Money, Dirt and Steel: Year End 2016

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COPIES AND AFFIDAVITS ADMISSIBLE IN POWER OF SALE FORECLOSURE PROCEEDINGS

By: Gilbert C. "Gib" Laite, III

In the Matter of Foreclosure by Rogers Townsend & Thomas, __ N.C. App. ___, COA15-581 (April 15, 2016), was a Non-judicial foreclosure action commenced by the substitute trustee with the Bank alleged as the holder of the note by virtue of its acting as the trustee of a mortgage-backed trust. The Clerk dismissed the proceeding, and the Bank appealed *de novo* to the Superior Court, which, after hearing, also dismissed the proceeding. Apparently the Clerk and the Superior Court refused to allow copies of certain documents to be admitted into evidence and rejected affidavits that would have established the Bank's standing as the holder to proceed. On further appeal, the Court of Appeals reversed, concluding that the Bank satisfied its burden of proof through copies and affidavits which should have been admitted.

RULE APPLICABLE TO UNREASONABLE RESTRAINT ON ALIENATION APPLIES EQUALLY TO GRANTORS

By: Gilbert C. "Gib" Laite, III

In Davis v. Davis, ___ N.C. App. ___ COA16-400 (Nov. 1, 2016), Mr. & Mrs. Davis owned certain property which they rented from time to time for vacation rentals to earn extra income. They transferred a remainder interest in the property to their three children, reserving a life estate. The specific language reserving the life estate read:

said life estate to be personal to the use of the Grantors, or the survivor therefor, and may not be utilized by any other person, nor may it be reduced to cash value for the benefit of the Grantors, or the survivor thereof, but must remain always during the lifetime of said Grantor, or the survivor therefor, available for their individual and personal use without interference from either the remaindermen or any other person.

Mr. Davis died, and the children sent a letter to their mother advising her that the deed required that the property remain available for [her] personal use and [could] not be used to provide income to [her]. Mrs. Davis then proceeded to enter into a rental agreement with a real estate company to allow vacation rentals - just as she and her husband had done in prior years. The children filed suit for a declaratory judgment and to enjoin their mother's renting of the property. Summary judgment was entered for Mrs. Davis, and the plaintiffs appealed.

The Court of Appeals affirmed the decision in favor of Mrs. Davis holding that the deed language created an unreasonable restraint on the alienation of the life estate and was therefore void. The Court of Appeals explained that courts generally uphold any reasonable restraint on alienation except unlimited restraints, which are *per se* unreasonable. The Court rejected the argument that the rule against unreasonable restraints does not apply to the grantor who created the estate.

NOTICE OF SATISFACTION MAY BE RESCINDED FOR ERROR OR MISTAKE OF ANY KIND

By: Ronald R. Rogers

In Wells Fargo Bank N.A. v. American National Bank And Trust Company, __ N.C. App. __ COA15-689 (Nov. 1, 2016) homeowners obtained a HELOC from American National Bank which was junior to the existing deed of trust for their home loan. The homeowners then refinanced their original home loan with a new loan from Wells Fargo (the "First Refinancing"). After recording its deed of trust for the First Refinancing, Wells Fargo entered into a subordination agreement with American National moving the deed of trust securing the First Refinancing into first lien position. The homeowners then refinanced again with Wells Fargo in 2006 (the “Second Refinancing”) and executed a new note and deed of trust, neither of which referenced the documents relating to the First Refinancing. A portion of the Second Refinancing paid off the First Refinancing. No new subordination agreement was obtained from American National. Wells Fargo then recorded a certificate of satisfaction for the First Refinancing. The effect of recording the satisfaction was to move American National’s HELOC into first position. Wells Fargo then recorded a rescission of the satisfaction and filed suit to rescind the certificate of satisfaction and reinstate the First Refinancing's deed of trust to secure the Second Refinancing. American National opposed the action. Summary judgment was entered for Wells Fargo and American National appealed.

The Court of Appeal’s decision focused on the wording of North Carolina General Statutes § 45-36.6(b), the statute which authorizes the lender’s filing of a rescission of its previously recorded notice of satisfaction when the deed of trust was "erroneously satisfied." Wells Fargo argued the statute applies if there was an error or mistake of any kind. American National asserted the statute only applies if the lender erroneously believed the borrower’s debt had been paid off when in fact it had not been. The Court of Appeals accepted Wells Fargo's interpretation and held that "an instrument 'erroneously satisfied of record' under N.C. Gen. Stat. §45-36.6(b) is one for which the certificate of satisfaction was erroneously or mistakenly filed for any reason, even a unilateral mistake having nothing to do with whether the underlying obligation actually was fully paid off."

Although the Court of Appeals sided with Wells Fargo’s statutory interpretation, the Court held Wells Fargo was not entitled to summary judgment. Citing evidence submitted by each of the parties, the Court concluded a question of fact existed – namely, whether Wells Fargo intended to secure the Second Refinancing with the deed of trust recorded for the First Refinancing. A jury trial, in other words, is required to determine whether Wells Fargo’s cancellation was indeed a mistake.

TOWN WITHOUT AUTHORITY TO IMPOSE IMPACT FEES FOR FUTURE USE ABSENT SPECIFIC LEGISLATIVE GRANT OF POWER

By: Wyatt M. Booth

In 2003, the Town of Carthage enacted a water and sewer "impact fee" ordinance requiring developers who subdivide property to pay fees upon final plat approval per the Town's schedule. If the fees are not paid, building permits will not be issued. On the face of the Carthage ordinance, the impact fees were used to defray the costs of future expansion of the water and sewer systems. Many Towns in North Carolina had relied on a 1988 federal district court case, South Shell Investment v. Town of Wrightsville Beach, 703 F. Supp. 1192 (1988), for their implied authority to charge these forward looking impact fees.

Quality Homes challenged the ordinance as beyond the scope of the Town's authority and sought a return of all fees paid. The Town asserted that the fees were authorized by North Carolina's Public Enterprise Statute. The trial court granted summary judgment for the Town, and the Court of Appeals affirmed. The Supreme Court accepted the case for discretionary review.

The Supreme Court began its analysis by explaining that the General Assembly delegates express powers to municipalities through enabling statutes, and that acts of a Town beyond the scope of the enabling statutes are invalid. After reviewing the Public Enterprises Statutes, the Court found that those statutes did authorize the Town to charge for the "contemporaneous" use of its water and sewer systems, but that the plain language clearly failed to empower the Town to impose impact fees for "future" services. The ordinances in issue plainly pointed to payment for future services and contemplated "expanding" the systems, including the plant and storage expansion. The fees were not assessed at the time of actual use but payable on plat approval and before any improvements were made. The Court stated that municipalities routinely obtain enabling legislation to impose impact fees, but that the Town of Carthage had not done so. Further, the Court found that Carthage still had the power to impose large tap-on fees and impose rates sufficient to meet its expansion needs. Quality Built homes Incorporated v. Town of Carthage, __ N.C. __ 315PA15 (August 19, 2016).

The Court of Appeals has recently taken the case up on remand. In an unpublished opinion issued on December 30, 2016, the Court of Appeals decided that the ten (10) year catchall statute of limitation (N.C.G.S § 1-56) applied to this action, rather than the three (3) year statute (N.C.G.S. § 1-52(2)) that the Town sought to apply. The Court further determined that the question of whether the Town might owe legal fees under N.C.G.S. § 6-21.7 should be determined by the trial court, applying an abuse of discretion standard, and remanded the case to Moore County for additional findings.

DEED FROM PUBLIC ENTITY WITH PUBLIC PURPOSE CLAUSE DOES NOT CREATE REVERSIONARY INTEREST IN PUBLIC ENTITY, ABSENT EXPRESS FORFEITURE CLAUSE OR RIGHT OF REENTRY

By: Gilbert C. "Gib" Laite, III

In 1948 the Town of Belhaven recorded a deed to the Pungo District Hospital Corporation ("PDHC") for a 100 foot strip of land. Among other provisions, the deed included the following language or purpose:

WITNESSETH: That the party of the first part, in consideration of the benefits to be derived by the citizens of the Town of Belhaven from the construction and operation of a hospital on the property hereinafter described and pursuant to the authority granted by chapter 659 of the Session Laws of 1947, has given, granted, bargain, sold and does hereby conveyed [*sic*] unto the part of the second part that

certain lot or parcel of land

[the "Purpose Clause"]. The deed also included a standard Habendum Clause:

TO HAVE AND TO HOLD the said piece or parcel of land, together with all and singular, the rights, ways, privileges and appurtenances thereto belongs [*sic*] or in anywise appertaining unto the party of the second part, its successors and assigns in fee simple, in as full and ample manner as the party of the first part is authorize [*sic*] and empowered to convey the same.

After the deed was recorded, PDHC constructed a hospital on the land and operated the same until 2011. In 2001, PDHC transferred control of the hospital to Vident Health, Inc. ("Vident"). Shortly thereafter, Vident announced its intent to close the hospital. Based on public objections to the closure from the Town of Belhaven and the NAACP, Vident entered into an agreement charging Belhaven with creating the Pungo District Hospital Community Board to assume responsibility for the hospital, otherwise it would be closed. When Belhaven failed to comply with the terms, Vident closed the hospital and deeded the associated real estate, including the land set forth in the 1948 deed, to Pantego Creek, LLC. The Town and the NAACP then filed suit alleging several claims, including breach of contract, breach of the 1948 deed's terms, fraud, unfair and deceptive acts or practice and section 99D-1. Defendants' motion to dismiss was granted, and the Court of Appeals affirmed.

As an initial matter, the plaintiffs asserted that the Defendants were successors-in-interest to the 1948 deed which created a reversionary interest in the Town of Belhaven, and that, because under the North Carolina Constitution taxes must be levied for public purposes, the land in the deed could never be used for anything other than a hospital because it was conveyed by the public entity of the Town. The Court rejected this position finding that there was no language in the deed creating a reversionary interest in favor of Belhaven. To the contrary, the Court found that the deed clearly stated that the land was conveyed in fee simple absolute. As to the Purpose Clause in the deed, the Court explained that the "mere expression of the purpose for which the property is to be used without provision for forfeiture or re-entry is insufficient to create an estate on condition and that, in such case, an unqualified fee will pass." The Court was satisfied that the language in the deed was a mere expression of purpose. The Court rejected any implied reversionary interest simply because the granting party was a governmental entity that had a public purpose in mind at the time of the conveyance. The Court also relied on the recording acts that would bar any unrecorded interest after 30 years. The remaining aspects of the case are not relevant for purpose of this newsletter. Town of Belhaven, Inc. v. Pantego Creek, LLC, __ N.C. App.___ No. COA16-373 (Nov. 15, 2016).

ENTITY'S CORPORATE AUTHORTY TO SUE MAY BE RAISED BY COURT ON ITS OWN MOTION

By: Gilbert C. "Gib" Laite, III

In Willowmere Community Association, Inc. v. City of Charlotte, __ N.C. App. ___, No. COA15-977 (Nov. 1, 2016), the Charlotte-Mecklenburg Housing Partnership ("CMHP") rezoned 7.23 acres of land abutting the residential subdivisions of Willowmere and Nottingham. The Willowmere and Nottingham homeowners' associations ("HOAs") then filed suit challenging the rezonings. The Superior Court judge on his own motion raised the issue of the plaintiffs' standing to sue and, after hearing, entered summary judgment for the City finding the HOAs lacked standing to bring the suits because they failed to show the requirements in their respective bylaws had been satisfied to authorize their Boards and officers to initiate the action. The Court of Appeals affirmed.

The facts were that the Willowmere board made the decision to sue without a formal meeting, simply using an email chain of the consent of the directors. The bylaws allowed action to be taken without a

meeting if a consent in writing was signed by all the directors and thereafter notice of the action was posted within three days. The Court found that, although the non-profit corporation act in section 55A-1-70 allows an HOA to adopt bylaws whereby it can conduct transactions by electronic means, Willowmere had not done so. Further, the court found the emails were not in the record before it, but, even if they were, there was no evidence of the posting of the decision. Therefore, the suit was not authorized.

As to Nottingham, there was only a series of telephone calls by the President with Board members, no quorum and no writings. This failed to satisfy the bylaw's requirements for action without a meeting. Nottingham's assertion that it was not required to hold an actual meeting and that North Carolina General Statutes section 55A-8-20 allowed telephone conferences to suffice for meetings was rejected based on the bylaw requirement that any meeting needed to be noticed in advance to the members and open to the members and for minutes to be kept. Therefore, the suit was not authorized.

The take away from this case is that, for HOA's, or any other "entity" for that matter, before a suit is filed, they had better check their internal documents as well as applicable law, to be certain they are, in fact, authorized to proceed with the action. Further, it is a wake-up call for all entities and associations to be certain that their business practices match up with their internal documents.

COURT OF APPEALS RAISES ISSUES FOR EASEMENTS IMPLIED BY PRIOR USE OR NECCESSITY

By: Gilbert C. "Gib" Laite, III

There are a good many published opinions regarding easements implied by prior use and those created by necessity. In order to prove a right to an easement by prior use, a claimant must show: (1) common ownership of the dominant and servient parcels of land and a subsequent transfer of one of the parcels separating that ownership, (2) before the transfer, the owner used part of the tract for the benefit of the other part, and this use was “apparent, continuous and permanent,” and (3) the claimed easement is “necessary” to the use and enjoyment of the plaintiff’s land. Packard v. Smart Et Ux, 224 N.C. 480, 484, 31 S.E.2d 517, 519 (1944); Barbour v. Pate, ___ N.C. App. ___, 748 S.E. 2d 14, 17 (2013). To prove a right to an easement by necessity, the claimant must show (1) common ownership of the dominant and servient parcels and a subsequent transfer of one of the parcels separating that ownership, and (2) when the common owner sold or transferred a part of the land, it then became necessary for the purchaser to use a part of the retained land in order to have beneficial use of the land purchased or acquired. Cieszko v. Clark, 92 N.C. App 290, 374 S.E.2d 456 (1988). The difference between the two types of easement is that the easement implied by prior use specifically requires a use in existence at the time of severance of title that needs to continue after the severance of title, whereas the easement by necessity requires necessity from the severance of title alone without prior use. A critical element for both easements is that the “[T]he easement must arise, if at all, at the time of the conveyance from common ownership”. Broyhill v. Coppage, 79 N.C. App 221, 226, 339 S.E.2d 32, 37 (1986), citing Smith v. Moore, 254 N.C. 186, 118 S.E.2d 436 (1961)(easements by necessity); Woodring v. Swieter, 180 N.C. App 362, at 374, 637 S.E.2d 269, at 279 (2006); *see*, Cash v. Carver, 62 N.C. App. 257, 302 S.E.2d 819 (1983); The Law of Easements §4:21 p. 4-80 (“[A]ll ingredients for an implied easement must exist at the moment of severance.”).

The recent case of Adelman v. Gant, __N.C. App. __ COA16-339 (Dec. 30 2016) involved a driveway dispute between two lot owners in Charlotte. In 1978, a common owner, the Blairs, held title to both of lots 1 and 18, which were adjoining lots. In 1978 the Blairs sold lot 1 to the defendant and lot 18 to the defendant’s mother. At the time of severance of the title by the Blairs, there was a driveway between the properties, and it was used by the owner of Lot 18 after the severance of title from the Blairs. There was also a chain link fence located on the grass line along the driveway. As the result of a survey in

1989 performed by the defendant - still the owner of lot 1 - it was discovered that the driveway for Lot 18 encroached some 2 feet onto his lot 1. However, nothing appears to have been done about it at that time. In 2008 Lot 18 was sold to Mr. Adelman. Based on his physical observation of the property, Mr. Adelman believed the driveway was entirely on Lot 18 for his use and enjoyment. Later, an issue arose between Mr. Adelaman as the new owner of Lot 18 and the defendant as the owner of lot 1 concerning certain new fence posts located at the rear of the two lots. This led to a new survey which confirmed the 1989 survey showing that the driveway for Lot 18 encroached 2 feet onto Lot 1. Defendant then undertook to relocate the chain link fence to be on the property line - essentially taking back the 2 feet of driveway encroachment. Mr. Adelman filed suit asserting nuisance, an easement by prescription, an easement by prior use and an easement by necessity. The trial court, the District Court, held that Mr. Adelman had an easement for the driveway based on the theories of prior use and necessity. Defendant appealed.

The Court of Appeals affirmed the trial court. In affirming the finding of an easement by prior use, the Court recited the factual findings that existed at the time the plaintiff purchased Lot 18 in 2008 and stated that "the evidence at trial demonstrated that plaintiff reasonably believe[d] the entire concrete driveway would continue to serve in the manner as it had been for the past forty years" and that the evidence established that the driveway "is reasonably necessary to plaintiff's enjoyment and use of his land," citing several current day facts. In affirming the finding of an easement by necessity, the Court referred to the sole use of the driveway by plaintiff's predecessor-in–title, implying plaintiff's reasonable belief that he had a right of continued use and to the impact of a restriction on the use of the driveway on plaintiff's current use of his property.

The Court's analysis on both easement theories is flawed due to the focus on the plaintiff's current use and the events at the time of the plaintiff's acquisition of title in 2008, as opposed to being focused on the events at the time of the severance of the common title of the two lots in 1978. The Court's analysis is more appropriate to a prescriptive easement analysis than an easement by prior use or necessity analysis. The decision places too much emphasis on the plaintiff's expectations as the purchaser of Lot 18 in 2008, with the consequences being imposed upon the adjoining landowner who was not the plaintiff's grantor. Both owners derived their title from the common source that severed the title in 1978, and the facts in existence at that time, subject to which they both took title, should have been the focus for the creation of an easement by prior use or necessity.

CONTRACT, DECLARATION AND DEED READ TOGETHER CAN CONSTITUTE "COLOR OF TITLE" FOR PRESCRIPTION PURPOSES IN CONDOMINIUM CONTEXT

By: Gilbert C. "Gib" Laite, III

Larsen v. The Arlington Condominium Owners Association, Inc., __ N.C. App. __, COA16-618 (Dec. 30. 2016), addressed what constitutes color of title in the context of parking spaces in a condominium complex. There, the plaintiff contracted with Arlington Residential Holdings, LLC to purchase a condominium unit on the eighteenth floor of the condominium.[1] The contract expressly stated that the "Buyer shall be entitled to 2 parking space(s) to be selected in accordance with Section 3 below." Section 3 of the contract provided that the "Buyer shall be allocated either one (1) or two (2) parking spaces as set forth in the Declaration of Condominium for the Arlington Condominium." The Declaration in Article II, section 4 provided that every owner on the fifth through eighteenth floor shall have the use of one parking space, and every owner on the nineteenth through twenty second floor shall have two (2). However, Article VII Section 7 allowed the declarant to sell additional spaces to an owner. The deed was by general description only:[2]

Being all of Condominium Unit 1804 of Arlington Condominiums, as described and designated in the

Declaration of Condominium under the North Carolina Unit Ownership Act covering Arlington Condominiums as described and filed in Book 14743 at page 56 as supplemented and amended, and the Unit Ownership file #536 of the Mecklenburg County Public Registry TOGETHER WITH the undivided percentage ownership interest, as set forth in said Declaration, as supplemented and amended, in the common areas and facilities of said condominium as hereinabove described.

Plaintiff closed on the transaction and thereafter deeded the condominium to himself and a co-owner as tenants in common with an identical deed. From 2006 until 2013 the plaintiff or plaintiffs used two parking spaces without objection. In 2013 the Homeowners' Association discovered that some ten (10) units had been assigned two parking spaces on floors for which the Declaration only provided one space. In response to the plaintiffs' position that they had purchased two spaces, the Association responded that only the Declarant had the right to sell an additional space and that Arlington Residential Holdings, LLC was not the declarant.[3] Plaintiffs filed suit.

A jury returned a verdict for the Plaintiffs, finding that the additional space had been acquired by adverse possession under color of title for seven years. Defendant appealed, primarily asserting that the Plaintiffs failed to show that any adverse possession was under color of title.

On review the Court of Appeals found that the deed, although not referencing the parking spaces, did reference the Declaration, and the Declaration referenced the right to acquire an additional parking space. This fact, combined with the contract requiring the conveyance of two spaces, was found by the Court to constitute was sufficient color of title to support the claim of adverse possession. As a result of this decision, it is clear that possession puts others on inquiry notice, and they need to search out the "color of title." This search includes both record and unrecorded instruments, such as the sales contract. The decision is consistent with prior case law finding that a document does not have to be on record to constitute color of title. The moral of the story is that property owners must be vigilant about an adverse use of their property and make prompt and thorough inquiry.

[1] This is only known by reference to the Record on Appeal.

[2] *Id*.

[3] By reference to the Record it appears that Crescent Couth Development, LLC was the declarant but that it conveyed its interests and assigned it declarant rights to Arlington Residential Holdings.

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