

Curtis v Bouley

2012 NY Slip Op 30383(U)

February 15, 2012

Supreme Court, New York County

Docket Number: 104558/11

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

W. Robert Curtis

- v -

David Bonley

INDEX NO. 104558/11
MOTION DATE _____
MOTION SEQ. NO. 005
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits _____	<u>2</u>
Replying Affidavits _____	<u>3</u>

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

FEB 21 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/15/12

[Signature]
HON. EILEEN A. RAKOWER
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
W. ROBERT CURTIS,

Plaintiff,

-against-

DAVID BOULEY, BOULEY RESTAURANT,
BOULEY AT HOME/BOULEY COMPLEX,
BOULEY BAKERY & MARKET,
BOULEY STUDIO, BRUSHSTROKE,
BOULEY/CAFÉ, BOULEY TEST KITCHEN,
BOJI, BOULEY X CORPORATION,
BOULEY Y PARTNERSHIP, and
BOULEY Z ENTERPRISE,

Defendants.
-----X

Index No.
104558/11

DECISION
and ORDER

Mot. Seq.
005

FILED

FEB 21 2012

NEW YORK
COUNTY CLERK'S OFFICE

HON. EILEEN A. RAKOWER:

W. Robert Curtis ("Plaintiff") is the owner of the premises known as 155 Duane Street in New York County ("155 Duane"). Plaintiff now moves by order to show cause seeking an order granting Plaintiff a license to enter the adjacent premises at 130 West Broadway in order to make certain repairs to a common wall which Plaintiff alleges has allowed for the infestation of 155 Duane by "fruit flies and other vermin," as well as seepage of a "black ooze" into his basement. Plaintiff alleges that from the end of 2010 through 2011, the basement of 155 Duane has been rendered uninhabitable, and that, but for these conditions, he would have rented the basement area. Plaintiff states that "[t]he planned repair is limited to sealing a four-by-ten-foot section of the Common Wall opposite the Pullman Kitchen ... and ... to permanently seal a defective floor-joint"

Plaintiff provides his own affidavit and petition in support of his application. Annexed to the affidavit are 21 color photographs of the premises. Also annexed as exhibits are correspondence between Plaintiff and defendant David Bouley

("Bouley") concerning the alleged conditions, and Bouley's efforts to address the fruit fly issue "if, in fact, it is originating from the 130 West Broadway location."

Bouley submits an affidavit in opposition. Bouley contends that Plaintiff's motion must be denied for a number of reasons. First, Bouley argues that Plaintiff improperly seeks access to 130 West Broadway to perform repairs to his neighbor's wall rather than to perform repairs to his own premises, which is the only relief RPAPL §881 affords. Second, Bouley argues that Plaintiff has failed to name a necessary party to this action, in that Plaintiff has not named the actual owner of 130 Broadway as a party to the action. Third, Bouley argues that Plaintiff has failed to provide any substantive evidence to support his claims that a) vermin, flies and black ooze are coming through the wall of 130 West Broadway into the basement of 155 Duane; and b) entry into 130 West Broadway is necessary to fix the problem. Bouley notes that "[p]laintiff fails to provide any evidence such as an affidavit from a construction contractor, engineer, architect or even a handyman or any other person with construction and remediation experience." Fourth, Bouley argues that Plaintiff's application is fatally defective in that he fails to provide any specific details concerning the repairs he intends to make.

Bouley also provides the affidavit of Kimball Beasley, a professional engineer with over 38 years of experience who specializes in forensic engineering. Beasley states that he reviewed New York City Department of Buildings documents pertaining to both premises, and physically inspected them on September 21, 2011. Beasley's findings were as follows:

First, Beasley noted that 155 Duane and 130 West Broadway do not share a "common wall," as alleged by Plaintiff. Rather, as evidenced by the survey plan drawings depicting the subject buildings, the buildings have two separate abutting walls.

Second, Beasley observed that "[t]here does not appear to be any cracks, breaches or other defects in the structural wall of 130 West Broadway adjacent to 155 Duane Street." Beasley further noted that "the tiles that comprise the interior surface of the basement in 130 West Broadway which is adjacent to 155 Duane Street do not show any evidence that the structural wall system of 130 West Broadway behind the tiles is damaged." "Consequently, Beasley continues, there is no evidence that the structural wall is in need of any repair ... or that the condition

[* 4] .

of the structural wall would cause, permit or contribute to any vermin, insects or substances ... to pass from 130 West Broadway to 155 Duane Street.”

Third, Beasley states that he collected a sample of the black ooze from a crack in the floor of 155 Duane and performed a chemical analysis of the substance. Beasley states that “[t]he chemical analysis indicates that the ‘black ooze’ is a mineral system, containing primarily silica that cannot be transported through solid, absorptive materials, such as the masonry of the structural wall of 130 West Broadway.” Beasley further noted that the substance

does not match any substance found in 130 West Broadway,” and that “the substance that [he] observed plaintiff collect from under the ceramic tiles in 130 West Broadway and of which [he] also collected a sample is physically and chemically different from the ‘black ooze’ collected from the floor of 155 Duane Street, with the exception of certain calcium carbonate, which is a mineral common to most cementitious masonry or concrete elements.

Fourth, Beasley states that during his inspection of 155 Duane, he observed a crack in the floor of its basement, as well as cracks and deterioration “at the interior side of 155 Duane Street’s masonry wall in the basement’s kitchen area behind a cabinet.” Beasley states that he “observed no evidence that would support either assertion that there are deficiencies in the 130 West Broadway structural wall that require any repair or that there would be any reason to grant plaintiff access to 130 West Broadway to conduct repairs.”

In reply, Plaintiff asserts that Bouley incorrectly states that 155 Duane and 130 West Broadway do not share a common wall. Plaintiff states that, although the buildings have individual abutting structural walls, the problem area exists in the sidewalk vault of 155 Duane, which shares a common wall with 130 West Broadway.

RPAPL §881 provides as follows:

When an owner or lessee seeks to make improvements or repairs to real property so situated that such

improvements or repairs cannot be made by the owner or lessee without entering the premises of an adjoining owner or his lessee, and permission so to enter has been refused, the owner or lessee seeking to make such improvements or repairs may commence a special proceeding for a license so to enter pursuant to article four of the civil practice law and rules. The petition and affidavits, if any, shall state the facts making such entry necessary and the date or dates on which entry is sought. Such license shall be granted by the court in an appropriate case upon such terms as justice requires. The licensee shall be liable to the adjoining owner or his lessee for actual damages occurring as a result of the entry.

Relief under RPAPL §881 is not granted lightly, as the statute “stands in derogation to the existing common law regarding trespass” (*see Deutsche Bank Trust v. 120 Greenwich Dev. Assocs.*, 7 Misc.3d 1006A [Sup. Ct., N.Y. Co. 2005]).

Here, Plaintiff fails to state with any specificity why he has to enter the premises of 130 West Broadway to perform repairs to his own premises. Nor does he provide proof in the form of an affidavit or report from an expert indicating that entry onto 130 West Broadway is necessary to seal the basement wall of 155 Duane, or otherwise prevent the alleged conditions from affecting Plaintiff's basement (*see Lincoln Spencer Apts., Inc. v Zeckendorf-68th St. Assoc.*, 88 A.D.3d 606 [1st Dept. 2011]) (“the court erred by granting petitioner a license to access [respondent's] roof because petitioner failed to ‘state the facts making such entry necessary,’ as the statute requires The petition, and the affidavit of a “senior associate” submitted for the first time in petitioner's reply papers, conclusorily state that access to [respondent's] roof was necessary. Petitioner has failed to put forward any explanation as to why the work could not otherwise be performed or indeed, any facts whatsoever”). Wherefore it is hereby

ORDERED that Plaintiff's motion for a license to enter 130 West Broadway pursuant to RPAPL §881 is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: February 15, 2012



EILEEN A. RAKOWER, J.S.C.

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