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'Fence Affidavit' Ineffective Against Adverse Possessor

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In the course of a real estate deal, it is not unusual for a survey map to disclose a fence between adjoining property owners that is not precisely on the property line.

If the discrepancy is small, the problem is usually addressed by a so-called "fence affidavit."

Consider the following common scenario: The survey supplied to the buyer's attorney reveals a neighbor's fence encroaches on the property about to be purchased. The fence runs parallel to the actual line, but is a foot or so beyond the neighbor's actual boundary, and inside the boundary of the buyer's lot.

As a matter of course, the neighbors are notified of the problem. To satisfy the title insurance company, the buyer's attorney asks the neighbor to sign an affidavit saying he or she is aware of the actual boundary line and makes no claim of entitlement to the strip of land between the fence and the actual boundary.

Everyone is satisfied, and the purchase goes smoothly. The buyer assumes he or she owns up to the property lines shown on the survey map.

Case closed? Maybe not.

A recent Fourth Department memorandum decision made it clear this type of problem may not always be so simply solved.

If, for example, the neighbor's encroaching fence had been there for ten years, title to that strip of land may well have passed to the neighbor (by adverse possession). If it did, the fence affidavit means nothing.

In that circumstance, the only way the buyer can get title to the land on the other side of the fence is to buy it and have it transferred by deed.

The Fourth Department case, *Ahl vs. Jackson*, CA 99-1072, decided May 10, 2000, is only a single paragraph:

"Supreme court properly determined that plaintiff obtained title to the disputed parcel by adverse possession. Plaintiff established that, for a period of over ten years, he and his predecessors in title possessed the disputed parcel and that their possession was open and notorious, exclusive, continuous, hostile and under claim of right," the Appellate Division wrote, citing *Garrett vs. Holcomb*, 215 AD2d 885, 885; *Village of Castleton-on-Hudson*, 208 AD2d 1006, 1008; and *Tubolino vs. Drake*, 178 AD2d 951.

"Because plaintiff was vested with title to the property by adverse possession, title may be transferred only by deed or other method recognized at law. The statement of plaintiff in a 'fence affidavit' after the statutory period had run that he did not claim the land does not constitute a legal transfer. The affidavit constitutes at most a recognition of record title in another, which is insufficient to divest plaintiff of title after the statutory period had run," the Fourth Department held, citing *City of Tonawanda vs. Ellicott Creek Homeowners Assn.*, 86 AD2d 118, 123-124.

In *Ahl* it was the plaintiff who first (without the benefit of counsel) signed an affidavit stating he made no claim to a three-by-76 foot strip of land enclosed by his fence. Because title to the

land had already vested in him by adverse possession, however, the fence affidavit had no legal effect and he was able to successfully sue for a declaration of ownership of the property he once said he did not own.

In his successful motion for summary judgment in Monroe County Supreme Court, *Ahl* made the following arguments (among others):

1. "After a party has held land adversely for more than the statutory period, his admission that it does not belong to him is not sufficient evidence to destroy his title. *Stuyvesant vs. Tompkins*, 9 Johns 61."

2. "The recognition of title in another after the full statutory period has run in favor of the claimant will not reinvest title previously acquired by adverse possession. *St. William's Church vs. People* 269 AD 874 ..., and,

3. "Once title vests in the adverse possessor, the claimant's title can't be defeated by the actions of the record owner or even their own actions which otherwise would evidence lack of hostility. *Oistacher vs. Rosenblatt*, 220 AD2d 493 ..."

In his brief on appeal, *Ahl* argued:

"(The fence) affidavit could not transfer title of lands acquired through adverse possession to the appellant, since the appellant is not named in the document, and the document makes no statement regarding a transfer of title. The document also was not recorded with the county clerk, as would be required by section 291 of the Real Property law. It also was not proved as required by section 292 of the Real Property Law."

"The 'fence affidavit,' the *Ahl* brief continued, "is ineffective to dispossess the respondent because adverse possession ripened in the respondent long before the affidavit was executed, and the affidavit is not a transfer complying with the formalities prescribed by law."

Although the Appellate Division did not cite any authority directly on point, the court clearly accepted and adopted *Ahl*'s argument.

Once title passes by adverse possession, nothing short of a deed will transfer it to another.

WHAT THE COURT RULED

CASE NAME: *Ahl vs. Jackson, et al.*, Appellate Division, Fourth Department.

CASE NUMBER: CA 99-1072, May 10, 2000.

ISSUE: Once title has vested by adverse possession in a narrow strip of property along a boundary line, was a "fence affidavit," in which the adverse possessor stated he made no claim to the strip of land, sufficient to defeat the possessor's subsequent claim of ownership?

RULING: No.

PLAINTIFF-RESPONDENT'S ATTORNEY: G. Michael Miller of Dibble & Miller, P.C..

DEFENDANT-APPELLANT'S ATTORNEY: Sidney K. Schoenwald.