

FEDERAL STANDARD ABSTRACT

TITLE NEWS

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Standard of Search in Residential Mortgage Market

In 2005 two sisters brought an action to quiet title against their step-mother and step-sister. The property had been solely owned by their father until his death in 1989. His will conveyed the property to the sisters. However, the sisters had decided to allow their step-mother to remain in occupancy. Later, in 1993, the sisters had begun a probate proceeding, and the step-mother appeared represented by counsel, apparently ready to contest it. Allegedly, the sisters could not finish the probate proceedings due to lack of funds.

Between 1991 and 2005 step-mother and step-sister entered into several transactions involving the premises, which ultimately ended with a recorded deed in the name of step-mother and step-sister and a reverse mortgage in the amount of \$469,342.50. In 2005, upon discovering these facts, the sisters brought the action to quiet title. The mortgage holder moved for summary judgment to dismiss the complaint and the sister cross-moved for a declaration that the mortgage was invalid.

The mortgagee argued that the sisters' claim was barred by the doctrine of laches because they had waited fifteen years to assert their claim. The sisters rejoined that the break in the chain of title and the incomplete probate proceeding was sufficient notice of the sisters' claim. The sisters argued that a diligent title search would have included a surrogate's court search which would have shown the sisters' claim. The mortgagee, for its part, argued that a surrogate's court search was not done because such a search is not customary in the residential mortgage market.

The court found that, since neither party had submitted experts' affidavits attesting to the customary search standard in the residential mortgage market, both motions should be denied. *Chisolm v. Williams*, 2012 WL3115616 (Kings Cty. Sup. Ct., 7/26/2012).

Merger of Title Search with Policy; UCC-1 Fixture Filings Are Encumbrances on Title

Following the purchase of real property, the owner discovered that the property was encumbered by a UCC-1 fixture filing held to secure payment of heating oil deliveries made to the prior owner. The heating oil company obtained a judgment against the owner in the amount of \$21,143.21. The owner, in turn, sued her title insurer.

It appears that the owner brought the action *pro se* and that the court freely considered affidavits submitted by plaintiff to remedy defects in the complaint. To that end, the court reasoned that the claim against the title insurer was not based on issuing a deficient search. When a title insurance policy is issued, the search itself merges with the insurance policy. The owner's claim is then governed by the terms of the insurance policy and not by any standard of due diligence in issuing searches. That being said, the court ruled that the existence of a UCC-1 fixture filing was clearly an encumbrance covered by the terms of the title insurance policy. *Saul v. Fidelity Nat'l Title Ins. Co.*, 36 Misc3d 1217 (Kings Cty. Civ. Ct., 7/18/2012).

Privity of Estate and *res judicata*

An owner obtained several town approvals to erect a structure on his lot. The adjoining neighbors sued to revoke all or some of the approvals in order to prevent construction. The adjacent owners obtained a judgment in their favor, but the judgment was later reversed by the Appellate Division.

By the time construction started, both adjoining owners had sold their lots. One of the new owners brought a new action for a permanent injunction enjoining defendant from moving structures, equipment, materials and other items through the air space over his property and above the ingress and egress across his property, which apparently would prevent construction or make it much more difficult. The supreme court granted a preliminary injunction, subject to the posting of a bond, and both parties appealed.

The Appellate Division, Second Department, reviewed the applicable rule of *res judicata*. “[O]nce a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or seeking a different remedy. The doctrine not only applies to the parties of record in the prior action, but also to those in privity with them. Here, the causes of action asserted by the plaintiff are barred by the doctrine of *res judicata*, as he is in privity with the prior owners, who could have asserted these causes of action in the prior action.” Since the plaintiff’s causes of action are barred by the doctrine of *res judicata*, the plaintiff could not demonstrate a likelihood of success on the merits and the Appellate Division reversed the preliminary injunction. *Parolisi v. Slavin*, 2012 WL 3104218 (2nd Dept., 8/01/2012).

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