

**Matter of Withers Apts. LLC v Brooklyn
Williamsburg Arrondissement LLC**

2021 NY Slip Op 32165(U)

October 19, 2021

Supreme Court, Kings County

Docket Number: Index No.: 505582/2021

Judge: Richard Velasquez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

✓
not. seq. #1

At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 19th day of October 2021.

PRESENT:
HON. RICHARD VELASQUEZ
Justice.

-----X

In the Matter of the Application of:
WITHERS APARTMENTS LLC,
For an Order and Judgment pursuant to
Section 881 of the Real Property Actions and
Proceedings Law for access to adjoining property,
Petitioner,

Index No.: 505582/2021

-against-

Decision and Order

BROOKLYN WILLIAMSBURG ARRONDISSEMENT LLC,

Respondents.

-----X

The following papers numbered 1 to 3 read on this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause	
Affidavits (Affirmations) Annexed _____	2-12
Opposing Affidavits (Affirmations) _____	19-35
Reply Affirmations _____	40-47

After having heard oral argument on July 17, 2021 and a review of the foregoing submissions, the Court finds as follows:

Petitioner moves by Order to show cause for an order pursuant to N.Y. R.P.A.P.L. § 881 for an order granting Petitioner a license to enter upon a portion of the respondent's respective properties,

Pursuant to NY RPAPL § 881; 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 licensee shall be liable to the adjoining owner or his lessee for actual damages occurring as a result of the entry. NY Real Prop Acts Law § 881 (McKinney).

Under this section, a property owner, upon refusal of his neighbor to permit access to make 'improvements or repairs,' may move for a compulsory license where reasonable and necessary. The Court in *North 7-8 Investors, LLC v. Newgarden*, 43 Misc.3d 623, 982 N.Y.S.2d 704 (Sup. Ct., Kings Co., 2014), found that new construction was an "improvement" within the meaning of the statute and that "access is deemed necessary even where the access is necessary because a building is constructed to the lot line of a property." The statute directs that the license be granted "upon such terms as justice requires." In *North 7-8 Investors*, the Court, in granting the license, imposed a series of terms and conditions on the compulsory license including an award of attorneys' fees, not as an instance of the litigation but for the failed negotiations for a voluntary license agreement, as the fees were not based on being the prevailing party in the action but rather were a condition of the license. Other fees to the licensor which the Court deemed just include "the Respondent's architect's reasonable fees incurred in reviewing Petitioner's plans and making counter proposals, as well as ongoing monitoring of the work during the term of the license." "Other conditions the Court may impose include,

posting a bond, obtaining insurance coverage, agreeing to indemnify the adjacent landowner and paying for the use of the license.”

In the present case, Petitioner has demonstrated that a license is warranted as the construction is new construction within the meaning of the statute. Conditions the Court may impose include, posting a bond, obtaining insurance coverage, agreeing to indemnify the adjacent landowner and paying for the use of the license. In the present case, the Court has determined based on the papers submitted the following conditions on petitioner's license to enter; Petitioners are to pay respondents professional engineering fees within 15 days of receiving invoices for the same, not to exceed \$8,000.00. Petitioners must obtain and maintain insurance to protect the respondents and shall pay reasonable attorney fees associated with entering into the agreements not to exceed \$6,000.00 for negotiating the agreements. Petitioners shall pay a licensing fee of \$6,399 per month which considers the rent abatement given to the respondent's tenants as a result of not having access to the rooftop.

Accordingly, Petitioners request pursuant to N.Y. R.P.A.P.L. § 881 for an order granting Petitioner a license to enter is hereby granted to the extent that the (1) Petitioner has 60days from the date of this Order to obtain the required permits to commence work; (2) Petitioners are to pay respondents professional engineering fees within 15 days of receiving invoices for the same, not to exceed \$8,000.00; (3) Petitioners must obtain and maintain insurance to protect the respondents and shall pay reasonable attorney fees associated with entering into the agreements not to exceed \$6,000.00 for negotiating the agreements; (4) Petitioners shall pay a licensing fee of \$6,399 per month; (5) it is further

Ordered, Petitioners are hereby granted a license for a term of no more than 16 months to begin upon the petitioner obtaining the pertinent building permits pursuant to this Order.

This constitutes the Decision/Order of the Court.
Date: October 19, 2021

ENTER FORTHWITH:



RICHARD VELASQUEZ, J.S.C.

KINGS COUNTY CLERK
FILED
2021 NOV - 1 AM 10:25