

Brown v Lindsay

2024 NY Slip Op 32281(U)

July 3, 2024

Supreme Court, Kings County

Docket Number: Index No. 534320/2023

Judge: Wavny Toussaint

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At an IAS Term, Part 70 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 3rd day of July 2024.

P R E S E N T:

HON. WAVNY TOUSSAINT,

Justice.

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DWAIN BROWN and SANDY BIEN-AIME
BROWN,

Index No. 534320/2023

Plaintiffs,

DECISION AND ORDER

- against -

Motion Seq. #01

MARSHA LINDSAY, et al,

Defendants.

----- X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Shower Cause/
Petition/Cross Motion and
Affidavits (Affirmations) _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

4-25, 40-41
50-55
57-62

Upon the foregoing papers, plaintiffs Dwain Brown and Sandy Bien-Aime Brown move by Order to Show Cause, pursuant to CPLR §§ 6301 and 6313, for an order granting among other things a preliminary injunction enjoining, barring, and staying the defendants and all persons acting on their behalf from performing construction renovations or any work on the two properties located at 346

McDonough Street, Brooklyn, NY and 344 McDonough Street, Brooklyn, NY
(Motion Seq. 1).

BACKGROUND

Plaintiffs own and reside at 344 McDonough Street, Brooklyn, NY (“Adjoining Property”), which is the adjoining property to defendants Marsha Lindsay and Maria Lindsay’s (“Owner Defendants”) property located at 346 McDonough Street, Brooklyn, NY (“Site”). The two attached properties share a party wall. In or about December 2019, the Owner Defendants began unauthorized construction work at the Site, including, underpinning of the shared party wall; without the plaintiffs’ consent and without approval from the Department of Buildings (“DOB”). Soon thereafter, plaintiffs observed numerous cracks had appeared on their side of the adjoining party wall along with damage to the fence wall and access hatch wall at the Adjoining Property.

PROCEDURAL HISTORY

On November 21, 2023, plaintiffs commenced this action by filing a summons and complaint seeking injunctive relief based on claims of private nuisance, trespass, encroachment, strict liability and negligence. On November 27, 2023, plaintiffs brought the instant order to show cause to, among other things, enjoin Owner Defendants from performing additional construction work at the Site and encroaching upon plaintiffs’ property. On December 18, 2023, the order to

show cause was signed, and a temporary restraining order (“TRO”) was issued, which ordered that defendants are stayed and enjoined from any further construction activities at the two premises, pending a hearing of this application for a preliminary injunction.

Plaintiffs’ Order to Show Cause

Plaintiffs argue that there is an imminent threat of harm warranting the issuance of a preliminary injunction. Plaintiffs also argue Owner Defendants have performed unlawful construction renovations, which resulted in plaintiffs having to incur violations from the city and could ultimately subject plaintiffs to addition liability. In support of their motion, plaintiffs submit photographs of the premises and the affidavit of plaintiff Dwain Brown (“Brown”) describing the damages which he claims have been caused by the defendants’ construction work. Plaintiffs have also submitted, *inter alia*, the affidavit of their engineer Nouredine Benabdelhak (“Benabdelhak”); inspection reports dated January 13, 2021, February 8, 2021, June 7, 2021; a report dated February 2, 2022; a decision and order dated July 31, 2023; and DOB violations. The photographs show water damage as well as cracks at various locations at the Adjoining Premises.¹

In his affidavit, plaintiff Brown states, *inter alia*, that he did not receive any notice from the Owner Defendants for any construction work. Thereafter, he

¹ NYSCEF Doc. No. 22 and 23.

noticed a partial collapse of the wall, damage to the fence wall and top of the access hatch side wall leading to his basement, and water beginning to pool in the basement at various points along the shared party wall. He also experienced falling bricks and debris in his yard. Additionally, plaintiffs were cited with DOB violations, despite having nothing to do with the construction work performed. To date, the plaintiff and his family have been unable to enjoy the full use of their yard due to the unsafe conditions.

In his affidavit, the engineer Mr. Benabdelhak states *inter alia*, that upon a review of the available DOB records online, there was no application for the underpinning work filed with the DOB. He noted the construction work performed by Owner Defendants and observed, *inter alia*, the Site's rear façade was entirely removed, exposing the south end of the party wall without observable waterproofing or safety protection; and made recommendations to stabilize the party wall. Mr. Benabdelhak conducted follow-up inspections, which revealed further unauthorized construction work by the Owner Defendants, including exposed underpinning piers. He further stated that Owner Defendants failed to provide underpinning plans. He recommended the Site contractor perform test pits to verify the thickness of the underpinning installed but received no response. He opines work is required to properly stabilize the shared party wall and to perform remedial work.

The January 13, 2021 report revealed, *inter alia*, that underpinning was completed at the party wall, the Site's rear façade was entirely removed, exposing the south end of the party wall without observable waterproofing, and the grout is thin or missing all together in certain areas along the base of the party wall.² The February 8, 2021 report revealed, *inter alia*, that steel shims were installed along the top of the concrete underpinning piers.³ The June 7, 2021 report stated a total of three test pits were performed along the party wall, and the concrete from the underpinning work performed at the Site was exposed and inspected.⁴ The following was also observed:

1. "No form work was found behind the concrete to retain the soil from 344 side, it appears that the soil has caved in causing the concrete surface of the pins to slope at an angle which matches the soil angle of repose.
2. On average only half of the wall was pinned.
3. The concrete was poured to the underside of the stone foundation wall. Non-shrink grout was installed between the top of new concrete and the bottom of the existing foundation wall.
4. You have also reported water intrusion inside the cellar from the south east corner, this condition is most likely due to the removal of the rear facade and its foundation at 346 building , it is likely that some of the stones were dislodged during the demolition process making that end corner of the party wall susceptible to water leaks into your cellar especially that there is no roof over the rear extension."⁵

² NYSCEF Doc. No. 7.

³ NYSCEF Doc. No. 8.

⁴ NYSCEF Doc. No. 9.

⁵ *Id.*

Mr. Benabdelhak opines that the current condition of the underpinning work is considered unsafe if left without future remediation and repair.⁶ The February 2, 2022 report contains Mr. Benabdelhak's additional comments and recommendations to the plans.⁷

A decision and order dated July 31, 2023, is a related matter under a separate Index No. 507448/2023, wherein the Owner Defendants (petitioners) moved by Order to Show Cause against Dwain Brown (respondent), pursuant to RPAPL § 881, for an order granting a licenses to access respondent's property. The Court denied the petition and found, *inter alia*, that the petitioners had not received landmarks permit approval, which prevents them from submitting their project plans to the DOB for approval, and respondent established that there may be safety and compliance concerns.

On June 16, 2021, the DOB issued a full stop work order at the Site and referenced a requirement to renew license and insurance.⁸ On June 22, 2021, the DOB issued a violation upon the Adjoining Property, stating that "at the time of inspection, the shared party wall 'has been partially underpinned, [and] the pins do not extend'".⁹ On November 21, 2023, the DOB issued a partial stop work order and stated, *inter alia*, protection is required, as there is ongoing exterior exposure,

⁶ *Id.*

⁷ NYSCEF Doc. No. 11.

⁸ NYSCEF Doc. No. 20.

⁹ NYSCEF Doc. No. 10.

no overhead protection or control access zone in-place at the Site, and to stop all exterior exposure operation above first floor and upward.¹⁰

Defendants' Opposition

Owner Defendants, in opposition to plaintiffs' motion, argues that plaintiffs are not entitled to a preliminary injunction because the damages are compensable by money damages. They assert that plaintiffs have not made any showing that the work performed requires a license agreement, as the work is entirely on defendants' property, defendants' remaining work does not require access to plaintiffs' property, and the work does not pose a risk of damage to plaintiffs' property. They assert that although plaintiffs have complained to the DOB on multiple occasions, the DOB has made several visits to inspect the work and has found no issues. Owner Defendants argue plaintiffs failed to establish irreparable harm, as plaintiffs failed to state any facts to support a claim that the work being conducted puts plaintiffs' property at risk, there is no likelihood of harm to the plaintiffs' property, and plaintiffs cannot demonstrate that the harm they would suffer, absent an injunction, is greater than the harm Owner Defendants would suffer if the injunction was granted, as they are losing thousands of dollars from additional construction carrying and delay costs. Moreover, they contend that plaintiffs are not currently undertaking any remedial repairs for the improper

¹⁰ NYSCEF Doc. No. 14.

underpinning and other construction work that Owner Defendants' former contractor (Titus Brown d/b/a T. Brown Construction Co.) performed in 2020.

In support of their opposition, Owner Defendants submit, *inter alia*, the affidavits of defendant Maria Lindsay ("Lindsay") and Mohammed Bhuiyan ("Bhuiyan"). In her affidavit, Ms. Lindsay states that the DOB had issued a stop work order and commenced an audit of the underpinning work on the party wall. Thereafter, their engineer performed various inspections and tests of the party wall in accordance with the DOB, who ultimately determined that the party wall's underpinning required reinforcement in one location towards the center of the party wall. Moreover, their engineer prepared a support of excavation ("SOE") drawings for the project, which the DOB found satisfactory and concluded its audit. She further states that they have not been able to make the underpinning repair or the repair to the damage to plaintiffs' basement wall because plaintiffs refused to provide access to their property unless plaintiffs is paid so they can have their engineer direct the underpinning work. She claims that the construction work, performed by the new contractor, from late last year until stoppage of work on February 7, 2024, and most of the remaining work does not require access to the plaintiffs' property.

In his affidavit, Mr. Bhuiyan states he is the President of the general contracting company, DR & Sons Construction Corp. He asserts, *inter alia*, that

the DOB issued a stop work order because the former contractor did not properly shore the back wall of the existing structure. He further asserts that all the work that (DR & Sons Construction Corp.) performed has been in accordance with the DOB-approved plans, and that the DOB was satisfied with the work on the project. Moreover, it does not need access to plaintiffs' property, nor would any excavation or other work pose a risk of damage to plaintiffs' property to complete the job.

Plaintiffs' Reply

Plaintiffs argue that the construction work performed at the Site continues to create a hazardous condition and is a grave concern for plaintiffs' safety. Plaintiffs refute Owner Defendants' contentions that the plaintiffs' damages are compensable by monetary means, and that the irreparable injury suffered by the plaintiffs is less burdensome than Owner Defendants. Plaintiffs contend Owner Defendants failed to recognize the potential irreparable harm caused by the situation. Plaintiffs reiterate that defendants continued to perform illegal work without approved plans, permits or require Landmarks approval, even after the issuance of the Court's temporary restraining order.

Plaintiffs submit, *inter alia*, a DOB violation dated March 22, 2024, stating that the "Borough Commissioner has ordered all work stopped on #321975314 on 3/18/24 due to construction superintendent withdrawal"¹¹ and a second affidavit of

¹¹ NYSCEF Doc. No. 59.

plaintiff Dwain Brown (“Second Brown affidavit”). The Second Brown affidavit reiterates, *inter alia*, that the Owner Defendants unlawfully initiated construction work and caused structural damage to his property, and they refuse to adhere to a proper remediation plan that was already approved by the NYC Landmarks Commission and that work continued to be conducted illegally since “late last year” despite the Court’s issued TRO. Moreover, the Bhuiyan affidavit lacks credibility as he is not the engineer, thus lacks personal knowledge regarding the validity of the plans, and therefore not qualified to opine as to the plans. Additionally, he states the Owner Defendants’ plans were not approved by the DOB, as it was not endorsed and lack any DOB stamp of approval.¹² Further, plaintiffs have received approvals from the DOB and Landmarks Preservation Commission along with a permit to perform remediation and underpinning of the party wall.¹³

DISCUSSION

“Preliminary injunctive relief is a drastic remedy which will not be granted unless a clear right thereto is established under the law and the undisputed facts upon the moving papers, and the burden of showing an undisputed right rests upon the movant. A court evaluating a motion for a preliminary injunction must be mindful that [t]he purpose of a preliminary injunction is to maintain the status quo, not to determine the ultimate rights of the parties. As a general rule, the decision to

¹² NYSCEF Doc. No. 53.

¹³ NYSCEF Doc. No. 60 and 62.

grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court. In exercising that discretion, the Supreme Court must determine if the moving party has established: (1) a likelihood of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of the injunction. [A]bsent extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief to which he or she would be entitled in a final judgment.” (*Shake Shack Fulton St. Brooklyn, LLC v Allied Prop. Grp., LLC*, 177 AD3d 924, 926–927 [2d Dep’t 2019][internal quotations and citations omitted]).

Upon review of the plaintiffs’ submissions, the Court finds that they have sufficiently demonstrated a likelihood of success on the merits. It is well established that plaintiffs need not conclusively prove the case to be entitled to a preliminary injunction, and a court may exercise its discretion in granting a preliminary injunction even where questions of fact exist (*Vanderbilt Brookland, LLC v Vanderbilt Myrtle, Inc.*, 147 AD3d 1104, 1106 [2d Dep’t 2017]). “As to the likelihood of success on the merits, a prima facie showing of a right to relief is sufficient; actual proof of the case should be left to further court proceedings” (*McLaughlin, Piven, Vogel, Inc. v W.J. Nolan & Co.*, 114 AD2d 165, 172–173 [2d Dep’t 1986]). In opposition, the Owner Defendants question the plaintiffs’ showing, but has failed to set forth any facts or evidence beyond what has been shown by the plaintiff.

In addition, the plaintiffs satisfied the irreparable harm requirement. In light of Owner Defendants' ongoing efforts with their construction work, there exists a danger that the premises would be irreparably altered during the pendency of this action if an injunction is not granted, thereby irreparably harming the plaintiffs (*Congregation Erech Shai Bais Yosef, Inc. v Werzberger*, 189 AD3d 1165, 1167 [2d Dep't 2020])[“(t)he purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual”]).

Furthermore, a balancing of the equities tip in plaintiffs' favor. The Court finds plaintiffs' risk of property alterations and the concerns for their safety far outweighs Owner Defendants' additional construction carrying and delay costs, which are compensable by money damages, as “[i]rreparable injury, for purposes of equity, has been held to mean any injury for which money damages are insufficient. Conversely, “[e]conomic loss, which is compensable by money damages, does not constitute irreparable harm” (*Di Fabio v Omnipoint Communications, Inc.*, 66 AD3d 635, 636–637 [2d Dep't 2009]).

Accordingly, it is hereby

ORDERED that plaintiffs' Order to Show Cause (Motion Seq. 01) is granted in its entirety;

ORDERED that plaintiffs are to provide to the Court, on notice to the defendants, within ten (10) days of the date of this Decision and Order, a proposal for the amount of the undertaking required pursuant to CPLR § 6312 (b) and a detailed explanation of the basis for the amount proposed, noting that an undertaking should be rationally related to the amount of the defendants' potential damages if the preliminary injunction later proves to be unwarranted (*159 Smith, LLC v Boreum Hill Prop. Holdings, LLC*, 191 AD3d 741, [2d Dep't 2021]; *Lelakakis v Kamamis*, 303 AD2d 380 [2d Dept 2003]);

ORDERED that defendants, upon receipt of said notice, shall have five (5) days to respond to plaintiff's proposal with respect to the undertaking.

This constitutes the Decision and Order of the Court.

ENTER



J. S. C.

Hon. Wavny Toussaint
J.S.C.

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KINGS COUNTY CLERK
FILED