

<b>12 W. 31st St. Corp. v Consolidated Edison Co. of N.Y., Inc.</b>
2007 NY Slip Op 33921(U)
November 30, 2007
Supreme Court, New York County
Docket Number: 0100566/2006
Judge: Barbara Kapnick
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

**BARBARA R. KAPNICK**

PRESENT.

PART 12

Index Number : 100566/2006

12 WEST 31 STREET

vs

CONSOLIDATED EDISON

Sequence Number : 003

DECLARATORY JUDGMENT

INDEX NO. 100566/06

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 003

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

Upon the foregoing papers, it is ordered that this motion

*and cross motion are decided in accordance with the accompanying memorandum decision.*

**FILED**

DEC 04 2007

NEW YORK COUNTY CLERK

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

Dated: 11/30/07

**BARBARA R. KAPNICK** S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 12

-----X  
12 WEST 31st STREET CORP.,

Plaintiff,

-against-

CONSOLIDATED EDISON COMPANY OF NEW  
YORK, INC.,

Defendant.

-----X  
BARBARA R. KAPNICK, J.:

DECISION/ORDER  
Index No. 100566/06  
Motion Seq. No. 003

**FILED**  
DEC 04 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff 12 West 31st Street Corp. is the owner of the building located at 12 West 31st Street in Manhattan. Defendant Consolidated Edison Company of New York, Inc. is the owner of the adjacent property, 14-22 West 31st Street.

There is no dispute that a four-story building that was situated on defendant's property was demolished in or around 1967, nearly 40 years before defendant purchased the property, but the "party wall" that was shared by the buildings on the respective properties was left in place.<sup>1</sup> Plaintiff contends that a 1908 survey of the two properties reveals that a separate "independent wall" exists on each side of the "party wall".

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<sup>1</sup> A twelve story brick and stone building currently stands on plaintiff's property. A parking lot is located on defendant's property where the building once stood.

Plaintiff's initial Complaint alleged that the demolition of the building on defendant's property did not affect the "party wall" itself but rather damaged the "independent wall" of 14 West 31st Street (i.e., defendant's property), thereby leaving "an unsightly appearance of a jagged edge brick wall which subsequently has caused loose and potentially falling bricks."

Defendant denied that it was the owner of the wall at issue and/or responsible for its maintenance and repair.

Plaintiff previously moved, under motion sequence number 001, for a declaratory judgment against the defendant stating that "the jagged edge brick wall at issue should be declared the sole and exclusive property of the Defendant therefore invoking liability."

Defendant cross-moved for an order: (i) declaring that plaintiff is the owner of an "independent wall" that, together with the "party wall", forms the entire westerly wall of plaintiff's building; and (ii) directing plaintiff to repair that wall at its own expense.<sup>2</sup>

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<sup>2</sup> Alternatively, defendant argued that equity requires that plaintiff be held responsible for one-half the cost of maintaining the wall.

By Decision/Order dated January 8, 2007, this Court determined that

while it would appear that defendant continues to maintain an easement and/or ownership right over the "party wall", plaintiff is not seeking any declaration with respect to the "party wall" itself but rather with respect to the adjacent "independent wall".

There is, however, a factual dispute in the papers submitted, which this Court has been unable to resolve from its review of the blurry, black and white copies of photographs annexed to the cross-moving papers, as to whether the wall at issue is the "independent wall" on defendant's side of the "party wall", as plaintiff contends, or whether the wall at issue is the "independent wall" on plaintiff's side of the "party wall", as defendant contends.

Accordingly, the issue of which of the parties owned the "independent wall" was referred to a Special Referee to hear and report with recommendations (or, upon stipulation of counsel, to hear and determine).

Plaintiff's motion and defendant's cross-motion were consequently held in abeyance pending the Report of the Special Referee.

Pursuant to Stipulation dated February 28, 2007 and so-ordered by the Hon. Jacqueline W. Silbermann, the parties withdrew plaintiff's motion and defendant's cross-motion without prejudice, and agreed that plaintiff could amend its Verified Complaint,

"without first seeking leave of the Court, to assert that the 'jagged edge brick wall' described in the Verified Complaint is a party wall."

Defendant has interposed counterclaims in its Second Amended Verified Answer seeking a judgment declaring that plaintiff is solely responsible for the prompt repair and continued maintenance of the party wall, including that portion that extends from the westerly facade of plaintiff's building and encroaches on Con Edison's property, on the grounds that it is necessary for the continued support of plaintiff's 12-story building (first counterclaim) and for the continued support of plaintiff's 12-story independent wall (second counterclaim).

Defendant also seeks a judgment directing plaintiff, at its own expense, to abate the nuisance by immediately making all necessary repairs to the westerly facade of plaintiff's building, (or, if the Court determines that Con Edison is responsible, in whole or in part, for repairing the portion of the party wall that extends from the westerly facade of plaintiff's building and encroaches on Con Edison's property, to make the necessary repairs to the 12-story independent wall that is part of the westerly facade of plaintiff's building), including but not limited to those

recommended by plaintiff's contractor, Wonder Works Construction (third counterclaim).

Plaintiff now moves for an order:

(1) granting it a declaratory judgment against defendant stating that the exposed facade of the jagged edge brick party wall at issue should be declared the sole and exclusive responsibility of defendant, since there is no dispute that the exposed facade of the jagged edge brick party wall stands on defendant's side of the property line;

(2) granting plaintiff a judgment directing defendant to abate the nuisance created by the exposed facade of the jagged edge brick party wall and to rectify the conditions of the exposed facade of the wall, including but not limited to removing, replacing, and securing all of the loose brick; and

(3) dismissing defendant's counterclaims.

Defendant cross-moves for an order:

(1) dismissing the Amended Complaint in its entirety; and

(2) granting judgment in favor of Con Edison on its counterclaims.

As this Court observed in its prior Decision/Order,

"A party wall is generally described as a wall erected between two adjoining pieces of property and used for the common advantage of both owners' (10 Warren's Weed, New York Real Property, Party Walls § 104.01 [2004])." Wade v. Village of Whitehall, 17 A.D.3d 813, 814 (3rd Dep't 2005). See also, 25 West 74th Street Corp. v. Wenner, 268 A.D.2d 387 (1st Dep't 2000).

"Either party making a change when not required for purposes of repair is responsible for any damages which it occasions (citations omitted)." Schneider v. 44-84 Realty Corp., 169 Misc. 249, 252 (Sup. Ct. Bronx Co. 1938), aff'd, 257 A.D. 932 (1st Dep't 1939); lv. to rearq. denied, 257 A.D. 958 (1st Dep't 1939).

Defendant, however, contends that it should not be held liable for any damages by reason of the exposure of the "party wall" as a result of the demolition, because the building which formerly stood on its property was demolished in a careful and workmanlike manner. See, D'Onofrio v. Central Savings Bank in the City of New York, 176 Misc. 709, 710 (Sup. Ct., N.Y. Co. 1941), in which the Court held that "for any incidental damage which may result, where the demolition work is properly performed, there can be no recovery; it is *damnum absque injuria*." See also, Alberti v. Emigrant Industrial Savings Bank, 179 Misc. 1021 (Sup. Ct., Bronx Co. 1942), aff'd, 265 A.D. 1046 (1st Dep't 1943).

Plaintiff argues that this line of cases is inapposite since plaintiff is not seeking in this action to recover damages against the defendant.

However, there can be no dispute that when the defendant's predecessor-in-interest "demolished its building, it put an end to the necessity of support on its side of the wall." 357 East Seventy-Sixth Street Corp. v. Knickerbocker Ice Co., 263 N.Y. 63, 67 [1933]. "To the [plaintiff], having equal rights with [defendant], came then the option either to continue the [party] wall for the support of its own existing building or ... to put a definitive end to the easement" by demolishing the "party wall". (357 East Seventy-Sixth Street Corp. v. Knickerbocker Ice Co., supra at 67; see

also, 441 East 57th Street, LLC v. 447 East 57th Street Corp., 34 A.D.3d 378 (1st Dep't 2006).

The "party wall" was, however, not demolished because it was apparently needed for the continued support of plaintiff's building. Thus, defendant's interest in the "party wall" was not extinguished. See, Sakele Brothers, LLC v. Safdie, 302 A.D.2d 20 (1st Dep't 2002), an action which concerned two adjoining commercial properties which shared a "party wall" situated directly over the boundary between the two properties. The issue presented in that case was whether the partial demolition of plaintiff's building above the second story (which created a three-story disparity in height between the buildings) gave the defendant/adjacent property owner any right to exercise control over the exposed upper northerly face of the "party wall" on plaintiff's side of the property line.

The Appellate Division, First Department, held that defendant had no such right "beyond an easement for the support of her own building," (Sakele Brothers, LLC v. Safdie, supra at 21) since the plaintiff's easement in the upper portion of the subject wall did not terminate upon the demolition of the upper stories of its building (Id. at 27).

Plaintiff argues based on Sakele Brothers, LLC v. Safdie, supra, that defendant remains responsible for maintaining the exposed portion of the wall at issue, and thus may be held liable for any injuries which are caused by the failure to properly maintain and/or repair that wall.

In connection with the instant motion, plaintiff argues again based on Sakele Brother, LLC v. Safdie, supra, that defendant is responsible for the exposed portion of the party wall because it stands on defendant's side of the property line.

Defendant relies on the same case in support of its cross-motion, arguing that plaintiff is responsible for the cost of repairing and maintaining the party wall. Although defendant concedes that the wall at issue stands on its property, it argues that plaintiff should be responsible for its maintenance because the wall is subject to an easement interest held by plaintiff for the support of plaintiff's building.

However, in Sakele Brothers, LLC v. Safdie, supra at 25, the Appellate Division, First Department determined that the plaintiff there owned outright that portion of the wall which stood on its property, subject "only to defendant's easement for the support of her building."

Thus defendant Con Edison, as the owner of the wall at issue here to which plaintiff only holds an easement, has the duty to maintain and repair the wall. See, Morgan v. Chong Kwan Jun, 30 A.D.3d 386 (2<sup>nd</sup> Dep't 2006); Piluso v. Bell Atlantic Corp., 305 A.D.2d 68 (1<sup>st</sup> Dep't 2003).

Accordingly, based on the papers submitted and the oral argument held on the record on September 19, 2007, plaintiff's motion is granted and defendant's cross-motion is denied, and it is

ORDERED and DECLARED that the exposed facade of the jagged edge brick party wall at issue is the sole and exclusive responsibility of the defendant; and it is further

ORDERED that defendant is directed to abate the nuisance created by the exposed facade of the jagged edge brick wall and to rectify the conditions of the exposed facade of the wall, including but not limited to removing, replacing and securing all of the loose brick, and it is further

ORDERED that defendant's counterclaims are dismissed with prejudice.

This constitutes the decision and order of this Court.

Dated: November 30, 2007



BARBARA R. KAPNICK  
J.S.C.

**BARBARA R. KAPNICK**  
**FILED**  
**J.S.C.**  
DEC 04 2007  
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