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Adverse Possession After the 2008 RPAPL Amendments

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In 2008, the New York State Legislature enacted sweeping changes to those provisions of the Real Property Actions and Proceedings Law (RPAPL) that govern the circumstances under which title to real property may be acquired by adverse possession.1 The Legislature acted primarily to reverse the ruling of the Court of Appeals in the case of Walling v. Prysbylo.2 Under principles of New York adverse possession law nearly two centuries old, the Court had ruled that the Wallings had acquired title to a strip of land belonging to their neighbors, the Prysbylos, by treating the property as their own for the requisite 10-year period, despite the Wallings' admitted knowledge of the Prysbylos' record ownership of the disputed parcel. Contrary to Walling, under the amended RPAPL, no person may now acquire title to land by adverse possession without showing a claim of right to the land founded on a "reasonable basis for the belief that the property belongs to the adverse possessor."3

The 2008 legislation also, by statute, deemed certain encroachments and activities as "permissive and non-adverse" which previously might have been considered as evidence tending to show such use and occupation of the land by the intruder "as owners are accustomed to possess and improve their estates,"4 and, therefore, adverse to the interests of the record owner. Included in this now permissive and non-adverse category are (a) "de minimis non-structural encroachments," such as fences, hedges, plantings, sheds, and non-structural walls,5 and (b) "acts of lawnmowing or similar maintenance across the boundary line of an adjoining landowner's property."6

The RPAPL adverse possession amendments became effective on July 8, 2008, and they "apply to claims filed on or after such effective date."7 However, the question of whether or not the 2008 amendments apply to every case that is filed after July 8, 2008 is one that must be decided on a case-by-case basis, and how that question is answered can make a substantial difference in the outcome of each case.

Recent Appellate Decisions

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The issue was squarely presented in Franza v. Olin,8 a Fourth Department case that was the first appellate decision to rule on the question. In Franza, the plaintiff commenced her action six weeks after the 2008 amendments became effective. The plaintiff's verified complaint alleged that she had acquired title to the disputed property by adverse possession as early as 1985 by reason of her use of the land, including lawn mowing, landscaping, and erection of a shed and satellite receiver. The lower court dismissed the plaintiff's claim concluding that the alleged uses of the property were deemed "permissive and non-adverse" under the newly enacted RPAPL 543.

The Fourth Department reversed, holding that the amendments to Article 5 of the RPAPL, as applied to the plaintiff's claim by the lower court, were unconstitutional because they deprive her of a vested property right—title to the property that would have vested long before July 2008. The court stated:

> We conclude that the court erred in applying the amended version of article 5 to plaintiff under the facts of this case and that plaintiff is entitled to the application of the version of article 5 in effect when her claim to the disputed property allegedly ripened into title. "Although a statute is not invalid merely because it reaches back to establish the legal significance of events occurring before the enactment,…the Legislature is not free to impair vested or property rights." It is well-settled law that the adverse possession of property for the statutory period vests title to the property in the adverse possessor. "Adverse possession for the requisite period of time not only cuts off the true owner's remedies but also divests [the owner] of his [or her] estate." Thus, at the expiration of the statutory period, legal title to the land is transferred from the owner to the adverse possessor. Title to the property may be obtained by adverse possession alone, and "[t]itle by adverse possession is as strong as one obtained by grant." It therefore follows that, where title has vested by adverse possession, it may not be disturbed retroactively by newly-enacted or amended legislation (Citations omitted).

The defendants in Franza attempted to avoid the constitutional issues by contending that the 2008 amendments were merely "evidentiary" in nature, but the court rejected that argument noting that:

> The amendments abrogate the common law of adverse possession and define as "permissive and non-adverse" actions that, under the prior statutory law and longstanding principles of common law, were sufficient to obtain title by adverse possession. Thus, inasmuch as title to the disputed property would have vested in plaintiff prior to the enactment of the 2008 amendments, we conclude that application of those amendments to plaintiff is unconstitutional. (Citations omitted)

Finally, as the court also noted, "RPAPL 501(2), as amended, recognizes that title, not the right to commence an action to determine title, is obtained upon the expiration of the limitations period" (Emphasis in original).

In Barra v. Norfolk Southern Railway Company,9 a case that was commenced in March 2009, the Third Department followed Franza and held that the RPAPL amendments did not apply to a prescriptive easement which was alleged to have vested prior to the effective date of the amendments.

These amendments, which took effect on July 7, 2008, "apply to claims filed on or

after such effective date" and, as alleged in plaintiffs' March 2009 complaint, plaintiffs' prescriptive periods all commenced and concluded prior to the effective date. Although a creature of common law, the right to an easement by prescription, as with adverse possession, vests upon the expiration of the statute of limitations for the recovery of real property. Should plaintiffs succeed in proving their claims, titles to the easement would have vested prior to the effective date of the amendments and, consequently, "[they] may not be disturbed retroactively by newly-enacted or amended legislation." Accordingly, notwithstanding the statutory language to the contrary, at trial, plaintiffs are entitled to have their claims measured in accordance with the law of prescription as it existed prior to the enactment of the 2008 amendments (Citations omitted).

However, in a case commenced in September 2008, Ziegler v. Serrano,10 the Third Department, applied the 2008 RPAPL amendments and found adverse possession based on a claim of right under a 1985 deed which the court said provided the adverse possessors with a reasonable basis to believe that they owned the land. The adverse possessor plaintiffs had sued to quiet title. They had received the 1985 deed from the defendant's former husband at a time when he was without legal authority to transfer the property without the defendant's consent. The defendant subsequently commenced an action in 1992 challenging the plaintiffs' title to the property, but the action was dismissed in November 1994 for lack of prosecution.

The court found that the plaintiffs had satisfactorily demonstrated that their possession of the property was adverse, under a claim of right, actual, exclusive, open and notorious, and continuous for a 10-year period. The court stated in addition:

> Pursuant to the 2008 legislative enactments to RPAPL article 5, a "claim of right" now requires "a reasonable basis for the belief that the property belongs to the adverse possessor or property owner." Here, it is undisputed that plaintiffs have continuously possessed and exclusively occupied the property in question since the land was conveyed to them in 1985. Throughout this time, plaintiffs undertook numerous acts that were consistent with those of a property owner and sufficient to put defendant on notice, including the payment of all taxes, extensive landscaping, installing a shed and fence, replacing all the windows, the deck, front door, sidewalk and driveway, and prominently displaying their surname on the home's mailbox. Plaintiffs also demonstrated that they occupied the property under a claim of right. Their continued possession of the property since 1985 under the deed and the dismissal of defendant's 1992 action challenging their title, after which defendant took no steps to assert any right to title of the property, provided plaintiffs with a reasonable basis to believe that they owned the property. Upon this proof, plaintiffs made a prima facie showing of entitlement to the property by adverse possession (Citations omitted) (Emphasis added).

The court noted that "[i]nasmuch as the parties to this action have not raised the propriety of applying the 2008 legislation to the facts of the case, we do not pass on the issue." Nevertheless, the court said that "even were we to apply the law as it existed at the time that plaintiffs' title to the property vested by reason of adverse possession, the result reached here would not change."

While the court, citing Franza, properly noted in a footnote that the plaintiffs would have prevailed in any event without applying the 2008 amendments to their case, there is reason to question the court's reliance upon the 2008 amendments as the principal basis for its holding. The defendant's failure to prosecute her 1992 action challenging plaintiffs' title based on the faulty 1985 deed was, at best, an ambiguous action. It was not objectively reliable evidence upon which to find a "reasonable basis" for plaintiffs' belief that the property belonged to them.

It is certainly possible that another court, adjudicating these same facts, could have reached a different result. After the defendant had challenged their title derived from the faulty deed, the continued existence of a "reasonable basis" for plaintiffs' belief was at least questionable. This possibility of inconsistent judgments, based on non-objective evidence, is precisely what then-Governor Eliot Spitzer predicted in his veto message addressed to the Legislature's enactment in 2007 of its first attempted reversal of the Court of Appeals holding in the Walling case.11

In yet another Third Department decision, Sawyer v. Prusky,12 an action commenced in September 2008, in which the plaintiffs alleged they had encroached upon and maintained the disputed parcel as their own "between 1997 and 2008," the court applied the 2008 amendments without any hesitation and upheld the dismissal of plaintiffs' adverse possession claim. The court held that all of the plaintiffs' alleged acts of encroachment and maintenance were deemed permissive under the amended statute. Sawyer was decided on March 18, 2010, one day before the Fourth Department's Franza decision on March 19, 2010. The Sawyer opinion is unclear as to exactly when the period of plaintiffs' adverse possession was alleged to have actually begun and ended. However, if the alleged acts of adverse possession did indeed occur "between 1997 and 2008," then it appears that Sawyer was decided incorrectly and that the rule enunciated one day later in Franza, and acknowledged in the Third Department's own subsequent Barra and Ziegler decisions, supra, should have been applied to permit the Sawyers to prove their claim.

Recent Lower Court Decisions

The lower court decisions in Franza, Ziegler, and Sawyer, supra, which ruled against the adverse possessors in those cases, suggest that the lower courts have not yet fully appreciated the significance of deciding when to apply the law existing pre-RPAPL amendments and post-RPAPL amendments to an adverse possession claim.

In Hartman v. Goldman,13 an action commenced in April 2009, the Westchester Supreme Court applied the 2008 amendments and granted the defendant Goldman summary judgment against the plaintiffs who claimed adverse possession of the disputed parcel based upon the "installation of driveway lights, planting of foliage and shrubbery, landscaping and lawn maintenance,"—all of which the court said were "de minimis and, by statute deemed permissive and non-adverse [citing RPAPL 543]" (Emphasis in original). The plaintiffs had initially alleged that their adverse possession encroachments and maintenance activities had begun "circa 1990," and subsequently attempted to trace the beginning of their adverse possession to 1988.

There were facts in the case which made it questionable whether, during the relevant years, the plaintiffs had ever actually satisfied the 10-year prescriptive period against defendant Goldman or either of two predecessor owners of the disputed parcel. Nevertheless, without making any statement concerning the relevant 10-year period, the court applied the 2008 RPAPL amendments to the plaintiffs' claim without any discussion of whether it was appropriate to do so where an eighteen to twenty-year period of adverse possession prior to the amendments was alleged.14

In a more recent decision, Meckler v. Schnell,15 which was commenced in 2009 and decided after the Fourth Department's Franza ruling, New York County Supreme Court also applied the 2008 RPAPL amendments in finding against a claim of adverse possession.

The court held that the plaintiffs were not entitled to claim title by adverse possession to a strip of property 3.75 inches wide which had previously been part of their backyard. The defendants, after purchasing the adjoining property, had removed a backyard fence that separated the plaintiffs' property from the defendants' property and replaced it with a new fence. The defendants had installed the new fence 3.75 inches closer to what their surveyor had determined to be the actual property line (which had the effect of adding 3.75 inches to the defendants' backyard and removing those same inches from the plaintiffs' backyard). The court held that the 3.75 inches to which the plaintiffs claimed title was de minimis (citing RPAPL 543 and the Third Department's Sawyer decision, supra).

Although the plaintiffs in Meckler purchased their property in 1999 (10 years before commencing their action), the defendants purchased the adjoining property only in 2006 and had replaced the backyard fence (with plaintiffs' permission) after their purchase. Therefore, without tacking on the time the fence had been in place during the periods when their predecessors in interest owned their property, the plaintiffs could not have claimed that they adversely possessed the 3.75 inch strip of property for the requisite 10-year period. However, the court's opinion does not discuss any facts concerning the length of time that the old backyard fence was in place prior to plaintiffs' purchase of their property. Nevertheless, the court also cited decisions holding that encroachments of from 1.5 to 3.75 inches were deemed de minimis even before enactment of the 2008 RPAPL amendments.16

In contrast to the situation in Meckler, Rockland County Supreme Court held, in De Lorenzo v. Johnson,17 that a backyard stockade fence erected in 1979-1980, which encroached one half to two feet on defendants' property for 15 years before the defendant took title and 26 years before the defendant took down the fence, was sufficiently adverse to vest the plaintiff with title to the disputed parcel. In this action, which was brought in 2006, the court noted that RPAPL 543(1) did "not apply to matters of adverse possession which occurred prior to the adoption of this amendment" and that "[t]he claim of adverse possession occurred years prior to 2008."

Conclusion

This short review of recent adverse possession decisions issued after the enactment of the 2008 RPAPL amendments shows that, while the law is still evolving, the courts are aware of the significant changes the 2008 amendments have rendered in the law of adverse possession, but that, during this period of transition, the courts must be alert to recognize situations where adverse possession property rights were acquired prior to enactment of the amendments, even in cases where the parties to the action may have failed to address the issue.

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Endnotes:

1. See L. 2008, ch. 269, §8. Under RPAPL 501(1), an "adverse possessor" is a person or entity who "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," and, under RPAPL 501(2), an adverse possessor gains title upon expiration of the statute of limitations where the occupancy "has been adverse, under claim of right, open and notorious, continuous, exclusive, and actual."
2. 7 NY3d 228 (2006).
3. RPAPL 501(3).
4. Monnot v. Murphy, 207 NY 240 (1913).
5. RPAPL 543(1).
6. RPAPL 543(2).
7. L. 2008, ch. 269, §9.
8. 73 AD3d 44, 8897 NYS2d 804 (4th Dept. 2010).
9. 75 AD3d 821, —NYS2d— (3d Dept. 2010).
10. 74 AD3d 1610, —NYS2d— (3d Dept. 2010).
11. See Adam Leitman Bailey and John M. Desiderio, "Adverse Possession Changes Make Result Less Certain," NYLJ, Feb. 11, 2009; see also Adam Leitman Bailey and John M. Desiderio, "Adverse Possession (Veto Confirmed Existing Law on 'Claim of Right')", NYLJ, Sept. 12, 2007.
12. 71 AD2d 1325, 896 NYS2d 536 (3d Dept. 2010).
13. Index No. 8003/09, Westchester County Supreme Court, March 30, 2010. (Adam Leitman Bailey, P.C. represented the prevailing party in this action).
14. The defendant contended that, even if the 2008 RPAPL amendments did not apply, the plaintiffs' encroachments and maintenance activities should also be deemed permissive and non-adverse under governing Second Department cases decided prior to July 8, 2008. See, e.g., Simpson v. Kao, 222 AD2d 666, 636 NYS2d 70 (2d Dept. 1995); Giannone v. Trotwood Corporation, 266 AD2d 430, 698 NYS2d 698 (2d Dept. 1999).
15. Index No. 107339/09, New York County Supreme Court, Aug. 20, 2010.
16. See, e.g., Hoffman Investors Corp v. Yuval, 33 AD3d 511 (First Dept. 2006); Zhuang Li Cai v. Uddin, 58 AD3d 746, 871 NYS2d 675 (2d Dept. 2009).
17. Index No. 7710/06, Rockland County Supreme Court, NYLJ, May 25, 2010, p. 28.