THE LANDSTAR REPORT

Adverse Possession In New York - Will Albany's Cure Be Worse Than The Disease?

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Effective July 7, 2008 Governor Patterson signed chapter 269 of the laws of 2008 which modified RPAPL Sections, 501, 512 and 522. The law is a slightly revised version of Bill #S.364-A/A.9157 which Governor Spitzer vetoed in 2007. The legislature became interested in revising adverse possession law to prevent its offensive use following the decision in Walling v. Przybylo 7 N.Y.3d 228 (2006) whereby an adverse possessor who also happened to be a member of the Bar, carefully and deliberately established the elements of adverse possession and thereafter successfully acquired title to a neighbor's property notwithstanding the court's conclusion that the adverse possessor was aware of a survey which clearly showed that he did not own the property in question.

The necessary elements of adverse possession in New York are now:

1) Open, notorious and hostile possession
2) Exclusive and continuous possession
3) Under a reasonable claim of right
4) Acts which constitute notice or protection by a substantial enclosure
5) For a period of ten years or more

The revised RPAPL Section 501 now defines an adverse possessor as someone who occupies the real property of another with or without knowledge of the other party's superior rights in a manner which would give such other owner, a cause of action for ejectment. The most controversial new requirement is that the adverse possessor must have a reasonable basis for his belief that the property in question actually belongs to the adverse possessor. This revision changes the common law requirement that adverse possession must be "under a claim of right" and adds a requirement that the claim of right be reasonable. Yes, through this new adverse possession law, the often nebulous and imprecise "reasonable" standard makes a grand entrance into New York Real Property Law. Our new "reasonable basis" standard for adverse possession bears a striking resemblance to the reasonable person standard which has resulted in so much litigation and uncertainty in torts and other areas of law. If we are to believe even half the warnings contained in the NYS Bar Association's Memorandum In Opposition (to the adverse possession bill) dated July 2, 2008, we should expect a proliferation of adverse possession litigation resulting in many divergent and conflicting decisions.

Under the new revisions, in order for an adverse possessor to prove a reasonable claim of right, he must establish an objectively reasonable belief that he, the possessor and not the record owner, actually owns the subject property. To proceed under Section 511, the claim of right must exist under a written instrument which must have existed at the time

the adverse possessors entered into possession. Typical documentary evidence to establish a reasonable belief could take the form of a boundary agreement, tax records, probated will, filed map, unrecorded deed or survey suggesting that title to the property is vested in the adverse possessor. It is likely that few adverse possessors will be able to prove through documentary evidence a "reasonable basis" for their alleged belief that they own the property adversely possessed. What is more likely is that the record owner will be able to easily prove through discovery of the possessor's surveys, deeds and title policies covering neighboring property that the possessor was on notice that the adversely possessed property did not belong to him, thereby establishing that the possessor's claimed belief of ownership does not have a reasonable basis.

Under the revised Section 522, a reasonable claim of right not under a written instrument requires actual continuous occupation of the adversely possessed property together with acts sufficient to put a reasonably diligent owner on notice or protection by a substantial enclosure. At first glance, the revised Section 522 appears flexible and sounds like the old common law standard but there are some important new limitations. The words "usually cultivated and improved" have been deleted suggesting that minor improvements, lawn mowing, landscaping and maintenance will no longer be accepted as evidence of possession. The revised Section 543 deems "de minimus" non structural encroachments including fences to be permissive. The location of fences will no longer conclusively establish possession unless it can be proved that the variation between a fence location and record line is not de minimus. The legislature gives us no guidance to help determine exactly what is de minimus and what is not. Is an encroachment of 6 inches de minimus? How about 1 foot? What about 2 feet? The unfortunate answer is that no one yet knows what de minimus means in the context of encroachment distances until a few cases under the new law make their way through the courts. Because of this uncertainty, the major title insurance underwriter's have chosen not to revise their insuring guidelines relating to "out of possession" exceptions for mislocated fences. If your client has a fence which varies with record property lines by more than one foot, you will still see an out of possession exception on the title report schedule B and your seller will still be required to obtain a boundary line agreement or affidavit of continued permissive use and mutual consent signed by the record owner and encroaching neighbor.

Establishing a reasonable claim of right will no doubt prove exceedingly difficult in many circumstances where adverse possession had previously been presumed. For example, title insurers may now be hesitant to "clean up" and insure over common title defects including breaks in the title chain more than 10 years old, estate issues more than 10 years old and defective descriptions corrected more than 10 years ago. Prior to this revised adverse possession statute, insuring over these old defects had become commonplace. Now title insurers must consider the possibility of a reputed owner from the distant past filing an action to quiet title and claiming that the newly insured owner has not established a reasonable claim of right for a period of 10 years. In fact, the newly insured record owner may have difficulty establishing a reasonable claim of right for a full 10 year period because the new owner must tack on to the ownership period of all prior owners within a ten year period and all must have held title under a reasonable claim of right (vertical privity).

The “bottom line” of this adverse possession reform legislation appears to be that if an adverse possessor cannot prove that he had a reasonable basis to believe that he owns the possessed property, he looses even if all other elements of adverse possession are satisfied. There is great uncertainty regarding how this new statute will be interpreted by the courts and careful practitioners must advise clients to remain aware of conditions at the boundary lines of their property. Survey updates and/or survey stake outs should be performed in the event of any uncertainty regarding the location of improvements, fences and record property lines.

Your title company’s underwriting counsel should be consulted as a resource whenever you encounter issues of adverse possession under the new law. At Landstar Title Agency, Kenneth P. Warner Esq. and Philip Roman Esq. are available to answer adverse possession questions, provide title insurance solutions and update you with the latest information and court decisions.