Ping Xie v Andrews Bldg. Corp.
2012 NY Slip Op 32826(U)
November 21, 2012
Sup Ct, New York County
Docket Number: 102513/12
Judge: Debra A. James
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SCANNED ON 12/3/2012

[* 1]

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

PRESENT: DEBRA A. JAMES **PART 59**
Justice

LI PING XIE and HUNG FONG CHIU,
Plaintiffs,

- v -

ANDREWS BUILDING CORPORATION and
50 WARREN STREET CONDOMINIUM,
Defendants.

Index No.: 102513/12
Motion Date: 07/27/12
Motion Seq. No.: 01
Motion Cal. No.: _____

The following papers, numbered 1 to 5 were read on this motion for a preliminary injunction.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1
Answering Affidavits - Exhibits	2, 3
Replying Affidavits - Exhibits	4, 5

FILED
NOV 30 2012
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers,

Plaintiffs are the owners of premises at 118 Chambers Street in New York County. Plaintiffs seek a preliminary injunction against defendants, the owner and managing agent of the adjacent premises at 120 Chambers Street. Plaintiffs move to enjoin defendants, during the pendency of this action, from altering, disconnecting, or otherwise removing the sewage line that flows from plaintiffs' premises through to defendants' premises and then connects to the public sewerage system. Plaintiffs' legal theory is that they are entitled to continue to use the sewage

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

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SETTLE/SUBMIT ORDER/JUDG.

discharge pipe through defendants' premises based upon the doctrine of implied easement.

"A party seeking a preliminary injunction must demonstrate, by clear and convincing evidence, (1) a likelihood of success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) a balancing of the equities in the movant's favor. The decision to grant or deny a preliminary injunction lies within the sound discretion of the trial court." Gilliland v Acquafredda Enterprises, LLC 92 AD3d 19, 24-25 (2d Dept 2011) (citations omitted).

Plaintiffs argue that they have demonstrated a likelihood of success on the merits of their claim that they have an implied easement through the defendants' premises for the purpose of connecting to the public sewer. Plaintiff Xie states under oath that "At no time since I purchased the building in 1993 have Plaintiffs altered the common waste line." Defendants counter that plaintiffs are unable to meet their burden with respect to such claim because the evidence establishes that more likely than not plaintiffs themselves brought about the connection to defendants' sewer line in violation of the building code.

Although not cited by the parties, plaintiffs' application is subject to the over 100-year old binding precedent of the First Department in which a quite similar fact pattern and

application for injunctive relief was considered in the context of the doctrine of implied easement.

In the case of Stuyvesant v Early (58 AD 242, 243 [1st Dept 1901]), the "action was brought to enjoin the defendant from cutting off, disturbing or interfering with a drain which extended from the plaintiff's premises, No. 586 Seventh [A]venue, under the houses No. 584 and No. 582 Seventh [A]venue, the defendant being the owner of No. 582 Seventh [A]venue." All three houses were owned by the same grantor and at the time of the sale of the 586 house to the plaintiff therein "there was a drain extending from the premises owned by the plaintiff through the premises on the south to Forty-first street. Such drain conveyed the sewerage from the plaintiff's residence to the public sewer in Forty-first street, and during all the period named has continued to drain the plaintiff's premises." Id. That is, the drain from plaintiff's premises ran through the other premises and connected to the public sewer through the defendant's premises at the 582 parcel. The defendant's purchase of the 582 parcel was subsequent to the plaintiff's purchase of the 586 parcel. Id.

The defendant in Stuyvesant, as do the defendants in this case, argued that "that she purchased these premises without knowledge of the existence of this drain, and that as soon as she discovered it she notified the plaintiff that at the expiration

of thirty days she would cut off the drain and prevent its future use." Id. Defendant also presented an affidavit from her plumber stating that the defendant could not have discovered the drain without excavating the cellar and that the drain would be impossible to maintain because the amount of drainage was too great to be handled by the existing pipe. Id. at 244. Defendant also presented evidence that the Department of Health had served notices upon her stating that damage to the sewer line had created unhabitable condition. Id. Defendant also argued, as the defendants here do also, that the Building Code required each premises to have separate and independent plumbing and drainage systems and that there was a sewer in the street in from of the premises to which connection could be made. Id.

The Court in Stuyvesant reasoned that

> The question presented is whether the plaintiff acquired an easement by the purchase of his premises, when at the time of the conveyance to him there was a visible arrangement by which the plaintiff's sewerage was discharged through a drain under the adjacent property, then owned by the grantor, to the sewer in Forty-first street. That this drain and its connection were a visible appurtenance to the plaintiff's property is not disputed. The plaintiff's grantor must be chargeable with knowledge of the actual condition at the time of the conveyance to plaintiff and that when he conveyed one of the houses to the plaintiff he knew that he conveyed a house with this drain as an actual and visible appurtenance to it. That thereby the plaintiff acquired an easement to continue this drain as constructed at the time of the conveyance to the plaintiff by an implied grant, seems to me to be a settled rule of the common law, which so far as I am aware has never been questioned in this State. The principle upon which this grant is implied is stated in the leading case of Lampman v. Milks (21 NY 505). It is

there stated that 'where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion, the purchaser takes the tenement, or portion sold, with all the benefits and burdens which appear, at the time of the sale, to belong to it, as between it and the property which the vendor retains. This is one of the recognized modes by which an easement or servitude is created. No easement exists so long as there is a unity of ownership, because the owner of the whole may, at any time, rearrange the qualities of the several parts. But the moment a severance occurs, by the sale of a part, the right of the owner to redistribute the properties of the respective portions ceases; and easements or servitudes are created, corresponding to the benefits and burdens mutually existing at the time of the sale.' Instances may be multiplied in which this principle has been applied, but in no case that I am aware of has the principle itself been questioned. All of the cases cited by counsel for the appellant, as Butterworth v. Crawford (46 NY 349); Treadwell v. Inslee (120 NY 458) and Munsion v. Reid (46 Hun 399), were cases in which the premises upon which the easement was sought to be imposed were conveyed by the owner prior to the conveyance of the premises for whose benefit an easement was sought to be implied. If the owner of these three houses had conveyed the house now belonging to the defendant first, and after that had conveyed the plaintiff's house, the cases relied on by the defendant would apply and no easement would be implied. It is the right acquired by the grantee of the property first conveyed that is here under consideration, and that conveyance as against the grantor, applying the principle before stated, implied the grant of a right to continue this drain, and those who subsequently acquired the grantor's right to the remaining premises took it subject to this implied grant to use the drain as constructed and in use at the time of the grant to the plaintiff. It is quite clear that the day after the plaintiff's grantor had executed and delivered the deed to the plaintiff he could not have cut off this sewer and deprived the plaintiff of this right of drainage which by implication he had granted, and the plaintiff's grantor could not, by a subsequent conveyance of the premises that he retained, convey greater right to destroy this easement than he had after the conveyance to the plaintiff.

Stuyvesant v Early, supra, 58 AD, at 244 - 246.

The Court therefore concluded that "that by this conveyance of No. 586 Seventh avenue there was an implied grant of an easement to which the remaining portions of the grantor's premises were subject, and by which the plaintiff acquired the right to maintain this drain connecting his house with the sewer in Forty-first street." Id. at 246. The court further held that neither the rules of the Building Department nor the action of the Board of Health as relied upon by the defendants therein had the effect of defeating plaintiff's right to the easement. Id.

On this motion, defendants concede that the property records show that in 1988 both the properties at issue here had common ownership, that in 1991 both properties were sold to a joint venture and that in 1992, both properties were acquired in foreclosure by the parties' grantor. Defendants further agree that the records show that the plaintiffs purchased their property from the common owner in 1993, while defendants purchased their property interest in 1995.

Defendants cite the Tribeca South Historic District Extension Designation Report that found that the two buildings located at 118 Chambers Street and 120 Chambers Street were never a single building, but were constructed two years apart, and argue that therefore the buildings could not have shared a common waste system, assuming that they were connected to a public sewer system at that time. Defendants submit the affidavits of their

architect and plumber to the effect that the connection from plaintiffs' premises to their waste pipe uses materials that were only available after 1960 and that the connection was most likely made within the last 20 years. Defendants argue that the plaintiffs themselves installed the sewer connection after they purchased 118 Chambers Street, and in support of such proposition, submit the supplemental affidavit of their architect. The architect states that the plans for installation of new kitchen equipment in connection with the first floor restaurant of 118 Chambers Street that plaintiffs filed in 1993 reflect neither the connection that plaintiffs assert pre-date their purchase nor the configuration of the sewer lines as-built, i.e. as it now exists. He also avers that the "no-hub" fitting pipes used by plaintiffs were not approved by New York City until the 1980s and the distinctive design of the material of the pipes in question was only available in the early 1990's. Defendants contend that the difference between the plans submitted and the actual layout of the sewer pipes in plaintiffs' building as well as various and sundry violations issued by the Building Department both for plumbing and other illegal construction that plaintiffs were carrying out without the required permits and for illegal use of the premises by plaintiffs are evidence of plaintiffs' bad faith.

Plaintiffs counter with the affidavit of their engineer wherein he states that the type of connection in question was one used in the industry prior to the time the plaintiffs assumed ownership of the building. Such engineer also avers that to make a sewer line connection between the two buildings would requires access to both 118 Chambers Street and 120 Chambers Street, and concludes that therefore it is likely that the connection was made between 1988 and 1993 when the buildings were under common ownership. He points out that such time frame is consistent with defendants' position about the provenance of the "no hub" fittings and pipe material used at 118 Chambers Street.

Based upon the criteria set forth by the First Department in Stuyvesant, the court finds that the plaintiffs have adequately met their burden of setting forth a likelihood of success on the merits. The plaintiffs have established that they and the defendants purchased from a common grantor and that the plaintiffs' purchase pre-dated that of the defendants. Further, plaintiffs have set forth facts sufficient for purposes of this motion to demonstrate that the connection likely existed before or during the period of common ownership. Of course, such a showing is not dispositive as discovery may reveal other facts about the connection, but the existence of an issue of fact is not a bar to the grant of provisional relief. See Arcamone-Makinano v Britton Property, Inc., 83 AD3d 623, 625 (2d

Dept 2011) ("The mere existence of an issue of fact will not itself be grounds for the denial of the motion"); CPLR 6312 (c). Nor does the issuance of violations by the New York City Building Department to plaintiffs in connection with construction activity in 2000, and occupancy of an illegal apartment in 2005, militate against plaintiffs' claim. Defendants cite no evidence that ties the violations to the sewer connection at 118 Chambers Street, and in fact the inspectors issued no violation concerning such waste lines. Moreover, as plaintiffs points out, the Building Department has issued violations, likewise to matters unrelated to the sewer pipes, with respect to 120 Chambers Street during the period of defendants' ownership.

Plaintiffs have also met their burden of establishing irreparable harm by asserting that there is no other sewer connection to their premises and the defendants experts have not contradicted this assertion. "Without the preliminary injunction, plaintiffs will be left without any sewage, rendering their premises uninhabitable for an extensive period of time. The purpose of this interlocutory relief is not to finally determine the merits, but to preserve the status quo so that once a decision is reached on the merits, it would have a meaningful impact on the dispute." Verrazzani v 26 Commerce LLC, 2011 NY Slip Op 30010(U) *10, 2011 WL 109131 (Sup Ct, NY County, Scarpulla, J., 2011).

The same facts equitably weigh in favor of the plaintiffs. Though the court in reaching its decision considers the expense allegedly incurred by the defendants in maintaining the sewer pipe, the defendants' experts have not set forth that routine maintenance of the sewer pipe as the defendants have been doing for the past decade will not be sufficient to maintain the status quo. Therefore the equities tip in favor of the plaintiffs.

The court has examined the invoices submitted by the defendants as to their maintenance of the sewer. Although the court does not conclude at this juncture that grease from plaintiffs' waste line has caused the sewer backups complained of by defendants, the defendants are entitled, as a condition of any injunction, to be compensated for "all damages and costs which may be sustained by reason of the injunction." The court finds that such costs are limited to any extra maintenance or repairs to the sewer line that are caused or exacerbated by plaintiffs use of the sewer line. The bills submitted by defendants indicate that on average approximately $1000.00 per year is spent "snaking" out blockages in the sewer line while replacing a section of cracked pipe costs approximately $4000.00. In addition, in 2008 defendants expended $60,000, less $24,000 which was covered by insurance, for remediation of the mold condition that arose in the sub-cellar allegedly as a result of flooding from the sewerage line. Therefore the court finds that an

undertaking in the amount of $40000.00 is appropriate to meet the statutory mandate.

Accordingly, it is

ORDERED that the plaintiffs' motion is GRANTED; and it is further

ORDERED that an undertaking in the amount of $40000.00 is hereby fixed by the court, which obligates plaintiffs to pay to the defendants all damages and costs which may be sustained by reason of this injunction if it is finally determined that plaintiffs were not entitled to an injunction, and it is further

ORDERED, that defendants, their agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of defendants, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of defendant or otherwise, any of the following acts: removing and capping, or in any other way altering, the common waste line which plaintiffs and defendants share; and it is further

ORDERED that the foregoing is effective, upon the posting by the plaintiffs of the undertaking, which shall take place within thirty days of entry of the herein order and it is further

ORDERED that the parties are directed to appear for a preliminary conference at the Courthouse, 71 Thomas Street, Room 103, New York, NY 10013 on January 15, 2013 at 9:30 A.M.

This is the decision and order of the court.

Dated: November 21, 2012

ENTER:

DEBRA A. JAMES J.S.C.

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