

Ismael Realty Corp. v Zervos
2024 NY Slip Op 35638(U)
December 19, 2024
Supreme Court, Queens County
Docket Number: Index No. 719544/2023
Judge: Joseph J. Esposito
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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable Joseph J. Esposito PART 17
Justice



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ISMAEL REALTY CORP.,

Index No.: 719544/2023

Petitioner,

Motion Date: 4/²⁴~~17~~/2024

- against -

Motion Seq No. 1

HELEN V. ZERVOS,

Respondent.

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The following numbered papers read on this motion by petitioner for an Order granting a license to enter the property located at 25-42A 36th Street, Astoria, New York ("Adjacent Property"), owned by respondent, Helen Zervos, for the purpose of installing, maintaining and removing the scaffold platform and temporary overhead protections, consisting of the cantilever system and scaffold platform protections, as more specifically show in the drawings annexed as exhibit 1 to the accompanying Affidavit of Fady Habeel, PE, which shall be permitted to remain in place for a period of six (6) months commencing from the day the drawings are approved by the New York City Department of Buildings ("DOB") and petitioner's contractors mobilize and continuing until for such reasonable time thereafter as required by DOB and for such other and further relief as this Court may deem just and proper.

The following numbered papers read on this cross-motion by respondent for an Ordre: (1) consolidating this action with petitioner's earlier RPAPL 881 entitled *Ismael Realty Corp. v. Zervos*, Index no. 706818/2019; (2) requiring petitioner to remove scaffolding installed in and around respondent's property without consent or, alternatively, (a) imposing an immediate license fee \$2,500 per month; (b) requiring petitioner secure liability insurance of not less than \$2 million naming respondent as an additional insured relating to said unauthorized scaffolding; (c) requiring petitioner to provide an affidavit of engineer confirming safety of scaffold installed on respondent's property without consent; (4) requiring that petitioner install a lighter sidewalk cab in front of respondent's property; and (5) and for such other and further relief as to this Court may dem just and proper.

Papers Numbered

Order to Show Cause – Affirmation – Exhibits	EF 2-19
Notice of Cross-Motion/Affirmation in Opposition–Exhibits	EF 23-33
Affirmation in Opp to Cross-Motion/Reply Affirmation	EF 34-39
Reply Affirmation	EF 40-49

This is a special proceeding, commenced by Order to Show Cause, by one landowner (“petitioner”) against an adjacent landowner (“respondent”) for a license to enter the adjoining property to install, maintain and remove temporary overhead protection consisting of the cantilever system and scaffold protection. Petitioner is in the process of building a new five-story building that will contain resident apartments (“project”).

The petition, upon the foregoing papers, is being made pursuant to Section 881 of the New York Real Property Actions and Proceedings Law (“RPAPL”). Petitioner is the owner of the property located 25-40 36th Street, Astoria, New York (“premises”) and petitioner is in the process of performing certain pre-development work at the premises, the scope of which includes vertical construction and facade work. The New York City Building Code (the “Code”) requires Petitioner to protect the Adjacent Property, including its occupants, as well as general public from damage and injury during performance of vertical construction work and facade work. Petitioner’s engineer determined that to (i) perform facade work on the Premises, (ii) protect the Adjacent Property and (iii) comply with obligations of the Code, a certain scaffold platform, cantilever system and scaffold protection needs to be installed over and above the Adjacent Property so that certain vertical construction and facade work can be safely performed. Petitioner requires a license to access the Adjacent Property in order to perform the facade work and provide required protections. Petitioner submits that it cannot continue with construction without the erection of the required scaffolding and sidewalk bridges/shed/cantilever system and overhead and roof protections which requires respondent’s consent to access respondent’s property. To date, petitioner submits respondent has not consented to the needed access despite repeated requested by petitioner for same. Petitioner, therefore, brings the instant special proceeding for a license to enter the adjoining land for the purposes. Respondent opposes the application.

In support of the instant petition, petitioner submits the following: since January 2020, petitioner has repeatedly contacted respondent for the purpose of obtaining respondent’s consent and cooperation with petitioner’s desire to comply with the building code, and carry out the work on the subject premises, and for respondent’s written consent to petitioner’s performance of the temporary protection measures being sought herein during the course of petitioner’s construction. Petitioner submits that all such work is for the protection of the adjoining property and its occupants and guests. Indeed, a written agreement was drafted and sent to respondent for its review and negotiation. Such efforts were met with rejection and as a result, petitioner sought judicial intervention.

Petitioner also submitted the affidavit of Abdul Mubarez, president and owner of Ismael Realty Corp.. Mr. Mubarez attests to the necessity of the license and further discusses the latest proposed plan involving the cantilever system. Mr. Mubarez also affirms that the DOB “stop work-order” has since been lifted since 2020. Additionally, petitioner submits the affidavit of Fady Habeel, a professional engineer employed by FL&M (“FLM”) Design and Inspection, LLC. Petitioner retained Triboro Scaffolding to design and install a scaffold platform to be utilized during facade work at the project and FLM was thereafter retained by Triboro to develop, plan and draw the specifications. FLM was also retained by petitioner to develop roof protection plans for the adjacent property. FLM prepared the scaffold platform, cantilever system and roof protection plan attached as an exhibit to the instant motion. The plan identifies the temporary protections required by the Building Code and DOB to safely perform the project. The plan also consists of a

Cantilever System which includes a scaffolding protection of a continuous debris netting and a rigid galvanized wire screen. Mr. Habeel noted that the cantilever system will be attached to the petitioner's premises and will be suspended in the air over part of the adjacent property and will provide minimum intrusion to the adjacent property and temporary nature. Mr. Habeel attests to the safety of the cantilever system to the occupants and the adjacent property itself.

In opposition, respondent move to consolidate action with a prior RPAPL 881 action brought by the petitioner herein. Respondent also moves to require the petitioner to: (a) remove scaffolding installed in and around respondent's property without consent or, alternatively, (a) imposing an immediate license fee \$2,500 per month; (b) requiring petitioner to secure liability insurance of not less than \$2 million naming respondent as an additional insured relating to said unauthorized scaffolding; (c) requiring petitioner to provide an affidavit of engineer confirming safety of scaffold installed on respondent's property without consent; and (4) requiring that petitioner install a lighter sidewalk cab in front of respondent's property.

At the outset, the Court takes notes of a prior RPAPL 881 action brought by the petitioner herein for the same reasons set forth herein. Respondent moves to consolidate the two actions, however, the Court agrees with the petitioner in that the first action is marked as disposed, and it is this Court's interpretation of the Order that Justice Modica directed the petitioner to file a new petition rather than re-filing it under the same index number. As such, it is **ORDERED** that plaintiff's cross-motion to consolidate is denied.

RPAPL section 881 allows a property owner to petition for a license to enter the premises of an adjoining owner when such entry is necessary for making improvements or repairs to the petitioner's property and the adjoining owner has refused such access. A proceeding pursuant to RPAPL section 881 is addressed to the sound discretion of the court (*see, Matter of Van Dorn Holdings, LLC v 152 W. 58th Owners Corp.*, 149 AD3d 518, 52 N.Y.S.3d 316 [1st Dept 2017]; *Deutsche Bank Tr. v 120 Greenwich Dev. Assocs.*, 7 Misc. 3d 1006[A], 801 N.Y.S.2d 232, 2005 NY Slip Op 50467[U], 2005 WL 782810 [Sup. Ct. New York County]), 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** (*see, Mindel v Phoenix Owners Corp.*, 210 AD2d 167, 620 N.Y.S.2d 359 [1st Dept 1994]; *Matter of EXG 159W48 LLC v Benyetta 148 LLC*, 2017 N.Y. Misc. LEXIS 2667, 2017 NY Slip Op 31479[U], 2017 WL 2998841 [Sup. Ct., New York County 2017]; *[**4] MK Realty Holding, LLC v Schneider*, 39 Misc. 3d 1209[A], 971 N.Y.S.2d 72, 2013 NY Slip Op 50551[U], 2013 WL 1482745 [Sup. Ct., Queens County 2013]; *Matter of Rosma Dev., LLC v South*, 5 Misc. 3d 1014[A], 798 N.Y.S.2d 713, 2004 NY Slip Op 51369[U], 2004 WL 2590558 [Sup.Ct., Kings County 2004]).

The factors which a court may consider in determining the petition include 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 (*Queens Coll. Special Projects Fund, Inc. v Newman*, 154 AD3d 943, 943-944, 62 N.Y.S.3d 517 [2nd Dept. 2017], *lv. to appeal denied*, 31 N.Y.3d 901, 77 N.Y.S.3d 656, 102 N.E.3d 432 [2018]; *see, Chirichella v BCBS Lorimer LLC*, 2017 N.Y. Misc. LEXIS 2978, 2017 NY Slip Op

31665[U], 2017 WL 3386257 [Sup.Ct., Kings County 2017]; *Deutsche Bank Tr. v 120 Greenwich Dev. Assocs.*, 7 Misc. 3d 1006[A], 801 N.Y.S.2d 232, 2005 WL 782810, 2005 NY Slip Op 50467[U]).

After an assessment of the foregoing factors and balancing the respective interest of the two sides, this Court hereby grants the petition, pursuant to RPAPL section 881, for a license to temporarily access the respondent's property. The construction of a new building is an improvement of real property within the meaning of section 881 (*Matter of N. 7-8 Inv'rs, LLC v. Newgarden*, 43 Misc 3d 623, 627, 982 N.Y.S.2d 704 [Sup .Ct. Kings County 2014]; *Deutsche Bank Tr. v. 120 Greenwich Dev. Assocs.*, 7 Misc. 3d 1006[A], 801 N.Y.S.2d 232, 2005 NY Slip Op 50467[U], 2005 WL 782810, *supra*; *Rosma Development, LLC v. South*, 5 Misc. 3d 1014[A], 798 N.Y.S.2d 713, 2004 NY Slip Op 51369[U], 2004 WL 2590558, *supra*). It also has the potential to benefit greatly the surrounding businesses in this area.

The affidavits of the president of petitioner company and the professional engineer for the construction project, demonstrate that the limited access and placement of structures would protect the respondent's property and would not unduly interfere with the use of the premises; that the access would be limited and is expected by the petitioner to last no more than 15 months; that the temporary structures to be erected would not be unduly invasive and are necessary in order for the petitioner to build the five-story building while protecting the adjoining property as required by the New York City Building Code; that the public interest would be served by the development of the project; and that the respondent would be financially protected by the naming of the respondent as an additional insured on the relevant construction insurance policies and by the petitioner's promise to indemnify it for any loss (*see, Queens Coll. Special Projects Fund, Inc. v Newman*, 154 AD3d at 944-45; *Matter of EXG 159W48 LLC v Benyetta 148 LLC*, 2017 NY Slip Op 31479[U], 2017 WL 2998841, *supra*; *MK Realty Holding, LLC v Schneider*, 39 Misc. 3d 1209[A], 971 N.Y.S.2d 72, 2013 NY Slip Op 50551[U], 2013 WL 1482745, *supra*; *Deutsche Bank Tr. v 120 Greenwich Dev. Assocs.*, 7 Misc. 3d 1006[A], 801 N.Y.S.2d 232, 2005 NY Slip Op 50467[U], 2005 WL 782810, *supra*; *Matter of Rosma Dev., LLC v South*, 5 Misc. 3d 1014[A], 798 N.Y.S.2d 713, 2004 NY Slip Op 51369[U], 2004 WL 2590558, *supra*).

The evidence, in short, supports the conclusion that the petitioner would suffer an undue hardship if the license pursuant to RPAPL section 881 were to be denied, whereas the respondent, in contrast, would experience only temporary and relatively minor inconvenience as a result of its issuance. It is also important to note that pursuant to Justice Modica's Order, the petitioner has satisfied the requirements set forth in the Order. Justice Modica denied the application with leave to renew upon the lifting of a "stop work-order" issued by DOB, that the parties were able to resolve their differences regarding the damages caused to the Zervos property and in accordance with the decision regarding the cantilever system. The petitioner confirmed that the "stop work-order" is now lifted. And as for damages, Justice Livote considered the arguments made with respect to the alleged damages and found that Helen Zervos was entitled to recover the amount of \$24,985.00 for the repairing and replacement of the damaged concrete driveway, walk and stairway, the proposed cost to replace the gate and fence and a site inspection of the subject property to assess the extent of damage to her property. The Court further found that plaintiff failed to establish entitlement to any damages based on claim of loss of use and for alleged personal

injuries based on the claim of negligence. The issue then remains whether petitioner is in compliance with Justice Modica's decision regarding the Cantilever system which it is.

Where a license under RPAPL section 881 is granted, this Court may order the petitioner to fulfill additional terms and conditions (*Sunrise Jewish Center of Valley Stream v Lipko*, 61 Misc.2d 673, 305 N.Y.S.2d 597 [Sup.Ct. Nassau County 1969]). Conditions may include, among other things, posting a bond, obtaining insurance coverage, agreeing to indemnify the adjacent landowner, and/or paying for the use of the license (2225 46th St., LLC. v. Hahralampopoulos, 55 Misc.3d 621, 46 N.Y.S.3d 772(Sup. Ct. Queens County 2017) (Dufficy, J.) ("Other conditions the court may impose include posting a bond, obtaining insurance coverage, agreeing to indemnify the adjacent landowner and paying for the use of the license."); *Deutsche Bank Tr. v. 120 Greenwich Dev. Assocs.*, 7 Misc. 3d 1006[A], 801 N.Y.S.2d 232, 2005 NY Slip Op 50467[U], 2005 WL 782810, *supra*).

Although the determination of whether to award a license fee is discretionary, in that RPAPL section 881 provides that a "license shall be granted by the court in an appropriate case *upon such terms as justice requires*, the grant of licenses pursuant to RPAPL section 881 often warrants the award of contemporaneous license fees (*See, DDG Warren LLC v. Assouline Ritz 1, LLC*, 138 AD3d 539, 539-540, 30 N.Y.S.3d 52 [1st Dept. 2016]). The language in RPAPL section 881, "upon such terms as justice requires," has been interpreted rather broadly. In *PB 151 Grand LLC v. 9 Crosby, LLC*, 58 Misc. 3d 1219[A], 95 N.Y.S.3d 126, 2018 NY Slip Op 50163[U], 2018 WL 771792 [Sup. Ct. New York County 2018]. Accordingly, it is hereby

ORDERED that petitioner is granted a license to enter onto respondent's property with laborers and materials so that petitioners may erect, maintain, and deconstruct the cantilever system scaffolding, roof protection and overhead protections for the purpose of ensuring the safety of the public and respondent's adjoining property during the construction of petitioner's property, including the erection of temporary scaffolding and netting and/or such other protections as may be necessary and proper, in accordance with the New York City Building Code, to prevent damage to respondent's property and to the public, as may be necessary and pursuant to the plans and permits approved by the Department of Buildings of the City of New York, and it is further

ORDERED that the aforementioned granted license shall commence upon the entry of this Order, and upon petitioner's service of the order with notice of entry by Federal Express overnight mail to respondent, and shall continue for eighteen (18) months thereafter or sooner as the work is complete; and it is further

ORDERED that prior to the entry upon the respondent's property, petitioner shall obtain insurance naming respondent as an additional insured in the minimum amount of one million dollars (\$1,000,000.00), and such coverage shall remain until the work is completed, and it is further

ORDERED that all work shall be performed only by licensed contractors; and it is further

ORDERED that petitioner shall be liable for any damage caused to respondent's property as a result of the access granted by this Order; and it is further

ORDERED that the scope of the work shall be limited to the work approved by the Department of Buildings of the City of New York and all work shall be performed pursuant to approved plans and permits issued by the Department of Buildings of the City of New York, and it is further

ORDERED that petitioner shall not block or obstruct any access to the premises. Neither respondent shall be dispossessed or deprived of the use of the premises for the duration of the work project or at any point, and it is further

ORDERED that petitioner is directed to pay respondent a license fee in the amount of \$2,500.00 every month during the term in the license during which petitioner's work is ongoing, with the first payment due on the date when the petitioner's work begins and each payment thereafter to be on the first day of each month; and it is further

ORDERED that, if petitioner does not complete its work by the aforementioned time period, petitioner shall make further application to this Court which extension will be granted only for good cause shown and with the potential increase of license fees to be decided upon the granting of such extension; and it is further

ORDERED that petitioner shall notify respondent in writing when its work has been completed and it has removed all protection from respondent's property; and it is further

ORDERED that petitioner is solely responsible for the installation, maintenance, and removal of the temporary protection; and it is further

ORDERED that petitioner shall be liable to respondent for any damages which it may suffer as a result of the granting of this license and all damaged property shall be repaired at the sole expense of petitioner; and it is further

ORDERED that petitioner shall indemnify and hold harmless respondent to the fullest extent permitted by law for any liability, claims, damages or losses, including attorneys' fees, respondent may incur as a result of petitioner's work, whether or not caused by the negligence of petitioner or its employees, agents, contractors or subcontractors; and it is further

ORDERED that petitioner shall not interfere with respondent's necessary access to its property and quality of life, and shall take the necessary steps, measures and precautions to prevent any damage to respondent's property; and it is further

ORDERED that petitioner shall immediately report, in writing, to respondent any damage to respondent's property cause by petitioner's work; and it is further

ORDERED that petitioner shall cure any violation placed against respondent's property by a governmental or administrative agency as a result of petitioner's work, and petitioner shall reimburse respondent for any fines or penalties imposed as a result of such violations; and it is further

ORDERED that at the completion of the term of the license, respondent's property within the license area shall be returned to its original condition, and all materials used in construction and any resultant debris shall be removed from the license area; and it is further

ORDERED that the amount of reasonable attorneys' fees and reasonable engineering fees incurred by respondent in connection with this proceeding, as well as the amount of any actual and provable damages owed by petitioner to respondent incurred directly as a result of the issuance of the license (if not covered by insurance), will be referred to a Referee, based on hourly rates, for determination based on the rules of evidence at the conclusion of the license period; and it is further

ORDERED that any remaining contentions not specifically addressed are denied.

The foregoing constitutes the decision and order of this Court.

Dated: December 19, 2024


JOSEPH J. ESPOSITO, J.S.C.

