

**Board of Mgrs. of the Barbizon/63 Condominium v
Bozzo**

2023 NY Slip Op 30063(U)

January 9, 2023

Supreme Court, New York County

Docket Number: Index No. 160287/2021

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ PART 47

Justice

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THE BOARD OF MANAGERS OF THE BARBIZON/63
CONDOMINIUM, AS AGENT FOR AND ON BEHALF OF
ALL UNIT OWNERS,

Petitioner,

- v -

ELBA BOZZO, JEANETTE BOZZO, PLERN BONYTHON,
TANNER FAHL

Respondents.

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INDEX NO. 160287/2021

MOTION DATE 10/14/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 29, 30, 31, 32, 33, 34, 35, 36, 38, 40, 42, 44, 45, 46, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 86, 87

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

Petitioner The Board of Managers of the Barbizon/63 Condominium seeks an order and judgment under Real Property and Proceedings Law (RPAPL) 881 for a continued limited license allowing petitioner continued access to respondents Elba and Jeanette Bozzo's adjoining property at 148 East 63rd Street, New York, New York (the Bozzos' property) to allow: (1) the existing sidewalk bridging, and pipe scaffolding which was installed pursuant to the April 12, 2022 temporary restraining order to remain in place to allow petitioner's contractor to perform repairs of cracked and spalling brick (Phase A); and (2) installation of roof protection on the Bozzos' property prior to commencement of repairs to cracking and spalling masonry ornaments (Phase B) on the facade of 140 East 68th Street, New York, New York (petitioner's property) (collectively, the project) (Voto Further Reply Aff, ¶ 3, NYSCEF Doc No 76). Respondents Plern Bonython and Tanner Fahl were tenants in the Bozzos' property (tenants) from September 30, 2021 to July 31, 2022. After the temporary restraining order was granted on April 12, 2022,

the project commenced in May 2022 and is expected to last until December 2023 (NYSCEF Doc No 76, ¶ 11). Petitioner contends that the license is necessary in order to comply with Local Law 11 which requires buildings taller than six stories in New York City to have their facades inspected and repaired every five years (NYSCEF Doc No 76, ¶ 2). Respondents do not oppose the petition for an RPAPL 881 license; however, the disagreement in this matter revolves around the license fee amount (Bozzo Aff, ¶ 3, NYSCEF Doc No 47).

The Bozzos, request a license fee of \$25,000 per month “less any rental payments received for the Bozzos’ 63rd Street Rental Property per month” (NYSCEF Doc No 47, ¶ 25). The tenants request a license fee of \$8,000 per month based on their loss of use of the rear yard and light due to the scaffolding enclosing the rear yard of the adjoining property as well as loss of privacy from the project’s workers frequently accessing the rear yard scaffolding on the adjoining property (Fahl Aff, ¶¶ 1, 8-11, NYSCEF Doc No 61).

RPAPL 881 provides that “[w]hen 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.” “That access can be extremely invasive: RPAPL 881 is designed to strike a balance between the petitioner's interest in improving its property and the harm to the adjoining property owner's enjoyment of its property” (*Matter of Panasia Estate, Inc. v. 29 W. 19 Condominium*, 204 A.D.3d 33, 38 [1st Dept 2022]). A license fee should “compensate [a respondent] for loss of enjoyment [of their property] and [the] diminution in value due to loss of use” (*id.*).

The tenants monthly rent was \$18,000 [agreed to when the tenants were unaware of the impact of petitioner's work on the rear yard (Fahl Aff, ¶10, NYSCEF Doc No 61)], therefore, in order to compensate the Bozzos for the diminution in value due to the loss of use of the rear yard of their property the monthly license fee is calculated as follows: \$18,000 minus the rent for any new tenants but in no event greater than \$9,000 per month or if no new tenants then \$9,000 per month or in the event that the rent for any new tenants exceeds \$18,000 per month then \$1,000 per month for the duration of the license term. In order to compensate the tenants for the loss of use of the rear yard the monthly license fee is \$4,000 per month for the period May 1, 2022, through July 31, 2022. If the tenants did not pay the Bozzos \$18,000 per month for the period May 1, 2022, through July 31, 2022, or for any part thereof the license fee payable to the Bozzos will be the difference between the \$18,000 per month rental amount and the amount paid by the tenants but in no event greater than \$9,000 per month. If the tenants paid the full monthly rent during this period, then the license fee payable to the Bozzos will be \$1,000 per month.

In addition, respondents are awarded their reasonable attorneys and engineering fees because:

“[a] property owner compelled to grant a license should not be put in a position of either having to incur the costs of a design professional to ensure petitioner's work will not endanger his property or having to grant access without being able to conduct a meaningful review of petitioner's plans”.

(Panasia Estate, Inc., 204 A.D.3d at 37 [citations and internal quotation marks omitted]).

Accordingly, based on the foregoing it is

ORDERED that this motion and petition are granted, to the extent that petitioner is granted a continued license to enter upon the Bozzos' property located at 148 East 63rd Street, New York, New York, as set forth in the Department of Buildings approved site safety plan at

NYSCEF Doc No 79 to allow petitioner to perform repairs to the façade of its building at 140 East 68th Street, New York, New York pursuant to Local Law 11; and it is further

ORDERED that the terms of the license granted herein are those set forth in the license agreement at NYSCEF Doc No 75 except as modified herein and those terms are incorporated herein; and it is further

ORDERED that the license shall expire on December 31, 2023; and it is further

ORDERED that petitioner shall pay the Bozzos a monthly license fee of \$18,000 minus the monthly rent for any new tenants but in no event greater than \$9,000 per month or if no new tenants, then \$9,000 per month or in the event that the rent for any new tenants exceeds \$18,000 per month then \$1,000 per month for the duration of the license term; and it is further

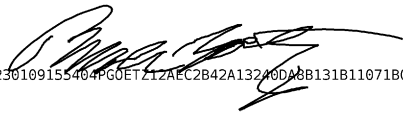
ORDERED that petitioner shall pay the tenant respondents a license fee of \$4,000 per month for the period May 1, 2022, through July 31, 2022; and it is further

ORDERED that in the event that the tenant respondents did not pay the Bozzos \$18,000 per month for the period May 1, 2022, through July 31, 2022 or for any part thereof the license fee payable to the Bozzos shall be the difference between the \$18,000 per month rental amount and the amount paid by the tenants but in no event greater than \$9,000 per month, and in the event that the tenants paid the full monthly rent during this period then the license fee payable to the Bozzos shall be \$1,000 per month; and it is further

ORDERED that petitioner shall pay respondents' reasonable attorneys and engineering fees in connection with this petition within 60 days after submission of invoices to petitioner; and it is further

ORDERED that petitioner shall notify the Bozzos in writing when it has completed the work under the license; and it is further

ORDERED that upon the completion of the term of the license, petitioner and its general contractor shall return the Bozzos' property to its original condition and that petitioner and its general contractor shall remove all construction materials and any debris from the licensed area.


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1/9/2023
DATE

PAUL A. GOETZ, J.S.C.

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|-----------------------|-------------------------------------|----------------------------|---------------------------------|--|
| CHECK ONE: | <input checked="" type="checkbox"/> | CASE DISPOSED | <input type="checkbox"/> | NON-FINAL DISPOSITION |
| | <input checked="" type="checkbox"/> | GRANTED | <input type="checkbox"/> DENIED | <input type="checkbox"/> GRANTED IN PART |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | | <input type="checkbox"/> OTHER |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> | <input type="checkbox"/> FIDUCIARY APPOINTMENT |
| | | | | <input type="checkbox"/> REFERENCE |