

To be Argued by:  
STEVEN A. SWIDLER  
(Time Requested: 15 Minutes)

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**New York Supreme Court**  
**Appellate Division—Second Department**

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STEPHEN ROZENBERG and RUTH ROZENBERG,

**Docket No.:**  
**2004-00555**

*Plaintiffs-Appellants,*

– against –

ROBERT BACIGALUPO and MARIE D. BACIGALUPO,

*Defendants-Respondents.*

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**BRIEF FOR PLAINTIFFS-APPELLANTS**

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## **QUESTION PRESENTED**

Whether, in an action to declare the existence of a prescriptive easement under Article 15 of the New York Real Property Actions and Proceedings Law, a party seeking such declaration, in whose favor the court has found on the facts, is entitled to an express pronouncement in the final judgment explicitly declaring the existence of a prescriptive easement?

Plaintiffs-Appellants respectfully submit that the answer is yes.

## **PRELIMINARY STATEMENT**

Plaintiffs-Appellants brought this action seeking a declaration that they have a prescriptive easement over a portion of their neighbors' land that they have been using as a driveway. Although the court below properly found the facts in favor of Plaintiffs-Appellants, it failed to enter a judgment that, consistent with those findings, declared the existence of a prescriptive easement. By modifying the lower court's judgment to explicitly declare the existence of a prescriptive easement, this Court will bring judgment into conformity with RPAPL §1521 and take the disputed property from the legal limbo in which it currently stands, thereby preempting any further litigation concerning this issue.

## **STATEMENT OF FACTS**

Plaintiffs-Appellants, Stephen and Ruth Rozenberg ("the Rozenbergs") brought this action pursuant to Article 15 (§1501, *et. seq.*) of the Real Property Actions and Proceedings Law ("RPAPL") for a judgment declaring that they are vested with and entitled to a prescriptive easement over an approximately 5 foot wide parcel of land owned by Defendants-Respondents, Robert and Marie Bacigalupo ("the Bacigalupos"), which parcel immediately adjoins the Rozenbergs' land, and which the Rozenbergs have been using as their driveway. (R.22-25). The Rozenbergs commenced this action by service of a summons and complaint in or around March 1998. *Id.* The matter was tried before Judicial Hearing Officer

Sidney Leviss on December 19, 2002 and February 14, 2003.<sup>1</sup> (R.11, 32, 151).

JHO Leviss' findings of fact and conclusions of law are contained in a memorandum decision, dated May 30, 2003 (the "Decision"). (R.13-19). In the Decision, JHO Leviss explained that, in order to establish a prescriptive easement, a party must demonstrate open, notorious and continuous use of another's land for at least ten years, and that the burden is on the owner of the land to show that the use was by license. (R.18). JHO Leviss held that, in this case, "there was no evidence to dispute that the plaintiffs' use of the driveway was open and notorious and uninterrupted and there was insufficient proof offered which did not establish that such usage was by licenses [sic]." (R.18). In connection with a release which the Bacigalupos raised as an affirmative defense to the action, JHO Leviss stated: "The court finds the wording of the document to be ambiguous as it does not clearly state that plaintiffs are giving up their right to continued use of the five foot portion of the driveway owned by their neighbor and that they would no [sic] have given up such right if they had been specifically requested to give up such easement by prescription." (R.19). Finally, JHO Leviss directed that the Bacigalupos be "permanently enjoined from interfering with plaintiffs use of or [sic] defendants [sic]

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<sup>1</sup>In their answer, Bacigalupos interposed a counterclaim seeking damages for fraud. (R.28-29). However, they withdrew this claim after trial (R.13) and it is not at issue in this appeal.



five foot wide portion of the driveway between their respective properties and that the same shall be kept open for the purpose of right-of-way for parking and ingress and egress of vehicles and persons entering or alighting from their vehicles.” (R. 19).

In accordance with JHO Leviss’ direction to the Rozenbergs to “enter judgment,” (R.19), the Rozenbergs submitted a proposed judgment and order for signature. (R.20-21). This proposed judgment and order stated, in relevant part, that the Rozenbergs “are vested with and entitled to a prescriptive easement over an approximately 5 foot wide parcel of land owned by defendants Robert Bacigalupo and Marie D. Bacigalupo . . . ” and further described the parcel. (R.21). The proposed judgment and order also contained a provision permanently enjoining the Bacigalupos from interfering with the Rozenbergs’ use and enjoyment of the parcel.

Id.

In response to the Rozenbergs’ proposed judgement and order, the Bacigalupos submitted a counter-judgment. (R.11-12). This counter-judgment, which JHO Leviss signed (hereinafter, the “Judgment”), contained only a provision permanently enjoining the Bacigalupos from interfering with the Rozenbergs’ use of the disputed parcel. (R.12). The Judgment did not contain the word “easement,” nor did it contain any other language affirmatively stating the nature of the

Rozenbergs' interest in the parcel. (R.11-12). The Rozenbergs now appeal from the Judgment to the extent that it fails to contain a provision, consistent with the Decision, affirmatively stating that the Rozenbergs have a prescriptive easement in the parcel.

### ARGUMENT

#### **I. THE JUDGMENT MUST BE MODIFIED TO DECLARE THE NATURE OF THE INTEREST THAT THE PARTIES HOLD IN THE REAL PROPERTY IN ORDER TO BRING THE JUDGMENT INTO CONFORMITY WITH RPAPL §1521**

N. Y. Real Prop. Actions and Proceedings L. §1521(1) provides, in relevant part, that a final judgment in an action under Article 15:

shall declare the validity of any claim to any estate or interest established by any party to the action. The judgment shall also declare that any party whose claim to an estate or interest in the property has been adjudged invalid, and any person claiming under him, by title accruing after the filing of the judgment-roll, or of the notice of pendency of the action, as prescribed by law, be forever barred from asserting such claim to an estate or interest the invalidity of which is established in the action . . . .

The Decision recites that the Rozenbergs brought this action pursuant to RPAPL Article 15 “for a judgment declaring that they are vested with and entitled to a prescriptive easement . . . .” (R.13). Therefore, any judgment in this action must conform to the requirements of §1521(1).

Where a judgment is insufficient for failure to comply with §1521(1) and the record contains sufficient facts to support a declaration of the parties' rights in the real property at issue, the appellate court should modify the judgment to declare those rights. See Avraham v. Lakeshore Yacht and Country Club, 278 A.D.2d 842, 719 N.Y.S.2d 424 (4<sup>th</sup> Dep't 2000) (stating that, while court properly granted defendant's summary judgment motion, it erred in failing to declare parties' rights in disputed land; accordingly, court modified judgment by declaring that plaintiffs did not obtain title to property by adverse possession); Fulgenzi v. Rink, 253 A.D.2d 846, 678 N.Y.S.2d 360 (2d Dep't 1998) (modifying judgment by, *inter alia*, adding thereto a provision declaring that defendant was a vendee in possession of property); Arrington v. County of Monroe, 210 A.D.2d 909, 621 N.Y.S.2d 979 (4<sup>th</sup> Dep't 1994) (modifying judgment to declare that defendant did not acquire fee title to certain lands by virtue of conveyance; that plaintiffs acquired ownership of same lands by adverse possession, and that plaintiffs were fee title owners of certain other land and otherwise affirming judgment as so modified); Duke v. Sommer, 205 A.D.2d 1009, 613 N.Y.S.2d 985 (3d Dep't 1994) (reversing order dismissing complaint and declaring plaintiff's right to a prescriptive easement); Ilucci v. James H. Maloy, Inc., 199 A.D.2d 720, 606 N.Y.S.2d 59 (3d Dep't 1993) (modifying judgment to include a declaration in favor of defendant because Supreme Court

properly found that plaintiff did not establish ownership of property by adverse possession); Astwood v. Bachinsky, 186 A.D.2d 949, 589 N.Y.S.2d 622 (3d Dep't 1992) (modifying judgment by reversing so much of judgment as dismissed complaint and declaring that plaintiff was not entitled to implied easement or easement by necessity over defendant's land); Costello v. O'Toole, 149 A.D.2d 396, 539 N.Y.S.2d 501 (2d Dep't 1989) (since record "amply support[ed] trial court's determination that deed was valid, court modified judgment to declare deed's validity in addition to dismissing complaint); Pegalis v. Anderson, 111 A.D.2d 796, 490 N.Y.S.2d 544 (2d Dep't 1985) (modifying judgment dismissing complaint and vacating notice of pendency to declare parties' rights in subject property); see also Forsyth v. Clauss, 242 A.D.2d 364, 364-65, 661 N.Y.S.2d 1004, 1004 (2d Dep't 1997) (although decision contained no reference to §1521, court modified order to insert provision declaring that plaintiff had no easement over subject property, commenting that, "since the complaint sought a declaratory judgment, the Supreme Court should have directed entry of a declaration in favor of the defendants."). Since a declaration of a prescriptive easement in favor of the Rozenbergs was implicit in JHO Leviss' determination that "there was no evidence to dispute that the plaintiffs' use of the driveway was open[,] notorious and uninterrupted and there was insufficient proof offered . . . [to] establish that such

usage was by licenses,” this Court should modify the Judgment to declare that the Rozenbergs have a prescriptive easement over the parcel and, as so modified, affirm the judgment. See Riggs v. Kirschner, 187 A.D.2d 759, 760-61, 589 N.Y.S.2d 680, 682 (3d Dep’t 1992) (modifying order for sole purpose of explicitly making declaration in favor of defendants that was “implicit in [Supreme Court’s] decision”).<sup>2</sup>

**II. THIS COURT SHOULD EXERCISE ITS POWER TO CORRECT THE INCONSISTENCY BETWEEN THE DECISION AND THE JUDGMENT BY MODIFYING THE JUDGMENT TO ACCURATELY REFLECT THE DECISION**

Even absent the mandate of RPAPL §1521, a written order or judgment must conform strictly to the court’s decision, and, where there is an inconsistency between the order or judgment and the decision, the decision controls. E.g., Matwijczuk v. Matwijczuk, 290 A.D.2d 854, 855, 736 N.Y.S.2d 520, 521 (3d Dep’t 2002); Madison III Assocs. Limited Partnership v. Brock, 258 A.D.2d 355, 355, 685 N.Y.S.2d 239, 240 (1<sup>st</sup> Dep’t 1999); Pauk v. Pauk, 232 A.D.2d 386, 390-91, 648 N.Y.S.2d 621, 625 (2d Dep’t 1996); Green v. Morris, 156 A.D.2d 331,

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<sup>2</sup>Although the court below granted an injunction enjoining the Bacigalupos from interfering with the Rozenbergs’ use of the disputed parcel, such injunction is not the equivalent to a declaration of the parties’ rights in the property. Cf. Gold v. Berkowitz, 235 A.D.2d 455, 455, 652 N.Y.S.2d 992, 993 (2d Dep’t 1997) (stating that preliminary injunction was improperly granted because plaintiff’s likelihood of success on easement claim was uncertain).

331, 548 N.Y.S.2d 899, 900 (2d Dep't 1989), appeal denied, 75 N.Y.2d 705, 552 N.Y.S.2d 927, 552 N.E.2d 175 (1990); Rowlee v. Dietrich, 88 A.D.2d 751, 752, 451 N.Y.S.2d 467, 469 (4<sup>th</sup> Dep't 1982). Such an inconsistency may be corrected on appeal, e.g., Pauk v. Pauk, 232 A.D.2d at 391, 648 N.Y.S.2d at 625; Green v. Morris, 156 A.D.2d at 331, 548 N.Y.S.2d at 900; Edward V. v. Monroe County Attorney, 204 A.D.2d 1060, 1061, 614 N.Y.S.2d 348, 348 (4<sup>th</sup> Dep't 1994) and this Court may modify the Judgment to give it the effect patently intended. See Central Funding Co. v. Deglin, 81 A.D.2d 601, 437 N.Y.S.2d 719 (2d Dep't 1981) (where court's determination concerning delivery of satisfaction pieces was recited in decision but not order, appellate court modified order to give it effect patently intended); Perry v. Zarcone, 77 A.D.2d 881, 431 N.Y.S.2d 50 (2d Dep't), appeal dismissed, 52 N.Y.2d 701, and appeal dismissed, 52 N.Y.2d 785, 436 N.Y.S.2d 622, 417 N.E.2d 1010 (1980) (where Special Term's determination as to homestead exemption was recited in its decision but not its order, appellate court modified order to give it effect patently intended).

Simply put, a party is entitled to the fruits of a favorable factual finding set forth in a decision by having the law properly applied in a judgment or order. As the Court of Appeals explained in Outwater v. Moore:

When the trial court found the facts in favor of the defendant, he was entitled to the fruit of the finding by having the law properly applied, and such an adjudication made as would, by matter of record, estop the plaintiff from reopening the controversy. It, therefore, became the duty of the court, upon request of the defendant seasonably made, to direct such a judgment in his favor as the established facts required, so that there might be authentic, permanent and indisputable evidence of record as to his rights . . . . This the learned trial judge . . . refused to do, although a request in proper form was presented to him at the proper time. Fortunately, this error is corrigible on appeal without ordering a new trial, as it is the duty of the appellate court to declare the law and apply it to the facts already found, and thus protect the parties from the evil of further litigation.

124 N.Y. 66, 68-9, 26 N.E. 329, 330 (1891). Here, the court below made factual findings favorable to the Rozenbergs – *i.e.*, that the evidence established that the Rozenbergs’ use of the driveway was open, notorious and uninterrupted for the 10-year statutory period, and there was insufficient proof offered to establish that such usage was by licenses. (R.18). Under these circumstances, the Rozenbergs are entitled to the fruits of that favorable finding – a declaration of the existence of a prescriptive easement. See Reed v. Piedimonte, 138 A.D.2d 937, 938, 526 N.Y.S.2d 273, 274 (4<sup>th</sup> Dep’t), appeal denied, 72 N.Y.2d 803, 532 N.Y.S.2d 369, 528 N.E.2d 521 (1988) (where proof demonstrated that plaintiff acquired an easement by prescription well before date defendant purchased property, plaintiff was “entitled” to a judgment declaring that he had an easement and restraining

defendants from obstructing driveway or otherwise interfering with plaintiff's continuous use thereof).

Under circumstances such as are present here, an injunction prohibiting the current owner of the servient estate from interfering with an easement is ancillary to a declaration of the easement and serves merely as an enforcement mechanism as against the party subject to the injunction. E.g., Newman v. Nellis, 97 N.Y. 285, 291 (1884) (stating that plaintiff had an easement and court would enforce plaintiff's rights by injunction); Alleva v. Tornatore, 254 A.D.2d 525, 5 N.Y.S.2d 479 (1<sup>st</sup> Dep't 1938), aff'd, 279 N.Y. 770, 18 N.E.2d 860 (1939) (stating that plaintiff, who held easement by implication in driveway, was entitled to enforce easement, and affirming order that granted injunction in favor of plaintiff,); see also Cannon v. Sikora, 142 A.D.2d 662, 531 N.Y.S.2d 99 (2d Dep't 1988) (declaring easement and enjoining defendant from interfering with plaintiff's use of property); Borruso v. Morreale, 129 A.D.2d 604, 514 N.Y.S.2d 99 (2d Dep't 1987) (affirming judgment declaring prescriptive easement and enjoining defendants from interfering with it); Hubert v. Gelmart Indus., Inc., 119 A.D.2d 630, 500 N.Y.S.2d 785 (2d Dep't 1986) (affirming judgment declaring existence of prescriptive easement and enjoining defendant from obstructing portion of its property burdened by the easement); Polyard v. Norman, 60 A.D.2d 868, 401 N.Y.S.2d 868 (2d Dep't), appeal denied,



45 N.Y.2d 708 (1978) (affirming judgment declaring prescriptive easements, directing defendants to remove a fence, and enjoining defendants from interfering with plaintiff's rights to pass over easements); Grayson v. Steinberg, 57 A.D.2d 565, 393 N.Y.S.2d 584 (2d Dep't 1977) (affirming judgment declaring prescriptive easement and enjoining defendants from interfering therewith).

The difference between a prescriptive easement appurtenant, on the one hand, and a license or an easement in gross, on the other hand, underscores the need for a clear declaration of the parties' rights in the disputed parcel. An easement is a permanent interest in land, Millbrook Hunt, Inc. v. Smith, 249 A.D.2d 281, 282, 670 N.Y.S.2d 907, 908-09 (2d Dep't 1998), that passes with the transfer of the dominant estate so long as there is privity of estate and an intent to convey the easement. Fila v. Angiolillo, 88 A.D.2d 693, 693, 451 N.Y.S.2d 316, 318 (3d Dep't 1982). By contrast, a license does not imply an interest in land, but is a mere personal privilege to commit some act or series of acts on the land of another without possessing any estate therein. Millbrook Hunt v. Smith, 249 A.D.2d at 282, 670 N.Y.S.2d at 909; Simmons v. Abbondadolo, 184 A.D.2d 878, 879, 585 N.Y.S.2d 535, 535 (3d Dep't 1992). An easement in gross implies a right to use land owned by another, is distinct from the ownership of any lands or dominant tenement, and is not assignable or inheritable, but is personal to the grantee.

Saratoga State Waters Corp. v. Pratt, 227 N.Y. 429, 443, 125 N.E. 834, 839 (1920);  
Henry v. Malen, 263 A.D.2d 698, 703, 692 N.Y.S.2d 841, 846 (3d Dep't 1999);  
Pallone v. New York Tel. Co., 34 A.D.2d 1091, 1091, 312 N.Y.S.2d 660, 661 (4<sup>th</sup>  
Dep't 1970); Chain Locations of Amer. v. County of Westchester, 20 Misc.2d 411,  
414, 190 N.Y.S.2d 12, 15 (Sup. Ct. Westchester Co.), aff'd, 9 A.D.2d 936, 196  
N.Y.S.2d 573 (2d Dep't 1959), appeal denied, 7 N.Y.2d 710 (1960). Since both a  
license or easement in gross would support the issuance of an injunction, but neither  
interest is transferrable, as matters currently stand, any purchasers of the  
Rozenbergs' property face the danger that the Bacigalupos (or subsequent owners  
of the Bacigalupo property) will interfere with their use of the parcel, since the  
injunction in favor of the Rozenbergs is personal to them and does not pass with the  
land. Similarly, there is a risk that any subsequent purchasers of the Bacigalupo  
property could interfere with the Rozenbergs' use of the parcel, as the injunction  
against the Bacigalupos is personal to them and does not pass with their land.  
These possibilities present a real risk of future litigation over the parcel – precisely  
the result the Outwater court inveighed against more than a century ago.

## CONCLUSION

For all the foregoing reasons, Plaintiffs-Appellants respectfully request that this Court

- (1) modify the Judgment of the Hon. Sidney Leviss, J.H.O., filed and recorded on July 16, 2003, to declare that the Plaintiffs-Appellants Stephen Rozenberg and Ruth Rozenberg, owners of the property known and described as 182-19 80<sup>th</sup> Drive, Jamaica Estates, New York (Section 32, Block 7249, Lot 64 in the County of Queens) are vested with and entitled to a prescriptive easement over an approximately five-foot wide parcel of land owned by defendants, Robert Bacigalupo and Marie D. Bacigalupo, which parcel extends from the Bacigalupos' house and immediately adjoins the land owned by Plaintiffs-Appellants and has been used by Plaintiffs-Appellants as their driveway; defendants' property being known and described as 182-15 80<sup>th</sup> Drive, Jamaica Estates, New York (Section 32, Block 7249, Lot 66 in the County of Queens); and
- (2) as so modified, affirm the Judgment, with costs; and

(3) grant such other, further and different relief as may be just and proper.

Dated: August 23, 2004  
New York, New York

Respectfully Submitted,  
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**CERTIFICATE OF COMPLIANCE**  
**PURSUANT TO 22 NYCRR §670.10.3(f)**

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