Brooklyn Restorations, LLC v South 1st St. Dev., LLC
2013 NY Slip Op 34087(U)
June 25, 2013
Supreme Court, Kings County
Docket Number: 3846/09
Judge: Yvonne Lewis

At an IAS term, Part 32 of the Supreme Court of the state of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 25th day June 2013.

PRESENT:

HON. yvonne lewis,

Justice,

BROOKLYN RESTORATIONS, LLC.,	:	
Plaintiff,	:	**Index No. 3846/09**
-against-	:	
SOUTH 1ST ST. DEVELOPMENT, LLC.,	:	**DECISION**
Defendant.	:	

The plaintiff's and the defendant's respective Orders to Show Cause are before this Court. The defendant moved to cancel the Notice of Pendency currently filed with the County Clerk in this action on property located at 277 South First Street, Brooklyn, New York , Block 2396, Lot 32. (hereinafter, "the property") and in exchange offers to make an undertaking in an amount to be fixed by the Court. The plaintiff seeks to extend the period of the duration of its Notice of Pendency.

The defendant argues that a notice of pendency pursuant to the New York Civil Practice Law and Rules (CPLR) §6501 is improper because the plaintiff's lawsuit seeks damages for an encroachment by the defendant upon the plaintiff's real property and not specific performance. The defendant proffers that the encroachment does not interfere with the plaintiff's use of its property as a parking lot and is de minimis – two feet. Additionally, says the defendant, due to an easement given by the plaintiff to another adjoining property owner, the plaintiff cannot build

on the property in the area where the encroachmont exists. The defendant also states that it is trying to refinance the property and the notice of pendency has prevented it from refinancing the mortgage. The defendant argues that the filing of an undertaking is a more appropriate security for the plaintiff's interests. The defendant also argues that where a plaintiff wishes to file a notice of pendency and the likelihood of success on the merits of the cause of action for specific performance is unlikely, one can post an undertaking to indemnify the other for any loss incurred as a result of the non-cancellation of the lis pendens.

The plaintiff seeks an order extending the Notice of Pendency for three years for good cause shown, pursuant to CPLR § 6513. The plaintiff proffers that its filing of a Notice of Pendency is proper in this action inasmuch as it seeks a judgment affecting title to, or the possession , use or enjoyment of real property, to wit, the return of that portion of its real property located at 277 South First Street, Brooklyn, New York which, the plaintiff avers, the defendant knowingly and maliciously took during the construction of its condominium building. The plaintiff argues that the request to cancel the Notice of Pendency in this matter cannot be granted and that the defendant has failed to meet the requirement of CPLR §6515 in several respects: (1) where the complaint seeks specific realty or a part thereof rather than the value, a notice of pendency cannot be cancelled upon the filing of an undertaking. Adequate relief cannot be secured by the deposit of money or the giving of an undertaking; (2) where a portion of specific real property is affected, as here, the defendant's title will be different if said property is returned; (3) the defendant's admission to the taking of said property and that said taking is not 'de minimis' as the defendant claims. The plaintiff argues further that it is entitled to the return of its property including monetary relief of exemplary, punitive and compensatory damages

which it says are incidental to the return of its property. The plaintiff also argues that if the court were to allow an undertaking, the property located at 291 Kent Avenue, Brooklyn, New York is an inadequate undertaking in exchange for the cancellation of the Notice of Pendency.

DISCUSSION

"A notice of pendency, commonly known as a "lis pendens," can be a potent shield to protect litigants claiming an interest in real property. The powerful impact that this device has on the alienability of property, when conjoined with the facility with which it may be obtained, calls for its narrow application to only those lawsuits directly affecting title to, or the possession, use or enjoyment of, real property." (*5303 Realty Corp. V. O & Y Equity Corp*,64 N.Y.2d 313, 315, 486 N.Y.S. 2d 877 [1984]). The courts have narrowed the definition of what constitutes use and enjoyment of real property to cases in which the plaintiff has an interest in the defendant's land. *(See, Braunston v. Anchorage Woods, Inc.*, 1961, 10 N.Y.2d 302, 222 N.Y.S.2d 316. The *Braunston* Court, noted that "a notice of lis pendens cannot be filed where the party who has filed it claims no right, title or interest in or to the real estate against which it is filed, and where the suit concerns simply some encroachment or wrong perpetrated by defendants on plaintiffs' land. ".

"Plaintiffs are claiming no interest in defendants' tract of land, they merely seek to prevent defendants from committing a wrongful act against plaintiffs. It does not give a right to file a lis pendens that the wrong is perpetrated by defendants in order to benefit their own real estate. The usual object of filing a notice of lis pendens is to protect some right, title or interest claimed by a plaintiff in the lands of a defendant which might be lost under the recording acts in event of a transfer of the subject property by the defendant to a purchaser for value and without

notice of the claim." (*Braunston* at 305) (internal citations omitted). Notices of Pendency have been properly filed for specific performance to purchase real property; to recover possession of real property, to determine claim to real property, partition actions, and the like. The potential judgment must have a direct effect on the land.

Where a defendant files a motion to cancel the Notice of Pendency , the court in reviewing the validity of a Notice of Pendency, must review the initial summons and complaint upon which the Notice of Pendency was based and filed and not the amended complaint. (See, *5303 Realty Corp. V. O & Y Equity Corp*, 64 N.Y.2d 313, 486 N.Y.S. 2d 877 [1984]). Brooklyn Restorations has filed a complaint and an amended complaint in this action. It owns Lot 32 and the defendant owns Lot 31. In its complaint, upon which the Notice of Pendency was filed, the plaintiff alleges that the defendant has constructed a 20 unit condominium unit that is nearing completion. The building erected by the defendant on Lot 31 "encroaches on the Plaintiff's property located on Lot 32 by an area at least one foot wide, and in some places at least two feet wide, running along the length of the adjoining property line between Lot 31 and Lot 32." The complaint also states that in constructing the new building, the defendant built a retaining wall underneath it which encroaches upon the plaintiff's property in Lot 32 by an area at least two feet wide under Lot 32 running along the adjoining property line between Lot 31 and 32. The plaintiff in its verified complaint states that, " the Defendant's actions ...will cause irreparable injury to Plaintiff inasmuch as the sale in the future of any of the condominium units in the New Building will necessarily result in a transfer of title to the purchasers of such units of portions of Plaintiff's property on Lot 32 which Defendant has seized for itself for construction of the New Building." The plaintiff seeks a judgment declaring its ownership interest over all of Lot 32,

including the areas wrongfully encroached upon by the defendant, and a permanent injunction against the defendant compelling the defendant to remove the encroachment from its property on Lot 32 and prohibiting the sale by the defendant of any condominium units in the building until such time as the plaintiff is restored to complete possession of the portions of Lot 32 encroached upon by the defendant.

The plaintiff's complaint establishes the validity of the application for a notice of pendency in this action. The complaint alleges facts and circumstances for which a judgment would affect the title to, or the possession, use or enjoyment of real property as required by CPLR §6501. The defendant has erected a condominium unit where a portion of the building sits on the plaintiff's land. The defendant, does not dispute the fact that it has used a portion of the plaintiff's property for the construction of its building, rather, the defendant suggests that said taking is "de minimus." The construction, a 20 unit condominium building on a portion of the plaintiff's property, appears to have given the plaintiff a real property interest in the defendant's land. Among other things the plaintiff seeks a declaratory judgment establishing ownership of said property upon which the defendant built, thereby making it constructively the defendant's property. The filing of the Notice of Pendency by the Plaintiff provides the plaintiff with some protection of its alleged rights, interest or title in that property. The Plaintiff's filing of the Notice of Pendency was proper. The plaintiff seeks a judgment declaring its ownership of the property. The question simply put, is whether the Court should cancel the notice of pendency under §6515. New York law provides that a court may cancel a notice of pendency "upon motion of any person aggrieved ... upon such terms as are just, whether or not judgment demanded would effect real property, if the moving party shall give an undertaking in an amount

to be fixed by the court, and if: (1) the court finds that adequate relief can be secured to the plaintiff by the giving of such an undertaking; or (2) in such action, the plaintiff fails to give an undertaking, in an amount to be fixed by the court, that the plaintiff will indemnify the moving party for the damages that he or she may incur if the notice is not cancelled." CPLR § 6515. It is clear from the express language of the statute that relief under §6515 is available to defendants in suits where the plaintiff is seeking specific performance.

The determination to cancel a notice of pendency pursuant to CPLR § 6515 is a matter entirely within the discretion of the court. *(See 5303 Realty Corp. v. O & Y Equity Corp.*, 64 N.Y.2d 313, 486 N.Y.S.2d 877, 476 N.E.2d 276, 280-81 [1984]). It is appropriate for courts to consider, among other things, the merits of the plaintiff's lawsuit and the plaintiff's likelihood of success in considering whether to allow a notice of pendency to be cancelled and replaced by an undertaking. (*See Weiss*, 150 F.Supp.2d at 583; *Weksler v. Yaffe*, 129 Misc.2d 633, 493 N.Y.S.2d 682, 686 (Sup. Ct. Kings Co.1985); *Ronga v. Alpern*, 45 Misc.2d 1029, 258 N.Y.S.2d 731 (N.Y.Sup.Ct.1964). In addition, the courts look to the nature of the relief sought by the plaintiff and the financial burden on the defendant if the notice of pendency remained. See *Weksler v. Yaffe*, Id. The plaintiff, as noted above, is seeking to have its property returned to the state it was in prior to the construction of the New Building by the defendant. i.e., the plaintiff wants the removal of the retaining wall, the wheel chair ramp, the encroachment of portions of the building on two feet along the plaintiff's property together with money damages.

The defendant, argues that the land encroached upon has no real value to the plaintiff because of an easement given to an adjoining neighbor, that at most, would allow the plaintiff to build a parking lot where the retaining wall is along the side of the defendant's building. It says

the plaintiff has given "a natural light and air easement courtyard for the adjoining property to the west...to start at the northwest corner of the property and extending 32 feet south along the west property line and is to extend 20 feet east into the property for this entire length....The right to unrestricted light and air over Parcel A (Brooklyn Restorations)....such that any construction on Parcel A shall never infringe upon the light and air proved to Parcel B (Grand Street, LLC)."

According to the defendant, it was and will be unable to refinance the mortgage seeking a higher amount than was currently held by its present lender and that it could not work out a lower interest rate. It would therefore, be unable to complete its building and unable to sell the apartments therein which would mean major damages to it. The documentation of this damage consists of an affidavit by Yidel Hirsh, the owner of South 1" Street Development and an email from Karen Weather of Valley National Bank. The Weather affidavit indicates that the Notice of Pendency is not the sole reason that the loan was denied. In fact, the decision of the bank states, "Although the project has been completed for some time, is fully occupied and operating as a rental, the loan is still a construction loan. It was anticipated repayment would have occurred by now; however, that event has not occurred. Further, while it is recognized that a resolution of the Lis Pendens issue could be "any day now", pending a ruling by the judge, it still represents a major repayment risk to the Bank and as such the Bank ought to be compensated for that risk. In addition, the Defendant was informed that the Bank was no longer interested in extending the loan on an interest only basis....."

The defendant, however is willing to substitute an unencumbered property which is a newly constructed two story commercial building located at 291 Kent Avenue, Brooklyn, New York, which has a long term tenant lease agreement valued at 1.5 million dollars as an

undertaking. The Court must determine whether the plaintiff can be adequately compensated, if so, whether the undertaking offered by the defendant is sufficient. CPLR § 2503 states, *inter alia*, that "[u]nless the court orders otherwise, an undertaking in an amount of more than one thousand dollars, ...upon which natural persons are surety shall be secured by real property located in the state which shall be worth the amount specified in the undertaking exclusive of all encumbrances....2503 (b)...the affidavit of the surety shall contain 1) a statement that the surety or sureties is or are the sole owner or owners of the real property offered as security;...3) a statement of the total amount of the liens, unpaid taxes, and other encumbrances against each property offered; and 4) a statement of the assessed value of each property offered, its market value, and the value of the equity over and above all encumbrances, liens and unpaid taxes."

The "double bonding" approach outlined in section two of the statute is the preferred course of action where, as here, the plaintiff has made a claim for specific performance. *See Weiss*, 150 F.Supp.2d at 583 (citing *Andesco, Inc. v. Page*, 137 A.D.2d 349, 357, 530 N.Y.S.2d 111 (N.Y.App.Div.1988)). Thus, if the court determines that the plaintiff can be given adequate relief through the posting of a bond by the defendant, the court can cancel the notice of pendency upon posting of such bond by the defendant unless the plaintiff posts an undertaking that will indemnify the defendant for any damages flowing from the notice of pendency. *Id.* This procedure is "preferable even when plaintiff's likelihood of success is doubtful." *Id.* It is within the discretion of this Court to determine the amount of the undertaking that each party must post in order to cancel or preserve the notice of pendency, and the amount of such undertakings need not be the same.

The plaintiff and the defendant were asked to supplement their papers to address the

issues of what damages the plaintiff sustains as a result of the defendant building on its property and to provide specific detail with respect to the defendant's proposed undertaking as the undertaking information that had been given was insufficient for the court to make a decision. Both parties responded. South 1st Street Development stated that they no longer wished to put up the property at 291 Kent Avenue, Brooklyn, New York as collateral for the cancellation of the Notice of Pendency. Instead, they are willing to put up a performance bond in the amount of $500,000.00; the figure of $500,000.00 being based upon the plaintiff's amended complaint which seeks damages in the sum of at least $500,000.00. The plaintiff 's position is that the defendant has suffered no damages due to "deminimus encroachment." The defendant has informed the court that it filed an application for a performance bond in the amount of $500,000.00 and a letter his insurance agency indicates that "based upon the application, the client's assets and financial statement provided to us, it is our opinion that a performance bond with an A+ carrier can be secured for Mr. Hirsh within 10 business days."

The plaintiff argued that in order to assess damages for the defendant's trespass, the trespass must be measured in large part by the gain derived from the defendant's wrongful conduct, not necessarily from the plaintiff's actual damages. In fact, the plaintiff does not provide the court with any "actual" damages other than the value/benefit to the defendant of encroaching on the plaintiff's property. The plaintiff asserts that said gain to the defendant is between 10 million and 20 million dollars, which is the proposed sales of the units in the condominium building.. The plaintiff argues that the handicapped ramp, which is on the plaintiff's property, is essential to the use of the condominium building. Without the ramp occupancy would be illegal and no certificate of occupancy would have been issued. The

plaintiff also states that it is seeking punitive damages for the defendant's wanton disregard for the plaintiff's rights, rules of law and for the applicable rules set out in the New York City Housing Code.

The Court finds it difficult to intelligibly ascertain the full extent of the plaintiff's damages from the encroachment particularly in light of the fact that the plaintiff was given the opportunity to make its damages known. It does seem clear that the plaintiff wants the defendant to be punished for its disregard of the plaintiff 's property rights, which though understandable does not give plaintiff an ascertainable amount of damages from which the defendant should be required to protect it; so a bond of $500,000.00 posted by the defendant, absent the acceptance of the plaintiff 's proffer that it's damages are tied to the gains that the defendant could expect to get from the occupants of the building, would cover any damages articulated by the plaintiff. Similarly, it is difficult to determine the adequacy of any undertaking that the plaintiff would have to post in any anticipation of damages the defendant might incur from the extension of the notice of pendency. The information supplied by the defendant *vis a vis* the current loan speaks to a denial of modification due to factors inclusive of the notice of pendency and apart from the notice of pendency. Specifically, the Bank asserts that "it was no longer interested in extending the loan on an 'interest only' basis." The bank also indicated that the project has been completed for sometime, fully occupied and operating as a rental and that it had anticipated that repayment would have occurred already. The defendant's failure to get the loan is not solely because of the notice of pendency and the evidence before the Court is of a single effort to refinance.

On the whole of the arguments before the Court it seems the best course to just allow the

undertaking to be made by the defendant and the lis pendens removed. This Court notes, however, that the notice of pendency has a duty and effect beyond the parties in litigation. The obvious effect of the filing of a notice of pendency in a proper action is to cloud the marketability of title of defendant's land for the duration of the lawsuit; together, of course with the fact that it warns the public that there might be a problem with real estate to which a notice of pendency attaches. CPLR §6501 states clearly that " [t]he pendency of such an action is *constructive notice*, from the time of filing of the notice only, to a purchaser from, or [e]ncumbrancer against, any defendant named in a notice of pendency..." (emphasis added). The Court must determine whether the Notice of Pendency should not be cancelled so as to afford protection and awareness of potential problems for unsuspecting buyers who wish to purchase the condominium units. Issues of fact exist on both sides with regards the damage that can be done to the opposing party's interest; this seems true in part because each party is being somewhat disingenuous as it proceeds in this litigation, but the record shows ample potential damage can be done to both parties. Double bonding is therefore appropriate here.

The defendant is to post an undertaking of $500,000 within twenty (20) days from the date of this order, and if defendant fails to post said undertaking, plaintiff need not deposit any security and the lis pendens is to remain in place. If defendant posts its undertaking, plaintiff is thereafter to post an undertaking in the amount of $250,000 within ten (10) days. However, if plaintiff fails to post said bond, the Notice of Pendency is cancelled in accordance with CPLR § 6515.

This constitutes the decision and order of the court.

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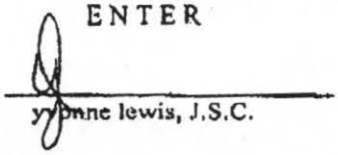

yvonne lewis, J.S.C.

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should not be granted herein pursuant to C.P.L.R. §6513 extending the period of duration of Plaintiff's Notice of Pendency for a period of three years from February 27, 2009, the date of the Notice of Pendency, and why Plaintiff should not have such other and further relief as may be just, proper and equitable.

Sufficient reason appearing therefor, let service of a copy of this Order together with the papers upon which it was granted, upon counsel for defendant South 1st Street Development, LLC ("Defendant"), Brian K. Condon, Esq., Condon & Associates, PLLC, of Counsel to David M. Ascher, Esq., at 55 Old Turnpike Road, Suite 502, Nanuet, New York 10954, on or before February 14, 2012, by federal express next business day delivery, be deemed sufficient service of this Order and the papers upon which it is based. [redacted]

ENTER:

Hon. Yvonne Lewis, J.S.C.

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