Matter of Board of Mgrs. of Ariel E. Condominium v. Broadway Metro Assoc., L.P.

Supreme Court of New York, New York County

March 15, 2024, Decided

INDEX NO. 161225/2023

Reporter

2024 N.Y. Misc. LEXIS 1290 *; 2024 NY Slip Op 30878(U) **

[1]** In the Matter of THE ***BOARD*** OF MANAGERS OF ARIEL EAST ***CONDOMINIUM***, Petitioner, - v - BROADWAY METRO ASSOCIATES, L.P., Respondent.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Judges: **[*1]** PRESENT: HON. JOHN J. KELLEY, J.S.C.

Opinion by: JOHN J. KELLEY

Opinion

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44 were read on this motion to/for *RPAPL 881* LICENSE/X-MOTION TO DISMISS OR STAY PROCEEDING.

In this proceeding pursuant to *RPAP L 881*, the petitioner, which owns a nd manages a residential ***condominium*** at 2628 Broadway in Manhattan, seeks access to the adjacent property at 2626 Broadway, which is owned by the respondent limited partnership, in connection with statutorily required exterior wall inspections and repair work. That work is estimated to continue for 18 months, at most. The respondent cross-moves to dismiss the petition or, in the alternative, to stay the proceeding due to the death of one of its limited partners, Albert Bialek. The cross motion is denied, and the petition is granted.

The petitioner is in the process of commencing the required inspection of, and any necessary repairs to, the exterior walls of its building, as required by *Admin. Code of City of N.Y. § 28-302.1* and *1 RCNY 103-04*. *Admin. Code of City of N.Y. § 28-302.1* provides that "[a] building's exterior walls and appurtenances thereof **[*2]** shall be maintained in a safe condition. All buildings greater than six stories shall comply with the maintenance requirement of this article." *Admin. Code of City of N.Y. § 28-302.2* provides, in relevant part, that "[a] critical examination of **[**2]** a building's exterior walls and appurtenances thereof shall be conducted at periodic intervals as set forth by rule of the commissioner, but such examination shall be conducted at least once during each five-year report filing cycle, as defined by rule of the department." 1 RCNY 103-04 articulates the technical requirements for inspections, reporting, and repairs.

In or about June 2023, the parties had exchanged a proposed License and Access Agreement, but a final agreement never was consummated, and it is not clear from the parties' submissions what issue or issues remained in dispute at the time that negotiations broke down.

In the first instance, the court rejects the respondent's contention that the proceeding must be stayed because of the recent death of one of its limited partners, Albert Bialek. Bialek died on October 29, 2023 and, thus, before the petitioner commenced this proceeding on November 15, 2023. The court notes, moreover, that Sheila Hoffman-Bialek, the second of **[*3]** the respondent's two limited partners, died on April 14, 2022 and, thus, also prior to the commencement of this proceeding. It is unclear whether Albert Bialek inherited her investment interest in the respondent limited partnership, or what the status of that interest currently is.

If Albert Bialek's death defeated the capacity of the respondent limited partnership to defend this proceeding, then the proceeding would have been a nullity, ab initio. The court, however, concludes that the death of a limited partner of a limited partnership does not affect the capacity of that limited partnership to participate in litigation. The court recognizes that *Partnership Law § 121-706* authorizes an executor or administrator of the estate of a deceased partner in a limited partnership to "exercise all of the partner's rights for the purpose of settling his estate or administering his property," and that a proceeding may properly be stayed where the general partner of a limited partnership dies during the pendency of an action (*see* *Bridgeview III, LLC v Bridgeview III Hous. Corp., 2019 NY Misc LEXIS 41181 [Sup Ct, Queens County, Apr. 5, 2019]*). Nonetheless, the respondent has cited, and research has revealed, no authority for the propositions that a proceeding commenced against a limited partnership is a **[**3]** nullity where one of its **[*4]** limited partners had died prior to commencement, or that such a proceeding must be stayed if the limited partner died during the pendency of the proceeding.

Here, the respondent's general partner is, in fact, a corporation known as Seavest Management Corp. (Seavest). Albert Bialek was the sole shareholder of Seavest, and the shares therein thus will be distributed in accordance with his will or via intestate succession, either for the purpose of continuing the business of the corporation (*see* *Matter of the Foreclosure of Tax Liens by City of Schenectady, 201 AD3d 1, 5, 158 N.Y.S.3d 279 [3d Dept 2021]*), or for the purposes of dissolution (see *Business Corporation Law §§ 1005*, *1006*). Since that corporation remains an ongoing concern regardless of Albert Bialek's death, there is no basis for deeming this proceeding a nullity or issuing a stay, particularly in light of the public policy and public safety concerns underlying the Administrative Code requirement that every building owner inspect and repair the exteriors of buildings every five years.

Inasmuch as this proceeding was commenced against the respondent after the sole shareholder of the respondent's general partner had died, and after the respondent's two limited partners had died, it is unclear as to who authorized a law firm to appear in this proceeding on the respondent's **[*5]** behalf. It now appears that there is no individual directly affiliated with either the respondent or Seavest who has such authority, or who may now have such authority to direct the course of the litigation the respondent's behalf. Nonetheless, "[t]he Supreme Court is a court of general jurisdiction with the power to appoint a temporary administrator and may do so to avoid delay and prejudice in a pending action" (*Dieye v Royal Blue Servs., Inc., 104 AD3d 724, 726, 961 N.Y.S.2d 478 [2d Dept 2013]*). This court thus has discretion to determine whether to exercise its authority to appoint a temporary administrator for Albert Bialek's estate (*see* *Lambert v Estren, 126 AD3d 942, 944, 7 N.Y.S.3d 169 [2d Dept 2015]*; *Harding v Noble Taxi, Inc., 155 AD2d at 266*; *Batan v Schmerler, 155 Misc 2d 46, 47, 586 N.Y.S.2d 873 [Sup Ct, Queens County 1992]*), particularly where the delays attendant in pursuing a remedy in the Surrogate's Court warrant this court's intervention (*see* *Harding v Noble Taxi, Inc., 155 AD2d at 266*; *see also* *Biancono v Pierre, 9 Misc 3d 1126[A], 862 N.Y.S.2d 806, **[**4]** 2005 NY Slip Op 51801[U], *2, 2005 NY Misc LEXIS 2460, *4 [Civ Ct, Kings County, Nov. 3, 2005]* [Civil Court also has authority to appoint a temporary administrator by virtue of *New York City Civ Ct Act § 212*]; *Abecasis v Fontanazza, 10 Misc. 3d 195, 196-197, 805 N.Y.S.2d 797 [Civ Ct, Kings County 2005]* [same]).

In the instant matter, John B. Simoni, Jr., of the law firm of Goetz Fitzpatrick, LLP, had represented the respondent limited partnership, as well as Albert Bialek, in connection with real estate matters. Here, the petitioner does not seek money damages from the respondent, Seavest, or Albert Bialek, but only a license from the respondent to permit the petitioner to perform statutorily mandated **[*6]** inspections and repair work. Where, as here, there is no possibility the estate of any individual might be held liable or sustain any damages as a result of the relief sought by a plaintiff or petitioner, the appointment of a temporary administrator "is a proper one for the exercise of the court's power, since [the proceeding] is otherwise . . . ready" for disposition and "[i]t should not be unduly delayed or forced to remain in limbo while the [respondent], at unnecessary expense, proceeds in the Surrogate's Court" (*Batan v Schmerler, 155 Misc 2d at 47*; *cf.* *Matter of Sheahan v Rodriguez, 194 Misc 2d 179, 184, 753 N.Y.S.2d 664 [Surr Ct, Bronx County 2002]* [under the circumstances presented, *SCPA 206* confers subject matter jurisdiction upon the Surrogate's Court in New York to issue temporary letters of administration in connection with the estate of a nondomiciliary, limited to the extent of insurance coverage]). Consequently, courts have appointed the attorney designated by an insurer to represent a defendant to serve as temporary administrator where an individual defendant dies during the pendency of litigation (*see* *Fahey v Zissis, 79 Misc. 3d 961, 194 N.Y.S.3d 431, 2023 NY Slip Op 23152, 2023 NY Misc LEXIS 2367 [Sup Ct, Bronx County, May*

16, 2023]; Batan v Schmerler, 155 Misc 2d at 47; *see also* Ramirez v Zalak, 10 Misc 3d 1080[A], 814 N.Y.S.2d 892, 2006 NY Slip Op 50160[U], *1-2, 2006 NY Misc LEXIS 213, *3 [Sup Ct, Kings County, Feb. 6, 2006] [recognizing the practice, but declining to apply it because the plaintiff had commenced the action against a defendant after that defendant had died]). The court concludes that the appropriate **[*7]** remedy here is to appoint, as temporary administrator of **[**5]** Albert Bialek's estate, for a limited purpose and duration, the attorney who had attempted to negotiate a license agreement on the respondent's behalf (*see generally* Bair v Windsor, 2023 NY Slip Op 32999[U], *3, 2023 NY Misc LEXIS 4824, *5 [Sup Ct, N.Y. County, Aug. 29, 2023] [Kelley, J.]), so that he may take possession of Seavest's shares and make decisions on behalf of Seavest, in that corporation's capacity as the respondent's general partner.

Since SCPA 707 provides that only a natural person may be appointed as a temporary administrator, the court concludes that it is appropriate to appoint John B. Simoni, Jr., Esq., as temporary administrator of the estate of Albert Bialek, with his authority limited to taking possession of all shares in Seavest, along with Albert Bialek's limited partnership interest in the respondent, and further limited to exercising only such authority as was conferred upon Albert Bialek by virtue of the ownership of the shares of Seavest in connection with defending this proceeding and implementing any relief granted by the court in connection therewith (*see generally* Biancono v Pierre, 9 Misc 3d 1126[A], 862 N.Y.S.2d 806, 2005 NY Slip Op 51801[U], *2-3, 2005 NY Misc LEXIS 2460, *5-7). In other words, he shall possess these shares and interest solely for the purpose of defending this proceeding and effectuating any relief that **[*8]** the court grants herein, and shall not transfer or encumber those shares or that interest in any manner.

The court further notes that, if, during the pendency of this action, any probate or administration proceeding has resulted in the issuance of letters testamentary or letters of administration to an appropriate representative of Albert Bialek's estate, that representative or Simoni shall, if warranted, be required to obtain approval from this court to establish who has the authority to continue the defense of this proceeding on behalf of the estate.

With respect to the merits of the proceeding, in order to establish prima facie entitlement to a license to enter the premises of an adjoining owner pursuant to RPAPL 881, the petitioner must show that issuance of a license is necessary and reasonable under the circumstances (*see Matter of* ***Board*** *of Mgrs. of Artisan Lofts* ***Condominium*** *v Moskowitz, 114 AD3d 491, 492, 979 N.Y.S.2d 811 [1st Dept 2014]*; Matter of Lincoln Spencer Apartments, Inc. v Zeckendorf-68th Street Assoc., 88 **[**6]** AD3d 606, 606, 931 N.Y.S.2d 69 [1st Dept 2011]). The petitioner must also specify "the date or dates on which entry is sought" (RPAPL 881). In deciding such an application, the court is required to balance the interests of the parties and may issue a license only "'when necessary, under reasonable conditions, and where the inconvenience to the adjacent property owner is relatively slight compared to the hardship of his neighbor **[*9]** if the license is refused'" (*Matter of* ***Board*** *of Mgrs. of Artisan Lofts* ***Condominium*** *v Moskowitz, 114 AD3d at 492*, quoting Chase Manhattan Bank [Natl. Assn.] v Broadway Whitney Co., 57 Misc 2d 1091, 1095, 294 N.Y.S.2d 416 [Sup Ct, Queens County 1968], affd 24 NY2d 927, 249 N.E.2d 767, 301 N.Y.S.2d 989 [1969]).

The proposed access to the respondent's property is limited both in scope and duration. The petitioner initially sought access to the respondent's property in June 2023, and now seeks access to the respondent's property as soon as possible, which it anticipates lasting only 115 work days, with an extension for up to 18 months, during required inspection and repair work on the exterior of the petitioner's building, beginning as of the date that the court grants the license. The petitioner seeks the license to conduct a pre-construction survey on the respondent's property and install temporary rooftop protections that are necessary for work on the façade of the petitioner's building.

The proof submitted by the petitioner includes the affidavit of Richard W. Lefever, P.E., LEED AP, a licensed professional engineer, as well as a site safety plan and New York City Department of Buildings (DOB) approvals. Lefever asserted that access to the respondent's property is necessary for completing a pre-construction survey of that property, installing temporary rooftop protections on that property, and accessing the airspace above that property to the **[*10]** extent necessary for the maintenance of a hanging scaffold rigging and to complete the petitioner's inspection and repair project. According to Lefever, the petitioner has retained Façade MD as its design professional for the performance of certain façade repair work, as required by the DOB Façade Inspection and Safety Program for the property located at 2628 Broadway. He stated that the pre-construction survey and roof protections are required by the **[**7]** Building Code and are necessary for the safety of the adjacent premises, any residents thereof, and the community at large. He further opined that air space access is necessary because the petitioner's project abuts the property line of the respondent's building and, therefore, work on the building façade that sits on the property line can only be performed above the air space of the respondent's building. As Lefever characterized it, if the access requested is not granted, the inspection and repair project will be stopped, and a potentially unsafe condition might exist that could adversely affect both the petitioner's and the respondent's ability to use and enjoy their respective properties. Moreover, he asserted that, if the petitioner **[*11]** is not granted access to perform the work, the petitioner will be unable to certify its compliance with the DOB's façade safety program requirements, which will subject petitioner to fines and violations.

The petitioner's submissions established that the work proposed to be performed on the respondent's property is designed to protect that property during the work on the petitioner's property, the proposed protections are necessary and required by the New York City Building Code, the protections will extend over the respondent's roof, and the methods proposed are the standard and safe methods for protecting the respondent's property. Furthermore, pursuant to the proposed license, prior to the installation of such protections, the petitioner is required to maintain, or cause its construction manager to maintain, general liability insurance, naming the respondent as an additional insured, with limits sufficient to protect the respondent's property or potential liability.

The petitioner has thus established that issuance of a license is necessary and reasonable under the circumstances, and that the inconvenience to the respondent is slight in comparison to the hardship to the petitioner **[*12]** if the license is refused (*see Matter of* ***Board*** *of Managers of Artisan Lofts* ***Condominium*** *v Moskowitz, 114 AD3d at 492*; *Matter of Lincoln Spencer Apartments, Inc. v Zeckendorf-68th Street Assoc., 88 AD3d at 606*).

The grant of a license pursuant to *RPAPL 881* often warrants the award of contemporaneous license fees (*see Matter of DDG Warren, LLC v Assouline Ritz 1, LLC, 138* ***[**8]*** *AD3d 539, 539-540, 30 N.Y.S.3d 52 [1st Dept 2016]*). A license fee is warranted "where the granted license will entail substantial interference with the use and enjoyment of the neighboring property during the [license] period, thus decreasing the value of the property during that time" (*id. at 540*; *see Matter of Panasia Estate, Inc. v 29 W. 19* ***Condominium****, 204 AD3d 33, 37, 164 N.Y.S.3d 551 [1st Dept 2022]*). The court concludes that the respondent should be paid a license fee in the sum of $5,000.00 per month over the term of the license (*see id.* [approving $4,000 monthly license fee, but annulling, as a penalty, the proposed escalation of the fee if project continued beyond a date certain]; *Normanus Realty LLC v 154 E. 62 LLC, 2023 NY Slip Op 34127[U];2023 NY Misc LEXIS 22715, *10-11 [Sup Ct, N.Y. County, Nov. 27, 2023* [fixing monthly license fee at $4,500]). Moreover, the petitioner shall maintain a commercial general liability insurance policy, naming the respondent as an additional insured, in the sum of $2,000,000 (*see Admin. Code of City of N.Y. § 28-105.12.7.1*; *1 RCNY 101-08[d][1][iv]*, [v]).

Accordingly, it is,

ORDERED that the respondent's cross motion is denied; and it is further,

ORDERED that, on the court's own motion, John B. Simoni, Jr., of the law firm of Goetz Fitzpatrick, LLP, is appointed as temporary administrator of the estate of Albert Bialek, for the sole purpose of taking possession of all **[*13]** of the shares of stock of Seavest Management Corp. and the limited partnership interest of Albert Bialek in the respondent, Broadway Metro Associates, L.P., limited further to exercising the rights of ownership of the shares of stock of Seavest Management Corp. solely in its capacity as general partner of Broadway Metro Associates, L.P., and solely for the purpose of defending this proceeding and complying and effectuating the relief directed herein, with no individual or personal liability imposed upon John B. Simoni, Jr., for any act or failure to act on behalf of Seavest Management Corp. or Broadway Metro Associates, L.P., and no obligation to post a bond, provided that, upon the effectuation of the terms and conditions of this Decision, Judgment, and Order, or the appointment of an executor or administrator of the estate of Albert Bialek, whichever is earlier, the temporary **[**9]** appointment shall be rescinded and dissolved, and the shares of stock of Seavest Management Corp. and the limited partnership interest of Albert Bialek in the respondent, Broadway Metro Associates, L.P., shall revert to their prior status or be transferred as directed by the Surrogate's Court or other probate **[*14]** court of competent jurisdiction, as may be the case; and it is further,

ORDERED and ADJUDGED that the petition pursuant to *RPAPL 881* is granted, and the petitioner is granted a license for access to the respondent's property for the purpose of surveying, inspecting, providing roof protection, and completing any necessary repair on the exterior walls of the property owned and managed by the petitioner, to the extent that the petitioner may have access to the premises known as 2626 Broadway, New York, New York, and designated as Block 1871, Lot 22, on the Tax Map of the Borough of Manhattan, City of New York, in accordance with the terms of the license, which shall be in the form of the proposed license, as last amended in blue-line type, that was uploaded to the New York State Court Electronic filing system as Docket Entry 8, which shall remain in effect during the surveying, inspection, and exterior wall repair work to be performed on the property located at 2628 Broadway, New York, New York, and designated as Block 1871, Lots 1101 to 1110, on the Tax Map of the Borough of Manhattan, City of New York, for a period commencing five days after service of a copy of this decision, order, and judgment **[*15]** upon the respondent with notice of entry, and continuing for a period of 18 months thereafter; and it is further,

ORDERED that the petitioner is and shall be obligated to pay to the respondent the sum of $5,000 per month during the term of the license; and it is further,

ORDERED that, for the purposes of the license and the work to be performed thereunder, the petitioner is and shall be obligated to maintain a policy of general commercial liability insurance, with a limit of $2,000,000, which shall name the respondent, Broadway Metro Associates, L.P, as an additional insured; and it is further,

ORDERED that the petitioner shall serve a copy of this order with notice of entry on the respondent within 10 days of entry of this decision, order, and judgment.

[10]** This constitutes the Decision, Order, and Judgment of the court.

3/15/2024

DATE

/s/ John J. Kelley

JOHN J. KELLEY, J.S.C.

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