

N47 Assoc. LLC v Jemsco Realty LLC
2022 NY Slip Op 31567(U)
May 13, 2022
Supreme Court, New York County
Docket Number: Index No. 159215/2020
Judge: Carol Edmead
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. CAROL EDMEAD **PART** **35**

Justice

-----X

N47 ASSOCIATES LLC

Petitioner,

- v -

JEMSCO REALTY LLC,

Respondent.

-----X

INDEX NO. 159215/2020

MOTION DATE 12/22/2021

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 104, 105, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER .

Upon the foregoing documents, it is

ORDERED AND ADJUDGED that the part of the motions of petitioner/defendant N47 Associates, LLC (N47) (motion sequence number 002 of Index No. 159215/2020 [the Special Proceeding] and motion sequence number 002 of index no. 190819/2020 [the Adverse Possession Action]), pursuant to CPLR 2221 (d) and (f), seeking to reargue its cross motion for summary judgment in the Adverse Possession Action is denied; and it is further

ORDERED AND ADJUDGED that the part of N47's motions (motion sequence number 002 of Index No. 159215/2020 and motion sequence number 002 of index no. 190819/2020), pursuant to CPLR 2221 (e) and (f), seeking to renew its motion for summary judgment on its cross-motion for summary judgment in the Adverse Possession Action is granted; and it is further

ORDERED AND ADJUDGED that, upon renewal, the court modifies its prior order, dated November 19, 2021 (NYSCEF Doc. No. 48 of the Adverse Possession Action; NYSCEF

Doc. No. 78 of the Special Proceeding) to the extent of dismissing those parts of the respondent/plaintiff Jemsco Realty LLC's (Jemsco) adverse possession and prescriptive easement claims predicated upon (1) the existence of the Foundation Wall and (2) the claim that the Cinderblock Protrusion provided structural support to the Jemsco Building; and the motion is otherwise denied; and it is further

ORDERED AND ADJUDGED that the remainder of the Adverse Possession Action continues; and it is further

ORDERED AND ADJUDGED that the adverse possession claims raised by Jemsco in opposition to the Special Proceeding are modified in accordance with the findings in this Decision and Order; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for both parties are directed to appear at a Microsoft Teams conference on June 14, 2022 at 10:00am to discuss and schedule all necessary discovery for the remainder of the Adverse Possession Action. Counsels shall be prepared to discuss all documents to be exchanged and all witnesses that they wish to depose. Counsels may direct any inquiries they may have regarding the discovery conference to the Court via email (mwcavarr@nycourts.gov). It is further

ORDERED that counsel for N47 shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days.

MEMORANDUM DECISION

Motion sequence number 002 of index no. 159215/2020 and motion sequence number 002 of index no. 190819/2020 are hereby consolidated for disposition.

Index no. 159215/2020 is a special proceeding (the Special Proceeding). Commenced by order to show cause, petitioner/defendant N47 Associates, LLC (N47) seeks an order, pursuant to Real Property Actions and Proceedings Law (RPAPL) § 881, granting N47 a license to access real property owned by respondent/plaintiff Jemsco Realty LLC (Jemsco), which is located at 29 West 47th Street, New York, New York (the Jemsco Property).

Index no. 190819/2020, commenced by respondent/plaintiff Jemsco, is an action to quiet title and resolve an adverse possession dispute regarding a 100-foot by 18-inch strip of land (the Strip) located at 27 West 47th Street (the Adverse Possession Action). The disputed Strip, as recorded, sits on property owned by N47 (the N47 Property), and is directly adjacent to the Jemsco Property.

By so ordered stipulation, dated December 15, 2020, the Special Proceeding and the Adverse Possession Action were consolidated (Special Proceeding, NYSCEF Doc. No. 61).

In motion sequence number 002 of each action, N47 moves, pursuant to CPLR 2221 (d) (e) and (f), for leave to renew and reargue that part of this court's November 19, 2021 decision and order (the Prior Order) (NYSCEF Doc. No. 48 of the Adverse Possession Action), that denied Jemsco's motion (with leave to replead), and for leave to renew and reargue that part of the Prior Order that denied, in part, N47's cross-motion for summary judgment (motion sequence number 001) (the Prior Motion).

The court adopts herein the recitation of facts as set forth in the Prior Order. The parties are presumed to be familiar therewith.

Briefly, in the Prior Order, the court determined that neither Jemsco or N47 had presented the court with sufficient evidence upon which a determination could be made as to – amongst other things – what standard to apply to the subject adverse possession and prescriptive easement claims and whether certain adverse possession elements had been established or disproven as a matter of law.

The Motion for Leave to Reargue

In the part of its motion which seeks leave to reargue, N47 argues that the court misapprehended the law when it purportedly failed to consider (1) N47’s exclusivity argument, (2) N47’s argument that the Pre-2008 RPAPL statute does not apply and (3) N47’s argument that an extension wall on the north side of the Strip (the Extension Wall) and a cinderblock protrusion on the south side of the Strip (the Cinderblock Protrusion) are non-structural.

A motion for leave to reargue “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion” (CPLR 2221 [d] [2]). A party may not use a motion to reargue as a vehicle to advance arguments different from those provided on the original application (*see Mariani v Dyer*, 193 AD2d 456, 458 [1st Dept 1993]), or to argue a new theory of law or raise new questions not previously advanced (*Levi v Utica First Ins. Co.*, 12 AD3d 256, 258 [1st Dept 2004]).

N47’s Exclusivity Argument

N47 argues that the court overlooked and/or misapprehended its argument with respect to the exclusivity prong of the adverse possession test.

A review of N47’s cross-motion papers establish that N47 never articulated an argument regarding exclusivity in the Prior Motion, beyond a brief citation to boilerplate caselaw. No argument or specific statements were made with respect to exclusivity, nor was any evidence

presented on this issue to establish as a matter of law that the Strip was or was not used exclusively by Jemsco.

Notably, in its motion to reargue, N47 explains – for the first time – its rationale purporting to establish lack of exclusivity (N47’s memorandum of law, p. 13-15). Such new arguments cannot be raised for the first time on reargument (*Levi v Utica First Ins. Co.*, 12 AD3d at 258).

Further, N47’s argument that it must win on its own summary judgment motion because Jemsco failed to establish that it had exclusive control over the Strip in its own summary judgment motion is unpersuasive. Moreover, this argument was addressed in the Prior Order.

“Finally, to the extent that N47 argues that Jemsco’s failure to establish its right to adverse possession requires this court to grant summary judgment in N47’s favor, such argument is unpersuasive. “[A] party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent’s proof” (*Fromme v Lamour*, 292 AD2d 417, 417 [2d Dept 2002] [internal quotation marks and citation omitted]).”

(notice of motion, exhibit 1, at 20 [the Prior Order]). N47 has presented nothing to the court that changes this determination.

The Pre-2008 RPAPL Statute

N47 argues that the court erred by not dismissing Jemsco’s pre-2008 RPAPL statute claims because Jemsco failed to establish that it was entitled to tack its claims to the prior owner’s purported adverse possession claims. This failure, according to N47, establishes N47’s own entitlement to summary judgment dismissing Jemsco’s adverse possession claim. N47 raised this argument in its initial motion papers and it was addressed by the court in the Prior Order. Nothing raised on reargument changes that determination.

For example, in its reargument motion, N47 relies primarily on *Diaz v Mai Jin Yang*, 148 AD3d 672 (2d Dept 2017) and *Reyes v Carroll*, 137 AD3d 886 (2d Dept 2016), both of which it relied upon in the Prior Motion. Both are inapposite to the situation presented here.

In *Diaz*, the court found that the defendants actively submitted evidence establishing their entitlement to summary judgment and the plaintiff failed to rebut that evidence. The defendants in *Diaz* did not, as N47 does here, rely on the plaintiff's failure to prove its own case, and then seek to use that failure as grounds for the success of their own motion (*Fromme v Lamour*, 292 AD2d at 417 [internal quotation marks and citation omitted] ["a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof"]).

In *Reyes*, the defendant established, as a matter of law, that adverse possession began in 2000 – the year that the plaintiff built a stockade fence on defendant's property. Based on this undisputed fact, the second department found that the adverse possession claim could not have ripened until 2010, after the enactment of the statute. Therefore, as a matter of law, the 2008 amendment to the RPAPL applied to the *Reyes* dispute. Here, on the contrary, the subject encroachments (the Extension Wall and Cinderblock Protrusion) were built in or around 1930.

Therefore, as noted in the Prior Order, the longstanding existence of the subject encroachments create “a colorable claim that the Strip may have been adversely possessed by a prior owner” well before the enactment of the 2008 amendment to the RPAPL (Prior Order, at 13). Accordingly, as the court already held, N47 did not establish that the adverse possession claim matured after 2008, so that the 2008 amendment to the RPAPL would, as a matter of law, apply.

The Extension Wall and Cinderblock Protrusion

N47 argues that the court erred when it refused to consider evidence that N47 first presented in its sur-reply/reply to cross-motion that purported to show that the Extension Wall and Cinderblock Protrusions were non-structural.

Specifically, N47 argues that the court gave it leave to introduce new evidence in its sur-reply/reply to cross-motion in its interim order dated January 27, 2021 (the Interim Order) (NYSCEF Doc. No. 40). This is incorrect.

The Interim Order stated that N47 would be afforded the opportunity to “file a further submission in response to all arguments raised by Plaintiff” in its reply papers – i.e., the court granted N47 leave to file a sur-reply. No broader right was granted to N47; especially not the right to introduce evidence that was not initially submitted on its own cross-motion, but could have been (*see Nationstar Mtge., LLC v Tamargo*, 177 AD3d 750, 753 [2d Dept 2019]).

Given the foregoing, N47’s motion for leave to reargue is denied.

The Motion for Leave to Renew

N47 also moves for leave to renew its prior motion based upon purportedly new information not available at the time that motion was submitted.

As relevant, CPLR 2221 (e) provides that a motion for leave to renew “shall be based upon new facts not offered on the prior motion that would change the prior determination” (CPLR 2221 [e] [2]) and “shall contain reasonable justification for the failure to present such facts on the prior motion” (CPLR 2221 [e] [3]).

“A motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation . . . [and] must be based upon new facts, not offered on the original application, that would change the prior determination”

(*Rowe v NYCPD*, 85 AD3d 1001, 1003 [2d Dept 2011] [internal quotation marks and citations omitted]).

The new evidence provided by N47 is addressed, chiefly, to (1) the existence of a foundation wall, located in the Strip, that purportedly provides structural support to the Jemsco Building (the Foundation Wall) and (2) whether the Cinderblock Protrusion in the Strip provides structural support to the Jemsco Building.

As noted above, a question of fact remains as to whether the court should apply the pre-2008 framework or the post-2008 adverse possession framework. The issues surrounding the existence of the Foundation Wall apply to both frameworks. The issues surrounding whether the Cinderblock Protrusion provides structural support apply only to the post-2008 framework analysis.

In the Prior Order, the court held the following with respect to the existence of a Foundation Wall:

“Here, there are disputes as to (1) what is depicted in the photograph, (2) whether the Foundation Wall exists, (3) whether the Foundation Wall provides support to the Jemsco Building, (4) whether the Foundation Wall was a part of the N47 Building, and even (5) whether the Foundation Wall is above ground such that it could be considered open and notorious. These disputes forestall any resolution of these issues on summary judgment under the pre-2008 analysis (questions regarding, inter alia, the open and notorious, actual and hostile elements). They also forestall any resolution under the post-2008 analysis (questions regarding whether the Foundation Wall provided structural support to the Jemsco Building)”

(notice of motion, exhibit 1, at 19). With respect to the Cinderblock Protrusion, the court held that N47 did not provide sufficient evidence to establish whether it was “non-structural, such that [its] existence would be deemed to be permissive and non-adverse (RPAPL § 543)” (*id.* at 16).

N47 now presents evidence it alleges was unavailable at the time the Prior Motion was filed. Specifically, N47 relies on evidence obtained during a November 2021 excavation of the lot lines between the two premises that purports to depict the underground conditions on the Strip.¹ In particular, N47 argues, the excavation revealed that the Foundation Wall does not exist and that the Cinderblock Protrusion was not a structural support for the Jemsco Building.

Based on this, N47 argues that the court should grant renewal as to these claims and, upon reviewing the new evidence, grant summary judgment dismissing any theory of adverse possession or prescriptive easement that relies upon (1) the existence of the Foundation Wall or (2) the existence of structural supports under the Cinderblock Protrusion.

Additional Facts Relevant to this Issue

In its motion in chief, N47 submits the affidavit of Gregory C. Moorman, P.E., R.A., along with several new photographs depicting a newly dug test pit in the Strip. In opposition, Jemsco submits the affidavit of Joseph Nevins. In its reply, N47 submits, for the first time, an additional document alongside the reply affidavits of Moorman and James Michael Patterson, P.E.

New Document Presented in the Reply Papers

As an initial matter, the court must address the document submitted for the first time in N47's reply papers. Specifically, in its reply papers, N47 submits a single amendment page from the 1930 Bureau of Buildings file regarding the Jemsco Building that purports to impact the Prior Order (the Amendment Page). The Amendment Page is then discussed by N47's experts, Moorman and Patterson, in their reply affidavits.

¹ The Prior Motion was filed on January 4, 2021 – 10 months prior to the excavation.

The court declines to consider the Amendment Page, as it was first presented in N47's reply papers (*see 2 N. St. Corp. v Getty Saugerties Corp.*, 68 AD3d 1392, 1396 [3d Dept 2009] [on a motion to renew, "evidence . . . [that] was not provided in [the] initial moving papers but only in [the] reply papers" was properly disregarded by the trial court]).

In addition, the court notes, the Amendment Page is only a single page of a much larger document – purported to be 309 pages – that was not produced to the court on this motion. Moreover, said document was only provided to Jemsco after N47's submission of its reply, preventing Jemsco from meaningfully reviewing such document. Therefore, Jemsco would be prejudiced were the court to consider this document at this time.

In light of this prejudice, in addition to disregarding the Amendment Page, the court will disregard those parts of Moorman's and Patterson's reply affidavits that discuss said document.

Affidavit of Gregory C. Moorman P.E., R.A. (on behalf of N47)

Moorman states that he is a licensed professional civil engineer in New York and a licensed registered architect in New Jersey. He is the principal of Ancora Engineering, PLLC (Ancora), an engineering firm located in Manhattan. N47 hired Ancora to demolish the N47 building and excavate the footprint to place the foundation for a new building.

According to Moorman, Ancora applied for excavation permits at some time in 2020. Those permits were not issued by the New York City Department of Buildings until October 6, 2021 (Moorman Aff, ¶ 9). Subsequently, on November 2, 2021, test pits were dug "along the western edge of the N47 Property line adjacent to the eastern side of Jemsco's Building at the Jemsco property line" (*id.* ¶ 11).

Moorman notes that, prior to receiving the permits from DOB in October 2021, N47 was unable to dig down to the depth where it could observe this new information (*id.* at 20 ["Without

the use of heavy machinery to dig to the depth of the test pit . . . no simple observation, or minimal hand digging conducted on site would have revealed” the nature of the subject building foundations]).

Based on his review of the test pits, Moorman opined that no wall exists in the Strip that supports the foundation of the Jemsco Building (i.e. the Foundation Wall) (*id.* at 5 [“there is absolutely no encroachment of a purported Jemsco Foundation Wall that extended” into the Strip]). Specifically, Moorman notes that “a more than four-inch gap exists between the exterior terra cotta tile of Jemsco’s Building and the remnants of the foundation wall” of a different building (*id.* at 5). He provides photographs that depict this gap. According to Moorman, this gap establishes that any foundation wall remnants that exist in the Strip do not provide structural support for the Jemsco Building in the Strip.

Moorman also states that there was “nothing” underneath the Cinderblock Protrusion and, therefore, the Cinderblock Protrusion was not a structural support for the Jemsco Building (*id.* at 17). Further, Moorman states that, after reviewing the test pits, he determined that the Jemsco Building is “supported by vertical steel columns” and not by foundation walls (*id.* at 18).

Affidavit of Joseph Nevins (on behalf of Jemsco)

Joseph Nevins states that he is a director of Howard L. Zimmerman Architects & Engineers DPC (HLZ), an architecture and engineering firm hired by Jemsco to provide “consulting services” with respect to the construction at issue in this action (Nevins Aff., at 1).

Nevins opines that Moorman overstates the value of the evidence obtained from the test pits, because Moorman’s opinion is “based solely on the existence of some open space under a broken piece of concrete pad” (*id.* at 6). Nevins further opines that Moorman assumes, incorrectly, that the Cinderblock Protrusion was non-structural, and that moorman discounts the

possibility that the protrusion might have been a “part of the brick and rubble stone foundation wall partially under the Jemsco Building” (*id.* at 6).

Nevins further opines that it is “likely” that many more cinderblock protrusions existed – spaced approximately 10 feet apart, but that they were demolished by N47 (leaving only the one Cinderblock Protrusion addressed in the Prior Motion) (*id.* at 10). Nevins opines that these demolished protrusions could have served to brace the Jemsco Building’s terra cotta walls. He believes that N47’s current bracing of the Jemsco Building’s wall supports his opinion.

As to the Foundation Wall encroachment, Nevins states that he viewed the Strip from a hole in the Jemsco Building’s basement and was able to determine “that at least four inches of Jemsco’s eastern wall, one floor below grade, protrude[s] into the Strip” (*id.* at 17).

Nevins agrees with Moorman that the Foundation Wall “is not a structural component of the Jemsco Building” (*id.* at 19). Nevins then opines that, notwithstanding the above, the Foundation Wall may have been a “structural component of previous buildings which stood on the Jemsco site” (*id.* at 19). Finally, Nevins opines that, while the Foundation Wall did not provide actual structural support to the Jemsco Building, it provided protection for the Jemsco Building’s “celler wall which was composed of weak and porous clay (or terra cotta) tile block” (*id.* at 22).

Reply Affidavit of Gregory C. Moorman

In his reply affidavit, Moorman notes that Nevins’s affidavit is based on speculative assertions about what might have existed. He reiterates that his investigation of the test pits, along with the photographs of the test pits themselves, establish that there was “no encroaching foundation or party wall . . . extending from the Jemsco Property” into the Strip (Moorman Reply Aff., ¶ 3).

Next, with respect to the Cinderblock Protrusion, Moorman rejects Nevins's contention that the "concrete pads" upon which the Cinderblock Protrusion rested could create structural support for the Jemsco building. Moorman states that the concrete pad was "even with sidewalk grade" (*id.* at 14). According to Moorman, "[p]ermanent structural footing would never have been permitted to be installed at sidewalk grade . . . nor is it permitted in any historical version of the [Building Code]" (*id.* at 14).

Aside from the above, Moorman recites his prior opinions, based on his engineering experience, and his involvement with the active demolition of the N47 Building, that there was no foundation wall or other structural elements in the Strip.

Reply Affidavit of James Michael Patterson, P.E. (on behalf of N47)

James Michael Patterson states that he is a licensed professional engineer and a principal of Ancora. Patterson was the design applicant of record for N47's project and the applicant of record for the demolition of the prior building on N47's property (Patterson Aff., ¶ 3).

Patterson opines that Nevins's opinion that additional protrusions may have existed in the Strip to provide support are based solely on supposition. Patterson states that, based upon his direct observations made during the demolition, there were no other cinderblock protrusions in the Strip. He supplies several photographs (which were a part of the file in the Prior Motion [NYSCEF Doc. No. 95]) in support of this position.

Next, Patterson notes that Nevins does not assert any basis for his conclusion that terracotta walls – such as the wall of the Jemsco Building abutting the Strip – need lateral support. Patterson then reiterates his opinion from the Prior Motion that it is "a fundamental principle of civil and structural engineering, and basic building construction, that terracotta walls are supported vertically and not laterally" (*id.*, at ¶ 16).

Here, in sum, N47 has presented new evidence that was unobtainable at the time of the Prior Motion. The test pits were not dug – and were not permitted to be dug – until after the Prior Motion was fully submitted. Therefore, this newly unearthed evidence regarding the nature of the Strip’s subsurface is properly before the court on this motion to renew, and the court may review such new information to determine whether it would change its prior determination (CPLR 2221 [e]).

Based on Moorman’s affidavit and the photographic evidence supplied therewith, N47 has set forth evidence establishing that a foundation wall providing structural support to the Jemsco Building, as described and discussed in the Prior Order, does not exist in the Strip. In addition, Moorman establishes that the Cinderblock Protrusion did not provide any support to the Jemsco Building.

In opposition, Jemsco – through Nevins – fails to raise a question of fact as to the existence of the Foundation Wall. Specifically, Nevins’s conclusions lack foundation and rely on supposition and speculation (*see e.g. Santoni v Bertelsmann Prop., Inc.*, 21 AD3d 712, 715 [1st Dept 2005], quoting *Samuel v Aroneau*, 270 AD2d 474, 475 [2d Dept 2000] [“If the expert’s conclusions lack foundation in the record and are speculative, the affidavit will not raise questions of fact sufficient to preclude summary judgment”]).

Accordingly, based upon this new evidence, N47 is entitled to summary judgment dismissing that part of Jemsco’s adverse possession and prescriptive easement claims predicated upon the existence of the Foundation Wall under both the pre- and post-2008 analyses. In addition, N47 is entitled to summary judgment dismissing that part of Jemsco’s adverse possession and prescriptive easement claims predicated upon the claim that the Cinderblock Protrusion provided structural support to the Jemsco Building under the post-2008 analysis only.

The parties remaining arguments have been considered and were found unavailing.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED AND ADJUDGED that the part of the motions of petitioner/defendant N47 Associates, LLC (N47) (motion sequence number 002 of Index No. 159215/2020 [the Special Proceeding] and motion sequence number 002 of index no. 190819/2020 [the Adverse Possession Action]), pursuant to CPLR 2221 (d) and (f), seeking to reargue its cross motion for summary judgment in the Adverse Possession Action is denied; and it is further

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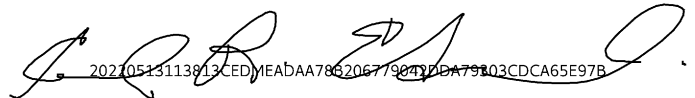
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ORDERED that counsel for both parties are directed to appear at a Microsoft Teams conference on June 14, 2022 at 10:00am to discuss and schedule all necessary discovery for the remainder of the Adverse Possession Action. Counsels shall be prepared to discuss all documents to be exchanged and all witnesses that they wish to depose. Counsels may direct any inquiries they may have regarding the discovery conference to the Court via email (mwcavarr@nycourts.gov). It is further

ORDERED that counsel for N47 shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days.



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5/13/2022
DATE

CAROL EDMEAD, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE