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First Department Expands the Right To License Fees Under RPAPL §881

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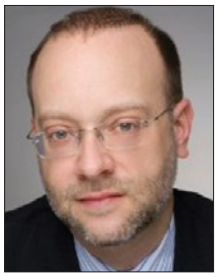

Enacted in 1968, Real Property Actions and Proceedings Law §881 has played an integral role in property owners' ability to repair or build new property. By permitting temporary entry onto neighboring property, RPAPL §881 converts a trespass into a permissive act for the sole benefit of one party over another. However, the permission shall be given "upon such terms as justice requires," in the words of the statute, and so long as the licensee pays for any damage caused by its entry.

In all cases, the licensor shall receive basic protections such as scope of work/time limitations and insurance/indemnification. License fees, however, have only been granted to the licensor when the access is for new construction, rather than mandatory work, the idea being that the licensor should not profit from its neighbor's need to clear violations or otherwise maintain their property. However, in *Van Dorn Holdings v. 152 West 58th Owners*, the First Department has collapsed the 50-year-old mandatory work/new construction distinction and opened the door to license fees in both contexts.

'As Justice Requires' Standard

RPAPL §881's constitutionality was upheld soon after enactment in *Chase Manhattan Bank v. Broadway, Whitney Company*, 57 Misc. 29 1091 (Sup. Ct. Queens Co. 1968), aff'd 24 N.Y.2d 927 (1969). Chase needed to occupy portions of a neighbor's parking lot in order to waterproof its wall. The court rejected the allegation that RPAPL §881 unjustly interferes with private property rights. Rather, the court said the statute is in accord with the legislature's police power, particularly for large cities where failure or inability to repair existing structures encourages blight, and the statute merely codifies equitable principles governing the rights of neighboring property owners. In granting the petition, the court set the numbers of days of access and directed licensee's removal upon completion of work. No fee for occupying the licensor's property was required.

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Sunrise Jewish Center of Valley Stream v. Lipko, 61 Misc.2d 673 (Sup. Ct. Nassau Co. 1969), also issued soon after the statute's enactment, similarly permitted access for waterproofing conditioned on completion by a date certain, and a bond to secure the licensee's obligation to pay for damages arising from entry. The court did not require a license fee.

More recently, in *Board of Managers of Madison Condominium v. Burlington House Condominium*, Supreme Court, New York County, Index No. 112754/2010, also involving façade repairs requiring scaffolding on

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licensor's roof and covering of the skylight, the licensee was not required to pay a license fee.

In 2012, mandatory work remained exempt from license fees in *10 East End Owners v. Two East End Avenue Apartment*, 35 Misc.3d 1215(A) (Sup. Ct. N.Y. Co. 2012). Speaking at length about RPAPL §881's limitations, the court granted access and required insurance for the licensor, but not a bond or payment of professional or license fees. The court held that "as justice requires" does not warrant fees because the statute speaks to damages separately and requires payment to the licensor only in that event. Moreover, the licensor is protected as an additional insured.

Again in 2014, façade work in *401 Broadway Building v. 405 Broadway Condominium*, Supreme Court, New York County, Index No. 156033/2013 required covering licensor's roof including the skylight of a tenant-occupied condominium unit. Citing *10 East End Owners*, the court directed the licensee to insure and indemnify and to not interfere with access to rooftop appurtenances. Despite the unit owner's potential loss of rental income, the court did not order a license fee. The court contrasted *Matter of Rosma Development v. South*, 5 Misc.3d 1014(A) (Sup. Ct. Kings Co. 2004) in which fees were awarded, but where licensee sought "voluntarily to erect a structure abutting respondent's premises, rather than to conduct work mandated by law."

License Fees in 'DDG Warren'

In *DDG Warren v. Assouline Ritz*, 138 A.D. 3d 539 (1st Dept. 2016), the first appellate division decision on RPAPL §881, the particular facts and precedent compelled the award of a license fee.

In a prior development agreement between the parties, the licensee agreed to indemnify and to not unreasonably interfere with the operation of licensor's new building. The licensee's construction caused the vacatur of licensor's penthouse tenant and interfered with licensor's ability to sell the unit. The First Department, affirming and modifying in part, granted a license fee because of licensee's interference with the tenancy and devaluation of licensor's property, and because the licensee previously agreed to compensate licensor. Most importantly, the First Department relied upon a series of lower court cases granting license fees in the new construction context. *Columbia Grammar & Preparatory Sch. v. 10 W. 93rd St. Hous. Dev. Fund*, 2015 N.Y. Slip Op. 31519(U) (Sup. Ct., N.Y. County Aug. 13, 2015); *Snyder v. 122 E. 78th St. N.Y.*, 2014 N.Y. Slip Op. 32940(U) (Sup. Ct., N.Y. County 2014); *Matter of North 7-8 Invs. v. Newgarden*, 43 Misc.3d 623 (Sup. Ct., Kings County 2014); *Ponito Residence v. 12th St. Apt.*, 38 Misc.3d 604 (Sup. Ct., N.Y. County 2012); *Matter of Rosma Dev. v. South*, 5 Misc.3d 1014(A) (Sup. Ct., Kings County 2004).

'Van Dorn' Expands Obligation

In *Van Dorn Holdings v. 150 West 58th Owners*, the First Department added license fees to the list of licensor protections for mandatory work, going beyond the parameters of *DDG Warren* and the lower courts.

In *Van Dorn Holdings*, the owner of an apartment building needing façade repairs attempted to negotiate access with the neighboring cooperative building for the erection of scaffolding on a portion of the penthouse roof. A new owner purchased the penthouse and constructed an outdoor dining area on that portion of the roof to be accessed, despite knowledge of the need for access. A vacate order issued on the dining area, prompting the licensee to commence the proceeding. The lower court awarded a monthly fee based on the size of the area and the monthly maintenance, and the First Department affirmed.

Conclusion

By upholding license fees for access to a non-critical, lifestyle portion of an apartment, the First Department has blurred the mandatory work/new construction distinction, thereby adding a new dimension to parties' negotiations for mandatory work access. Without a clear distinction, parties may find themselves at an impasse on whether compensation is in order and how much, resulting in delays in performance of critical repairs and requiring more judicial intervention to sort out the parties' rights. Owners needing access should expect longer negotiations or litigation, and additional costs in the form of license fees, legal fees or both.