

**Madison Ave Owner LLC v Board of Mgrs.
of the 25-83 Condominium**

2025 NY Slip Op 32463(U)

July 8, 2025

Supreme Court, New York County

Docket Number: Index No. 159923/2024

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

-----X

INDEX NO. 159923/2024

MADISON AVE OWNER LLC,
Plaintiff,

MOTION SEQ. NO. 001

- v -

THE BOARD OF MANAGERS OF THE 25-83
CONDOMINIUM and 25 EAST 83 CORP.,
Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 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, 68, 69, 70, 71, 72

were read on this motion to/for

LICENSE

Petitioner moves for an order granting access to an adjourning property pursuant to Section 881 of the Real Property Actions and Proceedings Law (“RPAPL”) in connection with petitioner’s construction of an eighteen-story building on the premises located at 1122 Madison Avenue, New York, New York and designated in the Tax Map of the City of New York as Block 1495, Lot 56. Respondents cross-move for an order dismissing the petition and awarding them attorney’s fees, engineer’s fees and costs incurred as a result of this proceeding, or, alternatively, appointing a referee to determine the attorney’s fees, engineer’s fees and costs owed by petitioner to respondents.

Petitioner is the owner of the aforesaid premises and sought a license agreement with respondents to enter the premises located at 25 East 83rd Street, a/k/a 1114 Madison Avenue, New York, New York (hereinafter, the “Adjacent Premises”). The Adjacent Premises is said to be a “condo-op” mixed use building, consisting of a condominium managed by respondent The Board of Managers of the 25-83 Condominium (“Board”), and a residential unit owned by respondent 25 East 83 Corp. (“Corp”).

Petitioner seeks an order and judgment allowing it access to the Adjacent Premises in order to (1) install, maintain and remove temporary flat protection on the main roof of the Adjacent Premises, including the bulkheads and chimneys located thereon; (2) install, maintain and remove overhead protection over (i) the rear yard of the Adjacent Premises and eleventh floor balcony of the Adjacent Premises, and (ii) the first-floor roof of the Adjacent Premises, which overhead protection over the first roof of the Adjacent Premises shall be cantilevered over such areas from the sidewalk shed to be installed on the public sidewalk in front of the Adjacent Premises; (3) protect the required windows of the Adjacent Premises by (i) welded wire mesh mechanically fastened to the façade in the mortar joint, (ii) plywood mechanically fastened to the façade in the mortar joint, or (iii) draping wire mesh over the windows on the Adjacent Premises facing the project and within 20 feet or less of the Adjacent Premises; (4) install, maintain and remove horizontal netting on the airspace of the Adjacent Premises; and (5) install, maintain,

utilize and remove suspended scaffolding in the airspace of the Adjacent Premises to perform work therefrom, all of which access is required by applicable law and shall be maintained for approximately thirty (30) months.

For its project, petitioner retained the services of an engineering firm, Paul Perdek Engineering PLLC (“PPE”). PPE provided review protection drawings, including drawings for temporary protections, identifying the areas of the Adjacent Premises requiring protections during the project. Petitioner avers that it abided by the requirements of the New York City Building Code (“Code”). Pursuant to section 3309.10 of the Code, petitioner is required to provide protection to the roof of the Adjacent Premises, including bulkheads and chimneys. Pursuant to sections 3309.1, 3307.6, 3307.6.2, 3307.6.3 and 3309.10 of the Code, petitioner is required install overhead protection over the rear yard, the eleventh-floor balcony and first floor roof of the Adjacent Premises. Pursuant to section 3309.14 of the Code, petitioner is required to protect the windows of the Adjacent Premises. Petitioner submits site safety drawings indicating its plan to protect the Adjacent Premises.

Petitioner contends that it had to bring this proceeding because respondents have acted in bad faith throughout negotiations to establish a license agreement. Petitioner states that respondents have delayed their assent to an agreement by not responding to its requests for approval of its plan for the project. Petitioner had previously forwarded drawings to respondents’ counsel who would forward them to respondents’ engineering firm. Petitioner claims that respondents did not respond properly and the delay in reaching an agreement will result in financial losses. Petitioner states that it has procured liability insurance for the project and is willing to include respondents as an “additional insureds.”

Petitioner further argues that it is entitled to a license because the inconvenience to respondents is outweighed by the hardship it would experience if no license is granted. Petitioner contends that it has offered reasonable protections for the Adjacent Premises. Petitioner states that under reasonable circumstances respondents would be entitled to license fees and other professional fees related to the project. However, petitioner holds that due to their delays and unreasonable conduct, they are not entitled to such fees, or are entitled to a minimal fee at most. Petitioner further claims that the granting of license fees is discretionary.

Respondents oppose petitioner’s motion and cross-move for its dismissal. Respondents contend that petitioner has acted in bad faith and have stalled the negotiations. Respondents previously granted petitioner access to the Adjacent Premises twice to perform a pre-construction survey and structural stability assessment under agreements dated March 7, 2024 and June 26, 2024. Respondents contend that petitioner previously filed a “premature” proceeding in Supreme Court, New York County, entitled *Madison Ave Owner LLC v The Board of Managers of the 25-83 Condominium, et al.*, Index No. 154227/24, alleging that respondents refused to provide access to petitioner. Thereafter, the parties entered into a “limited license” agreement which allowed petitioner access for the installation of temporary protections in connection with demolition work and excavation work for petitioner’s project (hereinafter, the “2024 License Agreement”).

The 2024 License Agreement provided in Article I (ii) as follows:

“[Petitioner] further represents that it has yet to complete plans for the substructure and superstructure for the project and shall provide said completed plans when developed and filed with the DOB [Department of Buildings] and negotiate and enter into a new license agreement with the Adjacent Owner, and if negotiations fail may seek an order from a court of competent jurisdiction for any required access to the Adjacent Premises in connection with the superstructure phase of the project.”

Respondents argue that instead of complying with their agreement, petitioner has again prematurely filed for a court-ordered license. According to respondents, petitioner failed to provide revised and complete plans to them. They aver that upon their request, petitioner provided dated drawings that were rejected by their engineering firm, GEI Consultants (“GEI”) as incomplete and deficient. Respondents also argue that petitioner never filed its plans with DOB pursuant to the 2024 License Agreement.

Respondents contend that petitioner failed to pay license fees from the previous agreements. They also claim to have suffered damages caused by petitioner’s previous work on the Adjacent Premises. Based on a warranty agreement, respondents’ roof manufacturer must approve the roof protections before petitioner can have access to the Adjacent Premises.

Respondents also argue that they are entitled to attorney’s fees and engineer’s fees from petitioner, said fees incurred in defending themselves in this allegedly unwarranted proceeding and in the process of negotiating for a license.

In the event the court grants a license to petitioner, respondents argue that petitioner should be ordered to pay license fees, attorney’s fees and engineer’s fees; to post a bond with adequate financial coverage; and to obtain insurance coverage and indemnify them from any harm. Respondents contend that due to the temporary protections installed by petitioner in the course of the project, such efforts shall interfere with their owners and residents’ use and enjoyment of their property and cause a decline in the resale and rental value of the units. They contend that such payments and coverage would compensate for any consequences incurred during the project.

In its reply, petitioner argues that respondents have failed to provide any legitimate objections to Adjacent Premises access. Petitioner contends that respondents’ engineer’s request for additional drawings is inappropriate because petitioner has already provided revised drawings and most of the requested drawings are not related to the present proposed license agreement. Petitioner also contends that the prior proceeding it brought against respondents involved the prior work done on the Adjacent Premises and is unrelated to the current situation. According to petitioner, respondents’ request for unpaid license fees and claim of damages are also unrelated to the current issue before the court. Petitioner states that it has sent the relevant drawings and plans to DOB for approval.

Petitioner argues that respondents are not entitled to reimbursement of fees because the fees requested are excessive and unsubstantiated; because they presently possess an illegal roof terrace constructed without a permit or a certificate of occupancy; and because they have acted in bad faith during negotiations. Referring to respondents’ warranty, petitioner claims that said argument should be rejected since they did not submit a copy of the warranty requiring the roof

manufacturer's prior approval of the roof protections. Petitioner also argues that the posting of a bond is unnecessary as adequate protections will be provided.

Petitioner contends that it has reasonable grounds for bringing this proceeding and is entitled to a license to gain access to the Adjacent Premises.

The purpose of Section 881 is to allow a license to an owner of real property who seeks access to an adjoining property for the purpose of making improvement or repairs on its own property. In the event that access is denied, such a license shall be granted by a court in an appropriate case. Here, petitioner plans the construction of an 18-story building next to the Adjacent Premises, which can constitute an improvement of its property. The evidence indicates that the parties have previously agreed to allowing petitioner temporary access to the Adjacent Premises. This matter is a continuation of petitioner's project.

While respondents have cross-moved for the dismissal of petitioner's motion, they have stated that they would consent to a license agreement if certain conditions are provided to their advantage.

In deciding whether to grant a license, the court applies a "standard of reasonableness" (see *Bd. of Mgrs. of Artisan Lofts Condo. v Moskowitz*, 114 AD3d 491, 492 [1st Dept 2014]). The factors courts should consider are 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 property owner for any damages or inconvenience resulting from the intrusion (see *Matter of Queens Coll. Special Fund Inc. v Newman*, 154 AD3d 943, 944 [2d Dept 2017]).

Petitioner contends that respondents are seeking damages related to a prior agreement between the parties. Respondents claim that petitioner had caused some damage to the Adjacent Premises in a previous intrusion and owes them license fees, though they failed to specify the damage or the nature and extent of the fees. As this refers to an earlier unrelated event, the court finds this should be addressed in another special proceeding where the details can be properly evaluated.

Petitioner states that it has provided respondents' engineering firm revised and relevant drawings related to its latest project. Petitioner also states that it has submitted its plans to DOB. Respondents' failure to reply indicates that they have not attempted to contest or contradict petitioner's statements in its reply. Respondents' failure to respond to petitioner's assertion that a manufacturer's warranty was not submitted raises a question as to whether the roof manufacturer's approval is a condition precedent to the acceptance of roof protections by respondents. Petitioner has provided proof that respondents' roof terrace did not receive a certificate of occupancy though, despite knowledge of this, petitioner was willing to negotiate roof protection with respondents. Petitioner has proposed a flat roof protection of the Adjacent Premises. Petitioner also proposes mesh netting for window protection as the least intrusive means of protection in compliance with the Code.

Respondents will settle for a license agreement on the condition that they are entitled to

some remuneration. The protections installed will be intact for over a year, affecting the property use of their owners and renters. They seek fees, a bond and insurance coverage. Petitioner has obtained insurance and would add respondents as additional insured upon request. Petitioner opposes the imposition of a bond because it claims it would be liable to respondents for any damages pursuant to section 881. Thus, petitioner argues that a bond would not be necessary.

The granting of license fees, attorney's fees and professional fees, like engineer's fees by this court is discretionary. In their cross-motion, respondents discuss the potential decline in value of the Adjacent Premises and request license fees at \$10,000.00 a month, increased to \$13,500.00 once roof protections are installed, and an additional \$2,000.00 from March to October. Petitioner objects over this request, claiming that they failed to offer specific evidence as to the actual value of the property or the diminution in value due to its intrusion. Petitioner also argues that the roof terrace is illegally occupied and should not be included in the determination of license fees.

The court shall allow a license fee at \$5,000.00 a month, and an increase to \$7,500.00 once roof protections are installed. Moreover, the court finds that a bond is not necessary, since petitioner shall be liable for any damages caused by it in the course of the license agreement pursuant to section 881 of RPAPL and other legal and contractual considerations.

Regarding attorney's and engineer's fees, the court finds that payment of such fees is necessary insofar as it has been held that because "[t]he respondent to an 881 petition has not sought out the intrusion and does not derive any benefit from it[.]. . . [e]quity 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 1, LLC*, 138 AD3d 539, 540 [1st Dept 2016]). In compelling the grant of a license, respondents should not be put in a position of having to incur the costs of a design professional to ensure petitioner's work will not endanger their property (see *Matter of Panasia Estate, Inc. v 29 W. 19 Condominium*, 204 AD3d 33, 37 [1st Dept 2022]). 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. All other arguments have been considered and are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

ORDERED and **ADJUDGED** that petitioner Madison Ave Owner, LLC's motion is granted and it is allowed access to the Adjacent Premises of respondents The Board of Management of the 25-83 Condominium and 25 East 83 Corp. to: (1) install, maintain and remove temporary flat protection in the main roof of the Adjacent Premises, including the bulkheads and chimneys located thereon; (2) install, maintain and remove overhead protection over (i) the rear yard of the Adjacent Premises and the eleventh-floor balcony of the Adjacent Premises and (ii) the first-floor roof of the Adjacent Premises, which overhead protection over the first floor roof shall be cantilevered over such areas from the sidewalk shed to be installed on the public sidewalk in front of the Adjacent Premises; (3) protect the required windows of the Adjacent Premises by draping wire mesh over the windows on the Adjacent Premises facing the project and within 20 feet or less of the Adjacent Premises; (4) install, maintain and removing horizontal netting on the airspace over the Adjacent Premises; and (5) install, maintain, utilize and remove suspended scaffolding in the air space of the Adjacent Premises to perform work therefrom; all of which access is required by applicable law and shall be maintained for approximately (thirty) 30 months; and it is further

ORDERED that petitioner shall agree to indemnify and hold harmless respondents, their members, partners, officers, directors and employees from and against all costs, damages, claims, causes of action and liabilities arising out of or related to claims for personal injury, property damage made against them in connection with petitioner’s access to the Adjacent Premises, except to the extent caused by respondents’ negligence or willful misconduct. Petitioner shall maintain and provide proof of insurance of which respondents shall be designated as additional insureds under the general liability policy for the duration of this license agreement; and it is further

ORDERED that petitioner shall pay respondents a license fee of \$5,000.00 per month, which shall increase to \$7,500.00 per month once roof protections are to be installed; and it is further

ORDERED that respondents’ cross-motion is granted only to the extent that petitioner shall pay respondents’ reasonable attorney’s and engineer’s fees, and it is otherwise denied; and it is further

ORDERED that the Special Referee shall hear and determine respondents’ reasonable attorney’s and engineer’s fees; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for respondents shall serve a copy of this decision and order, with notice of entry, upon petitioner as well as the Special Referee Clerk; and it is further and

ORDERED that service upon the Clerk of the Court and Special Referee Clerk 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.

July 8, 2025


HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE