

ACQUIRING TITLE TO REAL ESTATE UNDER THE ADVERSE POSSESSION DOCTRINE

BY: Vesna Marusic

Article 13 of the Code of Civil Procedure is known as the Limitations Act and provides limitations on actions relating to real estate. The purpose of the Limitations Act is to promote the stability of real estate titles.¹ The foundation of the adverse possession doctrine is the time limitation it incorporates. No person can successfully acquire title to real estate under the adverse possession doctrine without first satisfying the specified time limitation.

THE ADVERSE POSSESSION DOCTRINE (§5/13-101)

Adverse possession is the “open and hostile possession of land under claim of title to the exclusion of the true owner, which, if continued for the period prescribed by statute, ripens into an actual title.”² To establish title under the adverse possession doctrine in Illinois, a person must establish several elements.³ A party must prove that his or her possession of land was: (1) continuous, (2) hostile⁴ (3) actual, (4) open, notorious and exclusive, and (5) under claim of title inconsistent with that of the true owner for a period of 20 years.⁵ All five of these elements must have existed concurrently for the full 20-year period before the doctrine will apply.⁶

The Appellate Court of Illinois was faced with an adverse possession dilemma in Tapley v. Peterson.⁷ In this case, the Plaintiff-landowners [“plaintiffs”] wished to establish title to land adjacent to their home which was owned by their neighbors [“defendants”] but covered by plaintiffs’ driveway. The circuit court ruled that plaintiffs had established title by adverse possession to the land in dispute. The defendants appealed, arguing that the evidence was insufficient to establish that the possession was actually adverse, without permission, and that the possession had not lasted for the required 20-year period.⁸

In an adverse possession situation, all presumptions are in favor of the title-owner, and to overcome such presumptions the adverse possessor has the burden of proving each of the five elements by strict, clear and unequivocal evidence.⁹ Here, the plaintiffs had clearly established all five required elements of the adverse possession doctrine.

First, the plaintiffs possessed and used the land for over 20 continuous and uninterrupted years. Next, the plaintiffs use of the land was not permissive (as defendants contended), but hostile, because the “conduct of the plaintiffs with respect to the driveway area was flatly inconsistent with any claim of permissive

use.”¹⁰ There was no question that the possession was actual, because the driveway was actively and routinely used throughout the period in question.¹¹ Additionally, there was no question that the possession was “open, notorious and exclusive,” because the use of the land over which the driveway passed was readily visible to any interested party, including defendants.¹² Finally, the requisite time requirement of 20 years had been satisfied.¹³ Therefore, judgment for the plaintiffs was affirmed in their action for title based on adverse possession.¹⁴

RECOVERING LAND AFTER SEVEN YEARS WITH POSSESSION AND RECORD TITLE (§5/13-107)

Some actions for the recovery of land may be commenced before the expiration of twenty years. Under §5/13-107, a person can acquire property if they have (1) actual possession of the land for seven years, and (2) record title.¹⁵ The person in possession must have acquired title from a specified source¹⁶ that is deducible by record.¹⁷ Under this provision, mere color of title¹⁸ is not adequate; at least a prima facie¹⁹ title is required.²⁰ In Irving v. Brownell, the Illinois Supreme Court stated that the word “title” does not mean a perfect title, but only such a title as is evidenced by a deed in proper form, and duly executed by someone of the officers or persons named in §5/13-107.²¹

Furthermore, there must have been “actual” possession.²² The Illinois Supreme Court also said in Irving that to be constituted as “actual,” the possession should be “open, visible and exclusive, either by an enclosure, the erection of buildings, or in such manner as to give the real owner notice that the person in possession is claiming the land as his own.”²³

RECOVERING LAND AFTER SEVEN YEARS WITH THE PAYMENT OF TAXES AND COLOR OF TITLE (§5/13-109)

If a claimant has paid taxes on property for a period of seven successive years, they can acquire property under §5/13-109 if (1) the claimant has been in “actual” possession of the land for seven years, and (2) his claim to the property was made under color of title,²⁴ (3) in good faith.²⁵

What is considered good faith? Most courts use a common sense construction of the expression “good faith.” For example, in Winters v. Haines, the Illinois Supreme Court stated that “a purchaser who buys and pays his money for land under the belief he is acquiring title, acquires title in good faith.”²⁶ While good faith is required in relation to possession for seven years under color of title, it is not relevant under the twenty-year requirement for adverse possession.

To comply with this provision, the possession must be hostile, actual, visible, open and notorious, exclusive and continuous for a period of seven years.²⁷ The possession, color of title and payment of taxes must exist concurrently before the

statute of limitations begins to run. Seven full years must have intervened between the day when the first payment of taxes was made and the day the suit was commenced to recover possession of the land.²⁸

In Cobb v. Nagele,²⁹ plaintiff landowners [“plaintiffs”] brought action against the adjacent landowner [“defendant”] to quiet title to a disputed 11 ½ foot wide strip of land allegedly acquired by adverse possession.³⁰ Plaintiffs alleged that for over 40 years, they farmed the land in question and had continuously, hostilely, openly and notoriously possessed that land.³¹ Defendant testified that in 1987 he began going onto the disputed strip of land, but only to mow weeds, not to destroy crops.³²

The circuit court ruled that plaintiffs had acquired title to the disputed property by adverse possession and had met their burden of proof regarding the doctrine’s required elements. Defendant appealed, arguing that he had title to the property because he paid taxes on the property since 1982 under color of title.³³

The Appellate Court of Illinois did not agree. The fact that the plaintiffs farmed the land satisfied the requirements of open, notorious, and actual possession of the premises. Further, defendant’s testimony that he did not mow down plaintiff’s crops until 1987 indicates that plaintiffs were in exclusive possession of the land from 1943 to 1987.³⁴ The hostility requirement was also met because plaintiffs, in farming the land, were acting as to indicate they were claiming title.³⁵

Moreover, defendant’s argument regarding his payment of property taxes was without merit. §5/13-109 of the Limitations Act only applies to parties who pay taxes under color of title for seven years and are in actual possession of the property. Here, defendant did not attempt actual possession until 1987, and therefore was not in possession for the requisite seven years. One can not acquire property under §13-109 unless (1) actual possession, (2) color of title and (3) payment of taxes have occurred concurrently for seven uninterrupted years.

CONCLUSION

The adverse possession doctrine serves as a notice to property owners that if they allow others to occupy their land for the requisite time period in a manner that satisfies the statutory components, they will be deemed to have submitted to the occupant’s claim of right to such possession.

¹ 1 Ill. Law and Prac. Adverse Possession §2

² Id.

³ 735 ILCS 5/13-102.

⁴ The word “hostile” does not refer to any ill will. Rather, it is an assertion of ownership that is incompatible with that of the record owner and all others. Tapley v. Peterson 141 Ill.App.3d 401, 405 (1986)

⁵ Id.

⁶ Id.

⁷ 141 Ill.App.3d 401 (1986)

⁸ Id. at 409.

⁹ Id. at 406.

¹⁰ Id. at 410.

¹¹ Id. at 407.

¹² Id.

¹³ Id.

¹⁴ Id. at 410.

¹⁵ 735 ILCS 5/13-107

¹⁶ Id. The statute lists the following sources: “From this State or the Unites States, or from any public officer or other person authorized by the laws of this State to sell such land for the non-payment of taxes, or from any sheriff, marshal or other person authorized to sell such land for the enforcement of a judgment or under any order or judgment of any court.”

¹⁷ Id.

¹⁸ Color of title: A written instrument or other evidence that appears to establish title but does not in fact do so. Black’s Law Dictionary. (8th ed. 2004)

¹⁹ In this context, prima facie title refers to any title a reasonable man would pay money for, and pay the yearly taxes assessed, for a period of seven years. Dickenson v. Breeden, 30 Ill. 279, 325 (1863)

²⁰ 1 Ill. Law and Prac. Adverse Possession §23

²¹ 11 Ill. 402 (1849)

²² 735 ILCS 5/13-107

²³ Irving at 415

²⁴ See endnote 18

²⁵ The following provision, 735 ILCS 5/13-110, lists the same 3 requirements for the purposes of acquiring *vacant* land. It states that if a person has actual possession of the land, color of title (or actual title), and pays taxes on the land for seven years, all persons holding under that taxpayer, be it through purchase, legacy or descent, who continue to pay taxes before the expiration of seven years, can acquire that land and benefit from the provision.

²⁶ 84 Ill. 585, 588 (1877)

²⁷ Malone v. Smith, 355 Ill.App.3d 812 (4th Dist. 2005)

²⁸ Id.

²⁹ 242 Ill.App.3d 975 (1993)

³⁰ Id. at 977

³¹ Id. at 978

³² Id.

³³ Id. at 979

³⁴ Id.

³⁵ Id. at 980