

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

D22606  
O/kmg

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Submitted - February 13, 2009

WILLIAM F. MASTRO, J.P.  
JOSEPH COVELLO  
RANDALL T. ENG  
JOHN M. LEVENTHAL, JJ.

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2008-06840

DECISION & ORDER

John K. Hauff, respondent, v  
Elaine Listemann, et al., appellants.

(Index No. 2002/08)

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Vergilis, Stenger, Roberts, & Davis, LLP, Wappingers Falls, N.Y. (Kenneth M. Stenger of counsel), for appellants.

In an action, inter alia, to impose a constructive trust on real property, the defendants appeal from an order of the Supreme Court, Dutchess County (Dolan, J.), dated July 14, 2008, which denied that branch of their motion which was pursuant to CPLR 3211(a)(7) to dismiss the complaint.

ORDERED that the order is affirmed, without costs or disbursements.

On a motion to dismiss pursuant to CPLR 3211(a)(7), the complaint must be afforded a liberal construction, the facts therein must be accepted as true, and the plaintiff must be accorded the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88). The court's function on such a motion is only to determine whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d at 87-88).

Applying these principles, the Supreme Court correctly denied that branch of the defendants' motion which was pursuant to CPLR 3211(a)(7) to dismiss the complaint.

MASTRO, J.P., COVELLO, ENG and LEVENTHAL, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court

March 31, 2009

HAUFF v LISTEMANN