

**Rosario Pagano et al., Respondents, v. Abram Kramer et al., Appellants**

**[NO NUMBER IN ORIGINAL]**

**Court of Appeals of New York**

**21 N.Y.2d 910; 236 N.E.2d 858; 289 N.Y.S.2d 626; 1968 N.Y. LEXIS 1540**

**February 19, 1968, Argued**

**April 3, 1968, Decided**

**PRIOR HISTORY:** *Pagano v. Kramer, 25 A D 2d 887.*

Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered May 31, 1966, which (1) reversed, on the law and the facts, a judgment of the Supreme Court at Special Term (Philip M. Kleinfeld, J.; opinion 47 Misc 2d 235), entered in Kings County upon a decision of the court dismissing the complaint, and (2) remitted the action to Special Term for the making of an appropriate judgment in accordance with the decision of the Appellate Division. Stated findings of fact contained or implicit in the opinion of the court at Special Term were reversed and new findings were made by the Appellate Division in lieu thereof. The action was commenced by plaintiffs, the owners of premises located at 1036 East 93rd Street in Kings County to enjoin defendants, Drogo Realty Corp., the corporate owner of adjoining property, defendant Kramer, its officer, sole stockholder and predecessor in title, who had acquired the property in 1963 by tax deed from the City of New York, and defendant mortgagee of said property, from interfering with plaintiffs' alleged right of way over a roadway thereon, known as Smith's Lane and located immediately to the south of plaintiffs' property, and to compel the removal of obstructions thereon. Defendants asserted, as a separate defense, that, if any right of way existed, it was extinguished by a judgment obtained by the City of New York in 1955, foreclosing tax liens on the property for the years 1899 to 1909. The Appellate Division stated that, while, as found by Special Term, plaintiffs had not established any right to the use of the entire Smith's Lane, they had established a prescriptive right to the use of a walk, 63 feet in length and 4 feet in width, over the northerly side of the lane and immediately adjacent to plaintiffs' property; that said walk had been constructed by plaintiffs' predecessors in title when their house was built in or about 1927, there had been open, notorious, hostile and uninterrupted use thereof since that time, and it had been maintained and repaired by plaintiffs since their acquisition of their property in 1945; that such acts on the part of plaintiffs and their predecessors in title indicated a use separate and exclusive from the general use, and that plaintiffs were entitled to a judgment adjudging that they had a permanent easement over said walk, directing defendants to remove any obstructions which they might have placed thereon and enjoining defendants from blocking said strip and from interfering with plaintiffs' use thereof.

**DISPOSITION:** Order affirmed.

**HEADNOTES**

**Easements -- right of way -- easement by prescription -- in action to enjoin defendants, corporate owner of property adjoining that of plaintiffs, its predecessor in title, who had acquired property by tax deed from City of New York, and mortgagee of property, from interfering with plaintiffs' alleged right of way thereon, Court of Appeals agrees with Appellate Division that plaintiffs had obtained easement by prescription -- assuming that, as contended by defendants, foreclosure sale for unpaid taxes extinguished easement because tax levy predated any prescriptive easement which plaintiffs might have established, tax deed from city to defendant predecessor in title explicitly stated that conveyance was subject to private right of way easement and, while this language could not create any easement, it did preserve plaintiffs' easement by prescription which might otherwise have been extinguished by tax foreclosure sale.**

**COUNSEL:** *Sylvan D. Freeman* and *Samuel Kirschenbaum* for appellants.

*C. Benedict Mauro* for respondents.

**JUDGES:** Chief Judge Fuld and Judges Burke, Scileppi, Bergan, Keating, Breitel and Jasen concur.

**OPINION BY:** PER CURIAM

**OPINION**

[\*911] [\*859] [\*\*\*627] In this action to establish a private easement to a 4-foot strip of land adjacent to plaintiffs' property and to enjoin defendants from interfering with the easement, we agree with the Appellate Division that plaintiffs obtained an easement by prescription. Appellants contend that the foreclosure sale for unpaid taxes extinguished the easement since the tax levy predated any prescriptive easement which plaintiffs might have established. Assuming this to be so, nevertheless, the tax deed from the city to appellant Kramer explicitly stated that the conveyance of the property was "subject to a private Right-of-Way easement". While this language could not *create* any easement, it did *preserve* plaintiffs' easement by [\*912] [\*\*\*628] prescription which might otherwise have been extinguished by the tax foreclosure sale.

The order should be affirmed, with costs.