

**One Lincoln Plaza Condominium v 14 W. 64th St.
LLC**

2020 NY Slip Op 30538(U)

February 26, 2020

Supreme Court, New York County

Docket Number: 161931/2019

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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ONE LINCOLN PLAZA CONDOMINIUM,

Index No.
161931/2019

Petitioner,

-against-

**DECISION
and ORDER**

14 WEST 64TH STREET LLC,

Respondent.

Mot. Seq. 1

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HON. EILEEN A. RAKOWER, J.S.C.

Petitioner One Lincoln Plaza Condominium (“Petitioner”) moves pursuant to Real Property Actions and Proceedings Law § 881 (“RPAPL § 881”), for a license to enter upon and access the properties owned by Respondent 14 West 64th Street LLC (“Respondent”) located at 14 W 64th Street, New York, NY, block 1116, lot 42, and 16 W 64th Street, New York, NY, block 1116, lot 43 (collectively, the “Adjoining Premises”), for the purpose of installing and maintaining roof protections.

Petitioner commenced this action on December 10, 2019 by filing a Verified Petition and Order to Show Cause as a special proceeding pursuant to RPAPL § 881.

The parties appeared before the Court on January 21, 2020, January 24, 2020, February 3, 2020 and February 5, 2020. The proceeding was marked fully submitted on February 14, 2020 after receipt of the minutes.

The Project

Petitioner owns the building located at 20 W 64th Street, New York, New York, block 1116 (“Petitioner’s Premises”). Petitioner’s Premises is a 44-floor residential and commercial building. The Adjoining Premises abuts Petitioner’s Premises along the Adjoining Premises’ eastern property line.

Petitioner prepared and filed a Local Law 11 (“Local Law 11”) technical report with an initial filing date of February 10, 2017 (the “Report”) with the Department of Buildings of The City of New York (“DOB”). Petitioner contends that the Report identified that the façade of Petitioner’s Premises was required to be

repaired, including relieving angle repair, selective brick replacement, selective relieving angle bolt replacement, and installation of masonry pins throughout the façade (collectively, the “Required Repairs”).

Petitioner seeks a temporary license for 23 months to enter upon certain portions of the Adjacent Premises to install and maintain roof protection.

Legal Standards/Discussion

RPAPL § 881 provides,

“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 in the adjoining owner or his lessee for actual damages occurring as a result of the entry.”

RPAPL § 881 “does not direct the court to grant a license to every applicant.” *Chase Manhattan Bank (Nat. Ass’n) v. Broadway, Whitney Co.*, 57 Misc. 2d 1091, 1095 [Sup. Ct, Queens County 1968], *aff’d sub nom. Chase Manhattan Bank v. Broadway, Whitney Co.*, 24 N.Y.2d 927 [1969]. Under this provision, the petitioner must “make a showing as to the reasonableness and necessity of the trespass.” *In re Tory Burch LLC v. Moskowitz*, 146 AD3d 528, 529 [2017]. Indeed, “Courts 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 Managers of Artisan Lofts Condominium v. Moskowitz*, 114 AD3d 491, 492 [1st Dept 2014]. “The Court should consider the extent to which the access sought interferes with the owners use and enjoyment of the property, the risks it poses to the property, as well as the complexities which the access sought presents in drafting a license agreement.” *N. 7-8 Inv’rs, LLC v. Newgarden*, 43 Misc. 3d 623, 632 [Sup. Ct, Kings County 2014].

A. RPAPL § 881 License

Petitioner seeks access to install, maintain, and remove Roof Protections. On January 24, 2020, February 3, 2020, and February 5, 2020, Jenna Halpern, P.E. (“Halpern”), a licensed Professional Engineer at Thornton Tomasetti, testified on Respondent’s behalf. Halpern raised concerns that she had regarding the Petitioner’s proposed roof protections. On January 24, 2020, Halpern testified that the plans are not complete, she stated:

“And all of the specific site conditions of the roof at 14 West 64th Street aren’t accounted for. For example, the balconies that we looked at before aren’t shown. And they are not shown to be protected, obviously. They do show the flat roof protection, but they don’t show how they are going to control access from one side of the roof onto the protection. Which is a safety hazard for anyone that is on the roof. They could just walk on top of the protection and they would be unprotected above from the work that is happening. Additionally, there are two air shafts that are adjacent to the building at One Lincoln that are not shown. And it is not shown how they would be protected. The roof drains and the gutter that exist between the two properties aren’t shown. If they are not adequately protected and allow water through, there is an issue that water could pool on the roof and subsequently cause damage to the interior structure of the building. Additionally, there are some air conditioning units that exist along the south façade of the building that aren’t shown, which do require protection. They show the area as overhead roof protection, but they don’t show how they are going to access the area. There is no scaffold shown on the drawings anywhere from how they will access. Additionally, they don’t show the bulkheads that exist on the west side of the property, and the skylights that exist on top of those bulkheads.” (Court Hearing Tr. January 24, 2020 at 13-14).

Halpern also raised concerns with Petitioner’s proposed pipe scaffolding. Halpern testified that:

“Pipe scaffolding, especially at this height would require an engineering set of plans to be produced for them. So there would need to be a set of calculations associated with

that as to how it would be supported, specifically laterally, to make sure that nothing happens that would cause it to fall down... to support a scaffold laterally, at approximately every 18 feet in height you need to install what are called tiebacks, which are basically bolts that are connected to the scaffold, that would then be drilled into the adjacent structure... I would laterally support this by bolting about every 18 feet in the structure at 14 West 64th Street... you drill holes into the building. Not much larger than three quarter of an inch diameter. And they would be spaced at every scaffold frame, so at about every 6 feet... Since it is only a stairwell it would only be two to three frames. So, widthwise it would be two to three locations, every 18 feet vertically. For those – that installation they would be drilled anchor bolts, mechanically anchored, or epoxy anchored, and no larger than three quarter inch diameter.” (Court Hearing Tr. January 24, 2020 at 17-21).

Regarding the skylights, Halpern testified that:

“We had some issues with these drawings as they show a netting spanning above the skylight and the mechanical equipment. And the netting does nothing to prevent debris or anything from ripping through it from getting through and damaging what is beneath it. So we had requested that they -- that they change it to a wood overhead protection detail to ensure the safety of the sky light and the mechanical equipment... Additionally they show that the protection for these units is bearing directly on the roof, which would be hitting the roof as a point load. We had issues with this as the roof isn’t rated for such a high point load and the load would need to be distributed... There are ways to -- multiple different ways to spread the load to make sure there are no point loads on the roof.” (Court Hearing Tr. January 24, 2020 at 33-36).

Halpern also raised her concerns with proposed movable barriers, testifying that:

“[the] movable barriers they show between the 20-foot protection zone and the rest of the roof. They didn’t provide any details for these movable barriers. Additionally, they didn’t provide what would be required

in the building code for site protection, which is an 8-foot construction fence. So that would be required to control access to the area for safety. The barriers aren't shown how they are going to be restrained. Typically for these types of barriers we expect to see within construction a Jersey barrier, a precast concrete barrier or a Yodock barrier, a plastic barrier they fill with water. Both are pretty heavy structures. So, since the details aren't provided, we couldn't assess whether the structure could hold such a load." (Court Hearing Tr. January 24, 2020 at 28-31).

In addressing some of Halpern's concerns, Respondent agreed to stipulate:

1. to put security cameras up to monitor the roof and do background checks on all of the general contractors and their employees that are assigned to do work on the façade;
2. to put the vertical traveling carriage, or sometimes referred to as a scaffold, 18 inches off the roof so there is no weight on the roof, and to disassemble it and move it to a way far back corner so that Petitioner's tenants can observe their holidays; and
3. to install a full bridge over the entire width of the roof.

Halpern stated that Respondent requested that the overhead protection be installed approximately 15 to 18 feet tall to protect his family when they are on the roof." (Court Hearing Tr. January 24, 2020 at 39). Halpern further stated how the bridge would be engineered:

"So, it will be steel posts that will terminate at header beams. And then there will be joists spanning between the header beams. The only thing that would be need to be additional, since it is on a roof and it is taller than the standard equipment protection, would be a cross bracing, which is very easy to install. It is just x bracing. And additionally it would probably need to be tied back in some way or tied down to ensure it doesn't blow away... The same tieback anchors that would be installed into the façade of One Lincoln... [there would be] no permanent damage ... It shouldn't impact the contractor's work in any way... So, with the scaffold stair that they intend to

build from their site, they can extend that stair up into the top of the shed and they would have the same accessibility on top of that shed as they would have the same accessibility on top of that shed as they would on the roof... It is removing or cutting off the anchors in place and then putting some grout in there. No structural damage would be associated with it.” (Court Hearing Tr. January 24, 2020 at 40-42).

After the close of hearing, the Court has determined that Petitioner is to have the controlled access zone where it was originally proposed on the southside of the Building as depicted in exhibit B1 and B2. On February 3, 2020, Petitioner’s project manager, Lauren Prince (“Prince”), stated that the general contractor and employees would not be prohibited from doing their work if the controlled access zone remained on the southside of the Building. Additionally, Petitioner is to have the full bridge as proposed by Respondent. To alleviate Halpern’s concerns, Petitioner must send Respondent an updated site safety plan addressing all of Halpern’s remaining concerns that were not addressed by Petitioner at the hearing and to provide Respondent with the point loads on the roof.

Petitioner has demonstrated its entitlement to a license to install and maintain roof protections. The roof protections will ensure the protection of the occupants of the Adjacent Premises from potential danger from the Required Repairs of Petitioner’s Premises.

Additionally, Petitioner is entitled to a license for access to conduct a pre-construction survey. Petitioner must provide Respondent with a copy of the signed and sealed pre-construction survey report, which will include photos and written descriptions of the existing conditions at the Adjacent Premises.

B. Licensing Fees

“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 licenses pursuant to RPAPL 881 often warrants the award of contemporaneous license fees.” *PB 151 Grand LLC v. 9 Crosby, LLC*, 58 Misc. 3d 1219(A) [Sup. Ct, NY County 2018] (citation omitted). “This is because the respondent to an 881 petition has not sought out the intrusion and does not derive any benefit from it Equity requires that the owner compelled to grant access should not have to bear any costs resulting from the access.” *Id.* (citation omitted).

Respondent has demonstrated that the proposed work will greatly interfere with its enjoyment of the roof. On January 24, 2020, Albert Faks (“Faks”), Respondent’s facilities manager, testified on Respondent’s behalf. Faks testified to the use of the roof by Respondent. Faks stated that:

So, the townhouse is a six-family townhouse. The top two floors are occupied by Mr. and Mrs. Podolsky. The lower floors are occupied by their children, along with two other tenants in the building. The roof and all of the access -- and the amenities spaces are used by everyone in the building. The roof is a good place for all of their grandchildren to go out and play. And a way of them taking them outside without having to go down to Central Park or having to leave home. (Court Hearing Tr. January 24, 2020 at 64-65).

Faks stated that Mr. Podolsky voluntarily allows the two “rent stabilized tenants” to have access to the roof. Faks further testified as to how the roof is used during the Jewish holidays, stating that:

[D]uring October is a Jewish holiday by the name of Sukkot where we build a temporary structure. Typically the structure on this roof is [] 12 by 20-foot long. And for the first seven days of the holiday we have all of our meals in the structure. Because having a sukkah in Manhattan is not typically common, a lot of the grandchildren and children bring their friends over and they actually sit down and have a meal in the sukkah... When you sit in the sukkah you have to be able to see the sky... Passover has nice weather, Your Honor. So sometimes even the seder nights would be hosted on the roof, weather permitting. (Court Hearing Tr. January 24, 2020 at 65-77).

Indeed, photographs introduced into evidence and testimony revealed a large open area approximately 3,000 square feet, finished with pavers, planters, decorative lattice, children’s play equipment, lounge chairs, and cooking and dining areas. The roof has a finished bathroom and is accessed by elevator. Light will not only be blocked by the shed, but a large number of necessary support poles will interfere with the free flow of the space.

Respondent’s occupants will have access to the roof during the duration of the project, however it is not without compromise. Therefore, Petitioner shall pay a

license fee of \$1,800/month to MKF, to increase to \$5,400/month after 23 months. While Respondent stated on the record numerous times that the license fee would be donated to charity, an escalating license fee would encourage Petitioner to complete the Project in a timely manner.

Wherefore it is hereby

ORDERED AND ADJUDGED that Petitioner is granted a license to enter onto Respondent's property to install roof protections and to conduct a Pre-Construction Survey; and it is further

ORDERED that Petitioner is directed to pay a license fee of \$1,800/month to Respondent, to increase to \$5,400 month after 23 months; and it is further

ORDERED that Petitioner shall post a bond in the amount of \$1,000,000.00 conditioned upon the payment of any damage award in favor of Respondents and against Petitioner, made pursuant to RPAPL § 881, and shall serve a copy of the bond upon Respondents, together with the judgment; and it is further

ORDERED that Petitioner shall notify Respondent in writing when its work has been completed and it has removed all protection from Respondent's property; and it is further

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

ORDERED that at the completion of the term of the license, Respondent's properties within the license area shall be returned to its original condition and all materials used in construction and any resultant debris shall be removed from the license area; and it is further

ORDERED that Petitioner shall not interfere with Respondent's necessary access to its property and quality of life, and shall take the necessary steps, measures and precautions to prevent any damage to Respondent's property; and it is further

ORDERED that Petitioner shall provide proof that Respondent has been added as an additional insured under the terms of the relevant insurance policy within 10 days; and it is further

ORDERED that Petitioner shall be liable to Respondent for any damages which it may suffer as a result of the granting of this license and all damaged properties shall be repaired at the sole expense of Petitioner; and it is further

ORDERED that Petitioner shall indemnify and hold harmless Respondent to the fullest extent permitted by law for any liability, claims, damages or losses, including reasonable attorneys' fees, Respondent may incur as a result of Petitioner's work, whether or not caused by the negligence of Petitioner or its employees, agents, contractors or subcontractors; and it is further

ORDERED that Petitioner shall immediately report, in writing, to Respondent any damage to Respondent's properties cause by Petitioner's work; and it is further

ORDERED that Petitioner shall cure any violation placed against Respondent's properties by a governmental or administrative agency as a result of Petitioner's work, and Petitioner shall reimburse Respondent for any fines or penalties imposed as a result of such violations.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: FEBRUARY 26, 2020



Eileen A. Rakower, J.S.C.