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Size Might Matter, After All

By Lance R. Pomerantz

Longtime readers of this space are familiar with the amendments to the statutes concerning adverse possession made in 2008.[1] One of the signature elements of the amendments was the addition of Real Property Actions and Proceedings Law ("RPAPL") §543. This section was designed to protect a record owner whose neighbor had engaged in various commonplace acts across a record boundary line. RPAPL §543(1) concerns the effect of "de minimus [*sic*] non-structural encroachments" and §543(2) concerns "acts of lawn mowing or similar maintenance." Both provisions declare that each type of activity "shall be deemed permissive and non-adverse."

Small enough to satisfy?

In a recent case, the Second Department considered the question of how small an encroachment must be to satisfy the *de minimis* requirement of §543(1). It turns out to be a fact question for trial. *Wright v. Sokoloff,* 2013 NY Slip Op 6856 (2nd Dept., Oct. 23, 2013).

Defendant's predecessor in title had planted an eight-foot wide hedge on plaintiff's property, and claimed title by adverse possession. RPAPL §543(1) provides that "the existence of de minimus [*sic*] non-structural encroachments including, but not limited to, … hedges, shrubbery, plantings, … shall be deemed to be permissive and non-adverse." The plaintiff contended that the statute mandated that "the existence of all encroaching hedges and shrubbery, no matter how large, shall be deemed permissive and non-adverse."


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The court flatly rejected this interpretation. It held that "[t]he more reasonable interpretation of RPAPL 543(1) is that the list contains examples of 'non-structural encroachments' which could still be adverse if they are not de minimis." Accordingly, it concluded that "plaintiff raised a triable issue of fact as to whether, under the circumstances of this case, the eight-foot encroachment was de minimis within the meaning of RPAPL 543(1)."

This case appears to be at odds with the Third Department's interpretation of §543(1). In *Sawyer v. Prusky,* 71 AD 3d 1325 (3rd Dept., 2010), the court appeared to say that any "non-structural encroachment" listed in the statute would be *per se* "de minimis" and therefore "deemed permissive and non-adverse."

A bigger enchilada

A different aspect of this case doesn't make for sly, attention-grabbing headlines, but might be of greater concern. The court tacitly accepts that §543(1) alters the quantum of possession needed to establish title. "Deemed permissive" is treated as if it is an irrebuttable presumption that can transform previously non-permissive activity. The defendant's sole recourse is to fight and win the *de minimis* battle, despite the plaintiff's delay in bringing suit.

The planting in *Wright* occurred in 1999. The action was not commenced until 2010. According to the plaintiff in *Wright*, he immediately objected at the time of the planting and repeatedly asked the former neighbor to remove the hedge. After the defendants purchased their property in October 2006, they also refused to remove the hedge. Clearly, the encroachment had continued for more than the ten-year period without the plaintiff's permission. Can the statute be read to grant the plaintiff's permission when the plaintiff himself has emphatically refused to do so?

This concern is not limited to transitional cases, where the possessory activity commenced less than 10 years before the effective date of §543. Nor is it limited to encroachments.[2] "Deemed permissive" might be appropriate when the plaintiff is unaware of minor incursions and, therefore, does not affirmatively withhold permission. It seems inequitable to reward inaction on the part of a plaintiff who affirmatively declares the activity non-permissive, yet fails to bring suit.

Note: Lance R. Pomerantz is a sole practitioner who provides expert testimony, consultation and research in land title disputes. He is also the publisher of the widely read land title newsletter Constructive Notice. For more information, please visit www.LandTitleLaw.com.

1. Demonic Possession: What Hath the Legislature Wrought? *The Suffolk Lawyer,* December, 2010, p.16.

2. Since both provisions of §543 employ identical language in this regard, the analysis can also be applied to maintenance activities under §543(2).