

268 W. 12th Owners Corp. v Kunst

2025 NY Slip Op 32755(U)

July 16, 2025

Supreme Court, New York County

Docket Number: Index No. 154569/2022

Judge: Paul A. Goetz

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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. PAUL A. GOETZ PART 47

Justice

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268 WEST 12TH OWNERS CORP.,
Petitioner,

- v -

ANDICA KUNST, BLAINE BORTNICK
Respondents.

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INDEX NO. 154569/2022
MOTION DATE N/A
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158

were read on this motion to/for CONTEMPT.

By decision and order dated May 15, 2024 (NYSCEF Doc No 85), the court resolved this RPL § 881 proceeding pursuant to the parties’ stipulation (NYSCEF Doc No 99) with license agreement (NYSCEF Doc No 100) and as stated on the record at oral argument (NYSCEF Doc No 86). The agreement between the parties contemplated that petitioner would obtain insurance (as a condition precedent to respondent permitting access) and all necessary permits from the Department of Buildings (DOB) to perform the required repair work.

As stipulated, petitioner paid respondents legal fees, escrow fees, and an initiation fee; the license commenced on the fifth business day following entry of the May 15, 2024 order; and the parties conducted a pre-construction survey on July 25, 2024. When petitioner requested an access date for the installation of the protective measures on November 1, 2024, however, respondents denied access.

Petitioner moves for an order of contempt based on respondents' denial of access (NYSCEF Doc No 129). Petitioner also seeks to extend the initial license term and holdover period, and to modify the "Access" paragraph of the agreement to allow pipe scaffolding to be used instead of suspended scaffolding as planned. Respondents cross-move for an order sanctioning petitioner for filing its motion and requiring petitioner to comply with certain provisions of the May 14, 2025 order and Site Safety Logistical Plan (SSLP) (NYSCEF Doc No 137). Respondents assert that they denied access because petitioner does not have the required insurance or DOB permits.

Denial of Access

Regarding insurance, respondents assert that the certificates of insurance petitioner submits are insufficient because: they do not include the required general contractor umbrella policy; they exclude asbestos removal, which is a significant portion of repairs at issue; petitioner did not provide proof of what liability is covered and what is excluded under the general contractor's insurance; and the policy expired on March 3, 2025 (*id.*). A review of the certificates reflects that these concerns are unfounded. The primary policy includes umbrella liability (NYSCEF Doc No 109); asbestos removal is included in the policy for the contractor performing that work (NYSCEF Doc No 116, p. 8); the certificate of insurance of the general contractor's policy (*id.*, p. 9) is sufficient "written proof of such insurance" (NYSCEF Doc No 100, ¶ 11[H]); and the policies were in effect at the time access was requested, and now that they are expired, petitioner may renew them. In sum, petitioner fulfilled its obligation to obtain the proper insurance.

Regarding the DOB permit, as petitioner notes, a permit cannot be obtained until the protective measures are put in place, which requires respondents permitting access. In other

words, obtaining proper permitting is a condition precedent to performing the actual repair work, not to installing the protective measures. Therefore, petitioner's lack of a DOB permit is not a valid basis for denying access.

Based on these delays, petitioner seeks to extend the initial license term (currently expiring March 27, 2025) and the holdover period (currently expiring August 27, 2025), for 127 days (representing the period from November 21, 2024 through the end of the initial license term, during which access was denied access) from the date that respondents give full access to petitioner to install the protective measures. Sine petitioner should not be required to pay fees for the time during which it was inappropriately denied access, the extension will be granted.

Scaffolding Modification

Petitioner seeks to modify the "Access" paragraph of the agreement to allow pipe scaffolding to be used along the eastern wall of petitioner's building instead of the originally proposed suspended scaffold. Petitioner submits the affidavit of Matteen Gafary, P.E., who states that a recently prepared conditions report showed deterioration of petitioner's exterior eastern wall indicating that suspended scaffolding "may no longer be adequate" and "pipe scaffold will be necessary to perform the repairs and protect the parties, the properties, and the workers" (NYSCEF Doc No 96). He further states that "the pipe scaffold will not be hanging from, or loading from, or tethered to, the Respondents' Property"; "the pipe scaffold will be capably supported by Petitioner's Building and Respondents' roof and will not cause any damage to Respondents' roof"; and "use of either suspended or pipe scaffolding will occupy the same amount of air space above the Respondent's Property" (*id.*).

In opposition, respondents note that "[t]he protections for Respondents' property were the subject of engineering review by both sides and were a significant part of the two-year

negotiations,” resulting in the plan for petitioner “to suspend scaffolding from its own property to perform the work” which is reflected in the SSLP (NYSCEF Doc No 137). Respondents assert that “pipe scaffolding is not a viable solution” because their “roof cannot support it” (*id.*) but do not provide an affirmation from an engineer supporting this contention.

Since respondents failed to rebut petitioner’s showing why the access agreement must be modified, the recommended change from suspended scaffolding to pipe scaffolding will be ordered.

Based on the foregoing, it is

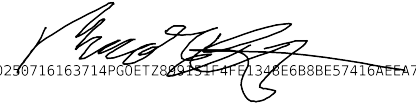
ORDERED that petitioner’s motion is granted to the extent that:

- (i) Respondents shall provide petitioner access to 266 West 12th Street, New York, NY 10014 within 10 days of the date of this order;
- (ii) Respondents’ failure to provide access as directed herein shall result in the imposition of a \$170 per diem fine for each day access is denied after the expiration of the 10-day period set forth herein;
- (iii) The initial license term and holdover period are extended for 127 days from the date that respondents give petitioner access to install the protective measures; and
- (iv) The “Access” provision of the agreement (NYSCEF Doc No 100) is modified to add the following sentence at the end of ¶ 4(b): “In addition, Licensee shall have access to hang, install, use, maintain, reposition, and remove pipe scaffold over (but not hanging from, or loading from, or tethered to) the 266 Property”;

And it is further

ORDERED that petitioner is directed to renew all insurance policies as necessary prior to requesting access to respondents’ property; and it is further

ORDERED that respondents' cross-motion is denied in its entirety.


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7/16/2025
DATE

PAUL A. GOETZ, J.S.C.

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