

**Board of Mgrs. of Hester Gardens Condominium v  
Mott St. Joint Ventures, LLC**

2009 NY Slip Op 33057(U)

December 14, 2009

Supreme Court, New York County

Docket Number: 111713/07

Judge: Louis B. York

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

PRESENT: LOUIS B. YORK  
J.S.C.

PART 2

Board of Managers

INDEX NO.

11/7/07

Mott Street Joint Ventures

MOTION DATE

MOTION SEQ. NO.

601

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  No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION.

**FILED**

DEC 24 2009

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 12/14/09

Ley  
**LOUIS B. YORK** J.S.C.

Check one:  FINAL DISPOSITION  ~~NON-FINAL DISPOSITION~~

Check if appropriate:  DO NOT POST

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

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

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BOARD OF MANAGERS OF HESTER GARDENS  
CONDOMINIUM,

Plaintiff,

-against-

MOTT STREET JOINT VENTURES, LLC,

Defendant.

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DECISION/ORDER

Index No. 111713/07

**FILED**  
DEC 24 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

LOUIS B. YORK, J.:

On April 20, 2004, Well-Com Housing, LLC, the sponsor of the Hester Gardens condominium, sold Unit C-2 to Mott Street Joint Ventures, LLC ("Defendant") in partial consideration of the purchase price for land. Unit C-2 is commercial space located under the building operating as a parking garage. Pursuant to the April 20, 2004 purchase agreement, Well-Com filed a Condominium Declaration ("Declaration") granting the owner of Unit C-2, defendant, an easement to erect and maintain exactly three signs to advertise the parking garage.

Section 12(h) of the Declaration specifically identifies the permissible type and location of the three signs granted under the easement. Generally, the three signs outlined in the Declaration are: (1) a horizontal sign above the Mott Street entrance to Unit C-2; (2) a vertical sign on the south side of the Mott Street entranceway; and (3) a sign on Hester Street at the intersection of Mott and Hester Streets. The provision states, as it relates to the Hester Street sign:

"The sign described in (iii) [Hester Street sign] shall *initially* be located adjacent to or above any signage for Unit C-1 located at the intersection of Mott and Hester Streets, but *may be relocated* by the owner of Unit C-2. (if

the owner of Unit C-2 determines that the visibility from such initial location is impaired) to an area adjacent to the Residential Unit on the second floor of the building as close to the intersection of Mott and Hester streets as possible in a location clearly visible to passenger cars on Mott and Hester Streets.” (See Declaration, Section 12(h)). (emphasis supplied).

Thus, the language of the easement asserts two options for the location of the Hester Street sign – Option A and Option B. Option A contains only one clear restriction on the Hester Street sign: it must be hung above signage for Unit C-1. If the owner of Unit C-2 is dissatisfied with the initial location, the easement allows for a second location, Option B. The easement does not state that the owner must obtain permission to exercise his right to move the sign. Option B restricts the sign to only be relocated “to an area adjacent to the Residential Unit on the second floor of the building as close to the intersection of Mott and Hester streets as possible. . . .” (See Declaration section 12(h) supra at pg. 2). Presently, the Hester Street sign is adjacent to the residential unit on the third floor of the building.

The Board of Managers of the Hester Gardens Condominium (“Plaintiff”) filed a complaint alleging that the Hester Street sign was in violation of the language of the easement. Plaintiff alleges the sign was moved from its original position without permission from plaintiff to an impermissible location. Plaintiff insists that any movement of the Hester Street sign from the initial location, Option A, activates only one alternative location, Option B, which orders the sign to be adjacent to the second floor residence. Further, plaintiff asserts that all three signs violate the New York Department of Buildings and zoning regulations.

Currently, defendant moves for summary judgment pursuant to CPLR 3212 against plaintiff. Defendant maintains that the current location of the sign is the sign’s original and only location. Therefore, it is defendant’s position that there are no material questions of fact as to

the Hester Street sign's compliance with the easement and that all signs are in compliance with New York's rules and regulations.

### DISCUSSION

In order for defendant to prevail on summary judgment, defendant must establish that there are no material issues of fact regarding: (1) the location of the Hester Street sign and (2) zoning and New York Building regulations regarding all three of defendant's signs. "To establish summary judgment it is necessary that the movant establish [its] . . . defense sufficiently to warrant the court as a matter of law in directing judgment in his favor. . . and must do so by tender evidentiary proof in admissible form." Zuckerman v. New York City Transit Authority, 49 N.Y.2d 557, 558 427 N.Y.S.2d 595, 599 (1980).

The Court now addresses the issue of the Hester Street sign location. The Court finds a question of material fact as to where the Hester Street sign was initially located and whether the sign was subsequently relocated. Moreover, there is a question of fact about whether any movement from Option A of the Hester Street sign initiates the height restriction of Option B.

In support of its motion, defendant maintains that the current location of the Hester Street sign is the initial location of the sign. Defendant argues that since there are virtually no restrictions on the original location of the Hester Street sign, it is in compliance with the easement. However, it is unclear to the Court if the sign was moved based on its motion papers. Defendant argues in his Reply Affirmation that even if the sign was "apparently first installed a couple of feet below its current location and then raised" (Reply Affirmation, ¶7, pg 3) the relocation would not activate the Option B height restriction. If the Hester Street sign was originally placed adjacent to the third floor, it appears from the text that the current placement of the Hester Street sign is acceptable under the terms of the easement, provided that the sign was

above any signage for Unit C-1. However, because it is unclear whether defendant moved the Hester Street sign from its original location it is also unclear whether, based on the text of the easement, Option B is the only alternative sign location to Option A.

The Court concurs with plaintiff's analysis that the language of the Declaration easement with respect to the Hester Street sign permits only two specific locations, but requires more evidence to refute defendant's assertion that it did not move the sign. In support of its contention that the sign was moved, Plaintiff presents pictures purported to show damage to the exterior of the building as evidence of the alleged sign relocation. The professed damage is unclear to the Court from the pictures, as they are from a significant distance. Plaintiff submitted no further evidence that defendant moved the sign, and no documentation or appraisal stating that the building was damaged.

The Court finally addresses the issue of sign compliance with zoning and New York Department of Building regulations. Defendant submitted an affidavit from a project manager from Sign-Expo, the company defendant hired to fabricate and install its three signs. The project manager states that he submitted the appropriate paperwork to the Department of Buildings. Attached to the affidavit are copies of the plot plans for all three signs and a copy of the letters of completion signed by the Borough Commissioner of the Department of Buildings in Manhattan.

Notably, plaintiff observes that the final letter of completion by the Department of Buildings is dated in 2009, therefore raising a question of fact as to whether the signs were previously in violation of the regulations and subsequently moved. However, it does not submit any documentation from the Department of Buildings that the signs were previously not in compliance with the New York rules and zoning regulations. The Court concludes that currently all three signs are in compliance with the New York regulations.

