

81-83 Rivington Corp. v D.A.B. Group LLC
2011 NY Slip Op 34209(U)
June 3, 2011
Supreme Court, New York County
Docket Number: 116974/10
Judge: Judith J. Gische
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

81-83 RIVINGTON CORP.,

Plaintiff,

-against-

D.A.B. GROUP LLC.,

Defendant.

DECISION/ORDER

Index No.: 116794/10

Seq. No.: 001

PRESENT:

Hon. Judith J. Gische

J.S.C.

FILED

JUN 08 2011

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	NEW YORK COUNTY CLERK'S OFFICE Numbered
Plt's OSC (CPLR 6301) w/DRD affid, DG affid, exhs	1
Def's opp w/WGW affirm	2
Def's v. ans	3
Plt's reply affid (DRD)	3

Upon the foregoing papers, the decision and order of the court is as follows:

Gische J.;

Plaintiff moves by order to show cause to preliminarily enjoin the defendant's alleged unlawful construction activity, pursuant to a zoning lot development agreement dated April 2, 2008 ("ZLDA"). For the reasons that follow, the motion is granted.

Plaintiff and defendant each own contiguous parcels of real property located in New York County, tax map Block 415. Plaintiff owns the land together with buildings and improvements thereon located at 81 Rivington Street, Block 415, Lot 63 ("Lot A"). Defendant is the owner of the following parcels of land together with buildings and improvements thereon: 79 Rivington Street, Block 415, Lot 62 ("Lot B"), 77 Rivington

Street, Block 415, Lot 61 ("Lot C"), 141 Orchard Street, Block 415, Lot 66 ("Lot D") and 139 Orchard Street Block 415, Lot 67 ("Lot E").

The parties executed the ZLDA in order to transfer development rights from plaintiff to defendant's property so that the defendant could build a hotel on its property. However, the ZLDA prohibits certain construction activity. Specifically, it provides as follows:

Notwithstanding anything to the contrary set forth in this Agreement or any rights or privileges that may inure to [defendant] by operation of law, [defendant] covenants to and with [plaintiff] that

(i) [defendant]'s New Building shall be constructed solely on Lot D and/or Lot E and in no event on Lot B or Lot C.

(ii) unless [defendant] acquires additional Floor Area Development Rights solely as the result of rezoning (and not as the result of the addition of lots to the Combined Zoning Lot) or unless required as the result of unforeseen events, [defendant] shall not alter the improvements located on Lot B and Lot C (collectively, the Lots B/C Buildings") in any manner that would cause the Lots B/C Buildings to extend beyond the respective heights, setbacks or articulations of the Lots B/C Buildings as of the date hereof; and

(iii) [defendant] shall not, under any circumstances, use any of the Excess Zoning Rights in constructing any improvements on Lot B and/or Lot C (including any reconstruction, alteration or replacement of the Lots B/C Buildings).

Further, the ZLDA authorizes that in the event of any breach or threatened breach of it by either party, the non-defaulting party "shall have the right to any remedy available at law or equity, including, but not limited to, injunctive relief."

Plaintiff now claims that the defendant is violating the ZLDA by constructing utilities and other improvements on Lot B and Lot C. It has provided copies of plans filed by the defendant with the New York City Department of Buildings ("DOB"). Exhibit

"B" annexed to plaintiff's order to show cause is a copy of Drawing No. S-1.00 entitled "Footing Foundation and Ground Floor Framing Plans" that shows that defendant plans to construct foundation footings on Lots B and C. Exhibit "C" annexed to plaintiff's order to show cause is a copy of Drawing NO. H301, entitled "HVAC Duct Plan" that shows that the defendant plans to construct a structure with duct work on Lots B and C.

Plaintiff's counsel sent defendant's counsel an email which put the defendant on notice that its constructions violated the ZLDA. Plaintiff claims that the defendant refused to stop such activity, thereby necessitating the instant action. In the complaint, plaintiff seeks damages for the defendant's alleged breach of the ZLDA, a permanent injunction enjoining further violations thereunder, and an order directing the defendant to restore Lot B and Lot C to what it was before such construction began.

In its reply papers, plaintiff provides additional drawings submitted by the defendant to the DOB. It claims that Drawing A-2.00, titled "East and West Elevations", clearly shows a new building being constructing that would extend onto Lot C. Plaintiff has also provided a copy of drawing A-1.01, titled "Cellar Plan First Floor Plan", which indicates that lot C will contain "BAR/LOUNGE" and as "ACCESSORY TO HOTEL". It claims that all of these DOB plans are documentary evidence of the defendant's clear violation of the ZLDA which prohibits defendant from placing any portion of a new building on Lots B or C.

The defendant has provided the affidavit of Nicholas Zagami, the defendant's representative, who claims to be fully familiar with the scope and the day-to-day construction activities at the site of construction. He states that he is on-site "virtually every day." Zagami maintains that the drawings provided by plaintiff should be

disregarded by the court because they were made nearly three years ago and those plans have been "abandoned." Zagami states that "none of the construction anticipated or planned will be built 'on lot B or lot C' and none of the construction thus far will alter lot B and or lot C in a manner that would cause those lots to extend beyond the respective height, setbacks or articulations as those lots existed on April 2, 2008, the date on which the relevant agreement was executed." The defendant highlights the fact that plaintiff has failed to attach any photographs or eye witness accounts of the activity that allegedly violates the ZLDA.

On a motion for a preliminary injunction, the movant must prove the likelihood of ultimate success on the merits, that it will suffer irreparable harm unless the relief is granted, and a balance of the equities in its favor (Paine v. Chriscott v. Blair House Associates, 70 AD2d 571 [1st Dept 1979]; Aetna Insur. Co. v. Capasso, 75 NY2d 860 [1990]). The purpose of a preliminary injunction is to maintain the *status quo* and prevent the dissipation of property that could render a judgment ineffectual (Moy v. Umeki, 10 AD3d 604 [2d Dept 2004]). "Likelihood of success" need only be shown from the evidence presented; conclusive proof is not required (Id). The granting of any preliminary injunction requires the posting of security (CPLR § 6312 [b]).

Here, a preliminary injunction is warranted. The defendant does not dispute the validity of the ZLDA. Nor does it dispute that the ZLDA, concerning the defendant's right to build on Lot B or C, provides that it "shall not alter the improvements located on Lot B and Lot C" in any manner that would cause those improvements "to extend beyond the respective heights, setbacks or articulations" as they existed on April 2, 2008. The defendant disputes the validity of the plans that it submitted to the DOB and the fact that

these drawings indicate that the defendant sought approval to build or construct beyond the dimensions of the improvements located on Lots B and C on April 2, 2008. Rather, the defendant claims that it abandoned those plans long ago, and argues that because the plaintiff has not provided an affidavit from someone who "witnessed" the alleged construction activity, the motion should be denied.

These arguments are unavailing. Based upon the record before the court, plaintiff has met its threshold burden. It has demonstrated a likelihood of success on the merits. Based upon the drawings submitted to the DOB by the defendant, such construction would appear to violate the ZLDA. Plaintiff has also demonstrated that the equities balance in its favor, especially in light of the fact that the defendant claims it has no intention of violating the ZLDA vis-a-vis its construction activities concerning the hotel.

Finally, although the defendant claims that plaintiff has not demonstrated irreparable harm, the court disagrees. The ZLDA specifically provided that a violation thereof could be redressed via injunctive relief. More importantly, the ZLDA indicates that the parties clearly intended for plaintiff to transfer its air rights to the defendant subject to certain bargained-for limitations, namely the prohibition on building on Lots B or C beyond the respective heights, setbacks or articulations of the improvements located thereon as of April 2, 2008. Further, defendant's plans as submitted to the DOB would likely have a negative impact upon the marketability of the units in plaintiff's building located on Lot A.

Accordingly, plaintiff is entitled to the preliminary injunction sought. Although defendant has not asked for such relief, pursuant to CPLR 6312 (b), plaintiff is required

to post an undertaking prior to the granting of a preliminary injunction. Given the nature of the transactions at issue in this case, and the financial positions of the parties, the court hereby directs plaintiff to post a bond in the amount of \$25,000.

Conclusion

In accordance herewith, it is hereby:

ORDERED that pending the trial or other disposition of this action, the defendant, its agents, employees, contractors and other representatives are hereby enjoined from engaging in any construction activities at or on Lot B or Lot C in violation of the ZLDA, including any excavation, concrete pouring, utility installation, equipment operation, and delivery of supplies or other materials; and it is further

ORDERED that plaintiff is directed to post a bond in the amount of \$25,000 that shall remain in place for the duration of the preliminary injunction; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on July 21, 2011 at 9:30 a.m. at 60 Centre Street in Part 10.

Any requested relief not expressly addressed has nonetheless been considered and is hereby denied.

This constitutes the decision and order of the court.

Dated: New York, New York
June 3, 2011

So Ordered:

FILED

JUN 08 2011



Hon. Judith J. Gische, J.S.C.

**NEW YORK
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