Madison 96th Assoc., LLC v 17 E. Owners Corp.
2013 NY Slip Op 34201(U)
May 23, 2013
Supreme Court, New York County
Docket Number: 601386/2003
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SHIRLEY WERNER KORNREICH, S.C. Justice PART 54

Index Number : 601386/2003
MADISON 96TH ASSOCIATES
vs
17 EAST OWNERS CORP.
Sequence Number : 017
SUMMARY JUDGEMENT

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). 290-303, 304-350

Answering Affidavits — Exhibits _____ | No(s). 353-354

Replying Affidavits _____ | No(s). 355-356

Upon the foregoing papers, it is ordered that this motion ~~is~~ decided in accordance with the annexed decision

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

Dated: 5/22/13

SHIRLEY WERNER KORNREICH, S.C. 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 54

----------X

MADISON 96TH ASSOCIATES, LLC,

Plaintiff,

-against-

17 EAST OWNERS CORP.,

Defendant.

Action No. 1
Index No.
601386/2003

----------X

17 EAST 96TH OWNERS CORP.,

Plaintiff,

-against-

MADISON 96TH ASSOCIATES, LLC and 21 EAST 96TH STREET CONDOMINIUM,

Defendants.

Action No. 2
Index No.
108695/2004

----------X

MADISON 96TH ASSOCIATES, LLC,

Defendant and Third-Party Plaintiff,

-against-

ATLANTIC DEMOLITION CORP.,

Third-Party Defendant.

Action No. 3
Index No.
591089/2005

----------X

MADISON 96TH ASSOCIATES, LLC,

Defendant and Third-Party Plaintiff,

-against-

MARSON CONTRACTING, INC.,

Third-Party Defendant.

Index No.
591089/2005

----------X

----------X

MADISON 96TH ASSOCIATES, LLC,

Third-Party Plaintiff,

-against-

Index No.
590585/2007

ILLINOIS UNION INSURANCE COMPANY,

Third-Party Defendant.

----------X

MADISON 96TH ASSOCIATES, LLC,

Third-Party Plaintiff,

-against-

Index No.
590113/2008

QBE INSURANCE CORPORATION,

Third-Party Defendant.

----------X

SHIRLEY WERNER KORNREICH, J.:

Plaintiff in action No. 1, Madison 96th Associates, LLC (Madison), moves, pursuant to CPLR 3212, for summary judgment on the issue of liability against defendant 17 East Owners Corp. (17 East Owners). Madison brings the within action to recover $800,000 in damages that its predecessor-in-interest suffered as a result of defendant 17 East Owners' refusal to remove its tenants' air conditioners from their windows, which protruded into the air space above Madison's property.

In 2001, the property on the northwest corner of Madison Avenue and 96th Street in Manhattan, then known as 1380 Madison Avenue (the 1380 Property), was owned by 1380 Madison Avenue, LLC (1380 Madison). The principals of that limited liability company were

Elinor Munroe and her husband George Munroe. At the time, the 1380 Property consisted of a two-story mixed-use building. The western adjoining tract of land has on it a 17-story, landmarked luxury residential cooperative building, 17 East 96th Street, which is owned by defendant 17 East Owners. 17 East Owners' building was built up to the property line.

In 2002, the Munroes decided to sell their property to a developer, Stuart Boesky, who planned to build an eleven-story condominium on the property. On September 5, 2002, the Munroes signed a Sale and Purchase Agreement (the Purchase Agreement) (Munroe, Boesky and Upkike affs, exhibit 2). During a period of due diligence provided by the Purchase Agreement, Boesky discovered that the air conditioners in the windows above the Munroe property protruded into the Munroe property air space, which would cause the title insurance company to create an exception to its title insurance policy. As a result, the Munroes and Boesky signed an amendment to the Purchase Agreement, dated December 12, 2002, which provided that the "[s]eller shall deliver the Property free of the encroachment of the existing air conditioners ('Air Conditioners') over the west property line of the Property" (*id.* exhibit 4).

On January 8, 2003, 1380 Madison's counsel sent a letter to 17 East Owners requesting that the air conditioners be removed (*id.* exhibit 5). 17 East Owners refused to remove the air conditioners.

In May 2003, 1380 Madison commenced action No.1 against 17 East Owners seeking a declaratory judgment and injunction requiring 17 East Owners to remove the protruding air conditioners. 1380 Madison also sought damages for trespass. Its complaint alleged that it was a party to a contract to sell the 1380 Property and that the contract of sale was conditioned upon the removal of the air conditioners (¶¶ 21-22). In response to the complaint, 17 East Owners took

the position that the air conditioners had been in place for many years and that, under the doctrines of adverse possession or prescriptive easement, 17 East Owners had the right to continue to use the air space over the 1380 Madison property.

On October 10, 2003, Justice Herman Cahn granted 1380 Madison partial summary judgment ruling that:

> it is declared that plaintiff, 1380 Madison Avenue, L.L.C., has the exclusive right to immediate use, possession, and enjoyment of the air space above its real property identified in an indenture, dated December 20, 1996, Reel 2410, Page 1108 of Conveyances, recorded in the Office of the Register of the City of New York; and that *defendant, 17 East Owners Corp., is currently in violation of that right by virtue of the air conditioning units presently protruding from its property into plaintiff's aforesaid air space*

(*id.* exhibit 11) (emphasis added).

By December 2003, the air conditioners had still not been removed. Madison claims that, as a result, 1380 Madison and Boesky entered into a second amendment to the Purchase Agreement, dated December 16, 2003, whereby they agreed to close the transaction for an $800,000.00 reduction in the purchase price (*id.* exhibit 13).

On February 2, 2004, 1380 Madison sold the property to Boesky who then transferred the property to Madison, a limited liability company formed by Boesky and two others. As of the February 2004 closing date, 17 East Owners had still not removed the air conditioning units. In March 2004, Madison was substituted as the plaintiff in Action No. 1 (Order, Hon. Herman Cahn, 3/12/04).

17 East Owners appealed Justice Cahn's decision. In November 2004, the Appellate Division affirmed the decision holding that the defendant (17 East Owners) had failed to

establish adverse possession (*1380 Madison Ave., L.L.C. v 17 E. Owners Corp.*, 12 AD3d 156 [1st Dept 2004]). On December 21, 2004, the parties entered into a stipulation by which 17 East Owners agreed to remove the air conditioners by January 7, 2005 (*id.* exhibit 21).

On October 17, 2005, Madison moved for leave to amend its complaint. The amended complaint named, as defendants, 17 East Owners as well as the individual unit owners whose air conditioners protruded into Madison's air space. Madison alleged that 1380 Madison had been forced to reduce the selling price of 21 East 96th St. by $800,000 as a result of the defendants' refusal to remove their air conditioners, despite a court order directing that they do so. In the amended complaint, Madison stated that it had been assigned all rights in the property and alleged a single cause of action for trespass (*id.* exhibit 8). 17 East Owners opposed the motion and moved to dismiss the complaint and/or for summary judgment arguing that Madison, the current plaintiff had not suffered any actual damages as a result of any alleged trespass because it had purchased the property for $800,000.00 less than the original contract price. In addition, 17 East Owners argued that Madison had not suffered any construction delays as a result of the air conditioners.

Leave to amend was granted on the record on January 23, 2006 (*id.* exhibit 30). By decision and order dated September 6, 2006, Justice Cahn denied the defendant's cross-motion, thereby rejecting its argument that Madison could not maintain the within action. The court found that New York General Obligations Law § 13-101 specifically permits the transfer of any claim or demand except a claim to recover damages for personal injury or one in contravention of statute or public policy (order, Justice Cahn, dated September 6, 2006).

The Motion for Summary Judgment

Madison now moves for summary judgment on the issue of liability. 17 East Owners' answer to the original complaint contained a counterclaim based upon adverse possession wherein it admitted that the air conditioners protruded onto the 1380 Property. Its answer stated:

> 18. That the air conditioning units projecting from 17 East 96th Street into the air space of 1380 Madison have been regularly and continually in the possession of Defendant and its shareholders / proprietary lessees and their predecessors in title for over ten years and as long as 40 years prior to the commencement of this action and said possession has been open, notorious, continuous and under claim of right adverse to any rights of the Plaintiff herein.
>
> 26. Defendant has been in possession of the areas occupied by the air conditioning units that project from 17 East 96th Street into the air space of 1380 Madison since on or about the mid 1950's (sic), and during that time Defendant has expended large sums of money in erecting and maintaining permanently affixed chattels upon 17 East 96th Street which overhang 1380 Madison

(Munroe, Boesky and Updike affs, exhibit 18).

Further, annexed to the answer is a document, entitled exhibit A, wherein 17 East Owners lists the tenants with air conditioners extending into the air space above 1380 Madison, and the "distance of projection" of each air conditioner (*id.*). Madison also notes that the protrusion of the air conditioners is documented in numerous photographs submitted (*id.* exhibit 32) and in a survey (*id.* exhibit 33).

By affirmation dated July 31, 2003, Charles E. Boulbol, Esq., counsel for 17 East Owners, submitted exhibit A to the court again, arguing that plaintiff had agreed "it would not contest any of the allegations contained in exhibit A to defendant's answer (a copy of which is attached as exhibit A), *with respect to the duration and location of any of the air conditioners*

that admittedly encroach upon Plaintiff's property" (*id.* exhibit 34, ¶ 3). Moreover, shareholders of 17 East Owners testified at their depositions as to the protrusion of their air conditioners beyond the wall of their building. One of those shareholders, Peter du Pont, testified:

> Q: Do you understand that this document [Exhibit A] is a representation by Mr. Boulbol to the court that there existed in your apartment as of the time of this affirmation two air conditioners, one of which protruded approximately nine inches into the air space next door and the other protruded approximately two inches into that air space?
>
> A: Yes.
>
> Q: And as far as your understanding goes, is that an accurate representation or was that an accurate representation of the situation at that time?
>
> A: I would not dispute it. I mean, I don't remember the measurements, but these sound reasonable.
>
> Q: Did someone actually come and take measurements of your air conditioners?
>
> A: I have absolutely no recollection.
>
> Q: So you have no specific recollection where Mr. Boulbol obtained the specific information with respect to your units that appears in this document?
>
> A: No. I may have provided it, but I don't recall"

(Peter du Pont deposition, exhibit 35 at 31-32).

In opposition to the motion, 17 East Owner's raises three arguments. First, it contends that there is no evidence in the record to establish whether any air conditioners actually crossed the common boundary and, if so, the extent of any such encroachment. As to this point, it argues

that on December 8, 2003, Justice Cahn ruled that 17 East Owners "may be entitled to hearing as to each air-conditioner and the encroachment or amount of encroachment, if any." Defendant states that nothing in this case has changed since December 8, 2003 that would deprive it of its due process right to a hearing. Second, 17 East Owners argues that there is no evidence of actual damage by reason of the temporary presence of the air conditioners. Finally, it argues that Madison has not met its burden of proof and that the survey attached as exhibit 33 to the plaintiff's papers is not supported by an affidavit from the surveyor, Roland Link, who prepared it, and cannot be used on the motion.

"Statements made by parties in the course of judicial proceedings–generally termed 'judicial admissions'– are evidence against the party who made them and are considered conclusive and binding as to the party making the judicial admission" (58 NY Jur 2d, Evidence and Witnesses § 329). Similarly, admissions made in a pleading constitute formal judicial admissions and are binding upon a party (*Aronitz v PricewaterhouseCoopers LLP*, 27 AD3d 393, 394 [1st Dept 2006]). As noted by the Court of Appeals:

> [A] formal judicial admission 'takes the place of evidence' and is '*conclusive* of the facts admitted in the action in which [it is] made" (Prince, Richardson on Evidence § 8-215 at 523 [Farrell 11th ed] [emphasis supplied]). 'A formal judicial admission is an act of a party done in the course of a judicial proceeding, which dispenses with the production of evidence by conceding, for the purposes of the litigation, the truth of a fact alleged by the adversary' (*id.*)

(*People v Brown*, 98 NY2d 226, 232 n 2 [2002]).

Contrary to defendant's argument that there is no evidence that its air conditioners encroached upon plaintiff's property, the record is replete with defendant's acknowledgments that its air conditioners, in fact, did encroach. These acknowledgments were made in its answer,

in exhibits, and in open court and are binding upon defendant.

Defendant's argument that Justice Cahn acknowledged that a hearing was necessary to determine the extent of the encroachment of each air conditioner is without merit. The December 8, 2003 hearing was on a motion by 1380 Madison for an injunction to enforce Justice Cahn's October 10th decision. At that time, Justice Cahn stated on the record:

> In discussion with counsel, the Court has indicated that without having read the papers, the Court preliminarily feels that the defendant may be entitled to a hearing as to each air conditioner and the encroachment or amount of encroachment, if any. The Court will make the final determination on this after the papers are submitted, but preliminarily certain discovery issues have been raised and this decision now concerns those discovery issues

(Joint statement of facts, exhibit G). Several days later, Justice Cahn determined that defendant's counsel had neglected to inform the court of a stipulation, noted on the record, that there were no open factual questions to be assessed in this matter.

By decision and order dated December 12, 2003, on 17 East Owners' motion to reargue the October 10th decision, Justice Cahn stated, among other things:

> Defendant's counsel now asserts that it should have been granted an interlocutory opportunity under CPLR 3212 (f) to adduce discovery on issues relating to plaintiff's knowledge of a possible claim of right originating prior to January 2003 (Boulbol Aff. ¶ 7). The court acknowledges that counsel's affirmation in opposition to the underlying motion contained an alternative request for such discovery (see, id., ¶ 6). *Counsel, however, neglects to acknowledge its stipulation, noted on the record on August 1, 2002, to the effect that there was no open factual determinant to be assessed in this matter* (Updike Aff. Ex. A at 2)

(decision and order, Dec.12, 2003) (emphasis added).

Finally, Justice Cahn's ruling that "defendant, 17 East Owners Corp., is currently in violation of that right by virtue of the air conditioning units presently protruding from its property into plaintiff's aforesaid air space" is binding upon the defendant and this court. "Once a point is decided within a case, the doctrine of law of the case makes it binding not only on the parties, but on the court as well" (*Dukett v Wilson*, 31 AD3d 865, 868 [3d Dept 2006], quoting Seigel, NY Prac § 448 [4th ed]). In sum, plaintiff is entitled to summary judgment on the basis of its judicial admissions and stipulation (*see e.g. Alexander Potruch, P.C. v Sanders*, 19 Misc 3d 134[A], 2008 NY Slip Op 50701[U] [App term, 2d Dept, 9th & 10th Jud Dists 2008]).

As to defendant's claim that plaintiff did not suffer damages as a result of its trespass, Justice Cahn has already ruled that:

> [Madison] acquired the premises with impediments to achieving its intended goal for the property. Defendants' protruding air conditioners, as well as their continuing refusal to remove them, was an impediment. The reduction in the purchase price by $800,000.00 may be evidence of the reduction of the value of the property. Whether this amount is found to be the actual reduction in the value of property suffered by Madison solely as a result of defendants' trespass is an issue of fact for trial"

(Decision and order, Justice Herman Cahn, Sept.6, 2006). Accordingly, it is

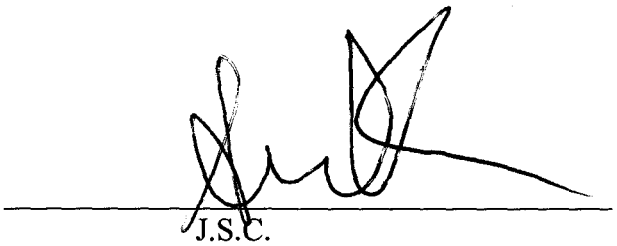
ORDERED that the motion by plaintiff Madison 96th Associates, LLC for summary judgment on the issue of liability is granted; and it is further

ORDERED that a trial on the issue of plaintiff's damages shall be had before the court; and it is further

ORDERED that the plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the

Trial Support Office (Room 158) and shall serve and file with said Clerk a note of issue and statement of readiness and shall pay the fee therefor, and said Clerk shall cause the matter to be placed upon the calendar for such trial.

Dated: May 23, 2013



J.S.C.