SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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MOVEMENT FOR A NEW COMMUNITY INC.,

Plaintiff,

- v -

174-176 1ST AVENUE OWNER LLC, ELI LIEDMAN, DREW POPKIN,

Defendants.

----------X

INDEX NO. 156214/2019

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9-83 were read on this motion for injunctive relief.

By order to show cause, plaintiff moves for an order enjoining defendants and their contractors, agents, employees, and all others acting in concert with them or on their behalf from performing or causing the performance of construction work at 174-176 First Avenue, New York, New York (site), within 20 feet of the adjacent property (plaintiff's property) until a mutually agreeable access agreement can be entered into with plaintiff or a court order is obtained, which would:

(1) remove overhead protections previously installed at plaintiff's property at 173 First Avenue contrary to the NYC Building Code (Code) and other applicable laws prior to an access agreement being executed, and cure the stop work order issued by the NYC Department of Buildings (DOB), and replace the protections with mutually agreeable Code-complaint protections to be removed the earlier of a) six months from the effective date of the access agreement or the court's order, or b) the completion of the work at the site requiring such protections;

(2) provide, and continue to provide, proper drawings and documentation (including proper special inspection reports) showing the work LLC performed, and will perform, on the lotline wall shared by plaintiff's property and the site (party wall) and the new concrete masonry unit party wall extension LLC constructed;

(3) provide mutually agreeable plans to repair the damages LLC caused to plaintiff's property during its construction activities and work at the site and on plaintiff's property to date;

(4) provide, and continue to provide, plaintiff with proper special inspection reports for LLC's work at the party wall and extension; or, in the alternative, converting this action to a Real Property Actions and Proceedings Law (RPAPL) § 881 proceeding and granting a license to plaintiff to perform the following work on plaintiff's property and at the site at LLC's sole cost and expense:

(a) removal of the non-compliant protections;

(b) installation of the protections which should cure the stop work orders issued by DOB and removal of such protections the earlier of: (i) six months from the effective date of the access agreement or the court's order, or (ii) the completion of work at the site that requires such protections;

(c) inspections of the party wall and extension from the site to ascertain the work performed;

(d) waterproofing of the party wall and extension; and

(e) repairs to the damages LLC caused to plaintiff's property and permitting access to the extent such repairs require (i) removal of equipment and/or materials belonging to LLC, or (ii) access to the site;

(5) awarding plaintiff the design professional fees, legal fees, and other costs incurred to date in

connection with the access previously sought and taken by LLC, including but not limited to reviewing iterations of deficient plans and access agreements, responding to and seeking cures of the damages caused by the work at the site and plaintiff's property, and opposing LLC's prior RPAPL § 881 petition dated April 15, 2019 as a result of LLC's refusal to provide proper plans and a schedule for the work in compliance with RPAPL § 881 and the requirements of the Code, applicable laws, and industry standards;

(6) awarding plaintiff a license fee for the duration of the non-compliant protections, the protections and repairs to the damages at its property "upon such terms as justice requires" under RPAPL § 881;

(7) sanctioning LLC and/or its counsel pursuant to 22 NYCRR § 130-1.1 for filing a petition to compel court-ordered access onto plaintiff's property knowing it did not fulfill its obligations to plaintiff under applicable laws and intentionally forcing plaintiff to incur the costs of opposing the petition and appearing in court knowing at least 11 days prior to oral argument of the petition on May 20, 2019 and five days before the day on which plaintiff was required to file opposition papers, that it was withdrawing the petition, as its counsel conceded to the court at the time oral argument was scheduled to commence;

(8) requiring LLC to post an undertaking and/or to escrow monies with the court as a means of enforcing LLC's compliance with its obligations to plaintiff under this order; and

(9) granting plaintiff such other and further relief as this court deems just and proper and as justice requires.

I. PROCEDURAL BACKGROUND

By complaint efiled on June 24, 2019, plaintiff advances causes of action against LLC for an injunction, negligence, gross negligence, trespass, and nuisance. (NYSCEF 11). On July 1,

2019, another justice of this court signed plaintiff's order to show cause. (NYSCEF 56). On September 11, 2019, following adjournments granted at the parties' requests (NYSCEF 60-63), I conferenced the case and directed that the parties try to resolve the issue of how LLC may safely remove the protections. (NYSCEF 84).

By letters dated October 9, 2019, the parties advised that no agreement had been reached on how to remove the protections. Rather, several issues were raised. (NYSCEF 87, 88). By emailed letter briefs dated October 21, 2019, the parties advanced their respective positions on the issues raised in their October 9 letters, and by email dated October 31, 2019, I advised the parties that as plaintiff had cited "no authority for the proposition that an inspection held after the work at issue has been completed must be covered by insurance and an indemnity agreement," and that as the action had not been brought pursuant to RPAPL § 881, the cases cited by plaintiff were "inapposite." Shortly thereafter, LLC advised by email that it had provided plaintiff with certificates of insurance and that nothing else had been resolved on plaintiff's motion.

II. CONTENTIONS

A. Plaintiff (NYSCEF 10-54)

On or about June 1, 2017, LLC advised plaintiff that it was in the process of developing the above-referenced property, which work could affect plaintiff's property. The parties discussed the work and LLC's access to plaintiff's property in 2017 and 2018, and in August 2018, plaintiff advised LLC that a "proper review" of the plans and an "access agreement" was needed. Although no access agreement had been executed, plaintiff permitted LLC access in November 2018 to install protections.

As LLC had built a two-by-four wooden platform that did not comply with Code §§ 3309.2 and 3309, water drainage on the roof was obstructed, thereby causing leaks,

water-staining and the peeling of joints. Plywood strips that LLC had nailed to the roof membrane and flashing produced holes that may have caused leaks.

On December 9, 2018, LLC advised plaintiff that the DOB had mandated its installation of the overhead protection in plaintiff's rear yard. The same day, plaintiff expressed concern to LLC about the construction of a parapet and party wall extension. Discussions between the parties concerning the noncompliant protections and the repair of damages caused by LLC ensued from February to April 2019 (NYSCEF 14-16), during which LLC forwarded to plaintiff a revised but Code-deficient site safety plan relating to plaintiff's rear yard, staircase, second-floor roof, and skylight. On March 11, 2019, plaintiff again sought from LLC Code-required protections in the rear yard and special inspection reports for the work on the party wall and party wall extension. (NYSCEF 19).

On March 12, 2019, the DOB issued a partial stop work order based on LLC's failure to provide adequate overhead protection (NYSCEF 12).

On March 15, 2019, plaintiff provided LLC with comments from its design expert relating to the rear yard shed. In response, LLC threatened to file a RPAPL § 881 to compel access. On March 20, 2019, plaintiff produced for LLC an access agreement (NYSCEF 21) and again asked that details about the rear yard shed be included in the revised site safety plan. Plaintiff's expert fruitlessly contacted LLC's expert about the issue (NYSCEF 20).

On April 18, 2019, LLC sent plaintiff a revised access agreement which did not include any obligation to provide it with the requested plans and details, to remove the noncompliant protections or violations, and to pay plaintiff legal and design fees incurred relating to access and LLC's work. (NYSCEF 17). On April 30, 2019, plaintiff again fruitlessly asked LLC for a revised site safety plan, and the next day, LLC built scaffolding and performed other

construction work within 20 feet of plaintiff's property in violation of the partial stop work order. It also damaged a structure around plaintiff's front door. (NYSCEF 28).

By special inspection report dated May 15, 2019, LLC stated that a special inspection of the party wall is not required as the Code requires inspections for buildings higher than three stories. (NYSCEF 29).

On May 20, 2019, after another justice of this court had issued an order to show cause by which LLC commenced an RPAPL § 881 petition against plaintiff (NYSCEF 24), LLC withdrew the application at oral argument on the motion, having determined, as early as May 9, 2019, that it no longer needed access to plaintiff's property. The justice denied plaintiff's request for costs and expenses in connection with the motion. (NYSCEF 32).

Notwithstanding LLC's representation that it no longer required access to plaintiff's property, on May 29, 2019, its contractors trespassed onto it while removing the overhead protections in front of both properties, tying caution tape on plaintiff's front gate, and leaving components of the sidewalk shed on plaintiff's property. (NYSCEF 51).

On June 4, 2019, in response to a complaint concerning the possibility of construction debris falling to the sidewalk at the site, DOB issued a second partial stop work order prohibiting work on the site's exterior. (NYSCEF 12). LLC trespassed onto plaintiff's property by continuing work on the site including using a crane to hoist building materials to the roof. (NYSCEF 13, 51).

Plaintiff maintains its entitlement to a preliminary injunction based on LLC's failure to protect its property by continuing its work in violation of two partial stop work orders which it argues demonstrates its likelihood to succeed on the merits and its failure to comply with Code §§ 3309.1, 3309.1.1, 3309.1.2, 3309.8, and 3309.10 relating to protecting an adjoining property,

notifying the adjoining property owner of the work and its duration and the details of inspections, maintaining and providing equipment or temporary construction to safeguard it and the public and properties, and retaining a registered design professional to investigate the stability and condition of the party wall or take necessary steps to protect the wall and structure or properly perform special inspections for masonry work that appears to affect the party wall. It also contends that there is no evidence that LLC properly investigated the stability and condition of the party wall and extension, and that LLC's May 15 report about masonry work does not comply with Code § 1704.5.3, taking issue with LLC's contention that it need not comply with that section of the Code, whereas LLC had stated in its Alteration Type I filing that the building is four stories high. (NYSCEF 54).

In arguing that it demonstrates that it will be irreparably harmed absent injunctive relief, plaintiff asserts that it has shown clearly and convincingly that it has incurred damage due to LLC's failures, the most egregious being the "makeshift" overhead protections installed by LLC as observed by the DOB in its partial stop work order. (*Id.*).

Plaintiff relies on an affidavit dated June 24, 2019, whereby its expert states that the overhead protections installed by LLC in plaintiff's rear yard violate Code § 3309 in that they consist of a "makeshift" scaffold system with inadequate connections for posts and members. The system, he contends, should be replaced with "an MEA-listed sidewalk shed, designed and detailed by a licensed design professional and filed with the DOB." Moreover, the roof-top plywood sheeting and foam insulation are not fire-retardant, in violation of Code § 3309.10. Two-inch thick fire-retardant planks are appropriate.

The expert observes that the overhead protections have damaged plaintiff's property by obstructing drainage on the lower roof and skylights and thereby causing leaks on plaintiff's

property and possibly causing leaks behind walls between the site and plaintiff's property and water stains on the gypsum wallboard next to the skylights and joint-peeling. By nailing plywood strips into the roof membrane, the expert opines, LLC created a series of holes. He conveys the need that defendants be compelled to remove and replace the code-violative protections and to repair the damage they caused to plaintiff's property and inspect the damage in order to plan to repair it and return it to the condition it was in before the project.

In addition, the expert opines that defendant's site safety plan (SSP) is incomplete for its lack of details about how the replacement rear yard protection will be installed or how it will be extended over the second-story terrace area. His numerous requests that those details be included in the SSP were inexplicably refused by defendants. Defendants are alleged to have also built a concrete wall on the party wall extension outside the DOB-approved plans and without providing required special inspection reports. Moreover, defendants did not completely waterproof the party wall extension on both sides nor did they provide documentation on the work related thereto, in violation of Code § 1704.5.3. He references LLC's alteration type I application for the project and photographs of the concrete wall which reflect that the building is four stories, not three as defendants claim, and thus, he maintains that defendants must comply with Code § 1704.5.3. (NYSCEF 52).

According to plaintiff, as LLC faces no "meaningful injury" from being enjoined as requested, the balance of equities is in plaintiff's favor. (NYSCEF 54).

In the alternative, plaintiff asks that this action be converted into a proceeding pursuant to RPAPL § 881, given LLC's refusal to comply with the Code. It otherwise seeks legal and professional fees incurred, in addition to sanctions related to and fees incurred in the prior proceeding. (*Id.*).

B. Defendants (NYSCEF 64-82)

According to defendant Liedman, who helped facilitate the project, he had reached out to plaintiff on LLC's behalf to discuss the project and access to plaintiff's property. He specifically explained the need for LLC to install protections pursuant to the Code, and in or around June or July 2018, he and plaintiff orally agreed that LLC would install, maintain, and remove all roof and overhead protections. The protections were installed in or around July 2018. (NYSCEF 73).

In February 2019, Liedman learned that plaintiff had also sought to negotiate an access agreement. Due to plaintiff's unreasonable demands, LLC commenced the prior special RPAPL § 881 proceeding, but then, having learned that the protections were no longer required as the exterior work was complete, LLC withdrew the petition. (*Id.*).

In denying that defendants had created a safety issue by failing to provide plaintiff with a copy of special inspection reports issued in connection with the party wall, Liedman relies on a technical report and statement of responsibility prepared by a special inspector engaged by LLC to review and inspect the masonry work. The report and statement reflect that a special inspection of the masonry was completed on May 2, 2019 (NYSCEF 78), that cast-in-place concrete had been inspected on May 15, 2019 (NYSCEF 79), and that the special inspector certified that all masonry work performed "substantially conforms to approved construction documents and has been performed in accordance with applicable provisions of the [Codes] and other designated rules and regulations," which the DOB accepted (NYSCEF 78, 79, 81). (NYSCEF 73).

In response to the claimed damage to plaintiff's property, Liedman observes that defendants have not been permitted to inspect the property. Before commencing construction, however, defendants had commissioned a third-party inspection company to perform a

pre-construction survey, which was performed on June 27 and 28, 2019. Photographs taken during the survey reveal that plaintiff's premises "had already sustained significant water damage" (NYSCEF 80). (NYSCEF 73).

Defendants argue that plaintiff seeks relief that "improperly relates back" to the prior and "wholly separate" RPAPL § 881 proceeding that had been withdrawn with plaintiff's consent. As the subject of that proceeding was a licensing agreement by which defendants had sought access to plaintiff's property and is now "long since resolved," and as the project is now complete, they argue that plaintiff is not entitled to the relief it seeks. In any event, they maintain, plaintiff's request for relief is moot and to the extent plaintiff wants existing protections to be removed, having declined offers to do so, there is no issue.

Moreover, defendants assert that plaintiff improperly seeks summary judgment absent discovery. They oppose plaintiff's alternative request that it be granted a license to access the project and contend that its request for fees is barred and/or waived by its consent to the withdrawal of the prior proceeding, because no license was issued, and as such, fees cannot be retroactively awarded, and that its request for sanctions relates solely to the prior proceeding. Should injunctive relief be granted, they argue, plaintiff should be required to post a bond. (NYSCEF 64).

Defendants otherwise allege, based on the affidavit of its expert dated September 5, 2019, that the project is "nearly fully complete," in that all overhead exterior work is complete, although some interior work remains as do modifications to the basement storefront. (NYSCEF 64, 72, 82). All protections "can be removed," he opines, and none of the work requires overhead or roof protections for plaintiff's property. Apartments in the premises have been offered for rental as of August 1, 2019, and there are no stop work orders in effect for the project. (NYSCEF

72).

Defendants' expert also states that based on his review of the premises configuration and the building, and the configuration of plaintiff's property and building, the project is "substantially complete" and that any remaining work does not require the installation of projections nor do best constructive practices require any additional protections on plaintiff's property. (NYSCEF 72).

III. ANALYSIS

Pursuant to CPLR 6301, a preliminary injunction may be granted "where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights." Preliminary injunctions are drastic remedies, substantially limiting the nonmovant's rights, and are awarded in special circumstances. (*1234 Broadway LLC v W. Side SRO Law Project*, 86 AD3d 18, 23 [1st Dept 2011]). To be entitled to a preliminary injunction, the movant must demonstrate a likelihood of success on the merits, irreparable injury absent the injunction, and that the equities weigh in its favor. (CPLR 6301; *Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862 [1990]).

Code § 3309.1 provides, in pertinent part, that

> [a]djoining public and private property, including persons thereon, shall be protected from damage and injury during construction or demolition work in accordance with the requirements of this section. Protection must be provided for footings, foundations, party walls, chimneys, skylights and roofs. Provisions shall be made to control water run-off and erosion during construction or demolition activities.

Pursuant to Code § 3309.1.1, a developer must notify and provide "the nature of the work, estimated schedule and duration, details of inspections or monitoring to be performed on the adjoining property" and "protection to be installed on the adjoining property."

Code § 3309.2 provides, in pertinent part, that

> The responsibility of affording any license to enter adjoining property shall rest upon the owner of the adjoining property involved . . . . Nothing in this chapter shall be construed to prohibit the owner of the property undertaking construction or demolition work from petitioning for a special proceeding pursuant to Section 881 of the Real Property Actions and Proceedings Law.
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> Code § 3309.8 requires that when
>
> any construction or demolition operation exposes or breaches an adjoining wall, including . . . party walls . . . the person causing the construction or demolition shall, at his or her own expense, perform the following: 1. Maintain the structural integrity of such walls and adjoining structure, and have a registered design professional investigate the stability and condition of the wall and adjoining structure, and take all necessary steps to protect such wall and structure.

And, pursuant to Code § 3309.10:

> Whenever any building is to be constructed or demolished above the roof of an adjoining building, it shall be the duty of the person causing such work to protect from damage at all times during the course of such work and at his or her own expense the roof, skylights . . . and to use every reasonable means to avoid interference with the use of the adjoining building during the course of such work, provided such person causing such work is afforded a license in accordance with the requirements of Section 3309.2 to enter and inspect the adjoining building and perform such work thereon as may be necessary for such purpose; otherwise, the duty of protecting the roof, skylights, other roof outlets, and equipment on the roof of the adjoining building shall devolve upon the owner of such adjoining building.
>
> Adjoining roof protection shall be secured to prevent dislodgement by wind. Where construction or demolition work occurs at a height of at least 48 inches (1219 mm) above the level of the adjoining roof, adjoining roof protection shall consist of 2 inches (51 mm) of flame-retardant foam under 2 inches (51 mm) of flame-retardant wood plank laid tight and covered by flame-retardant plywood, or shall consist of equivalent protection acceptable to the commissioner, and shall extend to a distance of at least 20 feet (508 mm) from the edge of the building being constructed or demolished.

Pursuant to RPAPL § 881:

> When an owner . . . seeks to make improvements or repairs to real property so situated that such improvements or repairs cannot be made by the owner or lessee without entering the premises of an adjoining owner or his lessee, and permission so to enter has been refused, the owner or lessee seeking to make such improvements or repairs may commence a special proceeding for a license so to enter pursuant to article four of the civil practice law and rules. The petition and affidavits, if any, shall state the facts making such entry necessary and the date or dates on which entry is sought. Such license shall be granted by the court in an appropriate case upon such terms as justice requires. The

licensee shall be liable to the adjoining owner or his lessee for actual damages occurring as a result of the entry.

A. Likelihood of success on the merits

It is now undisputed that the two partial stop work orders are no longer in effect and that LLC hired a special inspector who, after reviewing and inspecting the masonry work, certified that all of the masonry "substantially" conformed to the pertinent plans and that the masonry work was performed in accordance with the Code. Moreover, plaintiff cites no authority for the proposition that defendants may be compelled or have an obligation to enter into an access agreement and/or to provide proper drawings, documentation, or inspection reports, or a plan to repair plaintiff's damages; none of the Code sections relied on by plaintiff requires them.

Given defendants' evidence controverting plaintiff's claim that they damaged plaintiff's property, plaintiff has not shown a likelihood of success on her claimed damages. In any event, plaintiff cites nothing to support her claim that a party may be ordered to pay damages as part of a preliminary injunction. Rather, a preliminary injunction is intended to preserve the status quo, rather than requiring an affirmative act, as such an injunction would constitute a mandatory injunction, which is "used to compel the performance of an act, [and] is an extraordinary and drastic remedy which is rarely granted and then only under unusual circumstances where such relief is essential to maintain the status quo pending trial of the action." (*Shake Shack Fulton St. Brooklyn, LLC v Allied Prop. Group, LLC*, AD3d , 2019 WL 6139210 [2d Dept 2019]). It would also grant plaintiff a portion of the ultimate relief sought in this action (*id.*), which is permissible only in extraordinary circumstances. Plaintiff fails to show that there are extraordinary or unusual circumstances here or that awarding damages is necessary to maintain the status quo.

Nor has plaintiff articulated any legal basis for claiming entitlement to reimbursement for design professional and legal fees and other costs involved in this action to date.

Plaintiff thus fails to demonstrate that it is likely to succeed on the merits of its claims.

B. Irreparable injury

The alleged damage to plaintiff's interior walls is compensable by monetary damages, and indeed plaintiff requests to be compensated monetarily on this application. (*See e.g., Matos v City of New York*, 21 AD3d 936 [2d Dept 2005] ["plaintiff's request for monetary damages undercut her claim of irreparable injury"]).

Having agreed to remove the overhead protections, defendants demonstrate that injunctive relief in that regard is unnecessary except to the extent that they employ methods of removal that violate the Code.

C. Balance of equities

Conceded.

D. Alternative relief

Plaintiff offers no authority for the proposition that it is a party authorized to seek a proceeding pursuant to RPAPL § 881, as the statute permits "an owner or lessee seeking to make [improvements or repairs to real property to] commence a special proceeding for a license . . ." Defendants, not plaintiff, seek to make improvements and repairs here.

The decision denying plaintiff costs and expenses incurred in opposing defendants' RPAPL § 881 petition constitutes the law of that case and cannot be resurrected here. Nor does plaintiff cite authority for the proposition that a party may be sanctioned in one proceeding for conduct undertaken in a previous proceeding. (*See e.g., Rose Valley Jt. Venture v Apollo Plaza Assocs.*, 191 AD2d 874 [3d Dept 1993] [entry of final judgment in action bars later motion or

claim for costs, fees and/or sanctions; no authority for permitting commencement of separate proceeding after action in which frivolous conduct is alleged to have occurred has been terminated]; *Katz v Katz*, 31 Misc 3d 1202[A], 2011 NY Slip Op 50470[U] [Sup Ct, Kings County 2011] [no separate cause of actions to impose sanctions for frivolous conduct; party must apply for sanctions by motion "upon the happening of specific conduct."]).

Given plaintiff's failure to show entitlement to a preliminary injunction, it also fails to establish that an undertaking or escrow by defendant is warranted here.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for a preliminary injunction is granted solely to the extent that defendants are enjoined from removing any overhead protections by employing methods that do not comply with the Building Code; and it is further

ORDERED, that plaintiff's motion is otherwise denied in its entirety.

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11/25/2019
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE