ANNUAL REAL ESTATE SECTION LAW UPDATE 2009

ALASKA CASES

By

Gordon F. Schadt
October 22, 2009

1. **Mike Smith d/b/a Wasilla Concrete v. Raymond Kofstad, individually and d/b/a Busch Concrete, and Marguerite Kofstad, 206 P.3d 441 (April 24, 2009)**

Smith obtained a default judgment against Raymond Kofstadt, d/b/a Busch Concrete for $41,589.41 in September 1995 which was recorded the next month in the Palmer Recording District where Raymond and Marguerite owned a home as tenants by the entirety. Raymond died in January 2001. Almost ten years after the original judgment, Smith sought the permission of the Court to execute on the judgment required by AS 09.35.020 if more than five years have elapsed after entry of judgment and no previous execution has been issued. The reason given by Smith for failure to previously execute was that Raymond Kofstad had no assets. The District Court rejected this argument finding that there had been no attempt to find assets. The Superior Court affirmed.

The Supreme Court affirmed on an alternative ground: because the ownership of the property upon which the judgment creditor sought execution passed by operation of law to the judgment debtor's spouse upon the judgment debtor's death, the effort to execute is futile. While the judgment debtor is alive, the judgment creditor may take action to sever a tenancy by the entirety by obtaining a levy and sale of the judgment debtor's interest in the property. The purchaser at the sale may have the property partitioned or the individual's interest severed. The Court footnotes the possible application of the homestead exemption and expresses no opinion on when in the execution process a tenancy by the entirety is actually severed.

2. **Blanche L. Cragle v. Marie Gray, 206 P.3d 446 (May 8, 2009)**

The parties in this case contest the ownership of Elizabeth Sarren's Unalakleet House. Sarren died in 2000. Sarren's granddaughter, Marie Gray claimed that in 1999 Sarren orally agreed to give her the house if she would be Sarren's live-in caregiver until Sarren died. Gray did so, but after Sarren's death the house was conveyed to Cragle per Sarren's will executed in 1983. In 2005 Cragle served Gray with a notice to quit and filed a forcible entry and detainer action against Gray. Gray counterclaimed that she had equitable title to the property pursuant to the oral agreement. The trial court denied Cragle's motion for summary judgment based on the statute of frauds, and a four day jury trial resulted in a verdict that Gray had performed the oral agreement and was entitled to the house.

Although Cragle had not argued that AS 13.12.514, the statute that renders unenforceable oral contracts to make a devise, applied, the Supreme Court asked the parties to submit supplemental briefs discussing whether it applied, and, if so what the appropriate remedy would be. Apparently unable to take a hint, Cragle still did not brief the statute. The Supreme Court, however, stated that if an unraised issue "involves a question of law that is critical to a proper and just decision, we will not hesitate to consider it, particularly after calling the matter to the attention of the parties and affording them the opportunity to brief the issue." After such consideration, the Court determined that the alleged oral agreement was not incorporated in or referred to in Sarren's will, was not otherwise reduced to writing and signed by Sarren, and therefore did not satisfy the statute's requirements. The award of the house to Gray was reversed.

3. Lot 04B&C, Block 83 Townsite v. Fairbanks North Star Borough, 208 P.3d 188 (May 22, 2009)

The Borough brought a foreclosure proceeding including property owned by Wolfgand Falke. Although Faulke, proceeding pro per, admitted he had not paid his property taxes, he argued that his assessment was incorrect because of the Borough's denial of a partial tax exemption based his failure to pay the prior year's property taxes in a timely manner. His position was that this requirement violated AS 29.45.250 limiting the amount of penalties on unpaid taxes and the equal protection provisions of the Alaska Constitution by discriminating against the poor.

The Supreme Court affirmed the Superior Court's summary judgment in favor of the Borough. Review of equal protection issues for purely economic interestes are given relaxed scrutiny and upheld if they bear a fair and substantial relationship to a legitimate public purpose. Giving Borough residents a small reduction in future taxes to encourage prompt payment bears a fair and substantial relationship to the purpose of motivating prompt payment of residential property taxes. Nor did the statute apply since it did not contemplate treating the denial of an exemption as a penalty violating the provision prohibiting adding more that 20% of the tax due to the delinquent taxes. Also approved was the refusal of the Superior Court to add "properties similarly situated" to the caption since a class action requires that the class representative be represented by counsel.

4. Richard Steve Helfrich v. Valdez Motel Corporation, 207 P.3d 552 (May 22, 2009)

The main issue in this appeal is whether a landlord violates the anti-retaliation statute, AS 34.03.310(a)(2), of the Uniform Residential Landlord and Tenant Act by evicting a tenant who demands personal injury compensation following an on-premises slip and fall. Holding that a claim for personal injury damages resulting from an on-premises fall is not covered by the anti-retaliation statute, the Supreme Court affirms the trial court's directed verdict on that issue in favor of the landlord.

Helfrich was employed by the Motel to perform general repairs and maintenance for one of its properties, the Pipeline Inn. He rented a room on a month-to-month basis at a reduced employee rate. After work while walking in an area behind the Inn, he slipped, fall, and broke his leg, requiring hospital stays of four or five days. Not having medical insurance, Helfrich asked the motel to help with his medical bills. When the motel owners did not respond, Helfrich obtained an attorney who sent a demand letter asserting that the motel was liable for in excess of $40,000 in medical bills. The letter further ask the motel to seek coverage with their insurance provider and resolve the matter as expediently as possible. Shortly thereafter the motel posted a letter on the door to Helfrich's room indicating that getting a letter from an attorney was really not appreciated, and that he should move out as fast as he can. He packed and left within ten minutes of receiving the letter. Suit was filed, and following a directed verdict on the landlord/tenant claims, the jury found that the motel was not liable on the remaining negligence claim.

The retaliatory eviction claim is resolved by pointing out that the prohibition in the statute applies when the tenant has "sought to enforce rights and remedies granted the tenant under this chapter." The statute does not expressly grant the tenant a right to be free from the landlord's negligence, and, therefore, does not protect tenants from eviction if they threaten or file personal injury lawsuits. Justice Winfree, joined by Carpeneti dissent citing the requirement of AS 34.03.100 to keep the premises clean and safe, fit and habitable. In their view, the majority decision "produces a perverse framework of anti-retaliation protection." A tenant cannot be evicted for complaining about an unsafe condition, but can be evicted if an injury results and the landlord is requested to take responsibility for medical bills.

5. Earl C. Lockhart v. Duane Draper, et. al., 209 P.3d 1025 (June 26, 2009)

Lockhart appeals from a judgment awarding punitive damages against him in the amount of $24,000, prejudgment interest of $14,183.67 and attorney's fees of $4,320 for his role as recipient of a fraudulent conveyance . Affirmed except for prejudgment interest which is not permitted on punitive damage awards.

When Lockhart's brother Jimmy Lockhart was about to have judgment entered against him for $12,000, he created a deed of trust for $150,000 in favor of Earl effectively removing all equity for a duplex which was his only significant asset. There was no note for the deed of trust nor any debt sufficient to support it. Actual damages are not an essential element or may be uncertain if the underlying cause of action states a claim for relief independent of the request for punitive damages, defendant's conduct rose to the requisite level of culpability, and plaintiff suffered substantial damage.

6. **Lakloey, Inc. v. Jeffery Ballek, White Eagle Construction, and White Eagle Inc., 211 P.3d 662 (July 10, 2009)**

White Eagle owned property in North Pole on which it intended to build condominiums. The owner of a landscaping company contacted White Eagle about purchasing some of the dirt in piles following excavation for foundations for use on projects unrelated to White Eagle. The landscaper rented a loader from Lakloey for removal of some of the dirt with the rental agreement not mentioning White Eagle or its property. Lakloey subsequently filed a lien against White Eagle's property for $9,663, plus costs, fees, and interest. When Lakloey refused to remove the lien, White Eagle filed suit requesting the lien be declared invalid and for damages. Laklowy counterclaimed to foreclose its lien. The trial court after a bench trial held that the lien was not valid and awarded White Eagle attorney's fees of $35,000 pursuant to AS 34.35.074(a)(2).

A lien claimant must show its equipment was used for the construction, alteration, or repair of a building or improvement. Although the removal of the dirt was of some benefit to White Eagle, that alone does not give rise to a lien right unless it is part of the process of constructing, altering, or repairing some structure on the land. The sale and removal of dirt here did not qualify. The award of attorneys fees was also affirmed and the Court noted that the trial court had reduced the requested $43,853 to $35,000 to reflect the time spend on the damage claim which was ultimately withdrawn.

7. **Askinuk Corporation v. Lower Yukon School District, 214 P.3d 259 (July 31, 2009)**

After the Lower Yukon School District leased twenty acres from Askinuk on which to build a school in Scammon Bay, Askinuk sued the school district to reform or invalidate the lease. The lease specified a lease rate of one dollar per year subject to renegotiation after ten years. If mutual agreement could not be reached for a new rate after ten years, the initial rate would continue until it was reached. The Superior Court granted summary judgment in favor of the School District.

The numerous issues considered include authority to act, mutual assent, consideration, unconscionability, and mistake. The authority issue primarily related to the interlocking boards and whether the shareholder vote on the lease included adequate disclosure. Consideration issues included discussion about the benefit of having a school in the village and of high paying jobs during construction. The Court also noted that the covenant of good faith and fair dealing implied in all contracts would apply to lease rate negotiations after ten years.

Although the Supreme Court affirmed the Superior Court's summary judgment, Justice Matthews dissented based on his view that rent increase fall back provision was unconscionable and that good faith was not a sufficient cure.

8. **Boudewijn Roeland and Hendrika Flamee v. Douglas Trucano, Trucano Construction Co., and Steve Landvik, 214 P.3d 343 (August 21, 2009)**

Roeland and Flamee (Roeland) held a right of first refusal on property they had sold to Trucano and Landvik (Trucano). The basic terms were that Roeland would be able to purchase on terms identical to the terms offered to, or received from, any third party. An offer was received from David Coates for a 25% interest in a souvenir business to operated on the property in exchange for a 25% interest in the property. Roeland replied stating it was just a business proposal and they had no interest in becoming partners. Further communication did not resolve the issue and Trucano and Coates proceed with their business plan and property development. After completion of development, the property was deeded to a LLC in which Trucano had 75% and Coates and his associates had 25%.

Roeland sued Trucano for breach of the right of first refusal and after a bench trial, the Superior Court ruled against them on all counts. The Supreme Court reviewed the trial court factual findings on a clearly erroneous standard and exercise independent judgment for questions of law. The offer submitted to Roeland was sufficiently complete to allow understanding of its basic nature. This shifted the burden to Roeland to investigate further or raise questions about specifics they may have wanted to see better defined. To the extent it contained terms that they could not exactly duplicate, it constituted an invitation to submit a commercially equivalent offer. The trial court's determinations on estoppel and good faith were also upheld. The transfer of Trucano and Coates of their percentages of interest to a LLC did not constitute a sale to an unrelated third party triggering the right of first refusal for the remaining 75% interest, so the right of first refusal remains as to that interest.

9. **In the Matter of the Estate of Wayne Colver Fields, WL 2836498 (September 4, 2009)** [THIS CASE WAS ENTERED INTO THE WESTLAW DATA BASE BEFORE THE TIME FOR REHEARING HAD EXPIRED. IT IS POSSIBLE THAT REHEARING HAS BEEN SOUGHT, GRANTED, OR DENIED]

This is a lengthy, messy probate case commenced in 1991 with numerous factual and procedural issues. The import for real estate law is that an Alaska court with personal jurisdiction over the necessary parties can indirectly affect the title to real estate in another state by ordering them to convey it into a trust.

10. **Deborah A. Luper v. City of Wasilla, 215 P.3d 342 (September 11, 2009)**

Luper had a kennel with 18 dogs on property she owns in the City of Wasilla. City ordinances prohibited keeping more that three dogs without a permit. When the city sued to enforce its ordinance, she applied for a use permit for an eighteen-dog kennel. The city denied her permit application and she appealed. After consolidating her permit appeal with the city's enforcement action, the Superior Court denied her appeal and granted the city summary judgment in its enforcement action.

In considering the denial of the permit, the Court applied the reasonable basis standard of review, deferring to the agency's interpretation unless it is plainly erroneous and inconsistent with the regulation. It found the denial reasonable since substantial evidence supported the commission's factual findings that (1) there were twenty-four written comments from neighbors opposing the application and only one supporting it, (2) there were potential ground water contamination and drainage issues, and (3) there were potential noise and odor issues.

Her constitutional argument that the three dog limit infringed on her property rights in both her land and her dogs was also rejected. For zoning ordinance infringement on property rights, the Court applies the minimum level of scrutiny, under which the provision must bear a fair and substantial relationship to a legitimate government purpose.

11. <u>The Estate of Selma Smith, et. al. v. Charles Spinelli, et. al.</u>, 216 P.3d 524 (September 18, 2009)

This dispute centers around a 3.38 acre parcel of coastal land in the Turnagain area of Anchorage. Prior to the 1964 earthquake, it consisted of a steep, eroding bluff and tidal mudflats. The earthquake collapsed the bluff, spreading it out over the mud flats and transforming the once unusable parcel into gently sloping, potentially developable coastal property. Appellants are heirs of the children of Rasmus Simonson, whose 147 acre 1920s homestead encompassed the disputed parcel and the heirs of his daughter Selma Smith, who subdivided and sold the homestead in the 1940s and 50s. Appellees are the current owners of eight lots in the subdivsion that directly abut the disputed parcel.

The plat of the property depicts the norther bounday of the appellees' eight lots with a solid line drawn at what before the 1964 earthquake was the upper edge of a steep, eroding 50-70 foot bluff with tidal mudflats below. The plat thus left unplatted and undemarcated the largely unusable parcel of bluff and mudflats that was located between the subdivision boundary and the mean high tide line. Evidence at trial showed that a plat containing such a deficiency could not be recorded under modern standards. Neither the heirs or the lot owners paid property taxes on the parcel or attempted to build on it or sell it. No Simonson heir took any action to suggest that they owned the parcel, and several later testified that they never had reason to believe they had any interest in the parcel until the present controversy arose. The lot owners sought to quiet title to the disputed parcel in them, arguing that it should be considered part of their lots, which they purchased with the understanding that they were buying oceanfront property.

Following a bench trial, the Superior Court found that the plat was ambiguous as to whether Smith intended to convey the disputed parcel along with Lots 1-8 and that the surrounding circumstances established that Smith did in fact intend to convey the disputed parcel rather than retain it. The heirs challenged on appeal the trial court finding that the plat, which is incorporated into the deed, is ambiguous. They pointed out that the lot descriptions contained defined boundaries and square footage which did not include the disputed parcel. They also challenged the trial court's factual determination that Smith intended to convey the disputed parcel along with Lots 1-8 when she subdivided the Simonson homestead.

Whether a deed is ambiguous is a question of law which the Supreme Court reviews de novo. The primary issue is the intent of the parties. The Court utilizes a three step approach in interpreting a deed. First, is to look to the four corners of the documentt to see if it unambiguously presents the parties intent, and, if so, it is enforced and no further analysis is necessary. Second, if the deed is ambiguous, the facts and circumstances surrounding the transaction are examined to determine the parties intent. Third, if the parties intent cannot be determined, the court resorts to rules of construction. Rules of construction are used only when it is impossible to determine the parties' intent.

The Supreme Court affirms the trial court's determination that the failure of the plat to demarcate and reserve the disputed parcel or specify the exact location of the mean high tide line created ambiguity regarding Lots 1-8 despite their seemingly well-defined boundaries. The Court then reviews the trial court's determination that it was Smith's intention to convey the disputed parcel as part of the lots and determines that it meets the clearly erroneous standard used to review factual determinations regarding intent. Since intent has been determined, rules of construction are not applied nor is the question reached as to whether the Earthslide Relief Act is applicable.

12. **Jeffrey Labrenz v. Shane Burnett and Jill Burnett, WL 3320468 (October 16, 2009)** [THIS CASE HAS NOT YET BEEN RELEASED FOR PUBLICATION IN THE LAW REPORTER]

This case involves a dispute between neighbors regarding the use of land described in an easement. Labrenz has a drive way easement over the Burnetts' land, and in building his driveway, he installed decorative rocks, shrubs, trees, a fence, and a gate on the Burnetts' proprty. The Superior Court agreed with Labrenz that the slope of the Burnetts' land necessitated certain efforts to control erosion, but fount that many of Labrenz's improvements to the driveway easement were cosmetic in nature and ordered that they be removed. In addition, the court ordered Labrenz to move the fence and gate onto his own property. The Superior Court also permitted the Burnetts to use the easement to build a driveway to access the lower portion of their lot.

This case probably doesn't tell us much except the possibility for unpleasant relationships between neighbors. The Superior Court singles out Labrenz for taking an "unreasonable stance" and choosing "to continue flogging the poor expired beast before this court." It does affirm that improvements within the easement area must be reasonably related to the easement's purpose, and that the owner of the servient estate may utilize the easement area in any manner and for any purpose that does not unreasonably interfere with the rights of the easement holder.