

Matter of Epic Tower LLC v X & Y Dev. Group, LLC

2019 NY Slip Op 34280(U)

June 6, 2019

Supreme Court, Queens County

Docket Number: Index No. 701421/19

Judge: Robert I. Caloras

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ROBERT I. CALORAS

PART 36

Justice

-----X
**In the Matter of the Application of
EPIC TOWER LLC,**

**Index No. 701421/19
Motion Date: 4/4/19
Motion Cal. No. 9
Seq. No. 1**

Petitioner,

for a Judgment Pursuant to RPAPL 881

-against-

X & Y DEVELOPMENT GROUP, LLC,

**FILED
JUN 18 2019
COUNTY CLERK
QUEENS COUNTY**

Respondent
-----X

The following papers numbered E7-E15 read on this motion by petitioner for a license to enter upon portions of the respondent's property; and the cross-motion by respondent for an order dismissing petitioner's request for a license pursuant to RPAPL 881; consolidating this action with proceedings filed under Index No. 707065/2016 (X&Y Development Group, LLC v. Epic Tower LLC, et al.); contempt pursuant to Judiciary Law Sections 753 and 756, by finding that petitioner willfully violated and failed to comply with the Court Order, issued on January 26, 2018 and acting in contravention to the preliminary injunction articulated in same enjoining the petitioner from continuing construction in the alleyway portion of respondent's property; and restoring respondent's property to the condition it existed prior to petitioner's unlawful trespass.

	<u>PAPERS NUMBERED</u>
Petition-Exhibits.....	E1-E17
Order to Show Cause-Affirmation- Exhibits- Stipulation.....	E19-E20
Cross-Motion-Affidavit in Opposition to Order to Show Cause and support of Cross-Motion - Memorandum of Law-Exhibits.....	E21-E39
Affirmation in Opposition to Cross-Motion- Exhibits.....	E42-E78
Reply Affirmation-Exhibits.....	E79-E83
Affidavit in further Support of Cross-Motion.....	E84-E85

Upon the foregoing papers, it is ordered that petitioner's order to show cause and

respondent's cross-motion are determined as follows:

This is a special proceeding, commenced by the petitioner on January 24, 2019 by the filing of a petition. Petitioner is the owner and developer of property located at 41-62 Bowne Street, Flushing, New York. Respondent is the owner of one of the properties adjacent to petitioner's project site. In a decision issued on January 26, 2018, in the matter entitled *X & Y Development Group, LLC v Epic Tower LLC, AAA General Construction Corp., Cathay Bank, Yin Chou HU, and Vicente A. Magistrado*, Index Number 707065/16, Justice Diecia T. Pineda Kirwan directed that "the defendants are enjoined from continuing construction solely in the Alleyway, and must establish a proper monitoring program of defendant's property and the adjoining properties before recommencing construction". The Alleyway referred to in Justice Pineda Kirwan's order encompasses the following area: "[a]t the southern boundary of plaintiff's property and the northern boundary of defendant's property is a triangular parcel of land, . . . which runs 150.22 feet to the westerly side of Bowne Street on a northeast angle, and whose ownership was disputed by the parties. A rectangular strip of land north of the Triangle, and undisputedly on plaintiff's property runs approximately 150 feet east and west by approximately 7 feet north and south".

According to the petition, petitioner is doing work adjacent to respondent's property, and in accordance with the New York City Building Code has been advised by its expert Structural Engineer, Thomas Petracca, P.E., that it is required to conduct the following: a preconstruction survey; install monitoring on the interior and exterior walls of respondent's building; erect and install a temporary cantilevered moveable overhead protection system (in the form of a single cantilevered needle beam structure), temporary work platforms, concrete form pins, and scaffolding and debris safety netting over respondent's alleyway. Petitioner alleges that this work is necessary in order for petitioner and its contractors to perform their work on the Project and to protect and ensure the safety of the Adjacent Property, the alleyway, the public, and all of respondent's employees, invitees, and respondent's real property, while the petitioner's project is being constructed.

In the instant action, petitioner asserts that the erection of the a single cantilevered needle beam structure, temporary work platforms, concrete form pins, and scaffolding and debris safety netting over respondent's alleyway is necessary and reasonable. In the petition, petitioner alleges that in compliance with the NYC Building Code, it has obtained a set of DOB approved site safety protection plans which, rather than placing a sidewalk shed on top of the alleyway itself, utilizes Needle Beam Scaffolding suspended from the petitioner's building, such that the design of same does not actually touch the respondent's alleyway, except during the installation of the overhead needle beam protection. Petitioner further

alleges that because it intends on using a Cantilevered Suspended Needle Beam Scaffolding Protection Plan rather than a sidewalk shed (which would have been much less expensive), the petitioner will be able to raise the height of the Needle Beam Scaffolding protection so as to allow the respondent to utilize its alleyway if it so desires during petitioner's construction of its new building. Petitioner has attached a copy of it's NYC DOB approved Site Safety Logistic Plan as Exhibit C. Petitioner also alleges that the respondent is acting in bad faith. Petitioner alleges that access will be required as soon as the Court permits, and the protective measures required by the NYC DOB will be removed as soon as no longer necessary. Petitioner alleges that the respondent will not any suffer any material loss, inconvenience, or hardship, if this application is granted. Petitioner alleges that any inconvenience to respondent is temporary and clearly outweighed by petitioner's ownership interests in improving its property and preventing the loss of tax abatements and other financial loss. Petitioner alleges that the granting of a license is required to protect it's interests in the lawful use and improvement of its own property, and the equities weigh in its favor. Without such license allowing access to the Adjacent Property, petitioner alleges that it will not be able to continue its improvement work due to the NYC Administrative Code's requirement to install the enumerated protections. Petitioner further alleges that it and/or its contractor already have liability insurance in place. Petitioner also alleges that the respondent has acted in bad faith. Accordingly, petitioner requests that the Court issue, pursuant to RPAPL § 881, petitioner and its architect, engineers, consultants, and/or contractors, a license for the following:

- (i) To immediately enter the Adjacent Property to conduct a pre-construction survey, including but not limited to visually inspect, take photographs of, and document the current condition of the Adjacent Property;
- (ii) To enter the Adjacent Property immediately thereafter to install monitoring on the interior and exterior walls of Respondent's property and other locations as required by the NYC Building Code;
- (iii) To enter the Adjacent Property immediately thereafter to erect and install in the air space of Respondent's property and alleyway: the temporary cantilevered moveable overhead protection system, temporary work platforms, concrete form pins, and scaffolding and debris safety netting, over Respondent's alleyway, in connection with the work to be performed at the Project Site;
- (iv) To have limited access through the portions of Respondent's

building situated on the Adjacent Property in order to install, take readings of, and remove the monitors and protection system upon completion of the work;

(v) To enter the Adjacent Property for a period of twenty-four (24) months from the date access is granted at reasonable times and upon reasonable notice, to maintain and inspect the monitors and the protection work, and to remove the monitors and overhead protection system upon completion of the work;

(vi) To access the Adjacent Property and have access on weekdays between the hours of 8 am and 5 pm, in order to perform the required protective measures described herein, with such protective measures to remain in place for twenty-four (24) consecutive months or a longer or shorter period as required by the NYC Department of Buildings.

Respondent has only submitted opposition to the order to show cause, and papers in support of its cross-motion, for an order dismissing petitioner's request for a license pursuant to RPAPL § 881, consolidation; and contempt.

The Court notes that on February 19, 2019, the parties executed a stipulation consenting to consolidating for joint trial this action with the action entitled *X & Y Development Group, LLC v Epic Tower LLC, AAA General Construction Corp, Cathay Bank, Yin Chou HU, and Vincente A. Magistrado*, Index Number 707065/16. Pursuant to this stipulation, the Court issued an order granting the joining these actions for joint trial on February 19, 2019. Therefore, the branch of the cross-motion seeking a consolidation has been resolved.

In its opposition to the order to show cause and in support of its cross motion, respondent asserts that prior to January 24, 2019, petitioner had installed the protection they are seeking permission in violation of the preliminary injunction, and without any required permission to install such protection or request/issuance of a License Agreement. Respondent also disputes any claims of bad faith.

"A motion to vacate or modify a preliminary injunction is addressed to the sound discretion of the court and may be granted upon compelling or changed circumstances that render continuation of the injunction inequitable" (*Thompson v 76 Corp.*, 54 AD3d 844, 846 [2008], quoting *Wellbilt Equip. Corp. v Red Eye Grill*, 308 AD2d 411, 411 [2003]; see CPLR 6314; *Thompson v 76 Corp.*, 37 AD3d 450, 452-453 [2007]). With this special proceeding, petitioner seeks an order, pursuant to RPAPL §881, granting it a license to enter upon portions of respondent's property. In determining the issue of whether to grant

petitioner a license pursuant to RPAPL §881, the court must apply a "standard of reasonableness" (Mindel v Phoenix Owners Corp., 210 AD2d 167 [1 st Dept. 1994], lv denied 85 NY2d 811 [1995]). RPAPL §881 is "a codification of well-settled principles of jurisprudence expounded by [New York] courts . . . dealing with conflicting interests of adjacent property owners" (Chase Manhattan Bank [Nat. Assn.] v Broadway, Whitney Co., 57 Misc 2d 1091, 1096 [Sup. Ct. Queens Co. 1968], affirmed 24 NY2d 927 [1969]). The Court finds that the petitioner has set forth a sufficient basis to modify the January 26, 2018 order, to the extent that a hearing is necessary to determine the necessity and reasonableness of the requested license pursuant to RPAPL 881, and if the Court grants the petitioner's request, the terms upon which said license shall issue. Accordingly, it is,

ORDERED, that the determination of this order to show cause and cross-motion are held in abeyance pending a hearing on the issue of the necessity and reasonableness of the requested license, and if said request is granted the terms upon which the license shall issue, and it is

ORDERED, that both parties are directed to appear with their expert witnesses for a hearing on the issue on Monday, July 22, 2019 in Part 36, Courtroom 103 at 10:30 AM. A copy of this order is being mailed to counsel for both parties.

Dated: June 6, 2019



ROBERT I. CALORAS, J.S.C.

FILED
JUN 18 2019
 COUNTY CLERK
 QUEENS COUNTY