MASSACHUSETTS Lawyers Weekly
MASSLAWYERSWEEKLY.COM
VOLUME 49 NUMBER 20 Part of the BRIDGETOWER MEDIA network MAY 18, 2020

Title established by adverse possession not a taking

By Sander Rikleen and Amy Hahn

A recent Supreme Judicial Court decision highlights the distinction between establishing rights in real estate by adverse possession or prescription and an eminent domain taking, and answers the question often asked whenever there is a claim of rights by adverse possession or prescription: Was the property "taken" from the titleholder or "lost" by the titleholder's inaction?

The SJC ruled that property is not "taken" when adverse possession or an easement by prescription is established, but rather the former titleholder loses the ability to oust the adverse possessor because of its own prolonged inaction.

The case, *Gentili v. Town of Sturbridge*, 484 Mass. 1010 (SJC-12810, Feb. 24, 2020), took root in 1987 when the town of Sturbridge authorized reconstruction of Hall Road, which runs along one side of the Renato Gentili Trust property. The reconstruction included replacing an old culvert with a new culvert extending into the property.

In 1997, the trust asked the town's Conservation Commission whether the Wetlands Protection Act applied to the property, to which the commission responded that it did not.

However, when the trust asked the same question again in 2003, the commission indicated there were wetlands on the property. The trust then unsuccessfully attempted to sell the property.

In 2015, the trust sued the town and an abutter in Land Court, seeking declarations regarding the defendants' right to discharge water onto the property through the new culvert.

The Land Court judge declared that the town had met the requirements for acquiring a prescriptive easement to discharge storm water onto and across the property and dismissed the trust's complaint.

After the Land Court decision, the trust commenced an action in Superior Court against the town only, alleging an eminent domain taking by the town and seeking compensation for the taking. After a hearing on cross motions for summary judgment, the Superior Court granted the town's motion and denied the motion.

> Although the SJC's decision does not make new law, it points out the importance of objecting whenever a landowner perceives that its land is being used by another without permission.

The trust appealed and the case was transferred to the SJC. The trust's argument that the prescriptive easement amounted to an eminent domain taking for the public use of discharging storm water onto the property was rejected by the SJC.

The SJC ruled that prescriptive easements and takings do not interact in the way the trust suggested, and pointed out an important distinction between rights established by adverse possession or prescription and an eminent domain taking.

The SJC cited a U.S. Supreme Court case involving a state statute extinguishing mineral rights when not exercised for 20 years, *Texaco, Inc. v. Short*, 454 U.S. 516, 530 (1982) ("It is the owner's failure to make any use of the property — and not the action of the State — that causes the lapse of the property right; there is no 'taking' that requires compensation"), and quoted with approval an Ohio case explaining that, "[i]n the case of adverse possession, property is not taken. Rather, once the [relevant statutory period] has expired, the former titleholder has lost his claim of ownership and the adverse possessor is thereafter maintaining its possession, not taking property." *State, ex rel. A.A.A. Invs. v. Columbus*, 17 Ohio St. 3d 151, 152 (1985).

Although the SJC's decision does not make new law, it points out the importance of objecting whenever a landowner perceives that its land is being used by another without permission. Prolonged failure to assert property rights will result in their loss, without compensation.

It may even be necessary to retain the services of a surveyor, because uncertainty regarding property line locations will not prevent an adverse possession claim. *Kendall v. Selvaggio*, 413 Mass. 619, 622 (1992), holds that, "It is well established in Massachusetts that … a mutual mistake as to the location of a boundary line will not defeat a claim of adverse possession."

Sander A. Rikleen is a partner in the litigation department at Sherin & Lodgen in Boston. Amy L. Hahn is a law clerk at the firm.

Reprinted with permission from Lawyers Weekly, 40 Court Street, 5th Floor, Boston, MA 02108, (617) 451-7300 © 2020