Matter of West of Seventh L.P. v 382 8th Ave. Realty Corp.
2016 NY Slip Op 31611(U)
August 23, 2016
Supreme Court, New York County
Docket Number: 158324/2013
Judge: Arthur F. Engoron

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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In the Matter of the Application of,

WEST OF SEVENTH LIMITED PARTNERSHIP,

Petitioner,

For an Order Pursuant to Section 881 of New York Real Property Actions and Proceedings Law,

- against -

382 8th AVENUE REALTY CORP.,

Respondent.

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Index Number: 158324/2013

Motion Sequence No. 3

Preliminary Decision and Order

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 3, were used on this motion by petitioner to amend an RPAPL § 881 license and cross-motion by respondent for opposing relief.

	Papers Numbered:
Moving Papers	1
Cross-Moving Papers	2
Reply Papers	3

Upon the foregoing papers, the motion is held in abeyance pending a fact-finding hearing as to the necessity and safety of petitioner's request; and the cross-motion is decided as set forth hereinbelow.

Background

Prior to the events here in issue, petitioner owned a vacant lot, and respondent owned adjoining property on which sat, and still sits, an old building (in open court, respondent's attorney said something to the effect that it could easily be more than 100 years old, and petitioner's attorneys and representative did not disagree). The upper floors of the building apparently are residential.

In 2013 petitioner commenced a Real Property Actions and Proceedings Law ("RPAPL") § 881 special proceeding, claiming to need access to respondent's building to construct a new building on petitioner's property. In an Order dated July 8, 2015, this Court granted petitioner a license that stated, as here relevant, as follows:

> 2 (iv) "Work" means the installation of … rooftop protection on [respondent's building] …, periodic maintenance … [and] removal of the rooftop protection promptly upon Project Completion …. [Respondent] acknowledges that work on the project will include the use of a pipe scaffold which will be built on a platform

> secured to Owner's building and cantilevered over [respondent's building] .... The pipe scaffolding shall be enclosed with netting to prevent any debris from falling ... onto [respondent's building].
>
> 3. [Respondent] hereby grants to [Petitioner] a license to access the exterior portions of [respondent's building] (including but not limited to the roof and airspace above the roof) during the Construction ... for the purpose of completing the work, installing, using and disassembling the Pipe Scaffolding, and documenting [and inspecting] the Work ... . No part of [respondent's property] shall be used as a staging area for [petitioner's] work, except for applying protective measures for [respondent's] roof.

For all that appears, construction has proceeded according to plan. Petitioner has used the pipe scaffold that petitioner cantilevered from its roof, and over respondent's roof, to complete work on the outside of petitioner's building. Petitioner claims that the fly in the ointment is that for the two floors (or so) of its building directly above respondent's roof, petitioner's cantilevered pipe scaffolding will not work.

Thus, petitioner now moves, as stated at oral argument, either to clarify or amend the prior order, in either case to allow petitioner to construct a 20-25 foot scaffold directly on respondent's roof, which would allow petitioner to complete the work on that portion of the exterior of its building that is two floors (or so) directly above respondent's roof. Respondent now cross-moves for a grab-bag of relief, including, simply put, an order directing petitioner to remove certain construction materials on respondent's roof, and for engineering and attorney's fees.

Discussion and Resolution

By some measures, real estate drives New York City. And whether one favors "progress" or "preservation," New York State has, in RPAPL § 881, provided a means to facilitate construction.

> When an owner seeks to make improvements ... to real property so situated that such improvements ... cannot be made by the owner ... without entering the premises of an adjoining owner ... , and permission so to enter has been refused, the owner ... seeking to make such improvements ... may commence a special proceeding for a license so to enter ... . The petition and affidavits, if any, shall state the facts making such entry necessary ... . Such license shall be granted by the court in an appropriate case upon such terms as justice requires.

This Court readily granted the initial license that petitioner sought (and, incidentally, drafted).

However, the instant motion is problematic for several reasons. First, a careful reading of the facts set forth above makes clear that petitioner's application is to amend, not clarify, the license. The only permission for a scaffold that the initial license granted was for a scaffold to be cantilevered from petitioner's roof and hung over respondent's roof. There is nothing therein even to suggest permission to build a scaffold directly on respondent's roof. Second, despite some cute drawings in petitioner's papers, and some colloquy at oral argument, this court is still not convinced that a scaffold is necessary, as the RPAPL requires for the court to grant permission. Finally, and most significantly, this Court is not convinced that respondent's roof, in its present state, can support a two-story scaffold, including

workers and materials. At oral argument, petitioner's representative said that the scaffold would weigh less than the snow deposited by a winter storm. However, even if so (and the Court is not convinced that it is), the weight of the snow presumably would be more evenly distributed than the weight of a scaffold resting on vertical supports. The representative readily admitted that he is not an engineer; but the Court needs to hear from an engineer.

New York City Building Code §§ 3314.2 and 3314.3 provide that a permit is needed to build a scaffold unless certain technical requirements are met and the scaffold is "less than 40 feet in height." This Court accepts petitioner's statement, in open court, that the scaffold will be less than 40 feet in height. However, without expert testimony, this Court cannot determine whether petitioner's proposed scaffold meets the technical requirements, such as "No hoisting equipment with a manufacturer's rated capacity greater than 2,000 pounds (907 kg) will be located on the scaffold"; and, even more significantly, "The scaffold will not be loaded, or designed to be loaded, in excess of 75 pounds/square foot (366.15 kg/meter squared)."

Of course, when one is placing a scaffold on one's own building there is a certain amount of self-policing, and an enormous incentive not to have the building collapse. Here, this Court is confident that the last thing petitioner wants is for respondent's building to collapse under petitioner's scaffold. However, the calculus is slightly different when someone else's building, with which you have no or limited familiarity, is at stake.

Furthermore, if your own building collapses under your own scaffold, you have only yourself to blame. Here, if respondent's building collapses under petitioner's scaffold, respondent will have this Court to blame! The very least that can be done here is to have expert testimony before the Court orders a building owner to allow an adjacent property owner to build a significant superstructure on the building owner's roof.

The Court will address the cross-motion's prayers for relief seriatim. The request to dismiss the application is held in abeyance pending the hearing set forth herein. The request to require petitioner to remove certain materials from respondents roof is granted only to the extent that petitioner is hereby directed not to place any further materials on respondent's roof, and not to use the roof as a staging area without permission from the Court or respondent. The request to direct petitioner to complete the work by use of a hanging scaffold is denied; petitioner can complete the work any way it wants, as long as it is not inconsistent with the law and with court directives. The request for attorney's fees is denied without prejudice (but this Court currently sees no basis for them). The request to require petitioner to specify the scope, necessity and safety of the work is granted only as part of the hearing set forth herein. The request for engineering fees is granted to the extent that if petitioner decides to proceed with the instant application and the hearing set forth herein, petitioner is directed to pay for respondent's reasonable engineering fees. The request to compel petitioner to perform the work from petitioner's rooftop is denied.

Conclusion

Today's Preliminary Decision and Order is issued with full realization that it creates a costly impediment to the completion of petitioner's building (especially so as it comes during vacation season). Obviously, that is not its goal; insuring the safety of the residential occupants of respondent's building, and nearby pedestrians, is. The Court humbly suggests that petitioner consider every option other than building the

proposed scaffold. Perhaps some "out of the box" thinking will present a practical alternative. However, if a rooftop scaffold is necessary, counsel shall consult with each other, and the Court, as to when a hearing into the necessity and safety of the proposed scaffold can be held. Note that this Court is currently on vacation, to return on September 6, 2016, and most days of the succeeding weeks are already spoken for.

Dated: August 23, 2016

Arthur F. Engoron, J.S.C.