

Matter of State of New York v 735 Bedford LLC

2020 NY Slip Op 34229(U)

August 13, 2020

Supreme Court, Kings County

Docket Number: 503400/2020

Judge: Carl J. Landicino

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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 13th 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,
Petitioners,

Index No.: 503400/2020

DECISION AND ORDER PURSUANT TO CPLR 6312(B) and 2512(1) IN RELATION TO MOTION SEQUENCE #3

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.

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

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	109-113
Opposing Affidavits (Affirmations) & Memorandum of Law.....	115

Upon submission of the papers, the Court finds as follows:

On August 3, 2020, this Court granted the Petitioners' application for a preliminary injunction. In general, in relation to an application for a preliminary injunction, the Court must

also address the issue of an undertaking. *See Butt v. Malik*, 106 A.D.3d 849, 850, 965 N.Y.S.2d 540, 541 [2nd Dept, 2013]. On July 29, 2020, the parties entered into a stipulation to defer briefing on the issue of a bond and/or undertaking pursuant to CPLR 6312(b) until after a determination of the instant application. The plain language of CPLR 6312(b) directs the court to fix the undertaking in an amount that will compensate the defendant for damages incurred ““by reason of the injunction””, in the event it is determined that the plaintiff was not entitled to the injunction.” *Clover St. Assocs. v. Nilsson*, 244 A.D.2d 312, 313, 665 N.Y.S.2d 537 [2d Dept, 1997].

In the Affirmation of the Petitioners Regarding Security to Accompany Preliminary Injunction Issued by the Court, the Petitioners contend that CPLR 6312(b) specifically states, “except as provided in Section 2512.” CPLR 2512 therefore controls in this instance, and further exempts the State from providing an undertaking. CPLR 2512 does provide, however, that damages shall be fixed by the Court as a limit on, in this case, the State’s liability for damages. Petitioner contends that there is no need for the Court to fix damages pursuant to CPLR 2512(1), since the investigation being conducted by the Petitioners does not require the Respondent’s attendance nor the suspension of the Respondent’s business operations. In the alternative, the Petitioners contend that such sum be fixed at no more than \$5,000.00.

As part of the Affidavit of Respondent’s representative, Yoel Schwimmer, Regarding the Cap on the Amount of Damages to be Fixed by the Court, the Respondent requests that the Court set a cap on damages in the amount of \$72,550.00. This amount is based on, *inter alia*, an estimate that upwards of \$30,000.00 of physical damage could be sustained as a result of the

Petitioners' investigation, and that up to \$35,000.00 in legal fees could be incurred by the Respondents.

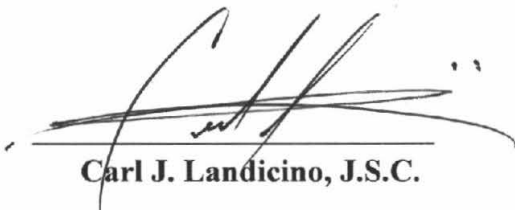
Based upon a review of the supplemental affirmations, the Court will accordingly not set an undertaking pursuant to CPLR 6312 (b), but will fix damages pursuant to CPLR 2512(1). Although the Court disagrees with the Respondent's reasoning regarding the approximate dollar amount associated with the damage that could be sustained by the Respondent, the Court does find that damages should be fixed at an amount greater than the \$5,000.00 suggested by the Petitioners. As a result, the Court finds that damages should be fixed at \$40,000.00. The Court finds that this is a reasonable sum given the Respondent's legitimate concerns regarding the possibility of property damage. See *Hofstra Univ. v. Nassau Cty., New York*, 166 A.D.3d 863, 866, 87 N.Y.S.3d 248, 251 [2d Dept 2018]; *Town of Putnam Valley v. Cabot*, 50 A.D.3d 775, 776, 856 N.Y.S.2d 166, 168 [2d Dept 2008] [the court is required to fix the limit of damages].

Based on the foregoing, it is hereby ORDERED as follows:

ORDERED that pursuant to CPLR 2512(1) damages should be fixed at \$40,000.00.

The foregoing constitutes the Decision and Order of the Court.

ENTER:


Carl J. Landicino, J.S.C.

KINGS COUNTY CLERK
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