

1768-68 Assoc., L.P. v City of New York

2010 NY Slip Op 32930(U)

September 28, 2010

Sup Ct, NY County

Docket Number: 118222/2009

Judge: Michael D. Stallman

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

PRESENT: Hon. MICHAEL D. STALLMAN, Justice

PART 21

1766-68 ASSOCIATES, LP.,

INDEX NO. 118222/09

Plaintiff,

-v-

MOTION DATE 7/22/10

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

CITY OF NEW YORK, METROPOLITAN
TRANSIT AUTHORITY, NEW YORK CITY
TRANSIT AUTHORITY, MTA CAPITAL
CONSTRUCTION, and S/3 TUNNEL
CONSTRUCTORS,

Defendants.

The following papers, numbered 1 to 5 were read on this motion to dismiss

Notice of Motion— Affirmation — Exhibits A, B
[Affidavit], C-K

Papers Numbered

1-3

Affirmation in Opposition— Exhibits A-E;
Affirmation in Opposition

4; 5

Replying Affirmation

FILED
SEP. 30 2010
NEW YORK
COUNTY CLERKS OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion to dismiss is decided in accordance with the annexed memorandum decision and order.

HON. MICHAEL D. STALLMAN

Dated: 9/28/10
New York, New York

[Signature], J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE SETTLE/SUBMIT ORDER/JUDG.

FOR THE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21**

-----X
1766-68 ASSOCIATES, LP.,

Plaintiff,

Index No. 118222/2009

- against -

CITY OF NEW YORK, METROPOLITAN TRANSIT
AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY,
MTA CAPITAL CONSTRUCTION, and S/3 TUNNEL
CONSTRUCTORS,

Decision and Order

Defendants.

FILED
SEP 30 2009
NEW YORK
COUNTY CLERK'S OFFICE

-----X
HON. MICHAEL D. STALLMAN, J.:

In this action, the owner of a leaning building claims that the Department of Buildings of the City of New York unjustly ordered the building to be vacated to facilitate and expedite excavation and blasting operations taking place in connection with the construction of the Second Avenue subway line. Plaintiff contends, among other things, that the acts of the Department of Buildings constituted a taking of property without due process and just compensation. The City of New York moves to dismiss the complaint as against it.

BACKGROUND

Plaintiff is the alleged fee owner of real property and a building thereon located at 1766-68 Second Avenue in Manhattan. According to the complaint, the two old law tenement style buildings, dating from the late 19th Century, that sit on the property were renovated and combined about 25 years ago into the single building at issue in this action. The north wall of the building is allegedly not plumb; the top of the building allegedly leans approximately 18 inches. Plaintiff asserts that, notwithstanding the leaning, the building is stable, and that it has not materially moved or shifted

for many years.

The construction of the new Second Avenue subway line allegedly takes place near the building. The Metropolitan Transportation Authority (sued herein as the Metropolitan Transit Authority), New York City Transit Authority, and MTA Capital Construction (collectively, the MTA defendants) allegedly notified the City's Department of Buildings (DOB) of their concern that drilling, excavation, and/or blasting as part of the construction could raise structural stability issues in the building due to its leaning condition.

By a letter dated June 4, 2009, DOB stated, "the referenced building [1766-68 Second Avenue], or portion thereof, has been declared unsafe and an imminent peril. It must be repaired or demolished immediately." Vidal Affirm., Ex H. An Emergency Declaration, reviewed and approved by the DOB Borough Commissioner on June 8, 2009, stated, "The north wall (Exposure 2) is [a] load bearing brick wall and is leaning 17 3/8 towards north. Remedy: Stabilize the building by proper bracing and shoring." *Id.*

Plaintiff claims that the building was not in any danger of immediate collapse, except as might be caused by excavation and blasting in connection with the construction of the Second Avenue subway line. Plaintiff allegedly engaged professional engineers to evaluate the situation and to interact with DOB.

According to plaintiff's counsel, DOB representatives met with plaintiff's engineer and with plaintiff's counsel on June 26, 2009. Hefelfinger Affirm. ¶ 15. DOB representatives allegedly stated that the building was well maintained and thanked counsel for having an engineer develop a long

term plan. *Id.* On June 29, 2009, DOB allegedly issued a Peremptory Vacate Order,¹ and DOB agents allegedly vacated the building of occupants, locked the building, and erected scaffolding around the building. Plaintiff asserts that it initially developed, in conjunction with DOB, a plan to reinforce the structural stability of the building, which was allegedly reviewed with DOB engineers and allegedly modified in response to those concerns.

Plaintiff alleges that it was forced and coerced into allowing MTA Capital Construction (MCC) and its contractor, defendant S/3 Tunnel Constructors (S3) to perform the plan that plaintiff initially developed. Plaintiff allegedly entered into an access agreement with MCC on September 18, 2009, pursuant to which MCC allegedly agreed to perform, at its own expense, the plan. According to the plaintiff, the plan involves detailed monitoring of the movement of the building and vibrations within the building resulting from blasting in front of, and adjacent to, the building. Plaintiff claims that MCC provided and shared the monitoring data with plaintiff and its engineers, but allegedly stopped sharing the data around December 2009.

In addition, plaintiff contends that DOB should have required the MTA defendants to protect, underpin and/or stabilize its building as a condition of excavation and blasting adjacent to the building, citing Sections BC 3309.4, BC 3309.4.1 and BC 3309.5 of the 2008 Building Code of the City of New York. Although the MTA defendants have allegedly stabilized the building from any danger posed from blasting operations, plaintiff contends that the building is now in a raw construction state, where walls have been opened, leaving it uninhabitable.

¹ The Peremptory Vacate Order states, "This order is issued because there is imminent danger to life or public safety or safety of the occupants or to property, in that Exposure 2 brick wall exhibit leaning 18" towards north causing unstable load bearing wall and in danger of collapse." Vidal Affirm., Ex J.

Counsel asserts that DOB did not mention that any DOB action was imminent at the alleged meeting on June 26, 2009, even though DOB issued the Peremptory Vacate Order the following Monday, on June 29, 2009. Plaintiff therefore argues that, based on the timing of DOB's actions, it is reasonable to infer DOB did not believe on June 26, 2009 that the building posed an immediate danger, but "political pressure was brought to bear at the highest level to keep the Second Avenue Subway Project moving that the Building became a victim of such pressure." Hefelfinger Affirm.

¶ 17.

The complaint asserts five causes of action against defendants. The City moves to dismiss the complaint pursuant to CPLR 3211 (a) (5) & (7). A conference to discuss the motion was held on July 22, 2010.

DISCUSSION

"When assessing the adequacy of a complaint in light of a CPLR 3211 (a) (7) motion to dismiss, the Court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff . . . 'the benefit of every possible favorable inference.'" *AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 (2005).

First Cause of Action

The first cause of action asserts that, pursuant to Sections BC 3309.4, BC 3309.4, BC 3309.4.1 and BC 3309.5 of the 2008 Building Code, defendants should be responsible for paying the costs of preserving and protecting the building from damage and potential damage. Plaintiff asserts that "DOB could have and should have, but has elected not to, require the MTA Defendants to protect and underpin and/or stabilize the [building] . . . as a condition of excavating and blasting

adjacent to the [building].” Complaint ¶ 21.

As the City indicates, whether DOB ought to have enforced those sections of the 2008 Building Code and directed the MTA defendants to protect, underpin and/or stabilize the building does not give rise to the City’s liability. “Government action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general.” *McLean v City of New York*, 12 NY3d 194, 203 (2009). Enforcement decisions of a municipality are discretionary actions that are immune from liability. *See e.g. Manuli v Hildenbrandt*, 144 AD2d 789, 790 (3d Dept 1988)(“the decisions of local municipal officials on whether to enforce zoning codes are discretionary and not subject to judicial oversight in a civil suit or by way of mandamus”).

Therefore, the first cause of action is dismissed against the City.

Second Cause of Action

The second cause of action seeks a mandatory and permanent injunction directing MCC to provide all monitoring data to plaintiff on an ongoing, timely basis. Because this cause of action is not seeking relief from the City, this cause of action is dismissed as against it.

Third Cause of Action

The third cause of action alleges that defendants have conspired, in effect, to take plaintiff’s property without paying fair consideration. Plaintiff asserts that “the actions of the City in the precipitous vacating and closing of the Building, on the eve of blasting by the MTA, ‘takes plaintiff’s property, without paying fair consideration, so as to facilitate and promote a long term capital improvement plan.” Opp. Mem. at 12.

“To determine if a taking occurred here, indeed we must assess whether respondents

were alone required to shoulder a public burden which, in fairness, should have been the responsibility of the public as a whole. . . . Nevertheless, compensation will not be required, even where governmental destruction of property is involved, if the government's action was necessary to stop an illegal activity, or prevent an impending danger emanating directly from the use or condition of the property.”

Birnbaum v State of New York, 73 NY2d 638, 645 -646 (1989)(citations omitted); *see also Rochester Poster Adv. Co. v City of Rochester*, 38 AD2d 679 (4th Dept 1971).

Here, DOB’s alleged acts fall within the City’s exercise of police power to prevent the impending danger of collapse that the building posed from the excavation and blasting operations of the construction of the Second Avenue subway line. The complaint does not claim that there was no danger of collapse. Rather, the complaint alleges, “The Subject Property was not in any danger of immediate collapse except as might be caused by excavation and blasting by the MTA Defendants in connection with the construction of the Second Avenue Subway . . .” Complaint ¶ 14; *see also* Opp. Mem. at 5. Plaintiff did not bring an Article 78 petition to challenge DOB’s actions; thus, the Court will not look behind DOB’s determination here. Moreover, “New York does not recognize an independent cause of action for conspiracy to commit a civil tort.” *Abacus Federal Sav. Bank v Lim*, 75 AD3d 472 (1st Dept 2010). Therefore, the third cause of action is dismissed against the City.

Fourth Cause of Action

The fourth cause of action alleges that defendants’ acts constitute an abuse of process. “Abuse of process has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective.” *Curlano v Suozzi*, 63 NY2d 113, 116 (1984). “While ‘process’ is defined as a direction or demand that one perform or refrain from doing some prescribed

act, it is clear that 'the judicial process must in some manner be involved.'" *Varela v Investors Ins. Holding Corp.*, 185 AD2d 309, 311 (2d Dept 1992)(citations omitted), *affd* 81 NY2d 958 (1993); *accord Raved v Raved*, 105 AD2d 735, 736 (2d Dept 1984) ("Some irregular activity in the use of judicial process for a purpose not sanctioned by law must be alleged").

Here, DOB's alleged acts, including the Emergency Declaration and the Peremptory Vacate Order, neither constituted nor involved the judicial process. Because the complaint lacks the allegations that plaintiff was issued judicial process, plaintiff fails to state a cause of action against DOB for abuse of process.

Fifth Cause of Action

The fifth cause of action alleges that defendants' acts constitute a prima facie tort. As discussed above, plaintiff's other causes of action based on DOB's alleged actions and omissions are legally insufficient. Plaintiff fares no better under a theory of prima facie tort. "Prima facie tort was designed to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort provides a remedy, and not to provide a catch all alternative for every cause of action which is not independently viable." *Eptfani v Johnson*, 65 AD3d 224, 232 (2d Dept 2009). Moreover, "there is no recovery in prima facie tort unless malevolence is the sole motive for defendant's otherwise lawful act or, in Justice Holmes' characteristically colorful language, unless defendant acts from 'disinterested malevolence.'" *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333 (1983). Here, the complaint is devoid of allegations from which any disinterested malevolence may be reasonably inferred on the part of DOB.

Therefore, the fifth cause of action is dismissed as against the City.

Sixth Cause of Action

The sixth cause of action alleges that defendants' actions constitute "violations of common law of the State of New York and basic principles of equity." Complaint ¶ 51. This purported cause of action is, in essence, a catch-all category, which the law does not recognize. As discussed above, courts rejected prima facie tort "as a 'catch-all' alternative for every cause of action which cannot stand on its own legs." *Frethofer v Hearst Corp.*, 65 NY2d 135, 143 (1985). Given that admonition, a catch-all category should not be created here. The complaint does not allege that DOB violated a contractual obligation. Because plaintiff has not articulated any specific principles of equity that are applicable in this matter, the sixth cause of action fails to state a cause of action against the City.

Accordingly, it is hereby

ORDERED that the motion to dismiss by defendant City of New York is granted, the complaint is severed and dismissed as against this defendant with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment in this defendant's favor accordingly; and it is further

ORDERED that the remaining parties are directed to appear at a preliminary conference in IAS Part 21, 80 Centre St Rm 278, New York, New York on December 16, 2009 at 2:15 p.m.

Copies to counsel.

Dated: September 28, 2010
New York, New York

ENTER:

FILED
SEP. 30 2010
NEW YORK
COUNTY CLERK'S OFFICE
J.S.C.