SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE BLUTH** **PART** **14**

Justice

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1643 FIRST LLC, FIRST NY I, LLC A.K.A FIRST NY LLC

Petitioners,

- v -

1645 1ST AVE., LLC,

Respondent.

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INDEX NO. 157759/2021

MOTION DATE 03/25/2022

MOTION SEQ. NO. 001 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 38, 39, 40, 41, 42, 43, 44, 80, 81, 105

were read on this motion to/for RPAPL 881.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127

were read on this motion to/for DISMISS COUNTERCLAIMS.

Motion Sequence numbers 001 and 003 are consolidated for disposition.

The petition (MS001), brought pursuant to RPAPL 881, for a license to *inter alia* install temporary protections for six months so that petitioners can proceed with demolition of their buildings is granted. The motion (MS003) by petitioners to dismiss respondent's counterclaims is granted and the cross-motion by respondent to amend its counterclaims is denied.

Background

Petitioners own two properties which are located at 1643 and 1647 First Avenue in Manhattan. Respondent owns the property in between petitioner's properties, at 1645 First Avenue. Petitioners want to demolish their buildings and seek a license to access respondent's property and install the protections required by the applicable building codes.

Initially, respondent objected to the license on the ground that it did not adequately accommodate its secondary means of egress through the backyard of 1643 First Ave., the building immediately *downtown*. Respondent claimed that its backyard is too narrow and so it cannot instruct tenants or other visitors in the building to shelter in the backyard. In other words, respondent claims its own backyard, at 1645 First Avenue, is not a safe place to gather if occupants need to exit the building.

After respondent alleged counterclaims, it subsequently amended (as of right) its counterclaims to assert causes of action for declaratory relief, quiet title based on implied easement, and quiet title based on easement by necessity. These claims all arose from respondent's contention that the secondary means of egress was at 1643 First Ave. The Court observes that respondent only amended its counterclaims *after* petitioners moved to dismiss the original counterclaims.

Petitioners then moved to dismiss these amended counterclaims and submitted proof rebutting respondent's claim that 1643 was its secondary means of egress and that respondent was entitled to use it at all. In response to this motion, respondent completely abandoned its claims regarding 1643 and now cross-moves to amend its counterclaims (yet again) to identify 1647 First Ave.- the building immediately *uptown* - as its secondary means of egress.

Petitioners are understandably upset with respondent's most recent change in position. Respondent insists it was an honest mistake and that its principal was experiencing personal issues and simply mixed up the uptown and downtown sides of the building, even though respondent submitted sworn affidavits and uploaded documents for months identifying 1643 as the relevant address.

Discussion

As an initial matter, the Court observes that respondent does not deny that petitioners should be able to demolish their buildings. However, respondent stresses that it wants an accommodation to account for its secondary means of egress through petitioners' backyard.

"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. 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" (*Bd. of Managers of Artisan Lofts Condominium v Moskowitz*, 114 AD3d 491, 492, 979 NYS2d 811 (Mem) [1st Dept 2014]).

Here, the Court finds that petitioners are entitled to a license under RPAPL 881. Petitioners have the right to make improvements to their property, including demolishing and building a new structure as long as they take the appropriate steps to protect respondent's building. The fact is that in a densely populated urban environment such as the Upper East Side (where the buildings are located), a property owner's improvements will necessarily impact an adjoining property. That is, of course, why there is RPAPL 881. And respondent identified no sufficient reason why this Court should bar petitioners' desire to improve its property—mere dissatisfaction is not enough.

"Although the determination of whether to award a license fee is discretionary, the grant of a license pursuant to RPAPL 881 often warrants the award of contemporaneous license fees, because an owner compelled to grant access should not have to bear any costs resulting from the access" (*New York Pub. Lib. v Condominium Bd. of the Fifth Ave. Tower*, 170 AD3d 544, 545

[1st Dept 2019]). Here, respondent asserted at oral argument that it is not seeking a license fee so that issue is moot.

Motion to Dismiss Counterclaim and Cross-motion

Having found that petitioners are entitled to a license, the question is whether respondent is entitled to amend its counterclaims yet again. The Court finds that it is not. It is deeply concerning to this Court that respondent took a clear and unambiguous position for six months, only to then change the entire basis for its counterclaims. This is a special proceeding—a legal proceeding that is supposed to quickly resolve a dispute.

The Court makes no finding about whether respondent's change of position was a mistake or an intentional tactic to delay this case. That is irrelevant to this Court's decision. The fact is that petitioners have demonstrated a clear right to a license to access respondent's property in order to improve their properties. And respondent has not demonstrated anything other than speculation or self-serving assertions in support of its new claim that 1647 is now their secondary means of egress. Nothing is attached from a relevant governmental agency, such as the Department of Buildings, that respondent must be entitled to access 1647 First Ave. during petitioners' demolition and construction. The affidavit from respondent's expert (NYSCEF Doc. No. 110) merely establishes that the fence put up during demolition will block a *potential* secondary means of egress. The expert does not conclude this is the only possible additional means of egress for respondent's property.

The broader point is that this sudden about-face creates prejudice to petitioners. "[T]he policy of this court has always been consistent with the rule that, in the absence of prejudice or unfair surprise, requests for leave to amend should be granted freely" (*Aetna Cas. and Sur. Co. v*

LFO Const. Corp., 207 AD2d 274, 277, 615 NYS2d 389 [1st Dept 1994]). A review of the docket in this case demonstrates that petitioners expended considerable resources exploring and discrediting respondent's assertion that 1643 First Ave. was, historically, respondent's secondary means of egress. They researched property records dating back to the Civil War and hired experts to investigate the issue. To change course only after nearly all of respondent's arguments were rebutted and force this special proceeding to drag along even further is too much for this Court and too prejudicial to petitioners. Respondent had ample opportunity to assert counterclaims and even to amend its counterclaims within a reasonable time. But now, only after two motions to dismiss previous versions of its counterclaims does respondent finally settle on a new theory (for now). This is a special proceeding, not a game of whack-a-mole.

The Court recognizes that respondent is correct that a property should have a secondary means of egress. But the Court cannot conclude, on these papers, that respondent is entitled to have that secondary means of egress through 1647 First Ave. The Court has no doubt that the relevant government agency will enforce the applicable regulations during petitioners' demolition and construction. And nothing prevents respondent from contacting such an agency if it believes petitioners are violating certain regulations. The issue for this Court is that there are no outstanding violations or documentation from a government agency stating that petitioners' demolition plans violate applicable laws. Rather, respondent offers theoretical conclusions about the impact of not having a secondary means of egress through 1647 First Ave. despite the fact that it never established that 1647 First Ave. was its secondary means of egress.

Petitioners are directed to upload a proposed judgment that includes a license agreement that affords respondent's property adequate protection. That proposed order should also include, as respondent requested at oral argument, vibration monitoring and appropriate roof protection.

Petitioners shall upload that proposed judgment and license agreement on or before April 25, 2022. The Court will then evaluate that document and decide whether to approve it.

The Court denies the branch of the motion by petitioners that seeks sanctions against respondent. Although, as stated above, it is concerning that respondent changed its position so far along in this proceeding, petitioners did not submit any evidence substantiating its claim that this change was malicious. The late change justifies denying respondent's cross-motion for leave to amend but it does not compel the Court to issue sanctions on these papers.

Accordingly, it is hereby

ORDERED that the petition (MS001) for a license to *inter alia* access respondent's property is granted and petitioners are directed to upload a proposed judgment and license agreement on or before April 25, 2022 that affords respondent adequate protection, including vibration monitoring and roof protection; and it is further

ORDERED that the motion (MS003) by petitioners to dismiss respondent's counterclaims is granted and the cross-motion by respondent for leave to amend its amended counterclaims is denied.

3/30/2022
DATE

ARLENE BLUTH, J.S.C.

CHECK ONE:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[ ] **DENIED**	[ ]	**GRANTED IN PART**	[X]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[X]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**