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Narrowing the Applicability of Adverse Possession Amendments

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Many Americans believe in the well-known motto "my home is my castle." This adage reflects the unique value placed upon individual property rights in this country. Any perception that these fundamental rights are being infringed upon can produce extreme responses.

This is true with respect to the doctrine of adverse possession, a longstanding legal principle that enables a party to divest another party of its ownership of real property. The doctrine of adverse possession has spawned countless litigations and produced cases that have created a significant level of outcry. One of these cases was the Court of Appeals case of *Walling v. Przybylo*, 7 N.Y.3d 228 (2006), affg, 24 A.D.3d 1 (3d Dept. 2005). In *Walling*, the Court, based on its holding that "decisional law does not support [the] position" that "there is no claim of right when the adverse possessor has actual knowledge of the true owner at the time of possession," permitted adverse possession claims to be established notwithstanding the adverse possessor's knowledge of the rights of the true owner.

In response to *Walling*, the New York State Legislature amended the Real Property Actions and Proceedings Law (RPAPL) in 2008 and materially changed the law as it relates to adverse possession cases. In doing so, the Legislature, motivated by a belief that the adverse possession law under *Walling* made it too easy for an adverse possessor to take away property rights, sought to impose more onerous usage requirements to establish adverse possession rights and required a component of good faith in order to meet the "claim of right" element.

Recently, some of the Appellate Divisions have narrowed the scope of the RPAPL amendments by declining to apply the amendments in several cases filed after the amendments' effective date of July 7, 2008, despite the fact that the statute expressly provides that the new law is to "apply to all claims filed on or after [the] effective date."¹ Not only have these holdings significantly limited the cases that are subject to the new law, but, in an odd twist, they have the effect of protecting the property rights of the adverse possessor, rather than to insulate property owners from facing attacks against their property.

Law Prior to Amendments

Prior to the RPAPL amendments, the elements for an adverse possession claim included possession that was (1) hostile or adverse and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required period, which is 10 years. *Walling v. Przybylo*, 7 N.Y.3d 228 (2006), affg, 24 A.D.3d 1 (3d Dept. 2005). When a party sought to obtain title by adverse possession not based on a written instrument, the prior law had required a claimant to show that the property was either "usually cultivated or improved" or "protected by a substantial inclosure." RPAPL 522[1][2] (McKinney's 1979).

In the 2006 case of *Walling*, the nature of the element of "a claim of right" was the central issue for the Court of Appeals. The Court, resolving an inconsistency between the holdings of the Appellate Division, Second Department² and Third Department,³ held that "decisional law does not support [the] position" that "there is no claim of right when the adverse possessor has actual knowledge of the true owner at the time of possession."

In permitting adverse possession claims to be established notwithstanding the adverse possessor's knowledge of the rights of the true owner, the Court of Appeals held that: (a) "[the] ultimate element in the rise of a title through adverse possession is the

acquiescence of the real owner in the exercise of an obvious adverse or hostile ownership through the statutory period"; (b) true owners' "failure to assert their rights in a timely manner prevents [them] defendants from prevailing on this appeal," and (c) "[c] onduct will prevail over knowledge, particularly when the true owners have acquiesced in the exercise of ownership rights by the adverse possessors."⁴

Response to 'Walling'

Less than a year after *Walling*, a New York State Senate Bill (No. 5364-A) was introduced and passed. The bill provided that whether or not an adverse possession claim was based upon a written instrument, the claimant's "actual knowledge" that another person is the title/record owner of the property in question would defeat the claim.

Former Governor Eliot Spitzer vetoed the bill and wrote in his "veto message" that while at "first blush this would seem to be a logical improvement to the law, in reality this change would have a radical impact on New York's adverse possession laws," and that "[w]hile I understand the Legislature's desire to protect innocent property owners from the 'theft' [of] their property by knowing adverse possessors, this bill misconstrues the purpose and operation of our adverse possession laws."

Thereafter, the Legislature adopted another bill (No. S. 7915-C), which became law. It contained a similar provision to that in the previous bill as well as additional provisions as discussed below. The "Introducer's Memorandum in Support" of the bill provided that the purpose of the bill was to provide that "title pursuant to adverse possession shall be defeated if the claimant has no 'claim of right' or reasonable basis for the belief that the property belongs to the claimant." The memorandum noted that the legislation was in response to the effect of recent case law which "has been to encourage the offensive use of adverse possession."

The new law on adverse possession 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."⁵ A "claim of right" is defined as a "reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case may be.

"Notwithstanding any other provision of this article, claim of right shall not be required if the owner or owners of the real property throughout the statutory period cannot be ascertained in the records of the county clerk, or the register of the county, of the county where such real property is situated, and located by reasonable means."⁶ In addition, the former element of "usually cultivated or improved" has been eliminated in favor of the term "acts sufficiently open to put a reasonably diligent owner on notice."⁷ Finally, a new section has been added to statutorily determine how adverse possession is "affected by acts across a boundary line."

These changes eliminate conduct that had often constituted valid grounds for establishing adverse possession rights. RPAPL 543 now provides that "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,"⁸ and that "the acts of lawn mowing or similar maintenance across the boundary line of an adjoining landowner's property shall be deemed to be permissive and non-adverse."⁹

Application of Amendments

The RPAPL amendments were signed into law on July 7, 2008, and became effective immediately so as to "apply to all claims filed on or after such effective date." Thus, the Legislature sought to make the new, more burdensome law govern all adverse possession cases filed after July 7, 2008, regardless of the duration or the nature of the historic property usage that may have occurred prior to the new law's adoption.

However, the Third and Fourth departments have recently held that the new law cannot be applied to "all claims" filed on or after the effective date of July 7, 2008. In *Franza v. Olin*, 73 A.D.3d 44 (4th Dept. 2010), the Fourth Department accepted the argument by the plaintiff, an adjoining property owner asserting an adverse possession claim, that "the amendments to article 5 of the RPAPL are unconstitutional as applied to her because they deprive her of a vested property right."

The court held that the lower court erred in applying the amended version of the RPAPL to the plaintiff, "inasmuch as title to the disputed property would have vested in plaintiff prior to the enactment of the 2008 amendments." The court concluded that "application of those amendments to plaintiff is unconstitutional," and the plaintiff was entitled to have the old law applied to determine whether she had acquired title to the disputed property by establishing vested rights prior to the effective date of the amendments.

Not only have subsequent Fourth Department cases followed the holding of *Franza*,¹⁰ but recent Third Department cases have addressed the issue as well. In *Ziegler v. Serrano*, 74 A.D.3d 1610 (3d Dept. 2010), the court pointed to the holding in *Franza*, but ultimately held that it need "not pass on the issue." A month later the Third Department expressly adopted *Franza* in *Barra v. Norfolk Southern Railway Co.*, 75 A.D.3d 821, 825 (3d Dept. 2010), holding that "[s]hould plaintiffs succeed in proving their claims, title 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.'"

The Second Department has not adopted the reasoning of *Franza* or *Barra*. In March of this year, the court, in *Maya's Black Creek, LLC v. Angelo Balbo Realty Corp.*, 82 A.D.3d 1175 (2d Dept. 2011), referenced the holding of *Franza*, but held that it "need not reach the issue decided by the Fourth Department." Some recent cases¹¹ may suggest that the Second Department might not be inclined to adopt the Third or Fourth departments' reasoning that in cases in which adverse possession rights are alleged to have ripened under the old law prior to the effective date of the new law, the new law cannot be applied. The recent Second Department cases appear to involve facts dating back in excess of a decade prior to July 7, 2008, yet the court did not make any reference to any vested rights or preclusion against applying the new law.

The First Department also appears not to have addressed the issue of whether the 2008 RPAPL amendments can be applied to defeat title by adverse possession that is claimed to have ripened prior to the effective date of the amendments. However, one trial level court has held that the holdings of the Third and Fourth departments in *Barra* and *Franza* govern the trial level courts within the First Department in the absence of a First Department ruling on the subject.¹²

Conclusion

The 2008 legislative changes to the law of adverse possession were intended to protect the property rights of owners facing "offensive" claims by adverse possessors. The goal was to prevent the "theft" of innocent property owners' property by adverse possession. In addition to changing the substantive elements for an adverse possession claim and heightening the type of conduct required to support an adverse possession claim, the Legislature sought to broadly have the new law applicable to "all claims filed on or after" July 7, 2008.

Now, some of the Appellate Divisions have limited the broad application of the new law by holding that the new provisions can only be applied to those cases commenced after July 7, 2008, in which an adverse possessor's rights had not ripened prior to that date. Thus, in an ironic twist, the reach of a law designed to protect property owners against claims by adverse possessors has the effect of protecting the property rights of the adverse possessors. Given the nature of adverse possession cases, in which long-term conduct dating back decades is often at issue, there is little doubt that the judicially created exception to the new law's applicability will impact many cases that have already been filed since July 7, 2008, as well as many more cases that are sure to be filed in the future.

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Endnotes:

1. L. 2008, Ch. 269, §9.

2. In the Appellate Division Second Department, knowledge or awareness by a claimant that she did not own the subject property that she was claiming title by adverse possession to defeated the "claim of right." See *Harbor Estates Limited Partnership v. May*, 294 A.D.2d 399, 400 (2d Dept. 2002); *Beyer v. Patierno*, 29 A.D.3d 613, 615 (2d Dept. 2006); *Robinson v. Eirich*, 2 A.D.3d 617, 618 (2d Dept. 2003).

3. The holdings of the Appellate Division Third Department were markedly different than those of the Second Department. *Birkholz v. Wells*, 272 A.D.2d 665, 666 (3d Dept. 2000); *Walling v. Przybylo*, 24 A.D.3d 1 (3d Dept. 2005).

4. *Walling*, 7 N.Y.3d 228 (2006).

5. RPAPL 501(1).

6. RPAPL 501(3).

7. RPAPL 512(1) (based upon written instrument/judgment); RPAPL 522(1) (not based upon written instrument).

8. RPAPL 543(1).

9. RPAPL 543(2).

10. *Perry v. Edwards*, 79 A.D.3d 1629, 1631 (4th Dept. 2010) ("we note that the 2008 amendments to RPAPL article 15 are inapplicable here, inasmuch as plaintiffs contend 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, 1290 (4th Dept. 2011).

11. In *Calder v. 731 Bergan, LLC*, 920 N.Y.S.2d 413 (2d Dept. 2011), the Second Department applied the new law, notwithstanding the fact that it appeared that the disputed parcel may have been used as far back as 1974. In *Hartman v. Goldman*, 2011 WL 1733962 (2d Dept. 2011), the action was commenced after the effective date of the amendments. The court applied the new law, which the parties did not dispute. However, it appeared that the disputed usage may have commenced in 1987, more than sufficient time to have given rise to ripened adverse possession rights prior to the effective date of the amendments.

12. *LBMH Group, L.P. v. Safer*, 29 Misc.3d 1236 (Sup. Ct. N.Y. Co. 2010).



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