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The First Department Levels the Field in RPAPL § 881 Proceedings

New York Real Estate Journal
04.18.2022

Twenty years ago, the New York Law Journal published an article about a then little-used law that authorized courts to grant a license to a property owner or developer unable to make repairs or improvements to its property without entering onto a neighbor's property (See *Little-Used Law Helps Developers Held Hostage*, N.Y.L.J. Aug. 14, 2002). The law in question, Real Property Actions and Proceedings Law ("RPAPL") Section 881, authorized a judicial license where a neighbor refused permission to access its property for necessary construction and repairs. It also provided the court with flexibility to set conditions on the license upon "such terms as justice requires."

Despite RPAPL § 881 being enacted in 1968, practitioners did not take full advantage of the statute for several decades, even though it provided developers with leverage to combat neighbors that were refusing access. For the first 34 years of RPAPL § 881's existence, it can be found in only 12 decisions on Westlaw, and only a handful of these involve the grant or denial of a license. Over the last 20 years, however, the dynamic changed. More than 185 decisions have cited the statute in the last 20 years. This explosive growth in RPAPL § 881 litigation reflects the statute's utility and suggests that developers now more fully appreciate this judicial option.

While RPAPL § 881 turned out to be an effective tool to allow necessary repair and maintenance, as well as to promote necessary development, it has, unfortunately, in recent years been wielded as a weapon against neighboring property owners. The statute is supposed to be applicable where a party refuses access, but it has frequently been invoked and used during negotiations when there had been no access refusal but rather disagreements about protection, costs, or both. In such circumstances, the developing party has used the threat of costly and uncertain RPAPL § 881 proceedings as a weapon to secure license terms that could not be achieved through good faith negotiations alone. One of the driving economic considerations of recent RPAPL § 881 litigation has been the fear that legal fees in opposing a petition would be considered incidents of litigation subject to the American Rule that each party traditionally bears its own cost of litigation. In such a circumstance, neighbors are usually at a disadvantage against developers. During these years, the pendulum swung firmly from those resisting access to those seeking access.

A balancing of the playing field, however, now appears to have been reached with of the First Department's recent opinion in *Matter of Panasia Estate, Inc. v. 29 W. 19 Condominium*, 2022 N.Y. Slip Op. 00975, ___ N.Y.S.3d ___, 2022 WL 456159 (1st Dept. Feb. 15, 2022), because it resolves ambiguities and reaffirms balanced principles of RPAPL § 881 litigation. The *Panasia Estate* special proceeding began much like any other, with the owner/developer of a building in Chelsea filing its petition to secure a license to access the adjacent properties to perform a preconstruction survey and install protection required by the New York City Building Code. While the neighbors were willing to enter a license agreement, seven months of negotiation still left the parties far apart on an agreement. The developing petitioner wanted to cap the adjacent parties' total legal and engineering fees, and it wanted to impose monthly licensing fees much lower than that sought by the respondent adjoining property owners.

The Supreme Court, New York County, then granted the petitioner a license that in many ways split the difference between the parties. It provided larger monthly access fees than the developer had offered during negotiations, but the respondents' professional fees components were set at fixed sums. The petitioner was also granted an open-ended license controlled by escalation of the monthly access fees at 12 and 24 months, whereas the respondents wanted a firm end date. The court also required the petitioner to both post a bond and add the respondents as additional insured on an existing insurance policy.

No litigant was satisfied with the Supreme Court's decision, and so both sides appealed. In its appeal, the petitioner aggressively sought to have RPAPL § 881 construed so it does not authorize an award of legal fees, engineering fees, or a monthly access fee. Specifically as to attorneys' fees, the petitioner argued that its reading of the statute was supported by the American Rule that parties to a lawsuit bear their own attorneys' fees. In their cross-appeals, the respondents sought a term-

limited license, an award professional fees for attorneys and engineers on an open-ended basis to cover all costs incurred, and it sought input on insurance limits and terms, rather than mere acceptance of additional insured coverage under whatever insurance petitioner might procure.

The Appellate Division rejected the petitioner's arguments and offered significant aid to the bench and bar by issuing license terms that "strike a balance between the petitioner's interest in improving its property and the harm to the adjoining property owner's enjoyment of its property." The First Department made several significant modifications to the compulsory license on the law and facts and as a matter of discretion. Among other things, the court vacated the 12- and 24-month escalation of monthly license fees on the basis that they "appear to be punitive," set a 24-month term on the license rather than an open-ended one, authorized design professional and legal fees incurred "in connection with petitioner's license, in amounts to be determined," and remanded for determination of appropriate insurance limits and requirements to be provided by the petitioner.

It was in the context of attorneys' fees "incurred in opposing the petition" brought under RPAPL § 881 that the First Department issued notable findings. In explicitly rejecting the notion that the American Rule applies where a neighbor is willing to grant a license to the developing party, the First Department explained that such fees can be awarded and considered "part of the process of negotiating a license agreement" where "the respondent in an RPAPL § 881 proceeding has *not refused* access but rather seeks reasonable terms for access" (emphasis added). This language was particularly significant, given the respondents' position that the proceeding was brought as a threat in order to gain leverage and impose harsh terms on the adjacent property owners. The record on appeal revealed that during negotiations leading up to the filing of the petition, petitioner's counsel specifically warned the neighbor's counsel that "my client has authorized me to prepare the 881 papers," softened only by the claim that this was not "a threat, but rather simply as a reality to address the costs under a prescribed project budget and the concerns I laid out above."

The Appellate Division's clarity about the recovery of fees in connection with responding to an RPAPL § 881 proceeding cannot be minimized. Augmenting prior appellate decisions covering the appropriateness of license fees, the First Department has provided clear appellate guidance affirming that attorneys' fees, including in defense of a RPAPL § 881 proceeding, are available remedies for neighbors willing to grant a license to the developing party. Going forward, counsel who look for reasonable protections and terms should be careful not to refuse access when dealing with developing neighbors seeking access and threatening litigation. Following this course of action, RPAPL § 881 litigation will no longer be the economic threat it once was, except for property owners who simply refuse to grant any access or a license where access is otherwise required. The Court's decision in *Panasia Estate, Inc* disarms one of ways RPAPL § 881 had been weaponized. This added clarity will hopefully promote good faith between parties to a prospective license agreement by

focusing on what "justice requires" under RPAPL § 881.

This article appeared in the New York Real Estate Journal. To read it online, click here.

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