

Matter of 831 Knickerbocker, LLC. v Guzman

2022 NY Slip Op 30734(U)

February 28, 2022

Supreme Court, Kings County

Docket Number: Index No. 513251/2021

Judge: Carl J. Landicino

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.

At an IAS Term, Part 81 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 28th day of February 2022.

0

PRESENT: CARL J. LANDICINO, J.S.C.

In the Matter of the Application of
831 KNICKERBOCKER, LLC.,

Petitioner,

-against-

FOR AN ORDER AND JUDGMENT PURSUANT TO ARTICLE 4 OF THE NEW YORK CIVIL PRACTICE LAWS AND RULES AND SECTION 881 OF THE NEW YORK REAL PROPERTY ACTIONS AND PROCEEDINGS LAW FOR ACCESS AND ENTRY TO ADJOINING PROPERTY

RAFAEL GUZMAN and
JOSE AUGUSTIN PEREZ-CONSTANTINO,

Respondents.

Index No.: 513251/2021

SUA SPONTE
CORRECTED¹
DECISION AND ORDER
ON DEFAULT

Motion Sequence #1

2022 MAR -4 AM 9:30

KINGS COUNTY CLERK
FILED

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

	<u>Papers Numbered (NYSCEF)</u>
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	1-10, 14, 21
Affidavits of Service	15, 16, 20, 23, 25, 28, 29, 31-33,
Memorandum of Law.....	12

UPON review of the Verified Petition dated May 26, 2021; the Affidavit of Yehuda Cohen duly sworn to on June 2, 2021 and the exhibits attached thereto; the Affidavit of Wu Chen, P.E., duly sworn to on May 26, 2021 and the exhibits attached thereto; the annexed accompanying

¹ This Court's Decision and Order dated January 18, 2022 in the instant matter is corrected *nunc pro tunc*, to address certain non-material scrivener's errors. Petitioner shall serve a copy hereof upon each Respondent by regular mail within 20 days entry of this corrected Order.

memorandum of law, Petitioner 831 Knickerbocker LLC (“**Petitioner**”), having moved by order to show cause for an order pursuant to Real Property Actions and Proceedings § 881 for a license to enter respondents Rafael Guzman and Jose Augustin Perez-Constantino’s (together, “**Respondents**”) property located at 835 Knickerbocker Avenue, Brooklyn, New York (“**Respondents’ Property**”), for a period of approximately eighteen (18) months from the date Petitioner is granted access to Respondents’ Property, to enable Petitioner to install, maintain, and remove the following property protections on the Respondents’ Property (the “**Property Protection**”): (i) a pre-construction survey of the portions of the Respondents’ Property that will be impacted by the Temporary Protections (defined below) consisting of non-invasive photographic survey of existing conditions on Respondents’ Property; (ii) monitoring equipment, including but not limited to remote access vibration monitors, optical monitors, and crack monitors, to the extent necessary, on Respondents’ Property; (iii) weatherproofing of the exposed portion of the exterior of Respondents’ Property and flashing between the building at Respondents’ Property and the new building at Petitioner’s Property (“**Weatherproofing**”); (iv) access to the air space above Respondents’ Property in order to install and maintain an outrigger system, and/or a netting system extending from the new building at Petitioner’s Property and to finish the exterior of the façade of the building to be constructed on Petitioner’s Property (the “**Airspace Access**”); (v) installation, maintenance, and removal overhead protection where needed and surface protection on the roof of the Respondents’ (together with the Airspace Access, the “**Temporary Protection**”); and (vi) the extension, modification or relocation of the chimneys, flues, exhausts and vents at Respondents’ Property, to the extent necessary; Petitioner’s Order to Show Cause having regularly come before this Court on July 7, 2021 and Petitioner demonstrating that it timely served Respondents pursuant to the Order to Show Cause signed by the Honorable Lillian Wan,

J.S.C.; Respondents having failed to file opposition and having failed to appear before this Court on July 7, 2021, the return date of Petitioner's Order to Show Cause; Petitioner's Order to Show Cause having come before the Court on October 13, 2021 pursuant to this Court's Order dated July 22, 2021 and Petitioner demonstrating that it timely served Respondents pursuant to this Court's Order dated July 22, 2021; Respondents having failed to file opposition and having failed to appear before this Court on October 13, 2021, the return date of Petitioner's Order to Show Cause; Petitioner's Order to Show Cause having come before this Court on December 2, 2021 at 10:00 a.m. for a hearing in relation to Petitioner's Order to Show Cause pursuant to this Court's Order dated October 20, 2021, and Petitioner demonstrating that it timely served Respondents pursuant to this Court's Order dated October 20, 2021 and providing the testimony of Yehuda Cohen and Wu Chen, P.E. on behalf of Petitioner; Respondents having failed to file opposition and having failed to contact or appear before this Court on December 2, 2021, the hearing date of Petitioner's Order to Show Cause;

NOW, upon motion of Harris Bricken Sliwoski, LLP, attorneys for Petitioner, it is:

ORDERED AND ADJUDGED that the petition brought by Order to Show Cause seeking a license to enter onto Respondent's Property pursuant to RPAPL § 881, upon the default of the Respondents, is **GRANTED** in part and **DENIED** in part; and it is further,

ORDERED that Petitioner is granted a limited license to enter the **EXTERIOR** of Respondents' Property located at 835 Knickerbocker Avenue, Brooklyn, New York 11207 (Block: 3425, Lot: 7) for a period of eighteen (18) months commencing 5 business days from service of this Decision and Order as provided herein to:

- (i) perform a pre-construction survey of only the **EXTERIOR** portions of the Respondents' Property that will be impacted by the Temporary Protections (as

defined herein) consisting of non-invasive photographic survey of existing conditions on Respondents' Property. Petitioners may **REQUEST** of the Respondents access to the interior of the Respondents' Property to perform a pre-construction survey, provided however, that Petitioner is not permitted to access the interior of the Respondents' Property without the consent of the Respondents. Petitioner's right to seek an order granting access to the interior of the Respondents' Property to perform a pre-construction survey is denied without prejudice to renew on good cause shown;

- (ii) install monitoring equipment, including but not limited to remote access vibration monitors, optical monitors, and crack monitors, to the extent necessary, on the **EXTERIOR** Respondents' Property;
- (iii) install weatherproofing on the exposed portion of the exterior of Respondents' Property and flashing between the building at Respondents' Property and the new building at Petitioner's Property ("**Weatherproofing**");
- (iv) access to the air space above the Respondents' Property in order to install and maintain an outrigger system, and/or a netting system extending from the new building at Petitioner's Property and to finish the exterior of the façade of the building to be constructed on Petitioner's Property (the "**Airspace Access**"); and
- (v) install, maintain, and remove overhead protection where needed and surface protection on the roof of the Respondents' Property (together with the Airspace Access, the "**Temporary Protection**"); and it is further

ORDERED that Petitioner's request to extend, modify or relocate the chimneys, flues, exhausts and vents at Respondents' Property is **DENIED WITHOUT PREJUDICE**. In the event

Petitioner determines that extending, modifying, or relocating the chimneys, flues, exhausts and vents at Respondents' Property is necessary, Petitioner may make a further application for an order granting permission to extend, modify or relocate the chimneys, flues, exhausts and vents at Respondents' Property upon notice and upon good cause shown; and it is further

ORDERED that in the event Petitioner's requires access to the Respondents' Property to perform a pre-construction inspection of the interior of the Respondents' Property and/or to extend, modify or relocate the chimneys, flues, exhausts and vents at Respondents' Property, Petitioner shall make an application for such access by Order to Show Cause and shall include the factual and legal basis for the requested access and provide for service of all necessary parties, including but not limited to the occupants of the Respondents' Property; and it is further

ORDERED that Petitioner shall not unreasonably interfere with Respondents' necessary access to their property and quality of life, and shall take the necessary steps, measures and precautions to prevent and avoid any damage to Respondent's Property; and it is further

ORDERED that Petitioner shall indemnify and hold Respondents harmless to the fullest extent permitted by law for any liability, claims, damages or losses that Respondents may incur as a result of Petitioner's access to Respondents' Property; and it is further

ORDERED Petitioner is not granted access to perform any underpinning or any other permanent encroachment on the Respondents' Property, and it is further

ORDERED Petitioner's workmen and contractors are allowed access to respondents' air space only from Mondays through Fridays, between the hours of 8:30 a.m. to 5:00 p.m., and it is further

ORDERED Petitioner and its contractor shall each procure insurance (occurrence policy), in the amount of \$1,000,000.00, per occurrence and \$2,000,000.00 aggregate, covering each

Respondent by name, and listing 835 Knickerbocker Avenue, Brooklyn, N.Y., including any improvements thereon, as part of the covered work site, for any liability and damage Respondents may incur for property damage, personal injury, or wrongful death, including any liability under the Labor Law, as a result of Petitioner's work, whether or not caused by the negligence of Petitioner or its employees, agents, contractors or subcontractors, and providing Respondents first-party benefits to cover any damage to their property, including damage caused by earth movement. Petitioner shall maintain this insurance for the duration of this limited license, and it is further;

ORDERED Petitioner shall indemnify and hold Respondents harmless to the fullest extent permitted by law for any liability, claims, damages or losses, including attorneys' fees the Respondents may incur as a result of Petitioner's work, whether or not caused by the negligence of Petitioner or its employees, agents, contractors or subcontractors, and it is further

ORDERED Petitioner shall immediately report, in writing, to Respondents any damage to Respondents' property caused by Petitioner's work, and it is further

ORDERED Petitioner shall cure any violation placed against Respondents' property by a governmental or administrative agency as a result of Petitioner's work. Petitioner shall reimburse respondents for any fines or penalties imposed as a result of such violations, and it is further

ORDERED Petitioner shall take all steps necessary to remove any mechanic's lien, or other encumbrance, against Respondents' property arising from Petitioner's work or use of Respondents' air space, and it is further

ORDERED that Petitioner shall be liable to Respondents for any damages which Respondents' Property may suffer as a result of the granting of this Order and all damaged property shall be repaired at the sole expense of Petitioner; and it is further

ORDERED that upon the completion of the term of the license afforded by this Order, or

completion of the Petitioner's work whichever is earlier, Petitioner shall return the area of Respondents' Property which Petitioner has accessed to its original condition, and all materials used in construction, including temporary protections, and any debris shall be removed from the license area within 20 days; and it is further

ORDERED that Petitioner is solely responsible for the installation, maintenance and removal of the temporary protections licensed by this Order; and it is further

ORDERED that Petitioner shall serve a copy of this Order with Notice of Entry by Certified Mail and Overnight Mail upon each Respondent within ten (10) business days of entry of this Decision and Order.

This constitutes the Decision and Order of the Court.

ENTER:

Honorable Carl J. Landicino, J.S.C.

KINGS COUNTY CLERK
FILED
2022 MAR -4 AM 9:30