

**276-W71 LLC v Board of Mgrs. of 240 W. End Ave.
Condominium**

2023 NY Slip Op 33224(U)

September 14, 2023

Supreme Court, New York County

Docket Number: Index No. 157834/2023

Judge: Dakota D. Ramseur

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR PART 34M

Justice

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276-W71 LLC,

Plaintiff,

- v -

BOARD OF MANAGERS OF 240 WEST END AVE
CONDOMINIUM, WALTER SAMUELS, INC.

Defendants.

-----X

INDEX NO. 157834/2023

MOTION DATE 08/07/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for INJUNCTION/RESTRAINING ORDER

Plaintiff, 276-W71 LLC (plaintiff), commenced this action for trespass, private nuisance, negligence, and pursuant to Real Property Actions and Proceedings Law (RPAPL) § 871 against defendants, Board of Managers of 240 West End Ave Condominium, and Walter Samuels, Inc. (defendants), stemming from defendants' erection of a scaffold, or sidewalk bridge, in front of plaintiff's building, located at 76 West 71st Street, New York, New York (76 building). Plaintiff now moves for injunctive relief and for, among other things, an order directing defendants to remove the sidewalk bridge. The motion is opposed. For the following reasons, the motion is denied.

Defendants own the building located at 240 West End Avenue, New York, New York, a 17-story pre-war elevator apartment building (240 building). The 240 building is located adjacent to the 76 building. In mid-2018, defendant erected a sidewalk bridge on the sidewalk abutting their property in order to "perform Local Law 11 facade work" on the 240 building (NYSCEF doc. no 17, def affirm at ¶ 4). The sidewalk bridge extended the length of the 240 building and onto the sidewalk abutting the 76 building but does not touch the 76 building. According to plaintiff, the sidewalk bridge blocks windows and encroaches on the front yard of the 76 building. Plaintiff further alleges that the erection of the sidewalk bridge damaged the 76 building.

Plaintiff alleges that they requested that defendants remove the sidewalk bridge, to which defendants refused. According to plaintiff, in early 2023, defendant further extended the sidewalk bridge on plaintiff's property, resulting in the loss of sunlight into the windows facing the front of the 76 building. Despite plaintiff's request, defendants have failed to move the original or newer sidewalk bridge.

In support of its motion, plaintiff argues that it is entitled to a preliminary injunction on its claim for trespass because the erection of the sidewalk bridge is an intentional entry onto its property without justification or permission. Plaintiff further argues that whether the erection of the sidewalk bridge is in compliance with Local Law 11 and/or an order by the Department of Buildings does not constitute a justified trespass. Plaintiff further argues that it will likely be successful on its claim for private nuisance, since plaintiff is unable to use the 76 building as intended because of the scaffold, in that the scaffold blocks sunlight from entering the windows of the front facing units and because the scaffold has caused damages to the building. Plaintiff further argues that it will likely succeed on its claim under RPAPL § 871 since defendants erected the sidewalk bridge on plaintiff's property for the purpose of making repairs to defendants' property.

In opposition, defendants argue that plaintiff fails to submit an affidavit from someone with personal knowledge of the alleged damages to the premises. Defendants further argue that the claims for a preliminary injunction fail because the erection of the sidewalk bridge was a legal requirement. Defendants further argue that this matter should not be converted to special proceeding under RPAPL § 881, since defendants did not need to access the 76 building in order to install the sidewalk bridge. In the event this matter is converted to a special proceeding, defendants argue that plaintiff are not entitled to a license fee under RPAPL § 881.

A preliminary injunction is a drastic remedy, which should not be granted unless the movant demonstrates "a clear right" to such relief (*City of New York v 330 Continental, LLC*, 60 AD3d 226, 234 [1st Dept 2009]). The party seeking a preliminary injunction must show: (1) a likelihood of success on the merits; (2) irreparable injury absent the granting of preliminary injunctive relief; and (3) a balancing of the equities in the movant's favor (CPLR 6301; *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839 [2005]).

"The elements of a cause of action sounding in trespass are an intentional entry onto the land of another without justification or permission or a refusal to leave after permission has been granted but thereafter withdrawn" (*Wlody v Birch Fam. Servs., Inc.*, 210 AD3d 1036, 1037 [2d Dept 2022] [internal citations omitted]). "The elements of a private nuisance cause of action are an interference (1) substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act" (*id.* at 1037).

In *22 Irving Place Corp. v 30 Irving LLC* (57 Misc 3d 253 [Sup Ct, New York County 2017]), a case involving similar claims as those here, the court denied the plaintiff's motion for a preliminary injunction to immediately remove a sidewalk bridge pursuant to RPAPL § 881 and granted the defendant's cross-motion to dismiss plaintiff's claims sounding in trespass and private nuisance. The plaintiff alleged that the defendant, an adjoining landowner, erected a sidewalk bridge in front of its building and for 20 feet in front of the plaintiff's building. Defendant argued that it obtained permits to perform building violation corrections and were issued permits to erect scaffolding in front of their building and in front of part of the plaintiff's building (*id.* at 254). In denying the motion for a preliminary injunction, the court determined that the plaintiff failed to demonstrate both the likelihood of success on the merits and balance of

equities of its claims, in that a claim for trespass and private nuisance may not lie where “[t]he sidewalk bridge is mandated by law and for public safety” (*id.* at 256).

Here, plaintiff fails to demonstrate both a likelihood of success and that the balance of equities is in plaintiff’s favor as to its claims for trespass, private nuisance, and RPAPL § 881. There is no dispute that defendant was required to erect the sidewalk bridge pursuant to New York City Administrative Code §§ 3307.6.2 and 3307.6.3. Further, there is no dispute that the purpose of the scaffold is for public safety (NYC Admin Code § 3307.6.2 [“A sidewalk shed shall be installed and maintained to protect all sidewalks, walkways, and pathways within the property line of a site, and all public sidewalks that abut the property”]). As defendant was required by law to erect the sidewalk bridge and the scaffold and was erected for public safety, both of which justify defendant’s entrance to plaintiff’s property and is not unreasonable, plaintiff’s motion for a preliminary injunction must be denied (*see 22 Irving Place Corp.* 57 Misc 3d 253 at 256). The Court notes that plaintiff does not submit proof concerning the scope of the work at the 240 building, including what work remains, or an engineer’s affidavit in its moving papers. Plaintiff’s submission of an engineer’s letter submitted for the first time in reply is not sufficient, as the engineer’s statements were not rendered within a reasonable degree of engineering certainty or based upon facts supported by the record, and is thus not considered.

The branch of plaintiff’s motion to convert this action to a special proceeding under RPAPL § 881 is also denied. “RPAPL § 881 is the means by which a landowner seeking to make improvements or repairs to its property may seek a license to enter an adjoining landowner’s property when those improvements or repairs cannot be made without such entry” (*Lincoln Spencer Apartments, Inc. v Zeckendorf-68th Street Associates*, 88 AD3d 606 [1st Dept 2011]). “A court may convert an action for a preliminary injunction into a proceeding under RPAPL 881 where such conversion is appropriate” (*Ponito Residence LLC v 12th St. Apartment Corp.*, 38 Misc. 3d 604, 612 [Sup Ct, New York County 2012], citing *Mindel v Phoenix Owners Corp.*, 210 AD2d 167 [1st Dept 1994]).

Here, defendant accessed plaintiff’s property to erect a sidewalk bridge in order to perform certain work on defendant’s property, and thus, the relief sought by plaintiff falls within the purview of RPAPL § 881 (*see Ponito* at 612).¹ However, as discussed above, plaintiff fails to present any facts demonstrating both that defendants have engaged in a significant delay in performing work at the 240 building and proof of the damages caused by the sidewalk bridge (*see 22 Irving Place Corp.* at 257-58 [declining to convert the action to a special proceeding pursuant to RPAPL 881 where “the sidewalk shed had been put up just two months prior to the application and there is no indication of a history of damage”], *but see Ponito* at 612 [converting an action pursuant to RPAPL 881 where defendant did not commence work 18 months after erecting the sidewalk bridge and there was prior history of damages]). Thus, the Court finds that there is no basis to convert this action to a special proceeding pursuant to RPAPL 881.

¹ The relevant portion of RPAPL § 881 states as follows:

“When an owner or lessee seeks to make improvements or repairs to real property so situated that such improvements or repairs cannot be made by the owner or lessee without entering the premises of an adjoining owner or his lessee, and permission so to enter has been refused, the owner or lessee seeking to make such improvements or repairs may commence a special proceeding for a license so to enter pursuant to article four of the civil practice law and rules.”

Accordingly, it is hereby

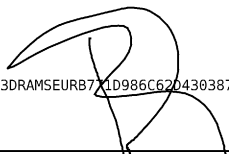
ORDERED that plaintiff's motion for a preliminary injunction, or in the alternative to convert this matter to a special proceeding pursuant to RPAPL § 881 is denied, without prejudice; and it is further

ORDERED that defendants shall answer the complaint within twenty (20) days; and it is further

ORDERED that the parties shall appear for a preliminary conference on October 31, 2023 at 9:30 a.m.; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order upon defendants, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.

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DAKOTA D. RAMSEUR, J.S.C.

9/14/2023

DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE