Snyder v Crown Wisteria, Inc.
2009 NY Slip Op 32638(U)
September 21, 2009
Supreme Court, New York County
Docket Number: 110543-09
Judge: Judith J. Gische
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SCANNED ON 9/23/2009

[* 1]

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

PRESENT: HON. JUDITH J. GISCHE PART 10

Justice

Richard Snyder

Plaintiff (s),

-v-

Crown Wisteria, Inc et al

Defendant(s)

INDEX NO. 110543/09

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for prelim injunction

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
SEP 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

and Prelim conf scheduled for Oct 29, 2009 @ 9:30 am in Part 10

Dated: SEP 21 2009

Hon. Judith J. Gische, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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Richard Snyder,

Plaintiff (s),

-against-

Crown Wisteria, Inc., Jared B. Stamell and Susan Frank Stamell,

Defendant (s).

----------x

DECISION/ORDER
Index No.: 110543-09
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Pltf's OSC (CPLR §6301) w/RS affid, BWK affirm, exhs	1
Def's opp w/JBS affirm, exhs	2
Def's supp opp w/JBS affirm	3
AO affid o/b/o def's opp	4
Pltf's letter 8/20/09	5
Def's 2nd supp opp w/JBS affirm, exhs w/cover letter 9/11/09	6

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action between neighboring owners of real property. Plaintiff Richard Snyder ("plaintiff") owns the real property and improvements located at 120 East 78th Street, New York, New York (Block 1412 Lot 63) ("plaintiff's house") whereas the defendant corporation is the record owner of the real property and improvements located at 118 East 78th Street, New York, New York (Block 1412 Lot 64). The individually named defendants are the beneficial owners of the property and Mr. Stamell is the principal of the corporate defendant The corporation and individuals are hereinafter referred to collectively as the "defendants" and the house on that property as "defendants' house."

Plaintiff brought an order to show cause with a temporary restraining order. The court granted the temporary restraining order on July 29, 2009 ("TRO"), restraining defendants from continuing demolition and/or construction work that is taking place in defendants' rear yard. The TRO remains in place pending the court's decision on this motion. Defendants oppose the motion in all respects.

After this motion was argued and submitted, plaintiff sent the court correspondence dated August 20, 2009, notifying the court that the Department of Building was considering revoking defendants' permit. In response, defendants sent the letter a letter dated September 11, 2009 responding to that correspondence and submitting a 2nd supplemental affirmation purporting to put new facts before the court. These submission have all been accepted because they bring to the court's attention new information that is important to this motion and the information is a matter of public record, available through the Department of Buildings' website. http://www.nyc.gov/html/dob/html/bis/bis.shtml.

Each side has presented legal arguments in those submissions. Since arguments are very similar to those before the court in earlier submissions and each side had the opportunity to address those arguments, there is no prejudice to either side for the court to consider the supplemental submissions.

Applicable Law

On a motion for a preliminary injunction the movant must prove the likelihood of ultimate success on the merits, that it will suffer irreparable harm unless the relief is granted, and a balance of the equities in its favor. Paine v. Chriscott v. Blair House Associates, 70 AD2d 571 (1st dept. 1979); Aetna Insur. Co. v. Capasso, 75 NY2d 860

(1990). The purpose of a preliminary injunction is to maintain the *status quo* and prevent the dissipation of property that could render a judgment ineffectual. Moy v. Umeki, 10 AD3d 604 (2nd dept. 2004). "Likelihood of success" need only be shown from the evidence presented; conclusive proof is not required. Thus even where there are facts in dispute, the court may, in its discretion, order such relief pendente lite to maintain the status quo. Moy v. Umeki, supra at 605.

Arguments

Defendants have owned their house since 1975 whereas plaintiff purchased his house in 1996. Both homes are within a land marked area known as the Upper East Side Historic District. Defendants have erected a wood fence that is approximately 6 feet tall in the rear yard of their property. Plaintiff contends the fence was built without the proper permits and it is a private nuisance. It is unrefuted that the fence is directly in front of and, therefore, blocks two of plaintiff's basement level windows. Plaintiff argues that not only have defendants flouted the law, they have created a private nuisance and also made his escape from danger in the event of a fire impossible. Plaintiff argues the basement windows are hinged and can open, thus he contends they could be used in the event of an emergency.

Plaintiff alleges that the individually name defendants are hiding behind the corporate defendant and thus, exploiting their property to inflict personal harm upon him, secure in the knowledge that they (the Stamels) face no personal liability. Thus, plaintiff contends defendants should be prevented from abusing the corporate form by stopping the construction under he can proceed with his underlying claims to pierce the corporate

veil.

It is unrefuted that the Department of Buildings issued a warning letter to defendants on June 18, 2009 and then it issued a partial stop work order on June 19, 2009. The partial stop work order states that a complaint was made about illegal work in defendants' backyard. The stop work order provides that all work must be stopped because there is no permit displayed. The Environmental Control Board issued a separation violation (and fine) for work being done without a permit, noting the work was "55% complete" and that the remedy was to obtain permit or restore to prior legal condition," without specifying what that condition is. Thus, it is plaintiff's argument that not only is the work on defendants' property being done without the permission of the Department of Buildings, the house is land marked and defendants failed to get the approval of the New York City Landmarks Preservation Commission ("Landmarks").

In opposition to plaintiff's motion, the defendants provide proof that on July 16, 2009, before plaintiff brought this Order to Show Cause, Landmarks had issued a permit and "Certificate of No Effect," approving alterations to defendants' building, including the new wood fence. Although defendants acknowledge there was a partial stop work order, they contend it was because no permit was displayed. The Department of Buildings issued a work permit on July 29, 2009, allowing general construction, including "replace [ment] [of] existing rear fence at rear yard with [a] new [fence] as per plans . . ." Although in August 2009, the Department of Buildings audited the work to decide whether to revoke the permit, the Borough Commissioner of the Department of Buildings has since "fully rescinded" and lifted the partial stop work it issued and the permits are effecitve.

That disposition occurred on September 10, 2009. Thus, it is defendants legal argument that not only was the fence approved by both agencies, Landmarks had approved the project on July 16, 2009, before plaintiff brought the order to show cause, and the "new" fence is simply a replacement for the fence that was already there.

Defendants maintain that plaintiff has not shown a likelihood of success or that the equities are in his favor because the work was approved. Moreover, while the fence may block plaintiff's view, he does not have a cause of action for private nuisance because New York does not recognize an easement for light or air and simply having no view or a bad view is inactionable, as a matter of law.

Defendants deny the fence poses any fire safety hazard to plaintiff, not only because the plans would not have been approved, but also because plaintiff has bars on both of the windows. Defendants argue further that plaintiff only needs one exit from his house because it is classified as a "J-3 Residential 1-2 Family." Thus, defendants argue that plaintiff multiple windows, a front entrance/exit and a rear door allowing him numerous escape routes, and covering the lot line windows does not put plaintiff in any danger.

Discussion

Landmarks and the Department of Buildings have approved the fence that is the subject matter of this motion for a preliminary injunction. The within action is not an Article 78 proceeding, where the court is called upon to review whether an administrative decision was made in violation of lawful procedure; affected by an error of law; or arbitrary or capricious or an abuse of discretion (CPLR § 7803 [3]), but a plenary

action. Therefore, the court accepts the approvals by these agencies at face value. Their approval is prima facie evidence that easily defeats plaintiff's motion for a preliminary injunction because plaintiff has not shown a likelihood of success on the merits.

Plaintiff has also failed to show a likelihood of success on his claim that the fence is a private nuisance. The fence is on defendants' property and even if it blocks his windows, New York does not recognize an easement for light and air, except where created by express agreement. Golub v. Simon, 28 A.D.3d 359 (1st Dept 2006); Chatsworth Realty 344 LLC v. Hudson Waterfront Co. A, LLC, 309 A.D.2d 567 (1st Dept 2003) (*internal citations omitted).* Plaintiff has not set forth any facts tending to show that the parties have an express agreement preventing the obstruction of plaintiff's basement level windows.

Nor is the subject fence a "spite fence" or "spite wall," within the meaning of RPAPL § 843. RPAPL § 843 grants the owner or occupant of one property a cause of action against the adjoining property owner when s/he is deprived of light or air due to the construction of a "spite fence" or "spite wall" on the adjoining property owner's property. That wall or fence must, however, exceed 10 feet in height, and must have been erected in bad faith. 419 Seventh Ave. Associates, Ltd. v. Ghuneim, 64 A.D.3d 746 (2nd Dept 2009). Here, the subject fence is approximately 6 feet tall. Even assuming it is taller (plaintiff estimates it at 8 feet tall), it is still under 10 feet tall and plaintiff has not put forth any facts that defendants erected the fence in bad faith or that it was not for the improvement of their own property.

Not only has plaintiff failed to prove the likelihood of ultimate success on the

merits from the evidence that he has presented (Paine v. Chriscott v. Blair House Associates, supra); Aetna Insur. Co. v. Capasso, supra), he has not shown that he will suffer irreparable harm unless the relief is granted, and a balance of the equities in his favor. The "new" wood fence is only a replacement for an existing fence and the replacement was approved by the agencies in charge of evaluating, monitoring and approving such construction. Therefore, the relief requested is not necessary to maintain the status quo since there was already a fence. Moy v. Umeki, supra.

Plaintiff's motion, for a preliminary injunction enjoining and restraining defendants, their agents, employees, contractors, etc., from doing demolition and construction in their back yard, and requiring defendants to remove the fence that has been erected at 118 East 78th Street, New York, New York (Block 1412 Lot 64) is hereby denied. All stays granted by the court on July 29, 2009 are vacated forthwith.

Conclusion

Plaintiff's motion is denied for the reasons provided herein. All stays are vacated forthwith.

FILED
SEP 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

This case is hereby scheduled for a preliminary conference on **October 29, 2009 at 9:30 a.m. in Part 10**, at 60 Centre Street in Room 232. No further notices will be sent.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
September 21, 2009

So Ordered:

Hon. Judith J. Gische, J.S.C.