

M E M O R A N D U M

SUPREME COURT: QUEENS COUNTY  
IA PART: 4

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THOMAS KOUDELLOU and CHRYSTALLA  
KOUDELLOU,

INDEX NO. 25156/02

BY: GRAYS, J.

Plaintiffs,

DATED:

-against-

ATHENA SAKALIS and KATHY SAKALIS,

Defendants.

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In this action for declaratory judgment and injunctive relief defendants Athena Sakalis and Kathy Sakalis seek an order granting summary judgment dismissing the complaint and declaring that the easement has been extinguished or was never created, and granting judgment in their favor on their counterclaims for adverse possession, estoppel and for injunctive relief, and awarding them reasonable attorneys fees, costs and disbursements. Plaintiffs Thomas Koudellou and Chrystalla Koudellou cross-move for an order granting summary judgment declaring that the plaintiffs have a recorded easement to the driveway located on defendants' property which allows them to access their garage; directing defendants to remove the fence that is blocking access to the driveway; enjoining defendants from blocking access to the garage; and striking defendants' answer and counterclaims.

Plaintiffs Thomas Koudellou and Chrystalla Koudellou are the owners of real property located at 32-11 32<sup>nd</sup> Street, Astoria,

New York (Block 612, Lot 31). This property is improved by a single-family house. Plaintiffs purchased this property pursuant to a deed dated January 31, 1979 and recorded on February 16, 1979. Plaintiffs presently reside in Maryland and their daughter resides

in the Koudellou premises.

The adjoining real property located at 32-13 32<sup>nd</sup> Street, Astoria, New York (Block 612, Lot 32) is improved by a one-family house and is presently owned by Athena Sakalis, pursuant to an unrecorded deed dated September 27, 2002. The court notes that the within action was commenced on September 25, 2002. Defendants Athena Sakalis and Kathy Sakalis are sisters.

The Koudellou house and the Sakalis house share a party wall, and there is a garage at the rear of each house, with a single driveway on the south side of the Sakalis property that leads to both garages. This driveway is the only means of ingress and egress to the Koudellou garage. In 1987, defendants' father and predecessor in interest Athanasios Sakalis erected a wooden fence between the two garages, thereby separating the two garages. The wooden fence is connected to the walls with metal hinges and can be swung open. A metal gate was later installed at the entranceway to the driveway. At the time the fence was erected, the Koudellou family made no objections, as it created a safe and separate area in the rear of each house for their children to play

in. In May 2002, the Koudellous' daughter, who resides in their house, asked the Sakalis family to remove the wooden fence. The

Sakalis defendants have refused to remove the fence.

Plaintiffs assert that an easement to the driveway on the adjoining property was created by the original grantor and recorded in subsequent deeds, with the express purpose of allowing the property owner access to their own garage. Defendants claim that the easement was never properly created, or that it was extinguished and that defendants acquired the right to the disputed property pursuant to the doctrines of adverse possession and abandonment. In the alternative, defendants claim impossibility of use due to the size of today's automobiles and assert that it would be inequitable to require them to remove the fence and deny Athena Sakalis and her children the private use of her backyard.

Prior to June 1922, Lots 31 and 32 were owned by Joseph and Henrietta Kneer. The Kneers erected a house and with a garage at the rear on each lot. On June 29, 1922, the Kneers transferred ownership to Lot 31 to Albertina Knodel for consideration of \$1.00, pursuant to indenture with a mortgage of \$4,000.00, which provides for "an easement or right of way over the premises immediately adjoining the first described parcel on the south for the purpose of ingress and egress by private automobile or conveyances which right shall extend along the most southerly 7 feet of the premises adjoining on the south to the rear of the house erected thereon and

thence across said premises to the premises herein above first described with the distinct understanding that no vehicle of any kind are to be parked within the confines of the premises over which this right of way is hereby granted." This indenture was recorded in Liber 2425 cp. 524 in the Office of the Register of Queens County. This property was thereafter known as 32-11 32<sup>nd</sup> Street.

On June 30, 1922, the Kneers transferred ownership of Lot 32 to Mary Elizabeth Kneer, for consideration of \$1.00, pursuant to an indenture with a mortgage of \$4,000.00, which provides that it is "[s]ubject, however, to an easement or right of way for the purpose of ingress and egress by private automobiles or conveyances which right of way extends along the most southernly 7 feet of the above described premises to the rear of the house erected thereon, and thence across said premises to the premises immediately adjoining said premises on the north, with the distinct understanding however that no vehicles of any kind are to be parked within the confines of the premises over which the right of way extends." This indenture was recorded in Liber 2426 cp. 484 in the Office of the Register of Queens County. This property was thereafter known as 32-13 32<sup>nd</sup> Street.

Albertina Knodel transferred ownership of the property known as 32-11 32<sup>nd</sup> Street (Lot 31) to Modesto Lefemine and Catherine Lefimine pursuant to a deed dated November 15, 1945 and

recorded on November 16, 1945, which stated that it was conveyed "Together with an easement or right of way over the premises immediately adjoining the first described parcel on the south for the purpose of ingress and egress by private automobile or conveyances which right shall extend along the most southerly 7 feet of the premises adjoining on the south to the rear of the house erected thereon and thence across said premises to the premises herein above first described with the distinct understanding that no vehicle of any kind are to be parked within the confines of the premises over which this right of way is hereby granted." Caterina Lefermine transferred this property to Salvatore Filoramo and Caterina Filoramo pursuant to a deed dated June 11, 1957 and recorded in June 1957 which contains the identical language pertaining to the driveway easement. The Filoramos transferred the property to the plaintiffs, Thomas Koudellou and Chrystalla Koudellou, pursuant to a deed dated January 31, 1979 and recorded on February 16, 1979 which states that it is transferred "Together with the benefits of a driveway easement recorded in Liber 2425 cp. 524 in the Office of the Register of Queens County."

Mary Elizabeth Kneer transferred ownership of 32-13 32<sup>nd</sup> Street (Lot 32) to Isabella Girz pursuant to a deed dated June 15, 1953 and recorded on June 19, 1953, which sets forth, verbatim, the language in the 1922 Kneer deed of sale pertaining to the driveway

easement or right-of-way. Isabella Girz transferred the property to Isabella Girz and Rudolph Girz, as joint tenants with the right of survivorship, pursuant to a deed dated September 23, 1967 and recorded on September 27, 1967, which sets forth, verbatim, the language in the 1922 Kneer deed pertaining to the driveway easement or right-of-way. Isabella Girz and Rudolph Girz transferred the property to Rudolph Girz, pursuant to a deed dated June 1, 1973 and recorded on June 4, 1973, which contained the identical language pertaining to the driveway easement or right-of-way. Rudolph Girz transferred the property to the defendants' parents Athanasios Sakalis and Plousia Sakalis, pursuant to a deed dated June 16, 1975 and recorded on June 18, 1975, that states that it is "Subject to the burdens of a Certain Right of Way recorded in Liber 2426 cp. 484 and repeated in subsequent instruments of record." Athanasios Sakalis and Plousia Sakalis transferred the property to Plousia Sakalis pursuant to a deed dated July 23, 1982 and recorded on August 13, 1982, which contained the identical language set forth in the prior deed as to the right-of-way. Plousia Sakalis transferred the property to Plousia Sakalis and Athena Sakalis pursuant to a deed dated August 9, 1988 and recorded on August 26, 1988, which repeated the language set forth in the prior deed as to the right-of-way. Athena Sakalis and Plousia Sakalis, as joint tenants with the right of survivorship, transferred the property by a deed dated September 9, 1992, and recorded on September 21, 1992, to defendants Athena Sakalis and Kathy Sakalis. The deed repeated

the language set forth in the prior deeds between members of the Sakalis family regarding the right-of-way. Athena Sakalis and Kathy Sakalis transferred the property to Athena Sakalis pursuant to a deed dated September 27, 2002. The 2002 deed was not recorded and does not contain any reference to the driveway easement or right-of-way.

To create an easement by express grant there must be a writing containing plain and direct language evincing the grantor's intent to create a right in the nature of an easement rather than a revocable license (see Willow Tex, Inc. v Dimacopoulos, 68 NY2d 963 [1986]). The writing must establish unequivocally the grantor's intent to give for all time to come a use of the servient estate to the dominant estate. Here, the 1922 instruments, called an indenture, conveyed the entire interest of Joseph and Henrietta Knoll's in each lot to the respective purchasers, subject to a mortgage. The original grantors Joseph and Henrietta Knoll created a permanent easement in favor of the dominant estate, the owner of Lot 31 (32-11 32<sup>nd</sup> Street) over a 7-foot strip on the south side of the adjoining property Lot 32 (32-13 32<sup>nd</sup> Street) for the purpose of ingress and egress to the garage located in the rear of the property, by express grant in the instrument dated June 29, 1922. At the time the easement was created the Knolls owned Lot 32, the subservient estate. The Kneers in the indenture of June 30, 1922 transferred their ownership of Lot 32 to Mary Elizabeth Kneer, subject to the easement that had been created in the deed for Lot

31. The 1922 indentures containing these easements were recorded and all subsequent deeds for these two properties made explicit reference to the easements, except for the 2002 deed between Athena Sakalis and Kathy Sakalis, which was not recorded.

Express easements, such as the one at bar, are defined by the intent or object of the parties (see Lewis v Young, 92 NY2d 443 [1998]). Here, the clear object of the easement is to ensure that each parcel owner has use of the common driveway for convenient ingress and egress to his or her parcel. It is undisputed that the fence erected by defendants' father and predecessor in interest blocks access to the plaintiffs' garage by private automobiles and conveyances via the driveway. Therefore, no issue of fact exists as to whether the fence substantially interferes with the plaintiffs, or by extension their tenant's right of ingress and egress to their garage via the easement (cf. Lucas v Kandis, 303 AD2d 649, 649-650 [2003]).

A party seeking to obtain title by adverse possession on a claim not based upon a written instrument must establish, by clear and convincing evidence, "the common-law requirements of hostile possession, under a claim of right, which was actual, open and notorious, and exclusive, and continuous for the statutory period" (Giannone v Trotwood Corp., 266 AD2d 430, 431 [1999]; see Brand v Prince, 35 NY2d 634, [1971]; RPAPL 501, 521). In order to establish possession, that party must produce evidence that the subject premises either were "usually cultivated or improved" or

"protected by a substantial inclosure" (RPAPL 522[1], [2]; see Manhattan School of Music v Solow, 175 AD2d 106, 107 [1991]). There is no evidence that the driveway has been cultivated or improved by the defendants in any manner for the statutory period. Furthermore, the mere fact that defendants' father erected a fence in 1987 is insufficient to establish adverse possession, as defendants concede that the fence was erected with the consent and knowledge of the plaintiffs. When permission can be implied from the beginning, adverse possession will not arise until there is a distinct assertion of a claim of right hostile to the owner (see Dickerson Pond Sewage Works Corp. v Valeria Associates, L.P., 231 AD2d 488 [1996]; Susquehanna Realty Corp. v Barth, 108 AD2d 909 [1985]). The defendants did not assert a claim of right hostile to the plaintiffs until May 2002, when they refused to comply with the request to remove the fence. As the within action was commenced some four months later, defendants are unable to establish that their claim of right, hostile to the owner, existed for the prescribed 10-year period.

The court further finds that there is no merit in defendants' contention that plaintiffs abandoned the easement. Although it is true that an easement created by grant may be lost by abandonment, non-use alone does not result in an abandonment no matter how long it continues (see Consolidated Rail Corp. v MASP Equip. Corp., 67 NY2d 35, 39 [1986]). "A party relying upon another's abandonment of an easement by grant must produce 'clear

and convincing proof of an intention to abandon it'" ( id., at 39, quoting Hennessy v Murdock, 137 NY 317, 326 [1893]). Defendants have proffered no evidence to establish any intention on the part of plaintiffs or their predecessors in title to relinquish their rights in the easement (450 West 14th St. Corp. v 4056 Tenth Avenue LLC, 298 AD2d 113 [2002]; D'Ambro v Squire, 204 AD2d 921, 922-923 [1994]).

Finally, neither the convenience afforded the defendants' family in having the garage and driveway area closed off, nor the possible dimensions of today's automobiles, do not work an estoppel in defendants favor. The easement is applicable to automobiles and conveyances, and the court need not engage in speculation as to whether any and all automobiles or conveyances could clear the narrow driveway.

In view of the foregoing, defendants' motion is denied in its entirety and plaintiffs' cross motion is granted as follows: It is the declaration of the court that an express easement exists that permits plaintiffs, as owners of the premises known as 32-11 32<sup>nd</sup> Street, Astoria, New York (Lot 31), ingress and egress by private automobile or conveyance to the garage located at the rear of this property via the driveway located on the south side of the property owned by defendants and known as 32-13 32<sup>nd</sup> Street, Astoria, New York (Lot 32). Defendants are directed to remove the fence which presently blocks plaintiffs' access to their garage vis

the easement and their garage, within 30 days after the service of a copy of the order to be entered hereon, together with notice of entry. Plaintiffs' request to dismiss defendants' counterclaims is granted in its entirety.

Settle order.

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J.S.C.