

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

D25410
W/kmg

_____AD3d_____

Argued - November 6, 2009

PETER B. SKELOS, J.P.
RANDALL T. ENG
JOHN M. LEVENTHAL
CHERYL E. CHAMBERS, JJ.

2008-09655

DECISION & ORDER

James W. Ryan, Jr., et al., appellants-respondents, v
Barbara Posner, respondent-appellant.

(Index No. 21451/05)

John J. Phelan, III, P.C., New York, N.Y., for appellants-respondents.

Shamberg Marwell David & Hollis, P.C., Mount Kisco, N.Y. (John S. Marwell and
Diana Bunin Kolev of counsel), for respondent-appellant.

In an action, inter alia, pursuant to RPAPL articles 15 and 20 to compel the determination of claims to real property and to enforce an easement, the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Westchester County (Donovan, J.), entered September 11, 2008, as denied those branches of their motion which were for summary judgment on the first cause of action to enforce an easement over the defendant's property via a certain path, declaring that they have an express or prescriptive easement over the defendant's property via the path, and on the third cause of action insofar as it was to permanently enjoin the defendant from interfering with their use of the path, and granted those branches of the defendant's cross motion which were for summary judgment dismissing the first cause of action, and on her first counterclaim declaring that the plaintiffs do not have an express or prescriptive easement over her property via the path, and the defendant cross-appeals, as limited by her notice of cross appeal and brief, from so much of the same order as granted those branches of the plaintiffs' motion which were for summary judgment on the second cause of action and in connection with her fourth counterclaim to the extent of declaring that the plaintiffs had and still have an easement across her property providing the plaintiffs a right of access to the spring located on one of her parcels of real property, declaring that any easement providing the plaintiffs a right of access to the spring is not extinguished, on the third cause of action insofar as it was to permanently enjoin her from interfering with that easement, and dismissing her second and fifth counterclaims alleging trespass and harassment, respectively.

ORDERED that the order is affirmed insofar as appealed and cross-appealed from,

December 15, 2009

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without costs or disbursements, and the matter is remitted to the Supreme Court, Westchester County, inter alia, for the entry of an appropriate judgment.

Contrary to the plaintiffs' contention, the Supreme Court properly granted that branch of the defendant's cross motion which was for summary judgment on her first counterclaim declaring that an express easement across her property for "egress and ingress" does not grant the plaintiffs the right to enter and cross her property via a specific, disputed path. The defendant established her prima facie entitlement to judgment as a matter of law by submitting extrinsic evidence tending to show the intent of the parties to the original conveyance (*see Loch Sheldrake Assoc. v Evans*, 306 NY 297; *Miller v Edmore Homes Corp.*, 285 App Div 837, *affd* 309 NY 839; Real Property Law § 240[3]) and, in opposition, the plaintiffs failed to raise a triable issue of fact.

Likewise, the Supreme Court properly determined that no prescriptive easement across the path was created. Even if each of the plaintiffs established that his or her use of the path was open, notorious, and continuous, the defendant submitted evidence demonstrating that the plaintiffs' use of the purported easement was not hostile, but was instead permitted as a matter of neighborly accommodation (*see Allen v Mastrianni*, 2 AD3d 1023; *Reiss v Maynard*, 148 AD2d 996). Thus, the burden shifted to the plaintiffs to come forward with evidence of hostile use in order to raise a triable issue of fact as to whether a prescriptive easement across the path was created (*see 315 Main St. Poughkeepsie, LLC v WA 319 Main, LLC*, 62 AD3d 690; *Rivermere Apts. v Stoneleigh Parkway*, 275 AD2d 701). The plaintiffs failed to carry their burden in this regard (*see 315 Main St. Poughkeepsie, LLC v WA 319 Main, LLC*, 62 AD3d at 691; *Kennelty-Cohen v Henry*, 62 AD3d 664; *Susquehanna Realty Corp. v Barth*, 108 AD2d 909).

In opposition to the plaintiffs' prima facie showing that they had and still have an easement across the defendant's property providing them with a right of access to a spring located on one of the defendant's parcels of real property, the evidence submitted by the defendant, by which she attempted to show that the plaintiffs abandoned that easement, was insufficient to raise a triable issue of fact. Thus, the Supreme Court not only properly denied summary judgment to the defendant on her fourth counterclaim declaring that this easement was extinguished (*see Bodin v Kinne*, 128 AD2d 931; *Filby v Brooks*, 105 AD2d 826, *affd* 66 NY2d 640), but also properly granted that branch of the plaintiffs' motion which was for summary judgment declaring that they had and still have that easement.

Since this is, in part, a declaratory judgment action, the matter must be remitted to the Supreme Court, Westchester County, among other things, for the entry of a judgment, inter alia, declaring that the plaintiffs do not have either an express or prescriptive easement across the disputed path on the defendant's property, that the plaintiffs had and still have an easement across the defendant's property providing them with a right of access to a spring located on one of the defendant's parcels of real property, and that this easement has not been extinguished (*see Lanza v Wagner*, 11 NY2d 317, 334, *appeal dismissed* 371 US 74, *cert denied* 371 US 901).

SKELOS, J.P., ENG, LEVENTHAL and CHAMBERS, JJ., concur.

ENTER:



James Edward Pelzer

