

543 11th St., LLC v Bogaty

2025 NY Slip Op 33552(U)

September 19, 2025

Supreme Court, Kings County

Docket Number: Index No. 528846/2023

Judge: Carolyn E. Wade

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 19th day of September, 2025

PRESENT: HON. CAROLYN E. WADE, JSC

SUPREME COURT OF THE
STATE OF NEW YORK COUNTY OF KINGS

-----X
543 11th Street, LLC & 11th Street Residence, LLC

Petitioners,

Index: 528846/2023

-against-

DECISION and ORDER

Peter Bogaty and Erin Bogaty,

Motion Seq. 2

Respondents,

-----X

Petitioners, 543 11th Street, LLC and 11th Street Residence, LLC (“Petitioners”), move for an Order granting Petitioners leave to conduct disclosure, pursuant to CPLR § 408, on an expedited basis, and directing Respondents to produce the documents demanded by Petitioners in their Request for Production of Documents to Respondents (NYSCEF Doc. No. 55). Upon a reading of the foregoing papers, and all other papers and proceedings in this action, and after oral argument, Motion Seq. 2 is decided as follows:

STATEMENT OF FACTS

On October 5, 2023, Petitioners commenced this special proceeding, pursuant to RPAPL § 881, for a temporary license to access and enter the property located at 545 11th Street, Brooklyn, New York, 11215 (Block 1094, Lot 57, the “Adjoining Property”) for the limited purposes of: (i) installing, maintaining, and removing temporary protections for the roof and exterior of the Adjoining Property under the New York City Building Construction Code; (ii) if Respondents, Peter and Erin Bogaty (“Respondents”), consent, raising the Adjoining Property’s chimney as required by New York Mechanical Code 801.1.1.1 and related

provisions; and (iii) performing construction and maintenance on the portion of the Property's exterior wall and roof that faces the Adjoining Property.

By Order dated March 24, 2024, and entered on April 2, 2024, the Court granted Petitioners' Petition and awarded Petitioners a three-month license from the date of the Notice of Entry of the Order. (NYSCEF No. 51, "the Order"). Notice of Entry of the Order was served on May 15, 2024, and Petitioners completed the work, and vacated Respondents' roof, within three months and without incident.

On October 7, 2024, shortly after Petitioners completed the work underlying the Order, 543 11th Street, LLC moved to consolidate this RPAPL § 881 special proceeding with the related action *Peter Bogaty et al. v. 543 11th Street, LLC*, Index No. 5270076/2023, which the Respondents had previously commenced ("Plenary Action").

By Order, dated February 27, 2025, and entered on February 28, 2025, the Court, in the Plenary Action issued an Order denying the motion to consolidate, stating, "The Court sees no efficiencies by joinder; no common issues of law or fact." (Index No. 520076/2023, NYSCEF No. 43). On March 4, 2025, the Court referred the matter to a special referee to determine the amount of professional fees, including engineering and attorneys' fees, that Petitioners owe to Respondents, pursuant to this RPAPL § 881 special proceeding, if any. (NYSCEF No. 53).

Almost immediately after, on March 7, 2025, Petitioners made this emergency application for expedited discovery, supported with evidence of, among other things, Respondents' refusal to provide copies of the legal bills for which they intended to seek reimbursement at the special referee's hearing. (NYSCEF Nos. 56, 57, 58, 59, 60, 61, 62).

On March 19, 2025, Petitioners and Respondents appeared for the special referee's hearing. During the hearing, Petitioners applied for an adjournment to accommodate this motion and offered to withdraw it if Respondents: (1) produced their legal bills and (2) provided all documents Respondents intended to introduce during the hearing. Later that day, Respondents sent a computer printout showing their alleged fees from December 11, 2023, to September 17, 2024. (NYSCEF No. 72). Respondents, however, refused

to sign the Petitioners' stipulation averring that the printout included everything Respondents intended to introduce at the hearing. (NYSCEF No. 70).

On April 8, 2025, the parties appeared on the adjourned date for the hearing. Due to the Respondents' refusal to stipulate, Petitioners made a second application for an adjournment to accommodate this motion, which the Court granted, citing: (1) documents that the Respondents had not produced to the Petitioners (NYSCEF Nos. 71, 80, Tr. 9:21-12:10) and (2) evidence that the Respondents' bills in the Plenary Action were relevant to the instant action because the Respondents were attempting to recover fees from the Plenary Action herein. (*Id.* 19:5-20:15, see also NYSCEF No. 75). Based on the foregoing, the special referee adjourned the hearing to accommodate this motion and marked it as final.

ANALYSIS

CPLR § 3101(a)(1) requires full disclosure of all evidence that is "material and necessary" in the prosecution or defense of an action, regardless of the burden of proof. The liberal approach to disclosure extends to summary proceedings because, "[t]oo often, summary proceedings have become too summary. It should not be forgotten that a summary proceeding, despite its name is nonetheless a judicial proceeding that the ends of justice should not be sacrificed to speed." *Pamela Equities Corp. v. Louis Frey Co.*, 120 Misc.2d 281 (Civ. Ct. N.Y. Co. 1983). However, CPLR § 408 requires that a party seeking disclosure in a special proceeding first obtain leave of Court. *Bramble v. New York City Dep't of Educ.*, 125 A.D.3d 856 (2nd Dept 2015).

The standard for determining whether a party is entitled to leave to conduct discovery in a summary proceeding is one of "ample need." *Groschlaude v. Lawlor*, 78 Misc. 3d 679 (N.Y. Civ. Ct. 2023). Under CPLR § 408, the criteria for considering whether the movant has shown ample need are:

1. Whether the petitioner has asserted facts to establish a cause of action;
2. Whether a need to determine information directly related to the cause of action has been demonstrated;
3. Whether the requested disclosure is carefully tailored so as to clarify the disputed facts;
4. Whether any prejudice will result;
5. Whether the court can fashion or condition its order to diminish or alleviate any resulting prejudice; and

6. Whether the court, in its supervisory role, can structure discovery so that pro se tenants in particular will be protected.

Mautner-Glick Corp. v. Higgins, 64 Misc.3d 16 (App. Term 1st Dept 2019) (citing *New York Univ. v. Farkas*, 121 Misc.2d 643 (Civ. Ct. N.Y. Cnty. 1983)). Here, Petitioners have demonstrated an “ample need” for discovery.

Petitioners seek discovery from Respondents relevant to the Court’s referral to the special referee to determine the amount of professional fees, including engineering and legal fees, that Respondents owe to Petitioners, if any. Respondents seek approximately \$57,000 for legal fees; however, despite requests for engineering fees in their counterclaims to the Petition, and substantial litigation regarding this issue, Respondents apparently did not retain an engineer in connection with the temporary license granted by this Court.

Legal fees in a special proceeding under RPAPL § 881 are not guaranteed and cannot be awarded for litigation errors or misconduct, such as claiming fees unrelated to this special proceeding. See *Matter of 1643 First LLC v. 1645 1st Ave. LLC*, 224 A.D.3d 623 (1st Dept 2024). If Respondents had prevailed in this action, they would be entitled to no fees whatsoever. See *Matter of 419 B.R. Partners LLC v. Zabar*, 209 A.D.3d 604 (1st Dept 2022). This is because the fees are intended only to compensate Respondents for Petitioners’ access, not for things like negotiating a settlement of Respondents’ Plenary Action, that has at issue a contractual fee-shifting provision. (NYSCEF No. 76 § 15(B)); see *DDG Warren LLC v. Assouline Ritz 1, LLC*, 138 A.D.3d 539 (1st Dept 2016). Moreover, when considering fees, the Court must consider the extent to which access interferes with the owner’s use and enjoyment, the risk access poses to the property, and the complexities that the access sought presents in drafting the license agreement. See *Matter of North 7-8 Investors, LLC v. Newgarden*, 43 Misc.3d 623 (Sup. Ct. Kings Cnty. 2014). Critically, fees must be proportional to the access sought. *Id.*

Respondents also cannot recover for negotiations over the resolution of this litigation or the Plenary Action, as those expenditures are mere incidents to litigation and not necessary to compensate Respondents for Petitioners’ access. *A.G. Ship Maintenance Corp. v. Lezak*, 69 N.Y.2d 1 (1986). As the Court stated in

E83 Properties LLC v. LL 1592 Second Ave. LLC, 2021 N.Y. Slip Op. 32672[U], 7 (N.Y. Sup Cnty Sup. Ct. Dec. 14, 2021),

“respondent has not identified any fees or costs beyond that of its counsel, incurred as a result of negotiations between the parties and these proceedings. Respondent has not submitted any evidence that it retained a design professional to review the tiebacks or other protective measures. In any event, it is beyond cavil that attorney fees are incidents of represented negotiation; had the parties successfully reached an agreement regarding the instant dispute, these attorney fees would be borne by each party.”

Petitioners have provided evidence to the Court of their ample need for discovery. In addition to the Respondent’s legal bills, suggesting Respondents are seeking substantial fees for negotiations that are mere incidents to the litigation, the Petitioners have presented evidence showing that Respondents are seeking fees for negotiations to settle the Plenary Action. Such fees are not recoverable here, if at all. Disclosure regarding the aforementioned is relevant to the special referee hearing, and is necessary to prevent prejudice to the Petitioners.

Thus, the discovery Petitioners seek meets the test in *Mautner-Glick Corp*, supra. It is directly related to Respondents’ application for fees, necessary to determine the appropriate amount of fees, and its disclosure will not prejudice Respondents. As with all fee hearings, if and to the extent that the documents provided contain information protected by the attorney-client privilege, Respondents may redact that information, but only to the extent necessary to protect the privilege.

Respondents’ other arguments are unconvincing. Contrary to Respondents’ claims, they cannot withhold material and necessary information merely by asserting that it is part of their rebuttal case. The Respondents are responsible for demonstrating that their fees are appropriate under RPAPL § 881. Respondents may not undermine Petitioners by withholding evidence of their prima facie case under the pretense that it is part of their rebuttal. Furthermore, even if such evidence properly forms part of Respondents’ rebuttal case, that does not exempt the information from being disclosed during discovery. See *Dani Michaels, Inc. v. Design, 2000 N.Y. Ltd.*, 4 A.D.3d 193 (1st Dept 2004) (“The trial court properly

precluded plaintiff from introducing into evidence, on rebuttal, documents that were covered by the parties' discovery stipulation but not produced, and which also should have been offered on plaintiff's case-in-chief.").

Accordingly, Petitioners' motion is **GRANTED**. Within twenty (20) days of Entry of this Order, Respondents counsel shall produce the following to Petitioner's counsel, via e-mail:

1. All legal bills, for which Respondents seek reimbursement in this action, including in any form(s) in which Respondents intend to introduce said information during the special referee's hearing;
2. All other documentary or physical evidence Respondents intend to introduce at the special referee's hearing; and
3. Respondents' legal bills (redacted for attorney-client privilege, only to the extent necessary) from the Plenary Action for the period November 2023, to October 2024, or any other cotemporaneous period for which Respondents seek legal fees in this special proceeding.

This constitutes the Decision and Order of the Court.

ENTER:



Honorable Carolyn E. Wade, J.S.C.

**Hon. Carolyn E. Wade
Supreme Court Justice**