

Matter of 371 Nostrand LLC v Monroe Plaza, L.L.C.

2024 NY Slip Op 31309(U)

April 8, 2024

Supreme Court, Kings County

Docket Number: Index No. 503071/2024

Judge: Rupert V. Barry

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 13

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In the Matter of the Application of:

371 NOSTRAND LLC,

Petitioner,

For an Order and Judgment pursuant to Section 881 of the
Real Property Actions and Proceedings Law
for access to adjoining property,

-against-

Cal. No.: 6 (Mt. Seq. 1)
Cal. No.: 47A (Mt. Seq. 2)
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DECISION & ORDER

MONROE PLAZA, L.L.C.,

Respondent.

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**Recitation, as required by CPLR 2219(a), of the papers considered in the review of
Petitioner’s application and Respondent’s cross-application: NYSCEF Doc. Nos.: 1 -14, 15 –
20, 23, 28 – 36, 38, 39 – 53.**

Petitioner, 371 Nostrand LLC (“Petitioner”), has brought this Special Proceeding against Respondent, Monroe Plaza, LLC (“Respondent”), seeking a Court-ordered access license to 369 Nostrand Avenue, Brooklyn, New York (the “Adjacent Premises”) pursuant to RPAPL § 881 for the following relief:

Petitioner seeks an Order and Judgment granting Petitioner access to the Adjacent Premises, pursuant to RPAPL § 881, in order to: (a) perform a preconstruction survey of the Adjacent Premises; (b) install, maintain and remove temporary protection on the roof and roof terraces of the Adjacent Premises; (c) install weather protection on the Adjacent Premises; (d) access airspace above the Adjacent Premises to install, maintain, utilize and remove needle beams and suspended scaffolding with debris netting that will be supported from the to-be-constructed building at the Project Premises; and (e) maintain, and remove vibration monitors, optical survey targets and crack gauges in and on the building located on the Adjacent Premises; all of which access is require by applicable law and shall be maintained for approximately eighteen (18) months, together with all such other and further relief as this Court deems just and proper. Respondent opposes the Petition and Order to Show Cause.

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Petitioner has submitted proper evidence that it seeks access to the Adjacent Premises in order to comply with various provisions of the New York Building Code, including Sections 3309.1, 3309.4.4, 3309.9, and 3309.10. Given that the Project Premises and Adjacent Premises are directly adjacent to one another, such access is required.

RPAPL 881 gives this Court the broad discretion to grant a license “upon such terms as justice requires”, this Court decline to award Respondent professional fees incurred in connection with this action. In addition, Respondent seeks professional fees for matters arising out of a separate action.

Respondent’s claim that this license is inconsistent with the terms of the preliminary injunction granted by the Honorable Aaron Maslow in the action captioned Monroe Plaza, L.L.C. v. 371 Nostrand LLC, Index No. 533210/2023 (See [NYSCEF Doc. No. 76](#)) (the “Separate Action”) is without merit. That order restrains Petitioner from “continuing with or engaging in any further...construction activities...until a license agreement pursuant to RPAPL 881 is entered into between the parties.” Petitioner has brought a proceeding pursuant to RPAPL 881, and the license is hereby ordered after the parties were obviously unable to come to an agreement.

Finally, this Court makes no determination as to whether Respondent has established its property damages claims against Petitioner. The Court notes, however, that Respondent is currently pursuing such claims in a separate action and is obviously free to continue to do so.

Accordingly, it is hereby:

ORDERED, that Petitioner’s Order to Show Cause and Respondent’s Cross-Motion are **GRANTED** to the following extent:

ORDERED, that the access requested by Petitioner is hereby **GRANTED** for a period of eighteen (18) months from the commencement of such access on the following terms and conditions:

(a) Petitioner shall conduct a preconstruction survey of Respondent’s property and Petitioner shall provide such preconstruction survey to Respondent and Respondent’s professional engineer.

(b) Petitioner shall provide any and all structural, SOE (Support of Excavation), foundation demolition, temporary protections, and site safety plans in relation to Petitioner’s construction project, to Respondent and its professional engineer.

(c) Petitioner shall install crack gauges, vibration monitors, and optical monitors.

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(d) Petitioner shall install, maintain and later remove remote access vibration monitors, optical surveying equipment, crack monitors and/or survey marks or electronic survey equipment (collectively, the “Monitoring Equipment”) pursuant to the monitoring plan ([NYSCEF Doc. No. 17](#)). Petitioner shall arrange the installation of the Monitoring Equipment with reasonable input from Respondent’s professional engineer.

(e) Petitioner shall maintain the Monitoring Equipment until the completion of the first floor of the superstructure of the new building being constructed at its Project Premises.

(f) If any threshold level set forth in the Monitoring Plan is exceeded, all project work shall be temporarily stopped and the means and methods being utilized that caused such exceedance shall be reviewed by Petitioner’s engineers and, if necessary, modified to avoid further exceedances.

(g) Petitioner’s or its Construction Team’s failure to stop work at any time required shall be considered a material breach of the access license.

(h) The vibration monitors shall be set to continuously monitor during the performance of construction work and so that in case any of the limits set forth in the Monitoring Plan are exceeded, the monitors will send email/ text message alerts in real-time to predesignated parties, to wit: Adjacent Owner Monroe Plaza, L.L.C. at Joey@abecomangement.com and Magdy Youssef, P.E.: youssefpe@gmail.com;

(i) In the event that Petitioner’s work causes a crack or widens an existing crack to Respondent’s foundation wall or slab to an amount which exceeds the thresholds on the monitoring plans, all work causing such crack exceedance shall immediately stop and the parties shall follow the same procedure as if there was an exceedance of the monitoring plan. Any and all cracks caused in Respondent’s foundation wall and/or slab caused by the work shall be notated in the special inspection reports to the extent required by Applicable Laws. Failure to monitor any time according to the plan as indicated herein shall be a material breach of the access license agreement.

(j) Petitioner shall install all NYC DOB required waterproofing for Respondent’s building.

(k) Petitioner shall hire a monitoring company in the State of New York to survey Respondent’s existing building optically and for vibrations with Respondent’s prior written approval of Plan.

(l) Petitioner’s design professional of record shall cause Special inspections for all work as required by applicable laws.

(m) Petitioner shall hire a third-party NYC DOB Licensed Special/Progress inspector to inspect the work during the construction and provide signed and sealed inspection reports as required by applicable laws.

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- (n) Petitioner shall perform its excavation safely and in compliance with all laws.
- (o) Petitioner shall provide all monitoring reports with raw data to Respondent on a weekly basis, including remote access vibration monitors, optical monitors, and crack monitor (gauges).
- (p) Petitioner shall provide an architectural detail showing the waterproofing and flashing requirements between the proposed building and existing parapet at 369 Nostrand Avenue.
- (q) Petitioner shall present all structural plans and foundation plans approved by the New York City Department of Buildings to Respondent.
- (r) Petitioner shall install roof protections in accordance with the roof protection plans and details attached as Exhibit 1 to the Moshe David Affidavit ([NYSCEF Doc No. 16](#)).
- (s) Petitioner shall provide waterproofing between new footing and existing wall;
- (t) Petitioner shall install scaffolding in accordance with the scaffold plans ([NYSCEF Doc No. 16](#)).
- (u) Petitioner shall install protections in accordance with the site safety plan SSP ([NYSCEF Doc. No. 16](#)).
- (v) Petitioner shall provide overhead protection as set forth in [NYSCEF Doc No. 16](#).
- (w) Petitioner shall follow all OSHA requirements.
- (x) Petitioner shall confirm in writing that no underpinning is being performed under Respondent's property.
- (y) Petitioner shall provide all foundation and SOE Plans.
- (z) Petitioner's Professional Engineer shall confirm seismic gap distance between the two buildings.
- (aa) Petitioner shall prevent water runoff in and upon Respondent's Property as required by applicable laws.
- (bb) Petitioner Professional Engineers are to confirm the seismic gap distance.
- (cc) Petitioner shall properly seal the seismic gap at the top of Respondent's building at roof level of Respondent's property between the two buildings.
- (dd) Petitioner to provide plans to extend and/or vent the chimney at Respondent's property, adjacent to the Petitioner's construction project to the height of the new construction.
- (ee) Petitioner to provide all architectural drawings for review where relevant to the connections and waterproofing between the parties' adjacent exterior walls.

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(ff) Any exterior drains, if present, should be covered with silt sack drain covers.

(gg) Notification of when contractor wishes to site safety protection and also when they want to access Respondent's property.

(hh) Petitioner at its sole cost and expense to make all repairs to Respondent's property to repair any and all damages caused by Petitioner's construction work after the date of this license.

(ii) Petitioner to pay Respondent monthly license fees of \$900.00 (nine hundred dollars) per month until all protections are removed in light of the fact the protections are primarily being installed on the Respondent's unused roof.

(jj) Petitioner to make Respondent an additional insured on Petitioner's or its General Contractor's Commercial General Liability policy by a proper endorsement from its carrier as follows:

1. Insurance. Licensee or its General Contractor/Construction Manager shall maintain at all times during the term, Commercial General Liability insurance covering claims for bodily injury, personal injury, death, or property damage with minimum coverage of One (1) Million Dollars (\$1,000,000.00) per occurrence and Two (2) Million Dollars (\$2,000,000.00) aggregate coverage.

2. Workers' Compensation of One Million Dollars (\$1,000,000.00) and in accordance with the applicable NYS law.

3. Employers Liability Insurance with limits as required by applicable law.

4. Commercial Automobile Liability Insurance with limits of One (1) Million Dollars (\$1,000,000.00) each, accident covering over Owned, Hired, and Non-owned vehicles.

5. Umbrella or Excess Commercial General Liability with combined single limit for bodily injury, personal injury, and property damage of at least Five (5) Million Dollars (\$5,000,000.00) or more if required by NYC DOB per occurrence and in the aggregate which aggregate amount may be reached by multiple policies. All excess or umbrella liability policies shall schedule the Primary Commercial General Liability as the underlying policy. Such insurance policies shall be written with a company or companies having an AM Best rating of at least A-VIII and authorized to engage in the business of insurance in New York State. Licensee shall provide certificates of insurance to Licensor within five (5) business days of the order.

(kk) Petitioner to defend, indemnify, and hold harmless Respondent against third party claims brought against Respondent arising out of the Petitioner's construction project.

(ll) Petitioner at its sole cost and expense to cure any and all violations it may cause to be issued against Respondent's property as a result of Petitioner's construction project within thirty (30) days of being notified of violation through Petitioner's counsel.


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(mm) Petitioner shall cause to be removed within fifteen (15) days after Respondent provides notice of any lien or encumbrance issued or filed against Respondent's property as a result of Petitioner's work on its project.

This constitutes the decision and order of this Court.

*All applications not specifically addressed herein are denied.

Dated: April 8, 2024



HON. RUPERT V. BARRY, A.J.S.C.