

Matter of West 96th Dev. LLC v 7 W. 96th St. Corp.

2016 NY Slip Op 30465(U)

March 21, 2016

Supreme Court, New York County

Docket Number: 161308/2015

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: MANUEL J. MENDEZ PART 13
Justice

In the Matter of the Application of WEST 96TH DEVELOPMENT LLC, Petitioner,

INDEX NO. 161308/2015 MOTION DATE 02-03-2016 MOTION SEQ. NO. 001 MOTION CAL. NO.

FOR AN ORDER AND JUDGMENT PURSUANT TO SECTION 881 OF THE REAL PROPERTY ACTIONS AND PROCEEDINGS LAW FOR ACCESS TO ADJOINING PROPERTY,

-against-

7 WEST 96TH STREET CORPORATION Respondent.

The following papers, numbered 1 to 12 were read on this Order to Show Cause for a License pursuant to Real Property Actions and Proceedings Law § 881 .

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... Answering Affidavits — Exhibits Replying Affidavits Cross-Motion: Yes X No

Table with 2 columns: PAPERS NUMBERED, 1 - 4, 5-9, 10-12

Upon a reading of the foregoing cited papers, it is Ordered that Petitioner’s motion by Order to Show Cause for an Order granting it a license to enter onto respondent’s property pursuant to Real Property Actions and Proceedings Law (here “RPAPL”) § 881 is granted to the extent stated herein.

Petitioner is the owner of a building located at 15 W. 96th Street, New York, New York (herein “Project Premises”). Respondent is the owner of a building located at 7 W. 96th Street, New York, New York (herein “Adjacent Premises”). The Adjacent Premises is adjacent to the Project Premises on the eastern lot line of the Project Premises. There is a chimney of the Project Premises that adjoins the western exterior wall of the Adjacent Premises.

Petitioner will be demolishing the existing building on the Project Premises, which includes demolishing the chimney from the Project Premises, which adjoins the western exterior wall of the Adjacent Premises (herein “The Project”). Petitioner has filed the appropriate plans with the New York City Department of Buildings, which have been approved. Petitioner is required to conduct a preconstruction survey of the Adjacent Premises prior to commencing construction/demolition of the Project. This preconstruction survey would include a photographic survey of the Adjacent Premises, and in order to finalize the means and methods to demolish the chimney, a probing of the chimney to

observe its underlying structural support. This access is needed to perform the survey and probing to determine if and how the chimney can be removed safely.

Petitioner engaged Respondent a number of times to request permission for access, provided respondent with a property protection plan, proof of insurance and a licensing agreement. The parties have not reached an agreement on various terms and Respondent has denied petitioner access to the Adjacent Premises.

Petitioner commenced this special proceeding pursuant to RPAPL § 881 for an order granting it access to respondent's building in order for it to: 1) Conduct a preconstruction survey of the Adjacent Premises, 2) conduct certain probing of the chimney servicing the Project Premises which is connected to the western wall of the Adjacent Premises in order to determine how to remove the Chimney, and 3) once probing is complete: i) remove the Chimney from the Adjacent Premises, patch the western exterior wall of the Adjacent Premises; ii) install, maintain, and remove overhead protections on the side yard of the Adjacent Premises; and iii) install weather protection on the portion of the western exterior wall of the Adjacent Premises which is exposed from demolition operations during the Project, all of which accesses are expected to take approximately two (2) months. Respondent answered the Petition and served an Affirmation in Opposition to Petitioner's application.

The parties had agreed to attempt another round of settlement and stipulate to a license agreement after the last conference date of February 3, 2016, if possible. However, the parties could not agree on the extent of the scope of the licensing agreement.

"RPAPL § 881 is the means by which a landowner seeking to make improvements or repairs to its property may seek a license to enter an adjoining landowner's property when those improvements or repairs cannot be made without such entry" (Lincoln Spencer Apartments, Inc. v. Zeckendorf-68th Street Associates, 88 A.D.3d 606, 931 N.Y.S.2d 69, 70 [1st Dept., 2011]). RPAPL § 881 requires that "[t]he 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." Further, the "licensee shall be liable to the adjoining owner or his lessee for actual damages occurring as a result of the entry."

Petitioner states a basis for the granting of a license pursuant to RPAPL § 881 to the extent of conducting a preconstruction survey and chimney probe. Petitioner annexes an affidavit from its engineer, Paul Perdek P.E. (see Aff. of Paul Perdek, P.E.), in further support of the need for Petitioner to have access to the Adjacent Premises in order to comply with the New York City Building Construction Code (herein "The Code") and the New York City Department of Buildings. Without access to the Adjacent Premises, Petitioner will not be able to conduct the preconstruction survey as required by the Code, nor will Petitioner be able to finalize its means and methods for demolishing the chimney without a chimney probe. (see Verified Petition PP 3-4 and Perdek Aff. P 2). Further, the Petition explains the hardship the Petitioner faces if access is not granted as the Project will be delayed since the Department of Buildings will not permit the demolition of the

Project Premises without this preconstruction survey and chimney probe. This delay will result in significant financial impact to the Petitioner and would delay the completion of the new residential apartments intended to be built at the Project Premises once demolition is complete. By granting access to the Adjacent Premises, Respondent will not be prejudiced and any hardship by Respondent will be slight compared to the hardship Petitioner will incur if the license is refused. (see Ver. Pet. P 7).

“Courts are required to balance the interests of the parties and should issue a license when necessary, under reasonable conditions, and where the inconvenience to the adjacent property owner is relatively slight compared to the hardship of his neighbor if the license is refused” (114 A.D.3d 491, 492, 979 N.Y.S.2d 811 [1st Dept., 2014]).

Petitioner shows that it will suffer harm by not being able to timely complete the survey and probe without the license, and that justice requires the granting of a license to access respondent’s property.

Petitioner’s remaining requests for relief in advance of a preconstruction survey and chimney probe are premature.

Accordingly, it is ORDERED that Petitioner’s motion by Order to Show Cause seeking a license to enter onto Respondent’s property is granted, and it is further,

ORDERED, that petitioner is granted a limited license to gain access to respondent’s property in order to:

- (A) conduct a preconstruction photographic survey,
- (B) conduct a chimney probe by a registered design professional which will consist of the temporary removal of bricks from the Adjacent Premises and observation of the underlying structural support of the Chimney, and
- (C) once the probing is complete replace any bricks removed to ensure the weatherproof integrity of the western wall of the Adjacent Premises.

, and it is further,

ORDERED, that Petitioner shall not unreasonably interfere with the Respondent’s necessary access to their property and quality of life, and shall take the necessary steps, measures, and precautions to prevent and avoid any damage to the Respondents’ property, and it is further,

ORDERED, that Petitioner shall maintain the existing policy of insurance covering liability and property damage in the amount of \$5,000,000.00 (five million dollars) naming the Respondent as an additional insured during the period of this license, and it is further,

ORDERED, that Petitioner shall be held liable to the Respondent 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, and it is further,

ORDERED, that Petitioner shall notify the Respondent in writing when it has completed the work under the license, and it is further,

ORDERED, that upon the completion of the term of the license, the Respondent's property 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, and it is further,

ORDERED, that the remaining relief requested by the Petitioner is denied.

ENTER:

MANUEL J. MENDEZ
J.S.C.



MANUEL J. MENDEZ
J.S.C.

Dated: March 21, 2016

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE