

Willow Dr. LLC v Lempert

2009 NY Slip Op 32230(U)

August 17, 2009

Supreme Court, Queens County

Docket Number: 12605/2009

Judge: Augustus C. Agate

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Upon the foregoing papers it is ordered that these motions are consolidated for the purpose of a single decision and are determined as follows:

Plaintiff, Willow Drive LLC is the owner of a building located at 150-44 11th Avenue, Whitestone, New York, and defendants Yakov Lempert and Sonya Lempert are the owners of a building located at 150-42 11th Avenue, Whitestone, New York. These commercial properties are alleged to be over 100 years old and are joined by a party wall. The complaint alleges that the party wall constitutes the westerly wall of the plaintiff's premises and the eastern wall of the defendant's premises. Some time in 2008, a fire in the defendant's building caused damage to both premises. On March 23, 2009, defendant's engineer filed plans with the New York City Department of Buildings (DOB) for the reconstruction of the defendant's premises. Plaintiff alleges that according to these plans defendants intend to construct a parapet wall which will vertically extend the present party wall by approximately 3.5 feet, and to insert roof beams in said parapet wall which will increase the interior height of defendants' ceiling by 3.5 feet. Plaintiff asserts that the parapet wall extension will increase the load bearing down the party wall and adversely impact on the party wall.

The Lemperts are the plaintiffs in a pending action against 12th Avenue Associates LLC, the owner of a condominium development west of the Lempert premises, which is alleged to have caused damage to the Lempert premises during the construction of the condominium (*Lempert v 12th Ave Associates, LLC*, Index No. 869/2008). Although Willow Drive LLC and 12th Avenue Associates LLC may have some members in common, they are separate entities and own separate parcels of real property. In the action commenced under Index No. 869/2008, the court in an order dated April 8, 2009, temporarily enjoined the Lemperts from performing demolition of the subject premises and from pouring a concrete slab for the sub-flooring of the premises until the April 15, 2009 adjourned date of a motion therein. The court further stated that the parties, pursuant to a prior order were directed to conduct an inspection of the foundation walls and underground area on or before April 14, 2009, and that if the inspection was not conducted by such date, it would be deemed waived.

Prior to conducting said inspection, GKC Industries, Inc., a third-party defendant in the Lempert action, had its engineers review the Lemperts' building plans dated March 23, 2009. Said engineers, in a letter dated April 17, 2009, stated that the proposed reconstruction of the Lempert building which called for the removal of the entire roof, its

replacement with steel beams, and a new foundation to support new columns located a short distance “in-board” from the 60-foot-long common party wall, would have a negative impact on the party wall and roof of the plaintiff’s building.

Despite the deadline for inspection set forth in the order of April 8, 2009, Gerald Caliendo, an architect, was permitted to inspect the Lempert premises on behalf of Willow Drive on April 14, 2009. Mr. Caliendo also viewed the building plans filed with the DOB on behalf of the Lemperts. Kyriakos Constantopes, Willow Drive’s manager viewed the Lempert premises on May 4, 2009. On May 4, 2009, Mr. Caliendo sent a letter to the Queens Borough DOB Commissioner regarding the construction at the Lempert premises, and on May 5, 2009 the DOB issued the Lemperts a full stop work order. On May 8, 2009, counsel for the Lemperts informed Willow Drive’s counsel that the Lemperts would re-commence construction on the subject property on May 13, 2009, and advised that an inspection of the underpinnings of the property could be had prior to said date.

Plaintiff Willow Drive commenced the within action for trespass and a permanent injunction and for damages, by way of an order to show cause dated May 13, 2009, and seeks a preliminary injunction restraining defendants from performing any construction work or other work, or otherwise disturbing the foundation, soil, slabs, columns, supports, roof, parapet walls, exterior walls, including party walls at the subject premises.

Defendants Yakov Lempert and Sonia Lempert cross-move for an order denying the plaintiff’s motion for a preliminary injunction and dismissing the complaint on the grounds of documentary evidence, pursuant to CPLR 3211(a)(1).

Defendants separately move for an order vacating the temporary stay prohibiting defendants from performing any construction or other work, or otherwise disturbing the foundations, soil, slabs, columns, supports, roof, parapet walls, exterior walls including the party wall shared with premises 150-44 11th Avenue, Whitestone, New York; and rescheduling the submission date of plaintiff’s opposition to defendant’s cross motion.

On May 19, 2009, after plaintiff’s action appeared on the calendar, the DOB rescinded in full the May 5, 2009 stop work order for the subject premises.

The within motions were fully submitted on June 9, 2009, at which time the temporary restraining order issued on May 19, 2009 was vacated “except that all work underneath or above the subject party wall is enjoined and restrained.” The court further directed that said order shall remain in effect pending the determination of this motion.

Plaintiff alleges that the defendants’ proposed re-construction of their property will permanently alter the party wall jointly owned by the parties, and that the construction in

progress and as planned with further undermine and degrade the integrity of the party wall; that defendants have excavated beneath the party wall without obtaining the plaintiff's permission; that the defendants without the plaintiff's permission have excavated a trench along the northerly portion of the party wall, exposing the bottom of the party wall, and that defendants have failed to shore up or brace the existing party wall; that defendants' seek to extend the party wall by erecting a parapet wall on top of the party wall and inserting beam pockets, without obtaining plaintiff's consent; and that the construction of said parapet wall on top of the party wall will permanently alter the shared roof, destroy the existing drainage plan, and will cause flooding and damage to plaintiff's building.

In support of its motion, plaintiff submits affidavits from its manager Mr. Constantopes and the architect Mr. Caliendo, and copies of the building plans filed by the Lemperts and approved by the DOB.

Defendants in support of their cross motion to deny the application for a preliminary injunction and to dismiss the complaint pursuant to CPLR 3211(a)(1) have submitted an affirmation from a professional engineer, the original plan filed with the DOB, the May 5, 2009 DOB notice to correct violation, and the amended plan dated May 6, 2009.

Plaintiff in its reply to said cross motion has submitted a copy of the deed to its premises setting forth the metes and bounds, including a description of all party walls, a 1998 survey map of the premises, copies of the defendants' plans and photographs of the excavated area, exposed party wall and roof top of the buildings.

Defendants, in support of their separate motion to vacate the court's temporary stay, submit a print out from the DOB's website which recites that the May 5, 2009 stop work order was fully rescinded on May 19, 2009. Plaintiff in opposition to said motion has submitted an affidavit of a professional engineer, copies of DOB documents pertaining to the subject premises, and a survey drawing of the premises.

It is undisputed that the defendants seek to extend the party wall and to alter the configuration of the shared rooftop by constructing a parapet on the roof of defendants' premises. The parties' experts, however, sharply dispute whether the defendants' proposed plan to increase the existing roof height and the erection of a parapet wall will adversely impact the existing foundation; whether the proposed footings contiguous to the party wall will undermine the existing footings and create an unstable condition; and whether the changes to the roof will create a barrier for drainage, cause flooding and damage to plaintiff's property, and impact the structural integrity of the roof; and whether the proposed reconstruction will significantly restrict any future use of the existing wall by the plaintiff.

Dismissal under CPLR 3211(a)(1) is warranted “only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*Leon v Martinez, supra* at 87-88 [1994]). The documentary evidence submitted by defendants in support of that branch of its cross motion to dismiss the complaint does not conclusively establish a defense to plaintiff’s claims as a matter of law. Therefore, that branch of defendants’ cross motion is denied.

The Court may grant a preliminary injunction where plaintiff shows: (1) probability of success on the merits; (2) danger of irreparable injury in the absence of an injunction; and (3) balance of the equities in its favor (*Aetna Ins. Co. v Capasso, 75 NY2d 860, 862 [1990]*). The grant of injunctive relief here is controlled by the definition of a party wall and the obligations and benefits which attach to it.

“ ‘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 AD3d 813, 814 [2005]*; *see also, 25 West 74th Street Corp. v Wenner, 268 AD2d 387 [2000]*).

A party wall “is for the common benefit of contiguous proprietors. Neither may subject it to a use whereby it ceases to be continuously available for enjoyment by the other” (*Varriale v Brooklyn Edison Co., 252 NY 222, 224 [1929]*). Each proprietor may subject the wall to whatever uses are proper, if the freedom of the other to use the wall properly is not consequently curtailed (*supra*).

The “land covered by a party wall remains the several property of the owner of each half, yet the title of each owner is qualified by the easement to which the other is entitled” (*Brooks v Curtis, 50 NY 639, 642-3 [1873]*). Consequently, a party wall is built and used for the mutual convenience of both property owners, and neither owner may use it to the detriment of the other (*Negus v Becker, 143 NY 303 [1894]*; *see also, D’Onofrio v Central Sav. Bank, 176 Misc 709 [1941]*). Thus, an adjacent owner may increase the height of a party wall or deepen its foundation so long as it is done without injury to the adjoining building (*see, Brooks v Curtis, supra; 25 W. 74th St. Inc. v Wenner, 268 AD2d 387, 388 [2000]*; *Gordon v Park Mad 74 Realty LLC, 8 Misc 3d 1003A [2005]*; *Spring Realty Corp. v Ryan, 206 Misc 37 [1954]*).

Contrary to plaintiff’s assertion there is no requirement that one owner seek the permission of the other prior to increasing the height of a party wall or deepening the foundation. However, “[e]ither 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 [1938]*, *affirmed, 257 AD 932 [1939]*).

Here, the parties' submissions demonstrate that the parties' building share a common wall, that the walls utilized or to be utilized by defendants' for re-construction are party walls, and that the rooftop wall is the same wall that supports both buildings. In addition, the evidence presented establishes that excavations have been made by the defendants in close proximity to the party wall. Defendants thus may not undertake construction which would either deprive the plaintiff of his easement, or effect the structural integrity of plaintiff's building (*see, Brooks v Curtis, supra* at 644; *Negus v Becker, supra* at 308; *D'Onofrio v Central Sav. Bank, supra*).

The court finds that in view of the sharply conflicting affidavits submitted by the parties' engineers and architect, a question of fact exists as to whether the integrity of plaintiff's building is, or will be, undermined by defendants' construction, and whether plaintiff would be deprived of his easement in the party wall. Therefore, the parties are directed to appear for a hearing in this part on September 9, 2009, at 9:30 A.M. to determine if the construction by defendants is causing, or will cause, actual injury to plaintiff's building.

In view of the foregoing plaintiff's motion for a preliminary injunction shall be held in abeyance pending the outcome of said hearing. That branch of defendant's cross motion which seeks to deny the plaintiff's motion for a preliminary injunction shall be held in abeyance pending the outcome of said hearing. That branch of defendant's cross motion which seeks to dismiss the complaint pursuant to CPLR 3211(a)(1) is denied.

That branch of defendants' separate motion to vacate the temporary stay granted in this action is held in abeyance pending the outcome of said hearing. The remainder of defendants' separate motion is denied as moot.

The temporary restraining order shall remain in effect pending the outcome of the hearing.

A copy of this order is being faxed on this date to counsel to the parties.

Dated: August 17, 2009

AUGUSTUS C. AGATE, J.S.C.