

Matter of 6163 Crosby St., Inc. v Hing Ping Lam

2017 NY Slip Op 31741(U)

August 18, 2017

Supreme Court, New York County

Docket Number: 156502/2017

Judge: Robert D. Kalish

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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: Hon. _____ ROBERT D. KALISH
Justice

PART 29

In the Matter of the Application of:
6163 CROSBY STREET, INC.,

INDEX NO. _____ 156502/2017

MOTION DATE _____ 8/03/17

Petitioner,

MOTION SEQ. NO. _____ 001

- v -

HING PING LAM and BIG YUK CHIU,

Respondents.

The following papers, numbered 1 to 20, were read on this motion for an order for premises access pursuant to RPAPL § 881.

**Petition—Grider Affidavit—Exhibits A-B—Proposed Order to Show Cause—
Affirmation—Memorandum of Law; Signed Order; Affidavit of Service;
Proposed Judgment**

No(s). 1-20

Motion by Petitioner 6163 Crosby Street, Inc. by order to show cause for an order pursuant to RPAPL § 881 granting Petitioner a license to enter the premises 222 Lafayette, for the purpose of installing and maintaining a temporary roof protection on the rooftop of the adjacent premises consisting of a layer of styrofoam placed on the roof's surface covered by a layer of wood planks and capped with a layer of plywood, is granted without opposition as follows:

BACKGROUND

Petitioner 6163 Crosby Street, Inc. is the owner of the premises known as and located at 61-63 Crosby Street, New York, New York, and designated in the Tax Map of the City of New York ("City Tax Map" as Block 482, Lot 13 ("Petitioner's Premises")), which is adjacent to the premises known as and located at 222 Lafayette Street and designated in the City Tax Map as Block 482, Lot 25 ("Adjacent Premises"), owned by respondents Hing Ping Lam and Big Yuk Chiu (collectively, "Respondents"). (Davidson Affirm. ¶ 1.)

On the instant motion, pursuant to RPAPL § 881, Petitioner seeks an order granting it a temporary license from August 1, 2017 to June 1, 2018, or in the

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

alternative, for a 10 month period commencing on the date that the Court grants the requested license, to access the Adjacent Premises, to install and maintain temporary roof protection on the rooftop of the Adjacent Premises, consisting of a layer of Styrofoam placed on the roof's surface, covered by a layer of wood planks, and capped with a layer of plywood (collectively, "Roof Protections"). (Davidson Affirm. ¶ 2; Petition ¶ 3.)

Petitioner contends that, pursuant to the Building Code of the City of New York § 3309.10, it is legally required to place the Roof Protections on the Adjacent Premises to protect the Adjacent Premises from construction work being done on Petitioner's Premises. (Petition ¶ 18; Grider Aff. ¶¶ 3-6.) Such construction work includes, inter alia, extending the first floor of the existing building on Petitioner's Premises to the rear lot line (the "First Floor Extension") and increasing the height of the building by adding an additional fifth story (the "Rooftop Addition," collectively with the "First Floor Extension," the "Development"). (Grider Aff. ¶ 1.)

Petitioner states that it has already received the relevant construction permits from the Department of Buildings, which it submits with its motion papers along with the architectural designs and drawings for the project. (Petition ¶¶ 13-14; Ex. E [Architectural Drawings]; Ex. F [DOB Permits].) In addition, Petitioner states that it has already begun some of the Development work, but it has filed the instant motion because the work cannot continue without the installation of the Roof Protections. (Hearing Tr. at 10:15-11:05.)

Petitioner also notes that, due to work currently being performed by a separate adjoining property, much of the Adjacent Premises has already been covered by roof protections put in place by another party, and that currently Petitioner would only need to add about "four or five feet" of Roof Protections to meet their legal obligation, pursuant to NYC Building Code § 3309.10, to ensure protection 20 feet from its property line. (Hearing Tr. at 7:03-8:05.) Petitioner estimates that it will probably need access to the roof for three days to install the necessary Roof Protections, and that it will be able to access the relevant portion of the Adjacent Premises via a second floor window—so that there is no need for Respondents to provide access through the building. (Grider Aff. ¶ 6; Hearing Tr. at 12:03-13:16.)

Petitioner also submits an affidavit of service from its process server. The affidavit of service states that service by personal delivery was attempted on

multiple occasions at two addresses listed for the Respondents in the property registration records, and that said process server eventually served Respondents pursuant to CPLR 308 (4) – “mail and nail” – at two separate addresses. (Aff. of Service.)

On August 3, 2017, petitioner’s counsel appeared for a hearing with the Development’s architect David Grider and the Development’s project manager Joshua Thompson. The Court took testimony from Mr. Grider and Mr. Thompson. Respondents did not appear at the hearing or respond to the instant order to show cause. Petitioner also revised its estimate for the project, stating that it only need a six-month license, and that all work would be performed during regular business hours. (Hearing Tr. at 19:10-25.)

DISCUSSION

RPAPL § 881, which is titled “Access to adjoining property to make improvements or repairs”, states as follows:

“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 so to enter pursuant to article four of the civil practice law and rules. The 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. The licensee shall be liable to the adjoining owner or his lessee for actual damages occurring as a result of the entry.”

Under RPAPL § 881, the party seeking entry must establish the necessity of the entry, and a license for entry cannot be granted for the party’s mere convenience. (*Lincoln Spencer Apartments, Inc. v. Zeckendorf-68th Street Assocs.*, 88 A.D. 3d 606 [1st Dept 2011]; *Amalgamated Dwellings, Inc. v. Hillman Hous. Corp.*, 299 A.D.2d 199 [1st Dept 2002]; *see also Arep Fifty-Seventh, LLC v. PMGP Assocs., L.P.*, 101 A.D. 3d 440 [1st Dept 2012] [stating that movant must show “why the work could not otherwise be performed”].) The movant cannot rely on conclusory assertions that access is necessary, but rather must present

specific facts that make the requested access necessary. (*Lincoln Spencer Apartments*, 88 A.D. 3d 606.)

In analyzing section 881 applications, courts apply a standard of reasonableness and “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.’” (*Board of Mgrs. of Artisan Lofts Condominium v. Moskowitz*, 114 A.D.3d 491, 492 [1st Dept 2014], quoting *Chase Manhattan Bank v Broadway, Whitney Co.*, 57 Misc 2d 1091, 1095 [Sup Ct, Queens County 1968], *affd* 24 NY2d 927 [1969].)

In the instant case, Petitioner seeks to place Roof Protections directly on the roof of the adjacent premises to comply with NYC Building Code § 3309.10. By definition, this work requires access to the Adjacent Premises. In addition, the placement of Roof Protections is being done to protect the Adjacent Premises, and most of the relevant area on the roof of the Adjacent Premises are already covered by roof protections put in place by another party. Furthermore, Petitioner has testified that the Roof Protections will be put in place in less than three days and that they will access the subject area of the Adjacent Premises via the second floor window of their premises without entering through the front door. As such, this Court finds that the inconvenience to Respondents posed by the proposed entry will be relatively slight compared to the hardship that denying the instant petition will impose on Petitioner—the latter would prevent Petitioner from legally proceeding with the Development. Therefore, this Court grants Petitioner the requested access.

CONCLUSION

Accordingly, it is hereby

ORDERED and ADJUDGED that the petition brought by Order to Show Cause seeking a license to enter onto Respondent's property pursuant to Real Property Actions and Proceedings Law (RPAPL) § 881, is granted to the extent stated herein; and it is further

ORDERED that Petitioner is granted a limited license during the construction project to gain access to the Respondent's adjacent premises located at 222 Lafayette Street New York, New York, Block 482 and Lot 25, to place Roof

Protections for a period of six (6) months from the date that this Order is served upon Respondents and a respective affidavit of service is e-filed; and it is further

ORDERED that Petitioner shall not unreasonably interfere with the Respondents' and Respondents' tenants' 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 Respondents' tenants' property; and it is further

ORDERED that Petitioner and its contractors performing the work shall obtain policies of general liability insurance on an occurrence basis against claims for personal injury and property damage with a combined single limit coverage of two million dollars (\$2,000,000.00) per occurrence, with excess umbrella liability coverage of at least one million dollars (\$1,000,000.00) naming Respondents as an additional insured during the period of this license through the removal of the roof protections encumbering Respondent's property or for any further period as set forth herein; and it is further

ORDERED that the Petitioner shall furnish to Respondents and shall file with the court a certificate of insurance evidencing such liability insurance coverage and further provide that said insurance shall not be cancelled or changed until the license has expired and until the expiration of thirty (30) days after written notice of such cancellation has been mailed to Respondents; and it is further

ORDERED that Petitioner shall be held liable to Respondents and their tenants for any damages which Respondents and their tenants 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 Respondents in writing when the work is completed under the license and the temporary protections are removed; and it is further

ORDERED that upon the completion of the term of the license, the Respondents' property within such licensed area shall be returned to its original condition, and all materials used in construction and any debris shall be removed from the licensed area; and it is further

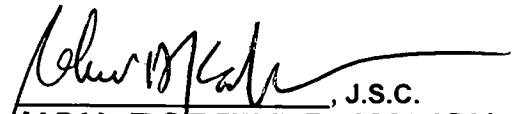
ORDERED that Petitioner is solely responsible for the installation, maintenance and removing of the temporary protections; and it is further

ORDERED that Petitioner shall serve of a copy of the instant order on Respondents with notice of entry forthwith via certified mail, return-receipt requested and shall e-file the respective affidavit of service immediately thereafter; and it is further

ORDERED that upon the e-filing of said affidavit of service, Petitioner may enter the Adjacent Premises and proceed accordingly with the proposed installation of the Roof Protections.

The foregoing constitutes the decision, order, and judgment of this Court.

Dated: August 18, 2017
New York, New York


J.S.C.
HON. ROBERT D. KALISH
J.S.C.

- 1. Check one:.....
- 2. Check if appropriate:..... PETITION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED NON-FINAL DISPOSITION
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE