

Sheehan v Pantelidis
2003 NY Slip Op 30045(U)
October 6, 2003
Supreme Court, New York County
Docket Number: 0112555/2555
Judge: Rosalyn H. Richter
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Rosalyn Richter
Justice

PART 24

Sheehan JE JRM

INDEX NO. 119555-2006

MOTION DATE _____

- v -

MOTION SEQ. NO. 016

Pantelidis JS

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION.**

SCANNED
OCT 09 2003

Dated: 10/6/03

Rosalyn Richter
HON. ROSALYN RICHTER, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 24

-----X
JOSEPH E. SHEEHAN and ROSA M. SHEEHAN,

Plaintiffs,

Decision & Order
Index No. 112555/00

-against-

GEORGE PANTELIDIS,

Defendant.

-----X

ROSALYN RICHTER, J.:

In Motion Sequence No. 016, defendant moves for summary judgment dismissing all trespass claims regarding the alleged encroachment of the fireplace flue (the flue) in the common wall (the party wall) between the parties' townhouses; dismissing the first, second, third, fourth, seventh, eighth and ninth causes of action; dismissing all claims set forth in plaintiffs sixth cause of action, except for the trespass claim arising from the dislodgment of several bricks from the party wall during the renovation of defendant's townhouse; and an order finding that plaintiffs lack standing to assert any claims for compensatory damages, since they accepted insurance proceeds from their homeowner insurer, Chubb Group, for the alleged damages sustained to their townhouse. Plaintiffs cross-move for summary judgment dismissing the counterclaims asserted by defendant in his amended answer.

Plaintiffs own and reside in a townhouse, located at 114 East 73rd Street, New York, New York (plaintiffs' premises). Defendant owns and resides in the adjoining townhouse, at 116 East 73rd Street, New York, New York (defendant's premises). The townhouses are separated by the party wall. Plaintiffs commenced this action, complaining that renovations undertaken by defendant at defendant's premises resulted in damage to and impairment of the party wall's structural and fire

integrity, and the encroachment of defendant's new heating system, fireplaces and flue into their side of the party wall by several inches. Plaintiffs seek injunctive relief in the first five causes of action, and assert claims based on trespass (sixth); encroachment (seventh); negligence (eighth); and nuisance (ninth). Defendant's amended answer and counterclaims included six affirmative defenses and the following seven counterclaims based on nuisance (first, second and fourth); trespass (second and third); slander of title (fifth); malicious civil prosecution (sixth); and defamation (seventh). There is a third-party action that was instituted by defendant against all of the contractors and the architect, who worked in defendant's premises. All of the third party defendants have been dismissed from the third-party action, except for Kreisel.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985). Once a prima facie showing has been made, the burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists warranting a trial of the action. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986).

Defendant initially seeks dismissal of plaintiffs' trespass claims regarding the encroachment of the flue in the party wall, claiming that this issue was previously decided in a prior litigation between plaintiffs and the predecessor owner of defendant's premises, Federal Ins. Co. v Buscarello & Sons, Inc., Supreme Court, New York County, Index No. 10278/84 (the federal decision). He argues that the federal decision found that he is entitled to use, maintain and repair the flue. He disputes plaintiffs' claim that he enlarged the flue, and maintains that the only alteration performed thereto was the installation of an interior lining. Additionally, he argues that, even if the flue

presently encroaches on plaintiffs' portion of the party wall, such encroachment is de minimis, and is, therefore, permitted.

In opposition, plaintiffs contend that the issues in the prior litigation were distinct from those raised in the instant action. They maintain that in the federal decision, the Court found that plaintiffs committed a trespass by installing a fireplace that extended into the party wall and connected into the flue. Here, plaintiffs allege that defendant created an encroachment by enlarging the flue. Plaintiff Joseph E. Sheehan also argues that the encroachment of the flue into plaintiffs' portion of the party wall is not de minimis, since defendant's renovation work resulted in the release of noxious gases, dust and debris into plaintiffs' home, and the impairment of the structural integrity and fire resistance capacity of the party wall (Sheehan affidavit, dated 6/30/03). He submits a copy of the court-directed smoke test report of Independent Testing Laboratories, Inc., which reported that two smoke bombs introduced into the flue at the cellar level of defendant's premises, resulted in "smoke billowing and pouring out of a fireplace hearth/mantle at the first floor rear west fireplace (of plaintiffs' premises), as well as huge volumes of smoke at the cellar area stone foundation wall adjacent to the flue tested." (Plaintiffs' Exhibit A, dated 4/26/01, at 2). The report also indicates that, after a fireplace flue was similarly tested on the second floor of defendant's premises, heavy smoke was again sighted in the same areas within plaintiffs' premises. Plaintiffs also submit an affidavit by Richard Adams, a member of Hunt Architects, a New York City architectural firm, together with photos of plaintiffs' premises, to demonstrate the alleged damage caused by defendant's renovation work.

As noted by defendant, the court in the federal decision found that the flue was designed exclusively for the use of the owner/occupants of defendant's premises (see the federal decision, at

8). It also found that the flue was "wholly on [the Prior Owner's] property"). Accordingly, defendant, as the current owner, had the right to use and maintain the flue, as it existed at the time of that litigation. *See Schneider v. Hans*, 204 Misc. 1058 [Sup. Ct, Queens Co. 1953], *aff'd* 283 App. Div. 797 (2d Dept. 1954). Here, since there is a factual dispute between the parties as to whether defendant altered and/or enlarged the flue into plaintiffs' portion of the party wall, the findings in the federal decision do not resolve the encroachment issue raised by plaintiffs in the instant action.

Further, as noted by defendant, adjoining owners have reciprocal rights in and to the use of the whole of a party wall. *Field's Apparel, Inc. v. C. & A. Brenninkmeyer, Inc.*, 219 N.Y.S.2d 306, Sup. Ct, Kings Co., 1961). "It is well settled law that a common or party wall "is for the common benefit of contiguous proprietors." *25 West 74th St. Corp. v. Wenner*, 268 A.D.2d 387 (1st Dept. 2000), quoting *Varriale v. Brooklyn Edison Co., Inc.*, 252 N.Y. 222, 224 (1929). However, an adjoining owner may not exercise a use of the party wall that would be detrimental to the other, e.g., that would weaken the party wall or cause actual injury to the other's building. *American Ry. Express Co v. Lassen Realty Co.*, 205 App. Div. 238 (1st Dept. 1923); *see also, Schneider v. 44-84 Realty Corp.*, 169 Misc. 249 (Sup. Ct., Bronx Co. 1938), *aff'd*, 257 A.D. 932 (1st Dept. 1939). The use of a party wall "should not be subjected by either owner 'to a use whereby it ceases to be continuously available for enjoyment by the other.'" *Sakele Brothers, LLC v. Safdie*, 302 A.D.2d 20 (1st Dept. 2002), quoting *Varriale v. Brooklyn Edison Co., Inc.*, 252 N.Y. at 224.

The parties' respective affidavits, expert affidavits, and other documentation raise numerous factual issues, including whether defendant extended the flue, whether the flue encroaches into the plaintiffs' portion of the party wall, and whether such encroachment, if any, is de minimis, and/or

detrimental to plaintiffs' use of the plaintiffs' premises. Therefore, that branch of defendant's motion for summary judgment dismissing all trespass claims relating to the encroachment of the flue in the party wall is denied.

Defendant also seeks summary judgment dismissing the causes of action for injunctive relief [excluding the fifth cause of action], trespass [excluding that portion claiming a trespass arising from the dislodging of bricks from the party wall during the defendant's renovation], encroachment, and nuisance. The injunctive causes of action seek removal of the encroaching structures (Complaint, first cause of action, ¶¶ 31, 61); conformance of the new chimney system to the applicable laws, removal of the fire hazards (second cause of action, ¶ 37); and restoration of the party wall to its former condition (third and fourth causes of action, ¶¶ 45, 51). The trespass, encroachment and nuisance causes of action (sixth, seventh, and ninth, respectively) are based on the alleged encroachment of defendant's new heating system, fireplaces and the flue into the plaintiffs' portion of the party wall, and the alleged penetration of noxious fumes, dust, debris and gases into the plaintiffs' premises.

Trespass occurs when a defendant intentionally and unlawfully interferes with plaintiffs' right to possession of certain real property, and there are resultant damages. *See Ain v. Glazer*, 257 A.D.2d 422 (1st Dept. 1999). "The elements of the tort of private nuisance are: (1) an interference, substantial in nature; (2) intentional in origin; (3) unreasonable in character; (4) with plaintiffs' right to use and enjoy land; (5) caused by the defendant's conduct." *Weinberg v. Lombardi*, 217 A.D.2d 579 (2d Dept. 1995). Here, the complaints raised in the aforementioned causes of action concern defendant's renovation work within defendant's premises, including work to the flue, and the facts in connection with this work are strongly disputed by the parties. In light of the factual disputes,

including whether defendant's renovations to defendant's premises weakened or affected the structural integrity of the party wall, whether the type of renovation work performed by defendant was such that compliance with Building Codes was required, defendant's motion for summary judgment on the aforementioned claims and the negligence claim are denied.

Additionally, defendant's argument that plaintiffs lack standing to sue because they have received insurance proceeds for the damages claimed here is without merit. Plaintiffs' reimbursement for damages is irrelevant to their standing to commence this action. Plaintiffs, as title owners of the townhouse adjoining defendant's premises, are entitled to bring this action. *See, e.g., 25 West 74th Street Corp. v. Wenner*, 268 A.D.2d 387; *see also Sakele Brothers, LLC v. Safdie*, 302 A.D.2d 20. Therefore, defendant's motion is denied in its entirety.

Plaintiffs cross-move for summary judgment dismissing defendant's counterclaims. The first, second and fourth counterclaims are based on private nuisance. Defendant's first private nuisance counterclaim alleges that plaintiffs allegedly performed various alterations in their townhouse, including the relocation, alteration and/or removal of structural members of the party wall and major components of the heating, electrical and plumbing systems (Answer, ¶¶ 72-74). The second counterclaim is based on plaintiffs' alleged acts of sealing and removing a fireplace on the west non-party wall of their townhouse (¶ 82), removing brick and other supporting structural materials from the party wall (*id.*, ¶ 86), and installing a wood-burning fireplace on the first floor of the party wall (the fireplace). The fourth counterclaim alleges that plaintiffs' rooftop chimney lists to one side and creates an imminent danger of collapse (*id.*, ¶ 95).

Plaintiffs claim that defendant does not provide evidentiary proof of the actions allegedly performed by plaintiffs in their townhouse. Sheehan acknowledges that the fireplace was the subject

of the prior litigation, but claims that in accordance with the federal decision, the flue and fireplace were sealed, and the fireplace has not been used since at least 1989 (Sheehan's affidavit dated 6/30/03, at 5). Plaintiffs also relies on the Adams Affidavit, wherein Richard Adams alleges that, by sealing the flue, plaintiffs neutralized the fireplace as the court directed in the prior action (Adams' affidavit dated 6/27/03 at 4). Plaintiffs also argue that the rooftop chimney is on the opposite side of plaintiffs' premises, near the property of their other adjoining neighbor, and has nothing to do with the party wall or any other part of defendant's premises. Additionally, they contend that there is no indication that the chimney will collapse.

In opposition, defendant claims that the fireplace was not removed as required by the federal decision. Defendant relies on an affidavit by Cornelius F. Dennis, a licensed engineer, wherein he alleges that, on April 26, 2001, he observed that the Fireplace was recessed approximately 14 inches into the party wall, which was at that point approximately 16 inches thick with plaster finish on both sides (Dennis' affidavit dated 7/9/03). He maintains that the party wall does not provide acceptable fire protection to the defendant, and creates an imminent fire hazard to both townhouses. Dennis also reported that he observed a listing chimney at the roof level of plaintiffs' premises, which he contends will collapse, if left uncorrected.

As previously discussed, a private nuisance arises when there is a substantial interference with the use and enjoyment of another's land, and that invasion is intentional and unreasonable, and is caused by another's conduct in acting or failing to act. *Copart Industries, Inc. v. Consolidated Edison Co. of New York, Inc.*, 41 N.Y.2d 564 (1977). Here, the parties' papers regarding defendant's private nuisance claims primarily focus on the fireplace. A review of the parties' submissions shows several questions of fact, including whether plaintiffs adequately neutralized the fireplace as required

maliciously published. Plaintiffs further argue that defendant has not demonstrated how the statements complained of reduced the marketability of defendant's premises, impeded a sale of defendant's premises, or resulted in any special damages.

Defendant claims that since November 1998, when he began the renovation of defendant's premises, he was bombarded by correspondence from plaintiffs, their attorneys, and their consultant, Rick Adams, all complaining about plaintiffs' inability to use the flue. Defendant claims that, in their correspondence, plaintiffs repeatedly claim a right to the use of the flue, although such claim was adjudicated adversely to plaintiffs in the prior litigation, and plaintiffs knew that such claim was false. He specifically refers to correspondence, which contained, inter alia, the following statements:

1) "[Y]ou or your contractors have closed and moved [plaintiffs'] Flue, thus depriving them of the use of the fireplace which they have used for the more than thirty years they have lived at [Plaintiffs' Premises] ... your closing up and moving the Flue was without legal right, and improperly took our clients' property (Defendant's Exhibit 6, Correspondence from plaintiffs' counsel to defendant dated 11/11/98);

2) "[Y]our client has expropriated for his exclusive use certain chimney/flue rights that are the historical property of [Plaintiffs' Premises] (Defendant's Exhibit 11, Correspondence from plaintiffs' counsel to defendant's counsel dated 12/15/98);

3) "[Y]ou have seized the Flue that is part of the property rights of [Plaintiffs' Premises] and are proceeding to seal it off and incorporate it into your premises..."

(Defendant's Exhibit 12, Joseph Sheehan to Defendant dated 1/12/99). Defendant further claims that, since the progress on his renovation work was interrupted and delayed by approximately four months, he sustained special damages in the amount of \$18,000.

The elements of slander of title are (1) a communication falsely casting doubt on the validity of complainant's title, (2) reasonably calculated to cause harm, and (3) resulting in special damages.

Brown v. Bethlehem Terrace Assoc., 136 A.D.2d 222 (3d Dept. 1988); *Carnival Co. v. Metro-Goldwyn-Mayer, Inc.*, 23 A.D.2d 75 (1st Dept. 1965). Special damages must be pleaded and proved in the action. An important factor in determining the amount of damages for the disparagement of property is the resultant impairment of vendibility. *105 East Second St. Assoc. v. Bobrow*, 175 A.D.2d 746 (1st Dept. 1991).

Here, it appears that the statements made in the submitted correspondence asserting plaintiffs' right to use the flue, casts doubt on defendant's entitlement to the exclusive use of the flue. Although defendant alleges that these statements defamed him, defendant does not demonstrate how these statements impaired the marketability of his property, an elements necessary to support a slander of title claim. *105 East Second Street Assoc. v. Bobrow*, 175 A.D.2d 746. Therefore, that branch of plaintiffs' motion for summary judgment dismissing defendant's fifth counterclaim for slander of title is granted.

The sixth counterclaim asserts a malicious prosecution claim alleging that plaintiffs lodged repeated complaints to the New York City Department of Buildings (DOB), which resulted in the issuance of unnecessary stop work orders and notices of violations. Plaintiffs claim that defendant fails to demonstrate that the complaints they lodged against him to the New York City Department of Buildings (DOB) were made with malice. In support of his claim, defendant submits copies of the following documents: (1) orders by the City of New York Environmental Control Board dismissing the violations issued to defendant; and (2) a rescission of a Stop Work Order issued to Defendant's Premises by the New York City Department of Buildings (Defendant's Exhibit 18, City of New York Environmental Control Board orders, dated 2/14/00 and 7/15/99; New York City Department of Buildings Rescission, dated 11/19/99).

The essential elements to the maintenance of an action to recover damages for malicious prosecution are: (1) the commencement of a judicial proceeding against the defendant; (2) at the insistence of the plaintiff, (3) without probable cause, (4) with malice, (5) which action was terminated in favor of the defendant, and (6) to the defendant's injury. See *Berman v. Silver, Forrester & Schisano*, 156 A.D.2d 624 (2d Dept. 1989). A review of the record discloses an order issued by the Department of Buildings on February 14, 2000 dismissing violations issued on October 6, 1999, since defendant "made reasonable efforts to comply and correct, and it was estopped from doing so by the complainant" (Defendant's Exhibit 18, Department of Building's Order of Dismissal dated 2/14/00). Defendant's submissions sufficiently raise issues of fact as to whether there was probable cause by plaintiffs to lodge their complaints against defendant, and whether there was malice, thus warranting denial of that branch of plaintiffs' cross motion for dismissal of defendant's sixth counterclaim for malicious prosecution. Since defendant has voluntarily withdrawn his seventh Counterclaim based on defamation, that branch of plaintiffs' cross motion for dismissal of this counterclaim is moot.

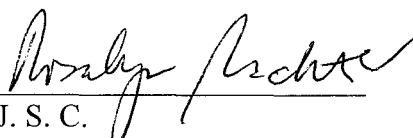
Therefore, plaintiffs' cross motion for summary judgment dismissing defendant's counterclaims is granted to the extent of dismissing the fifth counterclaim in its entirety, and it is further,

ORDERED that, in Motion Sequence No. 016, defendant's motion for summary judgment is denied; and it is further

ORDERED that, in Motion Sequence No. 016, plaintiffs' cross motion for summary judgment dismissing defendant's counterclaims is granted to the extent of dismissing the fifth (slander of title) counterclaim in its entirety.

Dated: Oct. 6, 2003

ENTER:



J. S. C.