

## ANNUAL REAL ESTATE SECTION LAW UPDATE 2012

### ALASKA CASES

By

**Gordon F. Schadt**

**October 4, 2012**

#### 1. **Shaffer v. Bellows, 260 P.3d 1064 (September 23, 2011)**

In 1981 Bradley Shaffer and Kenneth Bellows purchased Ring Island, a 4.6 acre property in Sitka, each contributing \$25,000 as a down payment. After a dispute, they agreed that Shaffer would convey his interest to Bellows in exchange for a repayment from Bellows of the money he had already spent and an option for the purchase of the property. The option could only be exercised if the property was to be sold, with an option price of \$123,200 adjusted by changes in the cost of living. In 2009 the property was allegedly worth approximately \$890,000 and the option price was \$240,363.20. Shaffer agreed that if he were awarded damages an offset of \$215,000 for appreciation due to improvements by Bellows would be appropriate.

In 2006 Bellows quitclaimed the property to his sister, Marlys Dee Hanson indicating it was a gift. In 2008 Shaffer filed suit for declaratory judgment, breach of contract, breach of the implied covenant of good faith and fair dealing, fraudulent conveyance, and conspiracy to fraudulently convey. The trial court granted summary judgment in favor of Shaffer for the declaratory judgment, but granted summary judgment to Bellows on all other counts.

After discussing the law related to fraudulent conveyance and the need to look a circumstantial evidence in relation to the badges of fraud, the Supreme Court reverses finding several genuine issues of fact that materially relate to the badges of fraud. The examples listed include whether the transfer was made for inadequate consideration, whether Bellows was in or approaching insolvency, whether Bellows retained possession of the property.

The Supreme Court then considers the contract claims and affirms the trial court's determination that the terms of the Option Agreement unambiguously give Shaffer a right to purchase the property if and only if Bellows elects to sell it. The Court then finds genuine issues of material fact as to anticipatory breach, breach of contract, and breach of the covenant of good faith and fair dealing which are to be considered on remand.

The Supreme Court on its own then raises the issue of whether the Option Agreement constitutes an unreasonable restraint on alienation and is, as a result, unenforceable. It cites the Restatement and case law indicating that the general rule is that a fixed price repurchase option of unlimited duration is an unreasonable restraint. It is then suggested that on remand the parties may wish to address this issue, as well as the issue of how to reform the Option Agreement or otherwise achieve an equitable resolution if the Option Agreement is unenforceable.

2. **Lot 04B & 5C Block 83 Townsite v. Fairbanks North Star Borough,**  
**261 P.3d 422 (October 7, 2011)**

Wolfgang Falke, pro se, continues to waste court time and taxpayer money in attempts to avoid paying property taxes on the above captioned lots. The Supreme Court in 2009 rejected his appeal between the same parties at 208 P.3d 188. Following that decision, the Borough filed for foreclosure of subsequent taxes. Falke contested on the grounds that the taxes were not for the immediately preceding year and since the earlier foreclosure action was “still current and in effect.” He also requested Rule 11 sanctions against the Borough Attorney.

Falke argues that the phrase “previous year’s delinquent taxes” in AS 29.45.330(a)(1) means that the Borough can include a property on the foreclosure list only if taxes are delinquent from the year immediately preceding the list year. (No taxes were due that year as he is now entitled to a senior exemption.) The Supreme Court rejects that interpretation pointing out that other provisions require the foreclosure list to include “years and amounts of delinquency” and to include property on its list as long as previously due taxes have not been paid.

The argument that the Borough can not foreclose on property it already owns is rejected. Although the Borough had received a certificate of sale, it had not received a tax deed and clear title pursuant to AS 29.45.450. It also points out that the taxes being foreclosed were not in the prior foreclosure and that unpaid taxes roll over from year to year.

The refusal of the superior court to sanction the Borough attorney for knowingly adopting legally erroneous positions was affirmed since both courts agreed with those positions.

**3. Erkins v. Alaska Trustee, LLC, Bank of New York Trust Company, N.A., 265 P.3d 292 (October 21, 2011)**

In October of 2004, Greg Erkins, a licensed real estate broker, acquired title to a house in Anchorage and obtained a loan secured by the property from Ameriquest in the amount of \$80,000 from which he received \$59,615.80 in cash. In February of 2005, he obtained another loan on the property from Ameriquest in the amount of \$142,477 which paid off the first loan and paid him cash of \$57,433.81. Erkins made payments on this loan through January 2007, at which time they became sporadic and ceased entirely in August 2007 following which foreclosure was commenced.

In July 2008 Erkins, acting pro se, filed suit disputing the terms of the second loan and arguing fraud as well as lack of capacity at the time of its origination. Several months later, counsel for the defendants presented Erkins with a forbearance agreement from Wilshire Credit Corporation, the servicer of the loan and not a party to the lawsuit calling for \$2,000 a month payments from Erkins. Allegedly unbeknownst to Erkins, the agreement also contained a waiver of claims broad enough to cover Erkin's claims against the defendants. Nine months later the defendants moved for summary judgment arguing that this waiver of claims functioned as a settlement and released all of Erkin's claims in the suit. The trial court granted summary judgment holding that the defendants were not liable for any tort of Ameriquest and that Erkins had released his claims in the forbearance agreement.

The Supreme Court affirmed the portion of the trial court ruling that found no liability of defendant Bank of New York for alleged torts of Ameriquest since its only relationship had been as purchaser of the note. However, it reverses and remands for consideration of whether inclusion of the waiver of claims provision in the forbearance agreement constituted constructive fraud. Constructive fraud is defined as a breach of a duty, which while not intentionally deceptive or actually dishonest, the law declares fraudulent because of its tendency to deceive others. Factors mentioned are that the forbearance agreement states that it was between Erkins and Wilshire as servicer, it does not name the defendants, reference the pending court case, and the word "settlement" does not appear in the agreement.

**4. Dena Nena Henash v. Fairbanks North Star Borough, 265 P.3d 302 (November 10, 2011)**

The Tanana Chiefs Conference (TCC) also known as Dena Nena Henash appeals the superior court decision upholding the Borough's denial of charitable-purpose tax exempt status for four of TCC's buildings. The first issue relates to the Tribal Hall which provides an alcohol free Native community center for events such as potlatches, funerals, memorials, and hardship fund raisers related to the Native community without payment of

a fee. The questionable uses were two wedding receptions for which the organizers paid \$375 and \$575. The Supreme Court holds that constituent weddings do not disqualify the Hall as a charitable use since it uniquely provides an alcohol-free venue.

Two of the other properties were denied, even though they were leased to qualified charitable organizations, since TCC received fair market value rent. The Court holds that the amount of rent is not material. Since TCC is a charitable nonprofit, the leased premises will be tax-exempt if the tenant is a qualified nonprofit using the property “exclusively for nonprofit, religious, charitable, cemetery, hospital, or educational purposes.”

The issue with the fourth property related to the Borough code’s specification that the exemption does not apply to vacant property. The exemption is granted for the entire year if the property is occupied by a qualified user on January 1, even if it is vacated soon after as happened here. The Court after reviewing the evidence reverses the determination that the property was vacant on January 1 as not being supported by substantial evidence. Since the superior court is reversed as to all four parcels, the award to the Borough of \$38,416 in attorney’s fees is vacated and remanded for reconsideration.

##### **5. Sengul v. CMS Franklin, Inc., 265 P.3d 320 (December 9, 2011)**

This case deals with rent abatement, constructive eviction, and waiver in a commercial leasing situation. In late April 2006, Samuel Sengul leased a commercial storefront in downtown Juneau to CMS Franklin, Inc. The improvements were under construction, and the lease provided for rent abatement if the building was not in the specified condition at the rate of 3 days for each day after May 15 and 4 days for each day after June 1. The building was not ready until June 8 giving potential abatement of 83 days or until August 23.

CMS moved in without paying rent or a security deposit. Sengul claimed that CMS assured him during late June and early July that it knew it was late, would make it up, and pay in full. CMS claimed Sengul did not ask for rent until late July and that it told him no rent was owed due to abatement. Following an exchange of letters by their attorneys, on September 4 Sengul placed a cable lock on the front door and put signs in the store window reading “Your Rent is Due. Pay it.” CMS moved out vacating the space by the end of September 6. May of 2007 Segal leased the space to a new tenant for approximately the same amount of rent as CMS’s would have been.

Sengul sued CMS and its principal for all of the lease payments over the five year term of the lease. CMS answered alleging rent abatement and constructive eviction and counterclaimed for breach of contract, intentional interference with prospective business, breach of the implied covenant of good faith and fair dealing, and defamation. Following

a bench trial, the superior court found that although CMS would have been entitled to rent abatement, it waived this right by failing to raise the issue with Sengul earlier in the course of the lease. The court awarded Sengul unpaid rent in the amount of \$33,570. However, it found Sengul's self-help actions of locking the door and putting signs in the window constituted constructive eviction depriving CMS of the value of the cost of its renovations in the amount of \$53,365.09. Offsetting that amount against the unpaid rent, it awarded CMS \$26,795.09 plus costs and prejudgment interest. Sengul appealed and CMS cross-appealed.

The Court first affirms the determination that CMS was constructively evicted by being locked out. The lease provided that "in addition to any rights and remedies that may be given to [him] by statute...[a]fter legal process on notice, reenter the Leased Property and take possession thereof." (Emphasis added in Opinion.) This overcomes the statement in AS 09.45.690, which applies to commercial leases, that "Unless otherwise provided in the lease, a landlord has a right to re-enter leased premises when a tenant fails to pay rent, and may bring an action to recover possession of the premises." By footnote, it distinguishes *Klosterman v. Hickel Inv. Co.*, 821 P.2d 118, 122 (Alaska 1991) which explained that a landlord could engage in self-help for nonpayment of rent when expressly permitted by the lease. It agreed with the superior court that locking out at least constituted a constructive eviction and further indicated it likely was an actual eviction.

The determination of the superior court that CMS waived the rent abatement is reversed based on the non-waiver provision in the lease and the use of the mandatory words shall and will in the abatement provisions. The statements "I'll pay it" and "I owe you" are ambiguous since a security deposit was also owed. The relatively short period of time compared to other cases where waiver was found was also important. Justice Christen dissented on the waiver of abatement issue finding less ambiguity in the statements regarding payment. She also indicated that the delay of "less than three months" was sufficient to constitute waiver since it constituted almost the entire summer tourist season in Juneau effectively wiping out Sengul's ability to collect rents for the entire year.

**6. HP Limited Partnership v. Kenai River Airpark, LLC, 270 P.3d 719 (January 13, 2012)**

This case involves a dispute over access to the Kenai River for fishing and related recreational uses along its banks. HP Limited Partnership is successor to one of the developers of Holiday Park subdivision. The original subdivision plat depicted a "30' BOAT LAUNCH ESM'T" on lot 30. Through later conveyances, Lot 30 was transferred to Airpark Owners Association, the owners' association of an adjoining subdivision, "for the benefit of all lot owners in the community." HP sued Airpark to prevent Airpark's

members from using the easement and to allow HP's members to use Lot 30 for general recreation including fishing, parking, picnicking, and camping in addition to boat launching. Airport counterclaimed that HP's members could only use the easement for boat launching.

The Supreme Court reversed the superior court's holding that HP could extend the uses beyond only boat launching. The superior court had ruled on summary judgment that the easement only covered boat launching but reversed that ruling after hearing the testimony of 14 lot owner witnesses at trial. Citing *Estate of Smith v. Spinelli*, 216 P.3d 524, 528 (Alaska 2009), the Supreme Court pointed out that under Alaska law, extrinsic evidence is only used when a document is ambiguous. Since the only use specified was for boat launching within the defined area, extrinsic evidence of expanded use should not have been considered.

The claim by HP for a prescriptive easement is also rejected primarily because the testimony related to it was by other lot owners not party to the action. Since HP was not trying to establish a public prescriptive easement, it could not rely on other owner's use of the lot to establish a prescriptive easement for itself. The evidence related to HP's individual claim was found lacking. The theories of easement by implication and estoppel are also rejected.

The critical element allowing Airpark and its members to use Lot 30 is that it owns it. "Because the Airpark Owners Association owns Lot 30, it is entitled to use Lot 30 in any manner that does not unreasonably interfere with the Holiday Park lot owners' use of the boat launch easement."

#### **7. Kiernan v. Creech, 268 P.3d 312 (January 20, 2012)**

In 2001, Bill Kiernan owned American Towing & Recovery (Kiernan) and Willie Creech owned Vulcan Towing & Recovery (Creech). They decided to share a lot for their towing businesses. Kiernan asserts that they agreed to buy the lot jointly, but because Kiernan had a substantial outstanding IRS debt they agreed to put the lot in Creech's name only. Creech asserts that they agreed that Creech would buy the lot and Kiernan would have an informal lease-to-purchase agreement if Kiernan resolved his IRS problems. They agree that they were to split all costs associated with the lot evenly. They did not put their agreement in writing.

Creech purchase the lot in the name of his towing company only and arranged the bank loan. Kiernan paid half of the earnest money, half of the down payment, and half of the closing costs to Creech. Kiernan also paid Creech half of various improvement to the lot, and half of the monthly mortgage payment, utilities, and property taxes. The relationship between the parties broke down and Kiernan brought

suit in 2007 when he became aware that Creech had taken out a second mortgage on the property without telling him. His primary claim was that they had an enforceable agreement to co-own the lot.

The superior court granted summary judgment for Creech on the grounds that the statute of frauds made any oral co-ownership agreement unenforceable and that no exception to the statute of frauds applied. The superior court rejected the part performance exception to the statute of frauds holding that Kiernan's alleged part performance was consistent with either a purchase or a lease agreement and not "notorious." It also rejected the promissory estoppel exception because there was substantial ambiguity concerning what the parties allegedly agreed to do. It concluded that "because of the uncertainty as to the terms of agreement, the exceptions of part performance and estoppel do not apply."

The Supreme Court clarifies that Promissory estoppel can be an exception to the statute of frauds in land transactions if proved with clear and convincing evidence. The uncertainty of the alleged terms creates disputed material facts which prevents resolution of the issue by summary judgment. That same uncertainty prevents summary judgment on part performance so that, if Kiernan can prove by clear and convincing evidence that the terms of the contract were as he alleges, he will have met the requirement for relief under the contract. The Supreme Court also reverses the dismissal of Kiernan's unjust enrichment claim since it does not depend on the existence of an actual contract.

Justice Christen dissents with Justice Fabe joining, pointing out that the majority decision permits Kiernan the opportunity to enforce a contract that he concedes was based on his desire to hide assets from his creditors. She also states that there were not sufficiently defined terms, such as a deadline by which Kiernan was to fulfill his obligations, to qualify for an exception to the statute of frauds. In fact, Kiernan still had not paid off his IRS debt at the time of oral argument on the summary judgment in the trial court. Promissory estoppel also should not be used due to the lack of defined terms and the ability to avoid injustice through the theory of unjust enrichment.

#### **8. Oakes v. Holly, 268 P.3d 1084 (January 20, 1084)**

Eleanor Oakes owns a 7/8 undivided interest in a 20 acre parcel of land in Council, and David and Sine Holly own a 1/8 undivided interest in the property. The parties went to court to partition the property, and each agreed to submit up to three partition proposals for the court's selection after it heard evidence about the choices. The superior court selected one of Oakes's proposals, and Oakes hired a surveyor to implement the division of the property. The survey revealed a significant error in the adopted map which resulted in the Hollys acquiring more river frontage than Oakes had intended.

Oakes moved to amend the proposal but the superior court declined concluding under the doctrine of mutual mistake in the formation of a contract that Oakes bore the risk of the drafting mistake in her proposal. The proposal was prepared not by a surveyor but by Oakes's counsel using google earth images, a ruler, and a calculator. The Supreme court points out that the mistake did not occur in the formation of the contract, but later in the proposals to be presented to the court. Therefore, the doctrine of mutual mistake does not apply and the case is remanded for consideration of possible relief from judgment or order under Civil Rule 60 (b)(1) related to "mistake, inadvertence, surprise, or excusable neglect."

The Supreme Court noted the superior court's concern about the disparity in effort and cost between the two parties since the Hollys had used a surveyor to prepare their proposals and indicated that the superior court could address this through an award of costs and attorney's fees if deemed appropriate. If the judgment is set aside, the superior court is to proceed with the partition of the property.

**9. Gottstein v. Kraft, 274 P.3d 469 (April 13, 2012)**

This is a divorce case disguised as a real estate case since it revolves around AS 34.15.010 which forbids a spouse from selling the "family home or homestead" without the consent of the other spouse. This case concerns the ownership of Jim and Terrie Gottstein's former marital home. Jim paid for the property, but Terrie's name alone was on the deed. After living in the house for fifteen years, they moved out in 2006 to another family home. They later separated. After lengthy attempts to sell the house, in 2008 Terrie accepted an offer from the Krafts for less than appraised value.

About a month before the sale Jim recorded a document entitled "Notice of Interest (AS 34.15.010(d)(2)). The sale closed and Stewart Title later admitted that it did not disclose the Notice of Interest to Terrie or the Krafts. Jim sued the Krafts, Wells Fargo Bank, and Stewart Title. The Krafts filed a third-party complaint against Terrie, who filed a complaint against Stewart Title and against Jim.

The superior court granted summary judgment in favor of the Krafts, Terrie, and Wells Fargo since it was undisputed that it was not the Gottsteins' "family home or homestead" because it was not their residence at the time of sale. It further held that any constructive or resulting trust or other equitable claims would best be resolved within the context of the Gottsteins' divorce case. The Supreme Court affirmed.

**10. Schweitzer v. Salamatof Air Park Subdivision Owners, Inc., 278 P.3d 1267 (June 22, 2012)**

In this pro se case, Craig Schweitzer appeals the superior courts determination

following a bench trial that the easement prepared by him as part of the purchase of a lot in an airport subdivision did not grant his lot exclusive rights to common areas in the subdivision used for aviation. The superior court also awarded the defendant subdivision association attorney's fees of \$60,000 and costs of \$8,250. In fact, the fees and costs are the only basis for the appeal since the property issues have been rendered moot by the loss through foreclosure of the lots to which the easement applied. The Supreme Court reaffirms the hearing of otherwise moot cases where appellate review could change the status of the prevailing party for the award of fees and costs.

It then agrees with the superior court that the unambiguous language of the Easement Agreement does not convey exclusive rights. It further points out that even if the easement were ambiguous, the extrinsic evidence does not support an exclusive easement. Since the subdivision plat dedicated all right-of-way to public use, the developer no longer had the legal right to convey exclusive use of the rights-of-way. The determination that the Association is the prevailing party on the main issue in the case and the award of fees and costs is affirmed.

**11. Offshore Systems-Kenai v. State, Dept. of Transportation & Public Facilities, 282 P.2d 348 (July 27, 2012)**

Offshore Systems - Kenai (Offshore) operates a commercial dock facility on Cook Inlet in the Kenai Peninsula Borough (Borough). Nikishka Beach Road traverses Offshore's property. The public has used this road to access the beach since the 1950's. In 2007 Offshore installed a gate blocking the road. The State and Borough sought an injunction against Offshore, alleging a public right-of-way or prescriptive easement exists over Nikishka Beach Road. Offshore counterclaimed for a declaratory judgment quieting title to its property.

The superior court concluded that Nikishka Beach Road was a public highway under the 1959 federal deed conveying the road to the State, the 1980 patent conveying the surrounding property from the State to the Borough reserved a separate public easement located over the road, and the public had established a prescriptive easement over the road for access to the beach. The Supreme Court finds the 1980 Patent sufficient and does not address the alternate rulings.

In 1980 the State conveyed the section within which the property is located to the Borough by Patent. The patent stated that the property was subject to a 50-foot wide public easement for access to and along the shoreline of Cook Inlet to be identified by the Borough. The Borough never located or platted the easement. In 1990 the Borough sold the subject property to Offshore by quitclaim deed. The deed did not specifically mention the Nikishka Beach Road or a public access easement, but contained a general reservation clause stating the conveyance was subject to "[r]ights and reservations of record and any

easements...of record or ascertainable by physical inspection.”

The Supreme Court considers the Patent and finds that it is not ambiguous, holding that nothing in its language suggest that the existence of the easement is conditioned upon the Borough’s duty to identify and plat its location. Nor is the failure to specify an exact location fatal since the superior court has the authority to specify the exact location of an otherwise valid easement where the parties have not done so themselves.

**12. Kuretich v. Alaska Trustee, LLC, No. 6707 (September 14, 2012)**

Homeowner Timothy Kuretich, Sr. sought a declaratory judgment that foreclosure fees were improperly included in the reinstatement amount necessary to halt foreclosure proceedings. At issue is the portion of AS 34.20.070(b) which provides that a borrower can halt a non-judicial foreclosure and cure the default “by payment of the sum in default other than the principal that would not then be due if no default had occurred, plus attorney fees or court costs actually incurred by the trustee.”

Plaintiff asserts that he should be able to reinstate for the amount of mortgage payments missed plus late fees, i.e., \$8,990, rather than the \$11,479.28 reinstatement figure produced by Alaska Trustee. That figure included Alaska Trustee’s fee of \$1250, title report of \$630, and other typical foreclosure costs. Alaska Trustee asserts that the reinstatement amount includes all sums expended by the trustee as part of the foreclosure. The superior court granted summary judgment to Alaska Trustee.

The Supreme Court discusses its only case dealing with the reinstatement provision, Hagberg v. Alaska National Bank, 585 P.2d 559 (Alaska 1978). That case held that the amendment to AS 34.20.070 providing for reinstatement did not violate the contract clause of the Constitution, even when applied to deeds of trust executed before the amendment’s effective date. It reasoned that reinstatement affected only the lender’s ability to accelerate the loan, not the value of the right itself, because the function of reinstatement is to place the lender and borrower in the same position as they were before default.

The Supreme Court further approves the statement by the superior court that [o]nly by allowing recovery of these [foreclosure] fees will the value of the lender’s rights be preserved and the parties returned to their status quo prior to the default.” Judge Guidi’s decision is adopted and attached as an appendix.