45 Assoc. LLC v City of New York
2017 NY Slip Op 31922(U)
August 11, 2017
Supreme Court, Bronx County
Docket Number: 303221/2016
Judge: Norma Ruiz
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX – PART 22

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45 ASSOCIATES LLC, Index No. 303221/2016

Plaintiff,

- against - DECISION/ ORDER

THE CITY OF NEW YORK,

Defendants.

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Hon. Norma Ruiz

Defendant City of New York moves for an order dismissing plaintiff's complaint pursuant to CPLR §§ 3211 (a)(1) and 3211 (a)(7). After review of the motion, together with opposition submitted thereto, and upon due deliberation, the motion is **denied**.

FACTS AND THE PARTIES' CONTENTIONS

Plaintiff 45 Associates LLC owns a residential building on West 177th Street, Bronx, New York, identified as Block 2862, Lot 5. The adjacent lot is owned by defendant City of New York ("City"), and is presently occupied by a New York City Public School. Running between the two properties is a retaining wall. The wall is approximately seventy-five (75) feet long and ten (10) feet high. Sometime in 2014, the Department of Buildings issued a summons to plaintiff charging it with failure to maintain the wall and alleging the wall was in serious disrepair and on the verge of collapse. Plaintiff alleges the City is responsible for sharing in the cost of repairing the wall, particularly where parts of the damaged wall are on the City's property. The City never responded to plaintiff's demands. Plaintiff commenced this action seeking an order directing the City to repair and maintain its portion of the retaining wall.

Defendant City of New York moves to dismiss plaintiff's complaint pursuant to CPLR §§ 3211 (a) (1) and (7). The City contends the wall is entirely on plaintiff's property, and points to a

2008 permit application filed by plaintiff in order to make improvements to the property. The permit includes architectural drawings which the City alleges demonstrates conclusively that the wall is solely on plaintiff's property.

In response, plaintiff avers that the architectural drawings are not meant to be dispositive of where the boundary lines are drawn. Instead, a surveyor is the proper source of such information. Plaintiff submits a survey performed in January of 2017 that shows the retaining wall running along its property line and onto the property of the City. Further, on June 28, 2014, after a hearing was held, the Environmental Control Board ("the ECB") sustained the violation issued to plaintiff for the disrepair of the wall. In doing so, however, the Board found that plaintiff had "credibly established" that only a portion of the retaining wall was located on their property. The City responds that the January survey shows the wall is not shared, but is an encroachment. Further, the City indicates that the ECB's decision supports its position that the subject wall is not on City property, but extends onto another lot not owned by the City.

STANDARD OF REVIEW

When considering a motion to dismiss pursuant to CPLR 3211 (a) (7), "the court must accept the facts as alleged in the complaint as true and accord the plaintiff the benefit of every possible favorable inference, and must determine whether the facts as alleged fit within any cognizable legal theory" (Phillips v City of New York, 66 AD3d 170, 174, 884 NYS2d 369 [1st Dept 2009] [internal quotation marks omitted]; see also CPLR 3026).

"When documentary evidence is submitted by a defendant[,] the standard morphs from whether the plaintiff stated a cause of action to whether it has one" (Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc., 115 AD3d 128, 135 [1st Dept 2014] [hereinafter "Basis

Yield"][internal quotation marks omitted] [citing John R. Higgitt, CPLR 3211 [A] [7] and [A] [7] Dismissal Motions—Pitfalls and Pointers, 83 NY St BJ 32, 33 [2011], and John R. Higgitt, CPLR 3211 [A] [7]: Demurrer or Merits-Testing Device?, 73 Albany L Rev 99, 110 [2009]).

Pursuant to CPLR 3211 (a) (1), dismissal may be "granted only where the documentary evidence [tendered by defendant] utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]). Thus if the "defendant's evidence establishes that the plaintiff has no cause of action, i.e., that a well-pleaded cognizable claim is flatly rejected by the documentary evidence, dismissal would be appropriate" (Basis Yield Alpha Fund (Master), 115 AD3d at 135 [citations and internal parenthesis omitted]).

APPLICABLE NEW YORK CITY ADMINISTRATIVE CODES

NYC Administrative Code § 28-101.5 defines a retaining wall as a "wall designed to prevent the lateral displacement of soil or other materials." NYC Administrative Code § 28-305.1.1 governs "[s]tructures located on the lot line of adjacent properties and partially on both properties," and provides, in pertinent part:

> The owners of adjacent properties shall be responsible jointly for the proper maintenance and repair of retaining walls . . . that are located along the common lot line and on both their properties; and each such owner shall be responsible for one-half of the costs of maintaining and repairing such . . . retaining walls . . . or such portions thereof

In contrast, NYC Administrative Code § 28-305.1.2 governs "[s]tructures located entirely on one property" and provides, in pertinent part: "[w]here such retaining walls . . . are located entirely on one property, the owner of such property shall be wholly responsible for the proper maintenance and repair of the retaining wall."

DISCUSSION

Accepting the facts in plaintiff's complaint as true and construing all inferences in plaintiff's favor, the Court concludes that plaintiff has stated a valid cause of action (see Basis Yield, 115 AD3d at 135). There is no dispute that the wall is a "retaining wall" within the meaning of NYC Administrative Code § 28-101.5. Accordingly, if any portion of the damaged wall lies on the City's property, the two parties are jointly liable for the repair of same. However, if the damaged portion of the wall lies exclusively on plaintiff's property, plaintiff is solely responsible for its repair (compare NYC Administrative Code § 28-305.1.1 and NYC Administrative Code § 28-305.1.2). Defendant's documentary evidence submitted in support of its motion is refuted by plaintiff's submissions, and fails to conclusively establish a defense warranting dismissal (see Goshen, 98 NY2d at 326). The Court is not persuaded, after careful review of the architectural drawings defendant has submitted, that the retaining wall rests entirely on plaintiff's property. Similarly, defendant's contention that the ECB's decision supports its position is unpersuasive. The ECB's decision confirms that only a portion of the subject retaining wall rests on plaintiff's property, but it does not conclusively demonstrate, or even suggest, on which lot or lots the remainder of the wall rests. Discovery in this matter is warranted.

Accordingly, defendant's motion to dismiss is denied in its entirety.

This constitutes the decision and order of this Court.

Dated: August 11, 2017

E N T E R,

Norma Ruiz, J.S.C.