

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D20800
W/prt

_____AD3d_____

Submitted - October 2, 2008

STEVEN W. FISHER, J.P.
JOSEPH COVELLO
WILLIAM E. McCARTHY
JOHN M. LEVENTHAL, JJ.

2007-10866

DECISION & ORDER

Monet Dunham, respondent, v
Elite Development, Inc., appellant.

(Index No. 27791/05)

Butler, Fitzgerald, Fiveson & McCarthy, P.C., New York, N.Y. (David K. Fiveson of counsel), for appellant.

Rothkrug Rothkrug & Spector, LLP, Great Neck, N.Y. (Simon H. Rothkrug of counsel), for respondent.

In an action, inter alia, for a judgment declaring that the plaintiff has an easement by prescription over property owned by the defendant, the defendant appeals, as limited by its brief, from so much of an order of the Supreme Court, Kings County (Rothenberg, J.), dated October 16, 2007, as denied its motion for summary judgment, in effect, declaring that the plaintiff does not have an easement by prescription over its property, and to cancel the plaintiff's notice of pendency.

ORDERED that the order is affirmed insofar as appealed from, with costs.

The plaintiff asserts that she has an easement by prescription over a portion of the defendant's adjacent property. The Supreme Court properly determined that the defendant failed to establish its entitlement to judgment as a matter of law. The record reveals that there is an issue of fact as to whether the plaintiff's use was hostile. Specifically, the defendant failed to establish, prima facie, that the plaintiff's use of its driveway was a neighborly accommodation or use by permission (*see Lillianfeld v Lichtenstein*, 245 AD2d 344; *Rogers v Holmes*, 217 AD2d 609).

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The defendant's remaining contentions are without merit.

FISHER, J.P., COVELLO, McCARTHY and LEVENTHAL, JJ., concur.

ENTER:


James Edward Pelzer
Clerk of the Court