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

PRESENT: _____ PART 15

Justice

511 W. 23rd St.

INDEX NO. 603735/04

MOTION DATE _____

- v -

MOTION SEQ. NO. 002

Sleepy Hudson LLC

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

FILED

APR 16 2007

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 4/12/07

_____ J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 24

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511 WEST 23rd STREET ASSOCIATES, LLC,

Plaintiff,

Index No. 603735/04
Mtn. Seq. 002

- against -

SLEEPY HUDSON LLC,

Defendant.

----------x

SLEEPY HUDSON LLC,

Third-Party Plaintiff,

- against -

KUDOS CONSTRUCTION CORP. and
ANCOR CONSTRUCTION CORP.,

Third-Party Defendants.

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WALTER TOLUB, J.:

In this action to recover damages for injury to real property, defendant/Third-Party Plaintiff, Sleepy Hudson LLC ("Sleepy Hudson"), moves, pursuant to CPLR 3212, for summary judgment dismissing the Complaint.

Background

Plaintiff, 511 West 23rd Street Associates, LLC ("511 West"), the owner of the real property located at 511 through 517 West 23rd Street, New York, New York (the "subject premises"), commenced this action seeking to recover for property damage allegedly caused by demolition and excavation work done on the adjacent property located at 519 West 23rd Street (the "adjacent premises"). Sleepy Hudson is the owner of the adjacent premises.

The following facts are gleaned from the submission of the parties. The subject premises sit under the High Line, an abandoned railroad track on West 23rd Street near the intersection of Tenth Avenue, in an area of Manhattan commonly referred to as Chelsea. The premises included a one-story warehouse, which was leased by a wholesale beer distributor.

Sleepy Hudson acquired the adjacent premises, which included a five-story commercial building, in 2003. The next year, Sleepy Hudson hired third-party defendant Kudos Construction Corp. ("Kudos") to demolish the commercial building. Kudos, in turn, hired third-party defendant Ancor Construction Corp. ("Ancor") to perform the demolition. Sleepy Hudson also hired nonparty ABR Construction Inc. to conduct excavation work at the adjacent premises and construct a new building on said premises.

The Complaint, which was filed in November 2004, essentially alleges that Sleepy Hudson caused substantial damage to the subject premises during its demolition and excavation work. 511 West claims that employees of Kudos and Ancor accessed the roof of the warehouse on the subject premises, without permission, to carry out the demolition work. 511 West also asserts that during the demolition, bricks from the commercial building fell onto the subject premises' roof, parapet, and exterior wall, causing damage, which included water leaking into the warehouse when it rained. 511 West further contends that during subsequent excavation of the adjacent premises, the excavation contractor

breached a duty of care and caused damage to the exterior and interior walls and interior floor of the warehouse on the subject premises by digging to a depth greater than 10 feet below curb level, without providing the required protection for the warehouse.

In the first cause of action, sounding in negligence, 511 West claims that Sleepy Hudson breached a duty of care to perform its demolition and excavation work in a reasonably safe manner. The second cause of action, seeking to recover damages for a private nuisance, alleges that the demolition work performed by Sleepy Hudson interfered with 511 West's use and enjoyment of the warehouse on the subject premises. In the third and fourth causes of action, which seek damages for trespass, 511 West claims that Sleepy Hudson interfered with its use and enjoyment of the subject premises, without its permission, by erecting a bracing that encroached upon the warehouse, and performed demolition and excavation work that severely compromised the structural integrity of the warehouse. In the fifth cause of action, 511 West claims that it is entitled to a permanent injunction mandating that Sleepy Hudson repair any structural damage to the subject premises and warehouse as a result of its demolition and excavation work.

Sleepy Hudson answered, generally denying the allegations in the Complaint and asserting several affirmative defenses. In

addition, Sleepy Hudson impleaded Kudos and Ancor seeking contribution or indemnification.

In its Response to Defendant's First set of Interrogatories, 511 West estimates the cost of repairs at $35,000, and the diminution in the value of the subject premises at $100,000 (Response, Notice of Motion, Exh B, ¶ 13). 511 West also asserts $1,500 in damages for the loss of use of a portion of the square footage of the subject premises over a 18-month period (*id.*). 511 West sold the subject premises in July 2005.

Sleep Hudson now seeks summary judgment dismissing the Complaint.

Discussion

It is well settled that 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 (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, *supra*). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*id.*).

As stated, the Complaint alleges causes of action for negligence, nuisance, and trespass, and seeks a permanent injunction based on Sleepy Hudson's demolition and excavation work at the adjacent premises. Negligence consists of a duty of care owed to another, and the breach of that duty resulting in injury (*see Pulka v Edelman*, 40 NY2d 781, 782 [1976], citing *Palsgraf v Long Is. R.R. Co.*, 249 NY 339 [1928]). Furthermore, a private nuisance threatens one or a few persons, an essential feature being an interference with the use or enjoyment of land (*Copart Indus., Inc. v Consolidated Edison of N. Y.*, 41 NY2d 564, 568 [1977]). Moreover, one who wrongfully uses another's land, without justification or consent, trespasses thereon and is liable to the owner for the cost of restoring the land to its condition immediately prior to the trespass and also, in an appropriate case, for damages based upon a duty of restitution for benefits received (*see Granchelli v Walter S. Johnson Bldg. Co.*, 85 AD2d 891 [4th Dept 1981]). In addition, a permanent injunction is a drastic remedy that will be issued only where a plaintiff demonstrates that it will suffer irreparable harm in the absence of injunctive relief (*see Icy Splash Food & Beverage, Inc. v Henckel*, 14 Ad3d 595, 596 [2d Dept 2005]). Irreparable harm has been construed to mean injury for which money damages would not be sufficient (*see Klein, Wagner & Morris v Lawrence A. Klein, P.C.*, 186 AD2d 631, 633 [2d Dept 1992]).

The proper way to measure injury to property, an essential element to the above-stated causes of action, is the diminution in the market value of the damaged property or the reasonable restoration costs, whichever is less (*see Fisher v Qualico Contr. Corp.*, 98 NY2d 534, 539 [2002]). Diminution in value is measured by comparing the value of the property immediately before and immediately after the alleged injury (*see Johnson v Scholz*, 276 App Div 163, 164 [2d Dept 1949]). If damages are based on reasonable restoration costs, then loss of use may also be added to the damaged suffered (*id.*). A plaintiff need only present as to one measure of damages (*Jenkins v Etlinger*, 555 NY2d 35, 39 [1982]).

Preliminarily, the assertion that claims of trespass and nuisance cannot survive a sale of real property lacks merit. "An action for trespass may be brought by a person in exclusive possession at the time of the trespass" (*Allied 31st Ave. Corp. v City of New York*, 27 AD2d 948, 949 [2d Dept 1967]). Similarly, a private nuisance is actionable by the individual whose rights have been disturbed (*see Copart Indus., Inc. v Consolidated Edison Co. of N. Y.*, *supra* [internal citations omitted]). A party who once had a vested right to recover damages for injury to real property cannot be deprived of that right (*see Appleton v Marx*, 191 NY 81, 84 [1908]). Thus, 511 West may properly pursue its claims for trespass and nuisance, along with its negligence claim.

Turning to the merits, Sleepy Hudson does not dispute that it undertook the demolition and excavation work which gave rise to 511 West's claims. Instead, Sleepy Hudson argues that it is entitled to summary judgment dismissing the Complaint since 511 West cannot show injury to property as a result of the demolition and excavation work.

Specifically, Sleepy Hudson argues that 511 West cannot show a diminution in the value of the subject premises as a result of the demolition and excavation work performed on the adjacent premises. In fact, Sleepy Hudson insists that any reduction in the value of the subject premises occurred prior to its demolition and excavation work. Using the amount of transfer taxes paid ($3,600), as indicated in the deed, dated October 14, 1986, filed in the New York County Clerk's office, Sleepy Hudson maintains that 511 West's predecessor paid $180,000 to acquire the subject premises. Furthermore, relying on the January 15, 2004 published New York City Notice of Value for the subject premises, Sleepy Hudson notes that in the value of the subject premises was reduced from $925,000 in 2003 to $649,000 in 2004. However, the reduction is not attributed to any work performed by Sleepy Hudson because the published New York City Notice of Value for property in 2004 indicates, as of January 5, 2004, which was prior to any excavation or demolition work performed by Sleepy Hudson. In addition, Sleepy Hudson asserts that despite a 2005 estimated market value of $700,000 for the subject premises, 511

West was able to sell the property for $12.5 million. Sleepy Hudson suggests that 511 West's ability to realize such a profit had nothing to do with the existence or condition of the warehouse on the subject premises, but rather, was based on the proximity of the subject premises to the High Line project and the changes in the area's zoning.

Sleepy Hudson also argues that 511 West cannot look to the cost of restoration as a measure of damages since it did not repair the alleged injury to the subject premises, and the warehouse was razed after the sale of said premises. To support its position, Sleepy Hudson relies on 511 West's Response to Defendant's First Set of Interrogatories, which essentially states that no corrective or remedial work was performed to correct the alleged damage (Response, Notice of Motion, Exh B, ¶ 12). Sleepy Hudson also maintains that the warehouse, which existed on the subject premises, was worth nothing since it was demolished soon after the sale of said premises in July 2005. In addition, Sleepy Hudson asserts that 511 West cannot recover on its claim for water damage to the roof of the warehouse on the subject premises, as a result of falling bricks during demolition work on the adjacent premises, since 511 West failed to take any measures to mitigate said damage.

In opposition, however, 511 West contends that, at the very least, triable issues of fact exist as to whether it sustained cost of restoration damages or a diminution in the value if the

subject premises as a result of Sleepy Hudson's demolition and excavation work. 511 West asserts that the proper measure of diminution in value damages is the value of the property immediately before and after the alleged injury, not the purchase and sale price of the subject premises. 511 West also maintains that its failure to make repairs does not preclude recovery of restoration costs.

To support its position, 511 West submits, *inter alia*, photographs of the alleged property damage and affidavits attesting to such damage. In particular, 511 West relies on an affidavit from Bruce Johnson, the owner and manager of the wholesale beer distributor that leased the warehouse on the subject premises. The Johnson affidavit states, in essence, that employees of Sleepy Hudson's demolition contractor accessed the roof of the warehouse on the subject premises without his permission, leaving debris and causing damage to the warehouse, and that Sleepy Hudson's excavation contractors compromised the foundation of the subject premises (Johnson Aff., Aff. in Opp). The Johnson affidavit also includes photographs of the alleged property damage (*id.*, Exh F), and a Notice of Violation and Hearing, dated August 12, 2004, issued by the New York City Department of Buildings to Ancor, stating that Ancor had violated New York City Administrative Code § 27-1009(a) by failing to protect adjacent buildings during demolition operations on the adjacent premises (*id.*, Exh D). The notice further states:

> Contractor demolished building at the above address to cellar level approximately 10' 0" feet below grade without earth fill. This left adjacent property at east elevation (foundation and footing exposed to elements and potential foundation damage) shoring and bracing is provided for adj[acent] property at west elevation - footing still left exposed and no shoring provided for adj[acent] building at north side. Contractor also failed to waterproof ... both adjacent properties. Upon inspection adj[acent] property found with water damage. Remedy: Protect adjacent property, provide earth fill for open hole and P.E. report for bracing of adjacent property.

(*Id.*).

In addition, 511 West submits an affidavit from Akber Afridi, a Consulting Engineer, essentially concluding that the demolition and excavation work performed by Sleepy Hudson caused significant damage to the foundation of and warehouse on the subject premises, and that said damage reduces the resale value of the premises by an indefinite amount (Aff. of Afridi, Aff. in Opp).

Sleepy Hudson objects to attempts by 511 West's engineering expert to offer an opinion as to valuation of real estate. This court agrees that Mr. Afridi's opinion pertaining to the valuation of the Premises has no probative value. First of all, Sleepy Hudson points out that Mr. Afridi was not identified as an expert witness in the discovery disclosures. Mr. Afridi, an engineer by education and training, is not qualified as an expert in the valuation of real estate in Manhattan. Furthermore, the

only offer of proof of the diminution of value to the premises in the Afridi Affidavit is speculative at best: "[i]n my opinion, if the Premises were to have been purchased by a new owner to be utilized as they were, the damage and potential future damage would have reduced the resale value by an indeterminate amount." (Afridi Aff. Para 20.). Expert opinions lack probative force when they are contingent, speculative or merely possible. (Horn v. State, 31 AD2d 364 [3d Dept 1969]).

On review of the submissions, the Court concludes that Sleepy Hudson established entitlement to judgment as a matter of law on all but the trespass causes of action. 511 West has wholly failed to provide any evidence that it has suffered any injury. As already stated and conceded by the parties, any potential recovery is limited to the cost of repairing the property or its diminution in value, whichever is less, with Plaintiff bearing the burden to prove one or the other. (McDermont v. City of Albany, 309 AD2d 1004 [3d Dept 2003]). Based upon all of the documentary evidence exchanged, Plaintiff will not be able to prove that its property value was diminished as a direct result of excavation or demolition work performed by the Defendant or that it incurred any costs to repair the property. In fact, Plaintiff concedes that it never performed any repairs to the subject premises amounting to a restoration cost of zero. Similarly, Plaintiff cannot prove, nor has it provided any evidence that it suffered a reduction in the value

of its property. Despite the published assessment of $700,000 in 2005 and the claimed damage, Plaintiff sold its property for $12.5 million. The Plaintiff's ability to obtain such a price was based on the proximity to the Highline Project and the changes in the areas zoning regulations. Furthermore, after the sale in July 2005, the entire warehouse was demolished, demonstrating that the warehouse itself had very little if any value. Since no reduction in property can be proved, the Plaintiff cannot recover for any damage allegedly caused by the Defendant. Sleepy Hudson has also established entitlement to summary judgment dismissing the cause of action for a permanent injunction. There simply is no proof that irreparable injury will occur if the relief is denied.

However, a trespasser is subject to liability for any harm he or she causes as a result of the trespass, even if the defendant's conduct would not otherwise subject him or her to liability. (Dellaportas v. County of Putnam, 240 AD2d 358 [2d Dept 1997]). Damages, albeit nominal, may be awarded in trespass actions in which the plaintiff is successful, even without an injury. (14 N.Y. Prac., New York Law of Torts §2:7). Even the most innocent of trespassers is liable for nominal damages in the case of a trespass against land. (Rossi v. Ventresca Bros. Constr. Co., Inc., 94 Misc.2d 756 [City Ct., White Plains, 1978]). This exception to the general rule that actual injury must be demonstrated in a tort action exists to protect a

property owner from a continuing trespass ripening into a prescriptive right and depriving the owner of title altogether. (Kronos, Inc., v. AVX Corp., 81 NY2d 90 [1993]). This being a CPLR §3212 motion where the record is complete, the court has the power to make the appropriate award of damages. (Karagiannis v. New York State Thruway Auth., 187 AD3d 1009 [4th Dept 1992]). Therefore, in the absence of proven damages, Plaintiff is entitled to nominal damages for Defendants trespass. (Kronos, Inc., v. AVX Corp., 81 NY2d 90 [1993]). Plaintiff is awarded one dollar in nominal damages.

Accordingly, it is

ORDERED that the motion for summary judgment is granted with respect to the causes of action for negligence, nuisance, and permanent injunction; and it is further

ORDERED that Plaintiff is awarded $1.00 in nominal damages for Defendants trespass.

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

Dated: 4/12/07

ENTER:

FILED
APR 16 2007
NEW YORK
COUNTY CLERK'S OFFICE

WALTER B. TOLUB J. S. C.