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| <b>Baptiste v 70A Cooper PH LLC</b>  |
| 2017 NY Slip Op 32416(U)   |
| November 22, 2017  |
| Supreme Court, Kings County  |
| Docket Number: 516901/2017   |
| Judge: Bernard J. Graham   |
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: Part 36**

Index No. 516901/2017

NATASHA BAPTISTE,

Plaintiff(s),

-against-

70A COOPER PH LLC and Z & J MANAGEMENT,  
LLC,

Defendant(s).

**DECISION**

Present:

**Hon. Judge Bernard J. Graham**  
Supreme Court Justice

**Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion:**  
Plaintiff's Order to Show Cause for Injunctive Relief and for an Access Order Pursuant to RPAPL sec. 881; Plaintiff's Motion for Contempt:

| Papers   | Numbered |
|--|----------|
| Plaintiff's Order to Show Cause and Affidavits Annexed.....      | 1-2      |
| Plaintiff's Notice of Motion (Contempt) and Affidavits Annexed.. | 3-4      |
| Answering Affidavits.....  | 5        |
| Replying Affidavits (Plaintiff's Reply)                          | 6        |
| Exhibits.....  |          |
| Other: _____   |          |

**Upon the foregoing cited papers, the Decision/Order on this application is as follows:**

***Decision:***

An order to show cause has been filed in this captioned matter on behalf of the plaintiff, Natasha Baptiste ("Ms. Baptiste").

Ms. Baptiste, by her attorneys, seeks an injunction, inter alia, against defendants 70A Cooper PH LLC ("Cooper") and Z & J Management LLC ("Z & J").

In addition, the plaintiff requests, as alternative relief, the issuance of an access order pursuant to RPAPL section 881 which would set forth terms to be imposed relative to any further construction work conducted by the defendant.

Opposition to the order to show cause was submitted on behalf of Cooper.

On or about September 18, 2017, a motion for contempt was filed by plaintiff's counsel, Martin P. Skolnick, Esq., alleging, inter alia, a violation of the stay which had been issued as part of the order to show cause dated September 5, 2017 (the "Order to Show Cause dated September 5, 2017") which had been signed by Hon. Peter Sweeney. Opposition to the motion for contempt was filed on behalf of defendant Cooper by Brian A. Kalman, Esq., on or about October 24, 2017.

The order to show cause was originally returnable on September 28, 2017. The return date was adjourned on consent to November 2, 2017. Argument was heard on November 2, 2017 before the undersigned. After initial argument was heard, a hearing was scheduled by the Court in light of the factual questions raised by the motion. A hearing was held by the Court on November 16, 2017 at 2:15 p.m. before the undersigned.

At the hearing, plaintiff called Anthony Marmo, a licensed civil engineer, and Peter Nance, a licensed architect, as experts. Defendant called Joel Schachter, a licensed engineer, and David Peraza, a professional engineer, as experts.

**Findings of Fact:**

As an initial matter, there was no evidence provided to support the plaintiff's contention raised in the plaintiff's contempt motion that defendant had violated the temporary restraining order by engaging in any construction or renovation after the issuance of the temporary restraining order. Accordingly, the motion for contempt is denied.

Secondly, the plaintiff has sought alternative relief against the defendant requesting "the agreement between the parties via a so ordered license agreement allowing the defendants access to the plaintiff's residence pursuant to New York Real Property Actions and Proceedings Law ("RPAPL") sec. 881, the terms of which should include such reasonable and customary terms as is ordinarily created by a license agreement of the nature being sought herein, i.e. ...". (See Order to Show Cause dated September 5, 2017).

Such alternative relief is not available as a matter of law. Section 881 of the RPAPL is premised upon a petition by an owner or lessee to gain access to make improvements or repairs to real property. There is no petition before the Court for access to the plaintiff's property and it would be a misuse of this Court's authority to order an access order when one has not been sought. Accordingly, at this time the relief requested for the issuance of an access order pursuant to RPAPL sec. 881 is denied.

**Injunctive Relief:**

Based on the credible testimony of plaintiff's witnesses, it was established that the foundation wall of plaintiff's property, known as 70 Cooper Street, Brooklyn, New York ("70 Cooper" or "subject property") was significantly damaged by the construction activity initiated by defendant Cooper and its contractor, Z&J, while working on the adjoining property known as 70A Cooper Street, Brooklyn, New York.

The damage to the 100 year old foundation wall was confirmed by defendants' expert, Joel Schachter, who admitted that the foundation wall was damaged due to defendant's construction. Furthermore, the evidence was absolutely clear that the construction activity initiated by Cooper was done without the knowledge or consent of Ms. Baptiste. In addition, after the construction by Cooper caused the wall to tear away from the foundation, the efforts of the defendants to restore the wall by building a cinder block wall with reinforcements was done without the consent or knowledge of Ms. Baptiste.

The testimony at the hearing given by Anthony Marmo explained that the plaintiff's heating system was rendered inoperable because the damage to the foundation wall resulted in damage to the base of the chimney, the chimney flu, and the chimney itself. The damage to the heating system was acknowledged by defendant's experts to have resulted from the construction activity initiated by defendants.

Defendant's experts (Mr. Schachter and Mr. Peraza) offered testimony as to the cinder block wall which was constructed by defendant, based on the design of Mr. Schachter. Both experts testified that the reconstructed wall is now stronger than the original rubble foundation wall. The Court did not permit any additional defense witnesses (over the objection of defendant's counsel) as such witnesses were produced solely to testify as to the cost of repair of the damage to plaintiff's property. The Court ruled that such testimony was not relevant to the scope of the hearing.

**Conclusion:**

The plaintiff, through her experts, has established that significant and immediate harm has been caused to her property due to the construction activity engaged in by the defendant Cooper and the defendant contractor, Z & J. The evidence at the hearing established that no prior consent was given by Ms. Baptiste and no notice of the construction was given to her. In addition, there was non-compliance by the defendant with the requirements of the Buildings Department of the City of New York, in engaging in construction which would affect the foundation of the adjoining property. The

consequential harm caused by the defendant includes destruction of the original foundation wall, making the plaintiff's heating system inoperable and causing water infiltration into the plaintiff's property.

Under the circumstances presented in this proceeding, it is fair to say that defendants have proceeded in a "cavalier attitude and disregard of plaintiff's rights" (see *McMullan v HRH Construction, LLC*, 38 AD3d 206 [1<sup>st</sup> Dept. 2007]). Defendants have failed to offer any explanation for their engaging in construction work that directly impacted and affected the subject property without the consent or authorization of Ms. Baptiste. The evidence presented confirms that defendants' actions are the proximate cause of plaintiff's property damage and that it is highly likely that plaintiff will prevail at trial. It is also apparent to this Court that an injunction would be necessary to protect the plaintiff's property and preserve the status quo. Accordingly, a preliminary injunction is warranted under these circumstances. (See *Gellman v Seawane Golf & Country Club, Inc.*, 24 AD 3d 415 [2d Dept. 2005]; *B & R Luncheonette Inc. v Fairmont Theatre Corp.*, 278 AD 133 [1<sup>st</sup> Dept. 1951]).

The plaintiff is granted a preliminary injunction by this Court against the defendants and their agents, staying all construction, renovation or repairs at 70A Cooper Street, Brooklyn, New York, pending further order of this Court.

The Court recognizes that the underlying action is pending and the plaintiff shall be entitled to move forward for compensation for any damages to the subject property caused by the defendants. However, the testimony at trial showed that the subject property does not have an operating heating system due to the chimney damage and that additional repairs will be needed to the foundation wall and to prevent water infiltration to the subject property. Given the exigent circumstances, and further recognizing that the damages incurred to the subject property were done solely by the acts of the defendants, it is additionally ordered as follows:

1. The court directs that the defendant, within ten (10) days of entry of this order, pay for the repair of the chimney and the flu and for the work that is necessary to make the heating system operational and complete the restoration of the foundation wall. The work shall be performed by a licensed contractor acceptable to the plaintiff.
2. Within thirty days, defendant shall pay for the cost and expense required to repair the condition causing water infiltration to the plaintiff's property. The work shall be performed by a licensed contractor acceptable to the plaintiff.
3. In the event that defendant does not pay for the repairs set forth above, the Court

shall issue a judgment against the defendant for the work set forth above upon plaintiff's counsel furnishing the Court with a written estimate.

The Court does not require the plaintiff to post a bond in conjunction with granting the motion for a preliminary injunction. The actions of the defendant in disturbing and damaging plaintiff's property was caused solely by the defendants without any recognizable authorization or excuse. To impose the cost of a bond upon the innocent plaintiff in this matter would be unfair and contrary to the equities in this case.

The relief granted in this order is not a limitation on such other and further relief which may be proven at trial of the underlying action.


That portion of the Order To Show Cause of September 5, 2017 seeking the issuance of an access order is denied

As set forth above, the motion by plaintiff for a judgment of contempt against the defendants is denied.

This shall constitute the decision and order of this Court.

Dated: November 22, 2017

ENTER:

  
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HON. BERNARD J. GRAHAM