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Evidentiary Problems in Adverse Possession

By Lance R. Pomerantz

Two Appellate Division decisions dealing with evidentiary problems in adverse possession cases were handed down recently. While they dispose of the controversies presented, the opinions raise additional questions of interest to land title practitioners.

Shilkoff v. Longhitano

In *Shilkoff v. Longhitano*[1] the trial court denied plaintiffs' motion for summary judgment awarding them title by adverse possession. In order to meet the "usual cultivation or improvement" requirement of former RPAPL §522, the plaintiffs claimed that their predecessor had planted a row of arborvitae in the disputed area. The trial judge held that an affidavit submitted by the defendant that *her* predecessor in title had planted them raised a triable issue of fact.

The Appellate Division found that the affidavit constituted inadmissible hearsay. Defendant had only purchased her property in 2007 and she failed to indicate whether she had personal knowledge of the original planting or subsequent cultivation. Although the decision does not detail plaintiffs' proofs, the Second Department found that they established all the requirements for adverse possession. The case was reversed and remitted to the trial court for entry of judgment awarding title.

Comment

The case was decided under the law as it stood prior to the 2008 amendments to the adverse possession statutes.[2] If the new statutes controlled, the plaintiffs' planting activity in *Shilkoff* might not pass muster under current RPAPL §543, which deems "hedges, plantings [and] shrubbery ... to be permissive and non-adverse."

Wilcox v. McLean

The second case, Wilcox v. McLean,[3] determined that the plaintiffs failed to establish a claim of adverse possession.

The description of defendant's lakefront parcel extends to the high water line of Lamoka Lake, but the rights conveyed in his deed extend to the low water line, subject to the rights of other owners to launch and dock boats, and to swim in the lake.

Each of plaintiffs' deeds grant a right to use a particular dock space located along the shore, but lack a precise description of each dock space. Thus, they don't specify whether the space extends above the high water line. Other than stating that the plaintiffs have a "permanent right to use said dock space," the uses to which the dock space may be put are also not specified. The deeds also grant non-exclusive rights-of-way "to the east shore of Lamoka Lake for the purpose of access to said dock space."

So the arrangement seems straightforward - defendant owns a parcel that is burdened with two "easements" in favor of plaintiffs. One "easement" is the right to use the dock space and the other is a right of way to get to the dock space. Moreover, the right of way easement ends where the dock space easement begins.

Plaintiffs claimed title to part of the adjacent upland by adverse possession. They contended that the claimed area is located "between the dock space and the common right-of-way," but the court held that the area "is necessarily located within the common right-of-way." However you slice it, the court and the plaintiffs agreed that the area was not within the indeterminate "dock space."


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Plaintiffs alleged that they had "mowed, cleaned, repaired, excavated, and repaved the parcel, as well as picnicked and congregated there, and that each summer they placed seasonal items thereon such as lawn furniture, a portable storage shed, and a temporary deck."

After reiterating that the claimed area was not within the dock space deeded to the plaintiffs, the court then held that "permission to use the area immediately adjacent to [the dock space] in a seasonally appropriate manner that does not conflict with the record owner's rights…may be inferred from [the] grants." Further, permission "can be inferred from [plaintiffs'] affidavit testimony that their use of the parcel was never challenged and that an amicable relationship prevailed among the owners before defendant acquired his property." As a result, the claimed activities were insufficient to establish the "hostility" that is elemental to adverse possession. The court also explained that the plaintiffs never engaged in activity that "indicates that they assumed a hostile attitude toward the record owner's rights," such as ejecting trespassers, marking boundaries, landscaping, erecting permanent structures or making any other "changes in the parcel that would have signaled continuous occupation beyond the summer season."

Comment

After parsing the opinion, *Wilcox* seems to be saying that activities that are reasonably contemplated within the dock space (by the grant of the dock space itself) are also "permitted" within the area of the right of way for the "purpose of access to said dock space." It reaches this result by construing both grants together, *as a matter of law*. The question of permissive use, however, is one of *fact*.

The decision affirmed summary judgment for the *defendant*. When it comes to fact questions on such a motion, the party opposing the relief is entitled to the benefit of every favorable inference that may be drawn from the pleadings, affidavits, and competing contentions of the parties.[4]

Plaintiffs seemed to be relying on the established principle that once all of the other required elements of adverse possession are shown, hostility will be presumed. While there is a "permissive use" exception to this principle, the burden is on the defendant to come forward with evidence showing permission. Once that showing is made, the burden shifts back to the plaintiff to produce evidence of hostile use.[5] There is nothing in the *Wilcox* opinion to indicate that the *defendant* offered any proof of permission. Indeed, the defendant's posture indicates that he believed the activities to be in violation of the original grant!

Even if, as appears here, the court *sua sponte* thought that an inference of permissive use could be drawn from the motion papers, summary judgment should have been denied and the case remitted to the trial court

for findings of fact on the issue.[6]

Typically, "permission" is shown through explicit verbal or physical acts ("It's ok with me if you put up a fence") or an implicit relationship or accommodating posture, like family-ties or long-term cooperation between the parties.[7] In either case, it's characterized by a recognition of the owner's underlying right to prohibit the activity and his decision not to do so. In addition, the grant of "permission" that will defeat a presumption of hostility can be revoked at the pleasure of the owner. If the right to engage in the activity is granted by a legal instrument, the burdened owner lacks this "right to prohibit" and "permission" is not needed. The *Wilcox* opinion blurs this distinction.

A frustrating aspect of this case is that the court accepted that the disputed area was outside of the "dock space" description. As a result, it essentially construed the plaintiffs' seasonal activities to be "for the purpose of access to said dock space" over the right of way area. This construction seems to be at odds with the language of the grant and it would have been helpful to understand how the result was obtained. Unfortunately, for the practicing bar, clarification will have to come at a later date.

Note: Lance R. Pomerantz is a sole practitioner who provides expert testimony, research and consultation in land title disputes. He is also the publisher of the widely-read land title newsletter Constructive Notice.℠ Visit www.LandTitleLaw.com.

1. 2011 NY Slip Op 09305 (2nd Dept., December 20, 2011).

2. L 2008, ch 269, § 5. See *Hogan v. Kelly*, 86 AD3d 590 (2nd Dept., 2011).

3. 2011 NY Slip Op 09230 (3rd Dept., December 22, 2011).

4. *Nicklas v.Tedlen Realty Corp., et al.,* 759 N.Y.S.2d 171 (2nd Dept. 2003).

5. See e.g., *Chaner v. Calarco*, 77 AD3d 1217 (3rd Dept., 2010), *Koudellou v. Sakalis*, 29 AD3d 640 (2nd Dept. 2006).

6. *Harrington, Trustee, et al, v. Estate of Crouse* 1 A.D.3d 778 (3rd Dept. 2003); *Levy v. Morgan,* 31 A.D.3d 857 (3rd Dept., 2006).

7. *Congregation Yetev Lev D'Satmar v 26 Adar N.B. Corp.,* 192 AD2d 501, 503 (2nd Dept., 1993).