

IN THE COURT OF COMMON PLEAS
COUNTY OF PHILADELPHIA
CIVIL TRIAL DIVISION

DOCKETED

MAR - 1 2017

631 N. Broad Street, LP.,
Plaintiff,

v.

Congregation Rodeph Shalom,
Defendant

:
: April Term, 2016
: No. 02632
:
: Commerce Program
:
: Control No. 16112416
:
:

R. POSTELL
COMMERCE PROGRAM

ORDER

AND NOW, this 1st day of March, 2017, upon consideration of plaintiff Congregation Rodeph Shalom's Motion for Preliminary Injunction, defendant 631 North Broad Street, LP's Response in Opposition, their respective Memoranda of Law, and following a two day hearing on December 2 and December 21, 2016, and for reasons explained in a Memorandum Order filed today, it is hereby ORDERED and DECREED that defendant's Motion for Preliminary Injunction is GRANTED as follows:

1. Plaintiff 631 North Broad Street, LP is preliminarily enjoined from demolishing the South Wall, in its entirety or partially, absent agreement by the property owner of 619 North Broad Street, its assignees, purchasers and successors.
2. This preliminary injunction enjoins any demolition of the South Wall, partial or complete, whether authorized by lawful demolition permit, or not, until further signed order of court. This preliminary injunction may not be dissolved by praecipe.

BY THE COURT



RAMYL DJERASSI, J.

631 North Broad Street, Lp Vs Congregation R. ORDOP



16040263200068

**IN THE COURT OF COMMON PLEAS
COUNTY OF PHILADELPHIA
CIVIL TRIAL DIVISION**

631 N. Broad Street, LP.,
Plaintiff,

v.

Congregation Rodeph Shalom,
Defendant

:
: **April Term, 2016**
: **No. 02632**
:
: **Commerce Program**
:
: **Control No. 16112416**
:
:

J. Djerassi

MEMORANDUM OPINION

March 1, 2017

Before this court is defendant Congregation Rodeph Shalom’s Motion for a Preliminary Injunction and 631 North Broad Street’s Complaint for Declaratory Judgment and in Quiet Title. This is a dispute between adjacent landowners concerning their respective rights in a wall that straddles the property line separating two lots.

This Memorandum Opinion explains why we are granting a preliminary injunction and also entering an order which if counterclaims were withdrawn would be entered as a final declaratory judgment in favor of Congregation Rodeph Shalom and against grant of quiet title to 631 N. Broad Street.

Background

Plaintiff 631 North Broad Street, LP (“631 North Broad Street”) is a Pennsylvania limited partnership that owns real property located at 631 North Broad Street in Philadelphia. Defendant Congregation Rodeph Shalom (“Congregation Rodeph Shalom”) owns real property at 619 North Broad Street. Their property is immediately south and adjacent to 631 North Broad Street.

631 North Broad Street plans to redevelop a brick building that has occupied their lot on North Broad Street since the 1860s. Plans include a proposal to convert the existing building into residences while also preserving historical portions of the building, including its original facade. As part of this plan, 631 North Broad Street sought approval from the Department of Licenses & Inspections of the City of Philadelphia (L&I) to demolish a portion of the south wall of the building. L&I has granted a demolition permit authorizing removal of three floors inside the building, and the removal of the existing building's roof, and a portion of the south wall facing 619 North Broad. ("South Wall").¹ 631 North Broad Street asserts that the partial demolition of the South Wall is necessary to accommodate windows in their design plans for certain apartments, which must be set back ten feet from the property line pursuant to building code.² The partial demolition is sought to open up light and air for several residential apartments. The South Wall, however, sits directly on the property line of both litigants. The South Wall extends approximately five inches over the property line onto Congregation Rodeph Shalom's 619 North Broad Street lot.

Both litigants stipulated to the fact that the property line runs underneath the South Wall. They agree the wall was built in the 1860's, and that the property line location is clearly marked on relevant deeds.³ The parties also agree that approximately five inches of brick wall lies on Congregation Rodeph Shalom's side of the property line.⁴ The parties, however, disagree about other circumstances regarding the timing and nature of the South Wall's construction.

The building located at 631 North Broad was built to be a stable. At the time, Pennsylvania's party wall statute allowed for the construction of party walls up to 6 ½ feet over a

¹ NT 12/2/16, p. 97.

² NT 12/2/16, p. 68.

³ NT 12/2/16, p. 193.

⁴ NT 12/2/16, p. 193.

property boundary.⁵ It is unknown precisely when a building was built on the adjacent lot at 619 North Broad, but eventually a commercial bakery is known to have existed there during the first half of the 20th Century. This bakery and the stable were adjoined along the South Wall until the bakery was demolished in the 1950s and the wall was left standing attached to the stable building.⁶ From the 1950s through the present time, no building on the 619 N. Broad Street lot has physically connected to the South Wall.

The South Wall as it exists today is attached to the original stable building at 631 North Broad. It is three stories and approximately 17 inches thick; 5 inches of the wall are over the 619 North Broad Street side of the property line.⁷ It is disputed who originally built the wall on Rodeph Shalom's property. There is a small gap existing between two horizontal layers, or "wythes" of brick, and these brick wythes are linked together by metal ties. Congregation Rodeph Shalom believes that this is evidence that there are two different walls constructed separately by the adjacent landowners.⁸ 631 North Broad's position is that the current wall was built entirely by the owner of the stable as a single wall.⁹ 631 North Broad Street, LP's expert testified that it was his opinion that the South Wall on 631 N. Broad was constructed, in its entirety, at the same time.¹⁰ We agree with 631 North Broad and find that the South Wall was built in its entirety at the same time by the owner of the stable.

Congregation Rodeph Shalom purchased 619 North Broad Street in 2009. At that time, the neighboring property at 631 North Broad Street was being used as an art gallery and was not owned by plaintiff 631 North Broad Street, LP. Today, there is a one story building located on

⁵ Plaintiff's Proposed Findings of Fact, parag. 5.

⁶ NT 12/2/16, p. 198.

⁷ NT 12/2/16, p. 50.

⁸ NT 12/2/16, p. 54.

⁹ NT 12/21/16, p. 15.

¹⁰ NT 12/21/16, p. 46.

the 619 Broad Street lot. This building has been used by Congregation Rodeph Shalom as an early learning center for young children. The existing building is separated from the South Wall by an alleyway. In 2011, the South Wall on the 619 North Broad Street side required repair due to falling brick and masonry. Congregation Rodeph Shalom paid \$350,000 to fix the brickwork and to add new meshing and a layer of stucco.¹¹ Congregation Rodeph Shalom also initiated a lawsuit against the prior owners of 631 North Broad and recovered a portion of these repair costs through settlement.¹²

Procedural History

The legal action in this case was initiated by plaintiff 631 North Broad Street, LP to obtain clear title to the entirety of the South Wall and end uncertainty relating to their demolition plans for the South Wall. A Complaint seeking Declaratory Judgment and in Quiet Title was filed on April 22, 2016. Congregation Rodeph Shalom filed its Answer, New Matter and Counterclaim on May 24, 2016; the counterclaims are not being considered here by agreement of the parties with the result we are unable to render a final judgment at this time, as all claims are not decided.

Congregation Rodeph Shalom filed a motion for preliminary injunction on November 17, 2016, seeking equitable relief while the legal suit was being litigated. The preliminary injunction seeks to prevent 631 North Broad Street from carrying out any demolition of the South Wall pending adjudication on the Quiet Title action. The court initially granted a temporary restraining order pending hearing which was extended after the evidentiary hearing until decision on the preliminary injunction. The parties have submitted proposed findings of fact and conclusions of law.

¹¹ NT 12/21/16, p. 128.

¹² NT 12/21/16, p. 128.

This Opinion explains two separate orders filed today: 1) an order in equity granting preliminary injunction against partial or total demolition of the South Wall, and 2) an order declaring that the South Wall is a party wall with specific property rights belonging to the owners of 619 N. Broad Street and denying quiet title to plaintiff. Regrettably, this declaration and order is not yet final as remaining counterclaims preclude a final order and judgment. Pa. R.A.P. 314(b) (1). We are also entering a self-explanatory order today denying an appeal by Congregation Rodeph Shalom to a variance granted by the Zoning Board of Adjustment.

Discussion

Congregation Rodeph Shalom moves for a preliminary injunction restraining 631 North Broad, LP from demolishing a portion of the South Wall and creating a large opening in the wall.

The purpose of a preliminary injunction is to preserve the status quo as it exists or previously existed before the acts complained of in the complaint.¹³ By preserving the status quo, the preliminary injunction attempts to avoid imminent and irreparable harm pending final adjudication of the underlying controversy.¹⁴ A preliminary injunction is “an extraordinary, interim remedy that should not be issued unless the moving party's right to relief is clear and the wrong to be remedied is manifest.”¹⁵

Pennsylvania law requires that:

[t]o obtain a preliminary injunction, a petitioner must establish that: (1) relief is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by money damages; (2) greater injury will occur from refusing to grant the injunction than from granting it; (3) the injunction will restore the parties to their status quo as it existed before the alleged wrongful conduct; (4) the petitioner is likely to prevail on the merits; (5) the injunction is

¹³ *Ambrogi v. Reber*, 932 A.2d 969, 974 (Pa. Super. 2007).

¹⁴ *Id.*

¹⁵ *Id.*

reasonably suited to abate the offending activity; and (6) the public interest will not be harmed if the injunction is granted.¹⁶

As the parties have extensively briefed the fourth requirement, whether the petitioner Congregation Rodeph Shalom is likely to prevail on the merits, we address this issue first.

Congregation Rodeph Shalom argues it is likely to prevail on the merits. They are correct because the South Wall is a party wall which Congregation Rodeph Shalom owns in part.

The South Wall partially lies on their side of the property line as stipulated.¹⁷ For many years the South Wall supported buildings belonging to owners on both sides of the property line. And since it acquired ownership of 619 North Broad, Congregation Rodeph Shalom has not abandoned its rights to the wall as demonstrated by its repair of the south façade of the South Wall in 2011.¹⁸

We, therefore, do not agree with 631 North Broad Street's argument that it is entitled to quiet title and denial of preliminary injunction on grounds that Congregation Rodeph Shalom has no property interest in the South Wall. 619 North Broad Street has two grounds for this position. First, they argue the South Wall is not a party wall. Second, they argue that even if the South Wall is a party wall, Congregation Rodeph Shalom has no remaining interest in the wall because it is no longer used for its original purpose. They claim that in these circumstances, the wall returns to the property lot whose owner originally built the wall.

In reaching our own conclusions, we first look back to our own court precedent. As Judge C. Darnell Jones, II summarized when he served on Commerce Court, "A party wall sits between adjoining properties. Each property is servient to the service of the other with respect to the

¹⁶ *Brayman Const. Corp. v. Com., Dep't of Transp.*, 13 A.3d 925, 935 (Pa. 2011) (citing *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003)).

¹⁷ NT 12/21/16, p. 196.

¹⁸ NT 12/21/16, p. 128.

property wall. The primary factor in determining whether a wall is a party wall is the intent of the builder. Other factors include the wall's location with reference to the boundary line between adjoining properties...the understanding of the adjoining owners at the time it was built, and its use for a long number of years.”¹⁹ Ordinarily, a party wall is constructed upon the division line, and each adjoining lot owner has an easement on his neighbor's premises for the support or extent of use made of the party wall.²⁰ “It is not necessary that such a wall be used to support the roof or floors of both buildings. It is enough that the wall be used as a curtain wall, protecting the buildings from the elements and protecting the spread of fire.”²¹

Here, the South Wall is clearly a party wall. Evidence established the South Wall was built as a party wall in accordance with relevant Pennsylvania statutes and Philadelphia ordinances authorizing builders to encroach over property lines when building party walls. Photo evidence also established actual use of the South Wall as a party wall for many years connecting a bakery and a stable. After the bakery was demolished, the South Wall was left standing and no evidence shows any of the subsequent 619 North Broad Street owners contractually sold, or otherwise devised their interest in the South Wall. But, the counter argument is that since the South Wall is no longer used as a party wall, it is not a party wall in law today.

Upon research, we find the South Wall is a legal party wall today, even though it is not used as it once was. Again, it is undisputed that the property line between the two properties runs under the wall, with approximately 5 inches on the 619 North Broad Street side. There is no evidence of any easements or covenants that address the status or use of the party wall in the

¹⁹ *Turchi v. MCW Washington Square Partners*, Aug. Term 2004, No. 1187, p. 4 (Phila. Ct. of Common Pleas, Commerce Program, Jan. 3, 2006) (Jones, C. Darnell, II, J.) (memorandum opinion published on FJD website and available at <http://www.courts.phila.gov/PDF/cpcvcomprg/040801187.pdf>) (citing *Lukens v. Lasher*, 51 A.887 (Pa. 1902); *Appeal of Western National Bank*, 102 Pa. 171 (Pa. 1883); *McClernan v. Greenberg*, 182 A.59, 61, 64 (Pa. Super. 1935)), *aff'd* 919 A.2d 985 (Pa. Super. 2007) (unpublished).

²⁰ *Sobien v. Mullin*, 783 A.2d 795, 798 (2001) (citing *Bright v. Morgan*, 67 A. 58 (1907)).

²¹ *Gimbel Bros. v. Markette Corp.*, 307 F.2d 91, 93 (3d Cir. 1962).

event one of the adjoining buildings is demolished. Nothing states that ownership of the wall lies with the property owner that owns the last building standing. There is no easement running personally or with the land granting the right to break into the wall and create a hole or opening as proposed by 631 North Broad.²² Finally, there is no evidence that one party has contracted with the other to alter the legal status of the wall from party ownership to sole ownership.

Given that the South Wall as it exists today is a party wall, both 631 North Broad and Congregation Rodeph Shalom own it. As stated by the winning appellee attorney in *Turchi*, “It is black letter law that land covered by a party wall remains the several property of the owners of each half, subject to implied reciprocal agreements by which each owner is entitled to support for this building by means of half of the wall belonging to his neighbor.”²³

In this context and in absence of any express agreements, Congregation Rodeph Shalom is entitled to legal recognition of its property rights in the wall. Moving to the question of one party unilaterally opening a hole in the wall without the other’s permission, the Pennsylvania Supreme Court long ago in *Milne’s Appeal* said no.²⁴ When a party wall exists, an owner of the party wall is entitled to a solid wall.

In *Milne*, defendant built a party wall on a Lombard Street property. The wall’s foundation encroached over his property line with plaintiff. When defendant’s wall was finished, he constructed window openings along the wall, annoying plaintiff and provoking a lawsuit. Even though the party wall ended behind defendant’s own property line, the *Milne* Court held it made no difference. Because the wall had infringed on plaintiff’s property at some point,

²² Compare *Turchi*, Aug. Term 2004, No. 1187, at p. 6 (Court found existence of express easements in applicable deeds).

²³ Brief for Appellees, 2006 WL 3368324, at 19, *Turchi v. MCW Washington Square Partners*, 919 A.2d 965 (Pa. Super. 2007) (unpublished).

²⁴ *Milne’s Appeal*, 81 Pa. 54, 56 (1876) (another benefit of a party wall owner “is the right to have a solid wall (without openings) of brick or stone or other non-combustible materials”).

the entire wall was a party wall. The Court then issued an injunction to remove the window openings created by the defendant and restore to plaintiff the benefits he possesses as owner of his side of the party wall. The *Milne's Appeal* Court cited *Vollmer's Appeal*, which a few years earlier had held that a party wall in Philadelphia must be a solid wall of brick or stone, without openings and that if a builder does not comply, "he becomes a trespasser and a wrongdoer."²⁵ In explanation, *Vollmer's Appeal's* author, Justice John M. Read, reviewed statutory history going back to The Building Acts in England under King Charles II and Queen Anne whose governments were responding to the Great Fire of London in 1666. The Building Acts were sources for Pennsylvania's colonial legislation of 1721 that set the Commonwealth's first rules for party walls applicable to Philadelphia. Statutory law governing party walls existed when the South Wall was built and they were enforced by courts like *Milne's Appeal* and *Vollmer's Appeal*.²⁶

As a party wall must be a solid wall unless the parties agree otherwise, 631 Broad Street may not create any opening to the party wall without the consent of defendant Congregation Rodeph Shalom.

While these conclusions dispose of the plaintiff's declaratory judgment and quiet title actions, preliminary injunction analysis also requires a balancing of relative harm. *Vollmer's Appeal* provides clear guidance. There, the mere creation of an opening in a party wall without the other side's permission was an irreparable harm, apparent on its face without further evidentiary proof.

²⁵ *Vollmer's Appeal*, 61 Pa. 118, 129 (1869).

²⁶ See the Acts of February 2, 1854, April 21, 1855 and May 13, 1856 followed by an enactment on May 7, 1855, Pampl. L. 464 in which the legislature passed, "An act to provide for the regulation and inspection of buildings in the city of Philadelphia, and for the better preservation of life and property", followed by additional acts on April 11, 1856 (Pamph. L. 319, May 20, 1857, Pamph. L. 590, and April 13, 1858, Pamph. L. 244) to form the supervisory system in Philadelphia that was in place when the party wall in this case was built.

“Of the injurious effect on the comfort and convenience of the adjoining owner and the tenants, there needs no proof, nor as to the damaging effect upon the value and price of the house and lot of the plaintiff.”²⁷

The Court in *Vollmer’s Appeal* continued, “But the windows in this party wall are wrongfully and illegally put there, contrary to law, and with a direct intention to do an unlawful act for the private benefit of the defendant. Using the language of the English Building Act, it is a nuisance, both public and private, and is clearly within the restraining powers of a court of chancery.”²⁸

631 North Broad Street, nonetheless, claims otherwise, citing *Roberts v. Bye*, 30 Pa. 375 (Pa. 1858) and *Masson and Besanson’s Appeal*, 70 Pa. 26 (Pa. 1871). 631 North Broad Street cites these cases for the proposition that the party who built the wall is entitled to ownership of a party wall if the other party has not paid his share of the costs of the wall’s construction. Both of these cases, however, address different legal issues than those reviewed here. Over two full days of testimony, no evidence was presented on whether the construction costs of the South Wall were paid, or not, by the adjoining landowner. As the South Wall’s initial construction costs are not in evidence, neither *Roberts v. Bye* nor *Masson and Besanson’s Appeal* is helpful here. *Milne’s Appeal* does not cite either case, and *Vollmer’s Appeal* which was decided after *Roberts v. Bye* makes no mention of *Besanson’s Appeal*.²⁹

Congregation Rodeph Shalom has, therefore, demonstrated that a preliminary injunction is necessary to prevent immediate and irreparable harm. The unilateral opening of a large hole in

²⁷ *Vollmer’s Appeal*, 61 Pa. at 130.

²⁸ *Id.*

²⁹ Compare *Cohen v. Perrino*, 355 Pa. 455 (Pa. 1947) (“If a property owner builds a wall entirely on her own property, the wall is not a party wall and the property owner may create windows and openings through the wall as she pleases; however if the adjoining property owner retaliates by building a wall on his side of the property line, and the new wall obstructs the other property owner’s air and light, the obstructing property owner has every right to do so, even if her motive is malicious.”).

the South Wall by 631 North Broad Street harms Congregation Rodeph Shalom and impacts its “unlimited right to enjoy the use of its own property for any lawful purpose....”³⁰ This harm cannot be measured and as noted in *Milne’s Appeal*, no proof is needed to show the “damaging effect upon the value of the lot” if Congregation Rodeph Shalom were to sell 619 N. Broad Street.

Finally, a preliminary injunction stopping partial or total demolition of the South Wall until final judgment does not harm public interest. Testimony is persuasive that the wall is not in danger of imminent collapse on its own. There are no safety issues implicated by maintaining the status quo until the parties resolve the dispute amicably or a court has entered final judgment. Additionally, by Order filed today, the Zoning Board of Adjustment’s grant of a use variance in favor of 631 North Broad Street is affirmed. 631 North Broad Street has zoning approval to go forward with its project. Because preliminary injunction does not change the use approved by the Zoning Board, there is no harm to the public interest. The project can still be built upon resolution of property issues and/or modification of architectural plans.

631 North Broad Street is, therefore, enjoined from demolishing the South Wall, in its entirety or partially, absent agreement otherwise by the property owner of 619 North Broad Street, their assignees, heirs, and successors. This preliminary injunction enjoins any demolition of the South Wall, partial or complete, whether authorized by lawful demolition permit, or not, until further order of court.

As noted, both parties have asked the court to issue an adjudication on the merits of the quiet title Complaint. We are constrained from doing so because a final order generally requires

³⁰ *Schick v. Girard Trust Co.* 33 Pa. D & C 464, 465 (Phila. Ct. of Common Pleas, 1938) (Parry, J.).

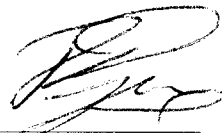
the disposition of all claims and all parties. Pa. R.A.P. 314(b) (1). Nevertheless, we are filing an Order today that addresses both Counts of plaintiff's Complaint.

Specifically, while there are limited exceptions that give a party wall owner permission to alter a party wall, these exceptions do not apply to 631 North Broad Street's goals. Typically, permitted alterations derive from a party wall owner's implied duty to maintain its side of the wall, as Congregation Rodeph Shalom did three years ago. Permitted alterations also derive from an implied reciprocal easement obligating party wall owners to protect a building from exposure to the elements, or risk of fire.³¹

In proposing to demolish a portion of the party wall for purposes solely related to its own architectural design choices, 631 North Broad Street is proposing something it may not do unless the property owner of 619 North Broad Street agrees. There are simply no implied or expressed easements or covenants giving 631 North Broad Street the right to unilaterally alter the party wall. As seen in *Milne's Appeal* and *Vollmer's Appeal*, the South Wall must remain solid until agreed otherwise.³² Congregation Rodeph Shalom prevails on the merits of both plaintiff claims at Count 1 and Count 2 in its Complaint.

In sum, the South Wall is a party wall which is not subject to unilateral changes.

BY THE COURT



RAMY I. DJERASSI, J.

³¹ See *Sobien v. Mullin*, 783 A.2d 795, 798 (Pa. Super. 2001); See *Gimbel Bros. v. Markette Corp.*, 307 F.2d 91, 93 (3d Cir. 1962).

³² In *Appeal of Vollmer*, the Supreme Court held that a builder violated Pennsylvania's party wall statute by building windows into a party wall because only solid walls further the purpose of permitting party walls. *Appeal of Vollmer*, 61 Pa. 118 (Pa. 1869).