

**441 E. 57th St., LLC v 447 East 57th St. Corp.**

2006 NY Slip Op 30286(U)

June 23, 2006

Supreme Court, New York County

Docket Number:

Judge: Rolando T. Acosta

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

PRESENT: ACOSTA  
Justice

PART 61

441 E. 57TH ST.

INDEX NO.

105915/06

MOTION DATE

- v -

MOTION SEQ. NO.

1

447 E. 57TH ST. (CP)

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 ...

PAPERS NUMBERED

1, 2 (Exh. A-5), 3 (Exh. K-Q), 4

Answering Affidavits — Exhibits \_\_\_\_\_

5, 6 (Exh. A-14) 7

Replying Affidavits \_\_\_\_\_

8

Cross-Motion:  Yes  No

**FILED**

JUN 28 2006

Upon the foregoing papers, it is ordered that this motion

NEW YORK  
COUNTY CLERK'S OFF.

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

SO ORDERED

Dated: JUNE 23, 2006

*[Signature]*

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

ROLANDO T. ACOSTA  
J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK PART 61**

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441 East 57<sup>th</sup> Street, LLC,  
  
Plaintiff,  
  
– against –

447 East 57<sup>th</sup> Street Corp.,  
  
Defendant .

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**DECISION/ORDER**

Index No. 105915/06

Motion Seq. 1

**Present:**

**Hon. Rolando T. Acosta**  
Supreme Court Justice

**FILED**  
JUN 28 2006  
NEW YORK  
COUNTY CLERK

The following documents were considered in reviewing plaintiff's motion for declaratory relief and defendant's cross-motion to dismiss the complaint pursuant to CPLR § 3211(a)(7), or in the alternative, for summary judgment pursuant to CPLR § 3212:

<b>Papers</b>	<b>Numbered</b>
<b>Order to Show Cause, Affidavit In Support,</b>	<b>1, 2 (Exh. A-J)</b>
<b>Emergency Affidavit, Memorandum of Law In Support</b>	<b>3 (Exh. K-Q), 4</b>
<b>Notice of Cross-Motion, Affidavit</b>	<b>5, 6 (Exh. A-H)</b>
<b>Defendant's Memorandum of Law</b>	<b>7</b>
<b>Reply Affidavit, Plaintiff's Memorandum of Law</b>	<b>8</b>
<b>in Further Support and Opposition to Cross-Motion</b>	

In this declaratory judgment action<sup>1</sup>, plaintiff 441 East 57<sup>th</sup> Street, LLC (“441 LLC”) moves by Order to Show Cause seeking a declaration from this Court that plaintiff has the right, or does not need the consent of defendant 447 East 57<sup>th</sup> Street Corp. (the “cooperative”) to demolish its building located at 441 East 57<sup>th</sup> Street, New York, New York (the “building”), including the eastern wall of such building, one half of which is located on defendant’s property. Defendant contends that plaintiff is precluded from demolishing the subject wall and cross-moves for dismissal of plaintiff’s claim pursuant to CPLR § 3211(a)(7), or in the alternative, for summary judgment pursuant to § 3212. Defendant’s cross-motion is denied in its entirety, and in searching the record, summary judgment is granted in favor of plaintiff and the Court renders a declaration that plaintiff has the right to demolish its building along with the subject wall, and does not need the consent of defendant.

The wall that is the subject of the controversy before the Court was erected between the contiguous lots of 441 East 57<sup>th</sup> Street and 447 East 57<sup>th</sup> Street in 1867 and the terms of its use was embodied in a “Party Wall Agreement” which

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<sup>1</sup> Defendant in this action originally commenced an action against plaintiff in this action under the caption 447 East 57<sup>th</sup> Street Corp. and Sir Harold Evans v. 441 East 57<sup>th</sup> Street, LLC, Index No. 104805/06 seeking a preliminary injunction to prevent 441 East 57<sup>th</sup> Street, LLC from demolishing the party wall at issue in this controversy. 447 East 57<sup>th</sup> Street Corp. and Sir Harold Evans subsequently discontinued the action before issued were joined.

states, in pertinent part, that the wall “shall be used by each of said parties respectively as a party wall between the buildings to be by them respectively erected upon the aforesaid lots.” Thus, the purpose of the “party wall” was to provide structural support for the adjoining buildings. The lot that is now owned by defendant consisted of a three-story building at the time of the Party Wall agreement but was subsequently demolished sometime in the 1910s or 1920s. Thereafter, the empty twenty foot lot where the demolished building once stood was combined with other lots to the east also owned by the cooperative. However, the original twenty foot lot does not currently have any building or structure on it, and has not had one since the original building was demolished. Rather, the lot is currently being utilized by defendant as a garden, with the party wall serving to provide enclosure and aesthetics to the garden. It is plaintiff’s contention that since the party wall no longer serves its intended purpose, i.e. to support two adjoining structures, it has the right to demolish the wall in order to construct its new condominium building. Defendant argues that the abutment of the wall in its property precludes plaintiff from demolishing without its consent. The Court disagrees.

The present dispute is governed by the principles articulated by the New York Court of Appeals in 357 East Seventy-Sixth Street Corp. v. Knickerbocker

Ice Co., 263 N.Y. 63 (1933). In the instant action, there is no question that the party wall no longer serves its intended purpose of supporting two adjoining structures. Thus, in circumstances such as this, “[t]he essential consideration which impels the continuance of a party-wall easement over the wishes of one of the property owners is the necessity of continued support of an existing building and not an isolated property right in the wall as such.” 357 East Seventy-Sixth Street Corp., 263 N.Y. at 66. The party wall only adjoins one structure, namely, plaintiff’s building. However, it is this precise building that plaintiff is seeking to demolish. Once demolition of the building is complete, the party wall will merely be an “isolated property right” for both parties. Moreover, defendant has failed to demonstrate any necessity of having the party wall remain undisturbed for the benefit of defendant’s garden. Indeed, even construction of a new building supported by an old party wall falls into the category of convenience rather than necessity. 357 East Seventy-Sixth Street Corp., 263 N.Y. at 67.

The building that originally stood on defendant’s lot when the party-wall agreement was executed is no longer there. In other words, the structural condition that required the existence of the party wall ceased when the building that formerly stood on defendant’s garden lot was demolished, and so too was the defendant’s right of support from the party wall. “To say that the right of support

of a building survives the building itself is paradoxical. Erecting an entirely new building on an old party wall falls pretty clearly into the categories of convenience rather than necessity.” 357 East Seventy-Sixth Street Corp., 263 N.Y. at 67. As is evident from the Knickerbocker decision, demolition of a building by one lot owner does not bestow upon that lot owner a right to prevent the adjoining lot owner from demolishing the party wall in perpetuity, which is the exact import of defendant’s contention if its argument is taken to its logical conclusion. Indeed, “even an express covenant will not be enforced beyond the duration of the conditions” giving rise to the covenant, which at the time of the erection of the party-wall here was to support two adjoining buildings. Ibid.; see also 5 East 73<sup>rd</sup> Inc. v. 11 East 73<sup>rd</sup> Street Corp., 16 Misc. 2d 49 (Sup. Ct. N.Y. Co. 1959) (“[W]here buildings are intentionally demolished, there is no obligation to maintain the wall for the benefit of one of the adjoining owners.”).

Thus, “[w]hen the [defendant] demolished its building, it put an end to the necessity of support on its side of the wall. To the [plaintiff], having equal rights with [defendant], came then the option either to continue the wall for the support of its own existing building or... to put a definite end to the easement.” 357 East Seventy-Sixth Street Corp. v. Knickerbocker Ice Co., supra, 263 N.Y. 63, 67 (1933). Plaintiff has now opted to put a definite end to the easement.

\* 7 ]

Finally, defendant's argument that its tenants who utilize the garden, such as Sir Harold Evans, have some legal right to privacy in the garden which prevents the demolition of the party wall is without merit. Apart from providing no caselaw whatsoever for their position that a tenant's subjective expectation of privacy in an outdoor garden can serve to maintain a party wall intact where that party wall no longer serves its original purpose of supporting two adjoining structures, defendant's privacy argument is belied by the garden's location on 57<sup>th</sup> Street in New York City with literally hundreds of windows peering into the garden. Thus, defendant has failed to establish that their "privacy" right in the garden rises to necessity rather than mere convenience.

ADJUDGED and DECLARED that plaintiff has the right and does not need the consent of defendant 447 East 57<sup>th</sup> Street Corp. to demolish its building located at 441 East 57<sup>th</sup> Street, New York, New York (the "building"), including the eastern party wall of such building; and it is further

ORDERED that defendant's cross-motion to dismiss the complaint pursuant to CPLR § 3211(a)(7), or in the alternative, for summary judgment pursuant to CPLR § 3212 is DENIED.

This constitutes the Decision and Judgment of the Court.

Dated: June 21, 2006

ENTER

SO ORDERED

*Rolando T. Acosta*

**ROLANDO T. ACOSTA**  
Rolando T. Acosta, J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

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CLERK'S OFFICE