

310 W. 99th St. Owners Corp. v 317 W. 98th St. LLC
2010 NY Slip Op 32631(U)
September 13, 2010
Supreme Court, New York County
Docket Number: 116597/05
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN

Justice

PART 7

310 WEST 99TH STREET OWNERS CORP.,
Plaintiff,

INDEX NO. 116597/05

-against-

MOTION DATE _____

317 WEST 98 TH STREET LLC.,
Defendants.

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

The following papers, numbered 1 to 2 were read on this motion by defendant(s) for a an order and Judgement for summary Judgement per CPLR 3212 and dismissal of plaintiff's first cause of action and plaintiff cross moves to amend the complaint.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

FILED
SEP 16 2010
NEW YORK COUNTY CLERK'S OFFICE
PAPERS NUMBERED 7

Cross-Motion: Yes No

For convenience, the following shall be consolidated.

In Motion Sequence No. 002, defendant moves for summary judgment dismissing the complaint. Plaintiff cross-moves for leave to amend its complaint.

In Motion Sequence No. 003, defendant moves for an order: (a) directing plaintiff to immediately take the necessary safety precautions to stabilize its rock mass and the face of its rock outcropping (a feature plaintiff calls a retaining wall); and (b) directing plaintiff to (i) immediately remove the defective concrete along its entire rear yard; (ii) install a waterproofing system that will minimize the penetration of rain water into the rock mass; (iii) replace the concrete from the rear of plaintiff's building to the edge of the rock outcropping ; (iv) remove any trees or other organic materials growing from the rock mass; (c) directing plaintiff to

immediately address and remedy plumbing failures set forth in plaintiff's engineering reports to minimize further erosion of the rock mass, if such has not been remedied, or, alternatively, provide proof to defendant that such repairs have been completed; (d) directing plaintiff to retain an engineer to (i) complete all site investigations, draft final plans, elevation and other drawings, and specifications concerning plaintiff's rock substrate, the integral rock face of plaintiff's substrate, and plaintiff's rear yard; and (ii) determine whether additional soil analysis along with other tests are necessary to determine if the rock mass and/or soil composition has changed since plaintiff's engineering reports were conducted 7-9 years ago; and (e) directing plaintiff to provide to defendant the final plans, drawings, speculations and estimates. Plaintiff cross-moves for an order directing defendant to stabilize the rock face of the excavation made on its property and vacating the temporary restraining order entered in this matter, pursuant to CPLR 2221(a).

Plaintiff is the owner of 310 West 99th Street, New York, New York. Defendant is the owner of 317 West 98th Street, New York, New York. The rear boundary of plaintiff's property abuts the rear boundary of defendant's property. The rear boundary of plaintiff's property is at a substantially higher elevation than the rear boundary of defendant's property. There is a bedrock outcropping that is approximately 75 feet long, and runs the entire rear boundaries of the parties' property. According to Daniel Siegel, a licensed engineer engaged by defendant in connection with this litigation, sometime around 1900, the bedrock outcropping was drilled, cut and/or sheared to slope approximately 90 degrees from plaintiff's property to defendant's property. The rear yard of plaintiff's property is covered by a paved concrete deck which, according to defendant, encroaches approximately one inch into defendant's property line at the top of the bedrock outcropping.

Plaintiff commenced this action on November 10, 2005, seeking an injunction compelling defendant to provide plaintiff access to defendant's property to effectuate the

necessary repair and maintenance of a retaining wall; a declaration that defendant is obligated to pay one-half the cost of the repairs and maintenance of the retaining wall, or alternatively, money damages constituting one-half the costs of such repairs and maintenance, should plaintiff be permitted to repair the retaining wall itself.

Defendant moves for summary judgment dismissing the complaint on the ground that the complaint inaccurately asserts that the bedrock outcropping is a retaining wall. Defendant contends that a retaining wall does not exist on the property, for which plaintiff claims defendant would be obligated to pay one-half of the costs for repairs and maintenance pursuant to Section 26-233 of the New York City Administrative Code (Code).

Section 28-101.5 of the Code defines a retaining wall as "a wall designed to prevent the lateral displacement of soil or other materials." Defendant argues that the outcropping is not a man-made construction but a natural rock formation. Defendant refers to plaintiff's deed for its property as well as the preceding sixteen recorded deeds, from 1917 to the present, claiming that the documents say nothing regarding a retaining wall at the southern boundary of plaintiff's property. All of the deeds refer to a party wall at the eastern boundary of plaintiff's property, which boundary is not adjacent to defendant's property. Likewise, defendant refers to its deed for its property, as well as the preceding eighteen recorded deeds, from 1931 to the present, which say nothing regarding a retaining wall at the northern boundary of defendant's property. Copies of all of the deeds are exhibited with defendant's motion papers.

Defendant refers to five engineering and/or consulting reports concerning inspections of the bedrock outcropping. The reports were made between 2001 and 2006, and do not indicate the existence of a retaining wall. The reports indicate that the outcropping has been eroding due to constant water seepage, and provide different methods to resolve the problem. One report expressly contemplates the installation of a retaining wall at the rear courtyard of plaintiff's property.

Defendant states that plaintiff, through K&H Consulting, obtained an ALT-2 permit from the New York City Department of Buildings for the installation of a retaining wall at its rear courtyard. Defendant asserts that this took place on February 7, 2007, after this action was commenced, and demonstrates that plaintiff was well aware that there was no retaining wall on its property.

Defendant also seeks dismissal of the first cause of action, in which plaintiff seeks a mandatory injunction directing defendant to allow plaintiff access to defendant's property. Defendant claims that the issue of access to its property is moot at this time, due to a stipulation regarding access so ordered by this court on March 15, 2010. The stipulation authorized plaintiff's workers to access defendant's property for the purpose of erecting, scaffolding and inspecting the vertical face of the bedrock outcropping.

Therefore, defendant moves for summary judgment on the ground that there is no retaining wall and no obligation to pay for repairs made on the property. The claim demanding access to defendant's property has allegedly been rendered moot.

Plaintiff opposes dismissal of the action and cross-moves for leave to amend its complaint. Plaintiff argues that defendant has admitted that a rock wall was created as a result of an excavation to level defendant's property. Plaintiff argues that defendant has implied that the face of the wall is on defendant's property.

Plaintiff submits a copy of the amended complaint. In this complaint, all references to a retaining wall are omitted as well as any references to Department of Buildings regulations relating to retaining walls. The relief requested has also been amended. The complaint now asks this court to declare which party is responsible for the repair of the wall and to direct the responsible party to repair the wall promptly and at its expense. Plaintiff avers that defendant will not be prejudiced by the granting of this cross motion.

In reply papers, defendant opposes the cross motion and argues that plaintiff has not

provided admissible evidence in opposing the summary judgment motion. First, plaintiff's attorney's affirmation is alleged to be insufficient to defeat defendant's motion. Second, defendant contends that the cross motion must be denied because the proposed amendment contradicts sworn statements by plaintiff, and lacks merit. Third, defendant argues that the cross motion must be denied as a matter of law because it lacks probative value. Fourth, defendant claims that it would be unduly prejudiced by the granting of this cross motion.

In the event that this court permits plaintiff to amend its complaint, defendant requests that the amendment be conditioned upon the payment of all of defendant's attorney's fees and costs to date.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact to dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1ST Dept 2007), citing *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc [ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Gross v Amalgamated Housing Corporation*, 298 AD2d 224 (1st Dept 2002).

An affidavit opposing a motion for summary judgment should indicate that it is being made by one having personal knowledge of the facts, and an affidavit of counsel is thus of no probative value in opposing a summary judgment motion. *Marinelli v Shifrin*, 260 AD2d 227, 229 (1st Dept 1999). Moreover, an attorney's affirmation is of no probative value unless accompanied by supporting documentary evidence. See *Ramnarine v Memorial Center for Cancer and Allied Diseases*, 281 AD2d 218, 219 (1st Dept 2001).

Defendant, through its motion papers and evidence, asserts that there can be no liability imposed on it due to the fact that no retaining wall exists on plaintiff's property. With an affidavit from its counsel, plaintiff admits that there is no retaining wall but that defendant remains liable to plaintiff. Because defendant provides evidence that changes the facts in this case, an issue is raised as to the cause of the deterioration of the rock outcropping.

"Leave to amend or supplement pleadings should be freely granted unless the amendment sought is palpably improper or insufficient as a matter of law, or unless prejudice and surprise directly result from the delay in seeking the amendment [internal quotations marks and citations omitted]." *Bennett v Long Island Jewish Medical Center*, 51 AD3d 959, 960-1 (2d Dept 2008).

The proposed amended complaint is very different from the original complaint. The original complaint alleged that a wall in dispute was situated along the property line between the parties and that each party was responsible for one-half of the cost of repairing the wall. The proposed complaint alleges that the wall is located on defendant's property and that defendant is solely responsible for repairing the wall and paying for the repairs. Plaintiff has apparently altered the facts of this case and its legal theory.

Because defendant provided evidence as to the cause of the damage of the rock outcropping, it would not be prejudiced by the granting of leave to amend the complaint.

In Motion Sequence No. 003, defendant seeks an injunctive order directing plaintiff to perform various and immediate actions to stabilize the rock mass and the face of the rock outcropping. Defendant states that if action is not performed, the rock will inevitably collapse on its property.

It is defendant's position that, as set forth in various reports compiled by plaintiff's engineers, that the deterioration of the bedrock outcropping was caused by plaintiff's failure to maintain drains on its property and its failure to fix the broken concrete in the rear portion of

plaintiff's property. This allowed water to penetrate into the natural rock foundation of plaintiff's property and caused its rock outcropping to deteriorate.

According to defendant, plaintiff failed for years to respond to these reports and did not take immediate steps to fix its drains and the broken concrete in its rear yard. Although defendant has allowed plaintiff to enter defendant's property in order to inspect the rock mass, defendant contends that plaintiff has failed to make plans to support and stabilize the rock formation. Defendant cites a report from one of plaintiff's engineers, dated April 19, 2010, which indicates that if measures are not taken by plaintiff, a present danger of rocks falling on defendant's property is imminent.

Defendant claims that the relief it seeks meets the requirements of a preliminary injunction. Defendant states that it will succeed on the merits because it has plaintiff's engineers' reports to sustain its position. Defendant avers that it will suffer irreparable injury in terms of property damage if relief is not granted. Defendant asserts that the balancing of equities favors defendant since plaintiff has been aware of this problem for years and has done little or nothing about said problem.

This court has, pending the hearing of this motion, in the context of a temporary restraining order, ordered the following: plaintiff has been ordered to take the necessary safety precautions to immediately stabilize its rock mass and the face of its rock outcropping; to remove the defective concrete along its entire rear yard, to install a waterproofing system that will minimize the penetration of rain water into the rock mass, to replace the defective concrete from the rear of plaintiff's building to the edge of the rock outcropping, remove any trees or other organic materials growing from the rock mass and/or the face; to address and remedy plumbing failures set forth in plaintiff's engineering reports to minimize further erosion of the rock mass, if such has not already been remedied, or alternatively, provide proof to defendant that such repairs were completed. Defendant has been ordered to provide plaintiff access to

defendant's property pursuant to the terms of the parties' aforesaid stipulation of access.

Plaintiff opposes defendant's motion and cross-moves for a repeal of the temporary restraining order and, for an order compelling defendant to stabilize the rock face.

Plaintiff argues that the rock on its property is unstable because of excavation that took place of defendant's property in 1908. The excavation allegedly occurred in order to allow construction of a building on that property. According to plaintiff and a licensed engineer, Brian Flynn, the excavation removed rock that provided lateral support to the rock underlying plaintiff's property. As a result, the remaining rock became unstable and has deteriorated over time. Plaintiff contends that it is defendant's responsibility to repair and stabilize the rock face, at its own expense, due to the aforesaid evacuation. Therefore, plaintiff makes a cross motion for a court order to direct defendant to do what plaintiff has been directed to do.

The movant seeking a preliminary injunction must demonstrate a likelihood of success on the merits of the action; the danger of irreparable injury in the absence of preliminary injunctive relief; and a balance of equities in favor of the moving party. *See Nobu Next Door, LLC v Fine Arts Housing, Inc.*, 4 NY3d 839, 840 (2005). The court must weigh a variety of factors and the matter is committed to the court's sound discretion. *See Doe v Axelrod*, 73 NY2d 748, 750 (1988).

Based on the evidence before this court, there is no doubt that damage to defendant's property is imminent. However, based on the findings of plaintiff's engineer, there is an issue as to the primary cause of the deterioration of the rock outcropping. The court shall grant the preliminary relief requested by defendant, and this action shall proceed until it is decided who shall be responsible for the ultimate cost for the repair and maintenance of the outcropping.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is denied; and it is further

ORDERED that plaintiff's cross motion for leave to amend is granted and the amended

complaint in the form annexed to the moving papers shall be deemed to have been served upon service by movant of a copy of this order with notice of entry; and it is further

ORDERED that defendant shall serve an answer to the amended complaint or otherwise respond thereto within 20 days of said service; and it is further

ORDERED that defendant is entitled to injunctive relief on the ground that a lack of performance by plaintiff will result in serious damage to defendant's property; and it is further

ORDERED that the undertaking is fixed in the sum of \$100,000 conditioned that defendant, if it is finally determined that it was not entitled to an injunction, will pay to plaintiff all damages and costs which may be sustained by reason of this injunction; and it is further

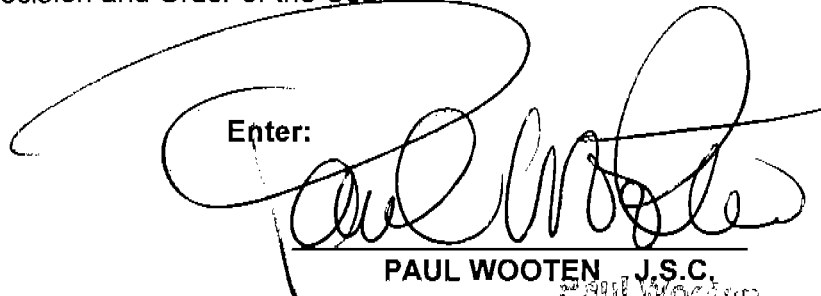
ORDERED that plaintiff, its agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of plaintiff, are directed to do the following: (a) immediately take the necessary safety precautions to stabilize its rock mass and the face of its rock outcropping; (b) immediately remove the defective concrete along its entire rear yard, install a waterproofing system that will minimize the penetration of rain water into the rock mass; replace the concrete from the rear of plaintiff's building to the edge of the rock outcropping, and remove any trees or other organic materials growing from the rock mass; (c) immediately address and remedy plumbing failures set forth in plaintiff's engineering reports to minimize further erosion of the rock mass, if such has been remedied, or, alternatively, provide proof to defendant that such repairs have been completed; and (d) retain an engineer to complete all site investigations, draft final plans and other drawings and specifications concerning plaintiff's rock substrate, the integral rock face of plaintiff's substrate and plaintiff's rear yard; determine whether additional soil analysis along with other tests are necessary to determine if the rock mass and/or soil composition has changed since plaintiff's previous engineering reports. Plaintiff shall provide defendant the final plans and documents; and it is further

ORDERED that plaintiff's cross motion for an order directing defendant to stabilize the rock face is denied; and it is further,

ORDERED that counsel are directed to appear for a preliminary status conference in New York State Supreme Court, Part 7, Room 320, 80 Centre Street, New York, New York on October 6, 2010, at 11:00 a.m.

This constitutes the Decision and Order of the Court

Dated: 9-13-10

Enter: 
PAUL WOOTEN J.S.C.
Paul Wooten
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: : DO NOT POST REFERENCE

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