SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** **PART** **36**
Justice

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THOMAS ANTHONY HOLDINGS LLC,
Petitioner,

- v -

BRIDGET GOODBODY and NEIL RADEY,
Respondents.

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INDEX NO. 157008/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 43, 44, 45, 77, 88, 89, 90, 91, 92, 93, 94, 95, 106, 107, 108, 109

were read on this motion to/for **RPAPL § 881**.

Petitioner, the owner and developer of a brownstone located at 224 West 22nd Street, New York, New York 10011, Block 771, Lot 52 (the, "premises"), is performing certain construction and improvements on the premises, which adjoin 226 West 22nd Street, New York, New York 10011 ("adjacent property"). Petitioner maintains that, in order to remove a green construction wall (as depicted on a photograph annexed to the application) (NYSCEF Doc. No. 2, photo), it is necessary to protect respondents' rooftop by installing certain plywood and that, despite requests to access the adjoining property to perform the applicable and necessary work, respondents have refused access. (NYSCEF Doc. No. 1, *petition*).

Petitioner commenced this action against respondents and now moves, by order to show cause, pursuant to RPAPL 881, for an order (1) granting it, without further interruption or delay, a license to enter upon and access the adjacent property to install, maintain and remove, as applicable and necessary, temporary overhead protection, roof protection and chimney work (collectively, "the protective work"), in accordance with RPAPL 881 and the New York City Building Code (the, "Code") §§ 3309.1, 3309.2, 3307.6, 3309.10, and 3309.12; (2) declaring that respondents have unreasonably denied and/or refused petitioner access to the adjacent property for purposes of complying with the Code; (3) declaring that respondents shall be responsible for all damages and liability to the adjacent property that may arise out of respondents' failure to grant petitioner access to the adjacent property in accordance with RPAPL 881 and Building Code § 3309.2; and, lastly, (4) prohibiting respondents from interfering with petitioner's planned protective work (NYSCEF Doc. No. 9, *OSC*).

This court issued a decision and order dated January 20, 2022, denying petitioner the relief sought therein (NYSCEF Doc. No. 43, *decision and order dated January 20, 2022*). Upon appeal, the Appellate Division, First Department, remanded the case for a hearing to determine whether there were appropriate conditions to protect respondents' interests, including the revised safety plan, and the amount of any license fee.

The hearing occurred on October 22, 2024 and October 23, 2024.

Petitioner called Bradley Cronk (hereinafter, "Cronk"), a New York licensed architect who consults on RPAPL 881 cases, testified that the content of petitioner's Site Safety Plan shows petitioner's building in relation to the neighboring properties, and the types of temporary protections necessary on those neighboring properties in order for petitioner's construction project to comply with the relevant building codes. He asserted that there is a temporary green wall that operates as an engineered enclosure system, which encloses petitioner's property so that construction debris and material do not enter the respondents' property. To remove the temporary green wall, posited Cronk, petitioner must install roof protection on the respondents' property in the form of fire-retardant Styrofoam, planks, and plywood. He also averred that regarding the rear yard of respondents' property, petitioner would create an overhead protection or a controlled access zone, which functions as a restricted area when dismantling the green wall. According to Cronk, the post-approval amendment plans have been approved by the Department of Buildings (hereinafter, "DOB") on July 5, 2022 (NYSCEF Doc. No. 91), as the plans explain in sequential order the phases in which work will be completed. Cronk opined that petitioner is prepared to install protections as required by the DOB codes to protect the mechanical equipment, skylight, and the roof hatch on respondents' roof (NYSCEF Doc. No. 93). Furthermore, Cronk asserted that petitioner would install a new party wall that would waterproof and weatherproof the portion of respondents' property that would be exposed for the duration of the construction project (NYSCEF Doc. No. 94), as well as install a new permanent chimney extension on respondents' roof (NYSCEF Doc. No. 95).

On cross-examination, Cronk testified that the Site Safety Plan that discusses controlled access zone, also mentions that the "suspended scaffold" and "roof protection" documents will be filed separately. On redirect, Cronk testified that it is the standard practice that other plans can be provided to supplement the Site Safety Plan. On re-cross, Cronk admitted that while he had not seen or accessed the suspended scaffold" and "roof protection" plans, he assumes they are with petitioner's design architect.

As its second witness, petitioner called Michael Mazzella (hereinafter, "Mazzella"), a registered architect in New York State, and the architect of record of petitioner's property, who testified that petitioner shall provide standard roof protection on respondents' roof. The standard roof protection shall consist of a rigid foam, with a soft cushy side that will lay on top of the roof's membrane. Next, a plywood on top of a two-inch OSHA board laying on the cushy foam will be placed on respondents' roof to distribute any impact from the load, states Mazzella. According to him, the rooftop air-conditioning units on the respondents' roof would be protected with either a metal pipe scaffolding or a wood framing. Mazzella noted that petitioner has shared drawings of the work to be completed with the respondents and has revised same based on feedback received. He further stated that similar work was completed on a neighboring property without issue.

On cross-examination, Mazzella acknowledged that there is a partial stop work order from the DOB for the construction work being done at petitioner's property. He noted that petitioner has neither furnished respondents with a copy of the drawings of the "suspended scaffold" and/or "roof protection" plans, nor filed same with the DOB. On re-direct, Mazzella testified that while petitioner has remedied all identified defects listed on the partial stop work order, the stop work order is still in effect because the access license is lacking.

Next, petitioner called Vincent DeFilippo (hereinafter, "DeFilippo"), the owner of petitioner, testified that the subject brownstone was an abandoned property that was deteriorating when he purchased it. He noted that the instant construction project is currently $2 million over-budget given petitioner's inability to obtain the access license. According to DeFilippo, the green wall, a four-foot-high wooden structure, was built to prevent building materials flying around during construction and coming unto respondents' roof. He noted that portions of the green wall are now deteriorating, and water infiltration from the deterioration has damaged dry wall in petitioner's building.

On cross-examination, DeFilippo acknowledged that respondents were not content with the duration of the construction project and how it was affecting their property.

Thereafter, petitioner rested.

Rodney D. Gibble (hereinafter, "Gibble"), a licensed structural engineer who rehabilitate and evaluate buildings and foundation systems, who was retained by respondents to advise on the license dispute at issue and the damage that was being caused to their property because of petitioner's construction testified on behalf of respondents. He testified that engineers from his company visited respondents' property and reviewed photographs and a report was generated. He testified that petitioner's construction work caused water infiltration into respondents' property. Gibble set forth that respondents have not seen or accessed any drawings with respect to the suspended scaffold and the roof protection documents that petitioner was to file separately. Without seeing the drawings, respondents cannot ascertain whether the alleged protections would be adequate, stated Gibble. He further stated that respondents were concerned that they would lose access to the rear of their property because petitioner designated that space a controlled access zone.

Gibble testified on cross-examination that he was not aware of an alternative way of removing the green wall from the roof without first installing roof protection on respondents' property. He asserted that petitioner's roof protection details offer the barest minimum roof protection as the drawings are not specific as to the type of work intended to be done. According to him, the type of construction work to be done determines the type of roof protection necessary, but a more robust roof protection will include an elevated platform that spans across the property and does not sit on the roof framing. Gibble opined that a controlled access zone or overhead protection in the rear yard of respondents' property are the two legally recognized methods for removing the green wall. He further testified that a carefully and properly installed overhead protection in the rear yard would not exacerbate any type of damage that might exist and that a survey of existing damages before further construction work is undertaken would be beneficial to the parties.

On redirect, Gibble testified that he has neither been furnished with a copy of a pre-construction survey nor a monitoring report in connection with the petitioner's construction. On re-cross, Gibble emphasized that while he is aware of petitioner's outstanding construction work, he has not provided written comments as to how those construction plans could be amended to

provide additional protection for respondents' property because that is outside the scope of his employment relationship with respondents.

Next, respondents called Bridget Goodbody (hereinafter, "Goodbody") who testified that petitioner did not negotiate in good faith with respondents concerning the access license at issue. According to her, respondents sent petitioner a draft of an access license agreement in February 2024, but they have yet to receive a response from petitioner. Moreover, respondents are not in receipt of a pre-construction report petitioner commissioned in 2018, despite respondents request for same. Ms. Goodbody noted that petitioner has not sent to respondents a detailed copy of the roof protection plan, as required.

On cross-examination, Ms. Goodbody testified that petitioner's construction has caused damage to her property in the form of a hole in the roof that was patched; a coating that was destroyed and has not been fixed; and roof and chimney damage, none of which has petitioner agreed to repair. Ms. Goodbody asserted that the roof protection plan details must be agreed to before the parties can enter into an access license. She further testified that there was an agreement that petitioner would fix respondents' chimney, but the extent of the damage needs to be determined and that before a detailed inspection of the chimney could be done, the green wall would need to be removed. She testified that there had not been water infiltration in her property in the last six to eight months as a result of petitioner's construction work. Concerning the rear yard, Ms. Goodbody stated that all items there are movable except some stone seating. She also testified that while there are air conditioners, mechanicals, and a skylight on respondents' upper roof, the space is not used for recreational purposes. She further noted that the green wall is a plywood painted green, and some portion of it is over the party line. Ms. Goodbody testified that she was willing to share petitioner's updated roof protection plans that address issues raised by Gibble in this hearing with respondents' experts who will review and provide comments.

On re-direct, Ms. Goodbody testified that respondents are willing to grant the access license if they receive the protection plans that address their concerns, and petitioner agrees to reimburse respondents for the cost they have incurred in connection with the project and fix the damages on their roof that are as a result of petitioner's activities.

"In determining whether or not to grant a license pursuant to Real Property Actions and Proceedings Law § 881, courts generally apply a standard of reasonableness" (*Matter of Board of Mgrs. of Artisan Lofts Condominium v Moskowitz*, 114 AD3d 491, 492 [1st Dept 2014]). "Courts are 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" (*id.*, "Prior to the granting petitioner's application, Supreme Court must consider and resolve the issue as to whether there are less intrusive and equally effective methods of roof protection" (*Matter of 400 E57 Fee Owner LLC v 405 E. 56th St. LLC*, 193 AD3d 626, 626-27 [1st Dept 2021]).

"Although the determination of whether to award a license fee is discretionary, in that RPAPL 881 provides that a 'license shall be granted by the court in an appropriate case upon such terms as justice requires' (emphasis added), the grant of licenses pursuant to RPAPL 881 often warrants the award of contemporaneous license fees" (*DDG Warren LLC v Assouline Ritz*

1, LLC, 138 AD3d 539, 539-40 [1st Dept 2016]). "After all, '[t]he 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'" (*id* at 540, quoting *Matter of North 7-8 Invs., LLC v Newgarden*, 43 Misc 3d 623, 628, [Sup Ct, Kings County 2014]). Additionally, courts have conditioned licenses or otherwise awarded property owners reimbursement of certain professional fees (see, e.g., *Matter of Van Dorn Holdings, LLC v 152 W. 58th Owners Corp.*, 149 AD3d 518, 518-519 [1st Dept 2017], quoting *North 7-8 Invs., LLC*, 43 Misc 3d at 630 ["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"]).

Here, after the hearing, the court grants the access license subject to conditions below. While respondents make a colorable argument about the need for specificity in petitioner's protective work plans, same does not warrant denial of the access license sought herein in light of the record made after the hearing. Petitioner's documentary submissions and testimony adduced at the hearing adequately sets forth the facts making entry necessary, and demonstrate that at this juncture, there are no alternative means to complete the construction project. Petitioner endeavors to complete the removal of the green wall within forty-five (45) to sixty (60) days. Without an access order, both parties would suffer damage. Petitioner's project would remain halted indefinitely - as without a license petitioner cannot remedy the violations set forth in the stop work order. More importantly, there is a continued threat of water infiltration in both properties as a result of the deteriorating green wall, causing a hazardous condition. Given that respondent Goodbody articulated that respondents do not use their roof, and sparingly use their rear yard, the inconvenience to the respondents is relatively slight compared to the hardship of petitioner if the license is refused (see *Matter of House 93, LLC v Lipton*, 178 AD3d 545, 545 [1st Dept 2019]). Moreover, it is adduced from the record that petitioner was prepared to do all that was feasible to avoid injuries resulting from its entry unto respondents' roof and rear yard (see *Matter of New York Pub. Lib. v Condominium Bd. of the Fifth Ave. Tower*, 170 AD3d 544, 545 [1st Dept 2019]).

The court further conditions the access license upon a showing by petitioner to respondents that the roof protection, suspended scaffold and overhead protection/control access zone in the rear yard plans address respondents concern as to specificity and adequate protection. The license period shall extend for three (3) months after the conditions set forth in this decision are satisfied.

Concerning the licensing fee, RPAPL 881 provides courts "with discretion to craft an appropriate remedy 'upon such terms as justice requires'" (*Matter of Tsoumpas 1105 Lexington Equities, LLC v 1109 Lexington Ave. LLC*, 189 AD3d 524, 525 [1st Dept. 2021]). In light of this principle, the Court grants a fixed monthly license fee of $2,000.00 for the construction work to be undertaken (see *Matter of New York Pub. Lib.*, 170 AD3d at 545). Petitioner's access is also conditioned upon payment of a license fee to respondents. Should the amount of the fee prove to be insufficient or otherwise need to be changed, either party may make an application to this court to determine the appropriate amount; such application should be supported by adequate proof. Respondents may move for a determination of a penalty if petitioner does not complete

the work within the license period (see *Matter of Van Dorn Holdings, LLC v 152 W. 58th Owners Corp.*, 149 AD3d 518, 519 [1st Dept 2017]).

Next, the license is also conditioned upon petitioner's procurement of insurance for the duration of the access license period that name respondents as additional insureds on its and its contractors and subcontractors general liability policies with coverage of at least $5 million; indemnifying and holding respondents harmless from and against all claims, losses, liabilities, damages, fines, liens, actions, judgments or costs (including attorneys' fees and engineering fees and expenses incurred until the green wall is removed and damages in respondents' roof are fixed) resulting or arising from the construction at petitioners' property or its access to respondents' property. Petitioner shall be liable for any damage or injury suffered by respondents resulting or arising from the construction at petitioners' property or its access to respondents' property, and that all damages are to be promptly paid and repaired at petitioner's sole cost and expense.

Turning now to the engineering fees and attorney fees, respondents are entitled to a reimbursement, if supported by proof, of their professional fees incurred, insofar as it as has been held that "'[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'" (*Van Dorn Holdings*, 149 AD3d at 519 citing *Matter of North 7-8 Invs., LLC v Newgarden*, 43 Misc. 3d 623, 628 [Sup Ct, Kings County 2014]). Respondents are also entitled to their attorneys' fees incurred in this RPAPL 881 license proceeding (see *Matter of Panasia Estate Inc. v 29 W. 19 Condominium*, 224 AD3d 414, 414 [1st Dept 2024]). Since at this juncture the amount of engineering fees and attorney fees incurred to date cannot be determined with reasonable certainty, that issue will be referred to a special referee to hear and determine. Accordingly, it is hereby

ORDERED and **ADJUDGED** that petitioner is granted a license from February 10, 2025, through May 10, 2025, to enter onto respondents' property to perform construction work to remove the green wall and fix damages on respondents' roof caused by petitioner's construction activities, and, after conferring with respondents, provide plans that provide adequate protections for respondents' property; and it is further,

ORDERED that petitioner is directed to pay respondents a fixed monthly license fee in the sum of $2,000.00 the period of February 10, 2025, to May 10, 2025, with the first payment due within 20 days of service of this order with notice of entry, with the remaining payments to be made no later than the fifth day of each month; and it is further,

ORDERED that, if petitioner does not complete the outstanding work by May 2, 2025, then it shall apply for an extension of its license, 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 respondents in writing when its work has been completed and it has removed all protection from respondents' property; and it is further

ORDERED that petitioner is solely responsible for the construction work to be undertaken affecting respondents' property; and it is further

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

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

ORDERED that petitioner shall procure a commercial general liability policy insuring its work with limits of no less than $5 million and excess limits of no less than $10 million, and petitioner shall name each contractor it may hire, as well as respondents, as an additional insured on its policy insuring work resulting or arising from petitioner's project, and such coverage shall remain in place for the duration of the access license period; and it is further

ORDERED that petitioner shall place into escrow with a neutral third party the sum of not less than $75,000.00 to secure the payment of damages and other associated fees; and it is further

ORDERED that petitioner shall be liable to respondents for any damages which they may suffer as a result of construction work done because of the granting of this license and all damaged property shall be repaired at petitioner's sole expense; and it is further

ORDERED that petitioner shall indemnify and hold harmless respondents to the fullest extent permitted by law for any liability, claims, damages or losses, including attorneys' fees and engineering fees, respondents 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 immediately report, in writing, to respondents any damage to respondents' property caused by petitioner's work; and it is further

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

ORDERED that petitioner is to reimburse respondents for all reasonable attorneys' fees and engineering fees incurred by respondents in connection with license negotiations through the end of the license period, as well as, the amount of any actual and provable damages owed by petitioner to respondents incurred directly as a result of the issuance of the license (if not covered by insurance); and it is further

ORDERED that the parties shall agree to a detailed license agreement in conformity with the terms and conditions set forth in this decision and order; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for petitioner shall serve a copy of this decision and order, with notice of entry, upon respondents as well as the Special Referee Clerk who shall hear and determine the reasonable attorneys' fees and engineering fees at the conclusion of the license period; and it is further

ORDERED that service upon the Special Referee Clerk and shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the court.

January 17, 2025

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	[ ]	**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[ ] **DENIED**	[X]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[X]	**REFERENCE**