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Adverse Possession in a Post-'Walling' World

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In a prior article, which reviewed adverse possession cases decided by New York courts in the two years following the 2008 amendments to Article 5 of the Real Property and Proceedings Law (RPAPL), the authors noted that "during this period of transition, the courts must be alert to recognizing situations where adverse possession property rights were acquired prior to enactment of the amendments, even where the parties to the action may have failed to address the issue."1

The RPAPL adverse possession amendments became effective on July 8, 2008, and they "apply to claims filed on or after such effective date."2 The importance of distinguishing between adverse possession rights acquired before or after the 2008 amendments was made clear by the Fourth Department's decision in Franza v. Olin.3

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."

This issue has arisen because of the sweeping changes the Legislature enacted in 2008 to reverse the ruling of the Court of Appeals in the case of Walling v. Prysbylo.4 In Walling, 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. 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."5

The 2008 legislation also 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,"6 and, therefore, adverse to the


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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,7 and (b) "acts of lawnmowing or similar maintenance across the boundary line of an adjoining landowner's property."8

Case Law

In the period since Franza was decided in March 2010, there have now been several decisions, at both the appellate and trial court levels, where the courts have had to determine whether to apply the 2008 RPAPL amendments or the law as it existed prior to the amendments. What emerges from these decisions is the conclusion that it is likely to be several years in the future before courts will apply the 2008 RPAPL amendments without having to make that determination.

Following its Franza decision, the Fourth Department has issued two additional decisions in which it has applied pre-amendment adverse possession law to cases in which the defendants sought to defeat the plaintiffs' claims by invoking the provisions of the 2008 amendments. In Perry v. Edwards,9 a case begun apparently after July, 2008, the court, in permitting the plaintiffs to amend their complaint, held that "the 2008 amendments to RPAPL article 15 (sic) 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." And, in Hammond v. Baker, 10 the court affirmed a trial court judgment in favor of plaintiffs' adverse possession claim, where defendants tacitly conceded, and the record established, that plaintiffs' possession and use of the disputed property, prior to July 8, 2008, had been actual, exclusive, and continuous for the required period of at least 10 years. The court reaffirmed its Franza holding noting that "[d]efendants err in contending that we should apply the current version of the RPAPL rather than that former version."

The Third Department adopted the Fourth Department's reasoning in Barra v. Southern Railway Company,11 a case decided shortly after Franza. In Barra, a case commenced in March 2009 in which the plaintiffs' claim to a prescriptive easement was alleged to have vested prior to July 8, 2008, the court held that "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."

Second Department Rulings

Although the Second Department was not called upon to decide the question regarding the effective application of the 2008 amendments until several months after the Fourth and Third departments had already done so, the Second Department, thus far, has had the most opportunity to address the issue—with mixed results.

The Second Department first acknowledged the enactment of the 2008 amendments in Asher v. Borenstein,12 a case commenced in March 2008, in which the court noted that the 2008 amendments did not apply to the facts in Asher because "[t]he amendments applied solely to those actions commenced after July 7, 2008." Applying the law as enunciated in Walling, the court found that "the record demonstrates by clear and convincing evidence, under the law existing at the time this action was commenced, that the plaintiff cultivated or improved the subject parcel, enclosed it with a fence, and satisfied the elements of adverse possession, and the defendants 'acquiesce[d]…in the exercise of

an obvious adverse or hostile ownership through the statutory period.'"

In Maya's Black Creek, LLC v. Angelo Balbo Realty Corp.,13 the Second Department said that it "need not reach the issue decided by the Fourth Department in Franza v. Olin because the complaint states a cause of action under both the law as it exists today and the law as it existed prior to July 7, 2008." The plaintiff sought to amend its complaint to add causes of action for a judgment declaring that it has an easement by prescription or an easement by necessity over the real property of an adjacent landowner. The trial court denied the plaintiff's motion to amend, and the Second Department reversed.

The court held that the actions of the plaintiff, which the defendant contended should be deemed "non-adverse" under the 2008 amendments, satisfied all of the elements necessary to establish adverse possession. The court said that, whether the case was determined under "the version of the law in effect at the time that the purported adverse possession allegedly ripened into title" or "even under the more restrictive newly enacted version of the RPAPL, we cannot say as a matter of law that the complaint fails to state a cause of action for adverse possession, particularly in light of the plaintiff's allegation that it blacktopped the premises from the edge of a building on its own property to the edge of a curb located on the outer boundary of the defendant's property."

Nevertheless, although the Second Department held that the plaintiff, Maya's Black Creek LLC, had alleged sufficient facts to satisfy both the old and amended versions of the law regarding the "adverse" nature of its possessory actions, the court did not state how the plaintiff had satisfied the 2008 amendments' additional requirement that there be a "claim of right" founded upon a "reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case may be."14 Ironically, the decision in Maya's Black Creek, which found the 2008 amendments satisfied by the plaintiff's "adverse" allegations, omitted making any statement on the "reasonable basis for the [plaintiff's] belief" of its ownership of the disputed property, the key requirement of the 2008 amendments, the enactment of which was the main purpose of the legislation.15

The Second Department next applied the 2008 amendments to a case of adverse possession, but this time without any equivocation, in Hartman v. Goldman,16 in which the court noted that "[t]he parties do not dispute that this action is governed by article 5 of the RPAPL, as amended in 2008, applicable to all claims filed on or after July 7, 2008." In the trial court, the defendant moved for summary judgment to dismiss so much of the plaintiffs' complaint as was based upon the plaintiffs' installation of driveway lights, planting of foliage and shrubbery, and landscaping and lawn maintenance. The trial court held, under the 2008 amendments, that "such de minimis encroachments are deemed permissive and non-adverse pursuant to RPAPL 543." The Second Department affirmed, noting that "RPAPL 543 represents a change in the law,"and that,

> [u]nder the plain terms of RPAPL 543, as amended, the plaintiffs' plantings of foliage and shrubbery, and landscaping and lawn maintenance are de minimis and deemed permissive and non-adverse. [Citation omitted]. Further, the driveway lights installed by the plaintiffs, which are approximately four feet high and six inches in diameter, are also governed by RPAPL 543, which applies to all de minimis, non-structural encroachments "including, but not limited to," those expressly listed in the statute.

It should be noted that 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, both the trial court and the Second Department applied the 2008 RPAPL amendments to the plaintiffs' claim without any discussion of whether it was appropriate to do so where an 18 to 20-year period of adverse possession prior to the amendments was alleged.

The Second Department's latest decision on adverse possession, Hogan v. Kelly,17 unequivocally adopts the reasoning of the Fourth and Third departments regarding the application of the 2008 amendments to a claim of adverse possession which vested prior to July 8, 2008. The court explained that,

> On appeal, the plaintiff contends, relying on the new statutory definition of "claim of right," that the defendants failed to establish that they acquired title to the premises by adverse possession because they were aware that Carmen Powell was the decedent's sole heir and, thus, the rightful owner of the premises. Although this action was commenced after the effective date of the 2008 amendments, we agree with our colleagues in the Third and Fourth Departments that the amendments cannot be retroactively applied to deprive a claimant of a property right which vested prior to their enactment. [Citations omitted]. Therefore, the version of the law in effect at the time the purported adverse possession allegedly ripened into title is the law applicable to the claim, even if the action was commenced after the effective date of the new legislation.

The court noted that "this issue was not before us in Hartman v. Goldman, …and was not necessary to resolve in Maya's Black Creek, LLC v. Angelo Balbo Realty Corp., …in which we found that the plaintiff's complaint stated a cause of action under both prior and current law."

Conclusion

As noted above, it is clear that, so long as actions are commenced alleging the acquisition of title based on the vesting of adverse possession rights that occurred prior to July 8, 2008, the 2008 RPAPL amendments will not apply to any such action that is commenced after that date.

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Endnotes:

1. See Bailey and Desiderio, "Adverse Possession After the 2008 RPAPL Amendments," NYLJ, Oct. 13, 2010.
2. L. 2008, ch. 269, §9.
3. 73 AD3d 44, 897 NYS2d 804 (4th Dept. 2010).
4. 7 NY3d 228 (2006).
5. RPAPL 501(3).
6. Monnot v. Murphy, 207 NY 240 (1913).
7. RPAPL 543(1).
8. RPAPL 543(2).
9. 79 AD3d 1629, 913 NYS2d 460 (4th Dept. 2010).
10. 81 AD3d 1288, 916 NYS2d 702 (4th Dept. 2011).
11. 75 AD3d 821, 907 NYS2d 70 (3d Dept. 2010).
12. 76 AD3d 984, 908 NYS2d 90 (2d Dept. 2010).
13. 82 AD3d 1175, 920 NYS2d 172 (2d Dept. 2011).
14. RPAPL §501(3).
15. See Bailey and Desiderio, "Adverse Possession Changes Make Result Less Certain," NYLJ, Feb. 11, 2009.
16. 84 AD3d 734, 924 NYS2d 97 (2d Dept. 2011). (Adam Leitman Bailey, P.C. represented the defendant in this action who prevailed on the adverse possession issues raised by the plaintiff both in the trial court and on the appeal).
17. 86 AD3d 590, 927 NYS2d 157 (2d Dept. 2011).