925 Madison Ave., Inc. v CLST Enters., LLC
2017 NY Slip Op 32626(U)
December 12, 2017
Supreme Court, New York County
Docket Number: 151407/14
Judge: Robert D. Kalish
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29

----------X

925 MADISON AVENUE, INC.,

Plaintiff,

- against -

CLST ENTERPRISES, LLC,

Defendant.

----------X

Index No. 151407/14

Seqs. 002 & 003

Decision and Order

HON. ROBERT D. KALISH, J.S.C.:

Motions by Plaintiff 925 Madison Avenue, Inc., pursuant to CPLR 6301, for a preliminary injunction (Seq.002) is denied as academic; and motion by Plaintiff 925 Madison Avenue, Inc., pursuant to CPLR 3126 and 3212, to strike the answer and for summary judgment (Seq.003), with an order granting Plaintiff a permanent injunction, is granted as follows:

BACKGROUND

The instant action concerns the rights and restrictions pertaining to a courtyard owned by Plaintiff 925 Madison Avenue, Inc.—who owns property located at 956 Madison Avenue. The courtyard abuts property owned by Defendant CLST Enterprise, LLC—who owns property located at 19 East 75th Street. In sum and substance, Plaintiff claims to own the subject courtyard in fee

simple, but acknowledges that there is a light and air easement burdening the property for the benefit of Defendant's property. This easement, as per Plaintiff, dates back to a handwritten agreement from 1881 made between Plaintiff's predecessor owner Henrietta A. Falk and Defendant's predecessor owner Harriet E. Page, which is recorded in the Office of the Register of the City and County of New York.[1] The relevant portion of the agreement states as follows:

> "And the said Henrietta A. Falk for herself her heirs executors Doth hereby covenant grant promise and agree to and with the said Harriett E. Page her heirs and assigns that a strip of land in length from East to West Thirty (30) feet in width from North to south Ten (10) feet along the Southerly side of the rear of the lot of land above described and hereby conveyed or intended so to be and forming part of said lot shall not nor shall any part of the said strip be built upon by any building or structure whatsoever which may obstruct the light or air of the buildings of the said Harriett E. Page her heirs or assigns now or hereafter to be erected on her or their certain lot of land now known as number 19 East 75th Street which adjoins said strip of land on the Southerly side thereof."

(Shore Affirm., Ex. 8 [Liber 1616 Deed] at 130.)[2]

---

[1] Both Plaintiff and Defendant's current deeds reference this easement. (Shore Affirm., Ex. 5 [Plaintiff Deed] ["Subject to covenants and restrictions contained in deed recorded in the New York City Register's Office in Liber 1616 of Covenants at page 129 . . . ."]; Ex. 6 [Defendant Deed] ["TOGETHER with easement of light and air over a strip of land in length, East to West, 30 feet and in width from North to South, 10 feet, adjoining said premises on the North, as the said easement is granted in and by a certain deed recorded in the Office of the Register of the City and County of New York in Liber 1616 of Conveyances at page 129."].)

[2] Plaintiff has provided the Court with a transcription of the handwritten Liber 1616 deed from 1881. (*See* Shore Affirm., Ex. 9 [Transcription].) Defendant's corporate officer, Margaret Mary Thomson, also handed a copy of her own transcription of the subject deed to the Court during oral arguments on October 23, 2017. (October Oral Arg. Tr. at 24:09-26:17.) While the Court has looked at and used both sides' transcriptions as aids in reviewing the papers, during oral arguments, and in the drafting of this decision, the Court has separately read and used the original handwritten document. All quotations from the handwritten Liber 1616 deed in the instant decision are based on the Court's own reading of the handwritten deed; and to the extent that Plaintiff or Defendant's transcriptions and the Court's reading of the handwritten deed are not consistent, the Court has relied on its own reading of the handwritten deed from 1881.

The issue before this court is: What restrictions does the 1881 agreement place on Plaintiff's use of the courtyard? More particularly, does Plaintiff's maintaining a wooden deck in the courtyard and mounted air-conditioning units on its building's courtyard-facing wall violate the 1881 agreement?

The History of the Underlying Dispute.

Plaintiff alleges that around November 2013, Defendant "or persons acting on its behalf began improperly trespassing in the Courtyard and placing construction debris in the Courtyard, without notice to Plaintiff and without Plaintiffs permission." (Shore Affirm., Ex. 2 [Complaint] ¶ 6.) Plaintiff alleges that, on or about November 12, 2013, Plaintiff's President Steven Georges[3] spoke to Defendant's officer Margaret Mary Thomson "to advise her that Defendant was impermissibly placing construction debris in the Courtyard." (Georges Aff. ¶ 10.)

Mr. Georges states that he received an email from Ms. Thomson that day, wherein she complained that Defendant had constructed a wooden deck in the courtyard that "clearly impinges on our 10 ft. easement rights to the court yard." (Georges Aff. ¶ 10, Ex. 2 [11/12/2013 Email].) Ms. Thomson further complained that Plaintiff had installed "two gigantic a/c units" in the courtyard that "clearly impinge on our air rights to get fresh air in our rear basement (and higher)

[3] Mr. Georges states that his family has owned the property at 956 Madison Avenue for approximately 70 years and that he became involved in managing the property around 2003. He states that he subsequently hired a management company to manage the property, and that he became President of Plaintiff 925 Madison Avenue, Inc. around 2013. (Georges Aff. ¶ 5.)

windows when the power of Electro Magnetic Radiation [] vibrates the entire court yard." (*Id.*) Mr. Georges states that Ms. Thompson was referring to two air compressor units located on the ground of the courtyard which were installed in 1992. (Georges Aff. ¶ 11.) Mr. Georges states that, at the time of Ms. Thompson's email, these two air compressor units were surrounded by construction debris. (*Id.*)

Mr. Georges states that, on November 19, 2013, he had his real estate attorney, Robert Bachner, Esq., send an email response to Ms. Thompson's November 12, 2013 email. (Georges Aff. ¶ 12; Ex. 5 [November 19, 2013 Email].) Mr. Bachner reiterated Plaintiff's complaint about the debris and further stated:

> "You appear to be under a misapprehension as to the nature of the rights granted to the owner of '19 East 75' Street. The entire courtyard is owned by our client with the possible exception of the approximately 10-12" adjacent to your building and covered by iron grating. You have no right to go upon the remainder of the courtyard and perform the renovation work or to store materials or leave rubbish but have been doing so as a trespasser without permission and without even the courtesy of notifying our client or the tenant occupying the ground floor."

(November 19, 2013 Email.)

Mr. Georges states that on November 21, 2013, Mr. Carl Thomson—who is also an officer of Defendant and Ms. Thomson's husband—replied to Mr. Bachner's email stating, "I have had the workers tidy the area and have erected a shield. They have been instructed to keep the area clean." (Georges Aff. ¶ 12; Ex. 5 [November 21, 2013 Email].)

Mr. Georges states that, on January 16, 2014, he learned from his retail tenant that "construction debris had once again been placed in the Courtyard by Defendant and that it was blocking a technician's access to one of the air compressor units in the Courtyard." (Georges Aff. ¶ 13.) Mr. Georges states that in response he had his attorneys send a letter to Defendant. (*Id.*) Said letter noted Mr. Bachner's November 19, 2013 demand that Defendant remove all construction debris from the courtyard and stated that "[d]espite such demand, you have once again piled the courtyard with debris (see enclosed photographs)." (Georges Aff., Ex. 6 [January 16, 2014 Letter] at CLST_0059.)

Mr. Georges states that on January 23, 2013 he received an email from Ms. Thomson, addressed to his attorney, Mr. Bachner, in which Ms. Thomson stated that "I have '**NO**' restriction as I don't own the land. The city can't restrict land for someone who does not own [the] courtyard, Mr. Bachner." (Georges Aff., Ex. 8 [January 23, 2014 Email] at CLST_0073.) Ms. Thomson further stated that: "For the time being and in consideration to my deeded easement, I will instruct the workers to continue work on the deeded easement and to keep it as clean as possible until our project is completed. I promise to make as clean as pre[-]construction." (*Id.*)

Mr. Georges states that, on the following day, he received an additional email from Ms. Thomson, addressed to Mr. Bachner, in which Ms. Thomson

purported to follow-up with "[a]dditional information I failed to mention regarding the 'easement'." (Georges Aff., Ex. 9 [January 24, 2014 Email].) In said email, Ms. Thomson stated:

> "Gentlemen Georges '**owns**' the land and is prohibited by his recorded deed not to build any structures on easement.
>
> Thomson and cable/telephone utilities, however, do not have same restriction of easement. We are giving that easement to allow a small space to building out and allow utilities to hang wiring[.]
>
> Thomsons' '**MAY**' build a structure on the easement as far as I am aware. If you know differently, I would appreciate you[r] expert opinion."

(*Id.* [emphasis in original].)

Mr. Georges states that, on January 30, 2014, he sent an email with the following proposal:

> "I would like to end this in a neighborly fashion and am attaching a simple agreement that would allow the owner of your property access to the courtyard when needed, and confirms that the owner of our building may keep the courtyard in the same condition as it has been for many years. Please let me know if this is acceptable."

(Georges Aff. ¶ 16, Ex. 10 [January 30, 2014 Email].) Mr. Georges states that Ms. Thomson responded via email that same day, stating that she and Mr. Thomson would review the offer and follow-up with Mr. Georges. (*Id.*)

Mr. Georges states that, on February 9, 2014, he received an email from Ms. Thomson thanking him for turning off the courtyard air compressor units and stating as follows:

> "For the past 20 years (est. ?) my in-laws, family, friends, tenants and workers, have been buzzed, vibrated and rattled by the forces of a 7.5 ton electromagnetic radiation producing condenser just as I expressed in my first e-mail.
>
> . . .
>
> My husband measured 10' from our building (grated grills) which is the 'entire' courtyard easement we paid for and were deeded in 1883. As is described in your recorded deeds for 956 Madison.
>
> We own the courtyard, not you, Mr. Georges.
>
> . . .
>
> We now believe, rent may be due for 20 years illegal use of Mr. Georges hostile (harassment by attorney, tenant, and legal assistant) confiscation of our deeded easement land."

(Georges Aff. ¶ 1, Ex. 11 [February 11, 2014 Email].)

Mr. Georges states that as a result of Ms. Thomson's email, Plaintiff commenced the instant action, on February 18, 2014, by filing and serving a summons with notice. (Georges Aff. ¶18; *see also* Shore Affirm., Ex. 1 [Summons with Notice].) The summons states:

> "[T]his action is to obtain a permanent injunction (i) directing Defendant and all persons acting on its behalf to remove any items, including, but not limited to, construction debris, that it or persons acting on its behalf have placed in the courtyard of Plaintiff s building located at 956 Madison Avenue (the " Courtyard"), (ii) enjoining Defendant and all persons acting on its behalf from placing any other items in the Courtyard, (iii) enjoining Defendant and all persons acting on its behalf from making entering the Courtyard for any purpose other than removing all items placed there by Defendant; and (iv) enjoining Defendant and all persons acting on its behalf from making any use of the Courtyard or taking any other actions to interfere with Plaintiffs use or enjoyment of the Courtyard, and, in the

> alternative, to recover damages suffered by Plaintiff arising from or relating to Defendant's trespass at the Courtyard."

(Summons with Notice.)[4]

Mr. Georges states that, on March 3, 2014, he received an email from Ms. Thomson seeking to resolve the dispute and stating as follows:

> "Why does your attorney feel the only solution is legal action. Just provide us with the same information you would present to a judge and let us evaluate who has proper legal rights on our deeded easement with a 'negative restriction' against 956 Madison to never build any structure 'whatsoever' in the easement air and light restriction (entire courtyard). Please refer to legal document for exact wording. It is all in the evidence.
>
> If there is something we are missing, just let us know and we will evaluate why a neighbor feels the need to file suit, waste precious judges time without trying to work it out in a neighborly way."

(Georges Aff. ¶ 19, Ex. 12 [March 3, 2014 Email] at P000144].)

Mr. Georges states that at his request, on March 4, 2014, Mr. Bachner replied via email to Ms. Thomson to explain Plaintiff's position. Mr. Bachner wrote as follows:

> "The old handwritten deed conveys all of the area of 956, including what is now the courtyard, to a predecessor of the present owner. Having done so, the owner of 19 East 75 had no further right to go onto any part of the 956 property, including the courtyard, without the permission of the owner of 956. And the owner of 956 could do anything he wanted in the courtyard.
>
> But, you say, the deed contains language that modifies the absolute rights of the owner. What does that language provide? Does it say that the owner of 19 East 75 still owns the courtyard, as you claimed in one of your emails?

[4] According to Mr. Georges, "Plaintiff no longer needs an Order requiring that Defendant remove the items that Defendants or its agents had placed in the Courtyard, as those items have already been removed . . . ." (Georges Aff. ¶ 25 n. 2.)

> No, it does not. Does it say that the owner of 19 East 75 can come into the courtyard at any time he or she wants to? No, it does not. Does it permit the owner of 19 to pile lumber and other materials in it and leave piles of rubbish? No, it does not. That is why there is no door in the side of 19 and the workmen have been crawling in and out the 19 basement window.
>
> What the language does do is to restrict the owner of 956 from erecting a structure that blocks light and air from 19. That would apply to something like a large shed or an expansion of the 956 building not to the two air-conditioners or the deck. You have no right to compel their removal."

(Georges Aff. ¶ 19, Ex. 12 [March 4, 2014 Email] at P000116].) Mr. Bachner noted that he had previously sent an agreement whereby Defendant could access the courtyard to perform necessary work in exchange for Defendant agreeing to acknowledge that Plaintiff had the right to maintain air conditioning units and a wooden deck in the courtyard. (*Id.*) Mr. Bachner further stated that this offer for a proposed agreement would expire by March 15, 2014 and that he would be happy to discuss the agreement with Defendant's attorney. (*Id.*)

Mr. Georges states that he received an email, addressed to himself and Mr. Bachner, on March 6, 2014, thanking them for their response, asking that the actioned be stayed, and further stating:

> "Although your position is clearly stated and may be correct, we have not been able to get the same clarification as is stated by you from any documents we researched.
>
> Every easement (right of way-pathway) I have ever[] known grants absolute rights to the Dominant owners, with an additional special restriction of air and light. I have yet to find any document or wording to confirm some of what you state. I apologize as it is not from lack of researching. It may be

> correct, but we have no restriction on our deed that says we cannot walk on our easement (pathway)."

(Georges Aff. ¶ 19, Ex. 12 [March 6, 2014 Email by Thomson] at P000115.)

Mr. Georges states that, later that day, Mr. Bachner replied to Ms. Thomson via email, further stating:

> "First, there is only one document involved—the 1880 handwritten deed which you have. It first conveys the 956 property. On the second page, it describes the 10' x 30' strip and says that the strip 'shall not nor shall any part of the said strip be built upon by any building or structure whatsoever which may obstruct the light or air of the building of the said ....' That is all of the relevant language.
>
> The word 'easement does not appear in the deed[,] nor is there any language reserving a right of access to the strip. Lawyers tend to refer to this sort of restriction as an 'Easement for Light and Air.' There are other easements that don't allow access. For example, power and telephone companies frequently have an 'easement' for wires over a property. That does not give them the right to drive their trucks back and forth whenever they want.
>
> You may have been under a misapprehension that an experienced real estate lawyer or title company could clarify in fifteen minutes. For several months, Mr. Georges has been trying to clear this up, and has been required to pay his lawyers because of your refusal to go for advice to professionals. There is no good reason why it has taken this long to deal with the question, and further delay is not appropriate. The March 15 date stated in my last email continues to apply. I hope that you will accept Mr. Georges fair offer, enter into an agreement and put the matter to rest."

(Georges Aff. ¶ 19, Ex. 12 [March 6, 2014 Email by Bachner] at P000114-15.)

Mr. Georges states that "further communications" failed to yield of a resolution of the dispute. (Georges Aff. ¶ 20.)

Mr. Georges states that, months later in August 2014, Plaintiff's new commercial tenant, Tomas Maier, had recently leased the ground floor space in Plaintiff's building at 956 Madison Avenue, removed the air conditioning units on the ground of the courtyard, and began installing new, "more efficient" air conditioning units that were mounted on the courtyard wall of Plaintiff's building. (*Id.* ¶ 21.) Mr. Georges states that the new wall-mounted air conditioning units were "almost identical to air condition units that had been similarly placed on the exterior wall of Defendant's building." (*Id.* ¶ 22; *see also* Ex. 15 [Photographs].)

Mr. Georges states that, upon information and belief, he learned that Ms. Thomson "verbally accosted one of the contractors who was installing the new air condition units and told him again that he could not install the units without her permission, and threatened to spray him with a garden hose." (Georges Aff. ¶ 23.) Mr. Georges states that, nevertheless, the new air conditioning units were installed. (*Id.*)

Mr. Georges states that, on August 11 and 12, 2014, he received emails from Ms. Thomson demanding that installation of the wall-mounted air conditioning units cease and further writing: "You[] can build no structures 'WHATSOEVER' that may obstruct our air and light. Only the 'OWNERS OF AIR EASEMENTS' can build in the [] easement." (Georges Aff. ¶ 24, Ex. 16 [August 12, 2014 Email] at CLST_0097.) Ms. Thomson further wrote that the air conditioning units should

be placed on the roof of Plaintiff's building rather than mounted on the courtyard facing walls. (Georges Aff. ¶ 24, Ex. 16 [August 11, 2014 Email] at CLST_0098].)

Mr. Georges states that, on August 12, 2014, Mr. Bachner also received a letter from Defendant's then-attorney demanding that Plaintiff cease installation of the air conditioning units. (Georges Aff. ¶ 24, Ex. 17 [August 12, 2017 Letter].) Defendant's then-counsel further wrote:

> "As you know, my clients have strongly objected to the use of an air-conditioner in that space because it violated their easement rights. Among other things, air conditioners are noisy, generate smells and substantially deteriorates the air quality in the courtyard. My clients and their tenants have many windows that face directly into the courtyard and have continually complained about the impact such air-conditioners have on the quality of life.
>
> Additionally, your clients have not properly taken care of the wood flooring in the courtyard. Substantial water has leaked into that area, mold has formed and there is a dank improper smell in the courtyard by reason of such actions. These acts, as well, have violated their easement rights."

(*Id.*) Defendant's then-counsel suggested, like Ms. Thomson, that the air conditioning units should instead be placed on top of the roof of Plaintiff's building. (*Id.*)

Mr. Georges states that, on September 15, 2014, Plaintiff filed its complaint in the instant action. (Georges Aff. ¶ 24; *see also* Shore Affirm., Ex. 2 [Complaint].) The complaint alleges two causes of action. The first cause of action seeks an injunctive relief for the purposes of:

> (1) requiring CLST to remove any items that it or its agents, representatives or others acting on its behalf have placed in the Courtyard; (2) enjoining CLST and its agents, representatives and others acting on its behalf from entering the Courtyard for any reason[;] and (3) enjoining CLST and its agents, representatives and others acting on its behalf from making any other use of the Courtyard or taking any other actions to interfere with Plaintiffs use and enjoyment of the Courtyard.

(Complaint ¶ 27.) The complaint alleged a second cause of action for "Trespass to Land" and sought compensatory and punitive damages. (*Id.* ¶¶ 28-30.)

Mr. Georges states that on October 8, 2014, Defendant filed its answer. (Georges Aff. ¶ 26; *see also* Shore Affirm., Ex. 3 [Answer].) The answer asserted a counterclaim, which would appear, to seek an order for injunctive relief, that would require that Plaintiff "comply with its easement obligations and not interfere with CLST's easement rights including its air and view and enjoyment of the courtyard." (Answer ¶ 35.) Mr. Georges states that Plaintiff subsequently filed a reply to Defendant's counterclaim. (Georges Aff. ¶ 26.)

Plaintiff's counsel states that, following the filing of Defendant's answer with counterclaim, Plaintiff "commissioned a professional land surveyor to prepare a title survey of the 956 Madison Property." (Shore Affirm. ¶ 7; Ex. 7 [Title Survey].)

Mr. Georges states that several months later, around May 2015, he was informed by his building manager that Ms. Thomson had spoken to himself and Tomas Maier's store manager, who had "advised them that she owns the

Courtyard." (*Id.* ¶ 27.) Mr. Georges further states that, in July 2016, Ms. Thomson sent "harassing emails" to himself and his commercial tenants complaining of the air conditioning units and work being performed in the courtyard. (*Id.* ¶ 28.) Mr. Georges state that he was "advised later in 2016 of additional instances of Mrs. Thomson or other agents of Defendant illegally accessing the Courtyard." (*Id.* ¶ 29.) Mr. Georges further states that, on February 27, 2017, he received another "harassing email" from Ms. Thomson "claiming, amongst other things, a right to access the Courtyard, and threatening to turn off Plaintiff s retail tenants air condition units." (*Id.* ¶ 30.)

At around the time that Mr. Georges received this last email, the Court had recently allowed Defendant's third attorney of record to withdraw as counsel. (See Seq001 Order [NYSCEF Document No. 28].) The Court's withdrawal order of December 21, 2016—which the Court signed after working out a detailed settlement agreement between Defendant and its counsel during a conference on that day—stayed the action for 120 days to allow Defendant to retain new counsel. (*Id.*)

On July 18, 2017, this Court conducted a status conference on the record. (Shore Affirm., Ex. 10 [July 18, 2017 Transcript].) At said conference, Mr. Thomson appeared with an attorney, who stated that he was Defendant's general counsel, and that Defendant was in the process of interviewing litigation counsel.

The Court noted that it had informed Defendant at the last conference that, as a limited liability company ("LLC"), Defendant was required to be represented by an attorney and could not proceed pro se. The Court stated that it was scheduling the Defendant's deposition for August 16 and 17, 2017, that Defendant was required to appear at the deposition with counsel, and that depositions could not be adjourned without the Court's approval. The Court further stated: "If the defendants fail to appear on that date, the Court will strike the Answer of the defendant and grant an inquest. It's as simple as that." (*Id.* at 4:16-18; *see also id.* at 5:18-6:20 [Mr. Thomson confirming that he understood the consequences of failing to appear for deposition with an attorney].)

Mr. Georges states that, on the evening of August 15, 2017, he received an email from Ms. Thomson—also addressed to his attorneys—stating that "[w]e can't find an attorney to do deposition tomorrow so they are hereby cancelled." (Georges Aff. ¶ 32, Ex. 22 [August 15, 2017 Email] at 4.) Ms. Thomson further stated that: "Because attys. fail to do as Judge Kalish ordered (resolute), starting at Midnight tonight, August 15, 2017[,] you can no longer operate A/C units in CLST owned Estate Title Interest of Possessions and Demands Whatsoever zone." (*Id.* at 3 [emphasis in original].)

Mr. Georges states that notwithstanding Defendant's unilateral canceling of its deposition, he appeared for Defendant's deposition at his attorneys' office the

next day "in the hope that Defendant would reconsider and that the depositions would go forward." (Georges Aff. ¶ 33.) Mr. Georges states that neither Mr. or Ms. Thomson appeared for their Court-ordered depositions. (*Id.* ¶ 34.)

Mr. Georges states that, instead, he received a call advising him that Defendant had entered the courtyard and turned off the air conditioning units being used by Plaintiff's commercial tenant, Tomas Maier. (Id. ¶ 35.) Mr. Georges states that, in addition, he received a copy of a notice posted on Tomas Maier's entrance door that reads in part: "Effective today, this will serve to notify Tomas Maier that the A/C Units, illegally installed in CLST's titled air zone (the rear inner court) have been turned off and can no longer run in the restrictive air zone, entire inner court space." (Georges Aff. ¶ 35, Ex. 23 [Shut-Off Notice].)

Mr. Georges states that he also received an email from Defendant on that same morning advising him that the air conditioning units had been turned off and that Tomas Maier had been notified. (Georges Aff. ¶ 37, Ex. 24 [First Shut-off Email].) Said email further stated:

> "CLST advised Tomas Maier, CLST [] will allow units to run thru the summer season, so long as Mr. Steven Georges agrees to remove units to roof as soon as summer season ends.
>
> ...
>
> My husband and I [are] willing and ready to work hard to end the dispute and wrongly filed suit without cause. The only hold up are confused attorneys, providing flawed opinions on ownership title."

(First Shut-Off Email.)

Mr. Georges states that, roughly two hours after the above email was sent, Ms. Thomson sent him a second email, stating that a representative of Tomas Maier and her agreed to allow the subject air conditioning units to be operated "so not to interrupt business operations." (Georges Aff. ¶ 39, Ex. 25 [Second Shut-Off Email].) The second email further stated:

> "It was explained that 956 Madison owner, Mr. Steven Georges, by copy, will have to agree to cease operation of units, deck, drains and exhaust by end of summer season 2017.
>
> Mr. Steven Georges, it's time to end your attorneys declared 'MOOT' suit without cause. We committed no crime and my husband will never sign any Licensed Agreement for A/c units.
>
> . . .
>
> You, your attys and engineers have officially bankrupted our business this month. I can't afford any atty., to defend a wrongly filed matter of 956's atty [] and no defense atty. wants to pick it up as it is a legal mess of flawed legal opinions."

(Second Shut-Off Email.)

Mr. Georges states that, on August 18, 2017, Defendant sent an email to his attorney, copying himself and representatives of Tomas Maier. (Georges Aff. ¶ 40; *see also* Shore Affirm., Ex. 12 [August 18, 2017 Email].) Said email informed Plaintiff's attorney, "[u]nits are being shut off in the morning" and "[a]ny business interruption will be as a direct result of Steven Georges who caused Carl and I so

much unnecessary stress and wasted monetary reserves . . . ." (August 18, 2017 Email.)

Mr. Georges states that, as a result of Defendant's "self-help" actions, Plaintiff moved by order to show cause for a temporary restraining order against Defendant, thereby initiating the first of the two instant motions before this Court ("Motion Seq. 002"). (Georges Aff. ¶ 41.)

On August 21, 2017, Mr. Georges appeared with Plaintiff's attorney on said order to show cause (Seq. 002), and Ms. Thomson appeared without an attorney to represent Defendant.

The Court granted Plaintiff's request for a temporary restraining order and stated the following on the record:

> "[U]nder the circumstances of this case, since the defendant has been seeking self help, so to speak, the only way the Court believes that we can keep the status quo, until I can determine who is the rightful owner, I guess, of this particular space, I am going to restrain the defendant from entering that courtyard and in any way hampering or infringing upon the rights of your tenants by turning off the air conditioning or doing anything of that nature."

(August 21, 2017 Conference Tr. at 41:16-24.)

In addition, the Court adjourned the motion for argument on the preliminary injunction and—once again—stressed to Defendant's officer that Defendant was required by law to be represented by an attorney. In addition, with regard to the deposition, the Court noted that it did previously indicate that it would strike

Defendant's answer if Defendant did not appear for the deposition scheduled for August 16 and 17. (August 21, 2017 Conference Tr. at 5:07-15.) On this point, Plaintiff's counsel stated that it intended to file a motion to strike the answer based on Defendant's failure to appear for a deposition (*id.* at 6:21-7:03, 40:19-25), and the Court offered Defendant one final chance to retain an attorney and undergo a deposition, stating:

> "And I am going to certainly consider the issue of the deposition. So if you intend to have this deposition before you return to court, the Court will allow it, even though you didn't do it the first time.
>
> Remember, if you don't have that deposition beforehand or you don't work something out with Mr. Shore with an attorney, this Court will simply grant what he is asking."

(*Id.* at 46:24-47:06.)

On September 25, 2017, Plaintiff initiated the second of the two instant motions ("Motion Seq. 003") when it moved by order to show cause for an order: (1) striking the answer, pursuant to CPLR 3126; and (2) granting summary judgment, pursuant CPLR 3212. The motion ultimately sought an order permanently enjoining Defendant from entering the courtyard and otherwise taking actions that interfere with Plaintiff's use and enjoyment of the courtyard. (Shore Affirm. ¶ 1.) Plaintiff's counsel stated that "Plaintiff, for purposes of this motion, is waiving its claim for monetary damages." (Shore Affirm. ¶ 2.)

Defendant did not file papers in opposition to either Motion Seq. 002 or Motion Seq. 003.

On October 23, 2017, Mr. Georges appeared with Plaintiff's attorney for oral arguments on Motion Seq. 002 and Motion Seq. 003, and Ms. Thomson and Mr. Thomson appeared without an attorney present to represent Defendant.

The Court noted that, at the previous conference on August 21, 2017, it had instructed Ms. Thomson that Defendant was required to be represented by counsel and that "without a lawyer present in court, the Court would obviously in effect grant the application of the plaintiff. In effect on default, I'm going to strike the answer of the defendant." (October 23, 2017 Oral Arg. Tr. at 3:04-4:14.)

Ms. Thomson stated that "we have worked like three months with a new attorney" who was employed by a bank, but that in the past week she and her husband had been unable to contact said attorney. (*Id.* at 7:05-9:08.) The Court asked Ms. Thomson to provide a phone number for the attorney, stating that it would call the attorney from the courtroom to confirm that he was Defendant's attorney. (*Id.*) Ms. Thomson and Mr. Thomson were unable to provide a phone number to the Court. The Court noted that the supposed attorney had not filed a notice of appearance, and that "[i]n all likelihood he's not allowed to practice law privately. Therefore, he may have been interested in giving you some help privately, advice, but he wasn't going to come into court and represent you." (*Id.*)

As such, the Court stated that, notwithstanding Defendant's prior failures to timely retain counsel in compliance with the general law and this Courts orders, the Court would give Defendant an additional fifteen (15) days to retain counsel and serve papers responsive to the instant motions, after which the Court would issue a decision on said motions. (*Id.* at 58:21-60:15.)

Plaintiff's counsel stated Plaintiff had presented a prima facie case in its instant motion papers, entitling Plaintiff to an order striking Defendant's answer and granting summary judgment on "both our claim for an injunction, given what's happened, given the deed language, we think it's clear, . . . but also on their counterclaim claiming that we're not entitled to have air units on the outer wall of our building facing the courtyard . . . ." (*Id.* at 12:13-13:12.)

Plaintiff's counsel further referenced the relevant language from the 1881 document that granted the easement, and argued that a literal reading of said language results in two conclusions: "[T]hat that covenant, one, does not give defendant or any of their agents [the] right to access or go on that strip. And, two, that that covenant does not prevent us from putting air units on the outer wall of our building, because it's not a structure, a building built upon the courtyard and it does not obstruct their light and air." (*Id.* at 22:24-23:06.)

The Court—although noting that an attorney was not present for Defendant—asked Ms. Thomson and Mr. Thomson to explain their position, and the following colloquy took place:

> MS. THOMSON: Our position is he is subject to what -- everything you said and we agree. But it also says whatsoever. If there is an itsy, bitsy, weeny chance that a structure -- A structure is anything you put together, your Honor. There is any itsy, bitsy chance it's going to obstruct, he can't have it. But my -- my important –
>
> THE COURT: Show me where it says it in this thing. I'm going by what it says.
>
> ...
>
> MS. THOMSON: Half way down, together with.
>
> THE COURT: It says together.
>
> MS. THOMSON: Together with, just about the subject area.
>
> THE COURT: Let me read this for a second.
>
> MS. THOMSON: Yes.
>
> THE COURT: (Examining). So, I see you have a translation. In your translation, just so we're clear, you translated the document to the extent -- to some extent exactly the same, more or less, what the plaintiff said. What is the specific language that you think –
>
> MS. THOMSON: Well, it says together with tenement. A tenement, sir, sets up a landlord's servient land and a dominant estate title, it says right below it, about the reversions.
>
> See in 1881 we sold his whole property to him. Not just this ten foot back, it's our ten foot setback. But we sold him the whole property where his land is. And at that time we reverted back. It just said ten foot setback. It's exactly 30 feet wide as our building, ten feet back from our building, together with

the tenement. He's the landlord. I'm the tenant in possession. And we know that because on his modern day deed, the last paragraph, first page states there is a tenant in possession. And in this deed it states that we are the tenant.

THE COURT: You're the tenant of what?

MS. THOMSON: In possession of the tenement. We are the party of the first part. We own that tenement back there. It's a tenement, not an easement of air and light. A tenement is different. Let me -- I wanted to clear this up, which will really help the Court and the plaintiff and the defense, which is I learned there are two ways to enter land owned by others. One is a right-of-way easement, which we were not issued. He is completely correct about that. But what we were issued, if you read the words slowly and look them up and understand them, we were issued together with tenement, and it explains that we are the tenants. We get the hereditaments and appurtenances with our tenement.

THE COURT: So, you're saying in modern day English, in modern day English --

MS. THOMSON: No. No. I'm speaking in the King's law.

THE COURT: I'm asking you now, I want you to translate for me in modern day English, what are you saying that you own?

MS. THOMSON: Together with tenement. Let me read it.

THE COURT: Don't tell me together with tenement. Just tell me in plain English what is your position.

MS. THOMSON: Well, I have to read it, because it's a little easier to read it to you than just to recite it.

THE COURT: No. I can read the old English. I'm asking you to translate for me, what do you say you own.

MS. THOMSON: In 1881 we reverted back that ten foot strip of land by 30.

THE COURT: What do you mean, you reverted back?

MS. THOMSON: Well, it was an old King's law back in 1881 and this is how they did a tenement, your Honor. If you read, they don't even make these -- these old deeds anymore, because it's not fair to the owner of the properties. But when the King ruled in 1881, our laws didn't come into effect I learned until about 1924. This was written off the King's law.

THE COURT: Okay. Ms. Thomson, it seems to me that Ms. Page owned the property and she sold her property.

MS. THOMSON: No. She reverted back a piece of it though.

THE COURT: She sold property for a certain amount of money.

MS. THOMSON: Yes.

THE COURT: And what she then did was she said, in so many words, to protect myself --

MS. THOMSON: That's correct.

THE COURT: -- to protect myself, I need some space between the property that I'm selling and my property.

MS. THOMSON: That's correct.

THE COURT: And said okay. Nobody can build in this particular space. You own it, 'cause you bought it from me, but you can't build in there because I want light and air to come into my building. She could have said, I'm not selling you this part of the property and could have sold ten feet out, but she didn't.

MS. THOMSON: I understand that.

THE COURT: She sold that piece of property to the other person. I assume to Falk. Falk buys it.

MS. THOMSON: Okay. You have to understand reversions though.

THE COURT: Reversion of what?

MS. THOMSON: Reversion of the land, Your Honor, together with tenement, all in singular.

THE COURT: Reversion of what? Reversion means in English something goes back to somebody.

MS. THOMSON: That's right. The landlord -- I didn't finish speaking before. There are two ways to enter land owned by other. And the other way -- It's not a right-of-way easement. The other way to do it is to issue a reversion back to yourself of a tenement, a little space of air that he owns. I become the tenure and he becomes the landlord servient land. That's what it says if you really study the words. And he didn't even bring this up to you, so we know he's trying to pretend it's not -- Let me finish speaking, please.

THE COURT: He hasn't said a word.

MS. THOMSON: I know. He's ready. But, you know, his deed says there is a tenant in possession.

THE COURT: Okay.

MS. THOMSON: That's us. It says it right here. I can show it to you. I don't have an attorney.

. . .

MR. SHORE: I think the language she's referring to refers to what's part of the sale. They're selling this. They're selling that, together with reversions and everything. They're getting everything subject to –

MS. THOMSON: No.

MR. SHORE: Where the word subject to comes us is in the very language I highlighted. So, whatever she's talking about has nothing to do with that prior owner of 19 East 75th keeping anything. Everything was sold to -- to Ms. -- I want to make sure I get the right name.

THE COURT: Falk.

MR. SHORE: -- Ms. Falk subject to the language I highlighted. So, I have no idea what she's trying to say, but I don't believe what she's pointed to has anything to do with any rights that were withheld by the seller of the property.

MS. THOMSON: Oh, lord, help us. In 18 --

THE COURT: Hold on. Give me a second. Who is James Kerney?

MR. SHORE: I'm trying to understand this. I mean, could I please say something?

THE COURT: I think James Kerney --

MR. SHORE: He sold it to Ms. Page. It's just like one of those like duplicative and kind of saying we're selling this, which we got from Mr. Kerney.

THE COURT: I think what Kerney had, Kerney owned the tenements, hereditaments, appurtenances, and anything that belonged to him he sold.

MR. SHORE: To Ms. Page who is now selling --

THE COURT: Who Page is now selling it to Falk.

MR. SHORE: Exactly.

THE COURT: That's the way I read it.

MS. THOMSON: No.

...

MS. THOMSON: You may give it all to them, but the fact is we still have the title here in front of us. And they have not proven it's not our tenement. I'm the tenant in possession, and it says it if you read it all.

THE COURT: Well, let me put it this way.

MS. THOMSON: But you can order them, but in law my title is indefeasible. You can't rule it away. No attorney can ask for it. No warrior in 1881 can come steal it. You can issue it, but it will be a wrong issuance. It's my title to go out there. It's my tenement. It's not Mr. Georges'. He owns the land. He's the landlord with a tenant in possession. Like any tenement uptown where somebody owns the building, somebody else possesses, is in possession of the space, and that's the important word. We're in possession. He possesses. You want to be in possession, your Honor, that's all I'll say. I'll end my argument. I won't waste any more of your time. And you may issue whatever you want, because no matter what you issue, I still have my title. And I am not going to obey a wrongly issued eviction based on an easement when this -- when the deed says a tenement. And a tenement situation, it sets up a landlord tenement.

THE COURT: Well, let me just read something to you so you know.

MS. THOMSON: Thank you.

THE COURT: For whatever it's worth. Have a seat.

MS. THOMSON: Okay.

THE COURT: The land to which an easement is attached is called the dominant tenement. That's what it is. It's the land. The land upon which a burden or servitude is laid is called the [servient] tenement. So, I'm not really sure what you're referring to. These words have certain meanings. Clearly -- clearly we're dealing with an easement, notwithstanding that you think it's not an easement.

MS. THOMSON: I know, but where in the deed does it say an easement? You show me that word.

THE COURT: I just gave you the definition of the word.

MS. THOMSON: It doesn't matter. The same kind of definition applies to tenement as well, your Honor. It's very similar.

THE COURT: You're quoting to me the King's language, and I'm just telling you what -- what the terms mean.

> MS. THOMSON: Okay. Well, you can't discuss an easement today when the titled words state a tenement. I've been saying this. We have been going on for four years. We can't get it done because all the attorneys use the improper terminology. He called it a yard. May I finish? He called it his yard. It is not the proper terminology is an inner court where people assemble. There are two titles back there. So, you can issue it away, but it doesn't matter if you do. I still have my title of tenement.

(*Id.* at 23:19-37:10.)

DISCUSSION

I. The Court Treats the Instant Motions by Plaintiff as Unopposed by Defendant.

As a preliminary matter, this Court notes that an a limited liability company (LLC) "may only be represented by an attorney and not by one of its members who is not an attorney admitted to practice in the State of New York." (*Michael Reilly Design, Inc. v. Houraney*, 40 A.D.3d 592, 593-94 [2d Dept. 2007].) Defendant failed to retain counsel for its August 16, 2017 deposition and it has not retained counsel since, despite *repeated* instructions from this Court to do so. As such, the Court grants Plaintiff's instant motion for a permanent injunction unopposed—as the Court warned Defendant it would do if Defendant did not timely retain counsel.

However, notwithstanding the Court granting the instant motion for a permanent injunction unopposed, the Court finds that Plaintiff has established, on the merits, grounds to grant the permanent injunction pursuant to CPLR 3126 and 3212.

II. The Court Grants the Branch of Plaintiff's Motion Seq. 003 for an Order Striking the Answer.

CPLR 3126 states as follows:

"If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or

2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or

3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party."

"The nature and degree of the penalty to be imposed pursuant to CPLR 3126 lies within the sound discretion of the Supreme Court." (*Schiller v Sunharbor Acquisition I, LLC*, 152 AD3d 812, 813 [2d Dept 2017].) "The striking of a pleading may be appropriate where there is a clear showing that the failure to comply with discovery demands or court-ordered discovery is willful and contumacious." (*Brandenburg v County of Rockland Sewer Dist. #1*, 127 AD3d

680, 681 [2d Dept 2015].) The courts however are encouraged to provide litigants with reasonable latitude before imposing the "ultimate sanction" of striking a pleading. (*See CDR Creances S.A.S. v Cohen*, 62 AD3d 576, 577 [1st Dept 2009].) Moreover, there is a strong preference in this state that, wherever possible, actions be decided on their merits and a discovery sanction lesser than striking a pleading be imposed. (*See Ayala v Lincoln Med. & Mental Health Ctr.*, 92 AD3d 542 [1st Dept 2012].)

Nonetheless, the bar and bench has been repeatedly admonished by the Court of Appeals and the Appellate Division that discovery non-compliance has an insidious effect on the legal system and should not be tolerated:

> "As this Court has repeatedly emphasized, our court system is dependent on all parties engaged in litigation abiding by the rules of proper practice. The failure to comply with deadlines not only impairs the efficient functioning of the courts and the adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice Law and Rules and a culture in which cases can linger for years without resolution. Furthermore, those lawyers who engage their best efforts to comply with practice rules are also effectively penalized because they must somehow explain to their clients why they cannot secure timely responses from recalcitrant adversaries, which leads to the erosion of their attorney-client relationships as well."

(*Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 81 [2010] [internal citations omitted].) To this end, as Chief Judge Kaye explained, CPLR 3126 was designed to give the Supreme Court the tools to combat discovery abuse:

> "If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity. Indeed, the Legislature, recognizing the need for courts to be able to command compliance with their disclosure directives, has specifically provided that a 'court may make such orders ... as are just,' including dismissal of an action."

(*Kihl v Pfeffer*, 94 NY2d 118, 123 [1999], quoting CPLR 3126.)

In the instant case, this Court, on July 18, 2017, literally told the Defendant: "If the defendants fail to appear on that date, the Court will strike the Answer of the defendant and grant an inquest. It's as simple as that." (*Id.* at 4:16-18; *see also id.* at 5:18-6:20 [Mr. Thomson confirming that he understood the consequences of failing to appear for deposition with an attorney].) Defendant never contacted the Court and opposing counsel reasonably in advance of the deposition to explain why it was having trouble retaining counsel. Nor did Defendant reasonably explain to the Court why it could not retain counsel. Rather, Defendant unilaterally chose not to show up for its deposition and decided to turn-off the air conditioning units in the courtyard.

Even worse, Defendant claimed a right to turn-off the air conditioning units "[b]ecause attys. fail to do as Judge Kalish ordered (resolute) . . . ." (Georges Aff., Ex. 22 [August 15, 2017 Email] at 3.) To be clear, this Court never ordered Plaintiff that it could not run its air conditioning units in the courtyard, and the Court is unaware of any occasion where Plaintiff has failed to comply with its

orders. In addition, this Court has ***never*** suggested that there would ever be a justifiable basis for either party to resort to self-help. For Defendant to claim authority from the Court to use self-help is disingenuous and contumacious.

Notwithstanding this disregard of the Court's order and Defendant's taking of self-help, the Court, on August 21, 2017, granted Defendant an additional opportunity to retain counsel and to make arrangements to have Defendant's deposition go forward. (August Conf. Tr. at 46:24-47:06.)

After Defendant failed to avail itself of that opportunity, the Court: (1) noted the prior opportunity it gave Defendant to retain counsel; (2) noted that Defendant still had not retained counsel; and (3) gave Defendant an additional fifteen days to retain counsel and submit opposition to the instant motions. As this Court writes, Defendant remains unrepresented.

As such, the Court finds that the discovery non-compliance by Defendant, paired with its resort to self-help, has been willful and contumacious, and that striking the answer is warranted. (*Oasis Sportswear, Inc. v Rego*, 95 AD3d 592 [1st Dept 2012] ["[T]he repeated failure of defendants to produce, despite express orders to do so, amply demonstrates wilfulness and the lack of any reasonable excuse for such failure."]; *see also Menkes v Delikat*, 148 AD3d 442 [1st Dept 2017] [affirming dismissal of complaint, pursuant to CPLR 3126, where plaintiff

failed "to respond to a simple demand for documentary discovery, as directed in five compliance conferences over the course of a year and one-half"].)

III. Plaintiff Is Entitled to Summary Judgment, on the Merits, Dismissing Defendant's Counterclaim and Granting Plaintiff a Permanent Injunction against Defendant.

It is well established that "[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law." (*Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551, 553 [1st Dept 2012] [internal quotation marks and citation omitted].) "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted].) If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. (Rotuba Extruders v Ceppos, 46 NY2d 223, 231 [1978]; Grossman v Amalgamated Hous. Corp., 298 AD2d 224, 226 [1st Dept 2002].)

A. The Court Finds that Subject Language Creates a "Light and Air" Easement Burdening Plaintiff's Property for the Benefit of Defendant's Property.

As a general matter, this Court is asked to determine what the following language from an 1881 document—executed by the parties predecessors in interest—means for the respective property rights and restrictions of the parties:

> "And the said Henrietta A. Falk for herself her heirs executors Doth hereby covenant grant promise and agree to and with the said Harriett E. Page her heirs and assigns that a strip of land in length from East to West Thirty (30) feet in width from North to south Ten (10) feet along the Southerly side of the rear of the lot of land above described and hereby conveyed or intended so to be and forming part of said lot shall not nor shall any part of the said strip be built upon by any building or structure whatsoever which may obstruct the light or air of the buildings of the said Harriett E. Page her heirs or assigns now or hereafter to be erected on her or their certain lot of land now known as number 19 East 75th Street which adjoins said strip of land on the Southerly side thereof."

(Shore Affirm., Ex. 8 [Liber 1616 Deed] at 130.)

For reasons to be explained, the Court finds that said language creates an easement burdening Plaintiff's property and for the benefit of Defendant's property. The Court finds that said easement restricts Plaintiff from building a building or structure in the courtyard that obstructs Defendant's property from receiving light and air. Said easement does not, by any interpretation, restrict Plaintiff from installing air conditioners on the walls of its building facing the courtyard, and neither does the easement grant Defendant the right to enter upon and / or make use of the courtyard.

According to statute, "[e]very instrument creating, transferring, assigning or surrendering an estate or interest in real property must be construed according to the intent of the parties, so far as such intent can be gathered from the whole instrument, and is consistent with the rules of law." (Real Property Law § 240.) "[A] court will only look outside the four corners of the deed to establish the intent of the parties when, unlike here, that instrument is found to be ambiguous." (*Pepe v Antlers of Raquette Lake, Inc.*, 87 AD3d 785, 787 [3d Dept 2011].) If, however, a deed is found to be ambiguous, the ambiguity is to be construed in favor of the grantee and against the grantor, and extrinsic evidence may be considered to clarify the ambiguity. (*See Carter v Heitzman*, 198 AD2d 649, 649 [3d Dept 1993]; *Town of Fowler v Parow*, 144 AD3d 1444, 1447 [3d Dept 2016].) At the same time, courts must also be mindful that "the law has long favored free and unencumbered use of real property, and covenants restricting use are strictly construed against those seeking to enforce them." *(Fleetwood Chateau Owners Corp. v Fleetwood Garage Corp.*, 153 AD3d 1238, 1239 [2d Dept 2017].)

Here, the Court finds that subject 1881 document unambiguously creates a light and air easement burdening Plaintiff's property for the benefit of Defendant's property, such that "any building or structure whatsoever" could not be built on the strip of land—now the courtyard—"which may obstruct the light or air of the

buildings" of Defendant's property. (Shore Affirm., Ex. 8 [Liber 1616 Deed] at 130.)

Ms. Thomson's reference to an earlier portion of the deed does not change the Court's finding. During oral argument, Ms. Thomson referenced the following portion of the deed:

> "Together with all and singular the Tenements and hereditaments and appurtenances thereunto belonging or in any wise appertaining and the reversion and reversions and remainder and remainders rents issues and profits thereof And also all the estate right title interest curtesy and right of curtesy property possession claims and demand whatsoever as will in law as in equity of the said Parties of the first part of in and to the same and every part and parcel thereof with the appurtenances To have and to hold the above granted bargained and described premises with the appurtenances unto the said party of the second part her heirs and assigns to her and their own proper use benefit and behoof forever."

(Shore Affirm., Ex. 8 [Liber 1616 Deed] at 129-30.)

The above section of the deed preceded a portion of the deed that described the bargained-for premises with its boundaries and referenced the owner of the property prior to the seller. As such this portion of the deed was reciting the bundle of property rights that Defendant's predecessor in interest granted Plaintiff's predecessor in interest. It does **not** grant any rights to Defendant.

The conclusion that the 1881 document creates only a light and air easement—and nothing more—is further buttressed by the fact that Defendant's current deed refers to its property rights to the courtyard as "an easement of light and air." (Shore Affirm., Ex. 6 [Defendant Deed] ["TOGETHER with easement of

light and air over a strip of land in length, East to West, 30 feet and in width from North to South, 10 feet, adjoining said premises on the North, as the said easement is granted in and by a certain deed recorded in the Office of the Register of the City and County of New York in Liber 1616 of Conveyances at page 129."].) In addition, the fact that Plaintiff's building is the only structure with a door to access the courtyard—and that one must climb through a basement window to access the courtyard through Defendant's property—further suggests that the intent between the parties is that only Plaintiff may enter upon and make use of the courtyard.

Finally, that Defendant's answer with counterclaim—which was served when Defendant was represented by counsel—asserts "easement rights including its air and view and enjoyment of the courtyard" and demands that Plaintiff comply with its "easement obligations" further militates in favor of the Court finding that Plaintiff's rights to the courtyard are that of an easement for light and air, and nothing more.

B. Neither Plaintiff's Mounting of Air Conditioning Units on its Courtyard Facing Wall, Nor Its Maintenance of a Wooden Deck Violate the 1881 Easement.

The 1881 deed is also unambiguous in that it does not intend to restrict Plaintiff from mounting air-conditioning units on its building's courtyard-facing walls. The Court finds that 1881 document is unambiguous in that it contemplates restricting Plaintiff from building a "building or structure" on the designated

"strip" of land (i.e. now the courtyard) "which may obstruct the light or air of the buildings" on Defendant's property. As such, Plaintiff would only breach its obligations under the easement if Plaintiff: 1) built 2) a "building or structure"; 3) on the designated "strip" (i.e. the courtyard); and 4) "which may obstruct the light or air of the buildings" owned by Defendant.

Here, the "structure" that Defendant complains of is not on the strip of land, but rather attached to the wall of Plaintiff's building. Moreover, that the deed references a "building or structure" contemplates an edifice that would cast a shadow on Defendant's property and occupy the open airspace of the courtyard that Defendant previously enjoyed (i.e. cutoff the Defendant's building from its previous access to the light and air). Here, the mounted air conditioners cast virtually no shadow and occupy a very small portion of the courtyard's airspace.

To the extent that Defendant feels that the air conditioning units violate its easement by allegedly blowing hot air into the courtyard, the easement does not restrict Plaintiff from blowing hot air into the courtyard from its building. The easement merely restricts Plaintiff from building a "building or structure" on the strip of land which "may obstruct the light or air of the buildings" owned by Defendant. The easement does not restrict what uses the Plaintiff may make of the buildings on its property but not located on the designated "strip"; and neither does it say that Plaintiff may not do *anything* that may affect the air *quality* in the

courtyard. To make such a restriction, there would need to be explicit language restricting such activities and uses.[5]

Likewise, the Court finds that, for the same reason, Plaintiff's wooden deck does not violate Plaintiff's easement obligations, as the wooden deck does not obstruct Defendant's buildings from accessing light and air.[6]

C. The Court Finds that a Permanent Injunction against Defendant is Warranted.

A permanent injunction is a drastic remedy which may be granted only where the plaintiff demonstrates that it will suffer irreparable harm absent the injunction." (*Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 403, 408 [2d Dept 2009].) "Injunctive relief is to be invoked only to give protection for the future[,] to prevent repeated violations, threatened or probable, of the plaintiffs' property rights." (*Id.* [internal quotation marks and emendation omitted].)

"To sufficiently plead a cause of action for a permanent injunction, a plaintiff must allege that there was a violation of a right presently occurring, or threatened and imminent, that he or she has no adequate remedy at law, that

---

[5] Although modern air conditioners—similar to the subject air conditioning units in this case—had not yet been invented when Ms. Faulk and Ms. Page executed the easement agreement in 1881, the problems and disputes that arise from the ventilation of hot and noxious air in tight urban spaces have existed throughout history. (*See e.g. Mulligan v Elias*, 12 Abb Pr NS 259, 259 [NY City Ct, Special Term 1872] [enjoining the "carrying on of a factory in such manner as to emit a sulphurous gas which is occasionally borne by the winds over the neighboring premises of the plaintiff, destroying vegetation, and compelling the closing of windows, and irritating and inflaming the throats of those who breathe it"].)

[6] Because this Court finds that the subject easement does not restrict Plaintiff from maintaining wall mounted air conditioning units and a wooden deck, this Court does not address Plaintiff's argument that the prior easement rights have been lost to adverse possession. (*See* Plaintiff Memo of Law at 12-14.)

serious and irreparable harm will result absent the injunction, and that the equities are balanced in his or her favor." (*In re Long Is. Power Auth. Hurricane Sandy Litig.*, 134 AD3d 1119, 1120 [2d Dept 2015].) Plaintiff establishes sufficient evidence for each element on the instant motion.

As discussed, the 1881 document does not grant any right to Defendant to use or make use of the courtyard. It is unambiguous in that the easement only benefits Defendant's property by restricting Plaintiff from: 1) building; 2) a "building or structure"; 3) on the designated "strip" (i.e. now the courtyard); 4) that "may obstruct the light or air of the buildings" owned by Defendant. Accordingly, Defendant can derive no right from the easement to go on and / use the courtyard.[7]

Defendant however has repeatedly trespassed on the courtyard—via its officer, Ms. Thomson—and allowed construction workers acting under its supervision to trespass upon the courtyard and leave debris therein. In addition, Defendant has repeatedly asserted ownership rights to the courtyard and told those working in the courtyard with the permission of Plaintiff, that they were on Defendant's property. Even as this case progressed, Ms. Thomson brazenly went into the courtyard and turned off the air conditioning units of Plaintiff's

[7] Tellingly, when Defendant was represented by attorneys, Defendant's then-counsel never attempted to assert such a right.

commercial tenant. As such, Defendant has repeatedly violated Plaintiff's property rights and threatens to violate Plaintiff's property rights in the future.[8]

Defendant's willingness to assert property rights over Plaintiff's premises that it does not have, to trespass upon Plaintiff's land, and to engage in "self-help," shows that Plaintiff will suffer irreparable harm if Defendant is not enjoined from trespassing on Plaintiff's courtyard. (*State v Johnson*, 45 AD3d 1016, 1020 [3d Dept 2007] [affirming issuance of permanent injunction where "overwhelming evidence established defendant's trespasses"]; *Long Is. Gynecological Services, P.C. v Murphy*, 298 AD2d 504, 504 [2d Dept 2002] ["The threat of continuing trespass entitles a property owner to injunctive relief where irreparable injury may result."]; *see also McMullan v HRH Const., LLC*, 38 AD3d 206, 206 [1st Dept 2007] [affirming issuance of preliminary injunction where the plaintiff presented evidence of the defendant's "repeated interference with plaintiffs' use and enjoyment of the premises by, inter alia, leaving thereon construction materials and debris, removing fences, obstructing an exit from plaintiffs' apartment"].)

Lastly, the equities clearly balance in favor of Plaintiff. Defendant has no property right to the courtyard other than—as discussed exhaustively—its light and

[8] Although not entirely clear, it would appear that Ms. Thomson has also threatened to not obey an order of this Court enjoining her from trespassing upon the courtyard. (*See* October Oral Arg. Tr. at 35:20-24 ["And you may issue whatever you want, because no matter what you issue, I still have my title. And I am not going to obey a wrongly issued eviction based on an easement when this -- when the deed says a tenement."].)

air easement. This easement gives Defendant no right to enter the courtyard. As such, there is no injury caused by restricting Defendant from doing something it never had a right to do. Plaintiff on the other hand has, for four years, been denied the peaceable enjoyment of its property rights, and will likely be further prevented from peaceable enjoyment if the instant permanent injunction is not granted.

Moreover, it bears noting that while Defendant claims that it is being injured by the noise and hot air emanating from Plaintiff's wall mounted air conditioners, photographs show virtually the same air conditioning units mounted on Defendant's wall. (*See* Georges Aff., Ex. 15 [Photographs]; *see also* August Oral Arg. Tr. at 33:07-35:13 [discussing Defendant's air conditioning units].) As such, Defendant has presumably been inflicting the same sort of injuries on Plaintiff that Defendant claims it has been taking self-help measures to prevent. Accordingly, Defendant cannot in good faith assert a right to self-help to prevent these supposed injuries when it is engaging in virtually the same conduct and producing virtually the same injuries to Plaintiff.

As such, this Court finds that there is a sufficient basis for issuing a permanent injunction enjoining Defendant from entering the courtyard and otherwise taking actions that interfere with Plaintiff's use and enjoyment of the courtyard.

IV. Plaintiff Shall File a Note of Issue If It Intends to Pursue Its Claim for Damages.

On the instant motion, Plaintiff states, "The Complaint also requests monetary damages, but Plaintiff is not seeking monetary damages on this motion, as any such damages are impossible to calculate and would not provide an adequate remedy for Plaintiff." (Plaintiff Memo. of Law at 5.) While Plaintiff expressly states that it is waiving its claim for monetary damages for purposes of the instant motion, Plaintiff does not state that it waives its claim for monetary damages for purposes of the action—which would appear to dispose of the remainder of the action. Accordingly, if Plaintiff intends to pursue it claim for damages, Plaintiff must file a note of issue within twenty (20) days of this order.

CONCLUSION

Accordingly,

Upon Plaintiff having established: that Defendant has willfully and contumaciously failed to provide discovery by appearing for a deposition as directed by the Court on July 18, 2017 and on August 21, 2017; that Defendant took self-help; and that Defendant falsely claimed authority from this Court to take self-help; and

Upon Plaintiff having established as a matter of law that Defendant's light and air easement, as originally granted in an 1881 agreement between the parties'

predecessors in interest, does not restrict Plaintiff from maintaining a wooden deck or wall-mounted air conditioning units in its courtyard; and

Upon due deliberation having been had, and Plaintiff having established a violation of its property rights presently occurring, threatened and imminent, that it has no adequate remedy at law, that serious and irreparable harm will result absent the injunction, and that the equities are balanced in its favor; it is

ORDERED that the instant motion by Plaintiff 925 Madison Avenue, Inc., pursuant to CPLR 3126 and 3212, (Seq.003) to strike the answer and for summary judgment, with an order granting Plaintiff a permanent injunction, is granted; and it is further

ORDERED that Defendant's counterclaim is dismissed with prejudice; and it is further

ORDERED that Defendant CLST Enterprises, LLC and its agents, representatives and others acting on its behalf are hereby enjoined from entering the rear courtyard portion of the premises known as 956 Madison Avenue or from making any other use of the courtyard or taking any other actions to interfere with Plaintiff's use and enjoyment of the courtyard; and

ORDERED that the instant motion by Plaintiff, pursuant to CPLR 6301, for a preliminary injunction (Seq.002) is denied as academic; and it is further

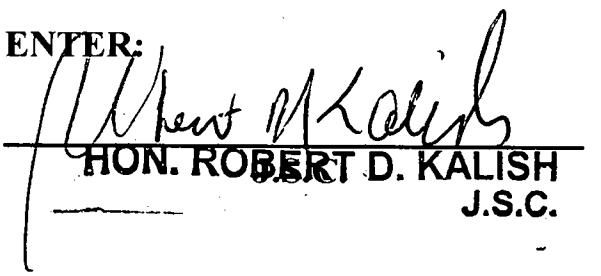
ORDERED that that the Clerk is directed to enter judgment in favor of Plaintiff, with costs and disbursements to Plaintiff as taxed by the Clerk; and it is further

ORDERED that Plaintiff—if it intends to pursue it claims for monetary damages—is directed to, within twenty (20) days of this order, serve a copy of this order with notice of entry upon Defendant via mail and upon the Clerk of the Trial Support Office (Room 158) and shall serve and file with said Clerk a note of issue and statement of readiness and shall pay the fee therefor, and said Clerk shall cause the matter to be placed upon the calendar for such trial on the issue of damages only.

This constitutes the decision and order of the Court.

Dated: December 12, 2017
New York, New York

ENTER:



HON. ROBERT D. KALISH
J.S.C.