SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH SUPREME COURT JUSTICE *Justice* PART 61

Index Number : 653362/2011
LOWER EAST SIDE II
vs.
349 E. 10TH STREET, LLC
SEQUENCE NUMBER : 001
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1
Answering Affidavits — Exhibits _____ | No(s). 2
Replying Affidavits _____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 3/4/2013

HON. ANIL C. SINGH, J.S.C.
SUPREME COURT JUSTICE

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☒ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

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LOWER EAST SIDE II ASSOCIATES, L.P.,

Plaintiff,

Index No.
653362/11

349 E. 10TH STREET, LLC,

Defendant.

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HON. ANIL C. SINGH, J.:

Plaintiff moves for partial summary judgment pursuant to CPLR 3212. Defendant opposes the motion

This action involves the enlargement of a building located on defendant's property at 349 East 10th Street in Manhattan. Plaintiff's property is located on 351-353 East 10th Street, which is adjacent to defendant's property. Plaintiff purchased this property on April 17, 1980. Defendant purchased its property on November 7, 2006.

Plaintiff states that, since 1980, a wall has existed on the portion of the length of a property line which is presently shared by the parties (hereinafter called the Shared Property Line), and is on both parties' property. The structural width of this wall is 12 inches thick, with the midpoint of the wall being located on the Shared Property Line. Plaintiff claims that six inches of the thickness of the wall is located on its property, and six inches is located on defendant's property.

The building in issue was originally four stories tall. Upon defendant's purchase of the property, plans were made to add two stories to the building. Construction was done, which plaintiff contends was performed illegally at times. As a result, the two stories are supported by the wall, which now straddles the Shared Property Line. The straddling was enhanced by

defendant's construction of additional walls on the pre-existing wall.

Plaintiff commenced this action alleging that the construction resulted in permanent interference with plaintiff's use and enjoyment of its property. The present condition of the wall is allegedly encroaching plaintiff's airspace. The complaint includes causes of action in encroachment (nuisance- third cause of action), trespass (fourth cause of action) and unjust enrichment (fifth cause of action), and seeks injunctive relief (second cause of action), damages, and a declaratory judgment that the subject wall wrongfully encroaches plaintiff's property and airspace (first cause of action).

Plaintiff moves for summary judgment with respect to liability on all of its claims. Plaintiff argues that there are no disputed facts about the current condition of the wall resulting from defendant's construction efforts, and the wall's effect on plaintiff's use of its property. Plaintiff submits documents which indicate that defendant's plans were made without complying with the New York City Department of Buildings's (DOB) rules, which included a pre-construction evaluation. Affidavits provided by plaintiff from engineers Saeid Jalilvand and Tony Skevas allegedly attest to the results of the construction. A 2011 survey conducted by Jalilvand allegedly demonstrates that portions of the prior wall and the additional walls both vertically and horizontally encroach into plaintiff's airspace ranging from over one and one half feet to over two and one half feet. Plaintiff avers that the 2011 survey provides ample proof of the consequences of defendant's work.

Plaintiff contends that defendant has attempted to delay this action by refusing to produce documents until ordered by this court. After pressure from the court, defendant produced some documents, but no extensive evidence such as a signed survey providing figures indicating the

extent of the wall's presence over plaintiff's property subsequent to the construction. Plaintiff submits a copy of defendant's interrogatory responses to plaintiff's interrogatories, in which defendant's president responds that "upon information and belief," the subject wall is not leaning more than six inches over the Shared Property Line. Plaintiff states that this response is contradicted by proof from plaintiff that the wall extends at its upper level onto and over the Shared Property Line between the two properties by at least 21.36 inches.

In opposing the motion, defendant contends that there are too many issues of fact to allow the granting of this motion. Defendant argues that the subject wall is a party wall to which it has equal rights, and that plaintiff cannot build above this wall as a matter of law. Submitting a copy of a 2006 survey, defendant states that the wall had been shifting before construction work commenced. The 2006 survey indicates that the dimensions of the bulge at the bottom and top of the wall were 1.8 feet, which defendant claims is the same as it is today. Moreover, defendant holds that the encroachment asserted by plaintiff is minor, less than six inches. Defendant submits a copy of a wall "survey" and a photograph of the wall site. According to defendant, not every intrusion of one's property is actionable or has similar consequences. Finally, defendant argues that plaintiff is barred by section 611 (2) of the Real Property Actions and Proceedings Law (RPAPL) from bringing this suit. This statute prescribes that any party that seeks judicial relief for an encroachment of less than six inches, must commence its action within one year. If the action is not commenced within that time, the alleged encroacher receives a statutory prescriptive easement to the extent of the encroachment. Defendant claims that this action is untimely.

In reply, plaintiff disputes the veracity of the 2006 survey, which plaintiff claims is

inadmissible because it is unsigned and unsealed and lacks an affidavit from an engineer. Plaintiff contends that the submitted photograph is unauthenticated and unclear, which undermines its reliability. Defendant allegedly fails to provide evidence as to elevation encroachments above ground level, nor does it provide proof that an encroachment existed prior to construction. Plaintiff disputes defendant's claim that the encroachment is under six inches and therefore, minor. Plaintiff insists that the evidence confirms an encroachment of 1.46 feet. As for the application of RPAPL, plaintiff argues that the plain language of the law provides that where no building is located on plaintiff's property, there is no application. According to plaintiff, defendant's wall is leaning over plaintiff's property and airspace and there is no building on plaintiff's property.

Plaintiff states that the subject wall is not a party wall which exists for the mutual benefit of the parties's adjoining structures, but a common wall. Plaintiff again claims that no building currently exists on its property. Plaintiff denies wanting to build on top of the wall, and avers that under no circumstances can defendant interfere with plaintiff's use of its property. Plaintiff claims that as a property owner, it has an inherent legal right to its airspace.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman,* 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc [ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso,* 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New*

York, 49 NY2d 557, 562 (1980). "If there is any doubt as to the existence of a triable issue of fact," summary judgment must be denied. *Rotuba Extruders v Ceppos,* 46 NY2d 223, 231 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dept 2002).

First of all, the court notes that the subject wall has been called a party wall and a common wall, which in fact are interchangeable terms. The "common or party wall 'is for the common benefit of contiguous proprietors. Neither may subject it to a use whereby it ceases to be continuously available for enjoyment by the other (citation omitted).'" *25 W. 74th St. Corp. v Wenner,* 268 AD2d 387, 388 (1st Dept 2000).

The court will first determine whether plaintiff has provided a prima facie case for summary judgment. The affidavits of Skevas and Jalilvand describe in detail how the subject wall and the additional wall erected in the course of defendant's construction have resulted in a 'leaning' condition. The leaning occurs above ground level, which accounts for an encroachment on plaintiff's airspace. The 2011 survey, which was conducted by Jalilvand's company, Montrose Survey Co. LLP (Montrose) is not submitted, but parts of the document are referred to in the affidavits. Some graphic excerpts of the survey are replicated in Skevas's affidavit. In his affidavit, Jalilvand refers to an earlier 2002 survey of the property, which Montrose had also conducted. According to this survey, it was estimated that the wall had extended into plaintiff's airspace by 8.4 inches. In comparing the two surveys, Jalilvand concludes that the 2011 survey shows that the wall has since shifted eastward by 12.96 inches, making the extension 21.36 inches into the airspace. This is claimed to be a result of the construction work.

Relying on this evidence, one would conclude that the construction work had an effect on creating an encroachment and that this encroachment is not minor, being more than a foot over

plaintiff's property. Both engineers declare that they have personal knowledge of the condition of the property and have personally examined the property. One engineer claims to have been personally involved in the two surveys of the wall. Plaintiff has therefore established a prima facie case for summary judgment.

"To support summary judgment, affidavits must recite material facts from affiants having knowledge of those facts." *Republic Natl. Bank of N.Y. v Luis Winston, Inc.*, 107 AD2d 581, 582 (1st Dept 1985).

In opposition to the motion, defendant submits evidence meant to raise issues of fact material enough to preclude summary judgment. Defendant is averring that there are issues as to whether the alleged encroachment had occurred prior to its possession of the property, and whether said encroachment is so significant as to constitute a trespass or nuisance. Defendant submits as evidence the 2006 survey and the 2012 survey, as well as a photograph of the subject wall. As plaintiff notes in reply, the 2006 survey is neither signed nor sealed and is devoid of an engineer's affidavit for verification. Moreover, as plaintiff notes, there is no depiction of the upper levels of the property, where the encroachment is said to exist. The 2012 survey provides a similar problem. Plaintiff also notes that an unauthenticated photograph lacks probative value.

In opposing this motion, defendant has not offered competent evidence as the surveys submitted were not accompanied by an affidavit of an engineer or surveyor, which explains or interprets the surveys. *See City of New York v Gowanus Indus. Park, Inc.*, 65 AD3d 1071, 1073 (2d Dept 2009). The lack of admissible evidence to support its opposition is insufficient to defeat the motion.

Plaintiff argues that it has made a sufficient case for trespass, nuisance and unjust

enrichment. A claim for trespass requires "an affirmative act constituting or resulting in an intentional intrusion upon [plaintiff's] property." *Stage Club Corp. v West Realty Co.*, 212 AD2d 458, 460 (1st Dept 1995). "Trespass does not require an intent to produce the damaging consequences, merely intent to perform the act that produces the unlawful invasion." *Berenger v 261 W. LLC*, 93 AD3d 175, 181 (1st Dept 2012). Here, plaintiff has made a case for trespass, whereas defendant's intention to undergo construction of its building sufficed as the intention to intrude on plaintiff's property, the result of the construction.

> "Unlike trespass, which arises from the exclusiveness of possession and requires a physical entry onto property, a claim of private nuisance arises from an interest in the use and enjoyment of property. The elements of a common-law claim for a private nuisance are: '(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act '"

Berenger, 93 AD3d at182 (citation omitted).

Here again, defendant's intentions to construct provided the basis for nuisance, since the consequences of the project led to the encroachment on plaintiff's property.

The last claim is based on unjust enrichment. "A plaintiff must show 'that (1) the other party was enriched, (2) at that party's expense, and (3) it is against equity and good conscience to permit (the other party) to retain what is sought to be recovered.'" *Mandarin Trading Ltd., v Wildenstein*, 16 NY3d 173, 182 (2011), quoting *Citibank, N.A. v Walker*, 12 AD3d 480, 481 (2d Dept 2004). "' The essential injury in any action for unjust enrichment . . . is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered.'" *Mandarin Trading* at 182, quoting *Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421 (1972). In this case, plaintiff has not shown the elements for such

relief, primarily any enrichment attained by defendant and deprived by plaintiff.

Plaintiff has demonstrated defendant's liability on the trespass and nuisance claims, but not on its equitable claim for unjust enrichment.

In its motion, plaintiff seeks a declaratory judgment that the subject wall wrongfully encroaches upon plaintiff's property and/or airspace. "The primary purpose of declaratory judgments is to adjudicate the parties' rights before a 'wrong' actually occurs in the hope that later litigation will be unnecessary (citation omitted)." *Klostermann v Cuomo,* 61 NY2d 525, 538-39 (1984). "A cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as a breach of contract." *Apple Records v Capitol Records,* 137 AD2d 50, 54 (1st Dept 1988).

Here, declaratory judgment is not necessary where plaintiff has an adequate and sufficient set of claims against defendant.

Plaintiff states in its reply papers that it is not interested in injunctive relief and would settle for compensatory damages, precluding any decision to remove or alter the structure on defendant's property. Upon granting judgment on the issue of liability, further proceedings will lead to a determination or assessment of such damages.

Accordingly, it is

ORDERED that plaintiff's motion for partial summary judgment is granted with regard to liability on the third and fourth causes of action and is otherwise denied; and it is further

ORDERED that the issue of damages is referred to a Special Referee to hear and report.

DATE: 3/4/2013

ANIL ~~C. SINGH~~

HON. ANIL C. SINGH
SUPREME COURT JUSTICE