

Matter of 875 E. 35th St. Mgt. LLC v Cole

2023 NY Slip Op 31299(U)

April 14, 2023

Supreme Court, Kings County

Docket Number: Index No. 511670/22

Judge: Ingrid Joseph

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 14th day of April, 2023.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF KINGS

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MATTER OF THE APPLICATION OF
875 EAST 35TH STREET MANAGEMENT LLC,
Plaintiff,

ORDER

- against -

Index No. 511670/22

PEARL JOSEPH COLE A/K/A PEARL SANGER,
Defendant.

-----X

The following e-filed papers read herein:
Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____

NYSCEF Doc Nos.
2-12, 15, 23-26, 28-33
24-26, 28-33

Upon the foregoing papers in this special proceeding, 875 East 35th Management LLC (Petitioner) moves (Motion Seq. 1), by order to show cause (OSC) pursuant to CPLR Article 4 and RPAPL § 881, for access and entry to the property owned by Pearl Joseph Cole a/k/a Pearl Sanger (Respondent) and for an order: (1) granting it and its contractors, employees, representatives, architects, engineers, construction managers, and trade contractors a license to access and enter Respondent's Property at 871 East 35th Street in Brooklyn, Block 7563, Lot 29, (Respondent's Property) for a period of approximately eighteen (18) months from the date Petitioner is granted access to enable Petitioner to install, maintain and remove the following property protections on the Respondent's Property: (i) a pre-construction survey of Respondent's Property consisting of non-invasive photographic survey of existing conditions on Respondent's Property; (ii) access to the air space above Respondent's Property in order to install and maintain an outrigger system and/or a netting system extending from the new building at Petitioner's Property and to finish the exterior of the façade of the building to be constructed on Petitioner's Property (Airspace Access); and (iii) installation, maintenance and removal of scaffolding and overhead protection where

Motions #1 and #2

needed and surface protection on the roof of Respondent's [Property] (together with the Airspace Access, the Temporary Protections); and (2) directing Respondent to execute forms required by the New York City Department of Buildings (DOB), if any, in connection with the installation of the Property Protections (*see* NYSCEF Doc No. 15).

Respondent Sanger cross-moves (Motion Seq. 2) for an order, pursuant to RPAPL § 881, dismissing this proceeding for lack of merit on a variety of grounds, including: (1) failure to submit any approved plans or permits to this court; (2) the vagueness of the requested trespasses; (3) the vague nature of the entire "Project" that lacks any approved plans or permits from the DOB; (4) the vague nature of Petitioner's proposed license agreement; or, alternatively, in the event that Petitioner is granted a license for scaffolding and/or for "Air Access" or "Overhead Access," (5) directing Petitioner to pay all professional (i.e., engineers and attorneys') fees necessarily incurred by Respondent in connection with this matter, as well as an appropriate monthly license fee in an appropriate sum and range for the entire term (18 months) of the proposed license.

In this action, Petitioner is the owner of the property at 875 East 36th Street in Brooklyn, Block 7563, Lot 27, where Petitioner is allegedly in the process of undertaking improvements (NYSCEF Doc No. 1 at ¶ 2). Respondent's Property is immediately adjacent to the east of the Petitioner's Property (*id.* at ¶ 3). The verified petition, filed contemporaneous with the instant OSC on April 22, 2022, alleges in part that Petitioner commenced this special proceeding to obtain access and entry to Respondent's property for the purpose of performing, installing, maintaining, and removing (as applicable) property protections on Respondent's property in connection with Petitioner's activities at Petitioner's property (*id.* at ¶ 1). Furthermore, the petition alleges that Respondent's property is situated such that Petitioner cannot proceed with its Project without accessing and entering onto Respondent's Property in order to install certain protection work as mandated by Applicable Law.

Petitioner claims it has repeatedly attempted to obtain Respondent's consent to access and enter Respondent's Property, that the access and entry required will not unreasonably interfere with the use of Respondent's Property and that Respondent has refused and failed to grant Petitioner access and entry to its property (*id.* at ¶¶ 4-5; 7-8). Petitioner alleges that Respondent's refusal to consent to Petitioner's requests has and will continue to cause significant hardship and

inconvenience to Petitioner, including but not limited to delays in the Project and the complete prevention of Petitioner's ability to improve its own property" (*id.* at ¶ 9).

Regarding the "Project" at Petitioner's Property, the petition merely alleges that "Petitioner is in the process of filing plans with the DOB to perform the Project" which will last approximately 18 months. Additionally, Petitioner claims that it is immediately ready to perform a pre-construction inspection of Respondent's Property upon gaining the necessary access and entry to Respondent's Property and that in order to proceed with the Project, Petitioner is required to perform, install, maintain, and remove (as may be applicable) certain protective measures on Respondent's Property (*id.* at ¶¶ 14 and 16). The petition alleges that "[d]espite Petitioner's repeated attempts to obtain Respondent's agreement and consent, Respondent has refused to engage in substantive discussions with respect to a license agreement . . ." (*id.* at ¶ 25).

Petitioner alleges that it cannot lawfully proceed with the Project without protecting Respondent's Property, and access and entry upon Respondent's Property must be obtained in order to perform and install the Property Protections (*id.* at ¶ 45).

Petitioner, in support of its OSC, submits an affidavit from its principal, Yehuda Cohen (Cohen), who attests that Petitioner intends to construct a five-story residential building on the Petitioner's Property. (NYSCEF Doc No. 3 at ¶ 5). Cohen claims that the DOB has approved Petitioner's plans for the Project, however until the relief sought herein is granted, namely a license for the Petitioner to access and enter, Petitioner cannot proceed with the Project. Cohen also reiterates that since Petitioner's Property is adjacent and/or adjoining to Respondent's Property, Petitioner cannot proceed with construction without accessing and entering Respondent's Property to install protections required by the Building Code and that "due to the close proximity of Respondent's Property to the construction activities at Petitioner's Property, the performance and installation of the Property Protection is necessary to protect the Respondent's Property from damage (*id.* at ¶¶ 6, 10 and 45).

Cohen mentions several Building Codes with which Petitioner must comply with in order to proceed with its "Project." Cohen annexes and discusses the parties' unsuccessful negotiations for a license agreement (*id.* at ¶¶ 31-42) and annexes a Site Safety Plan that was prepared by Petitioner's engineer (*id.* at ¶ 49 and NYSCEF Doc No. 9 [Site Safety Plan]). Cohen attests that:

“I am advised by the Petitioner’s professionals hired in connection with the construction of the Project that the Property Protection is necessary to the performance and completion of the Project and has been designed in a way that is as minimally invasive to the Respondent as possible. I have also been advised that there are no viable alternatives to proceed with the Project without the ability to access and enter Respondent’s Property for the limited purpose of performing the Property Protection” (NYSCEF Doc No. 3 at ¶ 51 [emphasis added]).

Petitioner also submits an affidavit from its engineer, Pramodray Shah, P.E. (Engineer Shah) from S.G. Drafting Services (SG), who attests that SG was retained by Petitioner “to prepare a Site Safety Logistics Plan in connection with Petitioner’s planned construction of a five-story residential building . . . including the plans for certain protections on properties adjoining the Project, as mandated by the New York City Building Code” (NYSCEF Doc No. 11 at ¶ 2). Engineer Shah attests that upon information and belief that pursuant to the plans filed with the DOB, “Petitioner plans to commence and perform excavation and construction activities on Petitioner’s Property in furtherance of the Project” (*id.* at ¶ 6 [emphasis added]).

On July 18, 2022, Respondent opposed Petitioner’s OSC and cross-moved for an order dismissing the proceeding for lack of merit on several grounds, including Petitioner’s failure to submit approved Project plans or DOB permits with its petition, the vagueness of the requested trespasses onto her property, and the vague nature of the Project. In support, Respondent submits Affidavits of Respondent Sanger and her engineer, Liviu Schwartz (Schwartz), who attest that both the proposed safety measures set forth in the Site Protection Plan and the details of the Project lack detail and relevant information, such as the depth of excavation, where scaffolding will be needed, and further information regarding the plans of the project.

Alternatively, if Petitioner is granted a license for scaffolding, “Air Access” or “Overhead Access,” Respondent seeks an order directing Petitioner to pay: (1) for all professional fees that she necessarily incurred in connection with this matter, and (2) a monthly license fee for the duration of the license (approximately 18 months).

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” (emphasis added).

Whether or not a RPAPL § 881 license is granted “is addressed to the sound discretion of the court, which must apply a reasonableness standard in balancing the potential hardship to the applicant if the petition is not granted against the inconvenience to the adjoining owner if it is granted” (*Queens Theater Owner, LLC v WR Universal, LLC*, 192 AD3d 690 [2021]).

In making that determination, the court “may consider . . . the nature and extent of the requested access, the duration of the access, the protections to the adjoining property that are needed, the lack of an alternative means *to perform the work*, the public interest in the completion of the project, and the measures in place to ensure the financial compensation of the adjoining owner for any damage or inconvenience resulting from the intrusion” (*Matter of Voron v Board of Mgrs. of the Newswalk Condominium*, 186 AD3d 833 [2020] [emphasis added]). Importantly, an application for a license pursuant to RPAPL § 881 can be denied without prejudice to renewal where the details of the work to be performed and the necessity for such work are not provided by the petitioner (*see MK Realty Holding, LLC v Schneider*, 39 Misc3d 1209 [A] [Sup Ct Queens County 2013]).

Here, the petition, while claiming that the Project cannot proceed without installation of certain “Protections” on Respondent’s Property, fails to describe the nature, scope or any details

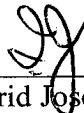
whatsoever about the Project to improve Petitioner's Property, other than the fact that plans for the Project were just "in the process" of being filed with DOB. Additionally, while Cohen annexes and discusses the parties' unsuccessful negotiations for a license agreement, he fails to describe or annex Petitioner's allegedly approved plans for the Project. Furthermore, Engineer Shah attests that his firm was hired by Petitioner to prepare a Site Safety Logistics Plan for the Project. Notably, Engineer Shah could only attest, "upon information and belief" that pursuant to "plans" filed with the DOB, "Petitioner plans to commence and perform *excavation and construction activities* on Petitioner's Property in furtherance of the Project" (NYSCEF Doc No. 11 at ¶ 6 [emphasis added]). Thus, Engineer Shah admittedly has no personal knowledge of the Project itself, including the excavation and construction plans that were apparently prepared by other engineers and purportedly filed with the DOB, which were not included in this record before the Court. All that was said about the nature of the Project was that Petitioner plans to erect a five-story building adjacent to Respondent Sanger's Property. It is impossible to determine the extent to which safety measures are required and whether there is an alternative means to perform the work, when the work itself is not described in sufficient detail in the record. At a minimum, Petitioner must submit the Project plans allegedly approved and filed with the DOB and testimony from the engineer and/or architect of the Project so that this Court can determine the necessity for a license to enter upon Respondent Sanger's Property.

Accordingly, it is

ORDERED that Petitioner's petition and OSC for a license (mot. seq. one), pursuant to RPAPL § 881, is denied without prejudice and with leave to refile based on papers that include the Project plans approved by the DOB and a detailed description of the Project by a licensed engineer and/or architect with personal knowledge of the Project for which Petitioner claims to require a RAPL § 881 license; and it is further

ORDERED that Respondent Sanger's cross motion (mot. seq. two) is granted to the extent that the petition is hereby dismissed without prejudice.

This constitutes the decision and order the Court.



Hon. Ingrid Joseph, J.S.C.

6

**Hon. Ingrid Joseph
Supreme Court Justice**