

**5 W. 20th St. Corp. v Settepant**

2011 NY Slip Op 32133(U)

August 2, 2011

Sup Ct, NY County

Docket Number: 107134/08

Judge: Debra A. James

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[\* 2]  
20<sup>th</sup> Street.

It is undisputed that an air-handling unit on the roof of defendants' building rests on two horizontal steel support beams that are supported on one end by the party wall between the properties. The air handling unit apparently serves a restaurant on defendants' premises. Electrical boxes and piping that service the air handling unit are also affixed to the party wall. The court notes that based upon the affidavits submitted in support of and in opposition to the motion there is no dispute that the wall between the premises is properly characterized as a party wall.

At the time this lawsuit was commenced a ventilation duct from defendants' premises protruded upward from defendants' roof and was supported by brackets attached to the party wall. There are also apparently wires affixed to the party wall although neither party appears to know who installed the wires and which premises are served by them.

Plaintiffs' seek a declaration that defendants' air handling unit and ancillary conduits, ducts and other wires are encroachments on plaintiffs' premises which are subject to removal for trespass. See RPAPL 1501. Defendants now seek summary judgment dismissing plaintiffs' action arguing that to the extent there is any encroachment upon plaintiffs' premises

[\* 3]  
such encroachment is protected because defendants have acquired a prescriptive easement to the extent of the encroachments.

With respect to the ventilation duct the court finds the issue has been rendered moot. Defendants assert, and plaintiffs do not contest, that the vertical ventilation ducts are no longer attached to the party wall and therefore the court need not decide the status of that alleged encroachment.

As concerns the air handling unit and electrical boxes, although the parties legal memoranda expend much effort on the concept of prescriptive rights, the court finds that such arguments are not determinative of the claims asserted here. Instead, because the parties do not dispute that the claims here concern the common party wall between their respective properties, the issue is whether defendants' use of the wall is violative of plaintiffs' rights therein.

As stated by Chief Judge Cardozo,

A party wall is for the common benefit of contiguous proprietors. Neither may subject it to a use whereby it ceases to be continuously available for enjoyment by the other. Each may subject it to whatever uses are proper to a wall, if the like freedom of the other is not curtailed thereby. The meaning of principles so general is pointed by example. A wall may be carried by either owner beyond its height as first erected, provided only it is strong enough to bear the weight and strain. In this there is no encroachment by one owner upon the equal privilege of the other. Either is continuously at liberty to place his beams in the addition. On the other hand, there are decisions to the effect that the wall, if carried upward, must be solid, without windows.

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Varriale v Brooklyn Edison Co., 252 NY 222, 224 (1929) (emphasis added, citations omitted). Applying the principles outlined in Varriale to a fact pattern analogous to that presented in this case, a trial court persuasively found that the use of a party wall to support an air handling unit did not constitute an infringement upon the neighboring property owner. As stated by that court

Plaintiff seeks an injunction requiring defendants to remove two steel beams placed in a wall between the properties of the plaintiff and the defendants, situate on Spring Street in the city of Rochester, for the purpose of supporting a part of the apparatus used to air condition defendants' restaurant. The wall was erected about the year 1922, and on the defendants' side was used as a support for a frame structure. When defendants purchased their premises, about the year 1940, they razed the frame structure and erected a one-story kitchen. The air conditioning unit was installed in 1953, at which time the beams running on an angle were inserted in the wall for the purpose hereinbefore stated.

I conclude from the evidence that the wall in which the beams have been inserted is in fact a party wall. It does not appear that the beams penetrate the wall on plaintiff's side. It is plaintiff's contention that the wall, even though a party wall, should not be used by the defendants to support the beams and that such use is illegal and improper.

\* \* \*

Plaintiff also cites as authority that the continued use of the wall by defendants should be enjoined, Varriale v. Brooklyn Edison Co., 252 N.Y. 222. In the Varriale case, the beams used for supporting an electric sign rested on the party wall for its entire length, preventing the adjoining owner from building higher without removing the beams. This case is distinguished from the case at Bar in that the beams entered the party wall a considerable distance from its top and would not thereby deter the plaintiff from building the party wall higher. . . There

is no evidence that the installation of the beams has weakened the wall or caused actual injury to the plaintiff's building.

A 'party wall' is a structure for the common benefit and convenience of the contiguous users and either party is restricted to such use as shall not be detrimental to the other. . .

I conclude that the use of the party wall by the defendants in this issue is not detrimental to the plaintiff. Even if it is a technical trespass, equity will not intervene.

Spring Realty Corp. v Ryan, 206 Misc 37, 38-39 (Sup Ct, Monroe County, July 10, 1954). Spring Realty has recently been cited favorably in this court in determining that beams may be inserted in a party wall for the purpose of supporting structures within one of the adjoining buildings. See Gordon v Park Mad 74 Realty LLC, 8 Misc3d 1003(A), 2005 NY Slip Op 50909(U), 2005 WL 1403763, \*5 (Sup Ct, NY County , June 9, 2005) ("does not appear that plaintiff will succeed in gaining an injunction to stop defendants from inserting beams into the common rear or roof walls" to support an elevator); see also American Ry. Express Co. v Lassen Realty Co., 205 AD 238, 240 (1<sup>st</sup> Dept 1923) (beams may be inserted into property wall beyond the property line so long as the wall is not weakened and no damage is caused to the adjoining property); accord Pearsall v Westcott, 30 AD 99, 105 (3d Dept 1898) ("[i]f a party wall, even if the plaintiff had title to the south half thereof, the defendants had the right to use the whole wall, providing that such use would not interfere

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with or be detrimental to such right as the plaintiff had acquired therein").

Based upon the facts presented by the parties on this motion following discovery, the court finds that defendants' use of the party wall to support the air handling unit does not constitute a trespass against the plaintiffs' premises. The cases relied upon by the plaintiffs are not to the contrary. "It is settled law that a common or party wall is for the common benefit of contiguous proprietors. Neither may subject it to a use whereby it ceases to be continuously available for enjoyment by the other. Each proprietor may subject the wall to whatever uses are proper, if the freedom of the other to use the wall properly is not consequently curtailed." 25 West 74<sup>th</sup> Street, Corp. v Wenner, 268 AD2d 387, 388 (1<sup>st</sup> Dept 2000). In contrast to 25 West 74<sup>th</sup> and Sakele Bros., LLC v Safdie (302 AD2d 20 [1<sup>st</sup> Dept 2002]) there is no allegation here that defendants' use of the wall to support the air handling unit and ancillary electrical boxes interferes with plaintiffs' use of the party wall.

To the extent that plaintiffs' allege that the air handling unit causes vibrations that interfere with the enjoyment of their premises or otherwise cause damages, such allegations are wholly unsupported by any admissible evidence or inference. Evidence that vibrations from equipment cause property damage or injury must be supported by more than the observations of lay witnesses

and where there is no expert testimony in support of such allegations the claims are insufficient to survive summary dismissal. See Holy Name of Jesus Roman Catholic Church v New York City Transit Authority, 28 AD3d 520, 521 (2d Dept 2006) ("plaintiff failed to submit any competent evidence tending to establish a factual issue as to the cause of the property damage. Here, the deposition testimony of the plaintiff's representative, Reverend Dennis Farrell, and the affirmation of the plaintiff's attorney merely offered speculation that the vibrations of the subway lines caused the property damage. Accordingly, the plaintiff's opposition was insufficient to defeat the defendant's motion for summary judgment"). The affidavit of plaintiffs' expert gives no basis for his conclusion that the vibration from the air handling unit is at such a level as to impact the occupants of plaintiffs' building. The affidavit fails to state what the levels of vibration are and how, where or whether they were even measured. Therefore, the expert opinion is insufficient to raise an issue of fact as to whether the defendants' are improperly utilizing the party wall. See Vazquez v JRG Realty Corp., 81 AD3d 555, (1<sup>st</sup> Dept 2011) ("plaintiffs' expert affidavit was speculative, conclusory, and not based on foundational facts, i.e., an exact measurement of the purported defect").

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Accordingly it is

ORDERED that defendants' motion for summary judgment is GRANTED with costs and disbursements to defendant as taxed by the Clerk; and it is further

ADJUDGED that the second and third causes of action in the complaint are DISMISSED; and it is further

ADJUDGED and DECLARED that as to the first cause of action for a declaratory judgment, defendants' use of the party wall between defendants' and plaintiffs' premises for the support of the air handling unit and appurtenant equipment as set forth above does not violate plaintiffs' property or rights in the party wall.

This is the decision and order of the court.

Dated: August 2, 2011

ENTER:

Debra A. James  
J.S.C.

**DEBRA A. JAMES**  
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**).