STATE OF NEW YORK
SUPREME COURT COUNTY OF SARATOGA

Monica Hulett and Harold Hulett,

DECISION & ORDER

Plaintiffs,

-against- Index No.: 2012-1246

Terri Korb,

Defendant.

Appearances:

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KUPFERMAN, J.,

The parties reside in the Town of Saratoga, Saratoga County. Since 1986, plaintiffs have accessed their property using a roadway, Rodgers Lane, that crosses over the neighboring properties, including a portion of defendant's property. In 2012, plaintiffs commenced this action seeking, among other things, a declaration that they have a prescriptive easement over that portion of the roadway that crosses defendant's property. Defendant disputed the existence of the easement in her answer and asserted counterclaims seeking, among other things, monetary damages.

During the prior proceedings, the Court (Nolan, J.) determined that plaintiffs possessed an easement by prescription over the defendant's land to access their property. After defendant's unsuccessful appeal, the Court scheduled a bench trial to determine the width and scope of the easement. During the trial, the Court heard testimony from the parties and the owner of a neighboring motel. In addition, the Court received various exhibits into evidence, including numerous photographs, the deposition transcript of a surveyor, and survey maps. The Court has also received pre-trial and post-trial submissions from the parties.

Findings of Fact

Plaintiffs began residing at 87 Rodgers Lane in 1986.[1] The property is situated on a hillside and overlooks Saratoga Lake. It is accessible from Route 9P using the subject roadway in dispute. The width of the roadway (excluding the shoulder area) from 1986-2002 was about the same as it is right now. The width is estimated as being 10 to 11 feet in most places.[2] In 1986, the shoulders were a little overgrown and the roadbed was just clay, making it difficult to use. The wet clay roadbed, if not properly maintained, can act like quicksand. At least once, plaintiffs' vehicle sunk into the road and got stuck. During the springtime, the roadway can get very muddy, especially with water flowing down the hill. The roadway also passes through the woods. During warmer months, the vegetation can narrow or obstruct the roadway if not properly trimmed/mowed. In addition, such overgrowth can physically damage the sides of vehicles and make it more difficult to observe deer running across the roadway. The roadway also requires plowing and sanding in

[1] Plaintiffs acquired title to an adjacent property in 1994/1995. They have apparently used this same roadway to access this other property as well.

[2] One of the surveyor's maps (in evidence) indicates that the roadway runs through defendant's property for a length of 285 feet, i.e., total area (2,850 square feet) divided by width (10 feet) (see Exhibit C to Surveyor's Deposition Transcript). It is not uniformly the same width from one end to the other.

the wintertime. Without such maintenance, the roadway becomes unusable and unsafe based on ice and snow.

After moving into their property, plaintiffs began maintaining that portion of the roadway that passes through defendant's property.[3] To prevent vehicles from sinking into the clay soil, plaintiffs have added a substantial amount of rubble/stone to the roadway over the years. They have also cleared the brush on the side of the roadway. Plaintiffs have also relied on two culverts to prevent water runoff from washing away the roadway. The first culvert had already been installed when plaintiffs acquired their property. They removed that culvert, cleaned it out, and put it back into the location where they found it. They installed the second culvert around 1990 or 1991, which consisted of plastic pipe and stone under the roadway.

After acquiring a backhoe in or around 1989, plaintiffs increased their efforts to clean out the vegetation from the shoulders to maintain the roadway. They clipped, trimmed, and mowed. They cleaned out the area so well that there was little need to perform similar maintenance on the shoulders for several years. Starting again sometime in or around the mid-1990s, plaintiffs resumed regularly mowing. Twice a year, they mowed the sides of the roadway, two mowers wide, in those areas necessary for maintenance.[4] Plaintiffs cleared out at least four feet on the uphill side of the roadway, making it easier to plow snow off the roadway in the wintertime.

In 2002, defendant acquired her nearby property at a foreclosure sale. She testified that she was unaware that the roadway used by plaintiffs crossed her property until after she purchased

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[3] Defendant attempts to minimize plaintiff wife's testimony by highlighting that she herself did not personally perform the maintenance. Nonetheless, in addition to plaintiff husband's testimony, the Court has relied on the wife's testimony given that she has resided at the property since 1986 and has been fully capable of observing the work performed and the condition of the roadway.

[4] During this time, plaintiffs apparently did not consider it necessary to mow on the lakeside to maintain the roadway.

it. In 2003, defendant paid for a survey of her property. The survey map indicates that defendant's property is approximately 3.39 acres in size. A different roadway provides access to defendant's house. Based on the map, the roadway used by plaintiffs appears to be located more than 200 feet downhill from defendant's residence. The map identifies the subject roadway as a "gravel driveway," however, it does not identify the width of the driveway or its precise location with measurements. The surveyor admitted at his deposition that in 2003 he did not physically mark the edges of the roadway and that he did not "measure ... exactly the width of ... any points." He did not know if the roadway was uniform in width from one end to the other end. Rather, he testified that the field notes (not in evidence) referred to the roadway as "10 feet, plus or minus, gravel drive." Based on this notation in the field notes, the surveyor located the middle of the roadway and depicted the roadway on the map as having a general width of 10 feet at all points.

The dispute over plaintiffs' use of the roadway started around 2010. Around this time, a culvert had collapsed, and there were apparently problems occurring with water runoff. In attempting to resolve these problems, plaintiffs engaged in behavior that defendant found objectionable. They dug or cleared out a ditch; removed dirt from one side of the roadway and placed it on the other side; allegedly installed a much larger culvert than the previous one; and disturbed significantly more area outside the roadway than they had done previously, destroying vegetation. The alleged disturbance is depicted in the map of the surveyor from 2011. Unlike when he conducted the survey in 2003, the surveyor located the edges of the roadway (gravel) in 2011 so that the measurements could be performed using computer software.

In addition, defendant also installed gates on the roadway and 26 large posts along the sides (13 posts on each side, some close to the roadway and others four to five feet from the side of the roadway). This prompted the current litigation.

Width of the Primary Easement Area

In the case of a prescriptive easement, the right acquired is measured by the extent of the use and the right enjoyed (see Vitiello v Merwin, 87 AD3d 632, 633 [2d Dept 2011]; Mandia v King Lbr. & Plywood Co., 179 AD2d 150, 157 [2d Dept 1992]; see also Prentice v Geiger, 74 NY 341, 347 [1878]). "The extent of the enjoyment measures the extent of the right" (Prentice, 74 NY at 347).

Based on the credible evidence, the Court concludes that the width of the roadway for purposes of the easement is approximately 10-11 feet wide in general, which has been the area used and enjoyed by plaintiffs as a roadway since 1986. The Court further concludes that the measurements of the "edge gravel (5-15-2011)", as depicted in the 2011 survey map, accurately depict the width, length, and location of the roadway as it has existed since 1986, and therefore accurately depicts the relevant size of the roadway for purposes of determining the easement.[5] The edge of the gravel on the 2003 and 2011 maps are very similar, with the roadway measured in 2011 as being slightly wider (i.e., 10 feet vs. 11 feet) and having a minor shift at one end. As the Court has credited the testimony that the roadway has always been the same width since 1986, this necessarily includes the width determined by the surveyor in 2011.

Contrary to defendant's contention, the 2003 survey map, which apparently depicts the width as 10 feet, does not more accurately depict the width of the roadway for purposes of the easement. As explained above, the surveyor admitted that in 2003 he did not physically mark the edges of the roadway or otherwise measure the width at the various points along the roadway. Rather, the surveyor in 2003 relied upon a comment in a field note that was not offered into evidence.

[5] The surveyor testified that the width of the roadway in 2011 was around 11 feet.

The Court further disagrees with plaintiffs' contention that the width of the passageway should be determined based on the alleged minimum width required for emergency vehicles under the NYS Residential Code. Roadways established by prescription are generally limited to their prior use/enjoyment (cf. Danial v Delhi, 185 AD2d 500, 502-503 [3d Dept 1992]). Notwithstanding, changes in width may be permitted "if necessary for safety and if the burden on the servient estate is not thereby unreasonably increased" (Restatement [Third] of Property: Servitudes § 4.8, Comment e; see also Holloway v Gargano, 657 So 2d 1231, 1231-1232 [Fl 3d DCA 1995] [holding that "an access easement created by necessity ... must be capable of accommodating traffic incident to the normal requirements of the property served by the easement consistent with the reasonable needs of the owners of the lands that are hemmed in" (internal quotation marks, alterations, and citations omitted)]).

Here, there has been no evidence presented that the State or any municipal entity is attempting to close the roadway for any safety concerns. Nor has any evidence been presented that emergency vehicles cannot or have not been able to safely access plaintiffs' properties using the roadway. Given the absence of any such proof, the Court is not inclined to rely on the Residential Code as a basis to expand the width of the roadway.

The Court also disagrees with plaintiffs' contention that the width of the easement should be established at 20 feet based on historical information, specifically information in a deed to a neighboring property and the existence of two physical markers. While it is certainly possible that the width of the easement was in fact 20 feet in the past, the proof relied upon in support of this contention is too loose and equivocal.

The Width of the Gross Easement Area

Plaintiffs also regularly and openly cleared vegetation and grass from the uphill side, two mowers wide, well beyond the applicable prescriptive period, for the purpose of maintaining the roadway, and by doing so they acquired the right to use that area of the side of the roadway for such maintenance. Moreover, the fact that plaintiffs apparently did not conduct any mowing for a period of approximately five years in the 1990s is not critical. As explained during the trial, the maintenance performed in the late 1980s was so extensive that it cleared the side areas for a significant period of time and, in any event, plaintiffs nonetheless performed regular mowing and similar maintenance for the bulk of the remaining time between 1986 (around the time plaintiffs started to maintain the roadway) and 2012 (when this action was commenced), well beyond the 10-year prescription period.[6]

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[6] During the bench trial, the Court attempted to limit the testimony to events occurring between 1986 and 2002. This was the time frame referenced in the jury verdict and the appellate court decision. This approach sought to avoid testimony regarding new uses of the roadway that first occurred less than 10 years prior to this action, as such new uses could not be relied upon to expand the scope of the easement (see Restatement [First] of Property § 477, Comment c). Nonetheless, the Court considers the mowing performed after 2002 as relevant to the issue of whether such maintenance is necessary to effectively maintain the roadway (see Restatement [First] of Property § 480, Comment a). In addition, the Court further considers such mowing (which started prior to 2002) as relevant to the issue of whether the scope of the easement was enlarged based on a subsequent 10-year prescription period that ran prior to this action (e.g., one that started in 1996) (see Restatement [First] of Property § 477, Comment c; 7 Thompson on Real Property, Thomas Edition § 60.04[a][2][iii] [Bender 2023] ["The prescriptive easement can itself be enlarged even to the extent that the servient estate is injured, but only by a further prescription."]; see also Rensselaer Polytechnic Inst. v Schubert, 170 AD3d 1307, 1310 [3d Dept 2019] [applying a 10-year prescription period]; Miller v Rau, 193 AD2d 868, 868-869 [3d Dept 1993] [same]; April 8, 2016 Decision and Order of Thomas D. Nolan, Jr., at pages 11-12 [same]). As the parties have not been provided the opportunity to brief the issue of a subsequent prescription enlargement, the Court declines to resolve this issue in this decision. The Court instead concludes that such mowing is necessary for the maintenance of the roadway and that the easement rights regarding clearing/mowing on the sides of the roadway matured prior to 2002.

In addition to this four-foot easement on the uphill side for mowing/trimming, plaintiffs may also use the same two culverts they used over the years to maintain the roadway, specifically the culvert that had already been previously installed and the culvert (or plastic pipe) installed around the early 1990s. As one or both culverts have apparently been damaged, plaintiffs may further replace them with useable culverts to the extent permitted by law. However, the Court declines to further address the scope of plaintiffs' maintenance rights regarding culverts as it has not been provided with any specific details regarding plaintiffs' future intended use of culverts to resolve any water runoff problems affecting the roadway.

Plaintiffs have also used other areas off the sides of the roadway for maintenance purposes, including for snowplowing. Although the exact number of feet used in the past for such maintenance was not clearly elicited during the testimony, an additional easement area should nonetheless be allocated based on plaintiffs' prior usage/enjoyment, as well as the necessity for such maintenance. This additional maintenance area will allow plaintiffs to continue to enjoy the same rights they previously enjoyed since the mid- to late-1980s, e.g., the right to drive without brushes/vegetation scraping their vehicles and the right to plow in a safe and efficient manner (see Prentice, 74 NY at 347 ["The extent of the enjoyment measures the extent of the right"]; see also Restatement [First] of Property §§ 477 & 480). In addition, the necessity for using the sides has been shown based on a variety of factors, including, among other things, the clay soil of the roadway, the roadway's location on a hillside in the woods, and the inherent nature of snowplowing (which requires the removal of snow from the roadway) (see Restatement [First] of Property § 480, Comment a ["In so far as they may become reasonably necessary, the privilege of making improvements and repairs is implicit in the creation of the easement created by prescription and is included within its extent."]; see also McMillan v Cronin, 75 NY 474, 477-478 [1878]).

Considering these circumstances, plaintiffs' request to use the sides for maintenance out of necessity, when such use has been openly and continuously employed in the past for a quarter century prior to this action, and no burden on the servient parcel has been shown, appears entirely reasonable and appropriate (compare Dermody v Tilton, 85 AD3d 1682 [4th Dept 2011]; see Dunn v Ransom, 2013 Ohio 5116 [Ohio Ct Appeals 2013] ["the landowner should reasonably expect that the easement would include some land beyond the traveled road to accommodate for the normal incidents to a roadway, such as passing and road maintenance"]; see also Restatement [First] of Property §§ 477 & 480; Restatement [Third] of Property: Servitudes, § 4.1, Comment h; id. at § 4.8, Comment e ["The dimensions of prescriptive easements for roads, particularly public roads, may extend beyond the traveled way to include ditches, shoulders, and passing areas reasonably necessary [for] use of the road"]).

Based on the evidence and the conditions along the roadway, plaintiffs may therefore use the sides of the roadway to the extent necessary and reasonable to maintain the roadway, as they have in the past, for maintenance activities such as snowplowing, mowing, and trimming, with such area not to exceed any more than four or five feet on either side of the roadway. Notwithstanding, Plaintiffs may not excavate or trench any areas on the shoulders of the roadway on defendant's property without consent, as they failed to establish any prior usage or necessity for such activities. The record further reflects that the excavation/trenching performed in or around 2010 created an unreasonable burden/disturbance on defendant's property.

In addition, the roadway appears to have served as the primary if not only feasible means used by plaintiffs to access their properties, including their personal residence since 1986.[7] Given the nature of the easement, the long history of use, and the lack of any evidence to the contrary, plaintiffs may also use the easement area identified above for such other ordinary purposes generally enjoyed for such a roadway/driveway, including, among other things, the right to receive deliveries; the right to allow passage for emergency vehicles; the right to temporarily park on the side of the roadway to perform maintenance; and the right to pull to the side of the roadway to allow another vehicle to pass (see Scope of prescriptive easement for access (easement of way), 79 ALR4th 604 [2023]; see also Holloway, 657 So 2d at 1231-1232 [concluding that an access easement created by necessity "must be capable of accommodating traffic incident to the normal requirements of the property served"]).

Poles and Gates

The Court questions defendants' need for the poles and gates. The area of the easement has been defined in this decision. There is no longer any need for defendant to use poles to try to define the easement's boundaries. In addition, there was no evidence presented that neighbors are trespassing through the property or that outsiders are using the roadway to perform criminal activities. Defendant has also not locked or closed the gates, thereby putting their usefulness into further question (see Missionary Soc. of Salesian Congregation v Evrotas, 256 NY 86, 90 [1931] ["The only kind of gate which can fail to interfere with defendant's right is one which not only

[7] Defendant previously asserted that plaintiffs could alternatively access their properties by, among other things, building a stairway up an approximately 45-foot-high hillside and leaving their vehicles at the base of their property. In addressing this issue, the Court (Nolan, Jr.) concluded that the terrain on plaintiffs' property was steep; that their residence was "40 feet higher" than the access point; and that this proposal would effectively render "useless" their separate garage, located on their upper parcel (April 8, 2016 Decision and Order of Thomas D. Nolan, Jr.).

remains unlocked but which is perpetually kept open. Such a gate is useless for any purpose."]). To the extent that defendant now seeks to lock or close the gates, such conduct could very well impermissibly interfere with plaintiffs' enjoyment of their easement (see B.J. 96 Corp. v Mester, 262 AD2d 732 [3d Dept 1999]; Briggs v Di Donna, 176 AD2d 1105 [3d Dept 1991]; see also Missionary Soc. of Salesian Congregation, 256 NY at 90).

Nonetheless, the Court declines plaintiffs' request to direct defendant to remove the poles and gates. There was no testimony or evidence presented that the remaining poles and gates are interfering with plaintiffs' use/enjoyment of the roadway at this time. In fact, it appears that any poles that may have unreasonably interfered with plaintiffs' ability to snowplow or conduct routine maintenance over the years have already been knocked down or removed. In addition, the Court is more inclined presently to permit the existing poles on the uphill side to remain to prevent plaintiffs from attempting to excavate or trench that area again. To the extent that any of the existing or new poles/gates may interfere with plaintiffs' use of their easement in the future, such an issue is not yet ripe for consideration based on the limited evidence presented at trial on this issue.

Permissible Vehicles

The Court declines defendant's request to limit the easement to only plaintiffs' passenger vehicles. As explained above, plaintiffs may use the roadway for their own personal access, as well as to provide access for guests, visitors, delivery persons, emergency personal, and such other persons who come within the scope of an easement by prescription for an access roadway/driveway. The Court likewise does not consider it reasonable to limit the rights of plaintiffs to permit invitees to visit their property simply based on the type of vehicle they drive. There was no proof presented that the roadway has ever been limited in this manner. In fact,

plaintiffs testified that they used a backhoe to perform maintenance work on the roadway and that they hauled in a significant amount of stone/rubble.

Defendant's position that plaintiffs should be prohibited from accessing the roadway with their trailer and small dump truck appears to be disingenuous. The record developed throughout these proceedings indicates that plaintiffs have regularly driven these vehicles across the roadway, and used them to maintain the roadway, since the 1990s, if not earlier. This is reflected in the summary judgment decision and the transcript of the jury trial, as well as the permit application materials defense counsel questioned plaintiffs about during the jury trial (see e.g. NYSCEF Document No. 92, Jury Trial Transcript Contained in Record on Appeal, at R81-R82 ["Q. When you go on jobs, do you bring your equipment back and forth during the day? A. Yes. Like I have ever since I lived there"; "Q. And Town of Saratoga zoning law doesn't allow you to park those vehicles on your property; do they? A. I have parked them there since I moved in there."]; R286-R295 [permit application materials]). Notwithstanding, defendant failed to raise this issue when plaintiffs testified during the bench trial. Defendant, moreover, presented only cursory testimony on this issue during the bench trial (consisting of about a page and a half in the transcript).

In any event, insufficient evidence exists that the small dump truck and trailer, or any other vehicles larger than a passenger vehicle, have imposed any increased burden on defendant's property. While defendant testified about noticing noise from the dump truck after vegetation had been removed in or around 2010, this testimony was overly generalized and lacked corroboration to persuade the Court that alleged noise from the dump truck did not exist prior to 2010 and that it has increased the burden imposed on defendant's property. In fact, the testimony seems to suggest that the alleged increase in the noise resulted from the removal of vegetation in 2010 rather than the use of any new vehicles on the roadway. In addition, any increase in the burden from the

alleged noise does not appear to be significant or unreasonable given that the roadway is in a wooded area more than 200 feet from defendant's residence; defendant apparently does not use the roadway to access her residence; plaintiffs (rather than defendant) have maintained the roadway; and there are several ways to mitigate noise (assuming any such noise exists).

Abstract/Premature Issues

The Court similarly declines the invitation to adjudicate the parties' alleged dispute over the rights of future purchasers, tenants, and other guests of the plaintiffs to access their second (adjoining) parcel. These issues were not addressed in any meaningful manner during the trial. Nor have they been adequately briefed. In addition, these issues rest on several future uncertainties. As such, the Court declines to determine this issue in the abstract and hypothetical manner presented.

Similarly, the Court finds that several other issues raised in the parties' trial submissions have been presented largely in the abstract and are not ripe for adjudication. This includes, for example, whether certain activities would increase the burden on the servient property; whether plaintiffs may pave the roadway; whether the easement rights may be assigned; and whether plaintiffs should be responsible for maintenance costs. The parties are therefore directed to the case law and secondary authorities discussing the potential rights and responsibilities associated with an easement by prescription (see Restatement [First] of Property §§ 477 & 480; Restatement [Third] of Property: Servitudes, §§ 4.1; 4.8; 4.10; Scope of prescriptive easement for access (easement of way), 79 ALR4th 604 [2023]; see also 7 Thompson on Real Property, Thomas Edition § 60.04[a][2][iii] [Bender 2023] [easements by prescription]; SRB Inv. Co. v Spencer, 2020 UT 23, 463 P3d 654 [Sup Ct UT 2020]). The parties are further encouraged to discuss these issues and resolve them among themselves.

Injunctive Relief

The Court also largely denies the requests for injunctive relief. "A permanent injunction is a drastic remedy which may be granted only where the plaintiff demonstrates that it will suffer irreparable harm absent the injunction" (Icy Splash Food & Beverage, Inc. v Henckel, 14 AD3d 595, 296 [2d Dept 2005]). Such relief is "to be invoked only to give protection for the future to prevent repeated violations, threatened or probable, of the plaintiffs' property rights" (Merkos L'Inyonei Chinuch, Inc. v Sharf, 59 AD3d 403, 408 [2d Dept 2009] [internal quotation marks, alterations, and citations omitted]).

Here, plaintiffs' right to use/maintain the roadway has already been adjudicated. There is no reason to conclude that defendant will not respect this Court's decision. In addition, several unresolved issues remain open and, as such, issuing injunctive relief could have a chilling effect on defendant's exercise of her rights to protect her interest in her property. Based on these circumstances, the Court declines to award injunctive relief against defendant at this time.

Further, defendant's request for an Order directing plaintiffs to restore her property to the condition it existed prior to 2010 is denied. As set forth above, the width of the roadway remains about the same as in the past. Plaintiffs have also established their right to use certain culverts. The wooded area has had more than a decade to rejuvenate itself since the disturbance. In addition, dirt has also already been added back to the ditch. There was also no proof that the larger culvert allegedly installed in or around 2010/2011 still exists on the defendant's property (assuming it ever existed).

Nonetheless, the extent of the disturbance in or around 2010, including the excavation and trenching, exceeded the scope of the easement. To prevent any similar instances in the future, the

Court considers it appropriate to enjoin plaintiffs from excavating or trenching the sides of the roadway on defendant's property without defendant's permission.

Damages

The Court denies the monetary damages requested by defendant in her post-trial submission. No receipts, invoices, or other reliable evidence of costs or itemization of services were provided to support these monetary requests. The disturbance, moreover, could have just as easily been documented by anyone with a measuring tape and a camera. The employment of a surveyor to create a survey map was an unnecessary cost. In addition, the installation of poles and gates was highly questionable conduct and should not be charged against plaintiffs. Defendant also did not provide sufficient proof to conclude that plaintiffs damaged the poles either intentionally or negligently. In fact, it is just as likely that the poles were damaged, if at all, because they unreasonably interfered with the snowplowing or other routine maintenance of the roadway.

Further, plaintiffs did not remove any dirt from defendant's property. Rather, the dirt was removed from one side of the roadway and put onto the other side. Defendant also paid for significantly more dirt/work than necessary to remedy the dirt removed from the one side. There has also been little, if any, evidence presented to conclude that the vegetation has not regrown since this action was commenced more than a decade ago. A portion of the damages sought may have also been related to alleged drainage/water problems or other issues which have not been sufficiently established as being attributable to plaintiffs.

Accordingly, defendant is not entitled to the damages requested in her post-trial submission. Nevertheless, because "nominal damages can be presumed in an action for trespass to real property," defendant may, if desired, receive nominal damages ($1.00) for the trespass that occurred in or around 2010/2011 (Ivory v International Bus. Machines Corp., 116 AD3d 121, 132 [3d Dept 2014]).

Any relief not expressly awarded herein is hereby denied. Those portions of plaintiffs' claim based on the existence of an implied easement and an easement by necessity are hereby rendered academic considering this decision. Plaintiffs are hereby directed to circulate a proposed judgment to defendant **by October 3, 2023.** The parties are further directed to submit to the Court either a joint proposed judgment or counter proposed judgments, consistent with this decision, **by October 12, 2023**.

This shall constitute the Decision & Order of the Court. No costs are awarded to any party. The Court is hereby uploading the original Decision & Order into the NYSCEF system for filing and entry by the County Clerk.

So-Ordered.

Dated: September 12, 2023
at Ballston Spa, New York

HON. RICHARD A. KUPFERMAN
Justice Supreme Court