229 Quimby Lane, LLC v Quimby Lane Assn.
2018 NY Slip Op 32153(U)
September 5, 2018
Supreme Court, Suffolk County
Docket Number: 13/4393
Judge: Thomas F. Whelan

COPY

MEMORANDUM DECISION

SUPREME COURT, SUFFOLK COUNTY

IAS PART 33

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229 QUIMBY LANE, LLC and 220 QUIMBY LANE LLC :

Plaintiffs,

-against-

QUIMBY LANE ASSOCIATION, an unincorporated association, STEFAN M. SELIG, HEIDI SELIG, GEORGE P. MILLS, ELIZABETH SWEEZY, individually and as members of Quimby Lane Association, an unincorporated association, NIKO ELMALEH, FAYE NESPOLA, RICHARD NESPOLA, SUSAN DeMENIL, FRANCOIS DeMENIL, FRED IRELAND, CYNTHIA IRELAND, JOSEPH SILVESTRI, MICHAEL FEIGENBAUM, ED MOOS, LOUISE MOOS, SHELLEY CARR, MICHAEL CARR, LARRY SCHEINFELD and JANE SCHEINFELD, AS MEMBERS OF Quimby Lane Association, an unincorporated association, QUIMBY LANE LLC, RICHARD NESPOLA, as Trustee of the Richard Nespola Residence Trust, FAYE NESPOLA, as Trustee of the Faye Nespola Residence Trust, NEXT DOOR, LLC, 2727 LLC, SAG POND DESIGN AND PROPERTY MANAGEMENT, LLC, THE ROCKY MOSES, LLC and 158 QUIMBY LANE PURCHASE LLC:

Defendants.

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BY: WHELAN, J.S.C.
Index No. 13/4393
Conference Date: 8/9/18
Motion Date: 5/23/18
Adj. Date: 8/10/18
Mot. Seq. # 009 - MG
Mot. Seq. # 010 - XMot D
Submit Judgment

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Over 110 years ago, the Quimby Family of Bridgehampton planned a private community overlooking Sagaponack Pond, in the Town of Southampton. Now, the current residents of the community are involved in a legal dispute, that brings up for review ancient principles of real property law, which pre-date even the origins of this conflict. In essence, the plaintiff property owners[1] claim the ability to utilize a long existing private way to access a second entrance into an estate. The defendants, in particular, Niko Elmaleh and Quimby Lane LLC (hereinafter "defendants"), insist that the private way is solely intended to provide pedestrian access to Sagaponack Pond.

This is an Article 15 action seeking a declaration that plaintiffs are owners of an easement and hold the right to free and unobstructed access over and across a certain private road known as Quimby Lane, which runs from Ocean Road, a public road, to Sagaponack Pond. While the majority of Quimby Lane, the private road, is 50 feet in width, the portion that is at issue is just 20 feet in width and 429 feet in length. It abuts plaintiffs' parcels to the north as it approaches Sagaponack Pond, which is to the east. Apparently, while the 50 foot section of Quimby Lane is improved for vehicular travel, this 20 foot section was unimproved but has been consistently maintained for ingress and egress. More importantly, plaintiffs seek a right to improve and use this 20 foot section for automobiles and "all other reasonable purposes incident to a private road."

Defendants assert, without contradiction, that the use sought by plaintiffs is as a second driveway and construction service entrance to plaintiffs' premises. Defendants seek a declaration that plaintiffs do not possess an easement appurtenant or easement implied by grant to improve and use the disputed section by motor vehicles and for a second driveway into either of the plaintiffs' parcels or alternatively, that plaintiffs' use of the section be limited to pedestrian use only to Sagaponack Pond.

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[1] The limited corporations plaintiffs own two adjacent parcels in the community and are both controlled by George Roger Waters, a noted musician.

Common Facts

Both parties have moved for summary judgment based upon common facts. They insist that the deeds, filed maps, surveys and expert affidavits only present the Court with questions of law. The Court agrees. The facts are not in dispute. However, a look back into Bridgehampton's history is first essential.

The original source of title starts with a common owner, Edward E. Quimby, who purchased a large parcel of land, by virtue of two deeds dated November 16 and November 18, 1894 (*see* Walsh Aff., May 21, 2018, Ex. N).[2] The record discloses that Edward E. Quimby caused to be built six summer homes for family members on Quimby Lane by 1906 (*see* Walsh Aff., May 21, 2018, Ex. P).

Edward E. Quimby passed away between March 1901 and March 1902 and his wife, Cynthia E. Quimby, inherited the above mentioned parcel. A year earlier, on February 5, 1905, Cynthia E. Quimby had a Will drafted which made clear the family's intention that the private road, Quimby Lane, was for the use of the owners of the lands that had been purchased by her husband in 1894 (*see* Walsh Aff., May 21, 2018, Ex. R). Paragraph X of the Will states:

> I dedicate as a private right of way for the use of the owners and occupants of all the lands conveyed, as hereinbefore stated, to my late husband, EDWARD E. QUIMBY, a parcel extending from the Concourse hereinafter described to the road leading into my property from Atlantic Avenue and bounded southerly by said Concourse southeasterly and northeasterly by the lands heretofore conveyed by me to said Wiley and by the road leading into my property from Atlantic Avenue, and bounded ...
>
> I dedicate as a Concourse for the use of the owners and occupants of all the lands conveyed, as hereinbefore stated, to my late husband, EDWARD E. QUIMBY, a parcel of the shore of Sag Pond bounded and described as follows: ...

This dedicated private right of way is the disputed area. Plaintiffs argue that the dedication is not restricted to pedestrian use or as limited to access to the "Concourse." Defendants, of course, disagree.

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[2] While both parties submitted identical exhibits, the Court will, for the most part, reference the exhibits submitted with the plaintiffs' motion.

On October 4, 1906, Cynthia E. Quimby subdivided a portion of land by conveyance to Charles Wiley by deed dated October 4, 1906 (*see* Walsh Aff., May 21, 2018, Ex. O) ("Wiley Deed"). This parcel is now the same parcels owned by the two plaintiffs.

In the metes and bounds deed description of the Wiley Deed, the property is described as bounded "...along a twenty (20) foot private road of the Quimby estate to an angle at a certain Locust Stub at the middle point of the West line of the concourse ...". The Wiley Deed also contains an appurtenance clause, which transfers all the rights of Cynthia E. Quimby to Mr. Wiley. In the Wiley Deed, the term "private road" is not described or limited as to the use of same. Additionally, the Wiley Deed makes mention of a "concourse" at Sagaponack Pond where the twenty (20) foot private road terminates at the beach.

By deed dated October 14, 1911, Charles Wiley and his wife conveyed their parcel to Charles Taylor, which deed contained an appurtenance clause (Walsh Aff., May 21, 2018, Ex. S). The same day, Charles Taylor deeded the parcel to Alice Wiley (Walsh Aff., May 21, 2018, Ex. T). Said deed also contained an appurtenance clause.

Cynthia E. Quimby passed away on October 27, 1912 and her Last Will and Testament was admitted into probate.

Thereafter, a subdivision map, entitled "Estate of Edward E. Quimby, Deceased" was filed in the Office of the Clerk of Suffolk County on December 6, 1915 as Map #721 (the "1915 Map") (Walsh Aff., May 21, 2018, Ex. E). The private road is noted on the 1915 Map, which shows the private road known as "Quimby Lane" has run from Ocean Road (the nearest public road) on the west to Sagaponack Pond on the east. The 20 foot section is noted on the 1915 Map as a private road. Also a "concourse" is shown on the 1915 Map. The parties admit that no concourse was ever built and that the private road ended at the edge of the pond.

Next, Alice Wiley deeded the Wiley parcel to Elaine Carrington on May 16, 1938, together with an appurtenance clause (Walsh Aff., May 21, 2018, Ex. U). By deeds dated December 28, 1954, January 24, 1955 and January 3, 1956, Elaine Carrington conveyed the entire Wiley parcel to Robert Bruce Carrington (Walsh Aff., May 21, 2018, Ex. V). Each deed contained an appurtenance clause.

In 1964, Robert Carrington subdivided the Wiley parcel into two lots denoted on the Suffolk County Tax Map, by the Real Property Tax Service Agency, as Lot 3 and Lot 4 (Walsh Aff., May 21, 2018, Ex. D). He sold Lot 4 to Edwina B. Worth and Theron O. Worth on November 3, 1965. Said deed expressly conveyed "an easement in, to, over and along a 20 foot private road and a concourse, abutting the above described premises ..." (Walsh Aff., May 21, 2018, Ex. W). Thereafter, Theron Worth, Jr., conveyed Lot 4 to Arch W. Cummin, by deed dated October 28, 1977 deed dated October 28, 1977, with the same easement language as set forth in the prior deed (Walsh

Aff., May 21, 2018, Ex. X).

Finally, on October 2, 2010, Arch W. Cummin conveyed Lot 4 to plaintiff, 229 Quimby Lane, LLC, with the same easement recitals as set forth in the prior two deeds (Walsh Aff., May 21, 2018, Ex. L).

Meanwhile, Robert Carrington conveyed Lot 3 to Keith Kerr Deering by deed dated April 27, 1964 (Walsh Aff., May 21, 2018, Ex. Y). Said deed conveyed by grant language "a right-of-way in common with others, over and along a private road known as "Quimby Lane" laid out upon "Map entitled Estate of Edward E. Quimby, Deceased" filed in the Office of the Clerk of the County of Suffolk in December 6, 1915 as Map #721..." (Walsh Aff., May 21, 2018, Ex. Y). The same year, this parcel, known as 220 Quimby Lane, was conveyed to Alan M. Siegel and Gloria F. Siegel, with the same easement recital as set forth above (Walsh Aff., May 21, 2018, Ex. Z). The parcel was transferred to a Qualified Personal Residence Trust on behalf of the Siegel family.

Plaintiff, 229 Quimby Lane, LLC, upon purchasing Lot 4, which faces Sagaponack Pond to the east, started to construct a new home and garage on the parcel.

The then owner of 220 Quimby Lane, Alan M. Siegel, whose parcel abutted plaintiff 229 Quimby Lane, LLC's parcel to the west, blocked the 20 foot section with fence posts and a sign stating "No Vehicles Pedestrian Access Only." After the removal of the sign, plaintiff 229 Quimby Lane, LLC started to construct a gravel roadway on the 20 foot section of private road, to provide a second access to its parcel. Court intervention ensued, resulting in a stipulation and order, dated September 18, 2015, maintaining the status quo pending the outcome of the action.

Eventually, while this litigation was pending, on February 28, 2016, Alan M. Siegel sold his property at 220 Quimby Lane to plaintiff, 220 Quimby Lane, LLC (Walsh Aff., May 21, 2018, Ex. M). This deed contains granting language which mentions the 1915 Map and "a right of way over the 20 foot wide private road adjoining the premises described herein...".

Plaintiffs currently own two adjoining parcels, Lot 4 and Lot 3, respectively, on the Suffolk County Tax Map attached to the moving papers. Directly north of these parcels, and also abutting the 20 foot private road, is the property owned by Quimby Lane, LLC, the main defendant to this action. The description in that deed notes that the property is bounded by "a 20-foot wide private right of way..." (Pomerantz Aff. Ex. E). So, the disputed area is that section of the private road between plaintiffs' parcels and defendant, Quimby Lane, LLC's parcel. Neither plaintiffs nor defendants own title to the disputed private road.

Contentions of the Parties

Initially, the Court notes that the Wiley Deed shows the disputed area as a boundary

designation for the parcel. The Wiley Deed does not contain any restrictions of use or limitations. Plaintiff, 229 Quimby Lane LLC, stresses the fact that each deed in its chain of title, which is also described as Lot 4, contains an appurtenance clause. Plaintiffs also argue that the dedicated right of way in Paragraph X of the Will of Cynthia E. Quimby, does not diminish the easement. This lack of restriction claim springs from the Wiley Deed, which was granted six years prior to Cynthia E. Quimby's passing and the probate proceedings.

Defendants believe that plaintiffs' reliance upon the term "private road" in the 1915 Map, which describes the disputed area, is misplaced and a "flawed premise" (Colavito Aff., par. 12). The defendants constantly describe the "concourse" as a "bathing concourse," the "private road" as a "right of way," and assert that the Wiley Deed "contains no express grant of an easement over the right of way because the right of way was intended to connect Quimby Lane to the bathing concourse for use solely by those residents who, unlike Cynthia Quimby, owned a lot which did not front on Quimby Lane and the bathing concourse" (Colavito Aff., par. 22).

The Court agrees that the Wiley Deed contains no express grant of an easement over the private road/right of way or any rights to the center line of said way. However, the Court refuses to accept the argument that the reference in the Wiley Deed as running "along a twenty (20) foot private road of the Quimby Estate," is nothing more than a boundary description, which fails to convey any easement rights.

Defendants' central point is their interpretation of the intention of Cynthia Quimby, which rests mainly upon the language of the Will (Colavito Aff. Par. 46):

> "In my opinion, the Will demonstrates that Cynthia Quimby wanted to create lots for her children, accessed by Quimby Lane. The Will also demonstrates that Cynthia Quimby wanted her children to recreate communally along the shore. So that could be achieved, she created the right of way at the terminus of Quimby Lane to permit the inhabitants of Quimby Lane, without direct access to the shore, to gain access to the bathing concourse."

Applicable Caselaw

Easements by implication are recognized in the law (*see* 3 Tiffany Real Prop. § 779 [3d ed.]; Jon W. Bruce et al.,The Law of Easements & Licenses in Land § 4:30). Courts are instructed to ascertain the intention of the parties, and particularly, the intention of the grantor. In 1858, the Court of Appeals established that principal in ***Huttemeier v Albro***, 18 NY 48 (1858).

> "It is a general rule that, upon a conveyance of land, whatever is in use for it, as an incident or appurtenance, passes with it. … Whether

> a right of way or other easement is embraced in an deed, is always a question of construction of the deed, having reference to its terms and the practical incidents belonging to the grantor of the land at the time of the conveyance. The intention of the parties is to be learned from those facts."

Long ago, the Second Department agreed with this principal, as set forth in ***Ranscht v Wright***, 9 AD 108, 109, 41 NYS 108 (2d Dept 1896).

> "... we think the question is one that must be governed by the intent of the parties, to be extracted from the grant and its language and the circumstances and conditions which existed at the time when the grant was made."

A hundred years later, the Second Department reaffirmed the principal in ***Fortunoff Silver Sales, Inc. v Euston Station, Inc***., 74 AD2d 895, 425 NYS2d 862 (2d Dept 1980) ("a question of the intent of the parties to be determined in light of the circumstances").

Here, the Last Will and Testament of Cynthia Quimby, dated February 5, 1905, the Wiley Deed, dated October 4,1906 and the Map of Estate of Edward E. Quimby, filed December 6, 1915, describe the private road in the deed, the Will and the 1915 Map. Such "surrounding circumstances" create an overwhelming showing of an easement by implication.

Initially, the Will contains no limitations on the use of the Private Road or the way in dispute. The Will also states Cynthia Quimby's intention to "dedicate as a private right of way for the use of the owners and occupants of all the lands conveyed, ...to my late husband, Edward E. Quimby ...". Importantly, the Wiley Deed states that the boundary is "along a (20) foot private road *of the Quimby estate*" (italics added). The Wiley Deed puts no limitation on the use of the way in dispute. Finally, the 1915 Map, filed by the Quimby Estate, shows the Private Road running from Ocean Road (Atlantic Avenue) to Sagg Pond, including the disputed way.

It is obvious from the record, the Will and the deeds, that no "bathing concourse" ever existed, as even the Google Earth images demonstrate (Doyle Aff. Ex. Y). While the term may help to craft an argument as to the grantor's intention, it is just that, an argument that should not have been inserted into the original documents. The expectation for the undeveloped "concourse" is unknown in this record. Was it intended for fishing, boating, swimming, or simply a promenade to observe the pond at sunset? Such is not the issue before the Court. The issue is the implied

easement to utilize the private road to access same, which has been shown.[3]

There is little doubt that the Private Road was in use prior to March 6, 1901 (the date of the Will of Edward E. Quimby) and prior to the Wiley Deed of October 4, 1906. In any event, the 1915 Map reconfirms the use of the Private Road, including the disputed section. The fact that the disputed section has been maintained, over the years, as a grassy way to Sagg Pond does not constitute an abandonment of same.

The claim that "Cynthia Quimby did not require an easement over the right of way because her home fronted on the two things that the right of way was intended to connect, Quimby Lane and the bathing concourse" (Colavito Aff. par. 49), is not only pure surmise but it also makes little sense. Cynthia Quimby owned the private road and could traverse it at any time and for any purpose. The submission of various Atlas' (Doyle Aff. Ex. G and H) does not change that fact.

More importantly, with the purchase of the property owned by former defendant, Alan M. Siegel, the plaintiff, 220 Quimby Lane, LLC, now possesses the very same rights that the defendants claim was restricted to them and the other parcel owners who do not abut Sagg Pond. Said plaintiff now can claim the very same easement rights that is claimed by the defendants.

Finally, there is simply no documentary evidence in the record to support the claim that the intention of the common grantor was to limit the use to pedestrian use. In fact, defendant, Niko Elmaleh admitted, at his deposition, that residents would occasionally drive to the shore to drop off sail boats or kayaks. While the Court acknowledges the many affidavits submitted from current residents, including some prominent members of the Bridgehampton society (Doyle Aff. Ex. V), the affidavits do not overcome or help to explain the original grantor's intent. The affidavits do demonstrate that the unimproved right of way was used and maintained and not abandoned.

The main case relied upon by the defendants, ***Tarolli v Westvale Genesee, Inc.***, 6 NY2d 32, 187 NYS2d 762 (1959) is distinguishable and the dicta supports plaintiffs' position. ***Tarolli***, *supra*, supports the line of cases that hold that "[m]erely bounding premises by a road (for purposes of description like using any other mark or monument) 'is very different from selling by reference to a map or plot on which the grantor has laid out streets' (citation omitted)." The cases which reject an easement by implication are based upon facts where the intention of the parties is to the contrary (*see* ***Brennan v Salkow***, 101 AD3d 781, 955 NYS2d 656 [2d Dept 2012]; *see also* ***Fennica Builders, Inc. v Hersh***, 159 AD2d 679, 553 NYS2d 180 [2d Dept 1990]).

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[3] The deposition testimony from the defendant Niko Elmaleh and former defendant, Alan M. Siegel, reveals the Sagg Pond to be unswimmable, too shallow for boating, mucky, full of debris and the home of snapping turtles.

In ***Tarolli***, *supra*, the Court of Appeals held that the parties to the transaction did not intend that the vendees should acquire a right of way easement as to a private road. The facts in this case are to the contrary. Here, the intention of Cynthia Quimby, the common grantor, upon examination of the surrounding circumstances, is clear.

This is not a case, like ***H.S. Farrell, Inc. v Formica Constr., Inc.***, 41 AD3d 652, 838 NYS2d 628 (2d Dept 2007), where "the only evidence regarding the intent of the initial, common grantor to create an easement was the filed subdivision map." Nor is this a case where there is not a common grantor (*see* ***Turner v Anderson***, 67 AD3d 146, 888 NYS2d 701 [4th Dept 2009]).

Here, plaintiffs have met their prima facie burden that it was the intent of the original grantor, at the time of the original conveyance, to create the easement by implication (*see generally*, ***Joy Builders, Inc. v Shapiro***, 57 AD3d 486, 869 NYS2d 168 [2d Dept 2008]). A grantor conveying land described as bounded by a road or way owned by the grantor impliedly grants an easement in such road or way unless the intention of the parties is to the contrary (*see* ***Hein v Conroy***, 211 AD2d 868, 621 NYS2d 210 [3d Dept 1995]).

This case is similar to a prior Southampton easement case, ***Glennon v Mayo***, 221 AD2d 504, 633 NYS2d 400 (2d Dept 1995), wherein the Court found "an implied easement by virtue of reference to the private road as a boundary in the deed which created their parcel, and the surrounding circumstances (citations omitted)."

Additionally, the case of ***Phillips v Jacobsen***, 117 AD2d 785, 499 NYS2d 428 (2d Dept 1986) appears to be on point. The attempts to keep an unimproved private road from being cleared for use as a private driveway were rejected by the Court ("a reasonable use of an easement consisting of a 50-foot-wide strip of land, with a terminus at a town road, is as a driveway providing access to property adjoining the easement [citation omitted]").

The parties must acknowledge that the private road was in use at the time of the Wiley Deed conveyance, although they contest the type and scope of use. This is not a case where the parties to the easement permitted the growth of trees, which may constitute signs of abandonment (*see* ***Sam Dev., LLC v Dean***, 292 AD2d 585, 740 NYS2d 90 [2d Dept 2002]). The facts of this case establish that the contested way was never abandoned (*see* ***Castle Assocs. v Schwartz***, 63 AD2d 481, 487, 407 NYS2d 717 [2d Dept 1978]).

In light of the recognized use of the private road and the surrounding circumstances, there is evidence of an implied private easement (*see* ***Seven Springs, LLC v Nature Conservancy***, 48 AD3d 545, 855 NYS2d 547 [2d Dept 2008]; *see also* ***Cashman v Shutter***, 226 AD2d 961, 640 NYS2d 930 [3d Dept 1996]; ***B.J. 96 Coru. v Mester***, 222 AD2d 798, 634 NYS2d 843 [3d Dept 1995]; *cf*, ***H.S. Farrell, Inc. v Formica Constr., Inc.***, *supra*.; ***Busch v Harrington***, 63 AD3d 1333, 880 NYS2d 774 [3d Dept 2009]; ***Palma v Mastroianni***, 276 AD2d 894, 714 NYS2d 537 [3d Dept

2000]).

The Court holds that by bounding a lot by an existing right of way creates an easement in the way (*see* ***Ranscht v Wright***, 9 AD 108, *supra*; *see also* 49 N.Y. Jur.2d Easements §52 [2d ed.]; 1 Robert F. Dolan, Rasch's N.Y. Law & Practice of Real Property § 18:33 [2d ed.]). Additionally, with the filing of the 1915 Map, the inferred intent of Cynthia Quimby became a reality (*see* 1 Robert F. Dolan, Rasch's N.Y. Law & Practice of Real Property §18:34 [2d ed,]).

The Court need not address plaintiffs' reliance upon the "appurtenance" clauses set forth in the respective chains of title, since such adds nothing to the Court's determination of the application of the doctrine of implied easements. It is noted that its presence will not create an easement where one never previously existed. In this case, the "appurtenance" clauses are irrelevant to this Court's determination.

Additionally, the defendants' assertion that the disputed right of way is limited to only pedestrian traffic, has no basis in fact or in law (*see* ***Chapman v Vondorpp***, 256 AD2d 297, 681 NYS2d 320 [2d Dept 1998]; ***953 Realty Corp. v Southern Blvd. Realty Corp.***, 50 AD2d 731, 376 NYS2d 124 [1st Dept 1975]). There is no restriction limited to any particular mode of travel, such as foot travel (*see* ***Arnold v Fee***, 1448 NY 214 [1896]). Limitations on use not contemplated by the original grantor should not be created by the Court (*see* ***West Babylon Union Free School Dist. v Quality Door & Hardware, Inc.***, 307 AD2d 290, 762 NYS2d 498 [2d Dept 2003]). In any event, defendants have conceded the occasional use of vehicles on the Private Road to transport sailboats and kayaks.

The one issue with some merit is the claim that the plaintiffs' proposed use as a second driveway constitutes an overburdening of the easement. It is recognized that the holder of an easement cannot materially increase the burden of the servient estate or impose new and additional burdens on the servient estate (*see* ***Solow Liebman***, 175 AD2d 120, 121, 572 NYS2d 19 [2d Dept 1991]; ***Havel v Goldman***, 95 AD3d 117, 945 NYS2d 332 [2d Dept 2012] [rock border reasonable use of easement]; *cf.* ***Shuttle Contracting Corp. v Peikarian***, 108 AD3d 516, 968 NYS2d 179 [2d Dept 2013]). However, many of the cases which address the issue of overburdening an easement involve direct and express grants of an easement, which set forth the scope or purpose of same (*see eg.* ***Sommers v Shatz***, 22 AD3d565, 802 NYS2d 245 [2d Dept 2005]; ***Havel v Goldman***, 95 AD3d 117, *supra*; ***Sordi v Adenbaun***, 143 AD2d 898, 533 NYS2d 566 [2d Dept 1988]; ***Minogue v Kaufman***, 124 AD2d 791, 508 NYS2d 511 [2d Dept 1986]).

Here, the Court has found a grant of an easement by implication, which contains no such limiting language. This implied easement is not limited to mere ingress and egress. The plaintiffs have a right to unobstructed passage, at all times, over the disputed private road. Where there is no limitations on a right of way over a private road, the party has the right to utilize the entire width of the road (*see* ***Rozek v Kuplins***, 266 AD2d 445, 698 NYS2d 866 [2d Dept 1999]), to utilize the way

for parking for short periods of time (*see* ***Ledley v D.J. & N.A. Mtg., Ltd.***, 228 AD2d 482, 653 NYS2d 675 [2d Dept 1996]) and to pave a grass right of way for the right of passage for vehicles (*see* ***Bilello v Pacella***, 223 AD2d 522, 636 NYS2d 112 [2d Dept 1996]).

Plaintiffs have the right to maintain the private road in a reasonable condition for its use (*see* ***Schoolman v Mannone***, 226 AD2d 521, 640 NYS2d 616 [2d Dept 1996]; ***Herman v Roberts***, 119 NY 37[1890]; ***Missionary Socy. of Salesian Congregation v Evrota***, 256 NY 86 [1931]). Here, the use of a gravel way does not burden the implied easement and plaintiffs have the right to so maintain the disputed section. Moreover, the gravel way will increase the use of the concourse, by all parties, for recreational purposes and to enhance the enjoyment of same.

As to the claim that the use of the private road for a second driveway access to the property is an overburdening of same, the Court understands the defendants' concern, in light of the fact that this portion of the Private Road is 20-feet in width. The issue becomes one of whether the use of the disputed area by the plaintiffs as a second driveway unreasonably interferes with defendants' right to traverse the disputed section (*see generally,* ***Byer v Terleph***, 69 AD3d 894, 893 NYS2d 281 [2d Dept 2010]).

Here, although the defendants complain about the proposed use of the Private Road as a second driveway, contrary to the historical use of the disputed section, no affidavits are submitted explaining how the defendants cannot use the right of way for pedestrian or vehicular use. It appears that defendants' use of the right of way has not been significantly impaired (*see generally*, ***Guzzone v Brandariz***,57 AD3d 481, 868 NYS2d 755 [2d Dept 2008]; ***J.C. Tarr, Q.P.R.T. v Delsener***, 19 AD3d 548, 800 NYS2d 177 [[2d Dept 2005]).

There is no showing of just how the "obstruction" of use as a second driveway unreasonably interferes with the defendants' use of the 20 foot section of the Private Road or even to access the "concourse" (*see generally,* ***Lucas v Kandis***, 303 AD2d 649, 757 NYS2d 86 [2d Dept 2003]; *compare* ***Karlin v Bridges***, 172 AD2d 644, 568 NYS2d444 [2d Dept 1991]). Here, it has not been shown that the proposed use is unreasonable and an abuse of the right of way (*compare* ***Mandia v King Lumber and Plywood Co.***, *Inc.*, 179 AD2d 150, 583 NYS2d 5 [2d Dept 1992]). There is no argument that the right of way will be threatened or destroyed (*compare* ***Herman v Roberts***, 119 NY37 [1890]).

A mere increase in traffic does not overburden an easement of access (*see* Jon W. Bruce, et al, The Law of Easements & Licenses in Land § 8:13). Here, the change or increase in utilization of the 20 foot way has not been shown to overburden or obstruct the way for defendants' use.

Basically, the claim is one of an annoyance to the defendants, who have previously looked out over a grass field to a tall hedge row and who will now see an unknown number of vehicles occasionally passing adjacent to the hedge row. Defendants can solve the annoyance by planting

a new hedge row on the north side of the disputed right of way. The various affidavits offered by the defendants, standing alone, fail to demonstrate an overburdening of the right of way or the intention of the common grantor (*see* ***Higgins v Douglas***, 304 AD2d 1051, 758 NYS2d 702 [3d Dept 2003] [*abrogated on other grounds by* ***Town of North Elba v Grimditch***, 98 AD3d 183, 948 NYS2d 137 (3d Dept 2012)]). The Court must conclude that there is no evidenced in the record to support defendants' claim that the disputed section was intended only for access to the Concourse.

The Court does agree with the claim[4] that the introduction of underground electrical, telephone or fiber optic cables under the disputed section by the plaintiffs constitutes an abuse of the implied easement (*see* ***U.S. Cablevision Corp. v Theodoreu***, 192 AD2d 835, 596 NYS2d 485 [3d Dept 1993]; ***Hudson Valley Cablevision Corp. v 202 Dev., Inc.***, 185 AD2d 917, 587 NYS2d 385 [2d Dept 1992]; *see also* ***Shaw v VanArsdale***, 138 AD3d 1411, 31 NYS3d 701 [4th Dept 2016]; ***Spiak v Zeglen***, 255 AD2d 754, 757, 680 NYS2d 680 [3d Dept 1998]; *cf.* ***Phillips v Iadarola***, 81 AD3d 1234,1235, 917 NYS2d 392 [3d Dept 2011]; ***Albright v Davey***, 68 AD3d 1490, 892 NYS2d 575 [3d Dept 2009]). Such should be removed within sixty (60) days of the entry of the Judgment.

As there is no authority in the applicable provisions of the RPAPL to award of attorney's fees, none are awarded in this case.

Although such agreements were not common or even necessary, in 1906, the Court suggests that the parties enter into and record an agreement to create a joint maintenance plan for the private road, if feasible. A pro rata division of future maintenance and repair expenses would be in the community's best interest.

This Court takes seriously its oath to adjudicate all cases equally and fairly, according to the established law. That commitment is even more pronounced when adjudicating real property disputes, for our Founding Fathers understood that the protection of property rights was critical to the maintenance of life, liberty and the pursuit of happiness. Here, while the defendants draw differing inferences from the undisputed facts, the common law is clear, an easement by implication was the intention of the common grantor.

Submit judgment on notice in keeping with this decision.

DATED: 9/5/18

THOMAS F. WHELAN, J.S.C.

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[4] The Court notes the defendants are not the owners of the land that is being burdened by the 20 foot right of way, but as parties who also enjoy the implied easement, they have the right to be heard here.