

1380 Madison Avenue, L.L.C. v 17 East Owners Corp.

2006 NY Slip Op 30110(U)

September 6, 2006

Supreme Court, New York County

Docket Number: 0060138/2003

Judge: Herman Cahn

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: REYNOLD CARR
Justice

PART 49

1350 MADISON AVENUE LLC

INDEX NO. 601386/03

MOTION DATE 12/19/05

MOTION SEQ. NO. 006

MOTION CAL. NO. _____

- v -

17 EAST OWNERS CORP

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

NYS SUPREME COURT
REVIEWED
SEP 08 2006
E-FILING DEPT.

FILED

SEP - 7 2006

COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE**

Dated: 9/6/06

Ann Cah

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 49

-----X
1380 MADISON AVENUE, L.L.C.,

Plaintiff,

-against-

Index No. 601386/03

17 EAST OWNERS CORP.,

DECISION AND ORDER

Defendant.

-----X

HERMAN CAHN, J:

Plaintiff 1380 Madison Avenue, L.L.C. (Madison) moves for leave to serve an amended complaint, CPLR 3025. Defendant 17 East 96th Owners Corp., s/h/a 17 East Owners Corp. (17 East Owners Corp.) cross-moves, pursuant to CPLR 3211 (a) (1) , (3), (4), (5), (7), and (10), to dismiss the complaint, and/or for summary judgment, CPLR 3212. I granted Madison’s motion to serve an amended complaint on the record on January 23, 2006.

Plaintiff Madison is former owner of a two-story building, which was located at 1380-1388 Madison Avenue, in Manhattan. Defendant 17 East Owners Corp. is the owner of a residential cooperative apartment building located at 17 East 96th Street, which is located immediately to the west of Madison’s premises.

Madison commenced this action in May 2003, to secure the removal of 17 air conditioners, protruding from 17 East Owners Corp.’s building into the airspace above its property. In September 2002, Madison had entered into a contract to sell the property, which required that Madison obtain the removal of the air conditioners, prior to closing.

On October 10, 2003, I granted Madison partial summary judgment, finding that 17 East

Owners Corp. had not stated a claim for either adverse possession or prescriptive easement, and that Madison was not barred by either laches or the statute of limitations from pursuing its claims. I also granted declaratory relief, stating in pertinent part:

[I]t is declared that plaintiff, 1380 Madison Avenue, L.L.C., has the exclusive right to the immediate use, possession, and enjoyment of the air space above its real property . . . and that defendant, 17 East Owners Corp., is currently in violation of that right by virtue of the air conditioning units presently protruding from its property into plaintiff's aforesaid air space . . .

(Amended Comp., Ex. 3). The Order was affirmed on November 4, 2004 (1380 Madison Ave., L.L.C. v 17 East Owners Corp., 12 AD3d 156 [1st Dept 2004]).

On November 20, 2003, 1380 Madison obtained an Order to Show cause restraining 17 East Owners Corp. from continuing to violate Madison's "exclusive right to the immediate use, possession and enjoyment of the air space above its real property," and requiring 17 East Owners Corp. to "remove immediately and or relocate the air conditioning units that protrude into the air space" (Notice of Cross-Motion, Ex. C). At a December 8, 2003 hearing, I ruled that 17 East Owners' Corp. was entitled to a hearing as to each air conditioner and the encroachment or amount of encroachment (id., Ex. D, at 2). No hearing has been held on that issue.

On February 2, 2004, 1380 Madison sold the property to Madison 96th Avenue LLC (Madison 96). As of the February 2004 closing date, 17 East Owners Corp. had not removed the air conditioning units. Madison alleges that, as a result of 17 East Owners Corp.'s refusal to comply with this court's rulings, Madison was in violation of the sales contract and Madison 96 had the right to cancel the contract. After negotiations, Madison 96 agreed to close on the property in exchange for an \$800,000 reduction in the sales price, plus an assignment of the

rights of Madison's existing claims against 17 East Owners Corp.

Thereafter, Madison 96 continued the action against 17 East Owners' Corp., and on December 21, 2004, a settlement was entered into pursuant to which the residents agreed to remove their air conditioners forthwith.

The amended complaint names 17 East Owners Corp. as well as the individual unit owners whose air conditioners protruded into Madison's air space (the unit owners) as defendants. The amended complaint alleges a single cause of action for trespass.

17 East Owners Corp. and the unit owners move to dismiss on the grounds that: (1) Madison 96, which is the real party in interest, purchased the property for \$800,000 less than the original sale price, and therefore, it has not been damaged by any alleged trespass; (2) any damages suffered by Madison were due to its failure to remove a commercial tenant from its space prior to closing; and (3) Madison 96 is estopped from suing for trespass by the so-ordered stipulation of the parties dated December 21, 2004. 17 East Owners Corp. also contends that the trespass claim in the complaint is identical to the counterclaim in another action, commenced by 17 East Owners Corp. against Madison 96 (Index No. 108695/04) (the 2004 Action), and therefore should be dismissed pursuant to CPLR 3211 (a) (4).

As to this last argument, the 2004 Action was commenced in June 2004, and the counterclaim was brought in July 2005. The within action was commenced in May 2003 and contained a cause of action for trespass. In general, in order to sustain a claim that another action is pending for purposes of CPLR 3211 (a) (4), the other action must have been commenced first (see, Reckson Assoc. Realty Corp. v Blasland, Bouck & Lee, Inc., 230 AD2d 723 [2d Dept 1996]). Although Madison 96 has recently moved to amend the complaint to state a single cause

of action for trespass and to include the individual tenants of 17 East Owners Corp. as defendants, this claim has been ongoing since 2003. That part of the motion to dismiss the claim pursuant to CPLR 3211 (a) (4) is therefore denied.

As to 17 East Owner's Corp.'s remaining arguments, trespass is the interference with a person's right to possession of real property, whether by unlawful act or by lawful act performed in an unlawful manner (Tornheim v Federal Home Loan Mortgage Co., 988 F Supp 279 [SDNY 1997], affd 198 F3d 235 [2d Cir 1998] citing Annutto v Town of Herkimer, 56 Misc 2d 186, 189 [Sup Ct, Oneida County], affd. in part 31 AD2d 733 [4th Dept 1968]; see also Ain v Glazer, 257 AD2d 422 [1st Dept 1999]). A structure which encroaches upon adjoining land is a continuing trespass which gives rise to successive causes of action (509 Sixth Ave. Corp. v New York City Tr. Auth., 15 NY2d 48 [1964]). The amended complaint therefore states a valid cause of action for trespass, and as defendants are well aware, I have previously found that the encroachment of defendants' air conditioners into Madison's air space was in violation of Madison's rights (Order, October 10, 2003, Steves Aff., Ex. 3). Nor is there any language in the parties' December 21, 2004 stipulation, which relieves defendants of their liability for damages (Steves Aff., Ex. 8).

Finally, the General Obligations Law specifically permits the transfer of any claim or demand except a claim to recover damages for personal injury or one in contravention of statute or public policy (General Obligations Law § 13-101). An assignee takes the subject of the assignment with all the rights possessed by the assignor, and the assignor has no further interest in the subject of the assignment (id., § 69). Since a claim of trespass is assignable, Madison 96 is entitled to recover the damages suffered by its predecessor, Madison, prior to the assignment, as

well as its own damages which may have occurred thereafter.

Madison 96 acquired the premises with impediments to achieving its intended goal for the property. Defendants' protruding air conditioners, as well as their continuing refusal to remove them, was an impediment. The reduction in the purchase price by \$800,000 may be evidence of the reduction of the value of the property. Whether this amount is found to be the actual reduction in the value of property suffered by Madison solely as a result of defendants' trespass, is an issue of fact for trial.

Accordingly, based upon the foregoing, it is

ORDERED that defendants' motion to dismiss the complaint, and/or for summary judgment, is denied.

Dated: September 6, 2006

ENTER:



J.S.C.

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