by a mere 67% vote.

What is the potential impact on developers? At its essence, for developers engaged in long-term development of planned communities, the opinion gives associations an avenue to dramatically alter the development scheme and potentially end developer control altogether. The opinion ignores the potential impact on constitutionally protected property rights. We believe the decision to be in error and

are hopeful that it will be corrected on further appeal to the Supreme Court.

State Supreme Court Will Not Review Historic Commission?s Approval of a Modernist Design House

By: Ronald R. Rogers

The legal saga of Louis Cherry and Marsha Gordon?s construction of a modernist-style house in Raleigh?s Historic Oakwood District recently ended on a quiet note.

On August 18, 2016 the North Carolina Supreme Court decided it would not review the North Carolina Court of Appeals? decision that sided with Mr. Cherry and Ms. Gordon?s modernist design. As a result of the Supreme Court?s action, the Court of Appeals? opinion stands as the final decision.

The legal controversy, spearheaded by an objecting neighbor, attracted national media attention. Most news stories emphasized that the new modernist house would be torn down if the neighbor?s litigation prevailed. These stories also focused on the fact that house construction only commenced after the local historic district commission had approved the modernist design. Few news accounts noted the neighbor had filed a timely appeal of the historic commission?s decision. Stated another way, the homeowners, Mr. Cherry and Ms. Gordon, proceeded at their own risk by moving ahead with construction before all appeals periods had expired. (For purposes of this article, we will refer to Mr. Cherry and Ms. Gordon as the ?homeowners,? as construction of their house was either underway or completed during most of the court proceedings.)

In all, four decisions were rendered during the course of the legal dispute. As mentioned above, the homeowners won the first round by obtaining the Historic District Commission?s order approving the homeowners? modernist design. The neighbor?s timely appeal of the Commission?s order moved the litigants to the next forum, the Raleigh Board of Adjustment (the ?Board?). The Board ruled against the homeowners. However, the homeowners quickly asked the trial court to overturn the Board. The trial court judge obliged.

As is customary in reviews of Board matters, the trial court judge acted as an appellate court. In other words, the trial court judge essentially limited her review to testimony and documents that had been presented at the Board hearing. Based on the Board?s records, the homeowners persuaded the trial court judge that the objecting neighbor lacked ?standing? to pursue the litigation against them. ?Standing? is a legal concept that narrows the pool of people who can appeal an adverse decision. Specifically, standing is limited to persons who will sustain special damages from the Board?s action, distinct from the rest of the community. The trial court held the neighbor?s reliance on the proximity of her house to the modernist-style home ? she lived directly across the street ? was misplaced. The Court of Appeals agreed with the trial court judge?s standing analysis. *Cherry v Wiesner*, COA15-155 (2016).

The Historic Oakwood District litigation is a good illustration of neighbors? tendency to focus on their objections to the proposed use of the property that is the subject of the land use case. As a result of

this decision, objecting neighbors will likely also present testimony at Board hearings to demonstrate that they will suffer special damages if the proposed land use is approved. Whether neighbors in future land use cases will be able to meet this legal burden remains to be seen.

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