

Tapper v 116 India St. Villa LLC

2018 NY Slip Op 33016(U)

November 7, 2018

Supreme Court, Kings County

Docket Number: 514860/2018

Judge: Carolyn E. Wade

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At Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Brooklyn, New York on the *1st* day of November 2018

**PRESENT:
HON. CAROLYN E. WADE,**

Justice

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MARIUS TAPPER and TERRI ABPLANALP TAPPER,

Plaintiffs,

Index No. 514860/2018

-against-

DECISION and ORDER

116 INDIA STREET VILLA LLC, M REMODELING CORP., RAFI MONOR a/k/a RAFAEL MANOR, DAVID SAPAN, and HADAS HAKMON,

Defendants.
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Recitation, as required by CPLR §2219(a), of the papers considered in the review of Plaintiffs' Order to Show Cause:

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed.....	<u>1</u>
Cross-Motion and Affidavits/Affirmations.....	_____
Answering Affidavits/Affirmations.....	<u>2</u>
Reply Affidavits/Affirmations.....	_____
Memorandum of Law.....	_____

Upon the foregoing papers and after oral argument, plaintiffs Marius Tapper and Terri Abplanalp Tapper (“Plaintiffs”) move, by order to show cause, for an Order granting the following reliefs: 1) Enjoining defendants 116 India Street Villa LLC, M Remodeling Corp., Rafi Manor a/k/a Rafael Manor, David Sapan, and Hadas Hakmon (collectively, “Defendants”) from conducting any excavation or construction activities at 116 India Street, Brooklyn, New York 11222 (the “Construction Site”), until such time that adequate protections are installed by Defendants to safeguard a building owned by Plaintiffs located at 118 India Street, Brooklyn, New York 11222 (“Plaintiffs’ Building”); 2) temporarily, preliminarily and/or permanently enjoining and restraining Defendants from taking any further action or performing any excavation or construction so as to endanger Plaintiffs’ Building; and 3) other and further relief as this Court may deem just and proper, including an award of attorney’s fees, costs and disbursements.

The underlying action was commenced by Plaintiffs for an emergency injunctive relief in connection with Defendants’ construction next to Plaintiffs’ Building. In their Verified Complaint, Plaintiffs claimed that Defendants’ excavation at the Construction Site and violation of the Administrative Code caused structural damage to Plaintiffs’ Building. Plaintiff alleged that Defendants’ conduct has caused Plaintiffs’ Building to shift, settle, lean and tilt towards Defendants’ Construction Site. Plaintiff further averred that Defendants’ construction has undermined the Building’s structural integrity, jeopardizing the safety and security of the Building’s occupants and the public at large.

On July 31, 2018, the instant order to show cause for preliminary injunction was signed by Hon. Reginald A. Boddie, J.S.C. It contains a stay requiring Defendants, pending the hearing of this order to show cause, to cease all construction activities and/or excavation work at Construction Site,

until Plaintiff's Building is shored-up, braced and stabilized to prevent further settlement, displacement and damage; and enjoining Defendants from taking any further action to endanger Plaintiff's Building and/or causing further cracks in Plaintiff's Building (the "TRO"). By Order dated August 10, 2018, this Court adjourned this order to show cause to September 28, 2018 and extended the TRO to the same date, "[restraining] any and all work at [Construction Site]". On September 28, 2018, after oral argument, this Court reserved decision of this order to show cause and marked it submitted.

In support of the instant application, Plaintiff Marius Tapper contends that Defendants' backhoe caused damage to Plaintiffs' Building's blue stone and concrete sidewalk in August 2015, and that Defendants' demolition of the existing building caused water infiltration along the western foundation of Plaintiffs' Building in April 2016. Photos were annexed to Tapper's affirmation to illustrate the alleged damage to Plaintiffs' Building. Tapper submits a limited license agreement, dated August 18, 2016, entered into by Plaintiffs, defendants 116 India Street Villa LLC and M Remodeling Corp. The license agreement provides, *inter alia*, that M Remodeling Corp "agrees to take [] necessary safety precautions to protect [Plaintiffs' Building] while performing such work and throughout the [excavation and construction of a building at 116 India Street], including any necessary bracing and/or shoring of the [Plaintiffs' Building] to ensure lateral support" (Tapper aff, exhibit 8). Tapper avers that Defendants never performed any of the work outlined in the license agreement and that no lateral support was provided to Plaintiffs' Building, as required by the license agreement. Tapper further submits that, on August 26, 2016, Plaintiffs' Building shifted and the front door became out-of-plumb and inoperable due to the excavation at the Construction Site. Tapper further states that, after the license agreement expired on December 19, 2016, Defendants

continued to occupy and trespass on their property for an additional nineteen months after the expiration of the license agreement.

To buttress their averments, Plaintiffs submits an affirmation by Wiktor Wasilewski, P.E., a licensed structural engineer retained by Plaintiffs, who states that he inspected Plaintiffs' Building in October 2017, and determined that Plaintiffs' Building was tilting towards the Construction Site. Wasilewski also noted multiple cracks and displacements throughout Plaintiffs' Building. Wasilewski avers that the basement and foundation of Plaintiffs' Building sustained significant structural damage along the western wall adjoining the Construction Site. Photos were annexed to Wasilewski's affirmation to illustrate the alleged damage to Plaintiffs' Building. He opined that, based on his inspection of the Plaintiffs' Building and the excavation work at the Construction Site, the damage to the Plaintiffs' Building was directly and proximately caused by Defendants' excavation work at the Construction Site. Lastly, Wasilewski claims that Plaintiffs' Building requires emergency repairs and support, and that if the conditions in Plaintiffs' Building continue to exist, the building is in danger of potential collapse and devastation to life and limb of the public around the area of the building.

Plaintiffs also submitted a supplement affidavit of Marius Tapper, dated August 9, 2018, wherein Tapper avers that he observed construction workers engaging in construction work at Construction Site on August 7, 2018, in violation of the TRO. Tapper further contends that his brother Joe Tapper was assaulted by Defendants' construction workers when he was documenting the conduct of the workers. Tapper avers that Defendants' construction workers were arrested for assault. Tapper also submits that Defendants continued to work at the Construction Site on August 8, 2018, despite the TRO.

In opposition, Defendants allege that the construction at the Construction Site was completed months before the commencement of this lawsuit. Defendants claim that, at the time this action was commenced, the only unfinished works were the external painting of the stucco and interior finishing details, which would not pose a risk to Plaintiffs' Building. Two pictures were annexed to Defendant Rafael Manor's affidavit, showing that the building construction has been completed. Furthermore, Defendants claim that they have no objection to an Order enjoining Defendants from any excavation or other construction activities that would pose a risk to Plaintiffs' Building's structural integrity, but argue that a preliminary injunction enjoining Defendants from completing the interior construction would be overly broad.

On a motion for a preliminary injunction, the movant must demonstrate (1) a likelihood of success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) a balancing of the equities in the movant's favor (*see Doe v Axelrod*, 73 NY2d 748 [1988]; *Automated Waste Disposal, Inc. v Mid-Hudson Waste, Inc.*, 50 AD3d 1072, 1073 [2d Dept 2008]; *Petervary v Bubnis*, 30 AD3d 498, 498 [2d Dept 2006]). "A party seeking the drastic remedy of a preliminary injunction must establish a clear right to that relief under the law and the undisputed facts" (*Omakaze Sushi Rest., Inc. v Ngan Kam Lee*, 57 AD3d 497 [2d Dept 2008]; *see Miller v Price*, 267 AD2d 363, 364 [2d Dept 1999]). The purpose of a preliminary injunction is to maintain the status quo, not to determine the ultimate rights of the parties (*see Moody v Filipowski*, 146 AD2d 675, 678 [2d Dept 1989]; *35 New York City Police Officers v City of New York*, 34 AD3d 392, 394 [1st Dept 2006]).

Here, in view of the affidavits by Marius Tapper and Wiktor Wasilewski, P.E., and the exhibits annexed thereto, this Court finds that Plaintiffs have sufficiently demonstrated entitlement to a preliminary injunctive relief. Most notably, insofar as relevant to the immediate relief sought by

Plaintiffs, Defendants expressly state that they do not object to this Court issuing an Order enjoining them from conducting any excavation or other construction activities that would pose a risk to Plaintiffs' Building's structural integrity. Accordingly, it is

ORDERED that plaintiffs MARIUS TAPPER and TERRI ABOKABOKA TAPPER's order to show cause is granted to the extent that 116 INDIA STREET VILLA LLC, M REMODELING CORP., RAFI MANOR a/k/a RAFAEL MANOR, DAVID SAPAN, and HADAS HAKMON are preliminarily enjoined from conducting any excavation or other construction activities that may pose risk to the structural integrity of the building located at 118 India Street, Brooklyn, New York 11222, until the final disposition of the underlying action; and it is further

ORDERED that the undertaking is fixed, in the sum of \$2,500.00, to be filed with the Court within thirty (30) days of the date of this Order; and it is further

ORDERED that Plaintiffs are directed to serve a copy of this Order with Notice of Entry on all named parties within twenty (20) days of entry.

This constitutes the Decision/Order of the court.



HON. CAROLYN E. WADE
ACTING SUPREME COURT JUSTICE

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