

**Phoenix Owners Corp. v Mindel Residential Props.  
L.P.**

2022 NY Slip Op 31284(U)

March 30, 2022

Supreme Court, New York County

Docket Number: Index No. 156549/2021

Judge: Verna L. Saunders

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.



respondent is seeking unnecessary and unreasonable additional protective measures. In summary, petitioner submits that it is entitled to a license to access respondent's property in order to complete its Local Law 11 work insofar as the license is necessary to satisfy its obligations under New York Local Law 11 and the New York City Building Code; it is willing to name respondent as an additional insured under the general contractor's and subcontractor's insurance; and its current Site Safety plans have been reviewed and approved by DOB. (NYSCEF Doc. No. 11, *Memorandum of Law*).

In opposition, respondent contends that this is the third litigation commenced between the parties regarding a license. Respondent submits that it commenced the first action when petitioner began Local Law 11 repairs without providing protections to respondent's property. The court referred the matter to a Special Referee whose report included specific protective measures petitioner should undertake when performing its work to respondent's property. The referee's report was confirmed by the court and upheld on appeal. (NYSCEF Doc. No. 24). Despite the referee's report, petitioner failed to incorporate the safety measures contained in the report in its Site Safety Plan, which caused the second litigation between the parties, commenced by petitioner. In that action, petitioner moved the court seeking a license to access and was denied as the safety concerns raised by respondent were not addressed and the proposed plans were not yet reviewed or approved by the DOB. (NYSCEF Doc. No. 28). Respondent argues, *inter alia*, that this third litigation is no different. Respondent avers that it has not denied petitioner a license to access its property and that its request to have the Site Safety Plans include the protections afforded by the referee's report is not unreasonable.

In support of its contention, respondent relies on an affidavit from Frank Fortino, licensed architect and president and founder of Metropolis Group, Inc., a building code consulting firm, who attests that while the current Site Safety Plans were approved by DOB and incorporate many of the objections raised regarding the previous plans, they are devoid of several significant Findings of the Special Referee and "[t]hese provisions should be added either to the Site Safety Plans or directly into a new License Agreement, as was done with the 2006 and 2011 License Agreements." (NYSCEF Doc. No. 31, *Affidavit of Frank Fortino*). Mr. Fortino goes on to state that Local Law 11 work is inherently dangerous; the findings of the Special Referee that have not been incorporated into the Site Safety Plan "have not been superseded by any of the amendments to the Code, are 'best practices' in the context of this project, and should be incorporated into the Site Safety Plans or in a License Agreement"; and petitioner's engineer has not suggested or demonstrated otherwise. (¶19-20, *Affidavit of Frank Fortino*).

Respondent further argues that aside from safety measures, the referee's report also requires petitioner to include insurance coverage listing the Mindels as certificate holders, in addition to the contractors and subcontractors. While petitioner has represented that it would insure respondent, it has not agreed to provide coverage to the Mindels. Respondent also argues that petitioner's attempt to relitigate the issues of protections to be afforded are barred by *res judicata* and collateral estoppel, but it does not seek a dismissal of the proceedings, instead respondent seeks to compel petitioner to sign the proposed license agreement annexed to its papers.

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].)

In an order dated December 14, 1993, this court granted a license under RPAPL § 881 to the extent that petitioner be permitted to enter respondent’s property “for the installation of the netting system proposed by [petitioner] and approved by the referee, which netting system should be constructed with as minimal entry, if any, upon the [respondent’s] property as possible, and [petitioner] shall be liable for any actual damage that occurs.” (NYSCEF Doc. No. 24, *Decision and Order, Herman Cahn, J.*) In that order, the court confirmed the referee’s report, denied petitioner’s application to disaffirm the referee’s report and ordered petitioner “to comply with the referee’s detailed recommendations.” The First Department upheld the decision, which adopted the referee’s report. (*Mindel v Phoenix Owners Corp.*, 210 AD2d 167 [1st Dept 1994]). Subsequently, the parties entered into a license agreement in 2006 and in 2011, both of which incorporated the referee’s report. The recent license, which is the subject of this litigation, fails to incorporate the safety measures outlined in the referee’s report and incorporated in the 2006 and 2011 license agreement between the parties.

Also, it warrants noting that petitioner, for a second time, failed to brief the court on the complete factual and legal history between the parties. In the second litigation between the parties, where petitioner sought the same relief it seeks in this proceeding, the court noted that petitioner failed to mention the prior litigation between the parties and that the terms of the prior license agreements incorporated the referee’s recommendations. (NYSCEF Doc. No. 25,

Decision and Order, *Kotler, J.* The court also opined that “[p]etitioner’s claim that respondent’s position is unreasonable is untenable” and that [r]espondents have demonstrated that the work and manner of protections petitioner proposes may be unsafe.” The court held that petitioner should have sought DOB approval. Here, petitioner has asserted that it submitted its plan to DOB and obtained approval. However, this court cannot ignore that it previously unequivocally confirmed the referee’s report inclusive of detailed recommendations issued after hearing extensive arguments by the parties. Further, petitioner’s arguments that respondent’s request for additional safety measures are unreasonable are belied by the fact that the parties entered into two license agreements, on their own, both incorporating the referee’s recommendations. The court is not persuaded that a license to enter respondent’s property was denied or refused. To the contrary, the respondents have agreed to two prior license agreements and have actively participated in negotiations regarding the terms of the subject license. Moreover, respondent, in its opposition, does not ask that the application for a license be denied, but instead that petitioner agree to the terms in the proposed license agreement and commence its Local Law 11 work expeditiously. Based upon the foregoing, the court finds that petitioner has not met its burden under RPAPL § 881 of establishing that it has been refused or denied access or that respondent’s objections are outweighed by its interest in commencing the Local Law 11 work. Thus, this petition is denied.

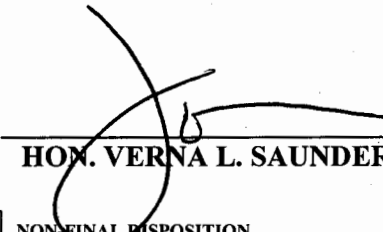
Respondent’s request to compel petitioner to sign the proposed license agreement is likewise denied. In lights of the facts and circumstances present here, the questions raised regarding the duration of the work and the issue of professional fees are best suited for further negotiations and agreement between the parties as was done with respect to the two prior license agreements. 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.

March 30, 2022

  
 \_\_\_\_\_  
 HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED  
 GRANTED  
 SETTLE ORDER  
 INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION  
 GRANTED IN PART  
 SUBMIT ORDER  
 FIDUCIARY APPOINTMENT

OTHER

REFERENCE