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Adverse Possession

Veto Confirmed Existing Law on 'Claim of Right'

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This past session, the New York State Legislature passed a bill[1] that would have effectively eliminated the doctrine of adverse possession as we know it today. However, on Aug. 28, Governor Spitzer vetoed the bill noting the "radical impact" it would have had on New York's adverse possession law.[2] For now at least, the law remains unchanged.

The bill provided that a possessor's "actual knowledge" of the true owner of the property would bar a claim of title by adverse possession. In passing the bill, the Legislature apparently intended to overturn the 2006 decision of the Court of Appeals in *Walling v. Prysbylo*[3] which held 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***." *Walling* confirmed that, in New York, "use it or lose it" is the guiding principle of adverse possession law which seeks both to encourage the active use of land and to serve as a statute of limitations to resolve real property title disputes. When unwelcome intruders use land as their own, actually, openly, and continuously, for 10 years, and record owners do not seek to eject them from the property, the law condones what is otherwise theft of real property.[4]

The law of adverse possession has ancient roots in British law, and its ruling principles have been well settled in America since the early 1800's. Nevertheless, in *Walling*, the Court of Appeals found it necessary to make clear, once again, that an adverse possessor may acquire title to land both without having any prior claim and knowing that he has no right to it. The Court held that the state of mind of the person claiming title by adverse possession is irrelevant to establishing his right to ownership of the occupied property over that of the record title holder. What matters is how "ownership" has been manifested by the parties. "Conduct will prevail over knowledge, particularly when the true owners have acquiesced in the exercise of ownership rights by the adverse possessors."

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A person claiming ownership by adverse possession, by claim of title not founded upon a written instrument,[5] must prove, by clear and convincing evidence,[6] that his possession has been (1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous.

Walling affirmed the ruling of the Third Department which had observed that the question of "whether possessors whose possession is otherwise open, hostile and continuous for the statutorily-prescribed period of time, can obtain property by adverse possession despite their knowledge that another party holds record title," has been "answered in the affirmative in New York as long ago as 1840."[7] The Court of Appeals agreed and held that it does not matter whether the adverse possessor has any knowledge of the record owner. The Court held that "[t]he issue is 'actual occupation,' not subjective knowledge." As the Court further noted:

> Defendants argue that there is no claim of right when the adverse possessor has actual knowledge of the true owner at the time of the possession. However, long-standing decisional law does not support this position.

Prior to *Walling*, despite the long pedigree of its holding, a number of decisions of the First and Second Departments had overlooked or misinterpreted the older precedents—either through mistaken analysis of the cases or perhaps due to "a sometime persistent judicial instinct that a 'wrongdoer' should not profit from the wrong when it affects title to land[8]—holding instead that "mere occupancy for an extended period of years coupled with open conduct consistent with ownership, *but absent an initial claim of right*, may [not] ripen into an ownership interest by virtue of the occupancy (emphasis added)."[9]

In *Joseph v. Whitcombe*, the First Department held that the "fundamental requisites" of entering under a claim of right "necessarily" relate to "circumstances pre-dating and contemporaneous with the initial act of occupancy." The First Department noted the following "circumstances" as satisfying these "fundamental requisites":

> The claim of right may arise from ancestral ownership of a residence, though not passed by written instrument, coupled with continuous occupancy and incidents of ownership, such as keeping out intruders and paying taxes [citation omitted], or when the adverse possessor is the title owner of the adjacent parcel, whose original boundaries extended to the disputed parcel [citation omitted] or whose use of the disputed parcel derived from a prior ownership [citation omitted].

While the *Joseph* Court acknowledged "that New York rejects the need to inquire into the adverse possessor's intent," it nevertheless held that acquisition of title by adverse possession must rest on some claim to ownership that the adverse possessor possesses at the time of entry. Without such a pre-existing claim, as the court held, although adverse possessors may enter the property "with the subjective intent to retain possession as owners," they enter "merely as expectant licensees, whose expectations [have] no objective basis in fact."[10] Similarly, the Second Department had repeatedly held, in recent years, that an adverse possessor could not establish a claim of right if he knew at the time of his initial entry that the land was owned by the record owner, and that "[m]ere possession, no matter how long continued, gives no title by adverse possession unless under claim of right."[11]

This view of what is necessary to establish a claim of right is truly remarkable in light of the many statements to the contrary made in seminal and controlling precedents ranging over the course of both the 19th and 20th centuries. As noted by the Third Department's *Walling* decision:

> In *Humbert v. Trinity Church* [1840]…the court held that ownership can be obtained by adverse possession even when the possessor claims title wrongfully, fraudulently and "with whatever degree of knowledge that he has not right." The court's ruling in *Humbert* that the "quo animo" (intent) required of an adverse possessor is "the intent to claim at all, right or wrong, with or without

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knowledge that another has title" was an explicit rejection of its earlier view…that the possessor had to have a good-faith belief in his or her ownership.

The Court of Appeals affirmed this principle, in *Monnot v. Murphy*,[12] a 1913 decision which held that a person, who in 1874 had been adjudged to have no right or title to certain lands from which he was ejected, nevertheless had acquired ownership to those same lands through his reentry thereto and by the actual and continual possession of them, by him and by his heirs at law, for the statutorily required period of time. The adverse possessor in *Monnot* clearly knew that he had no pre-existing claim of right to the lands in question when he reentered them. As the Court noted, not only had a judgment of ejectment been previously entered against him, but he had been forcibly removed from the lands immediately upon rendition of the judgment. His knowledge of a lack of right could not have been more evident.

As the Court of Appeals in *Monnot* explained it:

Hosson had the same right, after he was ejected, to acquire or claim a title to the lands as he would have had in case he had never possessed or been ejected from them. Neither the judgment nor the ejectment affected the existence of such right or the opportunity to exercise it.

The Court of Appeals reaffirmed this principle, in *Ramapo Manufacturing Company v. Mapes*, a 1915 decision:

[I]n the absence of a statutory requirement, the bona fides of the claim of the occupant is not essential, and it 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. [citing *Humbert v. Trinity Church*].[13]

In *Hinkley v. State*,[14] the Court of Appeals held that it was even possible for a person to acquire ownership by adverse possession when "the entry upon land has been by permission or under some right or authority derived from the owner" which "has been repudiated and renounced and the possessor thereafter has assumed the attitude of hostility to any right in the real owner." Again, the adverse possessor's knowledge of his initial lack of right to the land in this case was held to be immaterial to his ability to acquire ownership upon asserting the necessary intention to possess and deal with the land as his own for the requisite period.

Moreover, in *Belotti v. Bickhardt*, the Court of Appeals held that "[a]dverse possession, even when held by a mistake or through inadvertence, may ripen into a prescriptive right after [the requisite statutory period] of such possession [citations omitted], the actual physical occupation and *improvement being, in a proper case, sufficient evidence of the intention to hold adversely* (emphasis added)."[15]

As these holdings of the Court of Appeals make clear, and as the Third Department's *Walling* decision states, the two parts of the "hostile and under claim of right" element of adverse possession are "virtually synonymous" and "require that the possession be truly adverse to the rights of the party holding record title." Perhaps the critical error of the First and Second Department cases was to view the two parts of the "hostile and under claim of right" element as two distinctly different requirements. In *Walling*, however, the Court of Appeals stated that "[b]y definition, a claim of right is [both] adverse to the title owner and also in opposition to the rights of the true owner."

As the Court of Appeals, in *Monnot*, pointed out long ago, "[t]he 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." "Reduced to its essentials, [the requirement that the possession be 'hostile and under a claim of right, actual, open and notorious, exclusive and continuous'] means nothing more than that there must be possession in fact of a type that would give the owner a cause of action in ejectment against the occupier throughout the prescriptive period."

In 'Walling,' the Court of Appeals found it necessary to make clear, once again, that an adverse possessor may acquire title to land both without having any prior claim and knowing that he has no right to it.

As further explained in *Monnot*:

The actual possession and improvement of the premises, as owners are accustomed to possess and improve their estates, without any payment of rent or recognition of title in another, or disavowal of title in himself, will, in the absence of all other evidence, be sufficient to raise a presumption of his entry and holding as absolute owner, and, unless rebutted by other evidence, *will establish the fact of a claim of title* (emphasis added).

It would seem, therefore, in light of *Walling* and the long, unbroken line of precedent, upon which it rests, that the law of adverse possession and the "claim of right" is now settled and that no claim to ownership pre-dating the adverse possessor's entry upon the land should be required for him to acquire record title, so long as his possession has been otherwise actual, open, hostile, and continuous for the statutorily-prescribed period of time.

Indeed, the Second Department, in *Hall v. Sinclaire*,[16] has dutifully followed *Walling* and abandoned its prior line of cases which had adhered to the contrary position. The *Hall* decision, citing *Walling*, found that an adverse possession claim "was not defeated because [the defendants] were aware that the disputed area was actually owned by the plaintiffs."

However, the First Department has apparently remained steadfast. In *Keena v. Hudmor Corp.*,[17] the trial court had granted summary judgment against the plaintiffs who claimed title by adverse possession to the disputed property. The trial judge found that the plaintiffs had not shown that their predecessors in interest had adversely possessed the disputed parcels, and, therefore, the plaintiffs could not rely on the prior ownership to tack that time onto their own ownership to meet the 10-year statutory requirement. In reviewing the trial court's decision, the First Department noted that the trial court had improperly, on a summary judgment motion, drawn negative inferences from the affidavits of the prior owners on "matters concerning payment of taxes, use of the disputed property, etc." and held:

These questions impact on whether the prior owners did enter upon the premises under a claim of right, rightfully or wrongfully, and whether they intended to convey the disputed parcel to plaintiffs. These issues, as well as the question of plaintiffs' knowledge of ownership of the disputed parcels, are questions of fact which should be determined at trial.

The Court made no attempt to distinguish *Walling*. Indeed, the Court did not cite *Walling*, but relied solely on its own prior line of decisional law.

It does not seem possible to reconcile *Keena* with what appears to be *Walling's* definitive judgment on "claim of right." We must conclude that this is a rare error of law by the esteemed First Department. Apparently, the Legislature, in attempting to overturn *Walling*, correctly understood the Court of Appeals to have stated the governing rule on "claim of right" and, therefore, disagrees with the First Department's holding in *Keena*. In any event, for the immediate future, practitioners with adverse possession cases in the First Department need to be aware of *Keena*, and, to help win their cases, they should attempt to marshal as much evidence as possible of any pre-entry claim of right that their clients may possess.[18]

1. Senate Bill Number 5364-A; same as A 9156.
2. Veto Message No. 153, Aug. 28, 2007.
3. 7 NY3d 228, 818 NYS2d 816 (2006).
4. See *Belloti v. Bickhardt*, 228 NY 296, 308 (1920).
5. See RPAPL 522 (1), (2).
6. *Ray v. Beacon Hudson Mountain Corporation.*, 88 NY2d 154, 159, 643 NYS2d 939, 942 (1996).
7. *Walling v. Prysbylo*, 24 AD3d 1, 5, 804 NYS2d 435, 438 (3d Dept. 2005).
8. Parella, Annual Survey of Real Property, 51 Syracuse Law Review 703, at 720.
9. *Joseph v. Whitcombe*, 279 AD2d 122, 124, 719 NYS2d 44, 46 (1st Dept. 2001).
10. It is noteworthy that the First Department did not cite any case law precedent for this conclusion.
11. See, e.g., *MAG Associates, Inc. v. SDR Realty, Inc.*, 247 AD2d 516, 669 NYS2d 314 (2d Dept. 1998).
12. 207 NY 240 (1913).
13. 216 NY 362 (1915).
14. 234 NY 309 (1922).
15. 228 NY 296, 302 (1920).
16. 35 AD3d 660, 826 NYS2d 706 (2d Dept. 2006).
17. 37 AD3d 172, 829 NYS2d 471 (1st Dept. 2007).
18. For interesting discussion of the issues in the *Walling* case, see http://www.nyrealestatelawblog.com/2007/08/spitzer_vetoes_adverse_possess.html and associated links.