

**APPELLATE DIVISION – SECOND DEPARTMENT
DIGEST OF 2007 DECISIONS INVOLVING EASEMENTS**

CAPTION	DATE	CITATION	SUMMARY
<u>Eskenazi v. Sloat</u>	Decided May 1, 2007	2007 NY Slip Opinion 03877	In an action to declare that plaintiff has a prescriptive easement over defendant’s property, Second Department affirmed Supreme Court judgment upon jury verdict in favor of defendant. Jury’s conclusion was rational. Plaintiff failed to establish that their use of the disputed property manifested a sufficient degree of openness and notoriety to give rise to prescriptive easement.
<u>Lipman v. Vebeliunas</u>	Decided April 3, 2007	2007 NY Slip Opinion 02898	Motion for summary judgment in connection with action by successor owner of burdened property (“plaintiff”) declaring that a Lease and Easement Agreement is null and void since it was not executed by original true owner of burdened property . Second Department reversed Supreme Court ruling in favor of plaintiff. Plaintiff argued that, “[A]n unauthorized execution of an instrument affecting the title to land or an interest therein may be ratified by the owner of the land so as to be binding on him. ” However, Appellate Division determined that issues of fact remain leaving unanswered the question of ratification. “The act of ratification, whether express or implied, must be performed with full knowledge of the material facts relating to the transaction, and assent must be clearly established and may not be inferred from doubtful or equivocal acts or language.”



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**Norse Realty
Group, Inc. v.
Mormando
Family
Limited
Partnership et
al.**

March 29, 2007 2007 NY Slip
Op 02528

Plaintiff, as purchaser, sued to recover its down payment under a Contract of Sale. Language in Contract stated that, “[i]f after the ...due diligence period, Purchaser, in its sole opinion, shall determine that the easement may hinder Purchaser’s ability to develop the Property...” Purchaser may terminate the Contract and receive its down payment back. Defendant submitted un rebutted evidence establishing that the subject **easement** was **expressly conditioned** on the continued operation of the subject property “as a bowling alley.” Defendant demonstrated that the bowling alley business was permanently discontinued. Appellate Division determined that based upon this evidence, “the plaintiff had no conceivable basis upon which to determine that the easement might ‘hinder [its] ability to develop the [p]roperty.’”

**Academy of
Medicine of
Queens
County v.
Seminole 75
Realty Corp. et
al.**

March 20, 2007 2007 NY Slip
Op 02495

Appeal from action for declaratory judgment. Easement agreement was executed by the parties, expressly granting to plaintiff, its tenants, guests, licensees and employees an **easement for the purpose of parking** 20 passenger automobiles free of charge in parking spaces designated by grantor. The agreement provided use of the spaces limited by “reasonable rules and regulations as may be established by the grantor.” Defendant imposed numerous conditions. Recognizing that “[**Easements by express grant are construed to give effect to the parties’ intent, as manifested by the language of the grant.**]” the Court, as a matter of law, determined that those rules and regulations that controlled access to the parking lot were unreasonable, and those that merely regulated the use, such as registration of vehicles, were reasonable.



**APPELLATE DIVISION – SECOND DEPARTMENT
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<u>Patrick W. McGinley et al. v. Joan Lana Postel</u>	February 27, 2007	2007 NY Slip Op 01698	Plaintiffs sought declaration that their express easement for vehicular access was not extinguished by adverse possession . Defendant tendered evidence that she placed boulders and other obstructions on plaintiffs' right of way. Plaintiffs testified that they either removed the obstructions or maneuvered around them, traversing the right of way with cars, motorcycles, and tractors. Defendant failed to establish that she effectively interfered with plaintiffs use and enjoyment of the easement for the requisite period of time.
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**APPELLATE DIVISION – THIRD DEPARTMENT
DIGEST OF 2007 DECISIONS INVOLVING EASEMENTS**

CAPTION	DATE	CITATION	SUMMARY
<u>Raven Industries, Inc. v. Richard G. Irvine et al.</u>	May 10, 2007	2007 NY Slip Op 04016	Plaintiff’s motion for summary judgment as to alleged trespass was reversed. Defendant was granted a temporary easement from Plaintiff allowing access to its lot until such time as the area set forth in the easement became a town road. Defendant constructed ditches in portions of the easement alleging they were necessary to keep the road in passable condition. Plaintiffs sought to have the ditches removed and discontinued as unauthorized by the easement. The Court determined that, “the extent and nature of an easement must be determined by the language contained in the grant, aided where necessary by any circumstances tending to manifest the intent of the parties.” The Court felt there were sufficient disputed facts as to the necessity of the ditches to warrant reversal of the lower court order in favor of Defendant.
<u>Chris Karabatos v. Robert Hagopian</u>	April 5, 2007	2007 NY Slip Op 02847	Defendant performed substantial work to a portion of a road that was the subject of an easement without the consent of the Plaintiff. The deed creating the easement provided, in pertinent part, that: “Any change to the approaches or roadways or the alignment of such roadways through or upon either of the parcels here mentioned shall however not be made except upon the mutual consent [plaintiff’s predecessor] and [defendant’s predecessor] or their respective successors and assigns;...” The Court determined that this unequivocal language required mutual consent and thereby was sufficient to show a likelihood of success. Court affirmed preliminary injunction.



**APPELLATE DIVISION – THIRD DEPARTMENT
DIGEST OF 2007 DECISIONS INVOLVING EASEMENTS**

**Perlmutter v.
Four Star Dev.
Assoc.**

March 29, 2007 2007 NY Slip
Op 02639

Plaintiffs allege an unimproved portion of street is not a public highway as having been abandoned. Lower Court determined that Town had acquired fee to street by dedication, acceptance by Town and maintenance and use of all but the last 50' demonstrated intent to lay out the entire length of the dedicated property as a public highway. Lower court did not err in rejecting Plaintiff's challenge to Defendant's use of the 50' portion to access its parking lot.

**Kenneth
Ermiger v.
Gene Black et
al.**

January 11,
2007 2007 NY Slip
Op 00197

Plaintiff-Purchaser (Ermiger) and Defendant-Seller (Black) closed in escrow pending determination of a lawsuit to clarify rights of third party (Association) as to easement over subject property. Plaintiff-Purchaser deposited \$400,000 in escrow. Court in lawsuit granted motion which determined that Association was entitled to easement for vehicular and pedestrian access over subject property. Escrow agreement permitted Plaintiff-Purchaser to return of its funds if the lawsuit by Association resulted in "granting of a fee easement interest to which the real property conveyed pursuant to the agreement is made subject." Defendant-Seller argued that court order was not a "grant" within the meaning of the escrow agreement. Third Department disagreed. Language of the agreement was clear and unambiguous. "Granting of a fee or easement interest" logically includes the granting of such a property interest through the execution of a deed or through the granting of a motion or declaration that such a property interest exists.



**APPELLATE DIVISION – FOURTH DEPARTMENT
DIGEST OF 2007 DECISIONS INVOLVING EASEMENTS**

CAPTION	DATE	CITATION	SUMMARY
<u>Weston v. Smith</u>	March 16, 2007	2007 NY Slip Op 02201	Plaintiff contended that easement agreement violated GOL § 5-703(2) in that it failed to recite the consideration supporting it. Court concluded that the section was inapplicable and applied only to contracts to sell or lease an interest in real property. Section 5-703(2) does not apply here, however, because the easement agreement was fully performed when it was recorded and became the actual conveyance. As a conveyance of and interest in real property, the easement agreement is governed by § 5-703(1), which does not require that the writing express the consideration.



**SUPREME COURT, BRONX COUNTY
DIGEST OF 2007 DECISIONS INVOLVING EASEMENTS**

CAPTION	DATE	CITATION	SUMMARY
<u>McIntyre v. Estate of Keller</u>	January 18, 2007	2007 NY Slip Op 27023	Cause of action involves a driveway easement between plaintiff and defendant's property. Plaintiff seeks an extinguishment, and <i>inter alia</i> damages for tortuous misconduct by permitting commercial vehicles to use the driveway and over burdening the easement. Court noted that "an easement created <i>by grant</i> , express or <i>implied</i> , can only be extinguished by abandonment, conveyance, condemnation, or adverse possession." An easement cannot be extinguished by misuse. By prior court ordered stipulation between plaintiff and defendant's predecessor in title, further restrictions were imposed on the use of the easement. Since the stipulation did not "run with the land" defendant was not bound by these further restrictions.



**SUPREME COURT, NEW YORK COUNTY
DIGEST OF 2007 DECISIONS INVOLVING EASEMENTS**

CAPTION	DATE	CITATION	SUMMARY
<u>Elizabeth Street Inc. v. Oscar Z. Ianello Associates, Inc.</u>	March 9, 2007	2007 NY Slip Op 30066(U)	Part of action involved issue of constructive eviction in connection with commercial lease. Plaintiff/tenant claims defendant/landlord's failure to provide access to loading dock and freight elevator constitutes constructive eviction. Plaintiff asserts easement by implication. Court determined that whether loading dock and freight elevators or access thereto, were appurtenant to plaintiffs' leasehold is an issue of fact.



**SUPREME COURT, SUFFOLK COUNTY
DIGEST OF 2007 DECISIONS INVOLVING EASEMENTS**

CAPTION	DATE	CITATION	SUMMARY
<u>Fairchild Corporation and Stew Leonard's v. Boardman</u>	April 27, 2007	2007 NY Slip Op 31028(U)	Article 78 proceeding in nature of mandamus demanding NYSDOT issue highway work permit. NYSDOT “refused to grant easement over state owned property to facilitate petitioner’s access to Route 110.” NYSDOT relies on Highway Law §52 and implementing regulations which require DOT, “...to take into consideration the prospective character of the development, the traffic generated, etc...” DOT determined that location of the proposed buildings on Town approved site plan posed hazard to air navigation at nearby Republic Airport. Court held that NYSDOT is without authority to deny a highway permit based upon considerations not relevant to vehicular traffic safety.



**SUPREME COURT, NASSAU COUNTY
DIGEST OF 2007 DECISIONS INVOLVING EASEMENTS**

CAPTION	DATE	CITATION	SUMMARY
<u>Riark, LLC v. Dacosto and Singh</u>	March 1, 2007	2007 NY Slip Op 50442(U)	Plaintiff/purchaser acquired property from defendant/seller. Plaintiff claims that defendant's leasehold rights to parking spaces on adjoining lot were also conveyed to plaintiff as 'appurtenant' to title to the conveyed parcel. Court granted defendant's motion for summary judgment and dismissed the complaint. Citing Real Property Law §255, Court argued that plaintiff received only those rights the grantor had in the specific property conveyed.

