

**105 Eighth Ave., LLC v J.W. Weber House Corp.**

2016 NY Slip Op 32498(U)

December 22, 2016

Supreme Court, New York County

Docket Number: 159500/2016

Judge: Manuel J. Mendez

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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: MANUEL J. MENDEZ PART 13
Justice

105 EIGHTH AVENUE, LLC,
Petitioners,
-against-
J. W. WEBER HOUSE CORP.,
Respondent.

INDEX NO. 159500/2016
MOTION DATE 12-21-2016
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 11 were read on this petition for a license pursuant to RPAPL § 881:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: [ ] Yes [X] No

Upon a reading of the foregoing cited papers, it is Ordered and Adjudged that the petition brought by Order to Show Cause seeking a license to enter onto Respondent's property pursuant to Real Property Actions and Proceedings Law (RPAPL) § 881, is granted to the extent stated herein.

105 Eight Avenue LLC is the owner of a building located at 105 Eight Avenue, Brooklyn, New York, Block 1068 and Lot 6. Respondent owns the adjacent building at 101 Eighth Avenue, Brooklyn, New York, Block 1068 and Lot 8. Both buildings are located in an area designated in 1973, by The New York City Landmarks Preservation Commission (hereinafter referred to as "LPC") as the "Park Slope Historic District." On May 15, 2015, Petitioner sought a Certificate of Appropriateness (hereinafter referred to as "C of A") from LPC for the construction of a one-story penthouse on the roof and to in-fill the rear courtyard areas.

On March 8, 2016, LPC issued a Certificate of Appropriateness Permit to Petitioner (Pet. Exh. 3). On May 3, 2016, the New York City Buildings Department (DOB) issued a work permit to the Petitioner for the addition of one story to create a fourth floor, fill-in open courtyards at existing floors, interior egress stairs, new metal balconies at the rear and interior renovation to existing bulkhead (Pet. Exh. 4).

On May 23, 2016 Respondent filed a petition under index # 100805/2016, seeking to annul the determination of the LPC that granted a C of A to Petitioner, and directing the the DOB to permanently revoke the portions of the building permit issued to Petitioner pursuant to the C of A and for alternative relief. This Court's November 4, 2016 Decision and Order denied Respondent's petition and dismissed the proceeding.

Petitioner commenced this proceeding on November 10, 2016, seeking pursuant to RPAPL § 881 to obtain a license to enter onto Respondent's property. Petitioner claims that a license is necessary to install, perform, and maintain protection on the Respondent's property for the period in which construction of a concrete and brick wall is to take place on Petitioner's property.

The petition seeks an Order pursuant to RPAPL §881 granting a temporary license to access the adjacent premises in order to install protective netting in

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

accordance with proposed plans (Pet. Exh. 6), or a sidewalk shed in accordance with proposed plans (Pet. Exh. 11), which accesses are required by the applicable New York City building codes. The protective netting or a sidewalk shed is expected to remain on Respondent's premises from December 1, 2016 through March 2, 2017 or for a minimum of one hundred and twenty (120) days from the date of this Court's Order. Petitioner seeks to have the contractors performing work obtain policies of general liability insurance on an occurrence basis against claims for personal injury and property damage with a combined single limit coverage of one million dollars (\$1,000,000.00) per occurrence and two million dollars (\$2,000,000.00) in the aggregate, with excess umbrella liability coverage of at least one million dollars (\$1,000,000.00). The petition also seeks costs, disbursements and reasonable attorneys' fees for bringing this proceeding.

Petitioner argues that the relief being sought is necessary to be compliant with the New York City Building Code. Petitioner claims that attempts to secure Respondent's consent have been made and a proposed licensing agreement was provided to Respondent's attorneys by a July 13, 2016 e-mail (Pet. Exh. 6), but the parties could not agree on the terms.

RPAPL §881 allows a landowner seeking, "to make improvements or repairs to its property" to obtain a license allowing entry to an adjoining property when the work cannot be performed without such entry. The party seeking entry must establish the necessity of the entry (*Lincoln Spencer Apartments, Inc. v. Zeckendorf-68th Street Associates*, 88 A.D. 3d 606, 931 N.Y.S. 2d 69 [1<sup>st</sup> Dept., 2011]). A party must establish that the entry is not a mere convenience, but a necessity (*Amalgamated Dwellings, Inc. v. Hillman Housing Corp.*, 299 A.D. 3d 199, 749 N.Y.S. 2d 251 [1<sup>st</sup> Dept., 2002]). A party seeking entry must show facts concerning the necessity, and provide an explanation, "why the work could not otherwise be performed..." failure to do so requires the denial of the application (*Arep Fifty-Seventh, LLC v. PIMGP Associates, L.P.*, 101 A.D. 3d 440, 955 N.Y.S. 2d 40 [1<sup>st</sup> Dept., 2012]).

Petitioner argues that the financial hardship and inconvenience as a result of the denial of access to the adjoining property is greater than that of Respondent. Petitioner has stated a basis for the granting of a license pursuant to RPAPL § 881 by explaining the hardship faced if the license is not granted, citing to the New York Building Code requirements in order to protect the adjacent premises and occupants. Petitioner also annexes the affidavit of Leonard Colchamiro, R.A., AIA a registered architect detailing why the license is required, the specific work to be performed under the license, and why the work may not be performed without the license.

"Courts 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 Board of Mgrs. of Artisan Lofts Condominium v. Moskowitz*, 114 A.D.3d 491, 492, 979 N.Y.S.2d 811 [1<sup>st</sup> Dept., 2014]).

Petitioner has demonstrated that it will suffer harm by not being able to timely complete the project without the license, and that justice requires the granting of a license to access Respondent's property.

Respondent states in opposition that it does not contest the necessity of some protections sought to be provided by Petitioner, but that complete plans for the sidewalk shed were not provided and other defects in the Petitioner's plan are outlined in the affidavit of Respondent's engineer. Respondent argues that Petitioner did not negotiate the license agreement in good faith and already attached underpinnings on Respondent's property without consent. Respondent seeks payment of a fee as compensation for the inconvenience imposed by the Petitioner during the construction period. Respondent seeks copies of the insurance and

indemnification from all of Petitioner's contractors, and payments of all costs and expenses incurred for legal, engineering and professional services provided in connection with Petitioner's work.

Marco Giansante, Respondent's Senior Structural Engineer, states that Petitioner has not provided drawings showing scaffolding for the construction of the proposed masonry wall and that modifications to the plan for the sidewalk shed are needed in the form of the shed being the entire length of Respondent's building. Mr. Giansante also states that deck and window protection is needed for Respondent's building within 20 feet of the construction, and roof protection where the new construction is 48 inches or more higher than the Respondent's roof. He has not stated the basis for requiring the modifications given the limited area of construction or for providing additional drawings showing the scaffolding.

Respondent seeks in addition to the insurance provisions an escrow account of \$ 50,000.00 as security on payments but provides no explanation for the need for additional security and fails to establish entitlement to that relief. Respondent has stated that it is seeking a fee for the use of the property as retaliation because Petitioner brought this proceeding, that is not a reasonable basis to obtain such fees.

The parties are disputing the amount of legal fees and engineering fees. Petitioner claims that a cap was sought and Respondent refused agree to one. Petitioner in the proposed licensing agreement offered to pay Respondent actual and reasonable attorney fees and expenses together with actual and reasonable fees for engineer or architectural expert expenses relevant to the license. Respondent is seeking an unlimited amount of attorney fees and engineering fees which is unreasonable. Respondent's actual and reasonable attorney fees together with actual and reasonable fees for engineer or architectural expert expenses resulting from the Petitioner's license will be determined at a hearing at the conclusion of the license period. Petitioner has not stated a basis to obtain attorney fees, costs and expenses and that relief is denied. Any claims Respondent currently has or may have during the construction project may be brought by a special proceeding or action against Petitioner.

Accordingly, it is ORDERED and ADJUDGED that the petition brought by Order to Show Cause seeking a license to enter onto Respondent's property pursuant to Real Property Actions and Proceedings Law (RPAPL) § 881, is granted to the extent stated herein, and it is further

ORDERED, that Petitioner is granted a limited license during the construction project to gain access to the Respondent's adjacent premises located at 101 Eighth Avenue, Brooklyn, New York, Block 1068 and Lot 8, to place a sidewalk shed for a minimum of one hundred and twenty (120) from the date of this Order, and it is further

ORDERED, that Petitioner shall not unreasonably interfere with the Respondent's necessary access to their property and quality of life, and shall take the necessary steps, measures, and precautions to prevent and avoid any damage to the Respondents' property, and it is further,

ORDERED, that Petitioner will have the contractors performing work obtain policies of general liability insurance on an occurrence basis against claims for personal injury and property damage with a combined single limit coverage of one million dollars (\$1,000,000.00) per occurrence and two million dollars (\$2,000,000.00) in the aggregate, with excess umbrella liability coverage of at least one million dollars (\$1,000,000.00) naming Respondent as an additional insured during the period of this license through the removal of all temporary protections encumbering Respondent's property, and it is further

**ORDERED**, that Petitioner shall be held liable to the Respondent for any damages which Respondent may suffer as a result of the granting of this license and all damaged property shall be repaired at the sole expense of Petitioners, and it is further

**ORDERED**, that Petitioner shall pay Respondent's actual and reasonable fees for Marco Giansante and RAND Engineering and Architecture, P.C. fees and expenses resulting from the Petitioner's license to be determined at a hearing at the conclusion of the license period, and it is further

**ORDERED**, that Petitioner shall pay Respondent's actual and reasonable legal fees and expenses resulting from the Petitioner's license to be determined at a hearing at the conclusion of the license period, and it is further

**ORDERED**, that Petitioner shall notify the Respondent in writing when the work is completed under the license and the temporary protections are removed, and it is further

**ORDERED**, that upon the completion of the term of the license, the Respondent's property within such licensed area shall be returned to its original condition, and all materials used in construction and any debris shall be removed from the licensed area, and it is further

**ORDERED**, that Petitioners are solely responsible for the installation, maintenance and removing of the temporary protections, and it is further

**ORDERED**, that any further relief sought in this petition, for the costs, disbursements and reasonable attorneys' fees for bringing this proceeding, is denied.

**ENTER:**

  
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**MANUEL J. MENDEZ,**  
**J.S.C.**

**MANUEL J. MENDEZ**  
**J.S.C.**

Dated: December 22, 2016

Check one:  **FINAL DISPOSITION**     **NON-FINAL DISPOSITION**  
Check if appropriate:     **DO NOT POST**                       **REFERENCE**