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Adverse possession by tenants in common:

Preciado v Wilde, 2006

Roger Bernhardt

Tenant in common's exclusive use of property was not enough to establish adverse possession.

Preciado v Wilde (2006) 139 CA4th 321, 42 CR3d 792

Leonard Preciado (Leonard) and Elizabeth Wilde (Elizabeth), his niece, owned two parcels of real property as tenants in common. A house originally stood on the first parcel before it was demolished. The second parcel was a vacant back lot. Elizabeth owned an undivided three-tenths interest in each parcel that she inherited from her father. Leonard decided to purchase Elizabeth's interest in the properties. On September 9, 2002, he wrote Elizabeth a letter describing her ownership interest, which stated that she owned three-tenths of each parcel. Elizabeth and Leonard agreed on the price, but the sale did not take place because Leonard did not pay the purchase price.

Leonard sued to quiet title based on adverse possession. The trial court found that Leonard did not establish adverse possession, and that Leonard's attempt to buy the lots from Elizabeth was inconsistent with a claim of ouster.

The court of appeal affirmed. Each tenant in common has a right to occupy the whole of the property. The possession of one is deemed the possession of all. Each may assume that another in exclusive possession is possessing for all and not adversely to the others. Between cotenants, before title may be acquired by adverse possession, the occupying tenant must impart notice to the tenant out of possession, by acts of ownership of the most open, notorious, and unequivocal character, that he intends to oust the latter of his interest in the common property. Such evidence must be stronger than that which would be required to establish a title by adverse possession in a stranger. One tenant in common cannot, by mere exclusive possession, acquire the title of his cotenant.

Leonard failed to carry his burden on notice. Elizabeth testified she had no notice that Leonard wanted to interfere with her right to possession and title. Leonard admitted he never excluded Elizabeth from the property and never restricted her access or informed her that he was challenging her ownership. Although he constructed fences, they were not designed to exclude family members. Moreover, Leonard undermined his claim of adverse possession when he tried to buy Elizabeth's interest. His September 9 letter was an admission that Elizabeth held legal title. It refuted the allegations of the complaint and impeached Leonard's credibility.

The trial court properly admitted evidence about Leonard's offer to buy Elizabeth's interest. It did not involve an offer to compromise under Evid C §1152, which had no application here; §1152 facilitates candid discussion that may lead to settlement of disputes. Leonard and Elizabeth were not engaged in discussions to settle a dispute over her ownership; Leonard simply offered to buy Elizabeth's interest.

Leonard did not carry his burden of proof concerning his claims of title or color of title. A plaintiff must prove his title in order to recover in a quiet title action; merely challenging

defendant's title is insufficient. Leonard did not show that the court erred when it found Elizabeth inherited her tenancy in common interest, and Leonard did not prove title or a claim based on color of title. Elizabeth introduced probate documents and a title expert's testimony to support the origins of her title and the validity of her interest as a tenant in common. Leonard admitted that Elizabeth's father had legally inherited his tenancy in common interest in the two lots. The trial court could have reasonably inferred Elizabeth never abandoned the interest in the lots she inherited from her father.

THE EDITOR'S TAKE: How could Leonard's attorneys ever think that they could make out a case of adverse possession by him against his niece Elizabeth? From the appellate opinion, he seemed to have no evidence whatsoever to support that claim. Against outside third parties, Leonard probably did have good adverse possession, since he was in exclusive possession, had paid the taxes, and had color of title. But Elizabeth was not an outsider; she was a cotenant, which changes all of the rules for adverse possession.

Because tenants in common (as well as joint tenants) have *undivided* interests in property, neither can point to any particular bit of the property and say "this part is mine, so get off it" (unless they have leases or similar agreements to that effect). Since no cotenant can thus claim exclusive possession of all or any part of the common property, that gets shorthanded into the maxim that "the possession of one is the possession of all" (although it is hardly clear just why such peculiar language was chosen or what good it does to say it that way).

In order to start an adverse possession clock running, a cause of action must arise in favor of the plaintiff. That is easy to establish when a stranger takes possession of an owner's property without consent, since that act alone is a sufficient trigger. (Indeed, that seems so evident as to make it unclear why there must be any other requirements—*e.g.*, open and notorious, exclusive, hostile, claim of right—beyond the simple trespass requirement.)

But when a possession is in itself lawful, as in the case of a tenant in common, no cause of action in favor of the other tenant in common is generated by taking possession, even if the COTIP (cotenant in possession) goes there exclusively. If neither can tell the other to get out, possession by either one starts no clock running against the other (the COTOP).

What it takes to start the clock against a COTOP, in the case of exclusive possession by a COTIP, is not an entry by the COTIP, but an exclusion of the COTOP; only when the COTIP refuses to let the COTOP into possession—either as a shared or sole possessor—does the COTOP have a cause of action. That is how and when the clock starts.

That explains why the rules of adverse possession against co-owners are different than those of adverse possession against outsiders. Possession by a stranger is ipso facto enough to warn an owner that its rights are in danger, whereas possession by a cotenant, even when exclusive, does not give that warning. To start that clock, the system adds the requirement of ouster—an event that necessarily lets the COTOP know of the threat. Absent an ouster, a COTOP may be more than pleased that the other is in possession of their concurrently owned property, taking care of it for both of them; it would be ludicrous to file suit. Litigation need be considered only when the COTOP learns that the COTIP's possession is hostile and may lead to ultimate permanent exclusion, *i.e.*, that the COTOP has been

“ousted.” The ouster requirement is the system’s way of saying that it, the COTOP, has been notified that it is being excluded. (Just as it does in the case of permissive uses being converted into hostile ones for prescriptive easements, which I wrote about in my *Editor’s Take on Aaron v Dunham* (2006) 137 CA4th 1244, 41 CR3d 32, reported in 29 CEB RPLR 289 (May 2006).)

Ouster is thus inevitably a psychological and contextual event. It may be clear when COTIP tells COTOP to get off the property, but not when COTOP is someplace else. Since the real reason for the requirement is to assure that COTOP knows that COTIP claims the exclusive right to possess, equivocal acts may accomplish that and seemingly unequivocal acts may not. Was there an ouster if, as he was storming out of the door, she yelled after him, “And don’t come back!”? Was there an ouster if, when he came to the door, she said, “Please come into my house and make yourself at home”?

The hardest cases are when COTIP doesn’t even know there is a COTOP. Dad’s will left the house to his daughter, but the will was defective; her brother is legally a tenant in common, although neither one knew it. How can we expect her to oust her brother from what she thinks is all hers anyway?

There is CC §843, which clarifies how an ouster may be established; but it really only operates in favor of the COTOP. By complying with it—and if the COTIP thereafter makes the “right” response—COTOP can show that she has been denied possession and thereby gain the right to demand rental value from COTIP. While nothing in that statute tells COTIP how to do it from the other side, one thing is clear: Don’t write a letter to the other, as Leonard did, offering to buy her out.—*Roger Bernhardt*