

**12049 Flatlands Ave. Corp. v Research Ctr. of
Kabbalah, Inc.**

2021 NY Slip Op 31824(U)

March 25, 2021

Supreme Court, Kings County

Docket Number: 518554/2017

Judge: Richard J. Montelione

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 99

-----X
12049 FLATLANDS AVE. CORP.,

Plaintiff,

Decision and Order
After Trial

-against-

Index No. 518554/2017

RESEARCH CENTRE OF KABBALAH, INC.,
KABBALAH CENTRE OF NEW YORK,
INCORPORATED,

Defendants.
-----X

MONTELIONE, RICHARD J., J.

The action was commenced by filing a summons and complaint on September 26, 2017. Issue was joined on December 12, 2017. This action involves plaintiff's claims of ownership under Real Property Law §§ 501 and 522 through adverse possession. Plaintiff owns the real property located at 120-49 Flatlands Ave., Brooklyn, NY and defendant owns the building located at 999 Alabama Avenue, Brooklyn, NY, and holds legal title to the disputed parcel that can be described as a narrow passageway or alley which goes the full length of the block from the easterly side of Alabama Avenue to the westerly side of Georgia Avenue which separates the two buildings owned by the respective parties ("disputed parcel").

RECEIVED
MAY 23 AM 9:59
KINGS COUNTY CLERK

The trial commenced and proceeded virtually on February 26, 2021 and was completed on the same day.

On behalf of the plaintiff, the court heard testimony from Jason Knight, the sole shareholder of the plaintiff corporation who previously owned the property individually. Prior to his individual ownership, this property was owned by his grandparents beginning on November 22, 1949. Plaintiff testified that he visited the premises since he was four years old and often played on the disputed parcel.

On behalf of the defendant, the court heard and viewed a partial video deposition of Avraham Tchouba, a commercial tenant of the plaintiff who rented from plaintiff from May 24, 2006, and through lease extensions, had a lease that expired on March 31, 2021. There is no question of fact that at some point Avraham Tchouba enclosed the disputed parcel with gates, locks, cement barriers and barbed wire.

On behalf of both plaintiff and defendant, other deposition testimony of various witnesses were submitted into evidence and will be specified when relevant.

There is a sharp disagreement as to whether the enclosure of and occupancy of the disputed parcel by plaintiff's commercial tenant was at the direction of plaintiff or whether the commercial tenant and defendant reached an agreement allowing enclosure and use conditioned upon the commercial tenant maintaining

the parcel. At no time did Mr. Knight, individually or through his corporation, ever occupy the parcel since the transfer of ownership from his grandparents to him on October 20, 2006.

The Court considered the following exhibits all of which were stipulated into evidence:

Plaintiff's Exhibit	Description
P-1	Extension and modification of lease dated December 31, 2015 between plaintiff and Ultimate Used Auto Parts, Inc.
P-2	Letter dated November 4, 2005 from SALAMON, GRUBER, NEWMAN & BLAYMORE, P.C., attorneys for defendant to East New York Auto Sales Incorporated and Ultimate Used Auto Parts & Sales at 12073 Flatlands Avenue, Brooklyn, New York 11207-8210, with demand that addressees cease and desist from further using the disputed property.
P-3	Letter dated August 23, 2010 from defendant to Ultimate Used Auto Parts Inc., 120-49 Flatlands Ave, Brooklyn NY 11207, demanding that the disputed parcel be cleared for emergency fire use. (Same as D-7).
P-4	Certified deed dated June 4, 1999 reflecting initial ownership by defendant. (Same as D-17).
P-5	Certified deed dated October 20, 2006 from Leonard and Jessie Knight (Jason Knight's grandparents) to Jason Knight.
P-6	Certified deed dated April 24, 2019 from Jason Knight to plaintiff.
P-7	Letter dated January 16, 2006 from SALAMON, GRUBER, NEWMAN & BLAYMORE, P.C., attorneys for defendant to Leonard and Jessie Knight informing them that their commercial

Plaintiff's Exhibit	Description
	tenant was illegally using the disputed property. (Same as D-5)
P-8	Photo of defendant's building (left), enclosed area with barbed wire (disputed property), and plaintiff's property (right).
P-9	Photo of defendant's property (right), enclosed area with barbed wire (disputed property), and plaintiff's property (left).
P-10	Photo of lock and chain on gate.
P-11	Photo of cement skid in front of gate leading to disputed property.
P-12	Old photo.
P-13	Old News clipping.
P-14	Business Certificate 1958 Leonard Knight (auto parts business).
P-15	NYC Permit allowing cutting curve and construction of driveway.
P-16	Google Earth satellite image aerial view of the buildings and disputed property dated September 27, 2005.
P-17	Google Earth satellite image aerial view of the buildings and disputed property dated "7/2007."
P-18	Google Earth satellite image aerial view of the buildings and disputed property dated "4/2008."
P-19	Aerial view of the buildings and disputed property dated "10/11/2014."
P-20	Aerial view of the buildings and disputed property dated "8/17/2010."

Defendant's Exhibits	Description
D-1	Transcript of Examination Before Trial of Jason Knight dated August 18, 2018.
D-5	Same as P-7.
D-6	Letter from Salomon Gruber, et al (defendant's attorney) to Leonard Knight dated March 22, 2006 claiming that a former tenant of Leonard Knight left old tires on defendant's property that needed to be removed or it will be discarded by the defendant.
D-7	Letter from defendant to Ultimate Used Auto Parts Inc. dated August 23, 2010 confirming that UUAP will remove debris from the disputed property for fire safety or pay any penalties.
D-8	Letter from defendant's counsel to UUAP dated September 11, 2017 demanding that it cease and desist from using the disputed property.
D-9	Letter dated October 24, 2017 from Ultimate Used Auto Parts Inc., signed by Avraham Tchouba to defendant stating there was an agreement with defendant to use the space if UUAP maintained the property and demanding \$15,000.00 from defendant for improvements made to the space.
D-11	Plaintiff's Responses to Defendant's Demand for Interrogatories.
D-12	Commercial Lease dated May 24, 2006 between Leonard Knight (as landlord) and Ultimate Used Auto Parts, Inc. (as Tenant).
D-13	Extension and Modification of Lease dated December 31, 2015 between 12049 Flatlands Corp. (as Landlord) and Ultimate Used Auto Parts, Inc. (as Tenant).
D-15	Same as P-5.
D-16	Same as P-6.

Defendant's Exhibits	Description
D-17	Same as P-4.
D-19	Undated Google map of relevant properties.
D-20	Undated Google map of relevant properties.
D-22	Photo of defendant's building (left), disputed property (center) and plaintiff's property (right).
D-23	Google Earth satellite image aerial view of the buildings and disputed property dated June 26, 2019.
D-24	Google Earth satellite image aerial view of the buildings and disputed property dated December 31, 2003.

Applicable Law

RPAPL § 501. Adverse possession; defined

For the purposes of this article:

1. Adverse possessor. A person or entity is an "adverse possessor" of real property when the person or entity occupies real property of another person or entity with or without knowledge of the other's superior ownership rights, in a manner that would give the owner a cause of action for ejectment.

2. Acquisition of title. An adverse possessor gains title to the occupied real property upon the expiration of the statute of limitations for an action to recover real property pursuant to subdivision (a) of section two hundred twelve of the civil practice law and rules, provided that the occupancy, as described in sections five hundred twelve and five hundred twenty-two of this

article, has been adverse, under claim of right, open and notorious, continuous, exclusive, and actual.

3. Claim of right. A claim of right means a reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case may be. Notwithstanding any other provision of this article, claim of right shall not be required if the owner or owners of the real property throughout the statutory period cannot be ascertained in the records of the county clerk, or the register of the county, of the county where such real property is situated, and located by reasonable means.

CPLR 212:

(a) Possession necessary to recover real property. An action to recover real property or its possession cannot be commenced unless the plaintiff, or his predecessor in interest, was seized or possessed of the premises within ten years before the commencement of the action.

RPAPL § 522. Essentials of adverse possession not under written instrument

or judgment:

For the purpose of constituting an 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 forty-three of this article.

The Court in *Montanaro v. Rudchyk*, 189 A.D.3d 1214, 1216, 136 N.Y.S.3d 330 (AD 2nd Dept. 2020), in applying the pre-amendment elements to an action under RPAPL § 522, specified the following:

Pursuant to the pre-amendment law, in order to establish a claim to property by adverse possession, the claimant must prove that possession of the property was: (1) hostile and under a claim of right, (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous for the required period (*see Estate of Clanton v City of New York*, 153 AD3d at 789; *Asher v Borenstein*, 76 AD3d 984, 986 [2010]). Additionally, under the relevant provision of RPAPL 522 that was in effect at the time of the events during which the plaintiffs allege the disputed property was adversely possessed, the plaintiffs were required to prove that the disputed property was either usually cultivated or improved or protected by a substantial inclosure (*see Asher v Borenstein*, 76 AD3d at 986). All elements of an adverse possession claim must be proved by clear and convincing evidence (*see Marone v Kally*, 109 AD3d 880, 882 [2013]; *Best & Co. Haircutters, Ltd. v Semon*, 81 AD3d 766, 767 [2011]).

Legal Analysis

The defendant's argument that plaintiff cannot tack on periods of prior occupancy of the disputed property, if all other elements of adverse possession are met, is rejected as not being the law in this state. (*Yee v. Panousopoulos*, 176 A.D.3d 1142, 110 N.Y.S.3d 116 [2nd Dept. 2019]). Defendant's argument that a metes and bounds description of the disputed property must be part of the plaintiff's prima facie case is rejected because the parties and the court, without expert opinion, can clearly ascertain the area in dispute which is quantifiable and

can be subject to an order from the court directing a survey detailing the metes and bounds of the disputed property, if necessary. (*See Snyder v. Bistran*, 156 A.D.2d 355, 356, 548 N.Y.S.2d 311, 313 [2nd Dept. 1989], “Although the tax deed did not contain a metes and bounds description of the property, the plaintiff’s experts established that the description provided permitted the land to be identified with reasonable certainty [citations omitted]).”

These arguments, together with the argument that because none of the plaintiff’s deeds reflected its ownership of the disputed parcel, after equitable title allegedly vested through adverse possession, and that this failure waives such a claim as a matter of law, is rejected, if all elements of adverse possession are proven. (*See Ram v. Dann*, 84 A.D.3d 1204, 1205, 924 N.Y.S.2d 482, 483 [2nd Dept. 2011] “Additionally, where, as here, the adverse possession is not founded upon a written instrument, the possessor must also establish, in accordance with the law in effect at the time this action was commenced, that the disputed property was either ‘usually cultivated or improved’ or ‘protected by a substantial inclosure’” [*Skyview Motel, LLC v. Wald*, 82 A.D.3d at 1082, 919 N.Y.S.2d 191, quoting RPAPL former 522]).”

The issue before the court is whether the plaintiff has proved by clear and convincing evidence all the elements of a cause of action for adverse possession at

any continuous statutory period of ten years between 1949 and the commencement of this action.

The plaintiff's response to the following interrogatory question and answer follows:

13. Identify the individual(s) or entity(ies) who Plaintiff believes to be the rightful owner of the strip of land prior to Plaintiff's alleged adverse possession of same, stating:

a. The time periods during which each individual or entity was believed to be the rightful owner of the strip of land during each such time period.

My grandfather represented to me that the parcel in question was part of his land and always had been.

14. Set forth the facts which Plaintiff contends support its allegation in Paragraph 11 of the Complaint, insofar as such paragraph alleges that "Plaintiff has occupied the strip of land continuously since 2006 (and before), "including but not limited to:

a. The exact date upon which Plaintiff first began occupying the strip of land; *Ultimate Used Auto Parts has been occupying the property since my ownership began in 2006.*

...

c. the dates when the property was used for those purposes;

At least 2006 to present. Anything prior is unknown.

d. When any persons other than you knew that the property was being used for such purposes;

This information is unknown to me.

15. Set forth the facts which Plaintiff contends support its allegation in Paragraph 12 of the Complaint, insofar as such paragraph alleges that "Plaintiff has fenced the strip of land in Alabama Avenue since before 2006," including but not limited to:

a. The exact date upon which Plaintiff began fencing the strip of land into Alabama Avenue:

This information is in the tenant's possession.

Jason Knight's answer to the defendant's interrogatories, which was consistent with his trial testimony, that his grandfather told him that the disputed parcel was part of his land and had always been part of his land, is hearsay, conclusory and inadequate to meet all of the elements to show adverse possession. ie. (1) hostile and under a claim of right, (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous for the required period.

The court did not consider the transcript testimony of Eliran Bar, an employee of defendant with the title vice president of real estate since May 2017, except to the extent that reference was made to letters which were stipulated into evidence, information where the witness had first-hand knowledge, or admissions.

Defendant admits that Ultimate Auto Parts has occupied the disputed parcel since 2006 (T. 14, L. 12).

There is a letter dated November 4, 2005 from defendant's attorney at the time to the plaintiff's commercial tenant:

Gentlemen:

Please be advised that this office represents the Research Center of Kabbalah, Inc., owner of the above-referenced property. We have been advised by our client that you are currently illegally using and trespassing upon the above-referenced property. It is hereby demanded that you cease and desist all use and occupancy of the above-referenced property immediately.

There is a letter dated January 16, 2006 from defendant's attorney at the time to Mr. Knight's grandparents:

*VIA CERTIFIED MAIL, RETURN RECEIPT
REQUESTED AND REGULAR MAIL*

Mr. Jessie Knight
and
Mr. Leonard Knight
7 Nirvana Avenue
Great Neck, New York 11023-1150

*Re: Property: 12049-12071 Flatlands Avenue
Brooklyn, New York 11207-8338 a/k/a 1013
Alabama Avenue, Brooklyn, New York
11207*

Dear Messrs:

As per my telephone conversation on January 6, 2006 with Mr. Leonard Knight, I advised that the undersigned represents the owner of the neighboring property, the Kabbalah Center, to the above-referenced parcel of land. As advised to me by Mr. Leonard Knight, Mr. Jessie Knight currently owns the above-referenced property and

12 of 23

the property is currently leased to Ultimate Used Auto Parts & Sales ("Ultimate").

As discussed, my client has informed me that Ultimate has been illegally using a portion of the Kabbalah Center's property located adjacent to the above-referenced property. Despite notice of said illegal use, Ultimate still continues same. (See, letter dated November 4, 2005 attached).

As further discussed, a review of Mr. Jessie Knight's deed and/or any other surveys for the above-referenced property would help to discern the correct ownership rights between the two parcels.

Please contact my office to discuss this matter further or to put me in contact with a representative with whom I may discuss this matter.

Your immediate attention to this matter is appreciated.

Approximately two months later, there was another letter sent from defendant's counsel at the time dated March 22, 2006:

VIA CERTIFIED MAIL, RETURN RECEIPT
REQUESTED AND REGULAR MAIL

Mr. Leonard Knight
7 Nirvana Avenue
Great Neck, New York 11023-1180

*Re: Property: 12019-12071 Flatlands Avenue
Brooklyn, NY 11207-8338 a/k/a 1013
Alabama Avenue, Brooklyn, New York 11207*

Dear Mr. Knight:

As you are aware from our prior telephone conversations, the undersigned represents the owner of the neighboring

property to the above-referenced parcel of land; to wit, the Kabbalah Center. It has come to my attention that your former tenant, Ultimate Used Auto Parts and Sales (“Ultimate”) has vacated the above-referenced premises. Despite having vacated your property, Ultimate has left items remaining on the Kabbalah Center’s property, including, but not limited to, used tires.

At this time, my client would like to discard the property left by Ultimate, and will do so should we not hear from you within ten (10) days of the date of this letter.

Please do not hesitate to contact me should you have any questions or wish to discuss this matter further.

Plaintiff’s counsel argues that these letters are an acknowledgment that the disputed parcel was actually in possession of plaintiff’s commercial tenant, but there was never a response to these correspondences and inferences can equally be drawn that the defendant’s commercial tenant followed the instructions of the defendant or defendant exerted control over the parcel by removing the tenant’s items.

By letter dated August 23, 2010, defendant’s then general counsel wrote directly to Ultimate Used Auto Parts Inc.:

Ultimate Used Auto Parts Inc.
120 49 Flatlands Ave
Brooklyn NY 11207

RE: Fire Lane Obstruction

Dear Owner:

It has come to my attention that your business is storing inventory in the Fire Lane adjacent to our property located at 1020 Georgia Ave., Brooklyn, NY 11207.

It is imperative that you clear the fire lane immediately. As you know, time is of the essence because the Fire Department cannot access our property in the event of a fire or other emergency.

Bruce Roth, our Inventory Manager, has informed me that you have stated that you will clear the fire lane within six (6) weeks. I trust that you will address this matter with the urgent action it requires.

Thank you for your prompt (sic) to this matter.

The court infers from this letter that defendant exercised control over the dispute parcel and that no gates were in place because such gates would defeat the purpose of a fire lane. This contrasts with the testimony of Mr. Knight who testified that gates were always in place on both sides of the disputed parcel.

By letter dated September 11, 2017, defendant's then counsel sent this letter to plaintiff's commercial tenant:

NOTICE TO CEASE AND DESIST AND VACATE

VIA FEDERAL EXPRESS

Ultimate Used Car Parts
120-49 Flatlands Avenue
Brooklyn, New York 11207

Re: Notice to Vacate 999 Alabama Avenue, Brooklyn New York
Block 4410, Lot 18 (the "Property")

Dear Madam or Sir:

We represent the Research Centre of Kabbalah, Inc. (“Kabbalah Centre”), owner of the Property, and write concerning Ultimate Used Car parts” (“Ultimate”) continuing unlawful trespass on the Property. Specifically, despite the previous demand by the Kabbalah Centre that Ultimate vacate, and remove its personal property-including vehicles, vehicle parts, and other debris-from that portion of the property bordering Ultimate’s parcel (the “Driveway Area), Ultimate has failed to do so. Ultimate’s continued occupancy of the Property is improper and without authorization.

There is no dispute that Kabbalah Centre has an absolute ownership and possessory interest in the property on which Ultimate is currently illegally and impermissible storing materials. Toward that end, enclosed is a survey, along with the deeds conveying 999 Alabama Avenue and 120-49 Flatlands Avenue, which unequivocally demonstrate that the Kabbalah Centre is the owner of the Driveway Area. Moreover, the Kabbalah Centre has never authorized Ultimate to use any portion of the Property, including the driveway areas. As you have been previously informed by the Kabbalah Centre, continued trespass by ultimate on the Property will severely impact Kabbalah Centre’s operations and business and has damaged and will continue to damage the Kabbalah Centre.

Accordingly, the Kabbalah Centre hereby demands that Ultimate cease and desist from its unlawful occupancy of the Property and that within 48 hours of receipt of this letter, Ultimate advise of its intent to vacate and remove any and all vehicles, vehicle parts and other items from Kabbalah Centre’s property within 30 days. Absent hearing from Ultimate, the Kabbalah Centre will be left with no alternative but to commence legal action and seek damages from Ultimate, including, but not limited to, any losses from Kabbalah Centre’s inability to access portions of the Property, and physical damage to the

Property, and legal fees for having to enforce its rights in court.

Moreover, it is imperative that we hear from you inasmuch as our client is currently in negotiations with a potential tenant for the lease of a portion of its space, and the potential tenant has expressed concerns regarding the presence of Ultimate's vehicles and other items in the driveway area and its refusal to relocate the same. Consequently, please be advised that, if Ultimate fails to respond or refuses to remove the items illegally being stored on Kabbalah Centre's property, and such action results in our client's inability to tenant its space, the Kabbalah Centre will also seek to recover lost rents and other damages in connection therewith.

The commercial tenant, Ultimate Used Auto Parts Inc., by its principal Avraham Tchouba, responded to the plaintiff's demand by letter dated October 24, 2017:

Re: Notice to vacate 399 Alabama Avenue, Brooklyn
New York
Block 4410, Lot 13

Chiesa Shahinian & Giantomasi PC
Robert Homby
One Boland Drive
West Orange NJ 07052

Mr. Homby:

I am in receipt of your notice to cease and desist and vacate dated September 11, 2017. Please be advised that my friend Constants Correa had already responded on October 10th to your previous notices of cases and dasisfvia (sic) email on Oct. 10, 2017 and did not get a response.

As addressed in the email fertile (sic) past twelve years a verbal agreement between Raphi, who repfesantechthe (sic) Kabala Center, and Avraham Tchouba owner of Ultimate Used Auto Parts was in place. Back then Raphi had approached me to help the center maintain the property in question. The area had been inhabited by drug users and homeless people and was full of all sorts of garbage. Raphi asked if I could maintain the area in exchange for using it, so the squatters would not inhabit the premises. The area had been a concern to the cgriminity (sic), not good for business and not to mention an eyesore. The gate was broken, piles of garbage that included hundratts (sic) of tires, trees, weeds had accumulated through years of neglect.

In order to maintain and use the area, I had to spend a considerable amoynt (sic) of my time and resources to haul away truckloads of garbage, paved it, and install a new gate to keep the squatters from coming bask (sic). Only once the project was completed did the area become usable.

Although the agreement was not written, it was in place for more than a decpde (sic), because and up until now it had been mutually beneficial. Now and after more than a decade the center has different plans for the area and the Center as the owner of the property has every right to end the verbal agreement. Since Ityill (sic) no longer will be able to benefit from the agreement. I will need to get the money back for the cost of getting the spjadeto (sic) be usable. I am only looking to get reimbursed the amount of \$15,000 dollars which would cover the initial out of pocket expenses that I incurred to make the space usable. Once I am reimbursed, I will be happy to vacate within 10-days.

If you need to reach me directly regarding this matter, you can reach me at my cell phone at ###-###-####. I hope you can understand my position and look forward to resolving this matter in an amicable and fair way for all

parties. If not, I welcome the opportunity for go to court and let a judge decide.

Jason Knight testified at trial that he was the only one who authorized and gave permission to his commercial tenant to clear the trees from the disputed parcel, cement the surface, install the fencing, and lock the premises. The commercial tenant not only does all these things, but also placed barbed wire and a cement barrier on both entrances that required a mechanical lift to move the barrier (a "Bobcat"). There is no dispute that all these events occurred, but these events are contrasted with Mr. Tchouba's letter of October 24, 2017 referring to an arrangement whereby he could use the disputed parcel with the permission of the defendant if he maintained it properly. It also contrasts with Mr. Knight's interrogatory answers that only the *commercial tenant* knew when the fencing was put up and that it was *unknown* to him as to any other person knowing that the disputed parcel was being used to store tires, cars and car parts.

It is noteworthy that Mr. Knight never had a key to either gate of the disputed parcel. The court credits Mr. Knight's testimony that he visited the premises often (testimony being 25 times per year) and looked through the fence on numerous occasions, but the court does not credit his testimony that he once set foot on the disputed parcel since 2005. The testimony regarding his one-time physical presence on the disputed parcel is unlikely given his lack of a key or any explanation as to who provided him entrance or how he was able to otherwise gain

entrance given the locks, barbed wire and cement barrier. Moreover, there are no correspondences, emails, faxes, lease provisions, lease extensions, notes or any evidence, except Mr. Knight's testimony, that he ever directed his commercial tenant to take any action regarding the disputed parcel. The commercial tenant by its letter dated October 24, 2017 acknowledges the status of the parcel as owned by the defendant. It is more likely than not that an agreement did exist as detailed in both the correspondence and testimony of Avraham Tchouba, the principal of the commercial tenant, and a representative of the Kabbalah Centre, that the commercial tenant could use the disputed parcel if the tenant maintained the property. The court has taken into consideration that Mr. Tchouba made a \$15,000.00 demand for reimbursements for improvements he made to the defendant, but there was no evidence that this sum was unreasonable given the particular improvements made regarding clearing the trees, paving the parcel and gating the two entrances.

Mr. Knight's testimony that Ultimate Used Auto Parts Inc. was late paying rent from the very beginning of the lease and owed more than \$80,000.00 when it vacated the premises may be true but nonetheless plaintiff extended the lease term. The tenant requested a rent reduction given the current economy due to the pandemic, but this request was denied. Plaintiff suggest that the failure to pay rent affects the commercial tenant's credibility, but under these circumstances the court

disagrees and therefore these factors do not affect the court's assessment of Mr. Tchouba's video testimony, his credibility, or the likelihood that the facts are as simple as the permissive use of the disputed parcel. (Plaintiff's counsel objected to the court considering Mr. Tchouba's video testimony or transcript because he was not virtually present for cross-examination, but there is no issue that Mr. Tchouba is abroad and more than 100 miles away [CPLR 3117, (3)(ii)], that he is a non-party not in the control of the defendant (*see Marine Midland Bank v John E. Russo Produce Co., Inc.*, 50 NY2d 31, 427 NYS2d 961, 405 NE2d 205 [1980], *citing Richardson, Evidence* [10th ed--Prince], § 534, only when a witness is within the control of a party will the failure to produce the witness be used to assess the strength of the party's evidence) and it was not practical to secure such appearance). In any event, plaintiff was in the same position as defendant regarding the ability to call this witness.

In summary, it is more likely than not based on the documentary evidence in the form of correspondences, together with the contrasting testimony of Mr. Knight and Mr. Avraham Tchouba, that the plaintiff's commercial tenant struck a deal or had an arrangement with a representative of the defendant that plaintiff's tenant would secure the disputed parcel in exchange for its usage. There is no documentary evidence that plaintiff ever directed its tenant to gate or enclose the disputed parcel and the court does not credit Mr. Knight's testimony to the

contrary. It is inconsequential that defendant's employee may or may not have been authorized to reach an accommodation with the commercial tenant regarding the disputed parcel because it is the commercial tenant who could not ultimately make a claim of right. The plaintiff's case is built on its commercial tenant's usage of the disputed parcel, but permissive possession or use is not hostile. (2 N.Y. Jur. 2d Adverse Possession § 40, "[i]f the first or initial possession or use of land by a stranger is by permission, it is presumed to so continue until the contrary appears [footnote omitted].") The aerial photographs in evidence are not dispositive as to the hostile or permissive use of the disputed parcel.¹ Because the court finds the commercial tenant's use of the adjacent disputed parcel was permissive, no benefits of adverse possession or claim of right can be transferred from the commercial tenant to the plaintiff upon termination of the lease. (*Cf. Risi v. Interboro Indus. Parks, Inc.*, 99 A.D.2d 466, 470 N.Y.S.2d 174 [1984], "...a tenant may acquire a permanent interest in adjacent lands belonging to third persons for use with the leased property which will enure to the tenant's benefit during the tenancy. However, on its expiration, the land so acquired appertains to the landlord [*Dempsey v. Kipp*, 61 N.Y. 462, 470]"). Inasmuch as the plaintiff cannot even meet a standard of preponderance of the evidence regarding hostile

¹ There is also a permit for a curb cut obtained by Mr. Knight's grandfather, but the address 49-71 Fairfield Ave. appears to be his grandfather's residence and not the commercial property or the disputed parcel and therefore has no probative value.

use or having a claim of right, it fails to meet the much higher standard of showing hostile use or claim of right by clear and convincing evidence regardless of the application of the amended or pre-amended adverse possession statute.

(*Montanaro v. Rudchyk*, 189 A.D.3d 1214, 1216, 136 N.Y.S.3d 330 [AD 2nd Dept. 2020]).

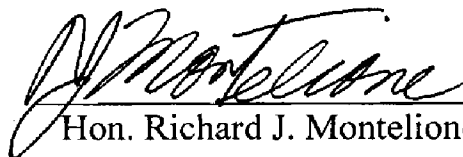
Based on the foregoing, the complaint is dismissed except for a declaration of the rights of the parties, the court grants the defendant's counter-claims to the extent of declaring that defendant continues to be the legal owner of the disputed parcel and all other requests for relief are denied.

This constitutes the decision and order of the court after trial.

The defendant shall serve a copy of this decision and order after trial with notice of entry. The defendant shall also settle on notice an Order and Judgment within 30 days of the entry of this Decision and Order after trial which shall declare the rights of the parties accordingly.

Dated: Brooklyn, NY

Mar. 25, 2021


Hon. Richard J. Montelione

2021 MAY 28 AM 9:39

KINGS COUNTY CLERK