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Landlords can be Vulnerable to Prescriptive Easement Claims

By Richard Gullen

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Property owners may be surprised to hear that when they lease property to a tenant, the owner-landlord relinquishes the right to bring legal action to protect his property from trespassers. Because a landlord transfers his right of possession to the tenant, any trespass onto the property by a third party is wrongful against the tenant, but not the landlord. As a result, landlords generally do not have standing to enjoin a trespassing. The right to bring such an action during the tenancy belongs to the tenant.

A trespasser can create and establish a right to use another's property by continuously and openly using the property without permission for five years. After five years, the statute of limitations to stop the trespassing expires, and the trespasser's use ripens into a prescriptive easement, which the trespasser can then perfect and record against the title of the property by filing an action for quiet title. If the property is leased, however, consistent with the rule that landlords do not have standing to evict trespassers, the trespasser will only acquire prescriptive rights against the tenant – not the landlord – meaning that once the tenancy is terminated, so, too, are any prescriptive rights. Traditionally, this rule has allowed landlords to ignore any potential prescriptive claims, relying on the comfortable belief that they can stop such trespassing once they regain possession of the property.

However, landlords should be wary of this false security, because a recent case somewhat curtailed this long-standing protection. Decided in August 2013, the case of **King v. Wu (2013) 218 Cal.App.4th 1211** involved a plaintiff property owner who installed a driveway in 1960 that encroached 8 inches onto his neighbor's property. Thereafter, the plaintiff drove and parked on a portion of his neighbor's property for

over 45 years. During that timeframe, the neighbor's property was continuously rented to tenants, except for intermittent periods totaling about four years. In 2009, the defendant neighbor installed a metal guardrail on the property line which blocked the plaintiff from trespassing. The plaintiff sued for a prescriptive easement, and the neighbor defended on the ground that the plaintiff had acquired prescriptive rights only against the neighbor's tenants – and not the neighbor – while the property was rented. The Court of Appeal rejected this argument and granted plaintiff a prescriptive easement. The court reasoned that every time the lease came up for renewal, the neighbor had constructive possession of his property. The court further reasoned that it was not necessary for the neighbor to be in possession for five continuous years in order for the trespasser to acquire prescriptive rights against the neighbor. It was enough that if the neighbor-landlord had possession at any point during the adverse use, even if only momentary constructive possession at the expiration of each renewable term, the neighbor had the opportunity and the obligation to take action to stop the trespassing.

The lesson for landlords from this case is that having a tenant in a property is not a failsafe protection against prescriptive claims, and does not diminish a landlord's duty to safeguard his investment. Landlords should be vigilant and remain watchful for any encroaching uses that could ripen into a prescriptive right with the passage of time. If a lease is periodically renewed, under the **King** case the court will deem that the landlord had constructive possession at the time of renewal and that at such time, however transient, he had the right and obligation to sue to prevent the trespass from ripening into a prescriptive easement.



Laurie and I had two very challenging real estate rights issues that we were advised were going to be difficult to prevail on. The RHRC team engaged with us and helped us understand our rights and prevailing position. RHRC were thoughtful advocates for us from the beginning to conclusion of our cases. We feel fortunate to know we will always be able to call on the firm in the future and that they are our legal counsel.

Albert "Rocky" and Laurie Pimental, President of Global Markets and Customers, Seagate Technology

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