

Matter of EXG 159W48 LLC v Benyetta 148 LLC
2017 NY Slip Op 31479(U)
June 23, 2017
Supreme Court, New York County
Docket Number: 160422/2016
Judge: Gerald Lebovits
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NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

In the Matter of the Application of

EXG 159W48 LLC,

Petitioner,

For a Judgment Pursuant to RPAPL 881

-against-

BENYETTA 148 LLC
and YETTABEN REALTY LLC,

Respondents.

Index No.: 160422/2016
DECISION/ORDER
Motion Seq. No. 001

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing petitioner’s order to show cause.

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Greenberg, Trager & Herbst, LLP, New York (Kalvin Kamien of counsel), for petitioner.
Albanese & Albanese, LLP, New York (Diana Centrella Prevete of counsel), for respondent.

Gerald Lebovits, J.

Petitioner, EXG 159W48 LLC, seeks a judgment under RPAPL 881 for a limited license to enter respondents’ Benyetta 148 LLC and Yettaben Realty LLC adjoining properties at 148 West 49th Street, New York, New York, and 150 West 49th Street, New York, New York (respondents’ property), and to perform non-invasive photographic survey, install and remove temporary protections to respondents’ property, and install materials to weatherproof respondents’ property.

I. Background

According to the Verified Petition, petitioner presented respondents with a proposed license agreement on November 19, 2015, to perform protective work at respondents' property to demolish an existing parking garage (the demolition) at 159 West 48th Street New York, New York (petitioner's property), to construct a 35-story building (the construction) at petitioner's property. (Verified Petition ¶¶ 9-10; Affirmation in Support, ¶ 10.) Petitioner argues that the work related to the demolition is required under New York City Administrative Code, Title 28, New York City Construction Codes, Chapter 33, Section BC 3309. (Petitioner's Memorandum of Law at 6; Benjamin Pattou Affidavit in Support, ¶ 9-10.) Petitioner argues that RPAPL 881 requires petitioner to weatherproof, survey, and provide rooftop protection (property protection) at respondents' property. (*Id.* ¶ 34.)

Petitioner alleges that it spent 12 months trying to obtain permission to access and perform work at respondents' property. (Affirmation in Support, ¶ 9-10.) During the negotiations, petitioner offered to pay for and repair any damage to respondents' property, promptly remove any violation, discard any debris, indemnify respondents, name respondents as additional insureds on petitioner and petitioner's contractor's insurance, and pay for respondents' attorney fees in relation to the construction and demolition. (*Id.*) Petitioner paid for respondents' attorney fees incurred pursuant to a fully executed letter agreement on April 26, 2016. (*Id.*) Petitioner alleges that after the letter agreement was executed, petitioner pursued negotiations for seven months to no avail until meeting with respondents on September 8, 2016. (*Id.*, ¶ 13-14.) Since the meeting, negotiations have not led petitioner to gain access to respondents' property. (*Id.* ¶ 16.) Petitioner and its contractor allegedly complied with respondents' insurance-coverage requests and obtained general liability coverage in the amounts of \$42,000,000 and \$26,000,000, respectively. (*Id.* ¶ 14.)

Petitioner agrees to indemnify respondents and their four named tenants for the "types of damages listed by [r]espondents, on the condition that such damages arise out of personal injury or property damage." (Petitioner's Letter to the court, February 6, 2017, ¶ 1.)

Petitioner agrees to modify the "No Interference" provision of its proposed draft of the license agreement to "provide that in an emergency, [r]espondents would be entitled to take action upon less than five day written notice." (*Id.*, ¶ 2.)

Petitioner also agrees to name respondents' four tenants as additional insureds on petitioner's and petitioner's contractor's insurance policies. (*Id.*, ¶ 3.)

Respondents do not contest that petitioner is required to conduct protection work under New York City Building Code requirements.

Respondents refute petitioner's claim that respondents have denied petitioner access to respondents' property. (Bennett Brodie Affidavit in Opposition, ¶ 4.)

Respondents allege that the protection work has the potential to damage respondents' property and create a danger for their tenant, and requests that petitioner be held responsible for any injuries or damages and obtain a temporary bond of \$1,500,000 or a similar escrow fund to be maintained by an unrelated third party in the event of damage or injury. (Affidavit in Opposition, ¶ 6-9.)

Respondents allege that petitioner has not provided "the exact nature, timing and extent of the work that will occur after the demolition is complete." (Affidavit in Opposition, ¶ 7.) Respondents request that petitioner enter into an amendment or new license agreement providing those details. (*Id.*)

II. Discussion

Petitioner's RPAPL 881 motion for a license to enter and perform protection work at the adjacent property is granted. RPAPL 881 provides the following:

"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."

Under RPAPL 881, a court may grant a license to a property owner whose adjacent property owner has refused entry when "the inconvenience to the adjacent property owner is relatively slight compared to the hardship of its neighbor if the license is refused." (*Bd. of Mgrs. of Artisan Lofts Condo. v Moskowitz*, 114 AD3d 491, 492 [1st Dept 2014], quoting *Chase Manhattan Bank [Natl. Assn.] v Broadway Whitney Co.*, 57 Misc 2d 1091, 1095 [Sup Ct, Queens County 1968].)

A petition to enter an adjacent property after an adjacent property owner refuses to grant a license must "state the facts making such entry necessary" by explaining why the work cannot otherwise be performed. (*Lincoln Spencer Apts. Inc. v Zeckendorf-68th St. Assocs.*, 88 AD3d 606, 606 [1st Dept 2011].) Under RPAPL 881, a petition to enter an adjacent property "shall state . . . the dates or date on which entry is sought."

The court may grant an RPAPL license to a petitioner that states that it will obtain adequate insurance and name respondents as additional insureds. (*25 Tenants Corp. v 7 Sutton Square, LLC.*, 2015 NY Slip Op 30526 [U], **2-3, 2015 WL 1623790, at **2-3 [Sup Ct, NY County 2015].)

Upon granting an RPAPL 881 license, the court may require a licensee, as a condition of the license, to post a bond. (*Ponito Residence LLC v 12th St. Apt. Corp.*, 38 Misc 3d 604, 612 [Sup Ct, NY County 2012].)

A certificate of insurance is insufficient proof of coverage; it is evidence that coverage exists but not conclusive proof that a contract exists. (*Horn Maintenance Corp v Aetna Cas. & Surety Co.*, 225 AD2d 443, 444 [1st Dept 1996].)

Respondents have refused to grant petitioner a license, and petitioner has stated facts that make entry and protection work at the adjacent property necessary.¹ (See Andrew Sellnau Affidavit in Support, ¶¶ 10-21; Memorandum of Law in Opposition at 1.) Petitioner explains that to comply with the New York City Building Code, it must access and conduct protection work at respondents' property. (*Id.*, ¶¶ 9-14.) Work on the construction and demolition cannot continue unless the license is granted. (Affirmation in Support, ¶7.) Under the Building Code, no other way exists to conduct the work. (Sellnau Affidavit in Support, ¶¶ 13-14, 25.) To demonstrate the need for a license, petitioner provides an affidavit from Benjamin Pattou, the engineer retained in connection with petitioner's demolition and construction activities. (Affidavit of Pattou in Support of Petition, ¶¶ 1-2.)²

Any harm to respondents from the temporary protection work at respondents' property is slight compared to petitioner's hardship if the construction and demolition cannot continue. Respondent will be merely inconvenienced by the work for approximately six months. (Sellnau Affidavit in Support, ¶ 28.) Respondents concede that they "believe the requests of Petitioner to be reasonable and fair." (Memorandum of Law in Opposition, ¶ 6.) The property protection work does not affect the operation of respondents' property. (*Id.* ¶ 37.) If the license is denied, the Department of Buildings (DOB) will stop petitioner's construction, and that will result in "extreme" financial loss to petitioner. (*Id.*, ¶ 33; Affirmation in Support, ¶ 7.)

Respondents' argument that petitioner has failed to provide "the exact nature, timing and extent of the work that will occur after the demolition is complete" is unpersuasive. (Affidavit in Opposition, ¶ 7.) Petitioner has provided both the exact nature of the work and a time frame of six months from the start date of the work. (Verified Petition, ¶¶ 17-23.)

Respondents' argument that petitioner must indemnify respondents for all risks of loss to respondents and their tenants is unpersuasive. Petitioner has agreed to provide insurance; RPAPL 881 fully protects respondents from any damages caused by the performance of the property protection. (Sellnau Affidavit in Support, ¶ 35.)

Petitioner and petitioner's contractor have named respondents as additional insured on petitioner and petitioner's contractor's insurance policies, which include general liability coverage in the amounts of \$42 million and \$26 million, respectively. (Sellnau Affidavit in Support, ¶ 35; Affirmation in Support, ¶ 14.) Certificates of insurance, petitioner and petitioner's

¹ Respondents state in their Memorandum of Law in Opposition that "Respondents have refused to execute a license agreement at this juncture." (Memorandum of Law in Opposition at 1.) But in their other opposition papers, respondents refute that they have refused to grant petitioner a license. (Affirmation in Opposition, ¶ 4; Brodie Affidavit in Opposition, ¶ 4)

² Pattou confirms the veracity of petitioner's claim that the property protection at respondents' property is necessary.

contractor's entire insurance policies, and endorsements evidence the insurance policies. (Verified Petition, ¶ 30.)

Respondents' argument that petitioner should post a temporary bond for \$1.5 million in the event of damage to respondents' property or to the tenants of respondents' property is persuasive. (*See Brodie Affidavit in Opposition*, ¶ 9.) The court may require a bond as a condition of an RPAPL 881 license. Respondents' property houses three restaurant tenants with "a myriad of critical equipment located within a very close proximity (as close as several feet) to the block wall at the rear of the garage property which is scheduled to be demolished." (*See id.*, ¶¶ 5-7.) Respondents allege that petitioner is a subsidiary of the Extell Development Company. Respondents provide three news articles that describe incidents of falling objects, building damage, and crane accidents at properties adjacent to Extell developments. (*See id.*, ¶ 4 & Exhibit B.) Petitioner concedes that it is a subsidiary of Extell and does not contest the alleged incidents at Extell's other developments. A bond for \$1.5 million protects respondents and their tenants in the event that the restaurants suffer damages to their property, equipment, or operations as a result of the construction and demolition.

Petitioner provides an affidavit from Sellnau, a signatory of petitioner, who knows about the negotiations between respondents and petitioner. (*See generally* Sellnau Affidavit in Support.) Petitioner has demonstrated that it negotiated in good faith.³ (*See id.*)

Respondent fails to show why the court should not grant petitioner a license under RPAPL 881.

Accordingly, it is ORDERED and ADJUDGED that this motion is granted to the extent that this court grants a judgment for a license to petitioner and its general contractor to access the respondents' property to perform non-invasive photographic survey of existing conditions, install, maintain and later remove temporary protections to respondents' property, and install materials to weatherproof respondents' property; and it is further

ORDERED and ADJUDGED that the license to petitioner and its general contractor shall last no more than 6 months, and work must be performed on weekdays between the hours of 8:00 a.m. and 5:00 p.m., effective immediately after service with notice of entry of a copy of this order; and it is further

ORDERED and ADJUDGED that petitioner and its contractor shall procure and maintain a policy of insurance covering liability and property damage in an amount not less than \$42 million and \$26 million respectively, naming respondents and respondents' four named tenants as additional insureds during the period of this license; and it is further

ORDERED and ADJUDGED that petitioner shall post a temporary bond for \$1.5 million in the event of damage respondents' property or to respondents' tenants; and it is further

³ Sellnau confirms the veracity of petitioner's claim that it negotiated in good faith and offered to obtain insurance naming respondent as an insured. Sellnau also confirms petitioner's claim that it persistently attempted to contact respondent.

ORDERED and ADJUDGED that petitioner shall be held liable to respondents and respondents' four named tenants for any property damage respondents or respondents' tenants may suffer as a result of the granting of this license, and all damaged property shall be repaired at petitioner's sole expense; and it is further

ORDERED and ADJUDGED that petitioner shall allow respondents to take immediate action, without written notice, if a tenant's business or its buildings is in jeopardy during an emergency or exigent circumstances; and it is further

ORDERED and ADJUDGED that petitioner shall notify respondent in writing when it has completed the work under the license; and it is further

ORDERED and ADJUDGED that petitioner shall remove any resultant violations at respondents' property from work conducted under the license; and it is further

ORDERED and ADJUDGED that petitioner shall pay for respondents' attorney fees in relation to any property damage related to the construction and the demolition; and it is further

ORDERED and ADJUDGED that upon the completion of the term of the license, petitioner and its general contractor shall return respondents' property to respondents in its original condition and that petitioner and its general contractor remove all materials used in construction and any resultant debris from the license area, and it is further

ORDERED that petitioner shall serve a copy of this decision and order with notice of entry on all parties and shall have execution thereof.

Dated: June 23, 2017

J.S.C.

HON. GERALD LEBOVITS
J.S.C.