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| Chang v 127 E. 92 LLC |
| 2019 NY Slip Op 30614(U) |
| March 12, 2019 |
| Supreme Court, New York County |
| Docket Number: 150531/2018 |
| Judge: Gerald Lebovits |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. GERALD LEOVITS PART IAS MOTION 7EFM

Justice

INDEX NO. 150531/2018
MOTION DATE 09/14/2018, 09/14/2018
MOTION SEQ. NO. 002 003

KAI CHANG, DORIS CHANG

Plaintiff,

- v -

127 EAST 92 LLC, TRIDENT RESTORATION INC.,

Defendant.

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 36, 37, 38, 39, 40, 54, 55, 56, 57, 58, 59, 60, 64

were read on this motion to/for DISMISSAL OF COUNTERCLAIMS

The following e-filed documents, listed by NYSCEF document number (Motion 003) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 61, 63, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85

were read on this motion to/for DISMISSAL OF CERTAIN CAUSES OF ACTION

Tuttle Yick, LLP, New York (Gregory O. Tuttle), for plaintiffs.
Rosenberg & Estis, P.C., New York (Alexander Lycoyannis, Roxanna Brahimi, Alexander M. Estis), for defendant 127 East 92 LLC, and Moses & Singer, LLP (Gregory J. Fleeser), for defendant Trident Restoration Inc.

Gerald Lebovits, J.

This case arises out of a dispute between owners of adjoining Manhattan townhouses that share a common (or "party") wall. Plaintiffs Kai and Doris Chang own the townhouse at 129 East 92nd Street (the 129 Property). Defendant 127 East 92 LLC, which owns the townhouse next door (the 127 Property), hired defendant Trident Restoration to do extensive renovations on the property.

Plaintiffs allege that during those renovations, defendants improperly removed substantial portions of the party wall between the properties and installed extensive pipework within plaintiffs' half of the party wall.

Plaintiffs sued, asserting various causes of action for both damages and injunctive relief. Plaintiffs also filed a notice of pendency against the 127 Property. Defendants counterclaimed,

asserting that filing of the notice of pendency was an abuse of process, seeking to cancel the notice of pendency, and requesting attorney fees.¹

In motion sequence 002, plaintiffs move under CPLR 3211 (a) (7) to dismiss defendants' counterclaims regarding the notice of pendency.

In motion sequence 003, defendants move under (i) CPLR 6314 to vacate the existing TRO; (ii) CPLR 3211 (a) (1) and CPLR 3211 (a) (7) to dismiss plaintiffs' sixth, seventh, and eighth causes of action (seeking injunctive relief); (ii) CPLR 6501 and CPLR 6514 to cancel the notice of pendency and award attorney fees, costs, and expenses incurred in connection with filing and canceling the notice; and (iii) Rule 130-1.1 (a) of the Rules of the Chief Administrator for sanctions against opposing counsel and plaintiffs for filing an assertedly frivolous notice of pendency.

Plaintiffs cross-move under Judiciary Law § 753 to hold defendants in contempt for violating this court's order regarding construction and for fees and costs incurred in connection with the motion.

Motion sequences 002 and 003 are consolidated for disposition.

Background

The 127 and 129 Properties share a brick party wall that stands approximately 40 feet high and which originally was 12 inches thick.

Defendants have been engaged in extensive construction on the 127 Property since early 2015, including relocating the bathrooms and kitchen and altering the building's plumbing. In July 2017, plaintiffs discovered a hole in the third-floor bedroom of the 129 Property. Plaintiffs later discovered that defendants installed pipework and anchored brackets on the 129 Property's side of the party wall, running the full height of the building.

Plaintiffs hired Rahul Ratakonda, a professional engineer, to investigate these modifications. Ratakonda concluded that defendants had removed substantial portions of the party wall.² Plaintiffs also discovered a second hole on the second floor of the 129 Property, directly under the third-floor breach.

Ratakonda also concluded that the breaches, pipe risers, and removal of portions of the party wall failed to conform with defendants' structural, architectural, and demolition drawings

¹ In motion sequence 001 in this action, plaintiffs sought a preliminary injunction restraining defendants from engaging in further construction work pending determination of the action. This court addresses that request in a separate decision and order issued today.

² Defendant Trident Restoration was fined by the New York City Department of Buildings in the fall of 2017 for thinning the party wall and failing adequately to protect the 129 Property during the construction.

filed with the Department of Buildings and had compromised the fire separation rating of the party wall in violation of City building codes.

Plaintiffs' complaint requested a declaration that defendants had improperly trespassed on the 129 Property and were responsible for any resulting harm to the property, and damages for that alleged harm to the 129 Property. Plaintiffs also sought injunctive relief barring defendants from "trespassing onto and over the 129 Property, further degrading the Party Wall, and proceeding with the Construction until such time as the Party Wall is restored to its preexisting condition." On the same date, plaintiffs moved by order to show cause for a TRO and a preliminary injunction. On January 19, 2018, this court issued a TRO directing that

"[a]ll work on the property may continue except work on the shared party wall which work may continue as necessary to fireproof and stabilize the shared party wall so it is completed within the next three weeks. Prior to commencing that work, [defendants] must consult with an engineer for [plaintiffs] regarding the work concerning the fireproofing and stabilization of the shared party wall."

Ratakonda and SW Engineering (defendants' engineer) were hired to inspect and prepare reports regarding the fireproofing and integrity of the party wall. The engineers exchanged three reports between January and March 2018. In Ratakonda's initial report, he found areas of missing brick within the property line of the 129 Property that should be replaced. SW Engineering's responsive report stated that "[w]hile the wall structural integrity has not been compromised, the contractor will repair all locations where openings [in the brick] were noted." In Ratakonda's reply report, he stated that as to this item he had "[n]o further comment."

On March 8, 2018, plaintiffs reported additional damage to the 129 Property, namely, six new holes in a third-floor room. Defendants have conceded that the holes were drilled in error and offered to repair that damage at no cost to plaintiffs.

Plaintiffs amended their complaint. The amended complaint now also alleges that defendants had also constructed an additional wall (which they refer to as a "concrete masonry unit" wall) on top of the party wall on the roof, that this additional wall encroached onto the 129 Property's side of the party wall by two inches, and that this encroachment existed along 55 feet of the party wall. Plaintiffs further allege that defendants attached to this new addition a cable box that rested on the 129 Property's side of the party wall.

The amended complaint added another cause of action for damages and requests injunctive relief "directing defendants to remove installations to and extensions of the Party Wall" and "to restore the Party Wall to its preexisting condition."

On July 23, 2018, plaintiffs reported new damage to the fourth floor of the 129 Property. According to plaintiffs, defendants attached a cable to the new cable box, and fastened the cable to the 129 Property's rooftop gutter. Plaintiffs allege that this cable prevents them from properly cleaning the gutter, causing the gutter to overflow and inflict water damage on the 129 Property.

I. Requests for Injunctive Relief

A. Defendants' Motion to Vacate the TRO

As noted above, plaintiffs sought and obtained a TRO on January 19, 2018, permitting construction to continue on the section of the party wall at issue for the limited purpose of stabilizing and fireproofing that section of the wall.

Defendants now seek in motion sequence 003 to vacate that TRO on the ground that the circumstances warranting the issuance of a TRO no longer exist. Their request is denied without prejudice.

A court may modify or vacate a TRO issued under CPLR 6314 upon, among other things, a showing of changed circumstances. (*See Heublein, Inc. v R.H. Macy & Co.*, 25 AD2d 825, 825 [1st Dept 1966].) Defendants have not shown that a change in circumstances warrants vacatur.

For one, although the parties stipulated several times to extend the time within which to stabilize and fireproof the party wall (*see e.g.*, NYSCEF Nos. 19, 21), the record does not reflect whether that work has been completed. At most, defendants appear to assert in conclusory terms that the work is finished (*see* NYSCEF No. 53, at 12) — but they cite no evidence to support that assertion. Similarly, defendants have not established that the party wall in its current form matches the drawings defendants filed with the Department of Buildings.

Defendants assert that plaintiffs' engineer Ratakonda conceded in § 1 (b) of his reply report that the section of the party wall at issue retains its structural integrity, rendering the TRO unnecessary. The court does not agree that Ratakonda necessarily made that concession. As described above, Ratakonda merely said in § 1 (b) that he had “no further comment” — a statement that may equally be read to say that Ratakonda had adequately set out his recommendation in § 1 (b) that certain missing brick be replaced and that he did not need to repeat that position in his reply report.

Defendants' motion to vacate the TRO is therefore denied without prejudice. The parties shall update the court on the status of the stabilization and fireproofing work on the party wall by letters of no more than one page each, to be filed electronically by close of business on March 19, 2019.

B. Defendants' Motion to Dismiss Plaintiffs' Causes of Action for Permanent Injunctive Relief

In motion sequence 003, defendants move under CPLR 3211 (a) (1) and CPLR 3211 (a) (7) to dismiss plaintiffs' sixth, seventh, and eighth causes of action. These causes of action — continuing trespass, continuing nuisance, and encroachment — rest on the same basic facts and seek the same permanent injunctive relief. Defendants' motion to dismiss these causes of action is granted in part and denied in part.

1. Defendants' motion under CPLR 3211 (a) (1)

A defendant moving to dismiss under CPLR 3211 (a) (1) has the “burden of showing that the relied-upon documentary evidence ‘utterly refutes plaintiff’s factual allegations’ and thereby ‘conclusively establishes a defense to the asserted claims as a matter of law.’” (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 433 [1st Dept 2014].)

Here, defendants assert that the reports exchanged between plaintiffs’ and defendants’ engineers demonstrate that the party wall is not load-bearing and that its structural integrity remains intact. This court is unpersuaded that these documents conclusively show that there are no risks to the structural integrity of the party wall. And defendants fail to show how such a showing would necessarily defeat plaintiffs’ causes of action in trespass and nuisance in any event.

The branch of defendants’ motion to dismiss under CPLR 3211 (a) (1) is therefore denied.

2. Defendants’ motion under CPLR 3211 (a) (7)

On a motion to dismiss under CPLR 3211 (a) (7), the question is whether a plaintiff has a cause of action, accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff, and taking into account affidavits submitted by plaintiffs in opposition to the motion. (*Chanko v Am. Broadcasting Cos.*, 27 NY3d 46, 52 [2016].)

Here, some — but not all — of defendants’ conduct, as alleged, is a trespass or private nuisance. Plaintiffs may seek permanent injunctive relief to remedy the conduct that constitutes a trespass or nuisance. The branch of defendants’ motion to dismiss under CPLR 3211 (a) (7) is granted in part and denied in part.

a. Causes of action

According to the allegations of the complaint and supporting affidavits, defendants intentionally installed extensive, permanent pipework to benefit the 127 Property on the 129 Property’s side of the party wall and built a wall (the CMU) on the roof that encroaches onto the 129 Property’s side of the party wall. Plaintiffs also allege that defendants’ construction damaged the integrity of the party wall and obstructed plaintiffs’ drainpipes.

Defendants’ alleged actions in drilling through the party wall and installing pipework within plaintiffs’ half of the party wall encroaches on plaintiffs’ property and therefore is a trespass. (*See Mastrobattista v Borges*, 157 AD3d 435, 436 [1st Dept 2018]); *Sakele Bros. v Safdie*, 302 AD2d 20, 25-26 [1st Dept 2002].)

Plaintiffs also assert that removing a substantial portion of the party wall will limit plaintiffs’ ability to drive fasteners into the walls of certain rooms of their townhouse (for example, to hang a wall-mounted television), for fear of breaking through the party wall altogether. Plaintiffs allege that defendants’ installation of the pipework within plaintiffs’ half of the party wall prevents plaintiffs from using that portion of the party wall for their own purposes.

These deprivations constitute an intentional, substantial, unreasonable, and ongoing interference with plaintiffs' right to use and enjoy their property. As such, the alleged removal of portions of the party wall and installation of the pipework is an actionable private nuisance. (See *Domen Holding Co. v Aranovich*, 1 NY3d 117, 123-24 [2003]; *Copart Indus., Inc. v Consolidated Edison Co. of New York, Inc.*, 41 NY2d 564, 569-71 [1977]; *Berenger v 261 W. LLC*, 93 AD3d 175, 182-83 [1st Dept 2012].)

This court is not persuaded by defendants' conclusory, unsupported assertion in their moving papers that the installation of the pipework was neither a trespass nor a nuisance.

A different conclusion, however, must be reached with respect to plaintiffs' allegations regarding both the CMU Wall (and attached cable box) and the water damage to the 129 Property. Plaintiffs allege that the CMU wall extends two inches over the centerline of the party wall on the roof of the building (and that the attached cable box rests on the 129 Property's side of the wall). But they have not alleged that constructing the CMU wall, standing alone, has affected "the structural integrity of the [party] wall" or that this encroachment "will prevent plaintiffs from using the party wall." The complaint fails to set forth a cause of action for trespass with respect to the CMU wall. (See *Fan v New York SMSA Ltd. Partnership*, 94 AD3d 620, 621 [1st Dept 2012].)

Plaintiffs also have failed to allege that the CMU wall has "substantially" interfered with any use they might otherwise have made of the top of the party wall, as needed to constitute a private nuisance. (See *Berenger*, 93 AD3d at 182.)

As to the issue of water damage, plaintiffs contend that defendants installed a cable-box cable running along the gutter of the 129 Property, that this cable prevented plaintiffs from properly cleaning the gutter, and that this in turn clogged the gutter, causing it to overflow and inflict water damage on the 129 Property. Plaintiffs have not shown, however, that defendants knew (or even should have known) when they installed the cable that doing so would make it impossible for plaintiffs to keep their gutter clear and thereby lead to flooding in the 129 Property. Merely installing of the cable along the gutter, without more, does not support a claim for private nuisance. (See *Copart Indus.*, 41 NY2d at 571.)

Defendants' motion to dismiss is granted as to plaintiffs' claims related to the CMU Wall and the water damage to the 129 Property.

b. Remedies

With respect to the conduct that does constitute a trespass or nuisance, defendants' motion to dismiss plaintiffs' requested remedy of permanent injunctive relief is denied. RPAPL § 871 (1) provides that "[a]n action may be maintained by the owner of any legal estate in land for an injunction directing the removal of a structure encroaching on such land." Similarly, a plaintiff may obtain permanent injunctive relief in appropriate cases to abate a private nuisance. (See *Handler v 1050 Tenants Corp.*, 295 AD2d 238, 239 [1st Dept 2002].)

Defendants argue strenuously that plaintiffs do not satisfy the criteria for permanent injunctive relief. That argument is premature. Whether an injunction should ultimately issue will depend on a more developed factual record regarding the equities of the case, the relative costs and benefits between the parties of requiring removal of the nuisance or the encroachment, and whether money damages will serve as a just and adequate remedy. (*See Hohenberg v 77 W. 55th St. Assoc.*, 90 AD2d 750, 750 [1st Dept 1982]; *Marsh v Hogan*, 81 AD3d 1241, 1242-43 [3d Dept 2011]; *Hullar v Glider Oil Co.*, 291 AD2d 825, 826 [4th Dept 1995].) For present purposes, the question is merely whether plaintiffs have stated at the pleading stage causes of action for permanent injunctive relief. They have done so.

II. Plaintiffs' Notice of Pendency

A. Defendants' Motion to Vacate the Notice of Pendency

In motion sequence 003, defendants also move under CPLR 6501 to cancel the notice of pendency that plaintiffs filed against the 127 Property and seek the costs and expenses they have incurred in seeking cancellation of the notice, under CPLR 6514 (c). Plaintiffs' filing of the notice of pendency was permissible, however. Defendants' motion is denied.

Under CPLR 6501 (c), “[a] notice of pendency may be filed in any action . . . in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property.” A notice of pendency is intended to “protect some right, title or interest claimed by a plaintiff in the lands of a defendant which might be lost under the recording acts in event of a transfer of the subject property by the defendant to a purchaser for value and without notice of the claim.” (*Braunston v Anchorage Woods, Inc.*, 10 NY2d 302, 317-318 [1961].) A notice of pendency may not be employed where the “party who has filed it claims no right, title or interest in or to the real estate against which it is filed, and where the suit concerns simply some encroachment or wrong perpetrated by defendants on plaintiffs' land.” (*Id.* at 318.)

Because plaintiffs and defendants share a party wall dividing their parcels, plaintiffs not only hold title to “so much of the wall as stands upon [their] own lot” but also an “easement in the *other* strip for purposes of the support” of their building.” (*Sakele Bros. v Safdie*, 302 AD2d 20, 25 [1st Dept 2002] [emphasis added; internal quotations omitted].) Thus, plaintiffs' request for injunctive relief — requiring removal of defendants' additions to the party wall and restoration of the party wall to its preexisting condition — would not simply affect the 129 Property but would also protect plaintiffs' support easement over the 127 Property's half of the party wall and affect 127 East 92's title to and use of its property. Plaintiffs' filing the notice of pendency therefore was proper. (*See Moeller v Wolkenberg*, 67 AD 487, 489-90 [1st Dept 1902] [affirming denial of motion to vacate notice of pendency filed by plaintiff in action to restrict defendant's use of a party wall]; *154 E. 62 LLC v 156 E. 62nd LLC*, 159 AD3d 498, 498 [1st Dept 2018].)

B. Plaintiffs' Motion to Dismiss Defendants' Counterclaims Relating to the Notice of Pendency

Plaintiffs' motion under CPLR 3211 (a) (7) to dismiss defendants' counterclaim for costs and expenses related to the notice of pendency is granted. Defendants are not entitled to cancellation of the notice of pendency under CPLR 6501. Defendants, therefore, may not recover the fees and expenses they incurred in seeking to cancel the notice.

Plaintiffs' motion to dismiss defendants' counterclaim for abuse of process is also granted. Asserting an abuse-of-process claim requires a party to establish that (i) the subject of the claim invoked "regularly issued process" to "compel[] the performance or forbearance of some prescribed act"; (ii) the party invoking such process was "moved by a purpose to do harm without . . . economic or social excuse or justification"; and (iii) the party invoked process to obtain "some collateral advantage or corresponding detriment" to the subject of the process that was "outside the legitimate ends of the process." (*Andesco, Inc. v Page*, 137 AD2d 349, 356 [1st Dept 1988].)

Here, filing a notice of pendency is not a process that "compel[s] the performance or forbearance of some prescribed act." (*Id.* at 357 [quotation marks omitted].) Additionally, plaintiffs' "effort to stop the sale of the property" is a "legitimate use of the notice of pendency." Defendants thus have failed to "establish that process was diverted from its lawful purpose," though "a malicious impulse may simultaneously have been satisfied." (*Id.* at 356-57, citing *Raved v Raved*, 105 AD2d 735, 735 [2d Dept 1984].)

C. Defendants' Motion for Sanctions Under Rule 130-1.1 (a) of the Rules of the Chief Administrator

Defendants move for sanctions under Rule 130-1.1 for plaintiffs' filing the amended complaint, their maintaining the TRO, and filing the notice of pendency, claiming that these actions were frivolous. But as discussed above, plaintiffs have causes of action for injunctive relief, the TRO properly remains in place, and plaintiffs were entitled to file a notice of pendency. Defendants' sanctions motion is denied.

II. Civil Contempt

Plaintiffs cross-move under Judiciary Law § 753 for an order holding defendants liable for civil contempt for violating the TRO. Plaintiffs argue that defendants violated the TRO by drilling six additional holes through the party wall.

Defendants contend that the drilling of holes into the 129 Property's side of the party wall was accidental and occurred while they installed a fire-rated sheetrock wall to fireproof the party wall, consistent with the TRO. Defendants have stated that they are willing to repair the damages at no cost to plaintiffs.

Plaintiffs' motion for civil contempt is denied.

To support a finding of civil contempt, plaintiff must establish the following elements by clear and convincing evidence:

“First, it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect. Second, it must appear, with reasonable certainty, that the order has been disobeyed. Third, the party to be held in contempt must have had knowledge of the court’s order, although it is not necessary that the order actually have been served upon the party. Fourth, prejudice to the right of a party to the litigation must be demonstrated.” (*El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015].)

Plaintiffs have not clearly shown that defendants disobeyed a court order. Plaintiffs do not contest the affidavit of defendant Trident’s president stating that the holes were an inadvertent byproduct of work to fireproof the party wall, work expressly permitted under the TRO. Nor have plaintiffs shown by clear and convincing evidence that they were prejudiced by the drilling of these small additional holes in the party wall—particularly in light of defendants’ concession that they were willing to pay the cost of repairing the holes.

Accordingly, it is

ORDERED that defendants’ motion to vacate the January 19, 2018, temporary restraining order (mot. seq. 003) is denied; and it is further

ORDERED that defendants’ motion to dismiss plaintiffs’ sixth, seventh, and eighth causes of action (mot. seq. 003) is denied; and it is further

ORDERED that defendants’ motion to cancel the notice of pendency and award attorney fees, costs, and expenses (mot seq. 003) is denied; and it is further

ORDERED that defendants’ motion for sanctions under Rule 130-1.1 (a) of the Rules of the Chief Administrator (mot seq. 003) is denied; and it is further

ORDERED that plaintiffs’ motion to dismiss defendants’ counterclaims (mot. seq. 002) is granted; and it is further

ORDERED that plaintiffs’ cross-motion for civil contempt against defendants (mot. seq. 003) is denied; and it is further

ORDERED that parties must appear for a preliminary conference on May 8, 2019, at 11:00 a.m.at 60 Centre Street, room 345.

3/12/2019
DATE


GERALD LEBOVITS, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: