

Only Props., LLC v Sylvia Wald & Po Kim Art Gallery
2020 NY Slip Op 34178(U)
December 18, 2020
Supreme Court, New York County
Docket Number: 150805/2019
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT DAVID KALISH PART IAS MOTION 29EFM

Justice

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ONLY PROPERTIES, LLC,

INDEX NO. 150805/2019

Petitioner,

MOTION DATE N/A

- v -

MOTION SEQ. NO. 002, 003

THE SYLVIA WALD & PO KIM ART GALLERY, CGM-LLNR, LLC

AMENDED DECISION + ORDER ON MOTION

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 51, 52, 53, 54, 55, 56, 57, 58, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73

were read on this motion to/for ATTORNEY - FEES

The following e-filed documents, listed by NYSCEF document number (Motion 003) 74

were read on this motion to/for ATTORNEY - FEES

Motions, pursuant to RPAPL § 881 for a decision and order granting Petitioner Only Properties, LLC ("Only") an award of license, expert and attorney fees is granted in part and denied in part for the reasons stated herein.

BACKGROUND

Petitioner Only Properties, LLC ("Only" or "Petitioner") is the owner of a five-story building located at 415 Lafayette Street in Manhattan. Respondent The Sylvia Wald & Po Kim Art Gallery ("Gallery" or "Respondent") is the owner of an eight-story building located at 417 Lafayette Street that abuts Only's building. Respondent CGM-LLNR, LLC ("CGM") is a commercial tenant of Only, occupying premises on the ground floor and basement.¹

On July 2, 2014, Po H. Kim Estate—owners of 417 Lafayette Street on that date—filed a Local Law 11 report through Epstein Engineering, P.C. in compliance with the New York City Department of Buildings ("DOB") Cycle 7 Local Law 11 review. Following the Cycle 7 review, the DOB declared 417 Lafayette's exterior walls "unsafe" and mandated that Po H. Kim Estate undergo certain façade work to correct the portions of 417 Lafayette's exterior wall and façade that were deemed non-compliant with the New York City Building Code ("NYC BC").

¹ It bears noting that Gallery has been sued by CGM in a separate action captioned CGM-LLNR LLC v. Sylvia Ward (sic) & Po Kim Art Gallery, Index Number 153910/2017, also before this Court.

Due to the nature of the outstanding work, the NYC BC required that the owners of 417 Lafayette Street install and maintain a sidewalk bridge along its property. Pursuant to NYC BC, for a building of 417 Lafayette Street's height, the subject sidewalk bridge was required to extend twenty (20) feet out onto the sidewalk; and, to ensure its neighbor's safety and security, twenty (20) feet into neighboring properties, which included 415 Lafayette Street. According to Gallery, it obtained a permit for a sidewalk shed and, in April 2015, erected the shed in front of 417 Lafayette Street to comply with all local rules and ordinances. (Affirm, NYSCEF Doc. 46 ¶ 11.)

According to Gallery, over the next year and a half, ownership of 417 Lafayette Street was transferred from the Po H. Kim Estate to the Gallery, due to Gallery's status as a beneficiary in the Po H. Kim Estate. The transfer of ownership was processed on November 30, 2015. (NYSCEF Doc. 46 ¶ 12; *see also* Transfer of Ownership, NYSCEF Doc. 32 [Seq. 001].) According to Gallery, during this period, it was unable to demonstrate the ownership necessary to obtain proper DOB approval to begin the corrective façade work. (NYSCEF Doc. 46 ¶ 12.) Therefore, no work could be conducted until the effective date of transfer of the property rights from Po H. Kim Estate to Gallery. (NYSCEF Doc. 46 ¶ 12.) According to Gallery, after the ownership transfer was processed, it commenced the necessary corrective work required pursuant to Local Law 11. (*Id.* ¶ 13.)

Prior to commencing the instant litigation, on April 27, 2018, the parties, without court intervention, executed a voluntary License Agreement, granting a license to Gallery to install and maintain protection at, on and around Petitioner's 415 Lafayette Street property related to Gallery's performance of the Local Law 11-related work. (*See* License Agreement, dated April 27, 2018, NYSCEF Doc. 005.) This License Agreement expired on September 30, 2018, at which time the subject work was not completed. (*See* License dated April 27, 2018, NYSCEF Doc. 005.) At that time the sidewalk shed was in place in front of 417 Lafayette Street and also extended partially onto the property of 415 Lafayette Street.²

Four months after this license expired, Petitioner brought the instant proceeding (Seq. 001 filed on January 25, 2019), which was, described by Petitioner, as a "reverse" RPAPL § 881 petition in which Only asked this Court to grant Gallery a license to trespass on its property in order for Gallery to complete its Local Law 11 façade repairs.³ Said motion also sought to have the sidewalk shed removed, pursuant to RPAPL § 871. Motion Sequence No 001 was resolved by so-ordered stipulation, dated March 27, 2019, and a First Amendment to the License Agreement was executed. (*See* NYSCEF Doc. 50; NYSCEF Doc. No. 73.) As part of the stipulation, Gallery was to complete the Local Law 11 work and certain other additional work between April 1, 2019 and June 30, 2019. This newly operative agreement extended the date by which the work was to be completed in compliance with Local Law 11 from September 30, 2018, under the pre-litigation agreement, to June 30, 2019. (*Id.* ¶ 1.)⁴ It was agreed that Gallery

² No fees based on this voluntary license agreement are being sought before this Court by the Petitioner. (*See* Memo in Supp of Seq. 002 at 7, 8.)

³ Traditionally, it is the building seeking to perform the work (the licensee) – and thus needing to trespass upon its neighbor's property (the licensor) – who brings the petition for an RPAPL § 881 license.

⁴ To be clear, these "extensions" of time to complete the subject work gave additional time for Gallery to trespass upon Only's property in order to complete said work. Under no circumstances should these

was to pay Only \$100 for each calendar day that “any element” of either the protections placed on the roof or the sidewalk shed (collectively, “the protections”) remained in place after June 30, 2019. (*Id.* ¶ 6.) In addition, the parties agreed, as per the stipulation, that Only’s claims for license, expert and attorney fees would be severed and decided by a subsequent motion—so as not to hold up the actual construction work in compliance with the Court’s Order.

Thereafter, on Motion Sequence No. 002, filed on April 24, 2019, Petitioner sought reimbursement of attorney and expert fees as a result of the prior Motion Sequence No. 001 and an award of a license fees, pursuant to RPAPL § 881.

This Court heard oral argument on this Motion Sequence No. 002 on July 10, 2019 (NYSCEF Doc. 79) and issued an oral decision on the record and supplemented the decision by written order that was filed on July 15, 2019 (NYSCEF Doc. 73). Further, in its written order dated July 15, 2019, the Court granted Only’s motion to the extent that it found that Gallery was liable for Petitioner’s appropriate and reasonable § 881 Negotiation Fees except for any attorney fees associated with the branch of the Seq. 001 motion, pursuant to RPAPL § 871, seeking removal of a sidewalk shed encroaching on Petitioner’s property (“the § 871 Branch”). (NYSCEF Doc. 73.)⁵ The Court further ordered that a Judicial Hearing Officer (“JHO”) or Special Referee shall pursuant to CPLR 4212, be designated to hear and report with recommendation on the following framed issues of fact:

1. The amount of appropriate and reasonable attorney fees to be awarded to Petitioner;
2. The amount of the appropriate and reasonable expert fees to be awarded to Petitioner; and
3. The amount of the appropriate and reasonable license fee to be awarded to Petitioner to compensate Petitioner for Respondent’s use of its property from April 1, 2019 to June 30, 2019.

(NYSCEF Doc. 73.)

On October 17, 2019, the parties appeared before Philip Straniere, Judicial Hearing Officer (“JHO Straniere”). (JHO Tr. at 1.)

Regarding the expert fee, the parties stipulated the expert fee to be \$855. (*Id.* at 4:05-10.)

During the hearing, Only’s lead counsel Carl Peluso, Esq. (“Peluso”) testified on direct and was then cross-examined by Gallery’s counsel Michael Savino, Esq. (“Savino”). Much of Savino’s cross examination focused on the fact that Peluso’s invoices did not distinguish which work was performed on the RPAPL § 881 branch of Motion Sequence No. 1 versus the RPAPL § 871 branch of that application—as this Court previously ruled that Only was not entitled to recover attorney fees for the latter. In Gallery’s papers opposing Only’s fee application (on Seq.

extensions be viewed as the Court condoning Gallery’s repeated failures to complete its Local Law 11 repairs—as Gallery is more than five years late in making said repairs.

⁵ The Court’s written order mistakenly refers to these fees as being pursuant to RPAPL § 811. It was understood at the JHO hearing that the Court meant RPAPL § 881. (JHO Tr at 11.) In addition, during this Court’s hearing on July 10, 2019, it was explained that such “negotiation fees” encompasses everything including litigation fees. (Tr dated July 10, 2019, NYSCEF Doc. 79, at 31.)

002) and during Savino's oral arguments during the fee application, Gallery further argues that it should not be charged for various revisions of Only's papers and work that it argues has been "block-billed." In addition, Gallery argues that Only is seeking to recover attorney fees on administrative work that could have been performed by non-lawyer personnel (i.e. paralegals).

Regarding the attorney's fees, counsel for the Petitioner, Peluso, testified that people of his experience bill over \$800 per hour, and he bills the Moskowitz Family—the owner of Only—\$400 per hour because the family gets a substantial break in his billable rate as friends and clients for over 30 years. (*Id.* at 5:18-25.) Peluso further testified that there were two other attorneys that worked on this case with him at the firm: Nicole Waknine and Qualia Hendrickson. (*Id.* at 7:03-05.) Nicole Waknine "was out of law school for about four or five years." (*Id.* at 7:06-07.) "She started with the firm before she graduated and recently left. She's very competent, very good attorney. For most of the time on this case she billed for the time of \$300 an hour. You'll also see substantially less charges for her in the bills, which was a mistake, which is a benefit to the Respondent." (*Id.* at 7:07-12.) Qualia Hendrickson "is a first-year associate at the firm. She is still there, she's also very good and capable." (*Id.* at 7:13-15.) Peluso testified that "there were numerous court appearances in addition to preparing [an order] to show cause, the affidavits, the memorandum of law, all of that stuff, there were numerous court appearances back and forth with Mr. Savino trying to settle this case and it all amounted to the bills that you have before you, except for the amounts that I have attributed to the injunction." (*Id.* at 21:01-08.)

Peluso further testified that: "We maintain our bills on a system called Rocket Matter, which is an electronic billing system. The bills are put in on a daily basis on that system. And when it's time to send out a bill to the client, they are generated by this program and forwarded to the clients." (*Id.* at 15:11-15.) He further added that he reviews the bills before they go out. (*Id.* at 15:16-18.) He further testified that the work that he was doing for this case was done through a general retainer dating back 35 years that he has with the Moskowitz family for all of their properties and that there is no separate retainer for this matter. (*Id.* at 17:05-12.)

Peluso further testified that pursuant to this Court's order, his firm's charges for work done on the RPAPL § 871 branch of Motion Sequence No. 001 are to be excluded from his fee application. Peluso testified that this work totaled up to \$1,956. (*Id.* at 17:16-18:01.)

Peluso further testified: "Because we are a small firm, ... everybody does everything. I've served papers, I file papers Our billing rate reflects that[.]" (*Id.* at 19:01-08.)

Peluso further testified that regarding the criminal contempt motion (Seq. 004)—which was filed but was not fully submitted at the time of the hearing before JHO Straniere—his firm had billed \$11,534.50 for such work. (*Id.* at 19:09-19: 80:04-09; 84:04.) Peluso acknowledged that the operative license agreement at the time provided for a fee of \$100 for every day that the protections remained in place past June 30, 2019—which he did not seek from Respondent and instead filed the contempt motion. (*Id.* at 82:13-21; *see also id.* at 85:11-13.) Respondent's counsel stated that the billing for contempt seemed to be "\$18,000." (*Id.* at 97:02-03.) Respondent's counsel further noted the following: "I think it is not appropriate for our client to be charged \$18,000 for a motion for criminal contempt, which the merits will be borne out by the

Court, but also procedurally defective and one that is not causally related to this particular incident relating to a license on the property.” (*Id.* at 100:05-10.) Peluso disagreed, arguing that the contempt motion was necessary “to get you to comply with the Court’s order.” (*Id.* at 100:11-21.)

Regarding the license fee, Peluso further testified that, “in [his] experience license fees can be anywhere from a thousand dollars to \$5,000 per month for the use of [Only’s] property. [Gallery] continued to use [Only’s] property. So it’s from April 1st to the present that [Gallery] ha[s] continued to use [Only’s] property. Yes, it is not an elaborate roof deck and balcony. And all of that stuff that deprives us of substantial use but [Gallery is] still using [Only’s] property.” (*Id.* at 19:21-20:04, citing *Ponito Residence LLC v 12th St. Apt. Corp.*, 38 Misc 3d 604, 613 [Sup Ct, New York County 2012][awarding \$1,500 per month license fee]; *Snyder v 122 E. 78th St. NY LLC*, 2014 N.Y. Slip Op. 32940[U] [N.Y. Sup Ct, New York County 2014] [awarding \$3,000 per month license fee].) Peluso further testified that a number between \$1,000 and \$3,000 would be appropriate in this case. (*Id.* at 126:25-127:01.)

Peluso further testified that the bills that he has submitted differentiated between the research work done on RPAPL § 881 as opposed to § 871 by way of notation “research of cases on sidewalk sheds.” (*Id.* at 22:18-23:03; 24:08-15.) However, Peluso further testified that when they worked on the § 881 branch of the motion, there is no special notation. (*Id.* at 25:19-20; *cf.* *id.* at 46:07-47:03.)

During the questioning, Peluso was asked: “We are going over your bills and I’m asking you specifically, there’s an order from the Court that four out of the nine pages that deal with research in your memo, you’re not getting compensated for. ... And you want us to think that those four pages only accounted for \$2,000 on a \$55,000 bill. ... But you can’t tell us with any certainty whether or not 871 appears anywhere else except for the sections that you marked.” (*Id.* at 45:01-15.) Peluso answered: “Correct.” (*Id.* at 45:01-19.)

Peluso further added that “there is no motion to compel” in this case. (*Id.* at 64:04-65:01.) But such notation was a typographical error on the billing. (*Id.*)

Peluso was further asked about “block billing entries” in his invoices in April and June. (*Id.* at 92:22-94:14; 94:18-95:14.) These entries seemed to refer to those “multiple entries on the same line.” (*Id.* at 95:05-11.) Savino argued during the hearing that “[w]hen you have a block bill for three and-a-half hours and four different lines of action in that one bill, it is hard for Your Honor to determine whether it is reasonable.” (*Id.* at 128:02-05.)

DISCUSSION

As previously mentioned, Only brought the instant special proceeding pursuant to Real Property Actions and Proceedings Law (“RPAPL”) § 881 which states:

“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.”

In sum and substance, Only made a “reverse” RPAPL § 881 application in that it asked this Court to grant Gallery a license to trespass upon its own property and for Gallery to be charged a license fee. As the First Department has explained:

“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. 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.”

(*Van Dorn Holdings, LLC v 152 W. 58th Owners Corp.*, 149 AD3d 518, 518-19 [1st Dept 2017] [internal quotation marks and emendation omitted].) In addition, a court is within its discretion to grant the licensor its attorney and engineer fees because “[a] property owner compelled to grant a license should not be put in a position of either having to incur the costs of a design professional to ensure petitioner’s work will not endanger his property, or having to grant access without being able to conduct a meaningful review of petitioner’s plans.” (*Id.* at 519.) Although in the instant case Petitioner has sought to have the work completed by Respondent and has voluntarily agreed to allow the trespass on its property such affirmative action would not preclude the entitlement to a license fee. Indeed, it bears noting that Petitioner Only has brought this petition—as it has stated—to force Respondent Gallery to finally complete the required repairs at issue.

Before analyzing the claims at issue, it is helpful to note what is not in dispute on this motion.

First, Gallery does not dispute that Only is entitled to all of their engineer fees in the amount of \$855. (JHO Tr. at 4:05-10.)

Second, Gallery does not dispute that Only is entitled to reasonable attorney fees, and Gallery does not dispute that the hourly rates of Only’s attorneys are reasonable.

However, Gallery contends that said attorneys have billed an improper number of hours. More particularly, Gallery argues that Only has billed for hours spent working on Only’s RPAPL § 871 application—which this Court held that Only cannot recover fees on—and that the time billed for tasks is otherwise excessive.

Thus, the issues before this Court are: 1) what, if any, license fee is appropriate for the period of April 1, 2019-June 30, 2019; and 2) what the appropriate number of attorney hours are for the various tasks billed. The Court will analyze these issues in turn.

I. License Fee

This proceeding was commenced on January 24, 2019. By March of that year, another iteration of the license agreement was executed and so-ordered (the First Amendment to the License Agreement dated March 22, 2019) (NYSCEF Doc. 50); and, the above issues of license and attorney fees were referred for a Judicial Hearing Officer (“JHO”) to hear and report in July of 2019. Counsel for the parties did appear before JHO Philip Straniere on October 17, 2019 for said hearing. However, JHO Straniere did not issue a report before the JHO program was suspended this year due to statewide budget reductions brought about by the COVID-19 pandemic. Around December of this year, this Court was asked to essentially take back these referenced issues and issue a decision on said issues—before said Court was due to step down from the bench on December 31, 2020.

Because this Court has actively managed many other aspects of this dispute in the time since the parties appeared before JHO Straniere, the Court arguably has a different perspective of events than JHO Straniere might have had roughly a year ago. Likewise, the parties have arguably conducted themselves differently without a ruling on said license fee than they would have if a quick decision had been issued. For example, in January of this year, the parties executed a Second Amendment to the License Agreement wherein the parties agreed that Gallery would pay to Only \$300 for every calendar day the protections remained in place between July 1, 2020, to August 31, 2020, and then “pay \$500.00 for each calendar day [the protections] remain[] in place from September 1, 2020 forward.” (NYSCEF Doc. 123 [Second Amendment to the License Agreement] at 11 of 16.)

In addition, roughly two months after executing the Second Amendment to the License Agreement, it is argued by Gallery that work on the subject façade was halted when, in response to the COVID-19 pandemic, the Governor of New York State issued an Executive Order banning all non-essential construction work in New York City between March 27, 2020, and June 8, 2020. As such, Gallery has before this Court another motion seeking (Seq. 006) (“Seq. 006” or “the Dispensation Motion”), in sum and substance, a dispensation for the 73-day period – between March 27 and June 8 – when Gallery halted its work, which it argues it was required to do pursuant to said Executive Order.⁶

Turning to the relevant merits, the Court rejects Gallery’s argument that Only is not entitled to a license fee because Gallery was performing the required Local Law 11 repairs. The fact of the matter is that Only has had to deal with Gallery’s intrusion onto its property for over five years, and thus a license fee is appropriate to compensate Only for that intrusion.

The Court here finds that a license fee of \$1,000 per month is appropriate for the period of April 1, 2019 to June 30, 2019. This fee appropriately takes into account that a sidewalk-shed

⁶ This motion is opposed by Only and is currently awaiting decision by this Court. Said decision will be issued simultaneously with the instant decision and order.

encroached on the sidewalk in front of Only's building from April 2015 to August 8, 2019. (NYSCEF Doc. 79 at 03:19-04:13; *see also* NYSCEF Doc. 126 at 04:15-05:01; NYSCEF Doc. 160 ¶ 3.)

The Court notes that while Only has been frustrated by the existence of the sidewalk shed, it is Only's commercial tenant CGM that is claiming that the sidewalk-shed essentially prevented them from operating a successful restaurant. And notably, CGM has a separate but related action seeking damages from Gallery under a theory of nuisance. It will be for CGM to establish liability and damages in that separate action.

The Court finds that this \$1,000 monthly license fee also takes into account the roof protections that are currently on Only's roof. Here, the roof is solely used to house equipment for Only, and thus the deprivation is minimal—but it does impact upon the ability of Only to access the roof for purposes of necessary repairs.

Moreover, the Court finds that in sum and substance, Only's true injury is not so much a deprivation of use of its physical property. Rather, Only's injury is the ongoing intrusion it suffers due to its neighbor's inability to complete the subject work. While Only has at times been cooperative with Gallery, it has also at times been difficult, and thereby contributed to some of the delays.

Lastly, the Court notes that at the time the parties appeared before JHO Straniere they had agreed to—and Gallery had begun incurring—a fee of \$100 for each calendar day that “any element” of either the roof protection or the sidewalk shed (collectively, “the protections”) remained in place after June 30, 2019. Thereafter, the parties agreed that Gallery would pay to Only \$300 for every calendar day the protections remained in place between July 1, 2020 to August 31, 2020, and then “pay \$500.00 for each calendar day [the protections] remain[] in place from September 1, 2020 forward.” (NYSCEF Doc. 123 [Second Amendment to the License Agreement].)⁷

Because Gallery agreed to pay these above fees, the Court finds that the \$1,000 monthly license fee—which it would have awarded at the time regardless of subsequent developments—is appropriate. As such, this Court awards Only a license fee of \$1,000 per month for the period from April 1, 2019 to June 30, 2019—for the period before which there were no daily fees of \$100 per day.

II. Attorney Fees

As mentioned, the licensor in an RPAPL § 881 proceeding is entitled to recover its reasonable attorney fees as well as any other related costs incurred in the process, such as engineering or architect fees. The rationale here is that the party that is trespassed-upon should not have to incur such costs in protecting its property interests—as it has “not sought out the intrusion and does not derive any benefit from it.” (*Van Dorn Holdings, LLC v 152 W. 58th*

⁷ In the Second Amendment to the License Agreement, these daily fees of \$300 and \$500 are referred to as “Additional Daily Penalties” which appear to be distinguished from “cost and/or license fees.” (NYSCEF Doc. No. 123 at ¶ 4.)

Owners Corp., 149 AD3d 518, 518-19 [1st Dept 2017]; *see also Matter of N. 7-8 Inv'rs, LLC v Newgarden*, 43 Misc 3d 623, 628 [Sup Ct, Kings County 2014].)

At the same time, the trespassed upon party is hardly entitled to *carte blanche* in recovering its attorney fees, and courts must be wary that the attorney representing the licensor might be tempted to treat such RPAPL § 881 work as a “cash cow”—since said attorney arguably has no interest in pleasing his adversary’s client through efficient litigation. As such, the licensor is only entitled to recover its reasonable attorney fees from the licensee—and any fees that are deemed unreasonable are not compensable.

“A reasonable attorney’s fee is commonly understood to be a fee which represents the reasonable value of the services rendered.” (*RMP Capital Corp. v Victory Jet, LLC*, 139 AD3d 836, 839 [2d Dept 2016].) “In general, factors to be considered include (1) the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; (2) the lawyer’s experience, ability, and reputation; (3) the amount involved and benefit resulting to the client from the services; (4) the customary fee charged for similar services; (5) the contingency or certainty of compensation; (6) the results obtained; and (7) the responsibility involved.” (*RMP Capital Corp.*, 139 AD3d at 839.) “Moreover, the determination must be based upon a demonstration of the hours reasonably expended on the litigation and what is reasonable compensation for the attorney based upon the prevailing rate for similar work in the community.” (*Id.*) “The determination of a reasonable attorney’s fee is left to the sound discretion of the trial court.” (*Id.* at 839-40.)

“Although an award of an attorney’s fee is within the discretion of the court, such award must be based upon a showing of the hours reasonably expended and the prevailing hourly rate for similar legal work in the community[.] The burden is on the party seeking attorney’s fees to submit sufficient evidence to support the hours worked and the rates claimed[.]” (*Casual Water E., LLC v Casual Water Ltd.*, 2013 N.Y. Slip Op. 31687[U] [N.Y. Sup Ct, Suffolk County 2013] [internal citations omitted].)

At the same time, “the determination of fees should not result in a second major litigation ... [and] trial courts need not, and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection.” (*Fox v Vice*, 563 US 826, 838 [2011].)

As mentioned, there is no dispute that the billing rates of Only’s respective attorneys are reasonable; and the Court agrees that these rates are reasonable based on the aforementioned factors. As such, the only question is whether the number of hours billed are reasonable.

On the instant motion, Only seeks, *inter alia*, an order from this Court directing Gallery to reimburse it for the 264.95 hours billed by Only’s attorneys for a total cost of \$91,365.05. It should be noted that at the time that Only moved this Court for an award of attorney fees around April 24, 2019 (in Seq. 002), Only was only able to submit invoices up through that period, which amounted to \$54,413.75. However, when the parties appeared before JHO Straniere on October 17, 2019, Only’s counsel submitted invoices up through mid-October 2019—these

invoices were obviously not available when Motion Sequence No. 002 was filed on April 24, 2019.

In doing “rough justice,” the Court finds that it is practical to analyze the fee application by separating the monthly invoices roughly based on particular events in the litigation as follows: 1) October 1, 2018 – March 31, 2019: The Pre-Action and Petition Period; and 2) April 1, 2019 – October 17, 2019: The Fee Application and Contempt Application Period. In establishing these periods, the Court is mindful that there was obvious overlap in the tasks performed, and the choice of names is not meant to imply that this was the only work performed by Only’s attorneys. Again, this segmentation is meant do “rough justice.”

A. October 1, 2018 – April 30, 2019: The Pre-Action and Petition Period

For the period covering work performed from October 1, 2018 to March 31, 2019, Only’s attorneys billed Only for 143.25 hours of work for a total cost of \$45,663.75:

Month Accrued ⁸	Hours	Monthly Invoice Total
October 2018	26.20	\$9,059.50
November 2018	2.6	\$1,001.00
December 2018	22.1	\$6,964.50
January 2019	37.55	\$9,154.25
February 2019	30.70	\$10,664.50
March 2019	24.10	\$8,820.00
TOTAL:	143.25	45,663.75

This total cost includes a handful of miscellaneous costs—such as the purchase of hearing minutes—but these charges are overwhelmingly for attorney time, and the vast majority of the entries are by Peluso.

As mentioned in this Court’s July 10, 2019 decision (Seq. 002) (the “Fee Reference”)—which referred the issues of attorney, license and expert fees to the Judicial Hearing Officer (“JHO”) / Special Referee (“SR”) Part to hear and report—this Court ruled that Only “shall not be awarded any fees associated with the § 871 Branch” of its application (Seq. 001), wherein it sought the removal of the sidewalk shed encroaching onto its property. (NYSCEF Doc. 73.)

The memorandum in support of Only’s Motion Sequence No. 001 devotes roughly 3.5 of its 10 pages to the § 871 Branch. As such, this Court determines, in its discretion, that Only is not entitled to recover 35% of its charges for this period. On this point, the Court finds that this is an appropriate reduction, rather than Peluso’s suggestion during the JHO Hearing that the reduction be roughly \$2,000 to account for the § 871 Branch. After subtracting 35%, Only is left with \$29,681.44.

⁸ The Court notes that the months here represent the months during which work was performed. This is why there is a discrepancy between this notation and that on page 43 of Plaintiff’s Exhibit 3 in evidence, which uses the next month—when the invoices were sent out—for billing dates.

Of the remaining \$29,681.44, the Court will further reduce this amount by 10% to account for the somewhat vague nature of the bills and work that appears excessive. In addition, this 10% reduction also takes into account work performed by attorneys that arguably could have been performed by paralegal staff (e.g. preparing copies for service). While such work is compensable, such work is only eligible for reimbursement at the reasonable rate for such paralegal work. (*Casual Water*, 2013 N.Y. Slip Op. 31687[U].) In making this calculation, the Court finds such work—which was performed by attorneys even though it could have been performed by paralegals—constitutes a very small portion of the work billed to Only. Finally, this reduction also reflects the Court’s belief that while Only has been reasonable and cooperative at times, they have at times also been unreasonable and inflexible and have contributed to excessive billing in this dispute. As such, this across-the-board reduction of 10% is appropriate to account for the entries that appear vague and / or excessive.

Accordingly, the Court finds that Only is entitled to an award of \$26,713.29 in attorney fees for this period.

B. May 1, 2019 – October 17, 2019: The Fee Application and Contempt Application Period

Next, this Court reviews the work performed by Only’s attorneys from April 1, 2019 to October 17, 2020, during which Only’s attorneys billed roughly 121.7 hours for roughly \$45,701.30:

Month Accrued	Hours	Monthly Bill
April 2019	27.10	\$10,074.00
May 2019	23.80	\$8,577.50
June 2019	4.90	\$1,960.00
July 2019	16.30	\$6,778.30
August 2019	25.70	\$9,454.50
September 2019	2.50	\$1,000.00
October 2019	21.40	\$7,857.00
TOTAL:	121.7	\$45,701.30

Here, there are a handful of miscellaneous expenses—again, the purchase of hearing minutes—but these charges are overwhelmingly for attorney time. The majority of the entries are from Peluso, but there are a significant number of entries from Nicole Waknine, who was a senior associate.

With regard to this billing period, this Court notes Gallery’s argument that it should not be required to reimburse Only for attorney fees that were charged as part of Only’s motion to hold Gallery in contempt (Seq. 004). This Court however finds that even though Only did not prevail on said motion, this fact does not preclude Only from recovering attorney fees for such work providing the amount of time billed represents a reasonable expenditure of attorney work in response to the ongoing license issue. In sum and substance, Only’s stated goal in this matter has been to push and prod Gallery to finish the subject work (which has persisted for over five years) and thus end Gallery’s trespass onto its property.

While this Court eventually held that there was no basis to hold Gallery in either civil or criminal contempt, this is not to say that it was unreasonable for Only to bring this motion. To the contrary the Court finds that Only's actions were reasonable and appropriate. After listening to testimony, particularly testimony from Gallery's president, Hyong Cho, the Court found that the failure of Gallery to complete its work at that time was caused by "several unforeseen setbacks" which were outside of Gallery's control, "most notably its contractor losing its license." (Seq. 004 Decision at 4 of 6, NYSCEF Doc. 116.) However, much of this evidence was brought out during the hearing on the contempt motion, and the Court finds that Only had a good faith basis to bring the motion at the time that it did, particularly in light of Gallery's long history of failing to timely complete its repairs.⁹

In addition, to the extent that Gallery argues that Only is not entitled to recover its attorney fees for work preparing the instant fee application, this Court also rejects that argument. While there is case law that supports the proposition that one is not entitled to recover such "fees-upon-fees," the Court finds that the purpose of the fee-shifting provisions under RPAPL § 881 is to ensure that the trespassed upon party should not have to incur such costs in protecting its property interests—as it has "not sought out the intrusion and does not derive any benefit from it." (*Van Dorn Holdings, LLC v 152 W. 58th Owners Corp.*, 149 AD3d 518, 518-19 [1st Dept 2017], quoting *Matter of N. 7-8 Inv'rs, LLC v Newgarden*, 43 Misc 3d 623, 628 [Sup Ct, Kings County 2014].) As such, if the licensee contests the licensor's entitlement to its attorney fees in an RPAPL § 881 proceeding, the natural consequence is that the licensor will incur additional attorney fees in making such a fee application. To deny the licensor reasonable attorney fees incurred on such a motion would thus contravene RPAPL § 881's policy of making the licensor whole.

Nonetheless, the Court will reduce Only's claimed attorney fees by 10% across-the-board to account for various entries that it finds to be either vague and / or excessive during this period for same reason it made this deduction to the prior period. As such, the Court awards Only \$41,131.17 in attorney fees for this period.

⁹ Here, again, JHO Straniere would not know the outcome of the contempt motion (Seq. 004). But this Court now has advantage of knowing that outcome, and being able to discern the reasonableness of attorney hours billed for such work.

CONCLUSION

Accordingly, it is hereby

ORDERED that Motions (Seqs. 002 and 003), pursuant to RPAPL § 881 for a decision and order granting Petitioner Only Properties, LLC (“Only”) an award of license, expert and attorney fees is granted in part and denied in part to the extent that Only is awarded attorney fees in the amount of \$67,844.46, expert fees in the amount of \$855, and license fees in the amount of \$3,000 and the motions are otherwise denied; and it is further

ORDERED that the decision and order of July 11, 2019 referring, pursuant to CPLR 4212, three framed issues of fact for a Judicial Hearing Officer (“JHO”) or Special Referee to hear and report on is hereby amended to reflect that this Court has taken back said three framed issues of fact which are decided pursuant to the above decretal paragraph; and it is further

ORDERED that upon being served with a copy of the instant decision with notice of entry, within twenty days, counsel for the parties are to meet and confer on a payment schedule which shall be memorialized in writing.

The foregoing constitutes the decision and order of this Court.

12/18/2020
DATE


ROBERT DAVID KALISH, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	OTHER