SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

ROBERT KLEIN and SUSAN KLEIN,

Plaintiffs,

- against -

DIMITRY ARONSHTEIN and OLGA ARONSHTEIN,

Defendants.

TRIAL/IAS PART 31
NASSAU COUNTY

Index No.: 16338/00
Motion Seq. Nos.: 03, 04
Motion Dates: 03/05/12
04/09/12

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 03), Affidavit, Affirmation and Exhibit and Memorandum of Law	1
Notice of Cross-Motion (Seq. No. 04), Affirmation, Affidavit and Exhibits	2
Reply Affirmation in Further Support of Motion (Seq. No. 03) and in Opposition to Cross-Motion (Seq. No. 04) and Exhibit	3
Affirmation in Reply and Further Support of Cross-Motion (Seq. No. 04) and Exhibits	4

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiffs move (Seq. No. 03), pursuant to CPLR § 3212, for an order granting them summary judgment. Defendants oppose the motion and cross-move (Seq. No. 04), pursuant to CPLR § 3212, for an order granting them summary judgment dismissing plaintiffs' Verified Complaint and for judgment, *inter alia*, on their first and second Counterclaims.

Plaintiffs and defendants both own adjacent residential properties constructed along the

so-called "Waukena Waterway" in Oceanside, New York. *See* Defendants' Affirmation in Support Exhibit B ¶¶ 2-5. At the location where the parties' homes are situated, the waterway essentially terminates in a right angle formed by two intersecting street lines. Plaintiffs' home is the first, water-facing property on one of the intersecting streets (Freeman Avenue), while defendants' home is the first water-facing home along the other street (Poplar Street). *See* Defendants' Affirmation in Support Exhibit B ¶ 3.

According to defendants, when they originally purchased their main residence in 1997, they also acquired title to "Lot 64" – an underwater parcel abutting the parties' respective, water-facing property lines. Notably, Lot 64 is also directly beneath the corner location where both parties have positioned their respective floats and docks. *See* Defendants' Affirmation in Support Exhibit B ¶¶ 7-10, 14-15; Defendants' Affirmation in Support ¶ 13; Defendants' Affirmation in Support Exhibits F, H and I. To the extent discernable from the parties' submissions, when viewed from the water's surface, there is no visible line of demarcation separating or distinguishing the surface water located above defendants' Lot 64 from the canal water directly above the abutting, Town-owned portion or bed of the waterway. *See* Defendants' Affirmation in Support Exhibit C ¶ 24; Defendants' Affirmation in Support Exhibits D and E.

At some point in 1999, defendants apparently obtained a dock building permit, after which they: (1) removed and/or relocated plaintiffs' existing float and ramp, thereby allegedly rendering access to the waterway unduly difficult; and (2) then installed a new dock and float adjacent to their own property. *See* Plaintiffs' Affidavit in Support ¶ 6; Defendants' Affirmation in Support Exhibits K and L. Plaintiffs claim that, prior to the point when the defendants

improperly relocated or moved their dock, it had been continuously positioned in the water directly above the "North-Northeast" portion of Lot 64 – allegedly for well over ten years. *See* Plaintiffs' Affidavit in Support ¶¶ 4-6; Defendants' Affirmation in Support Exhibit B ¶¶ 10-12.

Defendants contend, however, that after they installed their dock in the Spring of 2000, plaintiffs, in spiteful retaliation, placed an unlicensed and immobile "house boat" behind the new dock. The boat, which is still present, allegedly impinges upon the defendants' ability to access the adjacent waterway and exercise their riparian rights. *See* Defendants' Affirmation in Support ¶ 17-18; Defendants' Affirmation in Support Exhibit H; Defendants' Affirmation in Support Exhibit C ¶¶ 25, 26 and 30; Defendants' Affirmation in Support Exhibit J pp. 14-15, 21.

Thereafter, in October of 2000, plaintiffs, who originally purchased their home in 1994, commenced the within adverse possession action pursuant to RPAPL §§ 521 and 522, which govern claims not based on a "written instrument or judgment." *E.g. Estate of Becker v. Murtagh*, ___N.Y.3d___, 2012 WL 1080325 (2012); *Walling v. Przybylo*, 7 N.Y.3d 228, 818 N.Y.S.2d 816 (2006); *Ray v. Beacon Hudson Mtn. Corp*, 88 N.Y.2d 154, 643 N.Y.S.2d 939 (1996); *Kelly v. Bastianic*, 93 A.D.3d 691, 940 N.Y.S.2d 152 (2d Dept. 2012). In substance, plaintiffs allege that between 1954 to 2000 (a period incorporating several "tacked" time periods), they adversely occupied the "North-Northeast" portion of Lot 64 by, *inter alia*, continuously and openly using and maintaining their pre-existing dock and float. *See* Defendants' Affirmation in Support Exhibit B ¶¶ 11-18. A second cause of action asserts entitlement to damages predicated on defendants' conduct in relocating the dock apparatus, which conduct allegedly: (1) diminished the value of plaintiffs' abutting residential property and

(2) prevented plaintiffs from meaningfully using their repositioned dock and float. *See* Defendants' Affirmation in Support Exhibit B ¶¶ 19-22.

Defendants have answered, denied the material allegations of the Verified Complaint and interposed two Counterclaims. The first Counterclaim avers that plaintiffs damaged defendants' dock and trespassed on defendants' property by anchoring unauthorized pilings into Lot 64 and by maintaining "an attached boathouse" without a permit. The second Counterclaim asserts that plaintiffs improperly interfered with defendants' riparian rights by blocking their access to the adjacent waterway. *See* Defendants' Affirmation in Support Exhibit C ¶¶ 11, 25, 28-31.

Significantly, in his deposition, plaintiff Robert Klein testified, *inter alia*, that when he purchased his home in 1994 from the immediately prior owners (the Goulds), he did not know that Lot 64 existed; that, to him, the subject area was "just water;" and that he did not think anyone could "own the water." *See* Defendants' Affirmation in Support Exhibit J pp. 12, 55-56. He further stated that the Goulds informed him that, upon purchasing the house, he would be acquiring the existing dock, the ramp, the pilings and "access" to the canal. *See* Defendants' Affirmation in Support Exhibit J pp. 25-27. Notably, the Goulds never told plaintiffs that they (the Goulds) owned Lot 64, nor specifically stated they were conveying any part of it to plaintiffs. *See* Defendants' Affirmation in Support Exhibit J pp. 24, 34, 55-56.

According to plaintiff Robert Klein, although he used the water area in question primarily for boating purposes (*see* Defendants' Affirmation in Support Exhibit J pp. 50-51), he did not make significant improvements to his existing dock area after he moved in 1994 and did not enclose or otherwise restrict access to the area for his own or exclusive use. *See* Defendants' Affirmation in Support Exhibit J pp. 31, 51-52. Moreover, plaintiff Robert Klein stated that he

did not know how, or if, the Goulds used the dock and, to his knowledge, they did not even have a boat in 1994. *See* Defendants' Affirmation in Support Exhibit J pp. 28-29, 34, 55. Plaintiff Robert Klein had no specific discussions with his own predecessors in title, nor with defendants' prior title owners, concerning the specific arrangements, if any, that had historically existed between the various prior owners relating to the use of Lot 64. *See* Defendants' Affirmation in Support Exhibit J pp. 30, 55. In his Affidavit, however, plaintiff Robert Klein contends that, before the defendants arrived in 1997, the various prior owners of both properties "always shared" the use of the subject water location. *See* Plaintiffs' Affidavit in Support ¶ 4.

The parties now move (Seq. No.03) and cross-move (Seq. No. 04) for summary judgment on their respective claims. Specifically, plaintiffs move for summary judgment on their first, adverse possession, cause of action, while defendants cross-move for, *inter alia*, a judgment dismissing plaintiffs' Verified Complaint and for a judgment on their trespass and riparian rights Counterclaims.

Plaintiffs' motion (Seq. No. 03) is denied. Defendants' cross-motion (Seq. No. 04) should be granted to the extent indicated below.

Preliminarily, the record establishes that defendants' cross-motion (Seq. No. 04) was made after the sixty-day summary judgment filing period expired, as prescribed by this Court's December 13, 2011 Certification Order. However, the cross-motion primarily arises out of the same issues raised by plaintiffs' timely motion. *See Kun Sik Kim v. State Street Hospitality, LLC,* 94 A.D.3d 708, 941 N.Y.S.2d 269 (2d Dept. 2012); *McCallister v. 200 Park, L.P.*, 92 A.D.3d 927, 939 N.Y.S.2d 538 (2d Dept. 2012). In any event, it is settled that a "court, in the course of deciding the timely motion...[may] search the record and award summary judgment to a nonmoving party." *See* CPLR § 3212 (b); *Homeland Ins. Co. of New York v. National Grange*

Mut. Ins. Co., 84 A.D.3d 737, 922 N.Y.S.2d 522 (2d Dept. 2011). Additionally, while plaintiffs did not submit a copy of the pleadings with their papers (*see* CPLR § 3212(b)), those documents were thereafter attached by defendants with their cross-motion, thereby sufficiently completing the record for the purposes of facilitating adequate review by the Court. *See Daramboukas v. Samlidis*, 84 A.D.3d 719, 922 N.Y.S.2d 207 (2d Dept. 2011); *Sanacore v. Sanacore*, 74 A.D.3d 1468; 904 N.Y.S.2d 234 (3d Dept. 2010); *Welch v. Hauck*, 18 A.D.3d 1096, 795 N.Y.S.2d 789 (3d Dept. 2005).

To succeed on an adverse possession claim "not based upon a written instrument" a party "must show that the parcel was either 'usually cultivated or improved or protected by a substantial inclosure.'" *BTJ Realty v. Caradonna*, 65 A.D.3d 657, 885 N.Y.S.2d 308 (2d Dept. 2009) *quoting* RPAPL § 522(1) and (2). *See Becker v. Murtagh*, *supra*; *Gourdine v. Village of Ossining*, 72 A.D.3d 643, 897 N.Y.S.2d 647 (2d Dept. 2010). *See also Hogan v. Kelly*, 86 A.D.3d 590, 927 N.Y.S.2d 157 (2d Dept. 2011). Additionally, any alleged "occupation of the property must [also] be (1) hostile and under a claim of right (*i.e.*, a reasonable basis for the belief that the subject property belongs to a particular party), (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous for the statutory period (at least ten years)." *Estate of Becker v. Murtagh*, *supra*; *Walling v. Przybylo*, *supra*. If even a single element is lacking, "the alleged possession will not effect a change in legal title." *Matter of Perry*, 33 A.D.3d 704, 823 N.Y.S.2d 413 (2d Dept. 2006). Since adverse possession is a disfavored means of acquiring title to land, all elements of the claim must be proved by clear and convincing evidence. *See Estate of Becker v. Murtagh, supra*; *Ram v. Dann*, 84 A.D.3d 1204, 924 N.Y.S.2d 482 (2d Dept. 2011); *Keena v. Hudmor Corp.*, 37 A.D.3d 172, 829 N.Y.S.2d 471 (1st Dept. 2007); *Joseph v. Whitcombe*, 279 A.D.2d 122, 719 N.Y.S.2d 44 (1st Dept. 2001).

With these principles in mind, and whether the claims made are viewed as based upon a "written instrument" or not, the Court agrees that plaintiffs have failed to establish that they acquired title to Lot 64, or any portion thereof, by adverse possession. *See Gourdine v. Village of Ossining*, *supra*; *Reis v. Coron,* 37 A.D.3d 803, 830 N.Y.S.2d 589 (2d Dept. 2007).

More specifically, the evidence submitted, including relevant deposition testimony, belies the assertion that the property was hostilely and continuously held under the requisite "claim of right." *E.g.*, *Keena v. Hudmor Corp.*, *supra* at 173-174; *All the Way E. Fourth St. Block Assn. v. Ryan-NENA Community Health Ctr.*, 30 A.D.3d 182, 817 N.Y.S.2d 14 (1st Dept. 2006). Rather, the evidence demonstrates that, prior to 1999, plaintiffs were not even aware that the underwater lot existed as a parcel which could be adversely possessed. Plaintiff Robert Klein testified in this respect that he believed no one could "own the water" – a statement at odds with plaintiffs' current assertion that, instead, they actually held the property in a possessory and hostile fashion under a claim of right. *Cf. Joseph v. Whitcombe*, *supra* at 126-127. If anything, the record suggests that plaintiffs used Lot 64 not in a manner typical of an adverse possessor, but rather, as riparian land owners exercising a right of access to the adjacent water. The foregoing conclusion buttressed in part by the testimony of plaintiff Robert Klein; namely, plaintiff Robert Klein's testimony that the Goulds never told the him that they were conveying any sort of possessory right or title to Lot 64, but rather, that plaintiffs would be receiving the existing docking apparatus and "access" to the water. *See* Defendants' Affirmation in Support Exhibit J pp. 25-27; *Town of Oyster Bay v. Commander Oil Corp.*, 96 N.Y.2d 566, 734 N.Y.S.2d 108 (2001) (foundational riparian right is one of "*access* to the water")(emphasis added). *See also Ram v. Dann*, *supra* at 1206; *Reis v. Coron*, *supra* at 804.

Plaintiffs have also failed to competently describe the allegedly adverse or hostile

manner in which their predecessors occupied the subject location or document precisely what relationships, if any, existed with respect to the use of the dock prior to 1994. *See Reis v. Coron, supra* at 804; *Seisser v. Eglin*, 7 A.D.3d 505, 776 N.Y.S.2d 314 (2d Dept. 2004). *See generally Brand v. Prince*, 35 N.Y.2d 634, 364 N.Y.S.2d 826 (1974). Plaintiffs' inconclusive submission of photographs depicting, *inter alia*, a 1977 dock configuration at the subject location, does not establish that a portion of the underwater lot must therefore have been adversely or occupied by prior owners since that date. Nor does it reveal what those predecessors intended to convey, if anything, with respect to the subject location. *See Brand v. Prince*, *supra* at 637; *Ram v. Dann*, *supra*; *Reis v. Coron, supra*. Significantly, "mere occupancy for an extended period of years" – even when coupled with "open conduct consistent with ownership" – will not suffice "absent an initial claim of right." *Keena v. Hudmor Corp.*, *supra* at 174; *Matter of Perry*, *supra* at 706; *Harbor Estates Ltd. Partnership v. May*, 294 A.D.2d 399, 742 N.Y.S.2d 347 (2d Dept. 2002); *Joseph v. Whitcombe*, *supra* at 124.

Relatedly, plaintiffs' own submissions further undercut the claim of hostile and exclusive occupancy, since, according to plaintiff Robert Klein, the prior owners of both properties had "always shared" the use of the water location in question. *See* Plaintiffs' Affidavit in Support ¶¶ 4-5. A claim of adverse possession will generally fail where the disputed use is permissive or based on an neighborly accommodation. *See generally Estate of Becker v. Murtagh, supra.*

Finally, it bears noting that, in making their unpleaded, "written instrument," adverse possession theory (RPAPL §§ 511-512), plaintiffs rely in part on inapposite case law governing the distinct concept of riparian rights. *E.g. Town of Oyster Bay v. Commander Oil Corp., supra*; *Town of Hempstead v. Oceanside Yacht Harbor, Inc.*, 38 A.D.2d 263, 328 N.Y.S.2d 894 (2d

Dept. 1972), *aff'd*, 32 N.Y.2d 859, 346 N.Y.S.2d 529 (1973); *Tiffany v. Town of Oyster Bay*, 234 N.Y. 15 (1922); *Bravo v. Terstiege*, 196 A.D.2d 473, 601 N.Y.S.2d 129 (2d Dept. 1993); Plaintiffs' Memorandum of Law pp. 11-12; Plaintiffs' Reply Affirmation ¶¶ 9-10. Riparian rights, however, are not title-conferring in nature, but instead, merely create a right of access to adjacent, navigable waters. *See Town of Oyster Bay v. Commander Oil Corp.*, *supra* at 571; *Mascolo v. Romaz Props., Ltd.*, 28 A.D.3d 617, 813 N.Y.S.2d 765 (2d Dept. 2006).

Accordingly, **plaintiffs' first cause of action** grounded upon an adverse possession theory of recovery should be **dismissed**.

However, those branches of defendants' cross-motion (Seq. No. 04) which are for judgment on their first (trespass) and second (riparian rights) Counterclaims should be denied. The record supports the inference that plaintiffs, whose property abuts the water flowing in Waukena Canal (*see* Defendants' Affirmation in Support Exhibit C ¶ 24), would possess a right of riparian access over defendants' submerged land to the adjacent, navigable portion of the canal. *See Town of Oyster Bay v. Commander Oil Corp., supra*; *Tiffany v. Town of Oyster Bay, supra*; *Town of Hempstead v. Oceanside Yacht Harbor, Inc., supra. Cf. Gowanus Indus. Park, Inc. v. Hess Corp.*, ___F.Supp.2d___, 2012 WL 273657 (E.D.N.Y. 2012).

Although not absolute, riparian rights, which exist "regardless of the ownership status of the underwater land" (*see Ford v. Rifenburg*, 94 A.D.3d 1285, 942 N.Y.S.2d 285 (3d Dept. 2012), "include the right of reasonable, safe and convenient access to navigable water, including the right to make this access a practical reality by building a pier, or wharfing out from his frontage." *Town of Oyster Bay v. Commander Oil Corp., supra*; *Tiffany v. Town of Oyster Bay, supra*; *Mascolo v. Romaz Props., Ltd., supra. See also Errico v. Weinstein*, 25 Misc.3d. 1224(A), 901 N.Y.S.2d 906 (Supreme Court, Nassau County 2009). Moreover, "'[e]ach riparian

or littoral proprietor must allow sufficient room in the placement of structures within his own boundaries so that they will not be blocked by the construction of the neighbor.'" *Muraca v. Meyerowitz,* 11 Misc.3d. 1061(A), 816 N.Y.S.2d 697 (Supreme Court, Nassau County 2006)(citations omitted). It has also been held that a trespass claim will not lie where "an incursion onto a landowner's" parcel is "an authorized and reasonable exercise" of a person's riparian rights. *See Gowanus Indus. Park, Inc. v. Hess Corp., supra* at 6.

Upon the conflicting allegations made here, the Court cannot summarily determine whether the parties' conduct relative to the dock area was reasonable. Notably, "what constitutes a reasonable, safe and convenient use of the upland owner riparian rights has been gradually defined on a case-to-case basis" (*see Town of Hempstead v. Oceanside, Yacht Harbor, supra* at 266) and generally, the "reasonableness of the exercise of riparian rights is a question of fact." *See Gowanus Indus. Park, Inc. v. Amerada Hess Corp.*, ___F.Supp.2d___, 2003 WL 22076651, (S.D.N.Y. 2003); *Errico v. Weinstein*, ___Misc.3d.___, (NOR) Index No. 18048-04, Slip Opinion (June 20, 2006).

Although plaintiffs' application for an opposing dock permit was denied, that denial is not determinative of the parties' respective riparian rights. *See Errico v. Weinstein, supra* at 5-6 ("the issuance of the individual permits constitutes a.... legally dissimilar transaction from the collective allocation of riparian rights" which is "to be made solely by the Court."). *See also Muraca v. Meyerowitz, supra* at 351.

Lastly, although plaintiffs' Verified Complaint does not expressly raise the issue of riparian rights, it does allege that defendants' conduct has interfered with the use of their dock. *See* Defendants' Affirmation in Support Exhibit B ¶¶ 8-9. Further, defendants themselves have affirmatively raised the issue of riparian rights, including whether, *inter alia*, plaintiffs' exercise

of their own riparian rights constitutes a trespass under the circumstances presented. *See* Defendants' Affirmation in Support Exhibit C ¶ 11. *See also Gowanus Indus. Park, Inc. v. Hess Corp.*, *supra* at 6.

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

Accordingly, it is

ORDERED that plaintiffs' motion (Seq. No. 03), pursuant to CPLR § 3212, for an order granting them summary judgment on their first adverse possession cause of action is hereby **DENIED**. And it is further

ORDERED that defendants' cross-motion (Seq. No. 04), pursuant to CPLR § 3212, for an order granting them summary judgment is hereby **GRANTED to the extent that the plaintiffs' first, adverse possession cause of action is dismissed**, and the cross-motion (Seq. No. 04) is **otherwise hereby DENIED**.

All parties shall appear for Trial in the Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on June 14, 2012, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
May 14, 2012