

166 Fifth Ave. LLC v 168 Fifth Ave. Realty Corp.

2008 NY Slip Op 31811(U)

June 19, 2008

Supreme Court, New York County

Docket Number: 0111755/2007

Judge: Shirley Werner Kornreich

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

Index Number : 111755/2007
166 FIFTH AVENUE LLC.
 vs.
168 FIFTH AVENUE REALTY CORP.
 SEQUENCE NUMBER : 001
 SUMMARY JUDGEMENT

PART _____

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

Is motion to/for _____

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

PAPERS NUMBERED
 1 2
 3 4
 5

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

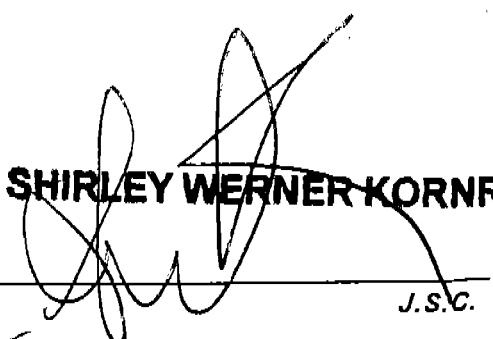
MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

FILED

JUN 30 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/19/08

HON. SHIRLEY WERNER KORNREICH

 J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
166 FIFTH AVENUE LLC,

Plaintiff,

-against-

INDEX NO. 111755/2007
DECISION & ORDER

168 FIFTH AVENUE REALTY CORP. &
JOSEPH ABADA,

Defendants.

-----X
KORNREICH, SHIRLEY WERNER, J.:

This is an action by plaintiff, 166 Fifth Avenue LLC, seeking an injunction directing defendants to remove a cinder-block wall adjacent to its building's wall, enjoining defendants from reconstructing the wall and seeking damages. The cinder-blocks cover two windows of the plaintiff's building. Defendants are a domestic corporation, 168 Fifth Avenue Realty Corp., and its owner and controlling principal, Joseph Abada. Plaintiff's complaint alleges that the wall was a private nuisance, not constructed in good faith, and constitutes a trespass. Defendants now move for summary judgment pursuant to CPLR 3212.

I. Background

Plaintiff and defendants are owners of adjoining buildings on Fifth Avenue. The north wall of plaintiff's building abuts defendants' building. There are two north-facing windows on the seventh floor of plaintiff's building. Defendants commenced construction of a penthouse apartment on the roof of their building in January 2005. The penthouse was set back from the front of the building to provide an outdoor space for the penthouse tenants. At some point during defendants' construction of the penthouse, a

cinder block wall was erected and completed. The wall is on the building line and blocks in plaintiff's seventh floor north-facing windows, rendering them non-functional.

II. Defendant's Submissions

Defendants have submitted the affidavit of Joseph Abada, one of the defendants and the person who ordered the construction of the penthouse. Mr. Abada avers that the wall was constructed to provide privacy to the penthouse tenants. He claims that a person looking out the plaintiff's windows could have seen not only the outdoor space on the roof of his building, but also the interior of the penthouse apartment. According to Mr. Abada, the windows are "Lot-Line Windows" which deprived the tenants of defendants' building of privacy and peaceful enjoyment of their property. The wall, he states, is built onto the southern wall of his building and was constructed with the good faith intention of providing privacy for his tenants.

Defendants include photographs of the windows before the construction of the wall, to illustrate their placement on plaintiff's building's northern face. The photographs document the construction phases of the wall and show how the wall is constructed of cinder-blocks that have been painted in an attempt to match the brick of plaintiff's building. The photographs further show that the wall is constructed very near to plaintiff's building. All photographs have been taken from defendants' building.

III. Plaintiff's Submissions

Plaintiff includes several affidavits with attached exhibits, in opposition to the motion for summary judgment. The affidavit of Anwar Zamel, the managing member of plaintiff, describes the construction of the wall and its impact on plaintiff's building. Mr. Zamel avers that the wall was constructed and affixed directly to plaintiff's building

without his permission or that of the seventh floor tenant. Mr. Zamel further claims that the physical appearance of plaintiff's building, a Landmarked structure, has been materially altered because the wall is visible from the street. In the affidavit, Mr. Zamel also states that Mr. Abada never approached either himself or the tenant of the seventh floor about the view from the windows and the potential privacy issue.

An affidavit from Nicholas C. Pappas, a licensed architect who reviewed the plans for the penthouse submitted to the Department of Buildings (DOB) and documents related to the construction of the masonry wall, is submitted. Included in his affidavit are copies of the relevant plans for the penthouse, along with the permits for the construction of the penthouse. He avers that he is familiar with the buildings and describes defendants' building as constructed in 1851.

Mr. Pappas opines that the sixteen foot wall should have been, but was not, included in the plans submitted to the DOB and the Landmarks Commission (Landmarks). As a result, according to Mr. Pappas, the wall was never reviewed or approved by the DOB or the Landmarks Commission and was not included in Landmarks' Certificate of No Effect. He states that in his experience, the DOB and Landmarks would issue a violation to the defendants for this omission, which violation would require removal of the wall or revised plans and approval, as well as a fine. He concludes that the wall is not in compliance with New York City Administrative Code.

In addition, Mr. Pappas opines, based on defendants' photographs and his street level observations of the buildings, that there are safety concerns. He states that the North and South walls of defendants' building were constructed of load-bearing masonry and that the roof is constructed of wood beams. Consequently, he states that the new

masonry wall was built upon wood beams and a question is raised as to whether the roof beams can support the weight of the concrete wall and whether it is “subject to overturning movement.” Moreover, he states that when a wall “is erected directly next to an existing building an expansion joint is created to prevent each building from pushing against the other as a result of settlement or movement.” The New York City Building Code requires a one-inch minimum expansion joint for each fifty feet of vertical construction. He states that the wall here is fixed and cemented directly against the north wall of plaintiff’s building, which does not permit for code compliant expansion and contraction. Finally, he opines that physical inspection of the wall and rooftop area would be helpful in forming his opinions.

Plaintiff also submits the affidavit of Jonathan Wajskol, the commercial tenant who formerly occupied of the seventh floor of its building. He was a graphic designer. The north facing windows had previously provided Mr. Wajskol with ample light and air. The windows were obstructed in July 2005 with cinder-blocks. He avers that he confronted Mr. Abada about the situation , and Mr. Abada insisted he could do what he wished with his property. Mr. Wajskol avers that from the windows, the view was onto the outdoor space of the penthouse only and the angle of the windows was too steep to permit a view into the penthouse. He avers that none was living in the penthouse when the windows were blocked. Finally, Mr. Wajskol explains that the construction of the wall, and the subsequent deprivation of light and air, led him to vacate the seventh floor, which he had occupied for twenty years.

IV. Defendant’s Motion for Summary Judgment

A. Standard of Review

Summary judgment may only be granted when it is clear there is no issue of triable fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325 (1986). The moving party bears the burden of making a *prima facie* showing of entitlement to judgment as a matter of law by submission of evidentiary proof in admissible form. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980); *S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 N.Y.2d 338, 341 (1974). Once such a showing is made, the burden shifts to the opposing party to provide sufficient evidence to demonstrate a material triable issue of fact. *Alvarez, supra*, 68 N.Y.2d at 324. When evidence necessary to defeat the motion is in the sole possession of the moving party, the summary judgment motion can and should be denied. *Pank v. Village of Canajoharie*, 275 A.D.2d 508, 509 (3d Dept. 2000). Additionally, the court must consider all papers submitted in the light most favorable to the non-moving party. *Martin v. Briggs*, 235 A.D.2d 192, 196 (1st Dept. 1997). In doing so, the court must not assess credibility. *Capelin, supra*, 34 N.Y.2d at 341. If there is any question about the existence of an issue of material fact, the motion for summary judgment must be denied. *Phillips v. Kantor & Co.*, 31 N.Y.2d 307 (1972).

B. Private Nuisance

[E]very person is bound to make a reasonable use of his property so as to occasion no unnecessary damage or annoyance to his neighbor. If he makes an unreasonable, unwarranted or unlawful use of it, so as to produce material annoyance, inconvenience, discomfort or hurt to his neighbor, he will be guilty of a nuisance to his neighbor...To construct a nuisance, the use must be such as to produce a tangible and appreciable injury to neighboring property, or such as to render its enjoyment specially uncomfortable or inconvenient.

Campbell v. Seaman, 63 N.Y. 568, 577 (1876). Thus, to establish a valid private nuisance claim, a plaintiff must demonstrate substantial, intentional and unreasonable interference with his right to the use and enjoyment of his property. *Copart Indus. V. Con Edison Co.*,

Inc., 41 N.Y.2d 564, 571 (1977). *Accord JP Morgan Chase Bk. v. Whitmore*, 41 A.D.3d 433, 434 (2d Dept. 2007); *Rashford v. Randazzo*, 38 A.D.3d 1261, 1262 (4th Dept. 2007); *Vacca v. Valerino*, 16 A.D.3d 1159, 1160 (4th Dept. 2005); *Ward v. City of N.Y.*, 15 A.D.3d 392, 393 (2d Dept. 2005). *See also Bove v. Donner-Hanna Coke Corp.*, 236 App. Div. 37, 39- 40 (4th Dept.1932)(person entitled to use his land as he sees fit so long as that use does not violate statute and use does not interfere with physical comfort of ordinarily reasonable person). Interference with another's right to use his land is considered intentional for private nuisance purposes when the actor acts for the purpose of causing it or knows or is substantially certain that the interference will occur. *Copart, id.* The term "use and enjoyment" refers to the "pleasure and comfort derived from the occupancy of land and the freedom from annoyance." *Domen Holding, Co. v. Aranovich*, 1 N.Y.3d 117, 124 (2003).

In New York, "no easement for light or air will ever be implied in favor of one city lot over another." *Wilmert v. McGrane*, 16 A.D. 412, 419 (1st Dept. 1897). However, New York Real Property Actions and Proceedings Law (RPAPL) §843 specifically provides that any structure exceeding ten feet in height, constructed in a manner to deprive the occupant of an adjoining property of light and air, can be considered a private nuisance and may be enjoined. Nonetheless, if the structure was built in good faith for the improvement of the property, it may be permitted. *Christenson v. Gutman*, 249 A.D.2d 805, 808 (3d Dept. 1998)(allegation of interference with plaintiff's right to light and air sufficient for claim of private nuisance when it substantially interferes with neighbor's land by annoyance, inconvenience or injury).

Here, the masonry wall clearly is greater than ten feet in height, as measured from

the curb level of the street. *See 122 E. 40th St. Corp. v. Dranyam Realty Corp.*, 226 A.D. 78, 82 (1st Dept. 1929) (height for purposes of statute to be measured from curb level).

Defendants knew with certainty that the construction of the wall would cause the harm that resulted-- the blocking-in of plaintiff's windows and the resultant deprivation of light and air. Nonetheless, defendants erected the wall directly in front of or on to the windows, rendering them non-functional. The sole issue is defendants' good faith.

Defendants argue that the wall was constructed in good faith with the intention of providing privacy to the tenants of the penthouse apartment. However, an issue exists as to whether one could see into the apartment from the windows. In a crowded urban environment such as New York City where buildings are of varying heights, it should come as no surprise to a property owner that others can look onto his roof and occasionally even see into his apartment. Plaintiff's proof pointing to defendants' failure to include the wall in their construction plans and the lack of DOB and Landmarks' approval, raises a question about defendants' good faith. In sum, an issue of fact exists as to defendants' intentions in building the wall and, therefore, whether a private nuisance pursuant to RPAPL §843 exists.

C. *Trespass*

Similarly, a question of fact exists on the trespass cause of action. In *Ward*, *supra*, 15 A.D.3d 393 citing *Zimmerman v. Carmack*, 292 A.D.2d 601, 602 (2d Dept. 2002), the Court explained that the essence of trespass is the invasion of a person's interest in the exclusive possession of land.

Trespass is an intentional harm at least to this extent: while the trespasser, to be liable, need not intend or expect the damaging consequence of his intrusion, he must intend the act which amounts to or produces the unlawful

* 9]
invasion, and the intrusion must at least be the immediate or inevitable consequence of what he willfully does, or which he does so negligently as to amount to willfulness. To constitute such a trespass, the act done must be such as "will to a substantial certainty result in the entry of the foreign matter." [citations omitted].

Phillips v. Sun Oil Co., 307 N.Y. 328, 331 (1954)

Plaintiff has submitted evidence, through its expert, that defendants built and affixed a cinder-block wall onto his building, without permission. But, the expert's opinion is guarded, since he states that a physical inspection of the wall and rooftop area would be helpful in forming his opinions. No such inspection has taken place. By building the wall, defendants may well have exceeded their legal rights. See *Thrope v. Haas*, 79 N.Y.S.2d 650, 651 (S.Ct., Queens Co., 1948). However, a question of fact is raised since the wall has not been fully examined. Accordingly it is

ORDERED that defendants' motion for summary judgment is denied; and it is further

ORDERED that a copy of this decision/order shall be served by overnight mail on both the New York City Department of Buildings and the Landmarks Commission, within 20 days.¹

Dated: June 19, 2008

ENTER:

J.S.C.

FILED
JUN 30 2008
COUNTY CLERK'S OFFICE
NEW YORK

¹ It appears that defendants failed to comply with New York City Administrative Code §25-305, which forbids construction on or improvement to a landmark without a Certificate of No Effect and requires separate approval for construction not in the plans approved by the Landmarks Commission. In addition, issues of safety are raised.