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

PRESENT: CAROL EDMEAD J.S.C. Justice

PART 35

Stone Realty

- v -

Soho 54 et al.

INDEX NO. 104711/08

MOTION DATE 6/11/08

MOTION SEQ. NO. 001

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 ☒

FILED

SEP 19 2008

COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the order to show cause by plaintiff, Stone Realty LLC, for a preliminary injunction ordering the defendants Soho 54 LLC, Kam Cheung Construction, Inc., Service Sign Erectors Company, Perdeco Displays, Inc., and OTR Media Group, Inc. to (1) remove a certain sign and its attending scaffolding and platforms from directly above plaintiff's property, (2) obtain adequate insurance in the event the removal causes any damage to persons and property, (3) refrain from entering onto plaintiff's property, and (4) refrain from intentionally diverting water runoff from the property adjacent to plaintiff's property is denied. And it is further

ORDERED that the parties shall appear for a Preliminary Conference on November 12, 2008, 2:15 p.m. And it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

Dated: 9/18/08

CAROL EDMEAD J.S.C. J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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STONE REALTY LLC,

Plaintiff,

Index No. 104711-2008

-against-

SOHO 54 LLC, KAM CHEUNG CONSTRUCTION, INC., SERVICE SIGN ERECTORS COMPANY, PERDECO DISPLAYS, INC. and OTR MEDIA GROUP, INC.,

Defendants.

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MEMORANDUM DECISION

Plaintiff, Stone Realty LLC ("plaintiff"), moves by order to show cause for a preliminary injunction ordering the defendants Soho 54 LLC ("SOHO"), Kam Cheung Construction, Inc. ("Cheung Construction"),[1] Service Sign Erectors Company ("Service Sign"), Perdeco Displays, Inc. ("Perdeco") and OTR Media Group, Inc. ("OTR") (collectively, "defendants") to (1) remove a certain sign and its attending scaffolding and platforms from directly above plaintiff's property, (2) obtain adequate insurance in the event the removal causes any damage to persons and property, (3) refrain from entering onto plaintiff's property, and (4) refrain from intentionally diverting water runoff from the property adjacent to plaintiff's property.

Order to Show Cause

Plaintiff owns the building located at 50 Watts Street, New York, New York (the "Property"). Defendant SOHO is the owner of the adjacent building at 52-54 Watts Street, New

[1] SOHO hired Cheung Construction as the general contractor for the renovation project at SOHO's Building. Cheung Construction and plaintiff reached a settlement, whereby Cheung Construction agreed to, *inter alia*, obtain proper approvals to remove the Street Bridge and Roof Material, and repair any part of the Slab damaged by Cheung Construction.

York, New York ("SOHO's Building"). The remaining defendants are contractors and subcontractors of SOHO. Specifically, OTR sells, leases, markets, manages, and otherwise provides space to others on signs situated on buildings within the City of New York for advertising purposes. OTR entered into a license with SOHO, permitting OTR to place a vinyl sign (the "Sign") on the wall of SOHO's Building.

Several years ago, Cheung Construction began a renovation project at SOHO's Building. It is alleged that during the renovation project, defendants trespassed onto plaintiff's Property, causing damage thereto.

During the course of the renovations, SOHO and its agents erected a sidewalk street bridge ("Street Bridge") and scaffolding ("Scaffolding") that extended onto and over the Property. Plaintiff contends that the Environmental Control Board ("ECB") issued violations and fines to SOHO related to the Street Bridge and Scaffolding. In December 2005, the Department of Buildings ("DOB") issued a Stop Work Order against plaintiff's Property, allegedly because SOHO's renovation intruded so profoundly upon plaintiff's Property that it caused physical damage thereto.

Plaintiff also alleges that SOHO failed to underpin properly, causing the entire floor of plaintiff's Property (the "Slab") to drop approximately one inch, and causing an approximately one-inch crack along the entire Slab. Despite its promises to fix the Slab, SOHO failed to repair the Slab.

Additionally, within the last six months, SOHO and Cheung Construction added a "scuffer," or "sopping edge" to SOHO's Building that diverts all of the rain runoff from SOHO's Building onto the Property.

On three occasions, plaintiff demanded that SOHO cease and desist from entering onto plaintiff's Property and diverting water onto plaintiff's Property, as well as provide copies of any certificate of insurance naming plaintiff as an additional insured. However, SOHO ignored plaintiff's demands.

Recently, defendant OTR sought plaintiff's permission for OTR, Service Sign, and Perdeco to enter onto plaintiff's Property, and install the Sign. Plaintiff declined, claiming that installation of the Sign would involve extensive entry into the air space above the Property and that SOHO failed to obtain adequate insurance. Defendants began constructing the Sign and the attending scaffolding and platforms (the "Platform") on SOHO's Building.

On February 9, 2008, defendants entered onto the roof of plaintiff's Property, deposited construction material thereon, and began affixing rigging to the fire escape and other structures located on the Property's roof. Plaintiff then called the police, who escorted defendants off of the roof. Defendants have not removed the construction debris and rigging from the Property's roof.

Thereafter, in an effort to avoid technically "being 'on'" plaintiff's Property, defendants then constructed the Platform and have suspended that Platform from SOHO's Building, into the air space above plaintiff's Property. Believing that defendants' construction of the Platform may be unsafe, plaintiff demanded that SOHO and OTR and their agents "immediately cease and desist from entering upon" the Property. Yet, plaintiff's demands went ignored. It is alleged that both the Sign and Platform are constructed directly above plaintiff's Property, and are allegedly unsafe and unreasonably interfere with plaintiff's enjoyment of the Property.

The SOHO's Building was served with a Stop Work Order on March 20, 2008, and is subject to 16 open DOB violations and three open ECB violations.

In support of injunctive relief, plaintiff argues that defendants' renovation created an ongoing trespass onto plaintiff's Property and the Property's air rights in that workers, materials, and construction equipment are repeatedly placed on or above the Property. Defendants' repeated entry and damage to the Property constitutes trespass and nuisance for which plaintiff is entitled to relief. Likewise, defendants' Street Bridge, Scaffolding, and Platform are continuing trespasses, which give rise to successive causes of action that are not extinguished unless barred by acquisition of title or an easement by operation of law. In addition, plaintiff is entitled to compensatory damages and disgorgement of defendants' profits attributable to defendants' trespass and nuisance.

Plaintiff also argues that it is entitled to the injunctive relief sought in the complaint. The right of a property owner to an injunction ordering the removal of encroaching structures, such as the Platform, is codified in RPAPL § 871(a). And, plaintiff's entitlement to injunctive relief applies to the structures intruding upon the air space above plaintiff's Property.

Plaintiff also contends that it is likely to suffer irreparable injury in the absence of injunctive relief. There is a serious risk of accident causing damage to plaintiff's Property, and a risk to the safety of the Property's occupants, guests, and passersby. Defendants' refusal to obtain adequate insurance protecting plaintiff from the risk of a collapse, failure to produce any valid permits for the Platform, and recent trespass, threaten immediate and irreparable injury to plaintiff.

In light of the risk of irreparable injury and the scope of relief sought, namely to compel the procurement of insurance and to compel respect of plaintiff's property rights, the balancing of equities tip in favor of the plaintiff.

Opposition

SOHO argues that injunctive relief cannot be granted since there are substantial factual issues in dispute between the parties. SOHO's architect, Peter Poon Architects, designed the plans for a hotel on SOHO's Building and construction documents for approval by the DOB. The DOB approved the plans and issued a building permit to Cheung Construction to construct the hotel. Moreover, plaintiff's claim of continuing trespass is without merit, as the Building Code mandates that SOHO and its general contractor enter onto plaintiff's Property to protect it. The Building Code, namely Section 27-1021(b)(7), specifically permits entry onto plaintiff's Property in order to protect it from construction damage and weatherproof issues relating to plaintiff's adjoining walls and roof. It is also standard construction practice to protect an adjoining roof by covering it with 2-inch wood planks and 2-inch Styrofoam. Also, Mr. Poon states that the design of SOHO's roof incorporates the requirements of Section 27-1026(d) of the Building Code with respect to the weatherproof integrity of adjoining buildings. The extension of the Sidewalk Bridge and Scaffolding onto plaintiff's Property is mandated by Building Code Section 27-1021(b)(7), and thus, cannot constitute a continuing trespass. The proposed sopping design is a common design that Peter Poon Architects has developed for similar projects. And, the DOB raised no objections to the design with respect to any threat of water damage from SOHO's Building. SOHO also points out that plaintiff did not include any architectural or engineering reports to corroborate its allegations of threatened water damage.

Additionally, the violations issued were either dismissed or are awaiting dismissal from the DOB.

With respect to the Sign, SOHO states that OTR, Service Sign, and Perdeco have

obtained proper permits and insurance naming plaintiff as additional insured, and completed the installation of the Sign and the temporary scaffolding has been removed. SOHO contends that its Building is constructed two inches within SOHO's property lines and the placement of the Sign on the wall does not protrude onto plaintiff's Property or air space. The claim that the scaffolding may be permanent or enters onto plaintiff's air space is exaggerated. Future maintenance, removal, or replacement of the Sign will not require contact with plaintiff's Property.

Further, the alleged irreparable injury can be compensated by money damages in an action at law. There has been no allegation of ouster of the plaintiff from its Property.

SOHO has, in good faith, complied with the measures required to protect the Property. Thus, in light of the above, the balancing of the equities favor the defendants.

OTR, Service Sign and Perdeco[2] also oppose the motion to the extent it seeks to require OTR or Service Sign to remove any structures or equipment from plaintiff's roof, since neither of them placed any equipment or structures there. OTR has nothing to do with SOHO trespassing on the roof of plaintiff's Property or with SOHO leaving construction and other material thereon. OTR it is simply a licensee of SOHO, which has never set foot on plaintiff's Property or plaintiff's roof. OTR and Service Sign also have insurance for all of the work involved in hanging the Sign. The certificates to such insurance name plaintiff, a related company of the plaintiff, and plaintiff's principals on the policy.

None of the violations, construction materials, Street Bridge, or police action involve OTR or Service Sign. The only complaint plaintiff has against OTR and Service Sign is that they

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[2] Service Sign is also known as Perdeco. Def. Memo of Law, page 1.

must pass through plaintiff's air space to install the Sign, which is a minimal violation. At no time during the installation of the Platform used to install the Sign on SOHO's Building did OTR or Service Sign enter upon plaintiff's roof or make physical contact with plaintiff's Property. The crane used to install the Sign passed the Platform through plaintiff's air space and overhangs the plaintiff's roof. OTR and Service Sign are contractually obligated to pass through plaintiff's air space 8 to 12 times a year to change the content of the Sign, and such *de minimus* nature of OTR's trespass into plaintiff's air space does not warrant injunctive relief. Plaintiff's opinion that the Sign and the Platform may be unsafe is insufficient. And, in the event injunctive relief is granted, OTR stands to lose substantial revenue and loss of the involved client, which will injure its reputation in the industry. On the other hand, plaintiff cannot demonstrate irreparable injury, since any damage that plaintiff might suffer by reason of the actions of OTR or Service Sign can be compensated with money damages. Thus, it is argued, the balance of the equities tips in favor of OTR, Service Sign, and Perdeco.

Reply

In reply, plaintiff maintains that defendants are mere licensees who seek the right to commercially exploit the air space above plaintiff's Property, without sharing the fruits of that commercial exploitation. Defendants' trespass is substantial; defendants intend to repeatedly place a platform and crane structures in the air space above plaintiff's Property 60 to 84 days a year, the equivalent of almost three months out of the entire year. Plaintiff, as owner of the Property, has the absolute right to exclude OTR, Service Sign, Perdeco and others from its Property, including the air space above that Property.

The law applicable to trespass upon real property applies with equal force to a trespass

into the air space above that property. If defendants' future plans involved placing a Platform and crane structure on plaintiff's roof throughout the coming years, plaintiff would unquestionably be entitled to injunctive relief. That plaintiff intends to place such structure above plaintiff's Property is a distinction without a difference. Further, caselaw addressing air space rights support plaintiff's request for injunctive relief. And, in the cases cited by plaintiff, there was either no trespass to enjoin, or the trespass fell within the statutory exceptions involving necessary use or improvement of one's own property or a permanent structure's incursion onto adjoining lands. The intrusion by OTR, Service Sign, Perdeco into the air space above plaintiff's Property is not necessary, but merely desired for commercial exploitation. Further, OTR, Service Sign, and Perdeco are not intruding into plaintiff air space for the purpose of "using" their own property, and are mere licensees.

Analysis

A preliminary injunction is a drastic remedy which should only be granted where the movant has demonstrated in the moving papers a clear legal right to the relief demanded based upon the law and the facts (*Koultukis v Phillips*, 285 AD2d 433, 728 NYS2d 440 [1st Dept. 2001]). Given that it is a provisional remedy, its function is not to determine the ultimate rights of the parties, but to maintain the *status quo* until there can be a full hearing on the merits (*Residential Board of Managers of the Columbia Condominium v Alden*, 178 AD2d 121 [1st Dept 1991]). To obtain a preliminary injunction, the movant is required to demonstrate a likelihood of success on the merits of its claim, irreparable harm in the absence of the injunctive relief, and a balancing of the equities in its favor (*see, Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862, 552, 552 NYS2d 918; *City of New York v Untitled LLC*, --- NYS2d ----, 2008 WL 2051098

[1st Dept 2008] *citing City of New York v Love Shack*, 286 AD2d 240, 242 [2001]).

The Court first addresses the merits of plaintiff's various claims in support of injunctive relief.

A. Dangerous Construction Practices

According to plaintiff, defendants received numerous violations in connection with their construction project on the SOHO's Building. However, according to defendants, some of the violations were dismissed, and the dismissal of the remaining violations is pending. In light of the fact that the merits of the remaining violations remain at issue, the existence of such violations are insufficient to warrant injunctive relief.[3]

B. Trespass onto Plaintiff's Property

Trespass requires that there be "an interference with a person's right to possession of real property either by an unlawful act or a lawful act performed in an unlawful manner (*Kurzner v Sutton Owners Corp.*, 245 AD2d 101 [1st Dept 1997]; Restat 2d of Torts, § 158). A property owner's permanent structure upon an adjacent owner's property is characterized in New York as an unlawful encroachment and as a continuous trespass giving rise to successive causes of action, unless barred by the acquisition of title or an easement by operation of law (*509 Sixth Ave. Corp. v New York City Transit Auth.*, 15 NY2d 48 [1964] *citing Pappenheim v Metropolitan El. Ry. Co.*, 128 NY 436). Although the nature of the structure may be permanent, the nature of the trespass is continuous (*id*).

[3] The Court also notes that the record contains copies of insurance certificates indicating that plaintiff is named as an additional insured on defendants' insurance policies.

1. Deposit of Construction Material onto Plaintiff's Roof

It is uncontested that defendants entered onto the roof of plaintiff's Property, an deposited construction material onto that roof. However, it is also uncontested that that defendants have removed the construction debris and rigging from the Property's roof.[4] Further, the record indicates that construction materials were placed on plaintiff's roof with the consent of plaintiff's principal officer, Robert Pestone. Therefore, injunctive relief based on defendants' placement of construction materials upon plaintiff's roof is unwarranted.

2. Sidewalk Bridge and Scaffolding

The Sidewalk Bride and Scaffolding allegedly extends onto the plaintiff's Property and constitutes a continuing trespass for which plaintiff is entitled to relief. Building Code Section 27-1021(b)(7) provides for the safety of the public and property during construction operations, and requires that the construction site and areas adjacent thereto be protected by the construction of a sidewalk shed as follows: "Unless the street is officially closed to the public during construction operations, the following minimum safeguards shall be provided for the protection of the public: . . .

> a. For all buildings one hundred feet or more in height, the deck and protective guards of the sidewalk shed shall be extended parallel with the curb at least twenty feet beyond the ends of all faces of the structure property. Extensions of sidewalk sheds complying with the foregoing shall be constructed so as not to unreasonably obstruct, either visually or physically, entrances, egress, driveways and show windows of adjacent properties.
> b. All sidewalk sheds shall provide a protection for the full width of the shed extending upward at an angle of forty-five degrees from the ends of the deck and outward a horizontal distance of at least five feet beyond the ends of the shed. Such sloping end protection shall be constructed to meet the requirements of

[4] By Stipulation dated April 3, 2008, OTR, Service Sign, and Perdeco agreed to "not have any physical contact" with plaintiff's Property or roof.

> paragraph one of this subdivision with substantial outriggers bearing on and securely attached to, the deck.

Likewise, NYC Administrative Code, Section 27-1026(d) provides for the protection of the weatherproof integrity of property adjoining a construction site and states:

> Where the weatherproof integrity of an adjoining building is impaired by construction operations, the flashing shall be restored, copings replaced, or other necessary measures taken to restore the weatherproof integrity of such adjoining buildings. . . .

According to SOHO's architect, the construction of the Sidewalk Bridge and Scaffolding was required in order to comply with the above provisions. Notably, plaintiff does not contest SOHO's argument in this regard. Therefore, the protrusion of the Sidewalk Bridge and Scaffolding onto plaintiff's Property do not provide a basis for injunctive relief.

3. Platform in Plaintiff's Air Space

The main crux of plaintiff's application for injunctive relief is whether the Scaffolding and Platform hanging from SOHO's Building and in the air space above plaintiff's Property, constitute a trespass upon the air rights of plaintiff's Property. It is uncontested that the Sign upon SOHO's Building will require that defendants suspend the Platform from SOHO's Building and into the air space above plaintiff's Property for at least eight times within the next several months. The issue is whether such intrusion constitutes a trespass of plaintiff's air rights to such a degree that injunctive relief is warranted.

An owner of real property possesses the right to utilize all of its air space (*Macmillan, Inc. v CF Lex Assocs.*, 56 NY2d 386 [1982]). Air rights is one of the bundle of rights associated with ownership of the land and are incident to the ownership of the surface property -- the right

of one who owns land to utilize the space above it. This right has been recognized as an inherent attribute of the ownership of land since the earliest times as reflected in the maxim, *"[c]ujus est solum, ejus est usque ad coelum et ad inferos*" ["to whomsoever the soil belongs, he owns also to the sky and to the depths"] (*Macmillan, Inc. v CF Lex Assocs.*, 56 NY2d 386, 452 NYS2d 377 [1982] *citing Butler v Frontier Tel. Co.*, 186 NY 486, 491; 2 Blackstone's Comm, p 18; *see* Ball, Vertical Extent of Ownership in Land, 76 U of Pa L Rev 631 in which the maxim is attributed to the early 14th century scholar Cino da Pistoia).

In a case dealing with the protrusion of scaffolding over and above a neighboring property, the Supreme Court found such a trespass *de minimus*, and denied injunctive relief.

In *Rusabo Co. v 620 Broadway Housing Corp.* (11/19/98 NYLJ 34, (col. 4)), plaintiff Rusabo Co. owned property on Broadway on which a gas station and one-story building was situated, and leased its air rights to plaintiff Go Outdoor Media for the erection of advertising signs on its lot. The defendant owned a multi-story building adjoining plaintiff's property, and licensed the right to sell paid advertising on its exterior wall to a company named Culver & Theisen. Scaffolding was later hung from the top of the defendant's building to permit workers to paint a sign advertisement on the wall of the defendant's building.

Plaintiffs sought to enjoin this activity, asserting the scaffolding located in their air space constituted a trespass onto their property. In denying injunctive relief, the court reasoned that the encroachment of "a narrow three-foot wide scaffold" "pressed up against the defendant's building" on plaintiffs' air rights was nothing more than *de minimis*. The plaintiffs did not suggest that the defendant was using any more air space than it needed or that there was any

viable alternative to scaffolding in order for the defendant to work on the wall of a building which it owns. In the court's opinion, "In a city as dense and congested as Manhattan, with scaffolding an integral part of the landscape, it is noteworthy that the plaintiffs have been unable to refer the court to any other case where a party sought, much less succeeded, in exercising its air rights to limit the sort of activity in which the defendant is engaged herein." The court also rejected plaintiffs' claim that the sign advertisement on defendant's building diminished the value of their air rights by conflicting with any advertising which they may place on plaintiffs' property. Since the advertisement painted on the defendant's wall did not itself encroach on the plaintiffs' air rights, the only encroachment was the scaffolding which hung over the plaintiffs' property, and plaintiffs failed "to point to any irreparable harm which the scaffolding itself has caused them other than the very fact of a *de minimis* intrusion on their property."

The intrusion caused by the Scaffolding herein likewise does not support plaintiff's request for injunctive relief. Contrary to plaintiff's contentions, the Sign is not constructed directly above plaintiff's Property, but is placed directly upon the wall of SOHO's Building. And, SOHO has the identical right to advertise on its Building as did the defendant in *Rusabo*. The platform in *Rusabo* is similar to the Platform being used herein, and the vinyl Sign placed upon the wall of SOHO's Building is no more intrusive than the painted sign at issue in *Rusabo*. Therefore, the Scaffolding hanging from SOHO's Building over plaintiff's Property and into the air space of plaintiff's Property is likewise *de minimus*, and insufficient to support the injunctive relief sought.

Plaintiff's reliance on *1380 Madison Avenue, L.L.C. v 17 East Owners Corp.*, 2003 WL 22383092 [N.Y.Sup. 2003]), is misplaced. In *1380*, plaintiff's two story building was located

adjacent to defendant's residential building. For more than 10 years, 12 of defendant's air conditioning window units protruded from its building into the air space above and over plaintiff's property, without plaintiff's express permission. Plaintiff later contracted to sell its building for the construction of a new building on its property. The contract, however, was conditioned upon the removal of the protruding air conditioners, which defendant refused to remove.

When plaintiff sought injunctive relief, defendant argued that it had acquired title to a portion of the air space through adverse possession and was entitled to a prescriptive easement to use the air space due to the clearance necessary for window air conditioning units to operate properly, and the potential nuisance to apartment occupants caused by exhaust fumes without adequate air space. The court disagreed, finding that there was no evidence that the use of the air conditioners was hostile or adverse to plaintiff's use of its property. The court also noted that there were other ways to cool the apartments other than by means of protruding window units, and that the court lacked the authority "to expropriate the plaintiff's rights to a part of its property for the benefit of the defendant."

Unlike the defendant in *1380*, defendants are not claiming, and there is no issue as to whether SOHO has any ownership or possessory right via adverse possession or prescriptive easement regarding plaintiff's air rights. The issue herein, and what was not addressed in *1380*, is whether the intrusion caused by the periodic use of a scaffold over and above an adjoining property owner's air rights constitutes an actionable claim for trespass. The periodic use of the Scaffolding herein does not constitute an expropriation of plaintiff's air rights as would the removable, yet permanently affixed air conditioners at issue in *1380*.

Sopping Edge/Scuffer-Diversion of Water

It is well settled that a landowner is not liable for damage to abutting property caused by the flow of surface water due to improvements to his or her land, provided that the improvements were made in good faith to fit the property for some rational use, and that the water was not drained onto the other property by artificial means, such as pipes or ditches (*Congregation B'nai Jehuda v Hiyee Realty Corp.*, 35AD3d 311, 827 NYS2d 42 [2006] *citing Kossoff v Rathgeb-Walsh*, 3 NY2d 583, 589-590 [1958]; *Gollomp v Dubbs*, 283 AD2d 550 [2d Dept 2001], lv denied 96 NY2d 721 [2001]). It is the plaintiff's burden to establish that the improvements on the defendants' land caused the surface water to be diverted, that damages resulted, and either that artificial means were used to effect the diversion or that the improvements were not made in a good faith effort to enhance the usefulness of the defendants' property (see *Langdon v Town of Webster*, 238 AD2d 888 [4th Dept 1997]; *Cottrell v Hermon*, 170 AD2d 910, 911 [3d Dept 1991]). Plaintiff did not provide any concrete evidence of water diversion, or of any damage resulting from the alleged water diversion. Thus, plaintiff's conclusory allegation that the water "threatens" damage to its Property (Donald R. Dunn, Jr. Affidavit ¶22) is insufficient.

Damage to Floor (Slab) of Plaintiff's Property

As stated above, Cheung Construction agreed to repair any part of the Slab caused by it. And, plaintiff's claim that SOHO's construction caused the entire floor of plaintiff's Property to drop approximately one inch, if established, can be remedied by monetary damages.

Irreparable Harm

Although a trespass of a continuous or constantly recurring nature qualifies for injunctive relief (*Jensen v General Elect.*, 82 NY2d 77, 82 [1993] [disposal of hazardous waste]), plaintiff's

contention that it is entitled to a disgorgement of defendants' profits and compensatory damages undermines its argument that the injury it suffered constitutes irreparable harm. Moreover, plaintiff failed to allege any injury resulting from any of the alleged trespasses committed by the defendants, that cannot be compensated by money damages.

Conclusion

In light of the foregoing, it is hereby

ORDERED that the order to show cause by plaintiff, Stone Realty LLC, for a preliminary injunction ordering the defendants Soho 54 LLC, Kam Cheung Construction, Inc., Service Sign Erectors Company, Perdeco Displays, Inc., and OTR Media Group, Inc. to (1) remove a certain sign and its attending scaffolding and platforms from directly above plaintiff's property, (2) obtain adequate insurance in the event the removal causes any damage to persons and property, (3) refrain from entering onto plaintiff's property, and (4) refrain from intentionally diverting water runoff from the property adjacent to plaintiff's property is denied. And it is further

ORDERED that the parties shall appear for a Preliminary Conference on November 12, 2008, 2:15 p.m. And it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: September 18, 2008

Hon. Carol Robinson Edmead, J.S.C.