Amalgamated Dwellings, Inc. v. Hillman Hous. Corp.

Supreme Court of New York, Appellate Division, First Department

October 5, 2006, Decided; October 5, 2006, Entered

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Reporter
33 A.D.3d 364 *; 822 N.Y.S.2d 499 **; 2006 N.Y. App. Div. LEXIS 12020 ***; 2006 NY Slip Op 7207 ****

[**1]** Amalgamated Dwellings, Inc., Appellant, v Hillman Housing Corporation, Respondent.

Prior History: [*1]** *Amalgamated Dwellings, Inc. v. Hillman Hous. Corp., 299 A.D.2d 199, 749 N.Y.S.2d 251, 2002 N.Y. App. Div. LEXIS 10808 (N.Y. App. Div. 1st Dep't, Nov. 14, 2002)*

Core Terms

prescriptive easement, disputed area, pedestrian

Case Summary

Procedural Posture
Plaintiff sought review of a judgment entered by the Supreme Court, New York County (New York), which, after a nonjury trial, declared that plaintiff was not entitled to prescriptive easements over two areas of defendant property owner's property for pedestrian and vehicular use.

Overview
Both parties were members of Co-Op Village. On appeal, the court affirmed, finding that plaintiff failed to create a presumption that its use of the disputed areas was adverse or hostile because it was not open, notorious, continuous, and under a claim of a right. Based on the parties' relationship, which was one of neighborly cooperation and accommodation, the court held that an inference arose that use of the disputed areas was permissive. Plaintiff's payment to the shared management of Co-Op Village did not constitute payment for upkeep to the disputed areas in such a manner as to create a prescriptive easement. The court noted that defendant conceded the existence of a pedestrian easement.

Outcome
The court affirmed the trial court's judgment.

Headnotes/Summary

Headnotes

Easements--Easement by Prescription.--Absent proof that plaintiff's use of disputed area was open, notorious, continuous and under claim of right, there was no presumption that such use was adverse or hostile, necessary for finding of prescriptive easement; on contrary, evidence gave rise to inference that use was indeed permissive.

Counsel: Rosen & Livingston, New York (Peter I. Livingston of counsel), for appellant.

Sills Cummis Epstein & Gross, P.C., New York (Mitchell D. Haddad of counsel), for respondent.

Judges: Tom, J.P., Saxe, Friedman, Catterson, McGuire, JJ. Concur--Tom, J.P., Saxe, Friedman, Catterson and McGuire, JJ.

Opinion

[*364] [500]** Judgment, Supreme Court, New York County (Marylin G. Diamond, J.), entered April 7, 2005, which, after a nonjury trial, declared plaintiff not entitled to prescriptive easements over two areas of defendant's property for pedestrian and vehicular use, unanimously affirmed, without costs.

Plaintiff failed to prove the elements of a prescriptive easement by clear and convincing evidence (*see* *Ray v Beacon Hudson Mtn. Corp., 88 NY2d 154, 159, 643 NYS2d 939, 666 NE2d 532 [1996]*). Absent any proof that plaintiff's use of the disputed area of Hillman Park

and Broome Street was open, notorious, continuous and under a claim of right, there is no presumption that such use was adverse or hostile--necessary for a finding of a prescriptive easement--and **[***2]** the burden thus never shifted to defendant property owner to show that the use was instead permissive (*Rivermere Apts. v Stoneleigh Parkway, 275 AD2d 701, 702, 713 NYS2d 356 [2000]*). On the contrary, the evidence revealed that the relationship between the parties, both of whom were members of Co-Op Village, was one of neighborly cooperation and accommodation, **[*365]** thus giving rise to the inference that the use of the disputed areas was indeed permissive (*see Allen v Mastrianni, 2 AD3d 1023, 1024, 768 NYS2d 523 [2003]*; *Bookchin v Maraconda, 162 AD2d 393, 394, 557 NYS2d 46 [1990]*). Nor did plaintiff prove that its payment to the shared management of Co-Op Village constituted payment for upkeep to the disputed areas in such a manner as to create a prescriptive easement. The judgment was supported by a fair interpretation of the evidence, particularly where the credibility of witnesses was central to the case (*Saperstein v Lewenberg, 11 AD3d 289, 782 NYS2d 720 [2004]*), and should not be disturbed. We note that **[****2]** defendant concedes the existence of a pedestrian easement, the scope of which is not before us and which must be determined in further proceedings in Supreme **[***3]** Court. Concur--Tom, J.P., Saxe, Friedman, Catterson and McGuire, JJ.