[* 1]

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

PRESENT: JUDITH J. GISCHE, J.S.C. PART 10

Index Number : 113163/2009
197 EAST 76 STREET
vs.
1330 3RD AVE. CORP.
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 004
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
JAN 05 2012
NEW YORK
COUNTY CLERK'S OFFICE

[illegible] IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

And status conf 3/22/2012 9:30 am Part 10
MOT extended 3/23/2012

Dated: Jan 4, 2012

JUDITH J. GISCHE, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

----------x

197 East 76th Street, LLC,

Plaintiff (s),

-against-

1330 3rd Ave. Corp.,

Defendant (s).

----------x

DECISION/ORDER
Index No.: 113163-2009
Seq. No.: 004

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

PAPERS	NUMBERED
1330 3rd Ave n/m (3212) w/MIB affirm, JB, AC affids, ehs	1
197 E. 76 opp w/SD affirm, JG, ES affids, exhs	2
1330 3rd Ave reply w/MIB affirm	3

Upon the foregoing papers, the decision and order of the court is as follows:

This action involves a dispute between adjacent owners of real property. Plaintiff 197 East 76th Street, LLC is the owner of the building located at 197 East 76th Street, New York, New York ("197") whereas defendant 1330 3rd Avenue Corp. is the owner of the building located at 199 East 76th Street a/k/a 1330 3rd Avenue ("199")[1].

In its complaint, 197 seeks a declaratory judgment regarding a boiler flue vent, chimney[2] and three fireplace vents or metal flues presently anchored to its easterly wall. 197 also seeks a permanent injunction against the defendant, enjoining it from

---

[1]Although the parties identify themselves as "East 76th" (plaintiff) and "3rd Ave" (defendant) in their papers, the court adheres to its prior identification of them to maintain consistency among the court's decisions.

[2]Throughout the parties' papers they use the terms "chimney" and boiler vent flues interchangeably although technically they are not the same thing.

destroying, etc., that chimney and the flues.

199 has answered the complaint and asserted counterclaims for a permanent injunction prohibiting 197's continued trespass (1st CC) and requiring 197 to remove a new wall it built a few years ago and appurtenant metal flues (2nd CC). Alternatively, 199 seeks monetary damages as compensation for 199's loss/destruction of property rights (3rd CC).

In connection with a prior motion for a preliminary injunction, the court ordered that 199, its agent and assigns not remove the chimney or flues pending further order of the court (Order, Gische J., 1/5/10) ("prior order").

199 now moves for summary judgment in its favor and 197 is opposed. Since issue has been joined, this pre-note of issue motion may be decided on the merits (CPLR § 3212; Brill v. City of New York, 2 NY3d 648 [2004]). The reader is presumed to be familiar with the court's prior order.

The following facts are undisputed, unrefuted or otherwise established by this record:

Facts and Arguments Presented

197 and 199 East 76th Street are buildings that are adjacent to one another on the north side of 76th Street in Manhattan near Third Avenue. There was once a 5 ½ foot alleyway between the two buildings and that alleyway was part of defendant's property. The footprint of the building on 199's property has been enlargened and now the buildings are flush against one another. Thus, there is no longer an alleyway and anything that was once in the alleyway has been encapsulated by 199 when it expanded its building. Some of the encapsulation occurred after this action was brought and the

court granted 197 a preliminary injunction. The preliminary injunction, however, only prevented removal of the metal flues on 197's easterly wall.

At one time 195, 197 and 199 were owned by a common owner. Later, when the owner sold off buildings, he entered into certain agreements with the new owners of 195 and 199. The agreement with 199 was that 197 and 199 would share heating costs since the two buildings shared one boiler. The costs were shared 40% by 197, whereas 199 would pay 60% of those costs. This cost sharing agreement, made May 19, 1975 ("1975 agreement"), was reduced to writing and recorded in the books and records of the clerk of New York County. The agreement expressly provides that it was to remain in effect until April 30, 1980, unless 199 sooner obtained its own heating system:

> In the event that 181 E. 78th St. Corporation, is successors or assigns installs at its sole cost and expense its own heating system and hot water supply to take care of its own premises at 199 East 76th Street and properly seals all lines of heat and hot water coming from 197 to 199 East 76th Street, then in that event this agreement shall terminate and termination date shall be effective on the date that the new heating system installed for 199 East 76th Street is working and operating. On that date all fuel bills shall be pro-rated and thereafter obligations to pay 60% shall terminate.

Although the 1975 agreement ended and 199 no longer derives a benefit from 197's boiler, 197's boiler is still using the chimney that emanates from defendant's cellar and transitions into the metal chimney flue vent attached to the easterly wall of 197's building.

Also on the easterly wall of 197 are three fireplace flues. The fireplace flues were erected in 2003 by 197 without defendant's permission. At that time, 197 renovated its

building and apparently installed (or reactivated) wood burning fireplaces that must be vented. Like the boiler vent flue, the fireplace flues once extended over the old alleyway between the two buildings. 199 states that it did not previously demand that the new wall built by 197 and these fireplace flues be removed because they were within a partially enclosed section of the alleyway and not easily seen. It is unrefuted that none of these flues (boiler or fireplace) service any of the systems located inside or benefitting 199 or its occupants. Presently, the only visible parts of these boiler and fireplace flues are on the top floor of 199. 199 is attempting to secure a permanent certificate of occupancy ("CO") for its newly remodeled building and claims these flues are an impediment to it doing so. 199 also states it has plans to build on the top floor of its building and cannot have the flues in that area. Finally, defendant states that the flues pose a health, fire, and safety hazard and they must be removed for that reason as well.

Previously, defendant was instructed by the court to notify the Department of Buildings ("DOB") about the fireplace flues (see prior order). It was unclear whether 199 had shown the fireplace flues in diagrams submitted to DOB. DOB has now conducted an investigation in connection with 199's application for a CO and issued what is known as a "residential occupancy checklist." This checklist identifies "objections" that must be addressed before DOB will issue a permanent CO. One of the notations on that checklist is as follows:

> Exclude/separate or disconnect boiler smoke pipe 197 E. 76th St. (adj bldg) from 199 E. 76th St. Bldg chimney.

In a reference area to the left of this notation appears the objection code "IM" which stands for "improperly completed." Despite that notation, DOB did not issue 199 a

violation nor are the fireplace flues identified as an objection to 199 obtaining a CO.

199 has now moved for summary judgment on its counterclaims seeking a permanent injunction. Defendant contends that 197 must remove the wall it built in 2003, the fireplace flues that were anchored to that wall and the boiler vent flue. 199 also seeks an order requiring 197 to detach its boiler vent flue from 199's chimney. The metal flues used to extend into the alleyway (approximately 10 inches) and now extend into the newly expanded building at 199.

Defendant's architect ("Chopra") has provided a sworn affidavit. He states that the illegal fireplace flues present a danger to the health, safety and welfare of the occupants of both buildings because any damage to the fireplace flues could cause smoke to back up into both buildings. Chopra also opines that one boiler flue cannot safely vent two boilers and that it is a violation of the building code to have 197's boiler vented through 199's chimney. 199 maintains that the 1975 agreement was an easement and once it expired, 197 no longer had any right to vent its boiler through 199's property and should have made arrangements to separately vent its boiler.

199 contends that 197 can – and must – vent its wood-burning fireplaces through its own building but if plaintiff cannot do so, 197 must simply keep them as decorative, non-functioning fireplaces. Without elaborating, 199 contends that 197 can also vent its boiler in other ways and that it does not have to use 199's chimney although 197 does not have its own chimney.

In opposition to defendant's motion for summary judgment, plaintiff maintains that it has not had discovery, though demanded, and that it would like to depose 199's president, Mr. Bari. 197 does not, however, explain what information Mr. Bari has to

offer or what facts are missing that would allow it to further develop its defenses against 199's counterclaims.

Alternatively, 197 argues that it cannot remove the fireplace flues now that they have been encapsulated by defendant and that the current situation is of defendant's own making. 197's engineer ("Simoniello") states that 197 is encumbered on all sides, except the access point to the public sidewalk. Simoniello states that he inspected the property and could not see anyplace where a chimney could have existed on 197 property, except for the old alleyway, that no longer exists. He opines that the chimney adequately serviced both buildings' boilers for decades and that NYC Mechanical Code specifically allows for multiple connections to a common vent.

As for the fireplace flues, Simoniello states they are not attached to the chimney or vented through that structure, as incorrectly stated by 197, but are attached to the outer wall of 197's building. Simoniello states that the encapsulated flues are not dangerous and the fireplaces cannot be vented any other way, but even if they could, such venting would require partial demolition of the units that have fireplaces. He states further that the "objections" by DOB are not violations and DOB has not issued 199 any violation for having the chimney hooked up the way it presently is to 197's boiler. Simoniello opines that the DOB's objection could be easily resolved if the defendant would agree to work with plaintiff to resolve it. Simoniello states that so long as the flues are properly connected and encapsulated by a fire rated wall, they are not hazardous. He states that 199 applied for a CO based upon 199's architect's certification that the configuration of the building is safe and, therefore, there is no present hazard in how the flues are encased.

Applicable Law

A movant seeking summary judgment in its favor must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. " Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). The evidentiary proof tendered, however, must be in admissible form. Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 (1979). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

Discussion

Although plaintiff contends defendant's motion should be denied because discovery is incomplete, plaintiff has not come forward with anything to suggest that discovery may lead to relevant evidence that will allow it to better defend against this motion (Bailey v. New York City Tr. Auth., 270 A.D.2d 156 [1st Dept 2000]). A "mere hope that further disclosure might uncover evidence likely to help [plaintiffs'] case" provides no basis for postponing summary judgment (Maysek & Moran v. Warburg & Co., 284 A.D.2d 203, 204 [1st Dept 2001]). Therefore, the motion for summary judgment is not premature and 197 has demonstrated it has the essential facts needed to oppose 199's motion for summary judgment on its counterclaims.

The parties' 1975 agreement set forth the parties' rights and obligations with respect to the apportionment of heating and heat related costs for their two buildings. Once the agreement expired in 1980, 199 was no longer obligated to share in the heating or maintenance costs of the boiler that existed (and still exists) in the cellar of

197. Clearly the 1975 agreement was for the benefit of 199, since it did not have its own boiler at the time. Thus issue is now whether 197 has to reconfigure how it vents its boiler or, put differently, whether 197 has some continued right to use the chimney that emanates from 199's cellar and transitions into the metal chimney flue vent attached to the wall of 197's building.

197 has raised the defense of adverse possession and implied easement or easement by necessity. A party claiming the defense of adverse possession must show by clear and convincing evidence that the possession was hostile, under a claim of right, actual, open and notorious, exclusive of any other right and continuous for a period of 10 (Longshore v. Hoel Pond Landing, 284 A.D.2d 815 [3rd Dept 2001] lv. den. 97 N.Y.2d 603 [2001]). 199 is, however, the moving party seeking summary judgment in its favor on its counterclaims. Thus, if 199 does not meet its burden, or 197 raises issues of fact regarding whether 197 has adversely possessed the area in dispute, 199's motion must be denied.

The location of the boiler vent flue alongside the easterly wall of 197 began with the permission of the owner of 199, since both buildings were jointly owned at that time. After 199 was sold, 199 allowed the chimney flue to remain in its alley space, despite the expiration of the 1975 agreement calling for shared heating expenses. The 1975 agreement did not address removal of the connections to 199's chimney or of the boiler vent flue from the location it was at the time of the 1975 agreement. Therefore, 199 has not proved it is entitled to summary judgment, as a matter of law, requiring the removal of that connection or the metal boiler flue vents.

Even, were the court persuaded that 199 has met its burden of proving the 1975

agreement was an easement for the metal work and connections involved, not just sharing of heating expenses, 197 has raised issues of fact that defeat the motion. Among those issues are whether 197's possession/use of the chimney and vent connection was hostile, under a claim of right, actual, open and notorious, exclusive of any other right and continuous for a period of 10 years. While 199 claims that it permitted 197 to keep the connections as they were after 1980, and therefore, 197's use was not "hostile" (see Chatsworth Realty 344 LLC v. Hudson Waterfront Co. A, LLC, 309 A.D.2d 567 [1st Dept 2003]), this presents a factual dispute that must be resolved before the court can properly apply the law. There is also the unresolved dispute of whether 197 acquired a prescriptive easement allowing the use of the chimney, etc. Like the defense of adverse possession, a prescriptive easement requires that such use be adverse and hostile (Wade v. Village of Whitehall, 17 A.D.3d 813 [3rd Dept 2005] lv den. 5 N.Y.3d 717 [2006]; Rasmussen v. Sgritta, 33 A.D.2d 843 [3rd Dept 1969]).

The dispute between the parties' experts also presents triable issues of fact. Whereas Chopra, defendant's expert, opines that 197 can and must ventilate its own boiler by removing the connections to defendant's chimney, stating that the present connections are dangerous, Simoniello disagrees. 197 has provided a section of the NYC Mechanical Code indicating that a connection can serve two or more "appliances," an apparent reference to boilers (NYC Mechanical Code Chapter 801 et seq) and the DOB did not issue any violation regarding the chimney connection. Simoniello has also raised the issue that 199's chimney has safely serviced both buildings for at least 60 years without any incident and that there is no reason presented by 199 that the connection can continue to be safely maintained.

Turning to the fireplace flues, it is unrefuted that these flues were installed when 197 renovated its building and either installed new fireplaces or reactivated old fireplaces that were not working before then. The installation of those flues was admittedly without 197's permission or consent. According to plaintiff, if the fireplaces are not vented, they cannot be used. Defendant has now, however, encapsulated the fireplace flues by building around them. In doing so, the fireplace flues are now virtually unreachable, except by demolishing a part of 197's building and possibly even 199's newly constructed building.

While arguing that encapsulation of the flues is dangerous, this is exactly what defendant did, thus contributing, in no small part, to the present situation. Furthermore, despite Chopra's opinion that encapsulation is dangerous, defendant's architect apparently certified that the work done at 199 was completed safely and DOB did not identify the fireplace flues as an objection to the CO or issue any kind of violation to either owner. Examining these circumstances, defendant has not proved its entitlement to summary judgment on its counterclaims, as a matter of law. There are significant issues of fact that must be resolved before the court can apply the law. Among those factual issues are whether the fireplace vent flues are safe as they presently are, whether the fireplaces at 197 can be vented a different way, and whether defendant will gain a substantial benefit by having these flues removed.

Where the removal or destruction of a building is the object of a permanent injunction, the court must exercise caution in granting such relief and will generally not do so unless there is a substantial benefit to be gained by the party seeking that relief (Sunrise Plaza Assoc., L.P. v. International Summit Equities Corp., 288 AD2d 300 [2nd

Dept 2001] lv den. 97 NY2d 612 [2002]; also Pennbus Realties LLC v. H Eighth Avenue Associates, LLC, 29 Misc.3d 1224[A] [Sup Ct., N.Y. Co. 2010]). Even assuming 199 is correct, and the encroachment into its property is approximately 10 inches, the relief sought – removal of the encroachments – may not be justified and could be compensable via money damages (i.e. the 3rd CC) (see Pennbus Realties LLC v. H Eighth Avenue Associates, LLC, supra). The issue of money damages is not addressed in 199's motion at all.

199, as the proponent of the motion for summary judgment, has not made a *prima facie* showing of entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case (Winegrad v New York Univ. Med. Ctr., 64 NY2d at 853). In any event, it is also well settled law that the court should draw all reasonable inferences in favor of the nonmoving party and 197 has not cross moved for summary judgment (Assaf v Ropog Cab Corp., 153 AD2d 520, 521 [1st Dept 1989]). Given these circumstances, 199's motion for summary judgment is denied.

Conclusion

It is hereby

Ordered that the motion by defendant/counterclaim plaintiff 1330 3rd Ave Corp. is denied for the reasons stated above; and it is further

Ordered that any remaining discovery shall be completed by March 9, 2012; and it is further

Ordered that the **note of issue is extended to March 23, 2012**; and it is further

Ordered that this case shall appear on the Part 10 calendar for **a status**

conference on March 22, 2012 at 9:30 a.m.; and it is further

Ordered that any relief requested but not expressly addressed by the court is denied; and it is further

Ordered that this constitutes the decision and order of the court.

Dated: New York, New York
January 4, 2012

So Ordered:

Hon. Judith J. Gische, JSC