

**Thomas Anthony Holdings LLC v Goodbody**

2022 NY Slip Op 30306(U)

January 20, 2022

Supreme Court, New York County

Docket Number: Index No. 157008/2021

Judge: Verna L. Saunders

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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. VERNA L. SAUNDERS, JSC PART 36**

*Justice*

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**INDEX NO. 157008/2021**

THOMAS ANTHONY HOLDINGS LLC,  
Petitioner,

**MOTION SEQ. NO. 001**

- v -

**DECISION + ORDER ON  
MOTION**

BRIDGET GOODBODY and NEIL RADEY,  
Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion to/for

**LICENSE**

Petitioner, the owner and developer of a brownstone located at 224 West 22<sup>nd</sup> Street, New York New York 10011, Block 771, Lot 52 (“the premises”), is performing certain construction and improvements on the premises, which adjoins 226 West 22<sup>nd</sup> Street, New York, New York 10011 (“the adjacent property”). Petitioner maintains that, in order to remove a green construction wall (as depicted on a photograph annexed to the application) (NYSCEF Doc. No. 2, *photo*), it is necessary to protect respondent’s rooftop by installing certain plywood and that, despite requests to access the adjoining property to perform the applicable and necessary work, respondents have refused access. (NYSCEF Doc. No. 1, *petition*).

Petitioner commenced this action against respondents and now moves, by order to show cause, pursuant to RPAPL 881, for an order (1) granting it, without further interruption or delay, a license to enter upon and access the adjacent property to install, maintain and remove, as applicable and necessary, temporary overhead protection, roof protection and chimney work (collectively “the protective work”), in accordance with RPAPL 881 and the New York City Building Code (“the Code”) §§ 3309.1, 3309.2, 3307.6, 3309.10, and 3309.12; (2) declaring that respondents have unreasonably denied and/or refused petitioner access to the adjacent property for purposes of complying with the Code; (3) declaring that respondents shall be responsible for all damages and liability to the adjacent property that may arise out of respondents’ failure to grant petitioner access to the adjacent property in accordance with RPAPL 881 and § 3309.2; and, lastly, (4) prohibiting respondents from interfering with petitioner’s planned protective work. (NYSCEF Doc. No. 9, *OSC*).

Annexed to its application, petitioner submits, *inter alia*, (i) the affidavit of Doug Manowitz (“Manowitz”), a construction manager at Stone Core & Shell Construction Consultants LLC, sworn to and dated July 23, 2021, who annexes a copy of the subject Site Safety Logistics Plan ( the “SSP”) (NYSCEF Doc. Nos. 4-5, *Manowitz’s affidavit and exhibit*); (ii) the affirmation of Eli Raider, Esq., affirmed to and dated July 27, 2021 (NYSCEF Doc. No. 7, *Raider’s affirmation*); and (iii) a memorandum of law dated July 27, 2021 (NYSCEF Doc. No. 8, *memorandum of law*).

Raider affirms that he was “advised by the design and construction team that [p]etitioner is required to install, maintain, and remove, as applicable and necessary, [the protective work]”, which will be in accordance with RPAPL 881; the SSP, as annexed to Manowitz’s affidavit; and the Code. The design and construction team also informed Raider that the protective work is the least intrusive means of protecting the adjacent property and that the work cannot be performed without entering the adjacent property.

Raider represents that petitioner was certain that the parties had agreed, through counsel, in or about December 3, 2020, to a license fee of \$1,500.00 per month, which was a reasonable and acceptable sum. This agreement, however, was reached between Raider and Sana Susman, Esq. (“Susman”) of Kane Kessler, PC. On June 16, 2021, Jesse Rabinowitz (“Rabinowitz”), of Kane Kessler, PC., emailed Raider, stating the following: “[a]s you mentioned, your client has had numerous iterations of its project and its requested access over the year-plus duration of its active work performance, with several discussions and requests left open ended among the clients . . . I have also been advised that the licensing fee in the amount of \$30,000.00 was previously discussed and agreed to by your client.” On June 25, 2021, in response to Rabinowitz’s email, Raider, among other things, denied ever agreeing to a \$30,000.00 license fee. Raider further stated that Rabinowitz’s email constituted a refusal of access and, that if respondents did not materially change their position, petitioner would seek appropriate relief. Respondents did not respond to Raider’s June 2020 correspondence. (NYSCEF Doc. No. 7, *Raider’s affirmation*).

Petitioner now argues that it has demonstrated its entitlement to a license pursuant to RPAPL 881 and the Code § 3309.2, because the protective work is necessary to comply with the Code; petitioner is seeking to comply with the law; and that petitioner is prepared to provide appropriate insurance. Moreover, petitioner asserts that issuance of the license far outweighs the minimal inconvenience to respondents. (NYSCEF Doc. No. 8, *memorandum of law*).

In support of its application, plaintiff relies on the affidavit of Manowitz, a construction manager, who attests as to the reasonableness and necessity of the protective work. Specifically, Manowitz affirms that “[p]etitioner is required to install the [o]verhead [p]rotection so that it extends a minimum distance of five (5) feet over the sidewalk in front of the [a]djacent [p]roperty”; that “[p]etitioner’s engineer shall ensure that the [o]verhead [p]rotection resists impact loads from [c]onstruction [w]ork debris, materials, and equipment” and that “[u]pon information and belief, such protections are a standard and reasonable way of complying with Sections 3309.1, 3307.6.2 and 3307.6.3 of the Code, including any other applicable provisions of the Code.”

As to the roof protection, Manowitz affirms that, as depicted in the SSP, “[p]etitioner intends to protect the roof of the [a]djacent [p]roperty by installing [r]oof [p]rotection.” He further states that, “[t]he [r]oof [p]rotection will generally consist of 2” flame retardant rigid insulation covered by 2” x 10” flame retardant wood planks as well as 3/4” flame retardant plywood, on the roof of the [a]djacent [p]roperty, which shall be in compliance with the Code and the SSP Plans.” According to Manowitz, “[i]t is anticipated that a typical medium duty pipe scaffold frame and planks will be installed above existing chimneys, flues and skylights in order

to protect them and not interfere with their function. This will be attached to the temporary [r]oof [p]rotection and not directly to the existing roof of the [a]djacent [p]roperty.”

Addressing the chimney protection, Manowitz states, “[t]o the extent required under the Code, and as applicable to the [a]djacent [p]roperty, [p]etitioner shall extend and/or modify any applicable chimney flue(s) or exhausts if found to be in use (the ‘Flue Work’)” and that “[p]etitioner will file all plans and obtain approval from the DOB for the Flue Work and obtain all required certificates of operation for such flues.”

Manowitz asserts that such protections are customary and a reasonably safe way of complying with the Code for the project and that it is consistent with projects of similar type, complexity, and scale. (NYSCEF Doc. No. 4, *Manowitz’s affidavit*). Annexed to his affidavit, Manowitz submits the SSP and an updated version of the same. (NYSCEF Doc. Nos. 4-5, 12, *SSP*).

In opposition to the motion,<sup>1</sup> respondents contend, *inter alia*, that petitioner has failed to establish its entitlement to the relief sought herein insofar as respondents have neither unreasonably refused access nor unreasonably refused to enter into a license agreement. Respondents maintain that “[p]etitioner never provided the nature of its access, never provided the nature of its proposed protections and never provided information, plans, or drawings or insurance information, as repeatedly requested.” Still, despite “the labels ‘Overhead Protection,’ ‘Roof Protection’ and ‘Chimney Work,’” respondents assert that, on this application, “[p]etitioner fails to give any specific information, plans, specifications or other details in order for [r]espondents to determine the reasonableness and necessity of access or protections.” Moreover, respondents assert that, the plans that petitioner did submit, are either unrelated to the protective work or fail to address other potential concerns about damage to their property (NYSCEF Doc. No. 25, *memorandum of law*).

These arguments are corroborated by the affidavit of Rodney D. Gibble, P.E., SECB (“Gibble”), a professional engineer, who opines, *inter alia*, that, having reviewed Manowitz’s affidavit and the documents annexed thereto, “there is nothing at all regarding the protection proposed for 226 West 22nd Street in the entire 73 pages.” Furthermore, Gibble notes that, “[n]owhere in its submission does [p]etitioner provide anything from a licensed architect or engineer concerning the property protections on [r]espondents home.” According to Gibble, the standard practice is that the party undertaking the demolition or construction provides full and complete details of the proposed protections, supported by plans or drawings, signed and sealed by professional engineers. (NYSCEF Doc. No. 22, *Gibble’s affidavit*).

In her affidavit, respondent Bridget Goodbody (“Goodbody”) denies petitioner’s contention that she and her husband, respondent Neil Radey, have unreasonably refused petitioner access to the adjoining property. Instead, she claims that petitioner ignored repeated requests for information regarding the scope of the project and information about how respondents could protect their property in the process. In Spring 2019, petitioner approached respondents about a license, but again failed to provide critical information about the scope of

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<sup>1</sup> Together with their opposition papers, respondents filed an answer wherein they raise affirmative defenses and assert counterclaims. (NYSCEF Doc. No. 26, *answer*).

the work and proposed protections. Goodbody further asserts that petitioner has a history of causing damage to respondents' property and that, prior to the filing of this application, petitioner, without permission, caused its workers to enter respondents' roof, destroyed certain of their chimney flues and installed improper temporary flu extension and other materials on their property (NYSCEF Doc. Nos. 17-21, *Goodbody's affidavit and exhibits*). This is corroborated by Anthony Rini, P.E., a licensed engineer who inspected the adjoining premises' roof in or about November 2020 and who opined that petitioner had improperly and illegally extended respondents' chimney flues creating a hazardous condition to the occupants of respondents' home and presented a danger to their property. (NYSCEF Doc. Nos. 23-24, *Rini's affidavit and November 2020 report*).

Also, in opposition, counsel for respondents submits an email, dated December 2, 2020, reflecting that during settlement negotiations, respondents suggested "\$1,500 per month, with the number of months TBD" (NYSCEF Doc. No. 16, *email*), which she claims would be contingent upon the scope of the work to be performed.

The Code § 3309.2 states that:

"[t]he responsibility of affording any license to enter adjoining property shall rest upon the owner of the adjoining property involved; and in case any tenant of such owner fails or refuses to permit the owner to afford such license, such failure or refusal shall be a cause for the owner to dispossess such tenant through appropriate legal proceedings for recovering possession of real property. Nothing in this chapter shall be construed to prohibit the owner of the property undertaking construction or demolition work from petitioning for a special proceeding pursuant to Section 881 of the *Real Property Actions and Proceedings Law*."

The court, in its discretion may grant a petitioner's application pursuant to RPAPL 881, which states, in relevant part:

"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... without entering the premises of the adjoining owner or 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 to enter . . . The petition and affidavits, if any, shall state the facts making such entry necessary and the date or dates on which entry is sought. Such license shall be granted by the court in an appropriate case upon such terms as justice requires. The licensee shall be liable to the adjoining owner or his lessee for actual damages occurring as a result of the entry." (see *Matter of 400 E57 Fee Owner LLC v 405 E. 56th St. Llc*, 193 AD3d 626, 626 [1st Dept 2021]; *DDG Warren LLC v Assouline Ritz 1, LLC*, 138 AD3d 539, 540 [1st Dept 2016].)

RPAPL 881 is a statute that stands in derogation of the existing common law regarding trespass and, thus, should be read narrowly. (see *Deutsche Bank Trust v 120 Greenwich Dev. Assoc.*, 7 Misc 3d 1006[A] [Sup Ct, NY County 2005], citing *Bayswater Health Related Facility v Karagheuzoff*, 37 NY2d 408 [1975].) Therefore, when assessing whether to grant a RPAPL

881 application, “[c]ourts are required to balance the interests of the parties and 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.” (*Matter of 400 E57 Fee Owner LLC v 405 E. 56th St. LLC*, 193 AD3d at 626.)

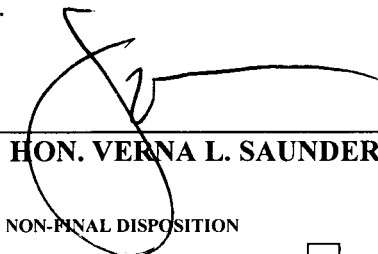
Here, the petition is denied. Case law is clear that “[b]efore it can grant a license pursuant to RPAPL § 881, it is critical that the [c]ourt be apprised of the ‘exact nature, timing and extent of the [work] requiring the license.’” (*Matter of Pav-Lak Indus., Inc. v Wilshire Ltd.*, 2009 NY Slip Op 33110[U], \*5 [Sup Ct, NY County 2009], quoting *Deutsche Bank Trust v 120 Greenwich Dev. Assoc.*, 7 Misc 3d 1006[A] [Sup Ct, NY County 2005].) Petitioner’s application lacks specificity regarding the full extent of the protective work it intends to perform at the adjoining premises or the necessity of the same. While Manowitz does submit the SSP, he fails to proffer to this court any explanation or guidance regarding the SSP’s contents. Instead, Manowitz affirms, in rather conclusory fashion, that the work will comply with said plans, will be Code compliant, and that access is necessary (see generally *Phoenix Owners Corp. v Mindel Residential Props., L.P.*, 2020 NY Slip Op 32835[U], \*3 [Sup Ct, NY County 2020] [“petitioner seeks to put the court in the role of the Department of Buildings and have it sort through respondent’s objections to the proposed work and temporary protections. While it is true that petitioner’s plans can be self-certified, the prudent course of action . . . would have been to seek DOB approval when respondent raised its objections. The DOB is an agency with the specialized expertise to make the determinations that the parties would leave up to this court”].) Notably, Manowitz’s representation is challenged by Gible, who maintains that petitioner’s purported protective work lacks sufficient specificity to address respondents’ concerns regarding potential damage to their property and their safety; that petitioner fails to submit plans, drawings, details, or calculations for respondents to assess petitioner’s requests and that, to the extent it submitted the SSP, they are irrelevant to the protective work herein requested. In light of the foregoing and given that this court is unable to ascertain from the papers the extent of the protective work, including whether any inconvenience to respondents will in fact be slight in comparison to petitioner’s claimed hardship, it is hereby

**ORDERED** that the application is denied in its entirety; and it is further

**ORDERED** that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for respondents shall serve a copy of this decision and order, with notice of entry, upon petitioner.

This constitutes the decision and order of this court.

January 20, 2022

  
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HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART