877 Empire Assoc., LLC v Grant
2024 NY Slip Op 32222(U)
June 24, 2024
Supreme Court, Kings County
Docket Number: Index No. 527617/2023
Judge: Carolyn E. Wade

At an IAS Term, Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 24th day of June 2024.

PRESENT:

Hon. Carolyn E. Wade, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 84

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877 EMPIRE ASSOCIATES, LLC,

Plaintiff,

-against-

VAIN V. GRANT AND WAVENEY L. WILLIAMS GRANT AS TRUSTEES OF THE VAIN V. GRANT AND WAVENEY L. WILLIAMS GRANT LIVING TRUST, WINSTON STACHAN, DANSFORD ANGLIN AND LAINELLE ANGLIN, LADOYVCE REALTY LLC, and 972 MONTGOMERY LLC,

Defendants.

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Motion sequences 2 and 3

DECISION AND ORDER

Plaintiff, 877 Empire Associates, LLC ("Plaintiff"), having moved this Court, by Notice of Motion, dated February 23, 2024, for an Order, pursuant to CPLR Section 2221(d), granting Plaintiff leave to reargue the Decision and Order of the Hon. Carolyn E. Wade, dated January 12, 2024, and filed and entered on January 22, 2024 (motion seq. #2); and Defendant 972 Montgomery LLC ("972 Montgomery/Defendant"), having opposed said motion, and having cross-moved, by Notice of Cross-Motion, dated April 11, 2024, for an Order imposing costs and/or 22 NYCRR § 130.1–1, and setting the matter down

for a hearing to determine the amount of damages, costs, expenses, including attorneys' fees, which defendant 972 Montgomery LLC incurred, and plaintiff, 877 Empire Associates, LLC having opposed the cross-motion (motion seq. #3); this Court, decides as follows:

CPLR Rule 2211(d) prescribes that a motion to reargue be "based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion but shall not include any matters of fact not offered on the prior motion."

Plaintiff seeks to reargue the portion of this Court's January 12, 2024 Decision and Order, which granted the branch of 972 Montgomery's underlying Order to Show Cause to cancel the Notice of Pendency that the Plaintiff filed against Defendant's property, located at 972 Montgomery Street, Brooklyn, New York.

"A notice of pendency may be filed only when the judgment demanded would affect the title to, or the possession, use of enjoyment of real property" (*Berry v. Wallerstein*, 219 AD3d 924, 926 [2023] [internal quotation marks omitted]).

In the instant case, Plaintiff filed the Notice of Pendency against Defendant's premises. However, Plaintiff stresses that the enjoyment and use of its property is affected by the maintenance and repair of the retaining wall, as opposed to Defendant's property. This Court credits Defendant's contention that a reinstatement of the Notice of Pendency against its property would be unwarranted, as it is not required to inform a potential purchaser that there is a pre-existing Retaining Wall at or near the border of the premises, which appears on every survey. Specifically, a survey or inspection of the 972 Montgomery Premises would depict the Retaining Wall, and a potential purchaser will know of its existence and location. This action will neither affect the existence and location

of the Retaining Wall, nor the fact that the duty to maintain, repair or possibly replace it continues to run with land. Moreover, this Court finds that Defendant reiterates arguments that were previously considered; and cites case law that is distinguishable from the facts at hand.

In *Bienstock v. Nista Constr. Co.*, 225 AD 534 [1st Dept 1929], the defendant erected an underground retaining wall on the plaintiff's property. The plaintiff sued to compel the defendant to remove the wall and rebuild it instead on defendant's property. The court found that the plaintiff was seeking an interest in a specific portion of the defendant's property that was previously unencumbered, for the construction of a retaining wall at a location, where it did not previously exist. Without a Notice of Pendency, a prospective purchaser of the defendant's land would have had not known that there was pending lawsuit that would require the installation of a new retaining wall on the defendant's property.

However, in the case at bar, no one is seeking to build a new wall on the defendant's property, at a location where it did not previously exist. The wall will continue to exist at its present location. It exists in full view, and appears in every survey; thus, the purchaser knows that it is responsible to repair, maintain and, if necessary, replace it, at its present location.

The *Jenmat Realty* case cited by Defendant is likewise inapposite (*Jenmat Realty v. 37 E. 63rd St. Park and Madison*, 2003 NYLJ LEXIS 847 [Sup Ct, N.Y. Cty 2003]). In *Jenmat*, the plaintiff was seeking to compel the defendant to remedy work that it performed, without notice or permission. The work included the installation of underpinning underneath an underground wall, and unlawfully installing an underground cement box, which adversely affected the plaintiff's neighboring property. These were not items that would be visible to a

prospective purchaser and would not appear on a survey. Thus, a Notice of Pendency was appropriate to put prospective purchasers on notice of the lawsuit that sought to require "alterations to defendants' land" to remedy concealed underground issues, that they would have not been aware of.

However, in this case, the wall on Defendant's property exists in full view, and appears on surveys; thus, the purchaser knows that he is responsible for repairing, maintaining and, if necessary, replacing it. Thus, a Judgment herein will not affect the title, possession, use or enjoyment of the 972 Montgomery Premises.

Notably, there is a fundamental difference between claiming a right in a neighbor's adjoining land to construct a new Retaining Wall where one did not previously exist, which would, in effect, take away a portion of the neighbor's land for a Retaining Wall; and on the other hand, requiring the maintenance, repair, or replacement of an existing Retaining Wall. Consequently, this Court finds no basis to disturb its underlying ruling, which vacated the Notice of Pendency that Plaintiff filed against Defendant's property.

Turning to 972 Montgomery, LLC's Cross-Motion for Costs, Attorney's Fees and Sanctions, 22 NYCRR 130-1.1 provides that sanctions may only "be imposed against a party or the party's attorney for frivolous conduct" (*GDG Realty, LLC v 149 Glen St. Corp.*, 187 AD3d 994, 995 [2d Dept 2020]). Conduct is considered frivolous if: "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false" *Id.* [citations omitted]).

Here, 972 Montgomery has not established that Plaintiff acted with malice in filing the Notice of Pendency, and that the filing of its re-argument motion constituted frivolous conduct.

Accordingly, Plaintiff's Motion to Reargue is granted, and upon reargument (motion seq. #2), is **DENIED**. This Court's Decision and Order, dated January 12, 2024, remains in full force and effect. Defendant's Cross-Motion for Costs, Attorneys' Fees and Sanctions (motion seq. #3) is **DENIED**.

This constitutes the Decision and Order of the Court.

HON. CAROLYN E. WADE, JSC

HON. CAROLYN E. WADE
JUSTICE OF THE SUPREME COURT

KINGS COUNTY CLERK
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