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Property—Real Property—Collateral Attack

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a number of acts which they maintained were part performance of an alleged oral contract, sufficient to render the statute of frauds inoperative. In return for the plaintiffs' landscaping the area adjacent to their and defendants' buildings and developing a garden project, defendants allegedly were to grant plaintiffs a perpetual easement. The court cited *Burns v. McCormick*,[11] containing the well-known opinion of Cardozo, which eloquently reaffirmed the general rule: "There must be performance 'unequivocably referable' to the agreement . . . 'An act which admits of explanation without reference to the alleged oral contract or a contract of the same general nature and purposes is not, in general, admitted to constitute a part performance.'[12] What is done must itself supply the key to what is promised. It is not enough that what is promised may give significance to what is done."[13]

The court said it knew of no authority holding that an oral contract for a perpetual easement has been sufficiently performed to authorize a decree of specific performance where the applicant did not have possession, and where no improvements were made, as was the case here. Notwithstanding, the court then referred to the specific acts of the plaintiffs and said these acts did not meet the above test. The plaintiffs' purchase of two adjoining buildings from third persons, the gaining of possession of eight apartments in one of them, the hiring of an architect to draw plans for the garden project, consultation with their attorneys relative to the preparation of formal grants, and even the registering of the trade name "Carnegie Gardens," the court said *could* be interpreted as part performance of the alleged contract, but "it is by no means the *only* reasonable explanation of those acts and that is the test which must be satisfied."[14]

Collateral Attack

In *Swindler v. Knocklong Corp.*,[15] defendant had acquired title to land at a tax sale and was awarded judgment in a partition action he then brought against plaintiffs. Here, the plaintiffs, successors of the heirs of the record owner, brought this action under Real Property Law, § 500, et seq., to set aside the service in the latter action. Plaintiffs founded their claim on the ground that service by publication in the partition action was void since it was based on an affidavit that the heirs of the record owner could not be found. Defendant's search only went as far as the date of his filing lis pendens in that action. A more com-

11. 233 N. Y. 230, 135 N. E. 273 (1922).
12. *Wooley v. Stewart*, 222 N. Y. 347, 351, 118 N. E. 847, 848 (1918).
13. *Burns v. McCormick*, *supra*, at 232, 135 N. E. at 273.
14. 113 N. E. 2d at 421.
15. 305 N. Y. 527, 114 N. E. 2d 25 (1953).

plete search of the record would have revealed a deed from these heirs which was recorded eight days after the filing of the lis pendens.

The court admitted that technically the affidavit of defendant was incomplete or even possibly misleading, but took judicial notice that the filing of a lis pendens in such an action is the cut-off point, and any transaction thereafter affecting title is subject to the lis pendens. Therefore, the court held that the application for the order of service by publication was justified. Citing *Valz v. Sheephead Bay Bungalow Corp.*,[16] the court pointed out that in such a collateral attack as the present one, the question is whether the prior judgment was so far invalid as to amount to a denial of due process. Since the lower courts decided in favor of the validity of the service in the previous action, the Court of Appeals said it could not hold, as a matter of law, that the affidavits on which the publication order was obtained were so fraudulent as to make the order itself, and the subsequent service and judgment, nullities. The plaintiffs, in this collateral attack, did not meet their heavy burden of proving clearly there was actual, and not mere constructive, fraud.[17]

Landlord-Tenant

Ordinarily where a lessee has the right to renew his lease provided he gives notice, the giving of notice is a condition precedent which must be complied with within the stipulated time.[18] However, when there is a showing of mistake or surprise or other similar excusable fault, equity may relieve against the forfeiture of a valuable lease.[19] In *Jones v. Gianferante*,[20] the tenant had intended to accomplish a renewal, but his notice to the landlord was thirteen days after the time ambiguously specified in the lease. The court found that this failure to notify within the designated time was the result of an honest mistake that caused no damage to the landlord, and that to evict the tenant would cause him great hardship because of his business investment, etc. Relying upon these equitable principles, the court affirmed the dismissal of the landlord's action.[21]

16. 249 N. Y. 122, 163 N. E. 124 (1928).
17. *Ward v. Town of Southfield*, 102 N. Y. 287, 293, 6 N. E. 660, 661 (1886).
18. *Doepfner v. Bowers*, 55 Misc. 561, 106 N. Y. Supp. 932 (Sup. Ct. 1907); *Ocumpaugh v. Engel*, 121 App. Div. 9, 105 N. Y. Supp. 510 (4th Dep't 1907); *Fidelity & Columbia Trust Co. v. Levin*, 128 Misc. 838, 221 N. Y. Supp. 269 (Sup. Ct. 1927), *aff'd*, 221 App. Div. 786, 223 N. Y. Supp. 866, *aff'd*, 248 N. Y. 551, 162 N. E. 521 (1928).
19. *N. Y. Life Ins. & Trust Co. v. Rector of St. George's Church*, 64 How. Prac. 511 (1883); *Matter of Topp*, 81 N. Y. S. 2d 344 (Sup. Ct. 1948).
20. 305 N. Y. 135, 111 N. E. 2d 419 (1953).
21. 280 App. Div. 856, 113 N. Y. S. 2d 703 (3d Dep't 1952).