

**Normanus Realty LLC v 154 E. 62 LLC**

2023 NY Slip Op 34127(U)

November 27, 2023

Supreme Court, New York County

Docket Number: Index No. 152586/2023

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*

-----X

NORMANUS REALTY LLC

Petitioner,

- v -

154 E. 62 LLC,

Respondent.

-----X

**INDEX NO.** 152586/2023

**MOTION DATE** 08/16/2023

**MOTION SEQ. NO.** 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 147, 148, 149, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182

were read on this motion to/for MISC. SPECIAL PROCEEDINGS.

Petitioner Normanus Realty LLC (“Normanus”) moves, by order to show cause, for a new license to enter respondent 154 E. 62 LLC’s (“154”) adjoining property pursuant to Real Property Actions and Proceedings Law (RPAPL) § 881 to complete a construction project (the project) that began in 2016. Respondent opposes the petition arguing that they have not denied Normanus access and are instead merely attempting to negotiate reasonable terms to a licensing agreement. Alternatively 154 asks that if the court does order a licensing agreement, then the court should use their proposed access agreement rather than the one provided by Normanus.

**BACKGROUND**

In 2016, petitioner, owner of a townhouse located at 152 East 62nd Street, New York, NY, (“the premises”) commenced a major construction project at the premises to build a multi-story extension on the building. In order to effectuate this planned construction, petitioner required access to neighboring properties including the property of respondent located at 154

East 62nd Street, New York, NY. On March 21, 2019, petitioner and respondent entered into a License, Access, and Settlement Agreement which granted access to respondent's property and allowed for the installation of certain protections required by the New York City Building Code. On September 27, 2019 Normanus informed 154 that work would commence in 30 days. Construction continued until March 2020 when it was halted pursuant to Governor Cuomo's Executive Order which halted all non-essential construction. Construction has not been reinitiated and Normanus has since modified their construction plans and no longer intend to build additional stories.

On November 12, 2021 154 filed an action against Normanus related to its construction project (*154 E 62 LLC v Normanus Realty LLC*, Index No. 160329/2021) and asserted causes of action for breach of contract, for specific performance, and for attorney's fees. In that action 154 argued that Normanus had breached the original licensing agreement by not making weekly payments to them once construction was able to be resumed. In the original licensing agreement, the parties agreed that if construction was to continue past 6 months after commencement, then Normanus would pay 154 \$1,500 per week for the next 6 months, then \$3,000 per week thereafter. 154 made a motion for partial summary judgement to compel Normanus to resume work on the project and finish construction of an unfinished wall abutting 154's property. Normanus opposed arguing that the original licensing agreement had expired making it impossible to finish work until a new licensing agreement was entered into by the parties.

By decision and order date July 3rd 2023, this court denied 154's motion for partial summary judgement, finding that the language of the original licensing agreement indicated that the agreement had terminated. Since, the original agreement had terminated, a new licensing agreement was required in order to allow Normanus to complete construction.

Turning to the present proceeding, Normanus now asks the court to issue a new license granting access to the property, pursuant to RPAPL § 881 and argues that the terms they propose are fair considering the diminished scope of the construction project will be less intrusive on 154 than the original, abandoned project. 154 opposes arguing that an RPAPL § 881 petition is inappropriate because they have not refused access but instead are attempting to negotiate more favorable terms. Alternatively, they ask if the court issues a license the court use a proposed access agreement that includes agreed upon terms from the March 21, 2019 original, now terminated, licensing agreement.

## DISCUSSION

### *A. Necessity of a Petition*

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.” In granting a license pursuant to RPAPL Sec. 881, “courts generally apply a standard of reasonableness” and are required to balance the interests of the parties (*Matter of Board of Mgrs. Of Artisan Lofts Condominium v. Moskowitz*, 114 A.D.3d 491, 492 [1<sup>st</sup> Dep’t 2014]). A court 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” (*Id.*). While most RPAPL § 881 petitions arise when one party explicitly refuses to allow the other access to their property, refusal of access can also be established if parties are unable to come to an agreement following good faith negotiation (*Matter of 2225 46th St., LLC. v Giannoula*

*Hahralampopoulos*, 55 Misc 3d 621, 624 [NY Sup 2017]). However, the court must be mindful not to allow parties to use the court in an attempt to avoid negotiating in good faith (*Id.*).

Here, the parties have clearly reached an impasse regarding negotiation of a new licensing agreement. Both parties have alleged that they are negotiating in good faith while the other side refuses to do so. The negotiation period has stalled for years leaving an unfinished construction project which both parties have expressed a desire to conclude. It is in the interests of all parties that the court intervene and make a determination on the petition.

*B. . Licensing Fees*

The terms of a court ordered temporary license including the award of licensing fees are within the discretion of the court and are subject to a standard of reasonableness considering the level of intrusion that access to their property may inconvenience the party (*Van Dorn Holdings, LLC v 152 W. 58th Owners Corp.*, 149 AD3d 518, 519 [1st Dept 2017]). Among other factors, the court should consider whether a “granted license will entail substantial interference with the use and enjoyment of the neighboring property” when determining what a fair licensing fee may be (*Panasia Estate, Inc. v 29 W. 19 Condominium*, 204 AD3d 33, 37 [1st Dept 2022], lv to appeal dismissed, 38 NY3d 1125 [2022]).

When determining the reasonableness of terms in a licensing agreement, the court may consider previous agreements made between the parties (*150 E. 73rd St. Corp. v 145-149 E. 72nd St. LLC*, 2022 NY Slip Op. 31798[U], 1 [SC NY Co 2022]). This can include using previous licensing agreements agreed upon between the parties to determine the amount of licensing fees the court should grant to the licensor (*74-76 South 2nd St LLC v. Agosto-Owens*, Index No 515009/2020 [SC Kings Co 2020]). However, since the determination of these terms requires an inquiry into the extent of the intrusion upon the licensor’s property, the court should

consider whether the previous agreement was entered into under similar conditions, compared to the conditions under which the petition is sought (*Thomas Anthony Holdings LLC v Goodbody*, 216 AD3d 538, 540 [1st Dept 2023] [“the appropriate remedy was . . . to resolve those issues, as well as the appropriate conditions to protect respondents’ interests”]).

Here, the primary dispute between the parties is over how intrusive the construction work will be on 154’s property and how much 154 should be compensated for suffering that intrusion. Normanus argues that the original licensing agreement should hold little weight in the current determination because the parties made the agreement under vastly different circumstances. The original planned construction project would have vertically enlarged Normanus’ premises by adding a fourth and fifth floor, in addition to renovating the basement and the first floor (Jimenez Affidavit, NYSCEF Doc No 140 ¶ 10). The updated project for which access is now sought includes horizontal enlargement, exterior and interior renovations, including a new roof, terrace, and parapets (*Id.* at ¶ 6). Along with the new roof, a stair bulkhead will be built which will raise the height of the premises by approximately 10 feet (Granville Affidavit, NYSCEF Doc No 160 ¶ 14).

Normanus argues that the reduced scope of the construction project results in a reduced intrusion upon 154’s property and thus making the original agreement irrelevant under the current circumstances. However, comparing the Site Safety Plans (“SSP”) from the 2019 project and the 2023 project reveal that many of the same protections must be installed on 154’s property in order for construction to take place. Both plans require full overhead protection over 154’s rear terrace (*Id.* at ¶ 7-8; see also Exhibit 4, Updated SSP 3.10.23, NYSCEF Doc No 144). Additionally, the SSP for the new project includes a pipe scaffold which will run from the top of an overhead protection in 154’s rear yard to the roof of 154’s building (*Id.*). The parties agree

that the SSP excludes chimney protections required in the original SSP, however they disagree over whether this deviation has any meaningful effect on the inconvenience that 154 will suffer from the construction (Granville Affidavit at ¶ 11).

In arguing that the court should adopt their proposed fees for the access agreement Normanus points to the agreement they have with the property on the other side of the premises located at 150 East 62nd Street, New York, NY. The property is a church operated by the Metropolitan Koryo United Methodist Church. Normanus and the church entered into an agreement wherein Normanus agreed to pay the church \$3,000 per month for access to complete the construction project. Normanus asks the court to adopt these same terms in a proposed license agreement with 154.

While agreements with neighboring property may be instructive on the fair market rate for such licensing agreements the court must consider the effect the intrusion has on the actual party in question. Allowing access and the construction of the temporary protections will result in a greater interference with the use and enjoyment of a private residency than it will a house of worship. The intrusion on 154 will include protection built over their rear terrace, scaffolding built in their backyard, roof protections, and a small section of scaffolding extended onto their property on the sidewalk. Meanwhile, the protection built for the church will be placed on its roof with a small section of scaffolding extended onto the sidewalk. Not only is there a smaller physical intrusion on the church than there is on 154, but the nature of the intrusion is also smaller. The residents of 154 will be unable to fully enjoy their terrace and their backyard while members of the church may not even notice construction work taking place on the roof.

Additionally, 154 argues that the construction project by Normanus has prevented them from starting their owned planned construction. While there is a dispute between the parties

whether 154 could commence construction on a proposed glass enclosure that would enclose their terrace, both parties have commented that it would take at the very least careful planning for both projects to commence simultaneously. 154's hesitancy to begin this project further interferes with their enjoyment of the property.

In 154's proposed agreement they suggest that the fee structure should start at \$1,500 per week for the first 6 months, then increase to \$3,000 per week thereafter. Notably, this is the fee structure from the original agreement if construction was to extend past the original 6 months. While 154 is proposing a new agreement, the effect will in essence be reviving the original agreement at the point when construction stopped in 2020. 154 argues that since the parties already agreed upon this arrangement in 2019, it would be reasonable to enforce the same terms today. However, it should be noted that in the related action this court read that specific clause in the contract to be "conditioned upon" Normanus actually making those payments. The original licensing agreement terminated six months after commencement and access could only be extended by Normanus paying the weekly fee.

Considering the marginally reduced scope of construction, but still significant interference with the use and enjoyment of 154's property a license fee of \$4,500 per month is reasonable for the first 6 months of construction. If the license work continues beyond 6 months then a increased license fee of \$6,000 per month is reasonable.

### *C. Professional Fees*

An additional issue in dispute is the payment of professional fees incurred in connection with negotiating the licensing agreement. In Normanus's proposed agreement they offer to pay "reasonable professional fees including architectural, engineering, and attorney's fees ... not

to exceed \$10,000” (NYSCEF Doc No 165). 154’s proposal does not have a cap on reasonable professional fees to be paid by Normanus.

“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 I, LLC*, 138 AD3d 539, 540 [1st Dept 2016]). A court may in its discretion appoint a referee to determine an issue that requires further inquiry (*Park Residence Condos, LLC v 348 13th St., LLC*, 189 AD3d 1249 [2d Dept 2020]). In *Park Residence Condos* the court appointed a referee to make a determination on the granting of attorney’s fees arising from an RPAPL § 881 petition.

Here, considering both the extent of the attorney involvement in the matter including multiple actions filed by each party, years of negotiation, and the requirement of multiple inspections by architects, it would be appropriate to appoint a referee to determine what professional fees are appropriate.

#### *D. Additional Terms*

In addition to the issues regarding fees, 154 points to several additional terms which were in the original agreement but are not in Normanus’ proposed agreement. Among these are agreements for tree protection, agreements regarding the installation of anchor points for a trellis on 154’s property, terms regarding maintenance of a newly constructed wall abutting both properties, providing 154 copies of all permits, and obtaining 154’s approval for the waterproofing plan for the newly constructed wall. Normanus has reaffirmed in its reply papers that it will provide anchor points for the trellis and be responsible for maintenance of the shared wall.

RPAPL § 881 provides that the license be granted “upon such terms as justice requires.” Among the terms that a court may deem necessary can be terms which require protections of certain property (*Matter of 2225 46th St*, 46 NYS3d at 776). The court can order such protections in order to ensure that the intrusion on to property is as minimal as possible considering the circumstances (*Id.*).

Here, the “terms that justice requires” should ensure the protection of 154’s property to the extent possible. This should include the tree protection services included in the original agreement, as well as confirmation in contract form that Normanus will install the anchor points previously promised. Normanus should also provide 154 with all the required permitting and submit for their approval the waterproofing plan for the shared wall.

Accordingly it is

ORDERED that the motion and petition are granted to the extent that petitioner is granted access to respondent's property in order to install and maintain the temporary protections on respondent’s property as set forth in petitioner’s Site Safety Plan (NYSCEF Doc No 144) and it is further

ORDERED that the terms of the license granted herein are those set forth in the license agreement proposal at NYSCEF Doc No 165 except as otherwise provided in this order and those terms are incorporated into this order along with the additional terms in this order; and it is further

ORDERED that petitioner shall pay respondent a license fee in the amount of \$4,500 per month for the first 6 months that the protections are on respondent’s property and thereafter petitioner shall pay respondent \$6,000 per month until all of the protections are removed from respondent’s property; and it is further

ORDERED that the term requiring Normanus to provide 154 with copies of permits included in NYSCEF Doc 166 at page 5 ¶ 1 (IV) be incorporated into the agreement; and it is further

ORDERED that the term for Tree Protections included in NYSCEF Doc No 166 at page 15 ¶ 19 be incorporated into the agreement; and it is further

ORDERED that the term regarding attorney's fees included in NYSCEF Doc No 166 at page 18 ¶ 20 (XV) be incorporated into the agreement; and it is further

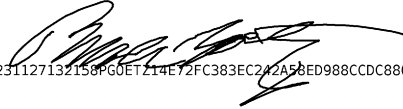
ORDERED that the Agreement Regarding Trellis and Underpinning of the Trellis included in NYSCEF Doc No 166 at pages 20-31 be incorporated into the agreement; and it is further

ORDERED that the term regarding professional fees included in NYSCEF Doc No 165 at page 5 ¶ 2 will not include a cap at \$10,000; and it is further

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this court on the amount of reasonable professional fees incurred by respondent in this proceeding; and it is further

ORDERED that counsel shall immediately consult one another and counsel for petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts.

  
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11/27/2023  
DATE

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PAUL A. GOETZ, JSC

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input checked="" 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"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE