

**Kilgannon v Local 338 of the Retail, Wholesale Dept.  
Store Union**

2010 NY Slip Op 30169(U)

January 19, 2010

Supreme Court, Nassau County

Docket Number: 14969/07

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK  
TRIAL TERM, PART 17 NASSAU COUNTY**

**PRESENT:**

**Honorable Karen V. Murphy**  
**Justice of the Supreme Court**

\_\_\_\_\_ x

**SUSAN KILGANNON d/b/a KELLAW REALTY  
a/k/a KELLAW REALTY CORP. and FRANK X.  
KILGANNON,**

Index No. 14969/07

Motion Submitted: 11/20/09  
Motion Sequence: 002

**Plaintiff(s),**

**-against-**

**LOCAL 338 OF THE RETAIL, WHOLESALE  
DEPARTMENT STORE UNION and LOCAL 338  
REAL ESTATE HOLDING CORP.,**

**Defendant(s).**

\_\_\_\_\_ x

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....X
- Reply.....X
- Briefs: Plaintiff's/Petitioner's.....X
- Defendant's/Respondent's.....XX

Defendants Local 338 of the Retail, Wholesale Department Store Union, and Local 338 Real Estate Holding Corp. move this Court pursuant to CPLR §3211 for summary judgment dismissing the complaint.

In 2006, the defendant Local 338 of the Retail, Wholesale Department Store Union, through its affiliate Local 338 Real Estate Holding Corp ["the defendant"], acquired for some \$5 million, certain commercial real property located at 1505 Kellum Place, Garden City, New York. The defendant's property fronts onto Kellum Place and is improved with a two-story brick building.

The defendant acquired the property from "Kellum Associates," which at the time leased space in the building to the law firm of Meyer, Suozzi, English & Klein, P.C. Several of the firm's then partners, including former Justice Joseph A. Suozzi, were also members of an entity called "English Associates II," which in turn was a member of Kellum Associates.

Located directly behind the defendant's building is its parking lot, which can be accessed through two separate driveways on Kellum Place, one on each side of the defendant's property to the north and south.

Adjacent to the defendant's building and to the north, is a two-story commercial building located at 1551 Kellum Place, which is owned by the plaintiffs Susan and Frank X. Kilgannon, d/b/a Kellaw Realty, Co. [collectively "the plaintiffs"].

The plaintiffs' parcel currently possesses its own entrance/exit driveway, which fronts onto Kellum Place and therefore permits access to and from that street to the plaintiffs' parking lot areas to the rear and side of their building. The plaintiffs' driveway is located on the non-adjointing [north] side of their property, as viewed in relation to the defendant's building and parking lot to the south.

As depicted in the photographs submitted by the defendant, there currently exists an eight-foot wide strip of land, bordered with Belgian blocks, located on the defendant's side of the parties' common, north-south boundary line. The foregoing strip of land, which is planted with grass, abuts the plaintiffs' building to the north on one side and on the other, borders the defendant's adjoining parking lot, which is graded about six inches below the strip's grass surface.

Before the defendant acquired the building, this strip of land extended along the parties' north-south boundary line into the parking lot area to the rear, but terminated before reaching the rear-yard property line, thereby leaving an open driving passage between the two properties and their respective parking lots.

By virtue of this open passage, vehicles could enter the plaintiffs' driveway from Kellum Place, circle around the rear of their building, turn into the defendant's adjoining lot, and then exit onto Kellum Place, by utilizing one of the defendant's two driveways. The plaintiffs contend that for well over twenty years and without objection by any party, vehicles associated with both properties have used the plaintiffs' Kellum Place driveway to access both parcels' lots, after which they would then exit to Kellum Place by utilizing one of the defendant's driveway outlets.

During his deposition, Frank Kilgannon was asked whether he had discussed the above-described parking arrangement with former Justice Joseph A. Suozzi whom he knew personally and professionally. According to Mr. Kilgannon, both he and Justice Suozzi, “let our neighborly ways continue as they had been for many years. His [Justice Suozzi’s] workers would use my exit to . . . [the] north side of my building. My tenants would use the exit on . . . [the] north and south side of his building with full knowledge and understanding”. Kilgannon was then asked, “[o]n behalf of both sides?” and affirmatively replied, “[o]n behalf of both sides.”

However, shortly after purchasing its property, and as part of its renovations, the defendant closed off the previously existing open passage between the lots by installing a six-foot construction fence in that location.

According to the defendant’s chairman, John Durso, the closing of the passage between the lots was part of a renovation plan and was intended, in part, to create additional parking space for the property. Since the building was located in a congested portion of Garden City in close proximity to a Long Island Railroad station and County Office buildings, Durso was concerned about unauthorized parking, particularly in light of the building’s significant employee population and its limited parking capacity.

In order to comply with the site plan developed for the property, it was allegedly necessary to create additional parking spaces and more handicapped spaces, requirements contained in plans approved by both the Garden City Buildings Department and the Village Architectural Design Review Board.

The defendant asserts that these approved plans also called for security gates at the defendant’s two driveway entrances (one on each side of the building, fronting onto Kellum), and a one-way driving path through the lot itself intended to mitigate potential parking congestion issues in the lot.

After the construction fence had been erected, the plaintiffs moved by order to show cause for a preliminary injunction precluding the defendant from maintaining the fence and/or installing any other structure which would impede access and upon the defendant’s property to its Kellum Avenue driveway outlet. At a hearing conducted with respect to application, Frank Kilgannon a party to the action who is also representing the plaintiffs summarized the nature of the dispute at one point by noting that, “I am not asking them to change their way of life in their building. I am just asking them to leave what was, . . . and learn to live together as good neighbors . . . .”

By order dated June 9, 2008, the Court denied the motion for injunctive relief, holding in substance that: (1) there was evidence that the access permitted over the defendant’s

property was pursuant to an agreed-upon “neighborly” accommodation; and (2) proof of irreparable harm was lacking since the lot could be easily restored to its prior state in the event the plaintiff was ultimately successful in the action.

Thereafter, and in conformity with the defendant’s renovation plan, the temporary fence was removed and the defendant extended the pre-existing, grass-covered strip all the way to the rear-yard property line. By doing so, the defendant permanently eliminated the previously existing driving passage between the two adjacent parking lots.

By summons and verified complaint dated March 2007, the plaintiffs commenced the within action, interposing claims for a prescriptive easement, adverse possession and related, injunctive relief. The plaintiffs’ “wherefore” clause particularizes the nature of their easement theory by requesting that the Court enter a decree granting the plaintiffs a prescriptive easement “on the northerly side of the defendant’s property so as to allow and permit continuing right of ingress and egress from and to the back of the plaintiffs’ building from and to Kellum Place . . . .”

Significantly and as later clarified by the plaintiffs, their adverse possession claim does not directly involve the path by which cars formerly traveled between the lots. Rather, and as variously described by co-plaintiffs Susan and Frank Kilgannon, the property being claimed is the eight-foot wide strip, discussed previously, and located on the defendant’s side of the parties’ common, north-south boundary line.

According to the Kilgannons, for a period in excess of 35 years, they allegedly landscaped, maintained and cut the grass on the strip; installed a sprinkler for the location in 1995; and, according to Frank Kilgannon, planted trees, although Susan Kilgannon testified that there were no trees along that side of the building.

The plaintiffs further contend that when they re-surfaced their own lot some 10 to 15 years earlier, they also black-topped the location where the previously existing, common access area was situated, and then without objection, painted parking stall lines (for two to four parking spaces) on the lot surface in that location. Occupants from both buildings, however, used these spaces “interchangeably”.

It is undisputed that the plaintiffs never enclosed or fenced in the subject strip of land.

It bears noting that while Frank Kilgannon described the plaintiffs’ adverse possession claim as including the planted strip and additional property extending all the way back to the parties’ common, rear-yard property line, Susan Kilgannon apparently depicted it less expansively, *i.e.*, as reaching only to the end of the Belgian-blocked, grassy area which terminated where the paved, driving pathway between the two lots had previously existed.

The defendant now moves for summary judgment dismissing the complaint arguing, *inter alia*, that: (1) the plaintiffs' easement claim is defective as a matter of law since the alleged parking arrangement existed permissively, and as a neighborly accommodation; and (2) the plaintiffs failed to demonstrate by clear and convincing evidence, that the property at issue was protected by a substantial inclosure and/or usually cultivated or improved by them within the meaning of former RPAPL § 522. The motion is granted.

“To prevail on a claim for a prescriptive easement, plaintiffs must ‘demonstrate by clear and convincing evidence that [their] use of defendants’ property was for [their] benefit and was adverse, open, notorious, continuous and uninterrupted for 10 years.’” (*Weir v. Gibbs*, 46 A.D.3d 1192, 1193, 849 N.Y.S.2d 97 (3d Dept., 2007), quoting from, *Gravelle v. Dunster*, 2 A.D.3d 964, 965, 768 N.Y.S.2d 240 (3d Dept., 2003), see also, *Walsh v. Ellis*, 64 A.D.3d 702, 705, 883 N.Y.S.2d 563 (2d Dept., 2009); *315 Main Street Poughkeepsie, LLC v. WA 319 Main, LLC*, 62 A.D.3d 690, 691, 878 N.Y.S.2d 193 (2d Dept., 2009); *Eskenazi v. Sloat*, 40 A.D.3d 577, 478, 834 N.Y.S.2d 330 [2d Dept., 2007]).

“Generally, where an easement has been shown by clear and convincing evidence to be open, notorious, continuous, and undisputed, it is presumed that the use was hostile, and the burden shifts to the opponent of the allegedly prescriptive easement to show that the use was permissive” (*Duckworth v. Ning Fun Chiu*, 33 A.D.3d 583, 822 N.Y.S.2d 147 (2d Dept., 2006), (quoting from, *J.C. Tarr, Q.P.R.T. v. Delsener*, 19 A.D.3d 548, 550, 800 N.Y.S.2d 177 (2d Dept., 2005), see also, *315 Main Street Poughkeepsie, LLC v. WA 319 Main, LLC, supra*; *Eskenazi v. Sloat, supra*; *Frumkin v. Chemtop*, 251 A.D.2d 449, 674 N.Y.S.2d 409 [2d Dept., 1998]). This presumption, however, is not applicable where the relationship between the user and servient landowner “was one of cooperation and neighborly accommodation” (*McNeill v. Shutts*, 258 A.D.2d 695, 685 N.Y.S.2d 318 (3d Dept., 1999); *Susquehanna Realty Corp. v. Barth*, 108 A.D.2d 909, 485 N.Y.S.2d 7 (2d Dept., 1985), see generally, *Ryan v. Posner*, \_\_\_ A.D.3d \_\_\_, 2009 WL 4852899 [2d Dept., 2009]; *Cole v. Rothe*, 18 A.D.3d 1058, 1060, 795 N.Y.S.2d 373 [3d Dept., 2005]).

Where such a relationship is demonstrated, an inference of permissive use arises, in response to which the proponent of the easement “must come forward with affirmative facts to establish that the use was under a claim of right and adverse to the interests of the landowner (*2239 Hylan Blvd. Corp. v. Saccheri*, 188 A.D.2d 524, 526, 591 N.Y.S.2d (2d Dept., 1992), see, *Ryan v. Posner, supra*; *315 Main Street Poughkeepsie, LLC v. WA 319 Main, LLC, supra*; *Duckworth v. Ning Fun Chiu, supra*; *Allen v. Mastrianni*, 2 A.D.3d 1023, 1024, 768 N.Y.S.2d 523 (3d Dept., 2003); *Frumkin v. Chemtop, supra*; cf., *Reed v. Piedimonte*, 138 A.D.2d 937, 526 N.Y.S.2d 273 [4<sup>th</sup> Dept., 1988]).

Although inconclusive allegations or a “mere claim” that a neighborly accommodation exists will not suffice (e.g., *Reed v. Piedimonte, supra*; *Casey v. Bazan*, 253

A.D.2d 838, 678 N.Y.S.2d 371 (2d Dept., 1988); *Rogers v. Holmes*, 217 A.D.2d 609, 629 N.Y.S.2d 791 (2d Dept., 1995), where properly established, such a defense will indeed be “fatal” to a prescriptive easement cause of action (*Beretz v. Diehl*, 302 A.D.2d 808, 809-810, 755 N.Y.S.2d 122 (3d Dept., 2003), see, *315 Main Street Poughkeepsie, LLC v. WA 319 Main, LLC, supra*).

Upon applying these principles to the facts presented, the Court finds that the defendant has established its *prima facie* entitlement to judgment as a matter of law with respect to the plaintiffs’ prescriptive easement claim. The burden then shifts to the plaintiffs, requiring them to produce evidence of hostile use sufficient to raise a triable issue of fact. The plaintiffs have failed to do so.

At bar, the defendant has submitted, *inter alia*, documentary evidence and the sworn deposition testimony of the plaintiff Frank Kilgannon, who testified that the parking arrangement existed pursuant to an agreement and understanding between the involved parties, *i.e.*, it existed, in Mr. Kilgannon’s own words, by virtue of the parties’ “neighborly ways”. Moreover, the agreement had been in place for “many years” with “*full knowledge and understanding . . . [o]n behalf of both sides.*”

Notably, both Susan and Frank Kilgannon further confirmed throughout their respective depositions that during the relevant time period, no one associated with the defendant’s property had ever objected to their use of the adjoining lot and driveway, testimony which comports with the existence of a neighborly accord “on behalf of both sides,” thereby further “strengthen[ing] . . . [the] inference” that the plaintiffs’ usage was indeed permissive (*2239 Hylan Blvd. Corp. v. Saccheri, supra*).

The Court notes that the plaintiffs have failed to meaningfully address the substance of Frank Kilgannon’s deposition testimony relating to the neighborly accommodation and understanding made “on behalf of both sides” (see generally, *Kuehne & Nagel, Inc. v. Baiden*, 36 N.Y.2d 539, 544, 330 N.E.2d 624, 369 N.Y.S.2d 667 [1975]). Contrary to the plaintiffs’ contentions, the defendant’s neighborly accommodation theory does not rest solely upon “one unsworn statement,” *i.e.*, Frank Kilgannon’s “good neighbors” comment made during oral argument on the preliminary injunction.

Although the defendant’s papers do refer to this comment which, in any event, was made by a party in open court, the record confirms that the defendant’s permissive use claim is primarily based upon Frank Kilgannon’s sworn deposition testimony, *i.e.*, those portions of his deposition in which he stated that a neighborly accord governed the existence of the alleged easement.

The evidence submitted also demonstrates that then Justice Suozzi was a partner in one of Kellum Associates' ownership entities (English Associates II), thereby belying the plaintiffs' assertion, *inter alia*, that he was merely a tenant and/or lacked authority to authorize the allegedly permissive use of the adjoining property. Further, a review of the context and tone of Mr. Kilgannon's testimony, indicates that he was aware that Kellum Associates was the owner of the property at some point, and that in speaking with Justice Suozzi, he believed he was speaking with an individual who possessed the requisite authority to enter into and authorize the usage agreement.

Turning to the plaintiffs' adverse possession claim, it is settled that to establish "title to real property by adverse possession on a claim not based upon a written instrument, in accordance with the law in effect at the time this action was commenced (see, *RPAPL, former § 522 [1], [2]*), the party seeking title must demonstrate that he or she usually cultivated, improved, or substantially enclosed the land" (*Walsh v. Ellis*, 64 A.D.3d 702, 703, 883 N.Y.S.2d 5 (2d Dept., 2009), see generally, *Walling v. Przybylo*, 7 N.Y.3d 228, 232-233, 851 N.E.2d 1167, 818 N.Y.S.2d 816 (2006); *Ray v. Beacon Hudson Mountain Corp.*, 88 N.Y.2d 154, 666 N.E.2d 532, 643 N.Y.S.2d 939 (1996); *BTJ Realty, Inc. v. Caradonna*, 65 A.D.3d 657, 885 N.Y.S.2d 308 (2d Dept., 2009); *Parfait v. Einhorn*, 62 A.D.3d 846, 847-848, 879 N.Y.S.2d 545 [2d Dept., 2009]).

"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" (*Ray v. Beacon Hudson Mountain Corp.*, *supra*, quoting from, *Brand v. Prince*, 35 N.Y.2d 634, 636, 324 N.E.2d 314, 364 N.Y.S.2d 826 [1974]; *Conklin-Penwell v. Riverhead Lodge*, 61 A.D.3d 916, 917, 878 N.Y.S.2d 157 [2d Dept., 2009]).

"Additionally, that party must establish, by clear and convincing evidence, the five common-law elements of the claim" (*Walsh v. Ellis, supra*), *i.e.*, that the alleged possession was "(1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required period" (*Walling v. Przybylo, supra; Ray v. Beacon Hudson Mountain Corp., supra; Spiegel v. Ferraro*, 73 N.Y.2d 622, 624, 541 N.E.2d 15, 543 N.Y.S.2d 15 (1989); *Van Valkenburgh v. Lutz*, 304 N.Y. 95, 99, 106 N.E.2d 28 (1952); *Chion v. Radziul*, 62 A.D.3d 931, 932, 880 N.Y.S.2d 666 [2d Dept., 2009]).

"By their nature, regular cultivation, improvement and inclosure of another's land constitute open and notorious acts of possession that would place record owners on notice of an adverse claim to the property" (*Ray v. Beacon Hudson Mountain Corp., supra; Gore v. Cambareri*, 14 A.D.3d 650, 789 N.Y.S.2d 304 [2d Dept., 2005]).

Even upon considering the evidence in a light most favorable to the plaintiffs (*Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgmt., L.P.*, 7 N.Y.3d 96, 106, 850 N.E.2d 653, 817 N.Y.S.2d 606 (2006), the Court agrees that the plaintiffs' conduct falls short of establishing that the disputed strip of land was "usually cultivated or improved" or "protected by a substantial inclosure" "within the [meaning and] intendment of RPAPL §522(1)" (*Gore v. Cambareri, supra; Yamin v. Daly*, 205 A.D.2d 870, 613 N.Y.S (3d Dept., 1994), see also, *Van Valkenburgh v. Lutz, supra; Walsh v. Ellis, supra; Kennelty-Cohen v. Henry*, 62 A.D.3d 664-665, 879 N.Y.S.2d 481 (2d Dept., 2009); *Conklin-Penwell v. Riverhead Lodge, supra; Cullen v. Village of Pelham Manor*, \_\_\_ F.Supp 2d \_\_\_, 2009 WL 1507686 at 5-6 [S.D.N.Y. 2009]).

The testimony indicates that at best, the grassy area as described by Mrs. Kilgannon was cut, watered and maintained by a gardener; and that a sprinkler system of some sort may have been installed at some point. There is no evidence that the subject area was improved or fenced in any meaningful or significant fashion (see, *Walsh v. Ellis, supra; Seisser v. Eglin*, 7 A.D.3d 505, 506, 776 N.Y.S.2d 314 (2d Dept., 2004); *Giannone v. Trotwood Corp.*, 266 A.D.2d 430, 431, 698 N.Y.S.2d 698 (2d Dept., 2009); *Yamin v. Daly, supra; Weinstein Enterprises, Inc. v. Cappelletti*, 217 A.D.2d 616, 617, 629 N.Y.S.2d 476 (2d Dept., 1995); *Cullen v. Village of Pelham Manor, supra; Bernardi v. Harrison*, \_\_\_ Misc3d \_\_\_, 2009 WL 2865069 [Supreme Court, Nassau County 2009]).

It has been held that "the cutting of grass and keeping the disputed area 'manageable' 'is insufficient to establish adverse possession by cultivation or improvement,'" and even "a fencing in of the disputed premises does not establish adverse possession by a substantial enclosure" (*Bernardi v. Harrison, supra; see, Giannone v. Trotwood Corp., supra; Cullen v. Village of Pelham Manor, supra*); rather, since "substantial and obvious alteration is required" (*Bernardi v. Harrison, supra*), "[l]imited activities such as cutting the grass, raking, clearing debris, and even planting or removing a few trees are . . . insufficient" (see, *RSVL Inc. v. Portillo*, \_\_\_ Misc3d \_\_\_, 2007 WL 2669463 (Supreme Court, Nassau County 2007), see also, *Walsh v. Ellis, supra; Giannone v. Trotwood Corp., supra; Yamin v. Daly, supra; Simpson v. Kao*, 222 A.D.2d 666, 636 N.Y.S.2d 70 (2d Dept., 1995); *Manhattan School of Music v. Solow*, 175 A.D.2d 106, 107-108, 571 N.Y.S.2d 958 [2d Dept., 1991]).

Finally, and assuming that the property claimed extends to the rear-yard property line, the record establishes that claimed acts associated with this discrete area alleged paving, maintenance and parking-stall installation, *etc.*, were not performed in conjunction with an exclusive or hostile use. Rather, and as depicted by the testimonial and documentary evidence submitted, the subject location was open, unenclosed and used in part, by the occupants of both buildings "interchangeably" and in accord with a joint understanding denoting permissive use (*Kennelty-Cohen v. Henry, supra; In re Perry*, 33 A.D.3d 704, 705, 823 N.Y.S.2d 413 [2d Dept., 2006]). Notably, "[m]ere possession, no matter how long continued,

gives no title by adverse possession unless under claim of right" (*Harbor Estates Ltd. Partnership v. May*, 294 A.D.2d 399, 400, 742 N.Y.S.2d 347 (2d Dept., 2002) accord, *Beyer v. Patierno*, 29 A.D.3d 613, 614-615, 815 N.Y.S.2d 194 [2d Dept., 2006]).

In sum, since the record establishes, *inter alia*, that the plaintiffs' conduct relative to the claimed strip of land "was insufficient to establish the usual cultivation and improvement or substantial enclosure," their adverse possession cause of action must be dismissed (see e.g., *Walsh v. Ellis, supra*; *Bruenner v. Clapp*, 18 A.D.3d 411, 793 N.Y.S.2d 774 [2d Dept., 2005]; *Giannone v. Trotwood, supra*).

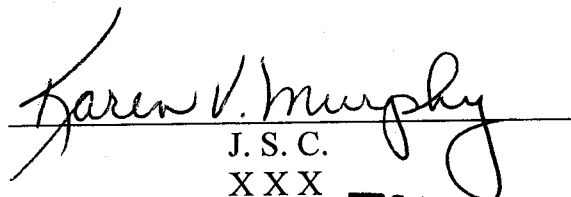
The Court has considered the plaintiffs' remaining contentions and concludes that they are lacking in merit.

Accordingly, it is,

**ORDERED** that the motion pursuant to CPLR § 3212 by the defendants Local 338 of the Retail, Wholesale Department Store Union, and Local 338 Real Estate Holding Corp. for summary judgment dismissing the complaint, is granted and the complaint hereby dismissed.

The foregoing constitutes the Order of this Court.

Dated: January 19, 2010  
Mineola, N.Y.

  
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J. S. C.  
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**ENTERED**  
JAN 25 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE