

THE TITLE *examiner*



An Informational Newsletter Provided Courtesy of Ticor Title Insurance Company

Summer 2004

The Parable of the Disappearing Street

By Gretchen M. Nichols, Esq.

This is a story of one eye-opening experience of yours truly, playing the part of the wet-behind-the-ears idealistic neophyte attorney, who learned the life-lesson that experience and a job title don't always lead to a competent and a just outcome.

Recently I was asked to do the title examination on a run-of-the-mill construction of a new home in one of the Buffalo area's "Boomtowns." The search and survey looked good but I noticed right away that the survey only

measured a portion of the lot being purchased. Review of the contract and proposed deed offered conflicting information. The contract seemed to cover the entire lot but the deed only described a portion of it. As part of my analysis, I retrieved a copy of the map cover from Erie County Hall and a couple things stood out right away.

"I was surprised to find that it was not on the corner of two streets as shown on the map cover."

First, the map cover showed our lot as a corner lot. Secondly, it had a substantial setback along the front of the premises and along the side where the side street was located. Neither of these things was reflected on our survey. Since only a portion of the property was being conveyed by the proposed deed, I was concerned that the newly built home may be violating the setback.

I mentioned this to the partner I work with and he suggested that I might drive by the lot to ease my mind and



Gretchen M. Nichols

gain a better understanding of what is going on. An experienced title examiner knows that a parcel looks very different in person than it does on paper.

As other work took precedence and as one just "knows" in the back of one's mind that neither the developer nor the town's building department could get something so major, so wrong, I procrastinated on the visual inspection while the closing deadline crept closer and closer.

Finally, finding myself with 20 minutes left on a blessedly brief one-hour luncheon meeting, I decided to

Continued on page 2
head for the new development in

From the Editor

Peter J. Battaglia

Like the Phoenix, we have risen!!! Hard to believe, but our last issue was the Summer of 2001. We hope this issue finds you and your families in good health. As you can see, we have a guest article from Gretchen Nichols which highlights the importance of thorough legal work.

continued on page 6

The Parable of the Disappearing Street

Continued from Page 1

question. The trip took forever and I started thinking I must have missed it as heavy snow started to fall. I was just about to turn around to head back to civilization and my office when the ostentatious subdivision sign appeared in the distance.

I finally found our lot and was surprised to find that it was not on the corner of two streets as shown on the map cover. Although there was no house built where I thought the side street was supposed to be, it clearly looked like a house foundation had been marked, and the builder had audaciously placed one of its signs in the front of the lot.

Back at the office, the partner I work with suggested that I contact the Town Building Inspector, so I faxed over a copy of the survey, map cover and my impressions after viewing the lot and waited for a response. Meanwhile the closing was scheduled to take place two days later.

The morning of the closing I received a call from the Town Building Inspector which sounded to me as ominous as those uttered to mission control 30 years earlier: "Gretchen, we have a problem." It seems that the Town believed the new development was progressing as set forth on the map cover filed with the Clerk's Office and never authorized the subdivision of lots in this neighborhood.

The Town Building Inspector investigated the situation after getting my fax and was very surprised to find another lot instead of the approved side street adjacent to our lot. The situation exploded after this phone call.

The builder was mad the Town "made" him take matters into his own hands by not approving the extra lot

initially. The Town was upset they were duped and, perhaps, not as watchful as they might have been. Even our clients were unhappy with our law office, seemingly for finding a problem that could derail their American Dream indefinitely.

Two full days of very heated negotiations followed, and I am happy to report that the ending was mostly happy, particularly for our clients. The Town agreed to let the charted street fall by the wayside. The builder got his extra building lot and his full purchase price from our clients. However, "Self-Help Builders" did have to supply extra work and expensive landscaping devices that made both lots more palatable to the owners and the Town alike.

Finally, our clients got their dream home and I received the "Attorney of the Year Award!" Actually, I may have dreamed the latter part of the statement, but I couldn't have felt any better if it were true.

In reality, I humbly assign the credit to the partner who was overseeing my work and who, I must admit came up with the suggestion for me to visit the scene. Without him, I probably would have been content to enthusiastically, but hopelessly, pour over lifeless title documents in a search for answers.

The parable of the disappearing street has left me with many thoughts—not all cynical toward "big business" and/or governmental agencies. First, I realize an attorney cannot always do the complete job while deskbound. Sometimes, it takes extra effort such as trekking out to East Boomtown in the middle of a snowstorm. Such investigation goes a long way and reinforces the fact that a real estate attorney earns his or her fee in more than one way and for more than one function. Secondly, an attorney has to be careful not to accept things at face value because they are not always what they seem. In

the instant case, it would have been easy for me to assume that an established builder in business for decades would conduct its business forthrightly. One might find instead that such a businessman may believe his longevity gives him a license and the knowledge to sidestep regulations.

Thirdly, any of us who has been chastised for not getting the proper permit for a garden shed comes to believe that a town building department practically has omniscient surveillance of its citizens' property useage. Certainly, it didn't here.

The true monitoring in such situations comes from ordinary citizenry, the next-door neighbor, or the "ordinary" attorney. I am proud that I was the ordinary attorney in this instance and that my ordinary actions led to an extraordinary outcome.

Which brings me to the fourth, not as obvious, lesson for a young attorney. Doing a job well really is its own reward. One doesn't need the official "Attorney of the Year" designation to know you "did good."

That's the message. Now, just go out there and do it again, and again, and again.

Gretchen Nichols
Nesper, Ferber & DiGiacomo, LLP
501 John James Audubon Parkway
Suite 300
Amherst NY 14228
716-688-3800
gnichols@nfdllaw.com

EXPIRED NOTICES OF PENDENCY IN MORTGAGE FORECLOSURES

By Gilbert M. Hoffman

Of the four provisional remedies recognized by the CPLR (Attachment, Article 62; Injunction, Article 63; Receivership, Article 64; and Notice of Pendency, Article 65), the Notice of Pendency--also known as the *lis pendens*--is the one most frequently encountered and utilized by the real estate bar. Considering that a *lis pendens* is also an essential ingredient of both a judicial mortgage foreclosure¹ and a mortgage foreclosure by power of sale², it is somewhat surprising that the *lis pendens* is the most misunderstood of the provisional remedies, by bench and bar alike. In particular, the ability of a practitioner to re-file an expired *lis pendens* in a mortgage foreclosure action has been oft litigated of late, with some surprising and disturbing results.

Generally, a *lis pendens*, once expired, may not be renewed. Such is the intent of the specific language of CPLR Section 6513, providing for discretionary renewal, by court order, for good cause shown, and only while the existing *lis pendens* remains unexpired. A *lis pendens* enjoys a special status among the provisional remedies. It is, after all, the only provisional remedy that may be exercised without initial judicial scrutiny. This procedure grants to a creditor the ability to file a *lis pendens*, and thereby effectively tie up an alleged debtor's property for up to three years, with little expense or effort, and only the requirement to commence an action within thirty days after filing the *lis pendens*, by serving a summons³. Under some circumstances, an alleged debtor, against whose property a *lis pendens* has been filed, can file an undertaking to cancel the *lis pendens* of

Gil Hoffman is Vice President and District Counsel for the Syracuse District of Ticor Title.

record⁴, but this takes time and money, and the coercive effect on the alleged debtor will have already taken its toll. It is the extraordinary power of this procedure that has caused courts to enforce the general rule of "no second chance," *i.e.*, once a *lis pendens* has expired, a new one can not be filed on the same property and same cause of action. The Court of Appeals reiterated the general rule against re-filing an expired *lis pendens* as recently as March 2002, in Matter of Sakow⁵.

There is, however, one important exception to the rule, as the lenders' bar is well ware, and that exception relates to mortgage foreclosures. Mortgage foreclosures are, in a word, different. First of all, as mentioned above, a *lis pendens* is required in a foreclosure. More importantly, though, a recorded mortgage is, itself, notice of an enforceable lien. Therefore, the coercive effect of filing a *lis pendens* is removed, because the recorded mortgage itself provides the constructive notice in favor of the mortgagee. These differences have been long recognized by the courts, which frequently had permitted a new *lis pendens* to be filed in mortgage foreclosure actions, even after expiration of the earlier one.⁶

Unfortunately, in Sakow, the Court did not mention the common law exception to the rule that applies to mortgage foreclosures, and this failure to mention the

exception has again exacerbated the misunderstanding. This was the situation in Campbell v. Smith⁷. A plaintiff mortgagee, seeking to foreclose a mortgage, allowed a *lis pendens* to expire, and then filed a second. The Appellate Division, First Department, citing Sakow, ruled that the new *lis pendens* was a nullity, and set aside the judgment in favor of the plaintiff mortgagee. Fortunately, Nassau County Supreme Court distinguished Sakow when it decided Queens County Savings Bank v. Spinella⁸. In Queens County, the court held that the plaintiff must re-file a *lis pendens*, but also granted it permission to do so in a mortgage foreclosure action. This appears to have encouraged the plaintiff in Campbell to apply to reargue the matter. The plaintiff did so, successfully, and the First Department recalled its earlier decision and decided in favor of the plaintiff mortgagee⁹; good news for the foreclosure bar, but still leaving a conflict between the precise language of Article 65 of the CPLR and decisional law.

Occasionally, some well informed member of the legislature introduces a bill to amend Article 65 to correct the problem. Hopefully, one of these bills will pass. In the mean time, we at least have the comfort of knowing that the second Campbell decision has, temporarily at least, righted the course.

¹ Real Property Actions and Proceedings Law, Section 1331

² Real Property Actions and Proceedings Law, Section 1403

³ Civil Practice Law and Rules, Section 6512

⁴ Civil Practice Law and Rules, Section 6515

⁵ Matter of Sakow, 97 N.Y. 2d 436, 767 N.E. 2d 666, 741 N.Y.S. 2d 175 (3/21/2002)

⁶ See, e.g., Slutsky v. Blooming Grove Inn, 147 A.D. 2d 208, 542 N.Y.S. 2d 721, Robbins v. Goldstein,

36 A.D. 2d 730, 320 N.Y.S. 2d 553

⁷ Campbell v. Smith, 297 A.D. 2d 502, 747 N.Y.S. 2d 18

⁸ Queens County Savings Bank v. Spinella, 193 Misc. 2d 222, 749 N.Y.S. 2d 861 (2002)

⁹ Campbell v. Smith, 2003 NYSlipOp 17429, (A.D.1) decided 10/14/03



Northern New York Marketing Committee

The NNY Marketing Committee was established in February 2002. Comprised of Ticor managers, sales account executives and the NNY IT manager, the committee brings to the table strategies, challenges, and solutions from across the state. From Herkimer County to Chautauqua County, you can rely on members of the Marketing Committee to deliver our latest products and services to your door.

Front row left to right: Chad Faulkner, Account Executive, Bath; Tina Gleason, Branch Manager, Bath; Travis Iradi, NNY IT Manager; Clark Schaffner, Branch Manager, Lockport; Mike Mangone, Account Executive, Rochester; Dave Reddinger, Branch Manager, Rochester; Bunny Thorn, Branch Manager, Lyons; Derek Teeter, Branch Manager, Syracuse; Carmen Polito, Account Executive, Buffalo. Back row left to right: Peter Battaglia, Underwriting Counsel, Buffalo; Mark Lotterer, NNY Area Manager; Chris Dardano, Account Executive, Syracuse; Rick Zimmer, National Processing Unit (HUB) Manager.

Convenient Locations to Serve your Title Insurance Needs:

Batavia

104 Bank St., PO Box 439
Batavia NY 14021-0439
Ph. 585-343-8088
Fax 585-343-5482

Bath

34 Liberty St., Suite 102
PO 111
Bath NY 14810
Ph. 607-776-7866
Fax 607-776-5198

Buffalo

420 Main St., Suite 200
Buffalo NY 14202
Ph. 716-854-2982
Fax 716-854-0223

Elmira

County Clerk's Office
210 Lake Street
Elmira NY 14901
Ph. 607-725-1018

Lockport

122 Niagara St., PO Box 551
Lockport NY 14095
Ph. 716-434-2825
Fax 716-434-9531

Lyons

66 William St., PO Box 349
Lyons NY 14489-0349
Ph. 315-946-4363
Fax 315-946-6462

National Processing Unit (HUB)

201 East Jefferson St., 5th Fl.
Syracuse NY 13202
Ph. 888-292-1533
Fax 888-551-4155

Oswego

34 East Bridge St., Suite 200
Oswego NY 13126
Ph. 315-342-2184
Fax 315-342-5959

Rochester

19 West Main St., 4th Floor
Rochester NY 14614
Ph. 585-546-6350
Fax 585-546-5465

Syracuse

201 East Jefferson St., 4th Fl.
Syracuse NY 13202
Ph. 315-474-1273
Fax 315-474-4281



Northern New York Sales Force

Whether it's a ProTitle installation, an examining counsel application, or one-on-one title processing training, our experienced sales force are the contact people for all your title needs.

Left to right: Chad Faulkner, Bath; Mike Mangone, Rochester; Chris Dardano, Syracuse; Carmen Polito, Buffalo

Introducing Our Underwriting Staff—

Some new names and places, plus many old favorites.

Buffalo—716-854-2892

(Allegany, Cattaraugus, Chautauqua, Erie Counties)

- Mark Lotterer, Area Manager
- Mary Jane Keyse, District Counsel
- Lisa Meyers, Title Examiner
- Mary Buckley, Title Examiner
- Dennis Zimmerman, Title Examiner
- David Mineo, Claims Counsel
- Peter Battaglia, Underwriting Counsel

Lockport—716-434-2825

(Niagara, Orleans, Wyoming Counties)

- Clark Schaffner, Branch Manager
- Mark Burhans, District Counsel

Batavia—585-343-8088

(Genesee County)

- David Reddinger, Branch Manager
- Mark Burhans, District Counsel

Rochester—585-546-6350

(Livingston, Monroe, Ontario, Yates Counties)

- David Reddinger, Branch Manager
- Josephine Carra, District Counsel

Bath—607-776-7866

(Chemung, Schuyler, Steuben Counties)

- Christine "Tina" Gleason, Branch Manager
- Josephine Carra, District Counsel

Lyons—315-946-4363

(Seneca, Wayne Counties)

- Bernardine "Bunny" Thorn, Branch Manager
- Josephine Carra, District Counsel

Syracuse—315-474-1273

(Broome, Cayuga, Chenango, Cortland, Herkimer, Jefferson, Lewis, Madison, Oneida, Onondaga, St. Lawrence, Tioga, Tompkins Counties)

- Derek Teeter, Branch Manager
- Gilbert "Gil" Hoffman, District Counsel
- Elissa Fagelman, Counsel
- Eva Hemingway, Senior Title Officer

Oswego—315-342-2184

(Oswego County)

- Derek Teeter, Branch Manager
- Gilbert Hoffman, District Counsel

Continued from page 1

I invite any of you to submit an article to me for possible publication. Public interest articles, amusing stories, as well as legal issues are also welcome.

As many of you may know, in January 2004 I left private practice and joined Ticor's Buffalo office as Underwriting Counsel. Ticor was my first employer after law school for four years in the early 70's. It's wonderful to be back providing underwriting assistance to all our offices, as well as customer development.

Please take a minute to review (and save) pages 4 and 5 to see many familiar as well as new faces and places. We have grown quite a bit in the last few years in order to provide whatever title assistance our customers may need.

We hope you enjoy this issue and welcome your comments and suggestions. Remember to take more time with your families and enjoy your summer.

Peter J. Battaglia
716-854-2907, ext. 223
battagliap@ticortitle.com



Visit us on the web!
www.nyticor.com

**Sign up to receive the *Title Examiner*,
learn about ProTitle, download legal
forms, search our branch directory, and
more!**



420 Main St., Suite 200
Buffalo NY 14202

The Title Examiner is a periodic newsletter of Ticor Title Insurance and Chicago Title Company. Please let us know if you would like to see a particular topic addressed in a future issue or if you have any questions regarding an article.