

18 W. 55th St. LLC v Pleiades House LLC
2022 NY Slip Op 33940(U)
November 22, 2022
Supreme Court, New York County
Docket Number: Index No. 154692/2022
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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18 WEST 55TH STREET LLC, 10 W 55 LLC

Petitioners,

- v -

PLEIADES HOUSE LLC,

Respondent.

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INDEX NO. 154692/2022

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4 - 24, 25, 26, 27, 28, 29, 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, 66

were read on this motion to/for RPAPL 881.

After the hearing, the Court grants the petition as described below.

Background

Petitioners want to build a 25-story residential building on 55th Street in Manhattan. In this proceeding, they seek access pursuant to RPAPL 881 to their neighbor’s property, a townhouse owned by respondent. After months and months of appearances at which the parties (with the Court’s assistance) attempted to reach a resolution, the Court issued an interim decision that granted petitioners a license and ordered that a hearing was necessary to determine the terms of the license and the financial issues, including a potential license fee (NYSCEF Doc. No. 66).

As an initial matter, the Court observes that right before the hearing began the parties reached an agreement with respect to nearly all remaining construction and protection issues. These representations were subsequently put on the record and the Court was asked to address

two issues: 1) whether petitioners are obligated, or alternatively the Court should direct, that a fourth-floor terrace located on the front side of respondent's townhome on 54th Street (not the side facing the construction site) should be afforded additional overhead protection by petitioners and 2) a determination about financial issues, including the issue of a license fee.

Front Terrace

The central issue in the hearing focused on whether petitioners had to provide protection for a fourth-floor terrace located on respondent's property. The terrace has a retractable glass roof and respondent emphasized that it required protection pursuant to two provisions of the Building Code.

The first section cited by respondent was NY City Building Code § 3307, a section entitled "Protection of Pedestrians." This section includes a requirement that "Streets, including bicycle lanes and sidewalks, as well as walkways and pathways, either within the public way or within a site, shall meet the requirements of Sections 3307.2.1 through 3307.2.6, and the requirements of the Department of Transportation." (*id.* § 3307.2).

Specifically, respondent pointed to a section stating that a sidewalk shed is required:

"When a structure higher than 40 feet (12 192 mm) or greater is to be constructed, and the sidewalk, walkway, or pathway is within a perpendicular distance from the new structure that is equal to or less than half the height of the new structure. The sidewalk shed shall be installed when the structure reaches the planned height of the shed. Such shed shall not be removed until the structure is enclosed, all exterior work has been completed and the sash is glazed above the second story, the façade has been cleaned down, and all exterior chutes, scaffolds, mast climbers, and hoisting equipment have been dismantled and removed from the site" (*id.* § 3307.6.2[2]).

The Court finds that these provisions are inapplicable to the terrace at issue here. This entire section applies to pedestrians, members of the public traveling on foot. The Court is

unable to conclude that this section has any impact on a terrace included inside private property. Pedestrians or members of the public do not have direct access to this terrace; access is only through the building. That there may be various events, such as concerts, in which people are invited into respondent's property does not suddenly transform it into an area in which these Building Code provisions apply. This section is clearly intended to provide protection to individuals walking by a construction site, not visitors inside private property.

The second Building Code provision also does not require petitioners to provide additional overhead protection for that terrace. This section concerns protection of roofs.

“Whenever any building is to be constructed or demolished above the roof of an adjoining building, it shall be the duty of the person causing such work to protect from damage at all times during the course of such work and at his or her own expense the roof, skylights, other roof outlets, and equipment located on the roof of the adjoining building, and to use every reasonable means to avoid interference with the use of the adjoining building during the course of such work, provided such person causing such work is afforded a license in accordance with the requirements of Section 3309.2 to enter and inspect the adjoining building and perform such work thereon as may be necessary for such purpose; otherwise, the duty of protecting the roof, skylights, other roof outlets, and equipment on the roof of the adjoining building shall devolve upon the owner of such adjoining building. Adjoining roof protection shall be secured to prevent dislodgement by wind. Where construction or demolition work occurs at a height of at least 48 inches (1219 mm) above the level of the adjoining roof, adjoining roof protection shall consist of 2 inches (51 mm) of flame-retardant foam under 2 inches (51 mm) of flame-retardant wood plank laid tight and covered by flame-retardant plywood, or shall consist of equivalent protection acceptable to the commissioner, and shall cover all areas of the adjoining roof that are within a horizontal distance from the building being constructed or demolished equal to the height of the highest working level of the building being constructed or demolished, *to a maximum of 20 feet (6096 mm), or to a greater maximum when ordered by the commissioner due to a unique hazard at the site*” (*id.* § 3309.10 [emphasis added]).

The key language here is that the protection must be provided to a maximum of 20 feet from the building being constructed or, possibly, a greater distance at the direction of the Commissioner of the Department of Buildings. There is no dispute here that the roof terrace at issue is more than 20 feet from petitioners' future building; at the hearing, the purported distance

ranged from 30 or 35 feet to 60 or 65 feet. And respondent admitted at the hearing that it had not yet obtained an order from the DOB commissioner.

Respondent also pointed to an exception in Section 3309.10 which provided that “Occupiable spaces on an adjoining roof, such as a roof terrace, observation deck, rooftop bar, or residential balcony, that will not be closed during the work, shall instead be protected in accordance with Section 3309.13.” But 3309.13 also contains the same language “to a maximum of 20 feet” from the building being constructed or demolished.

Therefore, this Court finds that petitioners need not provide additional overhead protection for the fourth-floor roof terrace at the front of the building at this time. Of course, respondent may (as it insisted it would at the hearing) request that the commissioner issue an order requiring petitioners to do so; nothing in this decision is intended to advise the Commissioner of Buildings one way or the other – this decision just holds that without a Commissioner’s order, the Building Code does not obligate petitioners to protect that roof deck, which is well more than twenty feet from petitioners’ site.

Financial Issues

The parties also informed the Court that the financial issues remained in dispute. However, curiously, the parties offered little testimony about the nature of this specific dispute. The Court finds, as an initial matter, that respondent is entitled to a license fee. “Although the determination of whether to award a license fee is discretionary, in that RPAPL 881 provides that a license shall be granted by the court in an appropriate case upon such terms as justice requires, the grant of licenses pursuant to RPAPL 881 often warrants the award of contemporaneous

license fees” (*DDG Warren LLC v Assouline Ritz 1, LLC*, 138 AD3d 539, 539-40, 30 NYS3d 52 [1st Dept 2016]).

The question, then is what license fee the Court should award. Unfortunately, there was essentially no testimony whatsoever about what the license fee should be. In closing, respondent’s counsel argued for \$20,000 and claimed that this is what petitioners promised they would pay. Of course, an offer submitted before this hearing began and before petitioners incurred ongoing carrying costs, legal fees, and professional fees while the parties tried to settle is not a reason to award that amount. Parties are often willing to settle on generous terms in order to move a project along and that is one reason why settlement discussions are not relevant to the fact finder.

There was no expert testimony provided about the diminution in value or loss of enjoyment to respondent. The only testimony offered was that it might affect the tenant in respondent’s building. But respondent admitted that the tenant is an entity (IMG Artists) that is owned (with a partner) by the owner of respondent’s property. This is not a situation in which there is concern that a commercial tenant might not renew its lease or residential tenants might demand a rent decrease due to the neighbor’s construction. Here, the only tenant is an entity that respondent’s principal also owns in part. And, of course, there is no prescribed formula for how to determine the precise amount of a license fee; it is left to the Court’s discretion.

A review of other license fees reveals amounts significantly less than the \$20,000 demanded by respondent: \$3,000 for an adjoining penthouse unit totaling over 1,700 square feet with a rooftop terrace (*Panasia Estate, Inc. v 29 W. 19 Condominium*, 204 AD3d 33, 35, 164 NYS3d 551 [1st Dept 2022], *lv to appeal dismissed*, 38 NY3d 1125 [2022]); \$2,000 for an adjoining penthouse (*Van Dorn Holdings LLC v 152 W. 58th Owners Corp.*, 149 AD3d 518 52

NYS3d 316 [1st Dept 2017]; a \$2,500 license fee for access to the an adjoining 26-story luxury hotel to install and maintain rooftop protection (*PB 151 Grand LLC v 9 Crosby, LLC*, 58 Misc 3d 1219(A), 95 NYS3d 126 [Sup Ct, NY County 2018]); \$2,500 per month license fee for a sidewalk bridge extending ten feet onto the sidewalk in front of respondents' property (*Rosma Dev., LLC v South*, 5 Misc3d 1014(a), 798 NYS2d 713 (Table) [Sup Ct, Kings County 2004]).

The common theme throughout the cases that explore the amount of a license fee is that there is no precise formula to calculate the amount. A Court must consider the unique facts and circumstances of each project. Here, respondent constantly emphasized the fact that respondent's building is undoubtedly a historic townhouse complete with ornate furnishings and one-of-a-kind windows – but that just goes to having to protect it very carefully, and the parties have already worked that out. The Court observes that the townhouse is used to hold concerts, although there was no testimony about how many concerts occur or when they occur. And there was no testimony at all about any diminution in value to respondent's property due to the protections.

While there was some witness testimony from respondent about a recent purchase price of the property and the amount expended on renovations (although there was no documentary evidence to back up these claims), there was no witness who opined about how the construction project and the associated protections might affect the property's value. Rather, respondent insisted that it was worried about what might happen if the building was damaged during construction. That is, of course, an understandable concern but not part of the process to determine an appropriate license fee. Based on the record, including petitioners' access and the intrusion caused by the protection scheme, the Court awards a monthly license fee of \$4,500 per month to begin when petitioners start to install the protections on respondent's property (i.e.,

when the access granted by the license is utilized). The Court finds that this amount sufficiently compensates respondent for the loss of enjoyment of the full use of the space. While the Court realizes that it is more than many other courts have given, the Court has factored in inflation.

The next issue is what terms the license agreement should incorporate. The Court finds that petitioners shall have a license to access respondent's property for a term of three years from the protections are installed construction begins. Petitioners assured the Court that they will procure more than enough insurance and name respondent as additional insured. However, the Court declines to expand upon this and declines to incorporate terms included in the parties' proposed license agreement (*see e.g.*, NYSCEF Doc. No. 7). The parties chose to proceed to litigation and hold a hearing rather than sign this agreement. The parties are, of course, bound by the items they agreed to at the hearing. But the Court declines to wade into any unresolved issues raised in this draft agreement because, as stated many times in this decision, the parties did not offer any testimony about disputed portions of the agreement that they wanted the Court to include in a final license. In fact, respondent's counsel argued in his closing statement that petitioners should not get a license at all.

With respect to professional fees for experts hired by respondent, there was only limited testimony that petitioners had already paid nearly all outstanding bills and apparently had made some representation they would continue to pay these experts (although the exact nature of that promise was not fully explored at the hearing). The Court finds that petitioners must pay the remaining amounts (for instance, Ms. Halpern claimed there was about \$20,000 due) to respondent's professionals for any bills incurred prior to November 17, 2022 (i.e., any bills due for time spent prior to the hearing).

However, respondent is not entitled to any fees incurred on the day of the hearing and thereafter. Respondent's witnesses were neither offered nor qualified as experts to opine on any matter- they were merely fact witnesses. In fact, they were not aware about the recent updates to the Building Code (which became effective November 7, 2022) and so their testimony was not particularly enlightening with respect to the roof terrace issue; they were, in fact, incorrect in their assertions about petitioners' obligations. And respondent did not substantially prevail in the hearing. The Court found that petitioners did not have to provide additional overhead protection for the front terrace and the license fee awarded is drastically less than what respondent demanded. There is no reason to award respondent fees for a hearing at which it did not succeed.

Similarly, the parties waited until closing arguments to discuss legal fees. Of course, an adjoining neighbor is ordinarily entitled to recover reasonable legal fees (*Panasia*, 204 AD3d at 37). However, no invoices were introduced at the hearing or testimony adduced by respondent and so the Court is unable to evaluate anything other than the invoices uploaded to the docket before the hearing (NYSCEF Doc. No. 42). That invoice claimed that \$20,325.00 was charged by counsel for respondent and so the Court finds that petitioners must pay that amount as reasonable legal fees in connection with this proceeding. Petitioners did not object to that amount at the hearing other than to offer a vague assertion in closing arguments that they were concerned about the amount sought by respondent. The Court cannot guess or speculate as to what else might be due; the hearing was the opportunity to make a request accompanied by evidence. A determination about an award of reasonable legal fees must be supported by evidence, and respondent failed to produce any documentation at the hearing.

Remaining Issues

In counsel for respondent's closing, a number of issues were raised for the first time - issues upon which no testimony was offered. Respondent requested that the Court include "quiet hours" in any license it grants to petitioners, that petitioners create an escrow account in the event that there is damage caused to respondent's building, that the Court limit the license to a shorter time period or retain jurisdiction over the dispute.

The Court denies all of those requests. The parties had ample opportunity to reach a settlement as to all or part of the construction issues and then had a hearing to present evidence so the Court could resolve what was in dispute. The parties represented to this Court that the only issues in dispute were the protection of the front roof terrace and the financial components (and specifically the license fee). There was no testimony about quiet hours and so the Court declines to grant any. As was noted at the hearing, construction normally must occur between 7 a.m. and 6 p.m. Monday through Friday, although a party can seek additional off-hours construction with permission from the relevant agency.

Of course, the Court hopes the parties can work together so that construction will not interfere with a concert, but that is precisely the type of provision that could have been included in a settlement. This Court is in no position to issue any quiet hours; even if it had the authority, the Court still has no idea how often concerts happen, what notice or methods of notice might be appropriate, or what penalty would be reasonable for violating such a provision.

Besides, this is an RPAPL 881 proceeding and noise from construction has nothing to do with building protections. Quite simply, builders do not have to pay everyone within earshot who may be somewhat annoyed by the noise; petitioners have no obligation under the law to automatically stop construction for a concert and this Court will not create one.

The Court declines to make petitioners put money into an escrow account or post a bond. There is no question that the RPAPL contains robust protection for adjoining property owners like respondent. It provides that “The licensee shall be liable to the adjoining owner or his lessee for actual damages occurring as a result of the entry.” Petitioners insisted that they would have more than adequate insurance. Notably, petitioners have to protect many buildings around the site, including respondent’s property. And respondent did not provide any evidence to show that petitioners might not be able to cover losses for any damage to respondent’s building. Certainly, if respondent showed that petitioners lacked resources or had failed to make certain payments, then an escrow account or a bond might be appropriate. But the record here shows that petitioners have been more than willing to make all manner of payments, including payments to professionals hired by respondent even before ordered to do so by this Court.

The Court similarly declines to issue a shorter license to petitioners—they are entitled to a three-year license, commencing when construction commences. Based on the procedural posture of this proceeding, the Court finds that making petitioners come back time and again would only serve to needlessly delay the construction. Respondent, as was its right, vigorously resisted petitioners’ attempts to get access. The credible testimony elicited by petitioners at the hearing showed that they continue to incorporate respondent’s comments and suggestions at every turn. This is not a situation where the Court is wary that petitioners are totally unconcerned with respondent’s building and more oversight is necessary to ensure respondent’s property is adequately protected.

Summary

The Court observes although the parties may consider their properties or construction project unique, this Court must apply RPAPL 881 and binding case law as it evaluates the arguments raised at the hearing. Certainly, there is no question that respondent's townhouse has significant historic value. At the hearing, respondent elicited testimony about how many of the items, including ornate fixtures, were previously donated to local art museums. Respondent also noted that certain items, such as antique windows, might be impossible to replace or even recreate.

Unfortunately, a landowner cannot prevent a neighbor from developing his or her property (as long as that project conforms to applicable zoning laws). In other words, while respondent's insistence on receiving details about every aspect of petitioners' plans is understandable, it also resulted in this protracted dispute. Contrary to what respondent may desire, petitioners need not predict every single possibility of what might happen as the project advances. The fact is that petitioners had their initial plans approved by the DOB and then, as respondent made comments, petitioners incorporated those details into its project. Although respondent questioned how petitioners could proceed without DOB approval for every item, respondent's continual comments delayed petitioners' ability to get subsequent DOB approval. There was no testimony that petitioners routinely refused to incorporate comments offered by respondent's professionals. And while respondent was entitled to offer these comments, it was also true, especially at the hearing, that respondent actively resisted stating that it was done with offering additional comments.

If the Court were to require that petitioners obtain DOB approval before a license is awarded, then the petitioners here could never start construction. Respondent's argument that


DOB approval is required while still offering comments would delay the project indefinitely. The Court declines to create a situation in which petitioners could never satisfy respondent's demands.

Accordingly, it is hereby

ORDERED that after a hearing, the petition is granted only to the extent that petitioners are entitled to a license granting them access to respondent's property for a term of three years from the date when petitioners start to install the protections on respondent's property, and pay a license fee of \$4,500 per month and provide protection as agreed to by the parties at the hearing; and it is further

ORDERED that petitioners shall pay any remaining outstanding expert fees incurred by respondent's professionals up to and including November 16, 2022 (the day before the hearing) within 14 days upon receipt of invoices for the amount due (a new invoice must be sent for any amount requested) and \$20,325.00 in reasonable legal fees on or before December 15, 2022.; and it is further

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

<u>11/22/2022</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	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> SUBMIT ORDER	<input type="checkbox"/> REFERENCE
	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/>