

109 Montgomery Owner LLC v 921 Washington Ave. LLC
2018 NY Slip Op 31530(U)
July 5, 2018
Supreme Court, Kings County
Docket Number: 510675/18
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

_____ X

109 MONTGOMERY OWNER LLC,

Petitioner,

-against-

921 WASHINGTON AVENUE LLC,

Respondent.

_____ X

**DECISION / ORDER
& JUDGMENT**

**Index No. 510675/18
Motion Seq. No. 1
Date Submitted: 6/21/18
Cal No. 59**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this petition for a license for access to real property under RPAPL § 881.

Papers	NYSCEF Doc.
Order to Show Cause, Verified Petition, Affirmation, Affidavits and Exhibits Annexed.....	<u>1-11,16</u>
Answer, Affirmation, Affidavit and Exhibits Annexed.....	<u>12-15</u>

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

This is a special proceeding brought by petitioner 109 Montgomery Owner LLC to obtain a license pursuant to RPAPL § 881 to access respondent 921 Washington Avenue LLC's adjacent property to install several protective devices which are required by the 2014 New York City Building Code. Petitioner is in the process of constructing a new twelve-story apartment building. The required items include the erection of a construction fence, a sidewalk shed, roof protection, netting on the fire escapes as well as overhead protection with pipe scaffolding over the rear alleyway, all of which will remain in place for approximately 24 months while the construction proceeds.

Petitioner's project is a residential apartment building with 163 apartments on what was

an empty lot. Respondent's building comprises 79 residential apartments. Petitioner's building will be built behind respondent's building, not alongside it. There is an alley behind respondent's building, so the new building will be ten feet away from respondent's building at its closest point, according to the drawing included in the Jones affidavit. From the front of respondent's building, which faces the Brooklyn Botanic Gardens, there will be no indication of any construction, as it is all in the rear, on the other side of the block. It is noted that respondent purchased its building in February of 2018, more than two years after petitioner first obtained the building permit for its project. As this information is readily available to the public, either on the Building Department's website or at their office, respondent cannot claim it was not aware of the plans for the adjacent property.

As the Second Department noted in *Queens Coll. Special Projects Fund, Inc. v Newman* 154 AD3d 943, 943–44 [2d Dept 2017] [internal citations omitted]:

RPAPL 881 allows a property owner to petition for a license to enter the premises of an adjoining owner when such entry is necessary for making improvements or repairs to the petitioner's property and the adjoining owner has refused such access. A proceeding pursuant to RPAPL 881 is addressed to the sound discretion of the court, which must apply a reasonableness standard in balancing the potential hardship to the applicant if the petition is not granted against the inconvenience to the adjoining owner if it is granted. The factors which the court may consider in determining the petition include the nature and extent of the requested access, the duration of the access, the protections to the adjoining property that are needed, the lack of an alternative means to perform the work, the public interest in the completion of the project, and the measures in place to ensure the financial compensation of the adjoining owner for any damage or inconvenience resulting from the intrusion.

The parties have already negotiated and agreed to all the terms of a license agreement (NYSCEF Doc. No. 8) except for the amount of the license fee which should be paid to respondent. In its memorandum of law (at 3), respondent urges the court to grant the petition on the terms set forth in the draft Limited License Agreement, but with

a \$9,000 per month license fee. In his affidavit, respondent's principal concedes that the parties have negotiated the terms of the agreement and that he "would sign the agreement" as long as a \$9,000 per month fee is included (Jones affidavit ¶ 12), and that if it is not included, the petition should be denied.

"Although the determination of whether to award a license fee is discretionary, in that RPAPL § 881 provides that a 'license shall be granted by the court in an appropriate case upon such terms as justice requires,' the grant of a license pursuant to RPAPL § 881 often warrants the award of contemporaneous license fees" (*DDG Warren LLC v Assouline Ritz 1, LLC*, 138 AD3d 539, 540 [1st Dept.2016]). Here, although the required protective devices will not prevent or interfere with respondent's tenants' occupancy of the premises, a residential building, respondent seeks \$9,000 per month as a license fee, which respondent states would be compensation for the anticipated diminution in the rental value of the market rent apartments in its building as a result of petitioner's placement of the required protective devices. Petitioner argues that the fee sought is unreasonable and is based upon purely speculative claims of the potential loss of rental income.

The court finds this analogous to the case in *Queens College* (154 AD3d at 944), where the court stated "the limited access and placement of structures would protect the [adjacent] property and would not interfere with the use of the premises . . . and [are] expected by the petitioner to last no more than 18 to 24 months after the commencement of construction; that the temporary structures to be erected . . . would not be unduly invasive and [are] necessary in order for the petitioner to build . . . while protecting the adjoining property as required by the New York City Building Code."

Further, the court finds that the respondent's estimate of the diminution of the

rental value of its market rent apartments is materially flawed. The claimed diminution in value considers petitioner's planned construction project as a whole, and not merely the specified protective devices. In paragraphs 6, 7 and 8 of his affidavit, defendant's principal cites to the construction noise, dust and dirt as well as an alleged loss of privacy from the construction work outside of the tenants' windows as making the apartments less valuable during the construction. These issues are not in any way related to the requested license.

Respondent's calculation is also flawed as it is based upon a loss of the rental value of units that are currently occupied and subject to existing leases, which may not become vacant during the construction at all. The court notes that many of the apartments are rent stabilized, and that those rents would not be affected by the temporary placement of the protective devices as they will presumably remain below the market rate.

Additionally, the projected "free market rental value" assigned to the apartments by respondent and the specified estimated rent decreases respondent indicates it would "suffer" are not based upon any expert analysis or upon comparable rents, but merely respondent's own estimates. Clearly, any loss of rental income at the property which respondent may suffer from the presence of the required protective devices is highly speculative. Respondent thus does not provide a reasonable basis upon which to determine an appropriate licensing fee (*see PB 151 Grand LLC v 9 Crosby, LLC*, 58 Misc 3d 1219(A); 2018 NY Slip Op 50163(U), [Sup Ct, NY County 2018]). The court also notes that a brand new building on the same block as respondent's building can only enhance the value of the respondent's apartments once it is completed. The court has also considered that the inconvenience to respondent's tenants during the

placement of the protective equipment will be minimal, that none of the apartments will be uninhabitable during the work, that petitioner cannot comply with the requirements of the Department of Buildings if these items are not placed to protect respondent's property, that petitioner has no alternative means to perform the work, and that despite respondent's protestations with regard to the petitioner's diminution of the rental value of its apartments, a prospective tenant who looks at the New York City Department of Housing Preservation and Development's website will readily see that the building has fifty-five open violations, which would be more of a deterrent to a market rate rental than the netting which may be temporarily placed on the fire escapes at the rear of the building.

Consequently, the court declines to impose a license fee herein. In the event the respondent does sustain actual damages as a result of the petitioner's construction, including due to the presence of the required protective devices, respondent may bring an action to recover its damages once the building has been completed, or, if only with regard to the protective devices which are the subject of the requested license, once they are removed.

Accordingly, it is

ORDERED and **ADJUDGED** that the petition is granted and petitioner 109 Montgomery Owner LLC is granted access to respondent 921 Washington Avenue LLC's premises, in accordance with the terms of the proposed Limited Access and License Agreement, annexed as exhibit A to the affirmation of Jonathan A. Grippo, (NYSCEF Doc. No. 8), which shall be deemed incorporated into and made a part of this Order and Judgment, and it is further

ORDERED that petitioner's claim for attorneys' fees is denied. There is no

statute which provides for attorneys' fees in connection with a RPAPL § 881 petition.

This constitutes the decision, order and judgment of the court.

Dated: July 5, 2018

ENTER:



Hon. Debra Silber, J.S.C.

**Hon. Debra Silber
Justice Supreme Court**