

Matter of Greenrock Realty Holdings, LLC v Licorish

2023 NY Slip Op 32171(U)

June 26, 2023

Supreme Court, Kings County

Docket Number: Index No. 518858/2022

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 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 26th day of June 2023

HONORABLE FRANCOIS A. RIVERA

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In the Matter of the Application of GREENROCK REALTY HOLDINGS, LLC,

Petitioner,

DECISION & ORDER
Index No.: 518858/2022

for an Order and Judgment pursuant to RPAPL 881 for access to adjoining property

- against -

DEBRA SLATER LICORISH, a/k/a Deborah Slater, LEE MYLKS, GRANT OLDS, K. PIERCE, "JOHN DOE" 1-4, "JANE DOE" 1-4, Respondents.

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Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of petition and verified petition of Greenrock Realty Holdings, LLC (hereinafter Greenrock or petitioner) filed on June 30, 2022, under motion sequence one, for judgment pursuant to RPAPL 881 and NYC Administrative Code § 28-306.1 granting the following relief:

- A) A license pursuant to RPAPL 881 permitting Greenrock and its retained architect, engineers, workers, and equipment to enter into and upon the building at 600 Pacific Avenue, Brooklyn, New York ("600 Pacific"), in order to:
 - i. effect the rooftop repairs and party wall extension identified in the accompanying petition, including the inspections of the party wall on the interior of 600 Pacific;
 - ii. permit the erection of protection over the second-floor terrace and the erection of sidewalk sheds in the front and rear of Greenrock 's property and that will extend over a portion of 600 Pacific;
- B) an order directing that the cost of the party wall extension be shared equally, by both petitioner and respondent Debra Slater Licorish, a/k/a Deborah Slater.

This petition is opposed by respondents Debra Slater Licorish, a/k/a Deborah Slater, Lee Mylks, Grant Olds, and K. Pierce.

- Notice of Petition
- Verified Petition
 - Exhibits 1 to 3
- Affidavit in Support by James Schelkle, Architect
 - Exhibits A to B
- Memorandum of Law in Support
- Answer
- Affirmation in Opposition
- Affidavit in Opposition by James M. Vignola, Engineer
 - Exhibits A to G
- Reply Affidavit of James Schelkle
 - Exhibits 1 to 3

BACKGROUND

On June 30, 2022, Greenrock commenced the instant special proceeding pursuant RPAPL 881 for a license to enter the adjoining property owned by respondent Debra Slater Licorish, a/k/a Deborah Slater (hereinafter Slater) by electronically filing a notice of petition, verified petition, a request for judicial intervention and supporting documents with the Kings County Clerk's office (KCCO).

On July 6, 2022, the petitioner filed a document titled "notice to the respondents as to the return date of the petition," which was recorded in NYSCEF as an amended notice of motion.

On November 16, 2022, respondents Slater, Lee Mylks, Grant Olds, and K. Pierce (hereinafter collectively as the respondents) interposed a verified answer in a special proceeding including seven affirmative defenses. On the same date, the respondents filed opposition papers to the petition.

On November 8, 2022, the petitioner filed an affidavit and exhibits in reply and in further support of the petition.

The Petition

Greenrock's verified petition alleges the following salient facts. Greenrock is the owner of the land and the building at 602 Pacific Street in Brooklyn, New York (subject premises or building). Slater is the owner of the land and the multi-dwelling building located at 600 Pacific Street in Brooklyn, New York (hereinafter the adjacent property or building). Respondents Lee Mylks, Grant Olds, and K. Pierce are alleged to be either the tenants or occupants of the apartments in the adjacent property. The petition alleges that there may be other tenants/occupants which it identified as John Doe 1-4.

Greenrock intends to renovate the subject building to create commercial space on the ground floor and residential units on the second and third floors. Such construction requires the erection of temporary sidewalk sheds in the front and rear of the subject building, which may extend to the front and rear of the adjacent building.

Greenrock avers that the subject building is in urgent need of repairs to the roof, which will require removal of the chimney, and performance of parapet work and flashing. The subject building and the adjacent building share a party wall, i.e., a shared common wall that separates the two buildings, in this instance the party wall is substantially flush with the rooftops of the two buildings. Greenrock seeks to extend the height of the party wall by 3 feet.

Greenrock alleges that the renovation, roof repairs, and party wall extension cannot occur without entering the adjacent building and its surrounding area. The petitioner contends that the construction work can be completed within 12 months of the issuance of a license pursuant to RPAPL 881.

Greenrock avers that it will be responsible for all actual damages that occur because of its entry upon the adjacent property. It has \$1,000,000.00 liability insurance policy that is available

in the event of any damage to adjacent property and the apartments therein. In addition, it will ensure that its general contractor maintains liability insurance in the amount of \$5,000,000.00, as a condition for the granting of the license. It proposes to add the respondents as additional insureds on both its liability insurance policy and the general contractor's liability insurance policy and will provide proof of same. Greenrock has unsuccessfully requested Slater's permission on multiple occasions. By letter dated, June 22, 2022, Slater's attorney refused to grant access to the adjacent property.

By order dated, January 31, 2023, the petitioner withdrew the portion of the application seeking an order that Slater pay for half of the party wall extension. The petitioner agreed to pay the entire costs of the wall extension. The order, further, directed respondent Slater to submit an affirmation that sets forth the favorable conditions and/or fees sought to consent to a license. The order also directed the petitioner to submit in reply to Slater's affirmation any of its objections or counter-proposals to the respondent's affirmation.

Respondents' Affirmation

The respondents submitted an affirmation of their counsel, Ronald Francis, Esq. and an affidavit by James M. Vignola, a professional engineer, and supporting documents in compliance with the Court's January 31, 2023 Order.

The respondents contend that the license will deprive the occupants of the adjacent property of the quiet enjoyment of their homes as well as the loss of access to their front sidewalk, rear yard, and second-floor terrace.

Consequently, the respondents seek the following conditions for the granting of a license. The respondents request that the petitioner pay attorney and engineering fees. The fees are described as fees incurred through January 31, 2023, and an estimate of fees after January 31,

2023, that may be incurred through continued litigation. Through January 31, 2023, Slater has incurred legal fees in the amount of \$20,648.50 and engineering fees in the amount of \$8,649.30. The respondents request that the petitioner pay all reasonable attorney's fees incurred after January 31, 2023, up to \$18,000.00, and all reasonable engineering fees incurred after January 31, 2023, up to \$10,000.00.

The respondents request that the petitioner obtain a general liability insurance policy in the amount of no less than \$1,000,000.00 for a single occurrence and a \$3,000,000.00 umbrella policy that includes the respondents as additional insureds and indemnifies the respondents for all damages or losses incurred due actions by the petitioner or its agents. The respondent also requests a monthly license fee of \$2,500.00.

The Petitioner's Affirmation

Greenrock submitted an affirmation of its counsel, Peter A. Schwartz, Esq., an affidavit by James Schelkle, and supporting documents as directed by the January 31, 2023 Order.

The petitioner opposes the respondents' request for a license fee, attorney's fees, and engineering fees. Alternatively, Greenrock proposes a \$500.00 monthly license fee, a cap on legal fees of up to \$20,000.00, and a cap of \$10,000.00 on engineering fees.

MOTION PAPERS

The petitioner's commencement papers consist of a notice of petition, a verified petition with three annexed exhibits labeled 1 through 3 (hereinafter Petition Exhibits), a memorandum of law, and an affidavit by James Schelkle with two annexed exhibits labeled A through B (hereinafter Schelkle Exhibits).

Petition Exhibit 1 is described a copy of letter dated March 29, 2022, from the petitioner's attorney to respondents' attorney. Petition Exhibit 2 is described as a letter dated

April 25, 2022, from the petitioner's attorney to the respondents' attorney. Petition Exhibit 3 is described as a letter dated June 22, 2022, from the respondents' attorney to the petitioner's attorney.

Schelkle Exhibit A is a copy of the Curriculum Vitae of James Schelkle, an architect. Schelkle Exhibit B is described as a printout from the NYC.gov website regarding the 1938 Building Code.

The respondents' opposition papers consist of a verified answer, an affirmation of counsel, and an affidavit by James M. Vignola with seven annexed exhibits labeled A through G. Exhibit A is a copy of the Curriculum Vitae of James M. Vignola. Exhibit B is a copy of the Certificate of Occupancy for 600 Pacific Street, Block No. 928, Lot No. 31. Exhibit C is a copy of the Work Permit Data for 600 Pacific Street, Block No. 928, Lot No. 31. Exhibit D is a copy of a handwritten card titled Department of Housing and Buildings Division of Housing. Exhibit E is a copy of the NYC Department of Buildings, DOB Violations. Exhibit F is a copy of the NYC Department of Buildings, Actions. Exhibit G is a copy of the NYC Department of Buildings, Property Profile Overview for 600 Pacific Street, BIN No. 3018389.

The petitioner's reply papers consist of an affidavit by James Schelkle with one annexed exhibit labeled 1 and an affirmation of counsel with two annexed exhibits labeled 2 through 3. Exhibit 1 is the Certificate of Occupancy for 602 Pacific Street. Exhibit 2 is an email dated August 26, 2022, from Peter Schwartz, petitioner's counsel to Ronald Francis, Slater's counsel. Exhibit 3 is an email dated September 12, 2022, from Peter Schwartz, petitioner's counsel to Ronald Francis, Slater's counsel.

LAW AND APPLICATION

According to the petition, the petitioner owns the land and building at 602 Pacific Street Brooklyn, New York (602 Pacific Street) and seeks a license pursuant to RPAPL 881 to enter the adjoining property (600 Pacific Street), including the apartments therein, to perform needed repair and renovation work to Petitioner's property, including the extension of a party wall. 602 Pacific and 600 Pacific share a party wall that is substantially flush with the rooftops of the two buildings. The petitioner seeks to make repairs to the roof, including the removal of a chimney, and to perform parapet work and flashing. The petitioner also seeks to extend the height of the party wall by approximately three feet.

The petitioner contends that the required roof repairs and party wall extension cannot be performed without entering in, on, and around 600 Pacific, including inside the individual apartments and on the roof, because, inter alia: (a) the party wall must be inspected from both sides before and during construction, including taking photographs; and (b) the existing roofing material for both 602 Pacific and 600 Pacific goes over the party wall and is tied into the roofing material for the adjacent building. That work presently requires that each party have access to the other party's property.

The work contemplated and the petitioner's need for access to perform it cannot be reasonably disputed. The respondents have made clear that they are amenable to a license agreement provided that the terms are appropriate and just. The petitioner agrees that reasonable compensation is appropriate. The parties, however, dispute the amount of the respondents' professional expenditures that are reasonably compensable and the amount of a license fee that should be granted for the respondents' loss of the use and enjoyment of part of their property during the license period.

The respondents spent a lot of time and effort opposing the branch of the petition seeking that the respondents share the cost of the extension of a party wall. The respondents strenuously objected to this request and would not negotiate a license agreement that required the respondents to pay half the cost of the party wall extension. After the petitioner withdrew that branch of its petition, the respondents began negotiating in earnest and proposed what they considered reasonable terms for consenting to a license agreement. The petitioner offered a counter proposal of what it considered reasonable terms for obtaining a license agreement of consent.

“RPAPL 881 provides: 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. . . . 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 because of the entry” (*Panasia Est., Inc. v. 29 W. 19 Condo.*, 204 AD3d 33, 36 [1st Dept 2022], 164 NYS3d 551, leave to appeal dismissed, 38 NY3d 1125 [2022] [internal quotations marks omitted]).

Because the respondent to a petition seeking access to adjoining real property for the petitioner to make improvements or repairs to the petitioner's property has not sought out the intrusion and does not derive any benefit from it, equity requires that the respondent compelled to grant access should not have to bear any costs resulting from the access (*Panasia Est., Inc.*, 204 AD3d at 37, quoting *DDG Warren LLC v Assouline Ritz 1, LLC*, 138 AD3d 539, 540 [1st Dept 2016]).

A license fee is warranted where the granted license will entail substantial interference with the use and enjoyment of the neighboring property during the license period, thus decreasing the value of the property during that time (*id.*).

Similarly, a compulsory licensor should be entitled to 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 (*Matter of Van Dorn Holdings, LLC v 152 W. 58th Owners Corp.*, 149 AD3d 518 [1st Dept 2017]).

Incurred Attorney's Fees

The respondents seek an award of attorney's fees incurred from August through January 31, 2023, at the rate of \$525.00 per hour in the total amount of \$20,648.50. This amount is supported by monthly invoices. The respondents also seek prospective attorney fees anticipated to be incurred after January 31, 2023, up to \$18,000.00. The respondents' counsel anticipates that he will need to spend an additional 20-25 hours counseling the respondent and communicating with the petitioner's counsel.

The petitioner opposes the respondents' request for attorney fees incurred through January 31, 2023, and anticipated to be incurred in the future. The petitioner's counsel has opined in a conclusory fashion that the attorney fees incurred through January 31, 2023, have been excessive and unnecessary. The petitioner also contends that the fees projected to be expended in the future are similarly excessive and not necessary considering the minimal work minimal work the respondents' attorney may have to do.

The Court disagrees. The respondents have supported the request for attorney fees incurred up to January 31, 2023, with monthly invoices and entries stating the work performed. The petitioner has not established that the expenses incurred were either unnecessary or excessive. The Court further finds that the hourly rate billed at the amount of time expended is facially reasonable. Consequently, respondent Slater is awarded attorney's fees incurred from August through January 31, 2023, at the rate of \$525.00 per hour in the total amount of \$20,648.50 (*see Matter of Van Dorn Holdings, LLC*, 149 AD3d at 518).

The respondents also seek an award of engineering fees incurred through January 31, 2023, in the total amount of \$8,649.30. The amount is also supported by invoices for the dates of December 16, 2022, January 13, 2023, and January 31, 2023. The respondents also seek prospective engineering fees anticipated to be incurred after January 31, 2023, up to \$10,000.00.

Once again, the petitioner's counsel has opined in a conclusory fashion that the engineering fees incurred to date have been excessive and unnecessary. The petitioner further contends that the fees projected to be expended in the future are similarly excessive and not necessary considering the minimal work the respondents' engineers may have to do.

The Court disagrees. The respondents have supported the request for engineering fees incurred up to January 31, 2023, with invoices and entries stating the work performed. The petitioner has not established that the expenses incurred were either unnecessary or excessive. The Court further finds that the hourly rate billed at the amount of time expended is facially reasonable. Consequently, the respondent is awarded engineering fees incurred up to January 31, 2023, in the amount of \$8,649.30 (*see Matter of Van Dorn Holdings, LLC*, 149 AD3d at 518).

The respondents seek a license fee of \$2,500.00 a month.

The petitioner contends that 602 Pacific is a narrow four-story building constructed in the late 1800s. The work which has been approved by the New York City Department of Buildings (DOB) will convert an existing single-family dwelling over an existing bi-level store into two new modern residential units over a grade-level commercial space.

The petitioner correctly contends that neither respondent Slater nor any of the three residents of the apartments in 600 Pacific have submitted an affidavit identifying any temporary loss of enjoyment that they purportedly would suffer as a result of the work proposed by the petitioner by either the periodic inspection of the party wall, the rooftop extension of the party wall, or the sidewalk sheds that will extend over only approximately five feet of the front sidewalk and rear yard of 600 Pacific.

While this contention is correct, a license fee is nevertheless appropriate for the respondents' loss of the use and enjoyment of part of their property during the license period. The petitioner contends that the request for a license fee of \$2,500.00 a month is unreasonable and that \$500 a month is more than sufficient compensation. The Court agrees that \$2500 a month is excessive, however, \$500 a month is insufficient. The Court hereby awards a monthly license fee of \$1,000.00.

The respondents request an award for attorney fees and engineering fees to be incurred in the future up to \$10,000 for each category. In the matter of *Panasia Est., Inc. v. 29 W. 19 Condo.*, (204 AD3d at 33), the trial court was found to have abused its discretion by granting property owners anticipated attorney fees and engineering fees as the condition of a license for a neighbor to enter the owner's properties for the neighbor to make improvements to its property, where no evidentiary basis existed for granting anticipated fees.

In the case at bar, there is no evidentiary basis for the award of future professional fees. Now it is at best an anticipated potential expense. Accordingly, no award will be made awarded at this time for future expenses as a condition of awarding an RPAPL 881 license to the petitioner. However, the denial of this branch of the award is without prejudice such that the respondents may apply for such an award in the future if the circumstances warrant same.

Protection for the Respondents

In paragraph twenty-seven of the verified petition, the petitioners affirmatively averred the following:

“Greenrock is aware and accepts that the grant of a license pursuant to RPAPL 881 is conditioned on Greenrock being responsible for all actual damages occurring as a result of the entry upon 600 Pacific. Greenrock has in place \$1,000,000 of liability insurance that is available in the event of any damage to 600 Pacific and the apartments therein. In addition, Greenrock will ensure that its general contractor maintains liability insurance in the amount of \$5,000,000. As a condition for the grant of the license requested herein, Greenrock will make sure that all Respondents are named as additional insureds on both Greenrock’s liability insurance policy and the general contractor’s liability insurance and will provide proof of same to Respondents.”

The respondents have requested that the petitioner be directed to obtain a general liability insurance policy in the amount of no less than \$1,000,000.00 for a single occurrence and a \$3,000,000.00 umbrella policy covering respondents as additional insurance, and indemnifying respondents for all damages or loss caused to respondents or their property by the petitioner or its contractors and agents.

The Court directs the petitioner to obtain a \$1,000,000 liability insurance policy that is available in the event of any damage to 600 Pacific and the apartments therein; to maintain a general contractor liability insurance policy in the amount of \$5,000,000 covering the

respondents as additional insureds; and to indemnify the respondents for all damages or loss caused to respondents or their property by the petitioner or its contractors and agents.

CONCLUSION

In accordance with the foregoing:

Petitioner Greenrock Realty Holdings, LLC is awarded a license to enter respondent Debra Slater Licorish, a/k/a Deborah Slater's property to commence the work set forth in its petition conditioned upon the following:

- (1) Petitioner Greenrock Realty Holdings, LLC is to pay to respondent Debra Slater Licorish, a/k/a Deborah Slater within 10 days of service of notice of entry of this order the amount of \$20,648.50 for the legal fees incurred by respondent Debra Slater Licorish, a/k/a Deborah Slater through January 31st, 2023.
- (2) Petitioner Greenrock Realty Holdings, LLC is to pay to respondent Debra Slater Licorish, a/k/a Deborah Slater within 10 days of service of notice of entry of this order the amount of \$8649.30 for the engineering fees incurred by respondent Debra Slater Licorish, a/k/a Deborah Slater through January 31st, 2023.
- (3) The payment of a monthly license fee in the amount of \$1000.00 for every month of the license to respondent Debra Slater Licorish, a/k/a Deborah Slater. The license period shall be limited to 12 months, with leave to move by notice of motion for an extension of the license beyond the twelve months if necessary.
- (4) Petitioner Greenrock Realty Holdings, LLC shall obtain a \$1,000,000 liability insurance policy that is available in the event of any damage to 600 Pacific and the apartments therein.

(5) Petitioner Greenrock Realty Holdings, LLC shall maintain a general contractor liability insurance policy in the amount of \$5,000,000 covering the respondents as additional insureds.

(6) Petitioner Greenrock Realty Holdings, LLC shall indemnify the respondents for all damages or loss caused to respondents or their property by Greenrock Realty Holdings, LLC or its contractors and agents.

The Court will retain jurisdiction over the petition for purposes of compliance with the instant decision and order.

The foregoing constitutes the decision and order of this Court. •

ENTER:



J.S.C.

FRANCOIS A. RIVERA
J.S.C.