

SQUATTERS PARADISE?

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It is hard to believe that more than 5 years have passed since the United States' housing bubble burst. The credit crisis resulting from the burst is, according to general consensus, the primary cause of the 2009 Great Recession. One of the many tragic results of that dark period in our economic history was the grief and despair felt by thousands of families who lost their homes.

But a small section of our population rejoiced when they saw rows and rows of abandoned homes: squatters. I'm sure you've seen the headlines – one in particular that comes to my mind is the story about Kenneth Robinson, a Texas man who squatted in a north-Texas McMansion worth \$350,000 and attempted to claim ownership. Stories like Mr. Robinson's sparked a national movement for squatters.

Mr. Robinson is not the first famous squatter case. The most famous cases happened on the Lower East Side of Manhattan in the 1980s and 1990s, when artists, run-aways and homeless people squatted in vacant buildings and brownstones. They initially were just looking for a dry place to sleep, but when no one yanked the welcome-mat from them, they stayed longer and longer. Even though most of these squatters were eventually forced out, some stayed and succeeded in taking ownership of the property – with the help of an old law called “adverse possession”.

The requirements to claim ownership of real estate – whether commercial or residential – varies by state law. Regardless of the state in question, it is generally not easy to claim ownership by adverse possession, despite the stories you may have seen on the news. Further, Texas law, like most other states, does not contemplate or promote the use of “squatting” as a business plan or tactic to “steal” someone else's real estate. In fact, there is sometimes a fine line between legitimate adverse possession on one hand, and flat out being nefarious or engaging in criminal activity, on the other hand: breaking and entering, filing false instruments, slander of title, and fraud are not legal means of gaining title by adverse possession. In Texas, adverse possession is governed by the Texas Civil Practices & Remedies Code Section 16.021, *et seq.*, and numerous court cases on the topic that have been decided over the years. In Texas, adverse possession is defined as “an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person.”

So, what does all that legalese really mean? Well, adverse possession is a combination of the squatter's (the adverse possessor's) conduct and activity, and the real property owner's inactivity or failure to kick out the squatter. The squatter must enter the property without consent (adversely) and stay openly, obviously and continuously in peaceable possession for a given number of years. The term “peaceable possession” is defined under the statute as “possession of real property that is continuous and is not interrupted by an adverse suit to recover the property.” In other words, if the owner fails to act by not filing a lawsuit or using other legal means to remove the squatter within the statutes of limitation, then the squatter may establish “peaceable possession”. Further, Texas courts have also consistently held that the squatter has to actually “openly possess” the property continually for the statutory period (more on this later). In other words, you have to do more than think you have the right to possess the property – you actually

have to possess it, and you have to stay there and not vacate the property for long periods of time. All of these are fact issues for a judge or jury to decide – if it gets to that point. The legitimacy of an adverse-possession claim is established when the claim becomes noticeable to the public. In other words, the real world needs to see that you are asserting a claim of right to the property, which is “actual, open, notorious, exclusive, adverse, hostile, continuous, and uninterrupted for the applicable statutory period.” In order to claim ownership to property via adverse possession, one must follow the rules of law precisely, and the legal burdens of proof must be conclusively met. For example, the squatter must be specific about the exact property he or she is claiming ownership of by adverse possession. This is accomplished by identifying the location of the property and the boundaries by a proper legal description.

This is less of an issue for squatters in a residential house, but those looking to squat in, say, vacant land, have to clearly “stake out” the property they want to claim.

There are four (4) periods (or statutes of limitation) that govern adverse possession: a three-year period, a five-year period, a ten-year period and a twenty five-year period. Under the three-year statute, the squatter must enter the property either under title or color of title, as defined by the statute. Under this section, the squatter must actually have title (i.e., a deed as part of a regular chain of title) or at least "color of title," which refers to a claim of title that has a reasonable basis but for some legitimate reason does not fit within the usual chain of title. So, the squatter must be able to produce conveyance or title paperwork to support the claim if it is to be successfully asserted under the three-year statute. Thereafter, the owner must file suit to recover the property within three years.

Under the five-year statute, the owner must file suit to recover the property before the squatter: (a) cultivates, uses or enjoys the property; (b) pays the property taxes for five consecutive years before they become delinquent; and (c) claims the property under a duly registered warranty deed. This is pretty straight forward, however, the requirement that the squatter “claims the property under a duly registered warranty deed” can be confusing. The statute specifically excludes entry under a forged deed or a forged power of attorney. Courts have held that a duly registered deed means a recorded warranty deed, but a quitclaim deed (a deed that simply releases but does not convey nor grant title or interest to the property) will not suffice. But unlike the three-year statute, only the deed, not the chain of title, is relevant. Basically, the adverse possessor must obtain a warranty deed from someone who has the legal capacity to sign the deed. The deed must be recorded when possession begins. Thereafter, the adverse possessor must pay the property taxes for five consecutive years. This scenario often comes up with boundary or property-line disputes.

The ten-year statute is sometimes referred to as “true adverse possession”. No incidence of title or deed is required for entry, and the squatter doesn’t even have to pay the property taxes to establish title. Per Section 16.026, the squatter simply cultivates, uses or enjoys the property for ten continuous years. There are some restrictions to the amount of land that the squatter can claim. If the squatter enters without title, and if the land is not enclosed, the claim is limited to 160 acres. If the land is enclosed, the squatter may claim all the enclosed acreage that is adversely and peaceably possessed. If the squatter enters under a registered deed or other instrument, however, the squatter’s claim extends to the specified boundaries after ten years.

Two other sections, Section 16.027 and Section 16.028, are less common. The first section provides a 25-year limitation “regardless of whether the person is or has been under a legal disability (such as a minor, someone who is legally incompetent, service in the armed forces, or

other legal “disability). The second section allows a 25-year limitation based on a title instrument, even if that instrument is void on its face or in fact.

Note that, for all the time periods discussed above, the applicable statutes of limitation do not include any periods of disability (a minor, legally incompetent, service in the armed forces, etc.) on the part of the original owner. Also, statutes of limitation may be tacked or combined by various successive squatters of the property so long as there exist “privity of estate” (a direct legal relationship) between the successive squatters.

So what do you do if you find someone squatting in your house or on your land? Let me give you a big hint: do NOT do NOTHING. The first thing to do is call competent legal counsel who is familiar with real-estate issues. Absent that, the most obvious thing to do is kick the squatter out – without disturbing the peace. If that doesn’t work, then you can file a suit for forcible detainer (which is essentially a lawsuit for eviction here in Texas). If that doesn’t work, or if you file a forcible detainer suit and the squatter claims some type of ownership in the title, then the owner has to file a trespass to try title action and request for a declaratory judgment stating that they are the true owner of the property in question. But remember, time may be of the essence depending on the applicable statute of limitations.

Alternatively, the squatter may be proactive and file suit to establish title. To do so, the squatter must prove (1) a visible appropriation (that is, taking some action to give notice to the public, like fencing off the property) and possession of the land, sufficient to give notice to the record titleholder (2) that is peaceable, (3) under a claim of right hostile to the title holder’s claim, and (4) that continues for the duration specified in the applicable statute. Section 16.034 provides that the prevailing party in a suit for possession of real property may receive an award of costs and reasonable attorney’s fees.

However, in lieu of filing a lawsuit, the squatter may file an “affidavit of adverse possession” in the county real property records which asserts the various elements of an adverse-possession claim. A properly worded, properly filed affidavit starts the “notice”, thereby providing a fixed point for the running of applicable statutes of limitation. The passage of time (without any other actions) will tend to allow the affidavit to gradually acquire increased credibility. The affidavit may contain a prior date when adverse possession allegedly commenced. In other words, you don’t have to file the affidavit the moment you start squatting.

So does the adverse-possession law create a squatters paradise? Not really, but it can certainly be a nightmare for the unwary property owner and a great tool for the opportunistic squatter. If someone enters a house, land, or other real property as a trespasser and uses the property in a way that clearly demonstrates his or her claim to the property contrary to the rights of the true owner, the land becomes the trespasser’s if it meets the conditions described above.