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Hey, That's **My** Property!

Maybe, and maybe not. Proving adverse possession has become easier in New York.

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GIVEN A RECENT decision by the New York Court of Appeals, property owners need to be on guard against adverse possession claims and to be increasingly vigilant in asserting their rights to avoid the loss of land they thought they owned. The effectiveness of a basic defense to a claim for adverse possession has been thrown into doubt by the Court.

In *Walling v. Przybylo*¹ (*Walling*), the Court of Appeals downplayed the importance of a previously accepted key element in the proof of an adverse possession claim, i.e., that the party claiming adverse possession must pursue its interests “under claim of right” and that the adverse possessor’s subjective knowledge or intent is a key consideration. In so ruling, the Court has resolved a growing split between the Second and Third Departments over precisely how that critical element will be interpreted.

Under *Walling*, the Court has de-emphasized the subjective knowledge and intent of the adverse possessor and focused instead on the acquiescence of the rightful owner to the

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activities conducted on his or her land during the statutory vesting period.

The Elements, the Conflict

It is well settled that a party seeking to obtain title by adverse possession must prove five elements:

- (1) the possession must be hostile and under claim of right;
- (2) it must be actual;
- (3) it must be open and notorious;
- (4) it must be exclusive; and
- (5) it must be continuous for the statutory period of 10 years.²

In addition, these elements must be established by clear and convincing evidence.³

While it has been generally held that “mere possession, no matter how long continued, gives no title by adverse possession unless under claim of right,”⁴ the Second and Third Departments have differing interpretations as to “under claim of right.”

Specifically, “the Second Department has held that an awareness of ownership by a third

party during the 10-year vesting period defeats any claim of right, while the Third Department has taken the contrary view.”⁵

In the Second Department, the courts have held that a mere “awareness that others own the property upon entry on the property or within the 10-year statutory period will defeat any claim of right.”⁶ In the Third Department, on the other hand, the courts have held that to defeat a claim of right requires “the possessor’s overt acknowledgment that another holds title, prior to the running of the statutory period.”⁷ The possessor’s subjective knowledge of the invalidity of his or her claim of title is considered immaterial in the Third Department absent such an overt acknowledgement.⁸

In the Second Department

The Second Department’s emphasis on the subjective knowledge and intent of the adverse possessor on this issue is well illustrated in the two cases of *Beyer v. Patierno* (*Beyer*)⁹ and *Harbor Estates Limited Partnership v. May* (*Harbor Estates*).¹⁰

In *Beyer*, the plaintiffs and the defendants owned adjacent properties. Before closing on their property, however, the plaintiffs learned that a portion of their driveway encroached onto the defendants’ property.¹¹

The plaintiffs’ attorney sought a license from the defendants permitting the plaintiffs to use the encroaching portion of the driveway.¹² The defendants, however, refused to grant the license.¹³ Thereafter, the plaintiffs closed on their property, and subsequently alleged that they continuously, openly, notoriously and exclusively used the encroaching portion

of the driveway from May of 1989 through May of 2004.¹⁴

In deciding the issue in favor of the defendants, the Second Department reasoned that they had “established their prima facie entitlement to judgment as a matter of law by demonstrating that the plaintiffs knew that the defendants owned the encroaching portion of the driveway before their alleged possession of the driveway.”¹⁵

The conduct of the plaintiffs’ attorney in requesting a license from the defendants, according to the court, constituted “an admission that title to the encroaching portion of the driveway belonged to the defendants.”¹⁶ As such, the court concluded that the plaintiffs did not enter the defendants’ land under a claim of right.¹⁷

Similarly, in *Harbor Estates*, the defendants installed a fence in 1987 on property owned by the City of New York, which was adjacent to the property owned by the defendants.¹⁸ In 2000, the plaintiff, who was the successor in interest to the city, commenced an action to remove the fence.¹⁹

The defendants counterclaimed that they owned the property formerly owned by the City of New York, by virtue of adverse possession for a continuous period in excess of the 10 year statutory period.²⁰ During the course of the litigation that ensued, a defendant admitted at an examination before trial that he knew that the subject property belonged to the city when he constructed his fence.²¹

In finding that no adverse possession existed, the Second Department reasoned that “the relevant consideration is not when the admission was made, but when the defendants knew that they did not own the subject property. The admission established that the defendants’ possession of the disputed parcel of real property was with knowledge that they did not own the subject property at the time that they constructed the fence.”²²

Based upon this proof of the subjective knowledge of the defendants, the Second Department found that they did not establish that they adversely possessed the property “under a claim of right.”²³

The Contrasting View

In sharp contrast to these Second Department cases, in September of 2005, the Third Department took the opposite position in the *Walling* case.²⁴

The plaintiffs and defendants had owned adjoining parcels in a residential subdivision since 1986 and 1989 respectively.²⁵ In 2004, defendants had a survey performed on their parcel and learned that their deed description included a portion of the plaintiffs’ side yard.²⁶

In ‘Walling’ the Court of Appeals effectively eliminated the subjective knowledge and intent of the adverse possessor as a defense to a claim for adverse possession and focused instead on the acquiescence of the rightful owner.

The plaintiffs then commenced an action seeking a declaration that they had acquired title to the disputed parcel by adverse possession.²⁷ During the course of the litigation, plaintiffs alleged that at the time of their purchase, their grantor had orally described the boundaries of their lot to include the disputed parcel.²⁸

On a motion to renew following a decision by the trial court to grant summary judgment to the plaintiffs, the defendants introduced evidence disputing this allegation, and the trial court found a material question of fact to exist as to whether plaintiffs had known from the first that they did not own the parcel.²⁹

In reversing itself, the trial court reasoned that “such knowledge, if proven, would be inconsistent with plaintiffs’ assertion of possession under a claim of right”³⁰ and relied explicitly on the Second Department’s holding in *Harbor Estates*, to support its decision.³¹

On appeal, however, the Third Department concluded that the trial court erred in reversing its prior determination in favor of the plaintiffs, expressly rejected the Second Department’s reasoning in *Harbor Estates*, and concluded that an adverse possession claim can succeed regardless of the possessor’s subjective knowledge

or belief.³² In doing so, the Third Department relied upon “the common-law origin of the doctrine of adverse possession in the bar that arises once the statute of limitations has run on the title holder’s cause of action for ejectment of a hostile possessor.”³³

The Third Department reasoned that “the right to assert an ejectment cause of action requires that the title holder has been wrongfully dispossessed, and the courts have found it reasonable to cut off the remedy of such a title holder who fails to timely assert his or her ownership rights.”³⁴ Following this reasoning, the Third Department reached the conclusion that, “as the essence of adverse possession is the loss of title due to the title holder’s inaction in the face of an open and hostile possession, the possessor’s knowledge of the invalidity of his or her claim of title is immaterial.”³⁵

The court noted an exception where the adverse possessor overtly acknowledges that another holds title, prior to the running of the statutory period. This will defeat a claim of adverse possession not because the adverse possessor has failed to possess the disputed parcel “under claim of right,” but because then it is no longer a claim in “utter hostility” to the true owner, which the court treats as a separate element.³⁶

As such the court concluded that “in the absence of an overt acknowledgment, our courts have recognized...that an adverse possessor’s claim of right or ownership will not be defeated by mere knowledge that another holds legal title. This principle requires that knowledge be distinguished from a possessor’s overt acknowledgment of title in another.”³⁷

It is under this reasoning that the Third Department in *Walling* declined to follow the Second Department’s holding in *Harbor Estates*.³⁸ In *Harbor Estates* the possessor had merely known of the rightful owners’ title during the statutory period but had only overtly acknowledged the rightful owners’ title during an examination before trial that was conducted well after the statutory vesting period had run.³⁹

The Third Department further bolstered its reasoning in *Walling* by relying on a separate line of cases that upheld adverse possession claims where the possessor mistakenly believed that he or she owned the disputed property.⁴⁰ “These cases hold that mistaken possession, despite the possessor’s lack of intent to enter

upon the land of another, may ripen into ownership because it is the visible, outward acts of ownership and use, rather than the possessor's subjective motive or belief, that effectively give notice of the intention to possess as owner and constitute the required hostile claim of right."⁴¹

In the Court of Appeals

In June of 2006, the Court of Appeals affirmed the decision of the Third Department in *Walling*.⁴² In so doing, the Court effectively eliminated the subjective knowledge and intent of the adverse possessor as a defense to a claim for adverse possession and focused instead on the acquiescence of the rightful owner to the activities conducted on his or her land during the statutory vesting period.

In deciding the case, the Court focused extensively on the extent of the plaintiffs' activities on the disputed parcel, noting that they purchased their lot in 1986, and although defendants purchased their lot in 1989, they did not construct their residence until 1991 and did not obtain a certificate of occupancy until May of 1994.⁴³

In May of 1987, plaintiffs bulldozed and deposited fill and topsoil on the disputed parcel, dug a trench and installed PVC pipe to provide drainage from their roof to and under the disputed parcel and ultimately discharging the water in and over the disputed parcel.⁴⁴ Also, prior to defendants' arrival, plaintiffs constructed an underground dog fence and continuously mowed, graded, raked, planted and watered the area in dispute.⁴⁵

Plaintiffs also installed some 69 feet of four-inch PVC pipe in such a way that all of the pipe ran underground but surfaced within a swale.⁴⁶ In 1992, plaintiffs installed a 10-foot pole and birdhouse in a corner of the disputed area.⁴⁷

The Court of Appeals reasoned that "[t]he ultimate element in the rise of 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."⁴⁸ It was not until almost 10 years after moving into their house, and almost 15 years after purchasing the property, that defendants sought to assert their rights to the disputed parcel.⁴⁹

Adopting the reasoning of the Third Department, the Court of Appeals concluded that "the failure to assert their rights in a timely manner prevents defendants from prevailing on this appeal."⁵⁰

With respect to the common law requirement that the adverse possessor must act under claim of right, the Court held that "by definition, a claim of right is adverse to the title owner and also in opposition to the rights of the true owner. Conduct will prevail over knowledge, particularly when the true owners have acquiesced in the exercise of ownership rights by adverse possessors."⁵¹ In short, "the issue is actual occupation, not subjective knowledge."⁵²

Words to the Wise Landowner

This move away from determining the "under claim of right" element by reference to the subjective knowledge and intent of the adverse possessor places a great deal more of the burden for avoiding these claims on the landowner and, accordingly, there are several steps landowners should take to protect themselves.

Purchasers of real property should have a survey prepared and updated at regular intervals, or at least whenever any new structures such as sheds, decks, fences, or even hedges, appear near the borders of their property, or when they add any of these improvements themselves. They should check to see if any monuments have ever been placed on the property by a surveyor, and if not, they should consider having a surveyor do so.

Once installed, the property owner should locate the monuments at least annually and take appropriate steps to ensure that the monuments do not become overgrown or buried with time. This will make it easier to locate their property lines in the future. Property owners should periodically check their property lines against their regularly updated survey to ensure that there is no encroachments on their property.

If one does occur, the landowner should address the situation immediately. The simplest solution might be to grant the encroaching neighbor permission, in writing, to continue to use the property, while acknowledging that no adverse possession claim can be made. This simple step will prevent an adverse possession claim because an element of the claim, that the possession be hostile, will not exist. Alternatively, a landowner could ask an encroaching neighbor to remove the encroachment.

In the wake of *Walling* these modest precautions, while certainly not exhaustive, should go a long way toward protecting

landowners from losing property they thought they owned.

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1. *Walling v. Przybylo*, 7 N.Y.3d 228 (2006).
2. *Beyer v. Patierno*, 29 A.D.3d 613 (2nd Dept. 2006); *MAG Assoc.'s v. SDR Realty*, 247 A.D.2d 516, 517 (2nd Dept. 1998); *Belotti v. Brickhardt*, 228 N.Y. 296 (1920); *Oak Ponds v. Willumsen*, 295 A.D.2d 587, 588 (2nd Dept. 2002).
3. *Beyer*, 29 A.D.3d at 614; *MAG Assoc.'s*, 247 A.D.2d 517.
4. *Harbor Estates Ltd. Partnership v. May*, 294 A.D.2d 399, 400 (2nd Dept. 2002).
5. *Doyle v. Hafner*, 12 Misc.3d 844, n. 4 (N.Y. Sup. Ct. 2006), citing *Oak Ponds*, 295 A.D.2d at 588 and *Walling v. Przybylo*, 24 A.D.3d 1 (3rd Dept. 2005).
6. *Oak Ponds*, 295 A.D.2d at 588; see also *Harbor Estates Ltd. Partnership*, 294 A.D.2d at 400; *Bockowski v. Malak*, 280 A.D.2d 572 (2nd Dept. 1998).
7. *Walling*, 24 A.D.3d at 4 citing *Bedell v. Shaw*, 59 N.Y. 46, 49 (3rd Dept. 1874); *Guariglia v. Blima Homes*, 89 N.Y.2d 851, 853 (1996).
8. *Id.* citing *Monnot v. Murphy*, 207 N.Y. 240, 245 (1913).
9. *Beyer v. Patierno*, 29 A.D.3d 613 (2nd Dept. 2006).
10. *Harbor Estates Ltd. Partnership v. May*, 294 A.D.2d 399 (2nd Dept. 2002).
11. *Beyer*, 29 A.D.3d at 614.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 615.
16. *Id.*
17. *Id.*
18. *Harbor Estates Ltd. Partnership*, 294 A.D.2d at 399.
19. *Id.* at 400.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Walling*, 24 A.D. 3d 1 (3rd Dept. 2006).
25. *Id.* at 2.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 3.
31. *Id.* at 7.
32. *Id.*
33. *Id.*
34. *Id.* citing *Humbert v. Trinity Church*, 24 Wend. 587, 603 (1840).
35. *Id.* citing *Baker v. Oakwood*, 123 N.Y. 16, 28-29 (1890); *Monnot v. Murphy*, 207 N.Y. 240, 245 (1913).
36. *Id.* at 4.
37. *Id.*
38. *Id.* at 7.
39. *Id.*; see also *Harbor Estates Ltd. Partnership*, 294 A.D.2d at 400.
40. *Id.* at 5 citing *Belotti v. Brickhardt*, 228 N.Y. 296 (1920); *Fatone v. Vona*, 287 A.D.2d 854 (3rd Dept. 2001); *Bradt v. Giovannone*, 35 A.D.2d 322 (3rd Dept. 1970); *West v. Tilley*, 33 A.D.2d 228 (3rd Dept. 1970).
41. *Id.* citing *Bradt v. Giovannone*, 35 A.D.2d 322 (3rd Dept. 1970); *West v. Tilley*, 33 A.D.2d 228 (3rd Dept. 1970).
42. *Walling v. Przybylo*, 7 N.Y.3d 228 (2006).
43. *Id.* at 230.
44. *Id.*
45. *Id.* at 231.
46. *Id.*
47. *Id.*
48. *Id.* at 232.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 233.

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