

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

D32635
W/prt

_____AD3d_____

Argued - September 26, 2011

PETER B. SKELOS, J.P.
RUTH C. BALKIN
JOHN M. LEVENTHAL
L. PRISCILLA HALL, JJ.

2010-01683
2010-07229

DECISION & ORDER

Matthew B. Gershon, et al., respondents, v
Robert Cunningham, et al., appellants.

(Index No. 26363/06)

Hagan, Coury & Associates, Brooklyn, N.Y. (Paul Golden of counsel), for appellants.

Stuart A. Klein, New York, N.Y. (Christopher M. Slowik of counsel), for respondents.

In an action, inter alia, to recover damages for trespass and private nuisance, to compel the determination of claims to real property, and to permanently enjoin alleged violations of the Zoning Resolution of the City of New York, the defendants appeal from (1) an order of the Supreme Court, Kings County (Ruchelsman, J.), dated December 17, 2009, which, upon confirming a determination of a Judicial Hearing Officer (Lodato, J.H.O.), dated August 26, 2009, made after a hearing, granted that branch of the plaintiffs' motion which was to permanently enjoin them from undertaking further construction on their real property, and to compel them to remove a concrete structure erected on their property, and (2) an order of the same court dated June 9, 2010, which granted the plaintiffs' motion for summary judgment on the eighth and ninth causes of action and denied the defendants' cross motion, in effect, pursuant to CPLR 5015(a)(4) to vacate the determination of the Judicial Hearing Officer and the order dated December 17, 2009.

ORDERED that the appeal from the order dated December 17, 2009, is dismissed as academic in light of our determination on the appeal from the order dated June 9, 2010; and it is further,

October 25, 2011

GERSHON v CUNNINGHAM

Page 1.

ORDERED that the order dated June 9, 2010, is reversed, on the law, the plaintiffs' motion for summary judgment on the eighth and ninth causes of action is denied, the defendants' cross motion, in effect, pursuant to CPLR 5015(a)(4), to vacate the determination of the Judicial Hearing Officer and the order dated December 17, 2009, is granted, and an order of the same court dated September 29, 2009, confirming the determination of the Judicial Hearing Officer is vacated; and it is further,

ORDERED that one bill of costs is awarded to the defendants.

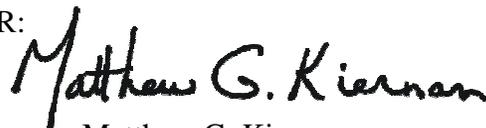
The Supreme Court purportedly referred certain material issues to a Judicial Hearing Officer (hereinafter J.H.O.). A J.H.O. derives authority through an order of reference from the court (*see* CPLR 4311), and an order of reference is made only upon the consent of the parties, except in limited circumstances not applicable here (*see* CPLR 4317; *G. Rama Constr. Enters., Inc. v 80-82 Guernsey St. Assoc., LLC*, 43 AD3d 863, 865; *Allison v Allison*, 28 AD3d 406; *Fernald v Vinci*, 302 AD2d 354). Here, the record does not contain an order of reference, and the record is devoid of any evidence that the parties consented to have a J.H.O. determine any issues in the absence of that "essential jurisdictional predicate" (*Fernald v Vinci*, 302 AD2d at 355, quoting *Litman, Asche, Lupkin & Gioiella v Arashi*, 192 AD2d 403, 403). The Supreme Court erred in predicating its order dated December 17, 2009—which permanently enjoined the defendants from undertaking further construction and directed them to remove the concrete structure erected on their property—upon any determination of the J.H.O. Accordingly, the Supreme Court should have granted the defendants' cross motion, in effect, pursuant to CPLR 5015(a)(4) to vacate the J.H.O.'s determination and the order dated December 17, 2009.

In support of their motion for summary judgment on the eighth and ninth causes of action, both of which include a request for a permanent injunction, the plaintiffs failed to submit an affidavit reciting the material facts from "a person having knowledge of the facts" (CPLR 3212[b]). Accordingly, the plaintiffs failed to establish their prima facie entitlement to judgment as a matter of law on those causes of action (*see Zellner v Tarnell*, 54 AD3d 329, 329-330; *Albert G. Ruben & Co. v Fritzen*, 101 AD2d 795, 795-796; *Harding v Buchele*, 59 AD2d 754, 754-755; *Jackson v Timmons*, 29 AD2d 664). Accordingly, the Supreme Court should have denied the plaintiffs' motion for summary judgment on the eighth and ninth causes of action regardless of the sufficiency of the defendants' opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *Hluch v Ski Windham Operating Corp.*, 85 AD3d 861, 863-864).

The defendants' remaining contentions are without merit, or have been rendered academic.

SKELOS, J.P., BALKIN, LEVENTHAL and HALL, JJ., concur.

ENTER:



Matthew G. Kiernan
Clerk of the Court