

**Matter of 825 Fifth Ave. Corp. v 828 Fifth Ave.
Owners Corp.**

2013 NY Slip Op 33667(U)

April 19, 2013

Sup Ct, New York County

Docket Number: 151159/2013

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

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

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In the Matter of the Application of

Index No. 151159/2013

825 FIFTH AVENUE CORPORATION,

ORDER & JUDGMENT

Petitioner

For an Order and Judgment Pursuant to
RPAPL Section 881 Granting Petitioner a
License to Enter Adjoining Property of Respondent

-against-

828 FIFTH AVENUE OWNERS CORPORATION,

Respondent.

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825 Fifth Avenue Corporation ("Petitioner"), by its attorneys Holland & Knight LLP, having commenced this proceeding pursuant to the provisions of Section 881 of the Real Property Actions and Proceedings Law ("RPAPL") for a Judgment granting Petitioner a temporary license to access limited areas of the exterior of property owned by Respondent 828 Fifth Avenue Owners Corporation ("Respondent") in order to erect and maintain certain statutorily required protection to Respondent's property located at 828 Fifth Avenue, New York, New York ("828"), in connection with certain statutorily required improvements being made to Petitioner's property located 825 Fifth Avenue, New York, New York ("825"), and to allow a swing stage scaffold to rest on top of the required roof protection when the scaffold is not being used (the "Project"), and the parties having submitted pleadings and other papers and appeared before the Court through counsel on April 2, 2013, April 3, 2013 and April 4, 2013.

Now, on reading and filing of the pleadings and papers submitted herein and the evidentiary hearing having taken place on April 3, 2013 and April 4, 2013, it is

ORDERED, ADJUDGED AND DECREED that Petitioner, acting through its architects, engineers, employees and agents, is hereby granted a temporary license for a period of twenty-seven (27) months from commencement of the Protection Work as defined below, except as otherwise provided, to enter and perform work on 828, on the following terms and conditions.

The Protection Work

1. Petitioner may survey the existing pre-construction conditions of 828 and erect, install, maintain and remove the scaffolding and protection work on 828 (collectively, the "Protection Work") to the extent required and in accordance with all applicable laws and regulatory permits, and as more particularly described in the Site Safety Plan approved by the New York City Department of Buildings on January 17, 2013 and annexed hereto as Exhibit A, as same may be amended from time to time as further described herein (the "Site Safety Plan"), except that Petitioner may not use the bridge across 828's eastern elevation to remove debris or bring in construction materials and that Petitioner may not use the roof of 828 to place any swing stage scaffold.

2. If Petitioner cannot reasonably create a landing platform on its own building on which the swing stage scaffolds can rest when not in use, and Petitioner and Respondent are unable to come to agreement, Petitioner shall contact the Part Clerk of this Part to request a continuation of the hearing conducted by this Court to resolve the sole issue of whether it should be granted a license to rest the swing stage scaffolds on 828's roof.

Advance Notice and Entry

3. Petitioner shall give Respondent at least five (5) business days' advance notice of the date and time entry onto 828 is required for the Protection Work.

4. Only those architects, engineers, employees and agents of Petitioner reasonably required by Petitioner for the performance of the Protection Work shall be permitted

access to 828 for such purposes, all of whom shall be required to sign in at the Project site prior to entering 828 and to wear photo identification badges or carry appropriate identification at all such times.

Insurance

5. During the term of the license granted herein, Petitioner shall obtain and maintain or cause its agents, employees, contractors and subcontractors to obtain and maintain (i) commercial general liability insurance, written on an occurrence basis, including bodily injury and broad form property damage, fire, legal liability, and contractual liability protecting Petitioner against claims (including all costs and expenses of defending against same) for personal injury or death and for damage or injury to or destruction of property (including loss of the use) occurring on, in or about 828, which commercial general liability shall each have a combined single limit of not less than \$1,000,000 per occurrence and \$2,000,000 general aggregate on a per location/per job basis, the policy shall not have any exclusions for contractual liability, independent contractors, independent contractors and injuries sustained by employee of an insured or any insured (ii) umbrella coverage (in excess of commercial general liability and automobile liability coverage) of not less than \$10,000,000, (iii) automobile liability insurance with a combined single limit of not less than \$1,000,000 per occurrence, including coverage for owned, hired and non-owned automobiles insuring Petitioner or its contractors, subcontractors, agents and employees and, (iv) Workers' Compensation insurance in compliance with all statutory requirements with an all states endorsement, and Employer's liability coverage with limits as required by law, covering any employees of Petitioner's general contractor entering on Respondent's property or installing, maintaining, or removing the Protection Work, or otherwise performing obligations of Petitioner under this Order and Judgment. Respondent shall be an additional insured on each policy referred to in clauses (i), (ii) and (iii) of this Paragraph 5 on a

primary and non contributory basis. Prior to installing the Protection Work, Petitioner shall deliver to Respondent a certificate of insurance which shows the date of expiration of the policies and coverages required under this Order and Judgment and showing the additional insureds referred to above as additional insureds. All insurance policies required by this Order and Judgment shall be issued by carriers that: (a) have a minimum policyholders' rating of "A-/VII" or better, based upon the latest rating publication of "Property and Casualty Insurers" by A.M. Best Company (or its equivalent if such publication ceases to be published) and (b) are lawfully doing business in the State of New York.

Removal of Protection Work/Remedial Work

6. As elements of the Project work are completed, Petitioner shall seek permission from the New York City Department of Buildings to reduce the amount of Protection Work on 828 by amendment to the Site Safety Plan.

7. The Protection Work as permitted herein shall be removed by Petitioner within ten (10) business days after said Protection Work is no longer required by applicable law, and in any event no later than twenty-seven (27) months after commencement of the Protection Work, unless such period is extended by this Court.

8. Petitioner shall cause any damage to 828 caused by Petitioner or its architects, engineers, employees or agents in connection with the Protection Work to be promptly corrected and restored to its original condition.

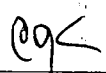
9. Upon the removal of the Protection Work, Petitioner shall: (a) notify Respondent in writing that the work under the license has been completed; (b) return 828 to its original condition; and (c) all materials used in conjunction with the Project and any resultant debris shall be removed from 828.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Respondent's cross-motion for a preliminary injunction is granted solely to the extent that Petitioner is denied a license to use a bridge erected over the eastern façade of 828 to remove debris or bring construction materials to the Project site; Respondent's Fourth Counterclaim for an order directing Petitioner to procure and maintain insurance is hereby granted solely to the extent set forth in paragraph 5 of this Order and Judgment; Respondent's Fifth Counterclaim concerning damages is granted solely to the extent that at the end of the license period, Respondent may seek a hearing before a special referee to determine the amount of actual damages incurred by Respondent, if any, as a result of Petitioner's entry onto 828; and Respondent's remaining counterclaims as alleged herein are dismissed.

The Court shall retain continuing jurisdiction of this proceeding during the pendency of the term of the temporary license granted herein.

Dated: New York, New York
 April 19, 2013

ENTER



 J.S.C.

CYNTHIA S. KERN
 J.S.C.