

Crown Wisteria, Inc. v Cibani

2023 NY Slip Op 34443(U)

December 18, 2023

Supreme Court, New York County

Docket Number: Index No. 159090/2023

Judge: Paul A. Goetz

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. PAUL A. GOETZ **PART** **47**

Justice

-----X

CROWN WISTERIA, INC.,

Plaintiff,

- v -

FIONA CIBANI, BHA CONSTRUCTION, INC.

Defendants.

-----X

INDEX NO. 159090/2023

MOTION DATE 09/20/2023

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 15, 16, 17, 18, 19, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

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

In this real property damage action, plaintiff, the owner of property located at 118 East 78th Street, New York, NY 10075, filed suit against defendant Fiona Cibani, the owner of the neighboring property at 116 East 78th Street, and defendant BHA Construction, Inc., which Cibani hired to perform construction work on her rooftop (NYSCEF Doc No 1). Plaintiff now moves for a preliminary injunction enjoining defendants from performing any additional work on the Cibani’s property pending a hearing and determination by this court on plaintiff’s underlying causes of action; compelling defendants to take all necessary steps to ensure plaintiff’s property is secure against damage; and compelling defendants to pay for any expenses plaintiff incurred in connection with defendants’ construction project (NYSCEF Doc No 42).

BACKGROUND

On January 23, 2023, plaintiff and Cibani entered into a limited license agreement granting defendants access to plaintiff’s property for the sole purpose of installing measures to protect plaintiff’s roof from damage (NYSCEF Doc No 35). A Site Safety Plan (SSP) depicting

the roof protection plan was approved by the NYC Department of Buildings (DOB) (NYSCEF Doc No 27).

Plaintiff alleges that on August 2, 3, and 4 of 2023, defendants entered plaintiff's property, carrying planks of wood and sandbags through the building, and placed those protective materials on plaintiff's roof (NYSCEF Doc No 1). Plaintiff sent defendants a letter on August 17, 2023, notifying them that: (1) defendants' entry constitutes a trespass, as defendants failed to obtain prior approval for entry from plaintiff, as contemplated by the license agreement; (2) defendants were interfering with residents' use and enjoyment of their property by placing protective materials on the terraces and rear yard, whereas they were only meant to be placed on the "low roof area;" and (3) "Crown's contractor will be removing the plywood, sandbags, and other items illegally installed by Cibani on **August 17, 2023**. To avoid additional damage to the interior space of the 118 Property, Crown will hand over the materials to Cibani through the rear yard fence bordering the properties" (NYSCEF Doc No 3, emphasis in original).

However, plaintiff apparently did not remove the materials on the date indicated because on August 28, 2023, Andrew Goldenberg, Esq. (plaintiff's counsel) advised Jessica Rothman, Esq. (defendants' counsel) that plaintiff would do so the following morning (NYSCEF Doc No 4). He stated that the materials would be placed in the rear yard and requested that Rothman "let us know within the next week when we can hand the material over the fence to your client." On September 6, 2023, Goldenberg advised that plaintiff wanted all of the materials "moved from the 118 rear yard to 116 property today," noting that the parties could "coordinate a hand off with BHA's workers." Rothman responded: "BHA is removing the protection materials [] today." Plaintiff then alleges that "[w]ithout any notice or approval by Crown, on September 7,

2023, BHA Construction entered the rear yard of the 118 Property and removed the illegal protection materials” (NYSCEF Doc No 1).

Concurrently, from August 30, 2023 to September 18, 2023, plaintiff filed five complaints against defendants with the DOB (NYSCEF Doc 28). The DOB found that the first four complaints—which complained of construction work performed contrary to a stop work order (SWO), lack of protection of adjacent buildings, and excessive debris—were either unsubstantiated or did not warrant a violation, and noted that no unsafe conditions were observed upon inspection. The DOB did, however, issue a violation in response to the last complaint due to “inadequate roof protection for adjacent property 118 East 78 Street,” noting that “[m]echanical equipment was not covered and plywood was not secure.” However, as defendants point out, the violation was issued after plaintiff removed the protective materials; the violation was for that precise lack of protection; and the DOB did not issue a SWO, so defendants were free to continue their work, assuming they would “provide and maintain adequate safety measures for operations going forward.”

DISCUSSION

To obtain a preliminary injunction pursuant to CPLR § 6301, a movant must demonstrate, by clear and convincing evidence: (1) a likelihood of success on the merits, (2) irreparable injury if a preliminary injunction is not granted, and (3) a balance of equities in their favor (CPLR § 6301; *Barbes Rest. Inc. v ASRR Suzer 218, LLC*, 140 AD3d 340, 431 [1st Dept 2016] [citing *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]]). “[T]he purpose of a preliminary injunction is to maintain the status quo,” and the decision to grant or deny a preliminary injunction rests in the discretion of the motion court (*360 W. 11th LLC v. ACG Credit Co. II, LLC*, 46 AD3d 367, 367 [1st Dept 2007]).

Considering that defendants' construction project is already underway, enjoining defendants from continuing their work would not be "maintaining the status quo." Rather, plaintiff is essentially asking the court to step in and issue a SWO where the DOB declined to do so. However, "[t]he record as it stands does not provide a basis for this court to take the significant step of second-guessing DOB's expert determination" (*Eugene Props. LLC v 726 Eighth LLC*, 2022 NY Slip Op 51084[U], *2 [SC NY Co 2022]). The damage and inconvenience caused by the installation of the protective materials is not relevant to this motion, as the materials have already been removed. Nor is plaintiff's claim of harm due to "falling debris" supported by the DOB reports (NYSCEF Doc No 28) or any other documents provided to the court. And, importantly, though plaintiff "expresses concerns about the possibility of damage" and the safety of its residents, "plaintiff has not established that damage is in fact occurring—let alone that DOB erred to such a degree in approving defendant's plans that this court must step in and halt construction" (*Eugene Props. LLC*, 2022 NY Slip Op 51084[U] at *1-2).

Plaintiff is entitled to a limited preliminary injunction to the extent that defendants must remedy the violations identified by the DOB in its September 18, 2023 order. However, plaintiff fails to demonstrate that stopping the entire project would prevent plaintiff from suffering an immediate "irreparable injury." The DOB approved the SSP and, upon inspection of the construction in progress, determined that a SWO is unnecessary. Accordingly, the court will not disturb these findings by halting construction (*Snyder v Crown Wisteria, Inc.*, 2009 NY Slip Op 32638[U], *7 [SC NY Co 2009] ["the court accepts the approvals by these agencies at face value. Their approval is prima facie evidence that easily defeats plaintiff's motion for a preliminary injunction because plaintiff has not shown a likelihood of success on the merits."]).

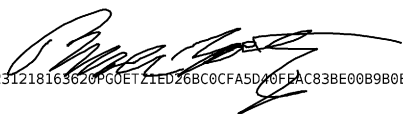
Moreover, the balance of equities favors denying a preliminary injunction so that defendants may complete this project as swiftly as possible. This serves both the interests of plaintiff, which is eager for the disturbances to come to an end, and defendant Cibani, whose license fees continue to mount as the project stretches on. “While the court is mindful that this lengthy construction project has been a very annoying, tiresome, and seemingly never ending ordeal for plaintiff, . . . it is in everyone’s best interest to keep the [protective measures] in place and continue the construction project without delay” (*Snyder v 122 E. 78th St. NY LLC*, 2014 NY Slip Op 32940[U], *8-9 [SC NY Co 2014]. Accordingly, it is

ORDERED that plaintiff’s request for a preliminary injunction is granted to the extent that defendants are ordered to re-install protective materials on plaintiff’s roof—precisely as set forth in the DOB-approved SSP—forthwith; and it is further

ORDERED that defendants shall remedy any other violations as identified by the DOB; and it is further

ORDERED that defendants shall comply with the terms of the parties’ license agreement in their completion of the project; and it is further

ORDERED that the motion for a preliminary injunction is otherwise denied.



20231218163620PGOETZTED26BC0CFA5D40FAC83BE0089B0E9D6

12/18/2023
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <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