

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 23

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BENJAMIN PARTNERS, LLC, and 589 ASSOCIATES
LLC,

Index No. 115272/04

OPINION

Plaintiffs,

-against-

583-587 BROADWAY CONDOMINIUM, BOARD OF
MANAGERS OF 583-587 BROADWAY
CONDOMINIUM, CARLTON JOHNSON, LINDA
JOHNSON, FABIEN BARON, PHILLIP M. SATOW,
DONNA P. SATOW, ROBERT SCHMETTERER,
STACY SCHMETTERER, GORDON SZE, CARL
JOHNSON, SCOTT ROSENBERG, CLAUDIA
ARONOW-ROUSH, MICHAEL D. RYAN, ROSEMARY
M. RYAN, MARK D. MADOFF, STEPHANIE
MADOFF, DANNY FONG, JODY A. HARRIS,
ROBERT C. HARRIS, JR., WILLIAM H. BERKMAN,
ANDRE BALAZS, DOUG GREENIG, ALISON L.
GREENIG, BROADWAY RETAIL, LLC, BHM
ASSOCIATES, MERCER 158, LLC, VAN
SCHOONHOVEN, LLC, MERC 921, LLC, MEIR
FAMILY LIMITED PARTNERSHIP, BKM
ASSOCIATES, and JOHN and JANE DOE Nos. 1 through
10, being the fictitious names of the owners of interests in
583-587 Broadway Condominium not named above,
collectively being the owners of undivided interests
totaling 100% of the encroaching structure located at 583-
587 Broadway and 154-158 Mercer Street, New York,
New York,

Defendants.

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RICHARD F. BRAUN, J.:

This is an action for an injunction and damages for encroachment. The individual unit owner
defendants move to dismiss the first amended complaint, pursuant to CPLR 3211 (a) (1) and (7).
Defendants separately move to cancel and vacate the notice of pendency filed by plaintiffs against

defendants; and award defendants costs and disbursements, pursuant to CPLR 6514 (c), and costs and sanctions, pursuant to 22 NYCRR 130-1.1.

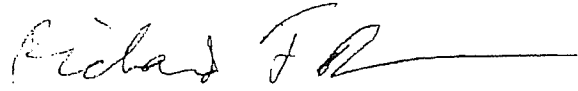
This court already held in a related action for nuisance, trespass, and negligence, and an injunction to abate the nuisance (*Benjamin Partners, LLC v 583-587 Broadway Condominium*, Sup Ct, NY County, June 19, 2003, Index No. 115966/02), that the individual unit owner defendants are not liable to plaintiffs, and granted the motions to dismiss the complaint therein against those defendants. Since then, the Appellate Division, First Department, has held that, in the absence of individual condominium unit owners' having control over the common elements of their building, the owners cannot be liable for damages (*Pekelnaya v Taratuta*, 25 AD3d 111, 113, 121 [1st Dept 2005]). The individual unit owner defendants have no such control here. Thus, the damages claim does not lie against the individual unit owner defendants, and any injunction would be against the defendants 583-587 Broadway Condominium and Board of Managers of 583-587 Broadway Condominium, not the individual unit owner defendants (*cf. Incorporated Vil. of Atl. Beach v Pebble Cove Homeowner's Assn.*, 139 AD2d 627, 628 [2nd Dept 1988] [where the injunction sought would have directly affected the individual condominium unit owners' heating and air-conditioning systems]). Therefore, the complaint has been dismissed as against the individual unit owner defendants, by this court's separate April 7, 2006 decision and order, and partly because the action has been dismissed against the individual unit owner defendants, the notice of pendency has been cancelled as to them by this court's separate April 8, 2006 decision and order.

Where an action does not "affect the title to, or the possession, use or enjoyment of real property", a notice of pendency cannot be properly filed, pursuant to CPLR 6501, and the statute must be strictly construed because of its drastic impact (*5303 Realty Corp. v O & Y Equity Corp.*,

64 NY2d 313, 317-318 [1984]). The encroachment claimed by plaintiffs here does not affect the title to, or possession, use, or enjoyment of plaintiff's real estate (see *Braunston v Anchorage Woods*, 10 NY2d 302, 304-305 [1961]; *Sourian v Saleh*, 50 AD2d 756 [1st Dept 1975]; *McManus v Weinstein*, 108 App Div 301, 302 [1st Dept 1905]).

Therefore, the notice of pendency also has been cancelled as to the other defendants. Under the circumstances, plaintiffs have been ordered to pay defendants' costs and expenses caused by the filing and cancellation of the notice of pendency, pursuant to CPLR 6514 (c), plus a total of \$100 motion costs on each motion to the moving defendants, pursuant to CPLR 8106 and 8202. Plaintiffs' motions are at best on the border of sanctionable conduct. Under the circumstances, and in light of the award pursuant to CPLR 6514 (c), costs and sanctions under 22 NYCRR 130-1.1 have not been awarded.

Dated: New York, New York
April 10, 2006



RICHARD F. BRAUN, J.S.C.