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Property—Real Property—Easements

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Community Planning

In *City of Yonkers v. Rentways, Inc.*[45] the court merely recapitulated established law regarding non-conforming uses under zoning ordinances.[46] In the instant case, the defendant Rentways had constructed a two story building in a business zoned lot. Access to the second story of the building was gained over an adjoining, higher-level lot which was in a residential district. The court held that such use of the lot in the residential district was a non-residential use which the City could enjoin.[47] The City is not estopped[48] from enforcing the zoning laws either because Rentways had been issued a permit,[49] or by laches because the City has neglected to enforce the zoning laws for many years.[50]

XI. Property

A. Real Property

Easements

An easement is the limited use or enjoyment of an interest in land possessed by another.[1] To create an easement by prescription, there must be adverse use of the privilege or enjoyment with the knowledge of the person against whom it is claimed, or such an open, notorious, and uninterrupted use that knowledge will be presumed. This use must be exercised under a claim of right adverse to the owner and acquiesced in by him for a period equal at least to that prescribed by the statute of limitations for acquiring title to land by adverse possession.[2] While easements are regulated by the common law, adverse possession, on the other hand, is controlled by statute and is defined as the open and hostile possession of land, under claim of title to the exclusion of the true owner, which if continued for fifteen years,[3] ripens into actual title.[4]

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45. 304 N. Y. 499, 109 N. E. 2d 597 (1952).
46. See 8 McQuillan, Municipal Corporations §§ 25.180 et seq. (3rd ed. 1949); 1 Yokley, Zoning Law and Practice §§ 147 et seq. (2d ed. 1953).
47. *Village of Great Neck Estates v. Bernak & Lehman*, 223 App. Div. 853, 228 N. Y. Supp. 917 (2d Dep't), *aff'd*, 248 N. Y. 651, 162 N. E. 562 (1928).
48. See 8 McQuillan, *op. cit. supra*, note 46 § 25.153; 1 Yokley, *op. cit. supra* note 46 § 109.
49. *City of Buffalo v. Roadway Transit Co.*, 303 N. Y. 453, 463 104 N. E. 2d 96, 100 (1952).
50. *Village of North Pelham v. Ohliger*, 216 App. Div. 728, 214 N. Y. Supp. 253 (2d Dep't 1926), *aff'd*, 245 N. Y. 593, 157 N. E. 871 (1927).

1. 3 Powell, Real Property § 405 (Cum. Supp. 1952); 5 Restatement, Property § 450 (1944).
2. *J. C. Vereen & Sons v. Houser*, 123 Fla. 641, 167 So. 45 (1936).
3. C. P. A. § 34. Before 1932, the period required was 20 years.
4. *Scallon v. Manhattan Ry. Co.*, 185 N. Y. 359, 363, 78 N. E. 284, 285 (1906).

Although the two doctrines have similarities, the differences between easements and adverse possession decided the case of *Di Leo v. Pecksto Holding Corp.*[5] Plaintiff in 1921 bought land, accessible by traveling a path over defendant's lands. The plaintiff alone maintained this right of way, which his daily traffic developed into a road. There were no objections until 1946 when defendant entered into an agreement with neighboring land owners to establish a new right of way which would have bisected and interfered with plaintiff's accustomed route. Plaintiff brought an action to establish his easement and to require removal of obstructions placed there by the defendant. In seeking to reverse the lower court's judgment for the plaintiff, defendant maintained that plaintiff did not satisfy the requirements of New York Civil Practice Act § 40, which states, in effect, that to constitute adverse possession, land is deemed possessed and occupied only where it has been protected by a substantial enclosure or where it has been usually cultivated or improved.

The court did admit that the doctrine of prescription will be treated as the application to incorporeal rights of the statute of limitations within the limits of the strong analogy between the rules, citing *Klin Co. v. N. Y. Rapid Transit Corp.*,[6] but recognized that "differences between corporeal hereditaments and easements prevent full application of the same rule in both cases."[7] Where an analogy exists, the statutory rules will be applied to easements, but in this case, the conduct specified in the statute as essential for acquiring land by adverse possession affords no analogy with the kind of physical conduct prerequisite to gaining an easement by prescription. Section 40 deals with the possession and occupation of land, but an easement or other corporeal right is not possessed or occupied. "An easement derives from use, and its owner gains merely 'a limited use or enjoyment of the servient land.' "[8] In short, the prescribed statutory manifestations of adverse possession can have "no application to the case of an easement, as of passage."[9] As plaintiff and his predecessor had openly and continuously used the right of way for more than the then required twenty years, the court granted plaintiff a perpetual easement.

An action for specific performance of an alleged realty contract for a perpetual easement gave the court an opportunity to reiterate a settled rule of property law.[10] Plaintiffs performed

5. 304 N. Y. 505, 109 N. E. 2d 600 (1952).
6. 271 N. Y. 376, 380, 3 N. E. 2d 516, 518 (1936).
7. *Id.* at 379, 3 N. E. 2d at 518.
8. At 109 N. E. 2d 602.
9. *Colburn v. Marsh*, 68 Hun 269, 272, 22 N. Y. Supp. 990, 992 (1893).
10. *Gracie Square Realty Corp. v. Choice Realty Corp., 154 East 97th St. Corp. v. Schelberg*, 305 N. Y. 271, 113 N. E. 2d 416 (1953).

a number of acts which they maintained were part performance of an alleged oral contract, sufficient to render the statute of frauds inoperative. In return for the plaintiffs' landscaping the area adjacent to their and defendants' buildings and developing a garden project, defendants allegedly were to grant plaintiffs a perpetual easement. The court cited *Burns v. McCormick*,[11] containing the well-known opinion of Cardozo, which eloquently reaffirmed the general rule: "There must be performance 'unequivocably referable' to the agreement . . . 'An act which admits of explanation without reference to the alleged oral contract or a contract of the same general nature and purposes is not, in general, admitted to constitute a part performance.'[12] What is done must itself supply the key to what is promised. It is not enough that what is promised may give significance to what is done."[13]

The court said it knew of no authority holding that an oral contract for a perpetual easement has been sufficiently performed to authorize a decree of specific performance where the applicant did not have possession, and where no improvements were made, as was the case here. Notwithstanding, the court then referred to the specific acts of the plaintiffs and said these acts did not meet the above test. The plaintiffs' purchase of two adjoining buildings from third persons, the gaining of possession of eight apartments in one of them, the hiring of an architect to draw plans for the garden project, consultation with their attorneys relative to the preparation of formal grants, and even the registering of the trade name "Carnegie Gardens," the court said *could* be interpreted as part performance of the alleged contract, but "it is by no means the *only* reasonable explanation of those acts and that is the test which must be satisfied."[14]

Collateral Attack

In *Swindler v. Knocklong Corp.*,[15] defendant had acquired title to land at a tax sale and was awarded judgment in a partition action he then brought against plaintiffs. Here, the plaintiffs, successors of the heirs of the record owner, brought this action under Real Property Law, § 500, et seq., to set aside the service in the latter action. Plaintiffs founded their claim on the ground that service by publication in the partition action was void since it was based on an affidavit that the heirs of the record owner could not be found. Defendant's search only went as far as the date of his filing lis pendens in that action. A more com-

11. 233 N. Y. 230, 135 N. E. 273 (1922).
12. *Wooley v. Stewart*, 222 N. Y. 347, 351, 118 N. E. 847, 848 (1918).
13. *Burns v. McCormick*, *supra*, at 232, 135 N. E. at 273.
14. 113 N. E. 2d at 421.
15. 305 N. Y. 527, 114 N. E. 2d 25 (1953).