

**Supreme Court, Appellate Division, Second Department, New York.**  
**RIVERMERE APARTMENTS, INC., Appellant-Respondent,**  
**v.**  
**STONELEIGH PARKWAY, INC., et al., Respondents (Action No. 1).**  
**Lake Avenue Owners, Inc., Respondent-Appellant,**  
**v.**  
**Eastbourne Apartments, Inc., et al., Respondents (Action No. 2).**  
**Sept. 11, 2000.**

Residential cooperative apartment brought an action for a judgment declaring that it had an easement by prescription for its residents to park in an area of a residential cooperative complex, and a second residential cooperative apartment brought a related action for a judgment declaring that it had the right to park on a portion of a road. The Supreme Court, Westchester County, Colabella, J., declared that the first cooperative apartment did not have a prescriptive easement, and that the residents of the second were precluded from parking along a portion of the road. The cooperative apartments appealed. The Supreme Court, Appellate Division, held that: (1) use of parking areas by general public made presumption of adverse use inapplicable, and (2) conclusion that parking along the road unreasonably impaired an express easement of egress was supported by the evidence.

Affirmed.

West Headnotes

[1] KeyCite Notes

141 Easements  
141I Creation, Existence, and Termination  
141k36 Evidence  
141k36(1) k. Presumptions and Burden of Proof. Most Cited Cases

Burden of proving all of the elements of a prescriptive easement is on the party asserting it.

[2] KeyCite Notes

141 Easements  
141I Creation, Existence, and Termination  
141k36 Evidence  
141k36(1) k. Presumptions and Burden of Proof. Most Cited Cases

If the party asserting the existence of a prescriptive easement demonstrates by clear and convincing evidence that the subject property was used openly, notoriously, and continuously for the statutory period, a presumption arises that the use was adverse and the burden shifts to the owner of the property to rebut the presumption by showing that the use was permissive.

[3] KeyCite Notes

141 Easements  
141I Creation, Existence, and Termination  
141k36 Evidence  
141k36(1) k. Presumptions and Burden of Proof. Most Cited Cases

Use of parking areas by the general public made the presumption of adverse use inapplicable, and thus, party asserting a prescriptive easement was required to prove that its use of the parking areas was adverse.

[4] KeyCite Notes

141 Easements  
141I Creation, Existence, and Termination  
141k36 Evidence  
141k36(3) k. Weight and Sufficiency. Most Cited Cases

Conclusion that parking along an avenue unreasonably impaired an express easement of egress over the avenue, thus warranting a declaration that a residential cooperative apartment's residents were precluded from parking along the avenue, was supported by the evidence.

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Bosworth, Gray & Fuller, Bronxville, N.Y. (David Otis Fuller, Jr., of counsel), for respondent Stoneleigh Parkway, Inc., in Action No. 1.

Hoey, King, Toker & Epstein, New York, N.Y. (Rhonda L. Epstein of counsel), for respondent Northgate Apartments, Inc., in Action Nos. 1 and 2.

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Schwarzfeld, Ganfer & Shore, LLP, New York, N.Y. (Steven L. Bloch of counsel), for respondent Rivermere Apartments, Inc., in Action No. 2.

SONDRA MILLER, J.P., WILLIAM D. FRIEDMANN, DANIEL F. LUCIANO and ROBERT W. SCHMIDT, JJ.

#### MEMORANDUM BY THE COURT.

\*701 In an action, inter alia, for a judgment declaring that the plaintiff in Action No. 1 has an easement by prescription for its residents to park in an area of a residential cooperative complex known as Alger Court, and a related action, inter alia, for a judgment declaring that the plaintiff in Action No. 2 has the right to park on a portion of a road known as Lake Avenue, the plaintiff in Action No. 1 appeals from stated \*702 portions of a judgment of the Supreme Court, Westchester County (Colabella, J.), entered February 23, 1999, which, after a nonjury trial, inter alia, declared that it does not have a prescriptive easement, and the plaintiff in Action No. 2 cross-appeals from stated portions of the same judgment which, after a nonjury trial, inter alia, declared that its residents were precluded from parking along a portion of a road known as Lake Avenue.

ORDERED that the judgment is affirmed, with one bill of costs payable by the appellant-respondent and the respondent-appellant to the respondents in Action Nos. 1 and 2.

The plaintiff in Action No. 1, Rivermere Apartments, Inc. (hereinafter Rivermere), is one of seven residential cooperative apartments within a complex known as Alger Court. Rivermere sought, inter alia, a judgment declaring that it had an easement by prescription for its residents to park on land owned by the other six cooperatives. The plaintiff in Action No. 2, Lake Avenue Owners, Inc. (hereinafter Lake Avenue Owners), also one of the seven cooperatives, sought, inter alia, a judgment declaring that its residents had the right to park on a portion of a road known as Lake Avenue.

[1] [2] The burden of proving all of the elements of a prescriptive easement is on the party asserting it. If the party demonstrates by clear and convincing evidence that the subject property was used openly, notoriously, and continuously for the statutory period, a presumption arises that the use was adverse and the burden shifts to the owner of the property to rebut the presumption by showing that the use was permissive (see, \*\*358 DiLeo v. Pecksto Holding Corp., 304 N.Y. 505, 512, 109 N.E.2d 600; Coverdale v. Zucker, 261 A.D.2d 429, 430, 690 N.Y.S.2d 134; Casey v. Bazan, 253 A.D.2d 838, 678 N.Y.S.2d 371).

[3] Here, the use of the subject parking areas by the general public made the presumption of adverse use inapplicable (see, Burcon Props. v. Dalto, 155 A.D.2d 501, 502, 547 N.Y.S.2d 362). Thus, Rivermere was required to prove that its use of the subject parking areas was adverse in order to be granted a prescriptive easement (see, Burcon Props. v. Dalto, supra; Susquehanna Realty Corp. v. Barth, 108 A.D.2d 909, 485 N.Y.S.2d 795). We agree with the trial court's finding that Rivermere failed to sustain its burden.

[4] The trial court's conclusion that parking along Lake Avenue unreasonably impaired an express easement of egress over Lake Avenue is supported by a fair interpretation of the evidence (see, Lewis v. Young, 92 N.Y.2d 443, 449, 682 N.Y.S.2d 657, 705 N.E.2d 649; Universal Leasing Servs. v. Flushing Hae Kwan Rest., 169 A.D.2d 829, 830, 565 N.Y.S.2d 199; see also, Nicastro v. Park, 113 A.D.2d 129, 495 N.Y.S.2d 184). Thus, we will not disturb the trial court's declaration that the residents of Lake Avenue Owners are precluded from parking along Lake Avenue.

\*703 In light of the foregoing, we need not reach Rivermere's remaining contentions.

N.Y.A.D. 2 Dept., 2000.

Rivermere Apartments, Inc. v. Stoneleigh Parkway, Inc.

275 A.D.2d 701, 713 N.Y.S.2d 356, 2000 N.Y. Slip Op. 07738

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