

ANNUAL REAL ESTATE SECTION LAW UPDATE 2013

ALASKA CASES

By

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October 31, 2013

1. **Albrect v. Alaska Trustee, LLC, 286 P.3d 1059 (October 19, 2012)**

This case was decided about a month after Kuretich v. Alaska Trustee, LLC, 287 P. 3d 87 in which the Alaska Supreme Court held that reinstatement fees in a non-judicial foreclosure could include foreclosure cost such as property inspection, broker's opinion of value, title costs, as well as attorney's fees. It reaffirms that holding.

The other issues related to attorneys fees. The superior court had augmented its award of attorneys fees finding the plaintiff's claims were frivolous. This was reversed since at the time Albrect's case was pending two other superior court judges had concluded that foreclosure fees were not allowed.

Plaintiff had also sought for the case to certified as a class action. Although liable for attorney's fees related to the merits of her own case, a plaintiff is not normally liable for fees related to the class in general. On remand the superior court is to determine the amount of fees spent solely litigating the structure of the class and whether or not she had any financial incentive to act as class representative.

2. **Cutler v. Kodiak Island Borough, 290 P.3d 415 (December 21, 2012)**

In 2007 Virgilio and Rosemarie Sabado hired Roger David to tear down a fire-damaged house on their property. David opened a commercial garbage account with the Kodiak Island Borough (Borough) and accrued about \$5,000 in garbage-service charges which became delinquent. In 2008 the Sabados sold the property to Cedric Cutler who was unaware of David's garbage account with the Borough. The Borough advised David that a lien could be placed on the property in the account remained unpaid, and in January 2009 recorded a lien against the property.

In February 2010 the Borough petitioned to foreclose the garbage-service lien. Cutler learned of the foreclosure and filed an answer and counterclaim, asserting that the lien against his property was invalid and seeking damages for wrongful recording of a nonconsensual common law (NCCL) lien. The borough released the lien and sought

dismissal of Cutler's counterclaim. Cutler argued that the lien had been wrongfully recorded and dismissal was inappropriate. He also argued that the superior court should not enter default judgment with respect to the other garbage-service liens. Both parties moved for summary judgment. The superior court entered default judgment on the other liens, granted the Borough's summary judgment motion, and ruled that the Borough's lien was not a NCCL.

Cutler argued the lien was an NCCL lien, statutorily defined in AS 09.45.169(2) as a lien that: "(A) is not provided for by a specific state or federal statute; (B) does not depend on the consent of the owner of the property affected for its existence; and (C) is not an equitable, constructive, or other lien imposed by a court recognized under state or federal law." A person who wrongfully records an NCCL lien is liable to the property owner for actual and punitive damages, as well as costs and reasonable attorney fees pursuant to AS 09.45.167.

The Supreme Court holds that this is a NCCL since the Borough does not have the ability to lien property to enforce payment unless specifically granted by statute which did not occur here. However, the Borough is immune from damages under AS 09.65.070. Cutler's argument that default should not have been entered against other properties fails since they are not parties and he does not have standing to challenge the entry of default against them.

3. Williams v. Ketchikan Gateway Borough, 295 P.3d 374 (February 15, 2013)

A pro per attempt to avoid paying real property tax. Fredrick Williams argued that since his house was built using funds from the Bureau of Indian Affairs Housing Improvement Program who took a deed of trust for \$115,00, that he didn't own his house and it shouldn't be taxed. The Supreme Court affirmed the superior court ruling denying his argument and adopted its ruling which was attached as an appendix.

The superior court pointed out that the deed of trust on the property specifically stated that Williams must pay all taxes and assessments affecting the property. It also pointed out that under Alaska law, a deed of trust creates a security interest, it does not convey title.

4. Griffin v. Weber, 299 P.3d 701 (March 22, 2013)

Kelley Griffin owns 25 acres of land near Wasilla with a house and a cabin. She lives in the cabin and Michael Weber lived in the cabin from 2005 until sometime after he filed suit against Griffin in September 2010. Although they were romantically involved in 2003, that aspect of their relationship had ended by 2005. Griffin wanted to refinance her property to pay off debts including loans from Weber in the amount of \$22,905.

When it became apparent that she could not personally qualify for the refinancing, Weber agreed to cosign the refinancing note. He also gave her a power of attorney to facilitate the refinancing since he worked for long periods on the slope. Griffin signed a quitclaim deed of her property granting it to herself and Weber on the day the \$150,000 loan closed with both of them signing a note and deed of trust.

Griffin made all the payments on the loan and also paid the insurance and taxes. A little over a year later she sought to refinance the property with her fiancé, Ed Grube. The credit union approved, conditioned on Weber relinquishing his interest in the property. When he refused, Griffin used the power of attorney to convey the property to herself. The credit union refused to proceed with the refinancing based on this deed.

Weber sued claiming that the quitclaim using the power of attorney was fraudulent, breach of fiduciary duty, and a conversion. In addition to damages he requested partition of the property as a one-half owner. Griffin counterclaimed and asked for reformation of the original deed to a security instrument and an award of back rent. Following a bench trial, the court found that Griffin breached her fiduciary duty by using her power of attorney to convey the property to herself and that the deed was invalid. The trial court also found that there was not clear and convincing evidence that the earlier deed was intended to be a security instrument. The judgment awarded an equal interest in the property to the parties as tenants in common.

In considering Griffin's appeal, the Supreme Court points out that the question of whether the deed was intended as a security instrument is a question of fact which will not be reversed unless it is clearly erroneous. It further states that deeds absolute on their face can be reformed into security agreements based on clear and convincing evidence that a security was intended. It then proceeds to find clear error primarily in not seeing that Weber's testimony that the purpose of the deed "was to secure my interest in the loan" was clear and convincing evidence that it was intended to be a security interest. Reversed and remanded to determine the form and terms of the security interest and if Weber owes any rent.

5. McCarrey v. Kaylor, 301 P.3d 559 (March 29, 2013)

Two couples own adjoining lots in Anchorage, located directly north and south of each other. Title to the southern lot owned by the McCarreys originated from a federal patent, which reserved a 50 foot right-of-way "for roadway and public utilities" across the northern boundary of the lot. A road currently runs through the right-of-way. The McCarreys proposed building a fence with a locked gate on the north side of the road, along the northern boundary of their lot; the fence would have impeded access to a cleared area on the Kaylors' lot to the north that they used for parking and storage. The Kaylors were informed that if they wanted to use the gate in the fence they would have to give the

McCarreys a 72-hour notice.

Kaylors filed suit to establish a prescriptive easement in the right-of-way and to get an injunction preventing the McCarreys from building the fence. A hearing was held at which testimony was presented about the use of the right-of-way. The superior court held that as a matter of law pursuant to the 50 foot right-of-way reservation in the patent it was open to public access stating it was “there to benefit the world.” The McCarreys appealed.

The Supreme Court first held that termination in 1976 of the Small Tract Act, under which the patent and right-of-way had been granted, did not terminate the right-of-way. It further held that the patent was an express offer of common law dedication to the public which was not complete until the offer has been accepted either by formal official action or public use consistent with the offer. Since the superior court had not made factual finding and ruled as a matter of law, the case was remanded for factual findings as to whether the dedication had been accepted. This also applied to the issue of whether a public road had been established through prescriptive use. It instructed that the superior court could make its factual findings on the record already before or hold another hearing.

6. Taylor v. Wells Fargo Home Mortgage, 301 P.3d 182 (May 17, 2013)

Susan Taylor fell behind on her mortgage payments to Wells Fargo. Despite the bank having agreed to postpone a foreclosure sale to allow a short sale, it proceeded with the sale. After Taylor threatened suit, the bank repurchased the home and entered into settlement negotiations promising to reconvey the property to her so she could proceed with a sale to a third party. The bank refused to perform as it had insisted on a confidentiality agreement in the proposed final settlement agreement. Confidentiality was not mentioned in the letters between attorneys constituting the settlement agreement.

Taylor sued Wells Fargo and its attorneys Routh Crabtree, P.C. for breach of the settlement agreement and fraudulent inducement. The superior court granted partial summary judgment to Taylor finding that a binding settlement agreement had been formed with the bank. Following a trip through bankruptcy court where the trustee sold the property and placed the remaining proceeds into the superior court registry, the superior court held a bench trial on the remaining fraud claim and on the parties’ respective damages.

At the conclusion of Taylor’s case, the court granted a directed verdict to the bank and the bank’s attorneys on the fraud claim. It awarded the bank the unpaid loan balance as well as the fair rental value of the property for the woman’s post-foreclosure occupancy, and awarded her lost sale damages. We are not given any guidance regarding whether awarding the full loan balance and rent constitutes double dipping, since it is

held that the bank abandoned its claim for rental damages at trial. Nor are we given any guidance as to whether the attempt to collect the amount of the deed of trust is prohibited under the statute of frauds for failure of the bank to produce a written deed of trust note. The merits of this issue, which was first raised late in the trial proceedings, is not addressed since an exception to the statute of frauds is admission of the writing's existence in a court proceeding, which happened here in both pleadings and testimony.

The rest of the decision deals with how to compute offers of judgment and the award of attorney's fees, particularly to Routh Crabtree as prevailing party. Enhanced fees under Rule 82(b)(3) of 60% are approved since the fraud claim against Routh Crabtree was unreasonable. However fees related the bankruptcy proceeding must be removed since only the bankruptcy court can award fees related to the bankruptcy. Also to be removed are fees related to the unsuccessful attempt to obtain Rule 11 sanctions against Yale Metzger, Taylor's attorney.

7. Windel v. Mat-Su Title Insurance Agency, Inc., 305 P.3d 264 (July 12, 2013)

The presence of Mat-Su Title in the caption indicates a much greater involvement than they actually had. This is primarily a case between the Windels and Thomas Carnahan over property they own in the same subdivision. The main issue is the validity of a 50' foot easement over the Windels' property providing access to Carnahan's property. The easement had been created by Robert and Evelyn Davis as part of an earlier subdivision when they owned the property.

As part of the plat application, Mr. Davis recorded a form easement for a right-of-way over the existing "Davis Road." It did not give a width and was not executed by Mrs. Davis. After being informed by the borough that it required a 50 foot width, Mr. Davis rerecorded the easement with the following handwritten changes: "Over existing road" was crossed out, "A 50 FT EASEMENT" was written above with his initials, and "Rerecorded to show easement footage" was written across the bottom of the page. It did not have the signature of Mrs. Davis and the changes by Mr. Davis were not notarized.

This is a document interpretation case. The Court recites its three step interpretation analysis: 1) is it ambiguous on its face, 2) if so evaluate extrinsic evidence, 3) if the parties' intent is still not revealed, use rules of construction. The original easement was ambiguous as to width. Extrinsic evidence including the attempt to change and various platting documents prove that 50 feet was the intended width. Although the original easement was a properly notarized document, it was not signed by Mrs. Davis who owned the property with her husband as tenants by the entirety. The Supreme Court disagreed with the superior court's interpretation of AS 34.25.010 providing for validation of defective acknowledgements after 10 years if certain conditions are met since here there was no acknowledgement or signature. She instead was found to have

ratified it by applying for the plat and signing later conveyances to other property subject to the easement.

Since the easement was valid, the fraud and misrepresentation claims against the title companies failed since their representation that the property was subject to a 50 foot easement was true. They had properly disclosed and excepted from coverage the two easement documents which were provided.

8. Wiersum v. Harder, No. 6815 (August 23, 2013)

In this per curiam opinion, all five justices also filed their own opinions either concurring or concurring in part and dissenting in part. This is a timber trespass case. The Wiersums owned property on a hill overlooking Lisa Wietfeld's cabin at the bottom of the hill. The Wiersums assumed that Wietfeld owned all the property between her cabin and their property. They called her at work and asked if they could cut some trees on her property that might "come down with the wind and harm their property. She gave permission because she thought the removal of some trees would "let a little more light in." When she returned from work later that day, she discovered that the entire hillside had been cleared.

Wietfeld did not own all of the property between her cabin and the Wiersum property. In-between was a lot owned by Paul Harder. Harder brought a timber trespass claim against the Wiersums seeking restoration costs and treble damages under AS 09.45.730. The Wiersums answered and filed a third-party complaint against Wietfeld seeking to have any potential damages apportioned between themselves and her. The superior court dismissed Wietfeld from the case on summary judgment. The jury awarded Harder \$161,000 in compensatory restoration damages and treble damages under the statute bringing the total to \$483,000. The trial court denied a motion for a judgment notwithstanding the verdict (JNOV) by Harder and had previously denied motions by him for directed verdict.

On appeal the Supreme Court affirmed the dismissal of Wietfeld primarily on a lack of duty on her part and a policy of requiring one seeking to remove trees from another's property to identify the true owner and accurate boundaries. The Court then struggles with the issue of damages many times the estimated fair market value of the lot of \$40,000. For guidance it looks to Osborne v. Hurst, 947 P.2d 1356 (Alaska 1997) which held that damages are measured by the difference between the value of the land before and after the harm if restoration cost is disproportionate to the reduced value, unless there is a "reason personal" to the owner for restoring the original condition.

The Court holds that the JNOV should have been granted as no reasonable juror would award restorations costs more than four times the fair market value of the property

before the trespass. The damage award is vacated and the case remanded for a new trial on damages. On remand, Harder should not be allowed to testify to and submit as evidence a purported notarized “contract” with the jurors promising that he would use any award of restoration damages to restore his property.

Fabe concurred with almost all aspects of the decision, but would establish an upper limit on compensatory damages at the property’s fair market value, \$40,000 in this case. A remittitur would be ordered wherein Harder could accept the \$40,000 and the treble damages bringing it to \$120,000 or elect to proceed to trial on the damages.

Carpeneti, with whom Winfree joins concurs in part and dissents in part. His dissent relates to the “contract” which he thinks also throws doubt on the “reason personal” determination of the jury. Rather than retry only the damages issue, whether restoration should be awarded should also be determined.

Winfree also individually concurs in part and dissents in part. He mainly notes that Fabe’s concurring opinion raised an important issue on the upper limits of restoration which was not addressed at trial or on appeal and suggests that it be raised in the superior court on remand.

Stowers with whom Maassen joins concurs in part and dissents in part. He disagrees with the decision to vacate the jury’s restoration damage award and order a new trial on damages. He states that by vacating the damage award the Supreme Court “intrudes into the jury’s role as fact finder and impermissibly substitutes its own judgment for that of the jury.