[* 1]

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

PRESENT: HON. JUDITH J. GISCHE PART 10

Justice

197 East 76th Street LLC
Plaintiff (s),

-v-

1330 3rd Ave Corp
Defendant(s)

INDEX NO. 113163/09

MOTION DATE

MOTION SEQ. NO. 001

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

FILED
JAN 11 2010
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

And preliminary conference scheduled for 2/4/2010 @ 9:30 am Part 10

Dated: JAN 05 2010

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

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

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: PART 10**

----------x

197 East 76th Street, LLC,

Plaintiff (s),

*-against-*

1330 3rd Ave. Corp.,

Defendant (s).

----------x

**DECISION/ORDER**
Index No.: 113163-2009
Seq. No.: 001, 002

**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 |
|---|---|
| **Motion Seq. #1** | |
| Pltf's OSC w/JG affid, JHH affirm, summons&complaint (sep back), exhs | 1,2,3 |
| Def's x/m w/JB affid, answer, exhs | 4 |
| Pltf's reply and opp w/SD affirm, ES affid, exhs | 5 |
| Def's reply w/JB affid, AC affid, exhs | 6 |
| So-Ordered Stipulation 7/17/09 | 7 |
| Steno Minutes 11/12/09 | 8 |
| **Motion Seq. #2** | |
| Pltf's OSC w/AJW, ETS affid, proof of service, exhs | 1,2 |
| Def's opp w/JB, AC affids, exhs | 3 |
| Steno Minutes 12/16/09 | 4 |



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

This action involves a dispute between adjacent owners of real property. Plaintiff 197 East 76th Street, LLC ("plaintiff") is the owner of the building located at 197 East 76th Street, New York, New York ("197") whereas defendant 1330 3rd Avenue Corp. ("defendant") is the owner of the building located at 199 East 76th Street a/k/a 1330 3rd Avenue ("199"). Plaintiff seeks a declaratory judgment regarding a "chimney" and three fireplace vents or metal flues attached to one of the walls of 197. Plaintiff also seeks a

permanent injunction against the defendant, enjoining it from destroying, etc., that chimney and flues. The chimney vents gases or smoke from the boiler and the fireplace vents provide similar venting to the fireplaces at 197.

Presently before the court are two motions by plaintiff and defendant's cross motion. Plaintiff's first motion is for a preliminary injunction pending a final determination of this action, requiring defendants to repair and re-install "that portion of plaintiff's chimney" that defendant removed, enjoining defendant from performing any exterior renovations, etc., to its building, enjoining defendant from removing three fireplace vents, and related relief. Defendant has answered and asserted counterclaims for trespass and a permanent injunction. It has cross moved for a mandatory preliminary injunction requiring the immediate removal of those fireplace flues.

Plaintiff's second motion is for contempt, based on allegations that defendant disobeyed the temporary restraining order that the parties stipulated to in writing on September 17, 2009 which was made an order of the court ("TRO").

These motions are consolidated for consideration and decision in this decision/order. The court's decision is as follows:

**Arguments**

195, 197 and 199 East 76th Street are buildings that are adjacent to one another on the north side of 76th Street in Manhattan near Third Avenue. 195 is the westmost of the three buildings and 199 is the eastmost. Whereas 195 and 197 share a common wall (i.e. 195's east wall is also 197's west wall), there is a 5 ½ foot alleyway between 197 and 199. There is no genuine disagreement that the alleyway is defendant's property.

At one time all three buildings had the same owner and were jointly taxed. Eventually they were separated and sold off to different owners. In 1975 the former owner sold 199 to a new owner, but kept the other two buildings. Since then the two buildings he kept (195 and 197) were also sold off by the original owner and plaintiff is the current owner of 197; the company bought the building in September 2008.

A "chimney" runs parallel to the eastern wall of 197. That chimney is for the venting of gases or smoke from the boiler[1]. There are also three fireplace flues extending out of that wall. To the right of that wall (and the chimney) is the alleyway between 197 and 199. 199 is presently set back from the lot line, but the owner of 199 (defendant) is in the process of building its property to the lot line. A dispute has arisen about the chimney, its vent, the fireplace flues, who owns the chimney and whether any of these structures can be removed by the owner of 199 so that it can proceed with its construction project.

According to plaintiff there have always been fireplace flues on the eastern wall of 197. In 2003-2004, 197 was renovated by the prior owner to add a new 5th floor and the eastern wall was replaced. The fireplace flues were extended upwards to compensate for the additional height of 197. Presently there are three fireplace flues on that wall.

Plaintiff raises three separate argument about why neither the chimney nor the fireplace flues should be removed by defendant unless and until this case is tried on the merits and the parties' claims decided.

First, plaintiff argues that when the properties were divided in 1975, the

---

[1]Sometimes the parties interchangeably use the term "chimney" to refer to the brick structure as well.

predecessor owners of 197 and 199 entered into an agreement for an easement which permitted the (former) new owner of 199 to continue using the boiler located in the basement of 197 to provide heat and hot water to 199. The agreement, between William Ling ("Ling"), then the owner of 197 with 181 East 78th Street Corp, the former owner of 199 provides that forty (40%) percent of the cost of the boiler and fuel would be borne by 197 with the balance to be paid by 181 East 78th Street Corp. The agreement was durational, expiring on April 30, 1980. However, as the agreement provides, once the owner of 199 or its successor etc., installed its own heating system and hot water supply for its premises, then the agreement would terminate effective on the date the new system was installed. Thus, plaintiff contends the boiler belongs to 197, as does the chimney, vent, etc., and therefore, the owner of 199 has no right to remove or destroy the chimney or vents because, as a result of the easement.

Alternatively, plaintiff argues it has acquired ownership rights through adverse possession of a portion of the alley way between 197 and 199, where defendant wants to extend his building into, because its possession of the area has been under a claim of right, actual, open and notorious, exclusive and continuous for a period of more than ten years (Brand v. Price, 35 NY2d 634 [1974]). According to plaintiff the chimney has been anchored in the same location since at least 1963 and the fireplace flue vents for the past 10 years.

Plaintiff's third argument is that even if the eastern wall that was rebuilt in 2003-2004 encroaches onto defendant's property, as defendant contends, the encroachment is de minimus and probably caused by a shifting in the foundation of 197 due to the excavation work on defendant's property. Thus, plaintiff contends that such

encroachment is subject to a prescriptive easement.

Plaintiff contends that there is no reason why defendant cannot simply encase the fireplace flues within a soffit and build around them, because they will still operate and vent the fireplaces at the roof. In this way, defendant can complete its construction project without disruption and both parties can co-exist.

Plaintiff accuses the defendant of having torn down its chimney vent and threatening to do the same with the fireplace flues. According to plaintiff's principal ("Gao"), she will suffer irreparable harm because her building will not be ventilated and her lot line windows will be blocked. Gao contends further that the equities balance in her favor because the status quo is that the chimney and fireplace flues are in the alley way.

After the motion and cross motion for a preliminary injunction were made and argued, plaintiff brought a motion to hold defendant in contempt based upon defendant's violation of the parties so-ordered stipulation dated September 17, 2009 which resolved the parties' dispute about the scope of any temporary restraining order ("TRO") in the Order to Show Cause. The TRO provides as follows:

> "Without defendant admitting the allegations asserted in plaintiff's order to cause papers, the parties agree that pending a hearing on October 2, 2009 at 9:30 a.m., defendant is temporarily restrained from removing the three fireplace vents from their present location on the exterior of plaintiff's building or the chimney from its present location."

The TRO was extended and continued by the court pending the resolution of the motion and cross motion for a preliminary injunction.

According to plaintiff, defendant has replaced the chimney and punched a hole in the basement of 197 which is in disobeyance of the TRO. Defendant acknowledges that it replaced as section of the metal chimney, *i.e.* a portion of the metal flue inside the brick chimney, but did not touch the brick chimney. Defendant contends this was essential because the flue duct was loose, rusted and unsafe. Defendant also contends the TRO is very narrow, enjoining the defendant from removing the chimney, which it did not do.

In opposition to plaintiff's motion, and in support of its cross motion, for a preliminary injunction, defendant presents a number of arguments. First, defendant argues that although the three properties have long had separate identities, the current and/or former owners of 197 have continued to act as if 197 and 199 are owned by the same owner. For example, defendant contends that 197 connected the flue vent for 197's boiler to 199's chimney by drilling a hole into the chimney. Defendant's principal ("Bari") states he offered to let plaintiff connect its boiler for 197 to 199's new chimney so that 197 will need no chimney at all, but plaintiff refused to accept that offer.

Defendant argues that even if there was an easement, it expired long ago and has no relevancy to the parties' present dispute.

With respect to the fireplace flues, defendant contends they were installed by the former owner of 197 without defendant's permission, when that owner added a new story to 197 and also rebuilt its east exterior wall. Defendant contends the wall was pushed outwards by some inches (into 199's alleyway) to accommodate new fireplaces that were added to 197 at that time. Thus, according to defendant, the fireplace flues protrude 10 inches into the alleyway and, therefore, trespass into 199's air rights and must be

removed. Defendant maintains that plaintiff does not have a likelihood of success on the merits with respect to the fireplace flues or chimney and that defendant will suffer irreparable harm because its $1.4 million expansion project will be delayed. Defendant argues that it cannot build around the fireplace flues but, even if it can, this will not work because if any work needs to be done to the flues the walls encapsulating them will have to broken open at great expense. Alternatively, defendant contends it would be unsafe to encapsulate the vents, but even if they can be safely encapsulated, this is unfair because defendant will lose valuable space in its property. Thus, defendant seeks a mandatory preliminary injunction allowing it the right to remove the fireplace flues and chimney immediately

The parties have each provided the sworn affidavits of professionals they separately hired to inspect the structures in dispute and render an opinion about the replacement chimney work that is the subject of plaintiff's contempt motion. According to defendant's architect, Ajay Chopra, the fireplace flues have not been there for "decades," as plaintiff argues, because they do not appear on the drawings that plaintiff submitted to DOB in connection with the renovation of 197 in 2003. Chopra concludes that either the architect who self-certified left them out on purpose, or their installation is a substantial deviation from the plans that were submitted – and a violation of the Building Code and Zoning resolutions. Chopra also observed that the connection from 197's boiler to the chimney is not a longstanding arrangement, but was done to gain valuable additional commercial space inside 197.

**Applicable Law**

The party seeking a preliminary injunction must demonstrate a probability of

success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor (*see* CPLR § 6301; Nobu Next Door, LLC v. Fine Arts Housing, Inc., 4 NY3d 839 [2005]; Aetna Insurance Co., Inc. v. Capasso, 75 NY2d 860 [1990]; W.T. Grant Co. v. Srogi, 52 NY2d 496 [1981]). Although the party seeking a preliminary injunction does not have to provide conclusive proof of its right to such relief, and a preliminary injunction can, in the court's discretion, even be issued where there are disputed facts (Terrell v. Terrell, 279 AD2d 301 [1st Dept 2001]), generally a preliminary injunction will be denied unless the relief is necessitated and justified from the undisputed facts (O'Hara v. Corporate Audit Co., 161 AD2d 309 [1st Dept 1990]).

In this context, "irreparable injury" means a continuing harm resulting in substantial prejudice caused by the acts sought to be restrained if permitted to continue pendente lite, and if granted, tailored to fit the circumstances so as to preserve the status quo to the extent possible (*generally*, Second on Second Café, Inc. v. Hing Sing Trading, Inc., 66 AD3d 255 [1st Dept 2009]). As a general rule, a mandatory preliminary injunction which seeks the ultimate relief should only be granted in unusual situations where the relief is essential to maintaining the status quo pending the trial of the action and the right to such relief is "clearly established" (Second on Second Café, Inc. v. Hing Sing Trading, Inc., 66 AD3d at 265).

To prevail on a motion to punish a party for civil contempt, the movant must demonstrate that the alleged contemnor has violated a clear and unequivocal court order, known to the parties (DRL §245; Judiciary Law § 753[A][3]; See also: McCormick v. Axelrod, 59 NY2d 574, 583 *amended* 69 NY2d 652 [1983]; Puro v. Puro, 39 AD2d 873 [1st Dept 1990]). The actions of the alleged contemnor must have been calculated to, or

actually defeated, impaired, impeded or prejudiced the rights or remedies of the other side (Farkas v. Farkas, 209 AD2d 316 [1st Dept. 1994]). Furthermore, there must be no effective remedies available (Farkas v. Farkas, 201 AD2d 440 [1st Dept. 1994]).

**Discussion**

*Preliminary Injunction*

In bringing the cross motion that it has, the defendant (owner of 199) is seeking the ultimate relief asserted in its counterclaim because it is asking that plaintiff (the owner of 197) be ordered to remove the fireplace flues protruding from 197's east wall (St. Paul Fire and Marine Ins. Co. v. York Claims Service, Inc., 308 AD2d 347 [1st Dept 2007]). Whether the flues have been at that location for "decades" as plaintiff contends, or they were "recently" added, as defendant contends, the flues have been in that location for at least several years, the defendant saw them and knew they were installed without obtaining defendants' consent, authorization or approval. Nonetheless, defendant embarked on a construction project last fall which entails building up to the lot line.

Even assuming that defendant has shown a likelihood of success on the merits, defendant has not shown irreparable injury in the absence of a preliminary injunction being issued, that the balance of equities is in its favor, or "clearly established" that a mandatory injunction is essential to maintain the status quo pending the trial of this action. In particular, defendant has not shown that the present circumstances are "imperative, urgent, or [of] grave necessity" warranting the immediate removal of the fireplace flues (Sithe Energies, Inc. v. 335 Madison Ave., LLC, supra) or that the status

quo would be disturbed by allowing the flues to remain in place.

Although defendant argues that it cannot encapsulate the flues because they cannot be reached to make repairs, this is not exactly what Chopra, its architect, states. According to Chopra, the flues were not declared on the drawings filed with DOB and therefore, the flues can only be "legally" placed within the walls of 197. Nonconformance with filed plans is not the same as posing a danger or hazard. Ed Simenello, plaintiff's engineer indicates the flues can be concealed, if properly insulated, because they will still vent gaseous fumes at the roof level. Thus far, DOB has not been involved in the parties' dispute or had any input about whether the flues are in a safe place to begin with or they can remain there and safely be encapsulated in a code compliant manner. It is also unclear whether defendant itself filed any drawings or plans with DOB in connection with its present project to build up to the lot line, and if so, whether fireplace flues protruding from 197's wall are depicted in those plans.

Given these circumstances, defendant's cross motion for a mandatory injunction must be denied at this time. Defendant is, however, directed to notify DOB of the alleged violation regarding the fireplace flues so that the agency can decide whether an investigation is necessary. Any renewal motion by defendant for a preliminary injunction shall, at a minimum, contain proof defendant complied with this order and include DOB's response, if any. Plaintiff's motion for a preliminary injunction as it pertains to the fireplace flues is granted.

Turning to the chimney dispute, it appears that the chimney has been anchored at its present location since at least 1975, if not before then. The chimney, at one time, ventilated both buildings because they shared a boiler. The 1975 agreement between

the former owners of each building shows that the boiler in 197 provided heat and hot water to 199, and 199 paid 60% of the cost of the heating expense. Thus, the agreement was for the benefit of 199. The agreement expired by its terms in 1980, or before then, if 199 installed its own boiler. Although 199 no longer relies on 197's boiler or derives a benefit from the chimney, the chimney still occupies space that belongs to 199 (i.e. the alleyway), defendant has shown a likelihood of success on the merits.

Defendant has not, however, shown irreparable harm or that the balance of equities are in its favor. Defendant has also failed to show that the preliminary injunction is necessary to maintain the status quo. The status quo is that the chimney has been anchored to its present location for many years and defendant was not troubled by it because the footprint of 199 is smaller than the lot it is on. Now that defendant wants to build its building out to the lot line, the chimney poses a problem. Thus, the change defendant demands - removal of the chimney- is the ultimate relief, and not the status quo. Arguments by defendant that it can do whatever it likes with the chimney because it "belongs" to defendant is an argument based upon its location, not how the chimney is used or its function. Without the chimney, there would be no ventilation for 197's boiler. Whether this arrangement should be changed is the ultimate relief sought, not the status quo. Therefore, the cross motion for a preliminary injunction to remove the chimney must be denied as well.

Although each side has presented argument in favor of and against plaintiff's adverse possession and prescriptive easement claims, those arguments focus on who has a greater right to the area in dispute only (i.e likelihood of success on the merits), not

who has a more immediate need for the space so occupied (see, Walsh v. St. Mary's Church, 248 AD2d 792 [3rd Dept 1998]). Thus, for reasons already addressed, plaintiff has (at this time), presented a more compelling argument than defendant why the status quo should be maintained until these disputed issues are resolved. Consequently, the balance of the equities tip firmly in plaintiff's favor.

*Scope and Terms of the Preliminary Injunction*

Since a large part of the parties' dispute is over who owns the chimney and whether defendant can do any work to it, the preliminary injunction must be broader than the TRO, but narrower than the proposed preliminary injunction. The preliminary injunction plaintiff is granted and imposed on the defendant is as follows:

Defendant, its agent and assigns shall not remove the chimney or fireplace vents pending the conclusion of this case, or further order of the court. Furthermore, defendant, its agent and assigns shall not replace any part of the chimney or fireplace vents without obtaining either the written consent of the plaintiff, or a court order.

*Contempt*

Defendant has repaired the metal chimney by installing a new one. According to plaintiff, this is a violation of the TRO that the parties agreed to and which was made an order of the court. Plaintiff complains that the repair left behind a hole and was done in callous disregard of plaintiff's rights.

The TRO does not prevent either party from repairing the chimney; it restrains defendant from removing the chimney from its present location. Defendant has not violated the TRO by removing it, although it has replaced it. The replacement has not

affected the venting of plaintiff's boiler, nor affected the brick chimney. The old chimney was rusted in places, as indicated in the sworn affidavit of Edward Simoniello, plaintiff's engineer. Thus, there is no basis for plaintiff's motion, to hold defendant in contempt for violating the TRO.

*Undertaking*

The granting of any preliminary injunction requires that plaintiff post an undertaking (CPLR § 6312 [b]). The purpose of the undertaking is to cover the enjoined party's damages, if it is finally determined that the party who obtained the preliminary injunction was not entitled to the preliminary injunction it obtained (Drexel Burnham Lambert Inc. v. Ruebsamen, 171 AD2d 457 [1st Dept 1991]).

Defendant has requested a bond of $1,500,000 because of the anticipated delay in completing its construction project and having to incur additional expense to work around the flues. Plaintiff has not addressed any of these arguments.

The court will require that plaintiff post an undertaking of $100,000 as a condition of the preliminary Injunction. The bond requested ($1,500.000) is greater than the cost of defendant's entire project ($1,400,000). The damages incurred if the preliminary injunction was ultimately, wrongfully, granted would be 199's increased costs, not the cost of the entire project. The undertaking must be posted within Ten (10) Days from the date of this decision.

**Conclusion**

It is hereby

**ORDERED** that plaintiff's motion for a preliminary injunction against defendant is

granted as follows: Defendant, its agent and assigns shall not remove the chimney or fireplace vents pending further order of the court. Furthermore, defendant, its agent and assigns shall not replace any part of the chimney or fireplace vents without first obtaining the written consent of the plaintiff, or a court order; and it is further

**ORDERED** that the court will require that plaintiff post an undertaking of Two Hundred Fifty Thousand Dollars ($250,000) as a condition of the preliminary injunction and the undertaking must be posted within Ten (10) Days from the date of this decision; and it is further

**ORDERED** that defendant shall notify DOB of the alleged violation regarding the fireplace flues so that the agency can decide whether an investigation is necessary; and it is further

**ORDERED** that defendant's cross motion for a preliminary injunction is denied; and it is further

**ORDERED** that plaintiff's separate motion for an order of contempt is also denied for the reasons provided; and it is further

**ORDERED** that this case is scheduled for **a preliminary conference on February 4, 2010 at 9:30 a.m. In Part 10**; no further notices will be sent; and it is further

**ORDERED** that any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied; and it is further

**ORDERED** that this constitutes the decision and order of the court.

Dated: New York, New York
January 5, 2010



So Ordered:

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