# *Rivermere Apts., Inc. v. Stoneleigh Parkway, Inc.*

Supreme Court of New York, Appellate Division, Second Department

June *2*, *2000*, Argued ; September 11, *2000*, Decided

1999-03717

**Reporter**

275 A.D.2d 701; 713 N.Y.S.2d 356; 2000 N.Y. App. Div. LEXIS 9152

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*.)

**Prior History:** **[***1]** 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 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.

## Core Terms

cooperatives, residents, prescriptive easement, judgment declaring, parking area, inter alia, Apartments, easement, parking

## Case Summary

### Procedural Posture

Plaintiffs, two apartment complexes, each respectively appealed from portions of a judgment of the Supreme Court, Westchester County (New York) which denied with respect to one plaintiff that it did not have a prescriptive easement over a defendant's property, and with respect to the second plaintiff that its residents were precluded from parking along a portion of defendant's road.

### Overview

Plaintiffs, two apartment complexes, each respectively claimed that their residents could park on a defendant's property. The first plaintiff claimed the right by prescriptive easement. The court affirmed the trial court's denial of the parking rights. For the first plaintiff's claims, use of the subject parking areas by the general

public made the presumption of adverse use inapplicable. The first plaintiff was required to prove, and failed to prove, that its use of the subject parking areas was adverse in order to be granted a prescriptive easement. The evidence supported the trial court's conclusion that the second plaintiff's residents were precluded from parking on defendant's road, as parking there unreasonably impaired an express easement of egress over that road.

**Outcome**

The judgment was affirmed. Use of the subject parking areas by the general public made the presumption of adverse use inapplicable. Thus, the first plaintiff was required to prove, and did not prove, that its use of the subject parking areas was adverse in order to be granted a prescriptive easement. Allowing the second plaintiff's residents to park on defendant's road unreasonably impaired an express easement of egress.

## LexisNexis® Headnotes

Evidence > ... > Presumptions > Exceptions > General Overview

Real Property Law > ... > Limited Use Rights > Easements > General Overview

Real Property Law > ... > Easements > Easement Creation > Easement by Prescription

***HN1*** 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.

**Counsel:** Terrence J. Dwyer, Bronxville, N.Y. (Mark S. Jordan of counsel), for appellant-respondent.

Cuddy & Feder & Worby, LLP, White Plains, N.Y. (Joshua E. Kimerling of counsel), for respondent Lake Avenue Owners, Inc., in Action No. 1 and respondent-appellant in Action No. ***2***.

Bosworth, Gray & Fuller, Bronxville, **[***2]** 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***.

Timothy G. Griffin, Bronxville, N.Y., for respondent Eastbourne Apartments, Inc., in Action Nos. 1 and ***2***.

Anderson & Rottenberg, P.C., New York, N.Y. (Steven S. Anderson and Jill Fradin Rhodes of counsel), for respondent Southgate Apartments, Inc., in Action Nos. 1 and ***2***.

Ballon, Stoll, Bader & Nadler, P.C., New York, N.Y. (Richard Turyn and Stephen P. Long of counsel), for respondent

Westbourne Apartments, Inc., in Action No. 1.

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

**Judges:** S. Miller, J. P., Friedmann, Luciano and Schmidt, JJ., concur.

## Opinion

**[*702]** **[**357]** 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 **[***3]** 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.

***HN1*** 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,* *Di Leo v Pecksto Holding* **[**358]** *Corp., 304 NY 505, 512*; *Coverdale v Zucker,* 261 AD2d 429, 430; *Casey v Bazan, 253 AD2d 838*). **[***4]**

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 AD2d 501, 502)*. 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 AD2d 909*). We agree with the trial court's finding that Rivermere failed to sustain its burden.

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 NY2d 443, 449*; *Universal Leasing Servs. v Flushing Hae Kwan Rest.,* 169 AD2d 829, 830; *see also,* *Nicastro v Park, 113 AD2d 129*). 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.

S. Miller, J. P., Friedmann, Luciano and Schmidt, **[*** 5]** JJ., concur.