

Columbia Grammar & Preparatory Sch. v 10 W. 93rd St. Hous. Dev. Fund Corp.
2015 NY Slip Op 31519(U)
August 13, 2015
Supreme Court, New York County
Docket Number: 156058/2015
Judge: Manuel J. Mendez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
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
Justice

PART 13

COLUMBIA GRAMMAR AND
PREPARATORY SCHOOL,
Petitioner,

INDEX NO. 156058
MOTION DATE 7/22/15
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

For a Judgment Pursuant to RPAPL 881 for
Access to Adjoining Property,

-against-

10 WEST 93 STREET HOUSING
DEVELOPMENT FUND CORPORATION

Respondent.

The following papers, numbered 1 to 11 were read on this Order to Show Cause for a License pursuant to Real Property Actions and Proceedings Law § 881 .

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...	<u>1 - 6</u>
Answering Affidavits – Exhibits _____	<u>7 - 9</u>
Replying Affidavits _____	<u>10 - 11</u>
Cross-Motion: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	

Upon a reading of the foregoing cited papers, it is Ordered that petitioner’s motion by Order to Show Cause for an Order granting it a license to enter onto respondent’s property pursuant to Real Property Actions and Proceedings Law (here “RPAPL”) § 881 is granted to the extent stated herein.

Petitioner is an educational institution that owns property located 36 West 93rd Street, New York, N.Y., Block 1206, Lot 20 (herein “Premises”). Petitioner sought to expand its facilities by adding a sixth and seventh floor to a building located on the Premises in order to accommodate more students. As part of the proposed project, petitioner obtained a Certificate of Appropriateness from the Landmarks Preservation Commission in July 17, 2012 and zoning variances by the New York City Board of Standards and Appeals on October 17, 2014. Petitioner then obtained various building permits from the New York City Department of Buildings in January 2015 and commenced construction on the project in February 2015.

The building adjoining the Premises is located at 10 West 93rd Street, New York, New York (herein “Adjoining Premises”), which is a limited income Co-op building owned by respondent 10 West 93 Street Housing Development Fund Corporation. By letter dated May 7, 2015 and delivered to respondent’s superintendent on May 8, 2015, petitioner requested permission “to install scaffolding and sidewalk bridges to protect [respondent’s] property” (See Docket No. 15). The letter further stated that “[i]f by May 20, 2015, we have not received your consent, we will be required to commence a proceeding under RPAPL § 881 to compel such consent” (Id.).

By Letter dated May 20, 2015, respondent acknowledged receipt of petitioner's request, but advised petitioner that its Board of Directors met on May 14, 2015, and that the Board needed more time to "acquire additional information and review [petitioner's] plans" (see Docket No. 16). By email dated May 22, 2015, petitioner's attorney advised Lisa Dicce, President of respondent's Board, that petitioner's "request was hand delivered to the acting superintendent on May 8, 2015," and that respondent's response time was "unreasonable" (see Docket No. 17). Respondent advised petitioner that it was "seeking professional guidance and expected that [petitioner] will reimburse us for this cost and any others associated with the unexpected expense to our building related to your school's proposed construction" (see Docket No. 22).

Petitioner the commenced this special proceeding on June 16, 2015 pursuant to RPAPL § 881 for an order granting petitioner access to respondent's building in order to erect, maintain and deconstruct scaffolding, sidewalk bridge and rooftop protections during the construction period. Petitioner now moves by Order to Show Cause for an Order granting it the relief sought in the Petition.

Respondent answered the Petition and now opposes the Order to Show Cause arguing that it has not denied petitioner access to the Adjoining Premises and that petitioner commenced this special proceeding prematurely. Respondent provided petitioner with a proposed License for Protection and Access (herein "LPA," see Docket No. 36), which petitioner has refused to enter into.

CPLR § 6301 grants this court the power to issue an order directing the defendant to perform an act for the benefit of plaintiff, or to refrain from performing an act which would be injurious to the plaintiff. A preliminary injunction may be granted under CPLR article 63 when the party seeking such relief demonstrates (1) a likelihood of success on the merits; (2) the prospect of irreparable injury and (3) a balance of equities tipping in the moving party's favor (*Doe v. Axelrod*, 73 N.Y. 2d 748, 532 N.E.2d 1272, 536 N.Y.S.2d 44 [1988]).

"RPAPL § 881 is the means by which a landowner seeking to make improvements or repairs to its property may seek a license to enter an adjoining landowner's property when those improvements or repairs cannot be made without such entry" (*Lincoln Spencer Apartments, Inc. v. Zeckendorf-68th Street Associates*, 88 A.D.3d 606, 931 N.Y.S.2d 69, 70 [1st Dept., 2011]).

Petitioner states a basis for the granting of a license pursuant to RPAPL § 881. Petitioner annexes an affidavit from Marian Czajka, the general contractor for the construction being performed on the Premises. Ms. Czajka states that §§ 3309.1 and 3309.10 of the New York Construction Code require petitioner to erect scaffolding, sidewalk bridges and rooftop protections in order to protect the Adjoining Premises and its occupants (see Docket No. 19, PP 4). §§ 3309.1 and 3309.10. Ms. Czajka further states that the building where the construction is being done falls on the border of the Premises and makes it impossible to erect and maintain the scaffolding and protections without entering into the Adjoining Premises (*Id.*, PP. 9-11).

Petitioner shows that it will suffer imminent and irreparable harm by not being able to timely complete the project without the license, and that the balance of equities favors injunctive relief. Respondent does not submit evidence refuting petitioner's showing that the construction may not be completed without petitioner entering the Adjoining Premises.

"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" (114 A.D.3d 491, 492, 979 N.Y.S.2d 811 [1st Dept., 2014]).

Accordingly, it is ORDERED that petitioner's motion by Order to Show Cause seeking a license to enter onto respondent's property is granted, and it is further,

ORDERED, that Petitioner is granted a license to enter Respondent's Premises to erect, maintain and deconstruct scaffolding, a sidewalk bridge and rooftop protections during construction, and it is further,

ORDERED, that Petitioner is directed to pay the Respondents a monthly license fee in the sum of \$2,500.00 commencing from the date of entrance onto Respondent's property through September 2016, and a monthly license fee in the sum of \$3,500.00 from October 1, 2016 until the date the temporary protections are completely removed from Respondent's property, and it is further,

ORDERED, that Petitioner shall not unreasonably interfere with the Respondents' 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 shall procure and maintain a policy of insurance covering liability and property damage, or equivalent bond with a corporate surety, in an amount of not less than \$10 Million dollars naming the Respondents as additional insureds 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 Respondents for any damages which they may suffer as a result of the granting of this license and all damaged property shall be repaired at the sole expense of Petitioner, and it is further,

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

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

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

ORDERED, that Petitioner or its agents, contractors, sub-contractors, or any other parties associated with the construction project shall not stage and/or store any materials or equipment on the roof of Respondent's property, the temporary protections, or any areas in or on Respondent's property, and it is further,

ORDERED, that Petitioner or its agents, contractors, sub-contractors, or any other parties associated with the construction project shall access the roof of Respondent's property through Petitioner's property, and not Respondent's property, and it is further,

ORDERED, that Petitioner shall pay Respondent all fees and costs incurred by Respondent associated with the temporary protections, including \$5,000.00 in legal fees incurred by Respondent to date, and any and all fees billed to Respondent by attorneys, engineers, and architects reviewing and inspecting plans for the temporary protections.

ENTER: **MANUEL J. MENDEZ**
J.S.C.

Dated: August 13, 2015



MANUEL J. MENDEZ
J.S.C.

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