

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS  
Justice

IAS PART 4

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GELMART INDUSTRIES, INC.,

Index  
No.: 1007/2002

Plaintiff,

Motion  
Date: February 25, 2003

-against-

Motion  
Cal. No.: 7

ANN HUBERT AND STEVEN AGNELLI,

Defendants.

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The following papers numbered 1-7 read on this motion by defendant Ann Hubert and Steven Agnelli for summary judgment dismissing the complaint based upon res judicata.

	PAPERS NUMBERED
Notice of Motion Affid.-Exhibits.....	1-4
Answering Affid.-Exhibits.....	5-7

Upon the foregoing papers it is ordered that this motion is determined as follows:

Plaintiff Gelmart Industries, Inc. ("Gelmart") commenced this action seeking declaratory and injunctive relief. Plaintiff Gelmart alleges that it is the owner of the property located at 20-20 129<sup>th</sup> Street, College Point, New York, and that defendant Ann Hubert is the owner of 20-43 127<sup>th</sup> Street, College Point, New York and defendant Stephen Agnelli s/h/a Steven Agnelli and Tamara Agnelli<sup>1</sup> are the owners of 20-45 127<sup>th</sup> Street, College Point, New York, the adjoining lots. Plaintiff Gelmart further alleges that Ann Hubert and Edward James Hubert are the "predecessors" in title to defendant Ann Hubert, and that Edward Angelli and Philomena.

Agnelli are the predecessors in title to defendant Steven Agnelli and Tamara Agnelli. According to plaintiff Gelmart, Ann Hubert, Edward James Hubert, Edward Agnelli and Philomena Agnelli commenced a prior action against it, entitled Hubert v. Gelmart Industries, Inc., (Supreme Court, Queens County, Index No 19321/1983), wherein

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Plaintiff commenced a separate action, entitled Gelmart Industries, Inc. V. Agnelli, (Supreme Court, Queens County, Index No. 29058/2002), against Tamara Agnelli. Tamara Agnelli and the counsel for the parties herein entered into an undated stipulation wherein they purportedly consolidated the two actions under Index No. 1007/2002, and agreed that upon consolidation, the answer served by defendants Ann Hubert and Steven Agnelli in this action be deemed to constitute the answer of

the Hubert plaintiffs were granted, by virtue of the judgment, October 16, 1984, a prescriptive easement permitting a right of way from the curb cuts on 128<sup>th</sup> Street, across Gelmart's paved parking lot, to the rear of the plaintiffs' properties. Plaintiff Gelmart also alleges that the prescriptive easement was granted for the purpose of permitting vehicular access, but that such easement was granted specifically to the named plaintiffs in the Hubert action, and has since terminated. Plaintiff Gelmart alternatively alleges that it has the right to relocate the easement to the boundary line of its property without the consent of defendants herein. Lastly, plaintiff Gelmart alleges that defendants herein and their families routinely park their motor vehicles on its parking lot, and that its written requests for them to stop doing so have been ignored. Plaintiff, therefore, seeks a permanent injunction enjoining defendants from parking vehicles, or placing other personal property, garbage or other matter on its property.

Defendants Ann Hubert and Steven Agnelli served an answer denying certain allegations of the complaint, and asserting an affirmative defense based upon res judicata.

At the outset, the court notes that to the extent the instant motion was made during the period that plaintiff's prior motion for summary judgment was sub judice, plaintiff's motion was denied by order dated March 28, 2003, because plaintiff failed to provide an affidavit of service of the order to show cause and supporting papers.

Contrary to the argument of plaintiff, the instant motion for summary judgment was timely served by defendants, inasmuch as defendants served plaintiff with the notice of the motion fourteen days prior to the scheduled return date (CPLR 2103 [b] [2], 2214 [b]. The affidavit of service, dated February 11, 2003 indicates that service of the notice of motion, setting February 25, 2003 as the return date, was made by ordinary mail on February 11, 2003. Such affidavit constitutes proof of proper mailing and gives rise to a presumption that the notice of motion was received by counsel for plaintiff (see, Engel v. Lichterman, 62 N.Y.2d 943). Plaintiff, furthermore, has submitted opposition papers relative to the merits of defendants' motion, albeit the court recognizes that some of the papers were originally prepared in support of plaintiff's own motion.

Defendants move for summary judgment dismissing the cause of action seeking declaratory relief based upon res judicata.

"Res judicata bars future litigation between the same parties, or those in privity with the parties, of a cause of action arising out of the same transaction or series of transactions as a cause of action that was either raised or could have been raised in a prior proceeding (Winkler v. Weiss, 294 A.D.2d 428; Ciancimino v. Town of E. Hampton, 266 A.D.2d 331). Under the transactional analysis approach to res judicata, once a claim is brought to a final conclusion, all other

claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357; see, CRK Contracting of Suffolk v. Jeffrey M. Brown & Assocs., 260 A.D.2d 530" Miller v. Kozakiewicz, 300 A.D.2d 399).

The subject easement was declared following the trial in the Hubert action wherein the Hubert plaintiffs proved they has acquired an easement by prescription across Gelmart's property. The Hubert judgment included a metes and bounds description of the easement as established by the Hubert plaintiffs. The Hubert plaintiffs also obtained an injunction directing Gelmart to remove any obstructions from the use of the easement. The judgment was affirmed by memorandum decision of the Appellate Division, Second Department (see, Hubert v. Gelmart Industries, Inc., 119 A.D.2d 630). Plaintiff Gelmart is bound by the Hubert judgment.

That the Hubert judgment itself did not state that the declared easement was to inure to the benefit of the successors in title to those plaintiffs is of no moment. An easement is not the personal right of a landowner but is an appurtenance to the land benefitted by it (the dominant estate) (see, Will v. Gates, 89 N.Y.2d 778). Plaintiff Gelmart has made no showing that, at any time following entry of judgment in the Hubert action, the Hubert plaintiffs, as the easement holders, released their rights to the judicially declared easement (see, e.g., Board of Educ., Rye Neck Union Free School Dist. V. Ryewood Farms, Ltd., 144 A.D.2d 413), or intentionally conveyed any of their interests in the dominant estates without the easement (see, e.g., Fila v. Angiolillo, 88 A.D.2d 693; Beutler v. Maynard, 80 A.D.2d 982). As a consequence, the prescriptive easement, having been declared in the Hubert, action, necessarily passes with the transfer of the dominant estates to convey the easement, (see, Fila v. Angiolillo, supra; Beutler v. Maynard, supra).

To the extent plaintiff Gelmart seeks to relocate the easement, such relief is also barred as a result of res judicata. Subsequent to the affirmance of the Hubert judgment by the Appellate Division, the Hubert plaintiffs moved to punish Gelmart for contempt, and Gelmart cross moved to modify the judgment to relocate the easement to another location on Gelmart's property, on the ground that the location specified in the judgment was unreasonable. By memorandum decision dated June 19, 1987, the motion by the Hubert plaintiffs to punish for contempt was granted and the cross motion by Gelmart to modify the judgment was denied.

Plaintiff Gelmart argues that notwithstanding the refusal of the Hubert court to amend its judgment, plaintiff Gelmart has an independent right, as the owner of the servient premises, to relocate the judicially declared easement without the consent of defendants herein, so long as such relocation does not impair defendants' right of passage. Such argument, however, merely constitutes a different theory upon which Gelmart could have sought modification of the Hubert judgment. In any event, the right of a landowner of a servient estate to relocate an easement, without the permission of the easement holders, is limited to those cases where

the easement is fixed by grant or reservation (see, e.g., Lewis v. Young, 92 N.Y.2d 443; Dalton v. Levy, 258 N.Y. 161). In this instance, the easement described in the Hubert judgment was not based upon an express grant, but rather upon proof of the Hubert plaintiffs' adverse, open, notorious and continuous use of Gelmart's property for the prescriptive period.

Defendants seek summary judgment dismissing the cause of action for injunctive relief, contending that the claim is subsumed within plaintiff Gelmart's claims for declaratory relief. Such contention is without merit. Plaintiff's allegation that defendants park vehicles on its property constitutes a claim that defendants have exceeded their rights to the judicially declared easement in the manner of its use. The Hubert judgment provides a prescriptive easement for the purpose of gaining "unimpeded and continuous vehicular access" to the rear of the Hubert plaintiffs' residences, but does not establish an easement for the purpose of parking vehicles. Defendants have failed to make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material question of fact with respect to the issue of their alleged parking of vehicles on plaintiff's property (see, Alvarez v. Prospect Hosp., 68 N.Y.2d 320; Zuckerman v. City of New York, 49 N.Y.2d 557).

Accordingly, the motion by defendants for summary judgment is granted only to the extent of granting partial summary judgment declaring that the easements previously established by the judgment in the Hubert action are not specific to the Hubert plaintiffs, are for the benefit of the successors in title to the Hubert plaintiffs, and do not terminate upon the deaths of the Hubert plaintiffs. Entry of judgment shall be stayed pending the determination of the entire action.

Dated:

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MARGUERITE A. GRAYS  
J.S.C.