

Verrazzani v 26 Commerce LLC

2011 NY Slip Op 30010(U)

January 5, 2011

Sup Ct, NY County

Docket Number: 106496/10

Judge: Saliann Scarpulla

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

PRESENT: SALIANN SCARPULLA

Justice

PART 19

Richard Verrazzani,
Et Al.

- v -

26 Commerce LLC

INDEX NO.

106496/10

MOTION DATE

MOTION SEQ. NO.

1

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

motion and ~~cross-motion~~ ^{is} are decided in accordance
with accompanying memorandum decision Settle Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: January 5, 2011

Saliann Scarpulla
SALIANN SCARPULLA J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X
RICHARD VERRAZZANI and
STANLEY S. SIMBONIS,

Plaintiffs,

Index Number 106496/10
Submission Date 09/08/09
Mot. Seq. No. 001

-against-

DECISION & ORDER

26 COMMERCE LLC,

Defendant.

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Appearances:

For Plaintiffs:

McGarry & Simon
By William A. Simon, Esq.
317 Madison Avenue, Ste 1511
New York, New York 10017.
212-867-0100

For Defendant:

Davidoff Malito & Hatcher LLP
By Howard Weiss, Esq.
Esther S. Rhee, Esq.
605 Third Avenue, 34th Floor
New York, New York 10158
212-557-7200

Papers considered in review of this motion for reargument:

Papers	Numbered
Notice of Mot. and Affirm. in Supp.....	<u>1</u>
Memo. of Law in Supp.....	<u>2</u>
Affirm. in Opp.....	<u>3</u>
Reply Affid. by Verrazzani. in Further Supp.....	<u>4</u>
Reply Affid. by Simon in Further Supp.....	<u>5</u>
Reply Memo. of Law in Further Supp.....	<u>6</u>

HON SALIANN SCARPULLA, J.:

Plaintiffs Richard Verrazzani (“Verrazzani”) and Stanley Simbonis (“Simbonis”) (together “plaintiffs”) move for a preliminary injunction prohibiting defendant 26 Commerce LLC (“26 Commerce”) from disconnecting the waste plumbing lines from the common sewer system, which runs from Verrazzani’s property located at 24 and 28 Commerce Street, New York, New York, through the basement at 26 Commerce Street

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into the municipal network. Verrazzani has owned 28 Commerce Street since 2003.

Simbonis has been the owner of 24 Commerce Street since 1975. In 2009, 26 Commerce purchased the lot located in between Verrazzani's and Simbonis' property.

The three premises, 24, 26, and 28 Commerce Street, are now separate legal lots, but were originally built in the early nineteenth century as a single building on a single framework. Sometime after the construction of the building, but still more than a hundred years ago, an indoor plumbing system was added to the building. The waste lines for all three premises in the building ran through a common sewer system in the basement of the middle portion of the building and connected to the New York City sewer system in the street in front of what is now 26 Commerce Street.

Another feature of the indoor plumbing system was a waste line called the vertical stack, which ran from 28 Commerce Street through the wall into the third floor of 26 commerce Street and down through the premises into the basement, where it connected to the common sewer system. Allegedly, the three premises were under the common ownership during all or most of the time after installation of the indoor plumbing system, until sometime in the 1950s, when the last common owner, Susan Prestigiacommo, sold the three buildings in separate transactions to separate owners. The common sewer system, together with the vertical stack, were still in place and functioning at the time of this separation of the premises.

On March 19, 2008, James Chambers and his wife, Amanda Gruss, purchased the middle lot at 26 Commerce Street. In February 2009, Amanda Gruss conveyed title to the premises to defendant 26 Commerce LLC and became the sole shareholder of 26 Commerce LLC. Before purchasing the premises, a home inspector advised Chambers and Gruss to conduct a gut renovation because the premises were structurally unsound. A sewer contractor had also inspected the premises prior to purchase. 26 Commerce commenced the renovations in November, 2009 to prepare the home residence for Chambers and Gruss, with work scheduled to be completed by September, 2010.

In his affidavit, Chambers alleges that prior to closing, neither he nor Gruss had any notice of the common sewer system, because all of the pipes were concealed within walls and the basement floor. Further, Chambers alleges that the deed to 26 Commerce Street is silent regarding the common sewer system, and the former owner did not disclose the existence of such connections. Chambers and Gruss simply assumed that the property had its own connection to the municipal system.

Plaintiffs move to enjoin 26 Commerce from disconnecting the common sewer system as part of the renovation work on the grounds that plaintiffs have an implied easement in the use of the sewer system and the vertical stack, and irreparable harm would ensue. 26 Commerce argues in opposition that plaintiffs are not entitled to an extraordinary remedy of preliminary injunction, because the measure of plaintiffs' damages is the cost of independent hookup into the municipal network. 26 Commerce

submits an estimate issued by Alex Figliolia Water & Sewer LLC, according to which the separation of the joint plumbing system would cost \$30,600.00. 26 Commerce also volunteers to halt renovation to permit plaintiffs sufficient time to connect to the municipal sewer. In light of such a relatively low cost of plumbing work, 26 Commerce argues, the balance of equities is in its favor, because absent the required renovation, the Chambers and Gruss family would not be able to move into their new residence, frustrating the purpose of their purchase.

In response to Chambers' affidavit that the sewer piping was fully hidden from view, plaintiffs submit affidavits from Lawrence N. Dowd, Sam W. Betterson, Philip George and Richard Wise, all of whom performed plumbing work and related construction work at 24 and 28 Commerce Street in the past. Dowd alleges that on at least three occasions, he had to seek access to the basement at 26 Commerce Street to clear up waste water blockages at 28 Commerce Street. In the subject basement, Dowd observed clearly visible pipes from the adjacent buildings connecting to the joint sewer system. Dowd described the pipes shown on the photographs attached to Verrazzani's affidavit as exhibits I, J and K to be an accurate depiction of the appearance of the pipes in the basement before 2008.

Betterson was a plumber with John J. Repetti Plumbing & Heating, which serviced both 24 and 26 Commerce Street on numerous occasions between 1963 and 2002, when he left. Thereafter and until retirement, Betterson continued to do plumbing work for

6] Simbonis at 24 Chambers Street.. Betterson identifies Mackey Irick and Nelson Barringer as the previous owners of 26 Center Street and opines that in the past all three owners of 24, 26 and 28 Commerce Street knew they were connected to a joint sewer system and that this was obvious to any plumber who would do work in any of the three town homes. George did plumbing work at 28 Commerce Street in the past as well and agrees with Dowd and Betterson that an ordinary review of the basement would reveal the common use of the sewer system and the vertical stack.

With respect to the cost of separating the sewage systems, Wise, on the basis of his experience and knowledge of the subject premises, details the extensive plumbing and renovation work required to independently reroute the plumbing into the municipal system. Wise estimates the cost of this work to be \$180,150.00 with a margin of error of twenty per cent and also opines that the project could take months, which includes wait time for required permits and approvals, the actual work and subsequent inspections by the Department of Buildings.

Both parties also submit correspondence between Simbonis and Chambers, which indicates that Chambers previously considered upgrading the common sewer system and keeping it in place if Verrazzani and Simbonis were willing to contribute to the cost of the plumbing work. Once disagreements arose and the relationship between the neighbors floundered, Chambers decided that the best way to avoid conflict was to have separate sewer systems.

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Discussion

To be entitled to a preliminary injunction, a plaintiff must show a clear likelihood of success, the danger of irreparable injury, and that the balance of equities are in his or her favor. *See Jones v Park Front Apts., LLC*, 73 A.D.3d 612, 612 (1st Dep't 2010). To show a clear likelihood of success, plaintiffs must demonstrate the merits of their contention that at the time the premises were subdivided into three separate lots, an implied easement in the use of the common sewer system arose to the burden of 26 Commerce Street and that 26 Commerce acquired the easement at the time of purchase.

To establish that an implied easement¹ was created, “plaintiffs must prove : (1) that the properties that presently are in separate ownership must formerly have been in undivided ownership; (2) that prior to the separation of title, the use giving rise to the claimed easement ‘shall have been so long continued and so obvious and manifest as to show that it was meant to be permanent;’ (3) the use must be plainly and physically apparent on reasonable inspection; and (4) that the easement is necessary to the beneficial enjoyment of the land granted or retained.” William Xenophon Weed, *Warren’s Weed New York Real Property*, Ch.40, § 40.26 (citation omitted).

Here, there is no dispute that the common sewer system was in place at the time the premises were partitioned into three separate lots and that it serves plaintiffs’ properties. The parties disagree on whether the sewer system was “apparent”. upon a

¹At issue in this case is implied easement by grant, not implied easement by necessity, also known as easement by necessity.

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reasonable examination at the time of purchase and whether the continued use of the joint sewer system is necessary. Plaintiffs have satisfied their burden of proof on the issue of apparent use with expert affidavits and pictures of the subject piping. The evidence shows that a reasonable inspection of the basement at 26 Center Street before the purchase by Chambers and Gruss would have revealed the common sewer system, with the existence of an implied easement therein. Chambers' assertion that he did not see any piping is unpersuasive. Chambers did not explain plaintiffs' pictures showing visible piping nor submit an expert affidavit showing that an inspection could not have revealed the permanent joint sewer.

Further, 26 Commerce's reliance on *Silvercrest v St. Christopher-Ottile*, 194 A.d.2d 720, 721 (2nd Dep't 1993) in arguing that availability of independent access to municipal sewerage makes the joint piping unnecessary is misplaced. In the case of an implied easement, the necessity required is not absolute, but merely reasonable. 49 N.Y. Jur. Easements and Licenses in Real Property § 85 (West Group 2010). What determines the reasonable necessity of the easement's continued use is the high cost incurred if the easement is trespassed upon. *See Monte v di Marco*, 192 A.D.2d 1111, 1112 (4th Dep't 1993) (finding that the use of a sewer line was reasonably necessary, and not a mere convenience, because it would have cost nearly as much to construct an alternative sewer line as it had cost to purchase the property).

In *Silvercrest*, necessity of the continued use of the adjoining land was not established, because the dominant estate could have simply moved the pipe in the ground to connect to the municipal sewerage with the total cost of \$40,000.00. In this case, plaintiffs have established with Wise's affidavit the extensive amount of work that would have to be done to reroute the plumbing network in the super-centenarian building, with the total price tag to be no less than about \$180,000.00. Any such work would require construction that would render plaintiffs' properties uninhabitable for months.

In contrast, Figliolia's estimate submitted in opposition bears no probative value, because it is not in an affidavit form and thus constitutes inadmissible hearsay. In any event, Figliolia's \$30,600.00 estimate covers the actual plumbing cost only, and does not include the cost and delay associated with the related construction work arising out of division of the sewer system. Therefore, plaintiffs have established a clear likelihood of success on the merits and the danger of irreparable injury. *See* Weinstein, Korn & Miller, *New York Civil Practice: CPLR P 6301.05* (David L. Ferstendig ed., LexisNexis Matthew Bender) ("courts often perceive a party's loss of the possession and use of real property as an irreparable injury warranting injunctive relief"); *see also Paley v Copake Lake Dev. Corp.*, 95 A.D.2d 903, 903 (3rd Dep't 1983) (finding that discontinuance of sewage constituted irreparable harm, even when alternative sewage options existed).

The balance of equities also favors the grant of preliminary injunction. While Chambers claims that he would not be able to proceed with the renovation of 26

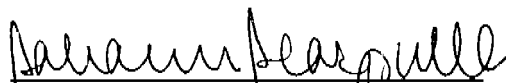
Commerce Street, having invested in it four million dollars, he also admits in his affidavit and in correspondence with Simbonis that 26 Commerce would be willing to maintain common sewer system if plaintiffs shared the cost of its upgrade. Enjoining 26 Commerce from cutting plaintiffs' sewage off would not stop the renovation work. 26 Commerce may renovate the common sewer system and then seek contribution from plaintiffs of their share of expenses.

Without the preliminary injunction, plaintiffs will be left without any sewage, rendering their premises uninhabitable for an extensive period of time. The purpose of this interlocutory relief is not to finally determine the merits, but to preserve the status quo so that once a decision is reached on the merits, it would have a meaningful impact on the dispute. *See Moody v Filipowski*, 146 A.D.2d 675, 678 (2nd Dep't 1989); *see also* 7A Weinsrein, Korn & Miller, *New York Civil Practice*: § 6301.05 (David L. Ferstendig ed., Lexis Nexis Matthew Bender). The cost and extent of the construction work involved in rerouting the plumbing network in these three town homes, coupled with the resulting deprivation of the use of plaintiffs' premises, outweighs any inconvenience to 26 Commerce Street.

In accordance with the foregoing, plaintiffs' motion for a preliminary injunction is granted, and plaintiff is directed to settle order.

Dated: January 5, 2011
New York, New York

ENTER:


Hon. Saliann Scarpulla, J.S.C.