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RPAPL §881: Litigating Access to Neighboring Property

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After providing a brief overview of the statute, a previous article (NYLJ April 19, 2016) explored open issues in litigating cases brought under Section 881 of New York's Real Property Actions and Proceedings Law (RPAPL), an important statute in real estate development that governs efforts to compel access to adjoining property to perform work on one's own property, and provides an opportunity for a building owner or developer to obtain a court-ordered license for that purpose. This article explores five common pitfalls to avoid when bringing an RPAPL §881 proceeding. Readers should remember that a pitfall is a situation presenting a hidden or unexpected danger or difficulty—it is not necessarily an error.

Pitfall 1: Failing to Consider Whether to Commence the Proceeding by Order to Show Cause or Notice of Petition and Petition. Special proceedings, including RPAPL §881 proceedings, are governed by Article 4 of the CPLR. A special proceeding can be commenced by notice of petition and petition, or an order to show cause with a supporting petition.[1] The careful practitioner should weigh the pros and cons of each method of commencing an RPAPL §881 proceeding.

A notice of petition and petition must be served in the same manner as a summons and complaint in a plenary action.[2] In general, commencing by notice of petition and petition allows the petitioner's counsel to pick a convenient return date and gives counsel more time and control over serving the initiating papers on the respondent. On the other hand, commencing by order to show cause offers the advantage of having the papers reviewed by the judge in advance, as well as the possibility of a quicker return date, which may be important if the requested access is time-sensitive.

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But commencing by order to show cause also introduces uncertainty and potential challenges relating to service of process, because the petitioner has no control over the method and timing of service the court will require. Service of an initiating order to show cause in an RPAPL §881 proceeding can be especially challenging because "the method of service provided for in an order to show cause is jurisdictional in nature and must be strictly complied with."[3]

Experience shows that RPAPL §881 proceedings are frequently commenced by order to show cause, yet the case law on service of an initiating order to show cause is more onerous than most practitioners generally imagine, and may be surprising to learn. This is the case because even where there is strict compliance with a judge's handwritten service provision, such service may be insufficient to obtain personal jurisdiction over a respondent, and the entire proceeding may therefore be dismissed.

For example, in *Happy Age Shops v. Matyas*,[4] a plaintiff submitted an initiating order to show cause that provided for service of a summons and complaint upon the law firm that represented the defendants in the

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parties' underlying, pre-litigation lease dispute. The defendants' law firm had not appeared in the action. Supreme Court, in the signed order to show cause, permitted service of initiating process on the defendants' law firm, and the plaintiff performed such service. Even though expressly permitted by the signed order to show cause, the Second Department ruled that service of an initiating pleading on a law firm whom it is believed will represent a defendant in a litigation is not equivalent to, and does not comply with, the CPLR's requirements for service of process upon a defendant, and is insufficient to obtain personal jurisdiction over the defendant itself.

Based on the lack of jurisdiction, the court reversed the lower court's issuance of a preliminary injunction in favor of the plaintiff. Substantially similar results have been reached by other courts as well.[5] Although not special proceedings brought pursuant to RPAPL §881, the holdings in these cases are still applicable.

While there are advantages to commencing an RPAPL §881 proceeding by order to show cause, in light of the applicable case law, it should not be a given to do so. Savvy attorneys will at least consider whether it might be preferable to commence by notice of petition and petition.

Pitfall 2: Failing to Plead Facts Establishing That Access is Necessary in the Petition. Because RPAPL §881 states that the petitioner "shall state the facts making such entry [onto adjoining property owned by another] necessary," every petitioner should be sure to allege with particularity the necessity of the requested access in the petition itself. In *Lincoln Spencer Apartments v. Zeckendorf-68th Street Associates*, the Appellate Division, First Department held that mere conclusory assertions that access to adjoining property was necessary, without "any explanation as to why the work could not be otherwise performed," were insufficient to support the grant of an RPAPL §881 license.[6]

Another RPAPL §881 dispute resulted in a court order permitting access to the respondent's premises for 30 consecutive days to repair the petitioner's rear brick wall, which had been damaged by moisture. After initially providing access, the respondent refused to allow petitioner access beyond the date on which it claimed that the petitioner had completed the necessary repair work. In response, the petitioner moved to punish the respondent for contempt of court, and for continued access to the respondent's property. The petitioner claimed in an attorney affidavit that some work still remained to be performed, including (a) repainting a pre-existing sign on petitioner's wall that had been partially destroyed as a result of the petitioner performing repointing to its brick work; and (b) applying a silicone substance to the wall to seal and waterproof the new brick work.

The court held that the petitioner's attorney's affidavit alleging the necessity of additional access to apply silicone "to complete the repair" was "insufficient" to meet the petitioner's burden of showing the remaining work was necessary, and "should be substantiated by an expert in the field."[7] Thus, a detailed petition explaining the necessity of the requested access, supported by an affidavit from a qualified professional—whether an architect, engineer, or other expert—can be critical.

Counsel should always remember that the petitioner in an RPAPL §881 proceeding is seeking a court order forcing a neighbor to relinquish sole control over his or her own property. In fact, courts have openly stated that they will consider the "competing interests of the two adjoining landowners"[8] in such cases, and the First Department recently reminded practitioners that "[t]he respondent to an 881 petition has not sought out the intrusion and does not derive any benefit from it."[9]

Counsel should therefore always take care when drafting the petition to explain why the requested access is necessary, or why it is the only approach (or the most reasonable and practicable approach), to accomplish the improvement and/or repairs at issue. Do not make the mistake of taking entitlement to a license for granted.

Pitfall 3: Failing to Plead Specific Access Dates. The statute also requires a petitioner seeking a temporary license to plead "the date or dates on which entry is sought." As this is a statutory element of a cause of action seeking RPAPL §881 relief, the omission of specific access dates in a petition may result in denial or dismissal of the petition for failure to state a cause of action.

In general, where a party fails to plead a required element of a cause of action, such cause of action can be dismissed.[10] A special proceeding brought under RPAPL §881 is no different. In *Pav-Lak Industries v. Wilshire Ltd.*, the Supreme Court, New York County, stated that "'[b]efore it can grant a license pursuant to RPAPL §881, it is critical that the Court be apprised of the 'exact nature, timing and extent of the [work] requiring the license.'"[11] The court observed that no specific access dates were pleaded in the petition, and denied the petition accordingly.

On the other hand, in *North 7-8 Investors v. Newgarden*,[12] the Supreme Court, Kings County, held that the failure to plead specific dates of requested access was not a fatal deficiency where the petitioner stated that it sought access "for approximately one year." The court reasoned that "[t]here is little purpose in dismissing the petition on this ground and requiring petitioner to bring a new petition when the court can simply set the duration of the license in its order."

Obviously, the better practice is to plead specific dates and avoid the possibility of dismissal.

Pitfall 4: Pleading Specific Access Dates That Become Stale or Unworkable. Another pitfall for the unwary practitioner is pleading specific access dates that, due to adjournments, the vagaries of court scheduling, or otherwise, have passed or become unworkable by the time the court is ready to render a decision. This pitfall is especially likely to present itself in counties (such as New York County) in which special proceedings brought on by notice of petition and petition are returnable in a centralized motion processing part instead of directly before the IAS justice.

Although court clerks no doubt process petitions and motions as quickly as they can, there is simply no telling when a motion processing part will forward the papers to the IAS part, and in turn when the IAS part will schedule its own return date for oral argument on the petition. An attorney who files an RPAPL §881 petition in April asking for May access will be dismayed to discover that the first court appearance has been scheduled for June.

One solution to this problem is to plead specific access dates and also plead alternative dates. For example, if access is requested for one week in mid-May based on a petition filed in mid-April, the petition could also plead that if such access dates have passed by the time the court is prepared to render a decision, the requested access should be ordered for the same duration, to commence three weeks from service of notice of entry of a decision or judgment granting a license for access. Do not permit your petition to become stale or deficient by the mere passage of time.

Counsel should always take care when drafting the petition to explain why the requested access is necessary, or why it is the only approach (or the most reasonable and practicable approach), to accomplish the improvement and/or repairs at issue.

Pitfall 5: Failing To Play Nicely With Others. Finally, practitioners should attempt to maintain a cordial or at least civil relationship with their adversaries. While this is true in every dispute, it is especially prudent in RPAPL §881 proceedings because in practice, courts often ask and expect the parties to work together to come up with reasonable access and property protection terms. Courts can be reluctant to delve into the nitty-gritty of construction and repair projects—such as the amount and nature of insurance coverage to be provided to the adjoining landowner, the composition of waterproofing materials to be applied, and the dimensions of protective fencing and netting—and often express a preference that the parties resolve these kinds of items on their own.

Absent amicable resolution, courts frequently direct the parties to settle an order or judgment on notice. When that happens, attorneys who have taken care to preserve a relationship with the other side may have an easier time, and be able to mitigate the uncertainty of a contested final order or judgment, by working with opposing counsel to find some common ground.

1. See CPLR §403(a), (d).
2. See CPLR §403(c).
3. *Zambelli v. Dillon*, 242 A.D.2d 353 (2d Dept. 1997) (citations omitted); *Goldmark v. Keystone & Grading Corp.*, 226 A.D.2d 143 (1st Dept. 1996).
4. 128 A.D.2d 754 (2d Dept. 1987).
5. See e.g. *Foster v. Piasecki*, 259 A.D.2d 804 (3d Dept. 1999); *Carlton Boiler Repair, v. D.N.G. Associates*, 2007 WL 4856389 (Sup Ct, N.Y. County Aug. 22, 2007).
6. 88 A.D.3d 606 (1st Dept. 2011).
7. *Chase Manhattan Bank (Nat. Ass'n) v. Broadway, Whitney Co.*, 59 Misc.2d 1085 (Sup Ct, Queens County 1969).
8. *Deutsche Bank Trust v. 120 Greenwich Dev. Assoc.*, 7 Misc.3d 1006(A) (Sup Ct, N.Y. County 2005).
9. *DDG Warren v. Assouline Ritz 1*, 2016 N.Y. Slip Op 02926 (1st Dept.) (citation omitted).
10. See e.g. *Skarren v. Household Finance*, 296 A.D.2d 488, 490 (2d Dept. 2002) (dismissing plaintiff's fifth cause of action "because the plaintiff did not plead the material elements of such a claim"); *Dee v. Rakower*, 112 A.D.3d 204, 216 (2d Dept. 2013).
11. *Pav-Lak Industries v. Wilshire Ltd.*, 2009 N.Y. Slip Op. 33110(U), 2009 WL 5243692 (Sup Ct, N.Y. Co.) (citation omitted).
12. 43 Misc.3d 623 (Sup Ct, Kings Co. 2014).

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