

Pearl St. Parking Assoc. LLC v County of Erie

2023 NY Slip Op 34754(U)

July 31, 2023

Supreme Court, Erie County

Docket Number: Index No. 806015/2020

Judge: Raymond W. Walter

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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

PEARL STREET PARKING ASSOCIATES LLC,
et al,

Plaintiff,

v.

COUNTY OF ERIE, et al,

Defendants.

Decision & Order
(Motion Sequence #3 and #4)
Index No. 806015/2020

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Attorney for Plaintiff

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Attorney for Defendant

Walter, J.:

The following papers were read on this motion by Plaintiffs and Cross-Motion by Defendants:

	<u>NYSCEF Doc. Nos.</u>
Notice of Motion, Affirmation, Memorandum, Exhibits.....	119-128
Notice of Cross Motion, Affirmation, Memorandum, Exhibits....	130-133
Affirmation in Reply, Memorandum, Exhibits.....	138-140

This matter comes before the Court on a motion to Compel on behalf of the Plaintiffs pursuant to CPLR § 3124 and a Cross-motion to dismiss the complaint on behalf of the Defendants pursuant to CPLR § 3211(a)(7). The Court will address the Defendants' motion to dismiss first.

The Defendants argue that the Plaintiff is attempting to avoid the three-year statute of limitations applicable to an inverse condemnation through a de-facto taking by characterizing its claim as a trespass. What distinguishes a de-facto

taking from a trespass is the degree of interference with the owners property right (*Stewart v State of New York*, 248 AD2d 761, 762 [3rd Dept. 1998]). As the Court of Appeals reasoned in *Corsello v Version New York, Inc.*, (18 NY3d 777, 787 [2012]), whether this was a trespass or a de-facto taking depends on “whether or not there was a continuous and permanent or merely a temporary occupation of the property.”

This Court previously found that the Defendants had committed both a trespass and a taking (Dkt. 109 p. 3). The 4th Department overturned that decision, and this remains an open factual question to be determined by the finder of fact (207 AD3d 1029, 1032).

The Defendants also argue that they are not violating the easement because the easement was extinguished by the taking. This, however, assumes there was a de-facto taking, but, as previously stated, that is an open factual question.

Finally, the Defendants argue that they are not in breach of contract because the Plaintiffs do not allege any contractual obligation that was independent of the deed. Even if the Plaintiffs could point to such obligation, the Defendants claim, the complaint would be barred by the merger doctrine (*citing Village of Warsaw v Gott*, 233 AD2d 846,865 [4th Dept. 1996]).

The complaint, liberally construed, meets the requirements of CPLR 3013 and adequately alleges the violation of a contractual obligation. In addition, the Plaintiffs correctly argue that where the parties intend for the provisions of a contract to survive the closing the merger doctrine shall not apply (*see Franklin Park Plaza, LLC v V & J Natl. Enters., LLC*, 57 AD3d 1450, 1451-1452 [4th Dept. 2008]). Furthermore, the three-party agreement was duly filed with the Erie County Clerk as a document distinct from the deed and in the chain of title. Such a filing constitutes additional evidence that the intent of the parties was for the agreement to survive the closing (*Id.* at 1452).

Turning to the Plaintiffs’ motion to compel. Plaintiffs’ motion to compel the Defendants to produce the Department of Homeland Security (“DHS”) site

assessment report is **DENIED** to the extent it is designated as Protected Critical Infrastructure Information (“PCII”). PCII is fully protected from disclosure without the express permission of the designated representative of DHS (6 CFR § 29.8). The Defendants, however, have an obligation to request permission from DHS to disclose the report for the limited purposes of this litigation. The Defendants have thirty (30) days from the entry of this Order to request such permission and if it is granted, they shall turn over the report to the Plaintiffs immediately.

The Plaintiffs’ motion to compel production of documents related to the DHS report including any information that Erie County provided to DHS for the preparation of the PCII report is **GRANTED**. Such information is fully discoverable and shall be provided to the Plaintiffs within ninety (90) days of the entry of this Order (*see e.g. County of Santa Clara v Superior Court*, 170 Cal App 4th 1301 [2009]).

As to Plaintiffs’ fourth demand, it is overbroad and **DENIED** without prejudice. The Plaintiff may submit a more particularized demand for such information within thirty (30) days of the entry of this Order. Any further assertion by the Defendants of a “public interest exception” shall be addressed through an in-camera review of the objected to material.

The Plaintiffs’ demand to produce Mark Poloncarz and Daniel Neaverth for deposition is **GRANTED**. Mr. Poloncarz is a duly named defendant and the information provided to the Plaintiffs so far indicates he played an active role in the circumstances that led to this dispute. Mr. Neaverth’s deposition was appropriately noticed, and the Defendants failed to offer an alternative employee with the relevant knowledge and facts in a timely manner. Mr. Poloncarz and Mr. Neaverth shall appear for deposition at mutually agreed dates and times within thirty (30) days following the production of written discovery.

The Plaintiffs' motion regarding its 7th and 8th demands are **DENIED** without prejudice. Plaintiffs are free to submit a supplemental clarifying demand within thirty (30) days of the entry of this order.

WHEREFORE, upon the foregoing, it is hereby

ORDERED that the Defendants' Cross-motion to dismiss the complaint is **DENIED** in its entirety; and it is further

ORDERED that the Plaintiffs' motion to Compel is **GRANTED** in part and **DENIED** in part pursuant to the preceding, and it is further

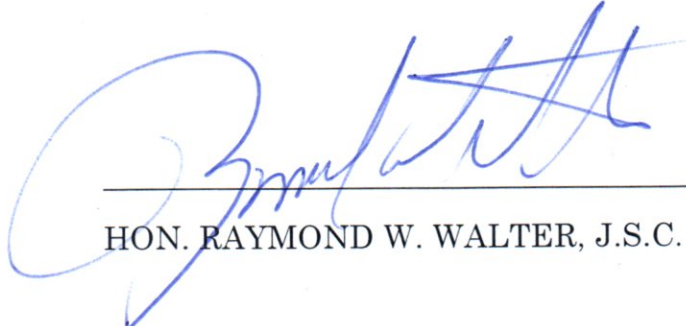
ORDERED that all written discovery shall be complete within ninety (90) days of the entry of this Order; and it is further

ORDERED that all depositions shall be complete within one hundred and twenty (120) days of the entry of this Order; and it is further

ORDERED that a status conference shall be held on Monday November 6, 2023, at 10:00 AM, via Microsoft Teams; and it is further

ORDERED that this constitutes the Decision and Order of the Court.

DATED: July 31, 2023



HON. RAYMOND W. WALTER, J.S.C.

ENTER: