

Phoenix Owners Corp. v Mindel Residential Props., L.P.
2020 NY Slip Op 32835(U)
August 27, 2020
Supreme Court, New York County
Docket Number: 162049/19
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

PART 8

PHOENIX OWNERS CORP.,

INDEX NO. 162049/19

- v -

MOT. DATE

MOT. SEQ. NO. 001 and 002

MINDEL RESIDENTIAL PROPERTIES, L.P.,

The following papers were read on this motion to/for RPAPL § 881 and reply

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS DOC No(s).
Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS DOC No(s).
Replying Affidavits ECFS DOC No(s).

This is a RPAPL § 881 proceeding whereby petitioner seeks a temporary license for access and to install protections on respondent’s property in connection with façade inspection and repair work to petitioner’s premises. There are two motions pending before the court. The first is the petition itself. The second was brought by order to show cause by petitioner seeking “leave to e-file reply papers... to address issues raised in Respondent’s opposition/answering papers...” Respondent opposes both. In its answer, respondent asserts counterclaims for a license fee of no less than \$20,000 per month, reimbursement of attorney’s and professional fees as well as for property damage. Petitioner has replied to the counterclaims. The court’s decision follows.

At the outset, the court grants petitioner’s order to show cause in the interests of judicial economy. While respondent argues that petitioner waived its right to reply, there is no substantial prejudice in considering same.

The court now turns to the petition itself. This proceeding was initiated in December 2019. At that time, petitioner alleges the following in the petition. Petitioner owns the residential building located at 160 East 65th Street, New York, New York. Petitioner seeks a temporarily license to access and enter onto the neighboring properties located at 185 East 64th Street, New York, New York and 183 East 64th Street, New York, New York, which are both owned by Respondent. Petitioner seeks the license “for the limited purpose of installing, maintaining, and removing roof protections, pipe scaffolding, a sidewalk shed, and a protective shed on [respondent’s] Properties, as well as the installation of a hanging scaffold over the western wall of [petitioner’s] Property, which will hang directly above and encroach upon the property located at 185 East 64th Street, New York, New York, solely in accordance with Petitioner's Site Safety Plans” annexed to the petition. Petitioner explains that the work it seeks to perform is

Dated: 8/27/20

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

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

necessary to comply with NYC Local Law 11 of 1998, New York City Administrative Code § 28-302.1 and Rules of the City of New York § 103-04. (hereinafter collectively "Local Law 11"), which requires that that façades of buildings greater than six stories be inspected every five years as well as any necessary repair work flowing from that inspection.

Petitioner further alleges that it has tried to negotiate reasonable terms for months with respondent to no avail. Petitioner claims that respondent "has unreasonably refused Petitioner's offer, and has demanded additional measures, equipment, and installations to further encapsulate [respondent's] Properties, which are unreasonable, unnecessary, and excessive in terms of both costs and applicable, standard site safety practices and procedures, including, but not limited to a demand to install horizontal netting protections and window protect."

In opposition, respondent's counsel points out that petitioner failed to mention prior litigation and the terms of license agreements between the parties which were entered into in 2006 and 2011 for similar façade repairs. Respondent has provided those agreements to the court. Respondent maintains that the protections proposed by petitioner are "palpably insufficient". There is no dispute that since the petition was filed, the parties have engaged in discussions about the proposed work and petitioner's plan work.

Respondent has submitted affidavits from a licensed architect, Frank Fortino, and a manager of CNR Group, Inc. ("CNR"), Marcin Los. Los explains that CNR provides services "to care for, and maintain[] homes, after they have been built or renovated." Both Fortino and Los maintain that petitioner's plans will not provide proper protection to respondent's properties. They compare and contrast the protections which the parties previously agreed to in 2006 and 2011 with what petitioner now proposes herein. Specifically, they claim that there are no plans for netting and rigid roof protections and that petitioner's plans otherwise lack sufficient details and means of protection for the windows and slate roof. Fortino and Los also claim that petitioner's site safety drawings do not accurately reflect field conditions and that other aspects of petitioner's plans lack specificity regarding the type of equipment to be used including scaffolding.

Fortino posits that "[a]lthough the DOB allows such plans to be self-certified, best practice would be to go through a full plan examination and review by the DOB, especially in this instance, where the parties had previously been engaged in litigation, resulting in comprehensive ordered protections in the Referee's Report." Fortino and Los also outline revisions respondent has received to petitioner's proposed plans in May and June 2020.

Respondent has also submitted the affidavit of Joel S. Mindel, a member of respondent, who lives in the subject property with his wife, Susan. Mindel states in pertinent part:

When Susan was a senior at Barnard, she lived in an off campus apartment with 3 other students. One was an underclass woman named Lori Gold. In 1979, Lori's younger sister, Grace Gold, was killed by a piece of falling masonry from a building owned by Columbia University. This directly led to Local Law 10, which later became Local Law 11. It requires buildings over a certain height to have facade inspections every 5 years.

On reply (submitted in connection with motion sequence 2), petitioner has provided the affidavit of Robert Masone, a professional engineer, who opines that the work petitioner seeks to perform is necessary and reasonably limited and that "[t]he site safety protections will not prohibit the Respondent's use of their backyard space. Although it may block some sunlight, the Respondent's will have full access and use to their backyard space." As to DOB approval, Masone argues that Fortino has failed to point out

how petitioner's plans fail to comply with "DOB standards" and maintains that Fortino's claims on this point are conclusory. Otherwise, Masone disputes Fortino's opinions.

Discussion

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]).

Petitioner has established that they cannot comply with their obligations under Local Law 11 without entering respondent's property and installing protections thereon. However, that does not mean that petitioner automatically gets a temporary license. The court is perplexed that the petition itself is bereft of the significant and relevant factual and legal history between the parties involving the very issues at the heart of this proceeding.

Petitioner's claim that respondent's position is unreasonable is untenable. Respondent's have demonstrated that the work and manner of protections petitioner proposes may be unsafe. This showing is sufficient to defeat the petition. Further, petitioner seeks to put the court in the role of the Department of Buildings and have it sort through respondent's objections to the proposed work and temporary protections. While it is true that petitioner's plans can be self-certified, the prudent course of action here would have been to seek DOB approval when respondent raised its objections. The DOB is an agency with the specialized expertise to make the determinations that the parties would leave up to this court.

Otherwise, petitioner has not met its burden and established that respondent's objections are outweighed by petitioner's interest in moving forward with the necessary work to comply with Local Law 11. The court does not find Fortino's affidavit conclusory as Masone urges.

Accordingly, the petition is denied. In light of this result, the counterclaims are severed and dismissed. The first two counterclaims are moot in light of the court's denial of the petition. To the extent that respondent seeks recovery of legal fees incurred herein, such a claim is without any basis in law as a right to same is not grounded in contract or statute. The third counterclaim, for property damage, is dismissed without prejudice to bringing such a claim in a plenary action.

Conclusion

In accordance herewith, it is hereby

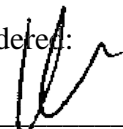
ORDERED that motion sequence 2 is granted; and it is further

ORDERED that the petition is denied, the second counterclaim is dismissed on the merits to the extent that it seeks legal fees and/or any other fees and costs incurred in connection with this proceeding and the balance of the counterclaims are dismissed without prejudice; and it is further

ORDERED that 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: 8/27/20
New York, New York

So Ordered: 

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