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Recording: The Boundaries of the Whole World

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Basic to any lawyer's understanding of the recording statutes,1 is the concept that the proper recording of an instrument in recordable form places "the whole world" on notice of the interest claimed in the recorded instrument.2 In a July 2011 Supreme Court decision from Brooklyn, Elbadawi v. City of New York,3 however, the court endeavors to find some boundaries as to whom in the whole world can complain if the recording clerk records an instrument erroneously.

In the landmark decision of Baccari v. De Santi,4 the Appellate Division, Second Department laid down the universally accepted doctrine that both the recording clerk and the municipality5 for whom the clerk works are liable for damages for misrecording. In Baccari, the one hurt by the misrecording was a senior lien holder, who lost seniority when it turned out that the premises were mortgaged to a junior mortgagee, who had no knowledge of the earlier lien because the clerk indexed the senior mortgage under the wrong town.

Baccari describes precisely the kind of person or entity one would expect would suffer injury from an erroneously recorded deed or mortgage. The injured party suing in Elbadawi, however, was a woman injured from falling in a pizza parlor. Her attorney relied on the public record to ascertain the name of the property owner to sue. Unbeknownst to her, however, the City Register misrecorded the most recent deed to the pizza parlor, and, therefore, the wrong defendant was sued. Nashwa Elbadawi did not find out about the recording error until it was too late to sue the correct defendant.

The Elbadawi court was likely correct in distinguishing the Baccari doctrine, but Elbadawi failed to create a generalized framework to determine who, exactly, is an appropriate Baccari plaintiff.

'Elbadawi' Theory

Elbadawi builds on a theory of relationship between the recording officer6 and the person seeking to establish liability. While such theory speaks to frameworks like breaches of fiduciary duty, it obscures the fact that misrecording a document affecting real property is the tort of negligence, for which theory is well defined, coming from Palsgraf v.


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Long Island Railroad7 where one has to determine the boundaries of the zone of danger created by the negligent act.

For example, a pothole is proprietary municipal negligence creating a danger, for which the city has no liability, at least until someone is injured. So too with misindexing. Baccari makes clear that if someone has actual notice of the superior lien, the absence of indexing is irrelevant.

Unlike potholes, however, the government, by statute, might have a duty to undertake a certain act, with no discretion in doing so. These are the so-called "ministerial" duties. Under Public Officers Law §73(d), "The term 'ministerial matter' shall mean an administrative act carried out in a prescribed manner not allowing for substantial personal discretion." Thus, RPL §291 states, "(S)uch county clerk shall, upon the request of any party, on tender of the lawful fees therefor, record the same in his said office" (emphasis supplied).

RPL §316 states:

Each recording officer must provide, at the expense of his county, proper books for making general indexes of instruments recorded in his office, and must form indexes therein, so as to afford correct and easy reference to the records in his office.

Both the recording officer's duty to record and the duty to index are mandatory, nondiscretionary acts, and making neglect of them, under Baccari theory, is essentially governmental "malpractice."

Lauer v. City of New York8 teaches how to determine when this malpractice is actionable:

This brings us directly to an essential element of any negligence case: duty. Without a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm. While the Legislature can create a duty by statute, in most cases duty is defined by the courts, as a matter of policy.

Fixing the orbit of duty may be a difficult task. Despite often sympathetic facts in a particular case before them, courts must be mindful of the precedential, and consequential, future effects of their rulings, and "limit the legal consequences of wrongs to a controllable degree." Time and again we have required "that the equation be balanced; that the damaged plaintiff be able to point the finger of responsibility at a defendant owing, not a general duty to society, but a specific duty to him."

This is especially so where an individual seeks recovery out of the public purse. To sustain liability against a municipality, the duty breached must be more than that owed the public generally. Indeed, we have consistently refused to impose liability for a municipality in performing a public function absent "a duty to use due care for the benefit of particular persons or classes of persons" (citations omitted).

In order to measure those to whom the municipality owes a particular duty of care, one must first look at all of the possible candidates.

Who Suffers?

Many persons could benefit from properly indexed real estate records over and above the intended class of beneficiaries. For example, those running credit reports on landowners may be interested in satisfied tax liens, or those investigating public figures may be interested in what properties they hold. As a practical matter, with the advent of systems like ACRIS (Automated City Register Information System),9 recording does not merely put the world on notice, but essentially gives even the most casual user vastly greater access to the public record than the horse and buggy designers of the recording statutes could ever have imagined.

In distinguishing between parties with and without a valid cause of action against the recording officer for an error in recording, however, one must distinguish between those with an "interest" in the property in a legal sense, and those with a lesser interest.

To place reasonable boundaries on municipal

liability, it is necessary to limit those with a cause of action for errors in recordation to the specifically intended beneficiaries of the recording statutes as first created.

Matter of Gray10 said of recording statutes, "Their only purpose is to furnish a means of protection against other assignees of the same interest."

Shill v. Careage Corp.11 states, "The purpose of the recording act is to notify subsequent purchasers and incumbrancers of the rights the recorded instruments are intended to secure."

Schleuter Co. Inc.. v. Sevigny12 states:

The purpose and object of our system of laws for the recording of written instruments affecting the title to real estate cannot be misunderstood. It is to give notice in the manner most likely to prove efficacious, to all who are or may become interested, of such contracts and agreements between parties as may affect the title to such real estate, or the rights and liabilities of parties who may deal in or with reference to it.

Through Schleuter's opacity we see Shill's "purchasers and incumbrancers" as the recording statutes' sole intended beneficiaries.

Thus, if the public record does not disclose a deed or mortgage (as a result of an indexing error on the part of the recording clerk), a bona fide subsequent purchaser or lender, without notice of the erroneously recorded interest, will achieve a priority interest in the premises under the protections of the recording statutes, and the holder of the erroneously recorded document will have a suit against the recording officer for damages incurred.13

These injured purchasers and lenders, however, suffer from an injury quite different from those individuals, who slip in a pizza parlor, but fail to sue the proper owner of the premises due to a recording clerk's indexing error. Although both the purchaser/lender and the personal injury plaintiff are victims of the recording error, per Elbadawi, (unless the recording clerk voluntarily undertook to assist the personal injury plaintiff), the recording clerk has no special relationship with, and owes no duty to, such a party with no direct interest in the recording of the document.14

Of course, in all of this, the obvious question is whether title companies paying out on claims caused by errors in recordation, which are brought by proper plaintiffs, have their causes of action against the recording officer. Directly speaking, they should not, but under basic principles of insurance law, they should certainly be subrogated to their insureds' claims.

That, however, leads directly to the very next issue.

Notice of Claim

Under General Municipal Law's infamous §50-e, one must serve a notice of claim upon a municipality within 90 days after the claim arises. This begs the question of when, exactly, the claim actually arises.

The 90 days seems to start running from when the injured person learned, or should have learned, about the recording error. "Case law provides that a claim arises and the 90-day period begins to run from the date of discovery of the injury, rather than the date of the injury itself." Cacucciolo v. City of New York.15

A title company seeking to bring a subrogation suit, therefore, has an extremely short period in which to serve the initial notice of claim, especially since the insured will not necessarily notify the title insurer as soon as there is a problem. Research reveals no precedent as to whether the insured's delay will give the insurer valid grounds to serve a late notice of claim. While the court is empowered to allow notices of claim to be served nunc pro tunc,16 it is a power sparingly exercised.

Conclusion

Although the familiar concept of recordation—placing "the whole world" on notice of a particular conveyance or encumbrance to real property—remains fundamental to our jurisprudence, those with legal standing to sue for the government's misfeasance in recording is a vastly smaller universe consisting solely of encumbrancers and grantees, (and their heirs, predecessors, successors, and assigns)—and even as to those protected persons, there are procedural hurdles that require acting extremely quickly to guard against being unsuited.

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Endnotes:

1. RPL Article 9.
2. "The recording of such instrument was constructive notice to the world of the contents thereof." Foss v. Riordan, 84 NYS2d 224 (1947); CPLR 6501, the Notice of Pendency (a/k/a lis pendens) indexed and recorded with the other land records, puts the world on notice merely that there is a dispute about possession or ownership of real property without requiring its filer to make any prima facie showing of possibility of success in the ensuing litigation.
3. 32 Misc.3d 1241(A) (Supreme Kings, 2011).
4. 70 A.D.2d 198, 431 N.Y.S.2d 829.
5. In all counties outside the city of New York, the County Clerk; in New York City, the City Register.
6. Although this article will continue to refer to the recording officer's duties and liabilities, it is only for clarity's sake, as the true defendant will no doubt always be the officer's boss, the municipality.
7. 248 NY 339.
8. 95 NY2d 95, 711 NYS2d 112 (2000).
9. These authors have previously recommended the extension of ACRIS to a state-wide system in Bailey and Treiman, "The Brewing MERS Crisis: Everyone Loses," NYLJ Aug. 10, 2011, Bailey and Halpern-Weinstein, "The Race to Erase Recording Mistakes," NYLJ 4/13/2011.
10. 28 Misc.2d 1051, 214 N.Y.S.2d 834 (Niagara Surr. 1961).
11. 353 NW2d 416 (Iowa Sup. Ct. 1984).
12. 564 NW2d 309 (Sup. Ct. SD 1997).
13. Baccari, supra.
14. Elbadawi, supra.
15. 127 Misc. 2d 513, 486 NYS2d 829 (1985).
16. Canty v. City of New York, 273 A.D.2d 467, 711 N.Y.S.2d 750 (2d Dept. 2000).