

Parabit Realty LLC v Town of Hempstead
2010 NY Slip Op 33999(U)
May 4, 2010
Supreme Court, New York County
Docket Number: 7250/09
Judge: Roy S. Mahon
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

ENTERED
IN
CLERK'S OFFICE

Present:

HON. ROY S. MAHON

Justice

**PARABIT REALTY LLC and PARABIT SYSTEMS INC.
as authorized agents of Town of Hempstead Industrial
Development Agency,**

TRIAL/IAS PART 7

INDEX NO. 7250/09

Plaintiff(s),

- against -

**TOWN OF HEMPSTEAD, TOWN OF HEMPSTEAD
DEPARTMENT OF BUILDINGS, BRIAN NOCELLA as
An agent of the Town of Hempstead Buildings Department,
MARK SCHWARTZ as an agent of the Town of Hempstead
Buildings Department, HOLZMACHER, McLENDON &
MURRELL, PC, MICHAEL BONACASA, TODD GOLDFARB
and B & A DEMOLITION and REMOVAL INC.,**

Defendant(s).

DECISION AFTER HEARING

On January 14, 2010, the parties appeared before the Court to conduct a hearing to determine petitioner's application for a preliminary injunction. The hearing continued intermittently until March 8, 2010. After hearing, the Court now makes the following findings of fact and conclusions of law.

By stipulation of the parties, the exhibits introduced into evidence at the hearing previously conducted by the Court to determine the petitioner's application for a temporary restraining order were introduced into evidence for the instant hearing.

Plaintiff's first witness was David Nation, vice president of Parabit Realty LLC. He testified that he is in charge of facilities for the petitioner and has been monitoring the cracks in the petitioner's building at 35 Debevoise Avenue, Roosevelt, NY. According to Mr. Nation, one crack in the eastern corner of the building has widened by 2 millimeters. On December 3, 2009, the Town of Hempstead issued a notice of violation for the building which compelled the petitioner to undertake emergency repairs to the northeastern corner of the building. While approximately three quarters of the recommended repairs were completed,

the balance was left undone due to the inability to gain permission, from the owner of the abutting 19 Debevoise Avenue, for access to the way at 35 Debevoise Avenue, due to a dispute arising from potential liability for job related injuries to workers.

Cross examination revealed that the crack in the Northeastern corner of the building is approximately 15 feet from the foundation. While no precise measurement was made by the witness on the growth in the crack, it was his informal estimate that the expression measured approximately 2 millimeters.

Plaintiff's second witness was Rudolph Shatharah, owner of R. Shatharah Consulting Engineers P.C., and a licensed professional engineer. By stipulation of the parties, Mr. Shatharah was qualified as an expert in civil engineering with structural issues. Mr. Shatharah has visited the site at 35 Debevoise Avenue, Roosevelt, NY several times since April 2009. On December 3, 2009 he again visited the site and determined emergency repairs were needed for the building. He prepared plans for the aforementioned repairs which he determined should be undertaken in two phases (*see Plaintiff's #11 in Evidence*).

The first phase of the repairs would consist of the application of braces to the building. The second phase would comprise a permanent repair to the building employing a process known as underpinning. In underpinning, the affected wall would be opened up and the foundation stabilized by the introduction of concrete supports and, where needed, the injection of specialized grout. These measures are needed, in the opinion of the witness, to correct the cracks occurring in the northeast corner of the building caused by foundation work undertaken by the defendants at 35 Debevoise Avenue.

The aforesaid plans were submitted to the Town of Hempstead in conjunction with an application by the plaintiff for a permit to undertake the work (*see Plaintiff's #12 in Evidence*).

Upon cross-examination, the witness indicated that he conducted no inspection of the building at 35 Debevoise Avenue before 2009. After examining a photograph of the east wall of 35 Debevoise Avenue, he further indicated that some of the cracks in the wall are hairline in nature and may have antedated the construction work undertaken at 19 Debevoise Avenue (*see Defendant's F in Evidence*). The witness stated that the foundation at 35 Debevoise Avenue lies only 18" below the ground and does not go below the frost line. Accordingly, frost below the foundation could be responsible for cracking in the walls.

However, the witness went on to say that in his opinion, the foundation at 35 Debevoise Avenue had "creeped" or dropped by a fraction of an inch due to undermining of the foundation which occurred during the construction process at 19 Debevoise Avenue. Underpinning would restore the foundation to a proper level and, in the opinion of the witness, is preferable to grouting as a solution to the problem.

During re-direct examination the witness went on to say that the soil under 35 Debevoise Avenue was not tested to determine its ability to bear weight. The soil there was merely returned to the foundation after it was excavated during the construction process at 19 Debevoise Avenue. Cracks in the northeast section of 35 Debevoise Avenue has grown 4 to 5 times larger than their initial width on February 18, 2009.

Plaintiff's third witness was Mr. Ray Schwartz, supervisor of inspection services for the Town of Hempstead. He stated that he has been employed by the Town of Hempstead for 21 years and while he is not a licensed engineer, he performs inspections of buildings which are alleged to be unsafe with a view toward demolishing them if they are found to pose a hazard to public safety. Responding to a letter regarding the premises at 35 Debevoise Avenue, he blocked off the sidewalk at the premises and barricaded the area in front of the building where there was concern that the building was separating. He is waiting to assess the condition (*see Plaintiff's 13 in Evidence*).

Plaintiff rested their case after the testimony of the third witness.

The defendant B & A Demolition elected to present a case. Their first witness, taken out of order to accommodate scheduling, was Ms. Loretta Laney, the owner of Slack Test Boring which is a business which conducts soil tests for construction purposes. They determine, in part, soil density, leaching rates and weight-bearing qualities of soil. Ms. Laney is a high school graduate with 2 years of college from the State University of New York at Stony Brook, NY and has taken various soil courses. She indicated that her business had been retained by the plaintiff to do soil testing at 19 Debevoise Avenue, but was unable to gain access to the premises for that purpose. However, the defendant B & A Demolition retained Soil Mechanic's Drilling Corp., a similar firm, to do similar testing. After receiving a copy of the report prepared by Soil Mechanic's Drilling Corp., the witness prepared her own report.

While the witness was uncertain as to what equipment was used for the testing, she said that the fill material was incompatible with the foundation at the site. She also questioned the method used to test the soil which employed the use of a 35 pound hammer sticking test materials for a depth of 18 inches rather than a 140 pound hammer striking a depth of 30 inches.

Cross examination by the plaintiff revealed that use of a 35 pound hammer to conduct the tests was not standard for the use, but could still be used to generate reliable results. The tests performed were done to establish soil composition and density, but could not establish the presence of voids under the foundation.

Re-direct examination of the witness established that a 140 pound hammer could not be placed between the buildings to conduct a soil test, but a 35 pound hammer could still be used to bring up soil samples in a device known as a "spoon".

The second witness to testify for the defendant B & A Demolition, also taken out of order to accommodate scheduling, was Mr. Vincent Nantista, a licensed professional engineer for 40 years, and the proprietor of Soil Mechanics Drilling Corp. for the past 29 years. He stated that he holds a bachelor of arts degrees in civil engineering, a masters degree in civil engineering, a second masters degrees in geo-technical soil engineering. Additionally, he has been previously employed by the New York City Transit Authority, the New York City Department of Public Works and the New York State Department of Public Works.

He stated that in his expert opinion, the construction work done by the defendants at 19 Debevoise Avenue did not create the damage and instability to the premises at 35 Debevoise Avenue. Rather, the movement which precipitated the problem at 35 Debevoise Avenue could have a variety of sources and was not necessarily the result of foundational "creeping".

In support of his opinion, Mr. Nantista indicated that he was retained by the defendants to do drilling tests at 19 Debevoise Avenue and inspected the premises at 35 Debevoise Avenue. The tests consisted of using a drop weight to recover soil samples with a device known as a "spoon" which would reveal soil type and soil constituents and, when combined with a blow count, can reveal the capacity of the tested soil. Seven borings were performed at the work site revealing the presence of handful for the first 4 feet between the surface and the lower soil, and some backfilled soil below the 4 foot level from unknown activity in the relatively distant past.

The witness also noted that the newly dug foundation at 19 Debevoise Avenue extends 4 feet below the surface of the soil in conformance with building code, requirements which mandate that the new foundation be placed below the frost line to avoid "heaving" or movement associated with accumulation of ice through expansion and contraction. The foundation at 35 Debevoise Avenue, built years ago before the

current building code extends only 18" below the surface which could cause setting on the older foundation and lateral pressure to be exerted on the neighboring foundation at 19 Debevoise Avenue. After inspecting the area around the foundation of 35 Debevoise Avenue he was unable to say if settling had occurred in its foundation.

Additionally, the witness estimated that the front of the building at 35 Debevoise Avenue is located approximately 25 to 30 feet from the new foundation at 19 Debevoise Avenue. The cracks appearing in the wall at 35 Debevoise Avenue are approximately 8 feet from the front of the building and approximately 22 feet from the foundation. In his opinion, the witness stated that the depth of excavation was too shallow to likely cause the cracks at 35 Debevoise Avenue and was even less likely if undertaken by hand rather than by heavy equipment. Cracks in a building could also be induced by bumping, gravity, vibrations and the shifting of weight. If soil had been backfilled between the two buildings after the completion of the foundation work at 19 Debevoise Avenue, lateral support would have been re-established soon thereafter.

According to Mr. Nantista, grout, consisting of water and cementation material, strengthen materials by binding them together. It can be inserted under pressure through pipes in the soil and can be used to fill large voids and minimize voids in the soil. It also serves to make filled soil, with potential for movement, more stable. At 35 Debevoise Avenue, it could be inserted vertically into the soil and could provide the needed measure of stabilization. Underpinning could perform the same function, but, in Mr. Nantista's opinion, would be needed only for support in the forward section of 35 Debevoise Avenue and not for the full length of the building foundation.

Mr. Nantista also opined that the completion of the construction at 19 Debevoise Avenue would not add to the stress at the premises located at 35 Debevoise Avenue.

Cross-examination of the witness revealed that the witness had visited the premises 2 or 3 times. Additionally he could not tell if there was any voids at 35 Debevoise Avenue.

Re-direct examination by the defendant B & A Demolition established that the witness did not feel that the premises at 35 Debevoise Avenue is not in immediate danger but could be rendered so if the foundation was altered and the building allowed to slump.

The third witness to testify for the defendant B & A Demolition was Thomas Lucchese, a licensed professional engineer holding a bachelor of science degree from Brooklyn Polytechnical Institute. He has been a practicing engineer for 42 years working with municipalities and school districts and provides on-call services for inspection concerning building allegedly posing a hazard to occupants and pedestrians.

He testified that he visited 35 Debevoise Avenue on December 5, 2009 and was unable to gain access to the adjoining site or the west side of the premises. The purpose of his visit was to determine the immediate hazard, if any, posed to the pedestrian public by the premises at 35 Debevoise Avenue.

The witness conducted five observations at the premises:

1. He observed no deterioration in the in-filled areas.
2. Horizontal beams supporting the structure were structurally sound posing no immediate threat of collapse.
3. The capping or caps of the parapet posture of the roof indicated no settling in its terracotta position

- [* 5]
4. Cracks in the east and west corners of the building had been present for some time, as a result of settlement, but posed no immediate threat of collapse.
 5. Cracks on the side of the east and west walls had been present for sometime.

Cross-examination revealed that the witness has testified for other parties in the past and not exclusively the Town of Hempstead. Additionally, the witness was unable to say how old the cracks at 35 Debevoise Avenue. Bowing in the building was attributed to workmanship at the in-fill area. The witness could not speak to the issue of future danger which might be posed from the condition of the premises at 35 Debevoise Avenue, other than to say there was, in his opinion, no immediate threat to the public or need for immediate repair.

The fourth witness for the defendant B & A Demolition was Mr. Louis Schwarz who visited the site in November 2009. A licensed professional engineer who testified at the hearing began on May 6, 2009, Mr. Schwarz stated that underpinning could not be accomplished without removing the foundation wall. In his opinion, cracks appearing in the wall at 35 Debevoise Avenue are the product of expansion and contraction attributable to frost and that there is no causal connection between the cracks in the west side of the building and the foundation work undertaken. The witness also opined that undermining recommended to correct the condition is unnecessary because the wall is not in danger, of imminent collapse.

The defendant B & A Demolition then rested its case. The remaining defendants did not elect to present a case. The plaintiffs did not offer a rebuttal case.

After hearing, the Court now makes the following findings of fact and conclusions of law.

In order to be entitled to a preliminary injunction, the movant must show a probability of success, danger of irreparable injury in the absence of an injunction, and a balance of the equities in their favor (see, **Aetna Insurance Co. v Capasso**, 75 NY2d 860, 552 NYS2d 918 (1990)).

In assessing the testimony and evidence adduced at the hearing, the Court credits the testimony and evidence adduced by the plaintiffs. While the cracks in the premises at 35 Debevoise Avenue, Roosevelt, NY may have their origin in any of a number of possible sources, including the foundation work undertaken at 19 Debevoise Avenue and the undermining of the foundation at 35 Debevoise Avenue associated with it, it can not, in the opinion of this Court, be fairly said that the foundation work undertaken by the defendants at 19 Debevoise Avenue, Roosevelt, NY was not a likely contributory cause, if not necessarily the sole precipitating cause, of the cracks or their continuing expansion.

Applying the aforesaid criteria to the plaintiffs' application for a preliminary injunction pursuant to CPLR 6313, the Court finds that the plaintiffs have met their burden in that there is a threat of irreparable harm to the plaintiffs' property which would result in loss or damages, and, at least in this early stage of litigation, that there is a likelihood of success on the merits. Accordingly, balancing the equities, the plaintiffs' application for a preliminary injunction enjoining the defendants from conducting further construction work on the foundation at 35 Debevoise Avenue, Roosevelt, NY, is **granted**.

The plaintiffs' Order to Show Cause and all opposition thereto submitted to the Court on March 8, 2010 seeking to permanently enjoin the defendants from undertaking further construction work on the foundation at 19 Debevoise Avenue, Roosevelt, NY, is **granted** to the extent that the Court will conduct a

further Conference with counsel relative to a hearing thereon.

Counsel for all parties are directed to appear at the **New York State Supreme Court, 100 Supreme Court Drive, Mineola, NY, Part 7, at 9:30 a.m. on Monday, May 24, 2010 for conference.**

This constitutes the decision and Order of the Court.

DATED:

5/4/2010

Roy S. Mahon

J.S.C.

ENTERED
MAY 07 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE