

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

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_____AD3d_____

Argued - December 1, 2025

BETSY BARROS, J.P.
CHERYL E. CHAMBERS
LILLIAN WAN
SUSAN QUIRK, JJ.

2024-09328

DECISION & ORDER

Deborah Rennie-Walker, respondent, v Alan L. Weiss,
et al., appellants, et al., defendant.

(Index No. 535119/23)

Cuomo LLC, Mineola, NY (Matthew A. Cuomo of counsel), for appellants.

Belkin Burden Goldman, LLP, New York, NY (Magda L. Cruz and Scott F. Loffredo
of counsel), for respondent.

In an action, inter alia, for injunctive relief and to recover damages for trespass and private nuisance, the defendants Alan L. Weiss and Samantha Bubes Weiss appeal from an order of the Supreme Court, Kings County (Patria Frias-Colón, J.), dated May 24, 2024. The order granted the plaintiff's motion for a preliminary injunction, denied the cross-motion of the defendants Alan L. Weiss and Samantha Bubes Weiss pursuant to CPLR 3211(a) to dismiss so much of the second and third causes of action as were premised on weatherproofing work and the first and fourth causes of action, and, sua sponte, converted the action into a proceeding pursuant to RPAPL 881.

ORDERED that on the Court's own motion, the notice of appeal from so much of the order as, sua sponte, converted the action into a proceeding pursuant to RPAPL 881 is deemed to be an application for leave to appeal from that portion of the order, and leave to appeal is granted (*see* CPLR 5701[c]); and it is further,

ORDERED that the order is modified, on the law, by deleting the provision thereof, sua sponte, converting the action into a proceeding pursuant to RPAPL 881; as so modified, the order is affirmed, without costs or disbursements, and the matter is remitted to the Supreme Court, Kings County, to fix an appropriate undertaking pursuant to CPLR 6312.

July 1, 2026

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In 2022, the defendants Alan L. Weiss and Samantha Bubes Weiss (hereinafter together the defendants) began renovation work on their property located in Brooklyn, including work on a terrace that abutted a wall of the adjoining property owned by the plaintiff. In 2023, as part of the renovation work, the defendants' contractors removed weatherproofing from the plaintiff's adjoining wall and replaced it with new weatherproofing. Thereafter, the plaintiff commenced this action against the defendants and another defendant, asserting causes of action against the defendants for injunctive relief (first cause of action), to recover damages for trespass (second cause of action) and private nuisance (third cause of action), and for an award of attorneys' fees and costs (fourth cause of action). The plaintiff simultaneously moved for a preliminary injunction enjoining the defendants from performing any work on the plaintiff's property without first obtaining the plaintiff's permission. The defendants cross-moved pursuant to CPLR 3211(a) to dismiss so much of the second and third causes of action as were premised on the weatherproofing work performed on the plaintiff's adjoining wall and the first and fourth causes of action. In an order dated May 24, 2024, the Supreme Court granted the plaintiff's motion, denied the defendants' cross-motion, and, sua sponte, converted the action into a proceeding pursuant to RPAPL 881. The defendants appeal.

“On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Drive N.J. Ins. Co. v RT Hospitality Group, LLC*, 240 AD3d 105, 109 [internal quotation marks omitted]; see *Keller v Keller*, 237 AD3d 1183, 1184). “When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, . . . dismissal should not eventuate” (572 *Walt Whitman Rd. Holdings, LLC v Whitman Capital, LLC*, 237 AD3d 878, 880, quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275).

“The elements of a cause of action sounding in trespass are an intentional entry onto the land of another without justification or permission, or a refusal to leave after permission has been granted but thereafter withdrawn” (*Fairchild Corp. v MTA Long Is. R.R.*, 241 AD3d 787, 789, quoting *Shrage v Con Edison Co.*, 216 AD3d 1023, 1025). “[T]respass involves the invasion of the plaintiff's interest in the exclusive possession of its land” (*Volunteer Fire Assn. of Tappan, Inc. v County of Rockland*, 101 AD3d 853, 856). “Liability may attach regardless of defendant's mistaken belief that he or she had a right to enter” (*State of New York v Johnson*, 45 AD3d 1016, 1019; see *Volunteer Fire Assn. of Tappan, Inc. v County of Rockland*, 101 AD3d at 855). “A landowner who retains an independent contractor ‘may be liable for trespass if the owner directs the trespass or a trespass is necessary to complete the contract’” (*Shimunov v Ashirov*, 238 AD3d 1088, 1090, quoting *Tschetter v Sam Longs' Landscaping, Inc.*, 156 AD3d 1346, 1347). “To establish the elements of a private nuisance, ‘a plaintiff must establish an interference with his or her right to use and enjoy land, substantial in nature, intentional or negligent in origin, unreasonable in character, and caused by the defendant's conduct’” (*Barricella v Papadopoulos*, 241 AD3d 1249, 1251, quoting *Banschick v Johnson*, 222 AD3d 608, 609).

Here, the complaint alleged that the defendants had caused their contractors to perform work on the plaintiff's adjoining wall without her consent, including by sawing and drilling into the brick and installing weatherproofing materials, and that the weatherproofing was improperly installed, leaving the plaintiff's property vulnerable to the elements. Accepting the facts as alleged in the complaint as true, according the plaintiff the benefit of every possible favorable inference, and considering the evidentiary material submitted by the defendants in support of their cross-motion, the Supreme Court properly denied that branch of the cross-motion which was pursuant to CPLR 3211(a) to dismiss so much of the second and third causes of action, alleging trespass and private nuisance, respectively, as were premised on the weatherproofing work performed on the plaintiff's adjoining wall (*see Kanayama v Kesy, LLC*, 219 AD3d 1222, 1223-1224; *Madison 96th Assoc., LLC v 17 E. 96th Owners Corp.*, 121 AD3d 605, 608; *Standard Realty Assoc., Inc. v Chelsea Gardens Corp.*, 105 AD3d 510; *Duane Reade v Reva Holding Corp.*, 30 AD3d 229, 236-237). Contrary to the defendants' contention, their obligation to install weatherproofing pursuant to New York City Building Code (Administrative Code of City of NY, title 28, ch 7) § BC 3309.9 did not justify performing this work without a license from the plaintiff (*see id.* § BC 3309.1 *et seq.*; *211-12 N. Blvd. Corp. v LIC Contr., Inc.*, 186 AD3d 69, 79-81).

“‘[T]o establish the right to a preliminary injunction, the plaintiff must prove by clear and convincing evidence (1) the likelihood of ultimate success on the merits, (2) irreparable injury absent the grant of the injunction, and (3) a balance of the equities in the plaintiff's favor’” (*Power-Flo Tech., Inc. v Crisp*, 231 AD3d 1070, 1071, quoting *Keneally, Lynch & Bak, LLP v Salvi*, 190 AD3d 961, 963). “‘The decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court’” (*572 Walt Whitman Rd. Holdings, LLC v Whitman Capital, LLC*, 237 AD3d at 883, quoting *Matter of Armanida Realty Corp. v Town of Oyster Bay*, 126 AD3d 894, 894-895). Here, the Supreme Court providently exercised its discretion in granting the plaintiff's motion for a preliminary injunction, since the plaintiff demonstrated a likelihood of success on the merits, irreparable injury absent the preliminary injunction, and that the balance of the equities favored the preliminary injunctive relief granted (*see 159 Smith, LLC v Boreum Hill Prop. Holdings, LLC*, 191 AD3d 741, 742).

However, CPLR 6312(b) provides that, upon the granting of a preliminary injunction, a plaintiff “shall give an undertaking in an amount to be fixed by the court.” “Thus, while fixing the amount of an undertaking when granting a motion for a preliminary injunction is a matter within the sound discretion of the court, CPLR 6312(b) clearly and unequivocally requires the party seeking an injunction to give an undertaking” (*Kosek v Engel*, 241 AD3d 1311, 1312 [alteration and internal quotation marks omitted]; *see 159 Smith, LLC v Boreum Hill Prop. Holdings, LLC*, 191 AD3d at 743). Here, the Supreme Court did not fix the amount of an undertaking that the plaintiff was required to give. Thus, the matter must be remitted to the Supreme Court, Kings County, to fix the amount of the undertaking (*see Kosek v Engel*, 241 AD3d at 1312-1313; *159 Smith, LLC v Boreum Hill Prop. Holdings, LLC*, 191 AD3d at 743).

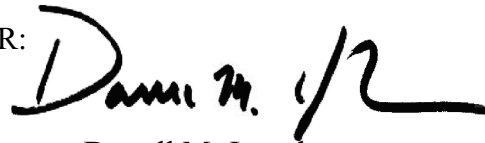
“RPAPL 881 allows the owner of real property to petition for a license to enter the premises of an adjoining owner when such entry is necessary for making improvements or repairs to the petitioner's property and the adjoining owner has refused such access” (*Quinn v 20 E. Clinton, LLC*, 193 AD3d 893, 895, quoting *Matter of Voron v Board of Mgrs. of the Newswalk*

Condominium, 186 AD3d 833, 834; *see* RPAPL 881). Here, the Supreme Court improvidently exercised its discretion in, sua sponte, converting the action into a proceeding pursuant to RPAPL 881 wherein the defendants are the petitioners (*see* CPLR 103[c]). The defendants, who have expressly contended that they were not required to obtain a license prior to performing weatherproofing work on the plaintiff's adjoining wall, have not sought relief under RPAPL 881 (*cf. Mindel v Phoenix Owners Corp.*, 210 AD2d 167, 167-168).

The defendants' remaining contentions are without merit.

BARROS, J.P., CHAMBERS, WAN and QUIRK, JJ., concur.

ENTER:

A handwritten signature in black ink, appearing to read "Darrell M. Joseph", followed by a long horizontal flourish.

Darrell M. Joseph
Clerk of the Court