

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

2024 NY Slip Op 30260(U)

January 19, 2024

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.

-----X

INDEX NO. 655017/2022

MOTION DATE 01/18/2024

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595365/2023

The following e-filed documents, listed by NYSCEF document number (Motion 004) 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 132, 133, 135

were read on this motion to/for RENEWAL.

Defendant’s motion to renew is denied.

Background

In this dispute about a party wall, plaintiff contends that defendant has let the party wall shared by plaintiff and defendant 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 then moved to reargue and for additional time to complete the repairs as well as a stay of this Court's order pending an appeal. This Court granted a stay of the initial deadlines to repair the wall in an order signed on August 4, 2023 (NYSCEF Doc. No. 64). The Court also scheduled subsequent appearances at which it issued various interim orders, including directives that defendant get a proposal from a contractor (NYSCEF Doc. No. 76 [order dated September 14, 2023]) and, after defendant failed to do so, that defendant put \$250,000 into an escrow account so that plaintiff could address the issues (NYSCEF Doc. No. 81 [order dated October 5, 2023]).

The Court adjourned defendant's motion to reargue to November 14, 2023 and stressed that defendant had insisted at oral argument that it did not need to get an engineer's report given the Court's stay of defendant's deadline to repair the wall (NYSCEF Doc. No. 78). The Court pointed out that "nothing prevents any party from making an additional motion" (*id.*).

No party made any additional motions and so the Court issued a decision on defendant's motion to reargue in a decision dated November 15, 2023 (NYSCEF Doc. No. 110). The Court granted defendant's motion in part, denied the request for a stay, and extended the deadline for defendant to fix the party wall to March 30, 2024 (*id.*).

Now, defendant moves for leave to renew the Court's decision for MS001 (plaintiff's initial summary judgment motion). Specifically, it seeks renewal of the Court's decision granting plaintiff summary judgment on its first cause of action for injunctive relief. In that decision, the

Court found that “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 . . . and repair the damage to the party wall” (NYSCEF Doc. No. 49 at 7).

Defendant claims that it has new facts that were not originally offered in its opposition to plaintiff’s motion for summary judgment. It points to the findings of its purported experts (an arborist and an engineer). It claims that these findings were “not available” to defendant at the time the opposition to plaintiff’s motion was due. Defendant argues that its experts conducted an inspection of the premises on October 13, 2023.

It insists that the arborist found that the ivy that is growing on the wall is not damaging the party wall and the engineer, while acknowledging that there was some cracking in the wall, asserted that there is no damage or deterioration to the wall.

In opposition, plaintiff argues that it made its first motion for summary judgment on April 19, 2023 and, in that motion, it offered expert reports, a repair estimate, and photographs. Plaintiff observes that it extended defendant’s time to oppose this motion from April 28, 2023 to May 26, 2023. It then observes that this Court granted defendant another extension to June 14, 2023. However, the opposition that defendant ultimately filed did not contain any expert reports.

Plaintiff also stresses that when defendant made its motion to reargue in August 2023, it again did not include any expert reports. Moreover, plaintiff observes that this Court issued various interim orders that noted defendant’s failure to retain an expert, such as an engineer.

Plaintiff insists that the Court should not condone defendant’s dilatory conduct and that defendant has not cited a legitimate reason for why it took so long to offer these expert reports. And it claims that even if the Court were to consider them, they do not compel the Court to

change the decision in MS001. It stresses that defendant's engineer admits that the wall has some cracks and needs some repair.

In reply¹, defendant reiterates that the expert reports were not available when the first summary judgment motion was submitted. It stresses that the experts say that there is no urgent need to fix the party wall and so there is an issue of fact that should compel the Court to reconsider the previous summary judgment decision. Defendant maintains that it argued in the first motion that plaintiff's application was premature and discovery was necessary.

Discussion

“A motion for leave to renew shall be based upon new facts not offered on the prior motion that would change the prior determination, and shall contain reasonable justification for the failure to present such facts on the prior motion. A motion to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation” (*Queens Unit Venture, LLC v Tyson Ct. Owners Corp.*, 111 AD3d 552, 552, 975 NYS2d 57 [1st Dept 2013] [internal quotations and citations omitted]).

The Court denies the motion as defendant did not offer a reasonable justification for the failure to present expert reports until it made this motion on December 28, 2023. As detailed above, plaintiff made its motion for summary judgment in April 2023 and defendant had nearly two months to file its opposition. In this Court's view that is more than enough time to hire experts and submit expert reports in opposition.

Critically, defendant did not offer any reason whatsoever for its failure to get these expert reports or to make the instant application at an earlier time. As plaintiff pointed out, the original motion for summary judgment contained expert reports from plaintiff. That should have alerted

¹ The Court will consider NYSCEF Doc. No. 135 as a reply for the instant motion despite the fact that it was filed under the wrong sequence number (MS002) and is labeled as MS002 on the first page of the document.

defendant to the fact that it probably needed to find some experts of its own, especially given the fact that the issues in this case involve the structural integrity of a party wall (which would likely require an expert's involvement).

Defendant did not argue that it tried to hire an expert during the months of April, May, or June 2023 as part of its effort to oppose plaintiff's motion. It did not seek a further extension to find an expert. Rather, defendant now claims that these experts were "not available." But that vague assertion, whatever it means, is contradicted by the fact that in reply, defendant admits that it retained the experts following the Court's interim order dated October 5, 2023 (NYSCEF Doc. No. ¶ 6[d]). That is, this is not a situation in which the reports were not available; instead, defendant waited until *only after* the Court ordered defendant to deposit \$250,000 to hire these experts.

In the Court's decision in MS001 dated July 11, 2023 (NYSCEF Doc. No. 49), the Court specifically noted that defendant "did not attach anything in opposition from someone with personal knowledge" and defendant "only attached an affidavit from its property manager" (NYSCEF Doc. No. 49 at 5). In other words, the Court stressed that defendant's failure to include an expert's report to rebut plaintiff's expert was a fatal flaw in defendant's motion papers.

Instead of hiring experts and making a motion for leave to renew, defendant instead made a motion to reargue that, again, did not contain any expert reports. Defendant could have made a motion that sought both reargument and renewal; but it did not. Moreover, the Court's interim orders made clear that defendant should take demonstrable steps, including hiring an engineer, to assess the condition of the party wall and to come up with a plan to repair it. The Court explicitly stated in a September 14, 2023 order that defendant should hire relevant experts before

the next appearance for September 28, 2023 (NYSCEF Doc. No. 76). But apparently, defendant did not do that. The Court fails to see how waiting this long and ignoring Court orders is a basis for renewal.

And despite the fact that the experts both visited the premises on October 13, 2023 (and their reports are dated October 25 and 26), defendant did not make the instant application until December 28, 2023. Although MS002 (defendant's motion to reargue MS001) was returnable on November 14, 2023, defendant did not do anything to incorporate these expert affidavits into the docket until *after* the Court decided the motion to reargue. No reason is offered for this complete lack of due diligence.

In other words, despite knowing for months that getting expert reports was most likely critical and necessary, defendant waited until after the Court decided two motions on this issue and waited more than two months after its experts issued their reports to make this motion. The point of a motion for leave to renew is to identify facts that were not available to a party when the first motion was made and cite a good reason for why those facts were not available. Commonplace examples include newly discovered documents or witnesses who were previously unavailable due to illness. Renewal is not, however, a method by which a party can sit back for months and months and then change its legal strategy only after a Court has issued multiple decisions in favor of the opposing party.

Even if the Court could consider these belated expert reports, they did not raise a material issue of fact. The arborist noted that there were visible cracks and, although she concludes that the vines are not damaging the wall, "Vines with larger tendrils can grow into existing cracks caused by other factors" (NYSCEF Doc. No. 126, ¶¶ 10, 12).

The engineer's report also contains contradictions. He asserts that he observed minor cracks that did not constitute "an urgent situation in any way" but that "The cracks should be patched and sealed, which is part of any normal maintenance program for a wall such as this" (NYSCEF Doc. No. 127, ¶¶ 9-11). And although he insists that there is no need to remove the vines to protect the wall, he adds that "The wall could be checked every 1-3 years after the leaves fall to verify the mortar is not deteriorating and to patch and seal the cracks, which will occur in a wall like this, regardless of whether or not there is vegetation on it" (*id.* ¶ 26).

In other words, both experts say that nothing is wrong with the wall but also insist that there are cracks that should be patched and sealed and the wall should be inspected every 1-3 years. In this way, they seem to confirm that the wall needs repairs. And, of course, the engineer admits that he has not yet gotten a chance to look at the wall from plaintiff's property and so he was unable to opine about the condition of the party wall from that perspective (*id.* ¶ 24). And neither expert included any photographic evidence to support their contentions.

The Court denies plaintiff's request for sanctions as it did not cross-move for that relief and merely included it in its opposition papers.

Summary

The timeline whereby defendant hired the experts it now references compels the Court to deny the instant motion. Defendant did not come close to offering a reasonable justification for why it waited the better part of 2023 to hire experts. The Court has no idea whether this was part of some legal strategy, cost saving or gamesmanship, but the result is that the aforementioned series of events makes it seem that defendant deliberately chose not to hire experts only to later change its mind. That does not establish a reasonable justification for renewal.

It is axiomatic that “[a] party appearing in opposition to a motion for summary judgment must lay bare his proof” (*Smith v Johnson Products Co.*, 95 AD2d 675, 676, 463 NYS2d 464 [1st Dept 1983]). Here, in a case that began in December 2022 and where plaintiff made a motion for summary judgment in April 2023, defendant did not make a sufficient effort to lay bare its proof. It did not endeavor to timely counter plaintiff’s arguments about the condition of the party wall or the cause of the wall’s purported deterioration with the appropriate experts. Nor did to offer an adequate reason for why it did not include expert reports in the initial motion.

Instead, it waited until October 2023 to hire experts and until December to finally make a motion that referenced those experts. Defendant clearly wants a second chance to litigate, having already lost two motions on this issue. That is not the purpose of a motion to renew.

Accordingly, it is hereby

ORDERED that defendant’s motion to renew is denied.

1/19/2024
DATE


ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: