

**Matter of 125 W. 21st LLC v ARC Assoc. GP
LLC**

2007 NY Slip Op 31658(U)

June 11, 2007

Supreme Court, New York County

Docket Number: 0106158/2007

Judge: Paul G. Feinman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: FEINMAN
Justice

PART 52

125 West 21st Street LLC

INDEX NO. 106/58/07

MOTION DATE 5/30/07

- v -

MOTION SEQ. NO. 01

ARC ASSOCIATED G.P. LLC
ET AL

MOTION CAL. NO. 10

The following papers, numbered 1 to _____ were read on this motion to/for RPAPL 881

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1-3

Answering Affidavits — Exhibits _____

4-5

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion petition is decided
in accordance with annexed
decision, order + judgment

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 41B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/11/07

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X

In the Matter of the Application of:

125 WEST 21st LLC,
Petitioner,

Index Number 106158/2007
Submission Date May 30, 2007

For an order pursuant to Section 881 of the RPAPL
for Access to Adjoining Property

Mot. Seq. No. 001
Cal. No. 10

- against -

**DECISION, ORDER &
JUDGMENT**

ARC ASSOCIATES GP LLC, CHESLEA CONDOS, LLC,
CASTLEHOPE LIMITED, SOMA HUDSONBLUE, LLC,
BERNARD VENET and DIANE SEGARD VENET,
Respondents.

-----X

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For the Respondents:
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Papers considered in review of this petition for a license pursuant to RPAPL 881:

Papers	Numbered
Order to Cause, Petition, Affidavits, Exhibits & Memo	1-3
Answering Affidavits, Exhibits	4,5

PAUL G. FEINMAN, J.:

Petitioner 125 West 21st LLC brings this special proceeding, pursuant to Real Property Actions and Proceedings Law (RPAPL) § 881, seeking a license to enter upon the roof of respondents' premises, designated as 117-119 West 21st Street in Manhattan, for a period of not less than 10 weeks, for the purpose of making certain improvements on a 13-story condominium building that petitioner is building on its adjoining premises, 125 West 21st Street. The proceeding was commenced by order to show cause. Due to the emergency nature of the

application and the quick return date, the court required personal service on the LLC respondents pursuant to CPLR 311-a and personal delivery to the individually named respondents. Petitioner was unable to fully satisfy the order's service requirements given that the individual respondents are primarily residing in France and not at the affected location. Petitioner's counsel set forth in a detailed affidavit dated May 21, 2007 the due diligence undertaken to serve these respondents before resorting to an alternative service method. At oral argument on May 31, 2007 (Ct. Reporter Margaret Baumann), counsel for ARC Associates GP LLC (ARC) indicated on the record that she was authorized to appear on behalf of all the named respondents and that any failure to strictly adhere to the service directives of the order to show cause was waived inasmuch as actual notice of the petition had been achieved. Notwithstanding extensive settlement negotiations, as of today the court has not yet been advised of an agreement and accordingly the court will proceed to determine the petition on its merits. The petition is granted upon the conditions set forth in the decretal paragraphs at the end of this decision, order and judgment.

Facts

By letter dated April 20, 2007, petitioner requested access to respondents' roof for 10 weeks in order to install a waterproof connection between the two buildings, so as to keep water from entering the gap between them; finish the façade of the eastern wall of petitioner's building in Exterior Insulation Finish System, from the top of that building to the parapet of respondents' building; and place protective materials on respondents' roof for the duration of the work. The letter stated that the waterproof connection could be installed only from the roof of respondents' building, and that the area of the proposed façade adjacent to the parapet of respondents' building could be built only from the roof of that building. Petitioner has obtained all necessary permits

from the New York City Buildings Department, and petitioner's project manager states in his affidavit that construction of the façade is approximately 40% complete.

By e-mail message dated April 26, 2007, James M. Francis, writing on behalf of respondent ARC, replied that, several weeks earlier, petitioner's site superintendent had orally requested authorization to enter upon respondents' roof, and that such authorization had been refused because of petitioner's refusal to cooperate with respondents' requests. Specifically, Mr. Francis noted that petitioner had failed to provide information regarding underpinning that petitioner had apparently performed, and that it had refused respondents' request to cooperate in seeking a zoning lot merger of the two lots. In sum, the letter concluded, "[y]ou need to find another way to accomplish the construction at your project, one that does not include any assistance from us."

Joel Breitkopf, a member of Alchemy 15th Street LLC, a Class A member of Alchemy 15-21 LLC which is a managing member of Open Heir LLC, the sole member of petitioner, states in his affidavit that more than 20 condominium units in the project are already under contracts to be sold; that without the requested access petitioner will be either unable to complete construction of its building, or at least, unable to complete it without significant delay; and that such delay would allow existing purchasers to withdraw from their contracts and prevent remaining units from being sold. In addition, Mr. Breitkopf states that each day of delay would result in significant increases in accrued interest on petitioner's construction loan, and in expenses for insurance, administrative and operational costs, and labor.

ARC, which opposes petitioner's application on behalf of the respondents collectively, has a co-development interest in respondents' building. ARC contends that petitioner has

committed various trespasses on respondents' building and land, including underpinning activity; that petitioner can use alternative ways to construct its façade, and to install waterproofing, that would not require entry upon respondents' roof; and that, inasmuch as ARC intends to build an additional eight stories on respondents' building, and has entered into a contract with an architect for that project, ARC would be inconvenienced by having to coordinate the activities of its workers with those of petitioner' workers. Finally, ARC argues that there is no need to build a façade and a water barrier to meet the roof of a four-story building, when that structure will soon be a 12-story structure.

Analysis

RPAPL § 881 provides that:

[w]hen an owner or lessee 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 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 Such license shall be granted by the court in an appropriate case upon such terms as justice requires. ~~The licensee shall be liable to an adjoining owner or his lessee for actual damages occurring as a result of the entry.~~

In deciding the instant application, petitioner's alleged trespasses are irrelevant to its application. The "clean hands" doctrine "is never used unless the plaintiff is guilty of immoral, unconscionable conduct" (National Distillers & Chem. Corp. v Seyopp Corp., 17 NY2d 12, 15 [1966]), and Mr. Francis claims neither that any of the prior trespasses was done with evil intent or that any of them caused any damage. ARC's stated concern, that its own construction activities may be impeded if petitioner's application is granted, appears to be exaggerated. ARC entered into its contract with its architect on March 19, 2007. It does not appear from the record

that the architect has yet drawn up plans, much less that any plans have been submitted to the Buildings Department, let alone been approved by it. Petitioner seeks a license for only approximately 10 weeks. While Johanna ML Francis, the managing member of ARC, states in her affidavit that there are many waterproofing systems that allow application by hanging from one's own roof, she does not disclose the basis for that statement. Moreover, while petitioner might, perhaps, have engaged in construction in a manner that would not have required access to respondents' building, nothing in the record suggests that petitioner and his architect were not acting in good faith when they chose their method of construction, and petitioner was entirely within its right in commencing construction in conformance with the permits obtained from the Department of Buildings. That petitioner thereby created its need to enter upon the roof of respondents' building is not a reason to deny petitioner's application. See Matter of Rosma Dev., LLC v South, 5 Misc 3d 1014 (A), (Sup Ct, Kings County 2004); Sunrise Jewish Ctr. of Val. Stream v Lipko, 61 Misc 2d 673 (Sup Ct, Nassau County 1969).

Finally, while petitioner may wish to take ARC's plans for its own future construction into account, those plans have no bearing on petitioner's instant application. This application is for immediate relief, and it is based upon the situation as it currently exists. While construction by ARC may require retrofitting of the construction that petitioner seeks to finish, any construction by ARC, and any required retrofitting are currently speculative, at best.

A license pursuant to RPAPL § 881 should be issued, on reasonable terms, where the resulting inconvenience to the owner of the adjoining lot would be outweighed by the hardship to the applicant if the license is not granted. Matter of Rosma Dev., LLC v South, 5 Misc 3d 1014 (A); Chase Manhattan Bank (Natl. Assn.) v Broadway, Whitney Co., 57 Misc 2d 1091 (Sup Ct,

Queens County 1968), affd 24 N.Y.2d 927 (1969). Here, it is undisputed that, if access to respondents' building is not granted, petitioner will suffer major financial losses. Conversely, it does not appear that ARC will suffer any significant hardship if the license is granted.

Accordingly, on balance petitioner's application should be granted.

Petitioner anticipates that the work, for the performance of which it seeks entry upon the roof of respondents' building, will take between four and eight weeks, and that, therefore, access is required for 10 weeks to allow for mobilization and demobilization. Petitioner also states that, thereafter, access will be required periodically for such repair and maintenance as may be necessary. RPAPL § 181 provides for temporary licenses, not permanent easements. Matter of Broadway Enters., Inc. v Lum, 16 AD3d 413 (2d Dept 2005); Sunrise Jewish Ctr. of Val. Stream v Lipko, 61 Misc 2d 673. Thus, while petitioner's application will be granted, it will be limited to the estimated time required for construction. If, in the future, petitioner needs access again, it will be free to apply for same. By the same token, in the event that ARC will need access to petitioner's property for its construction, it will be free to make an application for such access, in the event that access is refused by petitioner.

Petitioner has already had ARC named as an additional insured under petitioner's general liability and excess/umbrella liability policies, and RPAPL § 881 provides, by its own terms, that a licensee will be liable to an adjoining owner for any actual damages occurring as a result of the entry. In addition, the court will require petitioner to post a bond to cover any legal fees that respondents may incur in connection with any damages resulting from petitioner's entry.

Accordingly, it is hereby

ORDERED that the petition is granted; and it is further

ORDERED and ADJUDGED that petitioner 125 West 21st LLC shall have access to the roof of 117-119 West 21st Street in Manhattan, during ordinary construction work hours, for a period of ten weeks, commencing five days after service upon respondent ARC Associates GP LLC of a copy of this decision, order and judgment with notice of entry, on condition that, prior to entering upon said roof, petitioner shall post a bond in the amount of \$500,000.00, and provide said respondents with the name of each firm that will supervise or perform work on said roof; and it is further

ORDERED and ADJUDGED that petitioner shall provide said respondents with the start and end dates during which the work will be performed, and that it shall stage work in such a manner as to minimize any interference with any construction activities that said respondents may undertake.

This constitutes the decision, order and judgment of the court.

Dated: June 11, 2007
New York, New York



J.S.C.

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UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the County Clerk's Desk (Room 41B).