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Adverse Possession Changes Make Result Less Certain

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On July 8, 2008, Governor Paterson signed into law S.7915-C, which amended New York's adverse possession law, and two centuries of New York adverse possession doctrine came to an end. The new law is intended to prevent an absentee landowner from losing title to his or her property to persons who enter upon it and knowingly intend to divest title from the owner after 10 years of continuous possession.

This law was the Legislature's second attempt at overturning the 2006 Court of Appeals decision in Walling v. Przybylo.1 The Wallings and Przybylos owned adjoining properties and the Wallings began using a portion of the Przybylos' property as their own. In 2004, the Przybylos discovered that they had title to the portion of land that the Wallings had been using. The Wallings filed suit to quiet title. The Przybylos attempted to prove that the Wallings knew they did not own the disputed parcel. The Court of Appeals held for the Wallings and declared that "actual knowledge that another person is the title owner does not, in and of itself, defeat a claim of right by an adverse possessor."

The Walling decision merely restated the traditional rule of adverse possession, rooted in ancient British law that New York and other American courts have continually and repeatedly applied since the early 1800s. New York courts have held that a person claiming title by adverse possession must prove, by clear and convincing evidence, that his or her possession has been: (1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous.2 Under this traditional application of the rule, the guiding principle of adverse possession law was always "use it or lose it."

This point was clearly made in such cases as, Ramapo Manufacturing Company v. Mapes,3 a 1915 decision, and Hinkley v. State,4 a 1922 decision. In Ramapo, the Court of Appeals held, when no statutory requirement exists to the contrary, the lack of good faith of the adverse possessor "will not excuse the negligence of the owner in forbearing to bring his action until after the time in the statute of limitations shall have run against him to show that the defendant knew all along that he was in the wrong." In Hinkley, the Court of Appeals held that a person could acquire ownership of property through adverse possession even when that person made entry upon the land by permission of the owner and that permission "has been repudiated and renounced and the possessor thereafter has assumed the attitude of hostility to any right in the real owner."

Courts have noted two justifications for vesting title in persons holding property by adverse possession: (1) to encourage the active use of land, and (2) to serve as a statute of limitations to resolve real property title disputes.5

However, despite the ancient lineage and long-standing application of traditional adverse possession principles in New York statutes and case law, the Walling decision generated a populist backlash against the traditional rule that quickly gained widespread legislative support. As noted by the New York State Bar Association, although Walling "correctly articulated the law of New York, the decision was perceived by some as unfairly permitting a possessor to take property of an unsuspecting owner."6

In 2007, the New York Legislature enacted a Bill (S.5364-A) sponsored by Senator Elizabeth Little with the express purpose of overturning the Walling decision.7 The purpose of the bill was to amend RPAPL §§511 and 521 to require a person claiming title by adverse possession to prove that he or she did not have actual knowledge that another person is the true owner of the property. Both the state bar and the Property Rights Foundation of America opposed the bill.

S.5364-A was vetoed by then-governor Spitzer. The governor's veto message8 explained that the doctrine of adverse possession "is an essential mechanism for resolving disputes regarding title to property," that "in many instances, an individual who purchased property in good faith may believe that he or she is the rightful owner of the property, and may openly occupy and improve the property for many years," and, therefore, that "it is appropriate to place time limits on the ability of others to claim that they are the 'true' owner of the property." The governor further explained that:

given the frequency with which property is sold and transferred, the imposition of strict time limits on the ability of owners to seek to eject possessors of property is the only way to give homeowners throughout New York State the comfort of knowing that their homes cannot be taken away from them. At the same time, the doctrine gives the "true" owners of property a clear deadline within which to assert their claims to property. Thus the doctrine of adverse possession allows for efficient resolution of property ownership disputes and, as with other statutes of limitations, safeguards against the loss of evidence over time.

The governor stated that S.5364-A would shift

the focus of adverse possession law "from the owner's notice that the property is being occupied by someone else, to the possessor's knowledge that a third party may have an ownership interest in the property." The governor said this "adds an element for measuring this statute of limitations that will often be unknown and unknowable to a true owner." The governor further argued that the end result would be "extensive litigation of virtually every adverse possession claim."

Although the governor's veto in 2007 preserved the law of adverse possession as it had existed from time immemorial, and despite the many sound reasons supporting the veto, the populist controversy over the Walling decision persisted. The 2008 Legislature (again under Senator Little's sponsorship) introduced and passed legislation to reverse Walling - S.7915-C - which makes several changes to the RPAPL provisions concerning adverse possession law.

RPAPL §501, as amended by RPAPL §501(1) and §501(2) essentially codifies common law principles enunciated in the case law. RPAPL §501(1) defines an "adverse possessor" as 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 RPAPL §501(2) provides that 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."

However, RPAPL §501(3), now defines "claim of right" as a "reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case may be," (emphasis added), and a "claim of right," as so defined, is now required to establish adverse possession both "under written instrument or judgment" (RPAPL §511) and "not under written instrument or judgment" (RPAPL §521).9 In both situations, "land is deemed to have been possessed and occupied," for adverse possession purposes, by the adverse possessor, "where there have been acts sufficiently open to put a reasonably diligent owner on notice" or where the land "has been protected by a substantial enclosure." (RPAPL §§512 and 522).10

A new RPAPL §543(1) now provides that "the existence of de minimis non-structural encroachments including, but not limited to, fences, hedges, shrubbery, plantings, shed and non-structural walls, shall be deemed to be permissive and non-adverse," although the term "de minimis" is not defined. New RPAPL §543(2) also makes permissive and non-adverse "acts of lawnmowing or similar maintenance across the boundary line of an adjoining landowner's property."

Senator Little attempted to distinguish S.7915-C from the vetoed S.5364-A by stating that "[t]his legislation is all about good faith,"11 and that the inquiry would not focus upon "the person's belief, but instead upon the evidence introduced in court which justifies a reasonable basis for that belief. It will be an inquiry into the basis and whether it was reasonable, not into a person's mind." In approving S.7915-C, Governor Patterson also noted that the legislators' intent is "to have courts focus on the evidentiary basis for competing title claims."12

S.7915-C is now the law in New York and applies to all cases filed after July 8, 2008.13 It remains to be seen what impact it will have on real property law. Despite the good intentions of the Legislature and of others who supported S.7915-C, the legal disputes that may and probably will be generated by the new law will result in unintended consequences that will not be justified by the stated purpose for overturning Walling.

The requirement that a claim of right be established by proof of "a reasonable basis for the belief that the property belonged to the adverse possessor or property owner" will be subject to varying interpretations of what is "reasonable" in a myriad of circumstances. There can no longer be a truly objective rule to determine adverse possession. Each case will be sui generis.

Moreover, to establish adverse possession under a written instrument or judgment, under RPAPL §511, the occupant must prove that he or she, "or those under whom the occupant claims, entered into possession of the premises under claim of right" (Emphasis added). Therefore, any occupant claiming under a deed, and believing him or herself to be the rightful owner of the property must prove that those from whom title was derived also had a "reasonable basis" for their belief that they had a right to the property. With the passage of time and the death of parties and witnesses, such proof will generally be extremely difficult to establish. This is precisely the scenario that gave rise to Governor Spitzer's veto of the 2007 legislation.

In addition, the "reasonable basis for belief" requirement as a basis for "claim of right," as defined by RPAPL §501(3), would appear to apply equally to the non-occupant property owner, thereby requiring a retroactive (and possibly interminably futile) investigation of the chain of title of both claimants to the property. This is likely to cause adverse possession cases to be increasingly more complex and is also more likely to generate inconsistent results.

While the new provisions deeming "de minimis" non-structural encroachments to be permissive and non-adverse are well intended, the phrase "de minimis" is left undefined and ambiguous. Accordingly, here too, there is likely to be much litigation over what will constitute "de minimis" encroachments with many inconsistent results.

The stated purposes for changing the existing law were to protect landowners against "stealth" takeovers of their land by persons acting in "bad faith," to discourage "mischief between neighbors" and "even between families."14 While these purposes appear reasonable on their face, the Legislature acted without evidence to show that these problems actually existed to any substantial degree or, if they did, that they required a legislative remedy. No hearings were held on this legislation. It is difficult to understand the basis for the Legislature's nearly unanimous and precipitous embracement of the reasons given for this legislation which effectively ends adverse possession in New York after July 8, 2008.

The Legislature apparently saw no need to discourage "mischief" by tenants against landlords (RPAPL §531) or between tenants in common (RPAPL §541), for whom the law remains unchanged, with no "reasonable basis for belief" requirement to acquire title by adverse possession, and for whom, plainly, there could be no such basis.

Since 1998, of the 105 New York state cases dealing with adverse possession, 29 involved allegations by the property owners that the adverse possessors were aware they did not own the property.15 Nevertheless, none of these cases, including Walling, involved what could truly be considered a "stealth" takeover when the law of adverse possession required, as a precondition to divesting an owner's title, that the adverse possession be "open and notorious" and "continuous" for a 10-year period. Indeed, "open and notorious" is just another way of saying that "there have been acts sufficiently open to put a reasonably diligent owner on notice," as newly amended RPAPL §522 now provides.

Adverse possession law in New York, as reiterated in Walling, had stood the test of time for over two centuries. However, Senator

Little's Memorandum in Support of S.7915-C stated that Walling was "at odds with contrary case law."16 The senator's memorandum was clearly in error on this point.17 One must ask what great harm had adverse possession law, as enunciated by Walling, done to the citizens of the state?

The only sure thing we can say about the new law is that it will generate many legal disputes that would otherwise not have occurred. The new law will expose unsuspecting owners to unfounded and unsupportable claims to their land that may be extremely difficult, if not impossible, to defeat without costly and lengthy litigation.

If "this legislation [was] all about good faith," as Senator Little claimed, then the "good faith" of those who claim prior ownership of the land, and not of those in possession of the land, is what this legislation will ultimately be testing. This legislation stands adverse possession law on its head, and without any good reason for having done so.

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Endnotes:

1. 851 N.E.2d 1167 (N.Y. 2006).

2. See Ray v. Beacon Hudson Mountain Corp., 88 N.Y.2d 154, 159 (N.Y. 1996).

3. 110 N.E. 772 (N.Y. 1915).

4. 137 N.E. 599 (N.Y. 1922).

5. See Belotti v. Bickhardt, 228 N.Y. 296, 208 (N.Y. 1920).

6. NYSBA Memorandum in Support of S.7915 (June 12, 2008).

7. Introducer's Memorandum in Support of S.5364-A.

8. Veto Message No. 153 (Aug. 28, 2007).

9. A claim of right is not required if the owner of the real property throughout the statutory period cannot be ascertained in the county records office and located by reasonable means.

10. Showing that the property has been "usually cultivated or improved" is no longer required.

11. Introducer's Memorandum in Support of S.7915-C.

12. Approval Memorandum No. 13 (July 8, 2008).

13. S.7915-C, §9. Presumably, the new law does not invalidate adverse possession rights that vested during any 10-year period ending prior to July 8, 2008. See U.S. Const. Amend. V; Cf. Reiter v. Landon Homes Inc., 31 AD2d 538, 295 NYS2d 103 (2d Dept. 1968).

14. Introducer's Memorandum in Support of S.7915-C.

15. The referenced data has been provided using numbers from Westlaw's West Key Number Digest.

16. Introducer's Memorandum in Support of S.7915-C.

17. See Adam Leitman Bailey & John M. Desiderio, Adverse Possession, NYLJ, Sept. 12, 2007, at 5.