

300 W. 48th St. Assoc. v 306 W. 48th St. Condominium
2019 NY Slip Op 33614(U)
December 10, 2019
Supreme Court, New York County
Docket Number: 656045/2018
Judge: Joel M. Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOEL M. COHEN PART IAS MOTION 3EFM

Justice

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300 WEST 48TH STREET ASSOCIATES

Plaintiff,

- v -

THE 306 WEST 48TH STREET CONDOMINIUM, BY ITS
BOARD OF MANAGERS,

Defendant.

-----X

INDEX NO. 656045/2018

MOTION DATE N/A

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion to DISMISS THE COMPLAINT.

Upon the foregoing documents:

This action concerns a sidewalk shed that abuts two adjacent properties. Plaintiff, 300 W. 48th Street Associates, commenced an action against Defendant, 306 W. 48th Street Condominium, alleging trespass and encroachment caused by the presence of the sidewalk shed. Defendant files the instant motion seeking dismissal of Plaintiff's Complaint. The motion is unopposed. The matter was scheduled for oral argument on November 13, 2019 for which Plaintiff did not appear. For the following reasons, Defendant's motion is Granted.

In March 2017 it was reported to the DOB that there was a glass failure on the 7th floor of the Icon Building located at 306 W. 48th Street. *Zagdanski Aff.*, ¶ 5. The Icon Building is a 42-story tower in Manhattan with entrances on both 48th Street and 8th Avenue and is owned by Defendant. The glass breakage occurred on the north façade of the tower facing 48th Street that occupies the air over Plaintiff's building. *Id.*

On or about April 12, 2017, a sidewalk shed was installed at the southwest corner of W. 48th Street and 8th Avenue, in front of both Plaintiff's and Defendant's properties. *Compl.* at ¶ 8. As acknowledged by Plaintiff, the sidewalk shed was constructed for the purpose of making emergency repairs to Defendant's property. *Id.* at ¶ 11; *Zagdanski Aff.* at ¶¶ 12-13. Prior to the installation of the sidewalk shed, the DOB issued an ECB violation to Defendant on March 29, 2017 stating that there was a "failure to take and provide safety measures/sidewalk shed/netting etc . . . to protect and secure public safety from a documented unsafe façade as per 1 RCNY 103-04 façade technical report filed unsafe (FISP3) by PE/RA." Ex. 5 to *Feller Aff.*, see also *Zagdanski Aff.* at ¶ 6.

On May 26, 2017, the DOB issued a notification from the Commissioner of Buildings stating that because of a breakage of the tempered glass on the north façade of 306 W. 48th Street and "prior failures of glass curtain wall," a continuous sidewalk shed is ordered to be installed "around the corner of West 48th Street and 8th Ave. including sidewalk that belongs to 787 8th Ave. Shed to remain in place until the investigation and remedial work are completed." Ex. 9 to *Feller Aff.*; see also *Zagdanski Aff.*, ¶ 13. In addition, in December of 2017, Defendant was instructed by the DOB to conduct a Local Law 11 façade inspection concurrently with the necessary repairs to the façade. See *Zagdanski Aff.*, ¶ 14. Despite the various New York City agency directives, Plaintiff nevertheless claims that the continued existence of the sidewalk shed constitutes a trespass and encroachment onto Plaintiff's premises. See *Compl.*, ¶ 12.

The current permit, issued in April 2017, has been renewed yearly and is current through 2020. See Exs. 6-8 to *Feller Aff.*; *Zagdanski Aff.*, ¶ 9. Defendants assert, through the unchallenged Affidavit of Ari Zagdanski, that repairs to the façade and exterior of the Icon, as well as the mandatory Local Law 11 inspections of the façade of the Icon are ongoing.

Zagdanski Aff., ¶16. Defendant further represents that once final sign-off from the DOB is received (which first requires completion of all repairs, including glass replacements and a final survey of the façade), the sidewalk shed will be removed. *Zagdanski Aff.*, ¶17.

A motion to dismiss a Complaint made under CPLR 3211(a)(7) must demonstrate that, assuming the truth of the allegations asserted in the Complaint, Plaintiff nevertheless fails to state a cause of action. An essential element of a claim for encroachment and trespass is the absence of permission or justification. *Schwartz v. Hotel Carlyle Owners Corp.*, 132 A.D.3d 541, 542 (1st Dept 2015) (“the essence of a trespass is intentional entry onto the property of another without justification or permission”).

Here, Plaintiff admits that the sidewalk shed at issue was erected in connection with required, emergency repairs to the Icon Building. *Compl.*, ¶11. As Defendant asserts, and Plaintiff does not dispute, Defendant was *required*, while making repairs to the façade of its building, to erect a sidewalk shed for public safety purposes. New York City Administrative Code § 3307.6.2 (2019) (“sidewalk shed shall be installed and maintained to protect all sidewalks, walkways, and pathways within the property line of a site, and all public sidewalks that abut the property, as follows. . . (2) When a portion of a façade over 40 feet above curb level is to be . . . repaired . . . and the sidewalk, walkway, or pathway is within a perpendicular distance from the structure that is equal to or less than half the height of such façade work”).

Based on the record, and in the absence of an opposition from Plaintiff, the Court finds that Plaintiff’s claims are without merit and do not fit within a cognizable theory of trespass and encroachment. See *22 Irving Place Corp. v. 30 Irving LLC*, 60 N.Y.S.3d 640 (Sup. Ct. N.Y. County 2017) (dismissing complaint sounding in trespass and private nuisance because required

repairs to defendant’s façade and the necessity of the sidewalk shed to protect public safety provided justification for entrance onto plaintiff’s property).

Therefore, it is:

ORDERED that Defendant’s motion to dismiss Plaintiff’s Complaint is Granted and the action is dismissed in its entirety.

This Constitutes the Decision and Order of the Court.

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12/10/2019
DATE

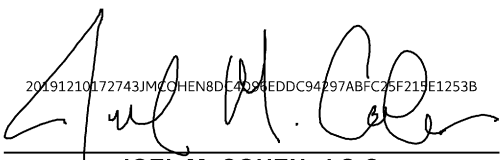
CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED		
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

APPLICATION:

CHECK IF APPROPRIATE:

<input type="checkbox"/>	NON-FINAL DISPOSITION		
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE



JOEL M. COHEN, J.S.C.