

**17 East 96th Owners Corp. v Madison 96th Assoc.,
LLC**

2015 NY Slip Op 30960(U)

June 8, 2015

Supreme Court, New York County

Docket Number: 108695/2004

Judge: Shirley Werner Kornreich

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**SHIRLEY WERNER KORNREICH
J.S.C**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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17 EAST 96TH OWNERS CORP.,

Index No.: 108695/2004

Plaintiff,
-against-

DECISION & ORDER

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

Defendants.

-----X
MADISON 96TH ASSOCIATES, LLC,

Third-Party Plaintiff,
-against-

ATLANTIC DEMOLITION CORP., and MARSON
CONTRACTING CO., INC.,

Third-Party Defendants.

-----X
SHIRLEY WERNER KORNREICH, J.:

Plaintiff 17 East 96th Owners Corp. (17 East) moves, pursuant CPLR 3025, for leave to serve a proposed third amended complaint (the PTAC) (Dkt. 108). Defendant Madison 96th Associates, LLC (Madison) opposes. 17 East's motion is denied for the reasons that follow.

I. Background

This action, along with the action styled *Madison 96th Assocs., LLC v 17 E. Owners Corp.*, Index No. 601386/2003, concerns a construction dispute that is more than a decade old. The cases have been heavily litigated and are finally on the precipice of trial. Appeals of all of the summary judgment decisions have concluded and the pre-trial conference is scheduled for June 11, 2015. Familiarity with the history of this litigation, including the totality of the extensive motion practice and appeals, is presumed. The facts relevant to this motion are set forth in the Appellate Division's most recent decision, dated October 30, 2014:

[17 East is] the fee owner of the building at 17 East 96th Street. [Madison] owned a building formerly located on the adjacent lot, at 1380 Madison Avenue, which it demolished to make way for a new building. 21 East 96th Condominium (Condominium) is Madison's successor-in-interest as owner of the new building. The lots on which 17 East 96th Street and 1380 Madison Avenue sit share a 100-foot common boundary. It is alleged that in the process of constructing its new building, Madison excavated more than 10 feet below the curb level and installed underpinning on [17 East's] property, which constitutes a permanent encroachment. [17 East] seeks both injunctive and monetary relief for the claimed trespass.

There was extensive litigation during the demolition phase of this project. Action No. 1 includes claims by [17 East] that Madison failed to comply with applicable notice requirements before obtaining demolition and foundation permits from the New York City Buildings Department. [17 East] sought injunctive relief, and in resolution of that motion in Action No. 1, the parties stipulated (in July 2004) that Madison would not excavate further than ten feet below ground without first retaining a licensed engineer or a licensed architect who would not only supervise the work, but also confer with [17 East's] professionals regarding any issues that might arise. The parties stipulated further that [17 East] would be afforded one week's advance notice of any excavation deeper than 10 feet and that excavation would not proceed without Madison's first retaining the aforesaid professional.

In September 2004, Madison requested permission "to enter and inspect" [17 East's] property "as it pertains to the pending adjacent excavations." It also requested that 17 East "accept this letter as formal notice to proceed with excavation and foundation work at [Madison's building]." In response, [17 East] granted Madison "a license in accordance with § 27-1026 of the New York City Building Code to enter and inspect 17 East 96th Street as it pertains to proposed excavations at 1380 Madison Avenue." [17 East] also reiterated in its response many of the terms of the July 2004 stipulation, stating that Madison could not excavate 10 feet below grade without its permission and without giving it advance notice so that its own professionals could review the plans and specification for the work.

Subsequently, in October 2004, Madison began and completed the underpinning of 17 East 96th. Although 17 East Owners brought a motion for injunctive relief to halt the construction, it was denied.

Madison 96th Assocs., LLC v 17 E. 96th Owners Corp., 121 AD3d 605, 606 (1st Dept 2014) (the October AD Order).

The October AD Order reinstated 17 East's trespass claims relating to the underpinning of its building, claims this court had previously dismissed by order dated May 23, 2013 (Dkt. 72). The Appellate Division held that disputed material facts "preclude a finding, as a matter of law, that [17 East] had sufficient notice of the work being done to bar it from objecting." *Id.* at 607. The Appellate Division further held that "Madison did not have the right, **in the absence of an agreement with [17 East]**, to erect permanent structures extending beyond the property line, either above or below the surface, and thus encroaching on [17 East's]." *Id.* at 608 (emphasis added). The Appellate Division, however, expressly declined to instruct this court on the proper measure of damages. *See id.* at 609. It should be noted that, in its prior decision affirming another of this court's summary judgment decisions, the Appellate Division noted that nominal damages may be awarded on a trespass claim. *See Madison 96th Assocs., LLC v 17 E. 96th Owners Corp.*, 120 AD3d 409, 411 (1st Dept 2014), citing *Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 95-96 (1993).

II. *The PTAC*

With the PTAC, 17 East seeks to broaden the scope of the damages it seeks on its trespass claims by: (1) asserting a claim for punitive damages; and (2) asserting a claim for disgorgement of profits. Madison opposes these proposed amendments on a number of grounds.¹ First, Madison argues that to permit these amendments at this late stage – years after the close of fact discovery, after summary judgment, and on the eve of the pre-trial conference – would be highly prejudicial. Second, Madison avers that even if 17 East prevails on its trespass claims, Madison's wrongdoing is not egregious enough to permit the imposition of punitive

¹ The court will not address the parties' numerous arguments that go to the merits of the claims to be tried. This is not a summary judgment motion.

damages. Third, Madison objects to the pleading of a profit disgorgement claim because such damages are not recoverable on a trespass cause of action.

III. Discussion

“Leave to amend pleadings under CPLR 3025(b) should be freely given, and denied only if there is **prejudice or surprise resulting directly from the delay**, or if **the proposed amendment is palpably improper or insufficient as a matter of law.**” *McGhee v Odell*, 96 AD3d 449, 450 (1st Dept 2012) (citations and quotation marks omitted; emphasis added).

A. Punitive Damages

At the outset, the court admonishes 17 East for making this motion. Aside from the clear lack of merit, discussed below, and the blatant gamesmanship of its timing, 17 East’s briefs are full of conclusory and inflammatory characterizations of the facts. The goal, clearly, was to frame Madison’s conduct as severe enough to warrant punitive damages. 17 East, however, merely proffers baseless rhetoric describing Madison’s work as dangerous and fraudulent. Particularly disingenuous is 17 East’s conflation of the alleged dangers of the subject underpinning work – the only work at issue on the trespass claim – with the supposed dangers of the other construction work performed on the buildings. 17 East, moreover, ignores the fact that the Department of Buildings (the DOB) vetted 17 East’s concerns and concluded that the building’s foundation was safe. *See* Dkt. 149. 17 East, undeterred, further attempted to convince the DOB that the underpinning was unsafe. The DOB inspected the underpinning and approved it. *See* Dkt. 136. The building has long been declared safe by the DOB, which issued a certificate of occupancy in 2006, almost a decade ago.

Indeed, despite the holdings in the October AD Order, there is no question of fact that Madison's underpinning work was necessary for the safety and integrity of both buildings. As noted by 17 East's own architect, the underpinning was required by the building code. Moreover, the DOB, not the courts, decide whether New York's buildings are safe. If the undermining posed a serious threat to public safety, the DOB surely would not have approved it.² 17 East's baseless claims to the contrary carry no weight. Consequently, the *only* issues on 17 East's trespass claims are whether Madison is liable for trespass and, perhaps, nominal violations of the applicable building code, and what damages should be awarded. The alleged trespass simply cannot give rise to punitive damages.

To explain, punitive damages are only allowed "in cases where the wrong complained of is morally culpable, or is actuated by evil and reprehensible motives." *Walker v Sheldon*, 10 NY2d 401, 405 (1961). It is not enough for the wrongdoing to be intentional; defendant must "evinced a high degree of moral turpitude and demonstrate such wanton dishonesty as to imply a criminal indifference to civil obligations." *Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 489 (2007), quoting *Walker*, 10 NY2d at 405. "Mere commission of a tort, even an intentional tort requiring proof of common law malice, is insufficient; there must be circumstances of aggravation or outrage, or a fraudulent or evil motive on the part of the defendant." *Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 85 AD3d 457, 458 (1st Dept 2011). In fact, punitive damages are not even "available 'in the ordinary fraud and deceit case.'" *Id.*, quoting *Walker*, 10 NY2d at 405 ("the fraud [must be] aimed at the public generally [and] involve[] high moral culpability."). Simply put, "in order for punitive damages to be awarded, the plaintiff must demonstrate that the defendant's conduct is intentional and deliberate, has fraudulent or evil

² The court, in addition, refused to enjoin the work in 2004.

motive, and has the character of outrage frequently associated with crime.” *Morsette v “The Final Call”*, 309 AD2d 249, 254 (1st Dept 2003), citing *Prozeralik v Capital Cities Communications, Inc.*, 82 NY2d 466, 479 (1993).

In a circumstance, as here, where the request for punitive damages is based on a trespass with alleged attendant public safety dangers, this court is guided by *Marinaccio v Town of Clarence*, 20 NY3d 506 (2013). In *Marinaccio*, the Court of Appeals vacated a punitive damages award based on plaintiff’s claim “that [defendant] willfully and wantonly caused danger to the health, safety and welfare of the public because of [] flooding.” *Id.* at 511. The Court held that defendants’ actions did not imply “a criminal indifference to civil obligations” where “[d]efendant complied with all federal, state and local planning and development laws and regulations, and worked closely with the U.S. Army Corps of Engineers, the Town Engineer and the Town Planner to secure all required permits and approvals; it hired a wetlands expert, an engineering expert, and soil expert to assist in those regards.” *Id.* Despite defendants’ attempt to comply with the law, they nonetheless were held liable for trespass because “those measures were ultimately unsuccessful in preventing damage to surrounding property.” *Id.* Trespass liability existed because defendant “did not obtain plaintiff’s permission to allow water to flow onto his property.” *Id.* at 511-12. In other words, as in this case, the trespass was predicated on the failure to obtain the property owner’s consent. Yet, even though the Court found that defendants “knew that overflow would be a problem along the furrow bordering plaintiff’s property,” the Court vacated the punitive damages award because even this level of intent and recklessness does not rise to the level of “moral turpitude.” *See id.*

17 East argues that here, as in all construction cases, liability for acts that implicate public safety may give rise to punitive damages. This is true. *See Garber v Lynn*, 79 AD3d 401, 405 (1st Dept 2010), citing *Longo v Armor Elevator Co.*, 307 AD2d 848, 850 (1st Dept 2003). However, the case law makes clear that the underlying wrongful conduct must involve *actual danger* to the public. It is simply insufficient for the underlying facts to involve construction. For instance, in *11 Essex St. Corp. v Tower Ins. Co. of N.Y.*, 81 AD3d 516 (1st Dept 2011), a case also involving underpinning construction work, the court permitted plaintiff to amend its complaint to add a punitive damages claim. *See id.* at 517. However, *11 Essex* involved claims of grossly negligent construction supervision that allegedly caused the installation of a faulty underpinning. *See id.* The court held that since “**the faulty underpinning of a multistory building implicates public safety**, if gross negligence is proved, punitive damages may properly be awarded.” *Id.* (emphasis added), citing *Fonda v 157 E. 74th Co.*, 158 AD2d 297 (1st Dept 1990) (permitting punitive damages claim where there was evidence that defendant “deliberately and knowingly violated accepted industry practice by taking dangerous shortcuts in the underpinning process.”).

Here, in contrast, Madison’s underpinning work did not cause any public danger. The DOB determined the underpinning was safe. And though 17 East’s property rights may have been violated by virtue of the alleged trespass, at worst, this trespass is merely a private wrong that does not concern, let alone threaten, the public. Punitive damages, therefore, are inappropriate.

B. Profit Disgorgement

Leave to amend to add a claim for disgorgement of Madison's profits attributable to the underpinning must be denied on prejudice grounds. This is a twelve-year-old case in which fact discovery concluded years ago. The trespass claim was part of 17 East's case until it was dismissed on summary judgment, well after the Note of Issue was filed. In other words, during fact discovery, 17 East had ample opportunity to assert a profit disgorgement claim and seek financial discovery from Madison. 17 East did not do so. To now introduce a new theory of damages on the eve of trial would prejudice Madison and further delay an overly protracted case.

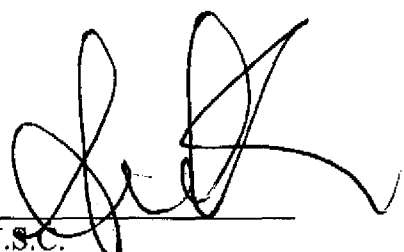
In addition, the proposed profit disgorgement claim is palpably devoid of merit. As this court noted in its summary judgment decision, it is well established that damages on a trespass claim – a claim for injury to real property – “is the **lesser** of the decline in market value and the cost of restoration.” See Dkt. 72 at 20 (emphasis added), quoting *Jenkins v Etlinger*, 55 NY2d 35, 39 (1982), and citing *Volunteer Fire Ass'n of Tappan, Inc. v County of Rockland*, 101 AD3d 853, 857 (2d Dept 2012) (same); see also *Fisher v Qualico Contracting Corp.*, 98 NY2d 534, 539 (2002) (“Evidence of a lesser measure of damages, not unlike mitigation evidence, ensures that a plaintiff receives ‘no more than is reasonably necessary to remedy fully the injury while avoiding uneconomical efforts.’”), quoting *Jenkins*, 55 NY2d at 39.³ A profit disgorgement claim is inconsistent with this measure of damages. Leave to amend is therefore denied. See *Pomerance v McGrath*, 124 AD3d 481, 482 (1st Dept 2015) (leave to amend should be denied when proposed claims are “palpably insufficient or patently devoid of merit”), quoting *MBIA Ins. Corp. v Greystone & Co.*, 74 AD3d 499, 500 (1st Dept 2010). Accordingly, it is

³ The Appellate Division noted that the trial “court did not limit or decide the measure of damages on the trespass claims related to the underpinning. Accordingly, we decline [17 East's] request that we instruct the court as to the proper measure of damages.” October AD Order, 121 AD3d at 609.

ORDERED that the motion by plaintiff 17 East 96th Owners Corp. for leave to serve a proposed third amended complaint is denied.

Dated: June 8, 2015

ENTER:



J.S.C.
SHIRLEY WERNER KORNREICH
J.S.C