

**Panasia Estate, Inc. v 29 W. 19 Condominium**

2020 NY Slip Op 34698(U)

January 15, 2020

Supreme Court, New York County

Docket Number: Index No. 157852/2019

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

[\* 1]

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

-----X  
PANASIA ESTATE, INC.,

Index No.  
157852/2019

Petitioner,

-against-

**DECISION  
and ORDER**

29 WEST 19 CONDOMINIUM, LAUREN CIPICCHIO,  
DANIEL DALY, and MKF REALTY CORP.,

Respondents.

Mot. Seq. 1

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

Petitioner Panasia Estate, Inc. (“Petitioner”) moves pursuant to Real Property Actions and Proceedings Law § 881 (“RPAPL § 881”), for a license to enter upon and access the properties located at 29 West 19<sup>th</sup> Street and 35 West 19<sup>th</sup> Street, New York, New York 10011 (“Adjacent Properties”), for the purpose of conducting a pre-construction survey (the “Survey”), and to install, maintain, and remove, as applicable, overhead protection (“Overhead Protection”), temporary roof protections (“Roof Protection”), vertical and horizontal flashing (“Flashing”), outrigger and netting system and to swing scaffolding (“Airspace Access”), and extend and/or modify any applicable flue(s) or chimneys (“Flue Work”) (collectively the “Protective Work”).

Respondents 29 West 19 Condominium (“Condominium”), Lauren Cipicchio (“Cipicchio”), and Daniel Daly (“Daly”) (collectively, “Condominium Respondents”) and Respondent MKF Realty Corp. (“MKF”) oppose.

Petitioner commenced this action on August 12, 2019 by filing a Verified Petition and Order to Show Cause as a special proceeding pursuant to RPAPL § 881. Respondents opposed the proceeding.

The parties appeared before the Court on September 24, 2019 and October 17, 2019. The proceeding was marked fully submitted on December 17, 2019 after receipt of supplemental submissions by the parties.

[\* 2]

### The Parties

Petitioner is the owner and developer of the property located at 33 West 19<sup>th</sup> Street, New York, New York (the "Property").

The Condominium is the owner of the common areas of the building located at 29 West 19<sup>th</sup> Street, New York, New York, which abuts the Property to the East. Cipicchio and Daly are the unit owners of Unit No. PH and CB in the Condominium, which includes an outdoor roof terrace abutting the Property. There is also an outdoor first floor terrace. The Condominium is a six-story residential mixed-use property which was constructed in or about 1910. There are six-unit owners and a commercial space at street level, which is occupied by a dentist's office. The Condominium is Landmarked.

MKF is the owner of the building located at 35 West 19th Street, New York, New York. The building is a six-story residential mixed use, which abuts the Property to the West. The commercial space is located at street level and is occupied by a tapas restaurant. The five remaining floors consist of one residential apartment per floor.

### The Project

Petitioner's proposed construction intends to construct vertical enlargement of the Property by adding two additional stories. Petitioner submits the Affidavit of Hemant Mehta ("Mehta"), the principal and vice-president of Petitioner. Mehta states that "[t]he Project and the Protective Work are expected to last about 24 months, but to be safe in the event of unanticipated delays, Petitioner seeks a license for a total of 36 months from this Court." (Affidavit of Mehta at 2).

### Parties' Contentions

Petitioner asserts that the threshold requirements of RPAPL § 881 are satisfied. Petitioner argues that it needs a license for temporary access to Respondent's Building to install certain protection measures in order to comply with Buildings Code § 3309. Petitioner asserts that the hardship of not granting the license far outweighs the minimal inconvenience to Respondents in granting the license. Petitioner contends that,

- (i) the Survey is a simple observation of the pre-existing conditions to establish a baseline from which to measure any potential damage to the Adjacent Properties; (ii) the Overhead Protection will benefit Respondents because it

[\* 3]

will prevent construction and demolition debris from falling onto the Adjacent Properties during the Project; (iii) the Roof Protection serves to guard against construction and demolition debris falling directly onto the Adjacent Properties during the Project; (iv) the Flashing will benefit the Adjacent Properties which would otherwise leave the Adjacent Properties susceptible to water infiltration; (v) the Airspace Access is needed to provide safety netting systems and guardrail systems to protect, unenclosed perimeters; and (i) the Flue Work is needed to extend and/or modify any applicable flue(s) or chimneys on the Adjacent Properties. (Tuttle Aff., ¶¶ 6-7).

(Petitioner's Memo. of Law at 6).

In opposition, Condominium Respondents argue that they are entitled to license fees for Petitioner's use of their property and should be reimbursed for all legal and professional fees incurred to date and may be incurred in the future. Condominium Respondents assert that Petitioner has not clearly stated to the parties or to the Court how long Petitioner will require access to their property. Condominium Respondents argue that Petitioner has stated that it needs access from 10 months to 36 months. Condominium Respondents contend that there will be long-term impacts as a result of the Project. Condominium Respondents assert that the loss of the use of terraces by the unit owners will be a major impact.

Daly submits an Affidavit in opposition to the Petition. Daly asserts that he purchased the apartment with the intent of using the main roof terrace for Daly and Cipicchio's rehearsal dinner. Daly argues that he and Cipicchio knew nothing about Petitioner's construction plans prior to purchasing the apartment. Daly further asserts that the Project will result in noise, dust, vibrations and the loss of privacy.

In further opposition, MKF argues that the proposed construction will impact MKF and its tenants use of the roof. MKF asserts that the "roof presently maintains necessary HVAC equipment for our residential tenants and exhaust vents for our commercial tenants (a restaurant), as well as satellite cable dishes, fire escape, and necessary utility service conduits for the building's residents." (Aff. of MKF at 4-5). MKF further asserts that the Project will create disturbance to the sixth-floor residential tenant, including "ear-deafening demolition, and the installation and hoisting of construction materials... along with the unending clamor of construction machinery equipment and construction personnel." (Aff. of MKF at 5).

[\* 4] MKF argues that Petitioner's request to install and extend the chimneys on MKF's roof constitutes a permanent encroachment. MKF asserts that it offered Petitioner "to personally undertake this construction on our own property, using our own contractor and engineer (with all costs to be borne by the Petitioner), but the Petitioner arbitrarily refused this request." (Aff. of MKF at 9).

Petitioner asserts that the proposed construction will not result in a significant physical intrusion to Condominium Respondents and MKF. Petitioner contends that the terraces in Condominium Respondents' Building will still be accessible by the tenants. Moreover, MKF's Certificate of Occupancy fails to state under "Permissible Use and Occupancy" any allowance for recreational use of the roof level. Furthermore, Petitioner argues that Cipicchio and Dally knew about Petitioner's construction plans or should have known prior to purchasing the apartment. Petitioner contends that Cipicchio and Daly negotiated to purchase the unit at \$400,000 less than the asking price.

#### 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

[\* 5]

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].

New York Courts have interpreted RPAPL § 881 to allow “for an encroachment as justice requires.” *Cucs Housing Development Fund Corp. IV v. Aymes*, No. 159303/2018, 2019 WL 934935, at \*3 [Sup. Ct, NY County 2019] (citation omitted). Where petitioner is seeking a license for a permanent encroachment, “a petitioner must demonstrate that ... it is virtually unavoidable.” *Id.* “Equity further requires that the respondent who is compelled to grant access should not have to bear any costs resulting from the access to his or her property.” *Id.* at \*4.

#### A. RPAPL § 881 License

##### *The Survey*

Petitioner seeks access to perform the Survey pursuant to New York City Building Code (the “Code”) § 3309.3. Petitioner demonstrates that the Survey will allow Petitioner to identify pre-existing conditions on the Adjacent Properties, so that potential damage can be identified and addressed by Petitioner.

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

##### *Overhead and Roof Protections*

Petitioner also seeks to install, maintain, and remove Overhead Protections in front or and/or over the Adjacent Properties during construction at the Project pursuant to Code §§ 3309.1, 3307.6.2, and 3307.6.3. Petitioner contends that the “Overhead Protection, and controlled access zones as applicable, will be required over 20’ of the sidewalk abutting the Adjacent Properties (as the Project building is greater than 100’), the rear courtyard of 29 West 19th street, and applicable terraces, as set forth in the Site Safety Plans.” (Verified Petition at 5). Petitioner anticipates

[\* 6]

that the Overhead Protection will need to remain in place for approximately 28 months. Petitioner avers that the Overhead Protection will prevent construction and demolition debris from falling on the Adjacent Properties. Moreover, Petitioner contends that “[t]he Overhead Protection is designed to properly resist impact loads from debris, materials and equipment.” (Verified Petition at 6).

Additionally, Petitioner seeks access to install, maintain, and remove Roof Protections, including, protections to the roof, terraces, outlets, skylights and mechanical unit(s) of the Adjacent Properties pursuant to Code § 3309.10. Petitioner contends that “[t]he Roof Protection will generally consist of 2” flame retardant Styrofoam insulation covered by 2”x10” flame retardant wood planks as well as ½” flame retardant plywood, on the roof of the Adjacent Properties.” (Verified Petition at 6). Petitioner further contends that “a typical medium duty pipe scaffold frame and planks will be installed above existing chimneys, flues, and skylights and will not interfere with their function” and will not be directly attached to the existing structure but to the Roof Protection. (Verified Petition at 7). Petitioner asserts that the Roof Protection will prevent occupants on the Adjacent Properties from walking into the protected area of 20 feet from the Property and will prevent construction and demolition debris from falling onto the Adjacent Property. Petitioner anticipates that the Roof Protection will need to remain in place for approximately 24 months.

Petitioner has also demonstrated its entitlement to a license to install and maintain Overhead and Roof Protections. The Overhead and Roof Protections will ensure the protection of the occupants of Condominium Respondents’ Building and MKF’s Building from potential danger from the proposed construction. While the Overhead and Roof Protections will greatly affect light into the units and the accompanying enjoyment of an outdoor terrace, the protections are necessary. The Overhead and Roof Protections will be installed in accordance with Exhibit 1 to Algende’s Affidavit.

### *Flashing*

Petitioner seeks access to install, maintain, and remove certain weather protection between the existing building and the Condominium Respondents’ Property, including Flashing pursuant to Code § 3309.9. Petitioner shows that the such safety measure is a “standard and safe method” and will prevent water infiltration to the Adjacent Properties.

Petitioner has demonstrated its entitlement to a license to install and maintain vertical and horizontal flashing between Petitioner’s Building and Respondents’ Buildings to protect it from water infiltrations. The Flashing will be installed in accordance with Exhibit 2 to Algende’s Affidavit.

[\* 7]

*Airspace Access*

Petitioner also seeks to enter the airspace of the Adjacent Properties “(a) to install, maintain and remove an outrigger and netting system extending from the building on the Site to protect the Premises from debris; and (b) to swing scaffolding extending over the Premises” pursuant to Code § 3308.1. (Verified Petition at 8). Petitioner avers that the scaffolding and outriggering scaffold system is needed to complete the exterior of the Project.

Petitioner has demonstrated its entitlement to a license to install and maintain outrigger and netting system and to swing scaffolding. The airspace access will have minimal physical intrusion and is needed to by Petitioner to finish the exterior of the Project construction. The flashing will be installed in accordance with Exhibit 2 to Algende’s Affidavit.

*Flue Work*

Lastly, in the Verified Petition Petitioner seeks to extend and/or modify the existing flues or chimneys on the Adjacent Properties pursuant to Code § 3309.12. However, in Mehta’s Reply Affidavit, Mehta states that “[w]e have determined that no other flue, chimney or vent modifications will be required, nor will flashing be needed at 35 W 19 [MKF’s Property].” (Mehta’s Reply Aff. at 2). It is unclear if Petitioner is still seeking to extend and/or modify the existing flues or chimneys on Condominium Respondent’s Property. The parties have not provided documentary evidence to support their requests to either grant or deny the license to extend and/or modify the existing flues or chimneys on Condominium Respondent’s Property. Therefore, a license to extend and/or modify the existing flues or chimneys is denied without prejudice.

**B. Licensing Fees**

Turning to the issue of compensation, “a license fee compensates the owner for the use the petitioner makes of his or her property and his or her temporary loss of enjoyment of a portion of his or her property.” *PB 151 Grand LLC v. 9 Crosby, LLC*, 58 Misc. 3d 1219(A) [Sup. Ct, NY County 2018].

As for Condominium Respondents, the protective work will interfere with Cipicchio and Daly’s terraces which is over 1,700 square feet, as well as the first-floor unit’s terrace<sup>1</sup>. Therefore, Petitioner shall pay license fees as follows:

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<sup>1</sup> There is no mention of the size of the first-floor terrace in the papers.

[\*8]

- i. \$3,000 month to Respondents Daly and Cippichio, to increase to \$4,000 month after 12 months and \$7,000/month after 24 months; and
- ii. \$1,000 month to the first floor Unit Owner, to increase to \$1,250/month after 12 months and \$2,000/month after 24 months.

Turning to MKF, the Protective Work will interfere with the commercial tenant's ventilation for their range hoods which are located on the roof, as well as the residential tenants roof access. Therefore, Petitioner shall pay a license fee of \$1,200/month to MKF, to increase to \$1,600/month after 12 months and \$3,200/month after 24 months.

### C. Professional Fees

"Respondent is entitled to reimbursement by petitioner for reasonable attorneys' fees incurred in" an RPAPL § 881 action." *PB 151 Grand LLC v. 9 Crosby, LLC*, 58 Misc. 3d 1219(A) [Sup. Ct, NY County 2018]. "Justice also requires that petitioner reimburse respondent for its reasonable engineering costs incurred in this matter." *Id.*

"[T]he burden of showing the 'reasonableness' of the fee lies upon the claimant and the court will usually, and especially in a matter involving a large fee, be presented with an objective and detailed breakdown by the attorney of the time and labor expended, together with other factors he or she feels supports the fee requested." *Matter of Karp*, 145 AD2d 208, 216 [1st Dept 1989]. "The determination of a reasonable attorney's fee is left to the sound discretion of the trial court." *RMP Capital Corp. v Victory Jet, LLC*, 139 AD3d 836, 839-40 [2d Dept 2016]. "Attorney fees may not be recovered for unnecessary work." *Nestor v Britt*, 16 Misc 3d 368, 379 [Civ Ct 2007], *aff'd*, 19 Misc 3d 142(A) [1st Dept 2008].

Condominium Respondents submit the Affidavit of David Schumeister ("Schumeister"), the Board President of the Condominium. Schumesiter states that the outstanding legal fees as of June 6, 2019, were \$10,000.00 and \$3,500.00 for engineering fees. Therefore, based on the representation of Schumesister the Court will award \$10,000.00 for legal fees and \$3,500.00 for engineering fees.

Additionally, MKF is seeking \$25,000.00 in legal fees and \$40,500.00 in engineering fees. MKF retained the Law Office of Van Leer & Greenberg ("Van Leer & Greenberg") on September 23, 2019 and from September 23, 2019 until November 21, 2019, Van Leer & Greenberg billed \$15,278.36 for legal work performed. Van Leer & Greenberg additionally seeks \$10,000.00 for legal fees that "will be required and expended in the post-hearing process, including insuring

[\* 9]

Petitioner's compliance with any Court Order issued herein, and potential enforcement proceedings." The Court will award reasonable attorney's fees for work that was incurred not for work that is anticipated. Therefore, MKF will be awarded the outstanding balance of \$15,278.36 reflected in its last invoice. MKF will not be awarded for legal fees that it might incur in the future. MKF will also be awarded \$40,500.00 for engineering services rendered by Stracar Engineering, P.C.

Wherefore it is hereby

ORDERED AND ADJUDGED that Petitioner is granted a license to enter onto Respondents' properties to install overhead and roof protections, vertical and horizontal flashing, outrigger and netting system and to swing scaffolding, and to conduct a Pre-Construction Survey; and it is further

ORDERED that Petitioner is directed to pay a license fee of \$3,000/month to Respondents Daly and Cippichio, to increase to \$4,000 month after 12 months and \$7,000/month after 24 months; and it is further

ORDERED that Petitioner is directed to pay a license fee of \$1,000/month to the first floor Unit Owner of Respondents 29 West 19 Condominium, to increase to \$1,250/month after 12 months and \$2,000/month after 24 months; and it is further

ORDERED that Petitioner is directed to pay a license fee of \$1,200/month to Respondent MKF Realty Corp., to increase to \$1,600/month after 12 months and \$3,200/month after 24 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 Respondents in writing when its work has been completed and it has removed all protection from Respondents' properties, excluding the flashing; and it is further

ORDERED that Petitioner is solely responsible for the installation, maintenance, of the overhead and roof protections and the outrigger and netting system, and the removal of the overhead and roof protections, and the outrigger and netting system and to swing scaffolding; and it is further

ORDERED that at the completion of the term of the license, Respondents' properties within the license area shall be returned to its original condition,

[\* 10]

excluding the flashing 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 Respondents' necessary access to its properties and quality of life, and shall take the necessary steps, measures and precautions to prevent any damage to Respondents' properties; and it is further

ORDERED that Petitioner shall provide proof that Respondents 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 Respondents 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 Respondents to the fullest extent permitted by law for any liability, claims, damages or losses, including reasonable attorneys' fees, Respondents 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 Respondents any damage to Respondents' properties cause by Petitioner's work; and it is further

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

ORDERED that Petitioner is to reimburse Respondents 29 West 19 Condominium, Lauren Cipicchio, and Daniel Daly for reasonable attorneys' fees in the amount of \$10,000.00, incurred by Respondents 29 West 19 Condominium, Lauren Cipicchio, and Daniel Daly in connection with this proceeding; and it is further

ORDERED that Petitioner is to reimburse Respondents 29 West 19 Condominium, Lauren Cipicchio, and Daniel Daly for reasonable engineering fees in the amount of \$3,500.00, incurred by Respondents 29 West 19 Condominium, Lauren Cipicchio, and Daniel Daly in connection with this proceeding; and it is further

[\* 11]

ORDERED that Petitioner is to reimburse Respondent MKF Realty Corp. for reasonable attorneys' fees in the amount of \$15,278.36, incurred by Respondent MKF Realty Corp. in connection with this proceeding; and it is further

ORDERED that Petitioner is to reimburse Respondent MKF Realty Corp. for reasonable engineering fees in the amount of \$40,500.00, incurred by Respondent MKF Realty Corp. in connection with this proceeding.

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

Dated: JANUARY 20, 2020

  
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Eileen A. Rakower, J.S.C.