

# A.R.S. ABSTRACT, LTD.

## LEGAL BRIEFS

**From:** John A. Kazazis  
[jkazazis@arsabstract.com](mailto:jkazazis@arsabstract.com)

**Date:** March 4, 2008

---

**Adverse Possession** – Defendants own three residential parcels abutting property owned by a Plaintiff and leased to the other Plaintiff. A fence is located within the Plaintiffs’ parcel three feet to the west of the property line, running the length of each Defendant’s property. The Plaintiffs notified the Defendants that the Plaintiffs were going to replace the fence with a new fence which would be on the property line. The Defendants objected, and the Plaintiff commenced an Action to quiet title and for ejectment. The Defendants counterclaimed in adverse possession. The Supreme Court, Nassau County, granted the Plaintiffs’ motion for summary judgment and dismissed adverse possession claims. There was no proof that the land between the fence and the property line was “usually cultivated or improved” by the Defendants or “protected by a substantial enclosure”, as required by Real Property Actions and Proceedings Law, Section 522 (“Essentials of adverse possession under claim of title not written”). ***According to the Court, “substantial and obvious alteration is required” to establish that the land was “usually cultivated or improved...Even the placement of a structure, such as a garage, is not enough to establish hostile possession by improvement if that structure lies mainly on the claiming party’s land and the encroachment on the disputed property is slight”. In addition, “the mere presence of a fence is insufficient [to show a substantial inclosure’]. There must be a showing that it was a substantial barrier erected by the party claiming adverse possession, without the consent of the owner”.***  
RSVL Inc. v. Portillo.

**Bankruptcy** – In a suit for divorce and spousal maintenance, the Supreme Court, Columbia County, ordered the Petitioner-husband to “bring the mortgage current and make monthly payments until further order”. The Petitioner filed a Chapter 7 bankruptcy petition and ceased making mortgage payments. His wife, the Respondent, moved in Supreme Court to have the Petitioner held in contempt for failing to comply with the Order. The Petitioner argued that the filing of the bankruptcy petition automatically stayed his obligation to pay the mortgage, and he moved in Bankruptcy Court for the Respondent to be held in contempt for violating the automatic stay. The Bankruptcy Court held that the Respondent did not violate

## A.R.S. ABSTRACT, LTD.

the stay. ***Under Section 362 of the Bankruptcy Code there is no automatic stay “of the collection of a domestic support obligation from property that is not property of the estate...” and, according to the Court, the mortgage payments in question were in the nature of support and maintenance which the Respondent was attempting to collect from non-estate assets of the Petitioner.***

The United States District Court for the Southern District of New York affirmed. According to the District Court, “the finding that a debt is a domestic support obligation is ‘a factual determination of the bankruptcy court...subject to reversal only if clearly erroneous’”, and “(t)he bankruptcy court’s findings that the state court order is in the nature of a support payment and that respondent is not seeking to collect from the debtor’s estate are not clearly erroneous”. *Chase v. Chase.*

**Condominiums** – A unit owner sought to enjoin the individual members of the condominium’s board of managers and Omnipoint Communications Inc., a lessee of portions of the roof and basement storage area, from erecting and maintaining a cell phone antenna in any common elements of the condominium. The Supreme Court, Westchester County, denied the motion for a preliminary injunction, finding that the Plaintiff had not demonstrated a likelihood of success on the merits. ***The Board of Managers “is protected by the “business judgment rule” in its management of the common elements, and it was not alleged that the installation of the antenna on the roof and the placement of related equipment in the basement would affect the Plaintiff’s unit.*** The Court granted cross-motions to dismiss the complaint on three grounds. As only injunctive relief was sought there was a failure to state a cause of action; a unit owner does not have standing to sue individually for injury to the common elements; and the Board of Managers was not a defendant. *Di Fabio v. Omnipoint Communications Inc.*

**Contract of Sale** – A contract of sale provided that the premises “will be delivered vacant and clean” at closing. The Defendant-seller did not comply, and the Plaintiff-purchaser expended \$17,000.00 after closing to remove storage bins, containers and other items. The Plaintiff sought to recover damages it incurred due to the seller’s failure to deliver the premises as required. The Supreme Court, Queens County, granted the Defendant-seller’s motion to dismiss the Plaintiff’s trespass claim and granted summary judgment to the Plaintiff on its breach of contract claim. The Appellate Division, Second Department, affirmed the dismissal of the trespass claim but reversed the lower court’s ruling on the contract cause of action. ***According to the Appellate Division, the seller’s obligation to deliver the premises “vacant and clean” did not survive the closing of title. It was not a collateral obligation extraneous to the sale of the realty which could survive the delivery***

## **A.R.S. ABSTRACT, LTD.**

**of title.** The trespass cause of action was a contract claim pleaded as a tort. Novelty Crystal Corp. v. PSA Institutional Partners, L.P.

**Easements** – A driveway easement was extinguished in 1978 when the beneficial and burdened parcels were acquired by a common owner. In 1982 the property was subdivided, and the two resulting parcels of land were subsequently conveyed. The deed to the land that had been burdened by the easement did not mention a driveway easement; the later deed and the subsequent deed to the Defendants, conveying the land that had been benefitted by the easement, referenced the driveway easement and noted that it burdened the servient land. In 2003 the owners of the purportedly dominant land, the Defendants in this case removed a tree and fencing to enable them to have access to their garage using the easement. The owners of the purportedly servient parcel commenced an action for a declaration that the easement was no longer in force and effect, and to restrain the Defendant from using any part of the Plaintiffs' property. The Defendants counterclaimed for a declaration that their land was benefitted by the easement.

The Supreme Court, Staten Island, granted the Plaintiffs' motion, holding that the easement was not re-created, because the deed conveying the Plaintiffs' property did not reference the easement. The Appellate Division, Second Department, reversed, concluding that the extinguished easement was re-created by the reference to the easement in the deed to the benefitted property, because the then owners of the burdened parcel knew of its existence. The Court of Appeals reversed the Order of the Appellate Division and reinstated the judgment of the Supreme Court.

***According to the Court of Appeals, interpreting its holding in Witter v. Taggart, 78 N.Y.2d 234, "(W)e held that an encumbrance must be 'record[ed] in the servient chain [of title]...so as to impose notice upon subsequent purchasers of the servient land'. We did not hold that a subsequent purchaser's notice of an extinguished encumbrance, that once burdened the servient estate, was sufficient to re-create that encumbrance...It is irrelevant that plaintiff's may have had notice of an earlier easement, since the easement was not in existence at the time they purchased the property..."*** Simone v. Heidelberg.

**Eminent Domain** – Property owners whose homes and businesses in downtown Brooklyn are to be condemned to enable the construction of the Atlantic Yards Arena and Redevelopment Project claimed that the taking would violate the Public Use Clause of the Fifth Amendment to the United States Constitution, under which "private property [shall not] be taken for public use, without just compensation". They alleged that the public uses advanced for the Project were pretexts for a private taking. The Second Circuit Court of Appeals has affirmed the District Court for the Eastern District of New York's Order dismissing the complaint. ***According to the Appellate Court, "the Project bears at least a rational relationship to well established***

## A.R.S. ABSTRACT, LTD.

**categories of public uses, among them the redress of blight, the creation of affordable housing, the creation of a public open space, and various mass-transit improvements".** The Supreme Court's decision in *Kelo v. City of New London* (545 U.S. 469) does not "require federal courts in all cases to give close scrutiny to the mechanics of a taking rationally related to a classic public use as a means to gauge the purity of the motives of the various governmental officials who approved it". *Goldstein v. Pataki*.

**Mortgages/Predatory Lending – The Supreme Court, Richmond County, denied a foreclosing mortgagee's motion for summary judgment and stayed the proceeding on finding that the original lender violated New York's "predatory lending" statute. The Court scheduled a hearing to determine damages incurred by the Plaintiff and indicated that relief may, under Section 6-L, include the voiding of the mortgage, the return of all mortgage payments, the expenses of obtaining the loans and attorneys' fees.** Among the acts in question were (i) lending in excess of the purchase price to enable payment of points and closing fees, leaving the borrowers with negative equity in the property; (ii) financing of fees and points in excess of three per cent of the principal amount of the loan; (iii) the failure to undertake the "due diligence" required regarding the borrower's ability to pay a "high cost home loan"; and (iv) not issuing to the borrower a required "Consumer Caution and Home Ownership Counseling Notice". *LaSalle Bank NA v. Shearon*.

**Streets – Two owners of property abutting Flushing Avenue in Brooklyn sued New York City and its contractor to recover for economic loss allegedly incurred due to a major reconstruction of the Avenue over a three year period. They claim that the project reduced vehicular traffic on the Avenue and deprived motorists of access to their properties, which were leased for use as a gas station, a car wash and a convenience store. The Supreme Court, Kings County, granted the Defendants' motion to dismiss. **Absent negligence, there is no liability for interference with access to private property during a public construction project unless the interference is both total and permanent; the Plaintiffs did not allege that there was a permanent loss of access.** Further, insofar as the work impacted the Plaintiffs' property, the Defendants made a sufficient showing that the manner in which the work was done was reasonable and necessary; the Plaintiffs did not provide evidence to the contrary. *Mishgy, LLC v. City of New York*.**