

**Chelsea Partners, LLC v New York City Dept. of
Bldgs.**

2017 NY Slip Op 31832(U)

August 31, 2017

Supreme Court, New York County

Docket Number: 154139/2017

Judge: Erika M. Edwards

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Application of CHELSEA PARTNERS, LLC,

Index No.: 154139/2017

Petitioner,

DECISION/ORDER

For Judgment Pursuant to CPLR Article 78,

Motion Sequences 001 and 002

-against-

THE NEW YORK CITY DEPARTMENT OF BUILDINGS; RICK D. CHANDLER, AS COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF BUILDINGS and MARTIN REBHOLZ, MANHATTAN BOROUGH COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF BUILDINGS.

Respondents,

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits/Affirmations/ Memos of Law annexed	1, 2
Opposition Affidavits/Affirmations and Memo of Law annexed	3

ERIKA M. EDWARDS, J.S.C.:

Petitioner Chelsea Partners, LLC (“Petitioner”) brought this Article 78 proceeding against Respondents The New York City Department of Buildings (“DOB”), Rick D. Chandler, as Commissioner of DOB, and Martin Rebholz, Manhattan Borough Commissioner of DOB (collectively, “Respondents”) seeking an order compelling Respondents to rescind the partial Stop Work Order under complaint number 1436171, dated October 27, 2016, on Petitioner’s property for Petitioner’s failure to protect an adjoining property with roof netting.

Petitioner now moves by order to show cause for the same relief under motion sequence 001 and a proposed Intervenor, Dr. Robert Molle (“Dr. Molle”), the owner of the adjoining property, moved by order to show cause under motion sequence 002 to intervene as a Respondent in this matter, to dismiss the Petition for failure to state a claim, to confirm the Stop Work Order and for the court to order Petitioner to fully comply with all the adjacent property protection requirements of the New York City Building Code.

Petitioner owns the property located at 212 West 20th Street, New York, New York, where the construction of a six-story building is almost complete. Dr. Molle owns a three-story building adjacent to Petitioner's property, located at 210 West 20th Street, New York, New York.

Petitioner alleges in substance that Dr. Molle has repeatedly refused to grant consent for Petitioner to install the required protective netting unless Petitioner complies with his unreasonable and unrelated demands. Therefore, Petitioner argues that it is absolved from its duty to protect the adjoining property, Dr. Molle assumes such liability and the Stop Work Order should be rescinded.

In their opposition to Petitioner's order to show cause, Respondents argue in substance that New York City law requires Petitioner to provide such roof protection on the adjoining property, Petitioner failed to demonstrate that it provided the owner of the adjoining property with the required detailed notice of the scope of the work being conducted and Petitioner cannot compel DOB to perform a discretionary act.

Dr. Molle seeks intervention and argues in substance that Petitioner began construction in late 2014 without proper notification or proper protection of Dr. Molle's property. Dr. Molle has repeatedly attempted to obtain basic information about the demolition and construction plans, as they greatly impact his property, but Petitioner and its agents have refused to provide the information. There have been previous Stop Work Orders and violations on this project and prior proceedings involving a chimney extension on Dr. Molle's property and other matters. There has been no written opposition to Dr. Molle's motion.

After the initial oral argument on the orders to show cause, the court reserved decision, waived Respondents' appearance, and attempted to assist Petitioner and Respondent in negotiating a resolution to their dispute regarding Petitioner's access to Dr. Molle's property to inspect and install the protective roof netting. Conferences in this action were held on July 6, 2017, August 3, 2017, and August 31, 2017.

On July 6, 2017, the parties executed a so-ordered Stipulation in which Petitioner agreed to provide Dr. Molle with the roof protection plans and other plans and documents related to the overall construction project so Dr. Molle could have an architect or engineer prepare a report at Petitioner's expense, in an amount up to \$1000.00. Upon receipt of the plans, Dr. Molle agreed to provide Petitioner's representatives with limited access to inspect his property for preparation of additional plans related to roof protection and other unrelated areas. Petitioner complied with this order and Dr. Molle had a report prepared, which resulted in Dr. Molle making several objections to the construction plans and he continued to refuse to consent to the installation of the roof netting unless his demands were met. Respondent argues that such objections are unreasonable, some of the work was already completed and they are unrelated to the access and consent needed to install the protective roof netting.

The court advised the parties in substance that it was prepared to order Dr. Molle to grant Petitioner access onto the premises to install the protective netting and the court provided the parties with an opportunity to negotiate a reasonable license agreement. The parties disagreed on the terms of such agreement and Dr. Molle declined to accept Petitioner's initial offer for weekly payment terms and refused to even discuss a monetary counter offer.

When considering Dr. Molle's motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211(a)(7), the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord a plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). A court may freely consider affidavits submitted by a plaintiff to remedy any defects in the complaint, but the court should not consider whether the plaintiff has simply stated a cause of action, but rather whether the plaintiff actually has one (*Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 [1st Dept 2009]). Normally, a court should not be concerned with the ultimate merits of the case (*Anguita v Koch*, 179 AD2d 454, 457 [1st Dept 1992]). However, these considerations do not apply to allegations consisting of bare legal conclusions as well as factual claims which are flatly contradicted by documentary evidence (*Simkin v Blank*, 19 NY3d 46, 52 [2012]).

The court agrees with Respondents' arguments in opposition to Petitioner's order to show cause. The court also determines that Petitioner's Petition fails to state a cause of action. Therefore, the court denies Petitioner's order to show cause and dismisses Petitioner's Petition without prejudice. Additionally, the court grants Dr. Molle's order to show cause to the extent that he is permitted to Intervene in this matter, Petitioner's Petition is dismissed and the court orders Petitioner to fully comply with all the adjacent property protection requirements of the New York City Building Code.

However, the court determines that based on Petitioner's compliance with the so-ordered Stipulation, dated July 6, 2017, Petitioner has provided Dr. Molle with sufficient information and details to permit Petitioner to have access onto Dr. Molle's property to provide the necessary protective netting. The court determines that although this Article 78 proceeding involves the Stop Work Order for Dr. Molle's refusal to permit Petitioner access onto his property to install the protective netting, Dr. Molle has repeatedly insisted on attempting to resolve numerous issues in dispute regarding the overall demolition and construction project, which is unreasonable and well beyond the scope of this limited action. The court has made great efforts to have Petitioner adequately address Dr. Molle's concerns with the overall demolition and construction project by providing the requested documents, but Dr. Molle continues to deny consent for Petitioner to install the protective netting and base his refusal on matters not before this court without filing the appropriate proceeding.

Therefore, since the court grants Dr. Molle's request to order Petitioner's compliance with the protection requirements and determines that Petitioner has provided Dr. Molle with all relevant documents requested, in the interest of justice and judicial economy, the court directs Dr. Molle to grant Petitioner reasonable access onto his premises for the purposes of inspecting, providing, installing, maintaining and removing the required protective roof netting necessary to lift the Stop Work Order and complete the construction project. Dr. Molle must grant such access to install the protective netting to begin no later than September 22, 2017. In the meantime, the parties are encouraged to continue negotiating the terms of a license agreement and they reserve their rights to seek further judicial intervention to enforce their rights, obtain compensation for damages, or seek other remedies by filing an appropriate judicial action, if necessary.

As such, it is hereby

ORDERED that Petitioner's order to show cause (001) is denied; and it is further

ORDERED that Intervenor-Respondent Dr. Robert Molle's order to show cause is granted to the extent that the court permits him to appear in this action as an Intervenor-Respondent; grants dismissal of Petitioner's Petition as against Respondents and orders Petitioner to fully comply with all the adjacent property protection requirements of the New York City Building Code; and it is further

ORDERED that the caption be amended to reflect the addition of the Intervenor-Respondent Dr. Robert Molle and that all future papers filed with the court, if any, bear the amended caption as set forth below:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Application of CHELSEA PARTNERS, LLC,

Index No.: 154139/2017

Petitioner,

For Judgment Pursuant to CPLR Article 78,
-against-

THE NEW YORK CITY DEPARTMENT OF BUILDINGS; RICK D. CHANDLER, AS COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF BUILDINGS and MARTIN REBHOLZ, MANHATTAN BOROUGH COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF BUILDINGS.

Respondents,

and

DR. ROBERT MOLLE,

Intervenor-Respondent.

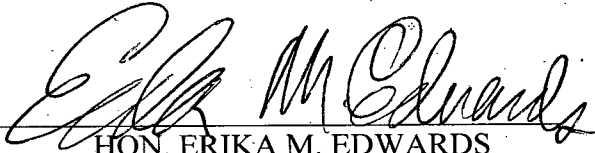
and it is further

ORDERED that Intervenor-Respondent Dr. Robert Molle shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 148), who are directed to mark the court's records to reflect the change in the caption; and it is further

ORDERED that the court directs Intervenor-Respondent Dr. Robert Molle to grant Petitioner Chelsea Partners and its agents and representatives reasonable access onto the property located at 210 West 20th Street, New York, New York for the purposes of inspecting, providing, installing, maintaining and removing the required protective roof netting necessary to lift the

Stop Work Order and complete the construction project, that Petitioner will be liable to Intervenor-Respondent Dr. Robert Molle or his lessee for actual damages occurring as a result of such entry, and Dr. Robert Molle must grant such access to install the protective netting to begin no later than September 22, 2017.

Date: August 31, 2017


HON. ERIKA M. EDWARDS