

Adverse Possession

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If a person takes possession of a property, improves it, possesses it in a public manner and continues to do so for an extended period of time, traditionally that person would be deemed to have acquired the property by "adverse possession". The concept of adverse possession is well known in both North America and Europe and has been around for centuries.

Traditional Elements of Adverse Possession

Traditionally, the possessor of property which is not his or her own has had to meet certain specified criteria in order to acquire ownership by adverse possession. The traditional elements are as follows:

1. Open, notorious and hostile possession;
2. exclusive and continuous possession (traditionally for a period of 10 years or more);
3. under a "claim of right"; and,
4. affirmative acts by the possessor such as payment of real property taxes, the making of substantial improvements, the maintenance of the property, etc.

When the true property owner finds that someone has been in possession of the property owner's land, the true property owner generally has an affirmative duty to take action to remove the possessor by commencing an action in ejectment. Alternatively, having discovered the possessor's occupancy, the true owner can grant to the possessor permission to remain on the premises with the owner's consent. This has traditionally eliminated the claim for "open, notorious and hostile possession".

In New York State, the Real Property Actions and Proceedings Law ("RPAPL") governs adverse possession.

2008 Amendment Brings New Confusion

On July 7, 2008, Governor Paterson signed into law certain amendments to the RPAPL. Many of the changes in the Law were adopted over the objections of the New York State Bar Association ("NYSBA") and at the behest of the New York State

Land Title Association (“NYSLTA”). Under the amendments, the necessary elements of adverse possession in New York are now:

1. Open, notorious and hostile possession;
2. exclusive and continuous possession;
3. a reasonable claim of right on the part of the possessor;
4. acts which constitute notice or protection by a substantial enclosure so that the true owner would have reason to know about the improper occupancy; and,
5. the expiration of a continuous period of ten (10) years or more.

What Was the Catalyst for the Change in the Law?

Most people believe that the change in the Law was initiated as a result of a decision by New York’s highest court in the case of *Walling v. Przybylo*, 7 N.Y. 3rd 228 (2006). In this case, G. Scott Walling, a knowledgeable lawyer who worked in the courts, took possession of a portion of an adjoining owner’s property. When the ten (10) year period for adverse possession expired, the true owner was deprived of ownership of the property. The decision of the New York Court of Appeals held that whether or not Walling knew the property was owned by his neighbor was immaterial.

The reaction to this decision was intense. The High Court’s decision was perceived as unfairly permitting an intentional taking of land of an unsuspecting owner by stealth.

In response to the strong reaction created by the High Court’s decision, the New York State Bar Association created a Task Force on Adverse Possession. The Task Force was originally created under the chairmanship of Karl B. Holtzschue, a retired professor of real estate law. Holtzschue was the attorney who negotiated on behalf of the New York State Bar Association with respect to the Property Conditions Disclosure Act when it was supported by the New York State Association of REALTORS®, Inc. The Bar Association’s Task Force on Adverse Possession had a simple objective, i.e. “to prevent the acquisition of property through adverse possession by stealth” (New York Real Property Law Journal, Winter 2009, Volume 37, Page 27).

The Bar Association was responding to a prior proposed amendment to the RPAPL. The prior proposed amendment would have prevented adverse possession from being applicable unless it was shown that the possessor had no knowledge that the property belonged to another. This first bill passed both houses of the legislature

and was vetoed by then Governor Spitzer. The Bar Association then submitted a new proposed enactment which would have eliminated a taking of property by stealth by mandating that an act constituting adverse possession must be sufficiently open to give reasonable notice to the true owner of the property. In addition, the Task Force recommended that small encroachments with a distance of twelve (12) inches or less, either through cultivation, planting or fencing, should not be the basis for adverse possession.

How the Proposed Bar Association Legislation was Derailed

After obtaining the approval of the Real Property Law Section of the New York State Bar Association, the Task Force attempted to enroll the New York State Land Title Association in supporting the new Bill. The Task Force believed that it had obtained the approval of NYSLTA in January of 2008. At the very last minute before the enactment was to be voted upon, NYSLTA indicated that it wanted amendments to the proposed Bar Association sponsored legislation. These changes resulted in an enactment which has been heavily criticized in legal circles since it was signed into law by Governor Paterson.

The New Law

Section 501(2) of the RPAPL states that “An adverse possessor gains title to the occupied real property upon the expiration of the statute of limitations for an action to recover real property...provided that the occupancy...has been adverse, under claim of right, open and notorious, continuous, exclusive and actual.”

Section 522 of the RPAPL indicates that when adverse possession is not based upon a written instrument or a judgment or decree, adverse possession mandates that “... there have been acts sufficiently open to put a reasonably diligent owner on notice” or “...it (the property) has been protected by a substantial enclosure...”

Under Section 501, an adverse possessor must now possess the land under a “claim of right” which under Section 501(3) requires proof that the adverse possessor had “a reasonable basis for the belief that the property belongs to the adverse possessor...”

The New Problems

When the language of Section 501 was rewritten at the last moment, certain language was left in which had been suggested by NYSBA and which is now out of context. This language indicates that the person who occupies the property adversely is one who occupies “with or without knowledge of the other’s superior ownership rights...”

Accordingly, there is a direct conflict in the statute which indicates that the person in possession may have knowledge of another's superior rights but still must be able to assert that he or she had no reasonable basis to believe that someone else had that superior right. There are other inconsistencies which have been thoroughly analyzed by the Bar Association and many title insurance companies. The new statute is silent on who has the burden of proving that the possessor has a claim of right or does not have a claim of right.

Significantly, new section 543 of the RPAPL states in part that, "Notwithstanding any other provision of this article, the existence of de minimus non-structural encroachments, including, but not limited to, fences, hedges, shrubbery, plantings, sheds and non-structural walls, shall be deemed to be permissive and non-adverse." The words "de minimus" are not defined.

Section 2 of the new Section 543 further states that, "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 shall be deemed permissive and non-adverse".

These changes leave many questions to be answered over time by the courts. Professor Robert E. Parella of St. John's University School of Law was the Reporter on behalf of the Real Property Law Section's Task Force on Adverse Possession. In preparation for this article, this author consulted with Professor Parella. Professor Parella confirmed that he was unaware of any decisions to date which have interpreted the new Law.

Conclusion

While prior to July 7, 2008 most lawyers could define what adverse possession meant in the State of New York, there was the potential for the unfortunate misuse of the law as occurred and which was litigated in the case of Walling v. Przybylo. In an attempt to eliminate the use of adverse possession as a means of acquiring property by stealth, legislation has been enacted which leaves most lawyers at a loss as to how to advise their clients.

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