

**Benyetta 148 LLC v 49th St. Realty Co.**

2009 NY Slip Op 32987(U)

November 19, 2009

Supreme Court, New York County

Docket Number: 108619/05

Judge: Walter B. Tolub

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

PRESENT: \_\_\_\_\_

PART 10

Justice

BENNETTA 148 LLC

INDEX NO.

108619/05

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

49TH. St. RUTY

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

**IS DECIDED**

**IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION**

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

Dated: 11/19/09

CF  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

-----x  
BENYETTA 148 LLC

Plaintiff,

**Index No.** 108619/05  
**Mtn.** 001

-against-

49<sup>th</sup> ST. REALTY CO. And HIT CORP. USA,

Defendants.  
-----x

**WALTER B. TOLUB, J.:**

Plaintiff is the owner of 148 West 49<sup>th</sup> Street, a four story building adjacent to the defendants' 12 story building located at 142 West 49<sup>th</sup> Street.

In December of 2004, plaintiff "discovered" that a sign had been erected on the wall over plaintiff's building with a light fixture extending horizontally eight feet over its property line. This was done without plaintiff's consent and plaintiff's counsel, in January of 2005, made a formal demand that the sign be removed.

Negotiations between the parties continued through the spring without resolution and this action was commenced in June of 2005.

Initially plaintiff sought injunctive relief for removal of the sign and the other encroachments, and for two years the parties adjourned this matter so as to negotiate a satisfactory settlement.

In the course of their negotiations, the sign, which was the genesis of this action and the lights which encroached upon plaintiff's premises, were removed. A co-defendant, the "owner" of the sign, went out of business.

Under normal circumstances, the major points of contention having been removed, this matter should have been put to rest, however the surveys conducted in preparation for a hearing in this matter, revealed encroachments which had not previously been discovered.

More particularly, plaintiff claimed that: (1) defendants' building (the westerly wall) was encroaching over plaintiff's property; (2) a water tank and its supporting beams were over the property line and that water and ice from the tank are falling on plaintiff's property; (3) that defendants had erected a roof in the air shaft between the buildings which was anchored in plaintiff's wall; (4) a rotating sign on defendants' property, when operative, intruded over the property line; (5) there is a cornice canopy encroaching on plaintiff's property; and (6) mounting fixtures and electrical conduits are still protruding over the property line from the western wall.

This matter proceeded to a hearing. The court has withheld its findings in the vain hope that the parties could resolve their differences without a determination which could result in severe financial consequences to the parties. Regretfully there

[\* 4]

has been no resolution and accordingly the court makes these findings based on the testimony of the principals of the parties, Messrs. Brodie and Wartski, and the parties' experts Mr. Ogur and Mr. Becker.

The Court finds that: (1) there are still mounting fixtures and an electrical conduits protruding from the westerly wall of the defendants building; (2) that the water tank and supporting beams on defendants building are over the property line; (3) that an extended roof and steel joints in the air shaft between the properties intrude onto plaintiff's property; (4) that a rotating sign on the sidewalk, when operative, can cross over to plaintiff's property; (5) that there is a cornice canopy encroaching on plaintiff's property; and (6) that defendants westerly wall extends one and a half to two inches over plaintiff's property.

At the outset and with respect to the testimony of plaintiff's principal Mr. Brodie, the court finds it incredible that Mr. Brodie first learned on the encroachments complained of in items (2)(3)(4)and (6) in April of 2005. The Brodie family acquired title to the premises in 1945 (Tr. p 94 ln. 27 -p.95 ln. 16). Mr. Brodie who has an engineering degree and a real estate broker's license has been managing the property since 1978 (Tr. p. 57 lns. 2-5). The air shaft structure (item 3) has existed for over 30 years (Tr. p. 108 lns. 20-26, p. 109 lns. 2-5 and p.

[\* 5]

134 lns. 13-16). The western wall encroachment and the water tank encroachment (items 2, 5 and 6) have been in place, according to surveys conducted (Ex. 20), since plaintiff's acquisition of the property in 1945 (Tr. p. 93 lns. 25-26, p. 94 lns. 2-26 and p. 95 lns. 2-21). These are open and notorious conditions that should have been observed by the plaintiff and have resulted in a prescriptive easement.

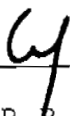
A prescriptive easement arises where the clear and convincing evidence shows there is an adverse, open, notorious and continuous use for the prospective period (Beutler v. Maynard, 80 AD2d 982 [4<sup>th</sup> Dept 1981]; Di Leo v. Pecksto Holding Corp., 304 NY 505 [1952]). Here, there has been such a showing and accordingly defendants are entitled to a declaration to that effect.

Plaintiff however is entitled to an injunction declaring that; (1) the mounting fixtures and electrical conduits be removed from the westerly wall; (2) that steps be undertaken to prevent the water tank from overflowing on plaintiff's property; (3) the rotating sign be immobilized or removed so as not to cross over plaintiff's property line; and (4) the metal brackets be removed from plaintiff's property.

[\*6]  
This constitutes the decision of the Court.

Settle Order.

Dated: 11/12/69

  
\_\_\_\_\_  
HON. WALTER B. TOLUB, J.S.C.