

Matter of Buck Development LLC v Noury

2008 NY Slip Op 33500(U)

December 15, 2008

Supreme Court, New York County

Docket Number: 110705/08

Judge: Kibbie F. Payne

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

PRESENT: KIBBIE F. PAYNE
Justice

PART 4

BUCK DEVELOPMENT LLC

INDEX NO. 110705/08

MOTION DATE 01-27-08

- v -

MOTION SEQ. NO. 001

JERRY NOURY

MOTION CAL. NO. _____

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

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

PAPERS NUMBERED

Answering Affidavits - Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, the petition is decided in accordance with the annexed Judgment/Decision.

FILED
JAN - 5 2009
COUNTY CLERK'S OFFICE
NEW YORK

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NYS SUPREME COURT - CIVIL

MDA

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

Dated: December 15, 2008

[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: PART 4**

-----X
Application of BUCK DEVELOPMENT LLC,
as agent for AB GREEN GANSEVOORT LLC,

Petitioner,

Index No. 110705/08

For a Judgment Pursuant to RPAPL § 881

Judgment/Decision

-against-

JERRY NOURY,

Respondent.

-----X
KIBBIE F. PAYNE, J.:

In this RPAPL § 881 proceeding, commenced by order to show cause, petitioner Buck Development LLC ("BDL") seeks access to respondent's property to complete certain repairs. Respondent Jerry Noury has answered, claiming that the petition seeks more extensive relief than is available pursuant to RPAPL § 881.

Petitioner BDL is the agent for AB Green Gansevoort LLC ("ABG"), which owns property located at 844 Washington Street, New York, New York (the "Site"). A hotel, The Standard Hotel, is currently being constructed on the Site (the "Project"), which abuts respondent's premises, located at 51 Little West 12th Street (the "Noury premises").

According to the petition, BDL and its contractors or agents need access to "a minimal portion of [the Noury premises] to perform work designed to keep the space between [the Site and the Noury premises] weather tight and to fix a crack that emerged

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during the construction of the Project on the party wall between [the Noury premises] and 53 Little West 12th Street" (Petition, ¶ 5). While the petition claims that the "access required is limited to the exterior terrace area and does not involve any work in or about Noury's residence itself" (*id.*, ¶ 7), the papers submitted in support of the petition seem to indicate that the work to be performed is actually more extensive in scope.

Specifically, petitioner seeks to install:

a painted aluminum wall coping for the lower parapet wall at 51 Little West 12th Street that extends across the small space between the buildings and extending up the new masonry parapet wall at [the Project]. As a secondary protection, a membrane gutter flashing will be installed under the wall coping extending across the space between the two buildings. To accept the new wall coping a minor masonry repair will be required at the top of the existing parapet wall at 51 Little West 12th Street.

(Petition, ¶ 13) (emphasis supplied)

Petitioner asserts that this work will require access to the roof at the Noury premises. Further, petitioner seeks to attach a counterflashing trim piece to the East wall of the Noury premises.

RPAPL § 881 provides:

When 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 his lessee, and permission so to enter has been refused, the owner or lessee seeking to make such improvements or repairs may

[* 4]

commence a special proceeding for a license so to enter pursuant to article four of the civil practice law and rules. The petition and affidavits, if any, shall state the facts making such entry necessary and the date or dates on which entry is sought. Such license shall be granted by the court in an appropriate case upon such terms as justice requires. The licensee shall be liable to the adjoining owner or his lessee for actual damages occurring as a result of the entry.

Here, however, petitioner does not seek mere access to the Noury premises in order to make repairs or improvements to its own property. Instead, the repairs petitioner seeks to make will occur on the Noury premises and will be attached to, or will be made to, portions of the Noury premises.

RPAPL § 881 is "limited to permission for the making of an improvement or repair. What the statute authorizes is a temporary license to enter and not a license to erect a permanent encroachment" (*Foceri v. Fazio*, 61 Misc 2d 606, 607-608 [Sup Ct, Queens County 1969]). The court must deny an RPAPL § 881 petition where the work sought to be performed would constitute a permanent encroachment on respondent's property (*Matter of Broadway Enters., Inc. v. Lum*, 16 AD3d 413, 414 [2d Dept 2005]).

However, since questions of fact exist as to whether petitioner's proposed construction indeed constitutes permanent encroachments to the Noury premises, a hearing is necessary to determine this issue (*Cf. Foceri*, 61 Misc 2d at 607).

Accordingly, it is

ORDERED that the issue of whether the coping, gutter and masonry work that petitioner seeks to perform will constitute a permanent encroachment on respondent's property is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Referee, or Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119) to arrange a date for the reference to a Special Referee; and it is further



ORDERED that the Clerk shall notify all parties of the date of the hearing on the above-specified issue.

The foregoing constitutes the decision, order and judgment of the court.

Dated: December 15, 2008

FILED
JAN - 5 2009
COUNTY CLERK'S OFFICE
NEW YORK

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ENTER:

KIBBIE F. PAYNE
J.S.G.

CLERK

Index No. 110705/08

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

Application of BUCK DEVELOPMENT LLC,
As Agent For AB GREEN CONSTRUCTION LLC,

Plaintiff/Petitioner,

-against-

JERRY MORLEY,

Defendant/Respondent

Judgment

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AT 4:37 P M
N.Y., CO. CLKS OFFICE