

CONSTRUCTION LAW

Protection of Adjoining Buildings During Construction

By
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Construction in New York City presents unique challenges for property owners and developers. The proximity of buildings and the sheer scale of construction can present dangers to both adjacent structures and the public at large, and the failure to account for these dangers can lead to damage of adjoining property and injury to passersby.

In the case of adjacent buildings, the New York City Building Code (Section BC 3309), imposes non-delegable duties on the owner or developer performing construction work to protect adjoining public and private property.¹ A failure to satisfy these duties can result in the revocation of necessary building permits and constitute evidence of negligence² or, potentially, result in strict liability.³ However, in order to comply with Section BC 3309, property owners require access to neighboring properties. Access requires a license, which can be given voluntarily by the neighboring property owner or, in some circumstances, compelled by court order under New York Real Property Actions and Proceedings Law Section 881.⁴ This article will

address the requirements of Section BC 3309, the necessity of a license for access, and the circumstances under which an owner seeking access can obtain a license from the court.

Requirements of BC 3309

Section BC 3309.1 mandates the protection of adjoining public and private property during construction or demolition work. "Protection must be provided for footings, foundations, party walls, chimneys, sky-lights and roofs." Similarly, Section BC 3309.4 requires a property owner performing excavation work to protect adjoining structures from damage by the appropriate means at his or her own expense. Section BC 3309.6 requires a property owner to monitor the ongoing effects of construction on the adjoining properties to ensure that no damage occurs. Where an adjoining property requires protection from the effects of construction work on the neighboring property, Section BC 3309.2 empowers the owner of the adjoining property to dispossess a tenant that refuses to grant access to the adjoining property. The failure to comply with these requirements of Section BC 3309 can expose a property owner to significant liability.

For example, in *Marbilla, LLC v. 143/145 Lexington*, the Supreme

Court, New York County, granted summary judgment in favor of a plaintiff whose property was damaged during an excavation of the defendant's adjoining property.⁵ The court held the defendant strictly liable under Administrative Code Section 27-1031, the statutory predecessor to Section BC 3309.⁶ The court based its decision, in part, upon the fact that the defendant never requested access to the adjoining property in order to protect it during the excavation.⁷ It remains unclear, however, whether the strict liability imposed by Section 27-1031 has been extended to Section BC 3309. The question has been left open by the New York Court of Appeals,⁸ but some lower courts have concluded that Section BC 3309 is, like Section 27-1031, a strict liability statute.⁹

Whether a strict liability statute or not, property owners would be wise to conform to the requirements of Section BC 3309 and guard against damage to adjoining property. Taking the necessary precautionary measures will decrease a property owner's exposure to liability, under either a strict liability or negligence standard. Section 3309.4 shifts the duty to prevent damage to adjoining property from the party doing the construction work to the owner of the adjoining property where the

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owner denies access to the adjoining property. Compliance with Section BC 3309 thus reduces the risk of damage to adjoining property, renders a finding of fault less likely and can potentially result in the shifting of the duty from the party performing the construction work to the owner of the adjoining property.

Complying With BC 3309

RPAPL 881 states that where property owners cannot make repairs or improvements to their property without entering the premises of an adjoining land owner (and permission to enter has been denied), the property owner may commence a special proceeding for a license to enter.¹⁰ “Such a license shall be granted by the court...as justice requires.”¹¹ This implies a balancing of the circumstances surrounding the construction and a determination of whether the balance of equities favors the issuing of a license. New York courts regularly cite a property owner’s need to take precautionary measures in order to prevent damage to an adjoining property as an important factor weighing in favor of granting a license pursuant to RPAPL 881.¹²

Property owners have successfully relied on RPAPL 881 to obtain a license in order to protect adjoining structures and comply with Section 3309 and its predecessor. At times, adjoining land owners have denied access to their properties (for their own self-protection) and their neighbors (seeking to provide protection) found themselves unable or unwilling to proceed without taking the preventative steps required by Section BC 3309. Fortunately for such property owners, New York courts have been willing to invoke RPAPL 881 in order to grant a compulsory license to access adjoining property in order to protect it from damage.

For example, in *Mindel v. Phoenix Owners*, the Appellate Division, First Department, affirmed the grant of a license to a property owner for the purposes of erecting a protective net to prevent damage to an adjoining roof, as required by Section BC 3309.1.¹³ The court stated: “[w]e adopt a standard of reasonableness in concluding that defendant is prepared to do all that is feasible to avoid injuries resulting from its entry upon plaintiffs’ properties, and that a RPAPL 881 license was therefore properly granted.”¹⁴

Protective measures require access to adjoining property and recalcitrant property owners may deny access to their property, even when access facilitates protection of their own property. RPAPL Section 881 offers relief from the recalcitrant owner.

Similarly, in *Laub v. Parklex Madison A.G.*, a property owner sought entrance onto an adjoining property to perform certain work that was “protective in nature.”¹⁵ The adjoining property owner refused and objected to the issuance of the license on the grounds that access might damage certain furniture, antiques and collectibles contained therein.¹⁶ The Supreme Court, New York County, granted the property owner’s petition for a RPAPL 881 license in order to effectuate certain repairs to his property and protect the adjoining property from damage.¹⁷

And, in *537 W. 27th St. Owners v. Mariners Gate*, the Supreme Court, New York County, considered a petition for a license to access a neighboring roof to protect it from falling debris during the seven-month construction of a 14-story luxury

residential condominium building.¹⁸ The adjoining property owner opposed the issuance of the license on the grounds that it had already been damaged and that stop work orders had already been issued.¹⁹ While imposing certain conditions which the property owner performing the construction was required to meet, the court ultimately granted the license pursuant to RPAPL 881 and allowed the property owner to take the necessary precautionary measures.²⁰

Conclusion

The protection of adjoining property during construction is critical for property owners and developers; however, protective measures require access to adjoining property and recalcitrant property owners may deny access to their property, even when access facilitates protection of their own property. RPAPL Section 881 offers relief from the recalcitrant owner, and the courts will not hesitate in granting a license to a neighbor offering protection to the owner.

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1. See New York City Admin. Code, Title 28, Section 3309.1.
2. See *532 39 Realty v. LMW Eng’g Grp.*, 2012 NY Slip Op 32798, **13 (N.Y. Co. Nov. 5, 2012) (“Section 3309.4 constitutes at least some evidence of negligence”).
3. *Yenem Corp. v. 281 Broadway Holdings*, 18 N.Y.3d 481, 490 (2012) (holding that the predecessor to Section 3309.4 imposed strict liability, but failing to address whether Section 3309.4 does the same).
4. R.P.A.P.L. § 881.
5. *Marbilla, LLC v. 143/145 Lexington*, 2013 NY Slip Op 30898, **13 (N.Y. Co. 2013).
6. *Id.* at **8.
7. *Id.*
8. See *Yenem Corp.*, 18 N.Y.3d at 486.
9. See *Am. Sec. Ins. v. Church of God of St. Albans*, 956 N.Y.S.2d 799 (Queens Co. 2012).
10. R.P.A.P.L. § 881.
11. *Id.*
12. See *Mindel v. Phoenix Owners*, 210 A.D.2d 167, 167 (1st Dept. 1994).
13. *Id.*
14. *Id.*
15. See *Laub v. Parklex Madison A.G.*, 2009 N.Y. Misc. LEXIS 2529, *4 (N.Y. Co. 2009).
16. See *id.* at *11.
17. See *id.* at *19.
18. *537 W. 27th St. Owners v. Mariners Gate*, 2009 NY Slip Op 32360, **2-3 (N.Y. Co. 2009).
19. *Id.*
20. *Id.* at *4-5.