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Rozenberg v. Bacigalupo
N.Y.A.D. 2 Dept.,2005.

Supreme Court, Appellate Division, Second Department, New York.
Stephen **ROZENBERG**, et al., appellants-respondents,
v.
Robert **BACIGALUPO**, et al., respondents-appellants.
May 31, 2005.

Background: Property brought suit seeking declaration that they had an easement by prescription over property owned by the defendants, and to enjoin the defendants from interfering with that easement. The Supreme Court, Queens County, Leviss, J.H.O., refused declaratory relief, but permanently enjoined defendants from interfering with the plaintiffs' use of a portion of their property and directed them to keep that portion open for the purpose of right-of-way to the plaintiffs' property. Plaintiffs appealed, and defendants cross-appealed.

Holding: The Supreme Court, Appellate Division, held that trial court should have declared that plaintiffs had an easement by prescription over driveway strip in addition to enjoining defendants from interfering with easement.

Affirmed as modified.

West Headnotes

Declaratory Judgment 118A 385

118A Declaratory Judgment
118AIII Proceedings
118AIII(G) Judgment
118Ak385 k. Declaratory Relief. Most Cited Cases

Declaratory Judgment 118A 387

118A Declaratory Judgment
118AIII Proceedings
118AIII(G) Judgment
118Ak386 Executory or Coercive Relief
118Ak387 k. Injunction. Most Cited Cases

Where judicial hearing officer issued findings of fact and conclusions of law which set forth findings sufficient to establish plaintiffs' right to an easement by prescription over driveway strip, trial court should have declared that plaintiffs had an easement by prescription over driveway strip in addition to enjoining defendants from interfering with easement, as action was one for declaratory judgment in addition to injunction.

****670** Steven A. Swidler, P.C., New York, N.Y. (Lisa Solomon of counsel), for appellants-respondents.
Joseph A. Solow, Hauppauge, N.Y., for respondents-appellants.

ROBERT W. SCHMIDT, J.P., SONDRA MILLER, FRED T. SANTUCCI, and WILLIAM F. MASTRO, JJ.

***854** In an action pursuant to RPAPL article 15, inter alia, in effect, for a judgment declaring that the plaintiffs have an easement by prescription over property owned by the defendants, and to enjoin the defendants from interfering with that easement, the plaintiffs appeal from so much of a judgment of the Supreme Court, Queens County (Leviss, J.H.O.), dated June 25, 2004, as, after a nonjury trial, failed to declare that they have an easement by prescription over property owned by the defendants, and the defendants cross-appeal from so much of the same judgment as permanently enjoined them from interfering with the plaintiffs' use of a portion ****671** of their property and directed them to keep that portion open for the purpose of right-of-way to the plaintiffs' property.

ORDERED that the judgment is modified, on the law, by adding thereto a provision declaring that the plaintiffs have an easement by prescription over a portion of the subject driveway owned by the

defendants; as so modified, the judgment is affirmed insofar as appealed and cross-appealed from, with costs to the plaintiffs.

The plaintiffs commenced this action pursuant to RPAPL article 15, inter alia, in effect, for a judgment declaring that ***855** they have an easement by prescription over a portion of their driveway adjacent to their property and owned by the defendants (hereinafter the driveway strip). After a nonjury trial, the Judicial Hearing Officer issued his findings of fact and conclusions of law which set forth findings sufficient to establish the plaintiffs' right to an easement by prescription. The record supports the findings that the plaintiffs' use of the driveway strip was adverse, open and notorious, and continuous for the 10-year prescriptive period, and that the defendants failed to rebut the presumption of adverse use (*see Di Leo v. Pecksto Holding Corp.*, 304 N.Y. 505, 510-512, 109 N.E.2d 600; *Borruso v. Morreale*, 129 A.D.2d 604, 514 N.Y.S.2d 99). The judgment appealed from, however, failed to declare that the plaintiffs have an easement. Instead, the judgment merely enjoined the defendants from interfering with the plaintiffs' use of the driveway strip. Since this is, inter alia, a declaratory judgment action, the Supreme Court should have declared that the plaintiffs have an easement by prescription over the driveway strip in addition to enjoining the defendants (*see Lanza v. Wagner*, 11 N.Y.2d 317, 334, 229 N.Y.S.2d 380, 183 N.E.2d 670,*appeal dismissed*371 U.S. 74, 83 S.Ct. 177, 9 L.Ed.2d 163,*cert. denied*371 U.S. 901, 83 S.Ct. 205, 9 L.Ed.2d 164; *Di Leo v. Pecksto Holding Corp., supra; Asche v. Land and Bldg. Known as 64-29 232nd Street*, 12 A.D.3d 386, 784 N.Y.S.2d 577; *Avraham v. Lakeshore Yacht & Country Club*, 278 A.D.2d 842, 719 N.Y.S.2d 424; *Fulgenzi v. Rink*, 253 A.D.2d 846, 678 N.Y.S.2d 360; *Forsyth v. Clauss*, 242 A.D.2d 364, 661 N.Y.S.2d 1004; *Led Duke v. Sommer*, 205 A.D.2d 1009, 613 N.Y.S.2d 985; *Reed v. Piedimonte*, 138 A.D.2d 937, 526 N.Y.S.2d 273).

The defendants' remaining contentions are without merit.

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