

E83 Props. LLC v LL 1592 Second Ave. LLC
2021 NY Slip Op 32672(U)
December 14, 2021
Supreme Court, New York County
Docket Number: Index No. 158834/2021
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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E83 PROPERTIES LLC, ELK 300 E 83LLC

Plaintiff,

- v -

LL 1592 SECOND AVENUE LLC,

Defendant.

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INDEX NO. 158834/2021
MOTION DATE 09/27/2021
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30

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

Petitioners and respondents are adjoining landowners with a shared wall between their properties. Petitioners seek to demolish their current building and construct a new building in its sted. Accordingly, petitioners seek an order, pursuant to RPAPL § 881, to enter respondent's property to: conduct a preconstruction survey; install/maintain window protection; install tie-backs into the shared party wall; install weather protection; and install overhead protection during demolition and construction phases of petitioners' project. Respondent opposes contending that petitioner E83 Properties lack standing as it is not currently an owner, access to respondent's property has not been denied, and the proposed tie-backs are an inappropriate permanent encroachment upon respondent's building.

As an initial matter, petitioners' memo of law in support fails to comply with the Uniform Rules in that no wordcount certification is provided (22 NYCRR § 202.8-b). "Page limits on submissions are appropriate, as is the rejection of papers that fail to comply with those limits" (*Macias v. City of Yonkers*, 65 AD3d 1298 [2d Dept 2009]). The current Uniform Rules had been in effect for nearly ten months prior to petitioner's application, public comment on these rules was sought in August 2020, and the rules were published, via Administrative Order 270/20, in December 2020. Additionally, the Uniform Rules are available on the Court's website. This is not a situation where counsel can reasonably argue they were caught unawares of the Uniform Rules. Notwithstanding, given the preference for adjudicating matters on the merits, and the subsequent refiling that would occasion a procedural denial of the petition, the Court, in its discretion will not deny the application for failure to comply with the Uniform Rules.

Turning to the merits, the Court first addresses the issue of standing, as it must. Respondent contends that petitioner E 83 Properties does not currently own the subject building, and as RPAPL § 881 provides only "an owner or lessee" the right to enter an adjoining property, E 83 Properties does not have standing to bring this action. In response, petitioners contend that the property

is currently owned by petitioner ELK 300 and ownership is being transferred to petitioner E 83 Properties, although such transfer is not yet complete. Thus, petitioners contend that petitioner ELK 300 undoubtedly has standing to bring this application, and naming E 83 Properties as an additional petitioner now serves judicial economy, as a further application granting E 83 Properties a license, following finalization of the transfer of ownership, will, therefore, be unnecessary.

The Court finds that petitioner ELK 300, as owner, has standing to bring this RPAPL § 881 action. However, while petitioners' arguments related to E 83 Properties' standing would serve to conserve this Court's limited resources, and makes good practical sense, RPAPL § 881 does not allow for prospective owners to bring an action. Upon transfer of ownership to E 83 Properties, E 83 Properties may petition this Court to have any license transferred from ELK 300 to E 83 Properties, should same be necessary.

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 incumbered 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).

“Where a party wall runs directly over the boundary between the two parcels, in the absence of any agreement or statute providing otherwise, each of the two adjoining owners owns in severalty so much of the wall as stands upon his own lot, each having an easement in the other strip for purposes of the support of his own building” (*Sakele Bros. v. Safdie*, 302 AD2d 20 [1st Dept 2002] [internal quotation removed]; see also *Partridge v. Gilbert*, 15 NY 601 [1857]).

Stated differently, each adjoining owner of a shared wall is simultaneously the dominant and servient tenement to the easement of the other, and each retains

the right to enter upon their neighbor's portion of the shared wall to make necessary repairs (*Partridge v. Gilbert*, 15 NY at 607).

However, RPAPL § 881 is not the proper vehicle to seek to demolish, repair, or rebuild a party wall (*Sakele Bros., LLC v. Safdie*, 302 AD2d 20, 28 [1st Dept 2002] “reliance on RPAPL 881 [to demolish, repair, or rebuilding a party wall] is misplaced”). Likewise, permanent encroachments are not properly to subject of a RPAPL § 881 action (*Matter of Tory Burch LLC v. Moskowitz*, 146 ad3d 528 [1st Dept 2017]; *Broadway Enterprises, Inc. v. Lum*, 16 AD3d 413 [2d Dept 2005] RPAPL § 881 petition denied as foundation underpinnings a permanent encroachment).

Here, petitioner has submitted evidence that the proposed tiebacks are the only means of meeting its requirement to maintain the structural integrity of the party wall in accordance with New York City Building Code § 3309.8 (Affidavit of George Cambourakis, Professional Engineer - NYSCEF Doc. No. 29 at ¶ 8). Notably, the tiebacks will not intrude beyond the face of respondent's side of the shared wall and will exist entirely within the shared wall (*id.* at ¶ 6). In opposition, respondents have failed to identify any other method by which the structural integrity of the shared wall may be assured.

Although respondents urge dismissal of the petition in its entirety, they have not offered opposition to those portions of the petition seeking entrance to conduct a preconstruction survey; install/maintain window protection; install weather protection; and install overhead protection during demolition and construction phases of petitioners' project. Accordingly, those portions of the petitioner are, effectively, unopposed. Failure to raise an argument in opposition constitutes waiver (*Raia v. Potoschnig*, 170 AD3d 433 [1st Dept 2019]; *Wilmington Trust v. Sukhu*, 155 AD3d 591 [1st Dept 2017]).

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, respondent has not identified any fees or costs beyond that of its counsel, incurred as a result of negotiations between the parties and these proceedings. Respondent has not submitted any evidence that it retained a design professional to review the tiebacks or other protective measures. In any event, it is beyond cavil that attorney fees are incidents of represented

negotiation; had the parties successfully reached an agreement regarding the instant dispute, these attorney fees would be borne by each party.

Furthermore, to the extent respondent has sought a licensing fee for entrance onto its property its claims amount to mere boilerplate, without support in analogous caselaw or fact. Similarly, respondents single sentence seeking compensation and costs stemming from relocation of its tenants is insufficient for this Court to award same, and evinces the importance of such relief to respondent (NYSCEF Doc. No. 27 at p 15). Respondent's bare assertion that it is entitled to "actual damages" without explanation of whether or under what circumstances it has been caused to incur same warrants no further discussion.

Accordingly, it is

ORDERED that the petition is granted in its entirety; and it is further

ORDERED that petitioner E 83 Properties shall be granted a license for 42 months from the date of this order to enter respondent's property to install the

protective measures outlined in the petition in furtherance of the planned demolition and construction work.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

12/14/2021
DATE



FRANK NERVO, 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