

“Get Out of My Backyard” Adverse Possession Claims

Adverse possession is a legal theory that allows one to assert a claim to property that is not his by taking, using and maintaining that property as if it were his. An adverse possession claim is typically asserted where one property owner makes use of part of a neighbor’s property, for example a portion of a driveway, for an extended period and then claims ownership to that part of the driveway when challenged by the true owner. To make out a claim for adverse possession, the adverse possessor must establish that he has been using that property, exclusively and openly, as if it were his, for a period of 10 years. In addition, in most situations, the adverse possessor must also improve or enclose the property. The idea is for the possessor to act as if he owns the property, ostensibly putting the true owner on notice that his property is being used by another.

To make out a claim for adverse possession, the adverse possessor must establish that he has been using that property, exclusively and openly, as if it were his, for a period of 10 years.

Until recently, there was a question as to whether the possessor had to know that the property that he was using was not his to satisfy the requirement that it be used openly, as if he owned it. One appellate court held that a possessor’s knowledge that the property belonged to someone else would defeat an adverse possession claim because the possessor’s use could never be considered use as an owner. A different appellate court, however, held that the possessor’s knowledge is irrelevant to the determination of adverse possession. So long as the possessor used the property as if he owned it, his knowledge, intent, and good faith, are immaterial. This theory allows an adverse possession claim even if the possessor knew

that the property which he used and now claims to own by adverse possession belonged to his neighbor during the time that he used it. Essentially, this allows one to use his neighbor’s backyard, in an open and notorious manner and years later claim ownership to that backyard, notwithstanding that the true owner was known to the possessor the entire time.

Recently, the question of the possessor’s knowledge reached New York’s highest court, the Court of Appeals. In *Walling v. Przybylo*, the court decided that so long as the possessor used the property as if it were his, to the exclusion of the true owner and without the owner’s objection, the possessor’s knowledge that the property was never his would not defeat the adverse possession claim. This decision surprised many as it seems to condone ownership by trespass.

The Firm recently assisted another attorney in representing a developer against a neighbor’s claim that a critical portion of a driveway was lost to the developer by adverse possession. In this case, the developer purchased a property and in the process of developing that property, learned that a portion of the driveway had been gated by a neighbor. When the developer demanded the removal of the gate, the neighbor sued claiming that while the gated portion of the driveway may have once been part of the developer’s property, it now belonged to the neighbor under a claim of adverse possession. Although this case is not yet resolved, it has caused months of delay for the developer, and illustrates how an adverse possession claim arises.

Tactic to Force Higher Buyout Price can Backfire

This article discusses a potential issue that may arise when one shareholder, in seeking to sell his interest in a corporation, uses a lawsuit as leverage to force a higher purchase price from the corporation. The issues apply equally to members of a limited liability company (“LLC”).

When a corporation or LLC is formed, the agreement among the shareholders or members¹ typically provides a method for a selling shareholder to sell his shares back to the corporation, and a formula to set a purchase price for that sale. The formula would also be used in other situations where a shareholder may be forced to sell his shares, including in bankruptcy or death (depending on the provisions of the shareholders’ agreement). This portion of the agreement between the shareholders is referred to as a buy-sell agreement. The buy-sell agreement can have a single, simple provision to effect the sale, or many provisions that provide for different methods for the shareholders to part ways. No matter the method of transfer, when a share holder sells to the corporation, the formula-set price dictates the price the corporation will pay for those shares. Often times, however, that formula is not updated, and when the issue of a shareholder seeking to sell arises, the formula-set price for the selling shareholder’s interest does not accurately value the shares, certainly in the view of the selling shareholder.

In an attempt to force a higher buyout price, it is not uncommon for that selling shareholder to seek the protection of the courts and file a petition asking the court to dissolve the corporation. This tactic is used in the hope that the defending shareholder would prefer to pay more than the formula price to avoid litigation, or the possibility that the court will grant the petition and dissolve the corporation, setting a value for the selling shareholder’s shares higher than the formula-set price. If this is the plan, the petitioning/selling shareholder would be wise to first consider the specific wording of the buy-sell agreement. If a selling shareholder’s buy-sell agreement is written too broadly, the filing of the petition could itself be construed by the court as an offer to sell shares to the corporation, and trigger the formula-set price.

This issue was first addressed in 1986 where a buy-sell provision was broadly written so that the formula-set price would be applied in the event of any disposition of the shares by the shareholder, including in the course of a “voluntary or involuntary disposition of the shares as part of a legal proceeding.” In that case, because

the filing of the petition was a legal proceeding, the court enforced the formula-set price. Until recently, only where that specific language was included in the buy-sell agreement was a petition deemed an offer to sell at the formula-set price. Recently, however, the court held that buy-sell language that included the phrase “disposition in any way whatsoever,” with nothing more, is also broad enough to include a disposition as part of a legal proceeding.

This is a matter of concern because many corporations and LLCs contain buy-sells with broad triggering language. If that is the case, a petitioning shareholder who is petitioning solely to force a higher buyout price may be not only wasting his time, but could end up with nothing more than the agreement’s formula-set price.

As an aside, a buy-sell agreement is usually part of a larger shareholders’ agreement which governs the relationship and responsibilities between the shareholders. Often times, individuals setting up a business minimize the importance of a shareholders’ agreement because they do not see any potential issue that could divide them. Anyone that doubts the important of a written shareholders’ agreement, should read the feature article in the November 2006 *Inc.* magazine. That story tells of a collapse of the relationship between partners of a long-standing and very successful business and the near dissolution of that business. Only a risky, and costly maneuver by one of the partners, allowed that business to survive. The partners in that case had no written agreement because when they formed the business they could envision no problems ever arising between them. By having a written agreement, those partners could have avoided their disagreement, saving much cost and aggravation, and not put their business at risk. If you would like to discuss further the details of a shareholder agreement, please call us at (212) 765-4567 or e-mail us at info@thesilberlawfirm.com.

¹ Although a LLC has members and not shareholders, the term shareholders will be used for both shareholders and members in this article.

This publication is a service to our clients, colleagues and friends and is designed to provide general information about the covered topics. The contents of this newsletter should not be considered legal advice nor does receiving this newsletter constitute an attorney-client relationship between The Silber Law Firm LLC and the recipient. Readers are advised not to take any action based on the material contained on this newsletter without consulting an attorney.