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Deed Theft: Recent New York Developments

New York State prosecutors, and the New York State legislature, have been focusing on the growing problem of deed thefts.

Long Island Man Charged with Deed Theft

New York Attorney General Letitia James recently indicted Joseph Makhani, 60, of Kings Point, Long Island, for deed theft, alleging that he stole two brownstones located at 107 West 118th Street and 135 West 131st Street in Harlem.

Prosecutors asserted that Makhani stole the two homes in 2012 through a scheme involving forged and falsified documents and shell companies to conceal and execute the thefts. As alleged, in New York state real estate tax filings, Makhani claimed to have paid only $10 for each home, but the properties had a combined estimated value of more than $4.7 million during the relevant times of possession. In one building, Makhani's actions allegedly resulted in a vulnerable and elderly homeowner being forced to live in a homeless shelter despite being the true owner of a property valued at approximately $2.9 million. In the other building, Makhani tried to evict tenants, causing confusion and stress, according to the government.

Makhani was arraigned in New York County Supreme Court before Judge Michele Rodney, where he pleaded not guilty to two counts of Criminal Possession of Stolen Property in the First Degree and one count of Scheme to Defraud in the First Degree. He faces a maximum penalty of eight and one-third to 25 years in state prison.

The West 118th Street Property

According to prosecutors, Makhani used forged deeds, other fraudulent documents, and shell companies to steal the brownstone located at 107 West 118th Street. The government asserted that, in a mortgage application filed by Makhani, he falsely claimed that he paid $975,000 for the brownstone and obtained a $650,000 construction loan for renovations. Makhani then allegedly refinanced and received a $1.2 million long-term mortgage loan on the property.

Moreover, the government said, Makhani also applied to the New York City Department of Housing Preservation and Development ("HPD") to convert the building into market-rate apartment rentals. According to prosecutors, from 2016 to 2023, Makhani rented each unit in the building out for approximately $3,000 and $3,400 per month, allowing him to collect a monthly rent income of more than $12,000. Makhani was able to amass this wealth while the elderly and vulnerable owner of the brownstone never received any money from him, according to the authorities. Prosecutors asserted that the true owner of the brownstone now lives in a homeless shelter while her stolen home recently was valued at approximately $2.9 million.

The West 131st Street Property

The government also asserted that Makhani illegally took ownership of the property located at 135 West 131st Street through falsified documents, shell companies, and other fraudulent tactics. As alleged, prior to Makhani's takeover, the last true deed recorded on this property was recorded in 1975 in the name of an elderly owner who died soon after. Around 2012, Makhani approached one of the building's tenants and said that he had purchased the brownstone, prosecutors said. Makhani allegedly secured the tenant's signature by pretending to offer him a job. Makhani then filed a new deed with that tenant's signature, misrepresenting the tenant as the owner, which was simply untrue, the government contended. It added that Makhani next transferred the brownstone to a company he controlled.

When Makhani's ownership of the brownstone and the deed were questioned in eviction cases brought by his company against the tenants, Makhani allegedly filed a new fraudulent deed that claimed the heirs of the last recorded owner had transferred the property to his company.

HPD sued Makhani in 2013, and in 2015 HPD obtained judgment for more than $1 million for his failure to appropriately maintain the brownstone, which was estimated to be worth $1.8 million. According to the government, soon after, Makhani abandoned the property, which was then foreclosed on by New York City.

Proposed Legislation

This past Spring, New York Attorney General Letitia James, State Senator Brian Kavanagh, State Senator Zellnor Myrie, and Assemblymember Helene Weinstein proposed new legislation to strengthen protections and remedies for victims of deed theft. In a statement she issued at the time, Attorney General James explained that deed theft "is a growing problem that predominantly targets Black and Brown homeowners" but that under New York's existing laws, "opportunities for prosecutors to hold deed thieves accountable are limited."

Attorney General James pointed out that, from 2014 to Spring 2023, the New York City Sheriff's Office counted nearly 3,500 complaints of deed theft throughout New York City, with more than 1,500 complaints in Brooklyn and 1,000 from Queens. Moreover, Attorney General James added, deed theft scams are not just limited to New York City. Throughout the state, district attorneys in Albany, Erie, Monroe, and Onondaga Counties have reported recent active deed theft complaints.

The two bills that were introduced in the New York State Legislature, one criminal, which would establish the crime of deed theft, and the other focused on changes to civil laws, are S6569 and S6577/A6656.

"Persons in Possession" Exception in Title Insurance Policy Barred Coverage for Insured's Claim, New York Trial Court Holds

A trial court in New York has granted summary judgment to a title insurer in a coverage dispute, finding that the title insurance policy's "persons in possession" exception to coverage applied to the insured's claim for damages stemming from an adjacent wall's encroachment on the insured's property.

The Case

As the court explained, the plaintiff in this case took title to property at 321 Manhattan Avenue (the "property") in Brooklyn, New York, by a deed dated July 29, 2015. The property was situated directly to the south of the neighboring parcel at 323 Manhattan Avenue. In conjunction with the purchase of the property, the plaintiff secured a $1,375,000 title insurance policy from the Stewart Title Insurance Company to provide insurance against loss or damages sustained as a result of defects in title or encroachments on the property.

The title insurance policy obtained by the plaintiff provided, in part, that the title insurer insured against loss or damage, not exceeding the amount of insurance, sustained, or incurred by the plaintiff by reason of:

> 2. Any defect in or lien or encumbrance on the Title. This Covered risk includes but is not limited to insurance against loss from . . .
>
> (b) Any encroachment, encumbrance, violation, variation, or adverse circumstances affecting the Title that would be disclosed by an accurate and complete survey of the land. The term "encroachment" includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments onto the Land of existing improvements located on adjoining land.

Schedule B of the title insurance policy set forth certain exceptions to coverage. The exceptions included:

1. Rights of tenants or persons in possession. . . .

Following the closing of title, the plaintiff said that it discovered that the southerly wall of the adjacent premises encroached approximately five feet into the second floor of the plaintiff's property for a length of approximately 15 feet, which encroachment the plaintiff discovered in the course of performing demolition work. According to the plaintiff, the encroachment was caused by the extension of the second floor bedroom of the adjacent property into and upon the plaintiff's property.

By letter dated February 4, 2016, the plaintiff provided the title insurer with notice of a claim. The title insurer denied the claim by letter dated March 17, 2016, based on, among other things, exception "1" (rights of tenants or persons in possession) in the title insurance policy.

The plaintiff sued the owners of the adjacent property, seeking an order ejecting the adjacent owners from the plaintiff's property (the "Ejectment Action"). In the Ejectment Action, the adjoining owner defendants interposed a counterclaim asserting title to the encroachment by way of adverse possession. The Ejectment Action was settled and discontinued pursuant to a stipulation of settlement dated July 13, 2017.

On January 13, 2020, the plaintiff sued the title insurer. In its complaint, the plaintiff maintained that the title insurer was obligated under the title insurance policy to provide coverage for loss or damage incurred by "[a]ny encroachment" and that the policy's exceptions to coverage were "not applicable."

In its answer, the title insurer set forth affirmative defenses that included, among other things, the exception language regarding rights of "persons in possession."

The parties moved for summary judgment.

In its motion, the plaintiff argued that there was no way of knowing that the encroachment existed because it was concealed entirety by opaque sheetrock walls and painted over. The plaintiff argued that, under prevailing national case law, the "persons in possession" exception only could be applied to deny coverage where the possession was open, visible, and exclusive. The plaintiff contended that the encroachment was not perceptible.

For its part, the title insurer argued that based on New York case law (as opposed to the out-of-state case law relied on by the plaintiff) the "persons in possession" exception was applicable to the encroachment – and that it was subject to a claim of adverse possession by the adjoining owners.

The Court's Decision

The court granted summary judgment in favor of the title insurer.

In its decision, the court explained that the adjoining owners' claim of ownership of the encroachment was grounded in adverse possession, the elements of which include an open, notorious, and exclusive possession. The court found that although the plaintiff argued that the encroachment was not perceptible from its property by casual inspection, the adjoining owners' adverse possession claim nonetheless "fell squarely within the [rights of persons in possession] exception from coverage."

Accordingly, the court declared that that the title insurer had no obligation, under the rights of persons in possession exception of the title insurance policy, to provide coverage, indemnify, or reimburse the plaintiff with respect to is claims regarding the encroachment.

The case is *321 Manhattan Ave, LLC v. Stewart Title Ins. Co.*, No. 500904/20 (N.Y. Sup. Ct. Kings Co. June 6, 2023).

Restrictive Zoning Ordinances Were Not Covered By Title Insurance Policy, New York Trial Court Rules

A trial court in New York has dismissed a policyholder's claims against a title insurance policy, holding that the policy covered defects in title and not zoning regulations that limited the policyholder's ability to demolish structures and construct a hotel on the insured property.

The court also dismissed a breach of contract claim against an agent for the title insurer, reasoning that the agent was not a party to the title insurance policy and, therefore, that it could not have breached the policy.

The Case

H 317-319 LLC, the plaintiff in this case, alleged in the lawsuit it filed against a title insurance company and a policy-issuing agent for the title insurer that the limited liability company was established in January 2016 for the purpose of constructing a hotel on the property located at 317-319 West 35th Street in New York City (the "property"). That month, the policy-issuing agent for the title insurance carrier issued a title report on the property. The plaintiff acquired title by deed dated April 18, 2016, two days after it purchased an owner's title insurance policy to insure the fee simple interest in the property.

According to the plaintiff, a number of years after the closing, on March 24, 2021, the New York City Department of Buildings sent the plaintiff a notice of objections based on the architectural plans that the plaintiff had submitted. In that notice, the department notified the plaintiff of six various zoning issues.

Specifically, the department said that the property was affected by restrictive zoning ordinances that prevented any demolition of structures on the property, thereby preventing the plaintiff from constructing a hotel as it had intended to do. The zoning resolutions affecting the property – the Special Garment Center District and the Special Hudson Yards District – were established in 1987 and 2005, respectively, which was many years prior to the date of the title insurance policy purchased by the plaintiff.

The plaintiff sued the title insurer and the agent for breach of contract and negligence and for declaratory relief. The title insurer and the agent moved to dismiss.

The title insurer contended that the restrictive zoning ordinances were not covered by the policy because they were not a defect in the title or a lien or encumbrance on the title. Rather, the title insurer contended that the restrictive zoning ordinances were governmental restrictions on the plaintiff's use of the property that were not covered by the policy and that were specifically excluded from coverage under Section 1(a), "EXCLUSIONS FROM COVERAGE," of the policy.

For its part, the agent argued that it was not a party to the title insurance policy and, therefore, that it did not have the capacity to process, approve, or deny claims against the policy or to breach the policy.

The Title Insurance Policy

The title insurance policy provided:

> SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, FIRST AMERICAN TITLE INSURANCE COMPANY . . . insures, as of Date of Policy and, to the extent stated in Covered Risks 9 and 10, after Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of: . . .
>
> 3. Unmarketable Title.

The title insurance policy defined "Unmarketable Title" as:

Title affected by an alleged or apparent matter that would permit a prospective purchaser or lessee of the Title or lender on the Title to be released from the obligation to purchase, lease, or lend if there is a contractual condition requiring the delivery of marketable title.

The title insurance policy expressly excluded from coverage:

1. (a) Any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to

(i) the occupancy, use, or enjoyment of the Land;

(ii) the character, dimensions, or location of any improvement erected on the Land;

(iii) the subdivision of land; or

(iv) environmental protection;

(v) or the effect of any violation of these laws, ordinances, or governmental regulations.

The Court's Decision

The court granted the defendants' motions to dismiss.

In its decision, the court explained that a title insurance policy is a contract by which the title insurer agrees to indemnify its insured for loss occasioned by a "defect in title." A title insurance policy, the court added, insures against loss by reason of defective titles and encumbrances and insures "the correctness of searches for all instruments, liens or charges" affecting the title to the insured property. The court then said that liability of a title insurer to its insured "is essentially based on contract law" and, as such, "is governed and limited by agreements, terms, conditions and provisions" contained in the title insurance policy.

Applying these principles, the court held that, under the plain terms of the title insurance policy, the Special Garment Center District and the Special Hudson Yards District "were excluded from coverage as they arose from a zoning regulation."

With respect to the agent, the court concluded that because the agent was not a party to the title insurance policy, it could not have breached the policy, and the plaintiff's breach of contract claim against the agent had to be dismissed.

The case is *H 317-319 LLC v. First American Title Insurance Co.*, No. 720678/2021 (N.Y. Sup. Ct. Queens Co. June 30, 2023).

California Court Dismisses Insured's Complaint Against Title Insurer as Untimely Filed

A trial court in California has dismissed a lawsuit brought by a policyholder against her title insurance carrier after finding that the lawsuit was time barred.

The Case

The plaintiff in this case purchased a title insurance policy (the "Policy") from North American Title Insurance Company for property located at 8848 Farralone Avenue in Canoga Park, California (the "Property"). The Policy became effective on August 16, 2011.

In October 2017, the City of Los Angeles recorded a Notice of Abatement against the Property in the public record, stating that the structures on the Property did not have permits or certificates of occupancy as required under the applicable Los Angeles Municipal Code. The plaintiff alleged that she did not know of the Municipal Code violation until it was recorded in the Notice of Abatement.

The plaintiff submitted claims to the title insurer under the Policy. The title insurer denied coverage and the plaintiff sued for breach of contract and breach of the covenant of good faith and fair dealing.

The title insurer moved to dismiss. The title insurer argued, among other things, that the plaintiff's claims were barred by the statute of limitations. It reasoned that the plaintiff asserted that the first time she discovered the facts giving rise to her losses was in October 2017, when the City of Los Angeles recorded a Notice of Abatement against the Property. Given this, the insurer argued that the statute of limitations began to run in October 2017 and, therefore, expired in October 2019. Because the plaintiff did not file her lawsuit until March 14, 2023, the insurer argued that the plaintiff's claims were time-barred.

For her part, the plaintiff argued that the statute of limitations did not begin to accrue until March 21, 2021, when the insurer first sent the plaintiff correspondence providing a preliminary analysis denying coverage. The plaintiff contended that she only incurred damages once the insurer denied her claims.

The Court's Decision

The court granted the title insurer's motion to dismiss the plaintiff's complaint as untimely.

In its decision, the court explained that a two-year statute of limitations period applied to the plaintiff's claims under the Policy. The court added that California law provides that a cause of action under a title insurance policy "shall not be deemed to have accrued until the discovery of the loss or damage suffered by the aggrieved party thereunder."

The court found that a cause of action under a title insurance policy accrues upon "discovery of the loss that may be incurred if the title is not as represented in the policy." In other words, the court continued, in title insurance cases, the statute of limitations runs upon "discovery" of an adverse claim, even if the adverse claimant has taken no action to enforce its claim. This is because, the court continued, the "possible existence of a cloud on title results in immediate damage, even without formal enforcement of the claim." Because the plaintiff affirmatively alleged that she discovered the factual

predicate of her action when she received the Notice of Abatement in October 2017, the alleged date of discovery, and thus, the date of accrual, rendered the plaintiff's action untimely, the court ruled.

The court also rejected the plaintiff's contention that the limitations period was equitably tolled while the insurer investigated the plaintiff's claim.

Under California law, the court observed, in an action by an insured against an insurer, the statute of limitations was tolled "from the time the insured files a timely notice, pursuant to policy notice provisions, to the time the insurer formally denies the claim in writing." However, the court continued, it was clear that "tolling can only suspend the running of a statute that still has time to run; it cannot revive a statute which has already run out."

The court then found that although the plaintiff alleged that the insurer did not indicate to the plaintiff that it intended to deny coverage until March 2021, that fact alone was "not sufficient to plead an entitlement to equitable tolling" because it did not establish that the plaintiff submitted her claim to the insurer "prior to the expiration of the statute of limitations (i.e., prior to October 2019)." The insurer's investigation can only "toll" the statute of limitations – it "cannot revive an otherwise-expired limitations period," the court emphasized.

The court concluded by stating that if insured plaintiffs were entitled to use the date upon which coverage was denied as the date governing the statute of limitations, it would not only be contrary to the plain language of the statute, which expressly pegs the date of accrual to the discovery of loss, but such a rule "would also give insureds the power to extend the limitations period indefinitely."

As such, the court concluded, the plaintiff's complaint was "untimely on its face" and failed to establish a plausible basis for equitable tolling.

The case is *Gennaro v. North American Title Ins. Co.*, No. CV 23-3991-MWF (AGRx) (C.D. Cal. Aug. 10, 2023).

Title Insurer Owed No Duty to Non-Party to Transaction, Texas Appellate Court Says

An appellate court in Texas, affirming a trial court's decision, has ruled that a title insurer that acted as the closer of a sale of real estate and as escrow agent in the transaction did not owe any duties to non-parties to the transaction.

The Case

Johnnie R. Sandles filed a lawsuit in a state court in Texas against David Bejar, alleging that Sandles was the owner of real property in Harris County, Texas, and that Bejar had unlawfully entered and dispossessed Sandles of the property. Sandles alleged that a purported deed from Jerome Wilkenfeld to David Gentry was a forgery and, therefore, that the deed from Gentry to Bejar did not convey good title.

Sandles also sued the title insurer, seeking to hold it liable "for its negligence, errors and omissions for not timely and diligently discovering the true record title holder ([Sandles]) of the real property" that was at the heart of his lawsuit.

The title insurer moved to dismiss, arguing that Sandles' negligence claim had no basis in law. The title insurer contended that it did not owe a duty to Sandles because Sandles was not a party to the closing between Gentry and Bejar, or to the escrow agreement.

Sandals filed a response and the parties filed supplemental briefings, responses, and replies in support of their arguments.

After considering the issues, the trial court granted the title insurer's motion and dismissed Sandles' claims against the title insurer with prejudice. Sandles appealed.

The Appellate Court's Decision

The appellate court affirmed.

In its decision, the appellate court explained that, to prove an action for negligence, a plaintiff must establish that the defendant had a legal duty. The appellate court then ruled that the title insurer owed no duty to Sandles.

The appellate court was not persuaded by Sandles' contention that because the title insurer acted as the closer of the sale of the property to Gentry and was responsible for the title commitment and title insurance, it owed a duty to Sandles. The appellate court explained that a title insurer acting as closer and escrow agent in a real estate transaction "does not owe duties to non-parties to the transaction." Moreover, the appellate court continued, "the only duty imposed by a title insurance policy is the duty to indemnify the insured against losses caused by defects in title."

Therefore, the appellate court concluded, the title insurer did not owe a duty to Sandles and his negligence claim had "no basis in law."

The case is *Sandles v. Fidelity National Financial, Inc.*, No. 14-22-00462-CV (Tex. Ct. App. Aug. 17, 2023).

Title Defect Did Not Affect Validity of Contract for Sale of Real Estate, Indiana Appellate Court Affirms

An appellate court has affirmed a trial court's decision in a breach of contract action, concluding that the trial court did not err in (i) upholding a contract to sell real estate by a seller who was not the titled owner, and (ii) finding that the seller had not committed fraud.

The Case

As the court explained, on September 1, 2010, Vinod Gupta purchased a tax sale certificate for certain property (the "Property") located in Owen County, Indiana. Thereafter, Gupta titled the Property in the name of Wiper Corporation (the "Corporation"), a company of which he was president. The tax sale deed was recorded November 18, 2011.

On February 27, 2015, Gupta, in his personal capacity, and William Bates and Greg Bates (the "Purchasers") executed a real estate contract (the "Contract") pursuant to which Gupta agreed to sell the Property to the Purchasers for $25,000.

Upon execution of the Contract, the Purchasers made a down payment to Gupta of $1,000. They consistently made monthly payments, often for more than the minimum due, for three and one-half years. In total, the Purchasers paid $14,450.28 in principal and interest, calculated at a rate of 8 percent per annum. They also paid the property taxes, insurance premiums, underground storage tank ("UST") fees, and the costs for mowing and maintenance, all as required by the Contract. The Purchasers spent substantial funds relining the USTs and performing testing required by the Indiana Department of Environmental Management ("IDEM").

Section 3 of the Contract provided that any evidence or assurance of title was to be obtained at the expense of the Purchasers, but they did not obtain a title search before the closing. The Contract also contained a provision in which the Purchasers acknowledged that Gupta had made no warranties or representations pertaining to the quality or condition of the Property and that they had inspected the premises and agreed to purchase the Property in an "'AS IS' CONDITION WITH ALL ITS FAULTS."

In 2018, the IDEM instituted regulatory proceedings concerning remediation and cure for the USTs on the Property and assessed a civil penalty of $10,100. This prompted the Purchasers to seek legal advice. They then learned that the Property had not been titled to Gupta when they purchased it but, instead, had been titled to the Corporation.

After November 2018, the Purchasers stopped making payments under the Contract and they did not pay any additional property tax installments, insurance, or maintenance fees. As of that time, $16,747.20 of the original $25,000 contract price remained unpaid.

After several months of nonpayment, Gupta contacted the Purchasers, and they informed him that they were no longer interested in purchasing the Property, citing their concerns about continued

liability related to the USTs and the title defect they discovered. Gupta immediately offered to cure the title defect by retroactively ratifying the Contract on behalf of the Corporation, but the Purchasers refused Gupta's offer. Gupta then offered to sign the Property over to the Purchasers by quitclaim deed on behalf of the Corporation and to forego collection of the remaining balance of the purchase price. The Purchasers rejected this offer as well, informing Gupta that they were no longer interested in the Property and that they would not accept title under any circumstances.

In November 2019, the Purchasers sued Gupta and the Corporation, alleging breach of contract, fraud, and negligent misrepresentation, and seeking actual and punitive damages.

Following a bench trial in an Indiana state court, the trial court decided that the Contract was a valid contract, and it entered judgment in favor of Gupta.

The Purchasers appealed.

The Appellate Court's Decision

The appellate court affirmed.

In its decision, the appellate court reasoned that the Purchasers and Gupta executed the Contract and that for the next three and one-half years, the Purchasers acted in accordance with the terms of the Contract by paying the downpayment, monthly installments, property taxes, insurance, maintenance fees, and other costs. Indeed, the appellate court continued, there was no dispute that the parties intended to execute the Contract and to be bound by the terms.

The appellate court added that for over three years, the parties were unaware of the title defect, proving that it had no bearing on their intent in executing the Contract. Moreover, the appellate court continued, had the Purchasers completed a title search prior to executing the Contract, they would have discovered the title defect and had it corrected prior to executing the Contract.

The appellate court then decided that the trial court's findings of fact were supported by the record and those findings supported the trial court's conclusion that there was a valid contract between Gupta and the Purchasers for the sale of the Property.

The appellate court next rejected the Purchasers' contention that the trial court erred in failing to find that Gupta committed fraud when he purported to sell real estate of which he was not the titled owner.

The appellate court explained that the elements of actual fraud are: (a) material misrepresentation of past or existing facts by the party to be charged, (b) which was false, (c) which was made with knowledge or reckless ignorance of the falseness, (d) which was relied upon by the complaining party, and (e) which proximately caused the complaining party injury.

As the appellate court observed, Gupta acknowledged that he should not have executed the Contract in his personal capacity but rather on behalf of the Corporation, of which he was the registered agent. The appellate court added that, in rejecting the Purchasers' claims of fraud, the trial court accepted Gupta's testimony that the representation in the Contract that he was the titled owner of the Property was an "honest mistake resulting from his ownership and management of numerous properties in Owen County" and that Gupta's explanation was "supported by the uncontested evidence that, upon being notified of the mistake, Gupta . . . immediately offered to cure the title defect." The appellate court declared that it would "not second-guess the trial court's evaluation of the evidence or assessment of Gupta's credibility." The findings supported the trial court's conclusion that Gupta did not misrepresent ownership with knowledge or reckless ignorance of its falseness, according to the appellate court.

Finally, the appellate court addressed the Purchasers' suggestion that Gupta committed fraud because he was aware of the severity of the problems with the USTs but did not disclose those problems

to the Purchasers. The appellate court found that their argument was "not supported by the record." The appellate court pointed out:

- The trial court accepted Gupta's testimony that he had not withheld information and that, in fact, the purchase price was discounted because of the existence of the USTs;
- The Purchasers admitted that they knew there were USTs on the Property and that they had the right to inspect the Property before executing the Contract; and
- In executing the Contract, the Purchasers acknowledged that they were accepting the Property "as is."

Accordingly, the appellate court concluded, the Purchasers did not establish that the trial court erred in determining that Gupta did not commit fraud.

The case is *Bates v. Wiper Corp.*, No. 23A-PL-27 (Ind. Ct. App. Aug. 23, 2023).

Connecticut Trial Court Denies Plaintiff's Prescriptive Easement Claim

A trial court has ruled that a plaintiff did not have a prescriptive easement over a road abutting her property, finding that she failed to demonstrate continuous and uninterrupted use of the road for the statutory 15 year period.

The Case

The plaintiff in this case owned residential property known generally as 5 Evans Court. The plaintiff's property abutted a private road known as Mallards Lane. The plaintiff filed a lawsuit seeking to have the court declare that, as a result of her conduct and that of her family, she acquired a prescriptive easement over Mallards Lane. Among other things, the plaintiff alleged that at some point in the late 1990s or as early as 2002, her husband began driving a motor vehicle over the southwesterly section of their property onto Mallards Lane.

The defendants in the plaintiff's lawsuit were the current or past owners of properties that abutted Mallards Lane, each of whom has or had an undivided interest in Mallards Lane. Among other things, the defendants filed a counterclaim seeking a declaration to the effect that the plaintiff had no interest, prescriptive or otherwise, in Mallards Lane.

The case was tried to a Connecticut court over three non-consecutive days in early April 2023 and the briefing scheduled ended on June 9, 2023. Thereafter, the court issued its ruling.

The Court's Decision

The court decided that the plaintiff had not acquired a prescriptive easement over Mallards Lane.

In its decision, the court explained that the statutory elements necessary to establish an easement by prescription under Connecticut law are that a use was:

- Open and visible;
- Continuous and uninterrupted for 15 years; and
- Engaged in under a claim of right.

The court then found that the plaintiff's evidence fell "far short" of establishing the necessary elements of a prescriptive easement. In the court's view, the better evidence was that the plaintiff's husband did not start driving onto Mallards Lane from 5 Evans Court until 2002, and that even beginning in 2002, the better evidence was to the effect "that neither he nor his children began driving any vehicles over Mallards Lane from 5 Evans Court with any regularity until approximately 2008."

The court added that even if there was open and visible use of Mallards Lane under a claim of right, "it was clearly interrupted in 2008" when the defendants planted a Blue Spruce and a Norwegian Spruce that prevented vehicular access to Mallards Lane from 5 Evans Court for at least two years.

According to the court, any "open use and continuous use" did not restart until approximately 2019 – and that in 2019 the defendants constructed a stone wall preventing that access and thwarting any plausible claim by the plaintiff that she established continuous and uninterrupted use for 15 years.

The court then entered judgment in favor of the defendants, concluding that the plaintiff had no prescriptive easement or other interest in the property known as Mallards Lane

The case is *Zucaro v. Andruik*, No. FST-CV20-6045737-S (Conn. Super. Ct. Aug. 21, 2023).

Plaintiffs Fail in Effort to Collectively Claim Property By Adverse Possession

A trial court in Connecticut has granted a defense motion to strike the plaintiffs' group adverse possession claim as legally insufficient, reasoning that state law did not support collective claims for adverse possession.

The Case

The plaintiffs in this case were owners of lots on Bashan Lake in East Haddam, Connecticut. A "right of way" ("ROW") lot on the lake was vacant and undeveloped. The defendants owned property on the lake across from the ROW lot.

The plaintiffs claimed that they owned the ROW lot by adverse possession. They alleged that they used and enjoyed the ROW lot for more than 15 years before filing their lawsuit, and that their use and possession was, at all times, open, visible, notorious, adverse, exclusive, continuous, and uninterrupted. Notably, the plaintiffs alleged that:

> The plaintiffs and their predecessors in the title and the defendants' predecessors in title of their individually owned lots in the subdivision have used and enjoyed the subject right of way lot for more than fifteen years prior to the commencement of this action and such use and possession has been at all times, open, visible, notorious, adverse, exclusive, continuous, uninterrupted and the plaintiffs and their predecessors in title and the defendants and their predecessors in title of their individually owned lots in the subdivision have all acquired sole and exclusive joint title to the premises.

Additionally, the plaintiffs alleged that the defendants blocked the lot, making it difficult for the plaintiffs to access.

The defendants filed a motion to strike the plaintiffs' adverse possession claim. They argued that the plaintiffs' adverse possession claim was legally insufficient because adverse possession was not and could not be a group claim.

The Court's Decision

The court granted the defendants' motion.

In its decision, the court explained that, to establish title by adverse possession, a claimant must oust an owner of possession and must keep the owner out without interruption for 15 years by an open, visible, and exclusive possession under a claim of right with the intent to use the property as the claimant's own and without the consent of the owner.

The court then ruled that the plaintiffs had not sufficiently pled an action for adverse possession. The court pointed to the fact that the plaintiffs failed to allege that they had ousted the defendants from use of the land.

Moreover, the court continued, the plaintiffs' attempt to claim adverse possession by multiple owners was "inherently contradictory to the claim of exclusive use."

The court concluded that the plaintiffs did not even allege that they had use of the ROW lot to the exclusion of the defendants but, rather, they alleged that the plaintiffs and the defendants all had the same use. Accordingly, the court granted the defendants' motion to strike.

The case is *Abramczky v. Lazos*, No. MMX-CV-21-6030948-S (Conn. Super. Ct. July 28, 2023).

Illinois Appellate Court Upholds Decision That Defendants Took By Adverse Possession Portion of Driveway Encroaching on Plaintiffs' Property

An appellate court in Illinois has ruled that a trial court properly granted summary judgment in favor of the defendants on their counterclaim that they took by adverse possession the portion of their driveway that encroached on the plaintiffs' property. The court reached this conclusion notwithstanding the plaintiffs' contention that the plaintiffs and the defendants were unaware that the defendants' use of that portion of the driveway was a trespass.

The Case

The plaintiffs in this case, Fangzhou Dai and Yingyi Xu, filed an action for ejectment against their neighbors, Robert and Marie Schroeder. The plaintiffs alleged that:

- Their property (the "south property"), to which they held title since September 4, 2018, was bordered on the north by the Schroeders' property (the "north property");
- A driveway was developed on the north property, consisting in part of a circular drive at the front of the residence; and
- The southern curve of the circular drive occupied part of the south property at its northern edge (the "driveway extension").

In response, the Schroeders, who acquired the north property in 2008, asserted that they owned the driveway extension by adverse possession. The Schroeders alleged that:

- For 20 years or more before the plaintiffs filed their action, the north property's driveway, including the extension, had been used exclusively for their benefit and the benefit of the prior owners of the north property;
- This prior use of the driveway had been open, as the driveway and the extension were always visible; and
- The north property owners had occupied, improved, maintained, and controlled the driveway extension without either the permission of the south property owners or any legal action against the north property owners.

The Schroeders moved for summary judgment, arguing that they had established as a matter of law that they owned the driveway extension by adverse possession.

The trial court granted summary judgment for the Schroeders, and the plaintiffs appealed. The plaintiffs contended that the Schroeders's proof fell short on three elements of adverse possession: hostility or adversity, openness, and exclusivity.

The Appellate Court's Decision

The appellate court affirmed, ruling that the trial court correctly held that, as a matter of law, the Schroeders achieved title to the driveway extension by adverse possession.

In its decision, the appellate court explained that, under Illinois law, to establish title to real property by adverse possession, a party must prove that, for 20 years, the party's possession of the property was continuous; hostile or adverse; actual; open, notorious, and exclusive; and under a claim of title inconsistent with that of the true owner.

The appellate court then rejected the arguments the plaintiffs put forth in an attempt to have the appellate court reverse the trial court's decision.

First, the appellate court explained that hostility "does not imply actual ill will, but only the assertion of ownership incompatible with that of the true owner and all others." The requirement, the appellate court said, was adverse "use," not adverse "intent." Therefore, a claimant's lack of knowledge that another held record title did not defeat a claim of adverse possession.

The appellate court also agreed with the trial court that the Schroeders proved that the owners of the north property used the driveway extension adversely for the requisite period. The appellate court pointed out that the plaintiffs produced no evidence of permission by any owner of the south property at any time. Indeed, the appellate court continued, the plaintiffs argued that, for most of the 20-year period, the owners of the south property were unaware that the driveway extension lay on land

to which the south property owners had title. Possession could not be permissive if neither the owners nor the possessors knew that there was any encroachment, the appellate court observed.

Next, the appellate court rejected the plaintiffs' contention that the Schroeders did not establish as a matter of law that the north property owners' use of the driveway extension was open and notorious for the 20 year period on the ground that the owners of both properties were unaware that the north property owners' use of the driveway extension was a trespass. The appellate court said that the plaintiffs misunderstood the nature of "open and notorious use," explaining that it "need not be recognized as a trespass at the time." In this case, the appellate court observed, "nothing was hidden or obscure about the north property owners' regular use of the driveway – necessarily including the extension – to travel between their home and their places of work, shopping, and other activities."

Finally, the appellate court rejected the plaintiffs' contention that the Schroeders' use of the driveway extension was not exclusive, finding that it was "undisputed" that, for more than 20 years after the driveway was finished, the owners of the north property used the extension as their own, and the owners of the south property never possessed it, even though they might have walked across it or stumbled onto it on occasion.

The case is *Fangzhou Dai v. Minchella & Associates, Ltd.*, No. 2-22-0411 (Ill. Ct. App. Aug. 21, 2023).

Connecticut Trial Court Dismisses Adverse Possession Claim to Strip of Land Measuring Approximately 15.5 Inches in Width

A state trial court has ruled that a defendant in a quiet title action failed to demonstrate that she owned by adverse possession a narrow strip of land between the property that she owned and her neighbor's property line.

The Case

The plaintiff in this case purchased property at 323 Ocean Avenue in New London, Connecticut, on April 28, 1993. At the time, a fence was on the plaintiff's property, approximately two feet from the boundary line of the plaintiff's property.

The plaintiff's next door neighbor (the "defendant") purchased the property at 317 Ocean Avenue in November 2009; she moved in two weeks later. The defendant owned a dog that learned to shimmy under the plaintiff's fence where a hole had developed, and the plaintiff would play with the dog. The defendant, however, did not want her dog going under the fence because she was trying to train the dog to stay in her yard. In response to the dog making its way under the hole in the plaintiff's fence, the defendant erected on the strip of land adjacent to the plaintiff's fence chicken wire attached to two metal rods approximately three feet apart to cover the hole.

A dispute arose on or about May 20, 2013, when the plaintiff told the defendant not to put the chicken wire on his property. The plaintiff was upset that the defendant had not first asked permission. In response to the dispute, the defendant called the police. The police spoke with both parties and no arrest resulted.

After the defendant erected her own fence along the disputed strip of land, the plaintiff went to court for an order that the plaintiff was the rightful owner of the strip of land. The defendant countered that she was the owner by adverse possession.

The Court's Decision

The court ruled that the strip of land, approximately 15.5 inches in width between the parties' properties, should be titled in the name of the plaintiff and that the defendant had to remove the chicken wire, posts, and fencing she erected on the strip of land owned by the plaintiff.

In its decision, the court first ruled that the defendant had not demonstrated that she owned the disputed strip of land by adverse possession. In the court's view, the defendant had not proved that the plaintiff "was ousted from possession and kept out uninterruptedly for fifteen years under a claim of

right by an open, visible and exclusive possession." There was no "clear and positive proof of adverse possession," the court decided. Accordingly, the court ruled that the defendant had no right, title, or interest in the disputed land.

The court also ruled that the defendant had trespassed on the plaintiff's property. The court explained that, under applicable state law, the essentials of an action for trespass were:

- Ownership or possessory interest in land by the plaintiff;
- Invasion, intrusion, or entry by the defendant affecting the plaintiff's exclusive possessory interest;
- Done intentionally; and
- Causing direct injury.

The court concluded that the plaintiff had proven each element of trespass by the defendant's "erecting the chicken wire and subsequent fencing" on the plaintiff's property. The court reasoned that the plaintiff owned the property, the defendant's intrusion affected the plaintiff's "exclusive possessory interest," the defendant's actions "were done intentionally," and the defendant's actions "caused direct injury to the plaintiff."

The case is *Shackles v. Booth*, No. KNL-CV19-6042445 (Conn. Super. Ct. Aug. 9, 2023).

Connecticut Trial Court Rejects Personal Injury Plaintiff's Claim That Property Owner Acquired Property By Adverse Possession

A trial court in Connecticut has granted summary judgment to a defendant in a personal injury action, finding that the defendant did not gain title, by adverse possession, to property on which the plaintiff allegedly had been injured.

The Case

The plaintiff in this case alleged that she was injured while crossing from a grassy area in Norwich, Connecticut, that was owned by the State of Connecticut and that abutted property at 3 Taftville-Occum Road (the "property"), where the plaintiff resided. According to the plaintiff, she stepped on a broken portion of a concrete retaining wall running alongside the driveway of the property, her foot slipped and twisted, and she fell to the ground.

The plaintiff sued the owner of the property (the "defendant"), seeking damages. She claimed that the retaining wall was owned and controlled by the defendant and, therefore, that it was the defendant's responsibility to maintain and manage it.

The defendant denied ownership of the retaining wall and obtained a land survey that determined that the retaining wall was situated on the State of Connecticut's property, approximately one foot from its border with the defendant's property.

The defendant moved for summary judgment, arguing that she had no duty to maintain the retaining wall as that was the responsibility of its owner, the State of Connecticut.

The plaintiff objected, arguing that ownership was not always dispositive of the issues of maintenance, management, and control, and that, in fact, the defendant had exercised dominion and control of the retaining wall. In particular, the plaintiff contended that the defendant, having taken it upon herself to mow the grassy area, had acquired that land and the retaining wall by adverse possession and had thereby assumed a duty to maintain it.

In response, the defendant noted that title to realty held in fee by the state or any of its subdivisions for a public use could not be acquired by adverse possession.

The Court's Decision

The court granted the defendant's motion for summary judgment.

In its decision, the court agreed with the plaintiff's assertion that the duty to maintain property and keep it reasonably safe sometimes extended to parties other than the property owner.

For example, the court noted, the fact that a lease for a store did not include the pavement at the entrance to the store did not necessarily mean that the lessee had no duty to maintain the pavement in a reasonably safe condition for its business invitees.

Similarly, the court added, the owner/operator of a supermarket had a duty to keep its parking lot reasonably safe for its customers, even if the parking lot was not part of the leased premises, as the parking lot, as an accommodation to its customers, was essential to the supermarket's business.

The court then reasoned that the "common denominator of these cases" was that the conditions at issue were ones that affected the safe access to and egress from the subject premises by business invitees. In contrast, the court said, the allegedly defective condition the plaintiff complained about in this case was "not located at a point of access to or egress from the building on the defendant's premises."

Moreover, the court added, the record was devoid of "any evidence that the defendant knew or should have known that the path taken by the plaintiff across the retaining wall was one customarily taken by the defendant's tenants and invitees to enter or leave" the property.

Concluding that there was no genuine issue of material fact as to whether the defendant had a duty to maintain a structure that she did not own or otherwise control, the court granted the defendant's motion for summary judgment.

The case is *Lassu v. Senuta*, No. KNL-CV22-6056763S (Conn. Super. Ct. July 27, 2023).