

“Prescriptive Easements: Revisited”
by Dale Alberstone, Esq.

That decision, identified as Aaron On March 15, 2006 the California Court of Appeal issued an informative decision about prescriptive easements v. Dunham, has potential application to all privately-owned real property in the State of California.

Facts of the Case

In 1989, Stanley Fullerton bought property in Fontana, which in 2000, he sold to Richard Aaron. The property adjoined land owned by Dallas Dunham. Although Aaron’s new property was served by a steep driveway, use of that driveway had long since been discontinued by previous owners because more convenient access to the property existed via a private road across the Dunham property.

The road had been built by an oil company (Texaco) to provide access to gas wells on neighboring property. For nearly twenty years, the occupants of Aaron’s property had made unimpeded use of the road. Not long before Aaron’s purchase, however, Dunham had begun to limit use of the road.

After acquiring title, Aaron filed a lawsuit to establish his right to a prescriptive easement across Dunham’s property. (An easement is an interest in the land of another, other than by a lease or license, which allows the neighbor or other person to use of the land and enjoy the owner’s land, typically on a long-term basis. A prescriptive easement is an easement acquired merely by the neighbor’s long-term use, rather than by a deed from the owner.)

Express permission had been granted to the owners of Aaron’s property in 1982 when the road was built, but two sets of occupants had used the road since that time without asking or receiving permission.

In 1992, the oil company, as the lessee of the Dunham property, posted signs along the road pursuant to Civil Code §1008 (discussed below). In 1999, similar signs were also posted by Dunham. The signs stated that “Right to Pass [was] By Permission and Subject to the Control of the Owner.”

Based on the facts and the evidence presented at trial, the Superior Court entered a judgment granting Aaron a prescriptive easement over Dunham’s property, and the Court of Appeal affirmed that decision.

Application of the Law to the Facts

Readers of this column know from my previous articles that a prescriptive easement may be acquired by a neighbor or other person across an owner’s property if all of the following conditions are satisfied:

- The neighbor’s use is open and notorious (i.e. visible);
- The use is adverse or hostile to the owner’s rights in his own land;
- The use is continuous and uninterrupted as consistent with that type of use; and
- The duration of the use lasts for a minimum of 5 years.

The last element of “duration of use” may be based on the doctrine of “tacking,” which means that the neighbor’s use, even if less than 5 years, may be tacked onto use of his predecessors in interest (i.e. the prior owners of the neighbor’s land) so as to collectively equal or exceed the 5-year statutory period.

In the Aaron case, there was no issue that the first, third and fourth elements had been met by the neighbor and the neighbor’s predecessors. However, the issue of hostile or adverse use was feverishly litigated.

In reaching its decision that Aaron’s and Aaron’s recent predecessor’s use was hostile, the court explained that the expressions “adverse use” and “hostile use” mean only that the owner of the land being used by the neighbor has not expressly consented to the use, such as verbally, by a lease or by a license. More generally, the court explained: “Adverse” is a term synonymous with use “under claim of right” and “hostile” use. ***Adverse means only that the claimant’s use***

of the property was made without the explicit or implicit permission of the land owner.

Aaron's predecessor, Stanley Fullerton, had never asked permission from the owners of the Dunham property to use the road. Nor did Dunham or his predecessors give Fullerton permission to use the road.

The Court determined that the use by Fullerton was "adverse" to Dunham and his property because no permission was ever given.

In support of its decision, the Court relied on a doctrine in law which says that continuous use of an owner's land over a long period of time without the owner's interference establishes a presumption that the use is adverse. Only if there is evidence showing that the use was permissive will the element of hostile use be negated so as to defeat a claim of prescriptive easement.

To try to establish that Fullerton's use was permissive, Dunham introduced evidence at trial concerning certain signs which Texaco and he had posted on his land.

Posting of Signs

Civil Code §1008 provides that a neighbor cannot obtain a prescriptive easement over an owner's property if the owner posts signs at each entrance to the property, or at intervals of not more than 200 feet along the boundary line. The signs must contain the following text: "Right to Pass by Permission, and Subject to Control, of Owner: §1008, Civil Code."

In the Aaron case, the court found that the oil company, rather than Dunham, initially posted the signs. Since Texaco was not the owner of the property, but rather just the lessee, its posting of the signs did not satisfy the requirements of Civil Code §1008. Further, the court noted that there was no evidence showing that Dunham authorized Texaco to post the signs, or was even aware of Texaco's erection of the signs.

On the other hand, if the oil company had erected the signs at Dunham's request, then Fullerton, and ultimately Aaron, would not have acquired the prescriptive easement because the posting of such signs would constitute the owner's consent, thereby negating the element of adverse and hostile use by the neighbor.

The court also observed that about four years after the five years of adverse use had occurred, Dunham posted signs of his own. However, that was too late because the prescriptive easement had already been acquired by Fullerton. As Fullerton's successor-in-interest, Aaron succeeded to Fullerton's prescriptive easement.

Recommendations

The Aaron case points out that the law of prescriptive easements is alive and well in the State of California. Apartment owners, as well as all other land owners in California, need to be vigilant with their property. If an owner notes anyone using his/her land without his/her permission, such as by driving across it or walking on it, prompt action should be taken. Consider one or more of the following measures:

- Erect a fence or other barrier around the access points to the land so as to physically prevent such use.
- Communicate express permission to the trespasser to use the land in the manner in which that person has been using it. It is best that the permission be in writing and signed by the trespasser to acknowledge receipt of the letter giving the consent.
- Call the police and have the trespasser arrested (and then be certain that he does not thereafter again use the property).
- File a lawsuit against the trespasser for a restraining order and other injunctive relief.
- Confer with experienced real estate counsel to determine the best recourse.

Whatever action the owner takes, it needs to be swift and decisive because once the adverse use has

existed for more than five consecutive years, it becomes very difficult, if not impossible, to legally eliminate the prescriptive easement.

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 Mardindale-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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