

Brown v Lindsay

2024 NY Slip Op 33894(U)

October 23, 2024

Supreme Court, Kings County

Docket Number: Index No. 534320/2023

Judge: Wavny Toussaint

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This opinion is uncorrected and not selected for official publication.

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 23rd day of October 2024.

P R E S E N T:
HON. WAVNY TOUSSAINT,
Justice.

----- X
DWAIN BROWN and SANDY BIEN-AIME
BROWN,

Plaintiffs,

- against -

MARSHA LINDSAY, MARIA LINDSAY,
TITUS BROWN d/b/a T. BROWN
CONSTRUCTION CO.,

Defendants.

Index No. 534320/2023

DECISION AND ORDER

Motion Seq. #02

----- X
The following e-filed papers read herein:

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

NYSCEF Doc Nos.

46-48, 65
92-93

Upon the foregoing papers, plaintiffs Dwain Brown and Sandy Bien-Aime Brown move by Order to Show Cause, pursuant to Judiciary Law §§ 750, 753 and 773 seeking an order, among other things, to hold defendants Marsha Lindsay and Maria Lindsay (collectively as “defendants” or “Developer Parties”) in civil and criminal contempt, for their failure to comply with the court’s order dated December 18, 2023 (Motion Seq. 2).

BACKGROUND

Plaintiffs are residents and owners of 344 McDonough Street, Brooklyn, NY (“Adjoining Property”), which is the adjoining property to defendants’ property located at 346 McDonough Street, Brooklyn, NY (“Construction Site” or “Site”). The two attached properties share a party wall. In or about December 2019, the defendants began unauthorized construction work at the Site resulting in numerous cracks that appeared on plaintiffs’ side of the party wall as well as damage to the fence wall and access hatch wall to the plaintiffs’ property.

RELEVANT HISTORY

On November 27, 2023, plaintiffs sought by order to show cause (Motion Seq. 1) for an order, among other things, to enjoin defendants from performing further construction activities on their property located at 346 McDonough Street, Brooklyn, New York (“Site”) and upon plaintiffs’ property at 344 McDonough Street, Brooklyn, New York (“Adjoining Property”). On December 18, 2023, the order to show cause was signed and a temporary restraining order (“TRO”) was issued directing, among other things, that the defendants are stayed and enjoined from any further construction activities at the two premises. On December 21, 2023, defendants and their counsel were served with the December 18, 2023 order. On April 16, 2024, plaintiffs sought a separate order to show cause for contempt of court against the defendants for allegedly violating the December 18, 2023 order. By

decision and order dated July 3, 2024, this Court granted a preliminary injunction in plaintiffs' favor, on plaintiffs' first order to show cause of November 2023.

Plaintiffs' Order to Show Cause

Plaintiffs argue defendants willfully violated the December 18, 2023 order. Plaintiffs contend the terms of the order were clear and directed the defendants to halt all construction activities at the Site and "from taking any action, installing, constructing, and/or erecting any structures on Plaintiffs' [property]." Plaintiffs also contend that despite the order, defendants constructed additional structures and/or back extensions of the adjoining premises without proper safeguards, protections, and proper stabilization of the party wall. Plaintiffs further assert defendants' actions were also in violation of the building code (being conducted without fully approved plans, landmarks approval or permits), as defendants' additional construction activities continues to create a hazardous condition and nuisance for plaintiffs. Plaintiff Dwain Brown submits an affidavit which states, among other things, that after the order was issued by the Court, he had personally observed defendants continuing construction activities at the Site by erecting a structure extending from the basement of the defendants' property up to the fourth floor, and he refers to additional pictures of the neighboring site showing advanced work at the neighboring premises in a letter correspondence.¹

¹ NYSCEF Doc. No. 40, pages 4-7.

Defendants' Opposition

Defendants assert they did not know the Court had ordered them to stop all construction work on their property until they were informed by defendants' counsel on February 28, 2024. Defendants' counsel noted the second part of the order had "stay" written immediately next to it and had interpreted it as the Court had denied the TRO. He acknowledged he was wrong about what that notation meant. Moreover, he asserts he did not intentionally disregard the order. Further, defendants argue plaintiffs did not identify any post 2020-damage, nor how the work being performed has any effect on plaintiffs, the property, the party wall, or the claims in this case; plaintiffs never specified what is illegal about the construction work, and all of plaintiffs' complaints have been marked as resolved or closed. Defendants allege the DOB's records show the work at defendants' property was being performed in conformance with approved plans.

In support of the opposition, defendant Maria Lindsay submits an affidavit, where it is asserted defendants did not know the Court had ordered them to stop work at their property. She also states that her prior affidavit (dated April 16, 2024)² mistakenly identified the date in which they stopped work as February 7, 2024. Upon being informed by defendants' counsel on February 28, 2024, defendants

² NYSCEF Doc. No. 51, page 4.

immediately stopped all work on their property. She contends they did not intentionally violate the December 18, 2023 order.

DISCUSSION

A court has power to punish for criminal and civil contempt pursuant to Judiciary Law § 750(A)(3) and § 753(A)(3) respectively (*Department of Environmental Protection of City of New York v Department of Environmental Conservation of State of N.Y.*, 70 NY2d 233, 239 [1987]). Moreover, the same act may be punishable as both criminal and civil contempt, however, each serves a different purpose (*id.*). The purpose of a criminal contempt “involves an offense against judicial authority and is utilized to protect the integrity of the judicial process and to compel respect for its mandates” (*id.*). On the other hand, civil contempt is “not to punish but, rather, to compensate the injured private party or to coerce compliance with the court's mandate or both” (*id.*). “A lawful mandate of the court’ includes an order of a court of competent jurisdiction which is not facially void” (*Madigan v Berkeley Cap., LLC*, 205 AD3d 900, 904, appeal dismissed, 39 NY3d 927 (2022), and appeal dismissed, 39 NY3d 1056 (2023), reconsideration denied, 39 NY3d 1150 [2d Dep’t 2023][internal quotation marks and citations omitted]).

“The proponent of a finding of criminal contempt must demonstrate willfulness. Knowingly failing to comply with a court order gives rise to an inference of willfulness which may be rebutted with evidence of good cause for noncompliance. To warrant a finding of criminal contempt, the contemnor's guilt must be proved beyond a

reasonable doubt. [A]n application to adjudicate a party in contempt is treated in the same fashion as a motion and a hearing must be held if issues of fact are raised. However, “a hearing is not necessary when there is no factual dispute as to [the party's] conduct unresolvable from the papers on the motion” (*id.* at 906).

Judiciary Law §750(A)(3) states “[a] court of record has power to punish for a criminal contempt, a person guilty of . . . willful disobedience to its lawful mandate (NY Judiciary Law § 750 (McKinney). “Proof of noncompliance with the order established a prima facie case of criminal contempt, shifting the burden . . . to establish good cause for noncompliance, thereby negating the inference of willfulness” (*Siskind v Schael*, 33 AD3d 806, 806 [2d Dep’t 2006], citing *Ferraro v Ferraro*, 272 AD2d 510, 512 [2d Dep’t 2000]).

Here, the December 18, 2023 order plainly states, among other things, the following:

“ORDERED, that pending a hearing of the instant motion, the Developer Parties, together with their agents, contractors, subcontractors, and all persons acting on behalf or in concert with them, be stayed, enjoined and restrained from continuing construction activities at the construction site, located at 346 McDonough Street, Brooklyn, New York 11233 (Block: 1675; Lot: 29), and from taking any action, installing, constructing, and/or erecting any structures on Plaintiff’s adjacent property and Building located at 344 McDonough Street, Brooklyn, New York 11233 (Block: 1675, Lot: 28)”

The Court find defendants disobeyed the order; as although the order clearly and unequivocally directed the defendants to stop any further construction activities at

the Site and Adjoining Property, defendants continued with construction activities. Although defendants contend they did not know they were directed to stop construction activities because, among other reasons, the court's initials for the stay only appeared on the following page, it is clear the initials appear at the end of the sought stay relief. The Court finds defendants' contention unpersuasive. The record supports the finding that the defendants were not acting in good faith when they continued construction activities after having received notice of the December 18, 2023 order that was served upon defendants and defendants' counsel on December 21, 2023 (*Department of Environmental Protection of City of New York v Department of Environmental Conservation of State of N.Y.*, 70 NY2d 233, 241 (1987)). Moreover, defendants have failed to come forth with a good cause showing for noncompliance with the court's orders (*Gomes v Gomes*, 106 AD3d 868, 869 [2d Dep't 2013]). Therefore, the Court finds the evidence is sufficient to support a finding, beyond a reasonable doubt, that the defendant willfully disobeyed the December 18, 2023 order, and defendants are found to be in criminal contempt (*Agulnick v Agulnick*, 229 AD3d 492, 493 [2d Dep't 2024]).

“A motion to punish a party for civil contempt is addressed to the sound discretion of the motion court. To prevail on a motion to hold a party in civil contempt pursuant to Judiciary Law § 753(A)(3), the movant must establish by clear and convincing evidence (1) that a lawful order of the court was in effect, clearly expressing an unequivocal mandate, (2) the appearance, with reasonable certainty, that the order was disobeyed, (3) that the party to be held

in contempt had knowledge of the court's order, and (4) prejudice to the right of a party to the litigation. Prejudice is shown where the party's actions were calculated to or actually did defeat, impair, impede, or prejudice the rights or remedies of a party . . . [and] willfulness need not be shown. Once the movant makes the required showing, the burden shifts to the alleged contemnor to refute that showing, or to offer evidence of a defense such as an inability to comply with the order” (*Mendoza-Pautrat v Razdan*, 160 AD3d 963, 964 [2d Dep’t 2018][internal quotation marks and citations omitted]).

Judiciary Law § 753(A)(3) provides:

“A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in any of the following cases: . . .

3. A party to the action or special proceeding, an attorney, counsellor, or other person, for the non-payment of a sum of money, ordered or adjudged by the court to be paid, in a case where by law execution can not be awarded for the collection of such sum except as otherwise specifically provided by the civil practice law and rules; or for any other disobedience to a lawful mandate of the court” (NY Judiciary Law § 753 (McKinney)).

Additionally, Judiciary Law § 773 permits a fine sufficient to indemnify the aggrieved party for the loss or injury, not exceeding the amount of the complainant’s costs and expenses, and plus \$250.00 may be imposed (NY Judiciary Law § 773 (McKinney); *DeRosa v Gong*, 219 AD3d 830, 831 [2d Dep’t 2023][internal quotation marks and citations omitted]).

As hereinbefore stated, the Court finds defendants were aware of and violated a clear and unequivocal mandate in the December 18, 2023 order by continuing construction activities at the Site for over two months (*East End Hangars, Inc. v Town of E. Hampton*, 225 AD3d 865, 868 [2d Dep't 2024]). The record established that defendants' conduct defeated, impaired, impeded, or prejudiced the plaintiffs' rights or remedies (*id.*). Moreover, defendants are misguided in their argument that the work being performed does not have any effect on plaintiffs, the property, the party wall, or the claims in this case, as the evidence has demonstrated there was prejudice by their actions (*Rozenberg v Perlstein*, 200 AD3d 915, 919 [2d Dep't 2021]). Therefore, defendants are found to be in civil contempt.

Accordingly, it is hereby

ORDERED that defendants Marsha Lindsay and Maria Lindsay are found to be in criminal contempt for failure to comply with the court's order dated December 18, 2023;

ORDERED that defendants Marsha Lindsay and Maria Lindsay are found to be in civil contempt for failure to comply with the court's order dated December 18, 2023;

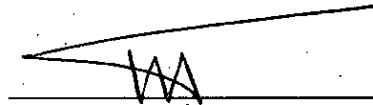
ORDERED that the matter is set for a hearing on December 19, 2024 at 11AM in Room 438 to determine damages incurred for the violation of the court's

order dated December 18, 2023.

All other relief, not expressly granted herein, has been considered and is denied.

The following constitutes the decision and order of the court.

ENTER,

A handwritten signature in black ink, appearing to be 'Wavny', is written over a horizontal line. The signature is stylized with a large 'W' and a 'T'.

J. S. C.

Hon. Wavny Toussaint
J.S.C.

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KINGS COUNTY CLERK
FILED