

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
HON. CAROLYN E. WADE, J.S.C.

BDSP LLC,

Index No.: 525289/2022

Petitioner

DECISION AND ORDER

-against-

MS # 1

WILLIAM M. POPALISKY and ELIZABETH
A. SVIRCHEV,

Respondents.

2023 FEB 21 AM 10:03
KINGS COUNTY CLERK
FILED

The papers numbered 1 through 42 were read on this Petition.

Upon the foregoing cited papers, and after virtual oral argument, Petitioner, owner of 407 Clinton Street, Brooklyn, NY ("407 Clinton") seeks an Order granting RPAPL 881 access in order to perform construction work on 407 Clinton, modify a party wall with 405 Clinton Street, Brooklyn, NY ("405 Clinton"), extend a chimney above the party wall, and install protections on 405 Clinton Street.

Respondents, owners of 405 Clinton, oppose the petition alleging that access is premature because a full review of Petitioner's plans has not been completed by their engineer due to Petitioner's refusal to reimburse Respondents \$3,723.35 for engineering, and \$1,732.00 in legal fees. Respondents also allege that Petitioner refused to advance a deposit of \$3,000 for their engineer to review new and/or revised plans.

"A proceeding pursuant to RPAPL 881 is addressed to the sound discretion of the court, which must apply a reasonableness standard in balancing the potential hardship to the applicant if the petition is not granted against the inconvenience to the adjoining owner if it is granted" (*Matter of Queens Theater Owner, LLC v WR Universal, LLC*, 192 AD3d 690, 690 [2d Dept 2021]).

"In deciding whether justice requires attorneys' fees, either for negotiating an agreement or in opposing a petition pursuant to RPAPL 881, the court must balance the equities" (*Matter of N. 7-8 Invs. LLC v Newgarden*, 43 Misc 3d 623, 632 [Sup Ct, Kings County 2014]).

"While the statute may compel him to grant access for the benefit of another, justice requires that he not be compelled to incur costs to protect his property from such access." *Id* at 633.

Here, Respondents are entitled to have the purportedly new and/or revised plans reviewed by an engineer to ensure that Petitioner's proposed construction and protections are adequate and satisfy

the NYC DOB Codes. Respondents should neither bear the costs of such review prior to negotiating an access agreement, nor should reimbursement be conditioned on entering into the agreement.

Accordingly, it is hereby

ORDERED that Petitioner's petition for an Order granting access to 405 Clinton pursuant to RPAPL 881 is **DENIED without prejudice**; and it is further

ORDERED that the Petitioner pay to Respondents, within thirty (30) days of notice of entry of this Order, \$3,723.35 for engineering fees and \$1,732.00 for legal fees incurred by Respondents up to the filing of this petition; and it is further

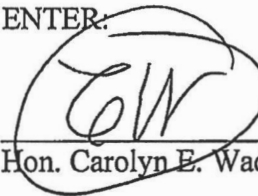
ORDERED that the parties proceed with good-faith negotiations in drafting the access license; and it is further

ORDERED that Petitioner provide all information reasonably required by Respondents' engineer for its review and any reasonable advance payment required by the engineer for said review; and it is further

ORDERED that Petitioner reimburse Respondents for all reasonable legal and engineering fees as incurred for the ongoing negotiations and drafting of an access agreement.

This constitutes the Decision and Order of the Court.

ENTER:



Hon. Carolyn E. Wade, J.S.C.

2/15/2023

2023 FEB 21 AM 10:03

KINGS COUNTY CLERK
FILED