

Crawford v Horatio St. Partners, LLC

2017 NY Slip Op 30441(U)

March 3, 2017

Supreme Court, New York County

Docket Number: 152845/2015

Judge: Nancy M. Bannon

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY – PART 42**

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**VIRGINIA CRAWFORD and JOHAN
MATTON,**

Plaintiffs,

-against-

**HORATIO STREET PARTNERS, LLC,
JOSEPH ARYEH, and MICHAEL ARYEH**

Defendants.
-----X

**DECISION AND ORDER
AFTER HEARING**

Index No. 152845/2015

MOTION SEQ. 005

NANCY M. BANNON, J.

The plaintiffs, Virginia Crawford and Johan Matton, are tenants who respectively reside in two rent-stabilized apartments at 40 Horatio Street in Manhattan (the building). They seek a judgment, inter alia, permanently enjoining and restraining their landlord, the defendant Horatio Street Partners, LLC (Horatio), and Horatio's principals, the defendants Joseph Aryeh and Michael Aryeh, from continuing or commencing new construction or renovation activities until the defendants obtained all necessary permits for those activities as required by applicable law or code, implemented necessary safety measures to protect plaintiffs' health and safety, plaintiffs' apartments, and the common areas during construction, and restored the common areas such that plaintiffs' use and enjoyment thereof is unimpaired. In particular, the plaintiffs contend that the defendants engaged in impermissible construction and renovation activity at the building that exposed them, their apartments, and common areas of the building to asbestos, mold, chemicals, lead paint, fumes, dust, debris, and vermin, exposed them and other residents of the building to live electrical wires, cut off water and electrical services to their apartments, and unlawfully prevented them from making use of certain common appurtenances, such as the backyard of the building.

In an order dated March 24, 2015, this court awarded the plaintiffs a temporary restraining order enjoining and prohibiting the defendants, their contractors, employees, agents, and any person or entity acting on their behalf or under their control from any construction or

renovation activities at the building, pending the hearing and determination of the plaintiffs' motion for a preliminary injunction. In an order dated July 14, 2015, this court granted the plaintiffs' motion for a preliminary injunction to the extent that, pending a final determination of this matter, the defendants and any agent, employee, or person acting on the defendant's behalf were enjoined and prohibited from proceeding with construction or renovation activities in the building until the defendants had obtained all necessary permits as required by applicable law or code, enacted necessary safety measures to protect the plaintiffs' health and safety, their homes, and the building's common areas during construction, and restored the building's common areas such that the plaintiffs' use and enjoyment is unimpaired. The court further directed the plaintiffs to comply with all obligations under their leases, including the obligation to pay rent in a timely manner.

The defendants thereafter moved, in effect, to vacate the preliminary injunction (MOT SEQ 005), arguing that they satisfied the conditions imposed by the court, and that they should be permitted to proceed with construction or renovation at the building. The plaintiffs opposed the motion, arguing that the defendants have not shown proof that they had fully complied with all of the applicable conditions. In an interim order dated December 9, 2015, this court granted the defendants' motion to the extent of directing an evidentiary hearing to determine whether they had complied with the directives set forth in the prior orders.

At the hearing, which was conducted on March 16, 2016, and May 10, 2016, the defendants adduced the testimony of Younes Berrada, an expediter retained by landlords and contractors that have business with the New York City Department of Buildings (DOB) and the New York City Landmarks Preservation Commission (LPC). Berrada identified numerous documents that were admitted into evidence. The defendants also submitted the testimony of licensed professional engineer Howard Bader, who manages an environmental consulting firm, and is licensed by the New York City Department of Environmental Protection (DEP) and state and federal agencies to perform asbestos evaluations and formulate remediation plans. Bader identified several asbestos inspection reports that were admitted into evidence, and gave his opinion as to the presence of asbestos, the risks to residents, and the condition of the building.

Following the hearing, the parties submitted proposed findings of fact and conclusions of law to the court.

The court credits the testimony of the witnesses and the documentary evidence to the extent indicated in the following findings of fact.

FINDINGS OF FACT

Younes Berrada, who is certified as a Class 2 Code and Zoning Representative. Berrada, was retained by Horatio to secure several DOB permits referable to interior renovation work and the installation of new plumbing fixtures and conveyances in six different apartments. To do so, he obtained numerous DOB and LPC permit applications and supporting documentation signed by various professionals, including engineers and asbestos abatement professionals. After Berrada confirmed that asbestos investigator Ola Ogundipe was licensed by the New York City Department of Environmental Protection, he retained him to inspect the apartments. Ogundipe thereafter completed and signed an ACP-5 report, which was submitted to Berrada. Berrada reviewed the ACP-5 report in the usual course of his business responsibilities, and thereafter forwarded it to the DOB on August 19, 2015. This report revealed that, as of summer 2015, there was no asbestos extant in the subject apartments. Berrada also received, from Kenneth Mack, a licensed professional engineer who was retained by Horatio, a permit application, known as a PW-1, a control inspection report, known as a TR-1, pursuant to which Mack certified that he was responsible for all work, an energy code compliance report, known as a TR-8, an affidavit of costs, known as a PW-3, a work checklist, known as a PC-1, and an engineer's self-certification document, known as a POC-1. Berrada reviewed these signed documents to assure that they were complete and in the proper form, although he did not review them for content, and forwarded them to the DOB. In addition, Berrada filed plans for renovation work with the DOB, consisting of drawings and a tenant safety and protection plan, with notes. The safety and protection plan provided that debris, dust, and dirt were to be kept to a minimum and confined to the immediate construction area, and that no insulation, including ceiling or duct insulation that may have contained asbestos, was to be disturbed.

The DOB issued two permits to Horatio for all renovation work based on the submission of these documents—one for work in apartments 6 and 20, and another for work in apartments

5, 7, 18, and 19. In accordance with the permits, Horatio seeks to undertake interior renovation for the installation of new partitions and the replacement of plumbing fixtures in these six apartments. Since the project was self-certified, the DOB did not specifically review the particulars of the statements in the supporting documentation, but assumed that the engineer's representations were accurate. This is the usual practice of the DOB where a licensed professional signs off on the documentation submitted to it.

Horatio had been issued a notice of violation by the LCP for improper installation of metal windows without a proper permit. Horatio placed certain funds in escrow, thus evincing its intent to correct the violation of the landmarks law, and, in reliance on Horatio's promise to correct the violation, the LCP issued a "certificate of no effect" in connection with the interior renovation work approved by the DOB.

Howard Bader was qualified as an expert in the field of environmental engineering as it relates to asbestos inspection, evaluation, and remediation. On April 22, 2015, and May 8, 2015, Bader inspected the public hallways and common areas of the building, as well as the six apartments in which renovation work was to be performed. He collected approximately 100 samples of materials from the common area, exterior portions of the building, and these apartments which he believed might contain asbestos, and had them analyzed at EMSL Analytical, a laboratory licensed by the State of New York. None of the samples taken from any of the six apartments contained any asbestos, and that conclusion was reflected in Bader's report, dated May 13, 2015. Some asbestos was present in samples taken from plaster in the walls of the common hallways and in tar applied to the exterior of the building. Bader returned to the building on January 22, 2016, on a date in late February, 2016, and on March 15, 2016. Upon visual inspection, he observed no asbestos in the subject apartments. On March 25, 2016, he collected 30 more samples of material from the apartments, and had them analyzed by EMSL Analytical, which issued a report concluding that none of those samples contained asbestos. Bader instructed Horatio as to how the interior renovations must be undertaken in order to avoid disturbing the asbestos contained in the hallway walls. Thus, despite the presence of undisturbed asbestos in the common hallways and the exterior of the building, the interior renovation of the six apartments will have no effect on the integrity of that asbestos. The tar sample collected from the exterior wall was not near the windows that must be replaced. There is thus no danger to the residents of the building that they had been or will be

exposed to asbestos in connection with the interior renovation of the six subject apartments, or the replacement of any windows. Bader was last at the building on April 25, 2016, and undertook a visual inspection of the common areas and outside yard of the building. At that time, the common areas and outside yard were unobstructed and in good, normal working condition.

CONCLUSIONS OF LAW

The defendants have obtained all necessary permits, as required by applicable law or code, in connection with the interior renovation of the six subject apartments, including building and work permits issued by the DOB and a certificate of no effect issued by the LPC. Although the mere submission of an application for a permit or approval is not proof of its issuance (see Matter of Patterson Materials Corp. v Zagata, 264 AD2d 525, 526 [2nd Dept. 1999]), here, the evidence included not only the applications, but the actual permits and approvals themselves. See Humphreys v Veneziano, 268 AD2d 461, 462 (2nd Dept. 2000). Contrary to the plaintiffs' contention, the defendants were not obligated to submit testimony from the persons who signed the applications or supporting documentation, since, absent a timely challenge to the issuance of a permit pursuant to CPLR article 78, it is for the relevant administrative agency, and not the court, to determine, in its discretion, the sufficiency, accuracy, and completeness of the permit applications and the qualifications of the signatories. See generally Katz 737 Corp. v Cohen, 104 AD3d 144, 150 (1st Dept. 2012); Serradilla v Lords Corp., 50 AD3d 345, 346 (1st Dept. 2008); Matter of Weissman v City of New York, 96 AD2d 454, 456 (1st Dept. 1983).

The defendants enacted necessary safety measures to protect the plaintiffs' health and safety, to protect their homes, and to protect the building's common areas during construction. Berrada's testimony established that the permits issued by the DOB were based, in part, on a tenant safety and protection plan that was included with the permit application package, as well as the ACP-5 asbestos report. Bader's testimony established that Horatio was instructed as to how to undertake the interior renovation of the subject apartments without disturbing asbestos contained in the common hallway walls. The court further accepts Bader's opinion, based on the tests conducted by EMSL Analytical, that there was no asbestos present inside of the six subject apartments, and that there was no risk that the plaintiffs or other building residents would be exposed to asbestos as a consequence of either the interior apartment renovations or the replacement of the windows in connection with the need to comply with the landmarks

preservation law. The plaintiffs' contention that such a danger still remains is based on speculation, inasmuch as they did not present expert testimony to rebut Bader's opinion.

The defendants restored the building's common areas such that the plaintiffs' use and enjoyment is unimpaired, as reflected in Bader's observations and inspections of the rear yard, the hallways, and other common areas. Contrary to the plaintiffs' contention, the defendants were not required to present testimony from a witness who actually performed the restoration work, since the court's directive was addressed to the end result of that work, not the particulars thereof, except insofar as it might relate to the release of friable asbestos.

The court rejects the plaintiffs' contention that they were improperly precluded from presenting their own witnesses. After Berrada testified for almost two hours on March 16, 2016, the court continued the hearing on May 10, 2016, at which time Bader testified. At the May 10, 2016, hearing, the plaintiffs did not make an objection that they were being precluded from offering testimony, and did not have any witnesses available to testify in any event.

Accordingly, it is

ORDERED that the defendants' motion, in effect, to vacate the preliminary injunction set forth in the order dated July 14, 2015, is granted, and the preliminary injunction is vacated.

This constitutes the Decision and Order of the court.

Dated: March 3, 2017



NANCY M. BANNON, JSC

HON. NANCY M. BANNON