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Rich May Attorneys Create New Law in Ancient Practice Area

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Adverse possession, a favorite of first year law school students, is a well-worn area of law that goes back hundreds of years. Despite its lengthy common law history, occasionally issues of first impression still arise. Thornton v. Driscoll presented one such novel issue that had no clear answer in Massachusetts case law. Rich May represented one of the parties in the case and convinced the Court to rule in its client's favor on this new issue before the Court. Attorneys Jeffrey B. Loeb and Jonathan Loeb worked on the matter, and Jonathan Loeb represented Rich May's client at the trial.



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Adverse possession, in its simplest terms, is the equivalent of squatter's rights. If a person actually possesses property of another for twenty years in a way that is open, notorious, exclusive, and adverse to the interests of the property owner, the title to the property is acquired by the adverse holder. To actually establish title to the held property, the holder of that property must bring a lawsuit for a declaration that he is in fact the new owner.

But what happens if a mortgage was granted on property acquired by adverse possession before a lawsuit is brought? The Court in Thornton v. Driscoll was faced with this issue. At its core, the case considered whether the two Driscoll Defendants had adversely possessed portions of the Plaintiff Thornton's neighboring property. After determining that portions of the Thornton property were taken by adverse possession by the Driscoll Defendants, the Court considered what happened to the mortgage Thornton had granted seven years before the case went to trial.

The Court looked to the case law for its initial determinations. In Massachusetts, the grantor of a mortgage gives legal title to property to the mortgagee (the lender), while the grantor of the mortgage retains "equitable" title in the property. The grantor of property can only convey what is actually owned by the grantor (as in, one person cannot grant property owned by another). The Court held that because of this, when the mortgage was granted in 2015, Thornton could only grant a mortgage on that property which Thornton owned as of 2015. The Court further held that the adverse possession elements for two areas claimed by adverse possession by the Driscolls were separately met in 2006 and 2012, prior to the

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grant of the mortgage. Therefore, the Court held, those two areas were taken by adverse possession free and clear of the mortgage.

But what about the area acquired by adverse possession after the grant of the mortgage in 2015? That was less clear in the case law. Rich May, representing the mortgage lender, argued that the adversely possessed property was taken subject to the mortgage. The Court agreed.

In answering the question, the Court considered two cases dating back to 1829 and 1864 that seemed to hold that an adverse possessor took property free and clear of a mortgage regardless of when the mortgage was granted. However, in agreement with Rich May's arguments, the Court found that those nineteenth century cases were no longer good law due to more recent statutes dealing with the conveyance of land.

As argued by Rich May, the Court held that a lender who lacks possession of a mortgaged property generally is unable to protect the mortgaged premises from an adverse possessor's activities. On the other hand, an adverse possessor has constructive knowledge that there is a mortgage on the property when that mortgage is recorded and can choose to either continue or suspend its adverse use of the property. In addition, there was no case law that the Court or the Driscolls could point to that gave the lender the right to oust an adverse possessor from the property, nor was there anything in the mortgage that gave the lender the right to challenge adverse possessors (in fact, the Court found that that remained Thornton's responsibility under the mortgage). This led to the Court holding that adversely possessed property acquired after the grant of a mortgage is taken subject to the mortgage.

While a partial win for Rich May's client and lenders in Massachusetts, this holding still requires lenders to be diligent when considering a potential property. All of the elements of adverse possession could be met prior to the grant of a mortgage and prior to a lawsuit. In such an instance, lenders could come to find that portions of the mortgaged property are not actually encumbered, and the mortgaged property could be smaller than initially believed.

The decision is Thornton v. Driscoll, Mass. Land Ct. No. 20 MISC 000345 (Sept. 8, 2022) (Vhay, J.).

Disclaimer: This summary is provided for educational and informational purposes only and is not legal advice. Any specific questions about these topics should be directed to attorneys Jonathan Loeb and Jeffrey B. Loeb.

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