

**Matter of ZDJ W 37 LLC v 437 W. 36th St. LLC**

2024 NY Slip Op 32448(U)

July 17, 2024

Supreme Court, New York County

Docket Number: Index No. 150932/2024

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: HON. SHAHABUDDEN ABID ALLY**  
*Justice*

**PART 16TR**

In the Matter of the Application of  
 ZDJ W 37 LLC,  
  
 Petitioner,  
  
 For an Order and Judgment Pursuant to Section 881  
 of the Real Property Actions and Proceedings Law  
 for Access to Adjoining Property,  
  
 -against-  
  
 437 WEST 36TH STREET LLC,  
  
 Respondent.

INDEX NO. 150932/2024  
 MOTION DATE 3/21/2024  
 MOTION SEQ. NO. 001

**DECISION & ORDER**

The following e-filed documents, listed by NYSCEF document number, were read on this motion (Seq. No. 1) to/for **RPAPL § 881 (LICENSE FOR ACCESS)**: 1-11, 13, 16-23

In this proceeding, petitioner ZDJ W 37 LLC ("Petitioner") seeks a court-ordered license, pursuant to RPAPL § 881, to access the property of respondent 437 WEST 36TH STREET LLC ("Respondent") to complete certain work necessary to commence a construction project on Petitioner's property. Petitioner initiated this proceeding by Verified Petition and Order to Show Cause filed on February 1, 2024. The Court signed the Order to Show Cause on February 7, 2024, setting a return date of March 21, 2024. On March 20, 2024, Respondent filed an Answer with Counterclaims seeking reimbursement of attorney and professional fees, as well as opposition to the motion. For the reasons discussed below, both Petitioner's and Respondent's requested relief are denied.

Petitioner's property, which is "mostly vacant," is located at 429 West 36th Street and 430 and 434 West 37th Street. Petitioner plans to construct an 11-story mixed-use residential building on the property. Respondent's adjoining property, residential housing to approximately 15 tenants, is located at 437 West 36th Street. Prior to beginning construction on its property,

Petitioner alleges that the New York City Building Code (the "Code") requires Petitioner to take certain actions to survey and protect Respondent's property, including by installing vibration monitors; roof, window, fire escape, and overhead protective measures; and weatherproofing on the wall facing Petitioner's property.

Petitioner alleges that it commenced this proceeding only after Respondent refused to engage in negotiations concerning a voluntary license. Respondent, however, claims that Petitioner is at fault for failing to provide detailed plans, duly approved by the New York Department of Buildings (the "DOB"), necessary for Respondent to determine whether to enter such license.

In support of its motion, Petitioner now submits, among other things, a proposed site safety plan ("SSP"), support of excavation drawings ("SOE Drawings"), and the affidavit of Yipeng Luan, a licensed civil engineer. Mr. Luan avers, in sum and substance, that the planned work set forth in the SSP and SOE Drawings is necessary under, and in full compliance with, the Code.

Respondent, in turn, submits, among other things, the affidavits of Don Erwin, a licensed architect, and Nizar Khoury, a licensed civil engineer. In their affidavits, Mr. Erwin and Mr. Khoury describe an array of alleged deficiencies in the SSP and SOE Drawings. First and foremost, and as relevant to this decision and order, Mr. Erwin states that site safety plans must be reviewed and approved by the DOB to "confirm the accuracy and conformance of such plans with the Code" but that Petitioner's SSP has not yet undergone such DOB review and approval. Similarly, Mr. Khoury states in his affidavit that the SOE Drawings also have not yet been reviewed and approved by the DOB.<sup>1</sup>

Neither Mr. Luan's affidavit nor any of Petitioner's other submissions state that the SSP and SOE Drawings have been approved by the DOB. And Petitioner has not made any attempt to refute Respondent's assertions that those plans have not yet been subject to DOB review and approval.

Because the SSP and SOE Drawings have apparently not yet been approved by the DOB, Petitioner has "failed to make a showing as to the reasonableness and necessity of the trespass,"

---

<sup>1</sup> Separately, Mr. Khoury points out—accurately—that Petitioner has not sought a license in this proceeding for the work contemplated by the SOE Drawings.

as required under RPAPL § 881. *Tory Burch LLC v. Moskowitz*, 146 A.D.3d 528, 529 (1st Dep't 2017). In *Tory Burch*, the First Department reversed the lower court's grant of a license pursuant to § 881 because, "at the time of the petition, none of the items sought had been memorialized in specific plans filed and approved by the Department of Buildings." *Id.* The First Department therefore denied the petition and dismissed the proceeding entirely. *Id.* The same outcome is thus mandated here.<sup>2</sup>

Although Respondent counterclaims for attorney and professional fees incurred in opposing the petition, the Court is not authorized to grant that request. *419 BR Partners LLC v. Zabar*, 209 A.D.3d 604, 604-05 (1st Dep't 2022) ("[T]he statute does not authorize an award of fees where, as here, the neighboring property owner successfully defends against the RPAPL proceeding and the court does not grant the license sought. In the absence of any statutory authority permitting the court to grant such fees where no license has been issued, an award of legal and professional fees is not authorized."). Respondent relies on several cases for the proposition that it is entitled to an award of fees in this proceeding, but each of those cases is distinguishable because the courts therein *granted* the petitioners a license. By contrast, here, Petitioner's request for a license is denied. To the extent that the trial court in *Second & Second Property LLC v. Second & Third, LLC*, Index No. 156088/2022, slip op. at 2 (N.Y. Sup. Ct. N.Y. Cty. Nov. 28, 2023), awarded the respondent fees in an unpublished decision despite dismissing the petition, that decision is contrary to the First Department's express holding in *419 BR Partners* and is not followed.

While the parties certainly have the right to once again seek court intervention in the future, the Court strongly encourages them to endeavor to negotiate a license amicably between themselves.

Accordingly, it is hereby:

**ORDERED and ADJUDGED** that Petitioner's motion (Seq. No. 1) and Verified Petition are **DENIED**, and this proceeding is **DISMISSED, without prejudice**; and it is further

---

<sup>2</sup> Because the Court denies the motion and petition on these grounds alone, it does not consider Respondent's other alleged grounds for denial.

**ORDERED and ADJUDGED** that Respondent's counterclaim for attorney and professional fees is **DENIED and DISMISSED**; and it is further

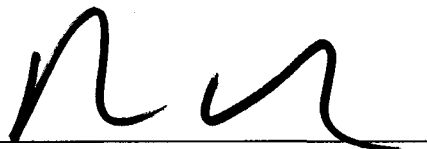
**ORDERED** that the Clerk shall mark Motion Sequence 1 decided in all court records; and it is further

**ORDERED** that the Clerk shall mark this proceeding disposed in all court records.

This constitutes the decision and order of the Court.

July 17, 2024

DATE



SHAHABUDDEEN ABID ALLY, A.J.S.C.

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