

840 Realty Group, LLC v Wing Yee Lee

2017 NY Slip Op 32949(U)

August 18, 2017

Supreme Court, Kings County

Docket Number: 501105/17

Judge: Pamela L. Fisher

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At an IAS Term, Part 94 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 18th day of August, 2017.

PRESENT:

HON. PAMELA L. FISHER,

Justice.

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840 REALTY GROUP LLC,

Petitioner,

- against -

Index No. 501105/17

WING YEE LEE; SHIH TUNG WANG; F&W CAPITAL INC.; ZI JIE LI; 815 REALTY CORP.; QING JUN WU and HONG YOUNG HOM & YUT FUN HOM (h&w),

Respondents.

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The following papers numbered 1 to 5 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	<u>1-3</u>
Opposing Affidavit (Affirmation)_____	<u>4</u>
Reply Affidavit (Affirmation)_____	<u>5</u>

Upon the foregoing papers, petitioner, 840 Realty Group LLC (840 Realty), moves, by order to show cause, for an order, pursuant to RPAPL 881: (1) granting petitioner "specific licenses to enter upon the portions of the Respondents' properties necessary to install, perform and maintain protection, install sealants and to perform certain excavation necessary to install waterproofing as described in each license on each property, for the period in which construction is to take place on 814 40th Street, Brooklyn, NY, such

protection being required by the New York City Building Code”,¹ and (2) granting petitioner an award for attorneys’ fees and costs.

Background

840 Realty owns the building located at 814 40th Street in Brooklyn, a multi-unit residential building that is currently under renovation. According to the revised petition, 840 Realty commenced this proceeding because it seeks “limited temporary access” to respondents’ neighboring properties, pursuant to RPAPL 881, “to install waterproofing remediation on the foundation of its building, which extends to its lot lines requiring access from neighboring properties” (revised petition at ¶ 1).

840 Realty submitted the affidavit of Jacob Landau, its Managing Member, in which he explains that 840 Realty’s building has water penetration in the first floor and basement, which 840 Realty seeks to remedy by: (1) “installing certain joint sealant to seal gaps between Petitioner’s [and] Respondents’ exterior walls to prevent water and snow from penetrating between the buildings,” and (2) “temporarily digging open ground areas on some of the Respondents’ lots adjacent to the foundation walls of Petitioner’s building to expose the foundation wall and install waterproofing protections subgrade.”² Landau contends that “the joint sealants need to be installed from certain Respondents’ roofs and some excavation needs to be performed on certain Respondents’ properties, rendering it necessary to access and perform work on each of the Respondents’ buildings and/or properties . . .”³

¹ See petitioner’s January 24, 2017 Order to Show Cause at 2.

² See ¶¶ 9-10 of the August 10, 2016 affidavit of Jacob Landau submitted in support of the petition (Landau Affidavit).

³ Landau Affidavit at ¶ 12.

According to Landau and the revised petition, 840 Realty attempted to obtain voluntary licenses from respondents granting it access to their adjacent properties to no avail; 840 Realty received no responses to its written notices from the adjoining property owners.

Respondents own the following adjacent properties: (1) respondent Wing Yee Lee (Lee) owns the property at 810 40th Street in Brooklyn; (2) respondent Shih Tung Wang (Wang) owns the property at 4005 8th Avenue in Brooklyn; (3) respondent F&W Capital Inc. (F&W) owns the property at 4013 8th Avenue in Brooklyn; (4) respondent Zi Jei Li (Li) owns the property at 811 41st Street in Brooklyn; (5) 815 Realty Corp. (815 Realty) owns the property at 815 41st Street in Brooklyn; (6) respondent Qing Jun We (Wu) owns the property at 817 41st Street in Brooklyn; and (7) respondents Hong Young Hom & Yut Fun Hom (Hom) own the property at 818 40th Street in Brooklyn.

After the commencement of this proceeding, 840 Realty resolved its dispute and discontinued the proceeding as against two of its neighbors, respondents Wang and F&W. 840 Realty's revised petition only seeks a license for access to respondent Lee's property, on which 840 Realty seeks to dig a 12 foot deep, 4 foot wide and 25 foot long trench.

Lee, in opposition, contends that 840 Realty's application for a license must be denied because "Petitioner seeks an order far beyond the scope of RPAPL § 881."⁴ According to Lee, "RPAPL § 881 allows an applicant to request permission to enter the premises of an adjoining property to do a repair on the applicant's property which could not reasonably be done without entrance upon the adjoining premises. . . . It does not grant the applicant a right

⁴ See ¶ 2 of the April 3, 2017 affirmation of Robert Corke, Esq., submitted in opposition to 840 Realty's revised petition/motion (Corke Opposition Affirmation) (emphasis omitted).

to do alterations, repairs, excavations, trenching, etc. on or to the adjoining property.”⁵ Lee notes that research has disclosed no legal authority for the relief that 840 Realty seeks here. Lee also argues that the application is deficient because “Petitioner fail[ed] to show [that] the planned improvements ‘cannot be made’ without access to adjoining property.”⁶ Lee further contends that the application must be denied because “the proposed license and insurance is grossly inadequate to address potential liabilities for such a project.”⁷

840 Realty, in reply, concedes that there is no legal authority for the relief it seeks, yet argues that “our situation creates an issue of first impression before the Court” (underlining in original).

Discussion

RPAPL 881 unambiguously provides, in relevant part:

“When 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”

In determining whether or not to grant a license pursuant to RPAPL 881, “courts generally apply a standard of reasonableness” (*Bd. of Managers of Artisan Lofts Condo. v Moskowitz*, 114 AD3d 491, 492 [2014]). “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’” (*id.* [quoting *Chase Manhattan Bank v Broadway*,

⁵ Corke Opposition Affirmation at ¶ 3.

⁶ *Id.* at ¶ 4.

⁷ *Id.* at ¶ 7.

Whitney Co., 57 Misc 2d 1091, 1095 (Sup. Ct., Queens County 1968), *affd* 24 NY2d 927 (1969)]).


Here, 840 Realty has failed to demonstrate the reasonableness and the necessity for a license granting it access to Lee’s property for the purpose of excavating a trench thereon. In any event, the scope of RPAPL 881 is limited to granting an applicant a license *to access* a neighboring property to perform work on the applicant’s own property. 840 Realty’s instant application for an order permitting it to excavate a trench on respondent Lee’s adjacent property is beyond the scope of RPAPL 881. Consequently, 840 Realty’s revised petition is denied. Accordingly, it is

ORDERED that the branch of petitioner’s motion for an order compelling respondent Lee to provide petitioner with access to his adjacent property, pursuant to RPAPL 881, is denied; and it is further

ORDERED that the branch of petitioner’s motion for an order awarding it attorneys’ fees and costs is denied.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.
Hon. Pamela L. Fisher, J.S.C.

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