

East Edge BK LLC v Nedd

2022 NY Slip Op 32633(U)

July 25, 2022

Supreme Court, Kings County

Docket Number: Index No. 522450/2021

Judge: Carolyn E. Wade

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 84 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 25th day of July, 2022.

PRESENT:

HON. CAROLYN E. WADE,
Justice.

-----X
EAST EDGE BK LLC,

Petitioner,

-against-

AUDREY NEDD,

Respondent.
-----X

DECISION/ORDER

Index No. 522450/2021

Mot. Seq. No. 1

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KINGS COUNTY CLERK
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The following e-filed papers read herein:

NYSCEF Doc Nos.:

| | |
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| Notice of Motion, Supporting Affirmation (Affidavits), And Exhibits Annexed | 1-13 |
| Opposing Affidavits (Affirmations) and Exhibits Annexed | 23-25, 39-47 |
| Reply Memorandum of Law and Exhibits Annexed | 29-44, 48-50 |

Upon the foregoing cited papers, and after a virtual hearing, and multiple conferences, petitioner East Edge BK, LLC ("Petitioner") moves by Order to Show Cause for an Order, pursuant to RPAPL § 881, granting it access to enter respondent Audrey Nedd's ("Respondent") adjacent premises, located at 78 East 53rd Street, Brooklyn, New York 11203 ("Subject Premises"), to install safety protections.

In support of the instant application, Petitioner submits an affidavit from its member, Samuel Eshaghoff, who states that the entity is the record owner of the neighboring property, a vacant lot, located at 76 East 53rd Street, Brooklyn, New York 11203. Mr. Eshaghoff avers that Petitioner's plans have been filed and accepted by the NYC Department of Buildings, to develop

the property and make improvements. However, to proceed with the construction, Petitioner and its general contractor, Boulder Builders, LLC require access to the side and rear yards, and front curb of Respondent's premises "to install, maintain, inspect and ultimately remove certain protections as required by the DOB to safeguard the Respondent's Premises from potential damage during completion of its work" (¶ 10 of Plaintiff's affidavit). Mr. Eshaghoff also states that access is needed to Respondent's roof to install and maintain protection, and to remove debris that is a by product of the work. He estimated that access would be needed for approximately a 1 year and 4 months.

Mr. Eshaghoff maintains that he has attempted to enter into a license agreement with Respondent since August 2020; yet, she has refused to have a discussion. To wit, Petitioner offered to do the following: 1) pay up to \$1,000 of Respondent's attorney's fees, 2) install a new fence along the shared property boundary at its own expense; 3) install security cameras in the direction of the Subject Premises, 4) indemnify and hold Respondent harmless against any claims against her with respect to the work; and 5) name Respondent as an additional insured on its contractor's insurance policy. Mr. Eshaghoff concludes that Petitioner's livelihood is being adversely impacted, as it can not proceed with the work on its premises. Petitioner, by its attorney's affirmation, cites NYC Building Code §§ 3309.1 and 3309.10, to stress that the protection of the Subject Premises is statutorily mandated.

This Court notes that Respondent submitted three oppositions in this matter- one by her former counsel, Steve G. Williams, Esq.; one as a pro se litigant once she relieved Mr. Williams, and another by her current counsel, Vincent Pallaci, Esq. In her initial affidavit filed by Mr. Williams, Respondent noted that the Subject Premises is a two-story house owned by her family, and currently occupied by the tenants. She alleged that Petitioner's preliminary construction activities caused cracks to the side yard of her premises. She also contended that the proposed

agreement neither contained a provision for her to be compensated for her adversary's access nor provide protection from dust/debris, the interference of light, and the obstruction of the foundation and sewer lines. As a result, Respondent requested \$2,500 per month or a lump sum payment as compensation. Respondent's affidavit was buttressed by Mr. Williams' affirmation, who annexed a copy of Petitioner's proposed license agreement.

However, after Respondent relieved Mr. Williams, she filed a pro se affidavit, stating that her initial affidavit supported Petitioner's interest rather than her own. She also asserted that she wanted Petitioner to waterproof and underpin her house's foundation. Respondent further stressed that she did not want scaffolding and equipment on her property, and did not want her adversary to have easement rights.

Respondent subsequently retained Mr. Pallaci, who was given the opportunity to submit opposition papers on her behalf. Mr. Pallaci asserted that more than 50% of Respondent's roof, front yard, entire side yard, including several windows, as well as her rear yard will be affected by Petitioner's access. Thus, he requested that Respondent received an access fee of \$4,000/month. Moreover, he stressed that Petitioner's offer of commercial general liability insurance of \$1,000,000 per occurrence and \$2,000,000 in the aggregate is inadequate. Instead, Mr. Pallaci proposed that the insurance has limits of not less than \$5,000,000 per occurrence; and include a requirement that Petitioner fully defend and indemnify Respondent from property damage, injuries or death. He further argued that the license requires Petitioner to repair any property damage; and that it post a bond of not less than \$250,000 to cover potential future damage to Subject Premises. Lastly, he averred that it is customary for an adjacent homeowner to be reimbursed for its legal and engineering fees.

In rebuttal, Petitioner objected to Mr. Pallaci's contention that the typical license fee for New York City-area construction ranges from \$3,000 month for minimal access to \$7,500 for

more extensive access. Petitioner averred that it has been prejudiced by delays attributed to Respondent, and have incurred significant costs. Petitioner further maintained that the project will be minimally intrusive, as roof coverage will only occur during the framing of the fourth floor, which should be completed in about a week. Moreover, netting will temporarily cover ½ of Respondent's front and side yards, and will protect her windows. Yet, Petitioner will be able to walk underneath and retain access to her yards. Petitioner's counsel added that her client is ready to repair damages that result from the work; and that Respondent is encouraged to take photographs to document the condition of her property throughout the construction.

"RPAPL section 881 allows a property owner to petition for a license to enter the premises of an adjoining owner when such entry is necessary for making improvements or repairs to the petitioner's property and the adjoining owner has refused such access (*Matter of AIH Group LLC v. C.J.F. & Sons Enters. Inc.*, 2019 N.Y. Misc. LEXIS 2686, 6 [Sup Ct, Queens Cty 2019]). "A proceeding pursuant to RPAPL section 881 is addressed to the sound discretion of the court [citations omitted], which must apply a reasonableness standard in balancing the potential hardship to the applicant if the petition is not granted against inconvenience to the adjoining owner if it is granted." *Id.* at 6-7. When a license is granted by the Court, a petitioner may be ordered to fulfill certain terms and conditions, including obtaining insurance coverage, indemnifying the adjacent landowner and/or paying for the use of the license. *Id.* at 9.

In the instant case, it is undisputed that Petitioner's plans were filed and accepted by the DOB; and that it is mandated to install certain protections to safeguard Respondent's property, pursuant to New York City Building Code § 3309. To wit, § 3309.1, in pertinent part, provides that "[a]djoining public and private property, including persons thereon, shall be protected from damage and injury during construction or demolition work in accordance with the requirements of

this section. Protection must be provided for footings, foundations, party walls, chimneys, skylights and roofs.”

After a review of the respective contentions, it is evident that both parties agree to the following: 1) Respondent is entitled to attorney’s fees; 2) Petitioner will indemnify and hold harmless Respondent against any claims asserted against it and its affiliates, in connection with its work; 3) Petitioner will name Respondent as an additional insured on its contractor’s insurance policy; and 4) Safety protections must be installed to protect the Subject Premises. Petitioner further agreed to install a new fence along their shared property boundary; and install security cameras in the direction of the Subject Premises to monitor Respondent’s sidewalk. The Court notes that during the April 5, 2022 hearing, both parties’ engineers agreed to make mutually acceptable revisions to their respective engineering reports, and update drawings.

Upon applying relevant case law to the facts herein, this Court, in its sound discretion, directs that the license to enter Respondent’s property includes the following terms and conditions:

ORDERED that, upon a balancing of the equities, Petitioner is directed to pay Respondent \$2,000 in attorney’s fees as a condition of the license (*see Matter of N. 7-8 Invs. LLC v. Newgarden*, 43 Misc3d 623, 632 [Sup Ct, Kings Cty 2014]) [Attorneys’ fees are justified in this case because petitioner’s demand to make use of respondent’s property has required respondent to hire an attorney to negotiate a license agreement”].

ORDERED that Petitioner procures and maintains an insurance policy with limits of not less than \$2,500,000 per occurrence, naming Respondent, and listing 78 East 53rd Street, Brooklyn, New York 11203, as part of the covered work site (*see Matter of Rosma Dev., LLC v South*, 5 Misc 3d 1014[A] [Sup Ct, Kings Cty 2004]). Respondent will be insured for any liability that she may incur for property damage, personal injury or wrongful death as a result of Petitioner’s work, and it is

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

ORDERED that Petitioner is responsible for the installation, maintenance and removal of all temporary protections, and it is

ORDERED that at the conclusion of the license, Petitioner is to return Respondent's property to its original condition, and all construction materials and debris are removed from the work areas, and it is

ORDERED that Petitioner install a new fence along the shared property boundary at its own expense, and it is

ORDERED that Petitioner install security cameras in the direction of the Subject Premises to monitor Respondent's sidewalk, and it is

ORDERED that Petitioner shall notify Respondent in writing when it has completed the work under the license, and it is

ORDERED that the license term shall commence fifteen (15) days after Petitioner has delivered a copy of the insurance policy to the Respondent, and it is

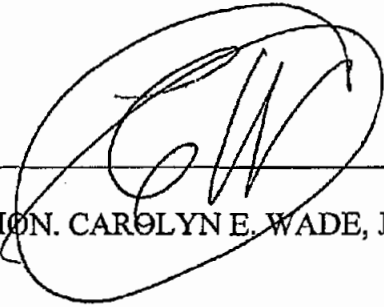
ORDERED that the parties can agree to such other terms and conditions that they memorialize in writing.

Turning to the issue of a license fee, this Court notes that Respondent and her former counsel, Mr. Williams, requested \$2,500/month. Respondent subsequently retained new counsel, Mr. Pallaci, who markedly increased her request to \$4,000/month. Mr. Pallaci does not cite case law to support this specific request. Following a review of similar cases, and the application of the reasonableness standard, this Court finds that a license fee of \$2,500/month is appropriate (*see Matter of Rosma Dev. LLC v. South*, 5 Misc3d 1014[A] [Sup Ct, Kings Cty 2004]).

ORDERED that the license is valid for a period of 12 months, upon commencement of construction. The license may be subject to renewal upon an application filed by Petitioner.

The parties are directed to finalize the remainder of the terms, if any, and e-file as well as e-mail to this Court, a proposed license order within twenty (20) business days of service of a copy of this Order with Notice of Entry.

This constitutes the Decision and Order of the Court.



HON. CAROLYN E. WADE, J.S.C.

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