At a term of the Supreme Court held in and for the County of Wyoming, at the Courthouse in Warsaw, New York, on the 27th day of August, 2012.

PRESENT: HONORABLE MICHAEL F. GRIFFITH
Acting Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT: COUNTY OF WYOMING

PATRICK GEORGE and
LINDA GEORGE *Plaintiffs*

v.

REISDORF BROS., INC.
Defendant

DECISION AND ORDER

Index No. 44005

The plaintiffs having moved for an order pursuant to CPLR 3212 granting them partial summary judgment to the extent of determining and declaring that the boundary line between their property and the adjoining property owned by the defendant lies at the location claimed in their complaint, and said motion having duly come on to be heard.

NOW, on reading the complaint and answer herein, and on reading and filing the notice of motion dated April 23, 2012, the supporting affidavit of James L. Magavern, Esq., attorney for the plaintiffs, sworn to on April 23, 2012, together with the annexed exhibits, the supporting affidavit of Patrick George, sworn to on April 19, 2012, together with the annexed exhibits, the opposing affidavit of Richard Reisdorf, sworn to on June 15, 2012, together with the annexed exhibit; and the reply affidavit of Patrick George, sworn to on June 20, 2012, together with the annexed exhibit, and after considering the arguments raised in the memoranda of law submitted by counsel to the parties, and after hearing James L. Magavern, Esq., for the plaintiffs and James M. Wujcik, Esq., for defendant, and due deliberation having been had, the following decision is rendered.

The plaintiffs and the defendant are adjoining landowners in the Town of Sheldon, New York. Patrick George and his wife Linda have a dairy farm at 1855 Perry Road which they purchased from Mr. George's parents in July 1989. Mr. George, in fact, has lived there since he was born in 1955. The defendant runs a feed, fertilizer and pesticide processing and distributing business on property lying on both sides of Perry Road to the west of the plaintiffs' farm. Before 1987, a wedge shaped parcel containing a tavern and residence separated the George family's dairy farm from the defendant's business on Perry Road. The parcel had belonged to a Francis P. George, a cousin of Patrick George's father. In September of 1987, the defendant purchased the wedge shaped parcel from Florence Dailey, formerly Florence L. George, administratrix of Francis George's estate, in order to use it for its business operations. At that time, the tavern and residence were demolished.

Along the side of the wedge shaped parcel which abuts the plaintiffs' property, but within its bounds as described in the deed, there is a barbed wire fence and a spring fed, "dug well." The plaintiffs draw water from the well, as did Mr. Georges's parents when they ran the family's dairy farm prior to 1989. The plaintiffs use the adjacent field on their property as a cow pasture. The fence, which the plaintiffs maintain, keeps their cows in the pasture – as it kept Mr. George's parents' cows in the pasture prior to 1989. With the exception of an indentation around the well, the fence stands today where it has stood since at least the 1960's. According to Mr. George, the fence had once also enclosed the well within the cow pasture, but sometime in the 60's it was "indented" in the direction of the plaintiffs' property in order to keep the cows away from the well. In recent years, Mr. George has slightly increased the size of this indentation in the fence line.

Under theories of adverse possession and practical location, the plaintiffs contend that they have acquired ownership of the well and the strip of land lying between their property line and the old fence line as it stood prior to being indented around the well. Initially, it is noted that the plaintiffs originally interposed their claim to ownership of this disputed strip in

a Federal Clean Water Act action against the defendant that they filed in the United States District Court on July 6, 2008. After the Federal Court action was dismissed without prejudice to the plaintiffs proceeding upon their claim to ownership in State court (George v. Reisdorf Bros., Inc., 696 F.Supp.2d 333 [W.D.N.Y., 2010]; affirmed, 410 Fed.Appx. 382 [2nd Cir., Feb 03, 2011]), the plaintiffs commenced the present action on July 20, 2011. Because of the date that the plaintiffs first interposed their claim to ownership, and because of the fact that the plaintiffs allege that they acquired title to the disputed strip prior to 2008, the Court finds that the version of Article 5 of the RPAPL in effect prior to its amendment in 2008 applies to the case (CPLR §206[a]; Franza v. Olin, 73 A.D.3d 44 [4th Dept., 2010]).

To establish a claim of adverse possession, a party must show by clear and convincing evidence that their occupation of the disputed property is hostile and under a claim of right, actual, open and notorious, exclusive, and continuous for the statutory period (Walling v. Przybylo, 7 N.Y.3d 228 [2006]; Estate of Becker v. Murtagh, 19 N.Y.3d 75 [2012]). If the other elements of adverse possession have been sufficiently established, hostility will normally be presumed (id.). In addition, where, as here, the claim relates to the period prior to the amendment of the RPAPL in 2008 and is not based upon a written instrument, the party claiming title must further show either that they have "usually cultivated or improved" the land in question, or that they have "protected [it] by a substantial inclosure" (RPAPL former §522).

The doctrine of practical location recognizes that where adjoining landowners, or their predecessors in interest, have long acquiesced in locating the boundary line between their properties in one place, that boundary line will control even over deed descriptions which place the line in a different location. To be effective, however, "'the acquiescence' 'must be an act of the parties, either express or implied; and it must be mutual, so that both parties are equally affected by it [and i]t must be definitely and equally known, understood and settled'" (Robert v. Shaul, 62 A.D.3d 1127, 1128 [3rd Dept., 2009], quoting from Adams v. Warner, 209 App.Div. 394, 397 [3rd Dept., 1924], quoting Hubbell v. McCulloch, 47 Barb. 287, 299 [Sup. Ct.,

Gen. Term, N.Y. Co., 1866]; Riggs v. Benning, 290 A.D.2d 716, 717 [3rd Dept., 2002]).

To obtain relief, the proponent of a motion for summary judgment must make a prima facie showing of an entitlement to judgment as a matter of law through the tendering evidence sufficient to demonstrate the absence of any material issues of fact (Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 [1986]). If the movant succeeds in showing an entitlement to judgment, then the burden shifts to the opposing party to respond with evidence raising questions of fact that preclude summary judgment. On the other hand, failure by the proponent of the motion to make a prima facie showing of an entitlement to judgment will "require[] a denial of the motion, regardless of the sufficiency of the opposing papers" (id.). In the present case, the Court finds that the submissions of the plaintiffs do not eliminate all material issues of fact with regard to their claims to own the disputed strip of land. Accordingly, the motion must be denied.

With respect to the plaintiffs' claim under the doctrine of practical location, although Mr. George states in his affidavit that he, all his life, has "understood without the slightest doubt, that the fence line, as extended to the west of the well, constituted the boundary line between our land and the Defendant's," the plaintiffs have not offered convincing evidence that the defendant, or the prior owners of the defendant's parcel, at any time shared this understanding. As noted above, for title to vest under the doctrine, the express or implied acquiescence in the boundary line must equally affect the adjoining owners and must be "definitely and equally known, understood and settled." In the Court's estimation, such a mutual acquiescence upon the fence line as the property boundary may not be inferred merely from the fact that the defendant and the prior owner of the parcel permitted cows to graze up to the fence line, or by the fact that the defendant, when he applied fill to his property, chose not to deposit the fill beyond the fence line.

With respect to the adverse possession claim, the Court notes that in the defendant's responses to the plaintiffs' first set of interrogatories – submitted by the plaintiffs

in support of the motion – the defendant denies that the plaintiffs use of the strip and the well are exclusive and adverse. On the contrary, the defendant asserts that the plaintiffs have acknowledged the defendant's ownership – through, among other acts, requesting that the defendant clean and test the well. According to the defendant, the plaintiffs continue to draw water from the well and graze their cows on the strip with permission granted by the defendant "in the spirit of civility and neighborliness."

For their part, the plaintiffs contend that the defendant's periodic work on the well actually constitutes recognition of their claim to title, since it came in response to their requests that the defendant take action to remedy pollution and disruption of the well that they believed had been caused by the defendant's business operations. In addition, the plaintiffs point to the deposition testimony of Richard Reisdorf in which he admitted that he never explicitly granted permission to the plaintiffs to use the land, he merely "never objected" to their continued use of it. The plaintiffs argue that what Mr. Reisdorf here refers to as permission – a mere failure to object for decades – is in fact nothing more than the kind of acquiescence which will cause an open and hostile occupation to ripen into title by adverse possession.

To establish that the character of their occupation of the strip was and is hostile to the interests of the defendant, the plaintiffs rely entirely upon the presumption of hostility which normally applies when all of the other elements of adverse possession have been sufficiently shown. In view, however, of the evidence in the record indicating that the defendant has periodically entered the strip since 1989 – to work on the well, to dig a new well and to dump excess snow in the wintertime – it does not appear that the plaintiffs have succeeded in eliminating all questions of fact with respect, at least, to the element of exclusive occupation. But even if the Court were to conclude that all of the other required elements have been sufficiently shown, the plaintiffs still could not take advantage of the presumption to establish the element of hostile occupation in this case. First, appeal to the presumption would seem to be ruled out by the simple fact that the prior owners of the parcels, Patrick George's

father and Francis P. George, were blood relatives (Estate of Becker, supra; McNeill v. Shutts, 258 A.D.2d 695, 696 [3rd Dept., 1999]; Weinberg v. Shafler, 68 A.D.2d 944 [3rd Dept., 1979], affirmed 50 N.Y.2d 876 [1980]). Second, there is evidence in the record of "a close and cooperative relationship" existing among the property owners with regard to the use of the strip. Evidence of such a relationship creates an implication of permissive use which rebuts the presumption (Estate of Becker, supra, 82; Susquehanna Realty Corp. v Barth, 108 A.D.2d 909, 909-910 [2nd Dept., 1985]; Hassinger v. Kline, 91 A.D.2d 988, 989 [2nd Dept., 1983]; Chaner v. Colarco, 77 A.D.3d 1217, 1218 [3rd Sept., 2010], leave to appeal denied by 16 N.Y.3d 707 [2011]). In this regard, the Court finds it significant that the well within the strip claimed by the plaintiffs originally served both the George family's dairy farm and the tavern and residence which had previously stood upon the parcel purchased by the defendant. This clearly indicates that the well was initially permissively shared by the adjoining owners. Therefore, to meet their burden upon the motion it was incumbent upon the plaintiffs to present some evidence of the commencement of hostile use – for instance, by showing that, though the use of the land was indeed initially permissive, a repudiation or renouncement of that permissive use occurred at some point in time more than 10 years prior to the interposition of their claim (Ropitzky v. Hungerford, 27 A.D.3d 1031, 1033 [3rd Dept., 2006]; Chaner, supra, 1218-1219; Dekdebrun v. Kane, 82 A.D.3d 1644, 1646 [4th Dept., 2011]; Schwartz v. Trustees of Freeholders and Commonality of Town of Huntington, 85 A.D.3d 1008, 1009 [4th Dept., 2011])

NOW, THEREFORE, it is hereby

ORDERED that the plaintiffs' motion for partial summary judgment is denied.

Dated: August 27, 2012

GRANTED
AUG 27 2012
CHIEF CLERK
WYOMING COUNTY SUPREME COURT

Acting Supreme Court Justice