

**Filicia Anstalt Vaduz, a Lichtenstein Co. v 11 E. 73rd
St. Corp.**

2023 NY Slip Op 34093(U)

November 15, 2023

Supreme Court, New York County

Docket Number: Index No. 655017/2022

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

-----X

FILICIA ANSTALT VADUZ, A LICHTENSTEIN COMPANY,

Plaintiff,

- v -

11 EAST 73RD STREET CORPORATION,

Defendant.

-----X

11 EAST 73RD STREET CORPORATION

Plaintiff,

-against-

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

Defendant.

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INDEX NO. 655017/2022

MOTION DATE N/A

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595365/2023

The following e-filed documents, listed by NYSCEF document number (Motion 002) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 81, 82, 83, 84, 85, 86, 87, 106, 107, 108, 109

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Defendant’s motion to reargue and for other relief is decided as described below.

Background

In this dispute about a party wall, plaintiff contends that defendant has let the party wall shared by plaintiff and defendant to deteriorate due to plant overgrowth from defendant’s courtyard. Defendant does not rely on the subject wall for support and instead its courtyard lies between the defendant’s building and the party wall. Plaintiff argues that vines and other plants have caused significant damage to the party wall.

Plaintiff previously moved for summary judgment on its claims for declaratory judgment and a preliminary injunction. The Court granted that relief in part and ordered defendant to remove the overgrowth on the party wall and repair damage to the party wall (NYSCEF Doc. No. 59).

Defendant now moves to reargue, for additional time to complete the repairs and for a stay of the Court's order pending appeal. The Court observes that it granted defendant a stay of the initial deadlines (NYSCEF Doc. No. 64). After subsequent appearances, the Court issued subsequent interim orders requiring defendant to take steps to remedy the overgrowth, such as getting a proposal from a contractor (NYSCEF Doc. No. 76) and then (after defendant failed to make adequate efforts) ordered that defendant put \$250,000 into an escrow account so that plaintiff could start fixing the issues with the party wall (NYSCEF Doc. No. 81).

In connection with this most recent order, the Court observed that defendant attempted to cite to a proposal to fix the party wall that was dated *before* the first oral argument date despite claiming at that appearance that it had not taken any steps to get estimates for the necessary work (NYSCEF Doc. No. 78). As the Court noted, either this proposal (which did not include any vine removal) to fix the party wall was back-dated or it was withheld from the Court at the first oral argument (*id.*). Either scenario did not evidence a good-faith effort to do anything to fix the party wall; accordingly, the Court found that defendant should pay into an escrow account so that plaintiff could start addressing the problems as this was the most expeditious way to fix the party wall.

Defendant subsequently obtained a stay of this Court's decision in motion sequence 001 and the order requiring defendant to put money into escrow for the repair of the wall (NYSCEF Doc. No. 108).

Discussion

As an initial matter, defendant is correct that this Court should not have granted summary judgment on plaintiff's fourth, fifth and sixth causes of action for negligence, trespass and nuisance. Plaintiff moved for summary judgment on only its first and second claims for a preliminary injunction and for declaratory relief.

Therefore, the Court grants reargument and, upon reargument, it modifies its decision to reflect that plaintiff is entitled to summary judgment on its first cause of action only. The Court declines to search the record and grant summary judgment on the fourth, fifth and sixth causes of action.

However, the Court adheres to its decision regarding the first cause of action for injunctive relief that enjoins defendant from planting any additional vines, ivy or other plants that can grow up against the party wall. Defendant is also directed to remove the overgrowth and to repair any damage to the party wall. As the Court noted in its previous decision, a court in 1959 found that this specific wall is a party wall (*5 E. 73rd, Inc. v 11 E. 73rd St. Corp.*, 16 Misc2d 49 [Sup Ct NY County 1959], *aff'd* 13 AD2d 764 [1st Dept 1961]).

And nothing presented in this motion requires the Court to reconsider the decision to grant plaintiff injunctive relief. In connection with the previous decision, the Court noted that plaintiff included an affidavit from its expert, photographs, and affidavits describing the damage (NYSCEF Doc. No. 59 at 5). The Court observed that defendant did not submit anything from someone with personal knowledge or an expert's affidavit (*id.*). In other words, plaintiff easily met its burden to demonstrate the elements for injunctive relief because it showed that defendant was causing the problems with the party wall. Plaintiff showed it has a likelihood of success on the merits that defendant is responsible for the party wall problems, it will suffer irreparable

harm if the party wall is not repaired as plaintiff relies upon the wall for support, and a balancing of the equities favors plaintiff as defendant does not rely on the party wall and merely has a courtyard to clean up.

In this motion, defendant includes an affidavit from its property manager (who also included a submission in connection with MS001) who claims that defendant could not meet the deadlines set by the Court to remedy the issues with the party wall (NYSCEF Doc. No. 63). However, the property manager does not dispute the cause or the severity of the issues with the party wall or even dispute that defendant has a responsibility to maintain the party wall. At one point, he states that “It is my duty as property manager to ensure the maintenance and repair of 11 East 73rd Street, New York, New York 10021, *including the party wall*” (*id.* ¶ 4). Plaintiff is certainly entitled to injunctive relief that defendant has to repair the party wall where defendant admits it has a duty to repair it and does not sufficiently contest that it caused the subject problems. Defendant did not include an expert’s affidavit in this motion to contest plaintiff’s concerns about the overgrowth and the deteriorating condition of the wall.

Summary

The Court recognizes that there is a pending motion before the Appellate Division, First Department. In this Court’s view, the stay issued by the First Department does not apply to this motion (the stay only mentions the Court’s October 5, 2023 interim order and the initial summary judgment order). However, the requirement that defendant put money into escrow is clearly stayed pending the First Department’s decision. And obviously, this Court stayed the initial deadlines to complete the work and so those directives are moot. The Court therefore sets

a deadline of March 30, 2024 for defendant to remedy the party wall issues. Of course, defendant may still be required to put money into escrow depending on the First Department’s decision.

The Court declines to grant a stay of these proceedings pending an appeal. On this record, there is no genuine factual dispute that there is significant overgrowth in defendant’s courtyard that is causing damage to the party wall. The Court prefers not to delay this case indefinitely while the party wall’s condition continues to deteriorate especially where, as here, defendant has not produced anything to dispute any of plaintiff’s assertions about the party wall or the scope of the problem. This is not just a case of who pays and how much; the Court views this as a safety issue. The Court takes safety matters very seriously and does not want to wait so long that a serious or emergency condition develops with the party wall that threatens the structural integrity of plaintiff’s building.

Accordingly, it is hereby

ORDERED that defendant’s motion to reargue is granted and, upon reargument, the Court adheres to its decision only to the extent that plaintiff is entitled to summary judgment on its first cause of action for injunctive relief; and it is further

ORDERED that the branch of defendant’s motion for a stay is denied; and it is further

ORDERED that defendant’s demand for a delay in fixing the party wall is granted to the extent that defendant shall have until March 30, 2024.

11/15/2023

DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE