

Monaco v Jagar Realty Inc.

2012 NY Slip Op 33706(U)

September 19, 2012

Supreme Court, Westchester County

Docket Number: 52416/2012

Judge: Sam D. Walker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.**

-----X
MICHAEL MONACO,

Plaintiff,

-against-

Index No. 52416/2012
DECISION & ORDER

JAGAR REALTY INC.,

Defendant.
-----X

Plaintiff moves this Court pursuant to CPLR § 3212 for an Order to Show Cause. Plaintiff asserts that he is entitled to a temporary injunction to allow his contractors to enter Defendant's land to survey it to take measurements necessary to restore the historical free flow of water in the watercourse that runs through Plaintiff's property. The following papers were read and considered in deciding the present motion.

| <u>PAPERS</u> | <u>NUMBERS</u> |
|--|----------------|
| Order to Show Cause | 1 |
| Affidavit of Plaintiff | 2 |
| Affidavit of Plaintiff's Engineer | 3 |
| Exhibits A-F | 4-9 |
| Memorandum of Law in Support of Plaintiff's Motion | 10 |
| Plaintiff's Counsel's Correspondence/ Exhibits A-C | 11-14 |
| Defendant's Affidavit in Opposition | 15 |
| Defendant's Engineer's Affidavit in Opposition | 16 |
| Plaintiff's Reply Affirmation/ Exhibits A-B | 17-19 |

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The action underlying this case is for injuries sustained from an alleged breach of riparian rights. Plaintiff's property is located below at the bottom of a slope below Defendant's property. On or about 2010 Defendant began construction on an A&P shopping center. Plaintiff alleges, with support from his engineer, that prior to Defendant's construction there was a preexisting surface and/or subsurface water channel that allowed for the flow of water to a retention basin located beyond the property line of Plaintiff. Plaintiff further alleges that Defendant's construction has directly caused the destruction of the preexisting channel, which has resulted in the repeated flooding of his property.

Plaintiff's engineer alleges that Defendant's construction plans provided for a wetland buffer around Defendant's site and that the plans also indicated that a drywell is to be constructed within the site to capture subsurface water. However, despite these measures the plan has failed and the result is that Plaintiff suffers frequent and damaging flooding of his land.

Defendant and his engineer allege that there was no preexisting water channel, that the current retention basin was designed to address only extreme flooding that may occur in the area, not the occasional rain showers. Defendants aver that since Plaintiff first purchased his property, the ground has been subject to "natural ponding" from water runoff as a result of being located at the bottom of the hill.

Plaintiff filed a Summons and Verified Complaint on February 17, 2012.

Issue was joined when Defendant filed his answer on or about March 19, 2012. Plaintiff alleges, *inter alia*, that Defendant was negligent in the construction of his shopping mall and has thereby caused the flooding of his property. Plaintiff moves for an Order to Show Cause to allow his contractors to enter Defendant's property and to take measurements and based on the result of the analysis of defendant's property, to take other actions necessary to restore the preexisting watercourse.

DISCUSSION

Insofar as relevant, CPLR 6301 provides that:

"A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff."

When a party seeks a preliminary injunction pursuant to CPLR 6301 he must establish three elements; "(1) the likelihood of success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) a balancing of equities in the movant's favor." *Trimboli v. Irwin*, 796 N.Y.S.2d 659, 659 (2nd Dept. 2005). "A party seeking the drastic remedy of a preliminary injunction must establish a clear right to that relief under the law and the undisputed facts." *Omakaze Sushi Restaurant, Inc. v. Ngan Kam Lee*, 868

N.Y.S.2d 726, 727 (2nd Dept. 2008). However, the interim relief sought cannot be equivalent of granting the ultimate relief sought by the movant. *201 Parkway Associates v. Fine*, 88 A.D.2d 595 (2nd Dept. 1982). Plaintiff seeks not only access to the defendant's property but also an order that would permit plaintiff to make such necessary changes to the topography or top the ground water course so as to relieve the effects of flooding that is alleged to take place on his property. The grant of the temporary injunction would in effect, grant the same relief to be expected by final judgment and this should only be granted, if at all, with great caution and only when required by urgent situations, and only upon the clearest evidence. (see, e.g., *Russian Church of Our Lady of Kazan v. Dunkel*, 34 A.D.2d 799, 801 [2nd Dept 1970])

In assessing the facts and case law, Plaintiff has not met his evidentiary burden to show that he is entitled to a Preliminary injunction. As to the first element, Plaintiff has not shown "a clear right to relief under the law and undisputed facts." *Omakaze*, 868 N.Y.S.2d at 727. In support of the temporary injunction Plaintiff's engineer has offered affidavits that a historical watercourse crossed Defendant's property prior to Defendant's acquisition of the land. Defendant's own design plans are alleged to show a free flowing stream and a wet land buffer line surrounding Defendant's construction site. Because the planned design contemplated numerous disruptions of the existing flow of water a proposed drywell was to be constructed within the wet land. Plaintiff's engineer states that it appears from a notation on the Defendant's plans, that the proposed dry well was to have as its function, the collection of subsurface water. Plaintiff's

engineer maintains that the drywell design was defective and has failed and this design failure has tampered with the natural drainage on the land and essentially capped off the subsurface flow through the Defendant's property.

Defendant's Engineer's have offered their own explanation of the cause of the flooding on plaintiff's property. The Defendant engineer's affidavit states that the extent of "ponding" on Plaintiff's property has always been directly related to the frequency and the amount of local precipitation. The downslope of the land on the three (3) interceding Lots between Defendant's property and Plaintiff land is a condition, which existed prior to any construction by Defendant, and is the cause of the accumulation of water on Plaintiff's property. Defendant's Engineer postulates several theories as to why Plaintiff has recently seen an increase in ponding; including, above average rainfall and naturally occurring changes in the path of the water's migration from the collapsing of underground cavers or voids, importation of less porous or otherwise unsuitable fill to the plaintiff's property or increased storm water volume and/or increased rate of flow over time from upstream of the plaintiff.

The Defendant Engineer's affidavit and the Plaintiff's Engineer's statement coupled with the affidavit from a neighbor is enough to create "a sharp factual dispute." *Cooper v. Board of White Sands Condominium*, 931 N.Y.S.2d 696 (2nd Dept. 2011) (Source of the flood was in dispute undermining Plaintiff's claim); *Wheaton/ TMW Fourth Ave., LP v. New York City Dept. of Bldgs.*, 65 A.D.3d 1051, 1052 (2nd Dept. 2009); see *Advanced Digital Sec. Solutions, Inc. v. Samsung Techwin Co., Ltd.*, 53 A.D.3d 612 (2nd Dept. 2008); *Omakaze*, 868

N.Y.S.2d 726. Plaintiff has not established entitlement to even temporary injunctive relief without further fact finding. Plaintiff requests this Court to grant a Preliminary Injunction to allow his contractors to enter Defendant's property for the purpose of taking measurements necessary to determine how to restore the historical free flow of water in the alleged underground and watercourse. A hearing on these disputed facts will be necessary to determine whether plaintiff has established the requisite "likelihood of success". Assuming Plaintiff can successfully meet this burden, a determination as to the irreparable injury that would be sustained by the Plaintiff is also necessary before a temporary injunction can be considered.

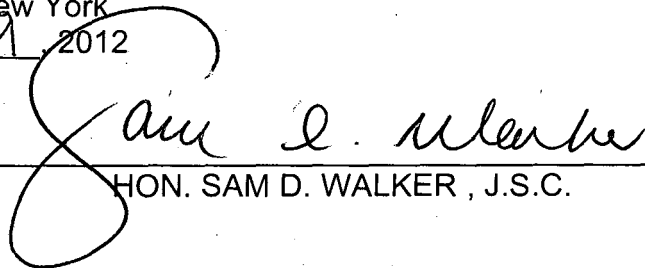
This Court further concludes, that in addition to the sharp dispute as to the underlying facts in this case, the permanent injunctive relief Plaintiff seeks is essentially the same as that which is sought on an interim basis. Plaintiff seeks an order allowing him to enter defendants Property and take what ever remedial measures that he deems necessary to effectuate the free flow of water from the "stream" that is alleged to run through the Defendants property. In the interest of effectively reaching a final determination that does not preclude Defendant's opportunity to potentially prevail in this action, the litigation should proceed expeditiously under the supervision of the assigned Court Attorney Referee towards the completion of discovery, pre trial conferencing and then to a trial on the merits.

For the reasons stated herein, Plaintiff's motion for interim injunctive relief is hereby DENIED. The parties are directed to appear at Courtroom 800 before

Court Attorney Referee, Mary Nicolas -Brewster at 9:30 AM on October 16, 2012.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
September 19, 2012



A handwritten signature in cursive script, reading "Sam D. Walker". The signature is written in black ink and is positioned above a horizontal line.

HON. SAM D. WALKER, J.S.C.