

Clinton v 695 Jefferson, LLC
2016 NY Slip Op 31561(U)
August 9, 2016
Supreme Court, Kings County
Docket Number: 507591/16
Judge: Wavny Toussaint
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At an IAS Term, Part 70 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 4th day of August 2016.

P R E S E N T:

HON. WAVNY TOUSSAINT,
Justice.

-----X

CAROLE CLINTON,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 507591/16

695 JEFFERSON, LLC, EYAL OVAIDA,
EMMA GROUP MANAGEMENT, INC.,
EXTREME HOMES GROUP, INC.,

Defendants.

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The following papers numbered 1 to read herein:

Notice of Motion/Order to Show Cause/ and Affidavits (Affirmations) Annexed _____	<u>1-2</u>
Opposing Affidavits (Affirmations) _____	<u>3</u>
Reply Affidavit (Affirmations) _____	<u>4</u>

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Plaintiff, the owner of the premises known as 693 Jefferson Avenue, Brooklyn, New York (Block 1651, Lot 55), commenced this action for trespass, encroachment and damage to the foundation of her home against inter alia, 695 Jefferson LLC (hereinafter "695 Jefferson"), as owner of the adjacent property known as 695 Jefferson Avenue, Brooklyn, New York. The plaintiff filed the instant order to show cause, seeking a preliminary injunction enjoining the defendants

and their agents from, among other things (a) engaging in any construction work at the premises known as 695 Jefferson Avenue, which is damaging the plaintiff's property and the foundation of her home; (b) prohibiting, restraining and enjoining the defendants from erecting any structures on the plaintiff's property; and (c) directing the removal of the plywood fence and all structures erected by the defendants, which are on the plaintiff's property. The defendants oppose this application.

Background

On or about January 28, 2015, 695 Jefferson filed construction plans with the New York City Department of Buildings to build a four story, seven unit residential building on the Property. On or about February 3, 2015, the plaintiff and 695 Jefferson entered into a "one day" license agreement, wherein 695 Jefferson, defendant Emma Group Management and non party Demo Works, were granted a license to enter onto the plaintiff's property, for the sole purpose of replacing the shingles, then present on 695 Jefferson Avenue. According to the agreement, no other work was to be performed on 695 Jefferson Avenue, which would require access to the plaintiff's property. Further, the agreement stated that no structures would be erected on the plaintiff's property and that no excavation work was to be performed at 695 Jefferson Avenue.

The plaintiff alleges that in or about May 2015, the defendants began demolition work at 695 Jefferson Avenue, which caused debris and housing material to fall onto her property. Plaintiff further alleges that during the course of construction at 695 Jefferson Avenue, the defendants have restricted her access to her rear yard due to the presence of construction debris on the passageway leading from her side door, utilized her water supply, erected a fence on her property and damaged the foundation of her property.

In or about December 2015, defendant Extreme Homes contacted counsel for plaintiff via

email and advised that the defendants intended to begin building soon and were just waiting for approved plans. The email went on to state that the defendants did not anticipate needing access to plaintiff's property as no underpinning was needed. Plaintiff alleges that over the next several weeks, her attorney attempted to negotiate a new license agreement with the defendants. Counsel for plaintiff forwarded a proposed license agreement to the defendants in or about March 2016. Instead of executing a new license agreement, defendants contacted counsel for plaintiff and advised that they would need access to plaintiff's property, for the purpose of erecting a wall on the side of the plaintiff's home. On or about March 23, 2016, counsel for plaintiff advised that this request was unacceptable and all further negotiations ceased regarding a license agreement. Demolition of the existing building commenced, followed by construction of a new building. This action was commenced on May 9, 2016.

The instant Order to Show Cause was thereafter filed. Upon the signing of the Order to Show cause, the defendants were temporarily restrained from engaging in any construction, excavation or the erection of structures at 695 Jefferson Avenue.

Defendants allege that the temporary restraining order should not have been issued, in that the plaintiff failed to provide notice of the application. The papers served on defendant's counsel allegedly failed to contain an Affidavit of Emergency, warranting the ex-parte application. The papers before the court include an "affirmation of no notice", which was submitted on June 28, 2016. By separate affirmation, plaintiff's counsel stated that no notice was given to defendants for fear that the defendants would rush to complete as much of the structure as possible, before they could be required to stop work; this would in turn result in further damage and trespass to plaintiff's property.

The defendants further allege that the plaintiff failed to submit any expert testimony to

substantiate her claim of foundation damage or that if it exists, it occurred as a result of the work performed by the defendants. In support of its position, the defendant attaches the affidavit of engineer Kenneth C Thomas, which states that he personally analyzed the approved plans and personally visited 695 Jefferson Avenue. Mr. Thomas goes on to state he compared what he observed at the property with the requirements of the approved plans and determined that the work being performed at 695 Jefferson conformed with the requirements of the approved plans.

In further opposition, defendant also submits the affidavit of Navon Somekh, the principal of 695 Jefferson. Mr. Somekh acknowledges that a temporary fence erected by the defendants encroaches on the plaintiff's property by one half inch to one inch. Mr. Somekh indicated that the defendant was willing to remove the temporary fence, or alternatively, willing to pay the plaintiff a fee to permit the fence to remain in its present location during construction.

Discussion

In order to obtain a preliminary injunction, the moving party must demonstrate the following: (1) a likelihood of success on the merits; (2) the prospect of irreparable harm if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor. (*Rowland v Dushin*, 82 A.d.3d 738 [2nd Dept 2011]; (*Zanghi v. State of New York*, 204 A.D. 2d 313 [2nd Dept 1994], citing *Anastasi v. Majopon Realty Corp.*, 181 A.D. 2d 706 [2nd Dept 1992]; see also *Aetna Ins. Co. v. Capasso*, 75 N.Y. 2d 860 [1990]). The fact that there may be questions of fact for trial does not preclude the court from exercising its discretion in granting an injunction; "all that must be shown is a likelihood of success; conclusive proof is not required." (*Moy v Umeki*, 10 A.D. 3d 604 [2nd Dept 2004], citing *Terrell v Terrell*, 279 A.D. 2d 301 [1st Dept 2001]; *Egan v New York Care Plus, Ins. Co.*, 266 A.D. 2d 600 [3rd Dept 1999]). The function of the preliminary injunction is not to determine the ultimate rights of the parties, but to maintain the status quo

until there can be a full hearing on the merits. (Wellbilt Equip Corp. v Red Eye Grill, 308 A.D. 2d 411 [1st Dept 2003]).

As to prong (1) of the test, the plaintiff has demonstrated a likelihood of success on the merits of her claim. Defendant argues that plaintiff's application must fail, as it is not supported by any proof submitted by an engineer or a construction expert. Defendant is mistaken. An expert is needed only if the issue requires special knowledge or skill. No special skill is needed to interpret the photographs showing the cracks at the foundation of plaintiff's home. Moreover, defendants' expert visited the work site, but does not assert that he visited/inspected plaintiff's adjacent property to determine any effect of defendants' work. The court finds that the photographs submitted in support of her Order to Show Cause, showing an extended crack at the foundation of plaintiff's building, support plaintiff's claim of a likelihood of success on the merits.

As to prong (2) of the test, to prove irreparable harm, the moving party must show that harm is "imminent, not remote or speculative." (Family Friendly Media Inc. v. Recorder Television Network, 74 A.D. 3d 738 [2nd Dept 2010], citing Golden v. Steam Heat, 216 A.D. 2d 440 [2nd Dept 1995]). Claims that are wholly speculative and conclusory are insufficient to satisfy the burden of demonstrating irreparable injury (Khan v SUNY Health Science Center at Brooklyn, 271 A.D. 2d 656 [2nd Dept 2000]). Plaintiff argues that if the sought after injunction is not granted, she will continue to suffer damage to the foundation of her home and be deprived of the use and enjoyment of her home. Further, she claims that the threat of harm is immediate, as she fears her home may collapse at any time, due to the cracks along the foundation line and in the basement. Plaintiff's claims of immediate and irreparable harm are not speculative. Photographs annexed to her application indicate that the damage is real. Continued construction/excavation work can continue to harm plaintiff's property. Plaintiff has established the prospect of suffering immediate

and irreparable harm if an injunction is not granted. (*Ragone v Devoe Properties*, 15 Misc 3d 1104(A) [Sup Ct. Kings 2007]).

With respect to the balancing of competing equities, the third traditional requirement for preliminary injunctive relief, the court should be able to conclude that the harm to the moving party without the injunction will be greater than the harm to the opposing party if the injunction is granted. (*Nassau Roofing & Sheet Metal Co. v. Facilities Development Corp.*, 70 A.D.2d 1021, 1022 [3rd Dept 1979]). Balance of the equities is also in plaintiff's favor. If the construction continues at 695 Jefferson Avenue, plaintiff's building might collapse from structural defects, or be subjected to damage so severe that plaintiff would be forced to vacate the premises.

Defendant's principal acknowledges that defendants trespassed upon the plaintiff's property, in that a temporary fence erected by the defendants encroaches on the plaintiff's property by one half inch to one inch. Defendant had the option of entering into license agreement with the plaintiff or coming into court seeking permission to enter onto plaintiff's property, but failed to do either. Defendants therefore, proceeded at their own peril.

With regard to that portion of the order to show cause relating to the removal of the plywood fence, the defendants' concede that the fence is encroaching on the plaintiff's property. In light of the fact that this encroachment does not pose an immediate danger to the plaintiff's property and that the plaintiff can be compensated for this inconvenience, that portion of the plaintiff's order to show cause is denied.

Accordingly, the plaintiff's order to show cause is granted to the extent that defendants are hereby restrained and enjoined from engaging in any construction, erecting of structures, building and excavation on the premises known as 695 Jefferson Avenue, Brooklyn, New York, to prevent any further damage to plaintiff's property. The plaintiff shall post an undertaking for defendants

benefit in the amount of a \$10,000.00 surety bond.

This constitutes the decision and order of the court.



J.S.C

HON. WAVNY TOUSSAINT
J. S. C.

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