

**203-79 Equity, Inc. v Mancuso**

2010 NY Slip Op 33089(U)

October 20, 2010

Supreme Court, New York County

Docket Number: 101228/04

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

230-79 EQUITY, INC.,  
Plaintiff,

Index No.: 101228/04

Motion Date: 02/09/10

- v -

Motion Seq. No.: 06

Motion Cal. No.: \_\_\_\_\_

ROBERT MANCUSO, HARRIET STEIN MANCUSO,  
BERNARD STEIN, BERNICE STEIN, ALAN  
SPIGELMAN, DIANE SPIGELMAN, EDWARD M.  
KREPS, SHARON M. KREPS, EDMUND STEVENS,  
JR., a/k/a EDMUND WILLIAMS STEVENS, JR.,  
SHARI REAM STEVENS, BARRY L. SOLAR as  
trustees of the EDMUND STEVENS, JR.  
qualified terminable interest trust for  
SHARI REAM STEVENS, GBL 78th ST., LLC and  
240-79 OWNERS CORP.,

Defendants

**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 1419).**

The following papers, numbered 1 to 10 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits \_\_\_\_\_  
Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits - Exhibits \_\_\_\_\_

PAPERS NUMBERED	
1	
2 - 4	
5 - 10	

Cross-Motion:  Yes  No

Upon the foregoing papers,

This action involves the disputed obligations to repair a portion of a stone wall which borders and separates properties located on East 78th Street and East 79th Street in Manhattan.

Although plaintiff's complaint has been dismissed, defendants' counterclaims, cross claims and motions for summary

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):

judgment remain pending.

Defendant 240-79 Owners Corp. (240-79) moves, pursuant to CPLR 3212, for an order granting it summary judgment declaring that, pursuant to Administrative Code of the City of New York (Administrative Code) § 28-305.1.1, the costs of repairing and maintaining the common retaining wall should be divided proportionately among the parties whose property touches the damaged portion of the wall, and going forward, each party is responsible for the pro rata cost of maintaining the damaged portion of the wall which touches its property.<sup>1</sup>

Defendants Alan Spigelman, Diane Spigelman (together, Spigelman) and Edward N. Kreps and Sharon M. Kreps (together, Kreps), as well as defendant Edmund Stevens, Jr. a/k/a Edmund William Stevens, Jr., Shari Ream Stevens, and Barry L. Solar as trustees of the Edmund Stevens, Jr. qualified terminable interest trust for Shari Ream Stevens (together, Stevens) cross-move, pursuant to CPLR 3212, for an order granting them summary judgment and dismissing all causes of action, cross claims and counterclaims as against them. They also seek an order declaring the same relief as 240-79 seeks with respect to the liability of

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<sup>1</sup> Tracking the language of Administrative Code § 28-305.1.1, 240-79 repeatedly asks for a ruling that each party responsible pay one-half the costs. Because more than two parties may be responsible to pay for the damaged wall, costs may not be split by one-half. Therefore, the court has changed the defendant's language from one-half to pro rata, as will be discussed below.

the remaining parties for repairing the damaged portion of the wall.

Defendant GBL 78th ST., LLC (GBL) also cross-moves for an order granting it partial summary judgment declaring that GBL is not responsible for the repair of the retaining wall, or, in the alternative, pursuant to CPLR 3212, declaring that all parties whose property touches the wall at any point are proportionately responsible for the repairs of the damaged portion of the wall, and granting GBL partial summary judgment on its second, third, seventh and ninth counterclaims and third cross claim, and awarding GBL damages for the costs incurred by GBL to temporarily repair the wall.

The subject wall runs between the lots on East 78th and East 79th Streets, parallel to these streets. Each of the parties owns property which abuts the wall at some point either on its north or south sides. Plaintiff, for example, is the owner of an apartment building located at 230 East 79th Street, which abuts the north side of the wall. The wall is estimated to be several hundred feet in length, ranging in height from four to 14 feet, and is constructed of masonry rubble. The wall was built over 100 years ago. A small section of the wall, estimated to be approximately 20-30 feet in length, is in disrepair. From the parties' submissions it appears only three or fewer parties own property which may abut the damaged portion of the wall.

GBL states that in 2005 it performed temporary repairs to the portion of the retaining wall which allegedly abuts GBL's apartment building. The final costs to repair the entire damaged portion of the wall are estimated to be around \$60,000-\$70,000.

240-79 does not dispute that there is a portion of the damaged wall on or abutting its property. Plaintiff and GBL assert that the wall is not on their property. On this motion it appears to be undisputed that the section of the wall which abuts the property of Spigelman, Kreps, Stevens and Mancuso-Stein is not in need of repairs at this time.

In 2002, plaintiff received a violation from the City of New York concerning the status of the wall and the necessity for repairs to be made. A dispute arose between the parties as to who was responsible for making the repairs.

In 2005, plaintiff filed an amended complaint, seeking a judgment declaring the rights and obligations of the parties regarding the wall's repair. In its complaint, plaintiff asserted that all the parties should be held responsible for the wall's repairs, even the parties whose property does not abut any portion of the damaged section of the wall.

On June 10, 2009, this court issued an order dismissing plaintiff's complaint pursuant to CPLR 3216 for want of prosecution; however, the claims of the other parties are still pending, including counterclaims against plaintiff.

Administrative Code § 28-305.1.1, the applicable statute for the governance of "[s]tructures located on the lot line of adjacent properties and partially on both properties," provides

The owners of adjacent properties shall be responsible jointly for the proper maintenance and repair of retaining walls, partition fences and other site structures, or portions thereof, that are located along the common lot line and on both their properties; and each such owner shall be responsible for one-half of the costs of maintaining and repairing such fences, retaining walls and other site structures, or such portions thereof. Where an owner elects to remove temporarily a retaining wall or partition fence that is required to support a grade differential between the two properties, or for any other reason is required by this code, such owner shall protect the adjacent property, shall not impair its safe use, and shall replace the retaining wall or partition fence at his or her own cost.

240-79 asserts that its consulting engineers determined that, out of the 20-30-foot section of the wall which needs repair, "approximately two feet separate GBL and 240-79's parcels and the remainder separates the properties of GBL and 230-79 Equity." 240-79 argues that the costs to repair the damaged section of the wall should be divided pro rata based on the damaged portion of the wall on the parties' property. 240-79 contends that applicable statutes and case law require that only the property owners whose property abuts the damaged section of the wall should proportionately pay for the costs to repair the damage.

Kreps, Stevens and Spigelman also argue that the costs to repair the damaged portion of the wall should be split

proportionately only among the property owners whose property abuts or is on the damaged portion of the wall and they contend that no portion of the retaining wall on their property is damaged or is in need of repair. As such, they claim that they should not be responsible to share in the costs of repairing the damaged portion of the wall. They state that they adopt all of the legal and factual arguments as set forth by 240-79.

GBL disputes that any part of the retaining wall is located on its property. GBL does not dispute the location of the other parties' properties at issue, nor does it dispute the fees assessed to repair the damaged wall. GBL claims that a recent survey, dated April 30, 2002, demonstrates that the portion of the wall which needs to be replaced is entirely on the property of plaintiff and 240-79. GBL alleges that the portion of the retaining wall which separates the rear yard of GBL and the rear yards of plaintiff and 240-79 is located two inches away from GBL's property. As such, it maintains that, instead of Administrative Code § 28-305.1.1, Administrative Code § 28-305.1.2 should apply. Administrative Code § 28-305.1.2 provides

Where such retaining walls, partition fences or other site structures, or portions thereof, are located entirely on one property, the owner of such property shall be wholly responsible for the proper maintenance and repair of the retaining wall, partition fence or other site structure. If, however, the proper maintenance and/or repair of such retaining wall, partition fence or other site structures requires access

to the adjoining property, the owner of such adjoining property shall allow such access.

GBL also maintains that, if Administrative Code § 28-305.1.1 was to apply in this situation, GBL would still not be responsible for the costs of repairs, since GBL asserts that no part of the retaining wall is located on GBL's property.

GBL maintains in the alternative that, if the court were to find that the retaining wall is located on GBL's property, the Administrative Code would require that all property owners in question should be responsible for repairing the wall, even if their property does not abut the damaged portion of the wall. In support of its position, GBL provides the court with a "single line survey." The other parties debate the accuracy of GBL's survey and GBL similarly disputes the plaintiff's survey also depended upon by the other parties.

In 2005, GBL had the wall temporarily repaired by installing steel bracing along the damaged portion of the retaining wall. GBL states that it had to perform repairs, or else the wall might have collapsed on to its property. At the time of the repairs, GBL states that plaintiff refused to pay for any portion of the repairs. GBL provides invoices totaling \$22,100.00 for the temporary repair costs.

GBL's second and third counterclaims request damages incurred as a result of repairing the wall, in an amount to be

determined at trial, but no less than \$35,000. GBL also alleges that the wall was damaged as a result of plaintiff's negligence in maintaining the tree root growth and the drainage in its yard. In GBL's seventh counterclaim, it seeks a compulsory license pursuant to Real Property Actions and Proceedings Law (RPAPL) § 881 to enter plaintiff's property to repair the wall, and also seeks payment for such repair. In its ninth counterclaim and third cross claim, GBL seeks a declaration that the repair of the wall is the responsibility of all the parties in the action.

Mancuso-Stein is the owner of property located at 235 East 78th Street. Harriet Stein Mancuso passed away after this action commenced. None of the other Mancuso-Stein defendants submitted any papers to the court referencing the various current motions and it appears that they are now acting pro se. However, in their combined answer with Kreps and Spigelman, Mancuso-Stein argue in their answer that it was plaintiff's negligence with regard to the tree roots in plaintiff's yard and improper drainage which led to the wall's damage. Mancuso-Stein also contend in their answer that the portion of the wall about which plaintiff sought declaratory relief is not adjacent to Mancuso-Stein's property, and therefore, they should not be responsible for repairing that portion of the wall.

The court holds that where at two or more property owners share the damaged portion of the wall on their common lot line, Administrative Code 28-305.1.1. applies. If the statute meant to include all property owners abutting a wall as being responsible for the costs of repairing a damaged portion of the wall, even if their property does not touch that portion, it would have stated such. As the Court in Matter of Town of Eastchester v New York State Board of Real Property Services (23 AD3d 484, 485 [2d Dept 2005]) held, "where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted and excluded [internal citation and quotation marks omitted]." See also Williamson v Culbro Corp. Pension Fund, 41 AD3d 229, 232 (1<sup>st</sup> Dept 2007). Similarly, to the extent that it is shown that the damaged portion of the wall is entirely within property line of one party, Administrative Code § 28-305.1.2 places the burden of maintenance and repair on that party alone.

Accordingly, this court finds that, pursuant to Administrative Code § 28-305.1.1, the cost of repairing and maintaining a common retaining wall shall be divided proportionately only among the parties whose property touches upon the damaged section of the retaining wall. As a result, the second part of 240-79's motion for a declaration of the parties' liabilities, stating that each party is responsible for the costs

of maintaining that pro rata damaged portion of the wall that touches its property, is granted.

However, it cannot be determined from the papers on these motions which parties' property abuts, or contains, the damaged portion of the wall. It is still not evident whether plaintiff's, GBL's or 240-79's property abuts the damaged portion of the wall. Although plaintiff, GBL and 240-79 have provided the court with surveys and other documentation, the submissions are in conflict as to where the damaged portion of the wall is located. As such, the exact measurements are still a question of fact, and neither proportionate liability, nor the future liability of the remaining parties involved, can be summarily determined.

However, it is undisputed in the record here that the damaged portion of the wall in question does not touch the property of Kreps, Spigelman, Stevens or Mancuso-Stein. As there is no question of fact, these parties have met their burden of proof as a matter of law that they are not responsible to pay for the costs of repairing the damaged portion of the wall. Accordingly, the cross motions for summary judgment are granted, in that all causes of action, cross claims and counterclaims are dismissed as against Kreps, Spigelman and Stevens and

Mancuso-Stein.<sup>2</sup> The motions are also granted with the court's declaration as set forth above.

In accordance with the foregoing, the Kreps, Spigelman, Stevens and Mancuso-Stein defendants are not responsible for the costs that GBL incurred as a result of the temporary repairs it made to the damaged portion of the wall as a matter of law because it is undisputed that their property does not abut the damaged portion of the wall and they were not the cause of the damage. As previously stated, at this time, 240-79 and GBL have not met their burden to show, as a matter of law, that no issue of triable fact remains as to the exact location and proportion of the damaged wall on their properties. Accordingly, GBL's request for damages as a result of having to pay for the temporary repairs to the wall cannot be determined on this motion, and also, for the reasons described above, GBL's cross motion for summary judgment is denied in its entirety.

Accordingly, it is

ORDERED that defendant 240-79 Owners Corp.'s motion for summary judgment is GRANTED to the extent that is

ADJUDGED and DECLARED that pursuant to Administrative Code § 28-305.1.1, the cost of repairing and maintaining the common retaining wall shall be divided proportionately among only the

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<sup>2</sup> With respect to the Mancuso-Stein defendants the court shall grant judgment upon a search of the record pursuant to CPLR 3212.

parties whose properties touch upon the section of the retaining wall in question; and it is further

ORDERED, ADJUDGED and DECLARED that going forward, the parties are responsible pro rata for the maintenance and repair of only that portion/section of the wall that touches their properties ; and it is further

ORDERED that all causes of action, counterclaims and cross claims are otherwise DISMISSED as against defendants ROBERT MANCUSO, HARRIET STEIN MANCUSO, BERNARD STEIN, BERNICE STEIN, ALAN SPIGELMAN, DIANE SPIGELMAN, EDWARD M. KREPS, SHARON M. KREPS, EDMUND STEVENS, JR., a/k/a EDMUND WILLIAMS STEVENS, JR., SHARI REAM STEVENS, BARRY L. SOLAR as trustees of the EDMUND STEVENS, JR. qualified terminable interest trust for SHARI REAM STEVENS, except as to the court's declaration as set forth above and the Clerk is directed to enter judgment reflecting same; and it is further

ORDERED that defendant GBL 78th ST., LLC's cross-motion for summary judgment is denied; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the remaining parties are to attend a pre-trial conference in 1AS Part 59, Room 122, 80 Centre Street, New York, NY 10013, on November 30, 2010 at 2:30 P.M. to set a trial date.

This is the decision and order of the court.

Dated: October 20, 2010

ENTER:

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).**