

145 E. 57th St. Assoc. LLC v 149 E. 57 Aldo LLC
2021 NY Slip Op 32567(U)
December 6, 2021
Supreme Court, New York County
Docket Number: Index No. 150660/2021
Judge: Frank P. Nervo
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. FRANK NERVO

PART

04

Justice

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145 EAST 57TH STREET ASSOCIATES LLC, BIC 57TH
STREET LLC

Plaintiff,

INDEX NO. 150660/2021MOTION DATE 01/21/2021MOTION SEQ. NO. 001

- v -

149 EAST 57 ALDO LLC,

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for

MISC. SPECIAL PROCEEDINGS

This matter was transferred to Part IV.

Petitioner seeks an order, pursuant to RPAPL § 881, granting it a license to enter respondent's property to install required roof protection and construction safety devices. Petitioner must perform masonry repair work along the brick façade of its building, including along a wall shared with respondent's building. Respondent opposes contending, inter alia, that petitioner has erected a sidewalk shed in front of its building without its permission and that petitioner waited 42 days after receiving a work permit to seek access from respondent - "there is no emergency" (NYSCEF Doc. No. 17).

RPAPL § 881 provides that upon a recitation of circumstances requiring entry onto an adjoining property, including the dates entry is sought, the Court shall grant a license in the appropriate case. In so doing, the Court applies a reasonableness standard, balancing a petitioner's hardship, if the license is not granted, against the adjoining owner's inconvenience, if the license is granted (*400 E57 Fee Owner LLC v. 405 East 56th Street LLC*, 193 AD3d 626 [1st Dept 2021]; *Matter of Board of Mgrs. of Artisan Lofts Condominiums v. Moskowitz*, 114 AD3d 491 [1st Dept 2014]; *Queens Theater Owner, LLC v. WR Universal, LLC*, 192 AD3d 690 [2d Dept 2021]). Where a license is granted, the encumbered property owner may be entitled to a licensing fee consummate with the inconvenience imposed as well as actual damages occurring as a result of the entry (*Matter of New York Pub. Lib. v. Condominium Bd. of the Fifth Ave. Tower*, 170 ad3d 544 [1st Dept 2019]; *Van Dorn Holdings, LLC v. 152 W58th Owners Corp.*, 149 AD3d 518 [1st Dept 2017]; RPAPL § 881).

Here, petitioner seeks a license to install, maintain, and access protective roof scaffolding for repairs expected to last four months. Petitioner has established the encroaching protective structures proposed are required by the NYC Building Code for the façade work petitioner plans to complete (Code §§ 3309.1 & 3309.10). As respondent's building's roof is approximately nine-stories

below that of petitioner's, roof protection on respondent's building is undoubtedly necessary. Respondent's roof is utilized solely to support mechanical equipment, and therefore there is little, if any, inconvenience to respondent in allowing protective roof scaffolding to be placed upon its roof.

Although respondent opposes petitioner's application for a license, its opposition is chiefly devoted to bemoaning perceived late responses from petitioner and the necessity of hiring attorneys to represent its interests in negotiations with petitioner. Respondent does not contend that the proposed protections will limit its ability to enjoy the property, or that the encroaching protections will negatively affect its business. Accordingly, respondent's generalized complaints do not rise to level sufficient to warrant denial of a license to petitioner.

Turning to costs and fees, attorney's fees and litigation costs are incidents of litigation, and a prevailing party is not entitled to recompense for these expenses absent agreement between the parties or statute or rules otherwise (*A.G. Ship Maintenance Corp. v. Lezak*, 69 NY2d 1, [1986]). However, RPAPL § 881 provides that the license shall be granted "upon such terms as justice requires," and justice often includes the award of a licensing fee, attorney's fees,

and engineer's fees (*DDG Warren LLC v. Assouline Ritz I, LLC*, 138 AD3d 539, 540 [1st Dept 2016]). This is because "the respondent to an 881 petition has not sought out the intrusion and does not derive any benefit from it ... [e]quity requires that the owner compelled to grant access should not have to bear any costs resulting from the access" (*DDG Warren LLC v. Assouline Ritz I, LLC*, 138 AD3d 539, 540 [1st Dept 2016]). A property owner, therefore, should not be forced to incur the costs of a design professional to ensure that the proposed licensee's design will not damage the owner's property (*Van Horn Holdings, LLC v. 152 W. 58th Owners Corp.*, 149 AD3d 518 [1st Dept 2017]).

However, the award of such fees to a respondent owner is not automatic, but rather dictated by concerns of equity. A proceeding under RPAPL § 881 necessarily flows from the failure of the parties to successfully negotiate a licensing agreement. As our sibling court prudently stated "[t]he court must be mindful of the fact that it is called upon to grant access after the parties have failed to reach an agreement, and must not allow either party to overreach and use the court to avoid negotiating in good faith" (*North 7-8 Investors, LLC v. Newgarden*, 982 NY2d 704 [Sup. Ct. Kings County, 2014]).

Here, for a license to place a protective roof scaffolding over its building, respondent has demanded escrow deposits or bonds exceeding \$2,000,000.00 (two-million dollars) (see NYSCEF Doc. No. 17 at ¶34). Respondent's demand for such extraordinary deposits is wholly conclusory; respondent has not claimed any loss of enjoyment of its property due to the proposed license, nor has it cited any authority supporting such exorbitant fees for the placement of a routine roof protections (*c.f.* *PB 151 grand LLC v. 9 Crosby, LLC*, 95 NYs3d 1219(A) [Sup. Ct. NY County 2018] awarding \$2,500.00 monthly license for scaffold placed on respondent hotel's terrace partially blocking view and limiting use of terrace; *Brown v. City of New York*, 2020 NY Slip Op. 32937 [Sup. Ct. NY County, 2020] awarding \$500.00 monthly license for roof protection; 26 *East 78 Street LLC v. Mark Propco LLC*, 2021 WL 4198088 [Sup. Ct. NY County, 2021] awarding \$500.00 monthly license for roof protection).

The Court finds respondent's palpably unreasonable demands evince a failure to negotiate in good faith and, accordingly, the Court declines to award respondent attorney's or engineer's fees or costs associated with this action. Notwithstanding, respondent is entitled to a licensing fee, and the trivial inconvenience to respondent - placing a scaffold on its roof without impacting access to its property - warrants an appropriately modest licensing fee. The

Court, therefore, awards respondent a monthly fee of \$500.00 for the duration of the license, absent further order. Petitioner shall place \$25,000.00 in an escrow account, in the event that the instant roof protections cause damage to respondent's building, to be determined by the Court at the end of the license period.

As to attorney's fees, respondent devotes significant portions of its opposition outlining the various retainers, hourly rates, and agreements it entered in engaging counsel to represent it during negotiations. However, having found that respondent negotiated in bad faith, as evinced by palpably unreasonable demands, the Court declines to award same. In any event, it is beyond cavil that such costs are incidents of negotiation; had the parties successfully reached an agreement regarding the instant dispute, these attorney fees would be borne by each party.

Accordingly, it is

ORDERED and ADJUDGED that the petition is granted and petitioner, agents, contractors and employees are granted a 12-month license, following notice of entry of this decision, to enter respondent's property to install the roof protection, and to have access to same; and it is further

ORDERED that petitioner shall remit to respondent, as a condition of the above license, a \$500.00 monthly licensing fee for the period that it enters or causes the roof protection to remain on respondent's property; and it is further

ORDERED that respondent has not negotiated in good faith and is therefore not entitled to engineer's or attorney's fees; and it is further

ORDERED that should it appear construction work will continue past the 12-month licensing period, the parties shall confer in good faith to stipulate to appropriate extension(s). Should the parties be unable to reach agreement regarding extensions of the instant license, they may petition the Court for further appropriate relief, as provided by the CPLR and RPAPL; and it is further

ORDERED that, at the conclusion of the licensing period, respondent shall serve notice of any claimed damage to its property resulting from the roof protection within 60 days following the removal of same. Failure to timely serve notice of damage shall constitute waiver of same; and it is further

ORDERED that the parties shall confer in good faith regarding claimed damage, as above, if any and the aforementioned escrow funds shall be remitted to respondent for recompense for such damage, should the parties reach agreement regarding damage amounts. Should the parties be unable to reach agreement regarding damage, if any, to respondent's building, they may petition the Court for further appropriate relief, as provided by the CPLR and RPAPL within 60 days of the removal of the instant roof protection; and it is further

ORDERED that should respondent fail to timely claim damages, as above, escrow funds shall be remitted to petitioner following the end of the license period; and it is further

ORDERED that any requested relief not addressed herein has nevertheless been considered and is hereby denied.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

<u>12/6/2021</u>			
DATE		FRANK MERVO, J.S.C.	
CHECK ONE:	☒ CASE DISPOSED	☐ NON-FINAL DISPOSITION	
	☒ GRANTED ☐ DENIED	☐ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE