

<b>Matteliano v Skitkzi</b>
2009 NY Slip Op 33440(U)
February 26, 2009
Supreme Court, Erie County
Docket Number: 2007-12348
Judge: Joseph G. Makowski
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STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE

JOSEPH MATTELIANO, and  
CHRIS VOGELSANG,

Plaintiffs,

FINDINGS OF FACT  
AND  
CONCLUSIONS OF LAW

-vs-

JOSEPH J.. SKITKZI, and  
MELISSA NEAL,

Defendants.

INDEX NO. 2007-12348

APPEARANCES:

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PROCEDURAL BACKGROUND

On or about December 14, 2007, Plaintiffs, Joseph Matteliano and Chris Vogelsang (hereinafter collectively referred to as "Plaintiffs"), commenced the instant action in connection with a boundary and easement dispute. Plaintiffs are the owners of certain real property at 108 Lancaster Avenue in the City of Buffalo, New York. Defendants are owners of certain real property at 766 Auburn Avenue, Buffalo, New York.

Consistent with the terms of a pre-existing easement granted by John Modica, prior owner of 766 Auburn Avenue and 108 Lancaster Avenue, Defendants have enjoyed an easement to use Plaintiffs' driveway for vehicular ingress and egress to access a garage located on their property. A dispute has arisen between the parties concerning the boundaries and extent of Defendants' easement rights to ingress and egress on the driveway, together with reimbursement for snow plowing services.

Plaintiffs' Second Amended Complaint requests the Court enter into a judgment which:

1. Declares the exact boundary lines of the properties;
2. Declares and defines the nature and extent of the easement so that the parties can continue to use the easement;
3. Declares that the Plaintiffs are entitled to re-erect the fence on their property to prevent access to the non-secured garage on Defendants' property;
4. Requests a judgment to the Plaintiffs for the cost of the 2006-2007, as well as 2007-2008 snow plowing, as well as future amounts as to be determined by this Court, together with interest and costs;
5. Enjoins Defendants from using the easement, for any purpose other than Defendants ingress and egress to their property as defined by this Court;
6. Grants judgment in favor of Plaintiffs, in an amount to be proven at trial, for all damages suffered by Plaintiffs because of Defendants' alleged trespass onto Plaintiffs property and the nuisance created by Defendants with respect to Plaintiffs' property.

On or about November 3, 2008, Defendants filed an Answer and Counterclaim to Plaintiffs' Second Amended Complaint requesting the Court enter a judgment granting the following relief:

1. Define the exact boundary lines for the property and declare and define the nature and extent of the easement as shown by a survey filed in the Erie County Clerk's Office so that the parties can continue to use said easement;
2. Deny Plaintiffs' cause of action with regard to nuisance;
3. Deny Plaintiffs the right to re-erect the fence on their property which would restrict access to the easement;
4. Enjoin the Plaintiffs from using the easement for any purpose other than Defendants ingress and egress to their properties as defined by the Court;
5. Granting judgment in favor of Defendants in an amount to be proven at trial for all damages suffered by Defendants because of Plaintiffs trespass on Defendants' property.

On November 25, 2008, the Court conducted a non-jury trial in this action. At the trial, the Court severed any and all damage claims of Plaintiffs and Defendants pending the Court's determination on liability. At the non-jury trial, the Court heard from Plaintiffs' witnesses: John Modica, prior owner of the properties, and Joseph Matteliano, one of the current owners of 108 Lancaster. The Court also heard testimony of Joseph Skitzki, one of the Defendants in the action, and Robert Pessin, Defendants' landscaper. At the trial, the Court has had the opportunity to observe and assess the credibility and demeanor of each of the aforementioned witnesses and to weigh their testimony. The Court has also had the opportunity to review all documents admitted into evidence, including: Plaintiffs' Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14,

15, 16, 17, 18, 19, 20 and 21. The Court has also reviewed Defendants' Exhibits A, B and C.

Based upon the foregoing, the Court issues the Findings of Fact and Conclusions of Law set forth below.

## FINDINGS OF FACT

1. In 1990, Mr. John Modica owned 108 Lancaster Avenue (hereinafter referred to as the "Lancaster Property") and 766 Auburn Avenue (hereinafter referred to as the "Auburn Property") in Buffalo, New York. (T. 12.)

2. Mr. Modica, as part of selling his Auburn Property, found it necessary to grant access to the backyard of the Auburn Property, through the driveway of the Lancaster Property. (T. 12 - 13.)

3. On April 17, 1991, Mr. Modica executed a "Declaration of Common Easement" (hereinafter referred to as the "Easement.") Plaintiffs' Exhibit 3. (T. 2-8.)

4. Mr. Modica subsequently sold the Auburn Property to Mr. Donald Hoke, who told Mr. Modica he wanted to use the backyard of the Auburn Property to park his car. To do so, Mr. Hoke would need use of the easement of ingress and egress on the driveway servicing the Lancaster property. (T. 13.)

5. The Grantor of the Easement, Mr. John Modica, did not make any markings on Plaintiffs' Exhibit 3. (T. 9-10.)

6. At the trial, Mr. Modica stated that he did not know what the markings on Plaintiffs' Exhibit 3 meant. (T. 59.)

7. As Grantor of the Easement, Mr. Modica never indicated to anyone that the easement he was granting encompassed the entire back fence line between the Lancaster Property and the Auburn Property he owned. (T. 10-11.)

8. At the time Mr. Modica sold the Auburn Property to Mr. Hoke, a fence existed at the property line, between the two parcels, but one 15 to 18 foot long section of the fence was

removed to permit access of one car through the fence and into the backyard of the Auburn Property. (T. 14-16, 56.)

9. After Mr. Modica sold the Auburn Property to Mr. Hoke in 1991, only one car at any given time could drive on the driveway servicing the Lancaster Property through to the Auburn Property. (T. 42, 62.)

10. At trial, Mr. Modica testified that he intended the Easement to give Mr. Hoke ingress and egress, one car at a time, to the stone area at the end of the Auburn Property, but not through the whole back property line. (T. 62-63.)

11. The trial record demonstrates that Mr. Modica parallel parked cars on the driveway behind the house on the Lancaster Property. (T. 59-62, 64-65 and Exhibit 4.)

12. When Mr. Modica owned the Auburn Property, he parked his cars in the backyard of the Auburn Property side-by-side, parallel to Auburn Avenue. (T. 16-17.)

13. After Mr. Hoke sold the Auburn Property, Mr. Modica had a disagreement with the subsequent owner, Mr. Gary DiFrederickus, because Mr. DiFrederickus did not want to share in the expense of maintaining the driveway. (T. 20.)

14. The dispute with Mr. DiFrederickus led to Mr. Modica putting up a new fence between the Auburn and Lancaster Properties, with a 14-15 foot gate. (T. 20-22, 25.)

15. That gate was located at the left side of the backyard of the Auburn Property, starting about a foot in from the left back corner of the property. (T. 23, 25, 36-37 and Exhibit 4.)

16. The gate swung open into the yard of the Lancaster Property. (T. 25.)

17. The gate blocked unobstructed access to the stone parking lot on the Auburn Property (T. 26), but still allowed passage of one car at a time through to the Auburn Property. (T. 28.)

18. The gate was locked, and to enter the Auburn Property, Mr. DiFrederickus had to drive up to the gate, unlock and open it, drive through, then get out of the car and close the gate. (T. 28-29.)

19. The gate in the fence between the Auburn and Lancaster Properties was still in place when Plaintiffs bought the Lancaster Property in approximately 2002. (T. 71-72, 146.)

20. Plaintiffs and Mr. DiFrederickus agreed that Plaintiffs would remove the fence between the properties so Mr. DiFrederickus could build a two car garage. In return, Mr. DiFrederickus would allow Plaintiffs to continue to park cars between the house on the Lancaster Property and the back property line of the Auburn Property, parallel to Auburn and Lancaster Avenues. (T. 76 and Exhibit 4.)

21. Once the garage was built, and during the remaining time he owned the Auburn Property, Mr. DiFrederickus allowed Plaintiffs to park on portions of his property that previously were part of the stone parking area on the Auburn Property, and access to the garage on the Auburn Property was consistent with the access when the gate was still in place. (T. 77-78, 93-94, 95, 99, markings on original Exhibit 4 and Exhibit 5.)

22. The Auburn Property garage has one manual double-wide overhead door. (T. 87.)

23. The overhead door of the Auburn Property garage opens to face Lancaster Avenue at the rear of the Lancaster Property at the end of the driveway servicing the Lancaster Property. (T. 136.)

24. The front of the Auburn Property garage is set back approximately 10 feet from the property line between the Auburn and Lancaster Properties. (T. 87, 92 and Exhibit 7.)

25. The area in front of the Auburn Property garage is black-topped. (T. 87-88.)

26. Mr. DiFrederickus kept the overhead door to the Auburn Property closed when not in use. (T. 98.)

27. Mr. DiFrederickus gained access to the interior of the Auburn Property garage through a straight-run drive through the area where the gate had previously been in place between the two properties. (T. 100-101.)

28. Despite Plaintiffs' repeated requests, Defendants have continuously refused to close the Auburn Property garage door whether cars are parked in it or not. (T. 98, 116.)

29. Defendants acknowledge they continuously never close their garage door. (T. 179.)

30. While Mr. DiFrederickus owned the Auburn Property, he reimbursed Plaintiffs half of the bill for snow plowing. (T. 101.)

31. Defendants have not paid or reimbursed Plaintiffs for one-half of the snow plowing charges since they purchased the Auburn Property in 2006. (T. 101-102.)

32. In October and November 2008, large quantities of soil from the Auburn Property were placed by Defendants' contractors on Plaintiffs' property, together with earth-moving equipment. (T. 103-104, 107-108, 112-113, 163-164, 166, Exhibits 8, 9, 10, 11, 14 and 15.)

33. As a result of the soil placement, Plaintiffs and their tenants could not park cars on their property, behind the house at 108 Lancaster, while the soil from Defendants' property was piled in that area. (T. 114-115.)

34. Despite Plaintiffs' requests, Defendants did not immediately engage in any clean-up of Plaintiffs' driveway at the Lancaster Property until a problem concerning their drainage was resolved. However, ultimately, the soil was removed by Defendants' contractor from Plaintiffs' property. (T. 117.)

35. As of the time of trial, Plaintiffs were unable to determine if Defendants' soil storage and earth movement activities caused any damage to Plaintiffs' driveway. (T. 117.)

36. The house at the Lancaster Property currently is home to three young adults with disabilities. (T. 137.)

37. Plaintiff, Joseph Matteliano, testified that when the Auburn Property garage door is open and empty of cars, passers-by may believe the house at the Lancaster Property is empty. Mr. Matteliano, further testified to a concern the open garage door makes it appear no one is home at the Lancaster Property. Mr. Matteliano further testified to concerns at the Lancaster Property with respect to a potential burglary. (T. 139-140)

38. Plaintiffs never modified the Easement to allow the owner of the Auburn Property any wider access to the Auburn Property than the gate-size opening which existed prior to construction of the Auburn Property garage. (T. 142.)

## CONCLUSIONS OF LAW

1. The "Declaration of Common Easement" (hereinafter referred to as the "Easement") (Plaintiffs' Exhibit 3), provides in part:

It is further the intention of the declarant to sell both properties to different purchasers and to provide the owner and residents of the *aforesaid 766 Auburn Avenue access through the driveway servicing 108 Lancaster Avenue* to a parking area immediately adjacent to said 108 Lancaster Avenue.

(Emphasis added.)

2. The language of the Easement is one only for ingress and egress by the property owners and residents of the Auburn Property for vehicular use of the driveway servicing the Lancaster Property.

3. The Easement affords the owner and residents of the Auburn Property only a right of passage and not a right in a physical passageway itself. *Lewis v. Young*, 92 NY2d 443, 448 (1998).

4. The Easement actually grants Defendants a right in a physical passageway, specifically the driveway of the Lancaster Property, which allows them full access to the rear property line of the Auburn Property. *Grafton v. Moir*, 130 NY2d 465 at 472.

5. Defendants have never been prevented from having ingress or egress to use the driveway at the Lancaster Property, which itself has a garage at the left rear of the property.

6. The language of the Easement does not require the driveway at the Lancaster Property be a certain width, such as to even allow passage of a vehicle, nor does it require the backyard of the Lancaster Property be paved behind the house on that property, to be used by vehicles.

7. The Court concludes, as a matter of law, that the Easement created by John Modica grants only a right of ingress and egress to the owners and residents of the Auburn Property to use the driveway servicing the Lancaster Property.

8. *Brill v. Brill*, 108 NY 511 (1888), involved an express easement for use of a farm road which had gates at either end, one which was opened and closed by those using the road, and the other of which was a portion of a line fence between the parties' properties. The defendant in *Brill* refused to close the gates and declared he would continue to keep it open, alleging he was entitled to passage over the road, free from the obstruction of gates. *Id.* at 514. In *Brill*, the Court of Appeals held that the plaintiff's lands were made servient to the convenience of the owners of the other parcel only to the expressed intent: a right of passage over the land. *Id.* at 516. The plaintiff in *Brill* had a right to subject that right of way to a swinging gate, to require the defendant properly close and secure the gate after he opened it and passed through, and as the owner of the burdened land, had the right to have his land fenced or unfenced at his pleasure. *Id.* at 516-517.

9. In "the absence of a demonstrated intent to provide otherwise, a landowner by an express easement of ingress and egress may ... gate it or fence it off, so long as the easement holder's right of passage is not impaired." *Lewis v. Young*, 92 NY2d 443 at 449 (1998).

10. The Court finds that Defendants' garage appears to be servicing the Lancaster Property. The Court further determines that when Defendants' garage is empty of vehicles, it does lead to the appearance that no one is home at the Lancaster Property. Under the circumstances of this case, the Court determines Plaintiffs' request of Defendants to keep the garage door closed to be a reasonable request given Plaintiffs' use of the Lancaster Property as a home for three young adults with disabilities.

11. Under the circumstances, the Court is required to strike a balance between Plaintiffs' property rights and Defendants' easement rights. While Defendants' garage is situated on their own property, their vehicular access to the garage requires continued ingress and egress through the driveway servicing the Lancaster Property.

12. Plaintiffs house three young adults with disabilities on the Lancaster Property. Plaintiffs have requested that the Defendants keep the garage door servicing the Auburn Property closed, particularly when the garage is empty. Defendants acknowledge that they do not keep the garage door closed.

13. The Court determines that Defendants' ingress and egress may be subject to reasonable conditions.

14. Should Defendants fail or refuse to keep the garage door closed when said door is not in use, the Court will entertain a post-trial motion of Plaintiffs to erect a fence with a gate along the rear property of the Lancaster Property.

15. Subject to further application, the Court determines Plaintiffs have the right to erect a fence with a gate along the property line of the Lancaster Property provided they provide Defendants with continued ingress and egress to use the driveway servicing the Lancaster Property.

**The Intent of the Grantor was for the Easement to be Wide Enough to Allow the Owner of 766 Auburn Avenue Direct Passage of One Vehicle at a Time**

16. Defendants at trial cited *Lewis v. Young*, 92 NY2d 443 (1998) and *Estate Court LLC v. Schnall*, 49 AD3d 1076 (3<sup>rd</sup> Dept. 2008), in support of their arguments.

17. *Lewis, supra*. addresses the issue of the servient landowner's right to relocate the right of way granted by an easement. The Court of Appeals found that in the absence of a demonstrated intent to forbid such a right, the servient landowner can move a right of way at his/her expense, as long as the change does not frustrate the parties' intent in creating the right of way, and does not significantly lessen the utility of the right of way. *Lewis*, 92 N.Y.2d at 452.

18. *Estate Court LLC, supra*, does not support Defendants' arguments because that case, unlike the instant case, involved an easement defined by a survey map showing the "precise path of the easement in detail, including exact distances and courses and with reference to monuments, adjacent property, high water lines and other landmarks." *Estate Court LLC*, 49 AD3d at 1078. This is not the instant case.

19. The Court heard the intent of the Easement expressed by the actual Grantor, John Modica. Mr. Modica stated his intent in creating and granting the Easement was to allow the passage of one car at a time through a 15-18 foot open section of the fence between the Auburn Property and the Lancaster Property. (Finding of Fact 10.) At the time the Easement was granted, the open section of the fence started at the left rear corner of the Auburn Property line, as one would approach it from the Lancaster Property. (Finding of Fact 8.) Mr. Modica had a disagreement with a subsequent owner of the Auburn Property, and erected a 14-15 foot gate where the opening in the fence previously existed. (Finding of Fact 14-15.)

20. When Plaintiffs bought the Lancaster Property, the same gate/fence set-up was in place at the rear of the property. (Finding of Fact 19.) Later, the then owner of the Auburn Property desired to build a garage, and requested of Plaintiffs that the fence and gate be removed. (Finding of Fact 20.) In return, he allowed Plaintiffs and their tenants to park, in part, on his property behind that garage. (Finding of Fact 21.) Once the garage was built, the Auburn Property owner continued to utilize the Easement as had been the practice consistent with the

original intent of Mr. Modica: he pulled up the Lancaster Property driveway and passed onto the 9.5 foot "apron" of his garage through the left side, where the gate had been, veering over to the right on his 9.5 foot apron to access the right side of his garage. (Finding of Fact 21.)

20. The only thing Plaintiffs agreed to in conjunction with the building of the garage on the Auburn Property, was to take down their fence and gate. They did not agree to any change in the Easement and the former Auburn Property owner did not act in a manner which indicated any change had occurred in the scope of the Easement. Defendants have shown nothing to the contrary.

21. The building and placement of the garage on the Auburn Property was totally the decision of the owner at that time, as it is totally the decision of the Defendants, and within their ability as current owners, to move the garage closer to Auburn Avenue if they need a larger "apron" to get their vehicles into their garage. The Easement allows them to access what was a parking area on their property, which they still can do. If the Defendants, or their predecessor, placed an obstruction – *i.e.*, the garage itself – which interferes with their access to the parking area as depicted on the Easement (Plaintiffs' Exhibit 3), then it is up to them to move it if it interferes with their gaining the full benefit of the access granted by the Easement.

**The Continuously Open Door on the Garage  
at 766 Auburn Avenue is a Private Nuisance**

22. Defendants may be subject to liability for a private nuisance when they intentionally and unreasonably invades a plaintiff's interest in the private use and enjoyment of his land. *Zimmerman v. Carmack*, 292 AD2d 601 (2d Dept. 2002). In *Zimmerman, supra*, the next door neighbors continuously and intentionally allowed the improper and unlawful accumulation of waste and garbage immediately adjacent of that plaintiff's property. *Id.*

The Second Department found in *Zimmerman* that plaintiffs had pled a cause of action to recover damages for nuisance based on such facts.

23. The Fourth Department has more recently reviewed the elements of private nuisance in *Vacca v. Valerino*, 16 AD3d 1159 (4<sup>th</sup> Dept. 2005). Specifically, the Fourth Department stated that to prevail on a private nuisance claim, a Plaintiff must show: (1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct. *Id.*

24. Mr. Matteliano offered testimony that because the Auburn Property garage door faces Lancaster Avenue, an open door revealing the presence of no cars in the garage gives the appearance that no one is at home at the Lancaster Property. That is an open invitation to possible burglars (e.g. see Plaintiffs' Exhibit 6).

25. The open garage door also is an "open invitation" for persons to use the Auburn Property garage for any purpose. Mr. Matteliano testified that the Lancaster Property is inhabited by several young adults, including his son, who have physical challenges, and are unable to react and respond quickly to threats and other dangerous situations. The open garage door on the Auburn Property increases the possibility that persons with less than "honorable" intent and purpose will use the side and backyard areas of the Lancaster Property to gain access to the open garage structure on the Auburn Property. Because the Defendants have only a small door of the garage facing the back of their home, they will very likely not be in a position to see any activities which might occur in their garage.

26. The open garage door is a situation which is easily remedied: close it when it is not in use for entering and exiting the garage. Defendants have clearly stated they will not close the garage door under any circumstances. The Court determines Plaintiffs are entitled to take reasonable action on their own property. In this case, Plaintiffs desire to re-install the fence and

the gate which closes across the Easement area. This is very much like the situation in *Brill v. Brill case, Id., supra*, where those using the easement on that road had to open and close a gate when passing on the road. In *Brill*, the only concern was cattle and farm stock. In the instant case, the safety of the young physically challenged inhabitants of the Lancaster Property is the consideration.

27. Since Defendants cannot be relied upon to close their garage door, even if ordered to do so, the only way to visibly and physically insure that a passer-by knows the Auburn Property garage is not readily accessible via the Lancaster Property, is for Plaintiffs to be allowed to re-install the fence and the gate, for which Defendants must be provided keys to enter onto their Auburn Property. This allows full use of the Easement as intended by the Grantor, John Modica, because Defendants will still be able to ingress and egress to the Auburn Property over the driveway at the Lancaster Property.

**The Defendants' Use of Plaintiffs' Backyard Area as Part of Defendants' Landscaping Project, Constitutes a Trespass.**

28. A trespass to a chattel is defined as "intentionally dispossessing another of the chattel or using...a chattel in the possession of another." Restatement 2d of Torts §217. Trespass involves an invasion of a person's interest in the exclusive possession of land. *Zimmerman v. Carmack*, 292 AD2d 60 (2d Dept. 2002). An actionable trespass involves a wrongful or unjustifiable entry upon the land of another, or performance of an improper, careless or wrongful act on the land of another. *Malerba v. Warren*, 108 Misc.2d 785 (NY Sup. Ct. Suffolk Cty. 1981). A person who asks or hires another to enter land, though not personally doing it his or herself, is also liable for trespass. Restatement 2d of Torts §158. Punitive damages may be

awarded for trespass conduct which is tantamount to a wanton and willful or a reckless disregard of the property owner's rights. *Malerba*, 108 Misc.2d at 788.

29. The record here is clear that Defendants hired landscapers to work on Defendants' yard, and that huge amounts of dirt from Defendants' yard was moved onto the backyard areas of Plaintiffs' Lancaster Property, along with earth moving equipment weighing several tons. (See Plaintiffs Exhibits 8, 9, 10, 11, 12, 14 and 15). This condition lasted for weeks, with vehicles traversing over the dirt, as can be seen by the presence of tire tracks in the dirt piles.

30. It is clear from the record that Plaintiffs never gave permission for Defendants to so use the backyard of the Lancaster Property. The existence of the Easement allowing Defendants to travel over the Lancaster Property driveway to access the Defendants' property, does not give Defendants any right to use the area of the easement for other than ingress and egress to the Auburn Property.

31. The Court rejects Plaintiffs' request for punitive damages as a matter of law. The Court will allow Plaintiff to demonstrate compensable damages.

**Defendants are Liable for One-Half of the Cost of Maintaining  
the Driveway at the Lancaster Property.**

32. Plaintiffs' Exhibit 3, the "Declaration of Common Easement," requires the owners of the two properties to "share the cost of maintaining only the highlighted portion of the easement on 108 Lancaster Avenue." The "highlighted" portion apparently cannot be discerned from currently existing documents. However, the testimony of the Grantor, John Modica, establishes that the snow plowing bill for cleaning 108 Lancaster Avenue was always split between the owners of the two parcels. Thus, the Court has the actual stated intent of the Grantor, together with the prior practice of the owners of the two properties.

33. Defendants are liable for one-half of the snow plowing costs for 108 Lancaster Avenue for 2006-07 and 2007-08, with exact amounts to be established as per the Court's severing of that damages claim.

RELIEF

For the reasons set forth herein, the Court hereby determines the following:

1. The Declaration of Common Easement at issue in this action grants only a right of direct ingress and egress to the owners and residents of 766 Auburn Avenue to utilize the driveway servicing 108 Lancaster Avenue.
2. Subject to this Court's determination, Plaintiffs', as land owners, are burdened by the express Easement and have the right to erect a fence and/or gate on the property across the driveway servicing 108 Lancaster Avenue.
3. The intent of the Easement as reflected by both the language thereof and the testimony of the original Grantor was for the easement to be wide enough to allow direct passage of one vehicle at a time to the Auburn Property.
4. The open door on the garage at 766 Auburn Avenue constitutes a private nuisance.
5. The Defendants' use of Plaintiffs' backyard as a part of Defendants' renovation and/or maintenance project constituted a trespass. Plaintiffs are entitled to seek compensatory damages. Plaintiffs' claim for punitive damages is rejected as a matter of law.
6. Defendants are liable for one-half the cost of maintaining the driveway at the Lancaster Avenue property for 2006-07 and 2007-08. Plaintiffs are entitled to seek compensatory damages in connection therewith.
7. Defendants' counterclaims are dismissed as a matter of law.
8. The Court directs the parties to appear in Part 33 on **MARCH 3, 2009 at 10:00 a.m.** to set a date for a hearing on damages.

**GRANTED**

FEB 26 2009

BY:   
LORRAINE R. CECCARELLI  
COURT CLERK

  
HON. JOSEPH G. MAKOWSKI, J.S.C.