ANNUAL REAL ESTATE SECTION LAW UPDATE 2008

ALASKA CASES

By

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I. In re Rodak, 367 B.R. 148 (Bankr. Alaska 2007)

In this case, Judge McDonald dealt with the validity of a recorded attorney's lien for unpaid legal fees of $14,118.43 held by Mary Ellen Meddleton for work done for Karsten Rodvik in a domestic violence action and subsequent contentious divorce. In addition to filing a "Notice of Attorney's Lien in the divorce action, she also recorded it in the Anchorage Recording District. The Court found that there is no common law attorney's lien in Alaska. For an attorney's lien to be valid the requirements of AS 34.35.430 must be met.

That statute limits the lien to papers of the client in the attorney's possession, money in the attorney's or the adverse party's possession, or money to be paid to the client pursuant to a judgment in that case. The court points out that if the attorney had obtained a judgment for the fees and recorded it that judgment would be a lien against the property of the client. The Court, therefore, ruled that the lien was invalid against the Chapter 13 debtor's home. The debtor was further entitled to costs and attorney's fees incurred in contesting the lien since the issues of the case were resolved under applicable state law.

II. Robert H. Bradley v. Daniel L. Klaes, et. al., 181 P.3d 169 (March 28, 2008)

Plaintiffs sued as holders of access easements to airstrip seeking continued access at the rate of $25 per lot per month, the amount they had been paying for years. Defendant Bradley claimed payment in the amount of $175 per plane per month with lots having up to five planes there for parts of the year. Much of the case discusses procedural issues such granting a preliminary injunctions allowing airstrip access while the suit was pending,

when to grant Rule 56 (f) extensions to conduct discovery prior to opposing a summary judgment motion, case dismissal for want of prosecution, and when summary judgment is appropriate.

The significant real estate issue resolved is that the owner of an access route who has the right to impose a reasonable use fee may charge fees at the top of the range, in other words they may charge the highest reasonable fee.

III. Michael J. Keenan v. Hugh G. Wade, 182 P.3d 1099 (May 9, 2008)

Two attorneys in a rather inartful attempt to partition commonly held property and to determine the "Owelty" payment necessary to the owner of the less valuable partitioned lot to equalize the value of what they have received. The use of a valuation formula that includes the improvements on one parcel but not the improvements on the other parcel may be weak precedent since it resulted in part from an unopposed rule of law motion on that issue. It also would seem to relate to the specific facts of this case. The Supreme Court confirms the right of a property owner to give an opinion of value as to the owned property, despite the inability to qualify as an expert. In fact, the trial court's acceptance of the owner's valuation was affirmed even though higher than that of an expert appraiser.

The Supreme Court also addresses that first impression issue of whether payment of owelty should be as a money judgment against the co-owner or a charging lien against the share of greater value. Although a money judgment is approved here, the case discussion seems to indicate approval of a case by case approach balancing the possible difficulty of the party owing owelty in paying a large money judgment with the expectation of the other party of being paid within a reasonable amount of time.

IV. Carr-Gottstein Foods Co. and Safeway inc. v. Wasilla LLC., 182 P.3d 1131 (May 16,2008)

Approximately six years after a supermarket relocated a stand-alone liquor store to the supermarket's premises, the landlord claimed that the move constituted a breach of the supermarket's lease. The claimed breaches were violation of a use provision for a general food supermarket and failure to obtain landlord permission for a sublease to it's subsidiary liquor store.

Following a two phase judge and jury trial, the superior court entered judgment in favor of the landlord for $270,365.78 and also awarded approximately $600,000 in full attorney's fees and costs.

The Supreme Court reversed the trial court finding that as a matter of law the action of the landlord constituted a waiver of a claim of breach of lease. The facts relied on included landlord's prior knowledge of the move, involvement of its management arm in assisting in the move, deciding to wait and evaluate the economics of objecting or not, filing an affidavit as part of obtaining a loan indicating that the lease was not in default. The tenant was prejudiced by the failure of the landlord to object to the relocation at a time when the tenant could have taken other action including possibly not doing the relocation.

V. Whittier Properties, Inc., v. Alaska National Insurance Company, 185 P.3d 84 (June 13, 2008)

Whittier Properties seeks insurance coverage for damages related to loss of over 50,000 gallons of gasoline from leaking underground storage tank fill pipe resulting in nearly a foot of free gasoline floating on the groundwater. The pertinent commercial general liability insurance policies contained a pollution exclusion for property damage arising out of "discharge, dispersal, seepage, migration, release, or escape of pollutants." Pollutant is defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." The Supreme Court rejects Whittier's numerous arguments for coverage, including the "reasonable expectation of the insured," and affirms the superior court's summary judgment ruling that there is no insurance coverage for the claim.

VI. Frank Griswold v. City of Homer, 186 P.3d 558 (June 20, 2008)

After the Homer City Council passed an ordinance limiting the floor area of stores in three City of Homer zoning districts to between 20,000 and 45,000 square feet, Homer residents passed an initiative that increased the area to 66,000 square feet for all three zoning districts. The Superior Court upheld the initiative and granted summary judgment to the city. The Supreme Court reverses holding that the initiative violates Alaska Statutes and Kenai

Peninsula Borough Ordinances.

The Alaska Statutes require a planning commission that prepares a comprehensive plan which is considered in zoning decisions. The Kenai Borough Ordinances require cities to which it delegates it zoning power establish a planning commission "to hear all requests for amendments to zoning codes." The initiative process does not comply with these requirements. Justice Carpeniti dissents stating that the majority opinion is too restrictive and that voter initiatives are not subject to the restrictions applicable to other legislative bodies.

VII. Russell Maddox v. Penny Hardy and Korene Lorenz, 187 P.3d 486 (July 11,2008)

This appeal involves a controversy surrounding a large fire started by Korene Lorenz and others for the purpose of clearing rubbish. Russell Maddox had a home and dog boarding business next door. The fire was to burn rubbish from Lorenz's property and the pile set ablaze likely contained, among other things a Quonset hut, a trailer, a storage shed, a school bus, old cars, furniture and wood. Although the parties disputed the size and ferocity of the fire, there was general agreement that it was large. There was another fire the following day. Following the fires, the Maddox property was covered with ash. He contacted the ADEC who told him to have samples of the ash tested. The tests revealed elevated levels of lead. As a result the ADEC, Health and Social Services, and federal EPA became involved.

Maddox filed suit against Lorenz, Wilbur "J.R." Thomas, and Ethel "Penny" Hardy. Thomas had been heavily involved in the clearing and burning. Hardy was sued as record owner of the property, although she had given an unrecorded bill of sale for the property to Lorenz prior to the fire and executed and recorded a quitclaim deed to the property following the fire. The court holds that for the purposes of determining liability, the bill of sale was effective to transfer title from Hardy to Lorenz, eliminating Hardy's potential pollution liability as owner. Since Maddox was not a purchaser, he was not in the class intended to be protected by the recording statute.

The results of the jury trial were affirmed with Maddox being awarded $21,000 for lost earnings, $72,000 for lost property value, $2,000 for mitigation expenses, and punitive damages against Lorenz and Thomas in the amounts of $500 and $50,000, respectively. However, the Supreme Court reversed the trial courts dismissal of Lorenz's claims for defamation, intentional infliction of emotional distress, battery, and nuisance based primarily on interactions between the parties following the fire. It found that Lorenz's pro se amendment to her counterclaims was a sufficient opposition to Maddox's motion to dismiss. The case was remanded for further proceedings on Lorenz's counterclaims.

VIII. Craig Wm. Black v. Municipality of Anchorage, Board of Equalization, 187 P.3d 1096 (July 18, 2008

Black, an owner of a condominium unit in a community consisting of single-family homes on large parcels of land appealed the Municipality of Anchorage's assessment of property taxes. The two arguments he presented in the appeal to the Superior Court were: first, that the land should not have been assessed to his condominium unit and second, that his condominium unit had been overvalued.

Review of various condominium documents, including a sufficiently legible plat allocating .92 of an acre as Limited Common Interest Lot Area to Black's unit, convinces the Supreme Court that the land in question is a limited common element. As such, it is taxed as part of the unit per AS 34.08.720 (b) (1) which provides that each unit, together with its interest in the common elements, is a taxable parcel.

Black then moves to constitutional issues of alleged violation of equal protection and due process rights. Allocating value between land and building in this condominium project while placing all the value in the building on most condominium projects does not violate equal protection because the distinction is justified due to the difference caused by the related land being at least thirteen times larger.

The due process argument relates to the 2004 assessment putting all the value on the building and no value on the land, and Black arguing that this establishes a precedent that the land value should not be taxed. The Court finds that the change was to attempt to make condominium assessments

more uniform by putting all the value into the building. It was not a precedent, and even if so, could have been changed for a reasonable and supportable reason. No due process violation.

The striking fact in relation to the valuation argument is that the 2005 valuation Black was fighting of $458,600 is only 5.4 percent more than the $435,000 Black paid for the property in 2002. Expert testimony indicated a higher rate in general for single family homes in that time. The valuation of the Board is upheld.

The Superior Court awarded the Municipality fifty percent of its attorneys fees in the amount of $4,510.75. Black complained that this was considerably more than usually awarded to the prevailing party in an appeal. After pointing out that the case Black relied on awarded 86% of actual attorneys fees, 50% is approved and the superior court judge is excused for not providing the normally required explanation of the award.

IX. South Anchorage Concerned Coalition, Inc., v. Municipality of Anchorage Board of Adjustment, David D. Hultquist and Lesa L. Hultquist, 172 P.39 768 (December 14, 2007)

The Coalition opposed Hulquists' proposed residential development on several hundred acres in south Anchorage. It appealed the Platting Board's preliminary plat for the development to the Municipality of Anchorage Board of Adjustment, but its appeal was automatically denied because it did not file the hearing transcript within the thirty-day period set forth in the Anchorage Municipal Code. Both the municipal clerk and the Board of Adjustment denied that they had authority to waive the deadline and accept the late transcript.

The Court discusses the difference between rules that are mandatory which require strict compliance and rules that are directory for which substantial compliance is acceptable absent significant prejudice to the other party. After discussing that there have been other late transcript filings allowed and that there appears to be no significant prejudice to the other party due to the short time frame, the case is remanded to the Board of Adjustment to consider whether the factual circumstances of this case warrant relaxing the deadline and allowing the Coalition's appeal to proceed.

IX. South Anchorage Concerned Coalition, Inc., v. Municipality of Anchorage Board of Adjustment, David D. Hultquist and Lesa L. Hultquist, 172 P.39 774 (December 14, 2007)

Same parties as the last case but a different case. This appeal arises from the coalition's opposition to a proposed residential development on a former gravel pit in south Anchorage. The primary issues related to submission and evaluation of evidence that local groundwater supplies would not be contaminated by the development.

After discussing the evidence presented, the Supreme Court finds that "substantial evidence" supports the Platting Board's decision. It further found that the Platting Board had a "rational Basis" for approving the plat. After discussing and rejecting the request that the Superior Court do a de novo review, the Court points out that the substantial evidence and rational basis standards are used for this type agency review. The decision of the Platting Board to approve the plat is affirmed