

Only Props., LLC v Sylvia Wald & Po Kim Art Gallery
2020 NY Slip Op 34179(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. 006

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

DECISION + ORDER ON MOTION

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174

were read on this motion to/for

INTERIM RELIEF

Motion brought by order to show cause (Seq. 006) by Respondent The Sylvia Wald & Po Kim Art Gallery (“Gallery”) for an order—(i) extending the Amended Access Agreement dated January 24, 2020 (the “Agreement”) for a term of 73 days, to account for the working days lost during the State of New York’s ban on non-essential construction; (ii) extending the scope of the existing Agreement to include access to 415 Lafayette to install additional roof protections corresponding with the repair of 417 Lafayette’s extended parapet wall project on the south side of the building; or, in the alternative; (iii) declaring the repair of 417 Lafayette Street’s parapet wall an issue of safety to life and property and granting Gallery permission, pursuant to RPAPL § 881, to install additional roof protections on the roof of 415 Lafayette, corresponding with the repair of 417 Lafayette’s extended parapet wall project on the south side of the building; (iv) granting Gallery an additional extension of time, if this application is granted, from the date that access was requested of 415 Lafayette for this project, until the date that permission is granted to install the additional roof protections; and (v) for any other relief this Court deems just and proper—is granted in part denied in part, with leave to renew said partial denial after good faith negotiations, as is explained herein; and the cross-motion by Petitioner Only Properties, LLC (“Only”) for the Court to issue an order directing Gallery to: 1) pay it “the monetary amounts owed pursuant to the License”; 2) grant it additional expert and attorney fees; 3) impose a license fee for “any new license pursuant to RPAPL § 881;” 4) what other relief this Court deems proper is granted in part and denied in part as further discussed herein.

BACKGROUND

Petitioner Only Properties, LLC (“Only”) is the owner of a five-story building located at 415 Lafayette Street in Manhattan. Gallery 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.

The instant motion is the most recent development in an ongoing, years-long saga between the parties in their attempt and disagreement as to how to finally complete Local Law 11 work on certain portions of Gallery's external walls.

Only brought this special proceeding, pursuant RPAPL § 881, seeking an order of this Court granting Gallery a license to make a limited use of Only's property so that Gallery could complete repairs to Gallery's façade which was designated "unsafe" around July 2014, pursuant to Local Law 11.¹ In sum and substance, Only and CGM assert that Gallery's failure to make timely repairs has interfered with their respective uses of their property, most notably caused by a sidewalk shed that encroached onto Only's property since roughly April 2015 and protections placed on Only's roof in 2019.

On March 27, 2019, Only, Gallery, and CGM entered into a stipulation of partial settlement ("the Stipulation") that was so ordered by the Court, and said stipulation amended the original pre-litigation License Agreement by annexing the First Amendment to the License Agreement as Exhibit A thereto. (NYSCEF Doc. No. 50.) Pursuant to the Stipulation, Gallery was granted a license to make limited use of Only's building for the purpose of completing its Local Law 11 repairs, with the license to commence on April 1, 2019, and end on June 30, 2019. The Stipulation further stated:

"From April 1, 2019 to June 30, 2019, [Gallery] shall complete the work designated in the amendment and license attached hereto as Exhibit A in the manner required by the amendment and license attached hereto as Exhibit A ...

[Gallery] shall remove the protection on Only's roof at 415 Lafayette Street, and the sidewalk shed in front of 415 Lafayette Street, New York, New York no later than June 30, 2019 in compliance with Local Law 11."

(Affirm in Supp., Ex. C [The Stipulation] at 2.) Furthermore, pursuant to the First Amendment to the License Agreement, Gallery was to pay Only \$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. (*Id.* [License Amendment] ¶ 6; *see also* NYSCEF Doc. No. 50.) It was further agreed, on January 24, 2020, in a Second Amendment to the License Agreement, 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. No. 123 [Second Amendment to the License Agreement].) In the Second Amendment to

¹ CGM has also brought a related action for damages, under a theory of nuisance, *CGM-LLNR LLC v The Sylvia Wald and Po Kim Art Gallery*, No. 153910/2017, which is also pending before this Court. CGM was made a respondent to this special proceeding on the grounds that it has a "property interest" at stake in this proceeding.

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

Presently, the work that needs to be completed is to the Southern and Eastern walls of Gallery’s building. The southern wall directly faces Only’s building. As such, the sidewalk shed was removed on or about August 8, 2019, although the roof protections remain in place. (NYSCEF Doc. No. 160 ¶ 3.)

A recurring problem in this case has been the weather. In sum and substance, due to the New York Department of Buildings regulations, the work at issue cannot be performed during the cold winter months. This has frequently led to halts as well as setbacks in the progress of the work, and it has led to the parties having to enter into extensions and / or amendments of the license agreements.

Following the latest such amendment on or about January 24, 2020 (“the Second Amendment to the License Agreement”) (NYSCEF Doc. No. 123), Gallery began performing the necessary work and removing certain rooftop protections. However, 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, there was a 73-day period – between March 27 and June 8 – when Gallery halted its work, which it argues it was required to pursuant to said Executive Order. In light of this lost time, Gallery requested a 60-day extension, which Only refused.

Further complicating matters, in performing the façade work, Gallery’s contractors discovered significant structural issues with the south parapet wall and determined that 46 feet of the south parapet wall needed to be rebuilt before the façade work could be completed. In order to do such structural work, additional protections would need to be placed on Only’s roof.

Essentially, it is this issue that has brought about this motion. While Only acknowledges the necessity of Gallery rebuilding its south parapet wall, Only initially objected to Gallery’s proposed amendment. The parties have since agreed to the amendment to the extent of the proper protection and how and where the work was to be done. The chief dispute brought by this motion that remains is whether this Court should grant a 73-day dispensation for the period during which Gallery claims they were unable to perform the work.²

Here, in sum and substance, Gallery “seeks to have only the time it lost - 73 days - added to the Agreement and nothing more.” (NYSCEF Doc. No. 147 at 1.) Gallery essentially argues that these days were lost because it complied with the lawful directives of this State that were brought on by a global pandemic that it could not have reasonably foreseen when it agreed to the deadlines in the Second Amendment to the License Agreement on January 24, 2020.

In opposition and on its cross-motion, Only argues that Gallery is not entitled to such dispensation. Furthermore, on its cross-motion, Only asks that the Court issue an order: 1)

² The parties have entered into another agreement permitting the remaining construction to move forward although said agreement has not been filed with this Court.

directing Gallery to pay it “the monetary amounts owed pursuant to the License”; 2) granting it additional expert and attorney fees; 3) imposing a license fee for “any new license pursuant to RPAPL § 881;” 4) and granting what other relief this Court deems proper.

In sum and substance, Only argues that Gallery is not entitled to a 73-day dispensation because, by law, the subject work was actually allowed. Only points to an FAQ webpage put out by the NYC Department of Buildings with the following:

“Q1. Is façade restoration permissible during this suspension of non-essential construction work?

A1. Only façade restoration work necessary to correct conditions labeled as Unsafe in a Local Law 11 Façade Inspection Report, or necessary to address any condition requiring immediate corrective action that severely affects life, health, safety, property, or significant number of persons can continue during this suspension of non-essential construction work.

As a reminder, there must be appropriate protection (e.g., sidewalk shed) to protect the public.”

(NYSCEF Doc. No. 156 [NYCDOB FAQ].)

Only further argues that Gallery’s own engineer published “posts on its website stating that façade inspection and repair work could continue throughout the pandemic” and that Gallery’s agents “have testified before this Court regarding the unsafe condition of its building and therefore [Gallery] knew that the work was ‘essential’ and [Gallery]’s Inspection Report said it was unsafe.” (NYSCEF Doc. No. 169 at 5 [Only Memo in Opp].)

CGM files its own papers reiterating Only’s arguments in opposition to the motion and support of the cross-motion.

In reply, Gallery points to the affidavit of its engineer John Monroe who states that there were no hazards or conditions present on the worksite on March 27, 2020 – the time the shutdown order became effective – and as such, the work did not meet an exception to the ban on non-essential work.

DISCUSSION

As previously mentioned, Only brought the instant special proceeding pursuant to Real Property Actions and Proceedings Law (“RPAPLP”) § 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.)

In the instant case, there is no dispute between the parties as to their mutual desire that façade work at issue be completed. What is principally at issue on this motion is whether Gallery is entitled to a 73-day dispensation—whereby the \$100 daily fee provisions would be effectively paused for the period of 73 days between March 27 and June 8, 2020, and the \$300 and \$500 daily fees would be adjusted by 73 days accordingly.

In a sense, one might say that Gallery is making a “reverse-reverse RPAPLP § 881 application” in that it is now seeking to be relieved from performing obligations imposed on it by the Second Amendment to the License agreement. Whatever one might want to call it, Gallery’s application appears to present a somewhat novel issue under RPAPL § 881.³

³ There are, however, a handful of trial court decisions that address the problem presented by COVID-19 related restrictions in the context of RPAPLP § 881. (See e.g. *379 13th LLC v Slope Dev. Realty Corp.*, 2020 N.Y. Slip Op. 31258[U], 4 [N.Y. Sup Ct, Kings County May 8, 2020] [noting that “as this license is being issued during the COVID-19 pandemic, the license period of 45 days shall commence upon the permittance of construction work pursuant to New York State’s executive orders and relevant provisions”]; *Stewart v Yorrick*, 2020 N.Y. Slip Op. 31652[U], 9-10 [N.Y. Sup Ct, Kings County May 27 2020] [noting that “in addition to the Partial Stop Work Order in effect for this property, the New York City Department of Buildings has imposed a ban on non-essential construction as a result of the COVID-19 Pandemic” in a decision that converted action for injunctive relief to an RPAPLP § 881].)

Here, the 73-day shutdown of the renovation project was not contemplated in the license agreement. Indeed, there is not even a force majeure clause. Nonetheless, this Court finds that the daily fee provisions in the license agreement were intended to incentivize Gallery to complete the façade renovation quickly and efficiently. They were not intended to incentivize Gallery to break the law, put lives at risk, and / or exacerbate a public health crisis that is estimated to have caused the deaths of 1 in 347 New York City residents. For these reasons, the Court finds that it is appropriate to retroactively “pause” the License Agreement for the 73 days between March 27 and June 8, 2020, when this type of non-essential construction was arguably prohibited by executive orders related to the COVID-19 pandemic.

Furthermore, while another justification for a license fee is to compensate the trespassed-upon owner for the intrusion, this Court finds that Only has not presented any evidence of ascertainable loss related to the presence of the rooftop protections on its property between March 27 and June 8, 2020. Indeed, even the Second Amendment to the License Agreement refers to these fees as “penalties”—and apparently distinguished these fees from license fees. (NYSCEF Doc No. 157 [Second Amendment] at 10-11 of 16.)

This Court does not find that it need rule on the issue of whether the contemplated façade may have technically been permitted pursuant to NYC DOB Guidance. Clearly, it is hard to ignore that the subject façade had previously been declared “unsafe” in a prior inspection and that a portion of the façade had not been fully repaired during the time between March 27 and June 8, 2020. However, Gallery’s engineer John Monroe has stated, under penalty of perjury, that, “[a]s of the date of the pause, no measures were necessary to protect the health and safety of the public and building occupants, as the site was safe for a shutdown.” (NYSCEF Doc. No. 173.) Moreover, whether Gallery’s contractor was allowed to continue working or not is not the issue. To be clear, the Court understands that the risk to public safety from falling debris exists on a spectrum just as the risk to public safety posed by workers spreading COVID-19 exists on a spectrum. Here, the Court finds that Gallery exercised its best judgment by determining that the risk of the former was significantly outweighed by the risk of the latter. As such, even if Gallery may have been allowed to continue the subject work pursuant to the letter of the NYC DOB regulations and guidance, it is not appropriate to penalize Gallery for its decision to halt its work from March 28 to June 8 during the height of the pandemic in this city. To do so would contravene the intent of the Second Amendment to the License Agreement and would contravene this State’s policy interest in protecting public health. Further, to penalize Respondent would be unjust considering the severity of the pandemic and the lack of knowledge as to controlling it.

In addition, this Court declines to award any additional license fee on top of the “penalties” that Gallery is already incurring and may potentially incur in the future. As the Court has simultaneously found in another decision (Seq. 002-003), the deprivation of use at issue is minor at most and \$300 to \$500 per day more than compensates Only for providing Gallery the privilege of placing protections on its roof.

With regard to Gallery’s request for an unspecified amount of additional dispensation time to account for the time spent ironing out additional terms of access necessitated by the recent discovery of the need to make structural repairs to its south parapet wall, that request is denied. The Court finds that the need for additional work is something that frequently arises

during construction work and something that the parties could have taken into account when negotiating the terms of the Second Amendment to the License Agreement. This type of disruption is fundamentally different from the disruption brought on by the COVID-19 pandemic.

The Court further finds that it is premature to award additional engineer and attorney fees, as the work of the attorneys and engineers is not yet complete—but will soon be. Moreover, while it is true that Only should not have to bear the costs for Gallery's trespass, Only cannot abuse its position by unreasonably withholding its consent and further delaying the project to accrue fees, as Gallery argues they have done. Moreover, given the very limited time available to this Court before it steps down from the bench at the end of the month, the Court believes it is more appropriate for counsel to use the related fee award decision on Motion Seq. 002-003 to enter into a reasonable agreement on fees.

As such, the Court finds that Only is entitled to its daily \$100 fees for the period between January 24 and March 27, 2020. The Court will then treat the daily fee provisions of the Second Amendment to the License Agreement as being paused for the 73 days between March 27, 2020 and June 8, 2020, and the Court will adjust the terms to account for those 73 days. Thus, on June 8, 2020, the \$100/day fee is deemed to have resumed and to have continued to September 11, 2020 when the \$300/day provision is deemed to have taken effect; and then on November 12, 2020, the \$500/day fee provision is deemed to have taken effect, and thus Gallery continues to incur such fees until the work is completed and the protections are removed. (NYSCEF Doc. Nos. 50 & 123.) At present, the Court is not aware that the work has been completed; and the Court presumes that the work is continuing and the protections remain in place.

The Court has the considered the parties' other arguments and finds them to be without merit.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion brought by order to show cause (Seq. 006) by Respondent The Sylvia Wald & Po Kim Art Gallery ("Gallery") for an order—(i) extending the Amended Access Agreement dated January 24, 2020 (the "Agreement") for a term of 73 days, to account for the working days lost during the State of New York's ban on non-essential construction; (ii) extending the scope of the existing Agreement to include access to 415 Lafayette to install additional roof protections corresponding with the repair of 417 Lafayette's extended parapet wall project on the south side of the building; or, in the alternative; (iii) declaring the repair of 417 Lafayette Street's parapet wall an issue of safety to life and property and granting Gallery permission, pursuant to RPAPL § 881, to install additional roof protections on the roof of 415 Lafayette, corresponding with the repair of 417 Lafayette's extended parapet wall project on the south side of the building; (iv) granting Gallery an additional extension of time, if this application is granted, from the date that access was requested of 415 Lafayette for this project, until the date that permission is granted to install the additional roof protections; and (v) for any other relief this Court deems just and proper—is granted in part denied in part as is explained

below; and the cross-motion by Petitioner Only Properties, LLC (“Only”) for the Court to issue an order directing Gallery to: 1) pay it the monetary amounts owed pursuant to the License; 2) grant it additional expert and attorney fees; 3) impose a license fee for “any new license pursuant to RPAPL § 881;” and 4) what other relief this Court deems proper is granted in part and denied in part as explained below; and it is further

ORDERED that the daily fee provisions of the Second Amendment to the Access Agreement are paused between March 28 and June 8, 2020 and all deadlines under these provisions are adjusted to account for this 73-day pause; and it is further

ORDERED that within twenty (20) days of the filing date of this order, Gallery and Only shall meet and confer on a payment schedule for the aggregate amount of the daily fees incurred between January 24, 2020 and the filing date of this decision, and shall further meet and confer for the purpose of negotiating a reasonable amount of attorney and engineer fees if possible; and it is further

ORDERED the remainder of the motion and cross-motion is denied, except that if the parties are unable to reach agreement on the amount of attorney and engineer fees after meeting and conferring, then counsel shall contact the Court and request a hearing on said fees.

The foregoing constitutes the decision and order of the Court.

12/18/2020
DATE


ROBERT DAVID KALISH, J.S.C.

CHECK ONE:

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CASE DISPOSED

☒

NON-FINAL DISPOSITION

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GRANTED

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DENIED

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GRANTED IN PART

☐

OTHER

APPLICATION:

☐

SETTLE ORDER

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SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

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FIDUCIARY APPOINTMENT

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REFERENCE