

Cibani v Blinbaum
2022 NY Slip Op 34299(U)
December 20, 2022
Supreme Court, New York County
Docket Number: Index No. 153937/2022
Judge: Paul A. Goetz
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PAUL A. GOETZ **PART** **47**

Justice

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FIONA MADELINE CIBANI

Petitioner,

- v -

JACQUES BLINBAUM,

Respondent.

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INDEX NO. 153937/2022

MOTION DATE 10/05/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 33, 34, 35, 36, 37, 38, 39

were read on this motion to/for MISC. SPECIAL PROCEEDINGS.

Petitioner Fiona Madeline Cibani seeks a judgment under Real Property and Proceedings Law 881 for a limited license to enter respondent Jacques Blinbaum’s adjoining property at 114 East 78th Street, New York, New York (respondent’s property) in order to install and maintain temporary roof protection of basic plywood and foam on the roof of respondent’s property to comply with a Violation and Partial Stop Work Order (SWO) dated October 7, 2021 from the New York City Department of Buildings (DOB). Petitioner contends that this license is necessary in order to complete the construction of a fifth-floor addition, bulkhead, and chimney (the project) at the premises located at 116 East 78th Street, New York, New York (petitioner’s property). Respondent opposes the petition for an RPAPL 881 license as unnecessary and unreasonable, and seeks monetary relief if the license is granted.

Petitioner hired contractor Shawmut Woodworking & Supply d/b/a Shawmut Design and Construction (Shawmut) on October 24, 2017 as the contractor for the full-gut renovation of petitioner’s townhouse property (Verified Petition, ¶ 14, NYSCEF Doc No 1). Since petitioner’s property is located in the Upper East Side Historic District the project requires approval by DOB

and the Landmarks Preservation Commission (NYSCEF Doc No 1, ¶ 2). The project includes two newly installed elevators (NYSCEF Doc No 1, ¶ 16). Each elevator's bulkhead must be enclosed, which cannot be completed under the SWO until Shawmut installs plywood planking and foam protection within 20 feet of both sides of the elevator's walls pursuant to New York City Building Code (BC) 3309.10 (NYSCEF Doc No 1, ¶¶ 17-19). Stone caps must also be placed at the top of the mansard (sloped) roof so that it is watertight (NYSCEF Doc No 1, ¶ 20). The stone cap installation must either be completed by accessing respondent's property or through the use of a cherry picker, an elevated work platform with a long, extendible arm with a cradle attached on the end (NYSCEF Doc No 1, ¶ 21). The bulkhead enclosure is expected to take eight weeks and the stone cap installation is expected to take two weeks to complete (Quakenbush Aff, ¶¶ 9, 13, NYSCEF Doc No 3).

Even though petitioner originally submitted a site safety plan to scaffold respondent's balcony and roof, which was approved by DOB (NYSCEF Doc No 1, ¶ 2), upon respondent's opposition, petitioner has decided to use a cherry picker as well as suspended scaffolding on top of petitioner's property to make the project the least encumbering on respondent's property (Quakenbush Reply Aff, ¶ 5, NYSCEF Doc No 30). The new site safety plan awaits DOB approval (NYSCEF Doc 30, ¶ 6). Nevertheless, the planned protection cannot be installed without access to respondent's roof and backyard, which respondent has denied (NYSCEF Doc No 1, ¶ 3).

RPAPL 881 provides that “[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.” In granting a license pursuant to RPAPL 881, “courts generally apply a standard of reasonableness” and are required to balance the interests of the parties (*Matter of Bd. of Mgrs. of Artisan Lofts Condominium v Moskowitz*, 114 A.D.3d 491, 492 [1st Dep’t 2014]). A court 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” (*id.*, quoting *Chase Manhattan Bank [Natl. Assn.] v Broadway, Whitney Co.*, 57 Misc 2d 1091, 1095 [Sup Ct, Queens County 1968], *aff’d* 24 NY2d 927 [1969]).

Here, it is undisputed that petitioner’s project constitutes an improvement to petitioner’s property under RPAPL 881 and petitioner has demonstrated through the affidavits from Jay Quakenbush sworn to on May 3, 2022 and June 22, 2022 that petitioner requires access to respondent’s property in order to complete this improvement of the project plans filed with DOB (NYSCEF Doc No 3, NYSCEF Doc No 30). The elevator bulkhead work and mansard cap installation cannot be constructed without the required roof protection, and in turn, the roof protection cannot be installed without access to respondent’s property (Petitioner’s Memorandum of Law, p 5, NYSCEF Doc No 8; *see* NYSCEF Doc No 30, ¶¶ 8, 10 [“The current plans for plywood and foam do not require access to the interior of [respondent’s] property. The contractor installing the protection will require access to the roof and the backyard of [respondent’s] property to the extent plywood and foam protection must be installed.”]). Respondent has ignored all communications and requests for access to respondent’s property, effectively denying access (NYSCEF Doc No 1, ¶ 3).

Respondent’s first argument that petitioner’s access is not “necessary” fails because petitioner explains how access to respondent’s property must be granted in order to comply with

the SWO (*see* NYSCEF Doc No 30, ¶¶ 3, 8, 10; *see also* OATH/ECB Violation, NYSCEF Doc No 5).

Respondent's second argument deeming petitioner's project unreasonable also fails because of petitioner's decision to use a cherry picker and suspended scaffolding on top of petitioner's property rather than scaffold respondent's property. A structural analysis is unnecessary since petitioner will only be using plywood and foam protection, materials that according to John McErlean, P.E., C.E., S.E., an engineer and expert witness for petitioner, weigh approximately five pounds per square foot, much less than the BC requirement of the snow load design of flat roofs to be a minimum of 20 pounds per square foot (McErlean Aff, ¶¶ 6-8, NYSCEF Doc No 36; *see* NYSCEF Doc No 30, ¶ 6.).

Respondent's third argument based on the affidavit from Anthony Grieco, R.A., an architect and expert witness for respondent, is that petitioner's new site safety plan does not meet certain requirements of BC 3309.10 and 3309.15 (Grieco Aff, NYSCEF Doc No 38); however, these concerns are more appropriately raised with the DOB once the new site safety plan is submitted for its approval.

Accordingly, it is

ORDERED that this motion and petition are granted, to the extent that petitioner is granted a license to enter upon respondent's property located at 114 East 78th Street, New York, New York, on condition that she obtain DOB approval for her new site safety plan at NYSCEF Doc No 37 in order to install temporary roof protection on respondent's property as set forth in the site safety plan; and it is further

ORDERED that the terms of the license granted herein are those set forth in the license agreement at NYSCEF Doc No 35 and those terms are incorporated into this order; and it is further

ORDERED that the license shall commence on the first business day following DOB approval of petitioner's site safety plan and shall expire 60 days thereafter; and it is further

ORDERED that petitioner shall pay respondent a license fee in the amount of \$2,000 a month on the terms set forth in section 1 of petitioner's proposed license agreement; and it is further

ORDERED that petitioner and its contractor shall procure and maintain a policy of liability insurance in an amount not less than \$1 million per occurrence and in the aggregate, on the terms set forth in section 2 of petitioner's proposed license agreement, including naming respondent as additional insured during the period of this license; and it is further

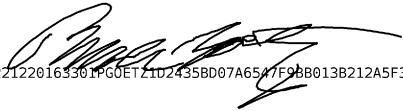
ORDERED that petitioner shall pay respondent's reasonable professional fees and reasonable attorneys' fees in connection with this petition within 60 days after submission of invoices to petitioner; and it is further

ORDERED that petitioner shall provide indemnification to respondent in accordance with section 3 of petitioner's proposed license agreement; and it is further

ORDERED that petitioner shall notify respondent in writing when it has completed the work under the license; and it is further

ORDERED that petitioner shall remove any violations imposed on respondent's property from work conducted under the license; and it is further

ORDERED that upon the completion of the term of the license, petitioner and its general contractor shall return respondent's property to its original condition and that petitioner and its general contractor shall remove all construction materials and any debris from the licensed area.


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12/20/2022
DATE

PAUL A. GOETZ, 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