

**17 E. 96th Owners Corp. v Madison 96th  
Assoc., LLC**

2007 NY Slip Op 33455(U)

October 18, 2007

Supreme Court, New York County

Docket Number: 0108695/2004

Judge: Herman Cahn

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

PRESENT: Cahn  
Justice

PART 49m

17 East 96th Owners

INDEX NO. 108695/04

MOTION DATE 5/15/07

MOTION SEQ. NO. 005

MOTION CAL. NO. \_\_\_\_\_

- v -

Madison 96th Associates

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

**FILED**  
OCT 24 2007  
NEW YORK COUNTY CLERK'S OFFICE

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

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

Dated: 10/18/07 Apex Cal

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 49

-----X

17 EAST 96<sup>TH</sup> OWNERS CORP.,

Plaintiff,

-against-

Index No. 108695/04

MADISON 96<sup>TH</sup> ASSOCIATES, LLC,

Defendant.

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MADISON 96<sup>TH</sup> ASSOCIATES, LLC,

Third-Party Plaintiff,

-against-

ATLANTIC DEMOLITION CORP. and  
MARSON CONTRACTING CO., INC.,

Third-Party Defendants.

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**Herman Cahn, J.:**

Motion sequence numbers 005 and 006 are consolidated for disposition.

In sequence number 005, defendant Madison 96<sup>th</sup> Associates, LLC moves for partial summary judgment of all claims based upon allegations of structural damage to plaintiff's building, precluding proof of money damages allegedly resulting from such structural damage, and limiting further discovery, if any, to other issues raised in this action, CPLR 3212. In sequence number 006, plaintiff 17 East 96<sup>th</sup> Owners Corp. moves for leave to serve and file a proposed second amended verified complaint joining 21 East 96<sup>th</sup> Street Condominium (the Condominium) as a defendant and asserting a claim of trespass against it, CPLR 3025 (b).

Plaintiff originally commenced this action to enjoin Madison 96<sup>th</sup>, the project sponsor,

from completing construction of a new condominium apartment building on property located at 1380 Madison Avenue in Manhattan, adjacent to plaintiff's property, and from trespassing upon plaintiff's property. Plaintiff alleges that certain construction-related activities, including excavation, demolition and underpinning, were performed without proper authorization, resulting in injury to its property and violations of the New York City Building Code.

In the amended complaint, served in April 2005, plaintiff asserts claims against Madison 96<sup>th</sup> based upon allegations of: violations of Building Code §§ 27-165 and 27-169 by failing to notify plaintiff of its intent to obtain certain construction permits; trespass as the result of demolition debris falling on plaintiff's land; trespass and violations of Building Code §§ 27-1029 and 27-147 by failing to notify plaintiff of its intent to conduct excavation on plaintiff's land and by failing to timely obtain appropriate permits; trespass by installing underpinning and other subsurface structures on plaintiff's property without its permission and without appropriate permits; entry upon plaintiff's land and installation of sidewalk sheds; and failing to install and maintain an alarm system while maintaining sidewalk sheds that compromised the safety of some of plaintiff's tenants.

On these claims, plaintiff seeks an order directing Madison 96<sup>th</sup> to cease demolition and construction and restore plaintiff's property to its original condition and awarding plaintiff \$7,500 for each month the sidewalk sheds remained on plaintiff's land. Plaintiff also seeks reimbursement of its actual costs in installing and maintaining an alarm system and \$10 million in compensatory damages, together with reimbursement of litigation costs, including attorneys' fees.

Madison 96<sup>th</sup> joined Marson Contracting Co., Inc., the project general contractor, as a

\* 4 ]  
third-party defendant. Plaintiff does not assert any claims directly against Marson Contracting in the proposed second amended complaint (see Charles E. Boulbol, Esq., Aug. 27, 2007, Reply Affirm. at ¶ 5).

In June 2006, during the pendency of this action, 96<sup>th</sup> Madison completed construction of the building and transferred ownership to the Condominium (see Plan for Condominium Ownership, Jan. 10, 2006; First Amendment to Declaration of 21 E. 96<sup>th</sup> St. Condominium, Sept. 26, 2006).

In 2007, after completion of the project, plaintiff commissioned a survey by S.P. Belcher, Inc. of the 100-foot common boundary line between plaintiff's property and the Condominium's property. The survey, prepared on May 18, 2007 by Earl B. Lovell, a licensed land surveyor, indicates that the foundation of the new building extends between four and five inches into plaintiff's property, underground and along a portion of the common property line.

In motion sequence number 006, plaintiff seeks to further amend the amended complaint to assert trespass claims arising out of the alleged encroachment by the subsurface foundation wall and to join the Condominium as a defendant. Plaintiff contends that, in the proposed pleading, it merely seeks to clarify the existing causes of action and to assert trespass claims against the Condominium identical to those previously asserted against Madison 96<sup>th</sup>.

In opposition, 96<sup>th</sup> Madison and Marson Contracting each contend that the proposed trespass claim is significantly different from the claims previously asserted by plaintiff and is without merit on the ground that it is time-barred, pursuant to Real Property Actions and Proceedings Law (RPAPL) § 611 (2).

In the proposed second amended complaint, plaintiff reasserts the claims asserted in the

first amended complaint against Madison 96<sup>th</sup> and adds a trespass claim against the Condominium and Madison 96<sup>th</sup> based on allegations that the new building's underground foundation encroaches upon plaintiff's property, thus depriving plaintiff of the full use and enjoyment of its property. Plaintiff seeks a mandatory injunction pursuant to RPAPL § 871 directing both defendants to immediately remove the encroaching foundation or, in the alternative, an order awarding plaintiff monetary compensation for damages sustained as a result of the encroachment.

The proposed trespass claim is subject to the limitations periods imposed by RPAPL § 611 (2). While a claim of trespass is generally subject to a three-year limitations period (see CPLR 214 [4]), an exception exists where a continuing trespass occurs on a narrow strip of land. RPAPL § 611 (2)<sup>1</sup> imposes a one-year limitations period on the commencement of actions to

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<sup>1</sup>RPAPL § 611 (2) provides that an action to recover real property

cannot be maintained: . . . (2) Where the real property consists of a strip of land not exceeding six inches in width upon which there stands the exterior wall of a building erected partly upon said strip and partly upon the adjoining lot, and a building has been erected upon land of the plaintiff abutting on the said wall, unless said action be commenced within one year after the completion of the erection of such wall. But an action may be maintained if commenced within the further period of one year, for the recovery of damages by reason of the erection of such wall, and upon the satisfaction of the judgment for such damages, the title of the plaintiff to such strip of land shall thereby be transferred to and vest in the defendant. If an action for the recovery of real property or damages is not brought within the period hereby limited therefor, the person in possession of such lands shall be deemed to have an easement in said strip of land so long as the said wall partly erected thereon shall stand, and no longer, and in case of the destruction of such wall the owner of such strip shall have the same right to take or recover the possession thereof as if such wall had never existed.

recover possession of a strip of land measuring six inches or less in width (see Sova v Glasier, 192 AD2d 1069, 1070 [4<sup>th</sup> Dept 1993]). The section also provides for a two-year limitations period on claims to recover monetary damages as the result of an encroachment on a narrow strip of land (see RPAPL § 611 [2]). Significantly, the section specifies that the limitations periods begin to run "after the completion of the erection of such [encroaching] wall" (RPAPL § 611 [2]).

The encroachment, as alleged, consists of a wall, albeit underground, that straddles the common boundary line between the two properties and abuts a building erected on plaintiff's land. There is no dispute that the encroachment does not exceed the statutory six-inch maximum width at any point. Therefore, the section governs this dispute.

The proposed trespass claim is time-barred. Section 611 (2) specifies that the one and two year limitations periods begin to run "upon completion of" the encroaching wall. Marson Contracting's internal records indicate that the underground foundation wall was completed no later than November 16, 2004 (see Beal Aff. at ¶ 7 [A]). Plaintiff has offered no proof to the contrary. Therefore, the limitations periods began to run on November 16, 2004. Thus, the time within which plaintiff could timely assert a trespass claim arising out of the subsurface encroachment and seek removal of the encroachment expired on November 16, 2005. The time within which it could assert such a claim and seek monetary compensation expired one year later, on November 16, 2006. Plaintiff did not make the instant motion for leave to amend until June 29, 2007, long after each limitations period had run.

Contrary to plaintiff's contention, the trespass claim that it seeks to assert against Madison 96<sup>th</sup> and the Condominium is not identical to the claims it asserts in the first amended complaint.

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Instead, the proposed claim is based on plaintiff's admittedly recent discovery that the underground foundation wall encroaches several inches beyond the common boundary line into plaintiff's property and is not based on allegations regarding the underpinning installed beneath plaintiff's building. Therefore, the proposed claim is new and distinct from the trespass claims previously asserted because it arises out of a different encroachment.

Indeed, plaintiff admits that, prior to the land survey performed in May 2007, "[p]laintiff did not know that Madison 96<sup>th</sup> had actually built its foundation on [p]laintiff's property" (Boulbol Affirm. at ¶ 8). Plaintiff further admits that all its "prior claims against Madison 96<sup>th</sup> were based upon the illegal excavation, demolition and unauthorized underpinning on [p]laintiff's property" (*id.*). Plaintiff thus indicates that its references in the prior amended complaint to trespass by installation of "subsurface structures" (*see e.g.* Am Compl. at ¶¶ 40-43) refer to underpinning and other, similar subsurface structures, rather than an encroaching foundation wall. Certainly, in plaintiff's 2005 motion for leave to add a trespass claim against Madison 96<sup>th</sup>, plaintiff specified only underpinning and did not raise any allegations of trespass relating to the underground foundation wall, although the wall had been completed before it served and filed the prior motion.

Plaintiff's contention that the proposed claim is timely because it was asserted on June 29, 2007, within one year after completion of the entire project in June 2006, is without merit. Section 611 (2) expressly provides that the operable date is the date that the encroaching wall is completed, rather than the date that the entire construction project was completed.

Finally, plaintiff contends that the proposed claim against the Condominium is timely on grounds that it relates back to trespass claims asserted in the amended complaint against Madison

96<sup>th</sup> and that Madison 96<sup>th</sup> and the Condominium are related in interest.

An amended complaint adding a new party will be found to relate back to the filing of an earlier complaint where: 1) both the existing and proposed claims arise out of the same conduct, transaction or occurrence; 2) the new party is united in interest with the defendant and by reason of that relationship can be charged with notice of the commencement of the action; and 3) the new party knew or should have known that, but for any mistake by the plaintiff regarding the identity of the proper party, the action would have been brought against the new party as well (Buran v Coupal, 87 NY2d 173, 178 [1995]; CPLR 203 [b]).

As discussed above, the trespass claims arise out of a different set of facts. The prior asserted claim concerns only the installation of underpinning under plaintiff's building, while the proposed claim is based on allegations that the later constructed underground concrete foundation wall is built partially on plaintiff's property.

Madison 96<sup>th</sup> and the Condominium could not have been united in interest when the amended complaint was served because the Condominium did not exist at that time. The relation-back doctrine applies to claims interposed against a defendant and a new party who were united in interest at the time the action was commenced (CPLR 203 [c]; see DeLuca v Baybridge at Bayside Condominium I, 5 AD3d 533, 535 [2d Dept 2004]). Here, the undisputed facts demonstrate that the Condominium came into existence after the foundation wall was completed, after the amended complaint was served, and after the one and two year limitations periods mandated by RPAPL § 611 (2) had expired.

In addition, plaintiff does not allege the existence of any agreement by the Condominium to assume the obligations and liabilities of Madison 96<sup>th</sup> when the Condominium became the

owner of the property.

For these reasons, the Condominium cannot be found liable for continuing trespasses, if any, by Madison 96<sup>th</sup>. "[C]o-defendants are united in interest for purposes of [CPLR 203] only when one defendant is responsible for the acts or omissions of another" (McLaughlin, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C203:3; see Kaczmarek v Benedictine Hosp., 176 AD2d 1183, 1184 [2d Dept 1991]).

Also for these reasons, the proposed claims based on the encroachment by the foundation wall, asserted against Madison 96<sup>th</sup> and the Condominium, are time-barred. While leave to amend a pleading shall be freely granted (Fahey v County of Ontario, 44 NY2d 934, 934 [1978]; see CPLR 3025 [b]), where the proposed amendment is palpably insufficient as a matter of law or is totally devoid of merit, leave to amend will be denied (Thomas Crimmins Contr. Co. v City of New York, 74 NY2d 166, 170 [1989]; see Rappaport v VV Publ. Corp., 223 AD2d 515, 516 [1<sup>st</sup> Dept 1996]). "The court is not required to permit futile amendments which may lead to needless litigation" (Saferstein v Mideast Sys., Ltd., 143 AD2d 82, 82 [2d Dept 1988]), such as where the proposed cause of action is time-barred (McManus v McManus, 269 AD2d 202, 202 [1<sup>st</sup> Dept 2000]; Mishalove v Goldfarb, 260 AD2d 219, 219 [1<sup>st</sup> Dept], lv denied 94 NY2d 815 [1999]). Therefore, leave to amend to join the Condominium and to assert a trespass claim arising out of the encroaching foundation wall against the Condominium and Madison 96<sup>th</sup> is denied.

In motion sequence number 005, Madison 96<sup>th</sup> seeks partial summary judgment in its favor to the extent that plaintiff asserts claims arising out of allegations of structural damage to its building as a result of the construction of the new building because no evidence of such

damage exists.

In opposition, plaintiff contends that the motion should be denied on grounds that depositions have not yet been taken, that the alleged Building Code violations by Madison 96<sup>th</sup> raise triable issues concerning the present and future safety of plaintiff's building as a result of work performed by Madison 96<sup>th</sup>, and that plaintiff's experts have found that the construction of the new building may cause damage to plaintiff's building.

This court has scrutinized the amended verified complaint and has found no factual allegations of structural damage, whether past, present or future. The claims of Building Code violations arise out of allegations of failures to timely notify plaintiff and obtain the proper permits prior to each phase of the new building's construction. Neither movant Madison 96<sup>th</sup> nor plaintiff has identified a specific cause of action or allegation as the subject of the partial summary judgment motion. Certainly, summary relief on a claim or measure of damages that has not been asserted is not possible.

Accordingly, motion sequence numbers 005 and 006 are denied in their respective entireties.

Dated: October 18, 2007

ENTER:

  
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J.S.C.

**FILED**  
OCT 24 2007  
NEW YORK  
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