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# Choose your helpers wisely

By Lance R. Pomerantz

A recent case out of the Third Department[1] hints at a hidden risk for buyers who use engineers, expediters, architects or other "helpers" to assist with their real estate matters.

**The facts of *Gibeault***

In 2007, the County of Saratoga hired an engineering firm, Malcolm Pirnie, Inc., ("Pirnie") for the purpose of "assisting the County in acquiring easements … from real property owners to install [a] water … line." Once the easements were purchased from the record title-holders, the county assigned the easements to the Saratoga County Water Authority. Construction and installation of the water line commenced in 2008. Before and during construction, Gibeault, an adjacent property owner, asserted ownership to a portion of the property over which the authority claimed that it had valid easements. After installation was complete, Gibeault "filed"[ii] a correction deed purporting to change his description. The changed description would result in certain of the authority's easements traversing the Gibeault property.[3]

**The claims of the parties**

The authority brought an RPAPL Article 15 action seeking a declaration that it had unfettered access to the easements, as well as an injunction and damages. Gibeault counterclaimed, asserting ownership of the disputed property, along with other causes of action. The authority then asserted a third-party action against Pirnie, claiming it was negligent in the manner in which it obtained the easements. Pirnie sought dismissal and the Supreme Court denied the motion. The Third Department panel affirmed.

In support of its motion, Pirnie pointed out that Supreme Court had expressly found that a search of the public records and an examination of the chains of title to the subject property would not have revealed the Gibeault title claims. In response, the authority asserted

> "that the Gibeaults put Malcolm Pirnie on notice of their claims of ownership of the subject property and Malcolm Pirnie did not do enough *outside the search of the public documents* to ascertain the proper boundary lines" (emphasis supplied).

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The panel held that the assertion was sufficient to support a *prima facie* claim of negligence. In addition, Pirnie submitted an affidavit from a surveyor that outlined the steps that should be taken-in addition to searching the public records-when easements are acquired from landowners. The surveyor concluded that those steps were completed in this instance. Nevertheless, the Third Department found that Gibeault had proffered sufficient facts to support the inference that "Malcolm Pirnie did not do enough to ascertain the appropriate boundary lines as a result of the Gibeaults' claims."

**Why is this worrisome?**

Clearly, Pirnie thought it had taken all reasonable steps to determine the location of the easements and the identities of the owners from whom easements would need to be obtained.

The opinion is silent as to whether the county had obtained title insurance on the easements. For the sake of discussion, let's assume that it had. If it is ultimately found that Pirnie "did not do enough *outside the search of the public documents*" to ascertain the proper boundary lines or ownership interests, could the insured have a viable claim under the policy?

The answer to that question hinges, in large part, on the applicability of Exclusion From Coverage 3(b) in the 2006 ALTA Owners Policy. That provision excludes from coverage

> Defects, liens, encumbrances, adverse claims, or other matters … not Known to the Company, not recorded in the Public Records at Date of Policy, but Known to the Insured Claimant and not disclosed in writing to the Company by the Insured Claimant….

Since Pirnie was engaged for the express purpose of "assisting the county in acquiring easements," its knowledge of adverse claims might well be imputed to the county.[iv] As such, Gibeault's off-record assertions could plausibly be construed to be "adverse claims, or other matters … not recorded … but known to the Insured…" and, hence, excluded from policy coverage. In addition, if Pirnie has an affirmative duty to do more than a public records search and comply with local surveying practices, might that duty also be imputed to the buyer, with the same exclusionary effect?

**Better safe than sorry**

Proposed buyers frequently engage the services of various "helpers" in connection with the acquisition of real estate. The engagement should spell out the helper's obligation to promptly and accurately report all matters it discovers that might impair title. Early and complete disclosure will permit counsel to work with the title insurer in crafting a policy that delivers the coverage the buyer expects to receive.

*Note: Lance R. Pomerantz is a sole practitioner who provides 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, please visit www.LandTitleLaw.com.*

1 *Saratoga County Water Authority v. Gibeault*, 2013 NY Slip Op 1120 (3rd Dept., February 21, 2013).
2 The opinion uses the word "filed." More likely, the deed was recorded, rather than filed.
3 It is unclear whether the "correction deed" was a true correction deed from the original grantor, or a unilateral one, from Gibeault to Gibeault, which would actually be ineffective to change the description. For purposes of the lawsuit, however, it was sufficient to create a cloud on the Authority's title.
4 The opinion does not characterize the parties' precise legal relationship.