Application of the Adverse Posession Amendements

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In 2008, the New York Legislature enacted sweeping changes to Article 5 of the Real Property Actions and Proceedings Law (RPAPL) that governs the circumstances under which title to real property may be acquired by adverse possession. The legislation was intended to overturn the Court of Appeals decision in *Walling v. Prysbylo*,[1] in which the court had reaffirmed the ancient rule that an adverse possessor's knowledge of the true owner would not preclude the vesting of title in the adverse possessor upon the expiration of the statute of limitations.[2] The implementation of the 2008 amendments has changed adverse possession law to make it harder for someone with bad intentions to use the adverse possession statute to obtain rightful ownership to property they know belongs to another. The 2008 amendments mandate that the act shall apply to claims filed on or after July 7, 2008, the effective date of the amendments.[3]

The Court of Appeals has not determined any of the issues raised by the new adverse possession statute.4 However, in accordance with the statutory mandate, the Court of Appeals has ruled, in *Estate of Becker v. Murtagh*,[5] that if a claim was filed before the amendments took effect and rights were vested by adverse possession before the amendments were effective, the old law will apply. The Court of Appeals did not address the effect the new amendments would have on cases brought after the amendments became effective but where ownership rights are alleged to have vested prior to July 7, 2008.

As a result, appellate courts throughout New York disagree as to whether the new law applies to every claim filed on or after July 7, 2008.[6] However, with a few exceptions, most of the appellate decisions agree it would be unconstitutional to repudiate adverse possession rights that have vested before the new law came into effect on July 7, 2008.

To date, there is no decision by the First Department determining whether or not the 2008 amendments to RPAPL Article 5 should be applied retroactively to adverse possession claims allegedly vested before 2008, but filed on or after July 7, 2008. Among the other three Departments that have addressed the question, no uniform answer has been given. There is disagreement between the departments, and even between different panels of the same Appellate Division within two of the departments, as to whether the new law applies to every claim filed on or after July 7, 2008.[7]

How different courts have resolved the question regarding the application of the 2008 amendments has made a substantial difference in the outcome of each case.

Fourth Department Cases

In *Franza v. Olin*,[8] the Fourth Department issued the first appellate decision that ruled on the retroactive application of the 2008 amendments. *Franza* held that "where title has vested by adverse possession, it may not be disturbed retroactively by newly-enacted or amended legislation," because, [when] title to disputed property would have vested in plaintiff prior to enactment of the 2008 amendments…application of those amendments to plaintiff is unconstitutional." Since *Franza* was decided, all Fourth Department decisions, that have addressed the issue, have consistently followed Franza and have held that pre-2008 law governs all cases where the action was commenced after July 7, 2008, but where the alleged adverse possession would have vested prior to that date.[9]

Second Department Cases

The courts in the Second Department have come to different conclusions regarding the application of the new law. To date, three decisions in the second department have applied the new law. *Hartman v. Goldman*[10] applied the new law, even though the alleged adverse possession would have vested in 1997, because the parties stipulated that the 2008 amendments applied. *In Calder v. 731 Bergan*,[11] adverse possession rights would have vested when the statute of limitations expired in 1984, but, without taking note of that fact, the court nevertheless applied the new law holding that, upon the facts alleged, the plaintiffs had a reasonable basis for their belief that the disputed parcel had been conveyed to them in 1974 by the U.S. government and had thereby established their claim of right to the parcel under the 2008 amendments. *Wright v. Sokoloff*[12] applied the new law because both the commencement of the claim and the alleged vesting of the adverse possession rights occurred after the amendments took effect.

The Second Department followed *Franza* and applied pre-2008 adverse possession law in *Hogan v. Kelly*[13] in which the court held that a "claim of right" could nevertheless be established, in a case filed after July 7, 2008, where adverse possession vested prior to that date, regardless of whether or not the adverse possessor "had actual knowledge of the true owner at the time of possession," citing Walling. As a result the court held that defendants' knowledge, that someone other than themselves had title to the property, did not bar the defendants from asserting a claim of right under pre-2008 adverse possession law.

In *Shilkoff v. Longhitano*,[14] the court applied pre-2008 law to a case commenced in 2009 because the alleged adverse possession rights would have vested prior to the effective date of the 2008 RPAPL amendments.

In *Maya's Black Creek v Angelo Balbo Realty,*[15] the court declined to decide whether the old law or the new should apply, and applied both, stating that the plaintiff's adverse possession cause of action would be upheld in either circumstance. However, the court did not state how the plaintiff had satisfied the requirement of the 2008 amendments that

that there be a "reasonable basis for the belief that the property belongs to the adverse possessor or property owner as the case may be."[16]

Third Department Cases

The Third Department has also issued conflicting decisions on the retroactive application of the 2008 RPAPL amendments to cases filed after July 7, 2008 but where title allegedly vested prior to that date.

In *Ziegler v. Serrano*,[17] the court applied the new law to a case where adverse possession had vested in 1995. In *Ziegler,* defendant and her husband owned property as tenants by the entirety from 1972-1984, at which point the defendant abandoned her husband and left the property. Defendant's husband received judgment for divorce and partition of the property due to defendant's default. Defendant's husband, now having fee title in the property, deeded the property to plaintiffs in 1985. The plaintiffs then continued to occupy the premises as their residence. In 1991, upon motion made by the defendant and her husband, both the divorce and partition judgments against the defendant were vacated for improper service. In 1992 defendant sued plaintiffs, challenging their title to the property. The action was dismissed due to failure to prosecute. However, in 2008, plaintiff's moved to quiet title.

Specifically mentioning RPAPL §§501(3) and 511 as amended in 2008, the Ziegler court held that plaintiffs' claim of right was based on a "reasonable basis" as it was pursuant to a written instrument—a deed. Because the plaintiffs entered with a reasonable claim of right and possession and occupation was continuous for the statutory period, adverse possession was upheld. The court acknowledged the holding in *Franza* and recognized that title would also have vested under pre-2008 law, but noted that the parties did not question the propriety of applying the 2008 legislation, and, therefore, the court declined to address the issue. The court held that a claim of right based on a deed is a reasonable basis for a claim of right under both the new law and the old law.

In *Sawyer v. Prusky,*[18] an action commenced in September 2008, where the alleged acts of adverse possession occurred "between 1997 and 2008," the court applied the new law without hesitation. Plaintiffs acquired the disputed property in 1997. At that time, a common walkway and pipeline marked the property line. Later, plaintiffs' built a rock wall on the property line. In 2008, defendants surveyed their property. Defendants found that certain land formerly believed to belong to plaintiffs, including the property upon which the rock wall lay, actually belonged to the defendants. Subsequently, defendants removed plaintiffs' rock wall and erected a fence on the boundary line found by the 2008 survey. Plaintiffs sued to quiet title. Plaintiffs' claim of right to the disputed strip of land was based upon a written instrument, the deed received by the plaintiffs at the time of purchase. Applying RPAPL §512 as amended in 2008 and newly enacted RPAPL §543, the court found the rock wall to be "de minimis" and "non-adverse," and, on that basis, plaintiffs' claim for adverse possession was dismissed.

In contrast, in *Barra v. Norfolk S. Ry.*,[19] a case commenced in March 2009, the Third Department applied the old law because title by adverse possession would have vested before the adverse possession statute was amended. Plaintiffs owned land adjacent to railroad tracks owned by the defendant. In March 2008, defendant closed the middle crossing. Plaintiff claimed, among other things, that they acquired a prescriptive easement for ingress and egress over the northern crossing. The court held that when all of the elements of a prescriptive easement are present, except express hostility, hostility is generally presumed, shifting the burden to the defendant to show that the use was in fact permissive. As defendant failed to sufficiently prove that permission was implied from the beginning, the court held that summary judgment for the defendant was inappropriate.

In discussing the application of the 2008 amendments to this case, the court held that because "the plaintiffs prescriptive period commenced and concluded prior to the effective date," and the "right to an easement by prescription, as with adverse possession, vests upon expiration of the statute of limitations for recovery of real property," that plaintiff's claims "may not be disturbed retroactively by newly-enacted or amended legislation." The court therefore held (citing *Franza*) that the "plaintiffs are entitled to have their claims measured in accordance with the law as it existed prior to the enactment of the 2008 amendments."

The Third Department has ap-plied pre-2008 adverse possession law to two other cases commenced after July 7, 2008, but where the alleged vesting of title occurred prior to that date. In *Wilcox v. McLean*[20] and in *Quinlan v. Doe*,[21] the court panels in those cases, citing Barra, held that the 2008 RPAPL amendments were not applicable to adverse possession claims that allegedly vested prior to the effective date of the amendments.

Wither the First Department?

As the above discussion shows, except for the Fourth Department, which appears to be rigidly adhering to the principles enunciated in *Franza*, it is clear that neither the Second or the Third Department has yet adopted a uniform rule regarding the retroactive application of the 2008 RPAPL amendments to adverse possession claims that allegedly vested prior to July 7, 2008. Without any ruling on the issue from the First Department Appellate Division, motion courts within the First Department are presently without any controlling First Department precedent to follow. In such circumstances, in the absence of any controlling Court of Appeals decision, courts are ordinarily "bound to follow the applicable ruling of another department."[22]

However, in view of the conflicting decisions existing between and among the courts of the other departments, there is no single controlling decision of any department dictating how motion courts in the First Department should determine how to apply or not apply the 2008 RPAPL amendments. Presumably, in matters where the parties either stipulate or agree that the 2008 amendments apply to the case, as in *Hartman*, or where the parties do not question the propriety of applying the 2008 amendments to the case, as in *Ziegler*, First Department motion courts may follow those rulings without any hesitation. The hard cases will be those in which the parties disagree on which law should control the results. Practitioners in the First Department still need to await the outcome of a controlling decision by the Appellate Division to know the answer to that question.

ENDNOTES:

1. 7 NY3d 228 (2006).
2. See Humbert, Appellants, & The Rector, Church-Wardens & Vestrymen of Trinity Church in The City Of New York, 24 Wend. 587 (N.Y. 1840).
3. See L 2008, ch 269, §9, eff July 7, 2008.
4. See Bailey and Desiderio, "Adverse Possession Changes Make Result Less Certain," New York Law Journal, Feb. 11, 2009.
5. 19 NY3d 75 (2012).
6. Compare, e.g., Franza v. Olin, 73 AD3d 44 (4th Dept. 2010)(Pre-2008 law applied), with Sawyer v. Prusky, 71 AD3d 1325 (3d Dept. 2010)(2008 amendments applied).
7. In the Second Department, compare Hogan v. Kelly, 86 AD3d 590, 927 NYS2d 157 (2d Dept. 2010) with Wright v. Sololoff, 110 AD3d 989, (2d Dept. 2013); and in the Third Department, compare McKeag v. Finley, 93 AD3d 925, 935 NYS2d 220 (3d Dept. 2013) with Sawyer v. Prusky, 71 AD3d 1325, 896 NYS2d 536, 538 (3d Dept. 2010).
8. Franza, supra Note 6.
9. See Perry v. Edwards, 79 AD3d 1629 (4th Dept. 2010), Hammond v. Baker, 81, AD3d 1288 (4th Dept. 2011), and Mau v. Schusler, 124 AD3d 1292 (4th Dept. 2015).
10. 84 AD3d 734 (2d Dept. 2011)(Full disclosure: Adam Leitman Bailey, P.C. represented the prevailing party in Hartman v. Goldman).
11. 83 AD3d 758 (2d Dept. 2011).
12. 110 AD3d 989 (2013).
13. Supra note 5.
14. 84 AD3d 974 (2d Dept. 2012).
15. 82 AD3d 1175 (2d Dept. 2011).
16. RPAPL §501(3).
17. 74 AD3d 1610 (3d Dept. 2010).
18. 71 A.D.3d 1325 (3d Dept. 2010).
19. 75 A.D.3d 821 (3d Dept. 2010).
20. 90 AD3d 1363 (3rd Dept. 2011).
21. 107 AD3d 1373 (3rd Dept. 2013).
22. See Tzolis v. Wolff, 39 AD3d 138, 142 (1st Dept. 2007).

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