

House 93, LLC v Lipton
2019 NY Slip Op 31855(U)
June 25, 2019
Supreme Court, New York County
Docket Number: 161159/2018
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

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INDEX NO. 161159/2018

HOUSE 93, LLC,

MOTION DATE 06/18/2019

Petitioner,

MOTION SEQ. NO. 001

- v -

HEIDI LIPTON,

DECISION AND ORDER

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 35, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80

were read on this motion to/for

MISC. SPECIAL PROCEEDINGS

ORDER

Upon the foregoing documents, it is

ORDERED that, for sixty days from service of this order with notice of entry and of the issuance of the additional insured endorsement on the policy of commercial general liability insurance, whichever is later, petitioner is hereby granted a license, pursuant to RPAPL 881, to enter upon a portion of respondent's land (Adjacent Property) (1) to install approximately twenty (20) feet of overhead netting for the purpose of protecting a small portion of the rear yard of the Adjacent Property as required by the New York City Administrative Code, Building Code of the City of New York and the Department of Buildings (Required Protective Measures) for the petitioner to finish constructing the cement block shell of

a two-story addition to the rear of the petitioner's property, which addition will have a footprint of approximately 318 square feet; and (2) to temporarily remove, and subsequently reinstall, an existing wooden fence located on the boundary line that separates the backyards of the petitioner's property and the Adjacent Property for the purpose of applying, with rollers, a waterproofing membrane, as well as applying stucco, on the exterior portion of the nineteen and one-half (19.5) foot long by twenty-four and one-half (24.5) foot high western wall of the addition, which wall is located adjacent to the portion of the boundary line of such properties that is separated by the wooden fence; and it is further

ORDERED that the installation of the Required Protective Measures will be carried out as aforesaid pursuant to the customary and standard practices used in the building construction industry as certified by an engineer licensed in the State of New York and retained by petitioner; and it is further

ORDERED that the granting of the foregoing license is subject to the following terms and conditions: (1) petitioner shall take the necessary steps, measures, and precautions to prevent and avoid any damage to the Adjacent Property; (2) upon the completion of the term of the license, the Adjacent Property within such license area shall be returned to its original

condition, and all materials used in construction and any resultant debris shall be removed from such license area; (3) petitioner shall save respondent harmless from any damages occurring within the license area, during the period of this license, and a policy of commercial general liability insurance, including but not limited to, coverage for contractual liability, personal injury, bodily injury and property damage, which names respondent as additional insured, shall be maintained by petitioner during the period of this license; and (4) petitioner shall be held liable to respondent for any damages which it may suffer as a result of the granting of this license and all damaged property shall be repaired at the sole expense of petitioner; and it is further

ORDERED that petitioner shall tender, as the licensing fee, the amount of \$ 2,000 monthly payable to respondent, which payment shall be delivered to the office of respondent's attorney, on the 20th day of each such month until completion of the term of the license; and it is further

ORDERED petitioner shall post with the Clerk of New York County an undertaking in the amount of \$ _____ to be determined by a JHO/Special Referee, to cover reasonable attorneys' fees incurred by respondent as the result of such license and petitioner's entry upon the Adjacent Property pursuant to such license, and upon the completion of the term of

the license, such amount shall be paid by petitioner to respondent; and it is further

ORDERED that this matter having come on before this court on June 18, 2019, on application of the petitioner for license pursuant to Real Property and Proceedings Law § 881 at oral argument of the written submissions, and the petitioner having been represented in connection therewith by Anthony J. Novella, Esq., and the respondent having been represented in connection therewith by Carl T. Peluso, Esq., pursuant to CPLR 4317, and it appearing to the court that a reference to determine is proper and appropriate pursuant to CPLR 4317 (a), it is now hereby

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to determine the following individual issue of fact, which is hereby submitted to the JHO/Special Referee for such purpose

(1) the issue of the amount of an additional undertaking, to cover reasonable attorneys' fees incurred by respondent as the result of petitioner's entry upon the Adjacent Property pursuant to such license, to be posted with the Clerk of New York County, and such amount to be paid by petitioner to respondent upon termination of the license; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR unless otherwise indicated; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the

date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly.

DECISION

Petitioner has established that the stop work order had been resolved and the ECB violation corrected, as of the time the petition and responsive papers were fully submitted. The respondent is incorrect that, on its application for the first time at oral argument and without any prior notice to petitioner and only after both sides fully submitted their papers on this petition and agreed and were granted serial adjournments of the hearing on such papers for the purpose of engaging in settlement negotiations, this court was compelled to take judicial notice of a subsequently issued stop work order. See Walker ex rel. Velilla v City of New York, 40 AD3d 278, 282 ((1st Dept. 2007)).

Nor is this court persuaded, assuming arguendo such a stop work order exists, that the existence of such stop work order alone, without any infirmity in the petition, such as a failure

of the petition to memorialize items sought in "specific plans filed and approved by the Department of Buildings" is fatal to the herein application. Compare Matter of Burch LLC v Moskowitz, 148 AD3d 528 (1st Dept. 2017); Mindel v Phoenix Owners Corp., 210 AD2d 167 (1st Dept. 1994), lv denied 85 NY2d 811 (1995). As petitioner has demonstrated the reasonableness and necessity of the trespass, the petition for a license pursuant to RPAPL § 881 shall be granted. See Van Dorn Holdings, LLC v 152 W. 58th Owners Corp., 149 AD3d 518 (1st Dept. 2017); Moskowitz v Pavarini McGovern, LLC, 83 AD3d 438 (1st Dept 2011); and DDG Warren LLC v Assouline Ritz 1, LLC, 138 AD3d 539 (1st Dept. 2016).

<u>6/25/2019</u> DATE					 DEBRA A. JAMES, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER	
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input checked="" type="checkbox"/> REFERENCE	