

Chirichella v BCBS Lorimer LLC
2017 NY Slip Op 31665(U)
August 3, 2017
Supreme Court, Kings County
Docket Number: 505985/2017
Judge: Paul Wooten
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**SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY**

PRESENT: HON. PAUL WOOTEN
Justice

PART 97

**MICHAEL CHIRICHELLA, VINCENT G. CHIRICHELLA
and MICHELA CHIRICHELLA,**

Plaintiffs,

Index No. 505985/2017

-against-

BCBS LORIMER LLC,

Defendant.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

Plaintiffs Michael Chirichella, Vincent G. Chirichella and Michela Chirichella (collectively, plaintiffs) are the owners of a three story residential home located at 145 Ainslie Street in Brooklyn, New York 11211 (Block 2768, Lot 38) (Chirichella premises). Defendant BCBS Lorimer LLC (defendant) is the owner of an adjoining property located at 532/534 Lorimer Street, Brooklyn, New York (Lorimer premises) and is constructing a five story, nine unit apartment building approximately 11,900 square feet (Defendant Morena aff'd ¶ 4). Specifically, a portion of plaintiffs' rear side wall on the northeast side of their property is in common with a portion of the defendant's rear wall (see defendant's opposition, Land Surveys, Exhibit 1 and 2).

Plaintiffs previously sought a Temporary Restraining Order (TRO) and are now before the Court seeking injunctive relief, pursuant to CPLR 6301, enjoining defendant from conducting any further construction work on the Lorimer premises. Plaintiffs are also seeking in the alternative, pursuant to RPAPL § 881, that this Court enjoin the defendant from further

construction until this Court orders defendant to accept plaintiffs' proposed License Agreement allowing defendant access to the plaintiffs' premises and fixing a reasonable license fee and awarding plaintiffs reasonable attorney fees. Plaintiffs claim defendant is trespassing on their property by defendant's active construction project plans to demolish or modify plaintiffs' rear adjoining property wall (*see id.* at ¶ 21).

BACKGROUND

Defendant first informed plaintiffs by letters dated October 7 and 21, 2015, that it intended to build a 9 or 10 unit apartment building and that it needed access to plaintiffs' property. On October 7, 2015, defendant wrote that it "will need your [plaintiffs] permission to access your property from the side or rear, to construct a legally required security and protection fence or scaffolding. This will remain in place during all phases of our work, until the new building passes in section, and it is determined to be safe to remove. Where demolition of a side or rear yard wall is to occur, that exposes an unfinished portion of the exterior of your building, we will protect these areas from weather until we can repair the finishes..." (plaintiffs' Exhibit A, letter dated Oct. 7, 2015, ¶¶ 2 and 3; Exhibit B, letter dated Oct. 21, 2015, ¶ 21; Michael Chirichella's affidavit ¶¶ 10 -11).

Thereafter the parties entered into negotiations to permit defendant access to plaintiffs' property, including plaintiffs offering defendant an access licensing fee agreement in September 2016 (*see* Michael Chirichella's affidavit ¶¶ 12-19 and OSC Exhibit G). Defendant countered by claiming, among other things, that plaintiffs' requested license fee was too high or that plaintiffs' demand for defendant to underpin the rear retaining wall was unnecessary or that defendant made its own changes to its construction plans which may or may not obviate the need for defendant to access plaintiffs' premises. Whether it was due to defendant's ever changing construction plans or changing negotiating representatives, or plaintiffs' request for significant licensing fees and expenses, the parties could not reach an agreement about access

to plaintiffs' property. In the interim, defendant moved forward with its construction plans.

On March 26, 2017, plaintiffs filed a Summons with Notice, via NYSCEF, and on Monday, March 27, 2017 filed the instant motion via Order to Show Cause (OSC). On March 27, 2017, the Honorable Noach Dear (J.S.C.) granted plaintiffs a TRO against defendant, enjoining defendant from conducting any further construction work on the Lorimer premises pending a hearing on April 3, 2017. On April 3, 2017, the Court modified the TRO to permit construction work on the Lorimer premises provided that defendant added plaintiffs as additional insured on defendant's construction insurance policy pending a hearing by this Court on April 10, 2017. By April 10, 2017, defendant had not added plaintiffs as an additional insured on its insurance policy (see hearing transcript p.3, line 8-17)

In support of their motion, plaintiffs' submit: (1) an affidavit from Michael Chirichella, who has lived in the Chirichella premises for fifty years, along with seven referenced exhibits, in which he recites and supports his version of the events surrounding the ownership of the premises and defendant's action to remove his rear property retaining wall; and (2) plaintiffs' attorney's affirmation with an attached draft License Agreement.

Defendant filed its opposition on April 1, 2017, alleging that plaintiffs' application "is based upon on their total misunderstanding of defendant's planned work" because Lorimer's construction plans "no longer need to or wish to enter plaintiff's property. The planned work has been altered so that no such entry is necessary" (defendant attorney's affirmation in opposition ¶ 9). In addition, defendant asserts that RPAPL § 881 does not grant plaintiffs a right of action, and that plaintiffs' alleged facts do not support a legal demand for a licensing agreement and fees for access by an adjacent property owner.

However, defendant's new position on non-access is contradicted by defendant's previous representation that the "demolition of the top portion of the eastern end wall of BCBS property may spit some debris into the yard of 145 Ainslie St. (Chirichella premises) but, it will

be very minimal and temporary and will be cleaned up. 27 "[A] small vibration monitoring devise called optical target will be attached to the outer wall of the 145 Ainslie house during excavation by BCBS under DOB (New York City Department of Buildings) Code" (see Han Soon Yom affidavit ¶¶ 26-27).

Defendant in support of its opposition submits, *inter alia*: (1) an attorney affirmation; (2) an affidavit from Dominic Cullen, a professional engineer; (3) an affidavit from Anthony Morena, a licensed architect; (4) affidavits from Han Soon Yom, Lorimer's managing partner and Sang Chin Yom, an attorney and husband to Han Soon Yom; and (5) fifteen referenced exhibits.

Six days later, on April 7, 2017, defendant herein filed a new action, by OSC, entitled *BCBS Lorimer LLC v Michael Chirichella, Vincent G. Chirichella and Michela Chirichella*, Index No. 506967/2017 returnable before this Court on April 10, 2017. Despite the defendant's earlier position in opposition to the plaintiffs' motion in the instant action claiming that it did not need access to plaintiffs' premises, defendant reversed its course by 180 degrees in seeking a license agreement, pursuant to RPAPL § 881, to enter the Chirichellas' property "during the pendency of certain construction activities." In the new action, Chirichella, now the respondent, consents to the petitioner BCBS Lorimer's motion and the Chirichellas request that the Court award a reasonable license fee.

On April 10, 2017, the parties consented to consolidate the two cases before this Court by filing a Stipulation of Consolidation on the Clerk of the Court via NYSCEF in the instant case. The Clerk of the Court immediately rejected the Stipulation of Consolidation because consolidation in this instance was improper; however, the two matters could be joined for disposition. Also, on April 10, 2017, this Court heard oral argument on both actions and both motions separately (see Court Transcript dated April 10, 2017). The parties met the same day in the Courthouse in an attempt to settle the matter, without success. The Court subsequently

vacated the TRO, and once again, directed that defendant add plaintiffs as additional insured on its construction liability insurance policy.

Also at the April 10, 2017 hearing, defendant represented that the Lorimer construction project will last seven or eight months and it needs a licensing agreement to: (1) "for the protection on their [plaintiffs'] property, such as we are going to put up netting on the wall, so that if debris falls from the demolition of the wall, we will go on their property to pick up any rocks that fall on the dirt. It's minimum" (hearing transcript p. 17, lines 2-7); (2) "We need to enter to take photographs of the survey of their [plaintiffs'] basement, to see the current condition of the wall, so if anything does happen in the future, it can be repaired at our expense. We are looking to fully indemnify for any damage that's to occur" (*id.* at p. 17, lines 2-14; p. 16 lines 11-13); (3) remove the "top three feet" of the parties co-terminus property wall (see *id.* at p. 16, lines 2-25); and (4) place monitoring devices "on the exterior of their [plaintiffs'] building" to "monitor any vibrations going in the ground. So when excavation is going on on (sic) our property, the monitoring" devices are required for the excavation work and underground heavy vibrations. (see *id.* at p. 19, lines 16-19; 23-25; p.20, line 1).

On April 24, 2017, plaintiffs filed a Complaint seeking injunctive relief that defendant be enjoined "from performing its construction project until such safe guards are put into effect." On June 5, 2017, BCBS Lorimer claimed to withdraw its petition in the related matter pending under Index No. 506967/2017, by representing in an attorney letter dated June 5, 2017, that "BCBS has determined that the license agreement at issue in both actions is no longer necessary. This is due to the fact that BCBS's work has been amended so that no entry to the petitioner Chirichellas' property will be necessary." To date, however, petitioner BCBS Lorimer has not formally withdrawn its action, nor has it issued any additional information in evidentiary form. Thus, the matter *BCBS Lorimer LLC*, Index No. 506967/2017 remains active.

STANDARDS

A. Preliminary Injunction

"To be entitled to a preliminary injunction, a movant must establish (1) a likelihood of success on the merits, (2) irreparable injury absent granting the preliminary injunction, and (3) a balancing of the equities in the movant's favor" (*County of Suffolk v Givens*, 106 AD3d 943, 944 [2d Dept 2013]; see *Omakaze Sushi Rest., Inc. v Ngan Kam Lee*, 57 AD3d 497 [2d Dept 2008]; *Zanghi v State*, 204 AD2d 313, 313-314 [2d Dept 1994]). "The purpose of a preliminary injunction is to maintain the status quo, not to determine the ultimate rights of the parties" (*Matter of Wheaton/TMW Fourth Ave., LP v New York City Dept. of Bldgs.*, 65 AD3d 1051, 1051 [2d Dept 2009]; see *Icy Splash Food & Beverage, Inc. v Henckel*, 14 AD3d 595, 596 [2d Dept 2005] ["The purpose of a preliminary injunction is to preserve the status quo until a decision is reached on the merits"]); "Preliminary injunctive relief is a drastic remedy that will not be granted unless a clear right to it is established under the law and upon undisputed facts found in the moving papers, and the burden of showing an undisputed right rests upon the movant" (*Anastasi v Majopon Realty Corp.*, 181 AD2d 706, 707 [2d Dept 1992]). "The decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court" (*County of Suffolk*, 106 AD3d at 944, quoting *Arcamone-Makinano v Britton Prop., Inc.*, 83 AD3d 623, 625 [2d Dept 2011]).

"Irreparable injury, for purposes of equity, has been held to mean any injury for which money damages are insufficient" (*Di Fabio v Omnipoint Communications, Inc.*, 66 AD3d 635, 636-637 [2d Dept 2009], quoting *Matter of Walsh v Design Concepts*, 221 AD2d 454, 455 [2d Dept 1995]). "Economic loss, which is compensable by money damages, does not constitute irreparable harm" (*EdCia Corp. v McCormack*, 44 AD3d 991, 994 [2d Dept 2007]).

B. RPAPL § 881 provides that:

"When an owner or lessee seeks to make improvements or

repairs to real property so situated that such improvements or repairs cannot be made by the owner or lessee without entering the premises of an adjoining owner or his lessee, and permission so to enter has been refused, the owner or lessee seeking to make such improvements or repairs may commence a special proceeding for a license so to enter pursuant to article four of the civil practice law and rules. The petition and affidavits, if any, shall state the facts making such entry necessary and the date or dates on which entry is sought. Such license shall be granted by the court in an appropriate case upon such terms as justice requires. The licensee shall be liable to the adjoining owner or his lessee for actual damages occurring as a result of the entry."

Section 881 allows a property owner, upon the refusal of his neighbor to permit access to the neighbor's property in order to make improvements or repairs, to apply to the Court for a compulsory license for access to a neighbor's property where "reasonable" and "necessary" (see *Matter of Board of Mgrs. of Artisan Lofts Condominium v Moskowitz*, 114 AD3d 491 [1st Dept 2014]). In granting such a license, the courts are required 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.* at 492, quoting *Chase Manhattan Bank N.A. v Broadway, Whitney Co.*, 57 Misc 2d 1091, 1095 [Sup Ct, Queens County 1968] *aff'd* 24 NY2d 927 [1969]). The construction of a new building is considered an improvement of real property within the meaning of section 881 (see *Matter of North 7-8 Investor, LLC v Mark A. Newgarden*, 43 Misc 3d 623 [Sup Ct, Kings County 2014]; *Matter of Rosma Dev., LLC v South*, 5 Misc 3d 1014[A], 2004 NY Slip Op 51369[U] [Sup Ct, Kings County 2004]; *Deutsche Bank Trust v 120 Greenwich Dev. Assoc.*, 7 Misc 3d 1006[A], 2005 NY Slip Op 50467[U] [Sup Ct, NY County 2005]).

RPAPL § 881 also provides that this Court may use its equity jurisdiction to grant a license "upon such terms as justice requires." "This language is broad and allows for the flexibility and full scope upon which equity depends. It is sufficient statutory authority to award

reasonable attorneys' fees as a condition of a license, where the circumstances warrant it" (*Matter of North 7-8 Investor, LLC*, 43 Misc 3d at 631). Such terms as justice requires extends to the nature and extent of access that is necessary, the duration such access may be necessary, as well as what protections may be necessary to safeguard the adjoining owner's property (*see id.* at 628). Thus, section 881 and case law does provide for strict liability for any damage that may be caused to an adjoining property owner's property (*see Sunrise Jewish Ctr. of Val. Stream v Lipko*, 61 Misc 2d 673 [Sup Ct, Nassau County 1969]; *MK Realty Holding, LLC v Schneider*, 39 Misc 3d 1209[A], 2013 NY Slip Op 50551[U] [Sup Ct, Queens County 2013]). Additionally, this Court is also not limited to requiring bonds and insurance to ensure that a party will be able to compensate the other for any damage to their property (*see Matter of North 7-8 Investor, LLC*, 43 Misc 3d at 627; *Ponito Residence LLC v 12th St. Apt. Corp.*, 38 Misc 3d 604 [Sup Ct, NY County 2012] [court awarded a licensing fee of \$1,500.00 a month]; *Deutsche Bank Trust v 120 Greenwich Dev. Assoc.*, 7 Misc 3d 1006[A], 2005 NY Slip Op 50467[U] [Sup Ct, NY County 2005] [court awarded a licensing fee of \$2,500.00 a month]). Justice also requires that the terms of any license provide for safeguards to prevent damage from occurring, particularly where a party is compelled to grant access to his home (*see Matter of North 7-8 Investor, LLC*, 43 Misc 3d at 627; *537 W. 27th St. Owners LLC v Mariners Gate, LLC*, 2009 NY Slip Op 32360[U] [Sup Ct, NY County 2009]). Other conditions the court may impose include posting a bond, obtaining insurance coverage, agreeing to indemnify the adjacent landowner and paying for the use of the license.

DISCUSSION

Plaintiffs' motion seeking injunctive relief, pursuant to CPLR 6301, enjoining defendant from conducting any further construction work to defendant's own property or until defendant secured a Court ordered license, pursuant to RPAPL § 881, is denied. It is clear from the record that defendant agreed to a licensing fee, although the amount was in dispute among the

parties, as well as to grant plaintiff full indemnification. Specifically to that effect, on April 20, 2017, defendant added plaintiffs as additional insured on its one million dollar (\$1,000,000) construction commercial liability policy, its five million dollars (\$5,000,000) excess liability umbrella policy, its two million dollars (\$2,000,000) excess liability policy, and its one million dollars (\$1,000,000) general liability policy. This indicates that defendant has consented to indemnify and accept liability for any reasonable damages it causes to the plaintiffs' property for the length of the project (see Defendant'S Certificates of Liability Insurance, Insurance policy numbers LB00139758, XL00006783, USA4169031, and NPP8407153 and April 10, 2017, hearing transcript p. 23 line 18 to 21). In addition, defendant has agreed that it "will repair the wall to its original condition" after the construction (April 10, 2017, hearing transcript p. 23 line 4 to 6) and defendant's indemnification includes any "Building Department Violations, ECB [New York City Environmental Conservation Board] violations, [or] any type of defense hold harmless language for any possible claim that may happen" (*id.* and p. 24 line 9 to 17). Thus, given these agreed upon concessions by the defendant, plaintiff fails to make a prima facie showing for injunctive relief (see *County of Suffolk v Givens, supra*). Moreover, defendant's voluntary extension of insurance coverage for plaintiffs obviates the need for defendant to post a bond or hold money in escrow sufficient to cover any potential property damage.

However, plaintiffs' request that the Court use its equity jurisdiction to impose a license upon defendant for access to the plaintiffs' premises is granted. RPAPL § 881 does permit plaintiffs herein, under these set of facts, where the parties cannot reach a licensing agreement and there is clear credible evidence that defendant has entered or is about to enter or damage plaintiffs' adjoining property, to maintain an action for the Court to impose a license for the defendant to access the plaintiffs' property during construction work (see *Matter of North 7-8 Investor, LLC, supra*). Defendant's reliance on the argument that a court ordered licensing agreement is only available in an action where plaintiffs are the adjoining property owners

encroached upon is misplaced.

Finally, as a general rule, “attorneys’ fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule” (*Matter of Nenninger v Kelly*, 140 AD3d 964, 965 [2d Dept 2016], quoting *Pickett v 992 Gates Ave. Corp.*, 114 AD3d 740, 741 [2d Dept 2014], quoting *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]; see *Flemming v Barnwell Nursing Home & Health Facilities, Inc.*, 15 NY3d 375, 379 [2010]; *Baker v Health Mgt. Sys.*, 98 NY2d 80, 88 [2002]; *214 Wall St. Assoc., LLC v Medical Arts-Huntington Realty*, 99 AD3d 988, 990 [2d Dept 2012]; *Spodek v Neiss*, 86 AD3d 561, 561 [2d Dept 2011]). However, the Court finds that the plaintiffs, as property owners, should not be put in the position to incur the costs of hiring counsel to conduct a meaningful review of defendant’s plan to ensure that the defendant, which is seeking to perform work on their premises will not endanger their family property (see *Matter of Van Dorn Holdings, LLC v 152 W. 58th Owners Corp.*, 149 AD3d 518, 519 [1st Dept 2017]). Accordingly, the Court finds it appropriate to grant plaintiffs’ reasonable attorneys’ fees herein, in an amount to be determined in a hearing before a Special Referee/JHO. The Court finds that the plaintiffs, the adjoining property owner, was forced to commence this action in order to obtaining a licensing agreement and fee to protect their property.

CONCLUSION

Based upon the foregoing, it is

ORDERED that the portion of plaintiffs’ motion seeking injunctive relief, pursuant to CPLR 6301, enjoining defendant from conducting any further construction work to defendant’s property located at 532/534 Lorimer Street, Brooklyn, New York is denied; and it is further,

ORDERED that the portion of plaintiffs’ motion, pursuant to RPAPL § 881, seeking that this Court impose a License Agreement allowing defendant access to plaintiffs’ residence is.

granted to the extent that (1) defendant shall be entitled to a licensing fee for the period of one year from the date of this order or the commencement of the actual construction work and renovation at the Lorimer premises construction project or until the construction completion of the project, whichever is less; (2) defendant shall pay to the plaintiff \$ 1,000.00 a month in licensing fees and pro rated for any part of a month thereof, as a licensing fee, for the period above; (3) defendant shall save and hold harmless plaintiffs for any damages occurring within the licensed area, during the period of this license and defendant shall continue to keep plaintiffs (commencing on April 20, 2017) as additional insured on its one million dollar (\$1,000,000) construction commercial liability policy, its five million dollars (\$5,000,000) excess liability umbrella policy, its two million dollars (\$2,000,000) excess liability policy and its one million dollars (\$1,000,000) under Insurance policy numbers LB00139758, XL00006783, USA4169031, and NPP8407153 for the period above; (4) plaintiffs shall not unreasonably interfere with defendant's necessary access to their land and property and shall take the necessary steps, measures, and precautions to prevent and avoid any damage to their land or property and defendant shall remove and cure any issued and outstanding violations or judgements from any actions from any city or state agencies during the licensing period; (5) defendant shall place monitoring and/or monitor plaintiffs' residence and property to determine the impact caused by vibrations emanating from the defendant's property or caused by the Lorimer premises construction and renovation project in order to protect plaintiffs' property from damage; (6) upon the completion of the term of the license, defendant's land within such license area shall be returned to its original condition, and all materials used in construction and any resultant debris shall be removed from the license area and defendant shall make any and all repairs to return the parties co-terminus wall to its original condition before defendant's construction and renovation; (7) defendant to provide site safety for scaffold, barricades, nets

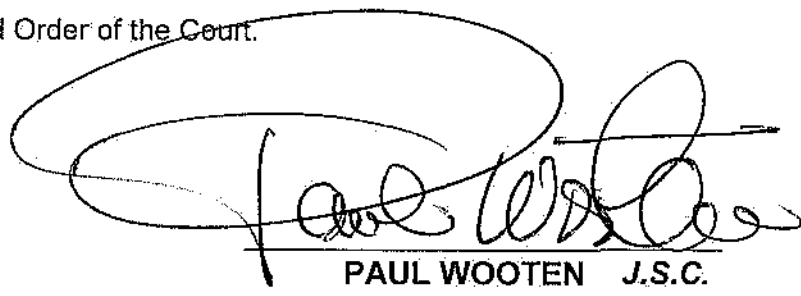
and any sidewalk sheds so as to ensure there are no injuries to the plaintiffs or anyone having access to their property and/or any damage to their property; (8) defendant to comply with all federal, state, local and environmental laws and protect against environmental hazardous discharge and comply with the proper control and disposal of hazardous materials; (9) defendant shall notify plaintiffs in writing when they have completed the work under the license; (10) defendant shall be held liable to plaintiffs' for any damages which they may suffer as a result of the granting of this license and all damaged property shall be repaired at the sole expense of defendant; and it is further,

ORDERED that plaintiffs' request that defendant post a bond or hold money in escrow sufficient to cover any potential property damage is denied; and it is further,

ORDERED that plaintiffs' request for reasonable attorney fees for bringing this petition is granted and the amount of fees to which plaintiffs are entitled shall hereby referred to a Special Referee/JHO to hear and determine upon submission of the appropriate proof for same; and it is further,

ORDERED that plaintiffs shall serve a copy of this Order with Notice of Entry upon defendant.

This constitutes the Decision and Order of the Court.



PAUL WOOTEN J.S.C.

Dated: 8/3/17

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 MG X
 Motion Seq. # 1