

150 E. 73rd St. Corp. v 145-149 E. 72nd St. LLC

2022 NY Slip Op 31798(U)

June 7, 2022

Supreme Court, New York County

Docket Number: Index No. 153075/2022

Judge: Arlene Bluth

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE BLUTH PART 14

Justice

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150 EAST 73RD STREET CORPORATION

Petitioner,

- v -

145-149 EAST 72ND STREET LLC,

Respondent.

-----X

INDEX NO. 153075/2022

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 27, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57

were read on this motion to/for RPAPL 881

The petition for a license to access respondent's property is granted.

Background

In this RPAPL 881 proceeding, petitioner seeks access to the respondent's adjoining properties so it can perform mandatory facade work. It claims that the repair plan has been filed with the DOB and that it has obtained all necessary permits to install the protection necessary for respondent's properties and to do the work required. Petitioner claims it has been trying to reach an agreement with respondent since early 2021 but has not yet reached an agreement.

Specifically, petitioner claims it agreed (in October 2021) to a monthly license fee of \$6,000 and that work would begin on April 1, 2022 because it is impracticable to try to complete facade work in the winter. Petitioner argues that it even agreed to move up the start date to the work to March 1, 2022.

Respondent argues that there was an agreement in October 2021 for access to its premises and that it was petitioner who has frustrated the parties' ability to reach an agreement.

Respondent blames petitioner for trying to avoid the agreement that the parties entered into and that it wants petitioner to immediately begin the work. Respondent demands that petitioner pay it \$43,000 in license fees stemming from when the agreement went into effect in October 2021. It also demands that petitioner immediately repair the work to the brick wall and remove the outstanding violations against the properties. Respondent requests that petitioner pay an additional \$1,000 per 30-day period that respondent's air space is used in connection with the drop scaffold petitioner apparently has to use in connection with the work. Respondent also wants its legal and professional fees that accrued during the negotiation process to be paid by petitioner.

Respondent also points out that DOB issued partial vacate orders on each of the three buildings adjacent to petitioner's building because the façade needs to be repaired.

Discussion

“In determining whether or not to grant a license pursuant to Real Property Actions and Proceedings Law § 881, courts generally apply a standard of reasonableness. Courts 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” (*Bd. of Managers of Artisan Lofts Condominium v Moskowitz*, 114 AD3d 491, 492, 979 NYS2d 811 (Mem) [1st Dept 2014]).

As an initial matter, the Court grants a license to petitioner to access respondent's properties. All sides agree that the work is necessary and should be done immediately. Clearly,

the work is necessary as evidenced by the fact that the DOB issued partial vacate orders for the adjoining properties.

The Court observes that after oral argument on May 20, 2022, at the parties' request, the Court adjourned the return date of the petition to June 3, 2022 so that the parties could attempt to settle the matter. Instead of resolving the matter, the parties waited until the afternoon of June 3, 2022 to start emailing the Court. Respondent insisted that petitioner consented to an adjournment while petitioner maintained no such agreement was ever reached. Given how long this proceeding has been pending, the Court declines to adjourn this proceeding any further. This Court will, as it is duty-bound to do, issue a prompt decision. The parties agree that the drastically needed façade work should start as soon as possible. There is no reason for this Court to wait around any longer on the chance that the parties might reach a settlement for an issue that has been pending since early 2021.

Having found that petitioner is entitled to a license, the Court must assess whether a license fee is appropriate and, if so, how much petitioner must pay to respondent. "Although the determination of whether to award a license fee is discretionary, the grant of a license pursuant to RPAPL 881 often warrants the award of contemporaneous license fees, because an owner compelled to grant access should not have to bear any costs resulting from the access" (*New York Pub. Lib. v Condominium Bd. of the Fifth Ave. Tower*, 170 AD3d 544, 545, 95 NYS3d 200 [1st Dept 2019]).

Here, the record before this Court suggests the parties were in agreement about a proposed license fee as part of the proposed access agreement from October 2021 (NYSCEF Doc. No. 51). That agreement provided that petitioner would pay respondent \$25,000 (plus applicable taxes) for a four-month license (*id.* at 5). The agreement also provided that if

petitioner did not complete the work within the four-month timeline, it would pay respondent \$6,000 per month for each thirty-day period it continued to work (and failed to get the DOB violations removed). The Court finds this arrangement to be reasonable (especially because the parties negotiated it) and implements it to the instant proceeding.

The Court denies respondent's request that petitioner pay license fees from October 2021 as part of the Court's decision on the petition.¹ Respondent failed to produce an agreement executed by *both* sides and the evidence submitted before this Court (particularly the emails between the parties) demonstrates that a final and binding agreement was never reached. The Court cannot bind petitioner to a contract that it did not sign even though it appears that the parties were somewhat close to finalizing an agreement. Similarly, the Court declines to award respondent additional fees for the drop scaffold or any legal fees in connection with this proceeding. The parties had an opportunity to reach a settlement, both before and after this proceeding was commenced, and for whatever reason did not settle this dispute. Therefore, each side must bear their own legal fees.

The Court also declines to find that petitioner is bound by the terms of the proposed agreement. Respondent's argument appears to want it both ways; it simultaneously wants the Court to find that there was a binding agreement that started in October 2021 and yet it also wants additional fees imposed against petitioner that were not included in the agreement. That makes no sense and the Court declines to do that. In this decision, the Court merely finds that petitioner is entitled to a license to access respondent's property to do the work at issue and must pay the fee as described above.

¹ This finding has no bearing on whether respondent might be able to recover damages against petitioner for allegedly refusing to complete work while respondent could not access its entire property (due to the partial vacate orders), or other claimed damages, in a separate plenary proceeding.

The Court observes that respondent asserted six counterclaims against petitioner. The Court does not view these as “counterclaims” and separate causes of action against petitioner; instead, they are, essentially, respondent’s desires for what should go in the license agreement. Respondent asks that petitioner be required to comply with the terms of the proposed license agreement, that petitioner pay respondent \$43,000 from when respondent contends that the agreement began, that petitioner begin the work immediately, that petition provide details about access and the drop scaffold, that petitioner pay \$1,000 for each 30-day period petitioner interferes with respondent’s air space, and that petitioner should pay all legal and professional fees to respondent.

The Court declines to implement those requests into the license for the reasons described above. While the third counterclaim, which requests that petitioner start work immediately, is a legitimate request, the Court is satisfied that petitioner is sufficiently motivated to get the work done quickly given the license fee imposed above.

Summary

Unlike many RPAPL 881 proceedings that have come before this Court, the instant dispute involves a situation where the parties both agree that the work is necessary, there are outstanding violations issued by the DOB concerning the work that needs to be done and that the work should be done immediately. Therefore, rather than hold a hearing about the amount of the license fee, the Court will impose the license fee the parties nearly agreed to in October 2021. And, instead of prolonging this proceeding regarding respondent’s “counterclaims,” the Court grants petitioner a license to access respondent’s property immediately. After all, respondent wants the work to be done soon and even argued that the wall (that needs to be fixed) is a danger

to respondent's tenants and properties. There is no reason to wait any longer- petitioner should have access immediately.

Accordingly, it is hereby

ADJUDGED that the petition is granted; and it is further


ORDERED that petitioner, including its agents, professionals, contractors, subcontractors and employees shall have a temporary license for reasonable, necessary and immediate access to enter in, onto and over the Adjoining Properties for a period of FOUR (4) months for the purposes of (i) conducting a physical examination of respondent's property as required by the applicable laws (including the Building Code), (ii) creating a controlled access zone in the rear yard of the properties located at 145, 147 and 149 East 72nd Street, New York, New York 10021 (the "Adjoining Properties"), (iii) erecting, maintaining and removing protection as more specifically shown in the protection plans prepared by Bond Engineering P.C. and annexed as Exhibit S to the Affidavit of Brian O'Connor, P.E., and in the proposed scope of protective work set forth in an exhibit to a proposed license agreement annexed as part of Exhibit O to the Affirmation of Peter Massa; and (iv) maintaining outrigger drop scaffolds over the south-facing exterior wall of the building known as, and located at, 150 East 73rd Street, New York, New York 10021, into the airspace above the Adjoining Properties to perform mandatory FISP (Façade Inspection Safety Program) repairs, including, without limitation, south elevation brick replacement, south elevation lintel replacement, south elevation spandrel waterproofing, south elevation sill replacement and south elevation coping stone replacement; and it is further

ORDERED that petitioner shall pay to respondent a license fee of \$25,000 for the four-month term described above along with applicable taxes; and it is further

ORDERED that petitioner shall have the ability to extend the temporary license for up to THREE (3) months without the necessity of making an application before this Court if the petitioner’s professionals, contractors or subcontractors determine that inclement weather and/or the discovery of unanticipated conditions requiring repair prevented the work from being completed within the initial time frame, and petitioner shall pay respondent an additional \$6,000 per additional month that the license is extended; and it is further

ORDERED that respondent’s requests relating to the license are denied (these are classified as “counterclaims”); and it is further

ORDERED that the Clerk is directed to enter judgment accordingly, along with costs and disbursements, upon presentation of proper papers therefor.

<u>6/7/2022</u> DATE	<input checked="" type="checkbox"/> CASE DISPOSED <input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED <input type="checkbox"/> SETTLE ORDER <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	 _____ ARLENE BLUTH, J.S.C.
CHECK ONE: APPLICATION: CHECK IF APPROPRIATE:	<input type="checkbox"/> NON-FINAL DISPOSITION <input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER <input type="checkbox"/> SUBMIT ORDER <input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE	