

Matter of Pav-Lak Indus., Inc. v Wilshire Ltd.

2009 NY Slip Op 33110(U)

December 17, 2009

Supreme Court, New York County

Docket Number: 114478/09

Judge: Eileen A. Rakower

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SCANNED ON 11/20/10
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: RAKOWER
Justice

PART 5

PAV-LAX INDUSTRIES, INC.

INDEX NO.

114478/09

MOTION DATE

MOTION SEQ. NO.

01

MOTION CAL. NO.

- v -
WILSHIRE LIMITED

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2
3, 4, 5
0

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

DEC 30 2009

NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

Dated: 12/17/09

HON. EILEEN A. RAKOWER 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):

2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
In the Matter of the Application of

PAV-LAK INDUSTRIES, INC., as Construction
Manager for an agent of 61 Fifth Avenue LLC,

Pctitioner,

- against -

WILSHIRE LIMITED,

Respondent.

Index No.
114478/09

**DECISION
/ORDER**

Mot. Seq.:
001

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-----X
HON. EILEEN A. RAKOWER

Petitioner, Pav-Lak Industries, Inc. ("Pav-Lak") brings this petition, by Order to Show Cause, seeking an order of this Court granting a liscence pursuant to RPAPL §881. Respondent Wilshire Limited ("Wilshire") opposes. Pav-Lak is the Construction Manager for, and agent of, 61 Fifth Avenue LLC ("61 Fifth"). 61 Fifth is the owner of a lot at that address in the County and State of New York. Pav-Lak is oversecing a project which involves demolition of the existing structure, and the subsequent construction of a residential condominium building. Wilshire owns the adjoining lot, located at 59 Fifth Avenue.

Pav-Lak claims that it has to enter Wilshire's property to perform certain work which includes "installing bracing, shoring and performing underpinning work to provide necessary subsurface support to the building on Wilshire's property." Pav-Lak asserts that entry is neccesary because of the "lack of adequate subsurface support for and the location of the south wall of the building located on the Wilshire Property line and lawful construction of 61 Fifth's Project." Pav-Lak argues that the instant application is neccesary because Wilshire has refused it permission to enter its property, despite several attempts at negotiation. Pav-Lak submits a proposed license agreement here.

Wilshire, in opposition, argues that Pav-Lak's proposed license does not offer sufficient protections. Thus, Wilshire requests that, should the Court grant the petition, the conditions contained in its proposed agreement should be incorporated into any license issued to 61 Fifth. Wilshire points out that it has already been damaged by 61 Fifth's work because, as a result of the demolition of the existing building at 61 Fifth, Wilshire has experienced flooding in the basement of the restaurant located on its property. Wilshire contends that 61 Fifth has made no attempt to compensate it for its losses.

The Pav-Lak proposed license contains two protective clauses. Section (5) states, in relevant part:

61 Fifth agrees to defend, indemnify and hold harmless Wilshire for the direct and foreseeable losses, costs, claims or damages (including reasonable attorney's fees and costs incurred by Wilshire), as well as indemnify any lawful occupants of the Property from such loss or damages, arising from the negligence, gross negligence, or reckless conduct in connection with the Work and/or the activities being conducted by 61 Fifth or its construction manager . . . on the Property or the Project site or by virtue of 61 Fifth's failure to comply with this Agreement, unless a claim against Wilshire is covered by the insurance referred to in Paragraph 6 hereof . . .

Paragraph (6) adds Wilshire as an additional insured.

Wilshire adds the following conditions to its proposed license: the indemnification clause should protect Wilshire against *any*, not only foreseeable losses, etc. for work performed on Wilshire's property or on 61 Fifth's property that affects Wilshire's property, and 61 Fifth should issue a one million dollar bond. Wilshire demands that it be made an additional insured on the insurance policies of any subcontractors or contractor involved in the project, whose work might affect Wilshire's property. Finally, Wilshire requests that it be provided with the following: all plans, inspection and test reports relating to the project; an inspection, test and structural work schedule; notice of, and access to all project coordination meetings during the underpinning and structural phase of the project; and an opportunity for Wilshire's engineer to review and approve or disapprove all work related to the structural and underpinning work. Additionally, Wilshire includes a provision that states that 61 Fifth will reimburse it for any expenses incurred in repairing the

flooding damage to its property.

By way of reply, Pav-Lak claims that Wilshire’s proposed license agreement is a “blank check,” especially with regards to the indemnity and reimbursement provision contained therein.

RPAPL §881 states, in relevant part:

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 . . . without entering the premises of the 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 to enter . . . 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.

RPAPL §881 should be read narrowly as it stands in derogation to the common law which protects landowners from trespass. (see *Deutsche Bank Trust v. 120 Greenwich Development Assoc.*, 7 Misc.3d 1006(A), 2005 WL 782810 (N.Y.Sup.) [Sup. Ct. New York Cty. 2005]). As such, granting a license under RPAPL §881 requires the Court to consider the “competing interests of the two adjoining landowners.” (*Id.* at WL *2)

In *Deutsche*, petitioner sought to build and maintain scaffolding on respondent’s property, in order to safely demolish a building on its property. The court in *Deutsche* found that there were several factual issues which could not be determined on the papers. Those issues included whether there was an alternative to erecting scaffolding, whether petitioner’s claim that demolition was environmentally necessary was bona fide, and whether the proposed demolition included improper demolition of a party wall.

RPAPL §881 requires, at a minimum, that the party seeking a license must include “the facts making such entry necessary and the date or dates on which entry

[*5]
is sought.” In that regard, both Pav-Lak’s proposed license agreement, and Wilshire’s counter proposal lack specificity. Before it can grant a license pursuant to RPAPL §881, it is critical that the Court be apprised of the “exact nature, timing and extent of the [work] requiring the license.” (*Deutsche* at WL*3).

Wherefore it is hereby

ORDERED that the petition is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: December 17, 2009



EILEEN A. RAKOWER, J.S.C.

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