Finkelstein Newman LLP

The Real Estate Litigation Leaders

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Inside this issue

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GETTING MOWED BY ADVERSE POSSESSION

Property owners are up in arms over the continuing confusion that surrounds New York's age-old "adverse possession" law. This law gives an individual the right to acquire legal title to another's land by adversely occupying it for a certain amount of time (at least ten years in New York). Possession is considered "adverse" if the occupant physically enters and exclusively uses the property, in an open and notorious manner, under a claim of right, for the requisite period. The possession must put the record-owner on notice that others are claiming the property as their own.

In 1989, Paul and Denise Przybylo purchased a vacant lot (on which they later built a home) in Queensbury, a town located in the foothills of the Adirondack Mountains. Because the couple did not take out a mortgage, they were not required to get the property surveyed and opted not to do so. After moving into their newly constructed home in 1994, they had a number of disputes with their neighbor G. Scott Walling, a retired lawyer. In 2004, in an effort to screen off their property, the Przybylos decided to plant large trees along the property line. To that end, the couple finally had their property surveyed and learned that Walling had been using a 5,800-square-foot piece of their property. After the couple objected to Walling about the use, he sued the Przybylos, claiming that he had been mowing and maintaining the land since 1986 and thereby owned the parcel in question, pursuant to New York's adverse-possession law.

Although the County Court of Warren County found that Walling satisfied most of the governing elements, it denied judgment in his favor because a question existed as to his "state of mind." Specifically, the court concluded that Walling's adverse-possession claim could be defeated if he knew that he did not own the parcel when he took possession. According to the court, Walling was required to believe that the property was his in order to trigger the law's "hostile and under a claim of right" component. Walling appealed to the Appellate Division, Third Department, which reversed the County Court.

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SUZANNE R. ALBIN JOINS FINKELSTEIN NEWMAN

On May 2, 2006, Suzanne R. Albin joined Finkelstein Newman LLP, of counsel.

Albin has more than 15 years experience in the areas of commercial litigation and real-estate law. She most recently practiced at the firm of Borah, Goldstein, Altschuler and Schwartz, P.C., where she was a partner.

"This is an exciting opportunity," says Albin, a graduate of George Washington University and New York Law School. "I know all the attorneys at Finkelstein Newman and respect them highly."

Over the course of her career, Albin has handled a litany of state and federal real-estate and landlord-tenant cases: declaratory judgments, injunctive actions, foreclosures, bankruptcies, workouts, and real-estate transactions; and, has represented the interests of owners, lenders, receivers and various cooperative and condominium boards.

Albin is a member of the New York and New Jersey State Bars and has been admitted to practice before the United States Supreme Court, as well as the U.S. District Courts for the Southern and Eastern Districts of New York and the District of New Jersey. She has also practiced before the state courts of New York and New Jersey.

"I believe my varied experiences make me a valuable addition to the team," says Albin, a Westfield, N.J., resident who serves as Vice President of the Jewish Community Center of Central New Jersey.

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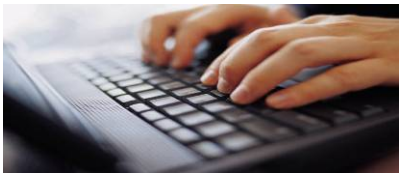

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JUNE 6, 2006

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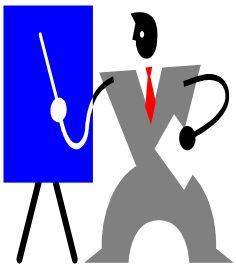

On Tuesday, June 6, 2006, from 8:30 A.M. to 4:30 P.M., partners Jonathan H. Newman and Robert Finkelstein will be the featured speakers at a Lorman-sponsored CLE. Joining them will be Bruce Feffer (Bruce Feffer & Associates) and Bruce S. Leffler (Goldfarb & Fleece)

ISSUES ON THE AGENDA

- Anticipating Litigation: How to Win (Or Lose) Your Case
- Landlord-Tenant Litigation: A Primer
- Let's Make A Deal – Use And Goals Of A Stipulation Of Settlement
- Special Considerations in Commercial Landlord-Tenant Proceedings
- Key Commercial Leasing Issues

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COLLECTING RENT FROM MONTH-TO-MONTH TENANTS

More often than not, the absence of a lease agreement will lead to problems. This can be especially true when dealing with month-to-month tenants. Such a tenancy usually comes into existence upon a landlord's acceptance of rent after the expiration of a lease, and/or when the parties have agreed to an open-ended arrangement to occupy space (whether it be commercial or residential), rent has been tendered and accepted, and, no lease or other writing related to the space exists. In order to end this kind of tenancy, the landlord must provide the tenant with a 30-day notice of termination pursuant to statute (New York Real Property Law).

Things can get particularly tricky when the occupant remains in possession of the space without remitting rent. For decades, many practitioners have been using nonpayment proceedings as a way to collect monies due. In a recent New York County Civil Court case, *305 Columbus, LLC. v. JP Morgan Chase Bank*, the court was asked to decide whether that procedure was legally correct. After considering the facts and the law, the Honorable Cynthia S. Kern determined that, "once [the tenant] became a month-to-month tenant, it was no longer bound by the rental obligations of the expired lease. Therefore, a nonpayment proceeding, predicated on tenant's default under the terms of the expired lease, cannot be maintained as there was no longer any agreement between the parties regarding the monthly rental amount."

Judge Kern relied upon several cases to support this holding. Most notably, *1400 Broadway v. Henry Lee & Co.*, wherein the tenant held over and paid one month's rent but remained in possession of the space for several months thereafter "rent-free." There, the court found that a nonpayment proceeding was not maintainable.

In that earlier case, the Honorable Michael D. Stallman reasoned that upon the creation of a month-to-month tenancy, to "permit the landlord to maintain a nonpayment proceeding under these circumstances, seeking payment at the lease rate would permit a landlord unilaterally to bind a tenant to payment at a rate predicated on a continuing agreement, even though there no longer was a meeting of the minds." Judge Stallman then noted that when such a tenant remains in possession of a residential or commercial space, the landlord is entitled to the "reasonable value" of the space which may be more, less, or the same as rent under the prior lease, if one existed. In any event, a landlord could only seek the recovery of such sums by way of a holdover proceeding or plenary (collection) action.

Clearly, month-to-month arrangements can be fraught with pitfalls—but these problems can be readily avoided. Outside of the rent-regulation context, all one need do is enter into a short-term lease or renewal setting the agreed-upon rental rate during the period the tenant will be in occupancy of the space. Had the parties in these two cases, contractually provided for a specific rental rate, their outcomes would likely have been quite different, and any unpaid rent would have been recoverable within a nonpayment proceeding.

If you have any questions or comments about this analysis, please contact partner Robert Finkelstein 212-619-5400 x 227 or email him at RFinkelstein@FinkelsteinNewman.com.

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The Appellate Division relied on *Humbert v. Trinity Church*--an 1840 case decided by the Court for the Correction of Errors (New York's highest state court until 1848)--which held that an adverse-possession claim can not be defeated by the occupant's knowledge or belief that another holds title to the land. Thus, Walling's state of mind was held to be immaterial. Although the Court of Appeals took a contrary position in *Van Valkenburgh v. Lutz*, where the claimant knew the disputed land was not his when he took possession and therefore could not satisfy the law's "claim of right" requirement, the Appellate Division discounted the high court's analysis as "dictum"—that is, commentary that was not required to reach the ultimate decision and was therefore not controlling precedent.

Since this "state of mind" conflict has plagued our courts for decades, the New York State Court of Appeals has agreed to hear the *Przybylo* case and hopefully will leave us with a clearer sense of the law. The dispute has also prompted legislative response. Assemblywoman Teresa Sayward of Willsboro has proposed a bill that would amend the law to prohibit a person from claiming title to a neighbor's property by adverse possession if they have a survey delineating their property. State Senator Betty Little of Queensbury advises that she will introduce a bill that would prohibit an occupant that knowingly enters another's land from acquiring title to it by adverse possession.

Because of the consideration being given to this issue by both the state's highest court and the state legislature, it is likely that additional developments will be forthcoming. Whether this age-old doctrine's viability will merely be reaffirmed or whether there will be some clarification of its current application is uncertain. All we can hope for is that the practical aspects of the doctrine will endure, and its needless complexities will fade away.

If you have any questions or comments about this analysis, please contact partner Lucas A. Ferrara at 212-619-5400 x 211 or email him at LFerrara@FinkelsteinNewman.com.

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