

Cale v P.O.H.R.C.N.Y., Inc.

2010 NY Slip Op 30855(U)

April 6, 2010

Supreme Court, New York County

Docket Number: 601594/04

Judge: Joan A. Madden

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4-14-10

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

HON. JOAN A. MADDEN
J.S.C.

PRESENT: _____
Justice

PART 11

Index Number : 601594/2004
CALE, JOSIP
VS.
P.O.H.R.C.O.N.Y.
SEQUENCE NUMBER : 005
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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 and cross-motion are determined in accordance with the annexed decision and order.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be entered on record hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: April 6, 2010

[Signature]
HON. JOAN A. MADDEN *c.*
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: IAS PART 11

-----X
JOSIP CALE and IVA CALE,

Plaintiffs,

-against-

Index No.601594/04
(Action No. 1)

P.O.H.R.C.N.Y., INC.,

Defendant.

-----X
P.O.H.R.C.N.Y., INC.,

Plaintiff,

Index No.115454/06
(Action No. 2)

-against-

JOSIP CALE and IVA CALE,

Defendants

-----X
JOAN A. MADDEN, J.:

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

These two actions, which are consolidated for purposes of determining the instant motions, arise out of alleged violations of an agreement granting the parties reciprocal easements regarding access to the basement area of the parties' buildings. As defendant in Action No. 1, P.O.H.R.C.N.Y., Inc. ("PInc."), moves for an order pursuant to CPLR 3212(e) and 3211(a)(7), granting partial summary judgment dismissing the first through fifth, and seventh causes of action. As plaintiffs in Action No. 1, Josip Cale and Iva Cale (the "Cales"), oppose PInc's motion, and cross-move for summary judgment on their complaint and to dismiss PInc's counterclaims. As defendants in Action No. 2, the Cales also cross-move for summary judgment dismissing PInc's complaint, and for an accounting.

The following facts are not disputed unless otherwise noted. The Cales own the building located at 104 Washington Place in Manhattan. PInc owns the adjacent and contiguous building, located at 102 Washington Place (a/k/a 316 Avenue of the Americas). The buildings share a furnace, fuel storage tank, and hot water tank (together the "Equipment"), which are located in the basement of both buildings, and are used to provide heat and hot water to both buildings. The portions of the basement where the Equipment is located are subject to reciprocal easements, pursuant to a Reciprocal Agreement for Easements (Agreement), dated July 25, 1990, and entered into by the parties' predecessors in interest.

The Agreement provides that the easements shall run with the land and that "the purpose of this agreement is to provide each of the parties hereto with the reciprocal right of access to that portion of each other's basement which contains the aforescribed equipment and to provide for the maintenance and/or replacement of the said equipment and for sharing the expense of operating and maintaining the same."

The Agreement states that the predecessor in interest of PInc, the party of the second part, shall maintain and operate the Equipment, at its sole expense, to provide heat and hot water to both buildings, and that the Cales' predecessor in interest, the party of the first part, will reimburse 35% of those expenses. The Agreement provides that if any of the Equipment needs to be repaired or replaced, the cost will be apportioned in

the same manner as the cost of operating and maintaining the Equipment, and either party may, at its own expense, install a new heating and hot water system on its own property so as to provide heat and hot water to its own building.

The Agreement also provides that if the party of the second part (PInc) fails to maintain and operate the Equipment, the party of the first part (the Cales) may take on those duties and be reimbursed 65% of its expenses. Moreover, if the one party required to reimburse a portion of the other party's expenses fails to do so, the latter may file a notice of lien on the other party's building and have all the rights of an unpaid mechanic or material man, as provided by the Lien Law. The Agreement further provides that if the use of the buildings or other existing circumstances or conditions change, either party may retain a consulting engineer, whose charge will be shared by both parties, to re-evaluate the relative distribution of heating costs between the parties; if the parties cannot agree on an independent consulting engineer, each party may name an engineer, and those two engineers will choose a third, with the decision of any two determinative.

I. Action No. 1

As the plaintiffs in Action No. 1, the Cales assert seven causes of action seeking monetary and equitable relief: 1) breach of the Agreement and money damages; (2) breach of the Agreement and an order extinguishing the Agreement, and permanently enjoining PInc from entering the Cales' premises; 3) trespass and

a permanent injunction; (4) trespass and punitive damages; (5) nuisance and money damages; (6) an injunction requiring PInc to remove unlawful encroachments; (7) negligence and property damages; and (8) a declaratory judgment that the encroachments are fixtures and part of the Cales' premises. The Cales allege that PInc abandoned the easement by failing and refusing to maintain and operate the Equipment to provide adequate heat to the Cales' premises; by "illegally altering" the Equipment while depriving the Cales' premises of adequate heat; by preventing the Cales from providing heat for their own building; and "by other bad acts that constituted a gross misuse and abuse of the easement." The Cales further allege that PInc stored equipment, garbage and cleaning supplies in their building, built walls and installed various equipment in their basement, affixed wiring and conduit on the exterior of the building, and placed an air conditioner on their roof.

A. Defendant PInc's Motion

As the defendant in Action No. 1, PInc moves for partial summary judgment dismissing the first through fifth, and seventh causes of action in the Cales' complaint.

With respect to the first, fifth and seventh causes of action, PInc's sole argument as submitted in its initial motion papers, was that if the court granted its then-pending motion to preclude (motion seq. no. 004), the Cales would be unable to prove any damages relating to those causes of action. By an order entered August 19, 2009, this court granted PInc's motion

to preclude "to the extent that Josip and Iva Cale are limited to the discovery produced to date to the extent the discovery was demanded." PInc's October 12, 2009 reply affidavit neither acknowledges the court's order, nor addresses the extent, if any, to which the order actually supports dismissal, as originally argued. Under these circumstances, PInc has not demonstrated sufficient grounds for awarding summary judgment dismissing the first, fifth and seventh causes of action, and those claims shall stand.

In the second cause of action for breach of the Agreement, the Cales seek an order extinguishing the easement on grounds of abandonment, and to permanently enjoin PInc from entering onto or using their premises.

An easement created by grant, such as the one at issue, may only be lost and extinguished by abandonment, conveyance, condemnation or adverse possession. See Gerbig v. Zumpano, 7 NY2d 327, 330 (1960); Consolidated Rail Corp v. MASP Equipment Corp, 109 AD2d 604, 606 (1st Dept 1985), aff'd 67 NY2d 35 (1986). Although abandonment necessarily implies non-use, "[i]n order to prove an abandonment, it is necessary to establish both an intention to abandon and also some overt act or failure to act which carries the implication that the owner neither claims nor retains any interest in the easement." Gerbig v. Zumpano, *supra* at 331; see also Consolidated Rail Corp v. MASP Equipment Corp, 67 NY2d 35, 39 (1986). "Furthermore, acts evincing an intention to abandon must be unequivocal . . . [and] must clearly demonstrate

the permanent relinquishment of all right to the easement." Gerbig v. Zumpano, *supra* at 331. However, "[t]he mere use of the easement for a purpose not authorized, the excessive use or misuse, or the temporary abandonment thereof, are not of themselves sufficient to constitute an abandonment." *Id* (quoting Roby v. New York Central & Hudson River RR Co., 142 NY 176, 181 [1894]).

Here, the Cales' reliance on a theory of abandonment is misplaced. Pursuant to its express terms, the purpose of the easement is to give each party a reciprocal right of access to that portion of each other's basement containing the Equipment, to provide for maintenance or replacement of the Equipment, and for sharing the operating and maintenance costs. In seeking to extinguish the easement, the Cales are not claiming that PInc had no interest in accessing their basement, or in operating and maintaining the Equipment.

Rather, the Cales' allegations that PInc altered the heat and hot water system for its exclusive benefit, interfered with their efforts to operate and manually override the boiler, and failed to provide heat and hot water to their building, evinces an intent to misuse, overuse or abuse the easement, as opposed to permanently relinquishing all right to the easement. Notably, the Cales specifically assert that PInc engaged in "bad acts that constituted a gross misuse and abuse of the easement." Under these circumstances, the Cales have not established a basis for extinguishing the easement, as misuse or overuse of an easement

does not constitute an abandonment. See Gerbig v. Zumpano, supra at 331; Graziano v. Turiano, 266 AD2d 187 (2nd Dept 1999); McIntyre v. Estate of Keller, 15 Misc3d 234, (Sup Ct, Bronx Co 2007). PInc is therefore entitled to summary judgment dismissing the second cause of action.

The motion is denied as to the third cause of action for trespass seeking permanent injunctive relief. While that cause of action as originally pleaded would have effectively extinguished the easement, in their affirmation in opposition to the motion, the Cales limit the injunctive relief to enjoining PInc from entering upon their premises for "any and all purposes unrelated to the provision of heat to the two buildings." In moving for summary judgment dismissing this claim, PInc merely raises factual issues as to when the alleged trespasses may have ended and whether they were authorized by plaintiffs or plaintiffs' tenants, which can only be resolved at trial. Thus, the third cause of action shall stand.

The fourth cause of action for an award of punitive damages based on the trespasses alleged in the third cause of action, is dismissed. Punitive damages may not be recovered for an ordinary breach of contract, or for tortious activity that does not exhibit a high degree of moral culpability. See Rocanova v Equitable Life Assurance Society, 83 NY2d 603 (1994); Bruckmann, Rosser, Sherill & Co, LP v. Marsh, USA, 65AD3d 865 (1st Dept 2009); Munoz v Poretz, 301 AD2d 382 (1st Dept 2003). Since the parties' dispute is a private matter with no impact upon the

public at large, the Cales are not entitled to punitive damages.

B. The Cales' Cross Motion

As limited by their brief, the Cales cross-move for summary judgment on their third, fifth, sixth, seventh and eighth causes of action.

The fifth, sixth, seventh and eighth causes of action, respectively, seek damages based on nuisance resulting from the alleged encroachments on plaintiffs' premises, an injunction requiring PInc to remove the alleged encroachments, property damages for negligence resulting from the alleged encroachments, and a declaration that the alleged encroachments are fixtures on and part of plaintiffs' premises. These claims all depend on the resolution of plaintiff's third cause of action for trespass, which is based on the same alleged encroachments.

The record establishes that triable issues of fact exist as to most of the alleged encroachments. For example, Robert Galpern, a principal of PInc, states in his reply affidavit that the air conditioner was placed on the Cales' roof for the benefit of a former tenant of that building, and was removed more than two years ago. Galpern acknowledges that he installed a hot water heater, enclosed by walls, in the Cales' portion of the basement, but he avers that he did so with their consent. Moreover, the Cales' photographs of the alleged encroachments are not conclusive, as the affidavit from their son provides no information as to when the photographs were taken, or the date

and duration of the alleged encroachments. Thus, the Cales are not entitled to judgment as a matter of law as to their third, fifth, sixth, seventh and eighth causes of action.

The Cales also cross-move to dismiss PInc's four counterclaims for damages based on breach of the Agreement and tortious interference. PInc alleges that the Cales breached the Agreement by not paying their share of certain costs associated with the provision of heat to the two buildings, and that such breaches originated in 1994 (first and second counterclaims) and 1996 (fourth counterclaim). To the extent PInc seeks damages outside the six-year limitations period for breach of contract, the first, second and fourth counterclaims are dismissed in part, as time-barred. The balance of these counterclaims shall stand.

The third counterclaim for tortious interference is dismissed. PInc alleges that since 1994, the Cales interfered with PInc's leases with its tenants, by requiring them to pay rent directly to the Cales for using the basement. PInc, however, does not allege that its tenants failed to pay rent as required under their leases with PInc, or that any other breach of PInc's leases occurred as a result of the Cales' alleged interference, which is a necessary element of a tortious interference claim. See Lama Holding Co. V. Smith Barney, Inc., 88 NY2d 413 (1996); Joan Hansen & Co., Inc. v. Everlast World's Boxing Headquarters Corp., 296 AD2d 103 (1st Dept 2002). Thus, the third counterclaim is dismissed.

II. Action No. 2

As the defendants in Action No. 2, the Cales cross-move for summary judgment dismissing PInc's complaint, and for an order directing an accounting.

The complaint in Action No. 2 alleges that in accordance with the terms of the Agreement, PInc filed a mechanic's lien on the Cales' building, in the sum of \$23,175.63, which represents the Cales' 35% share of the costs of providing heat and hot water to the buildings, and maintaining, operating and repairing the Equipment. PInc seeks a determination that it has valid lien, and a money judgment as to amount of the lien; alternatively if the lien is not valid, PInc seeks "a personal judgment against the Cales for the sum of \$23,175.83."

In cross-moving to dismiss PInc's complaint, the Cales submit an affidavit by their son stating that "on information and belief, there are no liens filed against plaintiffs' building." PInc submits no opposition to this portion of the Cales' cross-motion, and does not address the issue as to the existence of the mechanic's lien, or provide a copy of such lien.

The court takes judicial notice of the New York Judgment Docket and Lien Records maintained by the New York County Clerk in Supreme Court, New York County, where mechanic's liens are filed. Those records show that in 2006, PInc filed two mechanic's liens against the Cales' property. The first lien was filed on May 23, 2006 in the amount of \$11,134.74, and was "released by consent of lienor" on October 16, 2006. On that

same day, October 16, 2006, PInc filed a second lien in the amount of \$23,175.63, and commenced the instant action to foreclose the lien by filing the summons and complaint.

Pursuant to Lien Law §17, a mechanic's lien expires one year after filing unless an extension is filed with the County Clerk or an action is commenced to foreclose the lien within that time and a notice of pendency is filed in connection therewith. See Aztec Window & Door Mfg, Inc v. 71 Village Road, LLC, 60 AD3d 795 (2nd Dept 2009). If neither of those conditions is satisfied within the statutory period, and a further extension of the lien is not obtained by order of the court, the lien automatically expires by operation of law, becoming a nullity and requiring its discharge. Id. While a notice of pendency filed in conjunction with a action to foreclose a mechanic's lien, automatically extends the life of the lien for three years, if the notice of pendency is not extended within that three-year period, the lien itself expires by operation of law. See CPLR 6513; MCK Building Associates, Inc v. St. Lawrence University, 5 AD3d 911, 912 (3rd Dept 2004); A.C. Green Electrical Contractors, Inc v. SMG Construction, Inc., 279 AD2d 287 (1st Dept 2001).

Although PInc commenced the instant action to foreclose the lien within the one-year statutory time period, the record does not establish that PInc complied with the second requirement of filing a notice of pendency within that same one-year period. Absent a notice of pendency, the mechanics lien is a nullity and must be discharged. See Aztec Window & Door Mfg, Inc v. 71

Village Road, LLC, supra. However, even assuming without deciding that PInc filed a notice of pendency when it commenced this action in October 2006, absent a motion to extend the notice of pendency within the three-year period, as required by CPLR 6513, the mechanic's lien expired as a matter of law at the end of the three-year period in October 2009, and PInc can no longer maintain this action to foreclose the mechanic's lien. See MCK Building Associates, Inc v. St. Lawrence University, supra; A.C. Green Electrical Contractors, Inc v. SMG Construction, Inc., supra.

Thus, in either event, PInc does not have a mechanic's lien on the Cales' property and the complaint in Action No. 2 must be dismissed. To the extent the complaint includes a claim for money damages against the Cales, based on their share of the costs under the Agreement, that claim is duplicative of the counterclaims asserted by PInc in Action No. 1.

Finally, the Cales' request for an accounting is denied. In the absence of a fiduciary relationship between the parties, the Cales are not entitled to such relief. See Simons v Ross, 309 AD2d 667 (1st Dept 2003).

Accordingly, it is hereby

ORDERED that in Action No 1, the motion by PInc as defendant for partial summary judgment is granted only to the extent of dismissing the second and fourth causes of action, and the balance of the motion is denied; and it is further

ORDERED that in Action No. 1, the Cales' cross-motion for

summary judgment on the complaint is denied, and their cross-motion to dismiss PInc's counterclaims is granted only to the extent of dismissing the third counterclaim in its entirety, and the time-barred portions of the first, second, and fourth counterclaims; and it is further

ORDERED AND ADJUDGED that in Action No. 2, entitled P.O.H.R.C.N.Y., Inc. v. Josip Cale and Iva Cale, Index No. 115454/06, the mechanic's lien in the amount of \$23,175.63 filed by P.O.H.R.C.O.N.Y., Inc. on October 16, 2006 against the real property known as Block Number 592 and Lot Number 12 is hereby discharged of record; and it is further

ORDERED that the Cales' cross-motion for summary judgment dismissing the complaint in Action No. 2, entitled P.O.H.R.C.N.Y., Inc. v. Josip Cale and Iva Cale, Index No. 115454/06, is granted, and the Clerk is directed to enter judgment dismissing the complaint in its entirety; and it is further

ORDERED that the Cales' cross-motion for an accounting is denied; and it is further

ORDERED that the parties are directed to appear for the status conference previously scheduled for May 6, 2010 at 9:30 a.m., in Part 11, Room 351, at 60 Centre Street.

DATED: April 6, 2010

ENTER:

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

J.S.C.