# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Cases** **Page**

**Statutes** **Page**

## COUNTERSTATEMENT OF QUESTIONS PRESENTED ON THE CROSS-APPEAL

1. Whether, in an action for a prescriptive easement, the presumption of hostility arising from the claimant's open, notorious, continuous and uninterrupted use of the servient tenement for the prescriptive period remains where there is no evidence of a neighborly or friendly relationship between the claimants and the servient owner's predecessor in title that could support the owners' claim that the claimants' use of the property was permissive because it resulted from neighborly accommodation.

Plaintiffs-Appellants-Respondents respectfully submit that the answer is yes.

2. Where a purported written waiver contains specific limiting language, should it be narrowly construed consistent with the specific language, notwithstanding the inclusion of general language which may call for a broad interpretation of the document?

Plaintiffs-Appellants-Respondents respectfully submit that the answer is yes.

3. Does the inclusion of both general and specific language in a purported release make the document ambiguous, permitting the court to consider extrinsic evidence of intent in construing the document?

Plaintiffs-Appellants-Respondents respectfully submit that the answer is yes.

## PRELIMINARY STATEMENT

Try as they might, Defendants-Respondents-Appellants, Robert and Marie Bacigalupo, cannot defeat the prescriptive easement claim of Plaintiffs-Appellants-Respondents, Ruth and Stephen Rozenberg, by making things more than they are. They cannot prevail by converting their predecessor-in-title's benign neglect towards the Rozenbergs' open, uninterrupted and notorious use of a five-foot strip of their property for more than ten years into "neighborly accommodation." They cannot prevail on the basis that a document signed by the Rozenbergs—which is, at best ambiguous—constitutes a waiver or release of any claims based on the Rozenbergs' use (as opposed to ownership) of any of their property. And they certainly cannot prevail on the Rozenbergs' appeal seeking a modification of the judgment in their favor, to explicitly declare a prescriptive easement, by completely ignoring the arguments the Rozenbergs raised on their appeal. Because the court below properly found that the Rozenbergs established all of the elements of their prescriptive easement claim, the judgment appealed from should be affirmed, as modified to explicitly declare the existence of a prescriptive easement.

## COUNTERSTATEMENT OF FACTS RELEVANT TO THE CROSS-APPEAL

### A. The Rozenbergs' Use of the Driveway

Plaintiffs-Appellants-Respondents, Ruth and Stephen Rozenberg, live in and are owners of a home located in Jamaica Estates, Queens County, known as 182-19 80th Drive. (R. 22) (the "Rozenberg house"). They purchased and moved into their home in February, 1986. (R. 278-279). At that time, Isabelle Korik owned the adjacent home at 182-15 80th Drive (the "Bacigalupo house"). (R. 311-312). Defendants-Respondents-Appellants, Robert and Marie Bacigalupo, purchased the Bacigalupo house from Mrs. Korik on January 16, 1998 and have lived there continuously ever since. (R. 76).

The Rozenberg house and the Bacigalupo house are separated by an unpartitioned open concrete driveway approximately 15 feet wide. (R. 54-55, 286, 300). Surveys show that the dividing property line or boundary line separating the 2 houses extends straight through the driveway from the street to the rear of both properties. (R. 280-281, 286). The surveys further show, and the parties have stipulated, that an approximately 5 foot wide strip of the driveway extending from the Bacigalupo house is on the Bacigalupos' side of the property line and an approximately 10 foot wide strip of the driveway extending from the Rozenbergs'

house is on the Rozenberg side of the property line. (R. 54-55, 280-281, 286). From 1986 (when the Rozenbergs moved in) until the time of trial, there was never any marker or other visible delineation indicating the location of the boundary line between the two properties. (R. 55). Indeed, there is nothing on the driveway distinguishing the Rozenbergs' side of the driveway from the Bacigalupos' side of the driveway. (R. 232).

A curb cut, approximately 9 feet long, allows a car to enter from the street onto the driveway between the Rozenberg house and the Bacigalupo house. (R.50). The curb cut, which was present when the Rozenbergs purchased their property in 1986, cuts through the curb of both properties. (R. 50-51). The Rozenbergs have a garage in the rear of their property accessible (by car) only through the driveway. (R. 59, 281).

Since 1986, the Rozenbergs have regularly parked their cars in the driveway without any distinction or regard to the location of the property line. (R. 58-60, 231, 233). During that time, the Rozenbergs have also used the driveway to erect a Sukkah; as an open space for their children to play; for block parties; and for barbecuing and socializing. (R. 69-70). In using the driveway for these additional purposes, the Rozenbergs never restricted themselves to that portion of the driveway that is on their side of the property line. (R. 70).

Mrs. Korik was aware that the Rozenbergs regularly used the entire driveway beginning in 1986. (R. 311-312). The Rozenbergs never discussed their use of the driveway with Mrs. Korik. (R. 61, 150-151, 311-312). The Rozenbergs never asked for, and Mrs. Korik never gave, permission to use the portion of the driveway that fell on her property (which is now owned by the Bacigalupos). (R. 311- 312, 68).

In late 1986, the Rozenbergs reconstructed the entire driveway, including the part owned then owned by Mrs. Korik. (R. 61-62, 66, 282). The reconstruction work, which lasted for two weeks, included tearing up the entire driveway and laying new cement. (R. 61, 65). The Rozenbergs never discussed the construction work with Mrs. Korik, nor did they ask her for permission to have the work done. (R. 63, 312). During the two weeks of construction work, Mrs. Korik never asked the Rozenbergs about the work. (R. 65). The Rozenbergs paid the entire cost of the reconstruction work themselves. (R. 66, 282).

The Rozenbergs had "no relationship" with Mrs. Korik. (R. 57, 154). Ruth Rozenberg spoke to Mrs. Korik two or three times between 1986 and 1998. (R. 145). The Rozenbergs never socialized with Mrs. Korik, nor did they ever exchange telephone calls with her until the day before her sale to the Bacigalupos was to close. (R. 57-58, 235, 236).

The Rozenbergs' uninterrupted and undisturbed use of the driveway continued from 1986 until early March 1998, when Ruth Rozenberg received a handwritten note affixed to her door from Marie Bacigalupo. (R. 78, 80-81, 284). The note, dated March 12, 1998, indicated that the Bacigalupos intended to construct a fence bisecting the driveway and asked the Rozenbergs to remove their cars so that the fence could be installed. (R. 284). Mrs. Rozenberg was shocked, confused and angry. (R.79). Before receiving this note, the Rozenbergs had no communications with the Bacigalupos regarding their use of the driveway or the erection of a fence, and no one, including the Bacigalupos, ever gave the Rozenbergs permission to park their cars in the driveway. (R. 68, 78-79).

The defendants called no witnesses to refute the Rozenbergs' testimony and offered no evidence controverting the Rozenbergs' open, uninterrupted and continuous use of the driveway from February, 1986 until March, 1998. Indeed, Mr. Bacigalupo admitted that he had no knowledge concerning how the Rozenbergs used the driveway before December 1997, when he first looked at the property. (R. 194).

**B. The January 15, 1998 Document**

The Korik to Bacigalupo sale closed on January 16, 1998. (R. 76). At approximately 4:00 p.m. on January 15, 1998—the day before the scheduled

closing—Stephen Rozenberg received a phone call at work from Mrs. Korik. (R.235). This was the first time that Mrs. Korik had ever called Dr. Rozenberg. (R. 235, 236). Mrs. Korik asked Dr. Rozenberg if he would speak with her lawyer regarding a paper that needed to be signed in order to allow the sale of her house to close the next day at noon. (R. 236).

Within a few minutes of Mrs. Korik's call, Dr. Rozenberg spoke to Mrs. Korik's lawyer, Mr. Kiernan. (R. 237). Kiernan told Dr. Rozenberg that the title company "was concerned that I would say I owned that piece of property that was in my driveway that belonged to Mrs. Korik and would I please sign a document saying I did not own that property." (R. 237). At 4:22 p.m., Kiernan faxed a draft document for Dr. Rozenberg's signature. This document states, in relevant part: "We have read the attached deed dated June 12, 1992 from Leonid Korik to Isabella Korik. We certify that we have no claim to any portion of the property described in said deed." (R. 309). Dr. Rozenberg attempted to discuss this document with his attorney, but his attorney was not available to give him legal advice at that time. (R. 238).

Before he received Mrs. Korik's phone call late in the afternoon on January 15, 1998, Dr. Rozenberg was unaware of any title problem with the purchasers of Mrs. Korik's house, and nobody had discussed with him any problems concerning

the use of the driveway. (R. 240). Furthermore, neither Mrs. Korik nor her attorney used the word "easement" during their conversations with Dr. Korik on January 15, 1998, nor did the words "rights" or "use of driveway" come up in those conversations; by contrast, the word "ownership" came up repeatedly. (R. 245, 246, 269). On January 15, 1998, Dr. Rozenberg did not have any understanding as to what the term "easement" meant, and had never heard that term. (R. 245).

After Dr. Rozenberg's unsuccessful attempt to discuss the draft document with his attorney, he had a number of telephone conversations with Kiernan over the course of the evening of January 15. (R. 240-241). Dr. Rozenberg testified: "Kiernan reiterated that this could not possibly hurt me, that I was simply stating that I don't own it, which I agreed that I did not own it, and that by signing this paper I am simply affirming that I don't own that five-foot strip or approximately five-foot strip." (R. 242). Throughout the discussions between Kiernan and Dr. Rozenberg, there was never any mention that the Rozenbergs would not be able to use the driveway as they had in the past. (R. 247). In fact, there was no discussion at all concerning the Rozenbergs' use of the driveway. (R. 270).

Dr. Rozenberg, without the benefit of counsel, proposed a change to the initial draft he received from Kiernan. (R. 242). Dr. Rozenberg asked Kiernan to add, at the end of the document, the phrase "with the understanding that our deed

and survey for our property do not include any portion of the property described in Mrs. Korik's deed." (R. 244). After their phone conversation, Kiernan faxed to Dr. Rozenberg the final draft of the January 15th document, adding the clause Dr. Rozenberg had requested. (R. 247-248). The entire text of the document reads as follows:

> "We are the owners of the property adjacent to the east of the premises now owned by Isabella Korik and known as 182-15 80th Drive, Jamaica Estates, New York.
>
> We have read the attached deed dated June 12, 1992 from Leonid Korik to Isabella Korik. We have no claim to any portion of the property described in said deed with the understanding that our deed and survey for our property do not include any portion of the property described in Ms. Korik's deed."

(R. 301). Dr. Rozenberg would not have signed any document had he been told that he would be giving up any rights to use the driveway to park his cars, or to limit his rights to park his cars. (R. 272-273).

The deed referred to in the January 15th document references a map filed in 1920, and includes a metes and bounds description, the property address and a block and lot number. (R. 285). The deed does not contain any reference to the common driveway or to any existing or potential easements, encumbrances or other rights of third parties. (R. 285).

### C. Procedural History of the Instant Action

In March 1998, 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 that portion of the driveway that is on the Bacigalupos' land. (R.22-25). The Rozenbergs' verified complaint (R. 22-25) does not contain a cause of action seeking an easement by necessity. In its May 30, 2003 memorandum decision (the "Decision"), the court below (Sidney Leviss, JHO) made conclusions of law only with respect to whether the Rozenbergs had established the elements of their claim seeking a prescriptive easement; the phrase "easement by necessity" does not appear in the Decision. (R. 13-19).

In its Decision, the court below 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). The court below 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). The court below further found the wording of the January 15, 1998 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). On June 25, 2003, the court below signed a judgment (the "Judgment"), entered on July 16, 2003, permanently enjoining the Bacigalupos from interfering with the Rozenbergs' use of that portion of the driveway that is on the Bacigalupos' property; the Judgment did not, however, affirmatively declare the nature of the Rozenbergs' interest in the Bacigalupos' property that served as the basis for the injunction. (R. 12).

## ARGUMENT

### I. THE BACIGALUPOS FAILED TO REBUT THE PRESUMPTION OF HOSTILITY ARISING FROM THE ROZENBERGS' OPEN, NOTORIOUS, CONTINUOUS AND UNINTERRUPTED USE OF THE PROPERTY FOR THE PRESCRIPTIVE PERIOD

An open, notorious, uninterrupted and undisputed use of another's land is presumed to be adverse under a claim of right and casts the burden on the owner of the servient tenement to show that the use was by license. E.g., Di Leo v. Pecksto Holding Corp., 304 N.Y. 505, 512, 109 N.E.2d 600, 603 (1952); Cannon v. Sikora, 142 A.D.2d 662, 662-63, 531 N.Y.S.2d 99, 99 (2d Dep't 1988), appeal denied, 74 N.Y.2d 615, 549 N.Y.S.2d 960, 549 N.E.2d 151 (1989). The Bacigalupos do not challenge the finding

of the court below that the Rozenbergs' use of the driveway was open, notorious and uninterrupted for the statutory period; they contend only that the presumption of hostility does not arise because the Rozenbergs' use of the driveway was the result of "neighborly accord and accommodation or acquiescence." See Brief for Defendants-Respondents-Appellants ("Bacigalupo Brief"), at p.5. However, the Bacigalupos' "proof" of such "neighborly accommodation" is woefully insufficient to negate the presumption of hostility.

The sole basis for the Bacigalupos' claim that the Rozenbergs' use of the driveway was permissive is the fact that Mrs. Korik never objected to that use. See Bacigalupo Brief, at pp.6-9. A mere claim of "neighborly accommodation," without more, is not proof of permission. Reed v. Piedimonte, 138 A.D.2d 937, 937, 526 N.Y.S.2d 273, 274 (4th Dep't), appeal denied, 72 N.Y.2d 803, 532 N.Y.S.2d 369, 528 N.E.2d 521 (1988). Moreover, the fact that the Rozenbergs paid the entire cost of reconstructing the driveway, and that Mrs. Korik did not contribute to that expense, further negates the Bacigalupos' "neighborly accommodation" claim. See Amalgamated Dwellings, Inc. v. Hillman Housing Corp., 299 A.D.2d 199, 200, 749 N.Y.S.2d 251, 253 (1st Dep't 2002) (presumption of adverse use raised by plaintiff's tenants' open and notorious use of park, as buttressed by plaintiff's allegations that it contributed to cost of maintaining park, was not negated by parties' neighborly

relations over the years); Canon v. Sikora, 142 A.D.2d at 663, 531 N.Y.S.2d at 99 (fact that plaintiff shared in cost of maintaining driveway established that his use was not merely result of neighborly accommodation on part of defendant's predecessor in title, so presumption of adverse use remained); see also Di Leo v. Pecksto, 304 N.Y. at 512, 109 N.E.2d at 603 (proof was sufficient, not only from circumstances surrounding inception and continuance of use of right of way, but also from fact that plaintiff alone maintained right of way and kept it in repair, to support finding that use was adverse and under claim of right).

Additionally, the Rozenbergs did not have the sort of neighborly or friendly relationship with Mrs. Korik that might serve as a basis for a claim of neighborly accommodation. In fact, Ruth Rozenberg testified that "[t]here was no relationship. We would smile once in a while if we saw each other walking in and out of the house, and that was it." (R. 57). The Rozenbergs never socialized with Mrs. Korik, nor did they ever exchange telephone calls with her (R. 57-58); indeed, the only time Mrs. Korik called Dr. Rozenberg was the day before her sale to the Bacigalupos was to close, and then only to request that he sign document that would enable sale to close. (R. 235, 236). Under these circumstances, the Bacigalupos' "neighborly accommodation" claim must fail. See Sleasman v. Williams, 187 A.D.2d 852, 852-53, 589 N.Y.S.2d 974, 975 (3d Dep't 1992) (even though it was undisputed that plaintiffs

were friends with defendants' predecessor in title, there was no factual support for defendants' claim that plaintiffs' use of defendants' property arose from that friendly relationship).[1]

The Bacigalupos contend that any argument that a presumption of hostility arises because Mrs. Korik never "affirmatively gave [them] her permission" to use that portion of the driveway that was on her property would be a "red herring argument" because the Rozenbergs did not ask for such permission. Bacigalupo Brief, at p. 8. In fact, a clearer understanding of the elements of a prescriptive easement claim, garnered through a quick perusal of the case law, reveals that "[s]eeking permission from the record owner negates hostility . . . ." City of Tonawanda v. Ellicott Creek Homeowners Ass'n, Inc., 86 A.D.2d 118, 124, 449 N.Y.S.2d 116, 121 (4th Dep't 1982), appeal dismissed, 58 N.Y.2d 824 (1983); see also Duke v. Sommer, 205 A.D.2d 1009, 1011, 613 N.Y.S.2d 985, 987 (3d Dep't 1994) (where plaintiffs did not ask for or receive permission from defendant or her parents to use property, plaintiffs' proof raised presumption that their use of property was hostile and under a claim of right,

[1]None of the three cases the Bacigalupos rely upon in support of their "neighborly accommodation" claim state exactly what evidence the court relied on in finding a relationship of cooperation and neighborly accommodation sufficient to rebut the presumption of hostility. See Frumkin v. Chemtop, 251 A.D.2d 449, 674 N.Y.S.2d 409 (2d Dep't 1998); Susquehanna Realty Corp. v. Barth, 108 A.D.2d 909, 485 N.Y.S.2d 795 (2d Dep't 1985); O'Shea v. Freiberg, 279 A.D. 760, 108 N.Y.S.2d 759 (2d Dep't 1951).

placing burden on defendant to show that use was by license); Campano v. Scherer, 49 A.D.2d 642, 643, 370 N.Y.S.2d 237, 239 (3d Dep't 1975) (seeking permission for use from property owner negates hostility). Thus, far from aiding the Bacigalupos, the fact that the Rozenbergs never asked Mrs. Korik for permission to use that portion of the driveway that was on her property, and that Mrs. Korik never gave such permission,[2] actually supports a finding that the Rozenbergs' use of the property was hostile and under a claim of right.

Since the court below properly found that the Rozenbergs established all of the elements of a claim for a prescriptive easement (R. 18), the Judgment should be affirmed, as modified to explicitly declare that the Rozenbergs are vested with and entitled to a prescriptive easement over the property at issue.

## II. THE JANUARY 15, 1998 DOCUMENT DOES NOT PRECLUDE THE ROZENBERGS FROM MAINTAINING THEIR PRESCRIPTIVE EASEMENT CLAIM

The Bacigalupos, in their brief (at p. 10), misleadingly claim that the "pertinent" language of the January 15, 1998 document states ***only*** that "we (the Rozenbergs) have no claim to any portion of the property described in said deed (Isabelle Korik's June 12, 1992 deed). This is not the pertinent language. The

[2]Mrs. Korik did not testify at trial, but the Bacigalupos entered her affidavit (R. 311-312) into evidence. (R. 150-151).

operative portion of the January 15, 1998 document ***actually*** states: "We have read the attached deed dated June 12, 1992, from Leonid Korik to Isabella Korik. We have no claim to any portion of the property ***described in said deed with the understanding that our deed and survey for our property do not include any portion of the property described in Ms. Korik's deed***." (Emphasis added) (R. 301). Whether this Court finds the document to be unambiguous and thus construes it as a matter of law or finds it to be ambiguous and thus construes it, as a matter of fact, in light of extrinsic evidence as to its intended meaning, the result is the same: the document does not preclude the Rozenbergs' prescriptive easement claim.

### A. The Language of the January 15, 1998 Document Itself Reveals that the Rozenbergs Did Not Intend to Waive Any Claim for a Prescriptive Easement

The January 15, 1998 document contains words of general waiver or release ("we have no claim to any portion of the property . . ."), followed by limiting language (" . . . described in said deed . . . ."), followed immediately by more specific, limiting language (" . . . with the understanding that our deed and survey for our property do not include any portion of the property described in Ms. Korick's [*sic*] deed."). (R. 301). "[C]ourts have often applied the rule of *ejusdem generis*, and held that the general words of a release are limited by the recital of a particular claim, where there is nothing on the face of the instrument, other than

general words of release, indicating that matters other than those specifically referred to were intended to be discharged." Green v. Lake Placid 1980 Olympic Games, Inc., 147 A.D.2d 860, 862, 538 N.Y.S.2d 82, 84 (3d Dep't 1989) (quotation and citation omitted); see also Herman v. Malamed, 110 A.D.2d 575, 577, 487 N.Y.S.2d 791, 793 (1st Dep't 1985) (same); Coffman v. Coffman, 60 A.D.2d 181, 187, 400 N.Y.S.2d 833, 836-37 (2d Dep't 1977) (applying principle and determining that, although stipulation in matrimonial action provided that "'[e]xcept as hereinabove provided, the parties release each other from any and all claims against each other,'" this language only dealt with matters actually discussed in stipulation, and did not operate to bar claim based on statute that was not yet enacted at time of stipulation).

For example, in Di Leo v. Pecksto, the defendant argued that the plaintiff had divested himself of any prescriptive easement he might have acquired before 1932 by signing an agreement in that year. 304 N.Y. at 510, 109 N.E.2d at 602. According to the Court of Appeals,

> [a]fter describing the then existing boundaries, the parties denoted the lines that they desired to establish. Then, to effectuate their purpose, each party, it was recited, 'remises, releases and quitclaims' to his neighbor all his 'right, title and interest in and to the land lying'—as the case may be—to the north or south 'of said Boundary Line so established.'

> It is almost self-evident that the parties had but one object in mind, the establishment of boundary lines between their respective parcels. There was neither mention of the right of way nor manifestation of an intent that plaintiff release or divest himself of his easement or any other interest . . . . Where it appears that the purpose of the parties was solely directed towards the particular matter . . . general words will be restrained. [quotation and citation omitted]. Consequently, the words quoted above from the agreement, general though they may be, must be limited to their intended scope, taken to refer only to the boundary lines of the parties and have no effect on the plaintiff's right of way.

Id. at 513, 109 N.E.2d at 604.

Here, as in Di Leo, the January 15, 1998 document refers to the boundaries of the respective parties' properties, makes no mention of the Rozenbergs' use of the adjoining property and contains no manifestation of an intent on the Rozenbergs' part to divest themselves of an easement or any other interest. Under these circumstances, as a matter of law, the January 15, 1998 document waives only claims with respect to the Rozenbergs' ownership of any portion of the property shown on Mrs. Korik's June 12, 1992 deed, and does not waive any claims concerning their use of any portion of the property. See Kemp v. Perales, 199 A.D.2d 320, 321, 604 N.Y.S.2d 268, 270 (2d Dep't 1993) (where stipulation of settlement began with recital that portion of fair hearing decision that denied plaintiff certain benefits should be annulled and concluded with a general release of

all claims arising out of facts and circumstances alleged in proceeding, release barred only specific claim raised in prior proceeding and did not bar proceeding at bar in which plaintiff sought to enforce portion of same fair hearing decision that was decided in her favor).

### B. If, as the Court Below Found, the January 15, 1998 Document is Ambiguous, the Court Below Properly Relied on the Uncontradicted Extrinsic Evidence Demonstrating that the Rozenbergs Did not Intend to Waive any Prescriptive Easement Claim

The court below found that the January 15, 1998 document was ambiguous because it does not clearly state that the Rozenbergs were giving up their right to continued use of the portion of the driveway owned by their neighbor. (R. 19). This conclusion is supported by a number of cases in which the court found that the fact that the signed document contains both general language of release and specific limitations on that language makes the document ambiguous and permits reliance on extrinsic evidence to construe the document. See, e.g., Green v. Lake Placid, 147 A.D.2d at 862, 538 N.Y.S.2d at 84 (releases containing specific reference to plaintiff's outstanding contract claim, combined with additional factors that plaintiff had documented its entitlement to full amount of claim; release was prepared by defendant's attorney and was not reviewed by plaintiff's attorney before its execution; no consideration was furnished for release of any additional claim; and

no other claim was in suit at the time, sufficed to raise issue of fact and permitted resort to extrinsic evidence as an aid to interpretation); Hallmark Synthetics Corp. v. Sumitomo Shoji New York, Inc., 26 A.D.2d 481, 484, 275 N.Y.S.2d 587, 590 (1st Dep't 1966), aff'd, 20 N.Y.2d 871, 285 N.Y.S.2d 615, 232 N.E.2d 646 (1967) (circumstances surrounding execution of release, and facts as alleged, indicated that letter of settlement and release were to be read and construed together or least that release was ambiguous).[3]

The extrinsic evidence concerning the circumstances surrounding the execution of the January 15, 1998 document, and the Rozenbergs' intent in signing that document, in undisputed. Attorney Kiernan contacted Dr. Rozenberg after 4:00 p.m. the day before the Korik to Bacigalupo sale was to close. (R. 237). Kiernan and Dr. Rozenberg discussed only the Rozenbergs' potential claims to ownership of any part of Mrs. Korik's property (R. 237), and the issue of the Rozenbergs' use of

[3]The Court should reject the Bacigalupos' implication that their *post hoc* understanding of the import of the January 15, 1998 document has any bearing on how that document should be interpreted. See Bacigalupo Brief, at p.11. Contrary to the Bacigalupos' contention, the document was not "tendered to the defendants to facilitate their purchase" of Mrs. Korik's property (see id.): rather, Mrs. Korik's attorney, Mr. Kiernan, requested that the Rozenbergs sign a document that would enable Mrs. Korik to sell her property, and the Rozenbergs signed the document for that purpose. (R. 235-236, 272). Indeed, Robert Bacigalupo testified that he had no involvement whatsoever with the exchanges between Stephen Rozenberg and Attorney Kiernan, was not aware that those exchanges had taken place, and first saw the January 15, 1998 document at the closing. (R. 274). Perhaps the Bacigalupos should look for a remedy to their title company, which agreed to insure the title on their property. See R. 308.

the driveway did not come up. (R. 245, 246, 269). Indeed, before he received Mrs. Korik's phone call late in the afternoon on January 15, 1998, Dr. Rozenberg was unaware of any title problem with the purchasers of Korik's house, and nobody had discussed with him any problems concerning the use of the driveway. (R. 240). Attorney Kiernan assured Dr. Rozenberg that the document "could not possibly hurt [him]," that he "was simply stating that [he didn't] own it . . . and that by signing this paper [he was] simply affirming that [he didn't] own that five-foot strip or approximately five-foot strip." (R. 242). Dr. Rozenberg modified the document Attorney Kiernan had proposed, after unsuccessfully attempting to discuss it with his counsel. (R. 238). Dr. Rozenberg would not have signed any document had he been told that he would be giving up any rights to use the driveway to park his cars, or to limit his rights to park his cars. (R. 272-273).

Moreover, Dr. Rozenberg's stated intent in signing the January 15, 1998 document is entirely consistent with the language of the final version of the document. The deeds and surveys referred to in the document (Mrs. Korik's June 12, 1992 deed, the Rozenbergs' February 1986 deed and the Rozenbergs' January 15, 1986 and April 23, 1992 surveys) (R. 278, 281, 285, 286) do not refer to an easement in favor of the Rozenbergs because no easement had been established or judicially declared when those documents were created. All of the evidence thus

clearly demonstrates that the Rozenbergs did not intend to waive any prescriptive easement claim they might have against the owners of the property at 182-15 80th Drive.

## III. SINCE THE ROZENBERGS DID NOT PLEAD AN EASEMENT BY NECESSITY AND THE COURT BELOW DID NOT MAKE ANY RULINGS WITH RESPECT TO SUCH A CLAIM, THE ADMISSION OF CERTAIN EVIDENCE THAT IS PRESUMABLY RELEVANT ONLY TO A CLAIM OF EASEMENT BY NECESSITY IS NOT REVERSIBLE ERROR

As The Bacigalupos have, quite correctly, pointed out, the Rozenbergs' complaint does not contain a cause of action seeking a declaration of an easement by necessity. See Bacigalupo Brief, at p. 13; R. 22-25. However, the Bacigalupos' contention that, "in granting a permanent noninterference injunction" against them, the court below "effectively" declared such an easement (see Bacigalupo Brief, at p. 16), is incorrect.

Although the court below noted, in passing, that the Rozenbergs would not be able to park their car in their garage or open their car door in their driveway if the Bacigalupos constructed a fence on the property line (R. 15-16), it made conclusions of law only with respect to the Rozenbergs' claim for an easement by prescription (R. 17-19) and, as explained above, those conclusions of law are correct. Therefore, the fact that the court below allowed Ruth Rozenberg to answer

a single question that may be relevant only to a claim of easement by necessity[4] is harmless error and does not require reversal. See, e.g., Geico Gen. Ins. Co. v. Sherman, 307 A.D.2d 967, 969, 763 N.Y.S.2d 649, 652 (2d Dep't 2003) (any error in admitting testimony of two witnesses was harmless and did not prejudice appellants since it was clear that arbitrator based his decision on testimony of a third witness); Gilbert v. Luvin, 286 A.D.2d 600, 600, 730 N.Y.S.2d 85, 87 (1st Dep't 2001) (where error at trial bears only upon issue not reached by jury, error is harmless); Ost v. Town of Woodstock, 251 A.D.2d 724, 726, 673 N.Y.S.2d 768, 769 (3d Dep't), appeal denied, 92 N.Y.2d 817, 684 N.Y.S.2d 488, 707 N.E.2d 443 (1998) (any error by hearing officer in admitting testimony regarding polygraph test of complainant was harmless since neither hearing officer nor town board relied on it in deciding charges that formed basis for penalty imposed); Barracato v. Camp

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[4]The Bacigalupos' contention that their counsel objected to "any testimony or evidence coming in as proof of any easement by necessity" (see Bacigalupo Brief, at p. 13) is inaccurate. The relevant exchange is as follows:

> Q: If a fence were built down the property dividing line, would there be any – what difficulties would you have in parking your car, if any?
>
> MR. SOLOW: Your Honor, I'm going to object to the question as irrelevant. The claim here by the plaintiff is for an easement by prescription. This question would be relevant if the plaintiffs in their complaint had brought a cause of action for a declaration of an easement by necessity.

(R. 85).

Bauman Buses, Inc., 217 A.D.2d 677, 678, 630 N.Y.S.2d 261, 261 (2d Dep't 1995) (any error in admission of hearsay testimony was harmless since result would have been the same if evidence had not been improperly admitted); N.Y. Civ. Prac. L. & R. §2002 (CLS 2004) ("An error in a ruling of the court shall be disregarded if a substantial right of a party is not prejudiced.").

## IV. THE BACIGALUPOS' FAILURE TO BRIEF THE ISSUES RAISED ON THE ROZENBERGS' APPEAL IS TANTAMOUNT TO A CONCESSION THAT THE ROZENBERGS ARE ENTITLED TO THE RELIEF SOUGHT ON THE APPEAL

As discussed above, the court below properly found that the Rozenbergs demonstrated all of the elements of a prescriptive easement. Accordingly, as explained in the Rozenbergs' opening brief, this Court should direct entry of a judgment explicitly declaring the existence of a prescriptive easement to bring the judgment into conformity with both N. Y. Real Prop. Actions and Proceedings L. §1521(1)[5] and with the decision of the court below. In this regard, it should be noted that, in their brief, the Bacigalupos did not make a single argument in opposition to the arguments contained in the Rozenbergs' opening brief. This Court should consider the Bacigalupos' failure to, in effect, file an opposition brief as a concession that the Rozenbergs are entitled to the

[5]This provision states, in relevant part, that a final judgment in an action under Article 15 of the Real Property Actions and Proceedings Law "shall declare the validity of any claim to any estate or interest established by any party to the action." N. Y. Real Prop. Actions and Proceedings L. §1521(1) (CLS 2004).

relief they seek on appeal. See In re Faith AA, 139 A.D.2d 22, 26, 530 N.Y.S.2d 318, 320 (3d Dep't 1988).

## CONCLUSION

For all the foregoing reasons, and for all of the reasons set forth in Plaintiffs-Appellants-Respondents' opening brief, Plaintiffs-Appellants-Respondents 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 Plaintiffs-Appellants-Respondents Stephen Rozenberg and Ruth Rozenberg, owners of the property known and described as 182-19 80th 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-Respondents-Appellants, Robert Bacigalupo and Marie D. Bacigalupo, which parcel extends from the Bacigalupos' house and immediately adjoins the land owned by Plaintiffs-Appellants-Respondents and has been used by Plaintiffs-Appellants-Respondents as their driveway; Defendants-Respondents-Appellants' property being known and described as 182-15 80th Drive, Jamaica Estates, New York (Section

32, Block 7249, Lot 66 in the County of Queens);

(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: November 4, 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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