

ESSAY QUESTION NO. 7

Answer this question in booklet No. 7

Bob purchased a home on a large lot in Alaska from Al in June. Right after moving in, Bob started to notice the smell of sewage when the wind blew from the north. Bob first checked his wastewater system. His connection to the city wastewater system was normal. He could not find anything wrong and he could not find a source of the smell. After further investigation of his lot, Bob found what he thought was a septic system on his land. From the line of septic clean-out pipes beginning on his lot and heading north, Bob deduced that the septic system serviced his neighbor to the north, Wanda (a clean-out pipe is a plastic pipe that extends from the underground piping of the system to about two feet above the ground surface and is clearly visible). Bob confronted Wanda about her septic system being on his land.

Wanda responded by producing a written easement that Al had granted her many years ago. The easement appeared to properly grant the right to maintain a septic system on Bob's lot in exchange for a cash payment Wanda had made at the time. The document had never been recorded and Bob's title report at the time of his recent purchase did not list an easement in favor of Wanda. Wanda said that Al had told her at the time of the easement creation that he would take care of the paperwork, which she thought meant that Al would record the easement.

Bob sued Wanda for trespass and ejectment regarding the septic system.

Bob also sued Al for failing to disclose the presence of Wanda's septic system on the required disclosure form under Alaska's Disclosures in Residential Real Property Transfers statute. He asked that his purchase of the property be rescinded. Al had filled out the form in its entirety, but did not indicate anywhere on the form the existence of Wanda's system or of the unrecorded easement. He had attached an as-built survey to the form which did indicate the presence of the septic system serving Wanda's property, but said nothing about the easement. Al claims to have simply forgotten about the easement and septic system when he filled out the form.

1. Bob consults an attorney who advises him on his possible claims against Wanda. Bob's attorney advises him against filing any claim related to adverse possession, but tells him he should file both a trespass and an ejectment claim. Discuss the merits of Bob's trespass and ejectment claims.
2. Discuss the likelihood of Bob's success on his claims against Al under Alaska's Disclosures in Residential Real Property Transfers statute and whether, if successful, Bob might rescind the purchase. Discuss any other remedies he might have under the Act.

GRADER'S GUIDE

*** QUESTION NO. 7 ***

SUBJECT: REAL PROPERTY

1. Discuss the merits of Bob's trespass and ejectment claims. [50 points]

The right of a property owner to exclude others is a "fundamental element of the property right" of owners of real property. *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (cited in *State v. Arnariak*, 941 P.2d 154, 156 (Alaska 1997)).

Alaska law defines trespass as "an unauthorized intrusion or invasion of another's land, including subsurface areas." *Parks Hiway Enterprises, LLC v. CEM Leasing, Inc.*, 995 P.2d 657, 664 (Alaska 2000). "Trespass liability may result from an actor's intentional, negligent, or ultrahazardous conduct." *Id.*

An ejectment claim is governed by AS 09.45.630 which provides: "A person who has a legal estate in real property and has a present right to the possession of the property may bring an action to recover the possession of the property with damages for withholding it . . ." (The Alaska Supreme Court has noted: "To prevail in an action to quiet title to real property, a plaintiff must prove possession of the property; otherwise the proper cause of action is ejectment." *Miscovich v. Tryck*, 875 P.2d 1293, 1297 (Alaska 1994)). Bob is arguably not in possession of the interest in the property subject to the easement, thus an attorney would likely file both trespass and ejectment claims).

Here, the trespass and ejectment claims turn on whether the invasion of the property is unauthorized, which relates to the unrecorded easement granted by Al to Wanda. Whether the unrecorded easement burdens Bob's interest depends upon whether he had notice of the easement. Alaska is a race-notice state. AS 40.17.080 provides: "An unrecorded conveyance is valid as between the parties to it and as against one who has actual notice of it." Even though the statute requires actual notice, under state law sometimes inquiry notice is enough for purposes of AS 40.17.080.

a. Actual notice.

Although the easement was not recorded, the septic clean-outs – the facts state that there was a line of clean-out pipes beginning on Bob's lot and leading to Wanda's house – may be enough for a court to conclude that he had actual notice of the adverse use of his property created by the unrecorded easement. *Methonen v. Stone*, 941 P.2d 1248, 1252 n.6 (Alaska 1997). Bob will probably argue that the clean-outs themselves do not necessarily create actual knowledge of a septic system beneath the ground and it is close call whether

the clean-outs alone suffice for actual notice. The as-built attached to the Residential Disclosure Act form also arguably provided Bob actual notice of the adverse use of his property, but did not directly reference an easement and was not recorded.

b. Inquiry notice.

But even if the court were to find that Bob did not have actual notice, the apparent septic clean-outs, which would also have been obvious at the time of Bob's purchase (because they stick out of the ground by two feet), combined with the as-built survey which indicated the presence of the septic system, would probably be enough to create inquiry notice:

It is well established that a purchaser will be charged with notice of an interest adverse to his title when he is aware of facts which would lead a reasonably prudent person to a course of investigation which, properly executed, would lead to knowledge of the servitude.

Methonen v. Stone, 941 P.2d 1248, 1252 (Alaska 1997). Bob's duty of inquiry here would have required him to investigate whether there was an easement granted in favor of Wanda for a septic system on his land because of the presence of the septic clean-outs and the as-built survey indicating the presence of Wanda's septic system. *See id.* & n.6. Bob's arguments made in the context of the actual notice analysis will not likely be enough in the context of an inquiry notice analysis: first, the clean-outs were obvious enough that Bob found them when he walked his land searching for the source of the smell; second, the as-built survey indicated the presence of the system. Because Bob did not fulfill his duty of inquiry, the court will probably find that he had notice of the easement and enforce it, regardless of whether the easement was formally recorded.

2. Discuss the likelihood of Bob's success on his claims against Al under Alaska's Disclosures in Residential Real Property Transfers statute and any remedies he might have if successful. [50 points]

a. Disclosure obligations.

The Alaska Disclosures in Residential Real Property Transfers act requires sellers of residential real property to make a written disclosure to buyers: "Before the transferee of an interest in residential real property makes a written offer, the transferor shall deliver by mail or in person a completed written disclosure statement . . ." AS 34.70.010. The Alaska Real Estate Commission prescribes the form of the disclosure required. *See* AS 34.70.050.¹

¹ **Note:** Applicants are not expected to know the form of the required disclosure statement with any particularity.

The current form is comprehensive and requires disclosures regarding many different aspects of a residential property. On the current form there are many places where Al could have disclosed the presence of Wanda's septic system. In answering, it is enough that applicants know generally that sellers are required to disclose things like easements, problems with major residential systems (heating, water, sewer, etc.) and title issues in the disclosure form.

The Alaska Supreme Court has held that "[s]ellers of residential real property must make good faith efforts to disclose . . ." *Cole v. Bartels*, 4 P.3d 956, 960 (Alaska 2000). It is clear based on the facts that Al should have disclosed the septic system and the existence of the unrecorded easement in favor of Wanda.

Al will argue that he attached the as-built, which did arguably disclose the adverse use of the property for Wanda's septic system. But that is not likely to be enough to fulfill Al's duties of disclosure with regard to the easement granted in favor of Wanda.

b. Remedies.

The Residential Disclosure Act spells out the available remedies for violations of the Act at AS 34.70.090:

- (a) A transfer that is subject to this chapter is not invalidated solely because a person fails to comply with this chapter.
- (b) A person who negligently violates this chapter or fails to perform a duty required by this chapter is liable to the transferee for the amount of the actual damages suffered by the transferee as a result of the violation or failure.
- (c) A person who willfully violates this chapter or fails to perform a duty required by this chapter is liable to the transferee for up to three times the actual damages suffered by the transferee as a result of the violation or failure.
- (d) In addition to the damages allowed under (b) or (c) of this section, a court may also award the transferee costs and attorneys fees to the extent allowed under the rules of court.

Notably, even though Bob is likely to succeed on the merits of his Residential Disclosure Act claim against Al, he may not "invalidate" or rescind his purchase of the property based on Al's violation of the disclosure requirements. *See id.* at § (a).

The remaining available remedies under the Residential Disclosure Act are all monetary. The facts do not provide enough information for an estimate of damages, but applicants may argue that Al's disclosure was either intentional, which would result in up to treble damages, or negligent, which would provide for actual damages.