

Matter of North 7 Apts. LLC v 285 N. 6th LLC

2024 NY Slip Op 34242(U)

November 18, 2024

Supreme Court, Kings County

Docket Number: Index No. 511723/2024

Judge: Lisa S. Ottley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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In the Matter of the Application of:

NORTH 7 APARTMENTS LLC,

Index No.: 511723/2024

Petitioner,

Decision and Order

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

-against-

285 NORTH 6TH LLC,

Respondent.
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KINGS COUNTY CLERK
FILED
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North 7 Apartments LLC, (“**Petitioner**”) has brought this Special Proceeding pursuant to RPAPL §881 against the Respondent, 285 North 6th LLC, (“**Respondent**”) seeking a Court-ordered access license to 285 North 6th Street, Brooklyn, New York, designated in the Tax Map of the City of New York as Block 2331, Lot 42 (the “**Adjacent Premises**”).

AND Respondent, by its attorneys Rich, Intelisano & Katz, LLP, having opposed an Order granting access to the Adjacent Premises unless Petitioner agrees to meet certain conditions,

NOW, upon reading a filing of Petitioner’s Verified Petition and accompanying exhibit, Trujillo Affidavit and accompanying Exhibit, Petitioner’s Memorandum of Law, and CPLR 2217(b) Affirmation (NYSCEF Doc. Nos. 1-8 and 11) and Respondent’s Pahl Affirmation in Opposition, Basel Affidavit in Opposition with accompany exhibit, Memorandum of Law in Opposition, and Answer to Verified Petition (NYSCEF Doc. Nos. 15-19), after oral argument held on June 17, 2024; the Order and Decision issued by this Court dated September 18, 2024 (NYSCEF Doc. No. 2), and after a hearing before this Court on October 28, 2024, and

WHEREAS, Petitioner seeks an Order and Judgment granting Petitioner access to the Adjacent Premises, pursuant to RPAPL §881, in order to: (a) perform a preconstruction survey of the Adjacent Premises; (b) install, maintain and remove a controlled access zone in the rear yard and/or install overhead protections in that area to protect the Adjacent Premises; (c) install, maintain, utilize, and remove overhead protections over certain portions of the Adjacent Premises; (d) install, maintain, and remove roof protections over the roof at the Adjacent Premises; (e) install and maintain weather protection over the exterior wall and foundation of the Adjacent Premises and install and maintain horizontal and vertical flashing between the building on the Adjacent Premises and the new building to be constructed; and (f) install, maintain, utilize, and remove suspended and/or pipe scaffolding on the Adjacent Premises during the Project; all of which access

is required by applicable law and shall be maintained for approximately twenty-four (24) months, together with all such other and further relief as this Court deems just and proper, the court hereby finds that,

Petitioner has demonstrated its need for limited access to the Adjacent Premises in order to be able to proceed with improvement to its property, and the evidence supported its request for access to the Adjacent Premises in order to comply with various provisions of the New York Building Code, including Sections 3309.3, 3307.6.2, 3307.6.3, 3309.1, and 3309.10. Given that the Project Premises and Adjacent Premises are directly adjacent to one another, such access is required.

By Order dated September 18, 2024, this Court directed there to be a hearing on “possible revisions to the SSP, weatherproofing details, license fees, engineer fees, attorneys’ fees, posting of bond, insurance coverage/indemnification, and a remedies and self-help provision.”

The court finds that although the parties attempted to negotiate the terms of the access agreement, they were unable to reach an amenable agreement to the parties’ satisfaction regarding the necessary documents to be reviewed and/or turned over for review and/or were available by other means for review by respondent’s engineer which caused delay and incurred expenses. The issue of contention before this court are the professional and attorney’s fees sought by the Respondent.

Respondent’s engineer acknowledged that his concerns pertaining to excavation work were previously addressed by the publicly available SOE plans. Respondent’s engineer also acknowledged that the SSP’s reference to excavation depths is not the controlling document; rather the SOE plans essentially satisfied his concerns. Petitioner also agreed to withdraw that portion of its request to place scaffolding on the roof of the Adjacent Premises and updated its SSP (Petitioner’s Exhibit 9), which effectively addresses Respondent’s engineer’s final concerns.

Attorney and Professional Fees

RPAPL 881 provides the statutory authority for the court to award professional fees, including attorney’s fees under the circumstances encountered by respondents, and gives the court discretionary authority to award such fees under appropriate circumstances. *See, West End Ave Development LLC v. Ngamwajasat*, 79 Misc.3d 1231(A), 191 N.Y.S.3d 917 (Sup. Ct. Kings Co., 2023).

The court must balance the equities and should consider the context to which the access sought interferes with the owners use and enjoyment of the property, the risks it poses to the property, as well as the complexities which the access sought presents in drafting the license agreement. *See, North 7-8 Investors, LLC v. Newgarden*, 43 Misc.3d 623, 982 N.Y.S.2d 704 (Sup. Ct. Kings Co., 2014).

As such, upon consideration of the underlying submissions, and the testimony and proper evidence produced at the hearing, the Court finds that Petitioner is entitled to access the Adjacent Premises.

Accordingly, it is hereby:

ORDERED, that Petitioner's Order to Show Cause is **granted** to the following extent:

ORDERED, that Petitioner and its contractors, subcontractors, architects and engineers are granted a license to the Adjacent Premises in order to (a) perform a preconstruction survey of the Adjacent Premises; (b) install, maintain, utilize, and remove overhead protections over the cable tray, antenna, and AC units on the roof of the Adjacent Premises in accordance with the SSP dated October 28, 2024 (Petitioner's Exhibit 9); (d) install, maintain, and remove roof protections over the roof at the Adjacent Premises; (e) install, maintain, and remove window protections; (f) install, maintain, utilize, and remove suspended scaffolding only on the Adjacent Premises (which will not rest on the roof of the Adjacent Premises) during the Project; and it is further

ORDERED, that the access requested by Petitioner is hereby granted for a period of twenty-four (24) months from the commencement of such access upon the following terms and conditions:

- (a) Petitioner shall perform its construction project in accordance with all applicable laws;
- (b) Petitioner's design professional of record shall cause special inspections for all work as required by applicable laws;
- (c) Petitioner shall present all structural plans approved by the New York City Department of Buildings to Respondent;
- (d) Petitioner shall install protections, to the extent applicable, including roof protections and overhead protections, in accordance with the revised Site Safety Plan produced at the hearing as the Court's Exhibit;
- (e) Petitioner shall follow all OSHA requirements;
- (f) Petitioner shall prevent water runoff in and upon Respondent's Property as required by applicable laws;
- (g) Petitioner at its sole cost and expense must make all repairs to Respondent's property to repair any and all damages caused by Petitioner's construction work after the date of this license;
- (h) Petitioner to make Respondent an additional insured on Petitioner's or its General Contractor's Commercial General Liability policy by a proper endorsement from its carrier as follows: 1. Insurance. Licensee or its General Contractor/Construction Manager shall maintain at all times during the term, Commercial General Liability insurance covering claims for bodily injury, personal injury, death, or property damage with minimum coverage of One (1) Million Dollars (\$1,000,000.00) per occurrence and Two (4) Million Dollars (\$2,000,000.00) aggregate coverage. 2. Workers' Compensation of One Million Dollars (\$1,000,000.00) and in accordance

with the applicable NYS law. 3. Employers Liability Insurance with limits as required by applicable law. 4. Commercial Automobile Liability Insurance with limits of One (1) Million Dollars (\$1,000,000.00) each, accident covering over Owned, Hired, and Non-owned vehicles. 6. Umbrella or Excess Commercial General Liability with combined single limit for bodily injury, personal injury, and property damage of at least Ten Million Dollars (\$10,000,000.00) or more if required by NYC DOB per occurrence and in the aggregate which aggregate amount may be reached by multiple policies. All excess or umbrella liability policies shall schedule the Primary Commercial General Liability as the underlying policy. Such insurance policies shall be written with a company, or companies having an AM Best rating of at least A-VIII and authorized to engage in the business of insurance in New York State. Licensee shall provide certificates of insurance to Licensor within five (5) business days of the order.

(i) Petitioner shall reimburse Respondent for its engineering in the amount of ten thousand dollars (\$10,000) within seven (7) business days of entry of this Order through September 27, 2024. The Court finds that Respondent is entitled to a portion of the fees it is seeking.

(j) Petitioner to defend, indemnify, and hold harmless the Respondent against third party claims brought against Respondent arising out of the Petitioner’s construction project.

(j) Petitioner at its sole cost and expense must cure any and all violations it may cause to be issued against Respondent’s property as a result of Petitioner’s construction project within thirty (30) days of being notified of violation through Petitioner’s counsel.

(k) Petitioner shall cause to be removed within fifteen (15) days after Respondent provides notice of any lien or encumbrance issued or filed against Respondent’s property as a result of Petitioner’s work on its project.

Respondent’s request for attorneys’ fees is to be determined upon the submission of invoices to Petitioner’s counsel within seven (7) business days of entry of this Order, which are to be filed with the court for consideration.

This constitutes the Decision and Order of the Court.

Dated: Brooklyn, New York
November 18, 2024

HON. LISA S. OTTLEY, J.S.C.
HON. LISA S. OTTLEY
KINGS COUNTY CLERK
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