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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - PART 15

Present: HON. WILLIAM R. LaMARCA
Justice

XANDER CORP.,

Petitioner,

-against- INDEX NO: 14069/03

SINCLAIR HABERMAN, D. DOMENICO LTD., SCOTT KEMINS as the Building Commissioner of the City of Long Beach, and BELAIR BUILDING, LLC,

Respondents.

BELAIR BUILDING, LLC,

Plaintiff,

-against- INDEX NO: 17162/03

KEYSPAN GAS EAST CORPORATION d/b/a KEYSPAN ENERGY DELIVERY LONG ISLAND,

Defendant.

AMENDED MEMORANDUM DECISION AFTER TRIAL

The MEMORANDUM DECISION AFTER TRIAL, issued on December 8, 2009, is hereby amended to redact the name of counsel and to correct the caption to reflect that the companion action of BELAIR BUILDING, LLC. v. KEYSPAN GAS EAST CORPORATION d/b/a KEYSPAN ENERGY DELIVERY LONG ISLAND, INDEX NO: 17162/03, was previously severed by Stipulation of the parties on the record in open Court, on May 20, 2009. Accordingly, the correct caption on the AMENDED MEMORANDUM DECISION is as follows:

XANDER CORP.,

Petitioner,

-against- **INDEX NO: 14069/03**

SINCLAIR HABERMAN, D. DOMENICO LTD., SCOTT KEMINS as the Building Commissioner of the City of Long Beach, and BELAIR BUILDING, LLC,

Respondents.

Appearances:

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Introduction

Petitioner, XANDER CORP. (hereinafter referred to as "XANDER") , is the corporate owner of a ten (10) story cooperative building at 360 Shore Road in Long Beach, New York, that is comprised of one hundred twenty six (126) apartments that are occupied by one hundred twenty six (126) shareholder resident families. In September 2003, counsel for XANDER, on behalf of its shareholders, commenced the instant action to determine title to an adjoining parking lot to the west of the XANDER building, and to a portion of a pool deck, 17 feet of which extended beyond the XANDER property line into an adjoining tax lot owned by respondents. In four (4) causes of action, petitioner sought injunctive relief staying any construction on the subject property, an easement by prescription over the subject property, title to the property by adverse possession and damages for the destruction of petitioner's parking lot and fence. In essence, XANDER sought to have the Court find that it has established title to the real property in question by adverse possession or, in the alternative, that it has established the requisite elements for a prescriptive easement or that the fence installed between the parking lot and respondents' remaining property is the property line based upon practical location.

The trial of this matter consumed twenty -two (22) days before the undersigned and commenced on May 20, 2009, continued on May 21, 22, 26, 27, 28, June 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 22, 24, 25, 29 and 30, and concluded on July 6, 2009.

Background

The development of this Long Beach property has a long history. The record reflects that, on September 18, 1985, the Long Beach Board of Appeals (hereinafter

referred to as the "ZBA"), granted Jacob Haberman, respondent SINCLAIR HABERMAN's father and his predecessor in interest, a variance for the construction of the Sea Pointe Project, a four-building residential development to be "phased in" over time. Three Towers, "A", "B" and "C", were to be constructed on the south side of Shore Road, now tax lots 8-19, 41, 45 and 46, along the beachfront, and the fourth, Tower "D", was to be constructed on the north side of Shore Road.

A building permit for Tower "A" was issued on March 6, 1986. Tower "A" now XANDER, was built on the most easterly lot, tax lot 45, which had a backward "L" shape and included the ten (10) story building and a swimming pool and Jacuzzi complex at the lower left corner of the lot. The second building, Tower "B" was to be built on tax lot 46, opposite the pool and Jacuzzi complex, now a parking lot and the property at issue. The third Tower was to be built on lots 13-16, the most westerly portion of the property.

The entire parcel on the south side of Shore Road was designated to have a deck approximately twelve (12) feet above the ground surface, extending to the property lines on the eastern and western sides of all of the parcels. The swimming pool and Jacuzzi complex was built on XANDER's deeded property, and the deck extended along the boardwalk, running above the ground floor parking area. Said deck was designed and intended to be incorporated into a new "seamless, interconnected deck" covering all of the parcels south of Shore Road when Tower "B" and "C" were completed. The deck design and plans for three (3) additional towers were documented in the Offering Plan and zoning documents issued or filed in connection with the Sea Pointe Project.

One month following issuance of the building permit for Tower "A", in March 1986, respondent, SINCLAIR HABERMAN (hereinafter referred to as "HABERMAN"), caused the

formation of XANDER as a cooperative corporation to acquire title to Tower "A", pursuant to the Offering Plan. Thereafter, by deed dated May 27, 1986, Jacob Haberman conveyed title to all of the property, both on the north and south side of Shore Road, to HABERMAN and his brother, Brook Haberman. Brook Haberman then conveyed his interest in the property to HABERMAN, by deed dated December 29, 1986. Eventually, HABERMAN, conveyed the deeded property to Elsak, the project sponsor, which then conveyed the property to XANDER. Both of those conveyances contained highly detailed reservations of rights and easements to permit respondents to enter the property and construct the remainder of the Sea Pointe Project, and for the residents of the future Towers to use the facilities, including the pool and Jacuzzi complex.

The Offering Plan for the Sea Pointe Project was duly filed with the Attorney General of the State of New York, on about September 1, 1986, and declared effective on October 26, 1987. A sales office was established on the westerly side of the Shore Road Property which displayed "a large", glass covered, "three-dimensional diorama" of the entire planned Sea Pointe Project. The sales model depicted the "lanai deck" that would cover the entire ground floor parking level on the south side of Shore Road when the project was completed. Prospective purchases of a residence in Tower "A", were a) shown the large three-dimensional model to convey a better understanding of the entire Sea Pointe Project, b) given a complete copy of the Offering Plan, c) handed a brochure showing several renderings of all four Towers and d) told, as part of the basic sales presentation, that the residents could use HABERMAN's parking lot on tax lot 46 until construction of Tower "B" started. All initial purchasers were required to confirm in writing that they had "received and read" a copy of the Offering Plan and agreed to its terms. By signing the Subscription

Agreement, they specifically adopted and agreed to the Offering Plan, which was incorporated into the Agreement with the same force and effect as if set forth at length and which governed and was binding. The Offering Plan put all prospective buyers on notice of the three similar Towers to be built and of the 126 parking spaces to be "located under the building" at Tower "A".

The "Plot Plan" was located on page 81 of the Offering Plan, however, the pool configuration was changed at the request of the Nassau County Department of Health to contain two (2) pools, plus a Jacuzzi. Said change was approved at the 2/13/88 ZANDER Board Meeting, and HABERMAN extended the pool deck 17 feet beyond XANDER's property line to accommodate the revised structure of the pools. The additional extension was not cordoned off, and the residents of XANDER were permitted to use the extension for their enjoyment and to further the marketing plan. The record reflects that respondents repeatedly alerted prospective purchasers, both in the Subscription Agreement and the Offering Plan, that use of the pools and the Jacuzzi would be shared with all the tenants of XANDER and the future residents of the Sea Pointe Tower project. The Offering Plan reflects that "should the entire complex be constructed all 432 units will have the equal right to share in the use of the pool and Jacuzzi Complex". The Sponsor also clearly reserved rights to himself, his successors and all tenants, the right to use the pool and Jacuzzi in conjunction with the development of the Sea Pointe project, and that the pool costs to XANDER would be reduced following construction of the additional TOWERS.

HABERMAN's Continued Litigation with Long Beach

HABERMAN, or his predecessors in interest, owned Belair Gardens, an income - producing garden apartment complex located west of Tower "A" along Shore Road. Long

Beach complied with a variance granted in 1985 by issuing two permits to HABERMAN to demolish Belair Gardens, which was completed in May 1987. Long Beach was also required by the 1985 variance to issue permits for the construction of the three (3) additional Towers planned at Sea Pointe. Tower "B", the second building planned, was to be a ten floor residence built in the middle of the Parking Lot on tax lot 46, which was to carry the address 350 Shore Road. However, the record reflects that Long Beach delayed issuing the required permits to HABERMAN because the applicable zoning code was being revised.

In 1987, during construction of Tower "A", but before respondents had received their permit for the construction of Tower "B", Long Beach amended its Code to reduce the Tower height from ten (10) stories to seven (7) stories, and to increase its off street parking requirements. Long Beach then rejected respondents' applications for permits to construct Towers "B" "C" and "D". On July 16, 1987, HABERMAN commenced an action against the City of Long Beach, to enjoin it from enforcing its new Code provisions on the grounds, *inter alia*, that respondents right to build the three (3) future Towers had already vested because of the substantial completion of Tower "A" and because of respondents significant expenditures benefitting the entire property. On March 8, 1989, the parties entered into a Stipulation of Settlement resolving the Long Beach action, which reaffirmed that two (2) additional Towers on the south side of Shore Road, Tower "B" and "C", would be ten (10) stories, but reduced the height of Tower "D" on the north side of Shore Road to seven (7) stories, with the lower two stories to be used for parking. The Settlement was incorporated into a Judgment, entered April 10, 1989 (Goldstein, J.). The settlement further provided for construction of the additional Towers within certain time constraints, however, when

Long Beach failed to complete the necessary infrastructure improvements, the Settlement was modified by tolling the time requirements for the respondents to commence the Towers until Long Beach had completed its required improvements. The Modified Settlement was approved by the Court, by order entered June 25, 1992, and subsequently upheld by the Court of Appeals. *Haberman v. Zoning Board of Appeals*, 9 NY3d 269 (C.A. 2007).

BZA Petition

After completion of the litigation with the City of Long Beach, in the Fall of 2002, HABERMAN's construction company applied for a permit to begin work on Tower "B". The respondents claim that, at that time, XANDER's Officers and Directors, without notice to HABERMAN, a director of the co-op, held a series of meetings, on September 22, October 31, and November 7, 2002, and decided to retain counsel to prevent or delay construction of Tower "B". HABERMAN was neither invited not advised of the meetings. The "notes" of the meetings reflect that the Officers and Directors of XANDER were expressly told that its shareholder use of the outdoor parking lot and under the pool was pursuant to an "easement" from HABERMAN, as a favor to the residents, who had produced plans for the Long Beach Building Department for the construction of Tower "B". The Officers and Directors of XANDER were further reminded that the Offering Plan disclosed the developers plan to construct four (4) Towers, and that the Settlement Agreement in Court with Long Beach allowed HABERMAN to build four (4) Towers. The Officers and Directors were also told to "forget all time elements" because the Settlement Agreement tolled the need to build until Long Beach completed all required infrastructure work. When

respondents were issued a building permit, counsel was authorized by the Officers and Directors of XANDER to commence the instant action in an attempt to prevent the construction of Tower "B". Counsel also filed a petition, on August 29, 2003, with the ZBA in opposition to the granting of the building permits. At the public hearing, on October 23, 2003, numerous representatives of XANDER, including all of its directors, spoke against the issuance of the building permits, citing such concerns as potential loss of views of the Atlantic Ocean, inconvenience from relocation of their parking spots, or potential congestion resulting from shared use of the swimming pool and Jacuzzi complex with residents of the three (3) other proposed Towers. No challenge to HABERMAN's ownership of tax lot 46 was made.

On September 14, 2003, XANDER's attorney commenced the instant action and for the first time alleged a claim for adverse possession or a restrictive easement.

The Law

To establish a claim of title by adverse possession a party must prove by clear and convincing evidence, (*Winchell v Middleton*, 226 AD2d 1009, 641 NYS2d 208 [3rd Dept. 1996]; *Robarge v Willett*, 224 AD2d 746, 636 NYS2d 938 [3rd Dept. 1996]; *Dittmer v Jacwin Farms, Inc.*, 224 AD2d 746, 637 NYS2d 785 [2nd Dept. 1996]), that the possession of the claimed property was open, notorious, exclusive, continuous for the statutory period, and hostile under a claim of right (*Garrett v Holcomb*, 215 AD2d 884, 627 NYS2d 113 [3rd Dept. 1995]; *see, Brand v Prince*, 35 NY2d 634, 324 NE2d 314, 364 NYS2d 826 [C.A. 1974]; *see also, Manhattan School of Music v Solow*, 175 AD2d 106, 571 NYS2d 958 [2nd Dept. 1991]). "Reduced to its essentials, this means nothing more than that there must be

possession in fact of a type that would give the owner a cause of action in ejectment against the occupier throughout the prescriptive period" (*Brand v Prince*, *supra*).

"In general, when adverse possession of property is not founded on a written instrument, only that portion of the property actually occupied and possessed may be acquired by the adverse possessor." (*Hutton v Townsend*, 150 AD2d 972, 542 NYS2d 28 [3rd Dept. 1989]). The property claimed adversely not under a written instrument must be "usually cultivated or improved" or "protected by a substantial enclosure" (*Giannone v Trotwood Corp.*, 266 AD2d 430, 698 NYS2d 698 [2nd Dept. 1999]; RPAPL§ 522 [1], [2]).

There is a Court held presumption that title is vested in the true owner unless the burden of production is met by the party claiming title by adverse possession (*Saint Nicholas Ukrainian Orthodox Church of Little Falls, N.Y. v St. Nicholas Ruthenian [Ukrainian] Greek Catholic Church of Little Falls, N.Y.*, 157 NYS2d 586 [Herkimer Co. Sup. 1956], *aff'd*, 4 AD2d 741, 164 NYS2d 980 [4th Dept. 1957]). When a party claiming title by adverse possession proves that the possession of the property was open, notorious, and continuous, a presumption arises that the possession was adverse to the record owner (*Fatone v Vona*, 287 AD2d 854, 731 NYS2d 521 [3rd Dept. 2001]). In *Fatone*, where the plaintiff adverse possessor acted as a true owner of the disputed property for the statutory period and sued to quiet title; the Court held that there was a presumption of hostility once the open, notorious, exclusive, and continuous statutory requirements were established. The hostility requirement may be satisfied even if the adverse possession was by inadvertence or mistake. (*See*, *Katona v Lowe,* 226 AD2d 433, 641 NYS2d 62 [2nd Dept. 1996]).

If the party claiming title by adverse possession establishes a presumption of hostility, then the burden will shift to the true owner to rebut the presumption, (*Nazarian v Pascale*, 225 AD2d 381, 638 NYS2d 661 [1st Dept. 1996]) which may be done by either showing the use was permissive, (*Fatone v Vona*, *supra*) or that there was a license for the use granted to the party claiming title by adverse possession (*Landgray Assoc. v 450 Lexington Venture L.P.*, 788 F. Supp. 776 [SDNY 1992]).

After the running of the statutory period, recognition by a party who has acquired title by adverse possession that title vests in another will be insufficient to divest title. (*Ahl v Jackson et al.*, 272 AD2d 965, 708 NYS2d 778 [4th Dept. 2000]). However, when an adverse possessor "acknowledges during the ten (10) year statutory period that actual ownership of the property rests in the titled owner, the possession of the parcel is not under a claim of right and any claim of adverse possession is defeated" (*Dittmer v Jacwin Farms, Inc.*, *supra*). Moreover, "an admission by the party in possession prior to the vesting of title, that title belongs to another, will destroy the element of hostile possession" (*See, Soukup v Nardone,* 212 AD2d 772, 623 NYS2d 259 [2nd Dept. 1995]. *Compare Walling v Przybylo*, 24 AD3d 1, 804 NYS2d 435 [3rd Dept. 2005], *aff'd*, 7 NY3d 228, 818 NYS2d 816, 851 NE2d 1167 [C.A. 2006] [holding that a hostile claim can be defeated only when the adverse possessor acknowledges by words or conduct during the statutory period that title vests in another and negates the hostility requirement], *with Albright v Beesimer*, 288 AD2d 577, 733 NYS2d 251 [3rd Dept. 2001] [holding that conversations or tacit acknowledgments of title in another are sufficient to defeat an adverse possession claim).

Furthermore, "[t]he mere possession of land without any claim of right, no matter how long it may be continued, gives no title" (*Soukup v Nardone, supra*, quoting *Schoenfeld v Chapman,* 280 AD 464, 115 NYS2d 1 [2nd Dept. 1952]; *Lewis v Village of Lyons,* 54 AD2d 488, 389 NYS2d 674 [4th Dept. 1976]; *MAG Assocs. v SDR Realty,* 247 AD2d 516, 699 NYS2d 314 [2nd Dept. 1998]).

When permission to use property is granted by the record owner, a party will not be able to claim the possession was adverse (*Avraham v Lakeshore Yacht and Country Club, Inc.*, 278 AD2d 842, 719 NYS2d 424 [4th Dept. 2000] [holding that a party can not claim title by adverse possession when the adverse possessor and their predecessors had used the property for over ten [10] years after it was established that permission for such use was granted by the record title holder defeating the element of hostility]; *see also* AMJUR2d, Adverse Possession § 52). When there is "permission as a matter of willing accord and neighborly accommodation" no claim for adverse possession will lie (*Hall v Sinclaire*, 35 AD3d 660, 826 NYS2d 706 [2nd Dept. 2006]; *see, Koudellou v Sakalis*, 29 AD3d 640, 814 NYS2d 730 [2nd Dept. 2006]).

A party claiming title by adverse possession, may, after it has been established the possession was permissive, assert that the possession became hostile (*See*, *Longshore v Hoel Pond Landing Inc.*, 284 AD2d 815, 727 NYS2d 518 [3rd Dept. 2001]). The change from permissive use to hostile possession, however, must be done by clearly exhibiting hostility so that actual notice would be provided to the record owner of an adverse claim to the disputed property (AMJUR2d, Adverse Possession § 53).

The elements for a prescriptive easement are the same as those for adverse possession, without the necessity of exclusivity. (*City of Tonawanda v Ellicott Creek Homeowners Association, Inc.*, 86 AD2d 118, 449 NYS2d 116 [4th Dept. 1982]; see also, Borruso v Morreale, 129 D2d 604, 514 NYS2d 99 [2nd Dept. 1987]).

Petitioner's Contentions

It is XANDER's position that respondents acquiesced in XANDER's use of the outdoor parking lot and pool deck, but that no permission was given for said use. XANDER argues that "[t]he key difference between acquiescence by the true owner and possession with the permission of the true owner is that a permissive use requires the acknowledgment by the possessor that he hold in subordination to the owner's title" citing 7R. Poweel, The Law of Real Property ¶1014 at 721 (Rohan revised ed. 1979). XANDER claims that respondents acquiescence in its open, hostile and continued use of the subject areas through the statutory period demonstrates that adverse possession exists. XANDER asserts that its possession of the outdoor parking lot and pool deck from the time they were built has been hostile and under a claim of right.

In support of its position, XANDER presented evidence that, when a unit was sold, it was XANDER that designated in writing where an individual was to park, whether in an indoor space under XANDER's building, or an outdoor space on Lot 46. The witnesses for XANDER claimed that they were assigned parking spaces that were singed off by HABERMAN, then President of XANDER's Board, and it was their belief that their assigned parking spots belonged to them and would run with the land when their apartment was sold. Witnesses for XANDER point out that some shareholders required two (2) parking

spots and were permitted to purchase same, and that the additional spots came from the adjacent "parking lot" located on Lot 46. XANDER claims that, when HABERMAN settled its litigations with the City of Long Beach, it resulted in a revised site plan that had two separate pools and a Jacuzzi Complex, as well as mandatory 1.5 parking spaces for each XANDER apartment, for a total of 189 spots. At the time, HABERMAN confirmed that XANDER had a total of 190 parking spots, in a combination of indoor and outdoor spots, and that the parking lot was enclosed with a fence running north and south from the boardwalk to Shore Road. It is XANDER's position that the six to eight foot fence recognized the end of XANDER's property and the beginning of HABERMAN's other lots.

Witnesses for XANDER asserted that HABERMAN never made improvements to the parking lot or pools, that insurance of the areas was maintained for XANDER, not HABERMAN, that XANDER maintained the pools, provided lifeguards, that the parking lot was fenced off and the only way to enter was through the XANDER garage, that by 1999 when most units were sold, there were many assigned parking spaces in the outdoor lot, which XANDER repaired and maintained on a regular basis. All witnesses for XANDER testified that, since 1989, when they moved in, they believed that XANDER owned the outdoor parking lot and pool deck and that the only way to enter the lot was through the XANDER garage with the use of a remote, purchased from XANDER. Testimony reflects that in 2003, when XANDER shareholders became concerned that HABERMAN might try to build another TOWER on "XANDER's parking lot", XANDER moved quietly to obtain title to the property by adverse possession and petitioned the ZBA to revoke HABERMAN's building permit.

It is XANDER's position that, on January 9, 2005, HABERMAN, without a permit and contrary to a preliminary injunction, demolished XANDER's fence and parking lot with cars on it. XANDER claims that HABERMAN was stopped by the police and Judge Davis, who issued a TRO, and it seeks damages of $41,185.00 for the destruction of the parking lot and fence.

Respondents' Contentions

It is respondents' position that, at no time prior to commencement of this action in 2003, did XANDER or anyone on its behalf ever claim any right to ownership of the outdoor parking lot by adverse possession. No mention of such a claim is found in the notes and minutes of XANDER's board in the Fall of 2002 or the Spring of 2003. Indeed, respondents point out that XANDER, in its petition to the ZBA, acknowledged HABERMAN's ownership of the parking lot on tax lot 46, wherein counsel for XANDER stated that "350 Shore Road, Long Beach, New York, is upon information and belief owned by SINCLAIR HABERMAN". In the attached certification to the petition, Aaron Wagner, the then President of XANDER, swears that XANDER is the "adjoining property owner" to HABERMAN's property, the parking lot. On the attached list of names and addresses of affected Property Owners, Jacob Haberman is listed as the owner of tax lot 46, the Parking Lot, while XANDER is listed as the owner of the adjoining tax lot 45. More telling, since 1988, HABERMAN or his affiliates, not XANDER, have always paid the real estate taxes for tax lot 46, the Parking Lot, a fact that was acknowledged by XANDER's attorney, despite contrary testimony from XANDER shareholder of their belief that they paid the real estate taxes for the parking lot.

Additionally, at the public hearing at the ZBA, counsel for XANDER referred to SINCLAIR HABERMAN, Jacob Haberman and BELAIRE BUILDING, LLC, collectively as the Builders, "the current owners of the premises" (the parking lot). At the hearing, Mr. Wagner, the then President of XANDER, acknowledged that "over the years", HABERMAN frequently told XANDER shareholders that the use of the outdoor parking lot was a favor he was granting to them. Wagner, also told the ZBA that HABERMAN permitted individuals without residences at XANDER to use the Parking Lot. No one at the public hearing challenged HABERMAN's ownership of the property, but spoke of the inconvenience of reassigned parking spots, of loss of their views of the Atlantic Ocean, of congestion if the pool is used by residents of the proposed Towers.

Exercise of continued dominion and control of the parking lot on tax lot 46, is found in HABERMAN's letter of April 4, 1988, granting permission to XANDER residents to park anywhere on his land adjacent to their property until he needs the land to start construction; a memo to sales representative, Warren Switzler, dated June 30, 1988, advising him of same, of HABERMAN's installation of the fence around the outdoor parking lot to deal with a problem raised at a XANDER board meeting about dogs running loose and fouling the parking lot, of HABERMAN's permission sought by the XANDER Board to install a temporary hose connection on "his land", to be used by residents to wash sand off their cars, and to be removed when construction began on the next Tower, of HABERMAN's storage of construction material under th pool deck and permitting non-residents to use the parking lot, of HABERMAN authorizing New Centurion, which provided security for the construction site, to remove the fence on Shore Road adjoining the Parking Lot for the purpose of removing its' large trailer from the lot, and of HABERMAN's contract

with Herman Neumann, XANDER'S current President, for an additional parking space which "may be changed at any time and shall be cancelled when construction of the next Tower begins. It is respondents' position that the undisputable evidence from XANDER's own witnesses established that the adverse possession claim is totally devoid of merit. The respondents assert that, despite XANDER's parade of interested witnesses, who claimed that they "assumed" or "believed" that they owned their parking spots in the outdoor lot, or that the lot was owned by XANDER, documentary evidence at trial established that the respondents paid the real estate taxes for the parking lot, that XANDER's use of the parking lot and pool deck was temporary permissive use, and that XANDER's maintenance of the parking lot and pool areas was entirely compatible with respondents' ownership of the property, and was required by the Offering Plan in evidence.

Conclusion

It is the judgment of the Court that XANDER has failed in its burden to prove, by clear and convincing evidence, that it is entitled to obtain title to the subject property by adverse possession or that it is entitled to a prescriptive easement over said property. The Court finds that the testimony of the various XANDER witnesses strained credulity when they stated that they did not recall seeing the large, three-dimensional diorama of the proposed Sea Pointe Project and had no knowledge that four (4) Towers were to be built. Moreover, the Court rejects their testimony that they had no knowledge that XANDER's President testified at the BZA that the residents use of the outdoor parking lot was a favor granted to the them by HABERMAN.

It is clear to the Court that XANDER made numerous admissions that the shareholder's use of the subject property was with respondents' permission. The

testimony reflects that respondents permitted residents, and their guests, to use the outdoor parking lot, as a neighborly gesture, until such time as building on the second Tower commenced. The record also reflects that all of the parcels that comprised respondents property were of sufficient size to accommodate parking for the XANDER residents, as well as for the three (3) additional Towers to be built, and that assignment of a parking space came with a reservation of rights by respondents that said spot could be moved or cancelled to accommodate the completion of the Sea Pointe Project. Clearly, the XANDER parking spots could have been designated to areas at a far greater distance from the XANDER building and still have been in compliance with the Long Beach Code, and, as a favor to XANDER residents, respondents permitted them to temporarily use the nearby outdoor lot.

The Court finds that, at numerous times, the XANDER officers and directors acknowledged during the statutory period that title to the property was vested in HABERMAN, therefore defeating their claim for adverse possession. (*Walling v Przybylo*, *supra*, and *Albright v Beesimer*, *supra*). The Court concludes that XANDER's permissive use of the outdoor parking lot and pool deck negates hostility and defeats their claim for adverse possession and for a prescriptive easement (*Avraham v Lakeshore Yacht and Country Club, Inc.*, *supra; cf., United Pickles Products Corp. v Prayer Temple Community Church,* 43 AD3d 307, 843 NYS2d 1 [1st Dept. 2007]). When there is "permission as a matter of willing accord and neighborly accommodation" no claim for adverse possession will lie (*Hall v Sinclaire, supra; Koudellou v Sakalis*, *supra*).

Based on the foregoing, the Court finds that XANDER is not entitled to injunctive relief or to damages. By Short Form Order, dated May 20, 2005, Justice Kenneth Davis found that HABERMAN violated no Court order by demolishing the outdoor parking area and fence on January 9, 2005, because the preliminary injunction had been lifted days before, and respondents' action were not in violation of any Court order.

The Court has considered the additional contentions of the parties and finds them to be without merit.

The petition is dismissed in its entirety. Settle judgment on notice.

Dated: December 9, 2009

WILLIAM R. LaMARCA, J.S.C.

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