

Adverse Possession by a Co-Owner By Dale Alberstone, Esq.

Each month for about the past 20 years, I have written a column for AOA's members about new cases and developing areas of law that affect apartment owners, and in a more general sense, apply to all property owners in the State of California. This month I report on a case which was decided by the California Court of Appeal on May 9, 2006 concerning the ability (or inability) of one co-owner of property to acquire the other co-owner's title in the property by the doctrine adverse possession.

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Readers may recall from my prior articles that adverse possession is an established legal principle by which one person may acquire ownership of another person's property. The technical elements to prove adverse possession are the following:

- Possession must be by actual possession under circumstances to constitute reasonable notice to the owner;
- It must be hostile to the owner's title;
- The owner must claim the property as his own either under color of title or claim of right;
- Possession must be continuous and uninterrupted for five years; and
- The claimant must pay all the taxes levied and assessed against the property during the period.

Facts of the Case

In the new case of Preciado v. Wilde (May 9, 2006), Preciado filed an interesting lawsuit against Wilde, his niece, for adverse possession in connection with two parcels of real property that they co-owned as tenants in common. One of the properties contained a house and the second parcel was the first parcel's vacant rear lot.

Wilde owned a three-tenths interest in each parcel and Preciado owned the remainder.

At trial, Preciado testified that after Wilde's father died, he demolished the house on one of the parcels and planted crops in its place. He also testified that the lot was entirely fenced in. The fencing was not built to exclude Wilde, and part of it had been built by her father.

Preciado planted crops on one-third of the vacant lot for personal consumption. He erected a fence there in the 1960s to keep a horse on the property, but there were no horses there at the time of trial. The fence eventually collapsed and was partially buried. Preciado resided in a house near the two lots.

From 1972 to 1984, Wilde paid the property taxes on the two parcels. However, in 1992, Preciado began paying the taxes.

Of particular importance is the fact that Wilde testified at the trial that Preciado never excluded her from the properties or told her she could not go there. In fact, Wilde visited her father when he lived there and, after his death, had gone to the property a couple times a year.

Based on those facts, Preciado filed a lawsuit to quiet title to the property, to terminate Wilde's three-tenths interest in it, and to obtain a judgment that he had adversely possessed the property so as to divest Wilde of all further ownership in it.

Adverse Possession Denied

In most cases of adverse possession, a stranger who files an action for adverse possession is not on title and has no right to occupy the property. It is only by his continuous use of the land over a period of five years that he may acquire title to it.

Unlike the typical situation where a stranger is involved, co-owners of property have equal possessory rights in the land. Because of that equality, the Court of Appeal explained that ***for one co-owner to establish adverse possession against the other, more proof is required than where a stranger seeks to obtain ownership.***

Specifically, the Court held that where a claim of ownership by adverse possession is asserted by one co-owner, additional principles become operative. Each tenant in common has a right to occupy the whole property. The possession of one is deemed the possession of all.

Each co-owner may assume that the other in exclusive possession is possessing for all of them, and not adversely to the others.

The Court further explained that before title may be acquired by adverse possession as between co-owners, the occupying owner must “bring home or impart notice” to the owner out of possession, by acts of ownership of the most open, notorious and unequivocal character “that he intends to oust the latter of his interest in the common property.”

Such evidence, the Court said, must be stronger than which would be required to establish a title by adverse possession in a stranger. “In short, one tenant in common cannot by mere exclusive possession acquire the title of his co-tenant.”

Here, the Court of Appeal determined that Preciado had failed to carry his burden of proof. Wilde had testified that she had no notice that Preciado wanted to interfere with her right to possession and title.

Importantly, Preciado admitted he never excluded Wilde from the property. He never restricted her access or informed her that he was challenging her ownership.

At one point, he had constructed fences, but admitted that they were not designed to exclude family members, such as Wilde. Nor did he construct fences to completely surround the lot. Part of the fencing had been built by Wilde’s father.

Further, Preciado admitted that he never used more than one-third of one of the lots. Thus, Preciado lost the case and Wilde continued to own her three-tenths of the properties.

Comparison with Prescriptive Easements

The elements to acquire title by adverse possession are similar to the elements necessary to obtain a prescriptive easement. The significant additional element for adverse possession is that the claimant must also pay the real estate taxes levied against the property.

The theoretical difference between the two doctrines is the following: With adverse possession, the claimant acquires ownership of the entire property and may thereafter exclude the person whose title he procured. With a prescriptive easement, the claimant merely obtains a right to use and possess the property together with its true owner. The claimant who acquires an easement by prescription may not exclude the owner from the real estate. Nor may the owner exclude the claimant.

For a further discussion of the most recent law of prescriptive easements, please review my article published in last month’s June issue of this magazine.

Conclusion

The Preciado case involved is one of the few instances where the claimant of property paid the real estate taxes and assessments, as is required by one of the elements to obtain adverse possession. Rarely does a stranger to another’s land pay the taxes. It is for that reason that a non-owner of land rarely prevails in an adverse possession case.

However, where, as here, there are co-owners of the land, the claimant’s payment of the taxes alone is not sufficient. Preciado, for example, needed to give Wilde specific notification that he was claiming

exclusive ownership of the property and that Wilde would not be allowed to enter possession of the property at any time thereafter.

Had Wilde given that notification five years before he filed the lawsuit, and further, had Preciado actually occupied or possessed the entirety of both lots, he may have won his case against Wilde.

The Preciado case is applicable to all single and multi-family dwellings, including houses, duplexes, triplexes and large scale apartment buildings where there are at least two owners of the property. If one of the owners pays all the taxes and notifies the co-owner that the co-owner is being excluded from the property, at the end of five years, that co-owner might lose his portion of the title.

Of course, divestiture of the co-owner's title can only be determined by a court's judgment. No title company will insure the title of one owner against the other based on the doctrine of adverse possession without a judgment of the court.

The bottom line is that a co-owner who has any suspicion that the other co-owner is ousting him/her from the property, should promptly seek competent legal counsel to preserve his/her rights in the real estate.

Dale Alberstone is a prominent real estate attorney who has practiced real property and business law in Century City for the past 30 years. He has been appointed to periodically serve as a judge pro tem of the Los Angeles Superior Court and is a former arbitrator for the American Arbitration Association. He also testifies as an expert witness for and against other attorneys who have been accused of legal malpractice.

*Mr. Alberstone has been awarded an **AV** rating from Martindale-Hubbell. An **AV** rating, registered through Reed Elsevier, reflects an attorney who has reached the heights of professional excellence and is recognized for the highest levels of skill and integrity.*

The foregoing discussion is intended as a general overview of the law and may not apply to the reader's particular case. Readers are cautioned to consult an advisor of their own selection with respect to any particular situation.

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