

Matter of Double J. Partners, LLC v Forte

2010 NY Slip Op 33265(U)

November 19, 2010

Supreme Court, New York County

Docket Number: 111451/10

Judge: Joan B. Lobis

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

DECEMENT: *Sean B. Lobis*

PART 6

Index Number : 111451/2010

DOUBLE J. PARTNERS, LLC.

vs
FORTE, DOMINGO

Sequence Number : 001

OTHER RELIEFS

INDEX NO. _____

MOTION DATE 9/22/10

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

Petition
Notice of ~~Motion~~ / Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED
<u>1-4</u>
<u>5-6</u>
<u>8-10</u>

FILED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ *petition*

NOV 23 2010

NEW YORK
COUNTY CLERK'S OFFICE

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ASSOCIATING MEMORANDUM DECISION
and order.

Dated: 11/19/10

Bh

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

DOUBLE J. PARTNERS, LLC,

Petitioner,

Index No. 111451/10

For a Judgment Pursuant to § 881 of the Real Property
Actions and Proceedings Law for a License to Enter

Decision, Order, and Judgment

- against -

FILED

DOMINGO FORTE and RITA FORTE,

NOV 23 2010

Respondents.

-----X

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

NEW YORK
COUNTY CLERK'S OFFICE

Petitioner Double J. Partners, LLC brings this proceeding, pursuant to Real Property Actions and Proceedings Law ("RPAPL") § 881, for a license to enter the property of respondents Domingo Forte and Rita Forte, 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 117 West 81st Street, New York, New York (the "DJP Premises"). Respondents are owners of certain property located at 119 West 81st Street, New York, New York (the "Forte Premises"). The premises share a property line and a wall.

Petitioner seeks to extend the third floor wall; re-stitch a corner of the shared masonry wall; inspect the Forte Premises to determine which of its chimneys is active and extend the height of the active chimney; construct a wall on top of the party wall; replace coping stones on the roof terraces on the party

wall; and construct, point, and clean a new stoop. Petitioner asserts that all of these repairs require access to the Forte Premises in order to do the actual work and protect the Forte Premises from debris and potential damage. The work can only be performed in temperatures above 40 degrees Celsius, which, according to petitioner, means that work can only be done between March and December. Petitioner maintains that all of the work to be performed requires them to be no more than eight feet away from both the party wall and the shared property line. Petitioner also sets forth that the proposed work requires the removal of an iron fence owned by respondents that currently separates the two premises. Petitioner maintains that the fence will be removed and replaced at its expense. Petitioner asserts that the entire work can be complete in 25 to 30 weeks.

The parties have discussed allowing petitioner access without court intervention. Beginning on or about June 9, 2010, license terms were discussed by the parties' attorneys. Petitioner agreed to pay \$5,000 license fee payable to respondents upon execution of the agreement and to deposit \$5,000 into an escrow account maintained by petitioner's attorneys and payable to respondents either upon completion of the work or after eight months from the execution of the agreement. Respondents assert that the negotiations fell through when they requested that petitioner repair damages that they allege have already occurred.

In their opposition to the petition, respondents contend that petitioner trespassed onto the Forte Premises and in the course of making repairs to the DJP Premises caused damage to the Forte Premises. They further allege that petitioner has failed to demonstrate that it has the required permits to repair the property or that it owns the property; that petitioner has failed to prove that the license to enter

respondents' property is absolutely necessary to perform the work; that petitioner has failed to demonstrate that the work is necessary; and, that the petition is barred by the doctrine of unclean hands, because petitioner commenced work without a permit. They also seek compensation for the interference with the use of their property.

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 it needs access to respondents' property. See, In re Sunrise Jewish Center of Valley Stream, Inc. v. Lipko, 61 Misc. 2d 673, 674 (Sup. Ct. Nassau Co. 1969); see also, In re 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' claims of damages may have merit, but they are not grounds to deny a license. See In re Rosma Development, LLC v. South, 5 Misc. 3d 1014(A) (Sup. Ct. Kings County 2007). Instead, respondents will have the right to a hearing, after the completion of the work, to determine these damages as well as any

damages arising under this license. See id.; In re 75 South Greeley Corp. v. Greeley Country Store, 41 A.D.2d 855 (2d Dep't 1973). Accordingly, it is

ORDERED that the petition is granted and the license is granted for a period of up to thirty-five (35) weeks, from commencement of the work to its conclusion; and it is further

ORDERED that petitioner 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 commence between March 15 and April 15, 2011; and it is further

ORDERED that preparation and storage of materials shall be on petitioner's property, and not respondents' property; and it is further

ORDERED that upon commencement of the work, petitioner shall remit \$5,000 to respondents and shall deposit and maintain an additional sum of \$5,000 in escrow with its attorneys payable to respondents upon completion of the work or eight months after commencement of the work provided that respondents comply with the license granted herein and execute a general release acknowledging that petitioner has complied with the license granted herein; and it is further

ORDERED that 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, and shall serve a copy of the bond upon respondents, together with the judgment; and it is further

ORDERED that upon completion of all work, the Forte Premises shall be restored to the condition of the premises that existed prior to commencement of work; and it is further

ORDERED that 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 make an application for a hearing as set forth below; and it is further

ORDERED that upon the expiration of this license, a hearing shall be held before this court, upon application by respondents, to determine damages incurred by respondents by petitioner's work, not excluding alleged damages that may have occurred prior to this license; and it is further

ORDERED that the parties may agree to other terms and conditions in writing, not inconsistent with this order.

Dated: November 19, 2010.

FILED

NOV 23 2010

NEW YORK
COUNTY CLERK'S OFFICE



JOAN B. LOBIS, J.S.C.