

Matter of State of New York v 735 Bedford LLC

2020 NY Slip Op 34230(U)

August 3, 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 3rd 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

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/Order to Show Cause and Affidavits (Affirmations) Annexed 82-95, 97
Opposing Affidavits (Affirmations) & Memorandum of Law..... 104

Upon the foregoing papers, and after oral argument¹, the Court finds as follows:

¹ On July 24, 2020, the Court entertained oral argument by the parties, virtually, for approximately three hours. All applications were addressed during that appearance.

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”) generally seek access to Respondent’s property to investigate the existence of chlorinated volatile organic compounds (CVOCs). More specifically, in relation to this application (Motion Sequence #3), DEC seeks preliminary injunctive relief enjoining the Respondent, 735 Bedford, LLC (hereinafter the “Respondent”) from interfering with, and otherwise permitting the DEC access to Bedford’s property for the purpose of, *inter alia*, conducting a soil vapor intrusion investigation. The DEC maintains that CVOCs, usually chemicals from solvents, can cause damage to the nervous system, kidneys, liver and immune system, and that some may increase the risk of cancer. Bedford’s property is located and known as 12 Spencer Street a/k/a 735 Bedford Avenue, Brooklyn, N.Y. (the “Premises” or “Property”). DEC also contends that an examination indicated that groundwater from the Property may have flowed from the Property to neighboring 11 Spencer Street, Brooklyn (“11 Spencer”), contaminating that site and that the Property is also contaminated. DEC alleges that testing and investigations have shown high levels of contaminants at the perimeter of the Property which they contend, have flowed southeast to 11 Spencer.² Respondent opposes the application indicating, *inter alia*, that the relief sought conflicts with that of the Petition, the relief sought is the ultimate relief sought in the Petition, and that DEC fails to

² A related proceeding was initiated by 735 Bedford, LLC (735 Bedford, LLC v. New York State Department of Environmental Conservation, Et. Al., Index No. 514027/2019). As part of that proceeding, DEC moved to dismiss the petition in that action and 735 Bedford, LLC moved to enjoin DEC from designating the Property as an "Inactive Hazardous Waste Disposal Site" during the pendency of that proceeding. 735 Bedford LLC’s application was withdrawn. In the instant proceeding, 735 Bedford has moved to dismiss the petition brought by the DEC and the DEC has moved to enjoin 735 Bedford from preventing the DEC from accessing the Property and permit soil vapor intrusion testing. This Decision and Order only relates to motion sequence #3 in the instant action and the remaining applications have been reserved for a subsequent and separate decision and order.

meet the requirements for a preliminary injunction. The Respondent incorporates by reference its motion to dismiss.

DEC seeks limited access to make such investigation of the Property during the summer season.³ The DEC alleges that Bedford has refused it access. DEC argues that it has two sources of authority to support its claim for access and testing. First, because 11 Spencer has already been deemed contaminated, DEC has authority to enter and investigate surrounding areas. See Environmental Conservation Law 27-1431(1)(a). ECL §27-1431(1)(a) provides in pertinent part that “[t]he department, by and through the commissioner, shall be authorized to:

1. Require that any person permit a duly designated officer or employee of the department or of a municipal corporation, or any agent, consultant, or contractor of the department or of a municipal corporation, or any other person, including an employee, agent, consultant, or contractor of an applicant acting at the direction of the department, so authorized in writing by the commissioner, to enter upon any property which has or may have been the site of the disposal or discharge of contaminants, and/or areas near such site, for the following purposes:

a. to inspect and take samples of such contaminants and/or environmental media, utilizing such sampling methods as may be necessary or appropriate, including without limitation soil borings and monitoring wells; provided, that no sampling methods involving the substantial disturbance of the ground surface of such property may be utilized until after a minimum of ten days' written notice thereof shall have been provided to the owner and operator and occupant of such property, if identifiable by reasonable efforts, unless the commissioner makes a written determination that such notice will not allow the protection of the public health or the environment, in which case two days' written notice shall be sufficient.

³ Respondent argues that since both the Petition and OTSC seek specific beginning and end dates for access the Court may only consider relief in relation to that period. However, a review of the Petitioner/Movant's supporting papers, the dates were nothing other than an expression of access during specific seasonal periods, (i.e., summer, heating season) and does not serve to restrict this Court's ability to grant relief outside of the specific date ranges specified.

Second, DEC argues that it has authority to enter and investigate property that is an actual or suspected source of contamination. See ECL 3-0301(2)(g), which reads in pertinent part that:

2. To further assist in carrying out the policy of this state as provided in section 1-0101 of the chapter the department, by and through the commissioner, shall be authorized to:

g. Enter and inspect any property or premises for the purpose of investigating either actual or suspected sources of pollution or contamination or for the purpose of ascertaining compliance or noncompliance with any law, rule or regulation which may be promulgated pursuant to this chapter.

The DEC has moved by special proceeding. DEC commenced this proceeding by Notice of Petition on February 10, 2020. DEC's ultimate relief seeks to more generally physically inspect the Property by means of groundwater monitoring wells, soil samples and ground water samples and/or air samples by means of soil vapor intrusion testing, until sufficient data is acquired. As indicated, DEC's instant application seeks a preliminary injunction generally enjoining Bedford from interfering with DEC's access to the Property for the limited purpose of DEC performing soil vapor intrusion testing during the summer season.

The Brownfields Program concerns real property that is contaminated with hazardous waste and/or petroleum. A party can enter the program by submitting an application showing evidence of the need for remediation. Pursuant to ECL 27-1405(1)(a) defines a "Participant" as an applicant who either:

(i) was the owner of the site at the time of the disposal or discharge of contaminants or (ii) is otherwise a person responsible according to applicable principles of statutory or common law liability, unless such person's liability arises solely as a result of such person's ownership or operation of or

involvement with the site subsequent to the disposal or discharge of contaminants.

Pursuant to ECL 27-1405(1)(b) a “Volunteer” is defined as:

(b) “Volunteer” shall mean an applicant other than a participant, including without limitation a person whose liability arises solely as a result of such person's ownership or operation of or involvement with the site subsequent to the disposal or discharge of contaminants, provided however, such person exercises appropriate care with respect to contamination found at the facility by taking reasonable steps to: (i) stop any continuing release; (ii) prevent any threatened future release; and (iii) prevent or limit human, environmental, or natural resource exposure to any previously released contamination.

The Property History

735 Bedford, LLC purportedly acquired the Property on March 12, 2015 (Block 175 Lot 29, Brooklyn). 11 Spencer is apparently in the Brownfields program after a 2014 investigation. It is undisputed that sampling at the sidewalk fronting 12 Spencer revealed CVOC contamination in excess of normal levels. DEC contends that there is a plume of CVOCs flowing from the Property in an E/SE direction. In 2017 monitoring wells were fixed at various areas near the property. DEC contends that these wells also contained high levels of contaminant.

DEC contends that on or about February 23, 2018 DEC notified Respondent of the plume and that the Property was a potential inactive waste disposal site. DEC purportedly advised Respondent that it could conduct its own investigation pursuant to an agreement with DEC. Charles B. Sosik (hereinafter “Sosik”), a Professional Geologist licensed in the States of New York, was retained by Respondent. Sosik purportedly worked on 11 Spencer (as it’s consultant) and had conducted ground water sampling. Respondent did not enter into the agreement. Instead Sosik purportedly provided his own data from his investigation. DEC purportedly rejected that

data and indicated its position that the study did not utilize DEC guidelines. DEC thereafter maintained that it needed to be given oversight during any investigation and/or testing.

Apparently, in August of 2018 the Respondent submitted an application to be a Volunteer for the Brownfields Program, in relation to the eastern half of the Property. In September of 2018 the DEC determined that the Respondent's application was incomplete. Respondent provided a revised Brownfields application. According to DEC, on or about November 8, 2018 "DEC project manager and Sosik oversaw measurement by a licensed land surveyor of at least 22 existing monitoring wells in the Property's vicinity." Several weeks later Respondent provided a map of the wells allegedly showing that the ground water flowed in every direction, in the vicinity of the property. DEC found that this was inconclusive and argued that it contradicted Sosik's earlier analysis during his work on 11 Spencer. In December of 2018 DEC informed the Respondent that its application was complete. In February of 2019 DEC indicated that it accepted the eastern half of the Property into the Brownfields Program and provided an agreement to the Respondent, by which Respondent would be a Participant, not a Volunteer. The Respondent apparently had sixty days to sign the offer or the application would be deemed withdrawn. The Respondent did not execute this agreement.

The DEC contends that on November 4, 2019 the DEC issued a 10 day notice of site inspection to the Respondent. The DEC purportedly emailed the Respondent to advise them that they would be present for well installation and would like to arrange a walk through concerning well placement/drilling. Respondent sought an access stipulation relating to the performance of all tests to be performed. The agreement was never signed. DEC states that on December 4, 2019, access was denied by Respondent.

DEC's Application for a Preliminary Injunction

“To be entitled to a preliminary injunction, the movant must establish (1) a likelihood of success on the merits, (2) irreparable injury absent granting the preliminary injunction, and (3) a balancing of the equities in the movant's favor.” *Ruiz v. Meloney*, 26 A.D.3d 485, 485–86, 810 N.Y.S.2d 216, 217 [2d Dept 2006]. “The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual.” *Ying Fung Moy v. Hohi Umeki*, 10 A.D.3d 604, 604, 781 N.Y.S.2d 684, 686 [2d Dept 2004]. However, “[c]onclusive proof is not required, and a court may exercise its discretion in granting a preliminary injunction even where questions of fact exist.” *Vanderbilt Brookland, LLC v. Vanderbilt Myrtle, Inc.*, 147 A.D.3d 1104, 1106, 48 N.Y.S.3d 251, 254 [2d Dept 2017].

Likelihood of Success on the Merits

There is a history of testing and expert opinion based upon various testing which occurred outside of the Property lines over several years. Although the experts disagree as to the source and flow, Respondent does not dispute the existence of high levels of contaminant, in the area around the Property and acknowledges that 11 Spencer is a Brownfields Property. CPLR 6312(c) provides in pertinent part that:

Provided that the elements required for the issuance of a preliminary injunction are demonstrated in the plaintiff's papers, the presentation by the defendant of evidence sufficient to raise an issue of fact as to any of such elements shall not in itself be grounds for denial of the motion. In such event the court shall make a determination by hearing or otherwise whether each of the elements required for issuance of a preliminary injunction exists.

The Court finds that the application and overall proceeding relates to access to the Property pursuant to statute. The fact that the parties' experts do not agree on source and suggest conflicting flow grades, presents no issue in relation to the fact that contamination has been detected in and around the Property and that 11 Spencer is a Brownfields site. As such, although extensive oral argument was conducted, no further hearing was necessary in that the relevant facts in order to determine this application are not in dispute. Moreover, the access requested by DEC is limited, in light of the more extensive access and testing reflected in the relevant statutes. *See Inc. Vill. of Plandome Manor v. Ioannou*, 54 A.D.3d 364, 365, 863 N.Y.S.2d 241 [2d Dept 2008]. "To establish a likelihood of success on the merits, '[a] prima facie showing of a reasonable probability of success is sufficient; actual proof of the petitioners' claims should be left to a full hearing on the merits.'" *Barbes Rest. Inc. v. ASRR Suzer 218, LLC*, 140 A.D.3d 430, 431, 33 N.Y.S.3d 43 [1st Dept 2016], quoting *Weissman v. Kubasek*, 112 A.D.2d 1086, 493 N.Y.S.2d 63 [2^d Dept 1985]. A party's "contention that the Supreme Court was required to hold a hearing on his motion is without merit." *DiFabio v. Omnipoint Commc'ns, Inc.*, 66 A.D.3d 635, 637, 887 N.Y.S.2d 168 [2d Dept 2009]. Certainly, there is the possibility that a hearing may be required for a determination of some of the other outstanding applications. When and if that occurs the parties will have the ability to present witnesses for examination.

The DEC has the authority under ECL §3-0301(2)(g) to "[e]nter and inspect any property or premises for the purpose of investigating either actual or suspected sources of pollution or contamination or for the purpose of ascertaining compliance or noncompliance with any law, rule or regulation which may be promulgated pursuant to this chapter." Moreover, ECL §27-1431(1)(a) provides for access and inspection and the taking of samples "of such contaminants and/or environmental media, utilizing such sampling methods as may be necessary or appropriate,

including without limitation soil boring and monitoring wells.” What is more, the access sought in the instant application is limited to vapor intrusion testing and is not as broad as the access and multiple means of examination sought by DEC in the subject Petition. In light of the aforesaid this Court finds that the Petitioner has shown a likelihood of success on the merits.

Irreparable Harm/Injury

The Court recognizes that DEC’s procedural course, bringing this underlying Petition by Notice of Petition, and not seeking emergency relief by commencing the proceeding by Order to Show Cause, could undermine its cry of emergency now. Especially since the exigent circumstance alleged in support of the Petition was that a vapor intrusion test was needed before the summer season and was required to be performed by the end of March, 2020⁴. However, DEC’s support for the need of the Soil Vapor Intrusion testing prior to the end of summer is compelling and supports the need for a full understanding of the existence and is in the interest of public health and safety. “Irreparable injury, for purposes of equity, has been held to mean any injury for which money damages are insufficient.” *DiFabio v. Omnipoint Commc'ns, Inc.*, 66 A.D.3d 635, 636–37, 887 N.Y.S.2d 168, 170 [2d Dept 2009]. The nature of the contaminants is clearly and appropriately a concern of the DEC as reflected in the empowering statutes referred herein.

As such, the exigent nature of the application is apparent. The inability of DEC to have access at this time would deprive it of such testing during the summer season. An argument can be made that testing can occur next summer after the fall and winter seasons, in the event that fall

⁴ Petitioner asserted that vapor intrusion inspections in the summer could be less reliable because of open windows and air conditioner use during the summer months. DEC has stated that the best period for such testing was between November 15th through March 31st. (emphasis added)

and winter season testing is permitted by the Court. However, the lack of testing now could impact the efficacy of future tests and impair a full understanding of the condition of the property based upon a comparative seasonal analysis, in the event that future testing is permitted. Moreover, DEC's access was prevented during this state's recent COVID restrictions. This may be a limited window by which DEC could gain access to accomplish this testing. "In this context, irreparable injury means a continuing harm resulting in substantial prejudice caused by the acts sought to be restrained if permitted to continue pendente lite." *Chrysler Corp. v. Fedders Corp.*, 63 A.D.2d 567, 569, 404 N.Y.S.2d 844, 845 [1st Dept 1978]. As such DEC would in this Court's opinion be irreparably harmed if not permitted the injunctive relief it seeks.

As to Bedford, it certainly has an opportunity to perform whatever tests it chooses on the Property. Further, it would assuredly be privy to the DEC's findings and conclusions. Much like where the parties stand now, they will be able to present their findings, opinions and other evidence in relation to both Bedford's current action and DEC's Petition generally. Moreover, the award of this limited access is not dispositive of the application as a whole. A more intrusive investigation would only come after a determination of the applications in their entirety. Accordingly, Bedford would suffer no irreparable harm in the event the application is granted.

Finally, the nature of the contaminants, if present, represent a possible harm to occupants of the building on the property and could impact their health and safety. This further supports the need for expedited action. As such the Court finds that DEC has shown irreparable harm/injury in the event that the application was denied.

Balancing of the Equities

The Court also finds that DEC has provided sufficient evidence that a balance of the equities favors granting DEC's application for preliminary injunctive relief. As stated above, DEC has clearly articulated a public policy objective in ensuring the remediation of chemicals, such as CVOCs, that may pose a risk to the health and safety of the community. "Further, when the court balances the equities in deciding upon injunctive relief, it must consider the 'enormous public interests involved.'" *Seitzman v. Hudson River Assocs.*, 126 A.D.2d 211, 214, 513 N.Y.S.2d 148, 150 [1st Dept 1987], quoting *Barney v. City of New York*, 83 A.D. 237, 238, 82 N.Y.S. 124, 124 [1st Dept 1903]. What is more, the application by DEC is limited to obtaining air data with minimum intrusion to the Property and DEC contends that the investigation can be completed within two or three days.

The Court finds that the Petitioner has established by clear and convincing evidence the requirements for the granting of a preliminary injunction and restraining order. See *Ginsburg v. Ock-A-Bock Community Assn., Inc.*, 34 A.D.3d 637, 825 N.Y.S.2d 119 [2d Dept, 2006], *Kurlandsky v. Kim*, 111 A.D.3d 676, 975 N.Y.S.2d 98 [2d Dept 2013] and *19 Patchen, LLC v. Rodriguez*, 153 A.D.3d 1382, 61 N.Y.S.3d 616 [2d Dept 2017]. As stated above, DEC's application to access the Property and the need of the Soil Vapor Intrusion is compelling and supports the interim relief sought. Accordingly, the Petitioners' application for a preliminary injunction and restraining order is granted.

The parties have entered into a stipulation on July 29, 2020 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.

Based upon the foregoing, it is hereby Ordered that:

The Petitioners' motion (motion sequence #3) for a preliminary injunction and a restraining order is granted, as provided below. Specifically, Respondent 735 Bedford LLC is hereby Ordered that:

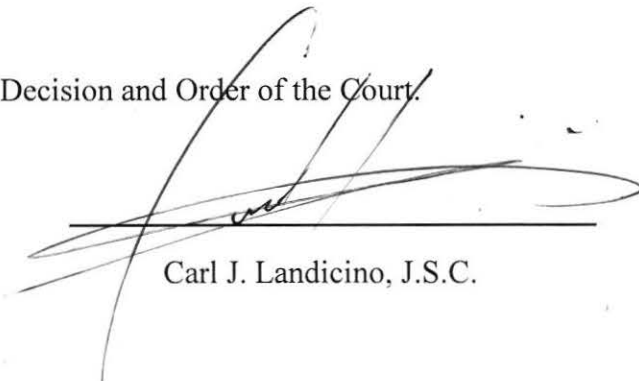
1. 735 Bedford LLC shall allow Petitioner DEC and/or its designee(s) access to the Property for the period of forty five (45) days after entry of this order, for the purpose of physically inspecting the Property and conducting a soil vapor intrusion investigation including the collection of indoor air, 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.

The foregoing constitutes the Decision and Order of the Court.

Enter:



Carl J. Landicino, J.S.C.