

93 Bowery Holdings LLC v 89 Bowery Realty LLC
2018 NY Slip Op 31461(U)
July 3, 2018
Supreme Court, New York County
Docket Number: 150738/2017
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32**

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93 BOWERY HOLDINGS LLC,

Plaintiff,

**Index No. 150738/2017
Motion Seq: 004**

DECISION & ORDER

-against-

HON. ARLENE P. BLUTH

**89 BOWERY REALTY LLC, ACCESS SOLUTIONS
GROUP, HUA YANG INC, CONSOLIDATED
SCAFFOLD & BRIDGE CORP. a/k/a CONSOLIDATED
SCAFFOLDING, INC., MICHAEL KANG ARCHITECT,
PLLC, BRIAN O'CONNOR R.A., d/b/a GREEN
DESIGN and JOHN and JANE DOES 1-10,**

Defendants.
----- X

The motion by defendant 89 Bowery Realty LLC ("89 Bowery") for a preliminary injunction directing plaintiff to remove a sidewalk shed pending a trial is denied.

Background

Plaintiff and 89 Bowery own adjoining properties in Manhattan. Plaintiff operates a hotel on its property while 89 Bowery is in the process of constructing a new building. Plaintiff commenced this action and alleges that 89 Bowery unlawfully encroached on its property, that 89 Bowery is conducting illegal construction work and that the work is negatively affecting plaintiff's ability to run its hotel.

In the instant motion, 89 Bowery seeks a preliminary injunction directing plaintiff to remove a sidewalk shed (pursuant to RPAPL 871) that allegedly prevents 89 Bowery from continuing its construction project. 89 Bowery claims that plaintiff erected a sidewalk shed in

March 2018 that obstructs the entire frontage of 89 Bowery's property. 89 Bowery claims that there has been no work done on plaintiff's building since the sidewalk shed was installed.

89 Bowery contends that the sidewalk shed has delayed its construction work, including the installation of a gas sleeve which requires the excavation of the sidewalk in front of its property. 89 Bowery estimates that this task would only require two to three weeks of work and that the entire construction project is nearly finished.

In opposition, plaintiff claims that the relief sought in the instant motion is identical to 89 Bowery's counterclaims against plaintiff and is therefore improper. Plaintiff further contends that it was required to erect the sidewalk shed because it is replacing all of the windows at its hotel. Plaintiff acknowledges that the shed extends in front of 89 Bowery's property but claims that under the Building Code, the shed must provide protection for the specified area plus an additional 20 feet on both sides.

Discussion

"The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor" (*Nobu Next Door, LLC v Fine Arts Hous. Inc.*, 4 NY3d 839, 840, 800 NYS2d 48 [2005] citing CPLR 6301). "Entitlement to a preliminary injunction depends upon probabilities, any or all of which may be disproven when the action is tried on the merits" (*Destiny USA Holdings, LLC v Citigroup Global Markets Realty Corp.*, 69 AD3d 212, 216, 889 NYS2d 793 [1st Dept 2009] [internal quotations and citation omitted]).

Here, the motion for a preliminary injunction is denied because 89 Bowery asks for the same relief in this motion as it requested in its counterclaims asserted against plaintiff.

“Preliminary injunctions which in effect can determine the litigation and give the same relief which is expected to be obtained by the final judgment, if granted at all, are granted with great caution [and] only when required by imperative, urgent, or grave necessity, and upon clearest evidence, as where the undisputed facts are such that without an injunction order a trial will be futile . . . Such an injunction, if ever permissible in advance of final judgment, is plainly inappropriate unless the undisputed facts are such that a trial is futility. If there are motives to be probed and opposing equities to be weighed, there must be the searching scrutiny of a trial and the sanction of a judgment” (*Xerox Corp. v Neises*, 31 AD2d 195, 197, 295 NYS2d 717 [1st Dept 1968] [internal quotations and citations omitted]).

89 Bowery’s first counterclaim asks the court to remove the encroaching sidewalk shed because it prevents the completion of the construction project (*see* NYSCEF Doc. No. 126 at 23). That is the same request made here. 89 Bowery cannot obtain the ultimate relief it seeks in this case by moving for a preliminary injunction before discovery has begun.

Even if the Court were to consider the merits of 89 Bowery’s motion, 89 Bowery cannot show irreparable injury because it can be compensated with money damages for the alleged delays in completing its construction project (*WHG CS, LLC v LSREF Summer REO Trust 2009*, 79 AD3d 629, 630, 915 NYS2d 36 [1st Dept 2010] [holding that “Plaintiffs failed to establish irreparable injury, since they can be compensated by money damages”]). 89 Bowery failed to articulate why money damages would not be a proper mechanism to compensate it should 89 Bowery prevail on its counterclaims. In fact, 89 Bowery’s counterclaims suggest that it has suffered at least \$100,000 in damages as a result of plaintiff’s purported interference with its construction project (NYSCEF Doc. No. 126 at 25-26).

Summary

For some reason, the parties were unable to work together to figure out a construction schedule so that plaintiff could do its window replacement and 89 Bowery could finish its project (which according to 89 Bowery only requires two to three weeks of work). Obviously, two buildings located right next to each other on the Bowery are going to have to communicate with each other to complete simultaneous construction projects. Instead, 89 Bowery asks this Court to impose a drastic remedy requiring plaintiff to take actions that are identical to the relief requested in its counterclaims. That is not the function of a preliminary injunction, which is “to maintain the status quo until there can be a full hearing on the merits” (*Olympic Tower Condominium v Coccoziello*, 306 AD2d 159, 160, 761 NYS2d 179 [1st Dept 2003]).

89 Bowery may ultimately be successful in proving that it was harmed due to unlawful acts committed by plaintiff. But a motion for a preliminary injunction is not the proper method to obtain that relief.

Accordingly, it is hereby

ORDERED that the motion by defendant 89 Bowery Realty LLC for a preliminary injunction is denied.

The parties are directed to appear for a preliminary conference on August 7, 2018 at 2:15 p.m.

Dated: July 3, 2018
New York, New York



ARLENE P. BLUTH, J.S.C.
ARLENE P. BLUTH
J.S.C.