

Parabit Realty LLC v Town of Hempstead

2009 NY Slip Op 33393(U)

July 31, 2009

Supreme Court, New York County

Docket Number: 7250/09

Judge: Roy S. Mahon

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

TRIAL/IAS PART 8

PARABIT REALTY LLC and PARABIT SYSTEMS INC.
as authorized agents of Town of Hempstead Industrial
Development Agency,

INDEX NO. 7250/09

Plaintiff(s),

- against -

TOWN OF HEMPSTEAD, TOWN OF HEMPSTEAD
DEPARTMENT OF BUILDINGS, BRIAN NOCELLA as
An agent of the Town of Hempstead Buildings Department,
MARK SCHWARTZ as an agent of the Town of Hempstead
Buildings Department, HOLZMACHER, McLENDON &
MURRELL, PC, MICHAEL BONACASA, TODD GOLDFARB
and B & A DEMOLITION and REMOVAL INC.,

Defendant(s).

DECISION AFTER HEARING

Plaintiffs moved by Order to Show Cause for a preliminary and permanent injunction enjoining and restraining the defendants from construction, excavation and demolition at the defendant's property located at 19 Debevoise Avenue, Roosevelt, NY as well as from the issuance of permits and licences for such work. Incidental to the relief sought was a temporary restraining order sought by the plaintiffs and issued by this Court restraining the defendants from said activities until a hearing for the motion could be held. Defendants opposed both the Order to Show Cause and the temporary restraining order. On May 6, 2009, the matter was set down for a hearing to determine whether the temporary restraining order issued in this case should be vacated or continued. All parties appeared by counsel at the hearing. After hearing, the Court now makes the following findings of fact and conclusions of law.

Plaintiff Parabit Realty LLC is the owner of premises known as 35 Debevoise Avenue, Roosevelt, NY and occupied by plaintiff Parabit Systems Inc., as a tenant. Plaintiffs' first witness was Mr. David Nation, vice president of Parabit Systems Inc., who testified that he arrived a work in late March 2009 to find workmen at the defendants' adjacent premises of 19 Debevoise Avenue, Roosevelt, NY. These workmen were undertaking construction and excavation work at 19 Debevoise Avenue, Roosevelt, NY and, in so doing, appeared to him to digging and chipping away underneath the foundation at the plaintiffs' premises

at 35 Debevoise Avenue. Mr. Nation began videotaping the excavation and found that the plaintiffs' workmen had excavated 2 to 3 feet below plaintiff's foundation in at least 2 places.

After complaints were filed with the Town of Hempstead regarding alleged violations committed by the defendants' workmen, a building inspector arrived who issued a temporary stop work order along the wall bordering plaintiffs' premises. A supervising building inspector and defendant herein, Mr. Brian Nocella, arrived the next day to conduct a further inspection and lifted the stop work Order and work at 19 Debevoise Avenue continued.

Approximately 1 week later, plaintiffs' contacted an engineer and an architect to consult with them about his concerns regarding the construction work at 19 Debevoise Avenue. Both the architect and the engineer inspected a wall at plaintiffs' premises at 35 Debevoise Avenue facing onto the project at 19 Debevoise Avenue. While plaintiff's building and specifically the wall facing 19 Debevoise Avenue, had pre-existing cracks, plaintiffs grew concerned over the appearance of new cracks and the expansion of older cracks in the aforementioned wall. Plaintiffs' placed a device to monitor the appearance of new wall cracks and the expansion of old cracks on the wall on April 29, 2009. According to Mr. Nation, the monitoring device confirmed that new cracks were appearing in the wall and older ones expanding, threatening the stability of the building and its approximately 48 occupants.

Introduced into evidence prior to or during Mr. Nation's testimony was a copy of building plans of 19 Debevoise Avenue, the blue prints for 35 Debevoise Avenue, a videotape of the construction work made by Mr. Nation in late March 2009, photographs of the plaintiffs building on April 14, 2009 and May 5, 2009 also displaying the crack monitor (*see, plaintiffs #1, 2, 3 and 4 in Evidence*).

Cross-examination of Mr. Nation revealed that he spoke with Mr. Nocella twice on the morning of April 1, 2009, the first conversation took place by telephone and the second was held personally with the witness. Declining to speak with Mr. Nation's attorney, Mr. Nocella advised the witness he was going to rescind the stop-work order and allow the construction at 19 Debevoise Avenue to continue.

Additionally, Mr. Nation related the substance of a conversation he had with Mr. Frank Merendino, a workman present at the site on March 31, 2009. Mr. Merendino explained to Mr. Nation that the construction process on which he and the other workmen were engaged involved a process known as "underpinning" in which the new foundation at 19 Debevoise Avenue would be constructed below the ground level of plaintiffs' foundation at 35 Debevoise Avenue and would require excavation beneath plaintiffs' foundation at 35 Debevoise Avenue in segments. This segmented excavation was necessary, according to Mr. Merendino to avoid instability to the plaintiff's foundation which would occur if the excavation beneath the foundation at 35 Debevoise Avenue was undertaken completely at one time.

Mr. Nation also testified that he never entered the hole excavated by the defendant's workmen, but did videotape the process. He also noticed plywood structures installed in the border of the trench dug along side plaintiffs' foundation and metal rods known as rebar also in the trench. The plywood structure were added after the stop work order was issued.

Plaintiff's second witness was Mr. Maximo Buchfrers who was a licenced architect in New York as well as New Jersey, Connecticut and Florida and held degrees from the City University of New York and New York University. The witness testified that he has worked as an architect for 11 years and has taught architecture at the college level. He was qualified as an expert in the field of architecture.

Mr. Buchfrers stated that the plaintiffs' hired him in April, 2009 in regard to the cracks occurring in its building. Denied access to the property at 19 Debevoise Avenue, he reviewed plans and drawings for

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the proposed project at 19 Debevoise Avenue. He indicated that the New York State Building Code requires adjoining property to be protected from damage occasioned by construction work. After reviewing the videotape made by Mr. Nation, he concluded that the excavations conducted by the defendant B & A Demolition and Removal Inc. exposed the foundation at 35 Debevoise Avenue and, in his expert opinion, was not adequate to provide support for the structure at 35 Debevoise Avenue. Further, in his expert opinion, underpinnings are needed at 19 Debevoise Avenue to provide lateral support for the foundation at 35 Debevoise Avenue and to prevent the de-stabilization of the soil and foundation at 35 Debevoise Avenue. Should the foundation at 35 Debevoise Avenue remain compromised, it could precipitate cracks in the structure at 35 Debevoise Avenue at some unknown time in the future.

The witness also stated that he observed cracks at the structure at 35 Debevoise Avenue. Some were of older origin and some were newly introduced to the structure. The recommended underpinning would have to be undertaken by a structural engineer.

Cross-examination of the witness revealed that he was uncertain of the depth of the excavation at 19 Debevoise Avenue. However, because soil between 19 Debevoise Avenue and 35 Debevoise Avenue had been disturbed during the excavation process, underpinning and not compaction of soil was needed to restore stability and support the structure at 35 Debevoise Avenue. The witness conceded that he could offer no opinion as to what would definitely happen at the structure at 35 Debevoise Avenue or when it might occur.

The witness also indicated on cross-examination that the observations made at 19 Debevoise Avenue were made from a distance or from the roof of 35 Debevoise Avenue.

Plaintiffs' third witness was Mr. Rudolph S. Shatharah who holds a bachelor's degree in civil engineering and is a license professional engineer in New York, New Jersey, Pennsylvania, Delaware, Virginia and West Virginia. He is an adjunct professor at the New York Institute of Technology and has received commendations for his work. He was qualified as an expert in civil engineering with structural issues.

He testified that he visited the site on April 8, 2009. He was not allowed access to 19 Debevoise Avenue. In evaluating the conditions at 35 Debevoise Avenue, he examined the videotape made by Mr. Nation and determined that undermining of 8 inches to 12 inches had occurred beneath the foundation at 35 Debevoise Avenue. Once soil is disturbed by this process, it is difficult to correct by compacting and needs to be underpinned by concrete supports. This process would be completed between 1 to 2 days.

According to the witness, he first examined the structure at 35 Debevoise Avenue on April 8, 2009 and last examined it on May 5, 2009. During that interval, cracks at the structure had worsened. The majority of cracks at 35 Debevoise Avenue were diagonal cracks which, in his expert opinion, signaled a shift in its foundation. Daylight can be seen through one such crack.

Existing plywood at the site is insufficient to provide the necessary underpinning. If undermining occurs at the site, the witness stated that there would be an immediate reaction likely to occur in the first 24 hours. In his expert opinion, concrete underpinning is necessary to match the adjacent foundation at 35 Debevoise Avenue, with assistance of steel bars known as rebar.

Again, in his expert opinion, the excavation at 19 Debevoise Avenue caused the cracks at 35 Debevoise Avenue. These cracks will become larger in the future. An unreinforced masonry structure, such as that at 35 Debevoise Avenue could give way without notice causing a collapse. Such collapses, in other instances, have resulting in human deaths.

After their third witness, plaintiffs' rested their case. The defendants moved to vacate the temporary restraining order. Plaintiffs' opposed the motion.

The defendants elected to present a case. The first witness for the defense was Mr. Frank Merendino. He testified that he is employed as a mason for Merendino Industries, having learned the trade from family members. He has installed approximately 200 foundations.

On March 30, 2009, he and approximately six other workers began digging a trench at 19 Debevoise Avenue by hand, removing the soil with hand shovels. The footing for the foundation at 19 Debevoise Avenue was 1 foot deeper than that at adjacent 35 Debevoise Avenue. At a couple of spots, he testified that 3 to 4 inches of soil had been dislodged below the footing of 35 Debevoise Avenue, but that no undermining occurred at that site.

According to the witness, any soil found at the site fell off the exterior of the foundation at 35 Debevoise Avenue during the construction process. Significant undermining would be required before the foundation at that site would weaken and significant, undisturbed soil remained in the trench separating the two sites.

Cross-examination revealed that the defendant Brian Noceila visited the 19 Debevoise Avenue site on March 31, 2009 and afforded him direction, visiting the site again on April 13, 2009 or April 14, 2009 before plywood forms were placed.

Defendants' second witness was Mr. Charles Levine, president of defendant B & A Demolition and Removal Inc., who testified that he is developing the property at 19 Debevoise Avenue, which is owned by the defendant Town of Hempstead.

Defendants' third witness was Mr. Louis Schwartz, a licenced professional engineer, holding a bachelor of science degree in civil engineering from Northwestern University. He testified that he served for 4 years with the U.S. Navy and has worked as a variety of engineering firms, including his own, the Louis Schwartz Development Corporation. He stated he has significant professional experience with building plans, site work and foundation issues and was qualified by the Court as an expert in civil engineering.

According to Mr. Schwartz, sometime near the end of April 2009, he visited and was given full access to the site at 35 Debevoise Avenue. At the site, he found a building in excess of 80 years of age in reasonably good condition. All 4 sides of the building contained cracks with the appearance of the west side of the building the same as the east side.

Mr. Schwartz explained that diagonal cracks in a structure are not necessarily indications of weakness in the foundation but can be the product of stress from winds or of expansion through moisture.

He further explained that the New York State Building Code mentions underpinning and other methods of preserving a foundation. Underpinning can also be done with building materials other than concrete. Underpinning can also be accomplished by "Shoring" Shoring is a process which prevents material from a neighboring site from moving into an opening.

This movement occurs when the cone of pressure from a footing at a 45° angle is altered. If corrected promptly, no hazard is rendered to the adjacent structure.

A review of the videotape by the witness lead him, in his expert opinion, to conclude that underpinning at 35 Debevoise Avenue is not necessary and that the shoring in place at the site currently is

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sufficient to prevent de-stabilization.

While the New York State Building Code required protection of adjacent structures during construction projects, it was the witness' expert opinion that shoring at the site was adequate protection and that underpinning is unnecessary. Again, in his expert opinion, the building at 35 Debevoise Avenue was in reasonably good condition and not in danger of imminent collapse.

Cross-examination of the witness revealed that shoring at the site might not be effective if compacted soil is disbursed.

The defendant Mr. Brian Nocella testified for the defense. He stated he has been employed by the Town of Hempstead, NY for 21 years and is now its Chief Building Inspector and formerly was its senior code enforcement officer. He regulates activity at construction sites and supervises 7 inspectors.

Mr. Nocella indicated that he visited 35 Debevoise Avenue after receiving complaints from its owner and his attorney. He thereafter visited their site at 19 Debevoise Avenue to find masonry footings formed out and rebar in place. A trench about 30 feet long and 3 feet deep had been dug along each side.

He examined the entire trench finding some soil removed from the bell footing at 35 Debevoise Avenue at different locations with most of the soil compacted at the footing. After inspecting the trench for approximately 3 minutes, he spoke with workers at the site and instructed them to install plywood shims to prevent erosion before the foundation was poured. The plywood shims were subsequently installed.

Mr. Nocella visited the site at 19 Debevoise Avenue again on April 1, 2009 and did not issue a stop work order. He did not visit the site thereafter.

Cross-examination revealed that the witness had visited many other sites in the past where foundation of adjacent structures differ in height. The witness saw undisturbed, compacted soil at the site with concrete placed against plywood placed again against earth to prevent undermining.

While unaware that a stop work order had been issued by a code enforcement officer the day before he visited the site, the witness' opinions remained unchanged.

The defendant Michael Bonacasa also testified for the defense. Employed by Holzmacher, McClendon and Marrell PC, he testified that he as a licenced architect in New York since 1995. He has practiced architecture for 4 years with various firms and 7 years in his own practice.

He testified that he designed the plans for 19 Debevoise Avenue and that he and his firm were no engaged to oversee contract administration. He was notified by Mr. Nocella of a problem at the site and was asked to review shoring at the excavation at 19 Debevoise Avenue. When he arrived, he found plywood shoring braced against an open excavation.

Cross-examination revealed he did not look behind the plywood shoring or center with an engineer at the site.

Thereafter, the defense rested its case. The plaintiffs' elected to present a rebuttal case. Their sole witness for rebuttal was Mr. Paul Angelides.

Mr. Angelides testified that he holds a bachelor of science degree from Brooklyn Polytech Institute and engineering licences in civil mechanics. He has significant prior experience in inspecting foundation

and installing underpinnings. He was qualified by the Court as an expert in professional engineering.

Mr. Angelides testified that he visited the work site at 35 Debevoise Avenue twice and inspected the plywood structure installed there. According to the witness, the plywood structures were to retain concrete and were inadequate to provide shoring for the foundation at 35 Debevoise Avenue. Additionally, he found voids or gaps in the soil with the soil uncompacted and de-stabilized beneath the foundation.

Plaintiffs' thereafter rested their rebuttal case. Defendants offered no sur rebuttal.

After hearing, the Court observes that the testimony of Mr. Rudolph Shathacah, Mr. Louis Schwartz and Mr. Paul Angelides, all qualified experts in the field of engineering is in direct conflict. Expert opinion differ regarding the nature of the footing at the 19 Debevoise Avenue site, the condition of the soil, the extent to which the soil is compacted or disturbed, and the soil's continued suitability to support the foundation of the building at 35 Debevoise Avenue. Also in conflict are the expert opinions of those same witnesses regarding the extent of cracks in the building at 35 Debevoise Avenue, the cause of those cracks, whether and when the cracks will grow in size and most importantly, whether the construction work at 19 Debevoise Avenue constitutes a threat to the structural integrity of the building at 35 Debevoise Avenue and to the occupants thereof.

In view of the photographic evidence introduced at the hearing documenting the appearance and growth of cracks in the building at a point in time nearly contemporaneous with the installation of the excavation and construction work at 19 Debevoise Avenue, the Court, at least at this early juncture, is compelled to credit the testimony of the plaintiffs' witnesses.

Accordingly, the Court finds that the defendants' application to dismiss and vacate the temporary restraining order previously granted herein, is hereby **denied**. The temporary restraining order previously issued shall continue until the hearing and determination of the plaintiff's application for a preliminary injunction.

The parties are directed to appear at the New York State Supreme Court, Part 8 at 9:30 a.m. on **September 15, 2009 prepared to commence a trial on the issue of a preliminary injunction.**

This constitutes the decision and Order of the Court.

DATED: 7/31/2009

Ray S. Mahon
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J.S.C.

ENTERED
AUG 04 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE