| **Tompkins 183 LLC v Marsha Frankel .** |
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| Motion No: M-262 |
| Slip Opinion No: 2020 NYSlipOp 62568(U) |
| Decided on February 11, 2020 |
| Appellate Division, First Department, Motion Decision |
| Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. |
| This motion is uncorrected and is not subject to publication in the Official Reports. |

February 11, 2020

Tompkins 183 LLC,

Petitioner-Respondent,

v

Marsha Frankel,

Respondent-Appellant.

An appeal having been taken from an order of the Supreme Court, New York County, entered on or about December 6, 2019, And respondent-appellant having moved to stay enforcement of the aforementioned order pending hearing and determination of the appeal taken therefrom, Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon, It is ordered that the motion is denied and the interim relief granted by an order of a Justice of this Court, dated December 19, 2019, is hereby vacated. ENTERED: February 11, 2020

_____ CLERK

PRESENT: Hon. Rosalyn H. Richter, Justice Presiding, Sallie Manzanet-Daniels Ellen Gesmer Anil C. Singh, Justices

M-262

Index No. 159644/19

# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 6

Tompkins 183 LLC

-v-

Sharsha Frankel

INDEX NO. 159644/19

MOTION DATE

MOTION SEQ. NO. 001

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s). ____

Answering Affidavits — Exhibits ____ No(s). ____

Replying Affidavits ____ No(s). ____

Upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 12/6/19

J.S.C.
HON. EILEEN A. RAKOWER

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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TOMPKINS 183 LLC,

Petitioner,

-against-

MARSHA FRANKEL,

Respondent.

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Index No. 159644/2019

**DECISION and ORDER**

Mot. Seq. 1

HON. EILEEN A. RAKOWER, J.S.C.

Petitioner Tompkins 183 LLC ("Petitioner") moves pursuant to Real Property Actions and Proceedings Law § 881 ("RPAPL § 881"), for a license to enter a portion of Respondent Marsha Frankel's ("Respondent") land and building located at 181 Avenue B, New York, New York ("Respondent's Building"), for the purpose of installing and maintaining a rear yard shed and party wall tie-backs. Respondent opposes.

Background/Factual Allegations

Petitioner owns the building located at 183 Avenue B, New York, New York, having Block 394, Lot 5 ("Petitioner's Premises"). Petitioner's Premises abuts Respondent's Building, the Southerly lot line of Petitioner's Premises being entirely adjacent to the Northernly lot line of Respondent's Building. Petitioner is in the process of demolishing the existing building located on Petitioner's Premises and constructing an eight story multi-family unit with commercial space on the ground floor (the "Project"). In or about July 2017, Petitioner retained George Berry, A.I.A as the architect for the Project. In or about September 2017, Petitioner retained Chad Serman, P.E. as the structural engineer for the Project. In or about February 2019, Petitioner retained All Dimension as the contractor to perform the demolition. In or about March 2019, Petitioner retained Don Erwin, A.I.A as an architect to review and advise of site safety measure required under the New York Department of Buildings ("DOB") and the New York Buildings Code ("Buildings Code") during the Project. On or about August 23, 2019, Petitioner received approval from the DOB for the demolition phase of the Project.

Petitioner commenced this action on October 3, 2019 by filing a Petition and Order to Show Cause as a special proceeding pursuant to RPAPL § 881. Respondent opposed the proceeding.

The parties appeared before the Court on October 17, 2019, October 21, 2019, and October 31, 2019. On these dates, Petitioner and Respondent presented witnesses and testimony regarding the request for access and proposed license.

The proceeding was marked fully submitted on November 8, 2019 after receipt of supplemental submissions by the parties.

Parties' Contentions

Petitioner asserts that the threshold requirements of RPAPL § 881 are satisfied. Petitioner argues that it needs a license for temporary access to Respondent's Building to install certain protection measures in order to comply with Buildings Code § 3309.

Specifically, Petitioner states that pursuant to Buildings Code § 3309.2, it is required to install temporary overhead protection in the form of a rear yard shed in the rear yard of Respondent's Building. Petitioner contends that DOB has permitted the rear yard shed. Petitioner asserts that this measure will protect the occupants of Respondent's Building from potential danger and will only have a small impact on Respondent because the rear yard is unoccupied and the use of Respondent's rear yard during winter will be minimal. Petitioner contends that it has offered a license fee of $1,500 per month for the rear yard shed.

Petitioner contends that it has attempted to negotiate a license agreement with Respondent in good faith since March 2019. Petitioner argues that without access to Respondent's Building it will be impossible to continue with the Project in a safe manner. Petitioner asserts that if the Project does not comply with the deadlines and the DOB classifies the Project as "unsafe," Petitioner will be subject "to exorbitant costs and expenses to make the building safe as well as violations, fines and penalties by the DOB." (Petition at 15). Petitioner asserts that "it is clear that Respondent is using monetary demands as an excuse to delay the Project." (Petition at 16). Petitioner contends that to date, it has reimbursed over $14,000 to Respondent for professional fees.

In opposition, Respondent asserts that Petitioner's application for a license is fatally deficient and therefore must be denied. Respondent argues that Petitioner has not been denied access pursuant to RPAPL § 881 but instead is using litigation to bully an elderly woman with limited resources. Respondent asserts that Petitioner is

seeking access to install party wall tie-backs which are permanent encroachments. Respondent further asserts that Petitioner does not respond or address the comments of Respondent's engineer on the tie-backs or the overhead protections in the rear yard. Respondent contends that she is willing to enter into a license agreement with Petitioner.

After the hearings, the Court notes that two of the main issues that remain in dispute are the installation of the rear yard shed and the party wall tie-backs.

Legal Standards/Discussion

RPAPL § 881 provides,

> "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 in the adjoining owner or his lessee for actual damages occurring as a result of the entry."

RPAPL § 881 "does not direct the court to grant a license to every applicant." *Chase Manhattan Bank (Nat. Ass'n) v. Broadway, Whitney Co.*, 57 Misc. 2d 1091, 1095 [Sup. Ct, Queens County 1968], *aff'd sub nom. Chase Manhattan Bank v. Broadway, Whitney Co.*, 24 N.Y.2d 927 [1969]. Under this provision, the petitioner must "make a showing as to the reasonableness and necessity of the trespass." *In re Tory Burch LLC v. Moskowitz*, 146 AD3d 528, 529 [2017]. Indeed, "Courts are required to balance the interests of the parities 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." *Board of Managers of Artisan Lofts Condominium v. Moskowitz*, 114 AD3d 491, 492 [1st Dept 2014]. "The Court should consider the extent 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 a license agreement." *N. 7-8 Inv'rs, LLC v. Newgarden*, 43 Misc. 3d 623, 632 [Sup. Ct, Kings County 2014].

New York Courts have interpreted RPAPL § 881 to allow "for an encroachment as justice requires." *Cucs Housing Development Fund Corp. IV v. Aymes*, No. 159303/2018, 2019 WL 934935, at *3 [Sup. Ct, NY County 2019] (citation omitted). Where petitioner is seeking a license for a permanent encroachment, "a petitioner must demonstrate that ... it is virtually unavoidable." *Id.* "Equity further requires that the respondent who is compelled to grant access should not have to bear any costs resulting from the access to his or her property." *Id.* at *4.

A. RPAPL § 881 License

On October 17, 2019, Michael Miceli ("Miceli"), the general contractor retained by Petitioner for the Project, testified. On direct examination, Miceli testified as to how the party wall tie-backs would be installed. Miceli stated that:

> "the party wall is eight inches [thick]. We have the brick on our side of the building. We have the brick on the neighbor's side [of] the building. Our floor joist, so it's four inches into this party wall on our side. Their floor joist goes four inches into the wall on their side. The means and methods of we are going to install these tie-backs requires us to remove the one brick on our side to expose – the joist is roughly about 10 to 12 inches by four inches thick... We are going to remove the brick basically on where the center of that floor joist is. Below that floor joist, there is a ceiling. We are going to remove a brick basically where we feel is the center of that floor joist based on our side to expose the outbound side of the joist. We are not exposing below that joist or above the joist, just to expose that part of the joist and then we are going to screw a, what's called, a Sammy Screw, a screw into the center of that joist. That Sammy Screw has an integrated female adapter to screw a rod in. we screw our Sammy Screw into the side of the joist. We take a threaded rod, screw that into that adapter, close the brick, mortar it. We will put some corking around the bolt. The bolt is going to be sticking out outside into our property. We take a C-channel, which is a steel channel the shape of a "C". It has a hole in it to accept that bolt. We place the C-channel onto the rod. There's a nut



[redacted]

> and washer that gets tightened on to that and that, is essence, is what ties back the floor structure or ties back the party wall into the structure of the adjoining building." (Court Hearing Tr. October 17, 2019 at 11-12)

Miceli testified that the Sammy Screws are a quarter inch by three inches. Miceli further testified that the installation of the party wall tie-backs would be done from Petitioner's Premises. Concerning the time that the installation would take, Miceli testified:

> "[i]n removing the brick is about, you know, a minute, you know, to take the brick out. It is done with a hand tool. Screwing in the pin takes, I don't know, ten seconds, you know, a couple of seconds to screw it in and then putting the brick back may take a couple of minutes but, you know, whatever time it takes to put the brick back." (Court Hearing Tr. October 17, 2019 at 13).

On October 21, 2019, Jenna Halpern, P.E. ("Halpern"), a licensed Professional Engineer at Thornton Tomasetti, testified on Respondent's behalf. Halpern raised the concerns that if the pull testing failed, the party wall would be exposed for a certain period time. Halpern stated that the pull testing was needed "to ensure that the anchors can adequately sustain the load for the application they're being used in." (Court Hearing Tr. October 21, 2019 at 35). Following Halpern's testimony, Javed Narain ("Narain"), a Professional Business Engineer at Ancora Engineering, testified on Petitioner's behalf. Narain stated that "the pull testing would be a test of those Sammy anchors once they're installed into the joist, to determine that they meet the requirements that we've -- per our design... [t]hey're typically not done in every single [Sammy anchor]. We'll specify about 10 to 15 percent of them, to get a representative data essentially; but there is also a visual inspection as well, of the joists." (Court Hearing Tr. October 21, 2019 at 43-46).

Petitioner's counsel stated on the record that to alleviate Halpern's concerns regarding the failure of the pull testing, Petitioner would pay Halpern to observe the installation of the tie-backs to ensure the pull testing is done and the adequacy of the tie-back. Moreover, Petitioner's counsel stipulated on the record that the plans would be updated to provide for no more than six inches of debris with regard to structural load.

Here, the intrusion into the adjoining property by way of the tie backs is minimal and the protection is necessary until a new building is erected to provide that same support. Accordingly, upon weighing of the interests of the parties herein,



[redacted]

this Court determines that Petitioner is entitled to a license to install the party wall tie-backs. Although Respondent strongly objects to the party wall tie-backs, such protection is, in this Court's opinion, the most reasonable option for the parties under the circumstances and is "virtually unavoidable." *Cucs Housing Development Fund Corp.*, No. 159303/2018, 2019 WL 934935, at *3.

Petitioner has also demonstrated its entitlement to a license to install and maintain the rear yard shed. The rear yard shed will ensure the protection of the occupants of Respondent's Building from potential danger from the demolition. Furthermore, it will not result in a significant physical intrusion because the rear yard is unoccupied. The rear yard shed will be installed in accordance with Exhibit 2 to Petitioner's Proposed License Agreement.

Additionally, Petitioner is entitled to a license for access to conduct a pre-construction survey. Petitioner must provide Respondent with a copy of the signed and sealed pre-construction survey report, which will include photos and written descriptions of the existing conditions at Respondent's Premises.

B. Licensing Fees

Turning to the issue of compensation, "a license fee compensates the owner for the use the petitioner makes of his or her property and his or her temporary loss of enjoyment of a portion of his or her property." *PB 151 Grand LLC v. 9 Crosby, LLC*, 58 Misc. 3d 1219(A) [Sup. Ct, NY County 2018]. Petitioner has offered to pay a license fee of $1,500 per month, pro-rata daily, while the rear yard shed is installed on Respondent's rear yard, and in the event that that rear yard shed remains beyond twelve months, Petitioner shall pay an increased monthly license fee of $2,000 per month, or partial month, pro-rata per day. Respondent provided no evidence that such fee is inadequate compensation. Since Respondent's rear yard is unoccupied, the rear yard shed will not result in significant physical intrusion on Respondent's Building. The proposed license is reasonable.

C. Professional Fees

"Respondent is entitled to reimbursement by petitioner for reasonable attorneys' fees incurred in" an RPAPL § 881 action." *PB 151 Grand LLC v. 9 Crosby, LLC*, 58 Misc. 3d 1219(A) [Sup. Ct, NY County 2018]. "Justice also requires that petitioner reimburse respondent for its reasonable engineering costs incurred in this matter." *Id.*

"[T]the burden of showing the 'reasonableness' of the fee lies upon the claimant and the court will usually, and especially in a matter involving a large fee,



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be presented with an objective and detailed breakdown by the attorney of the time and labor expended, together with other factors he or she feels supports the fee requested." *Matter of Karp*, 145 AD2d 208, 216 [1st Dept 1989]. "The determination of a reasonable attorney's fee is left to the sound discretion of the trial court." *RMP Capital Corp. v Victory Jet, LLC*, 139 AD3d 836, 839-40 [2d Dept 2016]. "Attorney fees may not be recovered for unnecessary work." *Nestor v Britt*, 16 Misc 3d 368, 379 [Civ Ct 2007], *aff'd*, 19 Misc 3d 142(A) [1st Dept 2008].

As for the attorney's fees, Respondent is seeking $153,493.71 in legal fees and disbursements in its application although its last invoice reflects an outstanding balance of $132,257.30. Here, the Court finds that Respondent has not demonstrated that the total amount of $153,493.71 represents reasonable attorneys' fees. The Court finds that the exorbitant amount sought is not reasonable. Respondent's counsel's invoices do not provide a "detailed breakdown" of the legal work performed. Rather Respondent's counsel groups together different labor expended based on the attorney and compile into one charge. Furthermore, Respondent's counsel does not provide "evidence concerning the difficulty of the matter, the skill, time and labor required, her experience, ability and reputation, and the customary fee for similar services." *Application of Jeffrey*, 214 AD2d 353, 353 [1st Dept 1995]. Reasonable fees in a RPAPL § 881 proceeding does not mean that Respondent is entitled to all fees allegedly incurred.

After reviewing the invoices submitted in camera, Respondent's counsel is entitled to $42,972.50 for the work performed in litigating this proceeding. In light of the time expended at the hearing and preparing the papers submitted, the Court deems such fee reasonable.

Respondent is also seeking reimbursement for engineering services in the amount of: (1) $12, 568.75 for engineering services rendered by Thornton Tomasetti; and (2) $6,632.72 for engineering services rendered by Tectonic. The Court finds that the engineering costs sought are reasonable. Additionally, Petitioner will reimburse the engineering fee for the oversight during the installation of the tie-backs.

Wherefore it is hereby

ORDERED AND ADJUDGED that Petitioner is granted a license to enter onto Respondent's property to install a rear yard shed, party wall tie-backs and to conduct a Pre-Construction Survey; and it is further

ORDERED that Petitioner is directed to pay Respondent a monthly license fee in the sum of $1,500, and partial pro-rata per day, beginning on the first date of



[redacted]

the installation of the rear yard shed, and continuing on the first day of each month thereafter, until the date that the developer has completely removed the rear yard shed, and in the event that that rear yard shed remains on Respondent's Premises beyond twelve months, Petitioner shall pay an increased monthly license fee of $2,000 per month, or partial month, pro-rata per day; the license fee shall be paid no later than the 15th day of each month; and it is further

ORDERED that Petitioner shall notify Respondent in writing when its work has been completed and it has removed all protection from Respondent's property, excluding the party wall tie-backs; and it is further

ORDERED that Petitioner is solely responsible for the installation, maintenance, of the rear yard shed and party wall tie-backs, and the removal of the rear yard shed; and it is further

ORDERED that at the completion of the term of the license, Respondent's property within the license area shall be returned to its original condition, excluding the party wall tie-backs, and all materials used in construction and any resultant debris shall be removed from the license area; and it is further

ORDERED that Petitioner shall not interfere with Respondent's necessary access to its property and quality of life, and shall take the necessary steps, measures and precautions to prevent any damage to Respondent's property; and it is further

ORDERED that Petitioner shall provide proof that Respondent has been added as an additional insured under the terms of the relevant insurance policy within 10 days; and it is further

ORDERED that Petitioner shall be liable to Respondent for any damages which it 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 indemnify and hold harmless Respondent to the fullest extent permitted by law for any liability, claims, damages or losses, including reasonable attorneys' fees, Respondent may incur as a result of Petitioner's work, whether or not caused by the negligence of Petitioner or its employees, agents, contractors or subcontractors; and it is further

ORDERED that Petitioner shall immediately report, in writing, to Respondent any damage to Respondent's property cause by Petitioner's work; and it is further



[redacted]

ORDERED that Petitioner shall cure any violation placed against Respondent's property by a governmental or administrative agency as a result of Petitioner's work, and Petitioner shall reimburse Respondent for any fines or penalties imposed as a result of such violations; and it is further

ORDERED that Petitioner is to reimburse Respondent for reasonable attorneys' fees and costs in the amount of $42,972.50, incurred by Respondent in connection with this proceeding minus the legal fees already reimbursed; and it is further

ORDERED that Petitioner is to reimburse Respondent for reasonable engineering fees in the amount of $19,201.47, incurred by Respondent in connection with this proceeding; and it is further

ORDERED that Petitioner is to pay the engineering fee associated with the observation of the installation of the tie-backs.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: DECEMBER 6, 2019

Eileen A. Rakower, J.S.C.



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