SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 58

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RICHARD SNYDER,

Plaintiff,

- against -

Index No. 159262/14
DECISION

122 EAST 78TH STREET NY LLC,
SWEENEY & CONROY INC.,
SEAN SWEENEY and ROBERT MURPHY,

Defendants.

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DONNA M. MILLS, J.:

This is a dispute between the owners of adjoining upper east side properties over a lengthy and ongoing construction project at 122 East 78th Street. Plaintiff Richard Snyder moves, by order to show cause, pursuant to CPLR 6301 and Real Property Actions and Proceedings Law § 871(1), pending the trial of this action, to enjoin and require the immediate removal of that portion of the scaffolding and sidewalk bridge erected by the defendants allegedly in violation of the New York City Building Code and which is allegedly unlawfully encroaching on plaintiff's real property located at 120 East 78th Street. Plaintiff also seeks the immediate removal of all fasteners which defendants used to secure certain coverings of the scaffolding which he claims were drilled into the brick of the plaintiff's building. Finally, plaintiff seeks to enjoin defendants from doing any construction work on weekends, holidays or before 7:00 a.m. and after 6:00 p.m. on weekdays due to the absence of an appropriate permit from the New York City Building Department.

Defendant 122 East 78th Street NY LLC (122 LLC), the owner of the adjoining property under construction, cross-moves, pursuant to RPAPL 881, for a license to enter the airspace

above a portion of the front and rear yard of the plaintiff's property until such time as the exterior shell of its building is completed, which is expected to be completed in approximately three months.

On September 29, 2014, one day prior to the return date of this motion, plaintiff filed a cross motion seeking ten additional items of relief relating to the party wall separating the two buildings, the existing front and proposed rear scaffolding, 122 LLC's request for a license pursuant to RPAPL 881, and discovery.

FACTUAL ALLEGATIONS

Plaintiff Richard Snyder owns and resides in a single-family townhouse located at 122 East 78th Street, New York, New York. Defendant 122 East 78th NY LLC (122 LLC) owns the adjoining property located at 122 East 78th Street since May 2010; non-party Bryan Verona is a principal of 122 LLC. In August 2011, 122 LLC commenced a construction project consisting of a near total gut demolition of the existing building, leaving only the front facade, to convert what was originally a 5-story residence and schoolhouse into a single-family townhouse. The general contractor in charge of the construction project is defendant Sweeney & Conroy, Inc. (SCI).

Plaintiff alleges that, despite the fact that the construction project has been ongoing for more than three years, defendants do not appear to be anywhere near completion, and believes that the construction will go on for several more years. Plaintiff is 81 years of age, retired and is presently writing his memoirs. He claims that, as a result of "certain significant incidents I suffer from post-traumatic stress which primarily confined me to my residence . . . for almost a year" (Snyder 9/18 affidavit, ¶ 2).

The complaint alleges that, since the commencement of the construction, defendants and

their employees and subcontractors have repeatedly, and without authorization, entered onto the plaintiff's property. Among other alleged trespasses, it is alleged that defendants have erected a scaffold which encroaches onto plaintiff's property, blocks the front of his residence, and appears to serve no purpose and has never been used (complaint, ¶¶ 17 [d], 19). Defendants have also allegedly secured certain covering directly into the brick facade of his residence (*id.*, ¶ 17 [f]).

The complaint alleges that the construction has substantially and detrimentally interfered with plaintiff's quiet use and enjoyment of his residence in the following ways: (1) by drilling holes into his the wall of his residence; (2) by causing the rear deck of plaintiff's residence to become separated from a shared party wall; (3) by the destruction of plants, shrubs and trees on plaintiff's property; and (4) placing the integrity of plaintiff's rear balcony in question by the placement of materials and structures on the balcony (complaint, ¶ 18). In addition to complaints of excessive noise, plaintiff alleges that excessive vibrations from the construction site have damaged his furnace (*id.*, ¶ 20 [a]). Finally, plaintiff alleges that the construction project has directly impacted his ability to market and sell his residence. The complaint alleges that, at first, a broker would not even list the property for sale allegedly because of the construction (*id.*, ¶¶ 22-24). When the property finally went on the market six months ago, despite a strong residential market and several viewings, not a singe offer was made (*id.*, ¶ 26).

Plaintiff commenced this lawsuit against 122 LLC on September 19, 2014 after attempting, without success, to pin Mr. Verona down as to exactly when the construction would be completed and the scaffolding would be removed (*see* Kishner 9/30/14 Affirm., Exs. I - K). On September 30, 2014, an amended complaint was filed naming as additional defendants: SCI; Sean Sweeney, SCI's president; and Robert Murphy, SCI's onsite construction superviser. The

amended complaint asserts eleven causes of action for nuisance, trespass, conversion, negligence, the violation of multiple sections of the Building Code, the violation of RCNY, tit. 15, § 28-102 regarding noise mitigation, and the violation of RPAPL 881 by failing to obtain plaintiff's permission to enter onto his property or seek a license from this court. In addition, plaintiff's fifth cause of action seeks a mandatory injunction, pursuant to RPAPL § 871, requiring defendants to remove that portion of the front scaffolding and sidewalk shed that encroaches on his property or $20 million in damages plus interest since May 2011.

DISCUSSION

RPAPL 871 (1) provides as follows:

> "An action may be maintained by the owner of any legal estate in land for an injunction directing the removal of a structure encroaching on such land. Nothing herein contained shall be construed as limiting the power of the court in such an action to award damages in an appropriate case in lieu of an injunction or to render such other judgment as the facts may justify."

Whether an injunction directing the removal of a structure encroaching on a plaintiff's land should issue depends on all the equities between the parties, with consideration given to factors such as the extent of impairment created by the encroachment, the defendant's hardship in removing the encroachment, whether any alternatives would afford more equitable relief, or whether money damages would be a just and adequate remedy (*Marsh v Hogan*, 81 AD3d 1241, 1242-1243 [3d Dept 2011]). Essentially, plaintiff must establish that the benefit to be gained by compelling the removal of the scaffolding and shed outweighs the harm that would result to the defendants from granting the injunction (*Broser v Schubach*, 85 AD3d 957 [2d Dept 2011]). This test is, of course, akin to what plaintiff must establish to obtain a preliminary injunction pursuant to CPLR 6301, namely a likelihood of success on the merits of his claims, irreparable

injury absent the grant of injunctive relief, and the equities balanced in his favor (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; *276-8 Pizza Corp. v Free*, 118 AD3d 591, 593 [1st Dept 2014]).

Plaintiff argues that the front shed and scaffolding is encroaching on his property. He further contends that threat of harm is immediate and ongoing as the construction is nowhere complete, and that he is suffering irreparable harm due to the continued interference with the quiet use and enjoyment of, and ability to market and sell, his residence. Plaintiff argues that the equities are in his favor, because the scaffolding is not being utilized. He further avers that defendants have further trespassed upon his property by nailing coverings over the front shed and scaffolding directly into the brick of his building (Snyder 9/30 affidavit, ¶ 7). He submits certain photographs allegedly depicting these coverings (*id.*, Ex. C). In support of plaintiff's request for an injunction preventing after hours and weekend work, plaintiff avers that defendants' employees continued their construction.work well after 6:00 p.m. on both Thursday and Friday, September 25-26, 2014, and worked on Saturday, September 27, 2014 (*id.*, ¶ 3). Plaintiff claims this was in retaliation for his filing this lawsuit on September 19, 2014, because prior to this lawsuit, defendants' employees always conducted the construction work between 8:00 a.m. and 4:00 p.m. on weekdays pursuant to an oral agreement (*id.*; complaint, ¶ 30).

In opposition to plaintiff's request for injunctive relief, defendants admit that they have previously installed a sidewalk shed with scaffolding in front of the construction site, which extends approximately five feet into the airspace above the front of plaintiff's residence (*see* Kornfeld affidavit, ¶ 5; Sweeney 10/10 affidavit, ¶ 8). Apparently, the Building Department issued permits for the scaffolding in December 2013 (Kishner 9/30 affirmation, Ex. K).

Defendants submit an affidavit from John Hulme, R.A., a licensed professional architect, who avers that since 122 LLC's building is less than 100 feet in height, section 3307.6.2 of the Building Code requires that the sidewalk shed extend 5 feet past the building, and that removal of any portion of the front sidewalk shed and scaffolding prior to completion of the construction of the exterior shell of the project would be in violation of the Building Code (Hulme affidavit, ¶¶ 4, 8). In addition, defendants' expert contends that the shed and scaffolding were designed to minimize intrusion onto plaintiff's property by the installation of the legs on the sidewalk in front of 122 East 78th Street, at additional cost to 122 LLC (*id.*, ¶ 5).

Defendant Sweeney submits an affidavit by which he avers that SCI has attempted, on multiple occasions to accommodate plaintiff and only entered plaintiff's property after receiving permission. For example, in anticipation of performing demolition work, in July 2011, SCI wrote to plaintiff and asked and obtained his written permission to take action to protect his rear yard and terraces (Sweeney affidavit, ¶ 3 & Ex. A thereto; *see also* Kishner 10/29 affirmation, Ex. H). SCI would also email plaintiff or plaintiff's assistant to let them know when SCI needed access to plaintiff's property and the type of work it would be performing (*id.*, ¶ 4 & Ex. B; *see also* Kishner 10/29 affirmation, Exs. G, J, K, L). SCI attempted to perform certain drilling work when plaintiff was scheduled to be away on holiday in January 2014 (*id.*, ¶ 13 & Ex. H). SCI also, in a further attempt at accommodation, voluntarily agreed to cease construction activity during the times that plaintiff's real estate broker was showing the townhouse (*id.*, ¶ 14). When plaintiff complained that the construction work destroyed plants, shrubs and trees on his property, SCI, on at least two occasions, paid for and replaced the damaged plants (*id.*, ¶ 9 & Ex. D).

Sweeney avers that, on or about February 4, 2014, SCI again needed to gain access to plaintiff's property to provide protection and wrote to plaintiff seeking his approval (Sweeney affidavit, ¶ 5; Snyder 9/18 affidavit, Ex. A). This letter describes the work as follows:

> "We are required by the DOB to provide protection to your rear yard property and terraces during the concrete bracing wall installation phase of **122 East 78th Street**. We are also required to install scaffolding into your airspace at your South façade to install the concrete bracing wall against our existing party wall to support your SE wall.
>
> The scaffolding will be erected on the rearyard of **122 East 78th Street** from the 1st floor to the roof level. The scaffolding would cantilever over the property line into your airspace by four feet and would be 6 feet wide. The scaffolding in your air space would go from the second floor of 120 East 78th Street to the roof and would be covered in netting. We are prepared to install the scaffolding as soon as possible. The scaffolding would be in place for approximately 10 -14 weeks and the concrete phase of work would take 5 - 7 weeks.
>
> The protection on your South façade would be blue foam boards placed over the floor of your backyard, 1st floor terrace and roof top terrace prior to the installation of our scaffolding and also cover the railing and parapet with packing blankets. We will coordinate with your home staff access and which days we are performing the work. We would protect the two large vases on the terrace in place with plywood. The protection would remain in place until the concrete bracing wall in completed and the scaffolding is removed.
>
> We will provide and maintain a dustproofing membrane at all windows and doors in 120 East 78th Street that could be affected by the work during the concrete bracing wall installation phase. We agree to bear the cost of any clean-up within the house that might be caused by infiltration that escapes said dustproofing. We request that you notify us immediately of any dust or debris in the home due to demolition so that we may address and resolve the issue in a quick and timely manner."

(Snyder 9/18 affidavit, Ex. A). When no response was forthcoming, Mr. Verona followed up with an email on March 7, 2014, again asking plaintiff's permission, asking if he needed more information, and stating "they are starting to make some progress and this is a critical path item

for us" (*id.*, Ex. B). On March 10, 2014, plaintiff responded by email to Mr. Verona and Sweeney, stating: "You are forbidden, your representatives, contractors, sub-contractors, in effect anyone related to 122 East 78th, to ever enter my property at any time regarding any subject" (*id.*, Ex. C). Sweeney avers that SCI and its employees have not accessed plaintiff's property since that time (Sweeney affidavit, ¶ 6).

With respect to the claim that defendants secured a covering over the front shed and scaffolding to the brick face of plaintiff's building, defendants insist that this is not true. They submit an affidavit from Sanford Kornfeld, the owner's representative on the construction project, who avers that:

> "specifically to avoid permanently affixing the covering to the Adjacent Premises, I understand that SCI secured the covering by wrapping it around a piece of wood and placing another piece of wood on top. Importantly, no nails were involved in the securing of the covering. I also note that the sole purpose of this covering is to prevent water infiltration and damage to the Adjacent Premises."

(Kornfeld affidavit, ¶ 10). Defendants also deny plaintiff's claim that after hours and weekend work were performed in retaliation for his commencing this lawsuit. It appears that an "After Hours Work Variance Permit" was obtained from the Department of Buildings for the weekend work admittedly performed on Saturday, September 27, 2014 (*id.*, Ex. D). Mr. Kornfeld avers that his client's "only goal throughout this ordeal is to complete the Project as quickly as possible, not to engage in a tit-for-tac with its neighbor" (*id.*, ¶ 9). Defendants further contend that if any workers were at the site after 6:00 p.m., it was only for a few minutes to perform clean up work (*id.*).

While the court is mindful that this lengthy construction project has been a very annoying, tiresome, and seemingly never ending ordeal for plaintiff, his family and invitees to

suffer through, there can be no dispute that none of the parties, especially the plaintiff, would benefit from the removal of what is a legal and temporary encroachment into the airspace over plaintiff's property and halt the construction permanently. Plaintiff offers no evidence to support the allegations in the amended complaint, which is unverified, that the construction is interfering with plaintiff's ability to market and sell his residence. In addition, that document does not place blame on the existing scaffolding, but on the ongoing construction in general (*see* complaint, ¶¶ 24, 26). Thus, it is in everyone's best interest to keep the scaffolding in place and continue the construction project without delay. Even if the scaffolding was interfering with the sale of his residence, this is a harm that can be compensated by monetary damages. Plaintiff makes the claim that the scaffolding is not being utilized, presumably because the construction has been delayed so long. But there is no question that the building has been gutted and the construction project must be completed; the annoyance it causes plaintiff does not outweigh the need to protect the public during a construction project.

Plaintiff's request for a preliminary injunction removing the existing front shed and scaffolding is denied. Plaintiff has not shown imminent and irreparable harm absent the grant of the preliminary injunction, a likelihood of success on the merits, or that the balance of hardships tips in his favor. As for plaintiff's request for the removal of any permanent fasteners, the photographs attached to plaintiff's moving affidavit as exhibit C do not definitely show that these coverings were affixed to plaintiff's building with nails. Even if nails were used, no showing of irreparable harm is established. Likewise, plaintiff has not established a likelihood of success on the merits of his claim that defendants retaliated by working after hours and on weekends. A permit was obtained for the Saturday work on September 27, 2014. And defendants' voluntary

agreement to restrict the number of hours during the workweek when construction activities take place to between 8:00 a.m. and 4:00 p.m. shows only a good faith attempt to accommodate plaintiff and the other neighboring property owners.

For these reasons, plaintiff's motion for injunctive relief is denied.

Turning to the cross motions, defendant 122 LLC seeks a license to enter the airspace above a portion of the front and rear yard of the plaintiff's property pursuant to RPAPL 881. Plaintiff opposes this request in his cross motion, and seeks a host of additional relief. Although plaintiff's cross motion is untimely (CPLR 2215), these motion papers have been considered by the court only to the extent they address 122 LLC's cross motion seeking a license pursuant to RPAPL 881. This statute provides:

> "When an owner or lessee seeks to make improvements or repairs to real property so situated that such improvements or repairs cannot be made by the owner or lessee without entering the premises of an adjoining owner or his lessee, and permission so to enter has been refused, the owner or lessee seeking to make such improvements or repairs may commence a special proceeding for a license so to enter pursuant to article four of the civil practice law and rules. The petition and affidavits, if any, shall state the facts making such entry necessary and the date or dates on which entry is sought. Such license shall be granted by the court in an appropriate case upon such terms as justice requires. The licensee shall be liable to the adjoining owner or his lessee for actual damages occurring as a result of the entry."

"In determining whether or not to grant a license pursuant to Real Property Actions and Proceedings Law § 881, courts generally apply a standard of reasonableness" (*Matter of Board of Mgrs. of Artisan Lofts Condominium v Moskowitz*, 114 AD3d 491, 492 [1st Dept 2014], citing *Mindel v Phoenix Owners Corp.*, 210 AD2d 167 [1st Dept 1994], *lv denied* 85 NY2d 811 [1995]). Courts must balance the interests of the parties and issue a license "when necessary, under reasonable conditions, and where the inconvenience to the adjacent property owner is

relatively slight compared to the hardship of his neighbor if the license is refused" (*Matter of Chase Manhattan Bank (N.A.) v Broadway, Whitney Co.*, 57 Misc 2d 1091, 1095 [Sup Ct, Queens County 1968], *affd* 24 NY2d 927 [1969]).

Plaintiff argues that 122 LLC's cross motion for a license agreement must be dismissed, because it was not brought as special proceeding pursuant to CPLR Article 4. However, CPLR 103(c) allows a court to convert a motion into a special proceeding where it has jurisdiction over the parties and "finds it appropriate in the interests of justice" (*see Mindel v Phoenix Owners Corp.*, 210 AD2d at 167-168; *Ponito Residence LLC v 12th St. Apt. Corp.*, 38 Misc 3d 604, 611-612 [Sup Ct, NY County 2012]). Here, 122 LLC's cross motion gives notice that it is seeking relief under RPAPL 881, the motion is supported by competent evidence, and plaintiff has been given an opportunity to submit arguments and evidence in response by way of his cross moving papers.

Plaintiff also argues that the court should deny 122 LLC's request for a license, because his counsel claims that the construction undertaken thus far has damaged the party wall that separates the two properties and submits certain photographs allegedly depicting the damage (*see* Kishner 10/29 affirmation, ¶¶ 6; Miller affirmation, ¶ 3 & Ex. P). These photographs, however, contains no external reference points to identify the orientation of the photograph or what wall is being depicted. Indeed, defendants contend that the brick wall opening depicted in the photographs is an independent wall extending from the rear of 122 East 78th Street and that this wall is entirely on 122 LLC's land (*see* Block 10/30 affirmation, ¶ 8). What is clear from a survey of the properties is that the party wall extends only to the end of plaintiff's smaller building, and that there is or was an additional wall extending further south into 122 LLC's

property (*see* Kornfeld affidavit, Ex. F). On this record, plaintiff has failed to raise a triable issue of fact that the shared party wall has been damaged by defendants' underpinning and foundation work,[1] work which was approved by the Building Department and performed some time ago. It is also settled law that either owner of a party wall may increase the height of the wall or deepen its foundation so long as it is done without injury to the adjoining building (*see Brooks v Curtis*, 50 NY 639, 642-643 [1873]; *Sakele Bros. v Safdie*, 302 AD2d 20, 25-26 [1st Dept 2002]; *25 W. 74th St., Corp. v Wenner*, 268 AD2d 387, 387-388 [1st Dept 2000]; *Schneider v 44-84 Realty Corp.*, 169 Misc 249, 253 [Sup Ct, Bronx County 1938], *affd* 257 App Div 932 [1st Dept 1939]).

Without the existing front and proposed rear scaffolding, the construction project cannot be completed. The license requested by 122 LLC must be granted, but only on terms and conditions that are fair to plaintiff.

Counsel for 122 LLC has drafted a proposed license agreement that incorporates some, but not all, of the terms that plaintiff has previously identified in his original, now withdrawn, motion for injunctive relief that plaintiff requested be included in a court-ordered license (Block 10/10 affirmation, ¶ 5 & Ex. B). This proposed license agreement describes the new intrusions on plaintiff's property as follows:

> "(1) temporary overhead protection in the rear yard of the Adjacent Premises, including but not limited to sidewalk bridging and scaffolding, as well as scaffolding installed on the Project Premises which will extend into the airspace above the Adjacent Premises, and (2) all other temporary protections required by the New York City Department of Buildings ("DOB") to be installed on the Adjacent Premises in order for Project Owner to protect the Adjacent Premises until their removal at the completion of the construction of the exterior shell of the Project in accordance with all applicable laws, rules, regulations, codes and

[1] Plaintiff submits no evidence in support of the complaint's allegation that his rear deck has become separated from the party wall (*see* complaint, ¶ 18).

directives of governmental entities having jurisdiction over the Project . . . ." (*id.*, Ex. B at 3). Notably, this description of the existing and proposed encroachments on plaintiff's property is rather vague, and much less specific than Sweeney's February 4, 2014 letter originally requesting access. At a minimum, the license agreement needs to include a more specific description of the structures and protective items being placed on/over plaintiff's property and the reason for the same.

The term of the proposed license agreement is from execution to "the date upon which a temporary certificate of occupancy is issued for the Project" (Block 10/10 affirmation, Ex. B at 5). This is completely unacceptable. Indeed, 122 LLC's notice of cross motion states that the construction of the exterior shell of its new building "is expected to be completed in approximately three (3) months" and Sweeney's February 4th letter had stated that "[t]he scaffolding would be in place for approximately 10 - 14 weeks" (Snyder 9/18 affirmation, Ex. A). Accordingly, the license will expire in three months time. If this phase of the construction is not completed at that point in time, 122 LLC may seek a court-ordered extension if they can document a legitimate reason for the continued delay (i.e, severe weather) and upon any further terms and conditions the court deems appropriate.

The following is a list of the terms that plaintiff requested and 122 LLC is willing to offer: (i) 122 LLC to indemnify and hold plaintiff harmless for potential property damage to and/or personal injury due to defendant's construction work; (ii) 122 LLC to provide insurance for potential property damage and/or personal injury, with plaintiff to be named as an additional

insured;[2] and (iii) 122 LLC will install remote access vibration monitor on the first floor of plaintiff's residence to determine the impact on vibrations emanating from the construction site (*compare* Exs. A & B to Block 10/10 affirmation). All of these items are appropriate and should be included in the license.

Plaintiff, however, demands some additional terms such as a license fee for the encroachment onto and use of plaintiff's property. Courts have awarded license fees as a condition of a license pursuant to RPAPL (*see In re North 7-8 Investors, LLC v Newgarden*, 2014 WL 5410753 [Sup Ct, Kings County 2014] [license fee of $3,500 a month for allowing a cantilevered balcony protrude 6 feet into respondent's airspace and 6 feet above his roof deck for approximately one year]; *MK Realty Holding LLC v Scneider*, 39 Misc 3d 1209(A), 2013 N.Y. Slip Op. 50551(U) [Sup Ct, Queens County 2013] [$1,000 fee for 15-day license to erect a scaffold on an adjoining property]; *Ponito Residence LLC v 12th St. Apt. Corp*, 38 Misc 3d at 613 [$1,500 monthly fee as a condition of a license to maintain a sidewalk shed which extended 20 feet in front of adjoining property]; *Matter of Rosma Dev. LLC v South*, 5 Misc 3d 1014(A), 2004 NY Slip Op 51369(U) [Sup Ct, Kings County 2004] [$2,500 monthly fee for erection of sidewalk bridging, abutting approximately 10 feet onto the sidewalk in front of respondents' real property]).

The court finds that a license fee is proper in this case given the extensive delay in the

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[2] 122 LLC has a commercial general liability policy with a $10 million per occurrence limit, and Sweeney has a commercial general liability policy with limits of $2 million per occurrence, $4 million in the aggregate, with an additional $13 million combined per occurrence limit in umbrella/excess coverages" (Block 10/10 affirmation, ¶¶ 7, 8 & Ex. C). Apparently, plaintiff has already been named as an additional insured on 122 LLC's commercial general insurance policy as of October 8, 2014 (*see* Kornfeld affidavit, Ex. C).

completion of this construction project, the fact the front scaffolding was erected more than 3 years ago when a building permit was only obtained in December 2013, and that no one can seriously doubt that this seemingly never-ending construction project has substantially interfered with plaintiff's quiet use and enjoyment of his own residence and may be the cause of his inability to sell his residence. I find that a fee of $3,000 a month is just and equitable under the circumstances, to be substantially increased if the work is not completed within four months from issuance of the license. Defendants may not enter upon plaintiff's property to construct the additional scaffolding until the first monthly payment is made, by certified funds, and each monthly payment will be due 30 days thereafter. The request for attorney and other professional fees is denied.

In addition, plaintiff shall have the right, at his own expense, to have an engineer, architect or other professional inspect and/or monitor the work that has been performed to date and is being performed, on 24 hours written notice to counsel for 122 LLC and SCI. Plaintiff shall also be provided with a free copy of any and all plans and drawings detailing the work to be performed, and defendants shall prepare and deliver every Friday, by 5:00 p.m., a description of what work was performed that week, a summary of what work is being planned for the following week, and a percentage estimate of how much time is needed to complete construction of the exterior shell of the building.

Any and all discovery issues shall be addressed at a preliminary conference.

CONCLUSION

For the foregoing reasons, plaintiff's motion for injunctive relief pursuant to CPLR 6301 and RPAPL 871 (1) is denied. 122 LLC's cross motion, pursuant to RPAPL 881, for a license to

enter the airspace above a portion of the front and rear yard of the plaintiff's property is granted on the terms and conditions set forth in this decision. **Counsel for 122 LLC is directed to settle an order, on 2 business days notice directly to chambers, attaching a license that conforms to the terms and conditions set forth in this decision.** Plaintiff's cross motion for various relief is denied.

Dated: November 17, 2014

J.S.C.

DONNA M. MILLS, J.S.C.