

Jackson Ave Owner LLC v Jaddidian

2012 NY Slip Op 33980(U)

October 25, 2012

Supreme Court, Queens County

Docket Number: 700979/12

Judge: Orin R. Kitzes

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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES

PART 17

Justice

-----X
JACKSON AVE OWNER LLC,,
Petitioner,

-against-

Index No.: 700979/12
Motion Date: 10/24/12
Motion Cal. No.: 24
Seq. No. 2

MASSOUD JADDIDIAN and PHYLLIS
JADIDIAN,

Respondents.

-----X
The following papers numbered 1 to 8 read on this application by respondents to reargue and/or renew the order of this court, dated August 2, 2012, which granted the application by petitioner for an order granting it a license to enter upon portions of premises owned by respondents allowing petitioner to install required protective scaffolding and safety fencing in conjunction with the demolition of petitioner's building, or, staying such entrance pending an appeal of the August 2, 2012 Order.

	PAPERS NUMBERED
Order to Show Cause-Affidavit-Exhibits.....	1-3
Memo in Opposition.....	4-5
Reply Affirmation.....	6-8

Upon the foregoing papers it is ordered that this application by respondents to reargue and/or renew the order of this court, dated August 2, 2012, which granted the application by petitioner for an order granting it a license to enter upon portions of premises owned by respondents allowing petitioner to install required protective scaffolding and safety fencing in conjunction with the demolition of petitioner's building, or, staying such entrance pending an appeal of the August 2, 2012 Order, is denied in its entirety, for the following reasons:

This court, in its August 2, 2012, Order, granted petitioner's application and found the following:

The court finds that petitioners have shown that they are the owners of the subject property and were within their lawful rights in electing to build the construction project upon the property. Similarly, the other assertions by respondents are not a basis for denial of the petition and respondents cannot prevent such "as of right" development by withholding their permission to access their property. Significantly, there is no dispute that the scaffolding and

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fencing are required work and can only be done in the manner proposed. Mindel v Phoenix Owners Corp., *supra*. See also, Sunrise Jewish Ctr. of Valley Stream, 61 Misc 2d 673 (Sup Ct. Nassau Co. 1969.)

The Court notes that concerns about the damage done to respondents' property are minimal since it consists of a vacant lot. However, if any problems arise, respondents will have their remedies in damages. See Sunrise Jewish Ctr. of Valley Stream, 61 Misc 2d at 676). RPAPL 881 affords the adjoining property owners adequate legal rights and remedies by subjecting the licensee to full liability "for actual damages occurring as a result of the entry." For such actual damages occurring as a result of the entry, respondents have a cause of action against petitioner under the statute, and, to insure payment of such damages, the court can require the maintenance of adequate insurance by petitioners. *Id.* The Court notes that petitioner has expressed that he is prepared to do all that is feasible to avoid damages resulting from the entry upon respondents' property and to provide insurance for respondents' property during the entry.

The court finds that the inconvenience to respondents will not be as substantial as, and is outweighed by the hardship to petitioner, in being denied his lawful right to build upon its land, if the requested license is denied. Petitioner, as the owner of the property, has an interest in completing this construction project as quickly as possible - to enable the property to be occupied- and in avoiding unnecessary delay and expense to the construction process. Furthermore, the granting of a license to petitioner, pursuant to RPAPL 881, is necessary to enable petitioner to benefit from its property interests and would not subject respondents to great and unreasonable inconvenience and any resultant damages to respondents can be remedied. As such, the court concludes that petitioner should be entitled to exercise its statutory right to gain the necessary access in order to proceed with the construction project without unreasonable interference. Rosma Dev. Llc v South, 5 Misc. 3d 1014A (Sup. Ct. Kings Co. 2004.) Accordingly, the granting of petitioner's application is warranted.

The court understands and empathizes with the difficult situation respondents will be subjected to and they should receive compensation for petitioners' utilization of their property during the time period of the license in a fair and equitable sum as set forth below.

Additionally, as noted above, respondents shall have the remedy of damages,

and other terms and conditions, including the maintenance of substantial insurance coverage, must be imposed RPAPL 881.

Accordingly, petitioner is hereby granted a license, pursuant to RPAPL 881, to enter upon the portion of the respondents' property that is reasonably necessary to perform the scaffolding and fencing, to wit, a ten foot strip along the property line. The granting of such license is subject to the following terms and conditions: (1) petitioners shall be entitled to such license for a period of 7 months, commencing upon the entry of this order and judgment, (2) petitioner is directed to pay the sum of \$1,800 per month to respondents until the work under the license is completed, (3) petitioner shall not unreasonably interfere with respondents' necessary access to their property and shall take the necessary steps, measures, and precautions to prevent and avoid any damage to respondents property. (4) petitioner shall notify respondents in writing when they have completed the work under the license, (5) upon the completion of the term of the license, respondents' land within such license area shall be returned to its original condition, and all materials used in construction and any resultant debris shall be removed from the license area, (6) petitioner shall procure and maintain a policy of insurance covering liability and property damage, or equivalent bond with a corporate surety, in an amount of not less than \$1 million naming the respondents as additional insureds during the period of this license, (7) petitioner shall be held liable to respondents for any damages which they may suffer as a result of the granting of this license and all damaged property shall be repaired at the sole expense of petitioner. A hearing shall be held before this court at the expiration of the term of the license granted herein to determine the actual damages incurred by respondents as the result of petitioner's entry upon respondents' land pursuant to said license. Alternatively, respondents may submit any present or future claim for damages directly to petitioner's insurer, without prejudice to their rights to later seek damages before the court, and (8) any such other terms and conditions that petitioner and respondents may agree to in writing.

Respondents now seek an order granting reargument or renewal of the August Order and upon granting such relief, deny the petition, or if such is not granted, stay petitioner from effectuating the August Order. Respondents claim that petitioner misrepresented to the Court that it had approved plans for the proposed work, when it did not. Respondents also claim the licensed work would cause them financial damages. Petitioner has opposed this motion.

Initially, respondent's motion does not differentiate between what part of his motion is for leave to reargue and what part of his motion is for leave to renew and does not identify separately and support separately each item of relief sought. Therefore, this motion is not in compliance with CPLR 2221(f) and should be denied.

In any event, it is well settled that a motion to reargue is "addressed to the sound discretion of the court [and] is designed to afford a party an opportunity to establish that the Court overlooked or misapplied the controlling principles of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided." Foley v Roche, 68 AD2d 558, 567-568 (1st Dept. 1979); *see also*, Rubenstein v Goldman, 225 AD2d 328 (1st Dept. 1996.) A motion to renew is one based on additional material facts which existed at the time of the original application but were not known to the party seeking leave to renew and, therefore, not made known to the court. Mayer v McBronigan Constr. Corp., 123 AD2d 606 (2nd Dept. 1986.)

Respondents' motion is, in essence, based upon facts that were known to them and were available at the time of the original petition. In fact, the instant motion consists mostly of facts that were proffered in respondents' original motion and reviewed by this court when it considered the original petitioner. Contrary to respondents' claim, petitioner did not misrepresent matters to this Court as it was set forth by petitioner that no plans were approved since such were not needed for the demolition sought. Accordingly, respondents' motion has been reviewed and the Court finds that respondents have failed to demonstrate that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law in making its decision. McGill v Goldman, 261 AD2d 593, (2d Dept. 1999.)

If this court were to review the instant motion as one to renew the August Order, it would be denied. Respondents have not shown that any facts were unknown at the time they opposed the petition. Finally, based on the above, there is no basis to stay the effectuation of the August Order of this Court.

Dated: October 25, 2012


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ORIN R. KITZES, J.S.C.