

**Matter of AY Phase II Dev. Co. LLC v 497 Dean St.
Residences, LLC**

2016 NY Slip Op 32389(U)

December 5, 2016

Supreme Court, Kings County

Docket Number: 502689/2016

Judge: Sylvia G. Ash

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5th day of December, 2016.

PRESENT:

HON. SYLVIA G. ASH,

Justice.

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In the Matter of the Application of
AY PHASE II DEVELOPMENT
COMPANY LLC,

Petitioner,

DECISION AND ORDER

- against -

Index # 502689/2016

497 DEAN STREET RESIDENCES, LLC,

Respondent,

-----X
The following papers numbered 1 to 8 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	<u>1-4</u>
Opposing Affidavits (Affirmations)_____	_____
Reply Affidavits (Affirmations)_____	<u>5, 6</u>
Letters _____ Affidavit (Affirmation)_____	<u>7, 8</u>

Petitioner, AY PHASE II DEVELOPMENT COMPANY LLC (hereinafter referred to as "Developer"), brings the instant application for an Order pursuant to New York Real Property Actions and Proceedings Law ("RPAPL") §881 granting it a license to access 497 Dean Street in Brooklyn, New York (hereinafter referred to as "497 Dean"). Respondent, 497 DEAN STREET RESIDENCES, LLC, the owner of 497 Dean, cross-moves for dismissal of the petition, or, in the alternative, the grant of license fees for use of its property.

Background

Developer owns a leasehold interest in property abutting 497 Dean, in which it plans to construct a new building consisting of a New York City public school on the lower floors and market-rate residential apartments on the upper floors (project is referred to as the "B15 Project"). The B15 Project entails demolition of the existing structure and excavation to a depth lower than the foundations of 497 Dean for construction of a building that will rise higher than the roof of 497 Dean.

For the demolition, Developer states that an 8-foot high construction fence must be installed on 497 Dean to close off access to it from the structure being demolished. Developer further states that demolition will take approximately two weeks, at which time the construction fence will be removed.

To excavate to a depth lower than the foundations of 497 Dean, Developer states that the relevant Building Code sections require it to (1) inspect and document the currently existing conditions of 497 Dean; (2) prepare and implement a monitoring plan including, if necessary, the installation of vibration monitors, crack gauges, optical survey points, noise meters, etc., for 497 Dean; and (3) protect and provide vertical and lateral support for the footings and foundations of 497 Dean. Developer submits a copy of its "Code-compliant design for support of the excavation" produced by its engineer Mueser Rutledge Consulting Engineer which shows "a vertical 'secant pile wall' abutting and supporting [497 Dean], laterally supported by diagonal threaded bars ('tie backs')" which are temporary supports that, once the project is completed, can be abandoned in place. Developer estimates that excavation and foundation construction will take approximately 12 months to complete.

In addition, because the B15 Project will be constructed higher than 497 Dean, Developer states that it must install roof and other protections over 497 Dean. Developer also states that certain portions of 497 Dean's foundation may require waterproofing because it may be exposed during excavation. Developer estimates that construction of the new building, after demolition and excavation, will take approximately 36 months to complete. Thus, Developer seeks an Order granting it entry to 497 Dean for a total period of 48 months.

According to Developer, it has offered to work jointly with Respondent to develop plans for the protection of 497 Dean during the process of constructing the B15 Project but that Respondent has refused such access. Developer states that, upon obtaining an §881 license to enter 497 Dean, it shall provide commercial general liability insurance with an aggregate limit of \$20,000,000.00 listing Respondent as an additional insured and that it will agree to indemnify Respondent against any claim for personal injury, death or property damage arising from Developer's access to and entry upon 497 Dean.

In its cross-motion to dismiss the petition, Respondent submits that it has been and remains willing to enter into a voluntary license agreement with Developer but that Developer has not adequately prepared for the dangerous excavation and foundation work that it wants to perform. In support, Respondent proffers the opinion of its engineer, Ira Beer, P.E., who identified alleged serious omissions in Developer's Support of Excavation ("SOE") drawings, gaps in their understanding of 497 Dean's foundation, and misleading statements in their petition wherein they claim to have Department of Buildings's approval to begin excavation but with drawings submitted as incomplete and labeled "preliminary." Respondent states that both

Developer's first SOE drawings dated October 9, 2015, which called for underpinning 497 Dean's foundation, and the second SOE drawings dated January 4, 2016, assume knowledge of 497 Dean's foundation and therefore lack critical information. Respondent contends that Developer has yet to utilize a "test pit" to learn essential information about 497 Dean's foundation.

It is Respondent's position that Developer has refused to reply to its engineer's request for information and provide him with accurate plans. For example, Respondent states that the location and shape of the proposed construction fence as reflected in Developer's drawing are erroneous but that, despite his request, Developer never provided Mr. Beer with corrected drawings.

Respondent also claims that Developer has been withholding critical details regarding the length and invasiveness of the B15 Project during their negotiations. Specifically, that Respondent did not know until the instant petition was filed that the entire process will take at least four years, that Developer will need access to its site *through* 497 Dean, and that scaffolding will be covering the roof of 497 Dean during much of the process. Respondent argues that because Developer has provided inaccurate information, withheld important details, and relied upon incomplete drawings, the petition should be dismissed.

In the alternative, in the event the Court grants a temporary license to Developer, Respondent contends that it is entitled to a monthly license fee and payment for the engineering and legal fees it has incurred throughout the process of negotiating the license agreement. Respondent contends that it is facing an intrusive and lengthy imposition that will limit its ability to use its property and which will benefit Developer.

Respondent also moves to cancel the notice of pendency on 497 Dean on the basis that CPLR §6501 does not allow Developer to file a notice of pendency under the circumstances herein and such a filing is a misuse of the statute. Specifically, Respondent argues that even if Developer were granted a RPAPL §881 license, the resulting interest in 497 Dean would only be temporary, limited, and easily renewable in the event 497 Dean was sold, and consequently, no interest of Developer's would be destroyed by the sale of 497 Dean.

In response and opposition to Respondent's cross-motion to dismiss the petition, Developer argues that Respondent has been unreasonable in opposing the petition claiming a lack of information while simultaneously refusing Developer's request for access to 497 Dean to conduct a pre-construction survey that will allow Developer to gain the necessary information to formulate its protection plan for 497 Dean. Developer also contends that the Court should not award any fees for a temporary license because Respondent has engaged in dilatory tactics to avoid entering into a voluntary agreement. With regards to its notice of pendency, Developer contends that it should not be canceled because CPLR §6501 applies to any action in which the

relief sought “would affect the title to, or the possession, use or enjoyment of, real property,” and by Respondent’s own admission, the relief sought herein would affect Respondent’s use and enjoyment of its property. Further, that the notice of pendency puts the world on notice of Developer’s claim for a license to enter the property pursuant to RPAPL §881.

On June 1, 2016, by short form order, Respondent was directed to allow Developer to conduct an on-site pre-construction survey of 497 Dean and, from the Court’s understanding, by the time these motions were marked submitted on October 19, 2016, such a survey had taken place.

Discussion

RPAPL §881 allows property owners who seek “to make improvements or repairs to real property” to bring a proceeding in order to obtain a license to enter upon the premises of adjoining property owners where permission to so enter has been sought by the property owners and refused by the adjoining property owners, and the property owners’ real property is “so situated that such improvements or repairs cannot be made by the [property] owners . . . without entering the premises of [the] adjoining [property] owners.” The construction of a new building is an improvement of real property within the meaning of §881 (*Matter of Rosma Dev., LLC v South*, 5 Misc 3d 1014[A], 798 NYS2d 713, 2004 NY Slip Op 51369[U][Sup Ct, Kings County 2004]).

The petition and affidavits must “state the facts making such entry necessary and the dates on which entry is sought” (RPAPL §881). Further, a license “shall be granted by the court in an appropriate case upon such terms as justice requires.” In determining the issue of whether to grant petitioners a license pursuant to RPAPL §881, the court must apply a “standard of reasonableness” (*Mindel v Phoenix Owners Corp.*, 210 AD2d 167, 167 [1994]). “The court must balance the competing interests of the parties and should grant the issuance of a license when necessary, under reasonable conditions, and where the inconvenience to the adjacent property owners is outweighed by the hardship of their neighbors if the license is refused” (*Matter of Rosma Dev., LLC v South, supra*).

Based on the papers submitted, this Court is inclined to grant Developer a license pursuant to RPAPL §881. Respondent does not dispute that Developer needs access to 497 Dean to construct the B15 Project. Nor does Respondent argue that a four-year license period is unreasonable given the type of construction Developer plans to undertake. In addition, Developer is no longer pursuing “underpinning” to excavate 497 Dean’s foundation, which could have been considered a permanent encroachment warranting a denial of a RPAPL §881 license (*see Matter of Broadway Enters., Inc. v Lum*, 16 AD3d 413, 414 [2d Dept 2005]). However, to address the issues raised by Respondent in its cross-motion concerning purported inaccurate information and the lack of specificity with regards to knowledge of 497 Dean’s structural characteristics and the

extent of intrusion during the duration of the project, the Court finds that a conference must be held to address these issues and set forth license parameters. Moreover, since the preconstruction survey has now taken place, the Court must determine what remaining deficiencies, if any, exist with regards to Developer's petition according to Respondent.

Secondly, this Court is inclined to award Respondent license fees and costs as determined by the Court. Although the determination of whether to award a license fee is discretionary, where the granted license will entail substantial interference with the use and enjoyment of the adjacent property for a lengthy period of time, such as is the case herein, fees are warranted (*see DDG Warren LLC v Assouline Ritz 1, LLC*, 138 AD3d 539, 540 [1st Dept 2016]). However, neither party has submitted sufficient information for this Court to make a determination as to what would constitute reasonable license fees and/or costs in the circumstances presented herein. Accordingly, this issue shall also be addressed at the conference.

Finally, that part of Respondent's motion seeking to cancel the notice of pendency on the property is denied. CPLR §6501 provides that "[a] notice of pendency may be filed in any action ... in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property." Here, there is no doubt or dispute that a license granted herein to construct the B15 Project will affect the use and enjoyment of 497 Dean.

Accordingly, the motions are resolved as set forth herein and is subject to further modification by this Court pursuant to a conference that shall be held on **Tuesday, January 10, 2017, at 10:00 a.m., Room 541.**

This constitutes the Decision and Order of the Court.

E N T E R,



Sylvia G. Ash, J.S.C.