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A Practitioner's Guide to Litigating Party Walls

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One developer-client once told us, "horse racing is not the sport of kings—litigation is." During the greatest high end real estate market in the history of our country, the ultra wealthy or the corporate kings have battled in our courts for every inch of land. Because only the wealthiest own townhouses in Manhattan and Brooklyn, these plots—built 50 feet by 50 feet—during the time of author Edith Wharton, resulted in shared walls, called party walls, supporting each townhouse. Because many kings want to expand their spaces wider and higher, the rules on party walls have been tested. This article aims at educating the practitioner on the not-so-obvious rules of the party wall.

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Defining Ownership Rights

A landowner owns the land and all that is on it. Where the wall is partially on one piece of land and partially on the other, the person who owns the land under the wall, owns the piece of the wall on that land.[1] However, each side has the right to maintain the part of the wall on the other party's property and to make sure that it is usable by both sides.[2] Neither one may interfere with the wall being completely available to the other owner.[3] Thus, for all practical purposes, the law treats the wall as completely belonging to both neighbors. The minor support given by a party wall to a perfectly independent wall, where the independent wall is sufficient in and of itself to stand, does not qualify as use of a party wall, therefore not obliging the owner of the independent wall to pay for the upkeep of the party wall under a contract obliging such payments in the event such owner makes use of the party wall.[4]

Use of Party Walls

The whole purpose of a party wall is that it is to be of use and benefit to both owners. Neither owner may subject the wall to a use where it ceases to be continuously available for enjoyment by the other owner,[5] but each may subject it to whatever uses are proper to a wall, so long as that does not interfere with the other owner's equal exercise of freedom.[6] The right to use the wall includes the right to use the portion that is on the neighbor's property as well as the right to use the portion on one's own property, provided the exercise of that right does not interfere with the neighbor's exercise of the neighbor's rights.[7]

Neither owner has a right to build on top of a party wall a construction that will be for that party's own purposes only, even if the construction is limited to that party's own side of the property line.[8] A party wall is for the mutual convenience and benefit of adjoining property owners and the only restriction upon its use by either is that that use shall not be detrimental to the other.[9]

Increasing Height and Length

Either owner may heighten the party wall, provided the existing party wall is not damaged by it, and the addition is available for use by both owners.[10] A party making an addition to a party wall does it at his or her peril; and if injury results he or she is liable for all damages. One adding to a party wall, either as to height or length is an insurer of the damages it causes to the other land owner.[11]

Replacing a Party Wall

However, where the action taken by one of the landowners is merely to replace a dilapidated wall with one that is in a good state of repair, that party cannot be held liable to the other for damages,[12] for such party acts as of right.[13]

Hanging Signs

As noted, a party wall is for the common benefit of adjoining landowners. Each party may use the wall properly so long as the other party is not harmed by the use. While the right to erect a construction under the party wall easement permits one to erect a construction that sits on both sides of the wall, the owner of one side has no right to erect a construction that sits entirely on the other side. Thus, one cannot hang a billboard on the other side.[14] Commercial use of a party wall, such as by hanging a sign, that is on the owner's own property, however, is permissible so long as it does not weaken or encroach on the other side of the wall.[15]

Weakening/ Harming Walls

Neither party can rightfully do anything on his or her own land, which would weaken the party wall and deprive the other party of their entitled use of the land.[16] However, neither owner can compel the other to make the wall stronger than it was when originally constructed, as by sealing off windows, for example.[17] The law is clear that a party wall does not have to be maintained as a solid wall. It can include piercings such as a flue.

Adding Windows

The placing of windows in a party wall where the agreement for the maintenance of the wall does not provide for such opening is a violation of that agreement.[18]

Adding windows to a party wall is generally permissible as long as the windows do not interfere with structural integrity of the wall[19] or cause any privacy concerns that may serve as a valid objection to the window.[20]

An owner of one side of such a wall can brick in the windows on that owner's side, but cannot compel the owner of the other side to do such.[21] This rule places the party wall within the general New York law that there is no such thing as an easement of light and air.[22] While either owner may brick in windows, neither owner may put in windows or water pipes,[23] especially, as to the latter, if they cause a nuisance to the other party.

Destroying Party Walls

A property owner using a party wall has a right to tear down the building on his or her land. However, he or she may be liable to the other owner if injury results. The rights of easements created by a party wall are not necessarily eternal. The rights to a party wall terminate when the reason for the party wall ceases.[24] Sometimes the rights of the wall are not utterly destroyed, but merely suspended as, for example, by destruction due to fire of one or both of the buildings using the wall.[25] However, if the buildings are rebuilt, that reconstruction will have the effect of reviving the rights formerly held with respect to the party wall.[26] The destruction by accident or design of only one of the two buildings does not remove the rights the other owner has to retain the support of the wall for the surviving building.[27]

Statute of Limitations

RPAPL §611(2) is the limitations statute applicable specifically to party walls. Located in the general "ejectment" statute of the RPAPL, it states:

The action cannot be maintained:
Where the real property consists of a strip of land not exceeding six inches in width upon which there stands the exterior wall of a building erected partly upon said strip and partly upon the adjoining lot, and a building has been erected upon land of the plaintiff abutting on the said wall, unless said action be commenced within one year after the completion of the erection of such wall. But an action may be maintained if commenced within the further period of one year, for the recovery of damages by reason of the erection of such wall, and upon the satisfaction of the judgment for such damages the title of the plaintiff to such strip of land shall thereby be transferred to and vest in the defendant. If an action for the recovery of real property or damages is not brought within the period hereby limited therefor, the person in possession of such lands shall be deemed to have an easement in said strip of land so long as the said wall partly erected thereon shall stand, and no longer, and in case of the destruction of such wall the owner of such strip shall have the same right to take or recover the possession thereof as if such wall had never existed.

Thus, by stating, "the action cannot be maintained," it clearly refers to the common law ejectment action to recovery of real property to which it assigns a one-year statute of limitations.[28] Such an action would be a response to the encroachment of the wall upon the plaintiff's land and call for the removal of the encroaching portion of the wall—if the encroachment is no more than six inches, but the statute has no applicability for larger encroachments.[29] If it is more than six inches, the ten-year statute of limitations for adverse possession kicks in.[30]

However, if rather than a possessory judgment, the plaintiff seeks damages, the statute of limitations is extended to two years, but the result of such a suit is essentially a forced sale, permitting the wall to stand, but deeding over the encroachment to the defendant if the defendant pays the judgment. The balance of the statute codifies the other principles we have set forth in this article in the event that no suit by reason of the encroachment is brought within the first two years of the wall's existence.

Litigation about party walls is clearly litigation about the use and enjoyment of real property and therefore allows for the filing of a lis pendens[31] under CPLR Article 65. Since the theory of action is not based on negligence, neither the common law theory of contributory negligence[32] nor the more modern one of comparative negligence has any applicability.

Unlike the RPAPL, there is no particular statute in the CPLR that acts as a statute of limitations specifically and exclusively for party walls. Rather, the practitioner must look to other statutes of limitations to see their applicability to the special factual matrix that a party wall creates. Thus, for example, in actions for negligent construction, CPLR 214(4)'s three-year statute of limitations for negligent damage to property begins to run when the structure collapses, or when the damages from the negligent construction otherwise become apparent. As a general rule, a tort cause of action "cannot accrue until an injury is sustained."[33]

In cases involving damage from construction by an adjoining property owner, the Appellate Division of the First Department has held that the injury was sustained, and the cause of action accrued, when the injury became visible or apparent after the construction. In Mark v. Eshkar,[34] that court held that a cause of action for damage to a party wall accrued not at time of the adjoining property owner's construction which resulted in "relatively minor damage to the wall," but years later when larger structural cracks became manifest. Similarly, in the Second Department, the court held in Russell v. Dunbar,[35] that the damage became "apparent," and a cause of action accrued, only when the plaintiff noticed the damage to the apartment ceiling caused by the water inside the wall.

Conclusion

The rules of party walls that have evolved in judicial decisions since the 1800's have fairly and justly adjudicated these inherent conflicts of shared space and property. As long as party walls and property ownership exist, real estate kings will use their gladiators or dirt litigators to flight for every inch of property. Thankfully, this is one area of real estate law that has been carefully defined.

ENDNOTES:

1. National Commercial Bank v. Gray, 24 N.Y.S. 997, 71 Hun 295 (1893), aff'd, 144 N.Y. 701, 39 N.E. 858 (1895); Sakele Bros. v. Safdie, 302 A.D. 2d 20 (2002).
2. Varriale v. Brooklyn Edison, 252 N.Y. 222 (1929); Brooks v. Curtis, 50 N.Y. 639 (1873).
3. 116 East 57th Street v. Gould, 273 A.D. 1000 (1948).
4. Kingsland v. Tucker, 115 N.Y. 574 (1889).
5. Varriale v. Brooklyn Edison, 252 N.Y. 222 (1929).
6. 116 East 57th Street v. Gould, 273 A.D. 1000 (1948); Varriale v. Brooklyn Edison, 252 N.Y. 222 (1929).
7. Lei Chen Fan v. New York SMSA Ltd. Partnership, 94 A.D. 3d 620 (2012).
8. American Ry. Express Co. v. Lassen Realty, 205 A.D. 238 (1923).
9. Batt v. Kelly, 75 A.D. 321 (1902).
10. Herrman v. Hartwood Holding, 193 A.D. 115 (1920).
11. Negus v. Becker, 143 N.Y. 303 (1984).
12. Schile v. Brokhahus, 80 N.Y. 614 (1880).
13. Id.
14. Sakele Bros. v. Safdie, 302 A.D. 2d 20 (2002).
15. Lei Chen Fan v. New York SMSA Ltd. Partnership, 94 A.D. 3d 620 (2012).
16. De Baun v. Moore, 22 A.D. 485 (1897).
17. Id.
18. Metzger v. 46 West 95th St., 216 A.D. 289 (1926).
19. Hammann v. Jordan, 129 N.Y. 61 (1891).
20. Metzger v. 46 West 95th St., 216 A.D. 289 (1926).
21. De Baun v. Moore, 22 A.D. 485 (1897).
22. But there may be municipal regulations requiring the maintenance of light and air. Before coming to the conclusion, therefore, that the party wall windows may properly be bricked in, the wise practitioner will check the municipal regulations regarding light and air.
23. Herrman v. Hartwood Holding, 193 A.D. 115 (1920).
24. 357 East Seventy-Sixth Street v. Knickerbocker Ice, 263 N.Y. 63 (1933).
25. Douglas v. Coonley, 156 N.Y. 521, 51 N.E. 283 (1898).

26. Douglas v. Coonley, 156 N.Y. 521, 51 N.E. 283 (1898).
27. Mileage Gas v. Kushner, 245 A.D. 836 (1935).
28. Normally, such actions are only brought in state Supreme Court.
29. Sova v. Glasier, 192 AD2d 1069, 596 N.Y.S.2d 228 [4th Dept. 1993].
30. Id. RPAPL 501.
31. Moeller v. Wolkenberg, 67 AD 487 (1902).
32. Id.
33. Kronos v. AVX, 81 NY2d 90, 94, 612 N.E.2d 289, 595 N.Y.S.2d 931 [1993].
34. 194 AD2d 356, 357, 598 N.Y.S.2d 255 [1st Dept. 1993].
35. 40 AD3d 952, 953, 838 N.Y.S.2d 97 [2d Dept. 2007].