

Third Ave NY Realty LLC v 1992 Third Realty LLC

2025 NY Slip Op 30498(U)

February 10, 2025

Supreme Court, New York County

Docket Number: Index No. 153757/2024

Judge: Judy H. Kim

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

PRESENT: HON. JUDY H. KIM PART 04

Justice

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THIRD AVE NY REALTY LLC,

Plaintiff,

- v -

1992 THIRD REALTY LLC,

Defendant.

INDEX NO. 153757/2024

MOTION DATE 04/22/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 27, 29, 30, 34, 35, 36, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121

were read on this motion for INJUNCTION/RESTRAINING ORDER.

Plaintiff Third Ave NY Realty LLC (“Third Ave”) owns the property at 185 East 109th Street in Manhattan and is in the process of constructing a sixteen-story residential building there (the “Project”). Defendant 1992 Third Realty LLC owns the neighboring property, 1992 Third Avenue, and the nine-story building on that lot (the “Building”).

This is the second lawsuit between these parties. On November 21, 2023, 1992 Third Realty LLC commenced an action against Third Ave in this Court, under index number 161382/2023, alleging that Third Ave and its general contractor were negligent in the demolition and construction work performed in connection with Third Ave’s Project and had, as a result, damaged the Building and undermined it, causing it to shift toward Third Ave’s property (the “2023 Action”). Third Ave interposed an Answer in the 2023 Action asserting counterclaims for negligence and nuisance based on allegations that the Building’s negligent design and construction

had left it unstable and that this instability had forced Third Ave to stop work on the Project. Third Ave also asserted a counterclaim for trespass based on allegations that the Building encroached onto Third Ave's property.

On April 22, 2024, plaintiff commenced this action, based largely on the same factual allegations underlying its counterclaims in the 2023 Action. It further alleges, however, that on or about July 24, 2023, the New York City Department of Buildings ("DOB") issued a violation to the Building related to its "structural design and strength" and "ordered Defendant to obtain a peer review of its structural design pursuant to Section 1617 of the New York City Building Code" (NYSCEF Doc. No. 1 [Compl. at ¶34]).

In this action, plaintiff asserts claims for: (1) a declaratory judgment that defendant is responsible to maintain the Building's structure and structural materials in a safe condition but has violated New York City Building Code §§3301.1.1, 3306.5.10 and 3309.1, et. seq., and Administrative Code §§28-104.7.1, 28-105.12.3, and 28-301.1, and that these violations are impeding plaintiff's ability to develop its Project; (2) a mandatory injunction compelling defendant to "permanently reinforce the structural stability of the foundation and lateral support system" of the Building by a date certain; (3) a trespass claim seeking money damages based on the Building's alleged encroachment onto plaintiff's property; and (4) a mandatory injunction ordering defendant to remove this encroachment (Id. at ¶94).

Plaintiff now moves, by order to show cause, for an order granting it the declaratory and injunctive relief sought in its complaint. Defendant opposes plaintiff's motion and cross-moves to dismiss the complaint pursuant to CPLR 3211(a)(1), (4), and (7), on the grounds that the complaint's first, third, and fourth claims are duplicative of its counterclaims in the 2023 Action and that the complaint fails on its merits because: plaintiff lacks standing to seek a declaratory

judgment, plaintiff's claim for a mandatory injunction is a "remedy untethered from a cause of action," and plaintiff's trespass claim is refuted by documentary evidence—i.e., that optical monitoring data establishes that the Building's movement was caused by plaintiff's excavation and foundation work and that certain surveys submitted by plaintiff establish that there has been no encroachment by the Building. Defendant adds that plaintiff's reliance on these surveys is "a willful misrepresentation of material facts to the Court" and seeks sanctions.

DISCUSSION

Preliminary Injunction

Plaintiff's motion for a preliminary injunction is denied. A preliminary injunction will only be issued if plaintiff demonstrates, with convincing evidentiary support, a likelihood of success on the merits, irreparable injury absent granting of a preliminary injunction, and that a balancing of equities favors its position (See e.g., Nobu Next Door, LLC v Fina Arts Housing, Inc., 4 NY3d 839, 840 [2005]). "[A] mandatory preliminary injunction ... by which the movant would receive some form of the ultimate relief sought as a final judgment, is granted only in unusual situations, where the granting of the relief is essential to maintain the status quo pending trial of the action" (Jones v Park Front Apts., LLC, 73 AD3d 612, 612 [1st Dept 2010] [internal citations and quotations omitted]) and "should not be granted, absent extraordinary circumstances" (Spectrum Stamford, LLC v 400 Atl. Tit., LLC, 162 AD3d 615, 617 [1st Dept 2018] [internal citations and quotations omitted]).

In this case, the balance of equities weighs against granting such relief because doing so would dramatically alter the status quo (See e.g. Moltisanti v E. Riv. Hous. Corp., 149 AD3d 530, 531 [1st Dept 2017]) and there is no irreparable harm to plaintiff from the alleged decline in its property value or lost profits caused by a delay of the Project (See Shelbourne BRF LLC v SR 677

Bway LLC, 192 AD3d 444 [1st Dept 2021] [“the feared loss of an investment can be compensated in money damages”]). Finally, as discussed below, plaintiff has not established a likelihood of success on the merits on its claims for declaratory and injunctive relief (See e.g. Schumacher v Douglas-Worghs Realty Corp., 2022 NY Slip Op 31318[U], 3-4 [Sup Ct, NY County 2022]; see also E. 62nd St. Ass'n, Inc. v 163-165 E. 62nd St. Assoc., LLC, 2016 NY Slip Op 30746[U], 7 [Sup Ct, NY County 2016]). Accordingly, plaintiff’s motion for a preliminary injunction is denied.

Defendant’s Cross-Motion To Dismiss

The Court first addresses the branch of defendant’s motion to dismiss this action pursuant to CPLR 3211(a)(7). On a motion to dismiss under CPLR 3211(a)(7), the pleading is afforded a liberal construction and the court must accept as true the facts alleged in the complaint, accord the pleading the benefit of every reasonable inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory (See Leon v Martinez, 84 NY2d 83 [1994]).

Defendant’s motion to dismiss plaintiff’s first and second causes of action, for declaratory judgment and a mandatory injunction, is granted. “A claim for declaratory relief based upon violations of statutory or regulatory provisions may not be pled in the absence of a private right of action to enforce such violations” (S&P Assoc. of New York LLC v Dewald, 2024 NY Slip Op 32187[U], 8-9 [Sup Ct, NY County 2024] [internal citations omitted]), and the Administrative Code provisions cited by plaintiff do not expressly create a private right of action (See e.g. Schumacher v Douglas-Worghs Realty Corp., 2022 NY Slip Op 31318[U], 4 [Sup Ct, NY County 2022] [Administrative Code §28.301.1 does not create a private right of action]). Neither can these provisions be read to imply a private right of action. The Court of Appeals has declined to recognize a private right of action in instances where “[t]he Legislature specifically considered and expressly provided for enforcement mechanisms’ in the statute itself” (Cruz v TD Bank, N.A.,

22 NY3d 61, 70-71 [2013] quoting Mark G. v Sabol, 93 NY2d 710, 720 [1999]) and, pursuant to New York City Charter §643, the New York City Council has empowered the DOB to “enforce compliance with this code the 1968 building code, the zoning resolution, other laws or rules enforced by the department and orders of the commissioner issued pursuant thereto ...” (Administrative Code §28-201.3) including specific enforcement mechanisms to address issues with a building’s structural integrity (See Administrative Code §28-216 et seq).

The absence of express or implied right of action precludes plaintiff’s claims for a declaratory judgment (See Homeowners v The City of New York, 2015 NY Slip Op 32413[U] [Sup Ct, Queens County 2015]) and mandatory injunction directing defendant to reinforce the Building’s structural stability¹ (See e.g. Delgado v New York City Hous. Auth., 66 AD3d 607, 607-08 [1st Dept 2009] [petitioners’ claims for declaratory and injunctive relief against NYCHA dismissed where exclusive power to remedy violations asserted by petitioners was vested, by statute, in Commissioner of New York City Department of Housing Preservation and Development]; see also Wachtel v Park Ave & 84th St., Inc., 180 AD3d 545, 546 [1st Dept 2020] [private litigants “lack standing to enforce the DOB’s order to correct ... violations”]).

The cases cited by plaintiff, Crocker v Manhattan Life Ins. Co., 61 AD 226 (1st Dept 1901) and Herrman v Hartwood Holding Co. Inc. 193 App Div 115 (1st Dept 1920), do not support a contrary conclusion. These cases, from the turn of the twentieth century, involve claims of trespass and have no bearing on plaintiff’s efforts to address the alleged instability of its neighbor’s building rather than that building’s alleged encroachment on plaintiff’s property.

¹ As defendant observes, a mandatory injunction is a remedy for an underlying wrong, not a cause of action (Talking Capital LLC v Omanoff, 169 AD3d 423, 424 [1st Dept 2019]; see also Hejailan-Amon v Amon, 160 AD3d 481, 483-84 [1st Dept 2018] [internal citations omitted]) yet plaintiff’s second cause of action is not connected to any cause of action.

Defendant's motion to dismiss the third and fourth causes of action, pursuant to CPLR 3211(a)(7), is denied, however. As to the third cause of action, for trespass, the complaint sufficiently alleges the requisite elements, i.e. the intentional entry onto the land of another without justification or permission" (211-12 N. Blvd. Corp. v LIC Contr., Inc., 186 AD3d 69, 82 [2d Dept 2020]). To the extent defendant submits optical monitoring data to demonstrate that any trespass was the result of plaintiff's construction work, this is not documentary evidence appropriate for a CPLR 3211 motion, as it requires additional interpretation (See e.g. Chacho v Cudney, 2024 NY Slip Op 33927[U], 2-3 [Sup Ct, Kings County 2024] ["demolition plan is not documentary evidence, as the Court can not interpret the plan without the use of an affidavit, which is not documentary evidence and can not be considered"]). Defendant's reliance on plaintiff's surveys to establish that no trespass has taken place is also unavailing as these surveys are also not documentary evidence for purposes of a CPLR 3211 motion (See Rahabi v Morrison, 81 AD2d 434, 442 [2d Dept 1981]).

Defendant's fourth cause of action, for a mandatory injunction ordering defendant to "remove the offending encroachment over the lot line of the Project Premises" is appropriate relief to seek in connection with its trespass claim (See e.g. Brown v Nelson, 55 AD3d 317 [1st Dept 2008]; see also 8 Jane St. LLC v Petrone, 198 AD3d 401, 402 [1st Dept 2021]). Of course, whether a developed record will support such a "drastic remedy" (Pennbus Realities, LLC v H Eighth Ave. Assoc. LLC, 29 Misc 3d 1224(A) [Sup Ct, NY County 2010]) remains to be seen.

Ultimately, however, the Court agrees with defendant that the 2023 Action prohibits the continuation of this action. CPLR 3211(a)(4) provides that

A party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires

(CPLR 3211[a][4] [emphasis added])

Here, there is “substantial” identity of the parties, regardless of the presence of Third Ave’s general contractor in the 2023 Action (See Jaber v Elayyan, 168 AD3d 693, 694 [2d Dept 2019] and plaintiff’s claims in this action and counterclaims in the 2023 Action unquestionably “arise out of the same subject matter or series of alleged wrongs” (Syncora Guar. Inc. v J.P. Morgan Sec. LLC, 110 AD3d 87, 96 [1st Dept 2013] [internal citations omitted]). In short, the “identity of parties and causes of action in [these] two simultaneously pending actions raises the danger of conflicting rulings relating to the same matter” such that CPLR 3211(a)(4) applies (Finch Prop. Holdings I, LLP v Blumenfeld, ---- NYS3d ----, 2025 NY Slip Op 00190 at *2 [1st Dept 2025]). While it is within the discretion of the Court to address this danger by consolidating this action into the 2023 Action, the Court declines to do so. Rather, in the interests of judicial economy, and in light of the dismissal of plaintiff’s first and second causes of action on the merits, the Court dismisses plaintiff’s third and fourth cause of action without prejudice to plaintiff’s repleading its fourth cause of action, for injunctive relief, as a counterclaim in an amended Answer in the 2023 Action (See e.g. SD Second Ave. Member LLC v SD Second Ave. Venture, LLC, 2024 NY Slip Op 33073[U], 3 [Sup Ct, NY County 2024]). The Court sees no need to grant plaintiff leave to replead its third cause of action, for trespass, as it is entirely duplicative of the fourth counterclaim asserted by Third Ave in the 2023 Action.

Sanctions

Defendant’s motion for sanctions is denied. For the reasons set forth above, this action is not “completely without merit in law” and the Court cannot say, at this juncture, that it was “undertaken primarily to delay or prolong the resolution of the litigation,” nor that plaintiff “assert[ed] material factual statements that are false” (22 NYCRR §130-1.1[c][1]-[3]).

Accordingly, it is

ORDERED that plaintiff’s motion for a preliminary injunction is denied; and it is further

ORDERED that defendant’s motion to dismiss this action is granted; and it is further

ORDERED that plaintiff’s first and second causes of action are dismissed pursuant to CPLR 3211(a)(7); and it is further

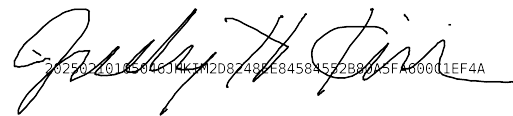
ORDERED that plaintiff’s third and fourth causes of action are dismissed, pursuant to CPLR 3211(a)(4), without prejudice to plaintiff asserting the fourth cause of action as a counterclaim in an Amended Answer in the 2023 Action; and it is further

ORDERED that defendant’s motion for sanctions is denied; and it is further

ORDERED that defendant is to serve a copy of this decision and order, with notice of entry, upon plaintiff as well as the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to enter judgment accordingly; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E filing” page on this court’s website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.



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2/10/2025

DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: