

Rennie-Walker v Weiss

2024 NY Slip Op 31830(U)

May 24, 2024

Supreme Court, Kings County

Docket Number: Index No. 535119/2023

Judge: Patria Frias-Colón

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS Part 20
HON. PATRIA FRIAS-COLÓN, J.S.C.

----- X
Deborah Rennie-Walker,

PLAINTIFF,

-against-

Alan L. Weiss, Samantha Bubes Weiss and The New
York City Department of Buildings,

DEFENDANTS.
----- X

Index # 535119/2023
Cal. #s 25, 27 Mot. Seq. #s 1, 2

DECISION/ORDER

Recitation as per CPLR §§ 2219(a) and/or 3212(b) of papers considered on review of this motion:
NYSCEF Doc #'s 14-16, 34-48, 60 by Plaintiff
NYSCEF Doc #'s 19-32, 56-59 by Defts. Weiss

Upon the foregoing papers and Oral argument on April 10, 2024¹ in this dispute between neighboring property owners, Plaintiff Deborah Rennie-Walker (“Plaintiff”) moves by order to show cause (OSC) (Motion Sequence #1), for an order, pursuant to CPLR §§ 6301, 6311 and 6313 (a), granting a preliminary injunction enjoining her neighbors, Defendants Alan L. Weiss and Samantha Bubes Weiss (“Weiss Defendants”), or any person or entity acting on their behalf or at their direction, including but not limited to their agents, contractors, workers, engineers or architects, from accessing or performing any work on Plaintiff’s real property at 557 1st Street in Brooklyn (“Plaintiff’s Property” or “557”) without obtaining Plaintiff’s permission/authorization or a court order and “such other and further relief as the Court may deem just, proper, and equitable under the circumstances”².

The Weiss Defendants cross-move (Motion Sequence #2) for an order, pursuant to CPLR § 3211(a)(1) and (a)(7): (1) dismissing Plaintiff’s second cause of action for nuisance; (2) partially dismissing Plaintiff’s third cause of action for trespass; (3) dismissing Plaintiff’s first cause of action for injunctive relief and awarding them attorneys’ fees, costs and disbursements; and (4) vacating the temporary restraining order (“TRO”)³.

Background

On December 1, 2023, Plaintiff commenced this action by filing a summons and a verified complaint alleging the following regarding the nature of this action:

“Plaintiff has commenced this action seeking a permanent injunction ordering the Weiss Defendants to immediately cease conducting unauthorized construction work on Plaintiff’s real

¹ Motion Sequence 3 (# 26 of the April 10, 2024 part 20 calendar) was filed by Defendant DOB and Plaintiff requested an adjournment to file an opposition, which was granted without opposition to May 8, 2024. On April 10, 2024, the parties requested the following motion schedule: Plaintiff was to file her opposition by April 22, 2024 and Defendant DOB was to file its reply to Plaintiff’s opposition by April 29, 2024. On May 8, 2024, Motion Sequence 3 (# 23 of the May 8, 2024 part 20 calendar) was withdrawn.

² NYSCEF Doc. #2.

³ The December 1, 2023 OSC has a TRO providing that “*pending the hearing* of this application, [the Weiss Defendants] or any individual or entity acting on their behalf or at their direction including but not limited to their agents, contractors, workers, engineers, or architects are hereby **ENJOINED** from accessing or performing any work on Plaintiff’s real property...(*id.* [emphasis added]).

property...without Plaintiff's authorization and/or consent and monetary damages stemming from the Defendants['] unlawful performance of work including the removing of waterproofing and brick cutting they've already performed"⁴.

The Weiss Defendants, who own the neighboring property at 559 1st Street ("559"), were allegedly performing work on their second-floor roof deck when they "caus[ed] their contractors to access 557, drill into the brick at 557 and remov[e] waterproofing and flashing which protected the structural integrity of 557..." and Plaintiff, in response, filed a complaint with Defendant New York City Department of Buildings ("DOB")⁵. In July 2023, the Weiss Defendants allegedly began performing such work, which does not comply with the New York City Building Code (Administrative Code of City of NY title 28, Ch 7) § 3309.9 regarding weatherproof integrity of adjoining buildings⁶, and is inconsistent with the plans that the Weiss Defendants submitted to the DOB⁷.

The complaint alleges that, by a September 7, 2023 letter⁸, Plaintiff's counsel "informed the Weiss Defendants that they were not authorized to access and/or perform work on Plaintiff's Building while simultaneously inviting the Weiss Defendants to contact Plaintiff about the negotiation of a license agreement pursuant to...RPAPL § 881"⁹. The letter also advised that the work being performed was not sufficiently protecting the adjoining wall, as required by Building Code § 3309, and memorialized certain work performed on Plaintiff's Property without authorization, which was "inconsistent" with plans that the Weiss Defendants filed with the DOB, including: (1) making a "saw-cut" on the brick-face of Plaintiff's Property at 557; (2) removing weatherproofing from 557; and (3) affixing an electrical/utility box, cables, tubes and paint to the wall at 557¹⁰. The complaint alleges that, despite the letter from her attorney, the "Weiss Defendants brazenly continued to cause their contractors to perform work on Plaintiff's real property"¹¹.

Upon information and belief, the complaint further alleges that the Weiss Defendants' plans were audited by the DOB, after which their work permits were revoked¹². The Weiss Defendants allegedly submitted a plan amendment to the DOB in October 2023 to address the lack of waterproofing protection for 557 and "[o]n or about November 22, 2023, the DOB issued a Partial Stop Work Order¹³. Allegedly, "[n]otwithstanding the Partial Stop Work Order, on November 27, 2023 the Weiss Defendants started to perform work by drilling, chipping and breaking away the brick of the eastern façade wall of 557"¹⁴. In response, Plaintiff allegedly contacted the police and the DOB

⁴ NYSCEF Doc. #1 at ¶ 7.

⁵ *id.* at ¶¶ 8-10.

⁶ New York City Building Code § 3309.9 provides, in relevant part, that "[w]here the waterproof integrity of an adjoining wall or building has been impaired due to construction or demolition operations, the person causing the construction or demolition operations shall, at his or her own expense, provide all necessary measures to permanently waterproof the adjoining wall or building in order to establish or restore the weatherproof integrity of such adjoining wall or building."

⁷ *id.* at ¶ 8.

⁸ *id.* at ¶ 12.

⁹ RPAPL § 881 provides that "[w]hen an owner...seeks to make improvements or repairs to real property so situated that such improvements or repairs cannot be made...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..."

¹⁰ *id.* at ¶¶ 13-14; *see also* NYSCEF Doc No. 12.

¹¹ *id.* at ¶ 15.

¹² *id.* at ¶ 16.

¹³ *id.* at ¶¶ 17-18.

¹⁴ *id.* at ¶ 21.

to complain¹⁵. However, “[o]n November 30, 2023 at or around 7:30 am in the morning, the Weiss Defendants again caused their contractors to begin working on the 557 wall, banging, breaking and chipping away at the brick of the entire length of the eastern façade of the 557 wall” and refused to stop the work on Plaintiff’s Property¹⁶.

The complaint asserts the following four causes of action against the Weiss Defendants: (1) an injunction pursuant to CPLR § 6301, compelling them to “immediately cease and desist trespassing upon and access[ing] 557 without the Plaintiff’s express authorization and consent,” to stop performing work in violation of DOB approved plans and to remove all electric boxes, cables, tubes and paint from 557¹⁷; (2) private nuisance¹⁸; (3) trespass¹⁹; and (4) an award of attorneys’ fees, costs and disbursements²⁰, pursuant to 22 NYCRR § 130-1.1 (Part 130)²¹.

Plaintiff’s OSC For An Injunction

Contemporaneous with the commencement of this action, Plaintiff moved, by OSC, for a preliminary injunction enjoining the Weiss Defendants or their agents from accessing or performing any work at Plaintiff’s Property without her permission/authorization or a court order and “granting Plaintiff such other and further relief as the Court may deem just, proper, and equitable under the circumstances”²².

Plaintiff submits an affidavit reiterating the factual allegations in the complaint, including the September 7, 2023, cease and desist letter from her counsel detailing the Weiss Defendants’ unauthorized “construction” work on 557²³. Plaintiff also submits the DOB’s Partial Stop Work Order²⁴, in which the DOB inspector noted on November 22, 2023 that “NO WATERPROOFING VERTICALLY APPLIED BEHIND METAL FLASHING ON THE ADJOINING WALL OF 5[57] & 5[59] 1ST ST AT THE PARAPET LEVEL...” and “WORK NOT CONFORMED TO APPROVED PLAN...” The DOB’s Partial Stop Work Order further notes that on November 30, 2023, the stop work order was partially rescinded so that the Weiss Defendants’ contractor could “CONFORM WORK TO APPROVED PLANS...”²⁵.

Plaintiff attests that “[t]he Weiss Defendants have every intention of performing significant work on the waterproofing of the 557 eastern façade without the Plaintiff’s consent or authorization or participation” and she “is now constrained to bring this action and seek emergency injunctive relief in the form of a Court Order enjoining the Weiss Defendants from trespassing, and damaging 557”²⁶.

¹⁵ *id.* at ¶ 23.

¹⁶ *id.* at ¶¶ 25-27.

¹⁷ *id.* at ¶¶ 34-39.

¹⁸ *id.* at ¶¶ 41-43.

¹⁹ *id.* at ¶¶ 45-52.

²⁰ *id.* at ¶¶ 54-57.

²¹ Plaintiff also asserted a fifth cause of action against the DOB, which was voluntarily discontinued.

²² NYSCEF Doc. # 2.

²³ NYSCEF Doc. # 12.

²⁴ NYSCEF Doc. No. 8.

²⁵ *id.*

²⁶ NYSCEF Doc. # 16 at ¶¶ 26-27.

Plaintiff also submits a supporting affidavit from Nouradine Benabdelhak, a licensed engineer, who asserts that:

“[o]n July 14, 2023, I inspected 557...and observed that a piece of aluminum had recently been installed into a ‘saw-cut’ into brick on the eastern façade of the wall on the 2nd floor of 557...There was no caulking above the flashing. There was no water membrane behind the flashing to prevent water intrusion through the 557...wall. As such, the wall is exposed to water damage as a result of this work.

“To prevent the water damage to the wall, it is recommended to install waterproofing membrane over the brick parapet (under the coping). The membrane should extend a minimum of 8” above the coping and should be secured to the 557 wall with two pieces of termination bar and metal counter flashing. Caulking should be installed above the counter flashing to properly protect 557. None of this exists as of this moment.

“It is not recommended to do masonry and waterproofing work during temperatures of less than 40 degrees.

“In order to do this work, the owner of 559 must secure authorization of the 557 owner whereby the parties can agree to oversight and parameters for the work to be done. The area under the coping will not be easily accessible in the future and if not done correctly water will intrude into 557 and damage the wall of the Building”²⁷.

Plaintiff submits an attorney affirmation arguing that a preliminary injunction is warranted to maintain the status quo pending the outcome of this litigation because the “Weiss Defendant[s] have brazenly and without the consent or authorization of the Plaintiff, trespassed onto 557 and undertaken work to drill into the brick of the Building and remove waterproofing which serves to expose 557 to water damage” despite Plaintiff’s repeated requests that the Weiss Defendants stop²⁸. Plaintiff’s counsel also asserts that:

“Plaintiff has been forced to seek this affirmative relief because the Weiss Defendants continue to access and work upon 557 without Plaintiff’s authorization or consent. The Weiss Defendants are removing waterproofing and flashing at 557. The Weiss Defendants are ignoring DOB Partial Stop Work Orders. The Weiss Defendants are ignoring the Plaintiff’s demands that they stop *chipping away at the brick of 557*.

“The NYPD and DOB have informed the Plaintiff that this is a ‘civil matter’ and thus requires a Court Order to enjoin the Weiss Defendants from continuing to engage in this conduct where they’re damaging 557.

²⁷ NYSCEF Doc. # 5 at ¶¶ 2-5.

²⁸ NYSCEF Doc. #3 at ¶¶ 4-6

“As such, Plaintiff has no remedy to enjoin the Weiss Defendants to stop what they’re doing and to stop threatening and damaging the structural integrity of 557!”²⁹.

Plaintiff’s counsel argues that Plaintiff is likely to prevail on the merits of her nuisance claim against the Weiss Defendants based on the expert engineering affidavit and the DOB’s Partial Stop Work Orders “which explain that the Weiss Defendants are actively failing to comply with the very plans they submitted [to the DOB]”³⁰. Plaintiff’s counsel alleges that “[t]he irreparable harm is obvious under the circumstances, given that Plaintiff, as the owner of 557 is trying to defend herself against active trespassers who are drilling saw[-]cuts into her brick, removing flashing, and damaging her Building” and “Plaintiff need not sit by and wait for significant water damage to the Building before seeking an injunction”³¹. Counsel contends that “a balancing of the equities clearly tips in Plaintiff’s favor, who merely seeks to protect 557 from being sawed into, damaged, or otherwise exposed to water and the elements”³².

Plaintiff’s counsel further asserts that “[t]he DOB has issued Partial Stop Work Orders acknowledging and stating that 557 must be protected from water infiltration and that waterproofing and steps need to be taken” and that the Weiss Defendants have refused to negotiate a reasonable RPAPL § 881 agreement with Plaintiff³³.

The Weiss Defendants’ Dismissal Cross-Motion

On March 3, 2024, the Weiss Defendants opposed Plaintiff’s OSC and cross-moved to dismiss the first cause of action for an injunction, the second cause of action for nuisance and to partially dismiss the third cause of action for trespass. The Weiss Defendants also seek an award of attorneys’ fees, costs and disbursements, pursuant to Part 130.

Alan Weiss submits an affidavit attesting that he and his wife have owned 559 since 2022, which “has been under renovation” and they have been “transparent” with Plaintiff about their renovation plans³⁴. Alan Weiss notes that “the only significant remaining work relates to the new bluestone terrace...overlooking our backyard and adjacent to Plaintiff’s building at 557...”³⁵. Alan Weiss describes the work on his terrace and admits that “as constructed in spring 2023, the terrace was not precisely the same as the plans that had been previously submitted [to the DOB]” which required the submission of an amended plan regarding the placement of bluestone coping on top of the parapet wall³⁶. Alan Weiss contends that Plaintiff never voiced any objection to the work being done until they received her August 2, 2023, letter, in which Plaintiff complained that they performed work on her Property without consent, yet demanded that the work be finished “immediately” to avoid water damage³⁷. Alan Weiss notes that Plaintiff filed her complaint with the DOB about the same time³⁸,

²⁹ *id.* at ¶¶ 25-27.

³⁰ *id.* at ¶¶ 28-30.

³¹ *id.* at ¶ 34.

³² *id.* at ¶ 42.

³³ *id.* at ¶¶ 44-45.

³⁴ NYSCEF Doc # 25 at ¶ 1.

³⁵ *id.* at ¶ 2.

³⁶ *id.* at ¶ 5.

³⁷ *id.* at ¶ 10.

³⁸ *id.* at ¶ 12.

and attests that:

“due to Plaintiff’s continued complaints, another DOB inspection occurred on November 22, 2023. According to that inspection, the terrace, as constructed, did not conform to the weatherproofing details of the amended plan (See the DOB complaint Exhibit ‘B’ to the Cuomo affirmation). According to that [DOB] inspection, which I did not observe, there was allegedly no waterproofing along the vertical section of the adjoining wall and the bluestone coping was pitched towards the adjoining wall instead of being pitched towards our roof. My contractor has told me that the work was performed properly, and that the inspector had merely capitulated to the ongoing complaints by Plaintiff...”³⁹.

Alan Weiss submits photographs of his terrace and claims that the DOB inspector was wrong because these photographs “show that the bluestone coping was pitched away from the adjoining wall and towards the new terrace...” *Id.* Alan Weiss alleges that “on November 22, 2023, DOB ordered that the bluestone coping be removed...” and that remedial steps be undertaken to weatherproof the adjacent area⁴⁰. Alan Weiss further attests that:

“[b]efore the stop work order could be lifted we were directed by DOB, without seeking permission or any form of license from Plaintiff, to cause our contractor to apply waterproofing to the vertical surface of the adjoining wall. Our contractor removed the bluestone coping and reapplied waterproofing to the vertical surface of the adjoining wall – as directed by the DOB and without any additional permission or consent from Plaintiff. At the subsequent inspection on December 6, 2023, that portion of the weatherproofing work was found to be in accord with the amended plan, 613.01. The partial stop work order was fully rescinded. Significantly, the rescission of the partial stop work order did not include any direction to seek permission from Plaintiff to do any further weatherproofing work which would be required, including the reinstallation of the bluestone coping and metal counter[-]flashing...”

“We have complied with the DOB requirements. However, Plaintiff’s frivolous lawsuit and demand for a preliminary injunction stand in the way of us completing the weatherproofing work which the law obligates us to have performed. Instead of finishing the waterproofing, for the benefit of our property and Plaintiff’s property, Plaintiff has decided to pursue a lawsuit which is strategically designed to force a license payment from us even though the law mandates that we do the weatherproofing work, and we are not required to seek permission or any form of license from Plaintiff”⁴¹.

Thus, Alan Weiss admits that his contractor performed weatherproofing work on Plaintiff’s Property without prior consent and without obtaining a license, pursuant to RPAPL § 881. Essentially,

³⁹ *id.* at ¶ 14.

⁴⁰ *id.*

⁴¹ *id.* at ¶¶ 14 and 16.

Alan Weiss claims that he and his wife were not legally required to seek Plaintiff's permission or a license before performing work on 557 because the DOB did not direct them to do so.

Defense counsel submits an affirmation arguing that “[t]he cross-motion seeks dismissal of Plaintiff's trespass and private nuisance claims to the extent they claim that weatherproofing work being performed by or on behalf of the [Weiss Defendants] pursuant to New York City Building Code § 3309.9 (‘BC’) constitute trespass or private nuisance”⁴². Defense counsel asserts that “[t]he act of performing BC § 3309.9 weatherproofing work is privileged by the defense of justification” and that “[t]he incursion, for weatherproofing work, on the face of the adjoining wall is not a trespass because it is justified by the law...”⁴³.

Pursuant to CPLR § 3211(a)(1), Defense counsel contends that dismissal is warranted based on Plaintiff's text messages and email correspondence with the Weiss Defendants⁴⁴, which “should be treated, for limited purposes in this matter, as documentary evidence” because it raises issues of fact regarding Plaintiff's implied “consent” to the work performed on her Property⁴⁵.

Defense counsel also argues that this action and Plaintiff's OSC for a preliminary injunction is “a tactical effort, not intended to address her property rights, but [is] designed to keep the work stopped so that Plaintiff may extort a license agreement[,]” which is not required because the “the law regarding the subject weatherproofing work mandates the [Weiss Defendants] to perform the weatherproofing work without a license, permission or consent from the adjoining landowner, Plaintiff”⁴⁶. Defense counsel notes that the text of BC § 3309.9 does not state that a license is required to do the weatherproofing work on an adjacent property⁴⁷.

Defense counsel asserts that “the dispute centers on whether weatherproofing work which must be performed on an adjoining wall pursuant to BC § 3309.9 requires permission of the adjoining landowner”⁴⁸. Defense counsel argues that weatherproofing, pursuant to Building Code § 3309.9, does not require *entry* onto Plaintiff's Property, and thus, should not require a RPAPL § 881 license, like other BC § 3309 provisions⁴⁹. Defense counsel further asserts, without any proof, that “[t]he work can be done completely from the [Weiss Defendants'] property”⁵⁰.

Plaintiff's Opposition and Reply

In opposition to the dismissal cross-motion and in further support of her OSC, Plaintiff submits an affidavit attesting that she obtained a survey “confirming that the 557 wall which has been damaged is an independent wall that is exclusively my property which the Weiss Defendants have damaged and

⁴² NYSCEF Doc # 20 at ¶ 2.

⁴³ Defense counsel notes that the Weiss Defendants are only seeking partial dismissal of the trespass claim because they may have trespassed on Plaintiff's Property when they installed an electric outlet to the face of the adjoining wall. *See id.* at ¶¶ 14 and 31. *See also id.* at ¶¶ 3 and 19.

⁴⁴ NYSCEF Doc # 29.

⁴⁵ NYSCEF Doc. #20 at ¶ 38.

⁴⁶ *id.* at ¶ 5.

⁴⁷ *id.* at ¶ 29.

⁴⁸ *id.* at ¶ 6.

⁴⁹ *id.* at ¶¶ 8 and 23.

⁵⁰ *id.* at 23.

permanently encroached upon”⁵¹. Plaintiff alleges that on December 1, 2023, “[k]nowing a temporary restraining order was imminent, and wanting to rush ahead with work, the Weiss Defendants proceeded to cut all the flashing out of the brick to my Building leaving a long gash along the side of the Building”⁵². Plaintiff provides a photograph of her damaged wall depicting a channel chipped along the length of the wall to 557⁵³. Plaintiff avers that:

“I have owned 557 for thirty (30) years. There is no reasonable dispute that the channel chopped along the side of my wall on videotape was performed by the Weiss Defendants in 2023. This channel, and the original saw-cut, did not exist for the last thirty (30) years I have owned the Building”⁵⁴.

Plaintiff argues that the Weiss Defendants’ dismissal cross-motion should be denied because they have failed to submit any documentary evidence for dismissal under CPLR § 3211(a)(1), and the complaint states a legally cognizable cause of action for trespass, since “the trespass and resulting property damage is literally on tape”⁵⁵.

Plaintiff also submits another affidavit from her engineer attesting that she reviewed the Weiss Defendants’ plans submitted to the DOB, which “show that the[y] originally represented to the [DOB] that their plans would solely consist of work on their own property” “without disturbing or ever needing to touch the wall of 557”⁵⁶. When “those plans were ignored and the implemented work was not in compliance with the approved plans, including but not limited to a change in the elevation of the paver height so that they not only exceed the height of parapet, but now abutted the [Plaintiff’s] property[,]” the DOB revoked Weiss Defendants’ permits⁵⁷. The Weiss Defendants’ amended plans “note that Weiss Defendants installed a ‘surface mounted outdoor junction box/enclosure’ affixed to the Plaintiff’s wall without consent”⁵⁸. Plaintiff’s engineer further attests that:

“[t]he channel was drilled into the wall of 557...between November 28, 202[3] and December 1, 202[3] likely in order to remove incorrectly installed flashing (that was all together missing waterproofing under the flashing) and cure violations which led to the...stop work order. Rather than cut the flashing out without damaging the wall-the Weiss Defendants opted to chop through the wall and create a channel to remove the flashing unscathed at the expense of Plaintiff and her Building”⁵⁹.

Essentially, Plaintiff’s engineer asserts that “[t]he project being implemented by the Weiss Defendants is not mere ‘weatherproofing’ [but rather i]t is construction work and excessive demolition which impacted the structural stability of the wall by reducing the wall’s cross section by channeling through the outer wythe of the brick” which “requires permission and consent pursuant to NYS Real

⁵¹ NYSCEF Doc # 35 at ¶ . *see also* NYSCEF Doc # 37.

⁵² NYSCEF Doc # 35 at ¶¶ 21-23.

⁵³ NYSCEF Doc # 46.

⁵⁴ NYSCEF Doc # 35 at ¶ 27.

⁵⁵ *id.* at 30. *See also* NYSCEF Doc Nos. 42-44.

⁵⁶ NYSCEF Doc. # 36 at ¶¶ 5 and 7.

⁵⁷ *id.* at ¶ 7.

⁵⁸ *id.* at ¶ 11.

⁵⁹ *id.* at ¶ 13.

Property Law Article § 881⁶⁰. Plaintiff's engineer attests that "[t]he Building Code does not permit this nor is it industry standard for the Weiss Defendants to do what they have done"⁶¹.

Plaintiff's engineer alleges that she witnessed the Weiss Defendants' contractor damage 557's wall the very same day that Plaintiff filed her OSC with a TRO:

"[o]n December 1, 202[3] I was personally at the site and observed [Defendants'] workers chopped a channel in the 557 1st Street wall. When Plaintiff asked them to stop because she had filed a lawsuit the day before and was awaiting injunctive relief, she was at first ignored and then spoken to disrespectfully in my presence. I advised Plaintiff to take photos to document the installation which can be seen by the Court at Exhibit H & I. These photos show the Court the damage done to the 557 1st Street wall which the Weiss Defendants amazingly claim they had every right to do. What was initially a sawcut is now a significant channel which obviously undermines the integrity of the brick wall. Furthermore, the rapid installation of waterproofing (to beat [the] filing of [the] lawsuit) was not done to manufacture's specifications.

"Waterproofing should be applied directly to concrete surfaces. On 557 wall the brick surface was painted. This paint should have been removed before application. The waterproofing is at risk of peeling away when paint peels away. Waterproofing was applied on top of unknown existing waterproofing on parapet. According to technical support, the manufacturer does not specify the product for use on top of other waterproofing materials. Therefore its implementation was not done to manufacture specifications and are at risk of peeling.

"Moving forward, the channel must be repaired using a method to assure the integrity of the brick wall, the state of the currently applied waterproofing must be addressed, surface preparation for additional waterproofing to achieve minimum height requirements must be addressed and an attachment method for flashing to the 557 1st Street wall which [would] avoid drilling and cutting further into the brick must be agreed upon"⁶².

Discussion

The Weiss Defendants' Dismissal Motion

"A motion to dismiss made pursuant to CPLR § 3211(a)(1) will fail unless the documentary evidence that forms the basis of the defense resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim[s]" (*Shaya B. Pacific, LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 37 [2006]; see also *1911 Richmond Ave. Assocs., LLC v G.L.G.*

⁶⁰ *id.* at ¶ 14.

⁶¹ *id.* at ¶ 18.

⁶² *id.* at ¶¶ 21-23.

Cap., LLC, 60 AD3d 1021, 1022 [2009]). “In order for evidence submitted in support of a CPLR § 3211(a)(1) motion to qualify as documentary evidence, it must be unambiguous, authentic, and undeniable” (*Feldshteyn v Brighton Beach 2012, LLC*, 153 AD3d 670, 670-671 [2017] [internal quotations omitted]). In this regard, while judicial records, mortgages, deeds and contracts, the contents of which are essentially undeniable, qualify as documentary evidence, emails and text messages do not constitute documentary evidence under CPLR § 3211(a)(1) (*MJ Lilly Assoc., LLC v Ovis Creative, LLC*, 221 AD3d 805 {2d Dept 2023}; *Kalaj v 21 Fountain Place, LLC*, 169 AD3d 657, 658 [2d Dept 2019]; see also *Eisner v Cusumano Const., Inc.*, 132 AD3d 940, 942 [2d Dept 2015]). As a result, that branch of the cross-motion seeking dismissal under CPLR § 3211(a)(1) is denied.

In considering a motion to dismiss, pursuant to CPLR § 3211(a)(7), for failure to state a cause of action “the pleadings must be liberally construed” and “[t]he sole criterion is whether from [the complaint’s] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*Gershon v Goldberg*, 30 AD3d 372, 373 [2006], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; see also *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). “The facts as alleged in the complaint are accepted as true, with the plaintiff accorded the benefit of every favorable inference (*Ginsburg Development Companies, LLC v Carbone*, 85 AD3d 1110, 1111 [2d Dept 2011]; see also *Sokol v Leader*, 74 AD3d 1180, 1180-1181 [2d Dept 2010])”. A dismissal motion under CPLR § 3211(a)(7) requires determining whether the plaintiff has stated a cause of action, but “[i]f the court considers evidentiary material, the criterion then becomes ‘whether the proponent of the pleading has a cause of action’” (*Sokol v Leader*, 74 AD3d 1180, 1181-1182 [2d Dept 2010]). Dismissal results only if the movant demonstrates conclusively that the plaintiff has no cause of action, or that “a material fact as claimed by the pleader to be one is not a fact at all”. *Id.* at 1182.

“The elements of a cause of action sounding in trespass are an intentional entry onto the land of another without justification or permission” (*Marone v Kally*, 109 AD3d 880, 882 [2d Dept 2013] [internal quotation marks omitted]; *Carlson v Zimmerman*, 63 AD3d 772, 773 [2d Dept 2009] [same]). “A defendant is subject to liability for a private nuisance if the defendant’s conduct is a legal cause of the invasion of an interest in the private use and enjoyment of land, and such invasion is (1) intentional and unreasonable, (2) negligent or reckless, or (3) actionable under the rules governing liability for abnormally dangerous conditions or activities” (*Trulio v Vill. of Ossining*, 153 AD3d 577, 579 [2d Dept 2017]).

Here, the complaint adequately alleges an intentional and unreasonable entry onto Plaintiff’s Property without her consent or authorization and without justification to perform construction work that has allegedly left her property in an unsafe condition. The construction work that the Weiss Defendants allegedly performed to 557’s brick wall was not included in the plans that they submitted to the DOB, and thus, they cannot claim their alleged encroachment upon Plaintiff’s Property was justified. Moreover, the alleged chipping away at 557’s brick wall, the removal of weatherproofing leaving a long gash along the side of Plaintiff’s Property and the installation of an electrical/utility box, cables, tubes and paint on 557’s brick wall sufficiently allege that the Weiss Defendants trespassed upon Plaintiff’s Property and state a potential claim for nuisance.

Nonetheless, the Weiss Defendants contend that this “dispute centers on whether weatherproofing work which must be performed on an adjoining wall pursuant to BC § 3309.9 requires permission of the adjoining landowner”⁶³. The Weiss Defendants argue that Plaintiff’s nuisance and

⁶³ NYSCEF Doc # 20 at ¶ 6.

trespass claims are subject to dismissal because the DOB ordered them to conform the weatherproofing on the parties' wall to the plans submitted to the DOB without directing them to seek a license, pursuant to RPAPL 881. Without any proof, defense counsel claims that a license is not required because weatherproofing can be completed by the Weiss Defendants' contractor without entry onto Plaintiff's Property.

However, the verified complaint alleges that the Weiss Defendants' contractor was already "drilling, chipping and breaking away the brick of the eastern façade wall of 557" without Plaintiff's prior authorization or consent⁶⁴. In addition, Plaintiff specifically attests that "the Weiss Defendants were causing their contractors to access 557, drill into the brick at 557 and remov[e] waterproofing and flashing..."⁶⁵. Plaintiff's engineer avers that she previously inspected 557 in the summer of 2023 and "observed that a piece of aluminum had recently been installed into a 'saw-cut' into brick on the eastern façade of the wall on the 2nd floor of 557..." and weatherproofing had been removed from Plaintiff's wall⁶⁶. Plaintiff's engineer further alleges that the Weiss Defendants' project did not involve mere weatherproofing, but consisted of construction and demolition work, which require a license, pursuant to RPAPL § 881⁶⁷.

Alan Weiss, an attorney by trade, does not dispute these allegations, and instead, admits that his contractor "removed the bluestone coping and reapplied waterproofing to the vertical surface of the adjoining wall..." and installed an electrical box on the wall of 557 without Plaintiff's consent, authorization or a license⁶⁸. Thus, the record reflects that the work performed by the Weiss Defendants' contractor on the brick-face of the eastern façade wall of 557 was more intrusive than mere waterproofing, pursuant to BC § 3309.9, and was admittedly done without obtaining Plaintiff's prior consent, authorization or a license, pursuant to RPAPL § 881. As a result, that branch of the Weiss Defendants' dismissal cross-motion based upon CPLR § 3211(a)(7) is denied. Accordingly, the Weiss Defendants' dismissal cross-motion is denied in its entirety.

Plaintiff's OSC for an Injunction

CPLR § 6301 provides that a preliminary injunction may be granted where:

"it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff."

"To be entitled to a preliminary injunction, a movant must establish (1) a probability of success on the merits, (2) a danger of irreparable injury in the absence of an injunction, and (3) a balance of the equities in the movant's favor" (*Congregation Erech Shai Bais Yosef, Inc. v Werzberger*, 189

⁶⁴ NYSCEF Doc # 1 at ¶ 21.

⁶⁵ NYSCEF Doc # 16 at ¶ 4.

⁶⁶ NYSCEF Doc # 5 at ¶ 2.

⁶⁷ NYSCEF Doc # 36 at ¶ 14.

⁶⁸ NYSCEF Doc #. 25 at ¶ 14 and NYSCEF Doc # 20 at ¶ 19.

AD3d 1165, 1166-1167 [2d Dept 2020] [internal quotation marks omitted]). “The purpose of a preliminary injunction is to preserve the status quo until a decision is reached on the merits” (*159 Smith, LLC v Boreum Hill Prop. Holdings, LLC*, 191 AD3d 741, 742 [2021] [internal quotation marks omitted]). “As a general rule, the decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court”. *Id.* at 1123.

Under the circumstances here, an injunction is warranted since Plaintiff demonstrated a likelihood of success on the merits by submitting the verified complaint, the DOB Stop Work Orders, the affidavit of her engineer/witness, videotapes and photographs of the Weiss Defendants’ construction work and the resulting damage to 557’s wall. In addition to the unrefuted evidence submitted by Plaintiff, Alan Weiss admitted to, at least, a partial trespass upon Plaintiff’s Property. Plaintiff has also demonstrated that there is a need to maintain the status quo to protect the stability and integrity of her Property at 557, which the Weiss Defendants allegedly compromised on the very same day that Plaintiff’s OSC and TRO were filed with the Court. Thus, pursuant to RPAPL § 881, Plaintiff is entitled to injunctive relief pending the resolution of this dispute and/or the parties’ negotiation of a reasonable license agreement.

New York courts have held that, under appropriate circumstances, an action for injunctive relief based on unauthorized construction work by a neighboring property owner can be converted into an RPAPL 881 proceeding for a license agreement (*see, e.g., Stuck v. Hickmott*, 158 AD3d 1331, 1332 [4th Dept 2018] [court implicitly converted Petitioner’s OSC into a special proceeding under RPAPL 881]; *Mindel v Phoenix Owners Corp.*, 210 AD2d 167, 167 [1st Dept 1994], *lv denied* 85 NY2d 811 [1995] [holding that “(t)he court’s conversion of this action, commenced by plaintiffs for injunctive relief, into a proceeding by defendant for leave to enter plaintiffs’ properties for repairs under RPAPL 881, was unusual but proper...”]; *Ponito Residence LLC v 12th St. Apartment Corp.*, 38 Misc 3d 604, 612 [Sup Ct New York County 2012] [holding that “(a) court may convert an action for a preliminary injunction into a proceeding under RPAPL 881 where such conversion is appropriate”]; *see also Quinn v 20 E. Clinton, LLC*, 193 AD3d 893, 896 [2d Dept 2021] [holding that “as no license is necessary at this juncture, the Supreme Court properly denied that branch of the plaintiff’s motion which was to convert the motion to a proceeding for a” license pursuant to RPAPL § 881.

“RPAPL § 881 allows a property owner to petition for a license to enter the premises of an adjoining owner when such entry is necessary for making improvements or repairs to the petitioner’s property and the adjoining owner has refused such access” and “[a] proceeding pursuant to RPAPL § 881 is addressed to the sound discretion of the court” (*Queens Coll. Special Projects Fund, Inc. v Newman*, 154 AD3d 943, 943 [2d Dept 2017]). Furthermore, “[e]quity requires that the owner compelled to grant access should not have to bear any costs resulting from the access, including steps necessary to safeguard their property” (*N. 7-8 Invs., LLC v Newgarden*, 43 Misc 3d 623, 628 [Sup Ct Kings County 2014]).

The circumstances here warrant the conversion of this action into a proceeding under RPAPL § 881. Such conversion is appropriate given the fact that, pursuant to the Building Code, the Weiss Defendants are required to weatherproof the 557 wall. As is her right, Plaintiff denied the Weiss Defendants access “absent a properly and lawfully secured Court ordered license agreement”⁶⁹.

Accordingly, it is hereby:

⁶⁹ NYSCEF Doc No. 34 at ¶ 61

ORDERED that Plaintiff's OSC (Motion Sequence 1) for a preliminary injunction and "such other and further relief as the Court may deem just, proper, and equitable under the circumstances" is granted to the extent that: (1) this plenary action for trespass, nuisance and injunctive relief is converted to a special proceeding, pursuant to RPAPL 881, and (2) the Weiss Defendants, or any person or entity acting on their behalf, are hereby enjoined from performing any work on Plaintiff's Property, including the subject wall at 557 adjacent to the Weiss Defendants' terrace, until the Weiss Defendants have obtained Plaintiff's prior permission and authorization to do such work in a mutually agreeable manner that protects Plaintiff's Property at 557 in a license agreement, pursuant to RPAPL § 881.

It is further ORDERED that the Weiss Defendants' pre-answer dismissal cross-motion (Motion Sequence 2) is denied in its entirety, and the Weiss Defendants shall serve and file an answer to the verified complaint (NYSCEF Doc No. 1, now deemed a verified petition) within ten days after service of this decision and order with notice of entry thereof, pursuant to CPLR § 3211 (f).

This constitutes the Decision and Order of the Court.

Date: May 24, 2024
Brooklyn, New York



Hon. Patria Frias-Colón, J.S.C.