

302 W. 87th St. LLC v SHS Upper City NY II LLC

2024 NY Slip Op 33299(U)

September 17, 2024

Supreme Court, New York County

Docket Number: Index No. 160684/2018

Judge: Lynn R. Kotler

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

PRESENT: HON. LYNN R. KOTLER PART 08

Justice

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302 W. 87TH ST. LLC,

Plaintiff,

- v -

SHS UPPER CITY NY II LLC,

Defendant.

INDEX NO. 160684/2018

MOTION DATE 12/22/2023,
01/10/2024,
01/12/2024

MOTION SEQ. NO. 009 010 011

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 009) 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 480, 489, 490, 493, 498

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 010) 447, 448, 449, 450, 451, 452, 499

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER

The following e-filed documents, listed by NYSCEF document number (Motion 011) 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 481, 482, 483, 484, 485, 486, 487, 488, 494, 495, 496, 497, 500

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER

Upon the foregoing documents, these motions are decided as follows.

There are three summary judgment motions pending in this action for ejectment and trespass concerning the premises located at 302 W. 87th Street (the "premises"). These motions are hereby consolidated for the court's consideration and disposition in this decision and order.

In motion sequence 9, plaintiff 302 W. 87th St., LLC moves for summary judgment against defendant SHS Upper City NY II LLC (sometimes "SHS") on the issue of liability and specifically seeks an order: (1) granting plaintiff summary judgment against SHS on the first cause of action for ejectment on the ground that there are no triable issues of fact as plaintiff is

the true owner of the premises, that plaintiff has the immediate right of possession, and SHS continues to occupy portions of the premises without any lawful right; (2) severing the first cause of action and authorizing the entry of a judgment forthwith, with immediate execution thereon, directing SHS to immediately effectuate, and bear all costs for, the safe removal of the equipment and temporary protections it placed on plaintiff's premises, that it do so in compliance with all pertinent laws and regulations and with sufficient insurance and that it remedy any dangerous condition resulting from its removal from the premises; (3) granting summary judgment in favor of plaintiff and finding SHS liable on the second cause of action for trespass and the third cause of action for use and occupancy as there is no genuine triable dispute that SHS installed pipe scaffolding on plaintiff's premises without permission or any legal authorization, and SHS continues to unlawfully refuse to vacate plaintiff's premises without justification or permission; and, pursuant to CPLR § 3212(c), directing an immediate trial on damages; (4) granting summary judgment on liability on plaintiff's fourth cause of action for property damage, and directing an immediate trial on damages, as SHS admits that it damaged plaintiff's property; and (5) pursuant to CPLR § 3025(b), for leave to amend the complaint's ad damnum clause, and conform the pleadings to the proof, to allege punitive damages.

SHS opposes plaintiff's motion and moves in motion sequence 11 for an order: (1) granting SHS summary judgment dismissing plaintiff's first cause of action for ejectment as a matter of law as SHS is not now, or was ever in possession of Plaintiff's property located at the premises; (2) granting SHS summary judgment dismissing plaintiff's second cause of action for trespass as a matter of law as SHS never committed a trespass onto plaintiff's premises; (3) granting SHS summary judgment dismissing plaintiff's third cause of action for alleged use and occupancy; (4) granting SHS summary judgment dismissing plaintiff's fourth cause of action

sounding in negligence for alleged damage to an exterior free standing wall as SHS did not damage this wall or any portion of Plaintiff's Premises; and (5) dismissing plaintiff's request for attorneys' fees as a matter of law as there is no agreement, statute or court order authorizing such fees. Plaintiff opposes SHS' motion.

Finally, in motion sequence 10, third third-party defendant S&E Bridge & Scaffold LLC ("S&E") moves for summary judgment dismissing the third third-party complaint by third third-party plaintiff White Contracting and Renovations, Inc. ("White") as well as all crossclaims filed against S&E. There is no opposition to motion sequence 10.

Relevant background

Plaintiff owns the premises and SHS owns the property located at 555 West End Avenue, New York, New York. In furtherance of its plans to develop its property, SHS previously commenced a RPAPL § 881 proceeding to obtain a license to enter plaintiff's property and install temporary protections entitled *In the Matter of the Application of SHS Upper City NY II LLC v. 302 W 87th St. LLC*, filed in this court under Index No. 151176/2017. The Hon. Carole R. Edmead granted SHS's petition "to the extent that Petitioner is granted temporary access to the portion of [plaintiff's premises], in order to ... install, maintain, and remove roof and rear yard overhead protections on the roof and rear and side yard of the Adjacent Premises in accordance with the Department of Buildings approved plans..." (decision and order dated 2/28/17).

Justice Edmead granted a separate order dated March 3, 2017 which provided in relevant part as follows:

ORDERED that commencing on the first date of Access, [defendant] shall pay \$1,500.00 per month in advance of the month as a "license fee" for a period of 12 months for the access noted in (a) through (e), which amount and term shall be reviewed by the Court at the request of either party if necessary; and it is further

ORDERED that [defendant], and the General Contractor or Construction Manager or Contractor shall add [plaintiff] to its liability coverage insurance policies in accordance with requirements of the Building Code, and provide copies of such polices to [plaintiff] prior to the first date of Access ... and it is further

...

ORDERED that [defendant] shall indemnify and hold harmless [plaintiff] from any and all claims, losses, and damages resulting from the Access granted to [defendant] herein; and it is further

ORDERED that [defendant] shall cause reasonable security and privacy protection regarding the tenants affected by the Access, including but not limited to the sidewalk bridge noted in the Petition

Thereafter, there is no dispute that defendant installed a sidewalk bridge, roof protection and related scaffolding, which has existed at plaintiff's premises since.

After the instant action was commenced in November 2018, SHS filed a second RPAPL § 881 petition in this court entitled *SHS Upper City NY 11 LLC v. 302 W87th St. LLC*, Index No. 155008/2019 in May 2019. Shortly thereafter, SHS withdrew that petition.

In this action, plaintiff seeks to recover for ejection (first cause of action), trespass (second cause of action), use and occupancy (third cause of action) and property damage (fourth cause of action).

Parties' arguments

Plaintiff asserts that SHS improperly installed pipe scaffolding, thereby accessing plaintiff's airspace without authorization to do so in the underlying RPAPL § 881 proceeding. Plaintiff further maintains that SHS damaged a portion of the brick wall along the easterly boundary line of plaintiff's property during demolition work SHS had performed on its property. Plaintiff's counsel further maintains that to date, defendant had never reimbursed plaintiff for the attorneys' and consulting engineer's fees incurred by plaintiff as required by Justice Edmead's

Section 881 Order nor removed the sidewalk bridge, roof protections or pipe scaffolding after its license expired. Plaintiff further maintains that SHS' installations have caused property damage to the premises and "[t]he full extent of any damage to plaintiffs property can only be determined after the sidewalk bridge and roof protections are removed" which "may require additional DOB permitting, Landmark approval, compliance with all applicable attendant statutes, codes, rules and regulations..."

Meanwhile, SHS argues that this action "is nothing more than an extortion technique crafted to unjustly enrich Plaintiff to the detriment SHS (sic)." SHS claims that plaintiff previously denied access to SHS to remove the protections that plaintiff now claims are on its property and that plaintiff "cannot have it both ways...". SHS further claims that "there is absolutely nothing stopping Plaintiff from removing any remnants of the temporary protections left on its Premises if it so chooses and this action is an "attempt to run up its purported 'use and occupancy' damages to extort SHS for more money".

SHS argues that it never trespassed plaintiff's property since Justice Edmead granted SHS a license to install temporary protections and that SHS "begged" plaintiff access to remove the protections. Otherwise, SHS maintains that plaintiff is not entitled to use and occupancy damages after its license term expired in May 2019, that it did not damage plaintiff's brick wall and that plaintiff is not otherwise entitled to attorneys fees.

DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to

make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

On this record, the court finds that plaintiff is entitled to summary judgment against SHS on the first cause of action for ejectment because SHS continues to occupy portions of the premises after its license to do so expired in May 2019. As for the remedy, the parties agree that SHS should remove the protections, with SHS asserting that plaintiff has refused permission to allow SHS to do so previously. Without passing on the disputed issues of fact regarding communications between the parties, the court will order plaintiff to give permission to SHS to remove the temporary protections installed on its property within 30 days from service of this order with notice of entry as follows: SHS shall submit to plaintiff a proposal to immediately effectuate, at its sole cost, the safe removal of the equipment and temporary protections it placed on plaintiff's premises, in compliance with all pertinent laws and regulations and with sufficient insurance. After expiration of that thirty-day period, if SHS has not provided such a proposal, unless the parties agree otherwise, plaintiff shall remove said protections and SHS shall pay the reasonable costs of such removal to be determined at a hearing that either party may notice upon an appropriate formal application. In the event SHS has provided such a proposal, but plaintiff refuses to grant SHS permission to perform the work, SHS is granted 5 days to file and

emergency application with this court for permission to enter plaintiff's property to remove the subject installations.

Further, on this record, plaintiff has established that after May 2019, SHS trespassed and continues to trespass the premises by installation of the protections that remain at the premises to this day. Accordingly, that portion of the motion seeking summary judgment on the third cause of action is granted. As a result, plaintiff is entitled to use and occupancy for the aforementioned encroachment, which the court finds should be set at the original license fee of \$1,500 per month. The court is not persuaded by defendant's argument that plaintiff has unreasonably withheld consent for SHS to enter and have the temporary protections removed as this claim lacks sufficient proof and SHS itself never sought court intervention despite clearly knowing that its license to have the subject installations on the premises had long since expired.

The remainder of the motion is denied. There is a dispute as to whether SHS' construction activities caused damage to the premises. Therefore, summary judgment on the fourth cause of action is not warranted. Finally, the motion for leave to amend the ad damnum clause is denied at this juncture as punitive damages, which are "intended as punishment for gross misbehavior for the good of the public" (*Home Ins. Co. v. American Home Prods. Corp.*, 75 NY2d 196 [1990]), are not available on this record rendering the proposed amendment patently meritless.

This case is otherwise ready for trial and note of issue has been filed. No immediate trial is warranted as this case can wait for trial according to its rightful place on the court's calendar as to plaintiff's damages on the first and second causes of action as well as the fourth cause of action *in toto*.

For the reasons already stated, SHS' motion for summary judgment is denied.

Finally, motion sequence 10 is granted without opposition and White's third-party claims and all crossclaims against S&E are severed and dismissed.

Conclusion

In accordance herewith, it is hereby

ORDERED that plaintiff's motion sequence 9 is granted to the following extent:

[1] plaintiff is entitled to summary judgment against SHS on the first cause of action for ejectment and plaintiff shall give permission to SHS to remove the temporary protections installed on its property within 30 days from service of this order with notice of entry as follows:

[a] SHS shall submit to plaintiff a proposal to immediately effectuate, at its sole cost, the safe removal of the equipment and temporary protections it placed on plaintiff's premises, in compliance with all pertinent laws and regulations and with sufficient insurance;

[b] after expiration of that thirty-day period, if SHS has not provided such a proposal, unless the parties agree otherwise, plaintiff shall remove said protections and SHS shall pay the reasonable costs of such removal to be determined at a hearing that either party may notice upon an appropriate formal application; and

[c] In the event SHS has timely provided such a proposal to plaintiff, but plaintiff refuses to grant SHS permission to perform the work, SHS is granted 5 days to file an emergency application with this court for permission to enter plaintiff's property to remove the subject installations.

