

Ponito Residence LLC v 12th St. Apt. Corp.
2014 NY Slip Op 33892(U)
August 7, 2014
Supreme Court, New York County
Docket Number: 156217/2014
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

PINTO RESIDENCE LLC,
Plaintiff,
-against-
12TH STREET APARTMENT CORP.,
Defendant.

INDEX NO. 156217/2014
MOTION DATE 08-06-2014
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this Order to Show Cause.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 3</u>
Answering Affidavits — Exhibits _____	<u>4</u>
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that this motion by Order to Show Cause is granted to the extent stated herein.

Plaintiff is the owned of 19 West 12th Street, New York, New York (herein “Premises”) and defendant owns the building adjacent to the Premises located at 3 West 12th Street, New York, New York (herein “Co-op”). In 2010 pursuant to a New York City Department of Buildings (herein “DOB”) work permit, defendant installed a 127-foot sidewalk bridge (herein “Scaffold”) that encroached upon plaintiff’s property by approximately 20 feet.

Plaintiff commenced an action - Index No. 111540/2011 - (herein “Prior Action”) seeking removal of the Scaffold. In a Decision and Order dated October 23, 2012 the court granted defendant a license pursuant to RPAPL 881 on the condition that (1) defendant is entitled to said license for a period of 5 months commencing at the entry of that decision and order and subject to an extension on notice to plaintiff and upon submission to the court of proof regarding the need for such extension; (2) that defendant shall pay the sum of \$1,500 per month to plaintiff for said license, which by an Order dated March 28, 2013 was increased to the sum of \$1,750 monthly; (3) defendant must name plaintiff as an additional insured on its policy of insurance, and in the event plaintiff deems the amount of coverage to be insufficient, it could apply to the court for an increase in such amount; and (4) that defendant shall be liable to plaintiff for any damages that may occur as a result of granting the within license. The Scaffold was removed in September of 2013.

Defendant sent plaintiff a letter dated May 28, 2014 seeking permission to install another sidewalk bridge for subsequent work on the Co-op’s facade at the direction of the DOB. Defendant installed said sidewalk bridge in June of 2014 before obtaining permission from plaintiff. In a letter dated June 18, 2014, plaintiff sent a proposed License Agreement, which defendant did not execute. Defendant subsequently sent two proposed Insurance Certificates adding plaintiff and defendant onto the Co-op’s contractors’ insurance policy. Plaintiff rejected the proposed Insurance Certificates and insisted on being added to defendant’s Insurance Certificate.

Plaintiff commenced an action on June 26, 2014 and now moves by Order to Show Cause seeking an order requiring the immediate removal of that portion of the sidewalk bridge erected by defendant encroaching on plaintiff's property. Plaintiff seeks an injunction mandating the removal of the sidewalk bridge pursuant to Real Property Actions and Proceedings Law § 871(1) which states, in part, that "an action may be maintained by the owner of any legal estate in land for an injunction directing the removal of a structure encroaching on such land."

CPLR § 6301 grants this court the power to issue an order directing the defendant to perform an act for the benefit of plaintiff, or to refrain from performing an act which would be injurious to the plaintiff. A preliminary injunction may be granted under CPLR article 63 when the party seeking such relief demonstrates (1) a likelihood of success on the merits; (2) the prospect of irreparable injury and (3) a balance of equities tipping in the moving party's favor (*Doe v. Axelrod*, 73 N.Y. 2d 748, 532 N.E.2d 1272, 536 N.Y.S.2d 44 [1988]).

RPAPL § 871(1) allows for an injunction compelling the defendant to remove the sidewalk bridge allegedly encroaching on plaintiff's real property. "In order to obtain the injunctive relief they sought, however, the defendants were required to demonstrate not only the existence of the encroachment, but that the benefit to be gained by compelling its removal would outweigh the harm that would result to the plaintiff from granting such relief" (*Broser v. Schubach*, 85 A.D.3d 957, 925 N.Y.S.2d 875 [2nd Dept., 2011] citing to, RPAPL 871; *Marsh v. Hogan*, 81 AD3d 1241, 1242, 919 NYS2d 536 [2011]; *Town of Fishkill v. Turner*, 60 AD3d 932, 933, 876 NYS2d 92 [2nd Dept., 2009]).

Plaintiff annexes the Decision and Order from the prior action in support of its motion by Order to Show Cause in which the court denied plaintiff injunctive relief and converted the action for a preliminary injunction into a proceeding granting defendant a license. RPAPL § 881 allows property owners or lessees seeking to make improvements or repairs to real property and said improvements cannot be made without entering onto adjoining real property to commence a special proceeding for a license to so enter the property if permission to so enter the adjoining property has been refused. "In determining whether or not to grant a license pursuant to Real Property Actions and Proceedings Law § 881, courts generally apply a standard of reasonableness," (*Matter of Board of Mgrs. of Artisan Lofts Condominium v. Moskowitz*, 114 A.D.3d 491, 492, 979 N.Y.S.2d 811 [1st Dept., 2014]) requiring the courts to "balance the interests of the parties and should issue a license when necessary, under reasonable conditions, and where the inconvenience to the adjacent property owner is relatively slight compared to the hardship of his neighbor if the license is refused" (*Id.* citing to *Chase Manhattan Bank [Natl. Assn.] v. Broadway, Whitney Co.*, 57 Misc 2d 1091, 1095, 294 N.Y.S.2d 416 [Sup Ct, Queens County 1968]).

Here plaintiff asserts that when the Scaffold was previously erected plaintiff's garden was destroyed. Plaintiff subsequently repaired the garden and argues that the new side walk bridge "apparently will be destroyed by Defendant's actions." Defendant argues that pursuant to Local Law 11, it performed extensive facade repair work. Upon inspection by the DOB, defendant was required to undertake additional work and "the City regulations require that the sidewalk bridge be erected in this place and manner," and "stay erected until the [DOB] evaluates the work and authorizes the [side walk bridge's] removal."

Plaintiff fails to show it will suffer imminent and irreparable harm and that the balance of equities favors injunctive relief.

Accordingly, it is ORDERED that this Motion by Order to Show Cause is granted only to the extent requiring defendant to add plaintiff as an additional insured under the Co-op's insurance policy within 7 days from service of a copy of this Order with Notice of Entry upon the defendant, and it is further,

ORDERED, that failure by the defendant to timely add plaintiff to the Co-op's insurance policy as so ordered in this Decision and Order shall result in an Order from this Court to removed the sidewalk bridge, and it is further,

ORDERED, that defendant is directed to pay plaintiff a monthly license fee of \$1,750 per month until the work under the license is completed, and it is further,

ORDERED, that defendant shall make the monthly license payment to plaintiff for the months of June, July, and August of 2014, no later than August 29, 2014.

MANUEL J. MENDEZ
J.S.C.

ENTER:

Dated: August 7, 2014



MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE