HW Dev. 3, LLC v Board of Mgrs. of the Art Deco Condominium

2025 NY Slip Op 32848(U)

August 8, 2025

Supreme Court, New York County

Docket Number: Index No. 161717/2024

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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HW DEVELOPMENT 3, LLC,
Plaintiff,

- v -

BOARD OF MANAGERS OF THE ART DECO CONDOMINIUM and ADAM DALLY,
Defendants.

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INDEX NO. 161717/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 21, 22, 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, 58, 59, 60, 61

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

Petitioner HW DEVELOPMENT 3, LLC, the owner of the real property known as 250 West 30th Street, New York, NY 10001 (NYSCEF Doc. No. 2, *deed*), commenced this RPAPL § 881 proceeding against respondents BOARD OF MANAGERS OF THE ART DECO CONDOMINIUM ("Art Deco"), located at 252 West 30th Street, New York NY 10001 (the, "Art Deco building"), and ADAM DALLY ("Dally"), the owner of Unit 2B in the Art Deco, which has use of a certain rear yard terrace, for temporary access to respondents' property for a period of four (4) weeks, to conduct a pre-construction survey and to install, maintain and subsequently remove protective measures required by New York City Department of Buildings ("DOB") Building Code. Respondents' building is a fifteen (15) story residential building and petitioner's property is a two-story structure. Petitioner represents that the access sought in these proceedings into respondents' property is requested solely with respect to the demolition phase of the development of petitioner's property, which includes, among other things, the full demolition of the existing structure at 250 West 30th Street.

In its petition, petitioner seeks access to (a) perform a pre-construction survey of interior and exterior conditions of respondents' property as required by Building Code § 3309.4.3; (b) install, maintain, and subsequently, remove overhead protection on the second floor rear terrace, as depicted in its Demolition ("Demo") and Site Safety Plan ("SSP") annexed to its papers as exhibit D in accordance with the Scaffolding Plans prepared by AP Professional Engineering, PLLC, annexed as exhibit E;[1] (c) protect, with wire mesh, the row of windows immediately abutting the roof of respondents' property during the demolition of petitioner's property with wire mesh as depicted in its Demo plan and SSP annexed to its papers as exhibit D (NYSCEF Doc. No. 1, *petition*).

[1] Petitioner represents that the demolition plans (i.e., the Demo and SSP plan) were approved by the DOB on December 6, 2024.

Petitioner contends that negotiations for a license agreement began in July 2024, but as detailed in the affidavit of Bruce H. Lederman, Esq., they were unsuccessful. Petitioner paid respondents' counsel an advance retainer of $10,000.00 pursuant to a Professional Fee Agreement.[2] Following a meeting with respondents in October 2024, counsel for Dally requested that Dally either be relocated or paid $11,500.00 per month during the demolition phase. Said demands, argue petitioner, are excessive and unreasonable and denotes a failure to negotiate in good faith, especially considering the limited scope of protections consisting of installing protections measuring 10 feet by 10 feet on a rear outdoor terrace. On October 18, 2024, respondents allegedly rejected petitioner's offer of a $2,500.00/month license fee. However, petitioner now argues that said amount was "generous" and that $1,000.00/month is a more appropriate fee. Considering respondents' conduct, petitioner argues that respondents should not be entitled to reimbursement of any professional fees and that the $10,000.00 previously deposited in the escrow account should constitute license fees, if any, granted for the access requested. Additionally, petitioner argues that the exorbitant license fee requested, i.e., $11,500.00/month, warrants that this court exercise its power to compel respondents to reimburse petitioner for attorney's fees and expenses incurred. Additionally, petitioner affirms that it stands ready to provide full indemnity to respondents should any damage to the Art Deco building arise during demolition (NYSCEF Doc. No. 1, *petition*).

In support of its petition, petitioner submits, *inter alia*, a copy of its deed (NYSCEF Doc. No. 2, *deed*); a copy of the condominium's recorded declaration of condominium (NYSCEF Doc. No. 3, *declaration*); a copy of the deed belonging to Dally for unit 2B within the building located at 252 West 30th Street (NYSCEF Doc. No. 4, *Dally deed*); petitioner's Demo and SSP (NYSCEF Doc. No. 5, *Demo and SSP*); its scaffold plan (NYSCEF Doc. No. 6, *scaffold plan*); a certificate of liability insurance (NYSCEF Doc. No. 7, *certificate of insurance*); e-mail exchanges regarding negotiation of the license agreement (NYSCEF Doc. Nos. 8-16, *e-mails*) and affidavits from Bruce L. Lederman, Esq., counsel for petitioner who negotiated the license agreement, and Wilson W. Chao, petitioner's architect (NYSCEF Doc. Nos. 17-18).

In opposition to the petition, respondents contend that the application must be denied because the complete scope of petitioner's work cannot be ascertained from the plans provided. Specifically, they argue that the demolition plans falsely identify the parties' shared wall as an "independent" wall. Alternatively, respondents claim that the court should hold an evidentiary hearing to determine whether the subject wall is in fact an independent wall and to afford respondents an opportunity to demonstrate that the developer's plan do not and will not sufficiently protect the Art Deco property and that the developer's hidden intention is to seal Art Deco's windows. If the court is inclined to grant the license, respondents request that the court hold a hearing to determine what reasonable conditions should be imposed on the developer as well as its financial obligations.

Respondents deny that they have refused access to petitioner; rather, they argue that they are willing to provide access once petitioner provides: (1) accurate demolition plans; (2) complete construction plans; (3) adequately detailed protection plans; (4) a schedule for the

[2] The parties negotiated an escrow agreement to reimburse respondents for professional fees incurred. Petitioner deposited the $10,000.00 into the escrow account but could not confirm whether any of the funds have been utilized by respondents.

temporary protections and construction; and (5) reasonable financial terms, including reasonable license fees and reimbursement of respondents' attorneys' and professional fees.

According to respondents, their experts have identified that the protection plans are "incomplete" and "insufficient" such that their professionals are not able to reasonably approve them with confidence. They argue that the sidewalk shed has not been approved by the DOB and is not tall enough. Moreover, the terrace protections are intrusive, argue respondents, and likely inadequate because they show overhead protections extending ten feet over the terrace, but the Code may require that those protections extend 20 feet over the terrace; thus, relying on the findings of C. Bradley Cronk ("Cronk"), AIA, president of Quarry Ridge Architecture P.C. and the expert retained by respondents to review the adverse impacts of developer's demolition work, respondents posit that engineering details and calculations with less disruptive options should be submitted. The window protections are insufficiently detailed, and they should extend at least two stories above petitioner's building. Additionally, respondents contend that the waterproofing details fail to provide product specifications. They also argue that the proposed plans contain no customary quality of life provisions, which means that petitioner has no obligation to, among other things, mitigate construction noise, vibrations, odors or dust. Also, the demolition plans do not account for the party wall, which is inaccurately reflected in petitioner's plans as an "independent" wall. Respondents further represent that there is no construction plan for its new building, which does not allow respondents to fully assess developers project. Respondents also argue that there is no monitoring plan for the respondents. Given that respondent's property is nearly 100 years old, Cronk recommends that developer use New York City's TPPN 10/88 enhanced monitoring protocols.

Additionally, respondents contend that petitioner's project will substantially interfere with respondents' use and enjoyment of the adjacent property. For example, they posit that nearly all of Art Deco's windows will need to be closed, resulting in loss of light and air and forcing tenants to reconfigure their rooms given the loss of windows. The protections, argue respondents, will also impact Dally's use of the terrace, by reducing his use of the terrace by half; invading his privacy; interfering with his current configuration of the terrace furniture; eliminating the dog run; damaging his plants; and will be an eye sore.

Respondents articulate that, at a minimum, a hearing is required to determine whether there is a party wall and whether justice requires that petitioner be granted a license to access the Art Deco property. Should the court be inclined to grant the petition, respondents argue that conditions should be imposed upon petitioner, i.e., that petitioner be required to pay license fees commensurate with the impacts and financial hardship; that petitioner reimburse respondents for attorney's fees and professional fees; and post bond and escrow to ensure any damage to the property; and that the court should include other customary license provisions such as, quality of life, indemnification, default and cure, insurance, term, and pre-construction survey. According to respondents, the court should also award respondents a substantial license fee given the access requested.

Respondents also argue that the petition fails to include a draft license agreement. They represent that the only draft agreement provided to respondents did not include standard business terms, such as a license fee amount, and it improperly requested an easement to the Art Deco

property and, as such, respondents argue that, although petitioner represents that this is an RPAPL § 881 proceeding to obtain access for the demolition of petitioner's two-story property, the developer's demolition plans are inextricably tied to its major construction project. As such, they insist that petitioner should furnish complete construction plans for the anticipated high-rise building on its property.

Respondents submit, *inter alia*, an unsigned copy of the professional fee and escrow agreement (NYSCEF Doc. No. 30); a draft of the "Demo Phase License, Indemnity and Protection Easement Agreement" (NYSCEF Doc. No. 31); e-mail correspondence regarding alternative plans and negotiation of the license agreement (NYSCEF Doc. Nos. 32-35); party wall agreement dated 1926 (NYSCEF Doc. No. 36).

Respondents also submit several affidavits. Dally's affidavit details the alleged adverse impact the proposed protection and project will have on him, his spouse, and their dog (NYSCEF Doc. No. 38). Paul Kimball, a member of the board, submits an affidavit wherein he avers, among other things, that there are 109 windows along the shared property line that will eliminate the impacted tenants' natural light and air, as well as, impact the interior of the impacted units (NYSCEF Doc. No. 38). Jeff Akerman, RA, a licensed architect with Rise Architecture, provides alternative proposed plans that he maintains will not require developer to seal any of Art Deco's windows along the property line (NYSCEF Doc. No. 41-43, *Akerman aff and exhibits*). Moreover, Cronk, in his affidavit, avers that the proposed plans make no mention of the party line and that they are bereft of details regarding commencement and completion of the new building, excavation, and construction work. Regarding the rear roof protection, Cronk opines that the developer should submit engineered details and calculations showing that the roof deck can support such the overhead protection loads or propose a less disruptive option, such as roof protection with a controlled access zone. Cronk also raises concerns regarding the sidewalk protection, rear roof protection, window protection and waterproofing detail, pre-construction survey, monitoring, and quality of life (NYSCEF Doc. No. 46). Ramon Gilsanz, a partner with Gilsanz Murray Steficek, affirms that, following a visit to the site, it appears that the parties do in fact share a party wall (NYSCEF Doc. No. 47-48). Also, Isaac Benshabat, a real estate appraiser with WM Shubert & Co., submits an affidavit wherein he opines as to the impact on the market value of the Art Deco property if Art Deco's windows are sealed (NYSCEF Doc. No. 49).

In reply, petitioner argues that the property owners with lot line windows must close those windows at their own expense when a neighbor builds a neighboring building to the lot line as allowed by applicable zoning and code. Moreover, they contend that Dally's request to substitute a controlled access zone for DOB-required overhead protection on ten (10) feet of his terrace should be rejected as creating unacceptable safety hazards. Additionally, respondents represent that the plans already provide for waterproofing any exposed areas. They further reiterate that respondents' requests for excessive license fees, additional professional fees, and other matters constitute overreaching which this court should reject (NYSCEF Doc. No. 56).

Petitioner also submits the affidavit of Anthony Hu, manager of petitioner, who reiterates respondents' rejection of a "so-called access zone" for Dally's terrace and restates that building owners with lot line windows bear the burden and risk that such windows will need to be closed if a neighbor lawfully builds a building up against the lot line windows. Mike Talty, a project

manager for the demolition contractor for petitioner, also submits an affidavit wherein he concedes that after personally inspecting and evaluating the property, the exterior wall of 252 W 30th Street is a party wall, to the extent that beams and joists in petitioner's property are inserted into pockets in the exterior wall of 252 W 30th Street. However, Talty affirms that the exterior wall does not structurally support petitioner's building and that it will not be demolished. Instead, Talty represents that the beams and joists inserted in the exterior wall will be cut and removed and the wall will be left intact. Any area exposed once the building on petitioner's property is removed will be waterproofed in accordance with the already filed plans (NYSCEF Doc. No. 55).

After oral argument on the motion, by letter dated May 2, 2025, petitioner informed the court that it intended to limit its original request for access by proposing the installation of a construction fence on its own property that adjoins Dally's terrace. Under this proposition, Dally would agree or be ordered to a controlled access zone when the fence is first installed and when it is removed (approximately a day each). Petitioners further state: "[w]e originally proposed a license fee of $1,500 per month for protecting Mr. Dally's terrace and such amount such then be prorated for any days when a controlled access zone is in effect." (NYSCEF Doc. No. 59, *letter*). Petitioner also submitted revised plans approved by DOB that reflect the party wall and the proposed fence (NYSCEF Doc. No. 61, *revised plans*). Respondent has not filed a formal response to the revised proposal.

RPAPL 881 is a statute that stands in derogation of the existing common law regarding trespass and, thus, should be read narrowly. (see *Deutsche Bank Trust v 120 Greenwich Dev. Assoc.*, 7 Misc3d 1006[A], 2005 NY Slip Op 50467[U], *3 [Sup Ct, NY County 2005], citing *Bayswater Health Related Facility v Karagheuzoff*, 37 NY2d 408 [1975].) Therefore, when assessing whether to grant a RPAPL 881 application, "[c]ourts 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." (*Matter of 400 E57 Fee Owner LLC v 405 E. 56th St. LLC*, 193 AD3d at 626.) 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 adjourning 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 adjourning 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]).

Here, respondents' opposition rests largely on issues arising out of the construction of the new high-rise building, i.e., the alleged lack of specificity as to the design of petitioner's new building and the construction's impact on respondent's windows, tenants, and the market value of the Art Deco building. However, the license petitioner seeks in this application concerns only the demolition phase of the project and, thus, this court agrees with petitioner that opposition to the instant license, based on tangential issues arising from the future construction, are premature. That said, this court does find that petitioner has failed to provide specific information concerning the temporary protections at issue to ensure that respondents' interests are protected.

For example, only in opposition does petitioner concede that its proposed plans omit a party wall, and questions remain as to the sufficiency of the proposed protections over Dally's terrace. Additionally, in reply, petitioner rejects respondents' proposition for a controlled access zone, arguing that "this request creates safety hazards and will not accomplish what Mr. Dally wants". However, in its May 2, 2025, letter, petitioner seeks to withdraw its prior request to install protective scaffolding on the rear terrace, claiming that it has determined that installation of a fence on its own property is sufficient to protect Dally's terrace. Petitioner submits a supplemental affidavit with revised plans approved by the DOB, reflecting the fence with controlled access, as well as, the party wall and plans to stabilize it using tie-backs on petitioner's side of the wall. Respondents have not had an opportunity to respond to the newly proposed protections. As such, a hearing is required to resolve this (see e.g. *Matter of Thomas Anthony Holdings LLC v Goodbody*, 216 AD3d 538, 540 [1st Dept 2023]; *Matter of 400 E57 Fee Owner LLC v 405 E. 56th St. LLC*, 193 AD3d 626, 627 [1st Dept 2021]; *Deutsche Bank Trust v 120 Greenwich Dev. Assocs.*, 7 Misc3d 1006[A] [Sup Ct, NY County 2005]). Accordingly, it is hereby

ORDERED that the parties in this action are hereby directed to appear for a pre-hearing conference on September 8, 2025, at 10:00 A.M.; and it is hereby

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.

This constitutes the decision and order of this court.

August 8, 2025

HON. VERNA L. SAUNDERS, JSC

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