

ESSAY QUESTION NO. 7

Answer this question in booklet No. 7

In 2007 Adam obtained title to three acres of property in Alaska. On that property Adam constructed a house for himself that he painted white and a house for his cousin Billy that he painted gray. In 2008 Adam subdivided the property into two lots designated as Lots A and B. Adam's white house was on Lot A. Billy's gray house was on Lot B.

Adam duly recorded the subdivision plat and also duly recorded covenants indicating that all buildings on the two subdivided lots had to be painted white or gray. Adam retained Lot A. He conveyed Lot B to his cousin Billy. At the time of the conveyance Billy accessed his Lot B by a paved road partially located on Lot A because that was the only safe and practical access to Lot B.

In 2009 Adam conveyed Lot A to his cousin Charly in exchange for a note secured by a deed of trust recorded on Lot A. A few months later Charly and another cousin, Danny, entered into a contract whereby Danny agreed to purchase Lot A.

Charly and Danny got into a dispute over their contract. Danny sued Charly seeking specific performance of their contract and duly recorded a lis pendens on Lot A. Meanwhile, Charly had fallen behind on his payments under his deed of trust note to Adam and Adam initiated a foreclosure on Lot A. Cousin Eddy bought Lot A at the foreclosure sale in 2010. Eddy knew about his cousin Danny's lis pendens on Lot A before he bought the lot at the sale.

Right after the foreclosure sale Eddy got together with his cousins and learned the following: that Billy was still crossing Lot A via the paved road to get to Lot B; that Adam's original house was still white but Billy had started to paint his gray house yellow; and that Danny claimed it would be imprudent for Eddy to build on Lot A because Eddy knew about the lis pendens before he bought Lot A at the foreclosure sale.

Eddy consults you about the situation. Based on the facts above, answer the following questions for Eddy. Explain your answer.

1. Discuss whether Billy currently has a right to cross Lot A via the paved road to get to Lot B.
2. Discuss whether if Eddy paints the white house on Lot A red, he would have a valid defense if Billy brought an action on the covenants against him.
3. Discuss whether Eddy's title to Lot A is affected by Danny's lis pendens.

GRADER'S GUIDE

QUESTION NO. 7

SUBJECT: REAL PROPERTY

1. Does Billy currently have a right to cross Lot A via the paved road to get to Lot B? (45 points)

The answer is 'yes' because it appears that Billy has an implied easement (sometimes referred to as a 'quasi-easement') over Lot A. An implied easement arises when there is "(1) a quasi-easement at the time of contract of sale or conveyance, (2) which is apparent, (3) 'reasonably necessary' for the enjoyment of the land retained or on the land conveyed [at the time of severance], and (4) continuous in nature." *Williams v. Fagnani*, 175 P.3d 38, 40 (Alaska 2007).

Here, the facts indicate that at the time of the conveyance Billy is crossing to his lot via a paved road across Lot A because that is the only safe and practical route. Thus, he has established a quasi-easement at the time of the sale or conveyance, the easement is apparent, and it appears to be "reasonably necessary." Assuming Billy's use is continuous, Billy should meet the test for an implied easement.

Examinees might also note that *Williams* provides that the easement only be reasonably necessary at the time of severance, not at a later point in time. *Id.* at 41. This point was originally established in *Freightways Term. Co. v. Industrial & Com. Construction, Inc.*, 381 P.2d 977 (Alaska 1963) where the court discussed the fact that jurisdictions adopting such implied easements vary a great deal in the degree of 'necessity' needed, ranging from strict necessity to mere convenience. *Id.* at 984.

Examinees should also address whether Billy may have an "easement by necessity." An easement by necessity requires 'strict', not merely 'reasonable', necessity. *Freightways*, supra, at fn. 16. Here, the facts indicate that Billy is using the paved road across Lot A to reach his property because it is "The only safe and practical access to Lot B." Depending on what the safety issues are, Billy might meet the test for an easement by necessity.

An easement by prescription is not available because in 2003 the Alaska statute amended these statutes to restrict the applicability of the doctrine of adverse possession in Alaska. Whereas previously an adverse possession claim could be made by any person who held uninterrupted adverse notorious possession of real property for more than ten years, AS 09.45.052 now limits such a claim to an adjacent real property owner with a good faith but mistaken belief that the real property at issue lies

within the boundaries of his property.

Since all the relevant facts in the question occurred in 2007 or more recently the ten year requirement could not be met. In addition, there is no mention of such a mistaken belief on Billy's part in the question.

2. If Eddy paints the white house on Lot A red, would he have a valid defense if Billy brought an action on the covenants against him? (35 points)

A. Validity of recorded covenants.

Covenants on real property have been recognized as enforceable in Alaska. See *Hurst v. Victoria Park Subdivision Addition No. 1*, 59 P.3d 275 (Alaska 2002). Because the covenants were duly recorded Eddy has constructive notice of their content (AS 40.17.080(a)) and they are not affected by the subsequent foreclosure.

B. Possible defenses to suit.

There is an argument that Eddy has the valid defense of unclean hands because Billy appears to be violating the covenants by starting to paint his house yellow. There is support for this argument in at least one treatise: "Ordinarily, an owner of a lot in a tract who has violated the building restrictions cannot enforce them against others." 20 Am.Jur.2d *Covenants, Conditions, and Restrictions* Sec. 276 (1995) (The Alaska Supreme Court has cited different sections of the Covenants section of the treatise in *Hurst v. Victoria Park Subdivision Addition No.1*, 59 P.3d 275, 278 fts. 9-13 (Alaska 2002) citing 20 Am.Jr.2d *Covenants* at Secs. 16 & 171). Of course, it can also be noted that since Billy has only begun to paint his house yellow, it may be too early to determine if the unclean hands defense would work, e.g. if the yellow paint were only a base cover and it would be covered by gray paint or it was only trim to a primarily gray house, the defense would probably fail.

Laches and waiver are both potential defenses to covenant claims. "[L]aches is an equitable defense against equitable causes of action, but not a legal defense against actions at law." *Laverty v. Alaska R.R. Corp.*, 13 P.3d 725, 730 (Alaska 2000). "The defense requires unreasonable delay by a plaintiff resulting in prejudice to the defendant." *Lake & Peninsula Borough v. Local Boundary Comm'n*, 885 P.2d 1059, 1065 (Alaska 1994). However, since the question specifies that Billy has just begun to paint his house yellow and that the house on Lot A is white, there is no basis for a laches defense in the facts. The same problem exists with a waiver defense. The Alaska Supreme Court has held that "covenants will be deemed waived if the 'evidence reveals substantial and general noncompliance.'" *Kalenka v. Taylor*, 896 P.2d 222, 226 (Alaska 1995) (quoting *B.B.P. Corp. V. Carroll*, 760 P.2d 519, 523-24 (Alaska 1988)). The Court further stated that "a failure to enforce covenants against a single property

[in a development] does not constitute abandonment.” *Id.* Here there are no facts to support an argument by Eddy that substantial and general noncompliance in the subdivision bars an action for violation of the covenants by Billy.

3. Is Eddy’s title to Lot A affected by Danny’s lis pendens? (20 points)

The answer is ‘no.’ See AS 09.45.940, entitled Lis Pendens, which reads as follows:

In an action affecting the title to or the right to the possession of real property, the plaintiff at the time of filing the complaint, or afterwards, and the defendant, when affirmative relief is claimed, at the time of filing the answer, or afterwards, may record in the office of the recorders of the recording district in which the property is situated a notice of the pendency of the action, containing the names of the parties, and the object of the action or defense, and a description of the property affected in that district. From the time of recording the notice, a purchaser, holder of a contract or option to purchase, or encumbrancer of the property affected has constructive notice of the pendency of the action and of its pendency against parties designated by their real names.

Also see *Alaska Laborers Tr. Fund v. P & R Enterprises*, 583 P.2d 825 (Alaska 1978) where the court specifically noted the following regarding the affect of a lis pendens:

His [the purchaser at a deed of trust sale] title is not affected by knowledge of adverse claims or interests arising after the execution of the trust deed; it is superior to them because it relates back to the time of the execution of the deed of trust. Thus a lis pendens which relates to an interest arising after the execution of the deed of trust will not affect the title obtained by a purchaser at a valid foreclosure sale.

Id. at 826-7. The *Alaska Laborers* decision was made in the face of the argument by the filer of the lis pendens notice that either actual or construction notice of the contract via the lis pendens should prevent the purchaser at the sale from retaining title.

In this case, Eddy’s title relates back to the execution of the deed of trust between Adam and Charly, which deed of trust was duly recorded before recordation of the lis pendens. Therefore, Eddy’s title is not affected by the lis pendens even though he knew about its existence before he bought the property at the foreclosure sale.