

Demonic Possession: What hath the Legislature Wrought?

By Lance R. Pomerantz

Real estate practitioners around the state took notice when the adverse possession statutes underwent a major overhaul in 2008 (L. 2008 c. 269). For the first time, New York has explicit statutory recognition that an adverse possessor “gains title” to the occupied property upon the expiration of the statute of limitations for an action to recover the property.¹ In this respect, New York has joined several other states, as well as England,² where the concept of adverse possession dates back to 1275.³

Under prior law, the acquisition of title by the adverse possessor was held to be a necessary corollary to the barring of the “true owner’s” right to bring an action seeking recovery of the property.⁴ Unfortunately, the new statute goes further than merely codifying widely accepted law. And, in so doing, creates a substantial ambiguity that was not present under prior law.

Among the many significant changes introduced by the new statutes, is the requirement that the adverse possessor “gains title” only if the occupancy complies with the long-established common-law requirements⁵ and the possessor are acting under a “claim of right.”⁶ “Claim of right” as used in the statute, is defined in RPAPL §501(3) as “a reasonable basis for the belief that the property belongs to the adverse possessor....” Apparently, the statute requires that possessors not only prove they believe that the property already belongs to them, but that the belief must be “reasonable.” Since the doctrine of adverse possession was developed specifically for the purpose of quieting titles that originated in wrongful possession,⁷ this new requirement repre-

sents an historic departure from the common law. It also imposes a substantial burden on claimants to which they were hitherto not subject.⁸

RPAPL §501(1) defines an “adverse possessor” as one who occupies real property “in a manner that would give the owner a cause of action for ejectment.” However, by conditioning the adverse possessor’s right to obtain title on a showing of prior entitlement, *in addition to those acts that would be sufficient to give rise to an action in ejectment*, the legislature has created a gap in the available remedy. An “adverse possessor” can enter into adverse, open, notorious, continuous, exclusive and actual occupancy of a parcel, protect it with a substantial enclosure,⁹ remain in such possession in excess of ten years, yet still not obtain title. In the meantime, however, the statute of limitations to recover *possession* of the property (RPAPL §212) will have run as against the “true owner.” Hence, the “true owner” has “naked title” to the land. The possessor, however, continues in possession and cannot be ejected by legal process.

The question then arises: what is the legal nature of this possession? Obviously, it’s not a freehold estate. Nor is it a leasehold, a tenancy at will, or at sufferance. Will the courts defend the right of the possessor against trespassers or other “off-record” interests? Can the possessor transfer possession to another possessor who also asserts no claim of right? Or, will that trigger the running of the statute of limitations afresh? Will it pass to the heirs, legatees or devisees



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of the possessor upon death? These and other questions will need to be answered by the courts on a case-by-case basis.

The Senate Sponsor’s Memorandum in support of the 2008 legislation portrays it as a remedy to perceived “offensive” use of adverse possession to wrongfully deprive landowners of property.¹⁰ Ironically, the legislature wound up creating a scheme whereby an out-of-possession landowner may be left

with no practical remedy at all!

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¹ RPAPL §501(2), as amended by L. 2008 c.269, §1.
² See III American Law of Property §15.1, pg. 757 (fn. 6) (Casner ed., 1952).
³ Statute of Westminster I, 3 Edw. I. c. 39 (1275).
⁴ Brand v. Prince, 35 NY 2d 634, 636 (1974); III American Law of Property §15.2, pg. 760 (at fn. 3 and cases cited) (Casner ed., 1952).
⁵ I.e. the possession is adverse, open, notorious, continuous, exclusive and actual.
⁶ RPAPL §501(2).
⁷ See American Law of Property, *supra.*, note 4.
⁸ See, e.g. Franza v. Olin, 73 AD 3d 44 (4th Dept. 2010), where the court held that the 2008 amendments were unconstitutional as applied to the plaintiff adverse possessor because they would deprive her of a previously vested property right, *viz.*, the vesting of title by adverse possession under prior law.
⁹ RPAPL §512, as amended by L. 2008 c.269, §3 and RPAPL §522, as amended by L. 2008 c.269, §5.
¹⁰ See Senator Elizabeth Little’s Memorandum in support of N.Y. Leg. Bill S-7915-C.