

Dopf v 319 W. 101st St., LLC

2012 NY Slip Op 32639(U)

October 12, 2012

Sup Ct, NY County

Docket Number: 115771/09

Judge: Cynthia S. Kern

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

L
10/18/12
(R)

PRESENT: _____
Justice

PART _____

Index Number : 115771/2009
DOPF, EUPHRASIA
vs.
319 WEST 101ST STREET, LLC
SEQUENCE NUMBER : 003
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

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

FILED
OCT 18 2012
COUNTY CLERK'S OFFICE
NEW YORK

RECEIVED
OCT 18 2012
CLERK OF SUPREME COURT - CIVIL

Dated: 10/12/12

CGK, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE:MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
EUPHRASIA DOPF,

Plaintiff,

Index No. 115771/09

-against-

DECISION/ORDER

319 WEST 101ST STREET, LLC and BRUSCO
CONTRACTING CORPORATION,

Defendants.

FILED
OCT 18 2012
COUNTY CLERK'S OFFICE
NEW YORK

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1, 2</u>
Affidavits in Opposition.....	<u>3</u>
Replying Affidavits.....	<u>4</u>
Exhibits.....	<u>5</u>

Plaintiff Euphrasia Dopf commenced the instant action to recover damages allegedly sustained to her personal property as a result of construction work performed by defendants 319 West 101st Street, LLC ("319 West") and Brusco Contracting Corporation ("Brusco"). 319 West now moves for an Order pursuant to CPLR § 3212 for partial summary judgment dismissing plaintiff's encroachment claims on the ground that plaintiff cannot prove any damages. Brusco also moves for an Order pursuant to CPLR § 3212 for partial summary judgment dismissing plaintiff's encroachment claims on the same ground. The above motions are consolidated for disposition. For the reasons set forth below, both motions are denied.

The relevant facts are as follows. Plaintiff owns a four-story brownstone located at 321

West 101st Street, New York, New York (“Plaintiff’s Property”). 319 West owns the building adjacent to Plaintiff’s Property located at 319 West 101st Street, New York, New York (the “319 Property”). Plaintiff’s Property and the 319 Property share a “party wall” that runs from the foundation to the third floor of both properties. In 2008, 319 West began a project to renovate and expand the 319 Property (the “Project”). 319 West hired Brusco to perform the contracting and renovation work for the Project. The Project was completed in the summer 2009 and involved, among other things, a vertical extension of the party wall, renovation of the existing structure and the construction of certain additions to the 319 Property.

In or around September 2009, plaintiff retained Andrew Harwood of Harwood Surveying, P.C. to perform a survey of Plaintiff’s Property and identify any encroachments made by 319 West and Brusco. Mr. Harwood prepared a survey dated September 17, 2009 that identified several encroachments onto Plaintiff’s Property that he believed were minor and resulted from the Project. The purported encroachments onto Plaintiff’s Property range from one-half inch to just over six inches. On or about November 9, 2009, plaintiff filed a verified complaint against defendants, which asserts various claims for damages stemming from the Project. Specifically, she seeks, *inter alia*, compensation for the encroachments identified by Mr. Harwood.

During discovery, defendants requested that plaintiff provide defendants with notice of the witnesses upon whose testimony she plans to rely. Plaintiff provided defendants with a witness list, which included Thomas Aloia, who plaintiff has indicated is an expert in general contracting/construction and demolition; Michael Larkin, a professional engineer; and family members and other fact witnesses. Discovery in this action is complete and the Note of Issue was filed by plaintiff on May 30, 2012. Defendants now move for partial summary judgment

dismissing plaintiff's encroachment claims on the ground that plaintiff cannot prove damages because she did not provide an expert witness who will testify as to the devaluation of Plaintiff's Property.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

In the instant action, defendants have failed to establish their prima facie right to partial summary judgment dismissing plaintiff's encroachment claims on the ground that plaintiff cannot prove damages as defendants have not provided any evidence that their encroachment onto Plaintiff's Property, however minor, has not devalued Plaintiff's Property. To the extent defendants argue that plaintiff cannot prove damages as she has failed to provide an expert witness to testify as to the devaluation of Plaintiff's Property, defendants have also failed to provide such an expert. As this is defendants' motion for summary judgment, in order to make out their prima facie case, it is the defendants' burden to show that the property has not been devalued. As defendants have not made their prima facie showing, their motion for partial summary judgment must be denied.

Accordingly, both 319 West's motion for partial summary judgment dismissing plaintiff's

