

<b>Matter of Fotos v Verral</b>
2009 NY Slip Op 30394(U)
February 18, 2009
Supreme Court, New York County
Docket Number: 112723/08
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: \_\_\_\_\_

PART 6

Index Number : 112723/2008

**FOTOS, CONSTANTINE**

VS.

**VERRAL, CHARLES S., II**

SEQUENCE NUMBER : 001

OTHER RELIEFS

INDEX NO. 112723/08

MOTION DATE 1/9/09

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

this motion is for leave under  
RPAPL § 881

PAPERS NUMBERED

1-3

4

5-8

Notice of ~~Motion~~ <sup>Order</sup> / Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be delivered in said person. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 2/18/09 \_\_\_\_\_ JBL J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6

-----X

In the Matter of

CONSTANTINE FOTOS,

Petitioner,

Index No. 112723/08

For a Judgment Pursuant to RPAPL §881 for a License  
to Enter

Decision, Order, and Judgment

- against -

CHARLES S. VERRAL II and JEAN VERRAL

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk  
and no return or other process has been served hereon. To  
obtain entry, petitioner or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
141B).

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JOAN B. LOBIS, J.S.C.:

Petitioner Constantine Fotos brings this proceeding, pursuant to Real Property  
Actions and Proceedings Law ("RPAPL") §881, for a license to enter the property of respondents  
Charles S. Verral II and Jean Verral, for the purpose of making certain repairs to petitioner's  
property.

According to the petition, petitioner is the owner of real property that is commonly  
known as 76 Rear and 78 Rear Horatio Street in Manhattan (the "Fotos Premises"). Respondents  
are owners of certain property located at 79 Jane Street in Manhattan (the "Verral Premises").  
Petitioner alleges, on information and belief, that respondent Jean Verral is the mother of respondent  
Charles S. Verral II. A portion of the rear of the Fotos Premises and the rear of the Verral Premises  
share a property line. The Fotos Premises consists of two single-family dwellings that share a wall;  
these premises are in the process of being combined, and the two tax lots composing the Fotos  
Premises are in the process of being merged.

Petitioner seeks to make repairs to the foundation wall at the rear of the buildings on the Fotos Premises. Petitioner states that leaks are penetrating the foundation, and that repairs are necessary on the side that faces the Verral Premises. Petitioner avers that other neighbors gave permission for petitioner and petitioner's contractors to have access to their property so that the work could be performed. Portions of the foundation adjacent to the property of other neighbors has already been repaired, without incident. The proposed contractor avers that when he inspected the premises, he observed the leaks emanating from the foundation wall adjacent to the Verral Premises and was able to smell the resulting dampness inside petitioner's basement. The contractor opined that because of the extensive damage, it is neither practical, effective, or recommended to make the repairs to the foundation from the interior of petitioner's home.

On October 1, 2007, petitioner met with respondent Charles S. Verral II to seek permission for access to the Verral Premises. Mr. Verral refused to grant petitioner and his contractors access to the Verral Premises. Thereafter, a six-foot high fence was erected on the Verral Premises that is adjacent to the Fotos Premises, and bamboo plants were planted along the property line on respondents' side of the property. According to petitioner, the erection of this fence, which he terms a "spite fence," will make it more difficult and possibly more costly for the repairs to be made, since the fence must be removed and reinstalled in order to complete the repairs to the Fotos Premises. Petitioner also contends that respondents were well aware that bamboo is an aggressive plant; that the roots will grow under the "spite fence;" and, that the bamboo was planted intentionally to cause additional damage to petitioner's property.

Petitioner's contractor has submitted an affidavit in support of the application, which states that additional repairs to the foundation are necessary to prevent further leaks and interior damage, including excessive moisture and mold. To complete the remaining repairs, the ground at the exterior of the foundation must be dug to the basement level for the entire length of the foundation adjacent to the Verral Premises. Then, the foundation will be cleaned, sealed, patched, and waterproofed. The area around the foundation will then be back-filled. In order to perform this work, the contractor has advised petitioner that an area of approximately three to five feet from the foundation is needed, which means that the contractor needs access to an area of the Verral Premises comprising approximately two to four feet in width for the length of the property line between the Fotos Premises and Verral Premises. According to petitioner's reply affidavit, respondents' house is in excess of thirty feet from the property line, and the excavation will not impact at all on respondents' home or its foundation. The construction company can begin the work with approximately two weeks' notice; the work will take approximately one to two weeks to complete.

The only response submitted to the petition and supporting affidavits is respondents' answer and counterclaim. They allege that petitioner has failed to obtain the required permits to excavate the property; that petitioner has failed to prove that the license to enter respondents' property is absolutely necessary to perform the work; and, that the petition is barred by the doctrine of unclean hands, because petitioner has attempted to commence work without a permit. Respondents further ask that if the petition is not dismissed, petitioner be required to produce copies of all plans; evidence that petitioner has obtained the necessary approvals for the work to be performed; assurances of the safety precautions that will be undertaken; and, sufficient financial

protection. They also seek compensation for the interference with the use of their property, and have counterclaimed for counsel fees. Petitioner has served a reply to the counterclaims, and asks in the affidavit in reply to dismiss the counterclaims. Petitioner states that he has been advised that permits have been obtained and that no further permits are required.

When a property owner refuses to give access to his or her property to allow an adjacent property owner to make repairs, the owner seeking to make repairs may bring a special proceeding, pursuant to RPAPL § 881, to obtain permission to enter the premises. Section 881 provides as follows:

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 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.

Petitioner has satisfied the requirements under the statute for demonstrating why he needs access to respondents' property. See, Sunrise Jewish Center of Valley Stream, Inc. v. Lipko, 61 Misc. 2d 673, 674 (Sup. Ct. Nassau Co. 1969); see also, Chase Manhattan Bank v. Broadway, Whitney Co., 57 Misc. 2d 1091 (Sup. Ct. Queens Co. 1968), aff'd on op. below, 24 N.Y.2d 927 (1969). Respondents' counterclaims are without merit. While the statute provides that the court may grant the application "upon such terms as justice requires," this court finds that there is no basis to award counsel fees to respondents. But, the court will require other conditions for the license, as set forth below.

The license is granted, for a period of up to thirty (30) days, from commencement of the work to its conclusion, based on the representation by the proposed contractor that the work will take up to two weeks, assuming acceptable weather. Petitioner is further directed to give respondents at least two (2) weeks' notice before commencement of the work, which shall begin on a date that is mutually agreeable between the parties. If no such date is mutually agreed to, then the work shall be performed between May 1 and May 30. Preparation and storage of materials shall be on petitioner's property, and not respondents' property, except for storage of the fence, which shall be on respondents' property if the contractor determines that there is a need to remove the fence to make the repairs. Petitioner shall post a bond in the amount of \$10,000, conditioned upon the payment of any damage award in favor of respondents and against petitioner, made pursuant to RPAPL § 881, including any damages awarded as a result of the removal and replacement of part of respondents' fence, and shall serve a copy of the bond upon respondents, together with the judgment. Upon completion of all work, the Verral Premises shall be restored to the condition of the premises that existed prior to commencement of work. Petitioner shall notify respondents in writing when work under the license has been completed and may make application on notice for discharge of the bond, unless within thirty (30) days of completion of the work, respondents shall have commenced an action under RPAPL §881 for damages. See, Sunrise Jewish Center of Valley Stream, Inc. v. Lipko, supra.

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

Dated: February 18, 2009

**UNFILED JUDGMENT**  
 This judgment has not been filed with the County Clerk and notice of entry cannot be given based thereon. To obtain entry, petitioner or respondent's representative must appear in person at the Judgment Clerk's Desk (Room 14TB).

*JBL*  
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 JOAN B. LOBIS, J.S.C.