

444 E. 86th Owners Corp. v 435 E. 85th St. Tenants Corp.

2012 NY Slip Op 30711(U)

March 23, 2012

Supreme Court, New York County

Docket Number: 106047/2009

Judge: Saliann Scarpulla

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

PRESENT: Scarpulla
Justice

PART 19

444 EAST 86TH OWNERS CORP, INDEX NO.

106047/09

- v -

MOTION DATE _____

MOTION SEQ. NO. 005

435 EAST 85TH STREET TENANTS,

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, together with motions 6, 7, and 8, is decided in accordance with the accompanying memorandum decision.

FILED

MAR 23 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/20/12

Saliann Scarpulla
SALIANN SCARPULLA c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 19

-----X
444 EAST 86TH OWNERS CORP.,

Plaintiff,

-against-

Index No. 106047/2009

435 EAST 85TH STREET TENANTS CORP.,

Defendant.
-----X

FILED

MAR 23 2012

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NEW YORK
COUNTY CLERK'S OFFICE

HON. SALIANN SCARPULLA, J.:

In this action between two landowners, defendant 435 East 85th Street Tenants Corp. ("85th St. Tenants") moves for an order awarding it sanctions pursuant to prior order by this court, and to dismiss the complaint in its entirety (motion sequence no. 5). In motion sequence number 006, plaintiff 444 East 86th Owners Corp. ("86th Owners") moves, pursuant to CPLR 2221, for an order granting leave to renew and reargue its prior motion for summary judgment. In motion sequence number 007, 86th Owners moves, pursuant to CPLR 6301, for an order granting a preliminary injunction directing 85th St. Tenants to permit 86th Owners to access its garage roof in order to build a scaffold bridge and sidewalk shed and repair the south facade of its building. In motion sequence number 008, 85th St. Tenants moves for a preliminary injunction enjoining 86th Owners from interfering with its air rights above the garage roof, pending resolution of this action, and

for other, related relief. Motion sequence numbers 005, 006, 007, and 008 are consolidated herein for purposes of disposition.

The relevant substantive and procedural history of this action has been fully set forth in this court's prior decision and order dated July 14, 2011 (32 Misc 3d 1232[A], 2011 NY Slip Op 51520[U] [the July 2011 order]) and will not be repeated here, except as is necessary for clarification. Briefly, in this action, 86th Owners seeks a determination that certain affirmative easements running in favor of its building remain in force, and permit it to enter onto 85th St. Tenants' property, consisting primarily of air rights above 86th Owners' garage roof, to erect a scaffold bridge and sidewalk shed in order to inspect the exterior south wall of its building, and to repair the building and the garage roof.

In 2009, prior to commencement of this action, the New York City Department of Buildings ("DOB") issued notices of violation to 86th Owners regarding pooling water on the garage roof and improper drainage. The Environmental Control Board ("ECB") subsequently dismissed most of the notices of violation. However, the DOB notice of violation issued on December 9, 2009 for spalling concrete on the underside of the garage roof resulted in the assessment of a fine against 86th Owners.

86th Owners contends that it cannot correct the problem without access to the topside of the garage roof. As of the date of the submission of these motions, that notice of violation remained open and subject to further enforcement by the DOB.

On February 28, 2011, the DOB issued a notice of violation to 85th St. Tenants for inadequate drainage at its rear yards that was damaging 86th Owners' concrete garage roof and main piers. By decision and order issued on October 13, 2011, the ECB dismissed the notice, holding that, "[b]ased on the testimony and evidence, I find that [85th St. Tenants] has rebutted the allegations as the testimony from [85th St. Tenants'] witnesses and the issuing inspector is that the insufficient drainage on the neighboring premises of 444 East 86th St. has caused the pooling problem on [85th St. Tenants'] premises and damage to the neighboring premises' roof," and that the insufficient drainage is the result of 86th Owners' garage roof not being correctly pitched and the lack of sufficient drains on 86th Owners' property (*City of New York v William Lee, 435 E. 85th St. Tenants Corp.*, ECB Violation No. 034879672Y[1 Nov]).

In July, 2011, this court granted 86th Owners' motion for a preliminary injunction, enjoining 85th St. Tenants from continuing to damage 86th Owners' garage roof to the limited extent that the court continued and extended the decision and order dated May 27, 2010 (the "probe order"), and directed that, among other things, probes of the garage roof shall commence on August 1, 2011. The court also directed that the failure of either party to timely comply in full with the probe order would result in the imposition of sanctions, pursuant to CPLR 3126, against the noncomplying party, upon application of the aggrieved party.

On August 1, 2011, 86th Owners applied to the Appellate Division, First Department for an interim stay of the July, 2011 order. By order issued August 1, 2011, the Appellate Division, First Department held that 86th Owners' "application for a Preliminary Injunction [and] Stay is denied in all respects as without merit."

By letter dated October 7, 2011, 86th Owners advised the court that it intended to erect a scaffold bridge and sidewalk shed on the garage roof, and commence the repairs on the rear facade of its building immediately.

On December 14, 2011, the court granted the branch of 85th St. Tenants' motion for a temporary restraining order restraining 86th Owners and its employees and agents from entering into 85th St. Tenants' air space to erect a scaffold bridge or sidewalk shed for the purpose of performing maintenance and repair work to the south wall of 86th Owners' building, without a license agreement, upon the posting of a \$50,000 bond. 85th St. Tenants posted the required bond on December 23, 2011.

Sanctions & Dismissal Motion:

85th St. Tenants now seeks an order awarding sanctions equal to its attorneys' fees and costs incurred in connection with this motion, and dismissing this action in its entirety, on the grounds that 86th Owners repeatedly failed to comply with the probe order and the July 2011 order. In opposition, 86th Owners contends that sanctions are not appropriate in the unique circumstances presented here.

[* 6]

85th St. Tenants has failed to demonstrate that 86th Owners willfully and contumaciously disregarded the prior orders. The documentary record, which includes contemporaneous letters between the parties and to the court, demonstrates that neither party complied in full with the probe order or the July, 2011 order, and that timely compliance was not possible, in view of the need to obtain appropriate insurance and permits, to hire engineering, moving, and storage companies, and to dismantle and remove concrete block and metal sheds and other large items from the garage roof. For these reasons, 85th St. Tenants' motion for sanctions and dismissal of this action is denied in its entirety.

Renew & Reargue Motion:

86th Owners seeks leave to renew and reargue its prior motion for a preliminary injunction enjoining 85th St. Tenants from continuing to damage 86th Owners' garage roof and other property. 86th Owners contends that the court overlooked evidence, and credited noncompetent evidence, in ruling that the court record does not establish that 85th St. Tenants' alleged acts and omissions are the cause of the damage being sustained by 86th Owners' garage. 86th Owners also seeks to introduce new evidence consisting of an affidavit by a moving and storage company project manager and documents obtained from the DOB and the New York City Board of Standards and Appeals ("BSA").

In opposition, 85th St. Tenants contends that reargument is improper because the court properly denied the motion, holding that 86th Owners had failed to demonstrate any

of the required elements. 85th St. Tenants also contends that renewal is improper because 86th Owners has failed to demonstrate the existence of relevant information not known to it before submission of the prior motion.

That branch of the motion for leave to reargue is denied.

A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided

Foley v. Roche, 68 A.D.2d 558, 567 (1st Dept 1979); see CPLR 2221 [d]. "Nor does reargument serve to provide a party an opportunity to advance arguments different from those tendered on the original application. It may not be employed as a device for the unsuccessful party to assume a different position inconsistent with that taken on the original motion." *Foley v. Roche*, 68 A.D.2d at 567-568. Here, 86th Owners has failed to establish that the court overlooked or misapprehended any facts or misapplied any principle of law.

Contrary to 86th Owners' argument, the factual findings made in the July, 2011 order do not demonstrate that 85th St. Tenants is damaging the garage roof, and do not mandate the granting of the preliminary injunction requested in the prior motion. The court also notes that, by order dated October 13, 2011, issued after issuance of this court's July 2011 order, the ECB dismissed the February 28, 2011 DOB violation issued against

85th St. Tenants, finding that the pooling water was not caused by 85th St. Tenants, but was the result of insufficient drainage caused by the improper pitch of 86th Owners' garage roof and the lack of sufficient drains on 86th Owners' property.

That branch of the motion for leave to renew is also denied. "An application for leave to renew must be based upon additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and, therefore, not made known to the court." *Foley v. Roche*, 68 A.D.2d at 568; see CPLR 2221 [e].

Renewal should be denied where the party fails to offer a valid excuse for not submitting the additional facts upon the original application. Nor should the remedy be available where a party has proceeded on one legal theory on the assumption that what has been submitted is sufficient, and thereafter sought to move again on a different legal argument merely because he was unsuccessful upon the original application

Foley v. Roche, 68 A.D.2d at 568 (internal citation omitted).

In moving for leave to renew, 86th Owners relies on an affidavit by Mark E. Lavin, a project manager at nonparty Sher-Del Transfer Relocation Services, Inc. ("Sher-Del"), a relocation and storage company retained by 86th St. Owners, and accompanying exhibits, including documents received from the DOB and BSA. Lavin attests that he visited 86th Owners' garage roof on two occasions in spring 2010 in order to prepare and provide an estimate regarding the costs of moving, storing, and insuring the items placed on the

garage roof by 85th St. Tenants (*see* Mark E. Lavin, Aug. 9, 2011 Aff. ¶¶ 13, 15). He revisited the space for the same purpose on August 8, 2011 (*see id.* ¶ 6).

Lavin attests that, following the 2010 and 2011 visits, he created commercial tally sheets, and took photographs showing that the roof was burdened with a number of small and large items, including wire fencing, locked gates, metal and cinder block sheds, bricks, cement blocks, storage bins, garbage pails, furniture, and planters that he believed had been placed there by residents of 85th St. Tenants' building (*see id.* ¶¶ 9, 11, 19). He further attests that some of these items would need to be demolished, that a crane might be necessary to remove some of them, and that the relocation process might pose a risk to Sher-Del employees and to the items themselves (*see id.* ¶ 34). By letter dated June 9, 2010, Sher-Del informed 86th Owners that its fee for the removal and return of the items to the site would be \$19,000, together with monthly storage fees, that it could not guarantee the safety of all of the items to be removed, and that it could not store or insure many of the items.

Although Lavin revisited the garage roof in August 2011, nothing in his affidavit mandates renewal of the prior motion. The additional facts set forth in the affidavit, such as the parties' continued failure to clear the garage roof, the collapse of some of the fencing in March, 2011, and the difficulties involved in clearing the roof of large, semi-permanent structures, were known to 86th Owners well before the submission of the prior motion on May 25, 2011.

Similarly, the DOB and BSA documents, consisting of the 1970 and 1975 applications to install the garage now owned by 86th Owners, were received by 86th Owners prior to April 2, 2011, well before submission of the prior motion.

For these reasons, 86th Owners' motion to renew and reargue is denied in its entirety.

86th Owners' Preliminary Injunction Motion:

86th Owners seeks a preliminary injunction enjoining 85th St. Tenants from interfering with 86th Owners' exercise of its easement through 85th St. Tenants' air rights above the garage roof surface by erecting a scaffold bridge and sidewalk shed, in order to permit 86th Owners to inspect the south facade of its building, and to complete the required repairs to that wall, pursuant to permits issued by the DOB in May, 2011 and on September 8, 2011.

In opposition, 85th St. Tenants contends that 86th Owners has failed to demonstrate its entitlement to the requested injunction, and that it will permit 86th Owners to access the garage roof only after 86th Owners enters into a license agreement, and pays a reasonable sum to recompense 85th St. Tenants' residents for the temporary loss of the use of their air rights.

"The owner of land benefited by an easement has two remedies available to seek redress upon a claim that another has interfered with or obstructed his easement rights. He can sue at law to recover damages or he can sue in equity for an injunction" (*Rahabi v*

Morrison, 81 AD2d 434, 438 [2d Dept 1981] [internal citations omitted]). 86th Owners has chosen to seek an injunction.

To demonstrate entitlement to a preliminary injunction directing a party to perform a particular act or requiring a party to refrain from certain behavior, the plaintiff must demonstrate that it is likely to succeed on the merits of the claim, that absent an injunction, it will suffer irreparable injury that cannot be compensated by money damages, and that the equities weigh decidedly in favor of the plaintiff (*W. T. Grant Co. v Srogi*, 52 NY2d 496, 517 [1981]; *Amarant v D'Antonio*, 197 AD2d 432, 434-435 [1st Dept 1993]; see CPLR 6301).

86th Owners has failed to demonstrate a likelihood of success on the merits. In the July, 2011 order, this court ruled that an easement through 85th St. Tenants' air space exists in favor of 86th Owners, and that the right to enforce the easement was not time-barred or waived. In addition, there are no disputes that 85th St. Tenants does not own the garage or the garage roof, and that 86th Owners owns them. There is also no dispute that 86th Owners has obtained the necessary DOB permits to proceed with the work.

Significantly, however, the easement does not permit 86th Owners to interfere with 85th St. Tenants' air rights in order to repair the facade of its building adjacent to the garage roof. The easement provides, in relevant part, that, inasmuch as 86th Owners' predecessor "has encroached upon" premises owned by 85th St. Tenants' predecessor, "by the construction of a building and certain supporting concrete beams at, above, and below

grade level," 86th Owners' predecessor is forever granted "the right and easement to maintain the encroachment," and "shall maintain and keep in good order and repair, the blacktop surface of the area described . . . at its cost and expense." Thus, the easement permits 86th Owners to access the garage roof surface to repair that surface, and to maintain the structure below.

By its terms, the easement is limited and does not permit 86th Owners to access the garage roof for any reason, other than repair of the garage roof blacktop, and maintenance of the garage structure below. Easement provisions are enforceable in accordance with their terms. *See e.g. 450 W. 14th St. Corp. v. 40-56 Tenth Ave.*, 15 A.D.3d 166, 166 (1st Dept 2005); *Brooklyn Design Ctr. v. Nutica, Ltd.*, 11 Misc. 3d 1056[A], 2006 N.Y. Slip Op. 50233[U] [Sup. Ct., Kings County 2006]; *Twenty First St. Assoc. v. Estates at Hallet's Cove Homeowners Assn.*, 179 Misc. 2d 972, 977 (Sup. Ct., Queens County 1999).

In view of the limited scope of the easement, 86th Owners cannot demonstrate that it will sustain an irreparable injury, if the injunction is not granted. For this reason as well, a balance of the equities does not lie in 86th Owners' favor. 86th Owners contends that it will obtain appropriate insurance naming 85th St. Tenants as an additional insured, and that, if the work is not completed, it will not be able to satisfy its obligations imposed by New York City Local Law 11 of 1998 to inspect and repair the building facade every five years. It also contends that the permits will expire soon, and so must be acted upon

promptly, and that, without the work, the leaking condition existing in south facade of the building may worsen. While 86th Owners may be correct in its dire predictions for the future maintenance and repair of its building, those predictions do not provide a basis upon which to grant the requested injunction. For these reasons, 86th Owners' motion for a preliminary injunction is denied in all respects.

85th St. Tenants' Preliminary Injunction Motion:

85th St. Tenants seeks a preliminary injunction enjoining 86th Owners and its agents from continuing to enter upon 85th St. Tenants' property and/or erect a scaffold bridge and sidewalk shed on the garage roof surface without a license agreement, pursuant to Real Property & Proceedings Law (RPAPL) 881.

In opposition, 86th Owners contends that 85th St. Tenants has no right to seek a license pursuant to RPAPL 881 because it is admittedly not the owner or lessee of the property upon which 86th Owners seeks to place the scaffold bridge and sidewalk shed.

In support of the branch of the motion for a TRO, 85th St. Tenants alleges that, during the course of a two-month period commencing October 25, 2011, 86th Owners and its agents and contractors had entered into 85th St. Tenants' air rights, in order to prepare for the installation of the scaffold bridge and sidewalk shed, and had cut down and removed wire fencing that separates the parties' buildings, creating security issues for the residents and property. By bench order issued on December 14, 2011, this court granted the TRO and restrained 86th Owners from continuing to enter onto the garage roof without

permission, upon payment of a \$50,000 bond, and pending resolution of this motion. 86th Owners has posted the required bond. Upon review, the Court finds that RPAPL 881 does not apply in the unique circumstances presented here.

RPAPL 881 provides, in relevant part, as follows:

Access to adjoining property to make improvements and repairs. When an owner or lessee seeks to make improvements or repairs to real property so situated that such improvements or repairs cannot be made by the owner or lessee without entering **the premises of an adjoining owner** or his lessee, and permission so to enter has been refused, the owner or lessee seeking to make such improvements or repairs may commence a special proceeding for a license so to enter pursuant to [CPLR Art. 4] . . . Such license shall be granted by the court in an appropriate case upon such terms as justice requires. The licensee shall be liable to the adjoining owner or his lessee for actual damages occurring as a result of the entry

RPAPL 881 (emphasis added).

Thus, the statute is applicable only where one landowner seeks to enter premises belonging to another. Here, 86th Owners seeks to erect a scaffold bridge and sidewalk shed on its own property, the garage roof surface. Contrary to 85th St. Tenants' contention, the mere fact that, in 2005 and 1997, 86th Owners chose to commence an RPAPL 881 special proceeding, *see e.g. 444 E. 86th Owners Corp. v 435 E. 85th St. Owners Corp.*, Sup Ct, NY County, Sept. 29, 2005, Wilkins, J., index No. 111919/2005, does not require 86th Owners to continue to seek such licenses, inasmuch as the statute is

not applicable here. Nothing in the statute permits a landowner to voluntarily be subject to its provisions.

For these reasons, 85th St. Tenants' motion for a preliminary injunction enjoining 86th Owners from entering into its air space, until 86th Owners obtains a license pursuant to RPAPL 881 or a license agreement is denied in its entirety.

The court has considered the parties' remaining arguments, and finds them to be without merit.

Accordingly, it is

ORDERED that motion sequence number 005 for sanctions and dismissal of this action is denied in its entirety; and it is further

ORDERED that motion sequence number 006 to renew and reargue is denied in its entirety; and it is further

ORDERED that motion sequence number 007 for a preliminary injunction is denied in its entirety; and it is further

ORDERED that motion sequence number 008 for a preliminary injunction is denied in its entirety, and the temporary restraining order granted on December 14, 2011 is lifted. This constitutes the decision and order of the Court.

Dated: March 20, 2012

FILED

***MAR 23 2012**

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ENTER:

Saliann Scarpulla

J.S.C.

SALIANN SCARPULLA