

**537 W. 27th St. Owners LLC v Mariners Gate, LLC**

2009 NY Slip Op 32360(U)

October 6, 2009

Supreme Court, New York County

Docket Number: 107845/09

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN

PART 17

Justice

537 West 27<sup>th</sup> Street Owners LLC

INDEX NO. 107845/09

MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. 01

Maurice Pato, LLC

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

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ 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

*for attached petition is dismissed*

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

Dated: 10/6/09

EMILY JANE GOODMAN 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 - I.A.S. Part 17

-----X  
537 WEST 27th STREET OWNERS LLC,

Petitioner,

Index No.: 107845/09

-against-

MARINERS GATE, LLC

Respondent,

-----X  
EMILY JANE GOODMAN, J.S.C:

This Petition for a license to enter Respondent's premises, pursuant to Real Property Actions & Proceedings Law §881, is granted in accordance with the terms of this Decision and Order.

In connection with its construction of a 14 story luxury residential condominium building, Petitioner seeks an order permitting it to enter Respondent's property for the purposes of protecting Respondent's roof from falling debris for the period of seven months. Petitioner agrees to return Respondent's roof to its original condition after the work is completed, agrees to hold Respondent harmless for any damages, and agrees to maintain Respondent as an additional insured under Petitioner's policy of liability insurance with coverage of \$5,000,000.

Respondent opposes the Petition, complaining that it has already been damaged, noting that stop work orders have already been issued, and that, in addition to the conditions Petitioner

[\*3]  
agreed to above, Respondent seeks specific indemnification language, access to Petitioner's property for the purposes of inspecting the work being done, and copies of crack or vibration monitoring reports (see ¶3 of Affirm of Christina H. Bost Seaton).

In reply, Petitioner agrees to the indemnification provision but without specificity, claims it is overly broad. Petitioner objects to providing access to Respondent for inspection of the work being done on Petitioner's property and objects to providing copies of crack or vibration reports, maintaining that those items do not directly relate to its application for permission to access Respondent's roof to protect Respondent's roof from falling debris. However, Petitioner does not dispute that stop work orders have been issued, nor that Respondent has been damaged.

Petitioner has established that a license to enter Respondent's premises is warranted. However, Real Property Actions & Proceedings Law §881 provides that the license shall be granted "upon such terms as justice requires." The Court finds that in addition to the terms Petitioner has agreed to above, Respondent's three conditions are reasonable, but the second condition (regarding access to Petitioner's property to inspect the work being done) is reasonable only to the extent that access shall be provided on one day, agreed to by the parties, and granted in a

manner so as not to interfere with the work being done.

Petitioner's narrow reading of Real Property Actions & Proceedings Law §881 does not comport with justice, under the facts as alleged here. In McMullan v HRH Constr, LLC, 38 AD3d 206 [1st Dept 2007]), the First Department affirmed the trial court's issuance of an injunction and refusal to covert an action to a proceeding for access under Real Property Actions & Proceedings Law §881. After noting that Real Property Actions & Proceedings Law §881 provides that a license may be granted upon such terms as may be just, the First Department found defendants' claim of entitlement to access "risible," given the fact that building violations were placed on the plaintiff's property because of defendants' acts and because defendants disregarded plaintiff's rights and damaged its property. Accordingly, if access can be denied where rights are being disregarded, then under the circumstances alleged here, justice allows for the limited relief requested by Respondent, who has not asked for, and has not benefitted from, the work being done, and who has allegedly suffered damages as a result of work requested by, and beneficial to, Petitioner.

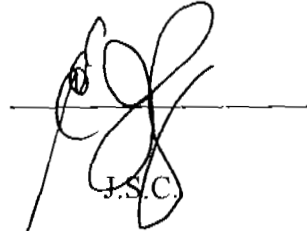
It is hereby ORDERED that the Petition is granted in accordance with the terms provided herein; and it is further

ORDERED that the parties settle judgment.

This Constitutes the Decision and Order of the Court.

DATED: October 6, 2009

ENTER:



**EMILY JANE GOODMAN**