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Adverse Possession

Test in New Law Is "All About Good Faith"

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Governor David A. Paterson signed Senate Bill 7915-C into law earlier this month, significantly altering the requirements that must be met before courts will find that title to real property has changed under the doctrine of adverse possession.

Under the new law, which went into effect immediately upon being signed by the governor, the existence of de minimus non-structural encroachments such as fences, hedges, shrubbery, plantings, sheds and non-structural walls is deemed to be permissive and non-adverse. Moreover, the law now specifically provides that the acts of lawn mowing or similar maintenance across the boundary line of an adjoining landowner's property are deemed permissive and non-adverse.

The Legislature, seeking to change the adverse possession standard for the second consecutive year (legislation was vetoed last August by then Governor Eliot L. Spitzer),[1] was reacting to two recent decisions finding in favor of claims of adverse possession, a June 2006 ruling by the New York Court of Appeals, in *Walling v. Przybylo*,[2] and an opinion by the Appellate Division, Third Department, in November 2006, in *Robinson v. Robinson*.[3] Although the new rules are likely to make it more difficult for parties to obtain title to property through adverse possession, whether they will limit—or encourage—litigation on this subject remains to be seen.

The Prior Test

For many years, the law has been quite clear that, to establish a claim of adverse possession, five elements had to be demonstrated. Possession had to be: (1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required period of time,[4] most recently, 10 years.[5] Given the significant impact of a finding of adverse possession, the courts had determined that it had to be proven by clear and convincing evidence.[6]

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ZONING AND LAND USE PLANNING

This test was at the heart of *Walling*, an action to quiet title by adverse possession. The case arose in January 1986, when the plaintiffs purchased lot 22 on Butternut Hill Drive in the Town of Queensbury in upstate Warren County. In 1989, the defendants purchased lot 23. Both lots were unimproved land on which the parties built homes and swimming pools. On lot 22, the plaintiffs also built a small shed. Even though the defendants purchased their land in 1989, they did not construct their residence until 1991 and did not obtain a certificate of occupancy and move in until May 1994.

In May 1987, before the defendants arrived, the plaintiffs bulldozed and deposited fill and topsoil on the defendants' northerly side yard, dug a trench, and installed PVC pipe to carry water from the plaintiffs' eaves and downspouts to and under the defendants' property. The plaintiffs also constructed an underground dog wire fence to enclose their dog and continuously mowed, graded, raked, planted, and watered the property. In 1992, the plaintiffs dug a hole near the northwesterly corner of the grassy part of the defendants' property and put in a post about 10 feet long, on which they affixed a birdhouse.

The defendants had the land surveyed in 2004 and discovered that they had title to this land. Upon learning of this, the plaintiffs brought an action to quiet title that reached the Court of Appeals. In its decision, the Court ruled in favor of the plaintiffs.

The Court explained that the plaintiffs had possessed the disputed parcel of land as early as 1986 in an open and notorious manner, hostile to the interests of the title owners and continuously for 20 years, 10 of which had occurred after the defendants had moved into their residence. The Court pointed out that it was not until April 21, 2004, close to 10 years after moving into the house and almost 15 years after purchasing the property, that the defendants sought to assert their rights over the disputed parcel. It then ruled that the defendants' "failure to assert their rights in a timely manner" prevented them from prevailing.

The Court rejected the defendants' argument that no claim of right exists when an adverse possessor has actual knowledge of the true owner at the time of possession. However, the Court said, "longstanding decisional law" did "not support this position." According

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to the Court, the adverse possessor must act under claim of right, which was adverse to the title owner and also in opposition to the rights of the true owner. "Conduct will prevail over knowledge, particularly when the true owners have acquiesced in the exercise of ownership rights by the adverse possessors," the Court declared. It then stated that the issue was "actual occupation," not subjective knowledge.

The 'Robinson' Ruling

The plaintiffs in Robinson, decided by the Third Department several months after *Walling*, sought to establish that they had obtained title to an approximately 0.6 acre parcel of land, claiming that they had adversely possessed the disputed parcel beginning in July 1987. Since that time and for a period of at least 10 years, the plaintiffs operated a seasonal canoe rental and camping business on the property. During the approximately five-month season each year, the plaintiffs placed moveable signage on the property, mowed the grass, cleared debris, planted grass if it was washed out by spring flooding, transported boats to the property, kept incidents of the business on the site throughout the season, and blocked the use of the property by trespassers. Buses dropped off customers during the season, at the peak of which up to 50 rafts, canoes and boats disembarked or landed on the property. In addition, the plaintiffs installed a road and made rock fire-ring supports at two permanent campsites, which, along with several other sites on an adjacent lot, were used and maintained on the property throughout the summer. Supreme Court, Sullivan County, entered judgment in favor of the plaintiffs, concluding that they had acceded to title to the disputed parcel by virtue of adverse possession. The defendant appealed.

The Appellate Division, Third Department, ruled that, given the nature of the property, the plaintiffs' use was "open, notorious and hostile" and, therefore, sufficient to convey notice of their adverse claim to the record owner of the property during the disputed time period. The appellate court rejected the defendant's argument that the fact that the plaintiffs' use was seasonal defeated their claim, in light of what the appellate court found to be the "continuous and uninterrupted nature of that use." It also rejected the defendant's contention that the occasional, recreational use by the defendant's family members and neighbors that did not interfere with plaintiffs' activities during the statutory period rendered the plaintiffs' possession nonexclusive. Similarly "irrelevant," according to the Third Department was the fact that the plaintiffs' had not paid taxes on the property during the relevant period, along with their "subjective belief" that someone else may have been the rightful owner of the property.

Finally, the Third Department ruled that the plaintiffs' "cultivation and improvement" of the property through "mowing, maintenance of the landing and campsites, storage and improvements" was consistent with the nature of the land, i.e., its location on a riverbank subject to natural fluctuation and the uses to which it was suited as a canoe rental business that had varying numbers of customers, and was "adequate to demonstrate possession under the circumstances."

The New Standard

As signed into law, Senate Bill 7915-C contains a number of new provisions that create a new standard for adverse possession.

First, Section 1 of the newly enacted law amends Section 501 of the Real Property Actions and Proceedings Law ("RPAPL") to define "adverse possessor" of real property as a person or entity that "occupies real property of another person or entity with or without knowledge of the other's superior ownership rights, in a manner that would give the owner a cause of action for ejectment." It then provides that an adverse possessor gains title to the occupied real property after 10 years[7] provided that the occupancy was "adverse, under claim of right, open and notorious, continuous, exclusive, and actual." Finally, the newly revised Section 501 defines "claim of right" to mean "a reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case may be."

Another section of the new law amends Section 522 of the RPAPL, which now is entitled, "Essentials of adverse possession not under written instrument or judgment." The prior version of Section 522 stated that land was deemed to have been possessed and occupied in either of two situations. The first situation in the prior version of Section 522 was where "it has been usually cultivated or improved." That text has been eliminated and replaced in the new Section 522, so that, now, land is deemed to have been possessed and occupied where "there have been acts sufficiently open to put a reasonably diligent owner on notice." The second situation in the prior version of Section 522 was where the land "has been protected by a substantial inclosure." Now, the word "inclosure" (which has been replaced by "enclosure") specifically excludes, in a new Section 543 of the RPAPL, "the existence of de minimus non-structural encroachments including, but not limited to, fences, hedges, shrubbery, plantings, sheds and non-structural walls," which Section 543 says "shall be deemed to be permissive and non-adverse."

For good measure, Section 543 also specifically states that "the acts of lawn mowing or similar maintenance across the boundary line of an adjoining landowner's property shall be deemed permissive and non-adverse."

Conclusion

The legislative history of the new law indicates that the new test is "all about good faith." It recognizes that the doctrine of adverse possession "should be used to settle good faith disputes over who owns land" but should not be "used offensively to deprive a landowner of" his or her real property.[8]

The legislative history also indicates that the new law rejects the *Walling* concept that "conduct will prevail over knowledge"; now, an adverse possessor can only acquire title if the occupancy exists under a "claim of right" in addition to an adverse, open and notorious, continuous, exclusive and actual occupancy. Given the changes to the RPAPL, it seems likely that if *Walling* and *Robinson* had been decided today, the results would have been different. It will be interesting to see the impact of the new law on future adverse possession claims, and on the volume of litigation that ultimately results.

1. For a discussion, see Jay Romano, "Adverse Possession: Mind Your Property," (N.Y. Times Nov. 11, 2007), available at http://www.nytimes.com/2007/11/11/realestate/11home.html?n=Top/Reference/Times%20Topics/Subjects/H/Homeowner%20Resources. See, also, New York State Senate Introducer's Memorandum in Support S7915-C ("Memorandum in Support").
2. 7 N.Y.3d 228 (2006).
3. 4 A.D.3d 975 (3rd Dept. 2006).
4. See, e.g., *Belotti v. Bickhardt*, 228 N.Y. 296 (1920).
5. See, e.g., *Ray v. Beacon Hudson Mtn. Corp.*, 88 N.Y.2d 154 (1996).
6. See, e.g., *Van Valkenburgh v. Lutz*, 304 N.Y. 95, 98 (1952).
7. See CPLR §212(a).
8. See Memorandum in Support, supra.