

ADVERSE POSSESSION

MYTHS AND REALITIES

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Five Benefits You Will Receive Today

1. Working knowledge of the new adverse possession law.



Five Benefits You Will Receive Today

2. Help resolve disputes before they go to Court!

Five Benefits You Will Receive Today

3. How to be a better expert witness in court.



Five Benefits You Will Receive Today

4. Make more money!
Witnesses charge 100
dollars plus an hour!



Five Benefits You Will Receive Today

5. Kick butts of lawyers who do not know secret weapon that will replace adverse possession

What is Adverse Possession?

- Legal mechanism where title to real property is transferred from true owner to actual possessor of property
- Other factors – OCEAN

“Adverse possession, although not a favored method of procuring title, is a recognized one. It is a necessary means of clearing disputed titles and the courts adopt it and enforce it, because, when adverse possession is carefully and fully proven, it is a means of settling disputed titles and this is desirable.”

– *Belotti v. Bickhardt*, 228 NY 296 (1920)

What is Adverse Possession?

- Standards
 - The course of conduct that could or should give a true owner **notice** that someone is possessing and claiming ownership of the property.
- Requisite period of time
 - Adverse Possessor engages in conduct for period of **TEN** years and true owner fails to take action to recover...true owner **BARRED** from ejecting adverse possessor

Adverse Possession

- Not favored by the courts.
- Barriers make it hard to obtain property via adverse possession.
- Burden
 - Preponderance to clear and convincing evidence.



OCEAN

- Open
- Continuous
- Exclusive
- Actual
- Notorious
 - MUST BE FOR TEN YEARS.



Hansen v. Larson

- Recent adverse possession case
- Limitations on settlement offers
- If adversely possessing party makes an offer to purchase disputed parcel, Courts will deny adverse possession, even if all other facts are present.
- **PRICE, TERMS, SCOPE:**
 - Lower court says enough to defeat.

Walling v. Przybylo



- **FACTS**

- In January 1986, the Wallings purchase lot 22 on Butternut Hill Drive.
- In 1989, the Przybylos purchase lot 23.

Walling v. Pryzbylo (continued)

- Prior to the arrival of Defendants to live on their purchased property in 1994, the Wallings:
 - Deposited fill and topsoil
 - Dug a trench
 - Installed PVC piping and an underground dog wire fence
 - Constructed a bird house
 - Continuously mowed, graded, raked, planted, and watered the grassy area in dispute.
- Land surveyed in 2004, Defendants find out they have title, Wallings bring action to quiet title.

HOLDING

- Court says actual knowledge of superior title does not preclude doctrine.
- Evidence was enough to establish title by adverse possession. Summary judgment granted to plaintiffs.

Conclusion 1

- Courts HATE adverse possession!



Conclusion 2

- Legislature HATES adverse possession!
 - Client 9 vetoes bill twice before new legislation passes.
 - Reason for veto:
 - Prospective bill said AP claim would be defeated if the claimant or any person in claimant's chain of title had ACTUAL KNOWLEDGE that property was owned by someone else. Was an attempt at barring 'bad faith' adverse possession claims.
 - Would have required claimants to prove the absence of knowledge in their chains of title.
 - Extremely difficult to prove! Would make it hard to resolve many of the property title disputes.

July 7, 2008: Time for a Change

- Governor signs new bill which changes 100 years of history.
- Bill intended to limit the use of adverse possession to good faith disputes over title to real property.
- Queensbury case serves as catalyst for bill change.

– *Walling v. Przybylo*

The New Adverse Possession Law

An Overview

Section 1. Section 501 of the real property actions and proceedings law, as added by chapter 312 of the laws of 1962, is amended to read as follows:

~~§ 501. [Action after entry. An entry upon real property is not sufficient or valid as a claim unless an action is commenced thereupon within one year after the making thereof and within ten years after the time when the right to make it descended or accrued.]~~

Adverse possession; defined. For the purposes of this article:

1. Adverse possessor. A person or entity is an "adverse possessor" of real property when the person or entity 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.

Adverse possession; defined. For the purposes of this article:
(continued)

- 2. Acquisition of title. 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 pursuant to subdivision (a) of section two hundred twelve of the civil practice law and rules, provided that the occupancy, as described in sections five hundred twelve and five hundred twenty-two of this article, has been adverse, under claim of right, open and notorious, continuous, exclusive, and actual.**

Adverse possession; defined. For the purposes of this article:
(continued)

- 3. Claim of right. A claim of right means 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.**

§ 2. Section 511 of the real property actions and proceedings law, as added by chapter 312 of the laws of 1962, is amended to read as follows:

§ 511. Adverse possession under written instrument or judgment. Where the occupant or those under whom [~~he~~] the occupant claims entered into the possession of the premises under claim of [~~title~~] right, exclusive of any other right, founding the claim upon a written instrument, as being a conveyance of the premises in question, or upon the decree or judgment of a competent court, and there has been a continued occupation and possession of the premises included in the instrument, decree or judgment, or of some part thereof, for ten years, under the same claim, the premises so included are deemed to have been held adversely; except that when they consist of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot.

§ 3. Section 512 of the real property actions and proceedings law, as added by chapter 312 of the laws of 1962, is amended to read as follows:

§ 512. Essentials of adverse possession under written instrument or judgment. For the purpose of constituting an adverse possession ~~[by a person claiming a title]~~, founded upon a written instrument or a judgment or decree, land is deemed to have been possessed and occupied in ~~[either]~~ any of the following cases: 1. Where ~~[it has been usually cultivated or improved]~~ there has been acts sufficiently open to put a reasonably diligent owner on notice. 2. Where it has been protected by a substantial ~~[inclosure]~~ enclosure, except as provided in subdivision one of section five hundred forty- three of this article. 3. Where, although not ~~[inclosed]~~ enclosed, it has been used for the supply of fuel or of fencing timber, either for the purposes of husbandry or for the ordinary use of the occupant. Where a known farm or a single lot has been partly improved, the portion of the farm or lot that has been left not cleared or not ~~[inclosed]~~ enclosed, according to the usual course and custom of the adjoining country, is deemed to have been occupied for the same length of time as the part improved and cultivated.

§ 4. Section 521 of the real property actions and proceedings law, as amended by chapter 116 of the laws of 1965, is amended to read as follows:

§ 521. Adverse possession [~~under claim of title not written~~] not under written instrument or judgment. Where there has been an actual continued occupation of premises under a claim of [~~title~~] right, exclusive of any other right, but not founded upon a written instrument or a judgment or decree, the premises so actually occupied, and no others, are deemed to have been held adversely.

§ 5. Section 522 of the real property actions and proceedings law, as added by chapter 312 of the laws of 1962, is amended to read as follows:

§ 522. Essentials of adverse possession ~~[under claim of title not written]~~ not under written instrument or judgment. For the purpose of constituting an adverse possession ~~[by a person claiming title]~~ not founded upon a written instrument or a judgment or decree, land is deemed to have been possessed and occupied in either of the following cases, and no others: 1. Where ~~[it has been usually cultivated or improved]~~ there have been acts sufficiently open to put a reasonably diligent owner on notice. 2. Where it has been protected by a substantial ~~[inclosure]~~ enclosure, except as provided in subdivision one of section five hundred forty- three of this article.

§ 6. Section 531 of the real property actions and proceedings law, as amended by chapter 375 of the laws of 1975, is amended to read as follows:

§ 531. Adverse possession, how affected by relation of landlord and tenant. Where the relation of landlord and tenant has existed [~~between any persons~~], the possession of the tenant is deemed the possession of the landlord until the expiration of ten years after the termination of the tenancy; or, where there has been no written lease, until the expiration of ten years after the last payment of rent; notwithstanding that the tenant has acquired another title or has claimed to hold adversely to his landlord. But this presumption shall cease after the periods prescribed in this section and such tenant may then commence to hold adversely to his landlord.

§ 7. Section 541 of the real property actions and proceedings law, as amended by chapter 375 of the laws of 1975, is amended to read as follows:

§ 541. Adverse possession, how affected by relation of tenants in common. Where the relation of tenants in common has existed [~~between any persons~~], the occupancy of one tenant, personally or by his servant or by his tenant, is deemed to have been the possession of the other, notwithstanding that the tenant so occupying the premises has acquired another title or has claimed to hold adversely to the other. But this presumption shall cease after the expiration of ten years of continuous exclusive occupancy by such tenant, personally or by his servant or by his tenant, or immediately upon an ouster by one tenant of the other and such occupying tenant may then commence to hold adversely to his cotenant.

§ 8. The real property actions and proceedings law is amended by adding a new section 543 to read as follows:

§ 543. Adverse possession; how affected by acts across a boundary line. 1. 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. 2. 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.

The New Law: A Summary of the Provisions

- Adverse possession claims are barred unless the claimant proves a **claim of right**, basically a ‘reasonable basis’ for the belief that the property belongs to the claimant.
- Defines “claim of right”
- Redefines “acts across a boundary line” which are deemed permissive and non-adverse.

Potential Problems With the New Law

- What acts are sufficiently open to put a reasonably diligent owner on notice?

Recent Court Decisions

- What is “reasonable basis”?
 - *Healy v. Amedore Quantum, LLC.*, 24 Misc.3d 1221(A) (N.Y. Sup. Ct. Albany Co. 2009)
 - *Sawyer v. Prusky*, 71 A.D.3d 1325 (3d Dep’t 2010).
 - *Ziegler v. Serrano*, 74 A.D.3d 1610 (3d Dep’t 2010)

Recent Court Decisions

- What is “permissive” or “non-adverse”?
 - *Hammond v. Baker*, 81 A.D.3d 1288 (4th Dep’t 2011)
 - *Maya’s Black Creek, LLC v. Angelo Balbo Realty Corp.*, 82 A.D.3d 1175 (2d Dep’t 2011)
 - *Hartman v. Goldman*, 84 A.D.3d 734 (2d Dep’t 2011)

Ways Around New Law

- Yes

1. Is new legislation applied retroactively?

- No:

- *Merget v. Westbury Properties, LLC*, 65 A.D.3d 1102 (2d Dep't 2009)
- *Franza v. Olin*, 73 A.D.3d 44 (4th Dep't 2010)
- *Hogan v. Kelly*, 86 A.D.3d 590 (2d Dep't 2011)

Ways Around New Law

- The Doctrine of Practical Location
 - Acquiescence between parties with regard to a boundary line
 - Must be for the statutory period of adverse possession OR considerable period of time that provides conclusive evidence as to the true location of the boundary
 - *Kaneb v. Lamay*, 58 A.D.3d 1097 (3d Dep't 2009)
 - *Henshaw v. Younes*



**WHAT DOES THIS MEAN FOR
YOUR PRACTICE?**

Working Knowledge of Law

- If there is a dispute over surveys, assist client and attorney to look at options.
- Educate attorneys on practical location.
- Impress clients; look for acquiescence during survey:
 - Fences
 - Stone walls
 - Ferns

Resolve Disputes before going to Court

- Negotiate with the surveyors
- Negotiate with title companies

How to be a better Expert Witness

- Go to site with attorney
- Show monuments
- Preparation
- Hearsay – confirm with facts
- Scope of employment – title; adverse possession
- Define retainer
- Prepare survey carefully

Make More Money

- Expert Witnesses make \$100+ per hour

Advantage over other Attorneys

- Kick butts of lawyers who do not know secret weapon that will replace adverse possession.

QUESTIONS?



