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SHORT FORM ORDER

INDEX No. 09-23454
CAL. No. 10-01283-CO

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Supreme Court

MOTION DATE 5-26-10 (#001 & #002)
MOTION DATE 8-4-10 (#003)
ADJ. DATE 10-15-10
Mot. Seq. # 001 - MotD
002 - XMD
003 - XMD

CSC ACQUISITION-NY, INC.,	:	FORCHELLI, CURTO, DEEGAN, et al.
	:	Attorney for Plaintiff
Plaintiff,	:	333 Earle Ovington Boulevard, Suite 1010
	:	Uniondale, New York 11553
- against -	:	
	:	KENNETH COOPERSTEIN, ESQ.
404 COUNTY ROAD 39A, INC.,	:	Attorney for Defendant
	:	54 Harbor Park Drive
Defendant.	:	Centerport, New York 11721

Upon the following papers numbered 1 to 63 read on this motion and cross motion and supporting papers (001) 1 - 28 ; Notice of Cross-Motion and supporting papers (002) 29-36; (003) 37-43 ; Answering Affidavits and supporting papers 46-55; 56-60 ; Replying Affidavits and supporting papers ; Other 44-45; 61-63(aerial photos) ;and after oral argument before this court; it is

ORDERED that this motion (001) by the plaintiff, CSC Acquisition-NY, Inc., pursuant to CPLR 3212 for summary judgment in favor of the plaintiff permanently enjoining the defendants from driving and/or parking on the subject circular driveway/parking area and the driveways/parking areas depicted on the survey by the yellow and blue colorings, and from otherwise trespassing on the plaintiff's property or further encroaching and maintaining any driving or parking areas upon the plaintiff's property is granted; and a mandatory injunction ordering permanent removal of the aforementioned circular driveway and encroachments encroaching upon the plaintiff's property is granted enjoining and restraining the defendant from maintaining the circular driveway on the plaintiff's property and directing that the defendant remove said encroachments within thirty days of the date of this order, and it is further determined that the defendant's actions constitute a continuing trespass onto the plaintiff's property; and it is further

ORDERED that the plaintiff is directed to serve a copy of this order with notice of entry upon the defendant and the Clerk of the Calendar Department, Supreme Court, within thirty days of the date of this order, and the Clerk is directed to schedule this matter for a trial on damages related to the cause of action for trespass; and it is further

ORDERED that this cross-motion (002) by the defendant, 404 County Road 39A, Inc., pursuant to CPLR 3212 granting the defendant judgment on its counterclaim to quiet title declaring the defendant has a prescriptive easement or adverse possession to the subject disputed property is denied and the counterclaims are severed and dismissed from this action based upon the determinations made in motion (001); and it is further

ORDERED that this cross-motion (003) by the plaintiff, CSC Acquisition-NY, Inc., pursuant to CPLR 3025(c) permitting the plaintiff to amend its verified Reply to the Counterclaims dated August 3, 2009 to contain denials to paragraphs 9, 10, 11, 12, 13, and 14 of served with defendant's answer dated July 21, 2009, has been rendered academic by the determination of motion (001) and is denied as moot.

This is an action, inter alia, to recover damages for trespass to real property, and pursuant to RPAPL article 15, to quiet title to real property and for an order granting a preliminary injunction as well as a mandatory injunction enjoining the defendant from entering onto the subject property, removing the gravel driveway and restoring the property to its original condition. The defendant claims to have established title to the disputed land by adverse possession or, alternatively, by prescriptive easement.

The complaint of this action was filed June 16, 2009 and contains a:

first cause of action seeking that the defendant and its agents, servants, guests, patrons, successors and assigns be permanently enjoined from driving and/or parking on the disputed circular roadway and for a mandatory injunction ordering the permanent removal of the circular roadway encroaching upon the plaintiff's property;

second cause of action permanently enjoining and restraining the defendant, its agents, servants, guests, patrons, successors, and assigns from using the subject disputed property as a parking area, and for a mandatory injunction ordering the permanent removal of all the defendant's encroachments from the plaintiff's property;

third cause of action permanently enjoining and restraining the defendant, its agents, servants, guests, patrons, successors and assigns, from in anyway using the gravel driveway marked in yellow on the survey dated January 12, 2004 contained in Exhibit B;

fourth cause of action permanently enjoining and restraining the defendant, its agents, servants, guests, patrons, successors and assigns, from in anyway using, driving or parking on the dirt driveway marked in blue on the survey dated January 12, 2004 contained in Exhibit B, and a mandatory injunction ordering the permanent removal of the gravel encroaching upon the plaintiff's property;

fifth cause of action pursuant to RPAPL section 871 for an order ejecting the defendant from the subject property and permanent removal of the encroachments;

sixth cause of action declaring the plaintiff will suffer irreparable injury on an ongoing and continuous basis and judgment against the defendant to remove the encroachments and restore the plaintiff's property to its previous condition at defendant's own cost and expense;

seventh cause of action declaring that the defendants are engaged in a continuous trespass upon the plaintiff's property, and to enjoin the defendants from trespassing on the plaintiff's property and for damages pursuant thereto;

eighth cause of action for declaratory judgment determining the respective rights and interests of the parties; and a

ninth cause of action for punitive damages based upon the defendant's malicious and willful conduct.

By way of an answer dated July 21, 2009, the defendant has asserted a first counterclaim asserting that it now owns the disputed property in fee simple absolute free from any claims of the plaintiff in that it has adversely possessed the disputed property for a ten year period of open, notorious, exclusive and hostile use by the Car Wash and its predecessors under a claim of right; and a second counterclaim that any interest the plaintiff had in the disputed property is now subject to an easement of way and for parking in favor of the Car Wash and appurtenant to its property.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065 [1979]).

In support of motion (001), the plaintiff has submitted, inter alia, an attorney's affirmation; copies of the pleadings, verified answer with counterclaims, verified reply to counterclaims; affidavits of Ronald Blydenburgh, Pia Olesen-Ferraris and Robert S. Savoia with exhibits; maps 0900-132-00, Suffolk County Clerks Office; survey; deeds dated September 28, 1965; quitclaim deed dated December 6, 1989, deed dated August 3, 2004, deed dated October 6, 2000 between Robert S. Savooia and 404 County Road 39A; photographs; plaintiff's first demand for written interrogatories and defendant's answer thereto; letter dated November 25, 2003 from Andrew E. Bloom, vice president, real estate, Cablevision, to Southampton Car Wash; letter dated November 26, 2003 from Kenneth Cooperstein to Andrew E. Bloom; unsigned transcript of the examination before trial of J.R. Siwicki dated December 22, 2009 with letter of January 4, 2010 pursuant to CPLR 3116. Therefore, the unsigned Siwicki transcript will be considered with the moving papers.

In support of cross motion (002), the defendant has submitted, inter alia, an attorney's affirmation; out-of-state affidavit of J.R. Siwicki, Jr.; affidavit of Lavent Baykan dated June 9, 2010; out-of-state affidavit of Al Stanaway; copies of photographs; and the unsigned copy of the transcript of the examination before trial of Robert Savoia dated May 20, 2010.

It is noted that in support of cross motion, the moving defendant has failed to provide a copy of the pleadings and therefore the motion fails to comport with CPLR 3212. Even if this court were to consider the cross motion despite its failure to comport with CPLR 3212, it is noted that the out-of state affidavits of

J.R. Sawicki and Al Stanaway fail to comply with CPLR 2109 as they are not in admissible form pursuant to CPLR 2106 and 2309(c), and lack a certificate of conformity as required by N.Y. Real. Prop. Law.§ 299-a(1) (*See, **Ford Motor Credit Company v Prestige Gown Cleaning Service,*** 193 Misc2d 262 [Civ Ct Queens County 2002], wherein it was provided that '[a]n oath or affirmation taken without the state shall be treated as if taken within the state if it is accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded within the state if such deed had been acknowledged before the officer who administered the oath or affirmation"). Therefore, such affidavits are not considered. The cross-motion is therefore not supported by an admissible affidavit or copy of deposition transcript of Siwicki in admissible form. Therefore, the cross motion further fails to comport with CPLR 3212.

Accordingly, motion (002) is denied.

To make a determination as to motion (001) and whether the plaintiff is entitled to an order permanently enjoining the defendants from driving and/or parking on the disputed property and for a mandatory injunction ordering permanent removal of the aforementioned circular driveway and encroachments encroaching upon the plaintiff's property, it is necessary to determine if the defendants have adversely possessed the disputed area, or have established a prescriptive easement or an easement by necessity over the disputed property.

Ronald Blydenburgh has set forth in his affidavit that he is the Long Island East, Inside Plant Supervisor for CSC Holdings, LLC, also known as Cablevision and has been employed by Cablevision, under various corporate names, for the last forty years. During his employ with Cablevision, he has been familiar with the antenna tower located on the subject property, and the Cablevision property which includes the access roadway to the antenna tower from David White's Lane. He personally travels to the antenna tower from David Whites Lane down the gravel driveway, marked in yellow on the survey dated January 12, 2004, every working day in order to make sure the antenna tower is maintained properly. Further, Cablevision has tenants who rent space on the antenna tower, including Nextel Sprint, Verizon, AT&T and radio WBAZ personnel and which companies travel from David Whites Lane down the gravel driveway at least twice a week to perform various maintenance activities at the tower and buildings in which they have equipment, and have been doing so for approximately ten years. In addition to the above, Randall's Auto Collision, an adjoining property owner, also drives down the gravel driveway from David Whites Lane for various business purposes. He has never given permission to anyone associated with the Southampton Car Wash to drive from David Whites Lane down the gravel driveway, although he is aware that they have been doing so.

Pia Olesen-Ferraris sets forth in her supporting affidavit that she is vice president of Critical Facilities for CSC Holdings, LLC (Cablevision), and is familiar with the property since she is responsible for maintaining the antenna tower located thereon. She states Cablevision uses the subject property and antenna for the distribution of cable, telephone, and internet service and rents property on the antenna tower. The area designated as "dirt and gavel parking area" on the survey dated January 12, 2004 is not protected by a substantial enclosure of any kind.

By indenture dated September 20, 1965, Holver Realty Corporation and Robert Tesori passed title of certain property to Long Island Cablevision Corporation of Southampton as described in that deed

(Exhibit E). A Quitclaim deed , by indenture made on December 6, 1989 between the Times Mirror Cable Television of Long Island, Inc. as grantor, demised, released and quitclaimed unto the grantee, CSC Acquisition Corporation, a certain plot of land described in Exhibit A annexed thereto. CSC Acquisition Corporation, by deed dated August 3, 2004 indentured the land to CSC Acquisition-NY, Inc. This land is the subject of the dispute in this action.

An indenture was made on October 6th, 2000 between Robert S. Savoia and 404 County Road 39A for a certain parcel of property along the southerly side of County Road 39(A) and the northeasterly corner of the lands of Charles W. Gould. The car wash operated by 404 County Road 39A is located upon this property.

According to the survey by Steven Barylski dated January 12, 2004, the yellow gravel driveway extends approximately 314.07 feet from David Whites Lane in an east/west direction. At the westerly end of the gravel driveway, to the left (southwest) is a gravel parking lot; and to the right (northwest) is a blue dirt driveway which leads to a dirt and gravel parking area.

SAVOIA AFFIDAVIT

Robert S. Savoia set forth in his affidavit dated March 22, 2010 that he was the owner of the Southampton Car Wash located on County Road 39A, Southampton, New York from 1989 until he sold it to the defendant 404 County Road 39A on October 6, 2000, and during the entire time that he owned the car wash, the only property that was used for the car wash business was the property which he deeded to 404 County Road 39A, consisting solely of Lot 36, as reflected on the deed and tax map annexed as part of Exhibit A. He further sets forth that when shown the aerial photograph dated May 5, 2009, entitled "Town of Southampton Geographic Information System," that the area enclosed within the yellow lines showing a roadway running from David Whites Lane to a large rectangular area, owned by CSC Acquistion-NY, Inc., was at no time during his ownership and operation of the car wash used by him or his employees for the car wash business purposes nor did they use the roadway coming off David Whites Lane for car wash purposes. Savoia further avers that when shown the photograph (Exhibit C), that none of the area in back of his former car wash was covered in gravel, and instead consisted solely of dirt. He further avers that he never had such a driveway which continues to the back of his former property and then off his former property making a semi circle, and then back onto his former property. When he owned the car wash, it contained only one driveway which was contained solely on his deeded property. Although a few dealers used his car wash, their cars only entered the car wash from County Road 39A and from no other road or area.

SAWICKI TESTIMONY

At his examination before trial on December 22, 2009, J.R. Siwicki testified that he is the president of 404 County Road 39A, Inc. which owns the property that the Southampton Car Wash is on. On October 6, 2000, he purchased the car wash business and property described in the deed from Mr. Robert Savoia. The owner of the car wash prior to Mr. Savoia was a man named Gus who is now deceased. He testified that David Whites Lane is east of his property. His property, 404 County Road 39A fronts on County Road 39A. Referring to the survey, he testified that his employees, and all of the contractors, and dealerships that he does wholesale business with, drive down David Whites Lane, highlighted in yellow, to park in back of the car wash; and in a westerly direction travel over a small white portion that is not colored in any way

onto the blue portion to the parking area. At the end of the blue roadway that is marked dirt driveway, there is another area in a rectangular area that says dirt gravel parking area, which is where they usually park as well as in the blue area. The employees from the dealerships park about 25 cars a day from the dealership for detailing and washing services in that area and drive across the yellow roadway to the blue roadway despite having access from County Road 39A as they do not want to wait in line. If the dealership is leaving the car for services, they have someone else drive there and pick them up, or they take another car back. He also instructs contractors or garbage trucks to use the yellow roadway instead of going through the car wash as he does not expect them to wait for the line or to maneuver around.

When he purchased the car wash and property in 2000, the roadway in yellow and the dirt driveway depicted in blue on Exhibit 1 were not part of the property that was deeded to him. He never asked Cablevision or CSC Acquisition for permission to use the roadway highlighted in yellow or the dirt driveway highlighted in blue, or the parking area just north of the roadway designated in blue. He does not, and never has, paid real estate taxes on those parcels and no one has ever deeded the property to him. He knows that Cablevision employees also drive from David Whites Lane down the same yellow driveway, but instead of making a right towards the car wash, they make a left towards the tower. He has also seen Randall's Auto Repair use the drive from David Whites Lane on the parcel labeled "Land N/FRJ Feinberg". He testified that he pays for removal of snow on the yellow roadway, the blue portion, and the back parking area and the car wash property, but he did not know the name of the company. He never made the yellow roadway wider, but did have some grading and crushed stone added to the surface and car wash employees pruned the trees. No one from the car wash ever changed configuration of the roadway. Two cars cannot pass on the roadway as it is passable only by one car. There were times he used the yellow roadway five times a day, and recently does not use it during the course of a week as he is not there. The roadway marked in blue was dirt and gravel when he purchased the car wash in 2000. In 2002, he had some junk removed and had wood chips and gravel placed and some grading, but it driveway was dusty, so he had more gravel added. The circular driveway depicted in Exhibit 22, had been partially paved by mistake in 2006 by an asphalt company that had extra asphalt and cut a deal with him to fill in pot holes but instead paved 2/3 of the driveway when he was not paying attention. Thereafter, he used it to queue up cars for his business. Two to three years ago, someone from Cablevision spoke to Robert Kujan, the site manager at the car wash, about using the property, and Kujan told the person from Cablevision that they had a right to the property. Someone else came by taking pictures and asked Tawiah, his back supervisor, what they were doing using the property.

There was testimony by Siwicki concerning photographs allegedly taken in 1987 and thereafter showing some vehicles on the area in the back of the car wash, and a motor home. However, there has been no evidence submitted that establishes that those vehicles were from the car wash to rebut the affidavit of Mr. Savoia wherein he averred that he only accessed his property for the car wash and others from his own driveway and not over Cablevision's property.

INTERROGATORIES

The plaintiff has also submitted the answer to the plaintiff's first set of interrogatories, signed by J.R. Siwicki, Jr. who sets forth that the paved circular roadway referred to in paragraph 7 of the plaintiff's complaint and depicted in the photographs annexed to the demand was constructed by the defendant in the spring of 2006 and was being used for the queuing of vehicles to be washed at the car wash. Siwicki states

that this was done without permission from the plaintiff and that a portion of the paved circular roadway was constructed on the plaintiff's land. Crushed stone was laid by the defendant on the disputed property on September 15, 2001 by Creative Landscaping on top of areas cleared by the previous owners. Siwicki also responds that in the absence of the crushed stone, the disputed area became muddy or dusty which interfered with his purpose to permit access, queuing and egress of cars of wholesale customers. He further sets forth that Robert Savoia, from whom he purchased the car wash, from 1990 to 2000 previously used the area described as the parking area in defendant's answer dated July 21, 2009, and also used the driveway for vehicles. Siwicki believes that it was first used by his predecessors in the early 1970's. Siwicki sets forth that the "wholesale customers" who use the disputed area are Mercedes Benz of Southampton, Land Rover, Storms Motors, Lexus, Yawnee Motors, Plitt For and tradesmen visiting the carwash. Employees use the disputed area for employee parking, detailing operations and queuing activities.

Based upon the foregoing, it is determined that the unrefuted admissible evidence establishes that the existing car wash owned by the defendant 404 County Road 39A began using the disputed property on or about October 6, 2000 after Siwicki purchased the deeded property and business from the former owner, Robert Savoia. Savoia established that he used only the deeded property for his car wash business prior to the time he sold it in 2000 to the defendant and that wholesale customers entered the car wash from 404 County Road 39A and did not utilize Cablevisions's property. Therefore, it has been established that this disputed land was used by the defendant since on or about October 6, 2000.

RPAPL-2008 AMENDMENTS

In 2008, the New York State Legislature enacted sweeping changes to those provisions of RPAPL that govern circumstances under which title to real property may be acquired by adverse possession, reversing the ruling of the Court of Appeals in ***Walling v Przysbylo,*** 7 NY3d 228 [2006], wherein the Court ruled that the Wallings had acquired title to a strip of land belonging to their neighbors, the Przybylos, by treating the property as their own for the requisite ten year period, despite the Wallings admitted knowledge of the Przybylos' record ownership of the disputed strip of land.

RPAPL §543, as amended and as became effective on July 8, 2008, applies to cases filed on or after that date, and provides in pertinent part that "1. Notwithstanding any other provision of this article, the existence of de minimus [de minimis] non-structural encroachments, including, but not limited to, fences, hedges, shrubbery, plantings, sheds and non-structural walls, shall be deemed to be permissive and non-adverse." It further provides, "2. Notwithstanding any other provision of this article, the acts of lawn moving or similar maintenance across the boundary line of an adjoining landowner's property shall be deemed permissive and non-adverse."

RPAPL §522 provides that the act shall take effect immediately, and shall apply to claims filed on or after such effective date. Pursuant to RPAPL §522, "For the purpose of adverse possession not founded upon a written instrument or a judgment or decree, land is deemed to have been possessed and occupied in either of the following cases, and no others: 1. Where there have been acts sufficiently open to put a reasonably diligent owner on notice. 2. Where it has been protected by a substantial enclosure, except as provided in subdivision one of section five hundred forth-three of this article."

There has been debate concerning whether RPAPL 543 should be applied to every case filed after July 8, 2008, because, in some instances, the property right acquired by adverse possession may have vested or ripened prior to that July 8, 2008 date. While the law is evolving, it is noted that the Fourth Department has declined to apply the statute as amended to cases wherein the property right vested prior to the date of amendment (see, ***Franza v Olin,*** 73 AD3d 44 [4th Dept 2010). However, in ***Hartman v Goldman,*** the Westchester Supreme Court applied the 2008 amendments and granted Goldman summary judgment against the plaintiffs who claimed adverse possession of a disputed parcel upon which the plaintiffs installed driveway lights, planted foliage and shrubbery, and performed landscaping and lawn maintenance, holding the plaintiff's actions were de minimus, and by statute, deemed permissive and non-adverse.

Furthermore, in ***Asher v Borenstein, et al,*** 2010 NY Slip Op [Supreme Court of New York, Appellate Division, 2nd Dept], the Court determined that because the action to quiet title was commenced prior to July 7, 2008, those amendments were not applicable to the action and the action was decided based upon the law as it existed prior to July 7, 2008. The instant action was commenced on June 16, 2009, after the enactment of the amendments, and, based on the court's findings herein, the defendant did not have vested property rights prior to the date of the amendment, and, therefore, the court will determine the action pursuant to the law as ameded in 2008, consistent with both the Second Department and Fourth Department decisions in Franza and Asher. The court notes parenthetically that even were the court to consider the case under the law as it existed pre-amendment, the result would be the same because, under the facts of this case, the plaintiff would be entitled to summary judgment under either standard.

ADVERSE POSSESSION-PRESCRIPTIVE EASEMENT-EASEMENT BY NECESSITY and STATUTE OF LIMITATIONS

The designation of the period of time within which the right to land by adverse possession and the right to an easement by prescription ripens, an analogy exists, and the statutory rules for adverse possession are to be applied to easements. An easement derives from use, and its owner gains merely a limited use or enjoyment of the servient land. And by the same token, when CPLR section 40 requires that, for the purpose of constituting an "adverse possession," the "land must be "protected by a substantial enclosure' or "usually cultivated or improved," the statute must be deemed to refer only to estates in land and, of necessity, calls for proof of one or another of the specified incidents in order to prove possession and occupancy, not a privilege or right of a user. The enjoyment of easements lies in use rather than in possession, the only physical conduct necessary for their acquisition by prescription is "making use" of a portion of another's land, and one claiming a right of way by prescription is not required to prove that the way was enclosed, cultivated or improved. In short, the prescribed statutory manifestations of adverse possession can have no application to the case of an easement as of passage. Not every use of another's land give rise to an easement (see, ***DiLeo v Pecksto Holding Corp. et al,*** 304 NY 505 [1952]). The party seeking to prove that an easement was established must do so by clear and convincing evidence. To acquire an easement by prescription, it must be shown that the use was hostile, open and notorious, and continuous and uninterrupted for a ten year period. Furthermore, as to the establishment of an easement by necessity, it is required that the party claiming such easement by necessity show that its use of the disputed stip of land is absolutely necessary for the beneficial enjoyment of its property (***Snapper Realty LLC v Duane Reade, et al,*** 6 Misc3d 1003A [Supreme Court of New York, Queens County]).

An effective claim of adverse possession has five elements: (1) the possession must be hostile and

under a claim of right; (2) it must be actual; (3) it must be open and notorious; (4) it must be exclusive; and (5) it must be continuous. Those elements must be established by clear and convincing evidence (***Kimber Mfg., Inc. v Hanzus et al,*** 56 AD3d 615 [2nd Dept 2008]; see also RPAPL §501). To acquire title to real property by adverse possession, common law requires the possessor to establish that the character of the possession is hostile and under a claim of right, actual, open and notorious, exclusive and continuous for the statutory period of ten years (***Ray et al v Beacon Hudson Montain Corporation et al,*** 88 NY2d 154 [1996]; see also, ***Gourdine v Village of Ossining et al,*** 72 AD3d 643 [2nd Dept 2010]). By definition, a claim of right is adverse to the title owner and also in opposition to the rights of the true owner. Conduct will prevail over knowledge, particularly when the true owners have acquiesced in the exercise of ownership rights by the adverse possessors (***Hall et al v Sinclaire et al***, supra).

Since adverse possession is a means of cutting off legal claims to title, it has historically been strictly applied in the sense that all constituent elements must be proved, with the burden resting on the adverse claimant, with the adverse possessor's acts construed against him, and every inference in favor of a possession that is subordinate to the title of the true owner. Since New York law has long disfavored the acquisition of title by adverse possession, its elements must be proved by clear and convincing evidence (***Joseph v Whitcombe et al,*** 279 AD2d 122 [1st Dept 2001]).

Hostile possession does not require a showing of enmity or specific acts of hostility. All that is required is a showing that the possession constitutes an actual invasion of or infringement upon the owner's rights. Consequently, hostility may be found even though the possession occurs inadvertently or by mistake (***Hall et al v Sinclaire et al,*** 35 AD3d 550 [2nd Dept 2006]).

Pursuant to RPAPL §522, for adverse possession not founded upon a written instrument or a judgment or decree, land is deemed to have been possessed and occupied where there have been acts sufficiently open to put a reasonably diligent owner on notice and where it has been protected by a substantial enclosure, except as provided in subdivision one of section five hundred forth-three of this article." Here, the claimed adverse possession is not founded upon a written instrument, judgment or decree.

Ten Year Period

It has already been demonstrated by the admissible evidence that the time period to measure either adverse possession or prescriptive easement in this action commenced October 6, 2000 when Siwicki purchased the car wash business and property . In that this action was commenced on June 16, 2009, it is determined that the plaintiff has demonstrated prima facie that the defendant, 404 County Road 39A, has not completed the requisite ten year period to establish a claim for adverse possession or prescriptive easement prior to commencement of this action.

Accordingly, it is determined as a matter of law that the defendant, 404 County Road 39A, did not acquire an interest in the disputed property either by adverse possession or by prescriptive easement for the requisite ten year period.

Furthermore, as to the establishment of an easement by necessity, it is required that the party claiming such easement by necessity show that its use of the disputed stip of land is absolutely necessary

for the beneficial enjoyment of its property (***Snapper Realty LLC v Duane Reade, et al,*** supra). Here, the testimony by Siwicki clearly establishes that the rear of the car wash could be accessed from County Road 39 A, through the car wash driveway, but various wholesale dealers who use the detailing and other services at the car wash did not want to wait to pass to areas maintained by defendant when there were cars queued in more than one line waiting for the car wash. The previous owner, Savioa, established that he and the wholesalers were able to access the property deeded to the defendant without crossing onto the plaintiff's property.

Accordingly, it is determined that an easement by necessity has not been established as a matter of law.

Substantial Enclosure and Improvements

In ***O'Hara v Wallace,*** 83 Misc2d 383 [Supreme Court of New York, Special Term, Suffolk County 1975], it was set forth that "The doctrine of adverse possession, which in essence permits a person to take someone else's private property for his own use is rationalized by a number of judicially created fictions stated as presumptions. Two such presumptions, each vital to the establishment of adverse possession, do not exist when the right sought to be appropriated is an easement created by reference to a filed map." The court continued, "Ordinarily, possession accompanied by the usual acts of ownership is presumed to be adverse until shown to be subservient to the title of another.... The rule in New York is that an easement created by reference to a filed map can be extinguished only by the united action of all lot owners for whose benefit the easement is created. In mapped street cases, the possession can only become adverse when the occupier proves that his affirmative acts of possessory ownership were known to all of the lot owners at times when each has occasion to assert a right to the use of the servient tenement.... Plaintiff's easement survives and it is a property right which equity can protect by injunction to the extent that the encroachments maintained by defendant interfere with the use of the right of way for pedestrian travel." Here, it has not been established that there is an easement created by reference to a filed map or written instrument.

A party seeking to obtain title by adverse possession on a claim not based upon a written instrument must show that the parcel is either usually cultivated or improved (RPAPL 522(1)) or protected by a substantial inclosure (***Hall et al v Sinclaire et al***, supra). A party asserting adverse possession by way of usual cultivation or improvement must show that, during the entire ten year period, more was done than merely taking reasonable steps to keep the site presentable, as opposed to openly altering the landscape. Substantial and obvious alteration is required. Limited activities such as cutting the grass, raking, clearing the debris, and even planting or removing a few trees are thus insufficient.... Even the placement of a structure, such as a garage, is not enough to establish hostile possession by improvement if that structure is mainly on the claiming party's land and the encroachment on the disputed property is slight. Similarly, the mere presence of a fence is insufficient. There must be a showing that it was a substantial barrier erected by the party claiming adverse possession, without the consent of the owner; a fence erected by or with the consent of the owner, or its predecessor in title, cannot be utilized by the adverse possessor, because its presence can never serve as an indication of conduct or possession openly hostile to the owner's rights (see, ***RSVL, Inc. and Oyster Bay Pump Works, Inc. v Portillo et al,*** 16 Misc3d 1137A [Supreme Court of New York, Nassau County 2007]). In the instant action, it has been established by unrefuted evidence that the defendant did not enclose the disputed area, and the stockade fence to the rear of the car wash does not

enclose the area. The acts of cleaning debris, adding more gravel, and even the blacktop accidently applied to a portion of the disputed area is not a substantial and obvious alteration. Additionally, it is undisputed that the plaintiff continued to use the disputed driveway and property from David Whites Lane on a regular basis and thus was not precluded from use of the property by the defendant's actions or additions.

In ***United Pickle Products, Corp. v Prayer Temple Community Church,*** 43 AD3d 307 [1st Dept 2007], the court determined a disputed parcel was protected by a substantial enclosure in that, inter alia, it was accessible only from the owner's property. In ***Morris v DeSantis,*** 178 AD2d 515 [2nd Dept 1991], the court held that when the possessor relies on substantial enclosure, only the area within the enclosure can be adversely possessed, and if the possessor relied on the usual cultivation or improvement element, no enclosure is needed. In the instant action, it is determined that the admissible evidence has failed to demonstrate that the defendant established an enclosure upon the disputed property.

Pursuant to RPAPL §543, fences, hedges, shrubbery, plantings, sheds and non-structural walls, shall be deemed to be permissive and non-adverse" and the acts of lawn mowing or similar maintenance across the boundary line of an adjoining landowner's property shall be deemed permissive and non-adverse. In ***Seisser et al v Eglin,*** 7 AD3d 505 [2nd Dept 2004]), the plaintiffs claimed adverse possession of a disputed parcel of land along the western boundary of their parcel which disputed parcel is in the title of their neighbor. The disputed parcel contained an old wire fence that ran parallel to the plaintiff's deed boundary. The disputed parcel also contained a wooded area. At the tree line was a mowed lawn which the plaintiffs contend was maintained by them and their predecessors in title. The court determined that the plaintiffs failed to present any evidence that the wooded area was cultivated or improved or protected by a substantial inclosure as required under RPAPL 522, citing ***VanValkenburgh v Lutz,*** 304 NY 95; ***Mayvill v Webb***, 267 AD2d 711; ***Simpson v Chien Yuan Kao***, 222 AD2d 666.

In the ***Manhattan School of Music et al v Solow***, 175 AD2d 106, 571 NYS2d 958 [2nd Dept 1001], the appellees had commenced an action for ejectment in January 1983 to compel the appellant to remove certain structures which encroached on their property, including a stockade fence, a wire fence, an outdoor shower, and a wooden stairway, and further sought damages for trespass. Summary judgment was granted to the appellees and affirmed on appeal as the Appellate Court stated that the appellant failed to present sufficient proof of cultivation and improvement of the property at issue, as it remained a dense grove of pine trees. The appellants made nonspecific allegations as to his purported cultivation and improvement of the disputed property which were insufficient to defeat the motion. (see, also, ***Sawyer et al v Prusky et al,*** 71 AD3d 1325 [3rd Dept 2010]). In the instant action, and as set forth above, there were pre-existing dirt and gravel areas on the disputed property and those areas remained gravel and unimproved areas, with only additional gravel, some grading, and partial accidental asphalt application done to maintain use of the dirt and gravel areas. Those areas remained what they previously were prior to the defendant's use of the disputed area and remained substantially unchanged despite the defendant's acts.

Based upon the foregoing, the plaintiff has established prima facie entitlement to summary judgment on the issue that the defendant did not acquire adverse possession of the disputed property, and did not acquire a prescriptive easement, or an easement by necessity, over the subject disputed property for a ten year period. The plaintiff has further established prima facie that the defendant did not enclose or substantially improve the disputed property for the purpose of adverse possession. In opposing this motion (001), the defendant has not raised a triable issue of fact with the submission of admissible evidence to

preclude summary judgment.

TRESPASS and STATUTE OF LIMITATIONS

Alleged acts of continuing trespass give rise to successive causes of action under the continuous wrong doctrine (***Lucchesi ,et al v Perfetto, et al,*** 72 AD3d 909 [2nd Dept 2010]; ***Hale v Burns et al,*** 101 AD2d 101 [2nd Dept 1905]). An unlawful encroachment has been consistently characterized as a continuous trespass giving rise to successive causes of action, and the statute of limitations would only bar recovery of damages more than three years propr to commencement of the action (***Bloomingdales, Inc v The New York City Transit Authority, et al,*** 52 AD3d 120 [2nd Dept 2008]). Actions sounding in trespass and to recover damages for injury to property must be commenced within three years of accrual, CPLR 214(4).

In the instant action, it is claimed that the alleged trespass has been ongoing since October 6, 2000 when the defendant purchased the car wash and began using the plaintiff's driveway and property, as admitted and asserted by the defendant. A cause of action premised upon claims of continuing trespass is viable for a period of three years prior to the date of the commencement of this action, and any claims prior to the three year period preceding the commencement of the instant action on June 16, 2009 are time barred.

Accordingly, only those causes of action premised upon theories of continuing trespass prior to the three year period preceding the commencement of the instant action on June 16, 2009 are time barred and are dismissed as a matter of law.

The essence of trespass is the invasion of a person's interest in the exclusive possession of land, and a person who enters upon the land of another without permission, whether innocently or by mistake, is a trespasser ***Fells v Schneider,*** 2009 Slip Op 33130U [Supreme Court of New York, Nassau County 2009]). Based upon the evidentiary submissions and defendants' own submissions and averments, it is determined that the plaintiffs have demonstrated that the defendant 404 County Road 39A trespassed onto the disputed portions of the plaintiffs' property and that the plaintiff did not give permission to the defendant to use the disputed property and asked the defendant to stop using the disputed property for two to three years prior to the commencement of this action. The defendant has testified to his unauthorized use of the plaintiff's property, and such ongoing, unauthorized use constitutes a trespass as a matter of law.

PRELIMINARY INJUNCTION

To obtain a preliminary injunction, a party must demonstrate (1) a likelihood of ultimate success on the merits; (2) irreparable injury if provisional relief is withheld; and (3) a weight of the equities in its favor (***Ricca, etc, et al v Ouzounian, etc, et al,*** 51 AD3d 997 [2nd Dept 2008]; see also, CPLR 6301; ***Haverland v Lawrence et al,*** 6 Misc3d 1026A [Supreme Court of New York, Suffolk County 2004]). The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual. Likelihood of success need only be shown from the evidence presented, conclusive proof is not required. Thus even where there are facts in dispute, the court may, in its discretion, order such relief pendente lite to maintain the status quo (see, generally, ***Snyder v Crown Wisteria, Inc, et al,*** 2009 NY Slip Op 32638U [Supreme Court of New York, New York County 2009].

In the instant action, the plaintiff has not demonstrated irreparable harm to entitle it to an injunction (see, generally, ***Toscano et al v Toscanso et al,*** 2003 NY Slip Op 51284U [Supreme Court of New York, Suffolk County 2003]). However, it is well settled that if a trespass is of a continuous or constantly recurring nature, a proper case for the granting of an injunction is shown (***Jensen et al v General Electric Company et al,*** 82 NY2d 77 [1993]). In this court's discretion, it is determined that the need for mandatory injunctive relief has been demonstrated to maintain the status quo, given the facts of this action.

Dated: January 6, 2011

HON. JOSEPH C. PASTORESSA.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION