

<b>2281 First Realty, LLC v Warminster Invs. Corp.</b>
2010 NY Slip Op 31015(U)
April 19, 2010
Sup Ct, NY County
Docket Number: 111121/08
Judge: Louis B. York
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4-26-10

**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**  
**PRESENT: Hon. LOUIS B. YORK** **PART 2**  
**Justice**

-----X  
**2281 FIRST REALTY, LLC,**  
Plaintiff,  
-against-

Index No. 111121/08  
Motion Date \_\_\_\_\_  
Motion Seq. No. 001  
Motion Cal. No. \_\_\_\_\_

**WARMINSTER INVESTORS CORP., a/k/a**  
**WARMINSTER INVESTMENTS CORP., ISA BRIJA**  
**and JOHN BRECEVICH,**  
Defendants.  
-----X

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to Dismiss Complaint

NUMBERED  
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

**FILED FOR JUDGMENT**  
PAPERS  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, scanned or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1412).

Defendants Isa Brija and John Breceovich move for summary judgment dismissing the first, second and third causes of action for failing to join a necessary party, to default plaintiff on failing to reply to the defendants' counterclaims and setting this matter down for an inquest on damages and dismissing defendant Warminster Investor Corporation's ("Warminster") claim which is pending in another action. Rather than dismissing, the parties will alert the Court to any decision in the prior action affecting this claim and if the matter is undecided here, the Court will give due consideration to the decision.

Plaintiff 2281 First Realty Corp., cross-moves for summary judgment on its first, second and third causes of action, to compel defendants to accept its reply to defendants' counterclaims.

On November 14, 1997, the premises at 2281 First Avenue, New York County, was sold to plaintiff 2281 First Realty Corp., LLC. Immediately to the north of plaintiff's building is 2283 First Avenue, New York County, which plaintiff contends is separated from 2281 by a party wall on the lot line separating the two properties. Defendant Breceovich owns the 2283 property. After he acquired ownership of the 2283 property, Breceovich borrowed over one million dollars from plaintiff and gave it the deed to the Warminster property at 2283 First Avenue as security. When Breceovich defaulted on the loan, plaintiff filed the deed in accordance with their agreement. Defendant continues to collect the rent. The Court is bound by collateral estoppel by the decision *Breceovich v Horigons Investors Corp.* (Index No. 107613/08 NY County), which held that plaintiff would have to bring a foreclosure action to obtain title to the property. Breceovich has destroyed part of the party wall which sits on the party line and sealed the gate through which the occupants of the plaintiff's building had access for over ten years. Plaintiff's unchallenged claim was that its access was open, notorious and without permission of any of the owners building, and therefore hostile.

That portion of defendants' motion to dismiss the first, second and third causes of

action because of the failure to join a necessary party - the Parks Department of the City of New York - is denied. The Parks Department is not a necessary party because the park which it manages is not an object of the plaintiff's request for prescription and that property will not be affected by the granting or denial of any relief requested in this action. Moreover, it is doubtful that the park managed by the Parks Department would be an adequate means of egress. Also, there is a significant height differential which the tenants would have to traverse according to plaintiff, although denied by defendants.

As to the first cause of action, the plaintiff's claim for damages for defendants demolishing the wall and sealing the gate without plaintiff's consent is granted. The amount of damages shall be determined at trial. The plaintiff is granted the injunction argued for, otherwise it will suffer irreparable harm as its occupants will not have an alternate means of egress in case of an emergency ~~is~~ blocking the main entrance. Also, it will continue to suffer the harm of continuing and further violations for not having a second means of egress. The third cause of action for an injunction requiring the defendants to repair the wall and unseal the gate is denied. Plaintiff has an adequate remedy. It can repair the wall and unseal the gate and add the cost of doing so to its claim for damages. If the defendants interfere with the plaintiff's attempt to do the repair and unsealing, the plaintiff may reapply for an injunction.

Rather than granting the defendants a default judgment on their counterclaims, the time to serve a Reply to the counterclaims in defendants' Answer is extended to the time the proposed Reply was attached as an exhibit to one of the affidavits. The plaintiff has throughout this proceeding litigated vigorously and their oversight in not timely responding to the counterclaims should not deprive the plaintiff of its day in court. Moreover, the defendants have alleged no prejudice to extending the plaintiff's time to serve a Reply. The Reply annexed to an affidavit in support of the motion is deemed served.

Accordingly, for all of the above reasons, it is

**ORDERED** that plaintiff's time to reply is extended, and the proposed reply is deemed served; and it is further

**ORDERED** and **ADJUDGED** that the motion to dismiss because of another action pending is denied; and it is further

**ORDERED** that plaintiff is awarded partial judgment on its first cause for money damages resulting from defendants' damage to the party wall and the sealing of the gate in the party wall; and it is further

**ORDERED** and **ADJUDGED** and **DECLARED** that plaintiff has a permanent casement through the gate in the party wall and onto the rear of Warminster's property; and it is further

ORDERED and ADJUDGED that the plaintiff's third cause of action for a permanent injunction is dismissed without prejudice.

Dated: 4/19/10

Enter:

*Rey*  
\_\_\_\_\_  
Louis B. York, J.S.C.

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

**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).

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE