

**2005-2009 3rd Ave QOZ LLC v Prestige Auto Ctr.,
Inc.**

2022 NY Slip Op 33287(U)

September 29, 2022

Supreme Court, New York County

Docket Number: Index No. 157411/2022

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH **PART** **14**

Justice

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2005-2009 3RD AVE QOZ LLC

Petitioner,

- v -

PRESTIGE AUTOMOTIVE CENTER, INC.,

Respondent.

-----X

INDEX NO. 157411/2022

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1- 26, 27, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40 were read on this motion to/for RPAPL 881.

The petition for a temporary license to enter the adjacent property is granted as described below.

Background

In this RPAPL 881 proceeding, petitioner explains that it wants access to the adjoining property, currently occupied by respondent, so that it can perform a demolition of an existing 3-story building. It claims it needs to install a construction fence on the adjoining property in order to comply with the applicable building codes. Petitioner maintains that it needs to construct an 8-foot-high construction fence 3 feet onto the neighboring property and maintain the fence for two months to complete the demolition work. It claims that respondent has refused to permit access. Petitioner adds that it will name respondent as an additional insured on the insurance policies procured by the demolition contractor and that it will agree to indemnify respondent for any loss suffered as a result of the demolition as well as the erection, maintenance, and removal of the fence.

In opposition, respondent (the lessee of the adjacent property) complains that petitioner failed to include a proposed agreement setting forth all of the terms and conditions for the access it is seeking. Respondent contends that petitioner has violated various DOB rules and regulations and that DOB has issued many violations against petitioner. It contends that petitioner has engaged in a campaign of harassment and points to a purported arrest of petitioner's demolition foreman for throwing a rock at respondent's principal.

Respondent argues that petitioner and respondent's landlord are owned by the same principal and both entities are solely focused on evicting respondent from the property despite respondent having a valid lease. It points to other pending litigation as evidence that the instant proceeding is simply a continuation of these bad faith efforts.

Discussion

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 entry is sought. Such 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.”

As an initial matter the Court observes that at oral argument, it was clear that much of the demolition of petitioner's three-story building has already been completed. Apparently, the only remaining demolition work required is to remove the footings of the building – what is underground. Respondent included a link that it contends shows that the building has already been demolished.

The Court finds that petitioner is entitled to a temporary license to erect a fence to complete whatever demolition remains. To the extent that petitioner may, or may not, have demolished portions of the building prior to bringing this petition without seeking judicial permission or following applicable regulations, those issues are irrelevant to the current request. The applicable governmental agencies can explore whether or not any violations should, or should not, be issued. This Court is only focused on the current application which seeks a temporary license to erect a fence for two months. And petitioner met its burden to demonstrate that the applicable building codes require it to erect a fence. Access is appropriate here, where petitioner intends to eventually construct a new building and only seeks to encroach 3 feet onto respondent's property for a limited time to do specific work.

Respondent's attempts to point to other litigation is without merit. While that might explain the parties' reticence to reach a resolution for this proceeding, it does not justify respondent's refusal to grant the limited access at issue here. This is not a situation, present in many RPAPL 881 proceedings, where the petitioner seeks significant access or where substantial protection is needed. According to respondent, petitioner's building is already demolished and petitioner claims it only needs to remove the footings. So, the risk of potential damage or a never-ending construction project are not present here.¹

Having found that petitioner is clearly entitled to access, the question is the amount of the license fee. "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

¹ Of course, petitioner's future request for access when actually constructing the building is a different story. But this petition is limited to the two-month access requested to build a fence for demolition.

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] [internal quotations and citation omitted]).

At oral argument, petitioner offered to pay \$2,500 per month while respondent noted that it pays \$30,000 per month in rent and that the erection of the fence would impact its ability to store customers’ vehicles (a key part of respondent’s business). Petitioner also represented that the owner of the adjacent property (respondent’s landlord) would be amenable to letting respondent store cars in the basement even though respondent thought it might run afoul of respondent’s lease. However, since the parties did not reach their own agreement and respondent’s landlord is not a party to this action, the Court cannot force an amendment to the lease.

Therefore, based on this record, the Court finds that petitioner shall pay respondent a license fee of \$5,000 per month for the two months of access it requested. Given that petitioner claims it needs only 3 feet of the adjoining property, this constitutes a reasonable amount for such limited access. The Court observes that if the demolition is completed (and the fence is removed) within a month, then petitioner need only pay \$5,000.

However, if the fence remains up longer than two months, then petitioner shall pay respondent a fee of \$15,000 per month. The Court has no intention of granting indefinite access. Hopefully, the increased license fee will incentivize the demolition to be completed quickly. The Court also orders that petitioner ensure that respondent is named as an additional insured on the insurance policy procured by the demolition contractor and such proof must be shown to respondent’s counsel before the fence is erected. And, as petitioner acknowledged, it will be responsible for any actual damages to respondent as a result of the demolition and the construction of the fence. The amount of actual damages referred to in the preceding sentence, if

there are any actual damages, does not include purported lost profits caused by the fence located three feet into the property – that amount is already included in the license fee.

The Court declines to award respondent any legal fees or expert fees. This determination is within the Court's discretion and respondent's opposition does not demonstrate a reasonable refusal to grant the access requested here (*c.f. Panasia Estate, Inc. v 29 W. 19 Condominium*, 204 AD3d 33, 38, 164 NYS3d 551 [1st Dept 2022], lv to appeal dismissed, 38 NY3d 1125 [2022] [noting that a respondent who seeks reasonable terms for access may be entitled to legal fees]). Respondent's opposition raises complaints with many, many irrelevant issues. It complains about petitioner's purported plan to build a significant residential building on the site, including on the property where respondent is a lessee. It also maintains that DOB has issued various violations and stop work orders and that illegal conditions remain on the site. These issues, while troubling, are not ripe for review in this proceeding. They can be handled in the other pending litigation between the parties.

The Court also observes that the expert affidavit from respondent's expert (Mr. Winter) focuses primarily on the various violations issued by DOB to petitioner and the report he attaches deals with other issues and seems to relate to another litigation. Mr. Winter does not state a sufficient reason for why the limited access requested here should not be granted. In other words, resisting this limited request because the parties are fighting about other issues does not compel the Court to grant respondent additional fees.

In the Court's view, petitioner seeks limited temporary access to build a fence that will only encroach 3 feet on to the property leased by respondent. That is not an outlandish request and respondent's opposition does not state a basis for denying that request. The temporary access

will begin on October 3, 2022, and only after proof of insurance, naming respondent as additional insured, is provided.

The Court stresses that there is no need for a hearing because the essential facts in this proceeding are undisputed. Petitioner needs to build a fence in order to comply with the applicable building codes to complete demolition. Petitioner does not need to do any work on the adjoining premises, it merely needs access to erect a fence. Under these circumstances, the Court sees no reason to delay this work any longer to debate about a relatively minor job (at least in comparison with the access needed for the eventual construction of the residential building).

Accordingly, it is hereby


ADJUDGED that the petition is granted to the extent that petitioner shall have a temporary license to access the adjacent property upon which respondent is a lessee for two months to commence on October 3, 2022; and it is further

ORDERED that petitioner shall construct an 8-foot fence (as described in NYSCEF Doc. No. 9) that intrudes on the adjacent property no more than 3 feet; and it is further

ORDERED that petitioner shall pay respondent a license fee of \$5,000 per month (starting October 3, 2022) for the two months of access and \$15,000 per month if the demolition is not completed (including the removal of the fence) by the end of the two-month period; and it is further

ORDERED that petitioner shall ensure that respondent is named as an additional insured on the contractor's insurance policy (NYSCEF Doc. No. 13) and provide proof thereof to respondent's counsel before erecting the fence; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly in favor of petitioner and against respondent along with costs and disbursements upon presentation of proper papers therefor.

<u>9/29/2022</u> DATE			 ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE