

East 44th St., LLC v Beaux Arts II LLC

2025 NY Slip Op 32462(U)

July 8, 2025

Supreme Court, New York County

Docket Number: Index No. 159906/2024

Judge: Verna L. Saunders

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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. VERNA L. SAUNDERS, JSC PART 36

Justice

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EAST 44TH STREET, LLC, INDEX NO. 159906/2024
Petitioner, MOTION SEQ. NO. 001

- v -

BEAUX ARTS II LLC, GOVERNMENT OF THE FEDERAL
REPUBLIC OF NIGERIA, 304 E. 45TH STREET
CONDOMINIUM, REVOCABLE TRUST OF MICHAEL J.
CALANDRILLO, and 836 SECOND AVENUE LLC,
Respondents.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 17, 18, 19, 20, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 69

were read on this motion to/for RPAPL 881.

In this RPAPL 881 proceeding, petitioner, the owner and developer of the premises located at 303-305 East 44th Street, New York, NY 10017, seeks an order granting it a license to access the adjacent property of 307 E 44th Street, New York, NY 10017, owned by respondent Beaux Arts II LLC, for the purposes of conducting a pre-construction survey and for the installation of temporary protections.¹ Petitioner asserts that it is developing a 41-story residential building on its property and that the access license is necessary to commence installation of protections, such as rooftop protections, overhead protection, and a sidewalk shed as set forth in petitioner’s site safety plan and in keeping with the New York City Building Code (NYSCEF Doc. No. 1, *petition*).

According to petitioner, both RPAPL 881 and the New York City Building Code § 3309 afford developers the right to obtain a license from the court to enter neighboring properties. Petitioner asserts that it has made extensive good faith efforts to negotiate an access license agreement with Beaux Arts II, even advancing money to pay Beaux Arts II’s professional fees. Despite these efforts, Beaux Arts II has refused to grant petitioner a commercially reasonable license, claims petitioner. Further, petitioner contends that the access is necessary because the subject properties are so situated such that the construction cannot be completed without access to Beaux Arts II’s premises. Petitioner also posits that the hardship it will experience if the license is not granted outweighs any temporary inconvenience Beaux Arts II may experience by the license. Due to the costs and size of the projects, petitioner argues that it will incur unnecessary financial costs if the project continues to be delayed. Lastly, petitioner asserts that Beaux Arts II will benefit from the protective work as it is specifically designed to protect Beaux Arts II’s premises and the public from property damage or injury (NYSCEF Doc. No. 15,

¹ The application has been discontinued as to all respondents except respondent Beaux Arts II LLC.

petitioner's memo of law). In support of the application, petitioner submits a copy of the Protection Plan, letter correspondence with Beaux Arts II, and a proposed escrow agreement (NYSCEF Doc. Nos. 8-14).

Beaux Arts II opposes the application and cross-moves for an order dismissing the petition, arguing that petitioner has failed to meet the requirements for the granting of a court-ordered license pursuant to RPAPL 881. According to Beaux Arts II, the instant petition is premature insofar as it has not denied petitioner access to the property, a historic building. It has rather, in good faith, engaged in negotiating an escrow agreement for legal and engineering fees in connection with the license agreement, which was funded on September 25, 2024, claims Beaux Arts II. As part of the access license negotiations correspondence, petitioner submitted different versions of the support of excavation plans ("SOE Plans") for review, which Beaux Arts II contends reflect petitioner's intention to install permanent encroachment on the property. Respondent sets forth that it identified myriads of issues while reviewing petitioner's SOE plans, such as lack of insurance coverage, in addition to petitioner's failure to specify the date(s) it seeks access to respondent's property to do construction work, as required by RPAPL.

Next, respondent insists that petitioner has not demonstrated that the access sought is reasonable or necessary, as required under RPAPL 881, insofar as petitioner has failed to submit redesigned excavation plans to remove the permanent encroachment on Beaux Arts II's property. Respondent further asserts that petitioner neither submits plans approved by the New York City Department of Buildings ("DOB") nor plans for the foundation and support of excavation phases, in support of the application. While petitioner seeks access for the superstructure phase of the construction project, respondent relies on the affirmation of Douglas S. Roy, its professional engineer (NYSCEF Doc. No. 33), to argue that petitioner's project requires the installation of permanent encroachment, in the form of tiebacks, rock bolts, or underpinning on Beaux Arts II's property. Since the draft license agreement makes no reference to the foundation and excavation phases of the construction, respondent argues that petitioner's construction plans are deficient because foundation work is a necessary part of the construction project. Respondent posits that its engineer identified deficiencies in the plans that petitioner submitted and made recommendations, GAZA report, that must be addressed by petitioner's engineer prior to the commencement of any work on the Beaux Arts II's property.

Concerning the access license negotiations, respondent posits that petitioner negotiated in bad faith insofar as petitioner did not supplement any of its drawings to address respondent's concerns to advance negotiations. Respondent insists that at this juncture, the balance of the equities lie against issuing a license so long as petitioner's plans, including its SOE plans, remain deficient and reflect the installation of permanent encroachments on Beaux Arts II's property. According to respondent, any prejudice that petitioner may suffer by the denial of the petition is of petitioner's own making for its failure to finalize its construction plans.

Further, respondent asserts that should the court grant petitioner an access license, the corresponding license agreement should provide adequate insurance and indemnities from petitioner and its contractors from any claims related to or arising from the construction project. Respondent also contends that it is entitled to the professional fees and attorneys' fees expended.

Moreover, respondent posits that the court should issue an award of costs, attorneys' fees and sanctions against petitioner for commencing a frivolous proceeding pursuant to Rule 130-1.1 of the Rules of the Chief Administrator. According to respondent, petitioner has no basis to commence the instant proceeding because respondent did not refuse to provide access to its property, but it was rather responsive and cooperative in negotiating the license agreement. As such, the petition should have been withdrawn when respondent notified petitioner via a Rule 130 Letter that the petition was frivolous and premature, claims respondent (NYSCEF Doc. No. 36, *opposition and cross-motion to dismiss*). In support of the cross-motion, respondent furnishes a copy of, *inter alia*, the Site Safety Plan, Draft License Agreement, SOE plans, the Rule 130 Letter, and engineer report (NYSCEF Doc. Nos. 25-35).

In reply, petitioner contends that, insofar as it took more than three months for respondent to engage petitioner on a proposed license agreement, it was entitled to commence the instant petition. According to petitioner, while respondent has not explicitly refused to provide access under any circumstances, it has also failed to articulate the terms under which it will grant access. Petitioner insists that respondent did not provide information about the insurance limits necessary for the access license agreement. Further, petitioner asserts that contrary to respondent's representation, it has provided a timeline for when it intends to begin work.

Next, petitioner sets forth that it has secured DOB approval of its site safety plan for the initial phases of its work. Petitioner insists that it has submitted a safety plan for the superstructure phase and post-approval amendments in support of excavation plans to the DOB for approval. Since these additional approvals are not needed for construction work to begin, claims petitioner, the court could condition access upon such approval by DOB in setting the terms of a license. Therefore, the cross-motion should be denied in its entirety, including the application for attorney's fees incurred, petitioner argues.

Concerning the permanent encroachment, petitioner posits that it has provided a comprehensive production of its plans with the removal of underpinning, tiebacks, or any form of permanent encroachment upon respondent's premises. To the extent respondent argues that it is entitled to certain protections, petitioner maintains that respondent should have proposed such terms when the parties were negotiating the access license (NYSCEF Doc. No. 66, *reply*). Petitioner submits a copy of the approved building plans (NYSCEF Doc. Nos. 50-65).

"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 I, 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"]).

Costs may be awarded, and sanctions may be imposed where a party engages in frivolous conduct. Conduct is frivolous if (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; or (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another. (See NYCRR 130-1.1; *Matter of 155 W. 21st St. v McMullan*, 61 AD3d 497, 501 [1st Dept 2009]).

As a threshold issue, the court declines to consider the proof submitted in support of the reply papers in the disposition of this matter insofar as they were improperly submitted in support of petitioner's *prima facie* burden. "It is well settled that the function of reply papers is not to introduce new grounds, argument, or evidence in support of a motion, inasmuch as the opposing party would be deprived of a fair opportunity to respond to the new contentions or evidence" (*Powell v City of New York*, 218 AD3d 1, 6 [1st Dept 2023], citing *EPF Intl. Ltd. v Lacey Fashions Inc.*, 170 AD3d 575, 575, [1st Dept 2019]). Here, respondent did not have an opportunity to review and discuss same as part of the opposition papers (see *Liparulo v New York City Health & Hosps. Corp.*, 193 AD3d 593, 594 [1st Dept 2021], citing *Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 561-562 [1st Dept 1992]).

Here, the petition is denied insofar as petitioner fails to make a *prima facie* showing as to the reasonableness and necessity of the access sought. Petitioner has not demonstrated that the plans were filed and approved by the New York City Department of Buildings at the time of the filing of the petition (see *Matter of Tory Burch LLC v Moskowitz*, 146 AD3d 528, 529 [1st Dept 2017]). While petitioner argues that it has secured approval for the site safety plans for the initial phases of its construction works, the proof provided in supported of this contention was improperly submitted as part of the reply papers.

Addressing now the cross-motion seeking sanctions and/or costs incurred in opposing the application, the relief is denied insofar as respondent has not demonstrated that petitioner's conduct rises to the level of frivolous conduct. Concerning that branch of the cross-motion seeking reasonable attorneys' and engineering fees, same is denied since the court is not authorized to grant said request. It has been held that "the 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” (*Matter of 419 BR Partners LLC v Zabar*, 209 AD3d 604, 604 [1st Dept 2022]). The grant of attorneys’ and engineering fees are predicated upon the issuance of a license to petitioner, but here, petitioner’s license request is denied. All other arguments have been considered and are without merit. Accordingly, it is hereby

ORDERED that the petition is denied, and the application is dismissed; and it is further

ORDERED that the cross-motion is granted only to the extent that the application is dismissed, and it is otherwise denied; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for respondent shall serve a copy of this decision and order, with notice of entry, upon petitioner.

This constitutes the decision and order of this court.

July 8, 2025


HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE