Filicia Anstalt Vaduz, a Lichtenstein Co. v 11 E. 73rd St. Corp.
2023 NY Slip Op 32454(U)
July 11, 2023
Supreme Court, New York County
Docket Number: Index No. 655017/2022
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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FILICIA ANSTALT VADUZ, A LICHTENSTEIN COMPANY,

Plaintiff,

- v -

11 EAST 73RD STREET CORPORATION,

Defendant.

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INDEX NO. 655017/2022

MOTION DATE 06/30/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

11 EAST 73RD STREET CORPORATION

Plaintiff,

-against-

BARTLETT TREE EXPERTS, THE F.A BARTLETT TREE EXPERT COMPANY

Defendant.

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Third-Party
Index No. 595365/2023

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 27, 32, 33, 34, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48 were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff's motion for summary judgment is granted in part and denied in part.

Background

This case concerns a party wall between two adjacent buildings owned by plaintiff and defendant on the Upper East Side of Manhattan. Plaintiff alleges that this party wall is in the courtyard of defendant's property and that vines, ivy and other plants have damaged this wall. Apparently, defendant does not rely on this wall to support its building; defendant's courtyard lies in between the defendant's building and the subject wall. Plaintiff claims that it asked

defendant to address the issue decades ago and that defendant finally agreed (in 2002) to maintain the side of the party wall that faces the courtyard.

Plaintiff contends that in 2009, it told defendant that there was more encroachment on the front and rear façade as well as the roof of plaintiff's property. It claims that this encroachment caused water leaks into plaintiff's building. Plaintiff alleges that defendant agreed to pay for the overgrowth to be cut back (as provided for in the parties' previous agreement). However, according to plaintiff, the encroachment continues and it has now hired contractors and experts to assess the damage caused from defendant's property. Plaintiff brings causes of action for injunctive relief, a declaratory judgment that defendant is required to maintain the party wall and prevent encroachment onto plaintiff's property, breach of an agreement, negligence, trespass, and nuisance.

Plaintiff moves for summary judgment on all of its causes of action. First, there is no question that this is a party wall - there was a lawsuit about this very wall in the late 1950s in which the Court found that the wall was a party wall. Defendant was a party to that lawsuit. Plaintiff details how it has asked defendant to fix the problems with the overgrown vines dating back to 2002 and that defendant has failed to take sufficient action to address the problems. It wants injunctive relief that defendant has to prevent further trespass and property damage as well as an order that defendant has to make the necessary repairs to the party wall. Plaintiff attaches an estimate for the repair work to the wall, which contains a quote for $134,500 worth of work (NYSCEF Doc. No. 18).

Plaintiff attaches photos from this year which show significant vine growth on the party wall (NYSCEF Doc. No. 21). And it includes an affidavit from Dane Barnes, an engineer, who claims that ivy growth on the subject brick wall exacerbates the weathering process and allows

more ways for storm water to enter (NYSCEF Doc. No. 10, ¶ 5). Mr. Barnes claims that he inspected the wall and insists that the vines be removed as soon as possible to prevent further deterioration of the brick party wall (*id*. ¶ 9). He noted that numerous bricks are visibly loose and cracked, which may mean that some bricks are not attached to the wall itself (*id*. ¶¶ 10-13).

In opposition[1], defendant contends that the motion is premature. It claims that it disputes many of the facts alleged by plaintiff. Defendant asserts that it needs time to do discovery about the alleged agreement between plaintiff and defendant. It insists that plaintiff has known about this issue for many years and only recently claimed the problems with the party wall constitute an emergency. Defendant includes the affidavit of its property manager (he claims he has been property manager since 1983) who insists that there is no party wall agreement between the parties (NYSCEF Doc. No. 41 at 2).

In reply, plaintiff claims that defendant failed to raise any issues of fact. It claims that defendant did not identify what discovery needs to be explored. Plaintiff argues that defendant's contentions about the fact that the wall is not a "load-bearing" wall are irrelevant and that the record shows that there was an agreement between the parties.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (id.). When deciding a summary judgment motion, the court views the alleged facts in the light

[1] Although plaintiff purported to reject the opposition papers, the Court will consider these papers as part of the record as plaintiff filed reply papers.

most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec*, Ltee, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], affd 99 NY2d 647, 760 NYS2d 96 [2003]).

The Court's decision begins with the 1959 decision in which the Court found that the subject wall is a party wall (*5 E. 73rd, Inc. v 11 E. 73rd St. Corp.*, 16 Misc 2d 49 [Sup Ct NY County 1959], *affd*, 13 AD2d 764 [1st Dept 1961]). In that case, plaintiff's predecessor brought a case against defendant for a declaration that the wall in question was under its exclusive control and possession (*id*.). That effort was unsuccessful and the wall remained a party wall (*id*.). Having found that the wall at issue is a party wall, the Court will consider each of plaintiff's causes of action.

First Cause of Action

The first cause of action seeks injunctive relief "enjoining Defendant from planting any additional vines, ivy or other plants on Defendant's Property that would grow up against and along the Party Wall between Plaintiff and Defendant's Property, enjoining Defendant to remove the Encroachment growing up against and along the Party Wall, and enjoining Defendant to

repair the damage caused to the Party Wall and Plaintiff's Property by the Encroachment growing from Defendant's Property" (NYSCEF Doc. No. 1, ¶ 45).

The Court grants the motion with respect to this cause of action. Defendant did not dispute that there is ivy and other overgrowth that is encroaching upon plaintiff's property or that this overgrowth is coming from defendant's courtyard. Plaintiff attached photographs in its moving papers as well as affidavits describing the damage, including the affidavit from its expert (Mr. Barnes).

Defendant did not attach anything in opposition from someone with personal knowledge with respect to this cause of action. It only attached an affidavit from its property manager concerning an alleged agreement between the parties from 2002. But the property manager does not dispute plaintiff's characterization of the problem or sufficiently contest Mr. Barnes' contentions. Accordingly, the Court finds that defendant did not raise an issue of fact on this cause of action and plaintiff is entitled to summary judgment on this injunctive relief.

Second and Third Causes of Action

The Court denies the second cause of action, which seeks declaratory relief arising out of an alleged agreement between the parties from 2002 about the repair and maintenance of the party wall. The affidavit of the property manager for defendant raised an issue of fact about whether there was an agreement. Moreover, plaintiff did not attach a copy of this agreement in its moving papers and references to such an agreement in letters from plaintiff's attorney (NYSCEF Doc. No. 16) does not satisfy plaintiff's burden on a motion for summary judgment on this claim. The Court cannot discern as a matter of law whether there was such an agreement, the terms of the agreement and, consequently, whether that agreement was breached. In fact, plaintiff's insistence that the Court find that there was an agreement or, possibly, an implied

contract suggests that there needs to be discovery on this issue. The Court is unable to bind defendant to any agreement on these papers.

For these same reasons, the Court denies the branch of the motion that seeks summary judgment for the third cause of action for breach of contract or breach of an implied-in-fact contract. Plaintiff's attempt to parse the affidavit of defendant's property manager is without merit. The property manager clearly denied that there was an agreement and plaintiff did not produce a copy of an agreement on this record. Summary judgment is not appropriate under these circumstances.

Fourth, Fifth and Sixth Causes of Action

The Court grants the motion for summary judgment on these claims for negligence, trespass, and nuisance. As noted above, plaintiff met its burden to show that the party wall was damaged because of the overgrowth coming from defendant's property. And defendant did not submit anything in opposition that directly contradicts the allegations relating to these claims. Merely denying them is not enough. Defendant did not, for instance, submit an expert's affidavit to raise an issue of fact about the nature of the damage to the party wall or the potential causes of the damage. In other words, summary judgment on liability is appropriate under these circumstances where defendant did not point to anything from someone with personal knowledge claiming that the conditions complained about by plaintiff do not exist nor contradicting the causes thereof.

Summary

On a motion for summary judgment the Court must consider the burdens on each party. Here, plaintiff met its burden to establish that there is a significant issue with a party wall from the overgrowth coming from defendant's property that needs remediation. Plaintiff attached

affidavits from its managing agent to show it hired an arborist to take a look at the issue, from its principal to include current photographs of the party wall, as well from its engineer.

Defendant did not directly address many of these points in opposition. Although it successfully raised an issue of fact about the alleged 2002 agreement, it did not sufficiently dispute any of plaintiff's contentions about the current status of the party wall. Of course, this is not a situation in which defendant does not have access to this wall (it is located in its courtyard) and it did not adequately oppose the claims for trespass, nuisance, and negligence. Nor did it explain why injunctive relief is not appropriate where, as here, plaintiff's expert says that the removal of the vines should be done immediately.

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted only to the extent that plaintiff is entitled to summary judgment on liability for its first, fourth, fifth and sixth causes of action; and it is further

ORDERED that plaintiff is entitled to injunctive relief that defendant may not plant any additional vines, ivy or other plants on its property that would grow up against and along the party wall between the two parties' properties, and defendant must remove the overgrowth (the vines, ivy etc.) growing up against and along the party wall on or before August 11, 2023, and repair the damage to the party wall on or before September 11, 2023.

Defendant may seek additional time to complete these items by making a motion and citing sufficient justification for a modification of this order.

The remaining issues, including the existence and terms of the alleged 2002 agreement, shall be explored in discovery. Also outstanding is a determination about how much each party must contribute towards the subject repairs (plaintiff need not contribute to the removal of the

vines and overgrowth). It may be that discovery reveals that plaintiff has to pay something towards the repair of the party wall depending on the causes of the issues with the party wall (for instance, sometimes repairs are a function of routine maintenance). The Court cannot make a finding that defendant is wholly responsible at this stage of the case.

Conference: September 27, 2023 at 11:30 a.m. By September 20, 2023, the parties shall upload 1) a stipulation about discovery signed by all parties, 2) a stipulation of partial agreement that identifies the areas in dispute or 3) letters explaining why no agreement about discovery could be reached. The Court will then assess whether a conference is necessary (i.e., if the parties agree, then an in-person conference may not be required). If nothing is uploaded by September 20, 2023, the Court will adjourn the conference.

7/11/2023
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE