

Hanasab v 1880 Boston Rd. Apt. LLC

2019 NY Slip Op 32209(U)

April 12, 2019

Supreme Court, Bronx County

Docket Number: 2610/2018E

Judge: Robert T. Johnson

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 12**

SAMIEL HANASAB and 72634552 CORP.,

Plaintiffs,

Index No. 2610/2018E

-against-

**1880 BOSTON ROAD APARTMENTS LLC
and LENDLEASE (US) CONSTRUCTION
LMB INC.,**

Defendants.

The following papers, numbered 1-2 were considered on the Order to Show Cause:

| <u>PAPERS</u> | <u>NUMBERED</u> |
|--|-----------------|
| Affirmation in Support of Order to Show Cause and Exhibits | 1 |
| Affirmation in Opposition and Exhibits..... | 2 |

Upon the foregoing papers, this Order to Show Cause is decided as follows:

Plaintiffs have moved by Order to Show cause pursuant to CPLR §6301 for a Temporary Restraining Order, an Order denying defendants access to 1893 and 1897 Longfellow Avenue in The Bronx, and an Order invalidating the License Agreement between the parties.

On May 30, 2017, the parties entered into a license agreement (“Agreement”) regarding the addition of eight floors to 1880 Boston Road, Bronx NY (“project”), a property adjacent to Plaintiff Samuel Hanasab’s property at 1893 and 1897 Longfellow Avenue (“plaintiffs’ properties”). Defendant 1880 Boston Road Apartments LLC is the owner of the Boston Road building and defendant Lendlease (US) Construction LMB Inc is the general contractor at the construction site (collectively “defendants”).

Plaintiffs, by the affidavit of Samiel Hasab, allege that the Agreement has been breached by defendants. Mr. Hasab claims that they “have completely failed to comply” with the

agreement “by virtue of their repeated failure to secure the Properties.” Although plaintiffs have submitted photographs of damage that was alleged to have occurred, their submissions fail to support their claims. That is particularly true regarding the allegation that there is a link to defendants’ construction activity. Furthermore, the court finds no duty to “secure the Properties” within the language of the Agreement. Therefore, the branch of plaintiffs’ order to show cause to invalidate the Agreement is denied.

The branch of plaintiff’s order to show cause for a temporary restraining order is similarly denied. It is well established that in order to prevail upon a motion for a preliminary injunction, the movant has the burden of demonstrating by clear and convincing evidence that 1) the moving party will succeed on the merits of the action, 2) the moving party will suffer irreparable injury absent the issuance of a preliminary injunction, and 3) a balancing of equities favors the movant’s position (*see* CPLR 6301; *Price Paper & Twine Co. v Miller* 182 AD2d 748 [2d Dept 1992]; *Karl v Wood*, 137 AD2d 22 [2d Dept 1988]). Injunctive relief will be afforded only in those extraordinary situations where the plaintiff has no adequate remedy at law and such relief is necessary to avoid irreparable injury (*Chicago Research and Trading v NY Futures Exchange*, 84 AD2d 413, 416 [1st Dept 1982]). Viewed within this framework, plaintiff’s request for a preliminary injunction is denied.

Here, plaintiff has not demonstrated a likelihood of succeeding on the merits of the case. In order to meet that burden, plaintiff must demonstrate that the right on which it seeks to ultimately prevail “is plain from the undisputed facts [and] [if] the right depends upon an issue which can only be decided upon a trial, the injunction cannot be granted” (*Zurich Depository Corporation v Gilenson*, 121 AD2d 443, 444 [2d Dept 1986] quoting *Family Affair Haircutters, Inc. v. Detling*, 110 AD2d 745, 747 [2d Dept 1985]). It is not clear that the plaintiff would

ultimately prevail, as plaintiff's allegation that defendant's failure to secure the scaffolding causes plaintiffs' properties to be susceptible to imminent danger is speculative. Plaintiffs have also not provided the requisite evidentiary showing that it is likely to succeed on the merits on their claim of negligence.

On a claim of negligence, plaintiffs need to establish that defendants owed a duty to plaintiffs and a breach of said duty proximately caused plaintiffs' injury (*Darby v Compagnie Natl. Air France*, 96 N.Y.2d 343, 347 [2001]). Plaintiffs cannot establish a duty owed to them by defendants since nothing in the Agreement requires defendants to "secure" plaintiffs' properties.

A defendant may be liable for trespass of land if the defendant enters the land of another without permission (*Curwin v Verizon Communications (LEC)*, 35 AD3d 645 [2d Dept 2006]) or causes or directs others to trespass onto plaintiffs' property (*Spellburg v South Bay Realty, LLC*, 49 AD3d 1001 [3d Dept 2008]). Here, it is not clear from the undisputed facts and consequently, a temporary injunction is not appropriate.

In order to prevail on a cause of action for private nuisance, plaintiffs must establish that defendants' conduct is "the legal cause of the invasion of interest in the private use and enjoyment of land and such invasion is (1) intentional and unreasonable, (2) negligent or reckless, (3) actionable under the rules of liability for abnormally dangerous conditions or activities" (*Copart Indus., Inc. v Consol. Edison Co. of New York, Inc.*, 41 NY2d 564, 569 [1977]). Here, there are no allegations that defendants' conduct is intentional or that they engaged in abnormally dangerous conduct or activities. To the extent that plaintiffs assert private nuisance based upon negligence, plaintiffs likewise cannot establish a likelihood of success under this claim.

To establish a trespass to chattels, plaintiffs must establish that defendants intentionally without justification or consent physically interfered with the use and enjoyment of plaintiffs' possession, and that plaintiffs were harmed thereby (PJI2d 3:9 [2019]). Additionally, plaintiffs must demonstrate that defendants acted with the intention of interfering with the property or with knowledge that such interference is substantially certain to result (*level 3 Communications, LLC v Petrillo Contracting, Inc.*, 73 AD3d 865 [2d Dept 2010]). Here, plaintiffs would not be able establish that defendants acted with the intention of interfering with plaintiffs' properties or with knowledge that the conduct would interfere with plaintiffs' use and enjoyment of their properties.

The elements of a cause of action for prima facie tort are "1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful" (*Freihofer v Hearst Corp.*, 65 NY2d 135, 142-143 [1985]). A critical element of the cause of action is that plaintiff suffered specific and measurable loss, which requires an allegation of special damages (*Id.*). Since plaintiffs do not allege any special damages, it is unlikely they would succeed on the merits of this claim.

Moreover, plaintiffs have not shown that they would not have an adequate remedy at law if they are able to demonstrate that defendants violated their rights. The Agreement offers plaintiffs a remedy for any damages through the vehicle of insurance, of which defendants submit proof as an exhibit attached to their attorney's affirmation, and plaintiffs do not dispute. "Damages compensable in money and capable of calculation, *albeit* with some difficulty, are not irreparable" (*SportsChannel Am. Assocs. v. National Hockey League*, 186 AD2d 417, 418 [1st Dept 1992]).

Plaintiffs further failed to demonstrate the equities balance are in plaintiffs' favor. "In balancing the equities, the court should consider various factors, including the interests of the general public as well as the interests of the parties (*De Pina v Educ. Testing Serv.*, 31 AD2d 744 [2d Dept 1969]). In the matter at bar, it is undisputed that the project involves construction of a new eight-story residential tower over an existing two-story structure. It is also uncontroverted that the new eight story structure is intended to operate as low income and senior housing. Furthermore, delays in the completion of the project will be financially prejudicial to defendants. In light of these factors, the Court finds that the balance of equities does not favor plaintiffs. Denial of defendants' access will do nothing more than cause the project to be in violation of the rules and regulations governing the project, and cause undue hardship, delay, and expense.

Accordingly, plaintiffs' order to show cause is denied in its entirety.

Movant is directed to serve a copy of this decision and order with notice of entry within 15 days.

This constitutes the decision and order of this Court.

Dated: April 12, 2019



Robert T. Johnson, J.S.C.