SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 19

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145 W. 21st REALTY LLC,

Plaintiff,

- against -

FIRST WEST 21st STREET LLC,

Defendant.

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Index No. 653241/12
DECISION & ORDER
(Motion Seq. 004)

KELLY O'NEILL LEVY, J.:

Defendant First West 21st Street LLC moves, pursuant to CPLR 3212, for partial summary judgment dismissing the amended complaint's ninth, tenth and eleventh causes of action. Plaintiff cross-moves for partial summary judgment on liability in its favor on these claims.

Familiarity with the court's January 22, 2016 decision and order is presumed. Plaintiff is the owner of a five-story residential building located at 145 West 21st Street in Manhattan. Plaintiff's building is directly adjacent to defendant's newly-constructed and much taller, 14-story residential building located at 153 West 21st Street (Chelsea Green). Plaintiff alleges in this action that its building and adjacent sidewalk suffered damage as a result of the construction, and, among other claims, that Chelsea Green's new eastern exterior wall encroaches on plaintiff's space, in that it is cantilevered over plaintiff's building and prevents plaintiff from further extending an existing party wall to add additional floors to its building. Plaintiff alleges that, as a result of the construction, its own options to expand its own building are to either:

> "(1) demolish its Building and construct something entirely new, up to 135 feet high, with 1/19th less square footage . . . ; or (2) construct a brand new western wall inside Plaintiff's property adjacent to the Party Wall, which would also prevent Plaintiff from utilizing square footage on its property. Both of these

> options would be a substantially greater cost than vertically enlarging the Party Wall"

(Affidavit of Lili Amog, sworn to July 6, 2016, ¶ 14; *see also* Am. Cmplt. ¶ 43).

At issue on these motions are the amended complaint's ninth, tenth and eleventh causes of action, which allege claims for conversion/encroachment, trespass and negligence regarding Chelsea Green's eastern exterior wall. Defendant now moves for partial summary judgment, relying on a survey of the wall and the surveyor's affidavit which, as both sides agree, conclusively establish that Chelsea Green's new eastern wall does not cross the parties' property line, and does not utilize the party wall in any manner. The sole issue is whether the owner of real property, which once contained a building that used a party wall supporting two adjoining buildings, but now contains a newly-constructed building that is supported by a new independent wall, may cantilever its new building over that portion of the former party wall which does not cross the parties' property line. Defendant says it can, and plaintiff says otherwise. For the following reasons, defendant's motion is granted and plaintiff's cross motion is denied.

A party wall is "a wall erected between two adjoining pieces of property and used for the common advantage of both owners" (10 Warren's Weed, New York Real Property, Party Wall § 104.01 [2004]; *see also 25 W. 74th St. Corp. v Wenner*, 268 AD2d 387, 387-388 [1st Dept 2000]). Where a party wall runs directly over the property line between two parcels, "[e]ach of the two adjoining owners of a party wall owns in severalty so much of the wall as stands upon his own lot, each having an easement in the other strip for purposes of the support of his own building" (*5 E. 73rd, Inc. v 11 E. 73rd St. Corp.*, 16 Misc 2d 49, 52 [Sup Ct, NY County 1959], *affd* 13 AD2d 764 [1st Dept 1961]; *see also 357 E. Seventy-sixth St. Corp. v Knickerbocker Ice Co.*, 263 NY 63, 66 [1933] [an owner of a building that shares a party wall has an easement for support over the portion of the wall on the adjoining property]). Either adjacent owner may increase the height of

a party wall when it can be done without injury to the adjoining building, the wall is of sufficient strength to safely bear the addition, and the addition can be used by both owners to increase the height of their own building (*Brooks v Curtis*, 50 NY 639, 644 [1873]).

Where one adjoining owner demolishes its building, however, this puts an end to the necessity of support on its side of the building (*357 E. Seventy-Sixth St. Corp. v Knickerbocker Ice Co.*, 263 NY at 67). At that point, the owner of the property no longer using the wall for support still has "'ownership' rights in that part of the wall lying on its property" (*5 E. 73rd, Inc. v 11 E. 73rd St. Corp.*, 16 Misc 2d at 54). And that owner may use its side of the wall for its own commercial use, so long as none of its structures compromise the integrity of the wall or cross the property line (*Wechsler v Elbeco Realty Corp.*, 119 Misc 178, 181 [Sup Ct, NY County 1922], *affd* 213 App Div 820 [1st Dept 1925] [*Wechsler*]; *see also Mileage Gas Corp. v Kushner*, 245 App Div 836 [2d Dept 1935]).

In *302 Lexington Ave. Corp. v 37th St. & Lexington Ave. Corp.* (34 NYS2d 445 [Sup Ct, NY County 1942]), the defendant tore down the buildings on its premises, leaving intact a party wall supporting plaintiff's adjoining building to the north. The new northerly wall of defendant's new building was, at the place where it reached the top of the party wall, carried out horizontally over that portion of the party wall which stood on the defendant's premises, to a point about one-half inch from the dividing line, and carried up vertically twelve stories. Thus, the new independent wall overtopped approximately one-half of the party wall. The plaintiff's motion for a mandatory injunction was denied, the court ruling that, absent any agreement, either owner may increase the height of a party wall if the wall is of sufficient strength and can be raised without injury to the adjoining building, and without impairing the cross easement to which the other owner is entitled (*id.* at 446). The court stated:

> "A party wall is to be treated as a structure for the common benefit and convenience of both of the tenements which it separates, and to permit either party to make any use of it which he may require, either by deepening the foundation or increasing the height, so far as it can be done without injury to the other. The right to carry up a party wall as a party wall is far removed from an obligation to carry up a party wall. If the wall is used as a party wall, it must be available to both; but when it is not used as such, which appears to be the situation here, no right of the adjoining owner has been invaded"

(*id.* at 446-447 [internal citations omitted]). In so ruling, the court stated that no authority for the plaintiff's position existed, and that the *Wechsler* case expressly forbade the relief plaintiff sought.

The *Wechsler* case is directly on point. In that case, the defendant also tore down the building on its lot, leaving intact a party wall supporting the plaintiff's one-story brick building housing an automobile repair shop. Defendant then began building a more modern 12-story building of steel construction. The plaintiff claimed that some of the outside girders at the second and third stories of defendant's new building projected a few inches over the present top of the party wall, and claimed that, when the masonry was added, the total projection would be about five inches. The plaintiff's chief complaint was that this would prevent her from extending the party wall upward at some time in the future. The defendant admitted this to be the case, but proved that the completed structure would not project beyond the actual property line. The plaintiff's request for a mandatory injunction removing the girders was denied. The court ruled that "where no contract or grant is shown the owner of one-half of a one-story party wall has [no] right to prevent his neighbor from utilizing his property rights in the open space above" (119 Misc at 181). The court further reasoned that, "[i]n view of modern building methods, the existence of a party wall would no longer be a mutual benefit [if plaintiff's position was adopted], but as much of a burden and incumbrance as though there were a perpetual covenant to rebuild" (*id.* [internal citations omitted]).

Another case directly on point is *Kreuzer v George Washington Univ.* (896 A2d 238 [DC Ct App 2006]), where the owner of a townhouse sued George Washington University (GWU), which owned the adjoining lot, complaining that GWU trespassed by building a ten-story residence hall that cantilevered over a party wall supporting the plaintiff's townhouse. The trespass claim was dismissed, since the dormitory did not cross the property line, the court concluding that "GWU was free to construct above the party wall on its own property so long as it did so without detriment to Dr. Kreuzer's servitude" (896 A2d at 243).

Plaintiff relies on *Herrman v Hartwood Holding Co. Inc.* (193 App Div 115 [1st Dept 1920]), but the facts are inapposite. In that case, the parties owned adjoining four- and five-story buildings with a shared party wall of brick construction. The defendant demolished the building on its property and built a 14-story hotel of steel and concrete construction. The plaintiff secured relief in that case because the defendant's construction methods interfered with the integrity of the party wall and because the defendant's new wall not only physically rested on the existing party wall, but also encroached over the plaintiff's lot line. The court concluded that "it is evident that if defendant's building should be removed or wholly destroyed a complete party wall would not remain for the protection of the plaintiff's building and for his enjoyment thereof" (193 App Div at 119). This is not the situation in the case at bar.

Plaintiff also relies on *American Ry. Express Co. v Lassen Realty Co.* (205 App Div 238 [1st Dept 1923]). But the problem in that party wall dispute was that the plaintiff built a new or additional wall on his property, the upper portion of which rested upon and was supported by the party wall and projected two inches beyond the property line. The court merely held that "[i]f the upper portion of the new wall which rests upon the old wall is not open to the use of the defendant as a party wall, it ought not to be where it is. Neither owner has a right to build on top

of a party wall, even on his own side of the property line, an extension for his own purposes only" (*id.* at 240). Since Chelsea Green has not built on or carried up the party wall, and certainly has not crossed the property line, this case is inapposite. Indeed, while plaintiff complains that defendant's construction will make its own upward expansion more expensive, because it can no longer extend the full width of the existing party wall upwards, what plaintiff is contemplating would be a trespass upon some or all of defendant's side of the property line, which is real, and not "imaginary," as plaintiff's counsel contends.

For the foregoing reasons, it is hereby

ORDERED that defendant's motion for partial summary judgment dismissing the ninth, tenth and eleventh causes of action in the amended complaint is granted, and those claims are hereby dismissed; and it is further

ORDERED that plaintiff's cross motion for partial summary judgment is denied.

This constitutes the decision and order of the court.

Dated: June 26, 2017

ENTER:

Kelly O'Neill Levy J.S.C.

HON. KELLY O'NEILL LEVY