

**201 EB Dev. III LLC v 205 E. Broadway Hous. Dev.
Fund Corp.**

2021 NY Slip Op 31871(U)

June 3, 2021

Supreme Court, New York County

Docket Number: 158179/2020

Judge: Paul A. Goetz

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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. PAUL A. GOETZ PART IAS MOTION 47EFM

Justice

-----X

201 EB DEVELOPMENT III LLC

Petitioner,

- v -

205 EAST BROADWAY HOUSING DEVELOPMENT FUND CORP.,

Respondent.

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INDEX NO. 158179/2020
MOTION DATE N/A
MOTION SEQ. NO. 001

INTERIM DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 64, 65, 66, 67, 68, 69, 71, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105 were read on this motion to/for MISC. SPECIAL PROCEEDINGS.

In this RPAPL § 881 proceeding¹ as noted in the December 16, 2020 interim decision/order (NYSCEF Doc No 69) three issues are impeding the parties settlement and require resolution by the court: 1) whether petitioner should be required to post a one million-dollar bond for damages; 2) whether respondent should be awarded past license fees for air space; and 3) whether respondent should be awarded professionals' fees incurred prior to the initiation of this proceeding related to petitioner's project. Resolution of these three issues is as follows:

Bond

Respondent argues petitioner should be required to post (now) a two million-dollar bond to secure payment for any damage to respondent's property as a result of the continued construction on petitioner's adjacent property. Petitioner argues that a bond is not necessary

¹ There is also a separate compensatory damages action brought by respondent against petitioner (NY Co Index No 656429/17) pending in this part.

because it will have fifteen million dollars of insurance coverage for the next stage of the project (excavation and foundation work was completed pursuant to an agreement in the compensatory damages action). Petitioner provides no proof that this insurance will be issued naming respondent as an additional insured.

In support of its argument for a bond, respondent relies on *DGH Warren LLC v Assouline Ritz I, LLC* wherein the First Department held that the court has “has authority to order a bond even though respondents were covered by petitioner’s insurance”(138 AD3d 539, 540 [1st Dept 2016] [internal citations omitted]). However, in *DGH Warren*, unlike here “[i]t was particularly appropriate for the court to order a bond since it had postponed the issue of license fees [until the end of the three-year license period]” (*id.* at 540). In this proceeding, the parties have resolved the issue of ongoing license fees making the argument for a bond less persuasive. Since respondent should not have to bear any costs resulting from the granting of access to its property under principles of equity (*Van Dorn Holdings, LLC v 152 W 58th Owners Corp.*, 149 AD3d 518, 519 [1st Dept 2917]), petitioner, as a condition precedent to commencing the next phase of its project, will be directed to obtain the insurance it indicates it is willing to procure naming respondent as an additional insured and will be directed to sign an indemnification agreement. Nothing in this determination will “preclude respondent from seeking additional relief as future circumstances require” (*240 w35 v 243 W. 34th St. LLC*, 2021 NY Slip Op 2974, 2021 NY App Div LEXIS 3105 [1st Dept May 11, 2021]; *Tsoumpas 1105 Lexington Equities, LLC v 1109 Lexington Ave., LLC*, 189 AD3d 524, 525 [1st Dept 2020]). Accordingly, respondent’s application that petitioner post a bond will be denied and petitioner will be directed to procure insurance naming respondent as an additional insured and petitioner will further be directed to sign an agreement to indemnify respondent.

Past Fees for Air Space

Respondent argues it is entitled to license fees for the period when overhead protections were removed from its rear yard in January 2017 to the present. Respondent avers it has not had full use of its rear yard since the removal of the overhead protections because “there has been a sinkhole at the property line and ongoing work on the superstructure adjacent to [its rear] yard without proper protections. . .” (NYSCEF Doc No 48 ¶ 68). However, as petitioner correctly argues, the issue of the removal of the overhead protections, the sinkhole and the ongoing work on the superstructure is outside the scope of the court’s limited order dated December 16, 2020 (NYSCEF Doc No 69) and therefore will not be entertained.

Respondent further argues it is entitled to past license fees for electric lines put up by petitioner over respondent’s rear yard without its permission (NYSCEF Doc No 48 ¶ 69). However, as petitioner correctly argues the intrusion over respondent’s rear yard, if there be any, is *de minimus* (see photos of electric lines NYSCEF Doc 59) and does not result in respondent’s actual loss of enjoyment of its property. Accordingly, respondent’s request for license fees related to incursion over its rear yard air space will be denied.

Professionals’ Fees

Respondent argues that under the License Agreement dated March 17, 2016 and the First Amendment to License Agreement dated December 23, 2016, (collectively NYSCEF Doc 52 ¶¶ 9, 11.2 & 11.3) and under principles of equity it is entitled to professionals’ fees it incurred as a result petitioner’s initial damage to the building in this RPAPL § 881 proceeding.

Petitioner has agreed to pay respondent’s professional fees in connection with this proceeding. Petitioner correctly argues that resolution of respondent’s request for reimbursement of professional fees not incurred in connection with this proceeding is more appropriately

resolved in the compensatory damages action between the parties pending in this part.

Accordingly, respondent's request for professional fees incurred not related to this proceeding will be denied without prejudice to seeking them in the compensatory damages action.

Accordingly, it is

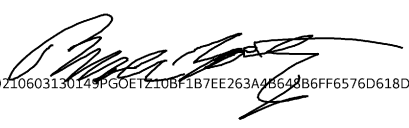
ORDERED that respondent's application that petitioner post a bond is denied; and it is further that

ORDERED that petitioner shall procure general liability insurance with a limit of not less than fifteen million dollars for the duration of petitioner's project and shall present proof of same to respondent and shall enter into an indemnification agreement with respondent before commencing further work; and it is further

ORDERED that respondent's request for license fees related to incursion over its rear yard air space is denied; and it is further

ORDERED that respondent's request for professional fees incurred not related to this proceeding is denied without prejudice to seeking them in the compensatory damages action between the parties; and it is further

ORDERED that the parties shall appear for a settlement conference on July 27, 2021 at 10:30 am.


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6/3/2021
DATE

PAUL A. GOETZ, 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	<input type="checkbox"/> GRANTED IN PART <input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE