

<b>Canfield v 290 Powers Group LLC</b>
2018 NY Slip Op 32953(U)
November 20, 2018
Supreme Court, Kings County
Docket Number: 505797/18
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8  
-----x

LEWIS CANFIELD,  
Plaintiff,

Decision and order

- against -

Index No. 505797/18  
*MS # 283*

290 POWERS GROUP LLC & SHAI BIRENZWEIG,  
Defendants,  
-----x

November 20, 2018

PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking leave to file a late answer and to cancel the Notice of Pendency filed by the defendants. The defendants have cross-moved seeking to amend the complaint and to add additional parties. The motions have been substantively opposed respectively as will be noted. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in a prior decision, the plaintiff is the owner of property located at 288 Powers Street in Kings County. The defendants are developers and builders of a condominium located next door at 290 Powers Street. On April 19, 2016 the parties entered into an agreement wherein the defendant was granted access to the plaintiff's property to extend the plaintiff's chimney and to protect it during construction. A dispute arose concerning the precise reach of the agreement and in the prior

order the court denied the plaintiff's request seeking an injunction. The defendant has now moved seeking to serve an answer. That portion of the motion is not opposed and is granted. Likewise, the plaintiff has cross-moved seeking to add parties and that request is likewise granted.

Concerning the defendant's motion seeking to cancel the Notice of Pendency the defendant argues that essentially the plaintiff does not present any allegation it has any claim of title to the defendant's property (see, CPLR §6501). The defendant counters that the agreement created an affirmative covenant that runs with the land and will be reflected upon subsequent condominium owners and hence affects the land and consequently the Notice of Pendency is proper.

An affirmative covenant is an agreement whereby the covenantor, the defendant herein, agrees that something shall be done. It is well settled a covenant to do an affirmative act, as distinguished from a covenant merely negative in effect, does not run with the land (Guaranty Trust Co. of N.Y. v. New York & Queens County Ry. Co., 253 NY 190, 170 NE 887 [1930]). However, there are exceptions to this general rule. Thus, where it can be demonstrated that (1) the original covenantor and covenantee intended such a result (2) there has been a continuous succession of conveyances between the original covenantor and

the party now sought to be burdened and (3) the covenant touches or concerns the land to a substantial degree, then the affirmative covenant will run with the land (Nicholson v. 300 Broadway Realty Corp., 7 NY2d 240, 196 NYS2d 945 [1959]).

It is true that the 'Limited Non-Exclusive License and Agreement' states that the developer defendant "will perform all work and protection associated with extending Adjacent Owner's chimney...and will maintain the chimney extension in perpetuity and shall require that any subsequent owner of the Project Site comply with this requirement" (id at §3(a)). However, that agreement does not affect the defendant's land at all. The agreement only affects the plaintiff's land. Thus, this covenant does not "touch or concern the land to a substantial degree" (id). In fact, it does not touch the land of the defendant in any manner. Rather, this agreement imposes obligations upon the developer and any subsequent owners, however, those are mere monetary obligations and such obligations are not affirmative covenants (see, Village of Philadelphia v. FortisUS Energy Corp., 48 AD3d 1193, 851 NYS2d 780 [4<sup>th</sup> Dept., 2008]).

Nor does New York City Administrative Code §27-860 demand a contrary result. That provision imposes obligations concerning the protection of chimneys of neighboring property.

Again, while the obligation might exist, it surely cannot be deemed an affirmative covenant.

Therefore, based on the foregoing, the motion seeking to cancel the Notice of Pendency is granted.

The motion seeking sanction is denied at this time.

So ordered.

ENTER:



DATED: November 20, 2018  
Brooklyn N.Y.

Hon. Leon Ruchelsman  
JSC

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