

<b>217 Franklin LLC v ZG Franklin LLC</b>
2020 NY Slip Op 34373(U)
December 22, 2020
Supreme Court, Kings County
Docket Number: 512278/2020
Judge: Kathy J. King
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At an IAS Term, Part 64 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 22<sup>nd</sup> day of December, 2020.

P R E S E N T:  
HON. KATHY J. KING,  
Justice.

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217 FRANKLIN LLC,  
Petitioner,

**DECISION/ORDER**  
Index No. 512278/2020

- against -

ZG FRANKLIN LLC,  
Respondent.  
----- X

The following papers number 1 to 3 read herein:  
Notice of Motion and Affidavits (Affirmations)  
Annexed  
Opposing Affidavits (Affirmations)

Papers Numbered  
1-2  
3

Petitioner moves by order to show cause for an access order to the adjacent premises owned by Respondent pursuant to RPAPL 881 (Mot. Seq# 1). Respondent cross-moves to dismiss petitioner’s petition under CPLR 3211(a)(4), CPLR 3211(a)(7), and CPLR 3211(a)(8) (Mot. Seq# 2).

Petitioner is the owner and developer of the lot located at 217 Franklin Street, Brooklyn, New York. Respondent ZG Franklin LLC is the owner of the adjacent premises located at 219 Franklin Street, Brooklyn, New York (the “Adjacent Premises”). Petitioner requires access to the adjacent premises in order to construct a six-story residential building and makes the within application based on respondent’s refusal to provide said access.

The Court shall first address respondent's cross-motion to dismiss the petition, since the relief requested in the petition would be deemed moot, if the respondent's motion is granted.

Under CPLR 3211, a party may move for judgment dismissing one or more causes of actions asserted against him on certain enumerated grounds including another action pending in any state (CPLR 3211 (a)(4);...that the complaint fails to state a cause of action (CPLR 3211(a)(7);...and, that the court lacks jurisdiction CPLR 3211(a)(8). On a motion to dismiss, pursuant to CPLR 3211, the Court must accept as true the facts as alleged in the complaint and submissions, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged, fit within any cognizable legal theory (*see Leon v. Martinez*, 84 N.Y.2d 83, 614 [1994]). It well settled that "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Id.* at 88).

Respondent's motion to dismiss the petition pursuant to CPLR 3211(a)(4) is denied. "Pursuant to CPLR 3211(a)(4), a court has broad discretion in determining whether an action should be dismissed based upon another pending action where there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same" (*Cooper v Bao Thao*, 162 AD3d 980, 981 [2d Dept 2018]). Here, an action entitled 217 Franklin LLC v ZG Franklin LLC was commenced by petitioner, bearing Index No 514699/2020 ("the Second Action") which alleged a cause of action sounding in encroachment. Upon review of the within action and the Second Action, the Court finds the two actions are not sufficiently similar, since the Second Action is a plenary action seeking monetary relief and/or declaratory judgment, and, the within action is a special proceeding for equitable relief seeking an access order to the adjacent premises for a pre-construction survey and installation of temporary

protections. Since the relief sought in the instant action and the Second Action are not sufficiently similar, dismissal is not warranted.

Respondent's cross-motion to dismiss the petition pursuant to CPLR 3211(a)(7) is granted to the extent of dismissing the branch of the petition regarding extension of the chimney flues. The Court finds that constructing an extension of the chimney flues constitutes a permanent encroachment on respondent's property contrary to the intent of RPAPL 881 (*see Matter of N. 7-8 Inv'rs, LLC v Newgarden*, 43 Misc 3d 623, 634-35 [Sup Ct 2014]). In all other respects, respondent's cross-motion is denied.

Respondent's motion to dismiss pursuant to 3211(a)(8) is denied. Petitioner's affidavit of service by personal delivery to the registered agent with the secretary of the state constitutes prima facie evidence of proof of service to respondent pursuant to CPLR 311-a.

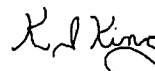
Since the Court has not dismissed the instant petition, the Court shall now consider petitioner's order to show cause for a temporary license and access order.

In support of the requested relief, petitioner submits an affidavit of petitioner's engineer, which establishes that improvements are being made as part of petitioner's construction project and cannot be completed without access to respondent's property. Accordingly, petitioner's order to show cause is granted to the extent of permitting a temporary license pursuant to RPAPL 881 for petitioner to enter upon respondent's property at 219 Franklin Street, Brooklyn, New York as follows: 1) for the purposes of conducting a photographic pre-construction survey; installing, maintaining, and removing of minimally invasive monitoring equipment including, without limitation, crack monitors, optical monitoring survey points and/or vibration monitors; 2) installing, maintaining, and removing of a shed and/or pipe scaffolding in the front of the rear yard, and on the rooftop of the adjacent

premises; and 3) installing, maintaining, and removing weatherproof protections and airspace usage. The license shall be in effect for 18 months from the date of this order. In all other respects, petitioner's order to show cause is denied (Mot. Seq# 1).

Respondent's cross-motion to dismiss is granted to the extent of dismissing the portion of the petition seeking to construct an extension of the chimney flues. In all other respects, respondent's cross-motion is denied (Mot. Seq# 2).

ENTER,



HON. KATHY J. KING  
J.S.C

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KINGS COUNTY CLERK