

323 53rd St. Owner LLC v Chien Chiang
2021 NY Slip Op 31431(U)
April 27, 2021
Supreme Court, New York County
Docket Number: 150099/2021
Judge: Laurence L. Love
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LAURENCE L. LOVE PART IAS MOTION 63M

Justice

-----X

323 E 53RD STREET OWNER LLC

Petitioner,

- v -

CHIEN CHIANG,

Respondent.

-----X

INDEX NO. 150099/2021

MOTION DATE 4/20/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 43, 62, 63, 64, 65 were read on this motion to/for MISCELLANEOUS.

Upon the foregoing documents, it is hereby ordered that the petition is GRANTED to the following extent:

Petitioner brings this special proceeding, pursuant to New York Real Property Actions and Proceedings Law ("RPAPL") § 881, seeking a license for temporary access to respondent's property, located at 321 East 53rd Street, New York, New York 10022 [Block 1346 and Lot 11] (the "Adjacent Property"), which is owned by Respondent., for the purpose of making repairs and improvements to Petitioner's premises, located at 323 East 53rd Street, New York, New and to install required roof protection on the Adjacent Property. Respondent has refused to grant access based upon the recent history of the building. Petitioner purchased 323 East 53rd Street at a foreclosure sale. Unbeknownst to Petitioner, the prior owner of the property had repeatedly disregarded a prior license agreement in their attempts to renovate the property, which lead to legitimate concerns and issues on the part of Respondent who acted in good faith in an attempt to resolve the current dispute. The parties were unable to resolve said dispute resulting in the instant action.

Pursuant to RPAPL § 881 “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 pursuant to article four of the civil practice law and rules. The petition and affidavits, if any, shall state the facts making such entry necessary and the date or dates on which entry is sought. Such license shall be granted by the court in an appropriate case upon such terms as justice requires. The licensee shall be liable to the adjoining owner or his lessee for actual damages occurring as a result of the entry.”

Petitioner seeks as much as one year of access to Respondent’s property for the purpose of:

- (a) Use of the existing and the installation of additional work scaffoldings on "needle beams" above the roof of the Adjacent Property;
- (b) Installing, securing, maintaining and utilizing (and removing when no longer required) roof top protection, as required by law, on the roof of the Adjacent Property;
- (c) Installing, securing, maintaining and utilizing (and removing) the existing "sidewalk shed/bridge" in front of a portion of the Adjacent Property;
- (d) Voluntarily installing, securing, maintaining and utilizing the existing temporary exterior fire escape and replacing it with a permanent fire escape at the Adjacent Property;
- (e) Installing, securing, maintaining and utilizing coping, waterproofing, sealant and flashing between the Property and the Adjacent Property;
- (f) Obtaining DOB approval of the flue extensions; and

(g) Installing, securing, maintaining and utilizing waterproofing and insulation on the extended party wall by the installation of an exterior insulation and finishing system ("EIFS") to the exterior extended party wall between the Property and the Adjacent Property.

Petitioner also seeks reimbursement of in excess of \$115,000.00 of fees expended in attempting to negotiate a license agreement with Respondent, approximately \$40,000 of which was paid to Respondent for legal and architectural fees and over \$75,000 of which has been paid to Petitioner's attorneys.

Respondent objects to the granting of a license and specifically objects to the installation of the EIFS as it permanently encroaches onto the entire length of the adjacent property by two and a half to three inches

On April 15 and April 20, 2021, this Court conducted a hearing via Microsoft Teams and heard testimony from Petitioner's expert John Saracco who testified that based upon the status of the construction left by prior owner of the building that the EIFS was best option to provide waterproofing and prevent mold from entering into both properties and expert testimony from respondents expert Shiming Tam who testified that other insulation and waterproofing options could be used on the interior of 323 so as to avoid encroaching on 321 property line.

After consideration of all of the arguments and evidence submitted, the Court finds that the inconvenience to Petitioner if the license is denied is far greater than the inconvenience to Respondent upon the granting of a license. *See, New York Pub. Library v Condo Bd. of the Fifth Ave. Tower*, 170 AD3d 544, 545 (1st Dep't 2019) (finding trial court providently exercised discretion in granting license where inconvenience to petitioner if license was denied was greater than inconvenience to respondent if license was granted). The Court further finds that the encroachment upon Respondent's property caused by installation of an EIFS is *de minimis* unless

Respondent or a subsequent owner of the adjoining property seeks to increase the height of the adjoining property at a subsequent time. The Court recognizes that it was the actions of the prior owner of 323 that created these difficulties, rather than Petitioner or Respondent who have been left to resolve this difficult situation.

Accordingly, it is hereby

ORDERED that petitioner is granted a license to enter respondent's property for a period of up to a year from the date of this order to complete the work specified in the Petition; and it is further

ORDERED that Petitioner shall pay to Respondent a license fee of \$7,500.00 per month until the work specified in the Petition is completed as specified in the prior license agreement; and it is further

ORDERED that petitioner's demand for reimbursement of legal and architectural fees paid to Respondent is DENIED and all such funds deposited in escrow shall be used as intended toward the legal fees of Respondent; and it is further

ORDERED that the EIFS shall not encroach beyond a maximum of 3 inches for the 44 feet of wall space and must be removed at Petitioner's or any subsequent property owner's sole expense, upon thirty (30) days written notice by Respondent or any subsequent property owner if removal is necessary for any upward expansion of the 321 East 53rd Street property; and it is further

ORDERED that if an EIFS is used, Petitioner shall pay to Respondent \$200.00 per month as compensation for the encroachment.

4/27/2021
DATE


LAURENCE L. LOVE, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>
<input checked="" type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>

CASE DISPOSED

GRANTED

DENIED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

<input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: