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Appellate Division Clarifies RPAPL § 881 Reimbursement Obligations

By Benjamin Fox Tracy

The Appellate Division, First Department, issued an opinion attempting to reconcile conflicting decisions about a petitioner's obligation to reimburse a respondent's professional fees in a proceeding held pursuant to Section 881 of the Real Property Actions and Proceedings Law (RPAPL § 881).

The court held in *1643 First LLC v. 1645 1st Ave. LLC* [Case Nos. 2022-02108, 2022-02371, 2024 N.Y. Slip Op. 01111, 2024 WL 847769 (1st Dept. Feb. 29, 2024)] that a petitioner need only reimburse a respondent's professional fees if the trial court determines that such fees are reasonable and if the respondent did not incur those fees due to litigation errors or respondent's misconduct.

RPAPL § 881 provides that a property owner may petition a trial court for a temporary license to access an adjoining property when necessary to improve or repair petitioner's property and when the adjoining property owner has denied the request.

Such requests for access frequently arise in New York City when a petitioner is required to install protections on adjoining properties pursuant to Chapter 33 of the Building Code during the petitioner's construction project, whether it be for new construction or a façade repair project pursuant to New York City's Façade Inspection and Repair Program (commonly referred to as Local Law 11).

The Legislature designed RPAPL § 881 to strike a balance between the petitioner's need to improve its property with the harm to the adjoining property owner's use and enjoyment of its property. "In the absence of successful negotiations, RPAPL § 881 is the legal remedy because respondents' right to negotiate is not infinite." *419 BR Partners LLC v. Zabar*, Index No. 156089/2022, 2023 N.Y. Slip Op. 30001(U), 2023 WL 15595, **22 (Sup. Ct. N.Y. Cnty. Jan. 2, 2023)

Because the respondent in an RPAPL § 881 typically derives no benefit from the petitioner's requested access and does not seek out the intrusion, "equity requires that the respondent should not have to bear any costs resulting from the access." *Van Dorn Holding, LLC v. 152 W. 58th Owners Corp.*, 149 A.D.3d 518 (1st Dept. 2017). Courts have typically awarded respondents reimbursement of their reasonable legal and engineering fees incurred to both negotiate a license agreement and defend against the RPAPL § 881 petition. *Id.* (citing *North 7-8 Invs., LLC v. Newgarden*, 43 Misc. 3d 623, 630 (Sup Ct. Kings Cnty. 2014)).

The professional fee reimbursement right is not absolute, however. Trial courts are typically given broad discretion to craft remedies in connection with court-ordered licenses "upon such terms as justice requires" as the RPAPL § 881 statute states. *Tsoumpas 1105 Lexington Equities, LLC v. Lexington Ave. LLC*, 189 A.D.524, 525 (1st Dept. 2020).

Frequently, a petitioner files an RPAPL § 881 proceeding due, in whole or in part, to the respondent's professional fee reimbursement demand, claiming that the respondent is demanding exorbitant fees, the fees are not reasonable considering the requested access, or the respondent is extorting the petitioner for excessive fees.

Trial court judges have exercised their discretion in varying ways resulting in several decisions barring several respondents from recovering all their professional fees incurred related to the applicable license requests. See, e.g., *419 BR Partners LLC*, 2023 WL 15595 at **26. In 2022, the Appellate Division, First Department, attempted to provide guidance on the reimbursement issue but instead offered confusing and conflicting decisions.

On Feb. 15, 2022, the First Department held in *Panasia Estate, Inc. v. 29 W. 19 Condominium* (204 A.D.3d 33, 36-38 [1st Dept. 2022]) that a respondent is “entitled” to reimbursement of its reasonable attorney and engineering fees in an RPAPL § 881 proceeding, citing the *Van Dorn* reasoning. The court seemingly limited the trial court’s discretion about professional fee reimbursement by holding that a respondent was entitled to some amount of fee reimbursement. The only remaining discretion available to the trial court appeared to be the amount of fees to be reimbursed.

On Dec. 6, 2022, the First Department in *Spence v. Strauss Park Realty, LLC* [211 A.D.3d 446, 447 (1st Dept. 2022)] affirmed a trial court decision denying the respondent any form of professional fee reimbursement of license fee payment for the license granted.

The court held that trial court correctly denied the respondent reimbursement of its professional fees because the petitioner established the need for access, the trial court ordered the petitioner to obtain sufficient insurance to cover the respondent for any damages, and the respondent failed to affirmatively claim the access substantially interfered with respondent’s use and enjoyment if its property.

The nuance to this case was that the retaining wall in need of repair was shared by both parties, but the court did not qualify the holding with this fact.

Despite the holding in *Panasia* setting forth unequivocally that a respondent was “entitled” to some form of professional fee reimbursement in an RPAPL § 881 proceeding, the holding in *Spence* provided trial courts with the discretion to deny the award of any professional fees in certain cases. The *1643 First LLC* holding appears to reconcile the discrepancy between *Panasia* and *Spence*.

In *1643 First LLC*, the trial court awarded the petitioner a license but denied the respondent’s professional fee request in its entirety “in accordance with the [trial court’s] order.” The First Department remanded the reimbursement issue back to the trial court and directed the trial court to grant respondent’s “reasonable professional fees and attorney fees.”

The court carefully noted that the trial court did not set forth its reason for denying the fee reimbursement. It further directed the trial court to deny recover of such fees “only to the extent such fees were unreasonably incurred and in order to redress the prejudice caused to petitioner by respondent’s litigation errors and other misconduct it identifies.”

Based on this most recent holding, a respondent appears to be entitled to reimbursement of all its reasonable professional fees, like attorney fees and engineering fees in RPAPL § 881 proceedings. A trial court may only deny those fees upon a showing that such fees were unreasonable or that respondent’s litigation errors or misconduct caused prejudice to the petitioner. If the trial court categorically denies professional fee reimbursement, the order must set forth a basis for doing so. Otherwise, the issue will be remanded.

Practitioners must carefully review the holding in *1643 First LLC* to prepare for their RPAPL § 881 proceedings. Petitioners’ counsel must be sure to affirmatively attack the reasonableness of a respondent’s demanded professional fees, or otherwise cite factual examples of respondent misconduct or litigation missteps that adversely impacted petitioner.

Examples of improper fees include those for objections and comments to draft agreements and plans that are exaggerated and excessive or for efforts to intentionally delay the petitioner’s project, *419 BR Partners LLC*, 2023 WL 15595 at **26.

Respondents’ counsel must not only present invoices to the trial court for reimbursement but must show that those fees were reasonably incurred in addressing respondents’ concerns about the impact the demanded access would have on respondents’ use and enjoyment of their property.

Courts determine reasonableness by assessing “appropriate factors, including the time and labor required, the difficulty of the issues involved, and the skill and effectiveness of counsel” and whether any work “was duplicative or was unnecessarily performed by an attorney, rather than a secretary or paralegal.” *JK Two LLC v. Garber*, 171 A.D.3d 496 (1st Dept. 2019). By establishing affirmatively addressing these factors in the court filing, counsel will likely avoid a trial court denying a professional fee reimbursement request outright and will position the respondent to recover all its incurred professional fees during the proceeding.

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