

Phoenix Owners Corp. v Mindel
2026 NY Slip Op 30556(U)
February 13, 2026
Supreme Court, New York County
Docket Number: Index No. 158569/2023
Judge: James G. Clynes
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JAMES G. CLYNES PART 39M
Justice
INDEX NO. 158569/2023
PHOENIX OWNERS CORP., MOTION DATE 08/01/2024
Petitioner, MOTION SEQ. NO. 004
- v -

JOEL MINDEL, SUSAN MINDEL, MINDEL RESIDENTIAL PROPERTIES L.P.

DECISION + ORDER ON MOTION

Respondents.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173

were read on this motion to/for CONTEMPT

BACKGROUND

In this special proceeding, which was commenced in August 2023, pursuant to a Verified Petition, petitioner Phoenix Owners Corp. (Petitioner) sought a license, pursuant to Real Property Actions and Proceedings Law (RPAPL) § 881, to access the property of respondents Joel Mindel, Susan Mindel and Mindel Residential Properties LP (collectively, Respondent) for the purpose of installing temporary protections on Respondent’s property so that Petitioner could complete Local Law 11 Emergency Work on its building.

On September 20, 2023, the Court found that Petitioner had met its burden under RPAPL § 881 and granted Petitioner a conditional license to access Respondent’s property, provided the parties submitted a proposed license agreement based upon the terms of the Court’s order (NYSCEF 142 [the First Order]). The Court further held that Respondent was entitled to a license fee for this access and to professional fees (Id.). In a Supplemental Order, dated September 28, 2023, the Court unconditionally granted petitioner’s request for a license for

access based upon the Court's receipt of the required submissions outlined in the First Order (NYSCEF 143 [the Second Order]), and approved the parties' License Agreement (NYSCEF 144). On January 5, 2024, the Court modified specific terms of the License Agreement including but not limited to language regarding weather-related delays (*see*, NYSCEF 145 [the Third Order]).

Regarding compensation, the License Agreement provides respondent would receive a license fee of \$12,000 per month from petitioner, to commence upon the day the petitioner accessed respondent's building to install site safety protections, for a period of six months. This amount would increase to \$15,000 for months 7-9, and to \$18,000 for any additional months, with any partial months to be prorated as necessary (*see*, NYSCEF 144 [License Agreement]). The License Agreement also provides that petitioner would be excused from paying the license fee for any days subject to unavoidable delays (*see, Id.* at ¶ 5(g) ["the time that it takes the New York Department of Buildings (DOB) to review and approve any plans and/or amended plans relating to the protection work, including the requests to remove the protection work"]).

Respondent asserts that license fees were timely paid by Petitioner commencing October 18, 2023, through May 31, 2024. However, Respondent contends that for the period of June 1, 2024, through August 13, 2024, Petitioner has not tendered the required license fees, despite the site protections remaining on Respondent's property during that time.

Respondent now moves in the instant motion (Mot. Seq. No. 4), requesting an order (1) holding Petitioner in contempt of court and directing Petitioner be fined in the amount of Respondent's costs and expenses, plus an additional \$250.00, (2) directing petitioner pay to Respondent a money judgment of \$36,467.86 for unpaid license fees, (3) granting Respondent its

attorneys' fees for litigation arising from this matter, and (4) for further relief as the court may deem just and proper.

Petitioner opposes the motion in its entirety and further requests an award of its own attorney's fees related to defending against the motion.

Here, Respondent alleges Petitioner is not only in contempt of the relevant court order(s), including the License Agreement, but that Petitioner owes Respondent \$36,467.86 in outstanding license fees. Specifically, respondent argues Petitioner has not tendered payment for the required license fee amounts due under the license agreement from June 1, 2024, through August 13, 2024. Respondent further argues that the \$5,400 tendered by Petitioner (and returned by Respondent) was insufficient to satisfy the outstanding license fees alleged to be owed (NYSCEF 167). In support of its motion, Respondent submits a detailed accounting (*see*, NYSCEF 168, ¶¶ 10-11), an affidavit from code analyst, Jaime Pabon (NYSCEF 169 [Pabon Aff]), and copies of DOB records to demonstrate that Respondent is entitled to payment of \$36,467.86 through August 13, 2024. Respondent's calculations also include a five-day deduction of license fees when Petitioner would be entitled to rely on the unavoidable delay exception within the license agreement due to DOB's review of Petitioner's removal applications.

In opposition, Petitioner argues Respondent improperly served its contempt motion, as Respondent failed to serve the accused personally, as required. Petitioner further argues that it tendered payment to Respondent in full satisfaction for any license fees due and owing and that such payment was voluntarily returned by Respondent. Specifically, Petitioner asserts it was faced with an unavoidable delay in seeking approval from DOB to remove the temporary protections, making Petitioner responsible for only fourteen days of payment. Additionally,

Petitioner contends that Respondent interfered with Petitioner's access, causing Petitioner to incur a fee of \$1,600 for lost time by Petitioner's contractor. As there is a carve out within the license agreement that provides for unavoidable delay, Petitioner asserts that the \$5,400 amount tendered to Respondent was proper, as it reflects payment for fourteen days at a rate of \$500 per day and includes the deduction of the \$1,600 fee. In support of its position, Petitioner submits an affidavit from Jeffrey Lenobel, the President of the Board of Directors (NYSCEF 162 [Lenobel Aff]), which states that Petitioner was not personally served with the instant motion. Petitioner further contends that Respondent's motion is frivolous, and as such, petitioner seeks its attorneys' fees.

DISCUSSION

Contempt

The Judiciary Law allows for the commencement of a contempt motion by service of a notice of motion. However, service of such a motion to punish for contempt requires service upon the accused. Section 761 of the Judiciary Law provides, "[a]n application to punish for contempt in a civil contempt proceeding shall be served upon the accused, unless service upon the attorney for the accused be ordered by the court or judge." Service upon the accused is required given the severity of the penalties available to the court in a contempt proceeding. The notice of motion before the court states, "your failure to appear in court may result in your immediate arrest or imprisonment for contempt of court." Further, such punishment may consist of "fines or imprisonment, or both, according to law" (*see*, Judiciary Law § 756).

Therefore, strict adherence to procedural requirements is required in matters of civil contempt (*see*, *Roajas v Recant*, 249 AD2d 95 [1st Dept 1998]). Here, respondent's method of service, consisting of uploading the motion to NYSCEF, was not ordered by the court and does

not comport with the service provisions of CPLR § 308. Therefore, respondent's failure to effectuate service as required by the clear language of section 761, and the absence of an order from the court permitting service in any other manner, is an incurable defect in this civil contempt proceeding. Accordingly, that part of respondent's motion seeking to hold petitioner in contempt is hereby denied.

License Fees

RPAPL § 881 provides:

“When an owner or lessee seeks to make improvements or repairs to real property so situated that such improvements or repairs cannot be made by the owner or lessee without entering the premises of an adjoining owner or his lessee, and permission so to enter has been refused, the owner or lessee seeking to make such improvements or repairs may commence a special proceeding for a license so to enter pursuant to article four of the civil practice law and rules. The petition and affidavits, if any, shall state the facts making such entry necessary and the date or dates on which entry is sought. Such license shall be granted by the court in an appropriate case upon such terms as justice requires. The licensee shall be liable to the adjoining owner or his lessee for actual damages occurring as a result of the entry.”

“RPAPL § 881 provides that a license shall be granted by the court in an appropriate case upon such terms as justice requires” (*DDG Warren LLC v Assouline Ritz 1, LLC*, 138 AD3d 539, 540 [1st Dept 2016]). Therefore, the determination of whether to award a license fee is discretionary, and warranted “where the granted license will entail substantial interference with the use and enjoyment of the neighboring property during the [license] period, thus decreasing the value of the property during that time” (*Id.* at 540).

In this special proceeding, it has been previously determined that Respondent was to receive a license fee pursuant to the License Agreement. Further, the license fee was to commence upon the day that Petitioner accessed the Respondent's building to install the Site Safety Protections, and was to be paid until such time as the temporary protections were

removed. As Respondent's submissions demonstrate that temporary protections remained on Respondent's building through August 13, 2024, Respondent is entitled to enforcement of the License Agreement and a license fee in the amount of \$36,467.86. While Petitioner contends that it tendered \$5,400 to Respondent in full satisfaction of what it owed in license fees, Petitioner fails to demonstrate how it calculated the number of days it allegedly suffered unavoidable delay while awaiting a determination from DOB on its approval to remove the temporary protections. Further, Petitioner does not submit a receipt or affidavit regarding the \$1,600 charge for lost time it claims.

License fees are not to be applied punitively, but instead "compensate for loss of enjoyment and diminution in value due to loss of use" (*Matter of Panasia Estate, Inc. v 29 West 19 Condominium*, 204 AD3d 33, 38 [1st Dept 2022]). Therefore, as temporary site protections remained on Respondent's building between June 1, 2024, through August 13, 2024, the court finds that Respondent is entitled to a license fee of \$36,467.86.

Legal Fees and Sanctions

Respondent seeks reimbursement of its attorneys' fees pursuant to Judiciary Law §§ 753 and 773 and RPAPL § 881. Generally, attorneys' fees may only be awarded to a prevailing party, based on a statute or contractual provision (*see, EVEMeta, LLC v Siemens Convergence Creators Corp.*, 173 AD3d 551, 553 [1st Dept 2019]). Here, the motion for contempt has been denied on procedural grounds. Accordingly, there is no prevailing party and no attorneys' fees shall be awarded. Furthermore, the license agreement, expressly prohibits the reimbursement of Respondent's attorneys' fees relating to the underlying proceeding.

6. Professional Fees:

- a. Within five (5) business days after the notice of entry of the Court's decision and order relating to this Agreement, [petitioner] shall pay the [respondent] Forty Thousand Dollars and 00/100

(\$40,000.00) for their reasonable professionals' fees, including attorneys and other professionals' fees, incurred ... []
b. Pursuant to the September 20th Decision and Order, the [respondent] shall not be entitled to reimbursement of professional fees incurred in any other prior proceedings, and/or for any other matters relating to the Proceeding. (NYSCEF 144, ¶ 6).

Accordingly, as the prohibition on the reimbursement of Respondent's professional fees includes attorneys' fees, Respondent's request for such relief is hereby denied.

Lastly, Petitioner asks this court to sanction Respondent and requests its attorneys' fees and expenses pursuant to 22 NYCRR § 130-1.1. Petitioner argues that Respondent engaged in frivolous conduct by filing the instant motion when Petitioner was allegedly still waiting for approval from DOB to remove the temporary protections and thereby provide a calculation of license fees. However, Petitioner has failed to show that Respondent's conduct in filing the instant motion was "so egregious as to constitute frivolous conduct within the meaning of 22 NYCRR 130-1.1" (*Nugent v City of New York*, 189 AD3d 631, 632 [1st Dept 2020] [internal citation and quotation marks omitted]). Accordingly, Petitioner's request is denied.

The court has considered the parties' additional arguments, even if not specifically addressed and finds them unpersuasive.

Accordingly, it is

ORDERED, that the motion of respondents, Joel Mindel, Susan Mindel and Mindel Residential Properties LP is granted to the extent that respondents are awarded a license fee in the amount of \$36,467.86 and the motion is otherwise denied; and it is further

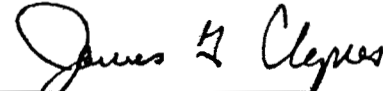
ORDERED, that Respondents shall serve a copy of this Decision and Order upon Petitioner and the Clerk of the General Clerk's Office, with notice of entry within twenty (20) days thereof; and it is further

ORDERED, that any requested relief not expressly addressed herein has been considered and is denied.

This constitutes that decision and order of the court.

2/13/2026

DATE



JAMES G. CLYNES, 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