

Horizon at 61 Rivington LLC v 143 Allen St. LLC

2019 NY Slip Op 34162(U)

December 9, 2019

Supreme Court, New York County

Docket Number: 157527/19

Judge: Lynn R. Kotler

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

HORIZON AT 61 RIVINGTON LLC et al.

INDEX NO. 157527/19

- v -

MOT. DATE

143 ALLEN STREET LLC

MOT. SEQ. NO. 001

The following papers were read on this motion to/for
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Notice of Cross-Motion/Answering Affidavits — Exhibits
Replying Affidavits

This is a special proceeding brought pursuant to RPAPL § 881. Petitioners seek a temporary license to enter respondent's property in order to install temporary scaffolding and safety measures to protect respondent's building during construction work at petitioner's building. Respondent opposes the petition. The court's decision follows.

Petitioners, as tenants-in-common, own the property located at 61 Rivington Street, New York, New York, 10002. Petitioner's property is improved by a four-story, mixed-use building. Respondent owns the property located at 143 Allen Street, New York, New York 10002, which is adjacent to petitioners' property. Respondent's property is improved by a landmarked three-story, mixed-use building.

The underlying work which petitioner seeks to perform includes removal of the fourth floor and the roof of petitioner's building, construction of a two-floor enlargement, internal renovations and the restoration of the facade. Petitioner has filed an Alteration Type-1 application with the New York City Department of Buildings ("DOB") on July 9, 2018 and its architectural plans were approved by the DOB on December 17, 2018. DOB issued an Alternation Type-1 Permit which is scheduled to expire on January 24, 2020. Petitioners have provided the affidavit of an architect who explains what safety measures need to be taken with respect to respondent's property.

Respondent opposes the petition. It argues that petitioners should first be required to provide "structural design and engineering documents reflecting adequate protection of the 143 Allen property and agree to perform their construction in accordance therewith; (2) to compensate 143 Allen for all attorneys' fees and engineering expenses incurred in connection with the parties' negotiations to date and defense of this special proceeding; and (3) to pay a monthly license fee to 143 Allen for her loss of use of her backyard and quality of life interferences."

Dated: 12/9/19

HON. LYNN R. KOTLER, J.S.C. (with signature)

- 1. Check one: [X] CASE DISPOSED [] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [] GRANTED [X] DENIED [] GRANTED IN PART [] OTHER
3. Check if appropriate: [] SETTLE ORDER [] SUBMIT ORDER [] DO NOT POST [] FIDUCIARY APPOINTMENT [] REFERENCE

RPAPL § 881, entitled “[a]ccess to adjoining property to make improvements or repairs” provides 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.

Applying a reasonableness standard, the court must balance the interests of the parties and should issue the 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” (*Chase Manhattan Bank [Natl. Assn.] v. Broadway, Whitney Co.*, 57 Misc2d 1091, 1095 [Sup Ct Queens Co 1968], *affd.* 24 NY2d 927 [1969]; *see also Board of Managers of Artisan Lofts Condominium v. Moskowitz*, 114 AD3d 491 [1st Dept 2014]).

While petitioners have established that they cannot make the proposed improvements to their real property without entering respondent’s property, they have failed to demonstrate that they are entitled to the relief they seek herein. The court finds petitioner’s heavy-handed tactics, including failing to provide structural design drawings and engineering reports to respondent, troubling. Petitioner has further demonstrated an inability to negotiate in good faith. In this and a related action also pending before this court, petitioners have shown that they would rather resort to a RPAPL § 881 proceeding than come to equitable terms with its neighbors (see court’s interim decision/order on motion sequence 001 in a related action entitled Horizon at 61 Rivington LLC v. MA88 LLC, Index Number 157525/19). This is an abuse of Section 881.

In that related action, there was no dispute as to the scope of the safety measures petitioner proposed to undertake. The only issues related to the terms and conditions of a license agreement. Here, however, respondent has demonstrated that it has been denied information which it is entitled to. Specifically, respondent’s counsel explains:

[petitioner’s counsel] refused to provide complete plans and specifications for all work to be performed at [petitioner’s] site or amendments thereto. In comments to my proposed License Agreement, [petitioner’s counsel] said “no to lpc plans, violations, notice, sign-offs and leters [sic] of completion...” He refused to provide a project schedule, pest controls, protections for 143 Allen’s roof, or information about the Developer’s principals.

Petitioners are not merely performing repairs, but also seek to improve and expand their own premises. The proposed work is substantial, and respondent is entitled to the information it seeks so it can make a meaningful determination about the impact of such on its landmarked building and the adequacy of the proposed protections. Indeed, respondents contend that in addition to the work petitioners have disclosed to the court, petitioner plans to excavate its cellar to install an elevator bay. On this record, petitioners have not demonstrated that the equities weigh in their favor.


Further, as this court stated in the related action, petitioner is required to reimburse respondent for its reasonable attorneys fees and costs incurred in connection with this action (*see i.e. North 7-8 Investors, LLC v. Newgarden*, 43 Misc3d 623 [Sup Ct Kings Co 2014]).

For at least these reasons, the petition is denied.

Accordingly, it is hereby **ORDERED** that the petition is denied, this proceeding is dismissed and the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 12/9/19
New York, New York

So Ordered: 

Hon. Lynn R. Kotler, J.S.C.