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Survey Says... Record Owner Pays Punitive Damages

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The Fourth Department recently handed down a (3-2) decision that appears to be the first New York appellate case to hold that a trespass to land held by adverse possession can trigger an award of punitive damages.[1]

The facts

In the memorandum opinion, the court gave an abbreviated version of a complicated set of facts. Plaintiffs owned Lot 8,[2] which was improved with a camp that was originally built around 1971. They are successors to their parents, who had purchased the camp in 1983. Lot 7 abuts Lot 8 immediately to the east. Defendant purchased Lot 7 in 2004 and then commissioned a survey based upon his deed description. Defendant's survey indicated that the camp improvements overlapped the boundary between the lots by approximately 2 ½ feet. Plaintiffs commissioned their own survey, which indicated that the boundary was approximately 10-12 feet east of the location shown on the defendant's survey. The court referred to this 10'-12' wide strip as the "disputed area." It is unclear from the opinion how far the camp improvements extended into the disputed area on the plaintiffs' survey.

The holding

The court rapidly concludes that the title to the disputed area ripened in the plaintiffs (or their predecessors) through adverse possession decades before the defendant neighbor moved in and commenced his trespass. ***Note that this result emphasizes that the defendant's survey was accurate.***[3] The defendant's conduct included desecrating a memorial erected to the father of one of the plaintiffs, plugging plaintiffs' vent pipe, entering their cellar and "rendering their toilet unusable." The majority believed that this conduct continued despite the fact that the defendant was aware of the claim of title through adverse possession. (The dissent differs on this point. See *The Dissent*, *infra.*)

Relying on precedent where punitive damages have been awarded for trespass to land acquired by deed, the court concludes that the neighbor's conduct, "amounted to a wanton, willful or reckless disregard of plaintiffs' rights,"[4] despite his possession of a survey that appeared to support his own claim of record title. Defendant's conduct was intentional, "evince[d] a high degree of moral turpitude and demonstrate[d] such wanton dishonesty as to imply a criminal indifference to [his] civil obligations.'"[5]

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The damage award

The trial court, sitting without a jury, had originally awarded $200,000 in punitive damages. The Appellate Division concluded that that amount was "so grossly excessive as to show by its very exorbitancy that it was actuated by passion (*Nardelli v Stamberg*, 44 NY2d 500, 504, 377 N.E.2d 975, 406 N.Y.S.2d 443)" (internal quotations omitted). Based on awards in other land trespass cases,[6] the panel concluded that $15,000 is the amount that "bears a reasonable relation to the harm done and the flagrancy of the conduct causing it.'" It vacated the award and granted a new trial on the amount of punitive damages "unless plaintiffs … stipulate to reduce that award to $15,000, in which event the order and judgment is modified accordingly."

It is noteworthy that the "actuated by passion" test enunciated in *Nardelli* was intended to guide trial judges in their discretion to limit punitive damages awarded by juries. In this case, it was invoked to support the reduction of an award made by the trial judge, who is presumably best situated to assess the level of moral turpitude and wanton dishonesty demonstrated by the trial testimony.

The dissent

The majority opinion states that the "defendant was aware that there was a dispute over the property line, and he granted plaintiffs permission to continue to use [the disputed area]" *before* he commenced his trespass.

The dissent, however, points out that the plaintiffs waited for two years following the defendant's assertion of ownership before bringing suit. In the interim, the dissenters believe that "the survey that defendants commissioned gave defendant a reasonable and factual basis to believe that he owned the disputed area." Furthermore, "once plaintiffs commenced this action and placed defendants on notice that they were asserting title to the disputed area by adverse possession, there were no further incidents of trespass by defendant." As a result, the dissent finds no basis for a punitive damages award.

The bottom line

Landowners frequently believe that a deed and/or a survey give them the authority to remove or destroy any encroachment on "their land." As this case so vividly demonstrates, taking such action before understanding all the facts involved in a boundary dispute can lead to liability far in excess of the value of the "offending" encroachments. Clients should be encouraged to contact counsel or their title insurer instead of resorting to self-help in this situation.

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1. West, et al. vs. Hogan, et al., 2011 NY Slip Op 07086 (Oct. 7, 2011) (http://www.nycourts.gov/reporter/3dseries/2011/20110708 6.htm).
2. The opinion does not mention the map to which the recited lot numbers refer.
3. Were plaintiffs' survey accurate, they would have had record title to the disputed area without having to prove adverse possession.
4. Citing *Ligo v. Gerould*, 244 AD2d 852, at 853 (4th Dept. 1997).
5. Citing *Ross v Louise Wise Servs., Inc., 8 NY3d 478,* at 489 (2007).
6. *Western N.Y. Land Conservancy, Inc., v. Cullen, et al.,* 66 AD3d 1461, at 1464 (4th Dept. 2009); *Vacca v. Valerino*, 16 AD3d 1159, at 1160 (4th Dept. 2005); *Ligo v. Gerould*, 244 AD2d 852, at 853 (4th Dept. 1997);