SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

SNAPPER REALTY LLC,	:	
	:	Index Nos. 2869/03
Plaintiff,	:	and 350128/03
	:	
-against-	:	IAS Part 13
	:	Hon. James P. Dollard, JSC
DUANE READE and THE DOROTHY BASSON MARTIN TRUST,	:	
	:	
Defendants.	:	
DUANE READE and THE DOROTHY BASSON MARTIN TRUST,	:	
	:	
Counterclaim-Plaintiffs,	:	
	:	
-against-	:	
	:	
SNAPPER REALTY LLC and SUNOCO, INC.,	:	
	:	
Counterclaim-Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS-COUNTERCLAIMANTS DUANE READE AND THE MARTIN TRUST

Preliminary Statement

This memorandum of law is respectfully submitted in support of the motion for summary judgment of defendants-counter-claimants Duane Reade and The Dorothy Basson Martin Trust ("Martin Trust") on Snapper Realty LLC's complaint and their counterclaims. Duane Reade and the Martin Trust also seek to recover their reasonable attorney's fees and costs under 22 NYCRR § 130-1.1 on the ground that Snapper Realty's filing and pursuit of this action was without basis in fact or law. See

Amended Answer and Counterclaims, Prayer for Relief, accompanying affirmation of Al J. Daniel, Jr., Esq. dated June 4, 2004 ("Daniel Aff.") Ex. B.

This memorandum demonstrates that Snapper Realty cannot establish an easement of right of way or any other of its claims of right over or in property owned by the Martin Trust in Rockaway Park, Queens, which it leased to Duane Reade for the construction and operation of a drug store. Snapper Realty only acquired its alleged property adjacent to the Martin Trust in July 2002 and cannot satisfy the 10-year requirement for an easement based upon its own alleged use of the Martin Trust's property under the New York Real Property and Procedure Law § 311 ("RPAPL"). Snapper Realty cannot "tack" its alleged use since July 2002 onto the prior alleged use of its predecessor in interest because the predecessor's use of the Martin Trust property was with the permission of the Martin Trust and was not adverse.

This Court initially granted Snapper Realty's ex parte application for a temporary restraining order (the "TRO") on February 7, 2003, to prevent Duane Reade and the Martin Trust from interfering with Snapper Realty's access over the southeast corner of the Martin Trust's property.

On February 14, 2003, the Court vacated its TRO on the motion of Duane Reade and the Martin Trust. On April 21, 2003,

the Court denied Snapper Realty's application for a preliminary injunction.

Duane Reade completed construction of its new store and it opened for business on June 5, 2003. Completion of the construction and opening were delayed by Snapper Realty's conduct and cost Duane Reade approximately and caused the Martin Trust to lose from Duane Reade.

Summary judgment should be entered dismissing Snapper Realty's baseless claims with prejudice. Duane Reade and the Martin Trust are entitled to a declaratory judgment that Snapper Realty and counterclaim-defendant Sunoco Inc. (R & M) have no right, title, or interest in or over the Martin Trust's Lot 10, by way of easement or otherwise. Snapper Realty's unfounded actions caused substantial delay and injury to Duane Reade and the Martin Trust. They are entitled to recover damages, as well as their reasonable attorney's fees and costs under 22 NYCRR § 130-1.1 *et seq*.

STATEMENT

1. Course of Proceedings

Snapper Realty's complaint was filed on February 3, 2003, alleging that it has acquired an easement of right of way over the southeast corner of the Martin Trust's Lot 10 and sought to

enjoin Duane Reade from constructing its drug store on Lot 10 pursuant to Duane Reade's building permit.[1]

Duane Reade and the Martin Trust answered the complaint, denying Snapper Realty's claims, and asserted counterclaims against Snapper Realty and counterclaim-defendant Sunoco for a declaratory judgment that Snapper Realty and Sunoco have no interest in or over the Martin Trust's Lot 10 and seeking damages for trespass.[2] Snapper and Sunoco answered and denied the counterclaims. See Daniel Aff., Exs. A-C.

On Snapper Realty's application, this Court issued an ex parte Order to Show Cause dated February 7, 2003, including a temporary restraining order which prohibited Duane Reade and the Martin Trust from interfering with Snapper Realty's access over the adjacent southeast corner of the Martin Trust's Lot 10, on which Duane Reade had begun construction of its new store. Daniel Aff., Ex. E.

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[1] The complaint asserts four causes of action: (1) for a declaratory judgment that it has an easement of right of way by prescription, alleging that Snapper Realty can "tack" its alleged use of less than two years to the alleged use of its predecessor in interest; (2) for a declaratory judgment that it has an easement of necessity; (3) for compensatory and punitive damages on the ground that Duane Reade's blocking of Snapper's alleged right of way constitutes a nuisance; and (4) for injunctive relief preventing interference with Snapper's alleged right of way.

[2] Sunoco was named as a counterclaim-defendant because Snapper Realty conveyed its alleged property to Sunoco as security for advances made by Sunoco, apparently in connection with the gas station operated on Snapper Realty's premises. Daniel Aff., Ex. D.

On February 14, 2003, following a hearing, this Court granted Duane Reade's and the Martin Trust's motion to vacate its ex parte temporary restraining order of February 7, 2003. See Order dated April 21, 2003, Daniel Aff., Ex. E.

After the Court vacated its TRO on February 14, 2003, Duane Reade continued construction of its new store on the Martin Trust's Lot 10. The new store was substantially completed on June 27, 2003; it opened for business on or about June 5, 2003. Cuti Aff. ¶ 6.[3]

On April 21, 2003, this Court issued a written order denying Snapper Realty's motion for a preliminary injunction, after hearing oral argument on February 19, 2003. Daniel Aff., Ex. F.

2. Pertinent Facts

The Martin Trust holds fee title to property identified as Lot 10, Block 16190, at 116-02 Beach Channel Drive, Rockaway Park, Queens, New York ("Lot 10"), which fronts on the northern side of Beach Channel Drive at Beach 116th Street. Affidavit of Robert H. Martin dated June, 2004 ("Martin Aff.").

[3] The Queens County Commissioner of the NYC Department of Buildings authorized issuance of a temporary certificate of occupancy for Duane Reade's new store on August 21, 2003. Exhibit A to accompanying affidavit of Anthony J. Cuti dated September 4, 2003 ("Cuti Aff."). A temporary certificate of occupancy for Duane Reade's new store was issued on September 4, 2003.

The Martin Trust entered a Ground Lease Agreement for its Lot 10 with Duane Reade on March 30, 2001 ("Duane Reade Lease") for a term of thirty years, with an option for an additional ten year term, in order for Duane Reade to build a drug store on the premises (the "Duane Reade Lease"). Martin Aff. ¶7.

Duane Reade began construction of a new store on the Martin Trust's Lot 10 under the Duane Reade Lease on or about [early] December 2002. Cuti Aff. ¶3. This construction apparently prompted Snapper Realty to commence this action to attempt to delay or stop Duane Reade's construction project. See Daniel Aff. Ex. A.

Snapper Realty claims to own the adjacent property to the east of Lot 10, which also fronts on Beach Channel Drive, at 115-20 Beach Channel Drive, Rockaway Park, Queens, New York (identified as Lot 317, Block 16166) ("Snapper Realty's Property"). A gas station is operated on Snapper Realty's Property (Daniel Aff., Ex. H), though it is apparently operated by a different legal entity.

Snapper Realty claims that it purchased its Property in July 2000 "from WTG Service Center, Inc. ["WTG"), a corporation controlled by Walter T. Gorman ("Gorman")." Complaint ¶ 8, Daniel Aff., Ex. A. Snapper Realty produced a Sales Agreement dated May 11 2000 under which WTG Service Center, Inc. purportedly sold the property to Paul Cassuto, individually.

Daniel Aff., Ex. I. Cassuto is the principal of Snapper Realty. Snapper Realty did not produce any documentary evidence that Cassuto conveyed the property to Snapper Realty.

At the time Snapper Realty commenced this action on February 5, 2003, it had purportedly owned the Snapper Realty Property since July 2000. RPAPL § 311 requires adverse use for 10 years in order to establish an easement by prescription.

Snapper Realty alleges that it can "tack" the prior alleged use of the Martin Trust's Lot 10 with the alleged use of its predecessor in interest WTG Service Center, Inc. Complaint, Daniel Aff., Ex. A.

Snapper Realty's alleged predecessor in interest, WTG, is a corporation controlled by Gorman, as Snapper Realty admits. Complaint ¶ 8, Daniel Aff., Ex. A.

Gorman also controlled and was president of Vacheron Horizon Corp., which had used the Martin Trust's Lot 10 pursuant to a written lease agreement with the Martin Trust from April 1, 1994 for a term of 10 years through March 31, 2004. Martin Aff., Ex. A. This standard "Blumberg" form lease gave Gorman's Vacheron corporation the right to "use and occupy demises premises for any legal purpose excepting the use thereof as a Diner … and for no other purpose." Id., p. 1. Gorman's

Vacheron corporation agreed to surrender the premises to the Martin Trust upon expiration of the lease. Id. at ¶ 21.[4]

In November 2000, Gorman's Vacheron corporation entered a written Lease Termination Agreement with the Martin Trust under which it surrendered its lease for the Martin Trust's Lot 10 prior to its expiration. Martin Aff., Ex. D. Gorman signed the Lease Termination Agreement as president of his Vacheron Horizon Corp. Under the Lease Termination Agreement, Gorman's Vacheron corporation expressly warrants that the premises were being delivered back to the Martin Trust "free of any occupants, claims or liens …." Martin Aff., Ex. B. It also expressly acknowledges that the reason for terminating Gorman's Vacheron corporation lease prior to its expiration date was for the Martin Trust to "[l]ease the premises to Duane Reade." Id.

WTG, Snapper Realty's alleged predecessor in interest, was controlled by Gorman and whatever use it may have made of Lot 10 was pursuant to the lease of Gorman's Vacheron corporation with the Martin Trust and was with the permission of the Martin

[4] As explained in the Argument below, RPAPL § 531 prohibits a tenant from asserting any claims adverse to its landlord during the existence of its lease. Any adverse use of the property by the tenant after expiration of the lease, cannot ripen into an easement for ten years after the lease has expired. RPAPL § 531. Gorman expressly acknowledged that his use of Lot 10 was permissive, under the terms of his lease of Lot 10 from the Martin Trust, and expressly acknowledged that there were no adverse claims in the Lease Termination Agreement. See Myers v. Bartholomew, 91 N.Y.2d 630, 674 N.Y.S.2d (1998) (holding

Trust, not adverse to its interest. Snapper Realty cannot "tack" its claimed adverse use to the prior use of Gorman's companies, which was not adverse, but was pursuant to a lease with and the permission of the Martin Trust. Martin Aff., Ex. C.

Snapper Realty cannot establish an easement of necessity. Its Property is not landlocked; it has direct access to Beach Channel Drive in Rockaway Park, Queens, through existing curb cuts to the road along the entire width of its property and from a road along its eastern perimeter. The physical requirements for an easement of necessity do not exist.

Snapper Realty cannot establish its claim of private nuisance against Duane Reade or the Martin Trust. Duane Reade holds a lawful lease on Lot 10 and constructed and operates a drug store on this commercially-zone property, pursuant to lawful building permits issued by the NYC Department of Buildings. This cannot constitute a nuisance as to Snapper Realty. Duane Reade's use of Lot 10 is not causing any injury on or to plaintiff's property and is not interfering with plaintiff's inherent property rights.

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comparable RPAPL § 541 regarding claimed adverse use by cotenant cannot ripen into adverse possession for 20 years).

ARGUMENT

I. THE MARTIN TRUST IS OWNER IN FEE OF LOT 10 AND DUANE READE IS ITS LAWFUL TENANT.

The Martin Trust is the owner in fee of Lot 10 in Rockaway Park, Queens, and Duane Reade is the lawful tenant of the property under a written lease. Martin Aff. ¶ 3, Ex. O; Cuti Aff. ¶ 3. In fact, Snapper Realty admits that the Martin Trust owns the fee interest in Lot 10. Complaint § 35 and Cassuto Aff. ¶ 9, Daniel Aff., Exs. A and K.

The Martin Trust and Duane Reade seek a declaratory judgment under Article 15 of the New York Real Property and Procedure Act to the effect that the Martin Trust is the fee owner of Lot 10 and that Snapper Realty and Sunoco have not and cannot establish an easement of right of way over a portion of Lot 10 or any other rights in or over Lot 10. See First Amended Answer and Counterclaims (Daniel Aff., Ex. B). The Martin Trust and Duane Reade also seek summary judgment dismissing Snapper Realty's complaint on the same basis.

The Martin Trust is the fee owner of Lot 10. Martin Aff. ¶ 3, Ex. A (deed); Daniel Aff., Ex. K, ¶ 9. The exact description of Lot 10 is contained in the deed. Martin Aff., Ex. A. The Martin Trust and Duane Reade entered a Ground Lease Agreement for Lot 10 on March 30, 2001 for a term of 30 years, with an option for an additional term of 10 years, for the purpose of building a new retail drug store.

II. SNAPPER REALTY CANNOT ESTABLISH AN EASEMENT OVER LOT 10 BY PRESCRIPTION AND THE MARTIN TRUST AND DUANE READE ARE ENTITLED TO A DECLARATORY JUDGMENT THAT SNAPPER REALTY AND SUNOCO HAVE NO RIGHTS IN OR OVER LOT 10

Snapper Realty claims that it has an easement of right of way over the southeast corner of the Martin Trust's Lot 10 and asserts other legal theories for the same right of access. Complaint, Daniel Aff., Ex. A. Snapper Realty had only owned the adjacent property for 2 1/2 years at the time it commenced suit, far short of the 10 years adverse use required under RPAPL § 311. It cannot "tack" its adverse use to its predecessor in interest, because its predecessor was essentially a tenant of the Martin Trust's Lot 10 and thus could not claim adversely for 10 years after termination of that lease. RPAPL § 531.

Snapper Realty cannot establish any of its claims, as a matter of law, as explained below. For the same reasons, the Martin Trust and Duane Reade are entitled to a declaratory judgment that the Martin Trust is the owner in fee of Lot 10, to which Duane Reade holds and lease, and that Snapper Realty and Sunoco have no rights in or over Lot 10, by way of easement or otherwise.

A. Requirements for Easement By Prescription.

An appurtenant easement "is a right to use the land of another, enjoyed by a dominant estate over a servient estate, is not personal to the owner, and is classified as an incorporeal hereditament." 49 NY Jur.2d § 2 at 80 (2002) (footnote omitted); Strnad v. Brudnicki, 200 A.D.2d 735, 606 N.Y.S.2d 915 (2d Dep't 1994) (easement created by grant passes with land).

RPAPL §311 provides as follows:

> In an action to recover real property or the possession thereof, the person who establishes a legal title to the premises is presumed to have been possessed thereof within the time required by law; and the occupation of the premises by another person is deemed to have been under and in subordination to the legal title unless the premises have been held and possessed adversely to the legal title for ten years before the commencement of the action.

See Guariglia v. Blima Homes, Inc., 89 N.Y.2d 851, 652 N.Y.S.2d 731 (1996).

In order to establish an appurtenant easement, a user must "show use that is hostile and under a claim of right, actual, open and notorious, and continuous for the statutory period …," 1 Warren's Real Prop. § 8.02 at 58. Di Leo v. Pecksto Holding Corp., 304 N.Y. 505 (1952); Frumkin v. Chemtop, 251 A.D.2d 449, 674 N.Y.S.2d 409 (2d Dep't 1998) (no showing of hostile use; "use was permitted as a matter of willing accord and neighborly

accommodation").[5] Accord, Beretz v. Diehl, 302 A.D.2d 808, 755 N.Y.S.2d 122, 124-125 (3d Dep't 2003) (use by permission defeats easement by prescription); Allen v. Mastrianni, 2 A.D.3d 1023, 768 N.Y.S.2d 523, 24 (3d Dep't 2003) (where initial use by permission, no adverse use arises until owner made aware of assertion of hostile right).

Moreover, where the alleged use is in connection with a use by the general public and not inconsistent with the owner's rights, as is the case here, there is no presumption of adverse use. Pirman v. Confer, 273 N.Y. 357, 264-265 (1937) (no showing of easement).

Under normal circumstances, the minimum adverse used period required to establish an easement by prescription is ten years. RPAPL § 311. However, where the person claiming adversely was a tenant of the legal title owner, a claim of adverse possession or use cannot even begin to run until ten years after the end of the tenancy. RPAPL § 531.[6] Risi v. Interboro Industrial Parks, Inc., 99 A.D.2d 466, 470 N.Y.S.2d 174, 176 (2d Dep't 1984); see

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[5] The New York statutes concerning adverse possession and prescription have remained largely unchanged since the original Field Code of 1848, and early New York cases on these issues remain relevant. 1 Warren's Weed New York Real Property, "Adverse Possession" § 1.01 at 4 (4th ed. 2002) ("Warren's Real Prop.").

[6] This provision is relevant because Snapper Realty's predecessor in interest was a corporation controlled by Walter T. Gorman, who also controlled a corporation which was a lawful tenant of the Martin Trust's Lot 10 during the period of the prior alleged use.

Myers v. Bartholomew, 91 N.Y.2d 630, 674 N.Y.S.2d 259 (1998), aff'g 217 A.D.2d 654, 629 N.Y.S.2d 796 (2d Dep't 1995) (construing parallel provision in RPAPL § 541 to require exclusive possession by one co-tenant for 10 years before co-tenant can even begin to hold adversely, resulting in 20 year requirement for adverse possession).

Moreover, where the alleged use is in connection with a use by the general public and not inconsistent with the owner's rights, as is the case here, there is no presumption of adverse use. Pirman v. Confer, 273 N.Y. 357, 264-265 (1937) (no showing of easement); Aubuchon Realty Co. v. Cohen, 294 A.D.2d 738, 742 N.Y.S.2d 421 (3d Dep't 2002) (use in common by employees and customers insufficient to show adverse use); Northtown, Inc. v. Vivacqua, 272 A.D.2d 917, 708 N.Y.S.2d 221 (4th Dep't 2000). Snapper Realty's complaint essentially complains that the general public has used the alleged right of way to access the gas station on its premises (Complaint ¶¶ 17-18). This is insufficient to show adverse use. Id.

B. Snapper Realty's Own Alleged Use For 2 1/2 Years Cannot Satisfy the 10-Year Adverse Use Requirement in RPAPL § 311.

Snapper Realty claims to own real estate on which a retail gas station is operated at 115-20 Beach Channel Drive, Rockaway

Park, Queens. Complaint ¶ 5; Daniel Aff., Ex. A.[7] Snapper Realty's property is adjacent to the eastern property line of the Martin Trust's Lot 10. The southern border of Snapper Realty's property fronts on Beach Channel Drive, a public street in Rockaway Park, and the eastern border of Snapper Realty's property is part of an alley that leads directly into Beach Channel Drive. See photographs and maps, Daniel Aff., Exs. M, N.

Snapper Realty alleges that it acquired its property adjacent to the Martin Trust's Lot 10 "from WTG Service Center, Inc. ["WTG"), a corporation controlled by Walter Gorman ("Gorman")." Complaint ¶ 8, Daniel Aff., Ex. A. Snapper Realty contends that it can "tack" its alleged adverse use to the alleged adverse use of Gorman. Complaint §§ 18, 32.

Snapper Realty apparently acquired this adjacent property from WTG Service Center, Inc. by deed dated July 3, 2000, which was recorded on August 9, 2000. Daniel Aff., Ex. J(b).

Thus, at the time Snapper Realty commenced this action to establish its alleged easement, it had only owned its property for two and a half years, far short of the ten years of adverse

[7] The purchase agreement produced by Snapper Realty indicates that Paul Cassuto and Jon Wapnick acquired the property from WTG and O'Rourke Realty Inc. Daniel Aff., Ex. I. In fact, Sunoco appears to be the present owner of legal title to Snapper Realty's property under what appears to be a mortgage transaction, although Snapper Realty conveyed legal title to Sunoco. Daniel Aff., Ex. J(c).

use required to establish an easement by prescription, RPAPL § 311, even assuming it met all of the other requirements, which it cannot do.

C. The Prior Use of Lot 10 By Snapper Realty's Predecessor In Interest Was Not Adverse To The Martin Trust and Cannot Be "Tacked" Onto Snapper Realty's Alleged Adverse Use.

Snapper Realty's complaint acknowledges that its alleged use of Lot 10 for 2 1/2 years is insufficient to establish an easement. Complaint ¶¶ 14, 18, Daniel Ex. A. Thus, Snapper Realty seeks to "tack" its alleged adverse use to the alleged adverse use of its predecessors in interest. Id. Snapper Realty cannot meet the requirements for "tacking" because it has not shown that its predecessor's use was adverse to the Martin Trust. Further, its predecessor in interest's use of Lot 10, if any, was with permission pursuant to a written lease, which would preclude the predecessor from claiming any easement or interest in Lot 10 for ten years after expiration of the lease. RPAPL § 531. There is no competent evidence of adverse use by Snapper's predecessor in interest or that any such use, even when added to the alleged use by Snapper Realty, meets the statutory durational requirement.

"Tacking" is only permitted to meet the ten-year requirement in RPAPL § 311 where the predecessor in interest also meet all the requirements for establishing a prescriptive easement. "Use or possession by predecessors in title, also

meeting the requirements [for an easement by prescription], may be tacked on to [the plaintiff's] use to establish the statutory period …, as long as there is an 'unbroken chain of privity between the adverse possessors ….'" Rose Valley Joint Venture v. Appollo Plaza Associates, 178 A.D.2d 695, 576 N.Y.S.2d 943 (3d Dep't 1991) (no tacking permitted because predecessor in interest was using the property with consent of owner).

Here, where there is no "proffered proof that [the prior owner] ever made claim to the property at issue …," the plaintiff cannot "tack the alleged adverse use onto his claim of adverse possession …." Garrett v. Holcomb, 215 A.D.2d 884, 885, 627 N.Y.S.2d 113, 114 (3d Dep't 1995), citing Rose Valley, supra.

There is no competent evidence to support Snapper Realty's allegation of adverse use of the Martin Trust's Lot 10 by Gorman or notice by him to the Martin Trust of his alleged hostile claim; it has thus has failed to meet the requirements for an easement appurtenant. Tulley v. Bayfront North, Ltd., 286 A.D.2d 873, 730 N.Y.S.2d 603, 604 (2d Dep't 2001). In fact, the evidence shows the contrary, *i.e.*, that Gorman's use, if any, through his controlled corporations, was with permission, pursuant to a written lease, as explained below.[8]

[8] In support of its motion for a preliminary injunction, Snapper Realty did not submit an affidavit from Gorman himself. Instead, it submitted the affidavit of John Risitano, who

Gorman is or was "Chairman or Chief Executive Officer" and "Principal Executive Officer" of both WTG Service Center, Inc., Snapper Realty's alleged predecessor in interest, and Vacheron Horizon Corp., which held a lease for Lot 10 from the Martin Trust. See Daniel Aff., Ex. G.; Martin Aff., Ex. C.

Snapper Realty cannot "tack" its alleged adverse use to the prior use of Gorman (through his controlled corporation), for the additional reason that Gorman's use of Lot 10 was pursuant to a written lease with the Martin Trust, signed by Gorman for his controlled corporation. Martin Aff., Ex. C. See Rose Valley, supra. This lease was in effect from April 1, 1994 until it was expressly terminated in November 2002 in a written Lease Termination Agreement between the Martin Trust and Gorman (through his controlled corporation Vacheron Horizon Corp.); Gorman expressly represented in the Lease Termination Agreement that there were no adverse claims against the property. Martin Aff., Ex. D.[9]

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claimed that he had managed the gas station property since 1992, including when Gorman owned it. However, he merely observed that the southeast corner of Lot 10 was being used by the gas station during that time, which proves nothing as to whether Gorman's use was purportedly adverse to the Martin Trust. Moreover, any such use was in conjunction with the general public, which is insufficient to establish an easement.

[9] The law also recognizes an easement in gross, which is created "for the benefit of a business or individual, as opposed to real property owned by the business or individual …," is personal to the user, and does not pass with the land. Id., § 9 at 88-89.

Under RPAPL § 531, whatever use was made of Lot 10 by Gorman, it was made as tenant of the Martin Trust, and "the possession of the tenant is deemed the possession of the landlord until the expiration of ten years after the termination of the tenancy …." See Risi v. Interboro Industrial Parks, Inc., 99 A.D.2d 466, 470 N.Y.S.2d 174, 176 (2d Dep't 1984) (TRO denied, complaint dismissed); accord, Koursiaris v. Astoria North Development Inc., 143 A.D.2d 639, 532 N.Y.S.2d 916, 917-918 (2d Dep't 1988). Gorman could not have used Lot 10 adversely to the Martin Trust and Snapper cannot prove any prior adverse use upon which to tack.[10]

Further, a fee owner can also grant a license to use its property which is not an interest in the land, is not transferable or descendible, and is revocable at will by the owner. Id., § 3 at 82-83. Here, even apart from the fact of Gorman's Lease for Lot 10, his purported use is consistent with a license, rather than an easement.

[10] The three cases cited by Snapper's counsel at the hearing are readily distinguishable on their facts and/or the law. Both the Gorman and Duke cases are classic prescriptive easement cases where no issues involving tacking or landlord-tenant relations were involved. Gorman v. Hess, 2003 N.Y.App.Div. LEXIS 38 (3d Dep't Jan. 2, 2003); Duke v. Sommer, 205 A.D.2d 1009, 613 N.Y.S.2d 985 (3d Dep't 1994). Thus, they have no bearing on the critical and determinative issues presented here. In the third case, the trial court held that a landlord could establish an easement over its own tenant's garage leasehold in the building for the storage and removal of the building's garbage, which the landlord had been doing for 21 years of an even longer lease. Saxon Garage Corp. v. Regency East Apartment Corp., 193 Misc.2d 166, 748 N.Y.S.2d 231 (S.Ct. NY Co. 2002). That case cannot aid Snapper because RPAPL § 531 explicitly provides that a tenant cannot hold or use leased property adversely to its landlord ten years after termination of the lease, without exception. That statute had no application in Saxon Garage.

Thus, Gorman's use could not have been adverse the rights of his landlord, the Martin Trust, as a matter of law. Gorman held a lease on the property and could not begin to hold adversely to his landlord for ten years after expiration of the lease, thus requiring a total of 20 years of adverse use to establish an easement by prescription. RPAPL § 531. "Where the relation of landlord and tenant has been once established, the possession of the latter and that of his grantees and assignees is the possession of the landlord." Bedlow v. New York Floating Dry Dock Co., 112 N.Y. 263, 287-288 (1889); accord, Gallea v. Hess Realty Corp., 128 A.D.2d 274, 515 N.Y.S.2d 683 (4th Dep't 1987), aff'd, 71 N.Y.2d 999, 530 N.Y.S.2d 105 (1988); Meerhoff v. Rouse, 4 A.D.2d 740, 163 N.Y.S.2d 746 (4th Dep't 1957) (no tacking where "predecessors never asserted a claim of right to the disputed area").[11]

[11] At the hearing before the Court on February 14, 2003, Snapper's counsel raised a question regarding Gorman's use of two different corporations. Counsel for Duane Reade pointed out that neither Gorman nor his corporations could accomplish indirectly what they could not do directly, a well-settled principle that has long been recognized by the Court of Appeals and other courts. "The law will not permit that to be done by indirection which is unlawful directly. *Quando aliquid prohibetur ex directo prohibetur et per obliquium.* (Co. Lit. 223)." People v. The Hudson River Connecting RR. Co., 228 N.Y. 203, 225 (1920); accord, People v. Howland, 155 N.Y. 270, 280 (1898); Matter of Bensel, 68 Misc. 70, 84, 124 N.Y.S. 726 (S.Ct. Ulster Co. 1910).

Snapper Realty's principal claim of an easement by prescription was and is utterly frivolous, *i.e.*, without any basis in fact or law.

III. PLAINTIFF CANNOT ESTABLISH AN EASEMENT OF NECESSITY.

Snapper Realty's second claim asserts that it has an easement of necessity for ingress and egress over defendant's Lot 10. Complaint ¶¶ 31-38, Daniel Aff., Ex. A. Snapper Realty cannot satisfy either the factual or legal requirements for an easement of necessity.

In order to establish an easement of necessity, Snapper Realty must show prior unity of title between its property and Lot 10 and must show that its property is landlocked and that an easement is an absolute necessity for access to its property. Palmer v. Palmer, 150 N.Y. 139, 146-147 (1896) ("Where a person conveys to another a piece of land surrounded by lands of the grantor, the grantee and those claiming under him have a right of way by necessity through the lands of the grantor as an incident of the grant"); Wolfe v. Belzer, 184 A.D.2d 691, 692, 585 N.Y.S2d 98, 99 (2d Dep't 1992) (easement of necessity where common grantors conveyed parcels and parcel of party claiming easement of necessity "entirely surrounded by land from which it was severed"). There must be evidence of a prior unity of title between the properties and necessity, *i.e.*, "that at the time of severance an easement over defendants' property was absolutely

necessary in order to obtain access to plaintiff's land …." Astwood v. Bachinsky, 186 A.D.2d 949, 589 N.Y.S.2d 622, 623 (3d Dep't 1992).

Snapper Realty cannot satisfy any of these requirements. There is no allegation or evidence that Snapper Realty's alleged property and Lot 10 derived from a common grantor. Its property is not landlocked and it has ample and complete access to Beach Channel Drive, which is the southern border of its property, and to a common road on its eastern perimeter.

As the Second Department held in rejecting a claimed easement of necessity, "[a]bsolute necessity is the standard for a finding of an easement of necessity." Van Schaack v. Torsoe, 161 A.D.2d 701, 555 N.Y.S.2d 836, 838 (2d Dep't 1990). There, as here, "the record indicates that [plaintiff's] parcel extensively fronts at least one public road." Id.

It is "irrelevant" that construction necessary to obtain access "may be costly or inconvenient." Van Schaack, supra. Accord, Town of Pound Ridge v. Golenbock, 264 A.D.2d 773, 695 N.Y.S.2d 388, 389 (2d Dep't 1999)("necessity must exist in fact and not as a mere convenience"). Cf. Wolfe v. Belzer, supra (easement of necessity where common grantors and plaintiff's land completely surrounded by grantor estate); accord, Palmer v. Palmer, supra (easement of necessity where parties had common grantor and way necessary to reach interior family cemetery).

It is also irrelevant to a claim of easement by necessity that denial of an easement will depreciate the value of the property claiming an easement, where the strict requirements for an easement of necessity are not satisfied. Staples v. Cornwall, 114 A.D. 596, 598-599, 99 N.Y.S. 1009 (4th Dep't 1906) (use of walkway and bridge to river by guest of resort hotel found to be under revocable license; other means of access were available and depreciation in value by denial of easement was irrelevant).

Here, plaintiff has not alleged or offered any evidence of prior unity of title, *i.e.*, that its property and Lot 10 derived from a common grantor. Palmer v. Palmer, supra. Moreover, it has failed to show the absolute necessity of access required to establish such an easement.[12]

Contrary to Snapper's assertions, its property is not landlocked, or even significantly restricted. It has full and open access to the property by roads on at least two sides. The entire southern perimeter of its property fronts on Beach Channel Drive, where there are three curb cuts where vehicles can enter and exit, and a road passes along all or most of the

[12] In its preliminary injunction papers, Snapper Realty relied upon a single case on this issue, *i.e.*, Leonard v. Igoe, 178 Misc.2d 385, 678 N.Y.S.2d 842 (S. Ct. Albany Co. 1998), Ps. Memo. In Spt. 8. However, that case recognized that prior unity of title and absolute necessity of access are the hallmarks of an easement of necessity, which Snapper Realty cannot establish here.

eastern perimeter of plaintiff's property. Thus, access over defendants' Lot 10 is hardly a necessity. Plaintiff would undoubtedly prefer direct access from all points of the compass, but the law does not entitle it to such access over the property of its neighbors such as defendants under the circumstances presented here.

Photographs and maps show the ample access to Beach Channel Drive available to Snapper Realty and its customers. Daniel Aff., Exs. M, N. The photos show full access to the southern perimeter of its property for vehicles traveling west on Beach Channel Drive. Vehicles traveling east on Beach Channel Drive and those traveling north on Beach 116th Street can readily reach plaintiff's gas station by circling a block or two and entering plaintiff's station from Beach Channel Drive traveling west.

Snapper Realty cannot meet any of the essential requirements for an easement of necessity and never had any reasonable prospect of doing so.

IV. PLAINTIFF CANNOT ESTABLISH A CLAIM FOR NUISANCE.

Snapper Realty's third claim is for common law nuisance, based upon its alleged desire to have unimpeded access or the southeast corner of the Martin Trust's Lot 10. Complaint, Daniel Aff., Ex. A. Snapper Realty has failed to allege and

cannot establish the essential elements of an action for private nuisance.

In order to establish a cause of action for private nuisance, Snapper Realty must show: "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act …." Copart Industries Inc. v. Consolidated Edison Co., 41 N.Y.2d 564, 570, 394 N.Y.S.2d 169 (1977); accord, Futerfas v. Shultis, 209 A.D.2d 761, 618 N.Y.S.2D 127 (3d Dep't 1994).

Snapper Realty's complaint does not allege any harm to its inherent property rights, such as violation of zoning laws, or causing noxious fumes or chemicals to fall upon its property, causing damage there. Instead, Snapper Realty characterizes as a private nuisance defendants' lawful use of their property, completely within the confines of their Lot 10, and without causing any harmful injury on plaintiff's property. This does not satisfy the requirements for a cause of action for private nuisance.[13]

[13] Snapper Realty erroneously relied upon Copart Industries, supra, in its papers in support of a preliminary injunction. However, in Copart Industries, "noxious emissions" from defendant's nearby smokestacks were falling on new motor vehicles on plaintiff's land, where plaintiff operated a new car preparation business. A jury found that the defendant's "noxious emissions" were causing direct injury to the paint of

The Martin Trust and its tenant Duane Reade are not operating a chemical factory or comparable industrial plant which unlawfully emits or drains noxious chemicals upon plaintiff's land, causing injury to its property.

Instead, the Martin Trust leased the property to Duane Reade for it to build and operate a drug store on this commercially-zoned property, which both have a lawful right to do, and which does not in any way cause injury to or upon Snapper Realty's alleged property.

Duane Reade completed its drug store which opened for business on or around June 5 2003. The gas station on Snapper Realty's alleged property continues to do business, with full access to Beach Channel Drive along the southern perimeter of its property and the alley on its eastern perimeter which connects to Beach Channel Drive.

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vehicles on plaintiff's land, requiring many to be repainted at substantial cost and thus constituted a private nuisance. Nothing comparable is present here.

Plaintiff's reliance upon Little Joseph Realty, Inc. v. Town of Babylon, 41 N.Y.2d 738, 395 N.Y.S.2d 428 (1977) and Hitchcock v. Boyack, 277 A.D.2d 557, 715 N.Y.S.2d 108 (3d Dep't 2000), is similarly misplaced. There, the defendant's asphalt plant created "'great quantities of dust and soot'" which invaded the plaintiff's property, causing damage. Little Joseph Realty, 41 N.Y.2d at 740. Nothing remotely comparable exists here. In Hitchcock, the court held any nuisance claim was dependent upon a showing of an easement, but the complaint was dismissed for failure to join necessary landowners and the complaint was dismissed.

Snapper Realty's complaint does not allege and it cannot show that anything done by the Martin Trust or Duane Reade on Lot 10 in any way causes injury to or upon plaintiff's property.

Snapper Realty may consider itself inconvenienced by its inability and that of its customers to use property owned by the Martin Trust and leased by Duane Reade, but defendants' activities on their own property is entirely lawful and in no way interferes with Snapper Realty's use and enjoyment of its property.

The Martin Trust and Duane Reade simply exercised their rights to lawfully develop and use their property, at least until Snapper Realty commenced this suit. They are not doing anything that interferes with Snapper Realty's right to enjoy its property, as it sees fit, as long as that does not include unlawful trespass on the Martin Trust's Lot 10.

V. DUANE READE AND THE MARTIN TRUST ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR COUNTERCLAIMS

A. The Martin Trust and Duane Reade Are Entitled To A Declaratory Judgment Under RPAPL Article 15 That Snapper Realty and Sunoco Have No Right or Interest In Or Over Lot 10.

For the reasons set forth in Point II above, Snapper Realty cannot establish any of its claims and Duane Reade and the Martin Trust are entitled to summary judgment on their first counterclaim against Snapper Realty and Sunoco under RPAPL Article 15 to the effect that Snapper Realty and Sunoco have no

easement or any other rights in or over Lot 10. See Guarglia v. Blima Homes, Inc., 89 N.Y.2d 851, 652 N.Y.S.2d 731 (1996) (affirming summary judgment against party claiming adverse possession); Orsetti v. Orsetti, 775 N.Y.S.2d 369 (2d Dep't 2004) (summary judgment for legal title holder where plaintiff no triable issue of fact on adverse possession claim); Aubuchon Realty Co. v. Cohen, 742 N.Y.S.2d at 423 (summary judgment against claimant of easement where use in common with public).

The first counterclaim seeks a declaratory judgment that Snapper Realty has no interest in or right to use the Martin Trust's Lot 10, which Duane Reade possesses under a long-term lease, and a permanent injunction to prevent Snapper Realty and Sunoco, or others from crossing or interfering with the Martin Trust's and Duane Reade's possession and use of Lot 10. Amended Answer and Counterclaims, First Counterclaim ¶ 26, Daniel Aff. Ex. B.

B. The Martin Trust And Duane Reade Are Entitled To Summary Judgment On Their Second Counterclaim Against Snapper Realty For Trespass Over Lot 10.

The Martin Trust and Duane Reade's second counterclaim against Snapper Realty is for its trespass to their real property. Amended Answer and Counterclaims, Second Counterclaim, Daniel Aff., Ex. B. Snapper Realty alleges and admits that it (along with members of the general public) entered and passed over the southeastern corner of the Martin

Trust's Lot 10, for which Duane Reade holds a long term lease. Snapper Realty's entry over and upon Lot 10 was without authorization of either the Martin Trust or Duane Reade and constitutes a trespass to their real property.

Trespass to real property is established by showing "[a]ny unauthorized entry upon the land of another …." 104 NY Jur.2d, Trespass § 10 at 454 (1992). See, e.g., Rager v. McCloskey, 305 N.Y.2 75, 79 (1953) ("trespass may consist, not only in making an unauthorized entry upon private property, but in refusing to leave after permission to remain has been withdrawn"); Frumkin v. Chemtop, 251 A.D.2d 449, 674 N.Y.S.2d 409 (2d Dep't 1998) (summary judgment on counterclaim of trespass where prior use by plaintiff was by permission, negating easement).

The plaintiff in an action for trespass to real property may recover compensatory damages, even if nominal, punitive damages, and injunctive relief, where appropriate. Fareway Heights, Inc. v. Hillock, 300 A.D.2d 1023, 752 N.Y.S.2d 515 (4th Dep't 2002) (compensatory damages of $35,000 and punitive damages of $250,000 for deliberate trespass for commercial gain); Kerryville Properties, Inc. v. Buvis, 240 A.D.2d 898, 658 N.Y.S.2d 544, 545 (3d Dep't 1997) (compensatory damages of $25,000 for trespass, inter alia); Chlystun v. Kent, 185 A.D.2d 525, 586 N.Y.S.2d 410, 412 (3d Dep't 1992) (punitive damages for trespass "as a penalty to the trespasser and as a warning to

others where the alleged conduct shows malice, a flagrant interference with the plaintiff's right to possession or other aggravating circumstances").

Moreover, "even in the absence of any showing of actual damages, plaintiff [in a trespass action] is entitled to an award of nominal damages …." Marino v. Lorch, 2 Misc.3d 56, 774 N.Y.S.2d 254 (S.Ct. App. Term, 2d Dep't 2003).[14] Further, an award of nominal damages will support an award of punitive damages where the trespasser's "conduct amounted to a willful disregard of plaintiffs' rights." Ligo v. Gerould, 244 A.D.2d 852, 665 N.Y.S.2d 223, 224 (4th Dep't 1997) (Appellate Division reversed trial court and awarded $1 in nominal damages and $1,500 in punitive damages). Accord, Kronos, Inc. v. AVX Corp., 81 N.Y.2d 90, 595 N.y.S.2d 931, 934 (1993); Miller v. Distribution Systems of America, Inc., 175 Misc.2d 513, 670 N.Y.S.2d 668 (2d Dep't 1997) (nominal damages for trespass where defendant continued to deposit unsolicited advertising circulars on plaintiff's property after plaintiff gave repeated notices to quit).

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[14] The Restatement of the Law, Second, Torts § 158 describes liability for trespass as follows:

> One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally
>
> (a) enters land in the possession of the other, or causes a thing or a third person to do so ….

As fully explained in Points I and II above, Snapper Realty cannot establish an easement over Lot 10. Its admitted and demonstrated use of Lot 10 without consent constituted a trespass to the real property owned by the Martin Trust and leased by Duane Reade. Further, Snapper Realty asserted a claim of an easement over Lot 10, knowing that it had no factual or legal basis for the assertion, and deliberately delayed and interfered with the construction of Duane Reade's store on Lot 10. Thus, Snapper Realty is liable to them for compensatory damages in the amount of $1,000,000 and punitive damages of $2,000,000. See Cuti Aff. ¶ 32. Fareway Heights, Inc. v. Hillock, supra. Liability is clear as a matter of law, though a hearing or trial might be necessary to determine the exact amount of damages.

In addition, the Court should enter a permanent injunction against Snapper Realty enjoining it from trespassing on or over Lot 10 and from asserting any right to do so. Frumkin v. Chemtop, supra.

See River Valley Associates v. Consolidated Rail Corp., 182 A.D.2d 974, 581 N.Y.S.2d 935, 937 (3d Dep't 1992).

VI. DUANE READE IS ENTITLED TO RECOVER ITS ATTORNEY'S FEES AND EXPENSES UNDER 22 NYCRR § 130-1.1 BECAUSE SNAPPER REALTY'S CLAIMS WERE AND ARE FRIVOLOUS.

The Court should award Duane Reade and the Martin Trust their expenses, including reasonable attorney's fees under 22 NYCRR § 130-1.1 because Snapper Realty's action was and is frivolous. Plaintiff had no basis in fact or law for asserting an easement or any other rights in or over the Martin Trust's Lot 10, rendering this action frivolous within the meaning of 22 NYCRR § 130-1.1(c). In addition, Snapper Realty sought "to harass or maliciously injury" the Martin Trust and Duane Reade, which also renders Snapper Realty's action frivolous. 22 NYCRR § 130-1.1(c)(2).

The Rules of the Chief Administrator of the Courts, 22 NYCRR § 130-1.1 (the "Rule"), authorize the Court to "award to any party … in any civil action … before the court … costs in the form of reimbursement of actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct …." The Rules define "frivolous conduct" as follows:

> (c) [C]onduct is frivolous if:
>
> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
>
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
>
> (3) it asserts material factual statements that are false.

The Rule has been applied by the Court of Appeals, the Appellate Divisions, and the trial courts in a variety of circumstances to compensate parties who have been burdened by frivolous lawsuits. Bell v. State, 96 N.Y.2d 811, 727 N.Y.S.2d 377 (2001) (frivolous appeal in action on student loan); Matter of Ferraro v. Gordon, 1 A.D.3d 595, 768 N.Y.S.2d 483, 486 (2d Dep't 2003) (sanctions appropriate where action intended to harass, even if party had prima facie claims); Cinque v. Schieferstein, 292 A.D.2d 197, 738 214 (1st Dep't 2002) and 772 N.Y.S.2d 813 (1st Dep't 2004) (sanctions for bringing, continuing, and appeal from dismissal of frivolous claim); Vasquez v. Vasquez, 175 Misc.2d 847, 670 N.Y.S.2d 740 (Sup. Ct. Queens Co. 1998) (sanctions for bringing baseless personal injury action based on same allegations of assault and battery raised in parties' divorce action).

Snapper Realty could not claim an easement over Lot 10 based on its brief alleged ownership of the property adjacent to Lot 10. RPAPL § 511. It had no reasonable basis for asserting that it could "tack" is brief alleged use of Lot 10 to the alleged prior use of a corporation controlled by Gorman because Gorman, through another controlled corporation, held a lease from the Martin Trust for Lot 10. As explained in detail in Point --, above, Gorman and his corporations were using Lot 10 by permission and could not assert an easement over Lot 10.

Further, Gorman's corporation expressly stated in a Lease Termination Agreement that there were no adverse claims against the property.

In addition, Snapper Realty evidently commenced and continued this action in order to harass or maliciously injure the Martin Trust and Duane Reade, an objective in which Snapper Realty succeeded. This also renders the action frivolous and warrants sanctions. 22 NYCRR § 130.1-1(c)(2); Matter of Ferraro v. Gordon, 768 N.Y.S.2d at 486; Vasquez v. Vasquez, 175 Misc.2d at 853.

Snapper Realty obtained an ex parte temporary restraining order at the outset of this case, which prevented the Martin Trust and its tenant Duane Reade from the use of their property and delayed Duane Reade's then-ongoing construction of its new drug store on Lot 10. The TRO was soon vacated on motion of Duane Reade and the Martin Trust and the Court subsequently denied Snapper Realty's motion for a preliminary injunction.

Thus, Snapper Realty's claims were frivolous at the outset, remained so, and warrant an award of the expenses, including reasonable attorney's fees to Duane Reade and the Martin Trust. They seek reasonable attorney's fees and expenses, as set forth in the accompanying affirmation of their counsel, Mr. Daniel and attached exhibits.

CONCLUSION

For the foregoing reasons, the Court should enter summary judgment dismissing plaintiff's complaint with prejudice; should grant summary judgment on the counterclaims declaring that plaintiff and Sunoco have no interest in or over Lot 10; should award summary judgment of liability for trespass against plaintiff on the second counterclaim; should award Duane Reade and the Martin Trust their reasonable attorney's fees and costs under 22 NYCRR § 130-1.1. *et seq.*; and should grant such other relief as the Court deems appropriate under the circumstances.

Dated: New York, New York
June 4, 2004

Respectfully submitted,

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