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Whose land is it? The 2008 Amendments to adverse possession law - by Justin Rostoff

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“Adverse possession:” The principle of acquiring legal ownership to land that is owned by another. This is an extremely powerful tool that literally changes landscape of property in every state, city, and borough, ranging in all uses from industrial to residential; vacant to over-built.

Just because land was conveyed via deed and ownership is shown via title does not legally conclude that a certain piece, parcel, or tract belongs to the owner of record. In many cases, especially in New York City with congestion and built-to-lot-line properties, the question arises: “Whose land is it?”

Over time, the elements to acquire title to another's land via adverse possession remained the same. But on July 7th, 2008, the New York legislature enacted amendments (the 2008 Amendments) to the adverse possession statute reshaping the landscape and invalidating many near ripe claims to adverse possession.

Prior to the 2008 Amendments, one could adversely possess the land of another, and thus gain title to said land, with or without the knowledge that somebody else held title. So long as you could prove that occupancy and use of the disputed land was:

Hostile and under claim of right;

Actual;

Open and notorious;

Exclusive; and

Continuous for ten years.

.... BANG, the land is yours. Congratulations.

According to the 2008 Amendments which are currently in effect, the elements remain the same, yet there is one crucial alteration: You cannot have knowledge that the land belongs to somebody else. This is so because of the novel definition of "claim of right," defined as, "A reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case may be."

If the ten-year mark hit prior to July 7th, 2008, then the 2008 Amendments do not apply and one could still gain title to another's land via adverse possession even if there was knowledge that another held title. New York state courts have continuously held and upheld decisions finding that retroactive application of the 2008 Amendments is unconstitutional.

However, if the ten-years concluded on July 8th, 2008, and you satisfied all of the elements of the pre-2008 Amendments for 3,649 out of the required 3,650 days, if you did not have a reasonable belief that the land was yours, then, unfortunately, any claim of adverse possession is now invalidated.

The 2008 Amendments' "claim of right" definition leads to the importance of knowing which version of the RPAPL to apply. Before the 2008 Amendments there was no definition of "claim of right." It was a longstanding precedent, set by over a century of New York common law, that an adverse possessor could satisfy the "claim of right" requirement whether or not the claimant had actual knowledge of the true owner when possession/occupation commenced.

As a result of the above, when title vested prior to July 7th, 2008, absent overt acknowledgment by the adverse possessor that another held title, knowledge alone of another true owner would not defeat the "claim of right" element as it does in the 2008 Amendments. But now, that is not the case.

If title vested post-July 7th, 2008, any arguable knowledge within the ten-year statute for possession to believe the land belongs to another will destroy any claim for adverse possession and will be overruled by the court.

Therefore, when a cause of action for adverse possession is commenced after the 2008 Amendments became law, yet title allegedly vested prior to July 7th, 2008, the “possessor” is not required to prove “a reasonable basis for the belief that the property belongs to the adverse possessor.” Not only is the claimant not required to satisfy this reasonable basis for belief, but it is unconstitutional for the court to apply this element retroactively.

As a practicing land use attorney, I am constantly either claiming adverse possession or defending against a claim for same. Property owners and their attorneys often apply the 2008 Amendments to adverse possession claims because the lawsuit commenced after 2008; however, that is not how the 2008 Amendments apply and can be fatal. If title vested after the 2008 Amendments, to claim adverse possession, there now remains only one answer to the vital question of: “Whose land is it?” and it better be, “Mine, of course.”

This article is not legal advice. Please consult an attorney for counsel with regard to your individual circumstances.

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