*County:* **SUFFOLK, ss.**
*Case No:* **236027**
*Date:* **January 20, 2000**
*Parties:* **HYDE PARK LIQUORS H, INC., d/b/a DORR'S LIQUOR MART, JACK WILLIAM SONTAG, and MAE, GORMAN, Plaintiffs V. SAHAG NAHABEDIAN and VARTOOHIE NAHABEDIAN, Defendants**
*Decision Type:* **DECISION**

On February 18, 1997, Hyde Park Liquors H, Inc. (HPL), d/b/a Dorr's Liquor Mart, commenced this action against Sahag Nahabedian (Mr. Nahabedian) and Vartoohie Nahabedian (Ms. Nahabedian) (collectively, Nahabedians) by filing a complaint pursuant to G. L. c. 185, s.1(k), and c. 231A, s. 1. The underlying action concerns a dispute over the right of each party to use an easement area (passageway) that runs from Academy Hill Road in the Brighton section of Boston to the property owned by Jack William Sontag (Sontag)[1] and Mae Gorman (Gorman). The Nahabedians own a certain parcel of real property located at 15 Academy Hill Road upon which the passageway is located (Nahabedian property).

---

[1] Sontag is also known as Jack W. Sontag and J. William Sontag.



In the complaint, BPL requests a declaratory judgment as to its unrestricted right to use the passageway for vehicular ingress and egress and as to its prescriptive right to use an eighteen-foot wide entrance to the passageway. Additionally, HPL seeks an award of damages, costs, and attorney's fees against the Nahabedians resulting from their interference with HPL's use and enjoyment of the passageway. Furthermore, HPL requests a permanent injunction concerning its rights to use the passageway.

HPL also filed on February 18, 1997, a motion for a preliminary injunction (preliminary injunction motion) seeking to prevent the Nahabedians from interfering with its use and enjoyment of the passageway during the pendency of the case at bar. In support of the preliminary injunction motion, HPL filed an affidavit of Leo G. Dervishian (Dervishian), its president and
treasurer.

On February 26, 1997, 1 heard oral argument on the preliminary injunction motion. At the hearing, the Nahabedians filed an opposition to the preliminary injunction motion together with Memorandum of Fact and Law in Opposition to Plaintiff's Motion for Preliminary Injunction. On the same day, the Nahabedians also filed the affidavits of Nancy A. O'Brien (O'Brien) and Erik M. Moon, employees of Jet Photo Services. HPL also submitted a supplemental affidavit of Dervishian at the hearing. I denied the preliminary injunction motion on March 3, 1997, with one minor exception[2].

On March 21, 1997, the Nahabedians answered the complaint and asserted three counterclaims. Count I alleges trespass and seeks damages as well as injunctive relief concerning the removal of gates HPL erected at the end of the passageway and the use of the passageway by

---

[2] The court ordered that the Nahabedians relocate their dumpster from the passageway to the rear of their building.

HPL and any of its agents or employees. Count II requests damages, attorney's fees, and a declaration that the Nahabedians have the right to park in the passageway and that the Nahabedians, by prescription, terminated or modified any right HPL may have in the passageway. Count III claims that HPL has overburdened the passageway and seeks a permanent injunction prohibiting HPL from using the passageway for deliveries. BPL replied to the counterclaims on April 3, 1997.

HPL filed on July 7, 1997, a renewed motion for preliminary injunction (renewed motion) again seeking to prevent the Nahabedians from parking cars in the passageway. In support of the renewed motion, HPL filed a memorandum and an affidavit of Sontag and a third affidavit of Dervishian. I heard oral argument on the renewed motion on July 16, 1997. At the hearing, the Nahabedians filed an opposition to the renewed motion. After taking the matter under advisement, I granted the renewed motion on July 22, 1997, and entered an order that HPL "have unimpeded access to the passageway Monday through Saturday, from 8:00 a.m. until 11:00 a.m., and from 3:30 p.m. until 5:00 p.m."

On May 15, 1998, the Nahabedians filed Motion to Join Indispensable Parties and Amend Counterclaim to Conform to the Evidence (motion to join). This motion requested this court add Sontag and Gorman as parties plaintiff because they owned the land upon which HPL operated its business. I allowed the motion to join on May 19, 1998. HPL, Sontag, and Gorman are hereinafter collectively referred to as plaintiffs.

The pre-trial conference also occurred on May 19, 1998, at which time the parties submitted their joint pre-trial memorandum. The memorandum contained nine agreed facts. I accept those facts as binding on the parties hereto and incorporate certain of those facts into my findings.

The trial was held in Boston on October 29, 1998 and October 30, 1998. A stenographer recorded and transcribed each day of the trial proceedings. Prior to the commencement



of trial on October 29, 1998, HPL filed two motions in limine. The first was a motion to exclude the testimony of a title expert for the Nahabedians (first motion), and the second was a motion to exclude the testimony of Vaughan H. Totovian (Totovian), the Nahabedians' civil engineer expert (second motion). The first motion was withdrawn, and I denied the second motion.

At trial, the following twelve witnesses testified: Sontag; Dervishian; Ms. Nahabedian; Gerard F. Melia (Gerard Melia), the son of a former owner of the Nahabedian property; Peter Winson, a former employee of Camtech Corporation; Mr. Nahabedian; Stephen Mosley, former employee of Jet Photo; Richard Moore, former bookkeeper for Jet Photo; Gary Pogharian, employee of Ilford Imaging; Totovian; Kirk Nahabedian, the present owner and operator of Jet Photo; and O'Brien. The parties introduced twenty-eight exhibits into evidence, some with multiple parts, which are incorporated into this decision for the purposes of any appeal. Prior to the commencement of the second day of trial, I took a view of the properties at issue in the presence of counsel and the parties.

I find and rule as follows:

1. HPL is a duly organized Massachusetts corporation having its principal place of business at 354-356 Washington Street, Brighton.

2. Sontag and Gorman are residents of Newton.

3. The Nahabedians reside in Waltham.

4. Prior to July 30, 1909, Noah W. Sanborn (Sanborn) was the record owner of two parcels of land shown on a plan entitled "Land Owned by Noah W. Sanborn" dated July 26, 1909, and prepared by D.W. Hyde (Hyde plan). The

 

Hyde plan is recorded in Suffolk County

- 4-

Registry of Deeds book 3383, at page 307[3]. According to the Hyde plan, one parcel (lot A) consists of 5,198 square feet with thirty-eight and five-tenths (38.5) feet of frontage on Washington Street[4]. The other parcel, the Nahabedian property, (lot B) measures 3,065 square feet and has seventy-one and sixty-four one-hundredths (71.64) feet of frontage on Academy Hill Road[5].

5. The Hyde plan depicts an eleven-foot wide area entitled "Passageway" that runs from Academy Hill Road along the northerly boundary of lot B for a distance of fifty-nine and eleven one-hundredths (59.11) feet to the westerly boundary of lot A.

6. On July 30, 1909, Sanborn conveyed lot A to Frank J. Dorr, Jr. (Dorr) by a deed recorded in book 3383, at page 307 (1009 deed). This deed granted Dorr "the right to use the passageway to Academy Hill Road, shown on said plan, in common with the owner of said lot B."

7. By an instrument dated November 20, 1920, Edwin F. F. Baxter, trustee under the will of Elizabeth Sanborn; Adelaide B. Sanborn; Lillian Dow; and Grace Thayer conveyed lot B to Spurgeon H. Leary "subject to existing rights of others in the passage way [sic] as shown on said [Hyde] plan[6].

8. In 1946, Sontag purchased the business known as Dorr's Liquors (liquor store) located on lot A from Dorr and continued to operate the liquor store under the same trade name. Dorr continued to hold title to lot A after the sale of the liquor store.

---

[3] Unless otherwise noted, all recording references are to this particular Registry of Deeds

[4] Lot A is now known as 354-356 Washington Street, Brighton.

[5] Lot B is the Nahabedian property located at 15 Academy Hill Road, Brighton. Hereinafter, the Nahabedian property shall be referred to as lot B.

[6] These grantors cited the deed of Sarah E. Willis to Noah W. Sanborn recorded in book 2011, at page 97, as the applicable title reference for this conveyance.

- 5-

9. A building occupies the entire width of lot A (lot A building) and approximately two-thirds of the length of lot A[7]. An open area constitutes the remainder of lot A to the south of the lot A building (back yard). The passageway is the sole means of vehicular access to the back yard.

10. On July 12, 1952, Dorr conveyed title to lot A to Gorman, Sarah Sontag, and Martha Sontag by a deed recorded in book 6782, at page 387. This deed referenced"the right to use the passageway to Acadamey [sic] Hill Road, shown on said plan, in common with the owner of said lot B[8]."

11. The Nahabedians acquired title to lot B by virtue of deeds dated December 30, 1965, recorded in book 8060, at page 663, and dated August 9, 1966, recorded in book 8060, at page 666. Neither of these deeds contained any mention of the passageway.

12. After purchasing lot B, the Nahabedians began operating Jet Photo[9]. Kirk Nahabedian, the son of the Nahabedians, currently owns and operates Jet Photo.

13. A two and one-half story building occupies most of the area of lot B (Jet Photo building). All of lot B north of the Jet Photo building is paved with bituminous concrete. The Jet Photo building is approximately fifteen inches from the southwesterly comer of the passageway and is twelve

 

feet away from the southeasterly comer of the passageway. A copy of a portion of

---

[7] Certain exhibits indicate that the lot A building may have been as long as eighty feet at one time, while other exhibits show the lot A building today to be approximately sixty feet in length.

[8] As of the time of trial, title to lot A was in the names of Sontag and Gorman pursuant to a deed dated February 29, 1996, and recorded in book 20400, at page 307. This deed stated lot A was conveyed "[t]ogether with the right to use the passageway to Academy Hill Road, shown on said [Hyde] plan, in common with the owner of said [l]ot B."

[9] The Nahabedians are hereinafter referred to as Jet Photo.



exhibit 2 is attached to this decision depicting lot B, the passageway, the Jet Photo building, and a portion of lot A.

14. Since 1985, HPL has leased lot A and operated the liquor store. Presently, HPL is named as the tenant under a Commercial Lease (lease) dated December 1, 1995, which contains a term of thirty years and an option to purchase. Two Notices of Lease and Options to Purchase are recorded in book 20339, at pages 298 and 300, respectively.

15. From 1946 through 1955, Sontag's father parked in the backyard occasionally and Sontag's brother-in-law parked there twice a week from 1946 through the mid-1970's. Between 1955 and the mid-1970's, Sontag used the passageway at least once a week to park in the back yard. From 1985 to the commencement of the instant action, Dervishian has used the passageway to park in the back yard on a daily basis. Between 1946 to the time of trial, part-time employees of the liquor store have utilized the back yard for parking between the hours of 6 p.m. and 11 p.m.

16. From 1961 until 1965, John F. Melia (John Melia) owned lot B. John Melia ran a catering business out of the Jet Photo building. On the second floor, he maintained an office and also rented space to a local union.

17. As a youth, Gerard Melia grew up and played in the neighborhood of lot B. Until he graduated from high school in 1955, he observed lot B and the passageway on a daily basis. From 1943 until 1955, he never saw chains placed across the passageway.

18. During the years of John Melia's ownership of lot B, Sontag used the passageway on rare occasions to access the back yard in order to park. When Sontag did utilize the passageway, someone on lot B would move vehicles parked in the passageway to allow Sontag to travel over the passageway.



19. Shortly after acquiring title in 1966, Jet Photo installed a chain-link fence along the northernmost boundary of lot B. Jet Photo replaced this fence with a new one in or about October 1996.

20. Prior to 1985, Sontag did not use the passageway for the delivery of product to the liquor store. During this time period, however, Sontag utilized the passageway to access the back yard for the purposes of parking his automobile.

21. Occasionally, vehicles parked on the passageway would impede Dervishian or HPL employees from utilizing the passageway for ingress or egress to the back yard. In the instances when this occurred, Jet Photo would comply with Dervishian's request that the vehicles impeding the use of the passageway be moved.

22. Once or twice a year, Dervishian informed Jet Photo that he needed vehicles moved for large deliveries in advance of major sporting events.

23. Between 1977 and 1985, Sontag rented the back yard to Jet Photo on

 

a nonexclusive basis for the parking of vehicles belonging to its owners and employees. The monthly rental payment was fifty ($50.00) dollars. From 1985 to 1996, HPL did not charge Jet Photo any rental fee for the continued right to park in the back yard.

24. For a period of ten years beginning in or about 1985, Dervishian maintained a six-yard dumpster in the back yard. During a period of time in the early 1990s, Jet Photo and HPL shared the use of the six-yard dumpster. This arrangement continued for a short time until the six yard dumpster could not satisfy the refuse containment needs of HPL and Jet Photo simultaneously. After the shared use ended, HPL permitted Jet Photo to maintain its own two-yard dumpster in the back yard.

- 8-

25. During the time HPL maintained dumpsters in the back yard, refuse trucks would traverse the passageway easement once a week to empty the dumpster. After the removal of the six-yard dumpster, Dervishian utilized a smaller dumpster for trash. Despite the use of a smaller dumpster, refuse trucks still traversed the passageway in order to empty the dumpster.

26. Since 1985, Dervishian began to take deliveries for the liquor store from the back yard with increasing frequency. Some vehicles used the passageway to reach the back yard while other truck drivers parked on Academy Hill Road and walked the deliveries down the passageway.

27. On or about 1986, Dervishian installed chain-link fence gates at the end of the passageway easement at the common boundary of lot A and lot B. The gates, affixed to posts on opposite sides of the passageway, opened into lot B. The posts were installed on lot A prior to HPL's tenancy.

28. Over the years, Dervishian has utilized the back yard to store equipment for the Brighton Little League. Additionally, for a period of several months in 1997, Dervishian also allowed Tobin Construction Company to store construction equipment and machinery in the back yard after it had completed renovations on the liquor store.

29. In addition to the two-yard dumpster it maintained in the back yard, Jet Photo also stored a number of pallets in the back yard. In or about May 1996, HPL requested Jet Photo remove the pallets from the back yard in order to allow HPL to clean the area. After several with no response from Jet Photo, HPL removed the pallets as well as Jet Photo's dumpster from the back
yard.

30. Thereafter, Dervishian informed Jet Photo that the Nahabedians and the employees of Jet Photo could no longer utilize the back yard any longer for any use including

- 9-

parking and refuse storage.

31. In 1998, Jet Photo installed two metal posts into lot B near the southern boundary of the passageway.

32. From 1966 through the initiation of the instant action, it was common practice for Jet Photo as well as its employees, customers, couriers, service people, and 'salespeople to park their vehicles in the passageway.

33. Following Dervishian's refusal to allow Jet Photo to use the back yard, Kirk Nahabedian instructed Jet Photo employees to "jam" their vehicles into the passageway. Contrary to past practices, Jet Photo would park three or four automobiles in the passageway sometimes completely impeding Dervishian's access to the back yard.

34. Jet Photo and the liquor store are businesses located in a commercially-zoned area of Boston.

In order to consider the arguments of the parties, one necessarily begins with a recognition of the legal status of the passageway. With the

 

execution of the 1909 deed, Sanborn created the passageway as an expressly granted easement appurtenant to lot A (easement). See Mason v. Albert, 243 Mass. 433, 437 (1923).

The easement contained no words of limitation as to the purposes for which the owners of lot A could use the passageway and is thus properly characterized as a general right of way. See Tehan v. Security Nat'l Bank of Springfield , 340 Mass. 176, 182 (1959). Under such circumstances, the passageway "may be used for such purposes as are reasonably necessary to the full enjoyment of the premises to which the right of way is appurtenant." Id. Those purposes are not necessarily limited to the uses made of the dominant estate at the time of the creation of the

- 10-

easement and [the easement] is available for all reasonable uses to which the dominant estate may thereafter be devoted." Marden v. Mallard Decoy Club, Inc., 361 Mass. 105, 107 (1972).

Jet Photo focuses at length on the types of vehicles which have utilized the passageway to access lot A and the times and frequencies they have done so. I find the arguments of Jet Photo based upon such facts to be misdirected. The instant action is not one where plaintiffs are asserting a prescriptive easement over the passageway and are consequently limited to the nature and extent of the adverse use. Unless Jet Photo can prove an overburdening of the easement or a nuisance, it is irrelevant as to when, what, and how often different types of vehicles have used the passageway so long as the easement is not terminated or abandoned.

Claiming the easement in the 1909 deed was ambiguous, Jet Photo maintains it is relevant to consider the intent of Sanborn in "reserving rights" in the passageway. Consequently, Jet Photo looks to the conduct of the parties and their predecessors in interest since 1936.

I disagree with this theory of an alleged ambiguity in the 1909 deed. I find nothing unclear in the simple language employed by Sanborn when he deeded lot A to Dorr. There is not even an hint of an intention of Sanborn to "reserve" a right to park in the passageway or to limit the use of the passageway by Dorr or his successors in interest.

Gerard Melia testified as to his recollections of the use of the passageway beginning in 1943. At that time, Gerard Melia was six years of age. Based upon that testimony, Jet Photo asks this court to infer that the use of the passageway that occurred between 1943 and 1961 extended back as early as 1936 when Sydney W. Watson purchased lot B[10].

---

[10] Members of the Watson family or their related corporation continuously owned lot B from 1936 until the 1961 conveyance to John Melia.

- 11-

Even if I were to find the testimony of Gerard Melia to be persuasive as to the facts as early as 1943, I am not willing to draw the inferences requested by Jet Photo. Furthermore, the conduct of the parties in 1943, or even 1936, is not probative as to the intention of the parties in 1909. The conduct of the parties on lot B only goes to the claim of Jet Photo that the easement has been extinguished by adverse acts.

As for the counterclaim alleging Jet Photo has terminated or modified the easement by adverse use, I find and rule that Jet Photo has failed to meet its burden of proof. "[A]n easement in a way may be extinguished by adverse possession." Brennan v. DeCosta, 24 Mass. App. Ct. 968, 969 (1987) (rescript opinion). "To establish acquisition of a fee unencumbered by an easement in the [passageway, Jet Photo was] bound to prove occupation of the

land irreconcilable with its use as a way, openly, notoriously, adversely, and without interruption for more than twenty years." Id. Although not mentioned in Brennan, adverse possession also requires the showing of exclusivity. See Ryan v. Starvos, 348 Mass. 251, 262 (1964). The party claiming rights by adverse possession bears the burden of proving "all of the necessary elements of such possession." Mendonca v. Cities .Service Oil Co., 354 Mass. 323, 326 (1968).

Jet Photo has offered no evidence as to any element of adverse possession for the years 1909 to 1943. I do not find the casual observation of Gerard Melia between the years 1943 to 1955 to be adequate to prove each of the elements of adverse possession. From 1955 until 1959, Gerard Melia attended college outside of this Commonwealth. Between 1961 and 1965, when John Melia owned lot B, Gerard Melia testified as to the Melias' occasional use of the passageway for parking and also testified to moving vehicles from the passageway at the request of Sontag. Gerard Melia also testified that, during the entire time he observed the passageway, he never saw chains across the passageway preventing plaintiffs from exercising their rights over lot B.

- 12-

Additionally, since starting business on lot B in 1965, Jet Photo has moved vehicles frequently from the passageway at the request of plaintiffs. Furthermore, the facts are uncontroverted that for some periods of time, Jet Photo shared the use of the passageway with plaintiffs for access to the back yard to park and to deposit rubbish in a dumpster kept on that portion of lot A. Until the commencement of the instant action, there was no indication of any dispute between the parties as to the use of the passageway.

Consequently, I find and rule that Jet Photo has failed to prove exclusive and adverse use of the passageway for any continual twenty year period. Jet Photo, therefore, has not extinguished the easement held by plaintiffs.

With my ruling that the easement continues to exist as created in 1909, the issue remains as to what use Jet Photo may make of the passageway. It is a "long standing rule, in cases of easements by grant, that 'an owner [of the servient estate] may use the land for all purposes which are not inconsistent with the easement ... or which do not materially interfere with its use."' Perry v. Planning Bd. of Nantucket, 15 Mass. App. Ct. 144, 15 8 (1983), quoting Western Mass. Elec. Co. v. Sambo's of Mass. Inc., 8 Mass. App. Ct. 815, 818 (1979). See also Ampagoomian v. Atamian 323 Mass. 319, 322 (1948) (holding a servient estate owner may use the land for all purposes "not inconsistent" with the easement); Hodgkins v. Bianchini, 323 Mass. 169, 174 (1948) (phrasing the rule as an owner of a servient estate is entitled to use that land in a way consistent with the easement); Merry v. Priest, 276 Mass. 592, 600 (1931) (stating uses by the servient estate owner may not materially interfere with the use of the easement by the dominant estate owner).

Jet Photo cites Harrington v. Lamarque for the proposition that it is a question of fact whether the scope of deeded passageway rights includes an implied right to park within the easement area. 42 Mass. App. Ct. 371 (1997). Harrington is inapposite to the issue before me. In that case,

- 13-

the question was the right of the dominant estate owners to park on the casement. Id. at 372. Here, the servient estate owners are the ones claiming a right to park in the easement area.

Had the parties continued to coexist as they had from 1943 to 1996, it might be possible to determine that the occasional use of the passageway by

Jet Photo for parking was not inconsistent with the purpose of the passageway nor a material interference with the rights of plaintiffs. However, the deliberate actions by Jet Photo since 1996 have proven otherwise. I find no express or implied right of servient estate owners to park in a right of way in a manner which interferes with its use by the dominant estate owners. I, therefore, rule Jet Photo, its owners, employees, customers, servants, agents, and any other persons controlled by Jet Photo have no right to park in the passageway.

Plaintiffs seek a judgment from this court that they have acquired a prescriptive easement over an additional width of seven feet to the south of the southerly line of the passageway along Academy Hill Road, thus enlarging the mouth of the passageway to eighteen feet[11]. The burden of proof to establish a prescriptive easement is the same as for adverse possession, except a party claiming a prescriptive easement need not prove the element of exclusivity. See Brooks, Gil & Co. v. Landmark Props., 217 Ltd. Partnership, 23 Mass. App. Ct. 528, 530 (1987) (holding it is unnecessary to prove exclusive possession or assertion of legal right to ownership of property to establish prescriptive easement); Lemieux v. Rex Leather Finishing Corp., 7 Mass. App. Ct. 417, 423 (1979) (explaining the difference between the burden of proving the extinguishment by adverse use and the creation of a prescriptive easement); G. L. c. 187, s. 2 (setting forth the statutory requirements necessary for creating an easement by prescription). Plaintiffs contend that their

---

[11] Plaintiffs do not state how deep into lot B they claim a prescriptive right.



delivery trucks need to swing onto lot B beyond the width of the easement area to access the passageway. They further assert that past deliveries traversing the seven-foot area have given them a prescriptive easement over such an area.

Similar to Jet Photo, plaintiffs have failed to show that the sporadic deliveries of product at the rear of the lot A building have satisfied their burden of proof. Sontag only accepted liquor deliveries over the passageway once or twice a year. I place little weight on the testimony of Sontag regarding oil deliveries being made in the back yard. I credit the testimony of Jet Photo and its witnesses that they have only witnessed oil deliveries being made by a hose extended from a truck parked on Academy Hill Road to the lot A building. Even if rare oil deliveries did occur by driving over the passageway, the frequency of such deliveries coupled with the few liquor deliveries made over the passageway do not establish that such use was continuous for the required twenty-year period.

Sontag further testified he had no trash pick up during his years of operating the liquor store. It has only been since 1985 that Dervishian placed a dumpster in the back yard and increased product delivery to the liquor store through the back yard. Clearly, plaintiffs have not met the requirement of twenty years of adverse use of the seven-foot area.

The right of plaintiffs to use the passageway, however, is not unlimited. See Hodgkins, 323 Mass. at 173. Although plaintiffs may use the passageway for uses connected with lot A, uses not related to the dominant estate "would constitute an overload upon the easement." Brassard v. Flynn, 352 Mass. 185, 190 (1967). Consequently, plaintiffs shall not permit the passageway to be used by any persons under their control to access the back yard for any purposes



 

unrelated to the use of lot A[12].

Although plaintiffs have the right to maintain gates across the end of the passageway at the common boundary of lot A and lot B, I find that the gates must be modified. Plaintiffs have shown no prescriptive right to have those gates open onto lot B. Therefore, the gates must be redesigned or reconstructed to open into lot A. I make this ruling not under Jet Photo's trespass claim but in connection with a declaration as the scope of the parties' rights in the passageway.

Since 1966, Jet Photo has maintained a fence along the northerly border of lot B without interruption. Jet Photo has a right to keep a fence in the same location even if a portion of the fence or posts are situated within the eleven-foot width of the passageway. See Pappas v. Maxwell, 337 Mass. 552, 557 (1958) (holding where acts of the servient estate render the use of only part of a right of way impossible for a twenty-year period, the easement is extinguished by adverse possession only as to that part). To the extent that the existing fence along the northerly border of lot B may encroach into the passageway, Jet Photo has modified the easement held by plaintiffs to the extent necessary to maintain the fence its current location.

At the same time, Jet Photo is entitled to use that part of lot B unencumbered by the passageway in any way it chooses. As disruptive as it may be to its own activities, Jet Photo may maintain the posts it installed to the south of the passageway, provided those posts are totally beyond the eleven-foot width of the passageway measured from the actual northerly boundary of lot B.

Jet Photo raises the affirmative defense of laches against plaintiffs arguing they delayed unreasonably the commencement of the instant action. I disagree. Until 1996, there was

---

[12] I specifically have in mind the permission granted by Dervershian to third persons to store construction equipment on the back yard when not being used to work on lot A. This example of an impermissible use is not intended to be all-inclusive.



no reason for plaintiffs to bring an action in the absence of any dispute over the use of the passageway. Once the controversy arose, EPL timely commenced this litigation.

As another affirmative defense, Jet Photo claims that the easement should be extinguished under an estoppel theory. I do not find that Jet Photo ever changed its position in reliance upon conduct of plaintiffs.

Lastly, each party seeks damages concerning the alleged improper actions of the other party. Neither party has introduced any evidence of damages, and I thus award none.

The order issued by this court on the renewed motion for preliminary injunction dated July 22,1997, is hereby dissolved. A permanent injunction shall issue enjoining Jet Photo and those acting under them from parking vehicles in the passageway or otherwise impeding plaintiffs' use and enjoyment of the passageway.

Judgment to enter accordingly.

So ordered.

*Judge:* **Leon J. Lombardi**
Justice

SEE TEXT FOR LOT B.

End Of Decision