

Matter of State of New York v 735 Bedford LLC

2020 NY Slip Op 32775(U)

August 20, 2020

Supreme Court, Kings County

Docket Number: 503400/2020

Judge: Carl J. Landicino

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 20th day of August, 2020.

PRESENT:
CARL J. LANDICINO, J.S.C.

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In the Matter of the Application of
STATE OF NEW YORK, NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL
CONSERVATION, and BASIL SEGGOS,
as Commissioner of the New York State Department
of Environmental Conservation, and
MICHAEL J. RYAN, P.E., as Director of the
Division of Environmental Remediation of the
New York State Department of Environmental
Conservation,

Index No.: 503400/2020

DECISION & ORDER

Motion Sequence: #4

Petitioners,

For An Order Pursuant to Environmental Conservation
Law Articles 3 and 27 to Access Real Property
Commonly Known As 735 Bedford Avenue/
12 Spencer Street, Brooklyn, New York

-against-

735 BEDFORD LLC,

Respondent.

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

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed	117-120
Opposing Affidavits (Affirmations) & Memorandum of Law.....	121
Reply Affidavits (affirmations)	122

Upon the foregoing papers. and after oral argument, the Court finds as follows:

Respondent, 735 Bedford, LLC (hereinafter the "Respondent"), moves (motion sequence #4) for an order fixing the amount of an undertaking pursuant to CPLR 5519 (a) (6) in relation to

a preliminary injunction granted to The State of New York, New York State Department of Environmental Conservation, Basil Seggos, Commissioner and Michael J. Ryan, P.E., Director of the Division of Environmental Remediation (hereinafter collectively the "DEC" or "Petitioners") which, *inter alia*, permitted DEC limited access to the property known as 735 Bedford Avenue, Brooklyn N.Y. a/k/a 12 Spencer Street, Brooklyn, N.Y. (hereinafter the "Premises" or "Property") for the purpose of an inspection (soil vapor intrusion testing) by Decision and Order of the undersigned dated August 3, 2020 ("Preliminary Injunction/Access Order").

Respondent contends that the limited access by Preliminary Injunction/Access Order for inspection and testing constitutes a temporary easement. Respondent further contends that the granting of a temporary easement constitutes a conveyance. Respondent concludes that as a conveyance has been granted, Respondent is permitted an automatic stay of the Preliminary Injunction/Access Order provided that it provides an undertaking in accordance with the relevant provisions of CPLR 5519(a)(6). DEC opposes the motion and contends that the Preliminary Injunction/Access Order is not a transfer or conveyance of real property, as clearly provided in CPLR 5519(a)(6), and that the Respondent is therefore not entitled to an automatic stay. As such the Petitioner's contend that the application for the Court to fix an amount for an undertaking is academic and should be denied.

The Preliminary Injunction/Access Order reads as follows:

- 1. 735 Bedford LLC shall allow Petitioner DEC and/or its designee(s) access to the Property for the period of forty five (45) days after entry of this order, for the purpose of physically inspecting the Property and conducting a soil vapor intrusion investigation including the collection of indoor air, out-door (ambient) air grid sub-slab soil vapor samples for analysis, in accordance with the New York State Department of Health Guidance for Evaluating Soil Vapor Intrusion in the State of New York, October 2006, as amended, upon Reasonable Notice by DEC.**
- 2. 735 Bedford LLC's agents shall unlock any doors, gates, chains, padlocks, fences or other security devices that restrict access to the Property by DEC and/or its designees on the date(s) and time(s) which DEC has provided Reasonable Notice in order to facilitate DEC's access to the Property for the investigation.**
- 3. 735 Bedford LLC shall not hinder nor interfere in any way with access to the Property by DEC or its designees which is reasonably necessary to conduct the investigation on the date(s) and time(s) for which DEC has provided Reasonable Notice.**

- 4. Beginning at least 24 hours prior to DEC and/or its designees first accessing the Property for the investigation, and for an additional period of at least 54 consecutive hours while the investigation is ongoing, 735 Bedford LLC shall ensure that the HVAC system in the building on the Property is operating, and that any windows and outside doors on the Property are closed, and shall further ensure that if the HVAC system has a variable outdoor air return, the outdoor air return should be turned to the lower variable level. This Order shall not hinder or otherwise affect the use of outside doors being used in the normal course by 735 Bedford LLC and others for purpose of ingress and egress to and from the building on the Property.**
- 5. 735 Bedford LLC's agents, designees and employees shall wear face coverings in the immediate presence of any DEC employee or DEC designees during the investigation, and 735 Bedford LLC shall instruct its tenants to have their employees who work in the building on the Property to do the same. Any DEC employee or DEC designee(s) shall similarly wear face coverings at all times while present on the Property for investigation.**
- 6. 735 Bedford LLC, and/or its designees may be present during the testing, provided their presence does not hinder nor interfere with DEC's access, testing or operation generally.**
- 7. Reasonable Notice as referenced herein shall for the purpose of this Decision and Order, be defined as reflected at footnote 2, page 2 of 4, of this Court's Order to Show Cause dated July 2nd, 2020, in relation to the subject application by DEC.**
- 8. Notwithstanding any term herein to the contrary the Parties shall comply with any applicable COVID-19 related rule, regulation, statute and/or executive order, or such other legal requirement.**

As reflected above the language is reasonably tailored to provide access for a very limited purpose upon reasonable notice. Although the period covered is a forty five day period, once access is obtained by the Petitioner its presence is limited to several consecutive days, in order to secure proper data collection and ensure that the equipment shall not be tampered with. This access is not a transfer or conveyance of real property, does not constitute a taking and does not serve to force the Respondent to cede possession of the Premises. This is not a situation where the Petitioner is seeking access to another parcel through the Respondent's parcel, or access to improve a neighboring parcel, this is limited access for a focused inspection purpose.

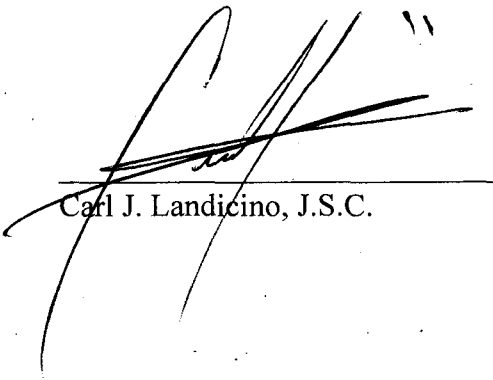
This is not an eminent domain proceeding. Accordingly, the cases cited by the Respondent involving the application of CPLR 5519(a)(6) in the context of an imminent domain proceeding are inapposite. *See Matter of City of New York*, 62 Misc. 3d 974, 978, 92 N.Y.S.3d 598 [Kings County Sup. Ct. 2019] [vesting had occurred]; *Matter of New York State Urban Dev. Corp.*, 166

Misc. 2d 909, 910, 636 N.Y.S.2d 568 [N.Y. County Sup. Ct. 1995] [even in a condemnation proceeding the applicability of CPLR 5519(a)(6) was denied].

A clear reading of the statute makes apparent its inapplicability. Nothing is being transferred and no one is seizing control of the Property from the Respondent. This access is ancillary to the overall purpose; inspection. There is no foreclosure, ejectment or eviction order underlying this application. What is more, the Respondent's cited authority is not applicable to this circumstance. As such CPLR 5519(a)(b) does not apply to the underlying Preliminary Injunction/Access Order. For all the reasons stated above the Respondent's application is denied.

The foregoing constitutes the Decision and Order of the Court.

Enter:



Carl J. Landicino, J.S.C.

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