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Property—Real Property—Landlord-Tenant

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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).

A novel question concerning a city imposed charge on real property after a lease had been executed was involved in *Black v. General Wiper Co., Inc.*[22] Here, a landlord was awarded possession of the rented premises in a summary proceeding, but was denied recovery of sewer rents levied against the property during the tenancy and paid by the landlord. These sewer rents were first imposed in 1950, about a year and a half after the lease was executed, by a local law of New York City which declared, ". . . the owner of . . . real property connected with the sewer system . . . shall pay a sewer rent or charge for the use of the sewer system."[23] Although the lease was silent upon the matter, the landlord maintained that the tenant should bear this burden. The court gave the problem extended treatment in convincingly affirming the Appellate Division's denial.[24]

Basically, of course, the burden rests where the parties intended, and since the lease said nothing concerning sewer rents, the court looked to the nature of the overall scheme of the obligation. No charge shall be imposed upon a tenant except those specified in the lease, and any ambiguity in that contract must be resolved against a landlord.[25] When the lease was executed in 1948, it was common knowledge that every city in the state since 1929 was empowered by express legislative mandate to impose sewer rents.[26] Therefore, the court pointed out, it cannot be said that these charges were of such an improbable character as to be beyond the contemplation of the parties. The very wording of the statute shows it did not intend to alter existing obligations of the landlord and tenant, viz., "the owner . . . shall pay . . ."[27] No new burden was imposed on the landlord since property taxes are the main source of revenue for the city and the maintenance of the sewers was then included in the city's budget, and in a like manner, sewer improvements were borne by property owners in the form of special assessments based on the value of the property. Thus, the burden of the sewer rents fell upon the landlord.

B. Personal Property

Sales

It is clearly settled that simple delivery of possession of personal property to another as a depository, pledgee, or agent is insufficient to preclude the owner from asserting title when the

22. 305 N. Y. 386, 113 N. E. 2d 528 (1953).
23. NEW YORK CITY LOCAL LAW 67 (1950); ADMINISTRATIVE CODE OF THE CITY OF NEW YORK § 82(d) 9-9.1.
24. 280 App. Div. 807, 113 N. Y. S. 2d 493 (2d Dep't 1952).
25. *455 Seventh Ave. v. Frederick Hussey Realty Corp.*, 295 N. Y. 166, 172, 65 N. E. 2d 761, 763 (1946).
26. GEN. CITY LAW § 20 (26).
27. See note 23 *supra*.