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| Matter of 268 E. 7th St. Owner, LLC v Gogan |
| 2024 NY Slip Op 32237(U) |
| July 1, 2024 |
| Supreme Court, New York County |
| Docket Number: Index No. 152484/2024 |
| Judge: Alexander Tisch |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ALEXANDER TISCH

PART 18

Justice

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INDEX NO. 152484/2024

In the Matter of the Application of:

MOTION DATE N/A, N/A

268 EAST 7TH STREET OWNER, LLC

MOTION SEQ. NO. 001

Petitioner,

For an Order and Judgment pursuant to Section 881
of the Real Property Actions and Proceedings Law for
access to adjoining property,

**DECISION + ORDER ON
MOTION**

- against-

LINDA H. GOGAN,

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50

were read on this motion to/for JUDGMENT (DECLARATORY)

Upon the foregoing documents, petitioner moves for a license pursuant to Real Property Actions and Proceedings Law (RPAPL) § 881. Petitioner seeks to: (a) establish and maintain a controlled access zone on the roof of respondent’s property, 270 East 7th Street designated as Block 376, Lot 27 (the “Adjacent Premises”) during working hours in order to protect the occupants of the Adjacent Premises, their guests and others; (b) install, maintain and remove temporary protections on the roof of the Adjacent Premises; (c) establish and maintain a controlled access zone in the rear yard of the Adjacent Premises during working hours as required to protect the occupants of the Adjacent Premises, their guests and others; (d) install and maintain flashing between the horizontal and vertical extension of the existing building at 268 East 7th Street, Block 376 Lot 26 (the “Project Premises”) and the Adjacent Premises in order to prevent water infiltration into the Adjacent Premises and the building being constructed at the

Project Premises; and (e) access the airspace above the Adjacent Premises in order to: (i) install, maintain, move and remove suspended scaffolding that will be anchored and supported by the building located on the project premises; and (ii) utilize the suspended scaffolding, from which work will be performed as required in order to finish and waterproof the exterior wall of the building being constructed on the project premises. Petitioner anticipates the project will last approximately two months.

The parties here entered into a prior licensing agreement on November 22, 2021 for petitioner's project (see NYSCEF Doc. No. 5) after a prior RPAPL § 881 action in this Court (268 East 7th Street Owner, LLC v Linda H. Gogan, Index No. 156637/2021). That agreement expired in February 2023. Apparently, the parties then entered into two other licensing agreements without court intervention. It is not seriously disputed that the license requested is necessary for petitioner to perform its work under the applicable laws.

However, respondent opposes the license here, contending petitioner has breached its obligations under the three prior licensing agreements. Respondent claims petitioner: (a) failed to repair and fill in the voids it caused in the rear yard and basement of the Adjacent Premises caused by the excavation and underpinning work petitioner performed; (b) failed to permanently repair the damage caused to the Foundation and the interior and exterior walls of the Adjacent Premises; (c) performed construction work in the rear of the Project Premises and above the roof of the Adjacent Premises without installing required protections; (d) did not allow respondent to review and approve any flashing installed on respondents property; (e) failed to pay all required license fees; (f) failed to reimburse respondents for all professional and exterminator fees incurred as a result of petitioner's project; and (g) caused further damage to the Adjacent Premises. This is described in the affidavit of Linda Gogan (NYSCEF Doc No. 30). Respondent

does not object to providing access to the petitioner, but wants access conditioned on petitioner “curing its continued breached of the prior license agreements and pursuant to a further license agreement including proper protections, insurance, indemnification, agreement to compensate me for all repairs, proper license fees for the access and reimbursement of all costs and reimbursement I have incurred in connection with access to my building, the prior license agreements, and the continued impact of the project to both me and my building.”

RPAPL § 881 states as follows:

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.

“In determining whether or not to grant a license pursuant to Real Property Actions and Proceedings Law § 881, courts generally apply a standard of reasonableness” (Matter of Board of Mgrs. of Artisan Lofts Condominium v Moskowitz, 114 AD3d 491, 492 [1st Dept 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 (Natl. Assn.) v Broadway, Whitney Co., 57 Misc 2d 1091, 1095 [Sup Ct, Queens County 1968], affd sub nom. Chase Manhattan Bank v Broadway, Whitney Co., 24 NY2d 927 [1969]). “Prior to the granting petitioner's application, Supreme Court must consider and resolve the issue as to whether there are less intrusive and equally effective

methods of roof protection” (Matter of 400 E57 Fee Owner LLC v 405 E. 56th St. LLC, 193 AD3d 626, 626-27 [1st Dept 2021]).

“Although the determination of whether to award a license fee is discretionary, in that RPAPL 881 provides that a ‘license shall be granted by the court in an appropriate case *upon such terms as justice requires*’ (emphasis added), the grant of licenses pursuant to RPAPL 881 often warrants the award of contemporaneous license fees” (DDG Warren LLC v Assouline Ritz 1, LLC, 138 AD3d 539, 539-40 [1st Dept 2016]). “After all, ‘[t]he respondent to an 881 petition has not sought out the intrusion and does not derive any benefit from it . . . Equity requires that the owner compelled to grant access should not have to bear any costs resulting from the access’” (*id.* at 540, quoting Matter of North 7-8 Invs., LLC v Newgarden, 43 Misc 3d 623, 628 [Sup Ct, Kings County 2014]). Additionally, courts have conditioned licenses or otherwise awarded property owners reimbursement of certain professional fees (*see, e.g., Matter of Van Dorn Holdings, LLC v 152 W. 58th Owners Corp.*, 149 AD3d 518, 518-19 [1st Dept 2017], quoting North 7-8 Invs., LLC, 43 Misc 3d at 630 [“A property owner compelled to grant a license should not be put in a position of either having to incur the costs of a design professional to ensure petitioner’s work will not endanger his property, or having to grant access without being able to conduct a meaningful review of petitioner’s plans”]).

The Court finds respondent’s contentions regarding prior damage unavailing and immaterial to the granting of this specific license. Respondent can commence a separate action for prior damages and for any hypothetical future damage pursuant to the statute (*see* RPAPL § 881 [“The licensee shall be liable to the adjoining owner or his lessee for actual damages occurring as a result of the entry”]).

Here, the Court finds that the \$3,500.00 per month licensing fee, which appears to be the amount negotiated under prior agreements, should continue for this license as well. Should the amount of the fee prove to be insufficient or otherwise need to be changed, either party may make an application to this Court to determine the appropriate amount; such application should be supported by adequate proof.

As for the professional fees, “[a] property owner compelled to grant a license should not be put in a position of either having to incur the costs of a design professional to ensure petitioner’s work will not endanger his property, or having to grant access without being able to conduct a meaningful review of petitioner’s plans” (North 7-8 Invs., LLC, 43 Misc 3d at 630).

The parties’ November 22, 2021 licensing agreement (See NYSCEF Doc. No. 5) states in relevant part as follows:

Reimbursement of Professional Fees.

Without limiting any of Developer’s other obligations hereunder, Developer shall pay to Owner, within ten (10) business days of submission of reasonably itemized and detailed notices therefor, (i) reasonable attorneys’ fees, charges and disbursements accompanied by supporting statements or invoices; and (ii) reasonable fees, charges and disbursements of any architect, engineer or other consultant retained by Owner, accompanied by supporting statements or invoices, in the amount of [Insert] for attorney’s fees through [Insert] in connection with the access sought through this Agreement. Developer further agrees to pay Owner, within ten (10) business days of submission of reasonably itemized and detailed invoices, engineering and attorney’s fees in connection with: (a) any modification of this Agreement sought by Developer, (b) damage caused to the Owner’s Property as a result of the Owner Property Access Work and (c) any breach of this Agreement by Developer (collectively “Costs”). The termination or expiration of this Agreement will not extinguish Developer’s obligation to pay Costs due under this Agreement. Developer shall not impose, as a condition to its obligation to pay Costs due under this Agreement, a requirement that Owner must first have paid the third party in question. This Article 11 shall survive the Expiration Date.

This should be the template for the proposed licensing agreement.

In conclusion, it is hereby ORDERED and ADJUDGED that the petition is granted in part to the extent that petitioner is granted license to access respondent’s property, conditional upon the directives set forth below; and it is further

ORDERED that neither party is awarded attorneys’ fees for bringing or defending the instant applications; and it is further

ORDERED that petitioner pay respondent a licensing fee of \$3,500 per month for the duration of the license; and it is further


ORDERED that petitioner shall reimburse respondent for reasonable attorneys’ fees incurred in reviewing, drafting, and attempting to negotiate the subject license agreement; and it is further

ORDERED that petitioner shall reimburse respondent for reasonable architectural or engineering or design professional fees (together with attorneys’ fees, hereinafter “professional fees”) incurred with respect to the subject license; and it is further

ORDERED that the parties may submit to the Court a proposed license to be so-ordered consistent with this decision and order.¹

This constitutes the decision, order, and judgment of the Court.

7/1/2024
DATE


ALEXANDER TISCH, J.S.C.

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| CHECK ONE: | <input checked="" type="checkbox"/> | CASE DISPOSED | <input type="checkbox"/> | NON-FINAL DISPOSITION | <input type="checkbox"/> | OTHER |
| | <input type="checkbox"/> | GRANTED | <input type="checkbox"/> | DENIED | <input checked="" type="checkbox"/> | GRANTED IN PART |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | <input type="checkbox"/> | SUBMIT ORDER | <input type="checkbox"/> | REFERENCE |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> | FIDUCIARY APPOINTMENT | <input type="checkbox"/> | |

¹ Having resolved the disputed issues, the Court anticipates that the licensing agreement will be finalized forthwith without issue. If a dispute arises as to any other term, the parties may submit a proposed license and counter license to the Court for resolution.