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Courts Reject Retroactivity Of Adverse Possession Claims

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Amendments to Article 5 of the Real Property Actions and Proceedings Law (RPAPL) that took effect on July 8, 2008, significantly altered the law applicable to adverse possession claims in New York.¹ Decisions by the Appellate Divisions in the Second, Third, and Fourth Departments have made it clear, however, that the Legislature's changes to the state's adverse possession rules do not apply to rights that vested before the law's effective date. Although neither the New York Court of Appeals nor the Appellate Division, First Department, have opined on the issue, the appellate court rulings that already have been issued should give a large degree of comfort to property owners who acquired rights under the adverse possession standards applicable before the law was changed.

Background

A person seeking to establish a claim of adverse possession before July 8, 2008, had to demonstrate, by clear and convincing evidence,² that his or her possession had been (1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required period of time³ (e.g., 10 years).⁴

The new adverse possession standard is different in several key respects. First, a "claim of right" now means "a reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case may be."⁵

Second, under the prior version of the law, land was deemed to have been possessed and

occupied where it had been "usually cultivated or improved" or "protected by a substantial inclosure." The 2008 amendments added Section 543, which provides that certain "de minimis non-structural encroachments including, but not limited to, fences, hedges, shrubbery, plantings, sheds and non-structural walls" must be deemed "to be permissive and non-adverse."⁶ Moreover, the law now also provides that, "[n] notwithstanding any other provision of this article, the acts of lawn mowing or similar maintenance across the boundary line of an adjoining landowner's property" must be deemed "permissive and non-adverse."⁷

These changes can have important practical ramifications to property owners and adverse possession claimants, as the parties in *Franza v. Olin*⁸ nearly discovered.

The 'Franza' Ruling

The case arose on Aug. 18, 2008, when Sharon Franzia, by a petition for declaratory judgment pursuant to CPLR 3001, sought a declaration that she had acquired title to specified property surrounding her home that was titled in the name of her neighbors based on adverse possession as early as 1985. Among other things, she alleged that her uses of the disputed property included lawn mowing, landscaping, and erection of a shed and satellite receiver. The Supreme Court, Onondaga County, found that those uses were deemed permissive and non-adverse under the newly-enacted RPAPL §543, and ruled that the amendments to the RPAPL barred her claim. Franzia appealed.

The Appellate Division, Fourth Department, reversed the judgment. It explained that the RPAPL amendments applied to claims filed on or after July 7, 2008, and that there was "no ques-

tion" that the amendments applied to Franzia's claim based on the law's effective date. The Fourth Department, however, concluded that the Supreme Court had erred in applying the amended version of the RPAPL to Franzia under the facts of this case, and that she was entitled to the application of the version of the RPAPL in effect when her claim to the disputed property allegedly ripened into title.

In the Fourth Department's view, although a statute was not invalid merely because it reached back to establish the legal significance of events occurring before its enactment, the Legislature was "not free to impair vested or property rights." It pointed out that it was "well-settled law" that the adverse possession of property for the statutory period vested title to the property in the adverse possessor and that, at the expiration of the statutory period, legal title to the land was transferred from the owner to the adverse possessor. The Fourth Department therefore reasoned that where title had vested by adverse possession, it could not be disturbed retroactively by newly-enacted or amended legislation.

The Fourth Department also rejected the argument that the 2008 amendments to the RPAPL were merely "evidentiary" in nature, concluding that because title to the disputed property would have vested in Franzia prior to the enactment of the 2008 amendments, application of those amendments to her was unconstitutional. The appellate court accordingly held that the Supreme Court had erred in dismissing Franzia's complaint on the merits.⁹

Third Department

The Third Department reached the same conclusion, in *Barra v. Norfolk S. Ry. Co.*¹⁰

In this case, the plaintiffs owned properties on the eastern shore of Cayuga Lake in the Town of Lansing, Tompkins County, in an area that was bounded to the west by the lake and to the east by railroad tracks owned by the defendant, Norfolk Southern Railway Co. For decades, three at-grade railroad crossings were located within an approximately 825-foot span of Norfolk's railroad tracks adjacent to the area, part of which was known as Ladoga Park; however, in March 2008, Norfolk closed the middle crossing (the "Northern Crossing").

In March 2009, the plaintiffs brought suit, asserting that they enjoyed an express easement for ingress and egress to their properties over the Northern Crossing, that they had acquired a prescriptive easement for ingress and egress over the Northern Crossing, or that an easement by estoppel existed for their benefit at the site of the Northern Crossing. Norfolk answered and moved for summary judgment. The Supreme Court, Tompkins County, granted the motion and dismissed the complaint, and the plaintiffs appealed.

After the Third Department ruled that summary judgment in Norfolk's favor on the issue of the prescriptive easement claims was inappropriate, it addressed the issue of the application of the 2008 amendments to the RPAPL to the plaintiffs' prescriptive easement claims, first noting that it was "well settled" that statutory changes affecting the law of adverse possession concomitantly altered the common law doctrine of prescriptive easement because of "the strong analogy between the two rules."¹¹

It then explained that although a creature of common law, the right to an easement by prescription, as with adverse possession, vested on the expiration of the statute of limitations for the recovery of real property. Thus, it continued, if the plaintiffs succeeded in proving their claims, title to the easement would have vested prior to the effective date of the amendments and, consequently, they could "not be disturbed retroactively by newly-enacted or amended legislation." Accordingly, the Third Department ruled that notwithstanding the statutory language to the contrary, the plaintiffs were entitled at trial to have their claims measured in accordance with the law of prescription as it existed prior to the enactment of the 2008 amendments.

The Second Department

The Second Department did not opine on the issue of the retroactivity of the 2008 amendments in two cases when it arguably could have. In one case,¹² the issue was not directly before it. In a second case,¹³ it explained that it did not have to

reach the issue because the complaint stated a cause of action under the law as it existed both before and after the 2008 amendments.

The retroactivity question, however, was squarely before the Second Department in *Hogan v. Kelly*.¹⁴ This action involved a dispute over the ownership of certain residential property located in Brooklyn that had been owned by Ferdinand Powell before his death. The defendants, Dorothy and Camille Kelly, claimed that after the decedent became a widower in September 1992, they moved into the property to assist him because of his age and health problems. The defendants further asserted that they had continuously resided at the property since 1992. The decedent died intestate on March 26, 1995, survived by one child, a daughter, Carmen Powell, who was a Panamanian citizen. Although Carmen Powell was the decedent's sole heir at law, on March 7, 1996, the decedent's brother, Bertram Powell, executed a deed purporting to convey title to the premises to Dorothy Kelly. The deed subsequently was recorded on June 27, 1996.

Carmen Powell allegedly was unaware that the decedent had owned real property until she visited the United States for the first time in the summer of 2008. Thereafter, on Sept. 24, 2009, Luis O. Hogan was appointed administrator of the decedent's estate. Upon his appointment, he sued to determine claims to the property. The Supreme Court, Kings County, granted summary judgment in favor of the defendants.

The plaintiff appealed and, relying on the new statutory definition of "claim of right" added by the 2008 amendments, argued that the defendants had failed to establish that they had acquired title to the property by adverse possession because they were aware that Carmen Powell was the decedent's sole heir and, thus, the rightful owner of the premises.

The Second Department observed that although the plaintiff's action was commenced after the effective date of the 2008 amendments, the amendments could not be retroactively applied to deprive a claimant of a property right that vested prior to their enactment. Therefore, it continued, the version of the law in effect at the time the purported adverse possession allegedly ripened into title was the law applicable to the plaintiff's claim, even if the plaintiff's action was commenced after the effective date of the new legislation.

The Second Department then found that because title allegedly vested in the defendants prior to the enactment of the 2008 amendments, the new statutory definition of "claim of right" was not controlling. Applying longstanding deci-

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sional law, it held that the defendants had made a prima facie showing that they possessed the premises under a claim of right, which had not been defeated by their alleged knowledge that Carmen Powell was the rightful owner of the property. Although the Second Department concluded that the defendants were not entitled to summary judgment in their favor because they failed to make a prima facie showing that their possession of the property was hostile for the prescribed period, the principle that the 2008 amendments could not be retroactively applied is now quite clearly the law in the Second Department.¹⁵

Conclusion

As noted, the Appellate Division, First Department, has not yet ruled that its courts only should apply the 2008 amendments prospectively. The general consensus among the Appellate Divisions, however, is quite clear: the 2008 amendments may not be applied retroactively. In light of the significant changes to the adverse possession rules enacted by the Legislature in 2008, this provides welcome clarity and certainty to property owners throughout the state.

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1. See, e.g., Anthony S. Guardino, "Adverse Possession," NYLI, July 23, 2008.

2. See, e.g., *Van Valkenburgh v. Lutz*, 304 N.Y. 95 (1952).

3. See, e.g., *Bellotti v. Bickhardt*, 228 N.Y. 296 (1920).

4. See, e.g., *Ray v. Beacon Hudson Mtn. Corp.*, 88 N.Y.2d 154 (1996).

5. RPAPL §501 (emphasis supplied).

6. RPAPL §543(1).

7. RPAPL §543(2).

8. 73 A.D.3d 44 (4th Dept. 2010).

9. See, also, *Perry v. Edwards*, 79 A.D.3d 1629 (4th Dept. 2010)(2008 amendments to RPAPL "inapplicable" where plaintiffs contended that they gained title by adverse possession based on actions that they and the previous owners of their property took prior to those amendments); *Hammond v. Baker*, 81 A.D.3d 1288 (4th Dept. 2011)(applying version of RPAPL in effect on June 13, 2008, when plaintiffs' summons and complaint were filed).

10. 75 A.D.3d 821 (3d Dept. 2010).

11. See *Klin Co. v. New York R.T. Corp.*, 271 N.Y. 376 (1936).

12. *Hartman v. Goldman*, 84 A.D.3d 734 (2d Dept. 2011).

13. *Maya's Black Creek v. Angelo Balbo Realty Corp.*, 82 A.D.3d 1175 (2d Dept. 2011).

14. 86 A.D.3d 590 (2d Dept. 2011).

15. See *Shilkoff v. Longhitano*, 94 A.D.3d 974 (2d Dept. 2012) (holding that 2008 amendments to the adverse possession statute contained in RPAPL Article 5 are not applicable where claimant alleged right of adverse possession vested prior to enactment of those amendments).