

**AREP Fifty-Seventh LLC v PMGP Assoc., L.P.**

2012 NY Slip Op 30511(U)

March 2, 2012

Sup Ct, NY County

Docket Number: 101320/12

Judge: Donna M. Mills

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SUPREME COURT OF THE STATE OF NEW YORK—NEW YORK COUNTY

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

AREP FIFTY-SEVENTH LLC,

INDEX NO. 101320/12

Plaintiff,

MOTION DATE \_\_\_\_\_

-v-

MOTION SEQ. No. 001

PMPG ASSOCIATES, L.P.,

MOTION CAL NO. \_\_\_\_\_

Defendant.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for \_\_\_\_\_.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits....	<u>1-7</u>
Answering Affidavits Exhibits _____	<u>8-10</u>
Replying Affidavits _____	<u>11-13</u>

CROSS-MOTION: \_\_\_\_\_ YES  NO

**UNFILED JUDGMENT**

Upon the foregoing papers, it is ordered that the motion is hereby decided in accordance with the attached memorandum decision. This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 3-2-12

*Donna M. Mills*

**DONNA M. MILLS, J.S.C.**

Check one:  FINAL DISPOSITION

\_\_\_\_\_ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 58

-----X

AREP FIFTY-SEVENTH LLC,

Petitioner,

Index No. 101320/12

-against-

PMGP ASSOCIATES, L.P.,

Respondent.

-----X

**Donna Mills, J.:**

In this petition, brought by order to show cause, plaintiff AREP Fifty-Seventh LLC (Project Owner) petitions, pursuant to Real Property Actions and Proceedings Law (RPAPL) § 881, for a license requiring respondent PMGP Associates, L.P. (Adjacent Owner) to remove a five-foot section of a sidewalk construction bridge erected in front of the Project Owner's property, to allow the Project Owner to erect a construction crane (crane) in furtherance of a construction project (Project) taking place on the Project Owner's property (Project Premises). Alternatively, the Project Owner seeks, pursuant to CPLR 6301, a preliminary injunction requiring the Adjacent Owner to remove the offending sidewalk bridge.

**I. Background**

The Project Owner is the net lessee of the Project Property, located at 120 West 57th Street, New York, New York. The Project

Owner is building a 29-story building on the Project Property to house a hotel (Project).

The Adjacent Owner owns the premises at 118 West 57th Street, which houses a hotel (Adjacent Property), and which has, apparently, been undergoing facade restoration for some time, requiring the construction of a construction bridge (Bridge). The Bridge covers the front of the Adjacent Property, abuts the Project Premises, and extends five feet in front of the Project Premises. No part of the Bridge actually rests on the Project Premises.

The Project Owner has reached the point in its construction activities that it wishes to erect a crane. A pad for the crane has been built abutting the Adjacent Property. The Project Owner claims that it cannot erect the crane on the pad without removing the encroaching five-foot section of the Bridge. It claims that removing the Bridge's five-foot extension, erecting the crane, and putting up a new bridge would only inconvenience the Adjacent Owner's work by three days, noting that the Adjacent Owner's work has been proceeding only intermittently.

Although the parties have had some negotiations on the subject, the Adjacent Owner refuses to give the Project Owner permission to take the five-foot section of the Bridge down. The matter is time-sensitive, as the Project Owner's construction schedule depends on getting the crane installed expeditiously.

The Adjacent Owner claims that it is doing "statutorily-required facade maintenance work" (Opp. Memo of Law, at 2), pursuant to Administrative Code of City of NY §§ 28-302.1 et seq., commonly known as Local Law 11 (Local Law 11). It claims that it cannot "ignore its legal obligations" to the Department of Buildings (DOB) (Opp Memo., at 2) by removing the safety features required for its own work. The Adjacent Owner insists that it must, by law, continue and complete its facade work, which will only be done when the DOB's Building Enforcement Safety Squad (BEST Squad) approves removal of the Bridge.

The Adjacent Owner also claims that the scaffolding rests on the Bridge, and that it would be required to remove all of the scaffolding on the side of its building which abuts the Project Premises if it removed the five-foot section. It argues that this would be an unreasonable and impracticable burden, calling for, essentially, the secession of its entire facade project until the Project next door was completed. The Adjacent Owner claims that it would have to recommence the permit process before it could return to its facade work, another intolerable burden. The Adjacent Owner claims that the Project Owner could easily relocate the position of its crane to the other side of the Project. The Adjacent Owner further argues that the project Owner has failed to bring the DOB into this action as a necessary party, because "[t]he only party that could possibly relieve

[Adjacent Owner] of [its] obligations is the [DOB]." Opp. Memo. of Law, at 6.

The Project Owner responds that the DOB has already approved the removal of the Bridge; that the Adjacent Owner has provided no engineer's report confirming that any scaffolding would have to come down; and the community will suffer if the time expended on the Project is expanded. The Project Owner has offered to reimburse the Adjacent Owner for the entire cost of removing and replacing the five-foot section of the Bridge.

## II. Discussion

Pursuant to RPAPL 881:

[w]hen 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. ... 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.

The court "adopt[s] a standard of reasonableness" in judging whether the licensee can do "all that is feasible to avoid injuries resulting from its entry" on the adjoining owner's property. *Mindel v Phoenix Owners Corp.*, 210 AD2d 167, 167 (1st Dept 1994).

While the Adjoining Owner claims that it will not be able to

get DOB permission to remove, and then replace, the overhanging Bridge, the Project Owner, in its reply papers, produces an amended "Site Safety and Logistics Plan" (SSP) presented to the DOB, which shows that the DOB has approved the removal of the overhang, the positioning of the crane, and the replacement of abutting bridges on the sites. See Reply Aff. of James McCormick, Ex. A. The approval followed an e-mail from Robert D'Alessio, Director, Excavation, Interior Demolition, Stalled Sites and Scaffolds Unit, of the DOB, previously produced by the Project Owner in its petition. Aff. of James McCormick, Ex. A. The Project Owner now supplies e-mails from Tom Connors, executive director of the BEST Squad, and Robert D'Alessio, affirming that the replacement of the five-foot overhang by a new bridge will not be a violation of the New York City Building Code, and that the Adjoining Owner need not provide a new SSP in order to have the changes effected. *Id.*, Exs. B, C.

The Adjoining Owner complains, in a letter to the court, that the Project Owner should not be allowed to present this evidence, as it has done so only in its reply and, in general, "[t]he function of a reply affidavit is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of the motion [internal quotation marks and citation omitted]." *Ambac Assurance Corp. v DLJ Mortgage Capital, Inc.*, \_\_\_AD3d\_\_\_, 2012 NY

Slip Op 00827, \*2 (1st Dept 2012).

Although the evidence presented by the Project Owner is new, and may not have been available to it previously, the evidence follows from evidence produced on the original petition, and directly addresses the Adjoining Owner's concerns, brought up in opposition to the proceeding. As such, the evidence is a permissible reply to those concerns.

The Adjoining Owner's claim that the Bridge and scaffolding are intertwined, so one cannot be removed without the other, is not supported by any affidavit of a person with knowledge, and is at odds with the DOB's approval of the removal of the five-foot extension of the Bridge, and the erection of the crane. In any event, under RPAPL 881, the project Owner is liable for all damages suffered by the Adjoining Owner's property in carrying out the license, and the Project Owner has stated that it will pay for the removal of the overhang, and any complications which may arise therefrom. The Adjoining Owner's fears that it will get on the wrong side of the DOB by being asked to delay legally required facade repairs is belied by the DOB approval of the Project Owner's SSP, and its finding that the Adjacent Owner need not even supply a new SSP.

Because the matter herein is governed by RPAPL 881, there is no need to address the Project Owner's arguments brought pursuant to CPLR 6301. Further, there is no cause to dismiss the



proceeding due to the Project Owner's failure to join the DOB in this action. The DOB is not a necessary party.

Accordingly, it is

ADJUDGED that petitioner AREP Fifty-Seventh LLC's petition is granted; and it is further

ADJUDGED that petitioner AREP Fifty-Seventh LLC is entitled to a license pursuant to RPAPL 881 requiring defendant PMGP Associates, L.P. to remove the overhanging five-foot section of defendant PMGP Associates, L.P.'s construction bridge; and it is further

ADJUDGED and ORDERED that petitioner AREP Fifty-Seventh LLC is obligated to reimburse defendant PMGP Associates, L.P. for all costs which arise from the removal of the construction bridge, and the replacement of the construction bridge.

Dated: 3-2-12

ENTER:

*Donna M. Miller*

\_\_\_\_\_

J.S.C.  
DONNA M. MILLER, C.S.J.