

CMCSSG 221E48, LLC v Brigitte Assoc., LLC

2023 NY Slip Op 32690(U)

August 2, 2023

Supreme Court, New York County

Docket Number: Index No. 153335/2023

Judge: Shahabuddeen Abid Ally

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT:	<u>HON. SHAHABUDDEN ABID ALLY</u>	PART	16TR
	<i>Justice</i>		
-----X		INDEX NO.	<u>153335/2023</u>
CMCSSG 221E48, LLC,		MOTION DATE	<u>04/12/2023</u>
Petitioner,		MOTION SEQ. NO.	<u>001</u>
- v -			
BRIGETTE ASSOCIATES, LLC,		DECISION + ORDER ON MOTION	
Respondent			
-----X			

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1-9, 11, 15-38 were read on this motion to/for ACCESS PROPERTY – RPAPL 881.

Petitioner commenced the instant special proceeding pursuant to RPAPL § 881, seeking an access license to respondent’s property for the purpose of conducting planned renovation work. Respondent opposes a compulsory license, contending that petitioner has not met its burden under RPAPL § 881. In the alternative, respondent objects to petitioner’s proposed license terms and seeks imposition of several of its own conditions on any license. Respondent also cross-moves for discovery in support of its counterclaim for a declaratory judgment granting respondent a prescriptive easement relating to purportedly shared HVAC systems.

The parties appeared before the Court via Microsoft Teams on May 25, 2023 for conference. At the Court’s direction, the matter was adjourned for petitioner to file opposition to the cross-motion. Upon consideration of the above cited papers, the Court grants petitioner a license pursuant to the terms and conditions set forth below. The Court further severs respondent’s counterclaim and denies respondent’s cross-motion.

Background

Petitioner is the owner of the premises located at 221 E. 48th Street, New York, NY (“Petitioner’s Property”). Respondent is the owner of the premises located at 223 E. 48th Street, New York, NY (“Respondent’s Property”), which is fully occupied by tenants. The properties are adjoined and share a backyard.

Petitioner is in the process of renovating Petitioner’s Property to construct additional floor(s) and expand the back of the building. Pursuant to New York City Department of Buildings Code 3309, this work requires certain protective measures to be taken in relation to adjoining properties. To that end, petitioner and respondent began negotiations for a license agreement that would permit petitioner to perform the required work.

After months of discussions, the parties failed to arrive at an agreement. Petitioner thereafter commenced this special proceeding on April 12, 2023, seeking an order granting petitioner and its contractors/employees a license pursuant to RPAPL § 881. The work to be covered in the license includes: (a) erecting scaffolding on Respondent’s Property for use for the project’s duration; (b) placing roof protection, overhead scaffolding, and sidewalk bridges onto the sidewalks in front of Respondent’s Property; (c) placing weather protection over the exposed exterior wall and foundation of Respondent’s Property during demolition and excavation work; and (d) installing flashing and an Emseal between the properties to protect both from water infiltration (collectively the “Protective Work”). In support, petitioner annexed the affidavit of Chok Lei, Managing Member of petitioner. Petitioner has also provided a copy of the licensing agreement it executed with the owner of the property adjoining Petitioner’s Property on its other side (219 East 48th Street), which contains the provisions purported to be the terms of petitioner’s

proposed license agreement (Petition, exhibit C), as well as excerpts from a Loan Agreement which show the expected completion date of the renovation (Lei Affidavit, exhibit B).

Respondent filed its answer with a general denial and affirmative defense and counterclaimed for a declaratory judgment awarding respondent a prescriptive easement that runs with the HVAC system. Respondent also cross-moved for discovery in support of its counterclaim, supported by, *inter alia*, the affidavits of Bruce Gallagher, an architect retained by respondent, and Arthur Rosenberg, principal of respondent. Respondent argues that while it is not opposed to a licensing agreement, petitioner has failed to provide plans or other documentation that would allow respondent to meaningfully assess the proposed Protective Work. Specifically, respondent asserts that petitioner has failed to provide sufficiently detailed information relating to a safety plan regarding work to be done on exhaust vents, flues, and chimneys.

Respondent argues in the alternative that, should the Court see fit to order a license, the following conditions be imposed: (1) a fixed monthly license fee of \$5,000.00 or higher; (2) petitioner to indemnify and hold harmless respondent from and against all claims, losses, liabilities, damages, fines, liens, actions, summary proceedings, judgments, or costs (including attorneys' and professional fees and expenses) resulting from or arising out of the construction on Respondent's Property; (3) petitioner to pay all attorneys' fees and professional fees and all expenses incurred related to petitioner's work to date and continuing; (4) petitioner to be held liable to respondent for any damage or injury suffered by respondent as a result of the construction or of petitioner's access to respondent's property, that all damaged property be promptly repaired at petitioner's sole cost and expense, and petitioner to place not less than

\$60,000 into escrow with respondent's counsel to secure payment of damages and other associated fees.

Petitioner was granted leave to file reply and opposition to respondent's cross-motion, which was filed concurrently with petitioner's answer to the counterclaim. Petitioner avers that it had previously provided to respondent documents containing details of the proposed Protective Work, and further maintains that matters relating to chimney protection or vent/flues access and airspace access are irrelevant to the proposed license as the contemplated Protective Work does not comprise any work on the chimneys, flues, or vents. Petitioner objects to respondent's proposed license fee as unreasonable and suggests instead a fee of \$250.00 per week as agreed to by the owners of 219 East 48th Street. Finally, while petitioner agrees to indemnify respondent with regard to any damage caused by the license or Protective Work, petitioner objects to the proposed bond, contending that its agreement to add respondent as insureds on its policies should suffice.

With respect to respondent's cross-motion and counterclaim, petitioner argues that a full determination of the easement issue would unduly delay adjudication of the petition because it would require further fact finding, including discovery and probable hearing. Petitioner contends that to the extent respondent wishes to further litigate its counterclaim, the counterclaim should be severed from the instant action and the license otherwise granted.

Discussion

RPAPL § 881 provides as follows:

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 . . . 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.

The granting of a license is addressed to the sound discretion of the court, which is “required to balance the interests of the parties and should issue a license ‘when necessary, under reasonable conditions, and where the inconvenience to the adjacent property owner is relatively slight compared to the hardship of his neighbor if the license is refused’” (*Bd of Mgrs of Artisan Lofts Condominium v Moskowitz*, 114 AD3d 491, 492 [1st Dept 2014], quoting *Chase Manhattan Bank [Natl Assn] v Broadway, Whitney Co*, 57 Misc 2d 1091, 1095 [Sup Ct, Queens County 1968]). Some factors that a court may consider include “that 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 and inconvenience resulting from the intrusion” (*Bd of Mgrs of the Artisan Lofts Condominium v Bd of Mgrs of the 137 Reade St Condominium*, 2022 NY Slip Op 31118[U] at *3 [Sup Ct, New York County 2022]).

The Court finds that petitioner has established that issuance of a license is necessary and reasonable under the circumstances. It is undisputed that petitioner’s project constitutes an improvement to petitioner’s property and that the Protective Work is required for the renovation project to progress. Indeed, respondent concedes that it does not categorically oppose a license agreement for the proposed Protective Work. As set forth in petitioner’s papers, the Protective Work is of a temporary nature, designed to protect Respondent’s Property from damage caused by the renovation project, and whose structures will be removed upon completion of renovation’s completion. Further, petitioner avers that deadlines imposed by its lender provides strong incentive for the renovation to proceed in a timely manner. The nature of the New York City

rowhouse necessarily requires that in order to install protective measures, petitioner must have access to Respondents' Property. Accordingly, the Court finds that a license for this purpose is warranted.

On review of petitioner's affidavits and exhibits, the Court is further persuaded that concerns regarding the integrity of any shared chimneys, flues, or exhaust vents do not impact the necessity or viability of a limited and temporary license to install the Protective Work as it is defined by petitioner and in the annexed license agreement. The Court's granting of a license is based upon petitioner's representation that the Protective Work does not comprise changes or alterations to chimneys, flues, or ventilation systems. Therefore, to the extent that such work is deemed necessary by petitioner, the parties must negotiate (or litigate, if necessary) such access separately.

The Court recognizes that because "the respondent to an 881 petition has not sought out the intrusion and does not derive any benefit from it . . . Equity requires that the owner compelled to grant access should not have to bear any costs resulting from the access" (*DDG Warren LLC v Assouline Ritz 1, LLC*, 138 AD3d 539, 539-540 [1st Dept 2016][internal quotation marks omitted]). For its part, petitioner concedes that a license fee is equitable and anticipated and has suggested that same fee agreed upon by the owners of 219 East 48th Street. As respondent points out, however, the license fee appropriate for an unimproved, unoccupied neighbor cannot be expected to accurately reflect the cost of the Protective Work's impact on Respondent's Property, which is fully occupied by tenants who are entitled to the use and enjoyment of their leased premises. In light of the distance between the parties' respective positions, the Court directs the parties to submit expert affidavits or other documentation from

which the Court can ascertain for itself the appropriate license fee for access to Respondent's property.

Finally, with regard to architects' or other professional fees, the uniquely integrated history of the properties in this matter reasonably supports respondent's decision to retain an architect or other professional in the review of the proposed renovation work and negotiation of the license. As such, the Court finds it reasonable to impose a requirement that petitioner pay reasonable professional fees. As respondent has not submitted any documents listing the type and value of the work purported to have been performed, this Court cannot determine what, if any, such fees are warranted on the papers. Respondent is therefore directed to submit documentation from which the Court can determine reasonable professional fees incurred relating to the license and Protective Work.

However, as for attorneys' fees, respondent requests \$6,129.00 for fees incurred through April 2023, and \$8,500.00 for fees incurred in May for the litigation of this action. Respondent has provided in support the affirmation of Gregory Byrnes and previously prepared invoices (Byrnes Affirmation, exhibit 1). However, the Court finds that this case does not require that the petitioner pay reasonable attorneys' fees incurred in reviewing, negotiating, and litigating the license granted herein. As such the license will not require petitioner to pay respondent's legal fees.

Respondent's Cross-Motion for Discovery

There is no right to disclosure in special proceedings except by leave of court (CPLR § 408). The party seeking discovery must demonstrate either "ample need" for the requested items or that "unusual circumstances" exist (*Matter of People v Northern Leasing Systems, Inc.*, 193 AD3d 67, 74 [1st Dept 2021][internal quotes and citations omitted]). While the court generally

has broad discretion in granting or denying discovery (*see Matter of L&M Bus Corp v New York City Dept of Educ*, 71 AD3d 127, 136 [1st Dept 2009]), the court is required to “balance the needs of the party seeking discovery against such opposing interests as expediency and confidentiality” (*Matter of Bramble v New York City Dept of Educ*, 125 AD3d 856, 857 [2d Dept 2015]).

Here, respondent claims that discovery is essential to determine the scope of the easement to which it is entitled. Respondent argues that it requires time to research the history of both properties, particularly in light of the properties’ history under single ownership. Respondent further argues that the license sought by petitioner must therefore be delayed in order to effectuate this research and requests a sixty-day period prior to petitioner gaining access to Respondent’s Property under any license.

Petitioner argues that respondent’s cross-motion should be denied because the question of a possible easement is irrelevant to the scope of the proposed renovation work. Petitioner further argues that the question of an easement should be dismissed or severed from that of the license so as not to delay the progress of the renovation project.

Here, the Court finds that respondent has not established that investigation of its counterclaim necessarily requires delay of the Protective Work sought by petitioner and as such denies respondent’s request for a sixty-day delay. The Court further notes that respondent does not seek specific discovery from petitioner, but only references its desire to conduct historical research and discovery of an unnamed third party. Accordingly, respondent has not made the requisite showing of “ample need” for disclosure or “unusual circumstances” as required by CPLR § 408. Respondents’ cross-motion is therefore denied.

CPLR § 407 permits a court to “at any time order a severance of a particular claim, counterclaim or cross-claim, or as to a particular party, and order that, as to such claim or party, the special proceeding continue as an action or as a separate special proceeding.” Because the Court is not persuaded that the determination of the easement issue is dispositive or otherwise essential to the determination of the license issue, respondent’s counterclaim is severed and will be considered separately from petitioner’s application.

Conclusion

Based on the foregoing, the Court finds that petitioner has met its burden under RPAPL § 881 to establish that a license is warranted for the purpose of performing the Protective Work at respondent’s property. The Court also finds that respondent is entitled to a license fee for such access, as well as to reasonable architects’ and other necessary professional fees incurred relating to the license and Protective Work, and directs the parties to submit documentation in support of their respective positions for the Court’s review. Finally, the Court further finds that severance of respondent’s counterclaim is warranted.

Accordingly, it is hereby:

ORDERED that petitioner’s application pursuant to RPAPL § 881 is granted and petitioner is awarded a license to enter Respondent’s Property to commence the work set forth in its petition as follows:

1. Petitioner shall have a limited, temporary, and non-exclusive license to enter respondent’s property for a period of up to twelve weeks from the date of the first license fee payment to respondent to perform the Protective Work as provided for in paragraphs 2 and 3 of petitioner’s annexed license agreement, excluding any extension or other modification of chimneys, exhaust vents, or flues;

2. Petitioner's contractors and other workers are permitted such access only from Mondays through Fridays and between the hours of 8:00 AM and 5:00 PM or on consent of respondent or respondent's agent;
3. Petitioner is to pay a license fee to respondent in an amount agreed upon by the parties or determined by this Court upon submission of supporting documents;
4. Petitioner is to pay respondent's architects' fees incurred as a result of this license and Protective Work in an amount agreed upon by the parties or determined by this Court upon submission of supporting documents;
5. Petitioner shall maintain industry standard insurance and such policies shall name respondent, residents of Respondent's Property, and employees at Respondent's Property as additional insureds as provided for in paragraph 7 of the annexed license agreement;
6. Petitioner shall indemnify and hold respondent harmless from and against all costs, expenses, liabilities, claims and damages for personal injury or death, property damage, and/or fines or violations to Respondent's Property to the extent caused by petitioner's access and/or the Protective Work as provided for in paragraph 8 of petitioner's annexed license agreement;
7. Petitioner shall repair and restore Respondent's Property damaged or destroyed as a result of petitioner's entry onto the property pursuant to this license or arising from the Protective Work as provided for in paragraph 8 of the petitioner's annexed license agreement;
8. To the extent that petitioner seeks access to Respondent's Property for reasons other than to perform the Protective Work or remove related installations, such access may only be permitted upon the parties' equitable negotiation of the applicable terms.

and it is further

ORDERED that the parties shall settle an order setting forth agreed-upon license fee and architects’/related professional fees for the above or, if the parties cannot agree on fees, submit expert affidavits, invoices, and other relevant documents in support of their respective positions within ten days of the date of entry of this order; and it is further

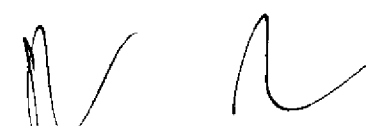
ORDERED that the parties shall submit such proposed order or affidavits via NYSCEF and courtesy copies to chambers by email (SFC-Part16@nycourts.gov); and it is further

ORDERED that respondent’s cross-motion for discovery is denied; and it is further

ORDERED that the parties shall appear before the Court for conference on respondent’s counterclaim via Microsoft Teams on September 14, 2023 at 10:00 AM; and it is further

ORDERED that any requested relief not expressly granted herein is denied.

This constitutes the decision and order of the Court.

<u>8/2/2023</u> DATE			 _____ SHAHABUDDIEN ABID ALLY, A.J.S.C.	
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER
	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
	<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE