Money, Dirt and Steel: Year End 2015 NC Real Property Litigation Update

By: Gilbert C. "Gib" Laite, III

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Inverse Condemnation:

***Nies v. Town of Emerald Isle*, COA15-169 (November 17, 2015).** The Town of Emerald Isle established a beach nourishment project extending the mean high water mark seaward, and regulating vehicles driving along the beach to the foot of the frontal dunes. An oceanfront property owner sued the Town for inverse condemnation claiming the ordinance infringed on the dry sand area of the beach above the mean high water mark, which was his private property, and thereby constituted a taking. Summary judgment was entered for the Town, and the property owner appealed. The Court of Appeals affirmed.

Under North Carolina law, Public Trust land includes the wet sand area of the beach that is regularly subject to flooding by tides and the dry sand area of the beach that is subject to occasional flooding by tides. At least some portion of the dry sand beaches is subject to the Public Trust. The Court of Appeals adopted a test: ?Natural indicators of the landward extent of the ocean beaches include, but are not limited to, the first line of stable, natural vegetation; the toe of the frontal dune; and the storm trash line.? This test makes clear that the Public Trust applies to both wet sand beaches, which are generally but not exclusively publicly owned, and dry sand beaches which are generally but not exclusively privately owned. The landward boundary is the reach of the storm tide. The Court of Appeals found that the ?right to prevent the public from enjoying the dry sand portion of the Plaintiff?s property was never part of the ?bundle of rights? purchased by the Plaintiffs . . .? Therefore, an ordinance that impliedly allowed driving on the dry sand area by regulating it did not result in a taking. The ordinance did not result in a physical taking, and, because Public Trust rights exist in the dry sand area, the Town could regulate them.

This area of the law is evolving, and this case is expected to be but one in a long line of cases to come.

***NCDOT v. Fromnecht, et al*, COA14-1185 (July 7, 2015).** NCDOT condemned a portion of the landowner?s 1.125 acre gas station property for a public highway. NCDOT did not claim to be acquiring the parcel?s right of access to any public road but did close the section of the public road that abutted the entire northern frontage of the property along Dowdle Mountain Road. The property retained frontage on Oak Forest Road, but this required a longer route for access from and to Highway 441. The trial court held that no taking occurred from the closing of Dowdle Mountain Road, as this was an exercise of the state?s police power, and the property still had access to the same public roads. The landowner appealed

The Court of Appeals found that access to Dowdle Road was an easement appurtenant to the property, however the closing of a section of Dowdle Road did not eliminate all direct access to the road, since there was direct access to the rerouted road. Before the taking the landowner had two points of access, one to Highway 441 and one to Dowdle Road. After the taking he also had two points of access, albeit rerouted some 650 feet to the rerouted Dowdle Road. The court found the rerouting a proper exercise of the police power and affirmed.

This case simply recalls the often cited general rule that circuity of travel alone does not create a compensable event.

***Town of Midland v. Wayne*, Supreme Court NO. 458PA13 (June 11, 2015).** An individual owned two adjoining tracts of land, one personally and one through his LLC. A development plan was approved for both tracts, and the tract owned by the LLC was partially developed. The tract owned individually was then conveyed to a third party. The Town of Midland subsequently filed a condemnation action to take 3 acres of the individually owned tract for a gas line. The LLC was not named as a party since the gas line did not go over any of the tract titled to the LLC. The LLC moved to intervene asserting that, since the land to be condemned was part of an overall development, its land was also affected by the taking. The individual owner answered and claimed damage to the entire subdivision on its tract outside the 3 acres taken, due to the reduction in the net developable acres. The trial Court found no unity of ownership and denied the motion to intervene. However, it did find a regulatory taking had occurred as to the subdivision on the individual?s tract. Both sides appealed.

The Court of Appeals refused to find a unity of interest between the two tracts, affirmed denial of the LLC?s right to intervene, and further found no regulatory taking had occurred since the land outside the 3 acres still had practical use. The Supreme Court accepted review.

The Supreme Court found that the LLC was entitled to intervene since the two tracts were physically connected and had a unity of use. The fact that one parcel was held by an LLC and the other by an individual did not defeat the right to claim unity for eminent domain damage purposes. As to damages, the Court made clear that, to the extent the taking of the 3 acres affected the developability of the remaining acres in the subdivision, this was compensable under the basic before and after value comparison set out in the statute, without the need to find a regulatory taking.

The Supreme Court?s decision is evidence that, for the most part, the existing eminent domain statutes cover the usual situations in regard to parties and damages.

GUARANTIES:

Guarantors? opinion that the property was worth the amount of the debt avoided summary judgment for lender in deficiency action.

***United Community Bank v. Wolfe*, COA14-1309 (July 7, 2015).** This was an action by the bank to recover a deficiency from the guarantors after the secured property was bid in at foreclosure by the bank as the successful bidder. The guarantors raised the defense under G.S. § 45-21.36 that the secured property was fairly worth the amount of the debt, notwithstanding the amount of the creditor?s bid, so under the statute there could not be a deficiency. The bank moved for summary judgment in reliance on its appraisal and the subsequent sales price of the property. The guarantors relied only on their joint affidavit giving their opinion that, at the time of the foreclosure sale, the property was worth the amount of the debt secured. The trial court granted summary judgment for the bank. The Court of Appeals reversed finding that even though the guarantors? affidavit may be much weaker evidence than the bank?s appraisal, it was still sufficient to create a material issue of fact. The case was remanded.

FORECLOSURES:

Possession of Note endorsed in blank establishes bank as holder.

***In the Matter of Foreclosure of a deed of Trust Executed by Carol Rawls*, COA15-248 (October 6, 2015).** In a foreclosure action, the borrower appealed from an order granting the right to foreclose, challenging the proof that the plaintiff was the holder of the note and that the defendant had personally defaulted. The plaintiff had possession of a note made payable to the original lender but endorsed in blank and produced it at the foreclosure hearing. The defendant contended that a specific finding of possession of the note was required and objected to the absence of proof that the plaintiff was in fact the holder. The appellate court disagreed ruling that a holder can be any bank or lending institution that is in possession of a note endorsed in blank. Nothing more was required.

Statute of limitations to foreclose does not commence on default absent acceleration or maturity.

***In the Matter of Foreclosure of Deeds of Trust execute by Grover C. Brown*, COA14-937 (April 21, 2015).** In 1980 Sherrill and Merton Brown conveyed two parcels of property to Grover and Margaret Brown, relatives, and took back a note and deed of trust on each parcel. Both notes were to come due April 1, 2010, and both contained acceleration clauses. Sherrill Brown passed away, and his interest passed to Merton. Payments were made until 1995. At that time, an offer was made to Merton to pay off the notes at a discount, which was refused, but Merton told her borrowers the notes were forgiven. In reliance on Merton?s statement of forgiveness, no further payments were made, but the deeds of trust were never cancelled. Upon the death of Merton in 2014, her executrix accelerated the notes and demanded payment. Unable to comply, the appellants declined, and a foreclosure was commenced. The clerk found as a matter of law that the notes had not been discharged and entered an order of foreclosure. The borrowers appealed arguing the 10 year limitations period in G. S. § 1-47 barred foreclosure since no payment had been made since 1995, well over 10 year earlier.

The Court of Appeals disagreed and affirmed the order of foreclosure. The Court of Appeals explained that for a foreclosure to be time barred two events must occur: (1) the lapse of 10 years after the forfeiture or after the power of sale becomes absolute or after the last payment, and (2) the mortgagor remains in absolute possession during the entire 10 year period. Since the parties stipulated that the maturity date was April 2010 and the last payment was made in 1995, the issue was when the power of sale became absolute. The Court found that, although the last payment was in 1995 and there may have been a default, the acceleration clause had not been exercised, and that, whereas an acceleration clause need not be enforced or may be waived, the default alone would not start the running of the limitations period. Therefore, the statute did not begin to run until maturity, and the claim was not time-barred. Thus, the Court has implied a condition that the last payment must be past due, or that any acceleration right must have been exercised.

Here, the Court is stating that the passage of time alone is not enough to invoke the 10 year limitations period to prohibit the enforcement of a deed of trust.

Mistaken cancellation of deed of trust void.

***In Re Dispute over the Sum of $375,757.47*, COA14-1239 (April 21, 2015).** Property owners had a loan secured by a deed of trust on their property with Mountain 1st Bank. The deed of trust named Mortgage Electronic Registration Systems, Inc. (?MERS?) as the Bank?s nominee. Mountain 1st assigned the note and deed of trust to Resource Mortgage Solutions, which in turn assigned it to Wells Fargo. Some four years later, while Wells Fargo was the holder, Mountain 1st recorded a Certificate of Satisfaction in error. Later, Wells, without knowledge of the cancellation, further assigned the loan to HSBC. The property owners contracted to sell the property and, at closing, refused to pay off Well Fargo due to the cancellation on record. Based on demands by Wells Fargo, $375,000 of the proceeds was escrowed. Later, when Wells Fargo realized it had assigned the Loan to HSBC, it recanted its claim, but after closing MERS recorded a Document of Rescission, and HSBC filed suit seeking the escrowed funds. The trial court entered summary judgment against the property owners in favor of HSBC, awarding them the escrow plus $57,162.76 in legal fees. The Court of Appeals affirmed, finding that Mountain 1st was without authority to cancel the deed of trust having previously assigned the loan, and, therefore, that the cancellation was without force and effect. By presenting to the court the note endorsed in blank, HSBC proved itself the holder.

This case makes clear that anyone checking the public record must look behind the public record to determine the validity of the documents, namely whether they were authorized.

DEEDS:

Notary?s self-interest invalidates deed ? curative statute does not apply.

***Quinn v. Quinn*, COA14-979 (October 6, 2015).** On May 10, 2004 a deed was recorded purporting to transfer property from the plaintiff to Danny and Patricia Quinn. On its face it had been executed on

March 12, 1999, but was notarized May 10, 2004 by Patricia Quinn. No revenue stamps were shown on the deed. Plaintiff filed suit to quiet title and for ejectment alleging that Patricia Quinn was disqualified from notarizing the deed since she took under it. Therefore, it should be deemed as though not recorded. Plaintiff asserted that the deed he signed was to his brother Thomas and his wife Inez Quinn. Defendants claimed that, before the deed was recorded, the first page was replaced to show them as grantees at the request of Thomas, Danny and Patricia. Patricia Quinn testified that she notarized a deed naming Thomas and Inez as grantees. Confusion abounded as to whom the deed was originally directed, but the judge found two possible outcomes: either plaintiff deeded the land to Thomas and Inez and Patricia notarized the deed in 2004, and the deed was changed before recording, or the deed was to Danny and Patricia, and Patricia notarized a deed to herself. Summary judgment was entered for the defendants upholding the deed. The Court of appeals reversed, finding the deed void.

As an initial matter, the Court of Appeals found that, if Patricia did notarize a deed to herself, the deed is void. The curative statute, G.S. §47-62 did not save it. The Court read G.S. §47-62 *in pari materia* with G.S. §10B-20(c)5-6 prohibiting a notary from notarizing for her own benefit. As such, G.S. §47-62 cannot cure any defect in the notarization if she was in fact the grantee. As to whether the deed was still valid between the parties, the court found this to be a material issue of fact. The same was found true in regard to defendants? claim to adverse possession under color of title. The Court of Appeals rejected the argument that, since the plaintiff admitted signing the deed to someone, it must be upheld, stating that the claimant under the deed had the burden of proving validity. Reversed and remanded.

Here the Court makes clear it will not support gamesmanship when it comes to the execution and notarization of deeds.

Litigation Tidbits

Law of the Case only applies if thing decided directly in issue and subsequent evidence not inconsistent.

***Bank of American v. Rice, et al*, COA 15-251 (December 15, 2015).** The action arose over the enforcement of three promissory notes from a financial adviser (?FA?) executed over a period of time. The FA was originally employed by a Bank of America affiliate. One of the notes was payable to B of A and the other two to the affiliate. Later, certain ?Promissory Note Novation Agreements? were executed between the FA and B of A, but not the affiliate. As time marched on, there were a series of mergers and acquisitions pursuant to which the affiliate was merged into Merrill Lynch and then Merrill Lynch was rolled up under B of A. There also was some confusion as to who was the holder of the notes. When the FA violated the terms of his restrictive covenants, B of A filed suit to enforce the notes. As an initial matter, the FA asserted a right to arbitration based on the clauses in the original notes, claiming the novations - which did not contain arbitration clauses- were ineffective because they were executed with B of A, and at least two of the notes were payable not to B of A but to the affiliate. The trial court ruled that the novation agreements were binding and that arbitration was not proper. The FA appealed.

In the first appeal the Court of Appeals found that the novation agreement was binding as to the note payable to B of A, but that, since B of A was not a party to the other notes, it could not be forced to arbitrate. The matter was remanded. On remand, B of A filed a motion for summary judgment on the claims and counterclaims, and was served with cross-motions. The trial court dismissed the claims on the notes in the name of the affiliate under a ?law of the case? theory based on the statement in the first Court of Appeals decision that B of A was not a party to those notes and, therefore, that the arbitration clauses in them were not binding on it. The trial court granted judgment in B of A?s favor on the note payable to it, and dismissed the counterclaims.

On the second appeal, the Court of Appeals found that the novation agreements were enforceable by B of A as to all three notes after explaining the intricate roll up of the various entities. Further, the Court of Appeals rejected the law of the case theory stating that the law of the case only applies to issues actually decided, and, moreover, the principle does not apply when the evidence presented at a subsequent hearing is different from that presented on the former appeal. On the first appeal the only issues was arbitrability; therefore the statements that B of A was not the holder of the two notes payable to its affiliate were not binding. Further, B of A had submitted evidence on remand of the assignments.

Adverse Possession by co-owners.

***Atlantic Coast Properties, Inc. v. Saunders*, COA14-1278 (October 6, 2015).** Three children inherited a 14 acre tract. Two of the siblings moved away. Over time the side of the family living out of state owned a fifty percent interest, and the other side of the family owned fifty percent. For decades, one side of the family lived on the land and recognized the interest of the other side of the family in various ways. All this changed in 2005 when the out of state family contingent sold their interest to a developer, Atlantic Coast Properties. When this occurred, the family living on the land asserted title to the whole by adverse possession under the theory of ?constructive ouster.? Summary judgment was entered for the owners in possession, and Atlantic appealed. The Court of Appeals reversed.

The law is that, if one cotenant has been in sole possession and use of property for 20 years, without any demand for rents, profits or possession by the cotenants, constructive ouster of the cotenants is presumed. However, if the occupying tenant does anything to recognize the title of the cotenants during the 20 year period, the presumption does not arise. The Court of Appeals found evidence from which a jury could find that the occupants recognized the out of state families? interest, even as to long deceased parties, from the following: a phone call wherein a family member from one side asked the other what they wanted to do with their interest; discussions about subdividing the property so each family member would have his or her own deed; and one side testified their parents would have wanted them to share. Some of the evidence in this regard occurred after the 20 year period would have run. The Court of Appeals found that even this slight evidence could be used to show recognition during the 20 year period.

This case makes clear that the Court holds property rights dear and will require strong showings to overcome them, especially based on passive activity.

Homeowner?s Association must comply with due process.

***Bilodeau v. Hickory Bluffs Community Services Association, Inc*., COA15-501 (November 17, 2015).**

The Hickory Bluffs community was developed with a common area dock with ten boat slips thatcould be assigned for exclusive use but remain common area subject to the Association?s maintenance and control. Two couples purchased exclusive rights to two boat slips. One couple, with the Association?s permission, installed a boat lift in the slip under a permit from the County naming them as the owner. The lift was on four pilings inside the mooring area with metal bars, and the pilings were not attached to the dock. Power was then run from the slip owner?s house to the lift. All this was done with the Association Board?s blessing, although not its express approval.

After the lift was installed and power extended, a new Board came into power and voted to discontinue power to the dock until the Board could agree on the matter. The lift remained but without power. Subsequently, the Board ordered the lift removed.

The Association noticed a hearing to discuss the alleged violations at which the slip owner and the Board members were allowed to attend. The Board members attempted to exclude other members of the community from attending the hearing, and, apparently it was a circus environment. The slip owners were stopped at the door. The meeting nevertheless proceeded and fines were imposed. The slip owner filed suit seeking judicial review of the Association?s authority to require removal of the lift and to enjoin the Association from precluding electric wiring to the lift. A consent order was entered whereby the lift could remain pending the suit.

Yet another Board was elected and voted to allow for the electric service to the lift and to rescind the fines. On partial summary judgment, the trial court ruled that the Board had the power to levy fines and to approve the lift, but found that the fines were imposed improperly because the slip owner was not provided an opportunity to be heard and to present evidence. Further, the Board properly rescinded the fine. After this order was entered and the parties agreed that the Board had approved the lifts and wiring, the former Board President brought an appeal. First, he challenged the finding that the imposition of the fines was improper. The Court of Appeals affirmed the lower court on this issue, finding that absent specific procedures in the planned community documents, an evidentiary hearing was required to impose a fine or suspend privileges. The Court of Appeals found that an e-mail notice that attempted to preclude other owners from the hearing failed to satisfy due process, especially in the face of evidence that they were excluded at the hearing and that the meeting was unruly. Further, no minutes were taken and no formal notice of the Board?s decision was given. Next, the appellant challenged the Board?s power to rescind the fines. The Court of Appeals found no prohibition on the rescission of the fines.

The takeaway from this decision is for HOAs to avoid informal decisions, particularly as regards construction of improvements, and to carefully follow basic due process in enforcing their remedies.

Related People

- Gilbert C. "Gib" Laite, III ? 919.981.4046 ? glaite@williamsmullen.com

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