

Matter of 419 BR Partners LLC v Zabar
2022 NY Slip Op 30357(U)
January 20, 2022
Supreme Court, New York County
Docket Number: Index No. 156867/2021
Judge: Verna L. Saunders
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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. 156867/2021

In the Matter of the Application of:
419 BR PARTNERS LLC,
Petitioner,

MOTION SEQ. NO. 001

For an Order and Judgment pursuant to Section 881 of the
Real Property Actions and Proceedings Law for access to
Adjoining Property

-against-

DECISION + ORDER ON
MOTION

ELI ZABAR, Trustee, SONDRA ZABAR, Trustee, and DEVON
FREDERICKS 2012 FAMILY TRUST,
Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 12, 13, 14, 15, 16, 17, 18,
19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34

were read on this motion to/for

LICENSE

Petitioner 419 BR Partners LLC, the owner of the premises located at 419 East 91st Street,
New York, New York, 10128, commenced this special proceeding against respondents, pursuant to
RPAPL 881, for an order granting it license to access the adjoining property located at 421 East 91st
Street, New York, New York 10128 ("adjacent premises"). Petitioner seeks access to the adjacent
premises as necessary to perform renovations and expansion of the existing building at the premises.
The project, when completed, will result in a facility which provides homeless services. (NYSCEF
Doc. No. 1, petition).

Petitioner now moves, by order to show cause, to "(i) perform a pre-construction survey of
the adjacent premises, which will consist of photographing the existing conditions thereof (the
'Survey'); (ii) install, maintain, and remove monitoring equipment on the [a]djacent [p]remises in
order to ensure that the [p]roject does not cause detrimental movement thereto (the 'Monitoring');
(iii) install, maintain, and remove roof protection over the roof of the [a]djacent [p]remises (the 'Roof
Protection'); (iv) install, maintain, and remove a standard overhead protection system over the
bulkhead on the roof; (v) install, maintain, and remove cantilevered overhead protection into the
airspace of the [a]djacent [p]remises; (vi) install, maintain, and remove pipe scaffolding with debris
netting in the airspace of the [a]djacent [p]remises, which will be supported by the cantilevered
protections, and to perform exterior finishing work on the eastern wall of the [p]roject [p]remises
therefrom, all of which said access is required by applicable law and shall be maintained for
approximately thirty (30) months from the date that this [c]ourt grants such license; together with all
such other and further relief as this [c]ourt deems just and proper." (NYSCEF Doc. No. 1, petition;
12, conformed copy of OSC).

In its memorandum of law, petitioner argues that it retained Professional Engineering PLLC to, among other things, prepare the temporary protection plans bearing Drawing Nos. EQ-001.00 – EQ-006.00 dated May 11, 2021, Drawing Nos. EQ-001.00 – EQ-004.00 dated June 9, 2021, Drawing Nos. EQ-001.00 – EQ-007.00 dated June 16, 2021, and Drawing Nos. EQ-001.00 – EQ-003.00 dated June 17, 2021 (collectively, “May 2021 PP”) (NYSCEF Doc. No. 7, *Exhibit A to Lampard’s aff.*). Petitioner also retained ZV Drafting to prepare a site safety logistics plan bearing Drawing Nos. SSP-002.00, SSP-003.00, SSP-004.00, SSP-100.00, SSP-101.00, SSP-102.00 and SSP-103.00 dated March 19, 2021 (collectively, the “Site Safety Plan”) (NYSCEF Doc. No. 8, *Exhibit B to Lampard’s aff.*). Petitioner contends that, as early as April 2021, it made numerous attempts to obtain access to the adjacent property to install “code-required protections” on the adjacent premises as is required to complete its project. Access was again requested on May 5, 2021 and June 21, 2021. Petitioner concedes that, “[a]lthough [a]djacent [o]wner, through its attorney, recently provided some initial comments in connection with the license agreement,” respondents have failed to give petitioner consent to access the adjacent premises, leaving petitioner with no choice but to commence this action in July 2021. It argues, in sum, that a license is necessary, pursuant to RPAPL 881, to access the adjoining premises in the manner requested in its petition to comply with several sections of the New York City Building Code (“Code”). Petitioner further alleges that the inconvenience to respondents is slight compared to the hardship it will suffer if the application is denied. (NYSCEF Doc. No. 9, *memorandum of law*).

Annexed to its motion papers, petitioner submits, *inter alia*, deeds for the subject premises (NYSCEF Doc. Nos. 2-3, *deeds*); notice letters requesting access (NYSCEF Doc. No. 5, *notice letters*); as well as, the affidavit of Stephen J. Lampard, P.E. (“Lampard”), a licensed engineer employed with Ancora Engineering PLLC, who avers, in relevant part, that, after reviewing the May 2021 PP and the Site Safety Plan, the temporary protections proposed by plaintiff at the adjoining premises are safe; will cause minimal intrusion; and meet Code requirements. (NYSCEF Doc. Nos. 6-8, *Lampard Aff. with exhibits*).

In opposition to the application, plaintiff submits, *inter alia*, the affidavit of Spencer Goroff, P.E. (“Goroff”), a licensed engineer and president of Spencer Engineering P.C. (“Spencer”), who affirms that Spencer was hired by petitioner to provide and perform engineering services, including a plan review of various construction plans and filings, including the May 2021 PP (NYSCEF Doc. No. 21); the demolition plan (“DM plan”); support of excavation plan (“May 2021 SOE”); and the test pit analysis (NYSCEF Doc. Nos. 21-24). Relying on said affidavit, respondents contend that the verified petition fails to state a cause of action pursuant to CPLR 3211(a)(7) because, *inter alia*, the plans relied upon by petitioner in this application, as well as amendments made to said proposals, present a clear and present danger to respondents’ property. Specifically, respondents assert that the May 2021 SOE raises concerns regarding potential dangers to respondents’ foundation. Respondents argue that it is unclear from the May 2021 SOE whether petitioner will be digging or underpinning deeper than the foundation of respondents’ property, which could result in the building collapse, a vacate order, demolition of the building, etc. Respondents further contend that petitioner submitted to respondents a subsequent support of excavation plan in August 2021 (“the August 2021 SOE”), after the filing of this proceeding, that show an excavation below the foundation of respondents’ property with no specifications for the vertical and lateral support of said foundation.

Goroff affirms that, in his professional opinion, the subject plans leave open the possibility of “catastrophic damage” to respondents’ foundation because, although the current plans do not seek to underpin respondents’ property, “it is impossible to know whether the underpinnings of

[r]espondents' [p]roperty is required pursuant to [Building Code] §§ 3309.4 and 3309.4.1." (NYCEF Doc. No. 33 ¶ 16). According to Goroff, on September 9, 2021, after the filing of this proceeding, respondents received the August 2021 SOE, as well as, new protection plans ("July 2021 PP") (NYSCEF Doc. Nos. 28-29, *superseding PP and SOE*). Goroff avers that a copy of the new plans reflect that the foundation plan changed from a classic foundation to a "mat-slab" foundation, which he asserts is a material change. The August 2021 SOE showed excavation and/or underpinning of petitioner's property extending deeper than the foundation of respondents' property. Goroff states,

"the design of the matt slab is a 2.5 foot thick piece of concrete poured over the entire footprint of [p]etitioner's [p]roperty. That is enormously heavy. In addition, the matt slab starts at the very bottom point of the foundation on [r]espondents' [p]roperty and goes 2.5 feet beneath the level of [r]espondents' foundation. The issue is that the loading, meaning weight distribution, goes out from a foundation at a 45 degree angle. With the matt slab being entirely deeper than the lowest point of the foundation on [r]espondents' [p]roperty, the loading will spread beneath the foundation of [r]espondents' [p]roperty. Such an occurrence re[pre]sents a real danger and possibility of disturbance of the soil beneath [r]espondents' foundation and/or settling of the foundation itself causing damage, settling of the foundation, cracking or worse." (NYSCEF Doc. No. 33 ¶ 30).

Even if the August 2021 SOE and the July 2021 PP are considered, Goroff claims that they continue to violate the Code §§ 3309.1; 3309.4 and 3309.4.1. (NYCEF Doc. No. 33).

Next, respondents argue that the subject plans present a danger of damage to the roof of respondents' property. As confirmed by Goroff, the protection plan for respondents' property includes roof protection of at least one of respondents' greenhouses situated on the roof. The plan depicts truss structures going over one or more of the greenhouses with the truss structures being directly footed on the roof of respondents' property. However, the plans, assert respondents, fail to indicate whether petitioner has accounted for the load of these structures and whether the roof on respondents' property would be able to support such weight without suffering damage. Goroff opines that a load test is required to avoid any possibility of damage to the roof or possible collapse. More to this specific point, respondents submit the affidavit of Janine Howe ("Howe"), certified public accountant, chartered global management accountant and chief financial officer of Eli Zabar and the related entities that utilize the greenhouses on the roof of the adjoining property. Howe opines that the proposed construction, with scaffolding several feet into respondents' property, will block light and air to one or more of the greenhouses, "decimating [r]espondents' ability to grow crops therein", resulting in a loss of approximately \$684,195.00 in revenue over the course of thirty (30) months. (NYSCEF Doc. No. 34, *Howe's affidavit*).

Respondents also refute petitioner's claim that they have refused access insofar as they maintain that the parties were engaged in negotiations and that this action is, in essence, premature; that petitioner has failed to establish the element of necessity; and that the application must be denied inasmuch as petitioner has failed to name, as a party, fifty percent (50%) of the ownership interest in respondents' property.

In their counterclaims, respondents request (1) an order (a) declaring the rights of the parties; (b) declaring that the foundation and excavation plans do not adequately consider and/or account for the protection of the foundation of respondents' property; (c) a preliminary injunction restraining and enjoining petitioner from performing any work in contravention with the Code §§ 3309.1, 3309.4,

3309.4.1 and 3309.10; and (d) directing the amendment of plans to account for protection compliant with those sections (first counterclaim). The second counterclaim seeks attorneys and engineering fees pursuant to RPAPL 881 (second counterclaim) (NYSCEF Doc. No. 17, *answer*).

As relevant to the issues raised in this motion, it is well-settled that RPAPL 881 provides that:

“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 petition and affidavits, if any, shall state the facts making such entry necessary and the date or dates on which such entry is sought. Such a 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.”

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], 2005 NY Slip Op 50467[U], *3 [Sup Ct, NY County 2005], citing *Bayswater Health Related Facility v Karagheuzoff*, 37 NY2d 408 [1975].) “In determining whether or not to grant a license pursuant to [RPAPL 881], courts generally apply a standard of reasonableness.” (*Matter of Bd. of Mgrs. of Artisan Lofts Condominium v Moskowitz*, 114 AD3d 491, 492 [1st Dept 2014], citing *Mindel v Phoenix Owners Corp.*, 210 AD2d 167 [1st Dept 1994], *lv denied* 85 NY2d 811 [1995].) Moreover, “[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 Bd. of Mgrs. of Artisan Lofts Condominium v Moskowitz*, 114 AD3d at 492 [internal quotation marks and citation omitted]; see also *Matter of 400 E57 Fee Owner LLC v 405 E. 56th St. LLC*, 193 AD3d 626, 626 [1st Dept 2021].)

Here, as an initial matter, this court notes that fifty (50%) of the adjoining property is owned by Eli Zabar and Sondra Zabar, as trustees of the Devon Fredericks 2012 Family Trust dated October 10, 2012. The remaining fifty (50%) percent of the adjoining property is owned by Devon Fredericks and Sondra Zabar, as trustees of the Eli Zabar 2012 Family Trust dated October 10, 2012. (NYSCEF Doc. No. 19-20, *deeds*). Insofar as petitioner failed to commence this special proceeding as against all owners of the adjoining property, the petition is procedurally defective and is hereby dismissed. (see CPLR 401, 1001[a], 1003).

Assuming, *arguendo*, this court were to reach the merits of the application, it would nevertheless deny the relief requested. 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], 2005 NY Slip Op 50467[U], *4 [Sup Ct, NY County 2005].) Upon considering the affidavit of Goroff, this court finds persuasive that petitioner fails to establish that the plans relied upon in this proceeding adequately reflect the construction work it intends to perform on the adjoining property and that said plans address respondents’ concerns regarding, among other

things, the impact said construction will have on the foundation and roof of said property. (see generally *Matter of Tory Burch LLC v Moskowitz*, 146 AD3d 528, 529 [1st Dept 2017]; *Matter of Broadway Enters., Inc. v Lum*, 16 AD3d 413, 413 [2d Dept 2005].) Thus, this court cannot determine, based on the plans petitioner submitted, and given the subsequent changes to the same, whether the work petitioner intends to perform will result in only a slight inconvenience to respondents. Moreover, petitioner’s claim that respondents have refused access is also belied by the papers in opposition to the petition, which demonstrate respondents’ attempt to negotiate the terms of the agreement and seek clarification from petitioner regarding its construction plans.

Turning next to respondents’ request for attorney’s fees and professional fees, that request is hereby denied. While it is well-settled that, “[a] property owner compelled to grant a license should not be put in a position of either having to incur the costs of a design professional to ensure petitioner’s work will not endanger his property, or having to grant access without being able to conduct a meaningful review of petitioner’s plans” (*Matter of Van Dorn Holdings, LLC v 152 W. 58th Owners Corp.*, 149 AD3d 518, 519 [1st Dept 2017] [internal quotation marks and citation omitted; see also *Matter of House 93, LLC v Lipton*, 178 AD3d 545, 546 [1st Dept 2019]), “if a respondent is successful in opposing an 881 petition and no license is granted then that respondent would not be entitled to attorneys’ fees for successfully opposing the petition.” (*Matter of N. 7-8 Invs. LLC v Newgarden*, 43 Misc 3d 623, 631 [Sup Ct, Kings County 2014].) All remaining arguments have been considered and are either without merit or need not be addressed given the findings above. It is hereby

ORDERED that petitioner’s motion is denied and dismissed; and it is further

ORDERED that all other requests are also denied; and it is further

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

January 20, 2022


HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED
GRANTED

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART

OTHER