

**Berard v Hamersley**

2021 NY Slip Op 30248(U)

January 28, 2021

Supreme Court, New York County

Docket Number: 157948/2020

Judge: Barbara Jaffe

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. BARBARA JAFFE **PART** **IAS MOTION 12**

*Justice*

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JEROME BERARD and JANE BERARD,

Petitioners,

- v -

KATHARINE HAMERSLEY, 24 WASHINGTON  
SQUARE COMPANY, LISA REID, BRIAN REID,  
JANE EINDERBERG,

Respondents.

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**INDEX NO.** 157948/2020

**MOTION DATE** \_\_\_\_\_

**MOTION SEQ. NO.** 001

**DECISION + JUDGMENT ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 23-32 were read on this motion for \_\_\_\_\_ a license pursuant to RPAPL § 881 \_\_\_\_\_.

By order to show cause, petitioners move pursuant to Real Property Actions and Proceedings Law (RPAPL) § 881 for an order granting them and/or their contractors, consultants, and representatives, a license to enter temporarily the outside courtyard adjacent to premises at 10½ MacDougal Alley, also known as 24 Washington Square North, New York, NY (24 WSN), in order to make necessary repairs and renovations to the exterior walls, windows and roof of their building, and to place temporary protections on respondents' property during the course of the work consisting of (1) protecting the ground beneath the work areas with half-inch plywood on top of two inches of styrofoam; (2) heavy duty plastic covering any outdoor furniture; and (3) a six-foot temporary barrier built with half inch plywood and 2" x 3" framing to block access to the protected floor areas when the work is being performed, as further described in the petition, and for such other and further relief as deemed just and proper, together with the costs and disbursements of this special proceeding. (NYSCEF 6-21). Respondent 24

Washington Square Company (24 WSC) opposes.

I. VERIFIED PETITION (NYSCEF 1)

Petitioners allege that all of the plans, repairs, and alterations for the project have been approved by the Landmark Preservation Commission (LPC) and by the New York City Department of Buildings (DOB), and that all of the required permits have been obtained. They claim that a protection plan and a COVID19 reopening safety plan ensuring the protection of respondents' property is in place and that protections for the adjacent premises will be installed, monitored, maintained, and removed at petitioners' sole expense.

According to petitioners, respondents have not consented to the requested access despite demands to the manager of 24 WSN and the attorney for 24 WSC, the owner of the adjacent premises. The two properties are separated by the courtyard (NYSCEF 2). The third floor of 12 MacDougal Alley, a carriage house built in 1881, was added in 1909. Because of the age of the house and resulting wear and tear, petitioners allege that the exterior renovations are necessary and required. Petitioners anticipate that the "balance" of the project will be completed in four to six weeks.

Petitioners allege that the renovation work will be conducted only in the courtyard, not in tenants' homes, and that the portion of the courtyard leading to the tenants' homes is not underneath the work area, and thus, will remain unobstructed to permit tenants' ingress and egress. They contend that access is also required to allow them to install the protections (NYSCEF 3), and maintain that 24 WSC refused their request that it secure access to the courtyard from the tenants.

Petitioners contend that in February 2019, they unsuccessfully sought an access agreement with 24 WSC through the managing agent and were referred to 24 WSC's attorney.

On February 20, 2020, 24 WSC paid the attorney \$2,500, his fee for negotiating and drafting the access agreement, which petitioners signed and forwarded to the managing agent for 24 WSC's signature. On March 5, 2020, petitioners were advised by the attorney that 24 WSC required additional terms and that an umbrella and seat cushion had fallen from petitioners' building onto 24 WSC's property. Petitioners denied that the items were theirs.

On July 16, 2020, petitioners provided the attorney with an updated protection plan showing exactly how his client's property would be protected during the project, and they attempted to comply with the new requests for the access agreement. On August 4, 2020, petitioners were informed that the Reid respondents would not agree to access to the courtyard by the nonparty contractor due in part to COVID-19 safety concerns, notwithstanding the COVID-19 reopening safety plan (NYSCEF 4).

Petitioners also allege that the contractor agrees to name 24 WSC, its managing agent, and the tenants as additional insureds on its commercial liability insurance policy with minimum limits of \$1,000,000 per occurrence, \$2,000,000 in the aggregate, and excess liability coverage of \$5,000,000 (NYSCEF 5), and to ensure that the policy remain in effect until completion of the project.

According to petitioners, the inconvenience to the adjacent owners is slight compared to the hardship petitioners will experience if the license is refused. Without access, petitioners will be unable to complete the repairs to the exterior of their home and replace missing window panes, and their building will continue to deteriorate and be unsound.

## II. ORDER TO SHOW CAUSE

### A. Petitioners' contentions

In support of the order to show cause, petitioner David Berard offers his affidavit in

which he states that due to the age of his house, exterior renovations are needed consisting of brick cleaning, painting of the exterior walls, minor brick repairs and pointing, roof repair and partial replacement, and window repairs. They are expected to be completed within four to six weeks. Berard also describes the blue stone roof caps, which date from 1909 and are cracked and have gaps and loose mortar. Given their disintegration, water is entering his home, causing damage. He also describes three windows on the west wall of the home. Some have broken panes and need to be re-caulked and painted.

According to Berard, the plans, access agreement, proof of insurance, scope of work, and protection plan annexed to the petition and order to show cause were shown by petitioners' contractor to the owner of the properties adjoining his home to the east and south, and based thereon, each gave the contractor permission to access and protect their properties for the work. He also states that, on information and belief, respondent Hamersley owns the property known as 10 ½ MacDougal Alley, a/k/a 24 Washington Square North (24 WSN), which is directly west of petitioners' home, and that although the recorded deed to 24 WSN shows that she is the owner, the managing agent told petitioners that 24 WSC owns it. Thus, Hamersley and 24 WSC are collectively referred to as owner.

The Reid respondents are the ground-floor tenants of 24 WSN; the second-floor tenant is respondent Einderberg (collectively, tenants). Berard states, on information and belief, that tenants are lessees of 24 WSC. Between his home and 24 WSN is a courtyard that tenants use, and to which petitioners need access in order to effect repairs to their home's exterior west wall. (NYSCEF 7).

Petitioners also offer the affidavit of a licensed architect associated with the architect of record for the renovations at the premises in issue and is fully familiar with the facts and

circumstances of this matter. He states that the architectural firm prepared the project plans and documentation for the filling of the work with the LPC and that the scope of work presented by the contractor is consistent with the approved LPC project plans. (NYSCEF 16).

For the repairs, the architect advises that the DOB requires sufficient protections and that the temporary protection plan presented by the contractor meets those requirements. (*Id.*).

By affidavit, the contractor's vice president of sales states that the contractor specializes in all kinds of historic preservation. As he is familiar with the LPC project plans, he states that the scope of work is consistent with those plans, and that the temporary protection plan meets DOB requirements. He also contends that the COVID-19 reopening safety plan complies with the COVID DOB requirements. According to the vice president, the north and south wall restorations were completed in March 2020 and that it will take four to six weeks to complete the restorations to the west wall of 12 MacDougal Alley. (NYSCEF 19).

Although respondents Reid apparently defaulted on this motion, petitioners attach to the order to show cause an email from respondent Lisa Reid, wherein she complains that a "significant portion" of her courtyard space is reduced in size, resulting in a reduction of "natural light" into her apartment due to the proposed protections. She characterizes petitioners' use of protections as "inhumane" in that it deprives her family of "the little outdoor space that we have and to reduce the amount of sunlight into our space just so our neighbors can make non-essential, cosmetic alterations to their home." According to Reid, she and her family

have tolerated the increasing amounts of dust and debris floating into the courtyard and our home thanks to [petitioners'] construction efforts these past few years. If we allow access to the courtyard, we will now add potential exposure to COVID-19 to the list. From what we've observed next door there is no clear way to ensure that proper social distancing, masking and sanitary procedures will be monitored, much less upheld. The Berard's renovation has been years in the making with multiple stop orders and violations over the years.

(NYSCEF 15).

B. Contentions of respondent owner (NYSCEF 26-32)<sup>1</sup>

The attorney for owner denies that his client refused petitioners permission to perform the work. Rather, he claims, it seeks certain protections, copies of all of the governmental approvals for the work to be performed, the protections that would be provided to ensure that no one is injured on owner's property, and the insurance coverages that were promised but not provided when an access agreement was being negotiated. He alleges that on March 5, 2020, he advised that a certificate of insurance (COI) would be required naming 24 WSC and its managing agent as additional insureds, at higher limits than were provided for in a certificate produced by petitioners. He acknowledges that the requirements are "partially satisfied" by the COI submitted with the petition, even though it incorrectly reflects that the coverage as additional insured is based on a nonexistent "written contract" and appears to offer \$5 million in umbrella coverage whereas \$10 million in umbrella coverage had been offered in the agreement that petitioners signed. The client also asked to see the plans, approvals, and permits for the work, and although he acknowledges those accompanying the petition, he maintains that, to date, no permits have been posted, displayed or shown to his client. Thus, he asserts that owner cannot verify that the work to be done has been filed with the DOB and is legal.

Additionally, the attorney observes that while it is asserted within the petition and related documents that all required permits and approvals have been issued, none is attached, and nothing from LPC is shown, nor does his review of BISweb reflect filings for the intended work (NYSCEF 28, 29). He also claims that none of the filed jobs refer to the exterior work that

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<sup>1</sup> As owner's attorney specifically disclaims representing the other respondents, who have apparently defaulted on this motion, any emails or other inadmissible evidence offered by the attorney concerning their position(s) on this motion are not considered.

petitioner advises will be performed. (NYSCEF 28). And, in its initial scope of work, petitioners stated that a scaffold would be erected, but no plans for same were ever produced. He asserts that there are several open construction violations, with DOB civil penalties due to: work not conforming to plans, inadequate shoring for excavations, inadequate shoring creating a hazard, and underpinning being done in excess of what was allowed. He maintains that these violations potentially endanger owner's building and raise serious concerns about the scope of petitioners' work. (NYSCEF 29).

The attorney observes that there is no start or end date for the work set forth in the petition or a description of how the work will be performed, all of which are requirements for obtaining relief pursuant to RPAPL § 881. He alleges that shortly after respondents were served with the petition, he spoke with petitioners' attorney who informed him that petitioners denied responsibility for any breach of the warranty of habitability or breach of the warranty of quiet enjoyment to owner's tenants, which is why no agreement has been reached. And, he states, any order granting the petition must ensure that owner and tenants are not responsible for any damage resulting from the work. While he acknowledges having been paid \$2,500 by petitioners for legal fees incurred in connection with the initial negotiation of an agreement, as petitioners never complied with that agreement, his client should be awarded its reasonable legal fees incurred subsequent to such negotiation and in connection with this RPAPL § 881 application.

In addition, the attorney notes that petitioners fail to explain in the petition why access is necessary, and why the work must be done, and that there is no affidavit of merit stating that there were leaks or damage to surfaces, only that they want to do the work. While petitioners assert that their bricks need cleaning and painting, such work, he maintains, constitutes cosmetic work, and there is no legal requirement that it be done. The need to replace broken windows, he

asserts, may be accomplished without entry onto owner's property in such an intrusive manner. While it is asserted that the blue stone roof cap on petitioners' building is leaking, the attorney states that petitioners do not explain the asserted need for access to owner's property for this purpose. The attorney references allegations concerning a rent-regulated tenant's children who would be precluded from playing outside in the courtyard due to construction debris and he blames petitioners for objects that have fallen onto the courtyard.

Owner thus asks that the petition either be denied for the reasons stated or that it be granted on condition that petitioners provide them with proof of LPC's permission, the issuance of all required permits, the determination of commencement and end dates for the work, and that petitioners pay Owner's reasonable legal fees on submission of a detailed affidavit and a reasonable weekly license fee of \$1,000.

### III. ANALYSIS

Pursuant to RPAPL § 881:

When an owner . . . 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.

A "standard of reasonableness" generally governs petitions brought under RPAPL § 881. Thus, courts must "balance the interests of the parties . . ." and when necessary and under reasonable conditions, and where the inconvenience to the adjacent property owner is slight compared to the hardship of the petitioner if the license is refused, a license should be granted. (*Board of Mgrs. of Artisan Lofts Condominium v Moskowitz*, 114 AD3d 491, 492 [1st Dept

2014]).

In *Meopta Properties II, LLC v Pacheco*, the Court granted the petitioner a 60-day license to access a limited exterior portion of respondent's property for the purpose of performing remedial and protective construction work (185 AD3d 511, 512 [1st Dept 2020]). The Court also affirmed the denial of a license fee in view of the lower court having ordered the petitioner to obtain and maintain insurance to protect the respondent's property interests and observed that should the respondent incur actual damages, the petitioner would be held liable for such damages.

Although the statute does not require that the repairs be necessary, only that the entry be necessary, petitioners here satisfy their burden of demonstrating that the need to repair and renovate an old landmarked building outweighs the unpleasantness entailed in undergoing a temporary reduction in sunlight into the Reids's apartment and the discomfort associated with renovation work, discomfort regularly experienced by city dwellers. As the court observed in *Celebrity Studios, Inc. v Civetta Excavating, Inc.*, 72 Misc 2d 1077, 1080 (Sup Ct, New York County 1973):

It cannot however be said, no matter how desirable it might be, that everyone at all times has an established legal right to peace, tranquility and a tension-free atmosphere. In the modern world some degree of noise, tension and discomfort is the inevitable concomitant of urban life. . . . A person who chooses to reap the advantages of location in an urban society must expect the impingement of that crowded society upon his life.

For all of these reasons, petitioners demonstrate that entry into the courtyard is necessary to repair and renovate the exterior walls, windows and roof of their building, and to place temporary protections on respondents' property during the course of the work consisting of (1) protecting the ground beneath the work areas with half-inch plywood on top of two inches of styrofoam; (2) heavy duty plastic covering any outdoor furniture; and (3) a six-foot temporary

barrier built with half inch plywood and 2-inch x 3-inch framing to block access to the protected floor areas when the work is being performed. The license is thus granted for 60 days, on the condition that within 30 days from the date of this decision and judgment, petitioners provide owner with (1) copies of the permission granted by LPC; (2) proof of the issuance of all required permits; (3) definite commencement and end dates for the work; and (4) proof that petitioners have obtained and maintain insurance to protect owner’s property interests. Petitioners are reminded to advise their contractors to utilize the least intrusive means of effecting those repairs and renovations promptly. Given the insurance requirement, there is no need to impose a license fee. (*See supra, Meopta Properties*, 185 AD3d 511). Attorney fees are not awarded.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED and ADJUDGED, that the petition for a license is granted to the extent of a 60-day license with the aforementioned conditions; and it is further

ORDERED AND ADJUDGED, that the proceeding is dismissed.

  
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**BARBARA JAFFE, J.S.C.**

1/28/2021  
DATE

CHECK ONE:

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<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED
<input type="checkbox"/>	SETTLE ORDER	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: