

Liberty Square v The Doe Fun Inc.
2012 NY Slip Op 33649(U)
August 7, 2012
Sup Ct, Bronx County
Docket Number: 302595/2011
Judge: Norma Ruiz
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NEW YORK SUPREME COURT ----- COUNTY OF BRONX

PART 22

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Index No. 302595/2011

LIBERTY SQUARE

Plaintiff,

Decision and Order

Present: HON. NORMA RUIZ

-against-

THE DOE FUND INC., BORICUA VILLAGE
HOUSING DEVELOPMENT FUND CO., INC.,
THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF HOUSING PRESERVATION
AND DEVELOPMENT

Defendants.

The following papers numbered 1 to 7 Read on this motion INJUNCTION
Noticed on and duly submitted as No. on the Motion Calendar of 8/1/12

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion

to:	Papers	Numbered
Notice of Motions and Affidavits Annexed.....		1
Answering Affidavits.....		2
Replying Affidavits		3-4
Memorandum of Law		
Other:		

Upon the foregoing papers this.

O.S.C. is granted in accord with the annexed decision and order of the Court.

Dated: 8/07/12

Hon. 
JUSTICE NORMA RUIZ

C

NEW YORK SUPREME COURT ----- COUNTY OF BRONX

PART 22

SUPREME COURT OF THE STATE OF NEW YORK Index No. 302595/2011
COUNTY OF BRONX

LIBERTY SQUARE REALTY CORP.,

Plaintiff,
-against-

Decision and Order
Present: HON. NORMA RUIZ

THE DOE FUND INC., BORICUA VILLAGE
HOUSING DEVELOPMENT FUND CO., INC.,
THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF HOUSING PRESERVATION
AND DEVELOPMENT

Defendants..

The following papers numbered 1 to 7 Read on this motion Injunction
Noticed on _____ and duly submitted as No. 1 on the Motion Calendar of 8/1/12

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion

to:	Papers	Numbered
Notice of Motions and Affidavits Annexed.....		1
Answering Affidavits.....		2
Replying Affidavits		3-4
Transcripts		5-7
Memorandum of Law		
Other:		

Upon the foregoing papers, the foregoing motion(s) [and/or cross-motions(s), as indicated below, are consolidated for disposition] and decided as various witnesses:

Defendants The Doe Fund, Inc. and Boricua Village Housing Development Fund Co, Inc. (collectively referred to as "Boricua defendants") move via an Order to Show Cause ("OSC") for injunctive relief directing the plaintiff to remove a fence located on what was previously East 161st Street between Third Avenue and Brook Avenue in the Bronx (161st Street). Defendants allege the fence is located on it's property. Upon a review of the moving papers, opposition submitted thereto and testimony of witnesses, the motion is granted.

The plaintiff and defendants both assert ownership rights to 161st Street between Third Avenue and Brook Avenue in the Bronx that abuts the Northern facade of the Courthouse, which borders both their respective properties.

Plaintiff Liberty Square Realty Corp. ("Liberty Square") is the owner of the historic landmark building formerly known as the Bronx Criminal Courthouse ("Courthouse"). On December 22, 1998, it purchased the Courthouse from defendant The City of New York ("the City") at a public auction for \$300,000.00. According to the Notice of Public Auction¹, the City was selling Block 2365, Lot 35 described as the southeast corner of East 161st Street and Brook Avenue, also known as 513 East 161st Street. The property's value was assessed at \$ 225,000.00. In the notice, the City provided the following facts: 1) the property was a historic landmark, 2) The Building Department for the City of New York issued an unsafe order against the building, and 3) due to an asbestos problem in the building there would be no inspection of the building prior to auction. As such, the property was going to be sold "as is."

Plaintiff alleges that when the City conveyed the deed to the Courthouse it also conveyed a diagramed and recorded easement over 161st Street which granted plaintiff use of 161st Street as needed.² Plaintiff further alleges that in any event, the fence is not on 161st Street, rather it is located on the sidewalk which belongs to the plaintiff.

The Boricua defendants are the fee owners of the adjoining parcels of land which they allege includes the street and sidewalk of 161st Street between Brook Avenue and Third Avenue. Movants annexed the affidavit of Ted Weinstein ("Weinstein"), the Director of Bronx Planning with the defendant New York City Department of Housing Preservation and Development ("HPD"). Weinstein stated that the property deeded to the moving defendants for the development of Boricua Village, included 161st Street.. Weinstein explained that 161st Street between Third Avenue and

¹See Exhibit "A" annexed to the The City of New York's affirmation entitled "Affirmation in Reply to Plaintiff's Papers Opposing Defendant's Request for a Preliminary Injunction."

² See plaintiff's Affirmation in Opposition dated July 30, 2012 at paragraph 26. The Court notes that the plaintiff had apparently drafted opposition papers when this OSC was initially before Justice Brigantti-Huges. However, those papers were not served on the parties. Thereafter, plaintiff served the opposition papers dated July 30, 2012. As such, the Court will only consider the opposition papers dated July 30, 2012.

Brooks Avenue was demapped (i.e. closed to vehicular traffic) in 1994. Thus, when the plaintiff purchased the Courthouse four years later, it was a matter of public record that vehicular access on 161st Street was prohibited.

In this OSC, movants allege that they have completed all of the re-development of Boricua Village, with the exception of paving approximately two feet of sidewalk located along the entire northern facade of the Courthouse building. Plaintiff's fence has made it impossible for the defendants to complete the remaining work of the project. The moving defendants explain that the paving of the remaining sidewalk must be done in order to meet their obligations as set forth in the Open Space Agreement between HPD and the Boricua Defendants.

In order for the plaintiff to obtain injunctive relief, it must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor (*Nobu Next Door, LLC v. Fine Arts Housing, Inc.*, 4 N.Y.3d 839, 839 [2005]).

Liberty Square commenced this action asserting, in its unverified complaint, three causes of action. The first cause of action is for the creation of an easement over 161st Street for emergency ingress and egress, as well as access to the loading dock to be used for the purposes of loading and unloading. The second cause of action seeks damages for: the loss of the full use and enjoyment of the property because the rear of the property is no longer accessible as a loading dock, the defaced walls and damage to building's facade. Lastly, the third cause of action seeks property damages caused by the defendants' negligent construction near the Courthouse.

Boricua Village asserts it owns the demapped 161st Street and the adjacent sidewalk right up to the northern facade of the Courthouse. In support, it annexed a copy of the Land Disposal Agreement ("LDA") between the City, HPD and the Atlantic Development Group, LLC (a co-owner of the property) ("Sponsor"). In the LDA, the Sponsor agreed to purchase the Disposition Area which at that time was located in the Melrose Commons Urban Renewal Area and to redevelop it in accord with the terms of LDA. As part of the LDA, the following was set forth:

WHEREAS, on June 15, 2007, by Resolution No. 921, a copy of which is annexed hereto as **Exhibit C** and made a part hereof, the Council, having held a public hearing following notice of the date, time, place, and purpose of such hearing, (i) found that the present status of the Disposition Area tends to impair or arrest the sound growth and development of the municipality and that the proposed Urban Development Action Area Project is consistent with the policy and purposes of

Section 691 of the GML, (ii) approved the designation of the Disposition Area as an Urban Development Action Area pursuant to Section 693 of the General Municipal Law, and (iii) approved the Project as an Urban Development Action Area Project pursuant to Section 694 of the General Municipal Law.

The Disposition Area was defined as Block 2366 and Lots 21, 27, 32, 33, 34, 37, 38, 39, 40, a portion of the demapped bed of East 162nd from Third Avenue to Washington Avenue, and a portion of the demapped bed of East 161st Street from Third Avenue to Brook Avenue. The LDA included a metes and bounds description for lots 21, 27, 37, 38, 39, 40, and the demapped beds of 161st Street and 162nd Street. Also included in the LDA was a diagram of the Disposition Area with the open spaces required under the agreement.

In addition, in the Reply Affirmation movants annexed a copy of the Title Survey map ("map") which was created using the metes and bounds description set forth in the deed (the same metes and bounds description that were also included in the LDA agreement). The map was updated on April 9, 2008 and includes an illustration of the fence and a portion of the Courthouse building which are on the property that was deeded to the Boricua defendants.

The plaintiff argues that the fence was installed on the sidewalk adjacent to the Courthouse on 161st Street and not on the demapped street. It further argues that the plaintiff and not the defendant, owns that sidewalk. However, plaintiff has failed to provide any evidence to substantiate such claim. During oral argument,³ plaintiff submitted to the Court without objection, a copy of the deed, the City Register Recording and Endorsement Page and what purports to be the tax map for the plaintiff's property. The deed described the property as Block 2365, lot 35 without a metes and bounds description. According to plaintiff's counsel, at the closing he asked for a metes and bounds description and was instead given a copy of a tax map with a circle around block 2365 and the entire demapped 161st Street. It is unclear who made this circle on the tax map. Other than the altered tax map, the plaintiff does not submit any additional evidence to substantiate the claim that it owns what was once the sidewalk on the northern side of the Courthouse.

The City's papers included an affidavit from Lisa Bova-Hiatt ("Bova-Hiatt") a Deputy Chief in the Tax & Bankruptcy Litigation Division at the New York City Law Department. Bova-Hiatt

³See transcript for oral argument held on July 30, 2012 in Part 22 at page 27-28.

supervised auction closings on behalf of the City in 1998. She annexed a copy of the deed from the City's closing file with the plaintiff. She noted that by deed dated December 22, 1998, the City conveyed to plaintiff Block 2365, Lot 35 as shown on the Bronx Tax Map and also known as 513 East 161 Street. She contends the closing file did not include a tax map. Moreover, the City does not annex Tax Maps to its deed. It was plaintiff's counsel or title company who recorded the altered tax map along with the deed. She opined the deed "clearly states plaintiff merely acquired title to property delineated on the Bronx Tax Map as Block 2365, Lot 35. The City did not convey, nor did Plaintiff receive anything else. Despite Plaintiff's claim to the contrary, it did not acquire an easement over East 161st Street, or any other street."

Based on the metes and bounds description on its deed, the Court finds that the Boricua defendants have established they own not only the demapped 161st Street, but also the sidewalk up to the northern facade of the Courthouse.

Turning now to the probability of success, the Boricua defendants vigorously dispute the existence of an easement. In addition, they contend any property damage is a result of the Courthouse being abandoned for many years and not from any of its construction. In opposition, the plaintiff raises an issue of fact with regard to whether or not it is entitled to an easement by necessity. Since CPLR § 6312 (c) does not preclude injunctive relief when an opposing party raises an issue of fact, the Court will proceed to determine the remaining elements.

The Court finds that the Boricua defendants are in danger of irreparable injury in the absence of injunctive relief. If the fence is not removed, movants can not comply with the Open Air Agreement. Consequently, HPD will not issue a certificate of completion. Without the certificate, the Boricua defendants could default on two mortgages and lose their lender's line of credit. The lender will, in turn, seek recoupment from the Boricua defendants for both mortgages in the amount of \$17,805,000.00. In addition, if the moving defendants fail to comply with the requirements of the Open Air Agreement, HPD could exercise its right of reversion on the property (the certificate of completion releases HPD's right of reversion on the property).

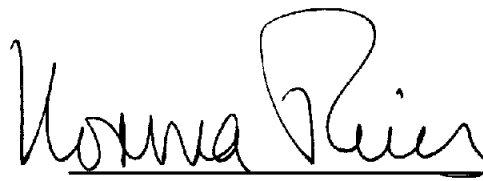
Lastly, the Court finds the balance of equities are in the Boricua defendants' favor. First, all evidence suggests the fence is on the Boricua defendant's property. Second, the Boricua defendants have stated that none of the plaintiff's grated air shafts, concrete bollards, or metal plates which are located on Boricua's property will be paved over. Third, Henry Weinstein, the principal of the

corporate plaintiff conceded when he testified before Justice Brigantti-Huges that the only harm it would suffer if the remaining sidewalk is paved would be the removal of the fence (see hearing transcript dated July 9, 2012 at page 29).

Accordingly, the motion is granted. The plaintiff is hereby directed to remove the portion of the fence installed on the northern side of the Courthouse at its expense within five days from the entry of this order. Upon completion of the paving work, as per the moving defendants counsel, plaintiff may reinstall the fence (see hearing transcript dated July 30, 2012 at page 17 lines 21 to page 18 line 2).

This constitutes the decision and order of the Court.

Dated: 8/07/12
Bronx, New York


HON. NORMA RUIZ, J.S.C.