

Sujnow v 1140 43rd St. LLC
2021 NY Slip Op 30644(U)
March 4, 2021
Supreme Court, Kings County
Docket Number: 512377/20
Judge: Mark I. Partnow
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At an IAS Term, Part 88 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of March, 2021.

P R E S E N T:

HON. MARK I. PARTNOW,

Justice.

-----X

AARON SUJNOW and URI SION f/k/a JURIJ KOGAN,

Plaintiff,

-against-

Index No. 512377/20

1140 43RD STREET LLC,

Defendant.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) _____

2-5, 8-10 14-28

Opposing Affidavits (Affirmations) _____

15-28 35

Reply Affidavits (Affirmations) _____

35 36-37

Upon the foregoing papers, plaintiffs Aaron Sujnow and Uri Sion f/k/a Jurij Kogan (collectively, plaintiffs) move (in motion sequence [mot. seq.] one), by order to show cause, for an order, pursuant to CPLR 6301: (1) enjoining and restraining defendant 1140 43rd Street LLC (defendant or I140) and its agents, representatives, contractors, subcontractors, construction managers and employees, and all other persons and/or entities acting on defendant's behalf, from conducting any and all demolition, excavation and/or construction activities at 1140 43rd Street in Brooklyn (the Project Premises) until such time as: (a) defendant has entered into a license agreement with plaintiffs, the owner of the adjacent premises at 1138 43rd Street in Brooklyn (Adjacent Premises), setting forth the conditions of defendant's access to the Adjacent Premises, and (b) defendant has taken all

necessary and legally mandated measures to protect the Adjacent Premises and the health, safety and welfare of its tenants, occupants and invitees; and (2) enjoining and restraining defendant and its agents, representatives, contractors, subcontractors, construction managers and employees, and all other persons and/or entities acting on defendant's behalf, from any future entry onto the Adjacent Premises absent further order from the court and/or an access agreement.

Defendant 1140 cross-moves (in mot. seq. two) for an order granting it a license to install safety measures on the Adjacent Premises, pursuant to RPAPL 881.

Background

The Instant Action

On July 14, 2020, plaintiffs, the owners of the Adjacent Premises, a three-story apartment building, commenced this action by filing a summons and verified complaint. The complaint alleges that defendant is the owner of the Project Premises, "upon which Defendant is performing an excavation and construction project (the 'Project')" and "[t]he Project Premises is immediately adjacent to the Adjacent Premises on the easterly side of the Adjacent Premises" (complaint at ¶ 3).

The complaint alleges that "Defendants caused the illegal installation of permanent support of excavation work on the Adjacent Premises, including, but not limited to, underpinning of the Adjacent Premises . . ." which "constitutes a permanent encroachment on the Adjacent Premises and was performed without any agreement, license or other consent from Plaintiffs . . ." (*id.* at ¶¶ 5 and 6). The complaint also alleges that defendant trespassed on the Adjacent Premises and installed an overhead protection system over the

front yard of the Adjacent Premises (the Overhead Shed) (*id.* at ¶ 14). The complaint further alleges that the underpinning work was negligently performed by defendant and “has caused significant structural stability concerns within the Adjacent Premises and has resulted in significant damages to the Adjacent Premises” (*id.* at ¶ 7).

The complaint alleges that “Defendants have refused to undertake *any* protective measures (including insurance) . . .” (*id.* at ¶ 9). The complaint also alleges that “despite the fact that Defendant will be required to install certain roof protections on the Adjacent Premises in connection with its Project, Defendant *still* persists in refusing to negotiate any access agreement” (*id.* at ¶ 17).

The complaint asserts four causes of action against defendant for: (1) trespass; (2) negligence; (3) removal of any encroaching structure; and (4) an injunction enjoining defendant from performing any work in connection with the Project.

On August 24, 2020 defendant 1140 answered the complaint and asserted two affirmative defenses, including that the construction performed on the plaintiffs’ property was performed with plaintiffs’ consent. Defendant also asserted a counterclaim for an order, pursuant to RPAPL 881, granting it a license to: (1) maintain the Overhead Shed already installed on plaintiffs’ Adjacent Premises for the remaining estimated six-month duration of the Project, and (2) to install roof protection on plaintiffs’ Adjacent Premises for the estimated six-month duration of the Project.

Plaintiffs’ Order to Show Cause

Simultaneously with the commencement of this action, plaintiffs moved, by order to show cause, for an injunction. Plaintiffs seek to enjoin defendant from conducting

construction activities at the Project Premises until it enters into a license agreement setting forth the conditions for defendant's access to the Adjacent Premises and has taken all necessary measures to protect the Adjacent Premises. Essentially, plaintiffs argue that "the Project should be stopped until such time as appropriate protective measures are in place."

Plaintiffs submit an expert affidavit from a professional engineer, Nathaniel B. Smith, P.E. (Smith), who attests that:

"The underpinning has caused the building located on the Adjacent Premises to experience settlement damages. Such damages include, but are not limited to: substantial cracks in the concrete basement floor slab of the Adjacent Premises; the separation of floor boards and tiles from the vertical walls of the Adjacent Premises; door and window jambs becoming out of plumb; worsening of cracks in the exterior of the Adjacent Premises; and cracks in the interior walls of the Adjacent Premises. . . ."

Smith further attests that "[i]n my professional opinion, the site conditions at the Adjacent Premises are emblematic of differential settlement damages that were caused by Defendant's underpinning of the Adjacent Premises in connection with the Project." Smith also attests that there is "potential for further exacerbation of this damage or new damage resulting from the construction activities . . ."

Defendant's Cross Motion

Defendant opposes plaintiff's order to show cause to the extent that it seeks an injunction stopping it from continuing the construction Project and cross-moves for an order granting it a license to install safety measures on the Adjacent Premises to protect plaintiffs and the Adjacent Premises, pursuant to RPAPL 881, for the duration of the construction Project (nine months).

Defendant 1140's owner, David Braun, attests that the underpinning work was installed under the direct supervision of plaintiffs' engineer, Aharon Derman; it is now complete and the remaining construction will not impact the Adjacent Premises. Defendant seeks a license "to install additional temporary safety measures on the Plaintiffs' property, including roof protection to protect the Plaintiffs' roof" which "is required by the NYC Department of Buildings to protect the Plaintiffs' property." Defendant argues that "the inconvenience of these safety measures to the Plaintiffs is relatively minor compared to the inconvenience to the Defendant of not being able to safely complete its construction." Notably, defendant submits a copy of its site safety plan and its insurance certificate naming the plaintiffs as additional insured.

Defendants submit an expert affidavit from a professional engineer, Sam Ghaida, P.E. (Ghaida), who attests that he thoroughly inspected all prior reports by plaintiffs' engineer (regarding the underpinning) and the exterior of the Adjacent Premises but was not granted access to the interior of the Adjacent Premises. Ghaida asserts that there is no danger of the Adjacent Premises shifting, settling or cracking and that the Adjacent Premises is completely stable and safe. Ghaida attests that "[a]ll of the larger exterior cracks appear to be very old and pre-exist the underpinning . . ." and "[t]he remaining exterior cracks are all minor in nature and easily remedied." Ghaida further attests that the underpinning is complete and future construction will have no impact upon the foundation of the Adjacent Premises.

Ghaida, in support of defendant's cross motion, attests that "the New York City Department of Buildings is requiring a few additional safety measures including the

installation of roof protection on the Plaintiffs' roof" which "will only serve to safeguard the Plaintiffs and their property."

Plaintiffs' Reply and Opposition to the Cross Motion

Plaintiffs, in further support of their motion and in opposition to defendant's cross motion, submit an affidavit from Chanan Tzionov (Tzionov), the property manager of the Adjacent Premises, who attests that "at no time did Defendant notify me or Plaintiffs, nor did Plaintiffs or I consent to (verbally or otherwise) Defendant accessing the Adjacent Premises for any reason, prior to Defendant commencing installation of underpinning on the Adjacent Premises." Tzionov further attests that "[p]laintiffs only engaged an engineer after they became aware of the underpinning work." Tzionov also attests that defendant again trespassed onto the Adjacent Premises to install the overhead protection system over the front yard, despite the fact that defendant did not have a license to access the Adjacent Premises. Tzionov further attests that:

"Defendant took these improper actions despite that Plaintiffs express[ed] their willingness to negotiate an amicable access agreement allowing for, *inter alia*, the installation of proper protections on the Adjacent Premises and the remediation of the damage already caused by Defendant's negligent underpinning."

Plaintiffs also submit a memorandum of law arguing that defendant's cross motion for a license is "deficient," "improper" and must be denied because:

"Defendant seeks a license for a permanent encroachment (i.e. the underpinning); Defendant fails to include plans approved by the Department of Buildings; Defendant fails to specify the access requested and the necessity thereof; Defendant fails to provide for insurance coverage and indemnification for Plaintiffs; Defendant brought its application to the Court

without first having good faith negotiations for access prior to seeking court intervention; Defendant has already damaged the Adjacent Premises and Defendant fails to identify that the proposed work can be safely performed on the ninety-year-old building on the Adjacent Property.”

Plaintiffs also argue that defendant’s cross motion for a license pursuant to RPAPL 881 is “procedurally defective” because defendant must seek such relief in a special proceeding.

Plaintiffs assert that if the court is inclined to grant defendant a license for access to the Adjacent Premises, it should impose reasonable conditions for the protection of the Adjacent Premises and its occupants, including a reasonable license fee to compensate plaintiffs for the loss of use and enjoyment of their property and reimbursement of their reasonable legal and engineering fees.

Defendant’s Reply

Defendant, in reply, submits an attorney affirmation asserting that defendant’s counterclaim and cross motion for a license, pursuant to RPAPL 881, can be converted into a special proceeding, pursuant to CPLR 103 (c):

“[A]lthough an RPAPL § 881 for access may ordinarily be brought by a special proceeding, since the Defendant asserted its request by counterclaim, which is directly related to the complaint in this action, and since it would be wasteful and inefficient for the Defendant to bring a special proceeding for such related relief, the Defendant’s counterclaim can be heard in this action by converting its request into a special proceeding.”

In addition, defense counsel clarifies that “the license sought here is merely to install temporary protection, as required by the Department of Buildings, to protect the Plaintiff’s

property from damage during the Defendant's construction" and "[t]he Defendant is not seeking a license to underpin."

Discussion

Essentially, the parties' order to show cause and cross motion seek similar relief. Plaintiffs' order to show cause seeks to enjoin defendant from continuing construction at the Project Premises until defendant has a license setting forth the conditions for defendant's access to the Adjacent Premises to adequately protect the Adjacent Premises and its occupants. Defendant similarly seeks a license, pursuant to RPAPL 881, for the limited purpose of installing temporary safety measures at the Adjacent Premises, including protection for the roof of the Adjacent Premises for the remaining nine-month duration of the Project, as required by the New York City Department of Buildings.

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.¹ 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" (emphasis added).

¹ Although defendant asserted a counterclaim and cross-moves for a license, pursuant to RPAPL 881, and did not commence a special proceeding, this court converts this action into a special proceeding, pursuant to CPLR 103 (c) (*see* CPLR 103 [c]; *see also* *Mindel v Phoenix Owners Corp.*, 210 AD2d 167, 167-168 [1994]).

RPAPL 881 is “a codification of well-settled principles of jurisprudence expounded by [New York] courts . . . dealing with conflicting interests of adjacent property owners” (*Chase Manhattan Bank v Broadway, Whitney Co.*, 57 Misc 2d 1091, 1096 [Sup Ct, Queens County 1968], *affd* 24 NY2d 927 [1969]).

“A proceeding pursuant to RPAPL 881 is addressed to the sound discretion of the court . . . which must apply a reasonableness standard in balancing the potential hardship to the applicant if the petition is not granted against the inconvenience to the adjoining owner if it is granted” (*Queens Coll. Special Projects Fund, Inc. v Newman*, 154 AD3d 943, 943-944 [2017] [internal citations omitted]), *lv denied*, 31 NY3d 901 [2018]; *see also Bd. of Managers of Artisan Lofts Condo. v Moskowitz*, 114 AD3d 491, 492 [2014]). “Courts are 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’” (*Bd. of Managers of Artisan Lofts Condo*, 114 AD3d at 492 [quoting *Chase Manhattan Bank*, 57 Misc 2d at 1095]).

Here, the parties agree that a license is necessary to protect the Adjacent Premises and its occupants. Defendant has satisfied the statutory prerequisites of showing the necessity of installing safety measures, including roof protection required by the New York City Department of Buildings; the duration of the license (nine months) is not unreasonable; and defendant has submitted a site safety plan and evidence of insurance naming plaintiffs as additional insureds. The record reflects that the inconvenience to

plaintiffs regarding the installation of safety measures at the Adjacent Premises is relatively slight compared to defendant's inability to complete its construction Project.

RPAPL 881 affords the adjoining property owners adequate legal rights and remedies by subjecting the licensee to full liability "for actual damages occurring as a result of the entry." For such actual damages occurring as a result of the entry, plaintiffs have a cause of action against defendant under the statute, and to ensure payment of such damages, the court will require the continued maintenance of adequate insurance by defendant (*see Sunrise Jewish Ctr. of Valley Stream v Lipko*, 61 Misc 2d 673, 676-677 [Sup Ct, Nassau County 1969]). Additionally, plaintiffs will receive compensation for defendant's utilization of the Adjacent Premises during the period of the license (nine months) in a fair and equitable sum as set forth below. Accordingly, it is

ORDERED, ADJUDGED AND DECLARED that plaintiffs' motion (in mot. seq. one) is only granted to the extent that defendant, its agents, representatives, contractors, subcontractors, construction managers and employees, and all other persons and/or entities acting on defendant's behalf, are enjoined and restrained from conducting demolition, excavation and/or construction activities at the Project Premises until defendant has installed necessary safety measures at the Adjacent Premises to protect the Adjacent Premises and its occupants, in accordance with a license, pursuant to RPAPL 881; and it is further

ORDERED AND ADJUDGED that defendant's cross motion (in mot. seq. two) and defendant's counterclaim, which are hereby converted to a special proceeding,

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pursuant to CPLR 103 (c), is only granted to the extent that defendant is granted a temporary license, pursuant to RPAPL 881, to install all safety measures necessary to protect the Adjacent Premises, including roof protection at the Adjacent Premises, as required by the New York City Department of Buildings, on the conditions that: (1) the license shall entitle defendant's contractors to access the Adjacent Premises, install and maintain roof protection on the roof of the Adjacent Premises for a maximum of nine (9) consecutive months;² (2) the license shall entitle defendant to maintain the Overhead Shed to protect the sidewalk at the Adjacent Premises for a maximum of nine (9) consecutive months, unless extended by court order; (3) defendant shall pay plaintiffs a license fee; (4) defendant shall maintain, during the period of the license, a comprehensive liability insurance policy covering any damage to the Adjacent Premises;³ (5) defendant shall provide proof of additional insured coverage to plaintiffs prior to accessing the Adjacent Premises; (6) defendant shall be held liable to plaintiffs for any damages which they may suffer as a result of the granting of this license, and all damaged property shall be repaired at defendant's sole expense; (7) defendant shall indemnify plaintiffs for any personal injury or property damage caused by its installation and maintenance of safety measures at the Adjacent Premises; and (8) defendant shall, upon the completion of the term of the license, restore the Adjacent Premises to its original condition, and all materials shall be removed from the license area.

² If necessary, defendant can make an application to extend the license period.

³ The parties shall contact the Court via e-mail or telephone to schedule a conference to determine the amount defendant shall pay to plaintiffs for the license fee and to determine the amount of the insurance policy coverage.

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This constitutes the decision and order of the court.

E N T E R,



J. S. C.