

SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. JOSEPH P. DORSA IAS PART 12  
Justice

- - - - - x

DENNIS MANGAR and AMARJIT MANGAR,

Plaintiffs, Index No.: 14647/03

- against - Motion Date: 1/18/06

MANSINGH JAIRAM,

Motion No. 21

Defendant.

- - - - - x

The following papers numbered 13 to 14 on this motion:

	<u>Papers Numbered</u>
Plaintiffs' Notice of Motion-Affirmation- Affidavit(s)-Service-Exh(s) & Memorandum of Law	1-5
Defendant's Affirmation in Opposition- Affidavit(s)-Exhibit(s)	6-10
Plaintiffs' Reply Affirmation-Exhibit(s)	11-12
Defendant's Sur-Reply Affirmation-Exhibits(s)	13-14

By notice of motion, plaintiffs seek an order of the Court, pursuant to CPLR §3212, granting them summary judgment and dismissing defendant's counterclaim.

Defendant files an affirmation in opposition, plaintiffs file a reply and defendant files a sur-reply.

The underlying cause of action is a claim by plaintiffs for trespass, private nuisance, and to compel the determination of claims to real property.

Defendant counter-claimed for adverse possession, a prescriptive easement, and for the determination of a violation of RPAPL §871.

The parties to this action are neighbors. Plaintiffs reside at 120-20 115<sup>th</sup> Avenue and defendant resides at 120-18 115<sup>th</sup>

Avenue in South Ozone Park, Queens, New York. Plaintiffs purchased their residence in November, 2002; the defendant purchased his residence three (3) months earlier, in July, 2002. Located between the two properties is a driveway, which is fourteen (14) feet wide, and approximately fifty (50) feet long, stretching from the curb to the rear of the properties. The deed to each lot reflects that each party owns a plot of land twenty-five feet (25') by ninety-five (95') feet. The deeds further reveal that plaintiffs' property line extends six (6') feet into the fourteen foot (14') wide driveway.

It is this "common driveway" which is the subject of dispute between the parties.

"One of the most widely quoted statements regarding the Court's function on a summary judgment motion appears in Esteve v. Abad (271 AD2d 725, 68 NYS2d 322 [1<sup>st</sup> Dep't. 1947]). The Court said that '[i]ssue-finding, rather than issue determination, is the key to the procedure,' language approvingly quoted by the Court of Appeals. See Stillman v. Twentieth Century Fox Film Corp, 3 NY2d 395, 144 NE2d 387, 165 NYS2d 498 [1957])." McKinney's Practice Commentaries, David A. Siegel, C3212:2 Finding Issues, Not Determining Them, Is Key, p. 11.

Turning first to plaintiffs' motion to dismiss defendant's counterclaim, the Court notes that the elements of a claim for adverse possession, must include by "...clear and convincing evidence that [their] possession was hostile, and under claim of right, actual, open and notorious, exclusive and continuous during the statutory period (see, Brand v. Prince, 35 NY2d 634, 636; Yamin v. Daly, 205 AD2d 870, 871; Denel v. McGilton, 199 AD2d 737) and that the property was either "usually cultivated or improved" or "protected by a substantial enclosure" (see, RPAPL \_\_\_; Somerset R.R. Corp. v. Owasco Riv. Ry;, 69 NY2d 1023, 1025; Yamin v. Daly, *supra.*, at 871, Porter v. Marx, 179 AD2d 962, 963; City of Tonowanda v. Ellicott Cr. Homes Assn., 86 AD2d 118; see also, Boumis v. Caetano, 140 AD2d 401, 402-403) Weinstein Enterprises, Inc. v. Cappelletti, et al., 217 AD2d 616, 617-618 [2<sup>nd</sup> Dep't. 1995]).

In response to plaintiffs' assertion that defendant has failed in his proof of adverse possession, defendant provides the affidavit of Michael Cicalese. Mr. Cicalese asserts that he is the grandson of James and Helen Johnson, the title holders of defendant's property from 1943 to 1973. Mr. Cicalese maintains that his grandmother, Helen Johnson, paved the driveway in question in 1968, and that his family made use of that driveway right up until the property was sold to Serome Rachpaul in 1998,

the predecessor in interest to defendant.

Mr. Cicalese's affidavit does not, and can not, attest to the circumstances surrounding his grandmother's decision to pave hers and a portion of her neighbor's property in 1968. Was it with the neighbor's permission while reserving the right of ownership and thus not hostile? Neither Mr. Cicalese, nor anyone else submits evidence to support defendant's contention of "hostile" or claim of right use. Moreover, Mr. Cicalese can not attest to exclusive and continuous use, not only because of his own absence from the premises for a period of time but also because of the sale of the property by his parents to Serome Rachpaul in 1998. No affidavit is provided from Serome Rachpaul, accounting for the treatment of said property from 1998 until July, 2002. Thus defendant has not submitted any proof that his predecessor used that portion of the driveway which falls within the boundary of plaintiff's property by any claim of right.

Thus, it is apparent that under the facts and circumstances of this case that defendant can not meet his burden by clear and convincing evidence, *Id.*, and plaintiffs' motion dismissing defendant's counter-claim for adverse possession is granted.

"To acquire an easement by prescription, the use must be adverse, open and notorious, continuous and uninterrupted for the requisite time period" (*Boumis v. Caetano*, 140 AD2d 401, 402 [2<sup>nd</sup> Dep't. 1988]; *Cole v. Rothe, et al.*, 18 AD3d 1058, 1059 [3<sup>rd</sup> Dep't. 2005]).

"Generally proof that use of a property was open, notorious, continuous and undisputed will give rise to a presumption that the use was hostile and under a claim of right" (*Cole*, at 1059). "The burden is then shifted to the party denying the existence of an easement to establish that the use of the subject land was, indeed, permissive." *Id.*

Here, however, defendant failed in his proof to establish that the use of the driveway was continuous by his predecessors in interest. Thus, there is no burden shifting requirement by plaintiff to show that such use was hostile and by claim of right rather than permissive. Plaintiff's motion to dismiss that portion of defendant's counterclaim for a prescriptive easement is also granted.

RPAPL §871 provides in part that: "[a]n action may be maintained by the owner of any legal estate in land for an injunction directing the removal of a structure encroaching on such land."

In such an action the burden is on the movant to establish ownership of the subject parcel (Duggan, et al. v. Hyland, et al., 50 AD2d 1066, [4<sup>th</sup> Dep't. 1975]; Schwartzberg v. Lin, 279 AD2d 466 [2<sup>nd</sup> Dep't. 2001]). As noted above, defendant has not established that claim by this theory of adverse possession. Consequently, the action does not lie and plaintiffs' third counterclaim is likewise granted.

Plaintiffs also seek summary judgment on their claims for trespass, private nuisance and to compel a determination of claims to real property.

"The essence of trespass is the invasion of a person's interest in the exclusive possession of land" (Ward, et al. v. City of New York, et al., 15 AD3d 392, 393 [2<sup>nd</sup> Dep't. 2003]).

"To recover damages based on the tort of private nuisance, a plaintiff must establish an interference with his or her right to use and enjoy land, substantial in nature, intentional or negligent in origin, unreasonable in character, and caused by defendant's conduct" (Kaplan v. Inc. Village of Lynbrook, 12 AD3d 410, 412 [2<sup>nd</sup> Dep't. 2004]).

Plaintiffs maintain that defendant regularly parks automobiles, and that defendant's tenant regularly parks automobiles in the shared driveway, causing interference with plaintiffs' use and enjoyment of their portion of the driveway.

Defendant, of course, does not deny such, since to do so would be inconsistent with his claim of adverse possession and prescriptive easement.

Accordingly, those portions of plaintiffs' motion for summary judgment on their cause of action for trespass, and their cause of action for private nuisance is granted as to liability only.

Finally, having already determined that plaintiffs are entitled to summary judgment and dismissal of defendant's counterclaim for adverse possession, prescriptive easement, and an alleged violation of RPAPL §871, it follows that plaintiff is entitled to summary judgment on the issue of the determination of entitlement to real property as described by plaintiff in paragraph six (6) of plaintiffs' complaint.

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for summary judgment as to defendant's counterclaim is granted and the counterclaim is

dismissed with costs and disbursements to plaintiff as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and, it is further

ORDERED, that the Clerk is directed to enter judgment accordingly; and, it is further

ORDERED, that plaintiffs are the lawful owners and are vested with an absolute and unencumbered title in fee to the property described in their complaint; and, it is further

ORDERED, that plaintiffs' motion for summary judgment is granted as to liability only on plaintiff's cause of action for trespass and private nuisance.

Upon proof of filing a copy of this Order with a note of issue and statement of readiness with the Trial Term Clerk and compliance with all the rules of this Court, this action shall be placed on the I.A.S. Part 12 calendar, for the 10<sup>th</sup> day of **May**, at **2006**, at **11:00 a.m.**, 88-11 Sutphin Boulevard, Jamaica, NY, Courtroom 45 for inquest/assessment of damages by the Court, provided that a copy of this order with notice of entry is served upon the defendant, MANSINGH JAIRAM, by regular mail and upon the Clerk of I.A.S. Part 12 of this Court at least twenty (20) days prior to the scheduled Inquest date.

Upon the rendering of said assessment, the plaintiffs shall recover judgment against the defendant, MANSINGH JAIRAM, in the sum for which the damages are thus fixed, together with the costs of the action to be taxed by the Clerk of the Court, and said Clerk is hereby directed to enter judgment in favor of the plaintiffs and against the defendant, MANSINGH JAIRAM, said sum in which damages are thus fixed, together with the costs of the action as taxed, if authorized by statute.

Dated: Jamaica, New York  
March 30, 2006

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**JOSEPH P. DORSA**  
**J.S.C.**