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Don't Delay, Plead Laches Today!

By Lance R. Pomerantz

The defense of laches in land title disputes has been looked upon with favor by the Second Department in 2012. Let's look at these cases and contrast them with another from the not-too-distant past.

"Laches is defined as 'such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity.' The essential element of this equitable defense is delay prejudicial to the opposing party." *Matter of Barabash*, 31 NY2d 76 (1972) [internal citation omitted].

In *Wilds v Heckstall,* 93 AD3d 661 (2nd Dept., 2012), the borrowers' fee title was found to be invalid, but the mortgage given by the borrowers remained a valid lien on the property.

Beulah owned the property. She made a will leaving the property to her sister, Rovina, subject to a life estate in Beulah's husband, Carroll. Beulah died in 1993 and, apparently, no proceeding was commenced concerning her estate. Carroll continued to live at the property. In 1999, Carroll deeded the property to his niece and nephew. Carroll died in 2002. The niece and nephew mortgaged the property to Delta Funding in 2003. In 2004, Rovina commenced an action in Supreme Court to quiet title based on Beulah's will. The action was transferred to Surrogate's Court for a determination of the probate issues.

The Surrogate's Court determined that the will was valid and, therefore, fee title had devolved to Rovina. The niece and nephew were without title. But, the Surrogate's Court also held that Rovina was guilty of laches in offering the will for probate, and that the delay prejudiced the lender's rights under the mortgage. The Second Department panel agreed, stating that the delay "prejudiced the mortgagee, which did not know and could not have known at the time that it took the mortgage on the property that the plaintiff would challenge [the borrowers'] ownership interest."

It may be precisely true that the lender could not have known that the *plaintiff* would challenge the title. However, examination of the deed chain would have revealed the gap in record title from Beulah to Carroll, alerting the lender to the possibility that *someone* would challenge the title. While the decision appears to leave the niece and nephew personally liable on the note, as a practical matter it results in a windfall for them at Rovina's expense.


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Laches requires both an unreasonable delay and knowledge that the opposing party has detrimentally changed his position. The opinion, however, fails to mention any evidence indicating when Rovina obtained knowledge of the assertion of title or the giving of the mortgage.

When *Wilds* first came down, it was featured in my "*Constructive Notice*" newsletter. At the time, an esteemed member of the New York land title bar had this comment: "Lance, I hope you are not suggesting that laches alone, without regard to the law as to adverse possession, should be a basis for barring someone from asserting fee title." While I assured counsel back then that I was not suggesting that position, the Second Department has, in fact, just adopted that very position as the law. *Stein v. Doukas, et al.,* 2012 NY Slip Op 06204 (2nd Dept., September 19, 2012).

In 2004, Doukas allegedly "wrongfully manufactured" a deed for a shopping center from Claire Stein to Doukas's company, Telcor. In August, 2007, Telcor conveyed the property to Jay Realty Enterprises, Inc. for $1,425,000. In 2008, Douglas Stein commenced this action to set aside both deeds.

The court held that "Jay Realty demonstrated its prima facie entitlement to judgment as a matter of law by establishing that the doctrine of laches precluded the plaintiffs from asserting a claim against it" because it demonstrated that, as of February 2007, Douglas Stein knew of the existence of the deed to Telcor. "Further, Jay Realty demonstrated that, despite that knowledge, the plaintiffs took no action to assert their rights to the shopping center property until they commenced this action in April 2008, more than one year later." That knowledge and delay, coupled with Jay Realty's expenditure of funds to acquire the property gave rise to an equitable estoppel against Stein.

While Jay Realty prevailed on its laches claim, the Appellate Division panel also held that Stein had adequately "raised a triable issue of fact as to whether the deed transferring the shopping center property from Claire Stein to Telcor was forged." The net result is that while the deed to the alleged forger may ultimately be overturned, the alleged forger's purchaser can keep the property, to the detriment of the record owner![1]

Among other cases cited by the court (including the *Wilds* case) is *Kraker v. Roll*, 100 A.D. 2d 424 (2nd Dept., 1984). *Kraker,* however, had held that "where title by adverse possession has not been made out, the true owner's inequitable conduct must essentially amount to a fraud to result in a deprivation of legal title. [T]here must be shown ... either actual fraud, or fault or negligence, equivalent to fraud on his part, in concealing his title, or that he was silent when the circumstances would impel an honest man to speak...." The *Doukas* Court does not state that the plaintiff's behavior was fraudulent, negligent or dishonest, or when in the course of events he was "impelled to speak." The change of position prejudicial to Jay Realty that formed the basis of the estoppel was held to be the consideration paid for the deed, but there is nothing in the decision to indicate that Stein knew of the impending sale to Jay Realty and failed to take action to prevent it.

In addition, the court's allusion to delay of more than one year in bringing suit conflates two different concerns. Although Stein had waited more than a year to sue Telcor, his claim against Telcor was allowed to proceed. His suit as against Jay Realty was commenced only a little more than seven months after the deed to Jay Realty was recorded. Yet, that delay was sufficient to invoke laches. In any case, since the payment for the Jay Realty deed itself was determined to be the only change of position by which Jay Realty was "prejudiced," should it matter how long the plaintiff waited to sue? By the court's reasoning, even the day after the sale would have been too late.

In 2010, the Second Department was called upon to decide whether a *seven-year* delay before bringing suit was sufficient to support a laches defense. *Bank of America, N.A. v 414 Midland Ave. Assoc., LLC*, 78 AD3d 746 (2nd Dept., 2010).

One tenant-in-common had delivered a deed that purported to convey the entire

property to a third party buyer in 1996. The buyer also borrowed over $1,000,000 secured by mortgages on the property. The other tenant in common became aware of the deed in 2001, but failed to bring an action to quiet title until 2008.

The buyer and the lender asserted, *inter alia*, the affirmative defense of laches. The court declined to recognize the defense, stating that delay in addressing a known defect in title does not, by itself, give rise to laches. It requires "inexcusable delay" coupled with knowledge that "the opposing party has changed his position to his irreversible detriment."

The court noted that the buyer and lender "made no allegation" that the owner both 1) knew of the sale and 2) did nothing to prevent it. Hence, their defense of laches was dismissed.

At a minimum, it is difficult to reconcile the holdings in *Wilds* and *Doukas* with *Bank of America*. Nevertheless, if you are defending an RPAPL Article 15 action in the Second Department, consider whether laches might be a viable defense to plead.

Note: Lance R. Pomerantz is a sole practitioner who provides representation, expert testimony, consultation and research in land title disputes. He is also the publisher of the widely-read land title newsletter Constructive Notice. For more information, visit www.LandTitleLaw.com.

1. There is abiding precedent stating that a forged deed is void, but the *Doukas* opinion does not address the implicit contradiction it creates with those cases.