

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

2021 NY Slip Op 32143(U)

November 3, 2021

Supreme Court, New York County

Docket Number: Index No. 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** **47**

Justice

-----X

201 EB DEVELOPMENT III LLC

Plaintiff,

- v -

205 EAST BROADWAY HOUSING DEVELOPMENT FUND
CORP.,

Defendant.

-----X

INDEX NO. 158179/2020

MOTION DATE N/A

MOTION SEQ. NO. 001

**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, 106, 107, 108, 109

were read on this motion to/for MISC. SPECIAL PROCEEDINGS.

Petitioner 201 EB Development III LLC seeks a judgment under Real Property and Proceedings Law Sec. 881 for a limited license to enter respondent 205 East Broadway Housing Development Fund Corp.'s adjoining property at 205 East Broadway, New York, New York (respondent's property) in order to (i) install and maintain temporary protection consisting of roof protection on the roof of the respondent's property and a scaffold in the rear yard of the respondent's property; (ii) install flashing and related work; (iii) complete the installation of the dowel bars and rear yard repairs. Petitioner contends that this license is necessary in order to complete the construction of a seven-story building (the Project) at the premises located at 201 East Broadway, New York, New York (petitioner's property).

Petitioner and respondent previously entered into a license agreement for the demolition phase of the Project on March 17, 2016 and subsequently entered into an amendment of this agreement on December 13, 2016 (Verified Petitioner, Exh. R [License Agreement]).

Subsequently, respondent commenced an action against petitioner on October 17, 2017, in Supreme Court, New York County (Index No. 656429/2017) in which respondent sought injunctive relief as well as monetary damages (Compensatory Damages Action). On March 16, 2018, petitioner and respondent entered into a settlement agreement in which petitioner agreed to perform certain protective and remedial work for the excavation and foundation phases of the Project (Verified Petition, Exh. H [“Settlement Agreement”]). Petitioner commenced this proceeding for a license which it states is necessary in order to construct the modular units or superstructure for the Project.

The parties attempted to reach an agreement regarding this proceeding and, in an effort to assist the amicable resolution of this case, the court issued an interim order dated June 3, 2021, which resolved three issues the parties stated were preventing them from reaching a settlement agreement. Nevertheless, the parties have been unable to resolve the remaining issues, which must now be resolved by the court.

RPAPL Sec. 881 provides that “[w]hen 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.” In granting a license pursuant to RPAPL Sec. 881, “courts generally apply a standard of reasonableness” and are required to balance the interests of the parties (*Matter of Board of Mgrs. Of Artisan Lofts Condominium v. Moskowitz*, 114 A.D.3d 491, 492 [1st Dep’t 2014]). A court 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” (*id.*).

Here, it is undisputed that petitioner's Project constitutes an improvement to petitioner's property under RPAPL Sec. 881 and petitioner has demonstrated through the affidavit of Douglas Lane sworn to on September 23, 2020 that petitioner requires access to respondent's property in order to complete this improvement in accordance with the Project plans filed with the New York City of Buildings. Respondent has effectively denied access by conditioning access on numerous conditions.

First, respondent demands that the repairs to its property's party wall, rear and front walls, chimney, parapet and rear yard must first be completed prior to the construction of the modular units or superstructure for the Project. Respondent contends that not only is this required by the parties' prior license agreement, which was entered into during the excavation and demolition phase of the project, but that such work will be rendered impossible once the superstructure is complete. However, respondent's conclusory statements that it would be impossible to perform these repairs after the superstructure is built are unsupported by any details and the court cannot simply surmise why this is so. Further, although the parties' license agreement provides for certain repairs to be completed prior to the construction of the superstructure, the parties Settlement Agreement revised the terms of the license agreement and provides that "much of the repair work will be performed after the modular superstructure" is installed (License Agreement, para 1.1 and Settlement Agreement, para. 7). The Settlement Agreement details certain repairs that must be completed before the modular superstructure is erected, to wit, the "rear yard repairs [shall be performed] after the first floor pad is poured at the project [and prior to the installation of the modular superstructure . . .] (*id.*). The Settlement Agreement explicitly describes the purpose of this schedule, which is intended to "minimize disruption to [respondent] and its tenants and unnecessary duplicative work." Therefore, other

than the rear yard repairs, there are no other repairs that must be completed prior to the construction of the superstructure.

Next, respondent demands that petitioner revise its site safety plan in accordance with the recommendations of its engineer to provide for the use of hanging/swing scaffolding rather than the stacking scaffolding proposed by petitioner, in order to protect the roof of the respondent's premises. However, respondent does not explain how the stacking scaffolding, which will be placed in the rear yard of its property, will damage its roof. Further, respondent's demand that security be provided by petitioner is also unsupported.

Respondent's demands for insurance coverage, indemnification, bond, reimbursement of professional fees and past license fees were addressed in the court's interim order dated June 3, 2021. Respondent's request for a license fee of \$4,500 a month is reasonable. Accordingly, it is

ORDERED and ADJUDGED that this motion is granted to the extent that this court grants a judgment for a license to petitioner and its general contractor to access the respondent's property in order to (i) install and maintain temporary protection consisting of roof protection on the roof of the respondent's property and a scaffold in the rear yard of the respondent's property; (ii) install flashing and related work; (iii) complete the installation of the dowel bars and rear yard repairs; and it is further

ORDERED and ADJUDGED that prior to the commencement of the work in the previous paragraph, petitioner shall, after pouring the first floor pad for its building, complete the rear yard repairs; and it is further

ORDERED and ADJUDGED that the license to petitioner and its general contractor shall last no more than 4 months, and work must be performed on weekdays between the hours of 9:00

a.m. and 5:00 p.m., effective immediately after service with notice of entry of a copy of this order; and it is further

ORDERED and ADJUDGED that petitioner and its contractor shall procure and maintain a policy of liability insurance in an amount not less than \$15 million, on the terms set forth in section 8 of the License Agreement, including naming respondents and respondents' employees, tenants, occupants and its consultant as additional insureds during the period of this license; and it is further

ORDERED and ADJUDGED that petitioner shall pay respondent a license fee in the amount of \$4,500 a month until all of the protections are removed from respondent's property; and it is further

ORDERED and ADJUDGED that petitioner shall pay respondent's reasonable design professional fees and reasonable attorneys' fees in connection with this petition in accordance with the terms of section 11 of the License Agreement; and it is further

ORDERED and ADJUDGED that petitioner shall provide indemnification to respondent in accordance with section 9 of the License Agreement; and it is further

ORDERED and ADJUDGED that sections 5, 6, 7, 8, 9, 11, 12 and 13 of the License Agreement are incorporated into the terms of this order; and it is further

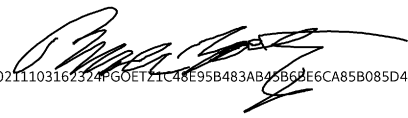
ORDERED and ADJUDGED that petitioner shall notify respondent in writing when it has completed the work under the license; and it is further

ORDERED and ADJUDGED that petitioner shall remove any violations imposed on respondent's property from work conducted under the license; and it is further

ORDERED and ADJUDGED that upon the completion of the term of the license, petitioner and its general contractor shall return respondent's property to respondent in its

original condition and that petitioner and its general contractor remove all materials used in construction and any debris from the licensed area, and it is further

ORDERED that petitioner shall serve a copy of this decision and order with notice of entry on all parties and shall have execution thereof.


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11/3/2021
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	<input type="checkbox"/> FIDUCIARY APPOINTMENT
				<input type="checkbox"/> REFERENCE