

## Case Note Recent Illinois Appellate Court Analysis of Adverse Possession

A recent case handed down by the Illinois Second District Appellate Court on April 1, 2020, styled *Christine Valenziano and C.J.W. Development Company v. Rachel L. Stewart f/k/a Rachel O'Connor* 2020 IL App (2d) 190503-U No. 2-19-0503, provides some good insight on issues surrounding claims for adverse possession. Although the Court's Order is filed under Illinois Supreme Court Rule 23 (and cannot be cited as precedent except in limited circumstances), the Court's analyses and insights are a good review of the principles of Illinois law surrounding adverse possession and a claim to disseize a cotenant of property. The case was an appeal of a Circuit Court decision granting summary judgment to a long-term occupant of real property, finding adverse possession against an individual whose original interest in the property was that of a joint tenant (the defendant), but who had vacated the property some forty plus years earlier. ¶1

The underlying facts of the case are somewhat convoluted in that in 1963, the defendant purchased the subject property (a house) with her then husband, John O'Connor, and they held title as joint tenants. ¶4 Three years later, the defendant left Illinois, divorced Mr. O'Connor and the defendant had no further possession of the property thereafter, nor did defendant thereafter pay any part of the mortgage, real estate taxes nor any other expenses related to the property. ¶4

Shortly after the defendant vacated the property and divorced Mr. O'Connor, both events occurring in 1968, Mr. O'Connor married a woman named Gloria, and he and Gloria had a daughter named Christine Valenziano ("Christine"). ¶5 Thereafter, Mr. O'Connor, Gloria and Christine exercised control of the property, Mr. O'Connor and Gloria paid the real estate taxes and other expenses related to the property. Christine moved out in 1991 and Mr. O'Connor died in 1993. ¶5 Gloria continued to occupy the property until 2010 when Gloria quitclaimed her interest in the property to Christine and passed away shortly thereafter. ¶5 In 2016, a fire gutted the house and Christine contracted with an entity called C.J.W. (C.J.W. was owned by Christine and her husband) and built a new house on the property. In 2017, Christine deeded her purported interest in the property to C.J.W. ¶6

The plaintiff (Christine) filed an action against the defendant to quiet title based on "adverse possession" and an additional count to quiet title based on the doctrine of "color of title" alleging possession and payment of real estate taxes for seven or more years. ¶7 The plaintiff claimed adverse possession and alleged that her actual possession was continuous and hostile for more than 20 years, open, notorious, exclusive and inconsistent with the true owner's possession. ¶7 In response, the defendant argued in part that Mr. O'Connor's possession was not adverse to her joint tenancy interest because she allowed Mr. O'Connor and his family to reside at the property after she left. ¶8 The defendant further asserted that she expected that when Mr. O'Connor sold the property, or no longer used the property for his primary residence, she would be compensated for her interest in the property. ¶8 Furthermore, when Mr. O'Connor passed away, the defendant asserted she became the sole

title holder and asserted that Gloria's attempt to convey title to Christine after Mr. O'Connor's death was ineffective. ¶8

In analyzing the facts of the case, the Appellate Court basically broke the facts into three separate time periods where adverse possession was to be analyzed: (1) the period of time after defendant vacated the property and Mr. O'Connor's death; (2) the period of time after Mr. O'Connor's death (when defendant was the sole title holder) and Gloria and the plaintiff (Christine) resided at the property; (3) after Gloria's death when Christine purportedly succeeded to Gloria's interest and paid the taxes, upkeep, etc. but did not reside at the property. ¶31 The Court reiterated Illinois law holding that successive periods of succession can be tacked together if there has been privity between the users. ¶14 The court reviewed the required elements to establish title by adverse possession, namely that "there must be 20 years concurrent existence of the five elements: (1) continuous, (2) hostile or adverse, (3) actual, (4) open, notorious, and exclusive possession of the premises, (5) under a claim of title inconsistent with that of the true owner." citing *Joiner v. Janssen* 85 Ill. 74, 81 (1981). ¶30

As to the elements of adverse possession, the defendant argued that throughout all three periods, any possession of the property was with her consent and therefore, not hostile. ¶32 As part of its analysis on whether the parties in possession of the property was "hostile" to the defendant for the required period of 20 years, the court distinguished between "acquiescence" and "permission." The court stated that "acquiescence" and "permission" are not synonyms but are mutually exclusive terms. ¶33 The court reiterated prior holdings that held, to be "adverse," the use by the third party claimant must be with the "knowledge and acquiescence" of the true owner, but not the "permission" of the true owner. Citing *Light v. Steward* 128 Ill. App. 3d 587, 595 (1984) The use of property by others "without the objection of the true owner is not permission but might be acquiescence." citing *Schultz v. Kant* 148 Ill. App. 3d 5656, 572 (1986) (in that case, the plaintiff's use of a roadway without asking permission of the defendant, of which defendant knew but to which he did not object, established "acquiescence and not permission" and thus established the adversity needed for an easement) ¶33 Said another way, if an owner knows that a third party is possessing their property and does not take any action, there is knowledge and acquiescence but not permission, and therefore, the possession is hostile (and therefore adverse if all other elements are satisfied). The court further stated that a party claiming title by adverse possession always does so in derogation of the rights of the true owner and admits the title was held in another party and not them (the foregoing was in response to the defendant's assertion the plaintiff knew or should have known that she was a title holder of record). ¶41

The court recognized the fact that when the defendant vacated the property she was still a joint title holder with Mr. O'Connor and therefore the plaintiff could not tack on that period of time between the defendant vacating and Mr. O'Connor's death unless the plaintiff could establish that Mr. O'Connor disseized the defendant. ¶43 The court held that disseizing of a cotenant must be an ouster or some act equivalent to an ouster, and the evidence must be even stronger than evidence establishing a claim of adverse possession. ¶45 One cotenant must assert exclusive ownership and deny all right or title to his cotenant. ¶45 That denial of all right to property by a cotenant can be by a formal notice or informal by overt acts of exclusive ownership, however, such acts of ouster by one cotenant must be clear and unequivocal. ¶46 The court looked to precedent which states that the "[m]ere possession by one tenant in common, who receives all the rents and profits and pays the taxes assessed

against the property, no matter for how long a period, is not sufficient to overcome the presumption of law that the possession of one is the possession of all” citing *Roberts* 259 Ill. at 235. ¶47 Further, the court found no reason to distinguish between tenants in common and joint tenants as to the analysis of whether one cotenant has ousted another cotenant. ¶44 (citing out of State authority).

The court looked to prior cases that held that notice of disseizing “by acts has been found when the cotenant is in a position (literally and figuratively) to be aware that the claimant has undertaken the acts” of disseizing its cotenant, citing *Roberts v. Cox* 259 Ill. 232, 235-236 (1913) and the case of *Guinzy v. Kratz* 28 Ill. App. 3d 500, 504 (1975) where a cotenant lived in the same vicinity and “it was certainly understood by other tenants in common living in the same vicinity” that a “cotenant and his the devisees claimed exclusive ownership and denied all right or title to other persons” (the cotenant divested declined to demand rent or assert any title). ¶51

Here the facts were different in that the defendant moved out of State after leaving Mr. O’Connor and apparently did not return. The record did not establish that Mr. O’Connor gave defendant any formal (written) notice of ouster and the court held that implicit ouster is a difficult bar to overcome under Illinois law which still holds that possession of one cotenant is deemed possession of all cotenants, subject to contrary facts and assertions by the party asserting ouster. (See ¶44 and ¶55) The mere continued residence on the property by Mr. O’Connor did not impart to the defendant that he was denying the defendant’s right as a cotenant. ¶55 The court found that prior to his death, Mr. O’Connor “did nothing by word or deed to inform defendant he was claiming her interest in the property” and was seeking ouster ¶55

Although the plaintiff could not establish adverse possession during Mr. O’Connor’s lifetime, the plaintiff tried to establish a 20 year adverse possession period after Mr. O’Connor’s death. Recall that the defendant had left the State of Illinois over forty years prior. The court reasoned that Gloria still could have (but did not) provide notice that she was claiming ownership in the property adverse to the defendant. ¶56 Gloria did occupy the property, paid the taxes, made improvements, etc. ¶56 The court again relied on precedent which held that a 20 year limitations period “should not start running... until the title holder has a visible, objective reason to know that someone is trespassing, ... and the 20 year period cannot run on the sly” citing *McNeil v. Ketchens* 397 Ill. App. 3d 375 393 (2010). The courts discussed that often it is persons in the immediate area of their cotenant that demonstrate exclusive management and control. ¶58 However, “the concept of hostility still requires notice to the titleholder, including one not residing nearby.” ¶58 It is clear from the court’s holding that one cannot quietly exercise adverse possession and the adverse possessor’s acts must be “brought home” to the party against whom one seeks to assert adverse possession. *McClellan v. Kellogg* 17 Ill. 498, 503 (1856) ¶58 Therefore, the plaintiff could not establish that either her predecessor’s occupying of the property or her and Gloria’s occupying of the property (tacked together) was hostile and adverse to the defendant. Therefore, the Court held that the granting of summary judgment by the Circuit Court was improper. Furthermore, as to the Plaintiff’s claim of title under the doctrine of “color of title” 735 ILCS 5/13-109, apparently neither court found the requisite statutory were satisfied as the Appellate Court did not rule on that issue. See generally, 735 ILCS 5/13-109.

The court remanded the case to the Circuit Court for further proceedings. Social Media posts indicate the case was subsequently settled. What makes this case most interesting is that not only did the defendant leave Illinois in 1968 without any communication with her ex-husband or his successors for 42 years, the defendant's ex-husband and successors occupied the property for over 42 years, paid the taxes, insurance, upkeep, etc. Not only is the subject case instructive as to adverse possession, but also tacking of interest and ouster of a cotenant. One significant take away is that if you intend on ousting your cotenant or exercising adverse possession against an owner, you better make sure the owner is on formal notice that you are acting adverse to their ownership interest, and not trying to effect adverse possession "on the sly" as the Appellate Court discussed.

The defendant was represented by The Law Offices of Thaddeus M. Bond, Jr. & Associates, P.C.