

Feldman v 3588 Nostrand Ave. LLC
2020 NY Slip Op 31274(U)
May 6, 2020
Supreme Court, Kings County
Docket Number: 526048/18
Judge: Leon Ruchelsman
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At an IAS Term, Commercial Part 8 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 6 day of May, 2020.

P R E S E N T:
HON. LEON RUCHELSMAN,

Justice.

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MARTIN FELDMAN, AS TRUSTEE OF THE MARTIN
FELDMAN FAMILY REVOCABLE TRUST,

Decision and Order

Plaintiff,

Index No. 526048/18

- against -

Motion Sequence Nos. 1, 2, 3

3588 NOSTRAND AVENUE LLC,

Defendant.

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The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Cross Motion, Affirmation (Affidavit), and Exhibits Annexed _____	<u>24, 3-7, 19, 57-59; 27-33; 106-108, 126</u>
Affirmation (Affidavit) in Opposition and Exhibits Annexed _____	<u>62-35; 129-131</u> Reply
Affirmation (Affidavit) and Exhibits Annexed _____	<u>93, 95</u>
Affirmation (Affidavit) in Sur-Opposition and Exhibits Annexed _____	<u>150</u>
Sur-reply Affirmation (Affidavit) and Exhibits Annexed _____	<u>145</u>
Independent Expert Reports and Parties' Affirmation (Affidavit) _____	<u>153, 157, 155/159, 154/158</u>

In this dispute between two neighboring property owners, plaintiff Martin Feldman, as Trustee of the Martin Feldman Family Revocable Trust (plaintiff), moves, by order to show cause, in motion sequence no. 1, for an order granting a preliminary injunction

restraining defendant 3588 Nostrand Avenue LLC (defendant) from performing machine work, excavation work, digging, and erection work within five feet of the property line of the two neighboring parcels, respectively owned by plaintiff and defendant. Defendant cross-moves, in motion sequence no. 2, for an order, pursuant to Real Property Actions and Proceedings Law § 881, granting it a license to access and occupy plaintiff's property to permit it to perform improvements on its own property. Plaintiff also moves, in motion sequence no. 3, for an order of contempt against defendant.

Background

This action relates to defendant's need to access plaintiff's property to complete construction work improving its own property, and alleged property damage to plaintiff's property caused by defendant's construction activities. Plaintiff owns the property located at 3590 Nostrand Avenue, Brooklyn, New York, and defendant owns 3588 Nostrand Avenue, which is directly north of plaintiff's parcel. Plaintiff's property maintains a one-story brick commercial structure (premises) and an asphalt driveway, which borders defendant's property.¹ In November 2016 when defendant purchased its property, it was encumbered by a two-story commercial structure. Additionally, steel bollards, installed by plaintiff's predecessor-in-interest, positioned just north of plaintiff's driveway, allegedly denoted the property line.

¹ Plaintiff's premises is occupied by commercial tenants.

Beginning in summer 2017, defendant began construction activities with the intention of demolishing the existing commercial structure on its property to construct a new commercial structure in its place. In furtherance of this, defendant installed a plywood construction fence enclosing its property, which included enclosure of the steel bollards along defendant's southern property line, abutting plaintiff's driveway. Defendant proceeded to remove the steel bollards and demolish the existing commercial structure. In 2018, defendant commenced and completed significant construction work, including excavation and the laying of a cement foundation.

During the course of defendant's construction activities, the parties engaged in ongoing discussions and negotiations relating to defendant's acquisition of a license to access plaintiff's property to complete the work and also to install certain construction apparatuses. Principally, defendant sought a license granting it access to the airspace above plaintiff's driveway to install scaffolding and netting, and permission to install roof and parapet protection extending five feet from plaintiff's commercial structure. During the negotiations, defendant paid plaintiff the sum of \$15,000, purportedly to cover the cost of professional fees plaintiff would incur prior to the entry of the license agreement.

The Lawsuit and Motions

Subsequent to the excavation and foundation work, plaintiff commenced the instant action asserting ten causes of action, including, nuisance, trespass, and negligence. Among other allegations, plaintiff asserts it sustained property damage to its driveway and its

premises due to defendant's construction activities. Shortly after filing the summons and complaint, plaintiff's moved, in motion sequence one, for an order granting a preliminary injunction enjoining defendant from performing machine work, excavation work, digging, and erection work within five feet of the property line of the two neighboring parcels. This court, per the order to show cause dated January 8, 2019, placed a temporary restraining order for the same, pending the determination of motion sequence one. Defendant then cross-moved for an order, pursuant to RPAPL § 881, granting it the aforementioned license to access plaintiff's property. Thereafter, the court ordered independent reports to determine, among other things, the property line of the properties and whether the alleged damages to plaintiff's property was caused by defendant's construction activities.

During the pendency of the motions, defendant received a citation from the New York City Department of Buildings (DOB), relating to the construction fence it erected around its premises. Defendant sought permission from the court to complete necessary repairs to the fence to cure the violation, as the fence is within five feet of the property line. This court, from the bench, ordered that such work could be performed, provided defendant add plaintiff as an additional insured and provide indemnification. Subsequent to this bench decree, defendant purportedly completed the necessary repairs, but allegedly did not add plaintiff as an additional insured; nor did it agree to indemnification language. As a result, plaintiff also moves, in motion sequence three, for an order of contempt against defendant.

Preliminary Injunction

Plaintiff's Position

Plaintiff argues that absent the institution of a preliminary injunction, it will continue to suffer irreparable harm due to defendant's conduct. It maintains that defendant's trespass, negligence, and nuisance have caused undeniable damage to its property (aff of Gwendy Feldman at 16, ¶ 87). Supporting its contentions, plaintiff proffers, among other evidence, the affidavits of (1) Ms. Gwendy Feldman, a trustee of plaintiff, (2) Ms. Briana Vargas, an investigator, (3) Mr. Harry Toung, professional architect, (4) Mr. Gerald T. O'Buckley, professional land surveyor, (5) Mr. Ron Becker, professional geotechnical Engineer, and (6) Mr. Liviu Schwartz, professional structural engineer.²

Ms. Feldman's Affidavit

Ms. Feldman attests that due to defendant's construction activities, plaintiff's parcel has experienced continuing encroachments. Among the trespasses, Ms. Feldman asserts that defendant's construction fence encumbers plaintiff's property. Further, Ms. Feldman avers that defendant covertly removed the bollards from its property, which caused significant damage to plaintiff's driveway. Ms. Feldman also states that defendant intentionally placed construction debris on plaintiff's driveway. She asserts that the encroachments and accompanying property damage have made usage of the driveway unsafe for plaintiff's commercial tenants.

² Among the other evidence presented by plaintiff are photographs illustrating the alleged damage to its property and trespass, as well as schematics denoting the properties' alignment to one another.

Additionally, Ms. Feldman avers that defendant's demolition and excavation work caused intense noise and vibrations resulting in physical damage to plaintiff's premises, and frustrated plaintiff's commercial purpose by interfering with its tenants' businesses. Ms. Feldman also details the extensive process between plaintiff and defendant in efforts to finalize a license agreement between the parties for defendant's lawful entry and use of plaintiff's parcel to complete its construction work. She maintains that a license agreement was never reached due to defendant's unreasonable demands.

Ms. Feldman insists that the preliminary injunction is necessary to preserve the status quo as defendant has demonstrated complete disregard for plaintiff's property rights. Absent a preliminary injunction, Ms. Feldman maintains that plaintiff will continue to experience irreparable harm both by way of physical damage to its property and the frustration of its business enterprise. Further, she contends that the supporting affidavits of Ms. Vargas (investigator), Mr. Toung (architect), Mr. O'Buckley (land surveyor), Mr. Becker (geotechnical engineer), and Mr. Schwartz (structural engineer), demonstrate plaintiff's likelihood of success on the merits of its trespass, negligence, and nuisance causes of action.

Ms. Vargas' Affidavit

Ms. Vargas attests that in January 2019, she visited plaintiff's property and could observe and hear construction activities occurring on defendant's property. She avers that while standing on plaintiff's property, she could feel vibrations and hear loud noises emanating from defendant's parcel.

Mr. Toung's Affidavit

Mr. Toung, a professional architect, opines that defendant's continuing construction activities are causing irreparable harm to plaintiff's property and that, should defendant erect additional construction apparatuses, including scaffolding, it would further interfere with plaintiff's use of its driveway. Mr. Toung specifically provides that defendant's demolition, excavation, and the laying of its foundation has caused damage to plaintiff's entire driveway and that defendant's construction fence encumbers plaintiff's property. Mr. Toung also attests that his review of defendant's construction plans leads him to determine that defendant's future construction work will result in further and permanent encumbrances on plaintiff's property, and continue to frustrate plaintiff's and its tenants' use of the driveway. Beyond these actions, Mr. Toung asserts that defendant failed to adhere to its construction plans filed with the DOB, specifically, that defendant failed to adequately monitor its construction activities or provide a protection plan to plaintiff. Thus, Mr. Toung opines that defendant has performed its construction negligently, resulting in damage to plaintiff's property, trespass, and nuisance, each causing irreparable harm to plaintiff.

Mr. O'Buckley's Affidavit

Mr. O'Buckley, a professional land surveyor, opines that he performed a survey of plaintiff's property and determined that defendant committed various acts constituting trespasses onto plaintiff's property. He asserts that the cement foundation laid by defendant likely extends onto plaintiff's property. Additionally, he opines that the steel bollards defendant removed resided on plaintiff's property. Thus, the removal of the bollards and the

erection of the construction fence both constitute individual trespasses. Accordingly, Mr. O'Buckley concludes that defendant's trespasses are not only significant, but caused damaged to plaintiff's property.

Mr. Schwartz's Affidavit

Mr. Schwartz, a professional structural engineer, opines that the driveway sustained extensive damage as a result of defendant's construction activities, principally its excavation work. He also asserts that plaintiff's premises displays cracks and separation of bricks on structural walls, which is directly attributable to defendant's construction activities. Mr. Schwartz asserts this structural damage resulted from vibrations emanating from defendant's worksite and the resulting shifting of soil caused by defendant's work. He concludes that absent essential protective measures, if defendant's work continues, plaintiff will suffer continuing damages to its property.³

Mr. Becker's Affidavit

Mr. Becker opines that due to defendant's construction activities, the soil supporting plaintiff's driveway was disturbed resulting in damage to the driveway, making it unsafe and unsuitable for use. Further, he opines that continuing construction activities will result in additional damage to both the driveway and plaintiff's premises. The damage to plaintiff's premises, Mr. Becker opines, manifests in cracks and separation of bricks on the structural wall facing defendant's property. In addition to soil disruption, Mr. Becker contends

³ Beyond monitoring vibrations, Mr. Schwartz does not expound on these essential protective measures.

vibrations emanating from defendant's worksite contribute to the damage to plaintiff's property.

Hence, plaintiff argues it has established its entitlement to a preliminary injunction restraining defendant from performing machine work, excavation work, digging, and erection work within five feet of the property line by demonstrating, by way of the affidavits and supporting exhibits, its likelihood of success on the merits of the action, irreparable harm, and that the balance of equities are in its favor. Plaintiff contends that it is beyond dispute that defendant and its agents have on numerous occasions, and continuously, entered onto its property without permission. Further, it asserts that such trespass includes the removal of its property, i.e. the bollards, and both temporary and permanent encumbrances by way of the construction fence and cement foundation. Plaintiff contends it conclusively established that defendant's construction activities damaged its driveway and premises, resulting in irreparable harm to it. Further, it maintains that if defendants are able to continue with its construction activities, it poses dangerous and hazardous conditions to plaintiff's property, damaging its property rights, its quiet enjoyment and use of its property, and increases the risk of bodily harm to individuals on its property. As such, plaintiff maintains that the balance of equities requires the court to grant a preliminary injunction in its favor.

Defendant's Position

Defendant, in opposition, asserts principally that plaintiff failed to demonstrate a likelihood of success on the merits or that it has suffered irreparable harm. It support of its

position, defendant presents the affidavits of, among others, Mr. Arkady Agres, member of defendant, Mr. Leonid Krupnik, a professional engineer, and Mr. Arnold Pecheny, a professional land surveyor.

Mr. Arges' Affidavit

Mr. Agres attests that defendant's construction activities have not resulted in nuisance or trespass against plaintiff; nor has defendant performed any work in a negligent fashion causing damages to plaintiff's property. Addressing plaintiff's nuisance allegations, Mr. Agres asserts that plaintiff failed to show clear and convincing evidence that defendant activities resulted in any actionable form of nuisance. Critically, defendant contends plaintiff showed no diminution of value in plaintiff's property. Specifically, Mr. Agres asserts that based upon defendant's monitoring data, all vibration emanating from the worksite fell within the limits set by the DOB. Turning to plaintiff's trespass allegations, Mr. Agres asserts that plaintiff failed to demonstrate, by clear and convincing evidence, that the construction fence encumbers plaintiff's property or that its foundation extends beyond the property line. He also contends that plaintiff failed to present any evidence that, in the event either trespass did occur, that such trespasses materially interfered with the use or occupation of its property. Finally, rebutting plaintiff's negligence allegations, Mr. Agres argues that plaintiff again failed to present clear and convincing evidence that any of the alleged damages sustained to plaintiff's property were caused by defendant's negligence. Mr. Agres asserts that applicable authority shifts the burden onto plaintiff, as the adjoining landowner,

to protect against potential property damage caused by soil disruption and foundation work, due to plaintiff refusal to grant defendant access to plaintiff's property to complete the construction work. Further, Mr. Agres contends that on numerous occasions defendant attempted to acquire a license from plaintiff to access its property in order to install protective equipment; however, despite providing plaintiff a payment of \$15,000, it refused to grant defendant a license.

Mr. Krupnik's Affidavit

Mr. Krupnik counters plaintiff's assertions that the foundation encumbers its property, and that the construction activities have resulted in a nuisance. He asserts that defendant's foundation resides wholly on defendant's property, laying 2 inches north of the property line. Further, Mr. Krupnik avers that defendant's construction activities were monitored to ensure vibrations were within the guidelines set by the DOB. He also maintains that the monitoring was not required as the depth of the excavation was only 11 feet, and based upon the positioning of the properties, such depth does not require vibration monitoring. Principally, Mr. Krupnik opines that any exterior damage to plaintiff's premises was not caused by defendant's construction activities, but were pre-existing conditions. Supporting his conclusions, Mr. Krupnik notes that the damage plaintiff cites as being caused by defendant's construction activities were itemized in defendant's pre-construction survey.

⁴ Mr. Krupnik also proffered a reply affidavit specifically addressing the affidavits of Messrs. Becker and Schwartz, which were submitted out of sequence. Fundamentally, Mr. Krupnik rejects the various assertions made by Messrs. Becker and Schwartz and maintains the opinions he attested to in his initial affidavit.

Mr. Pecheny's Affidavit

Mr. Pecheny, a professional land surveyor, opines that the bollards removed by defendant resided wholly on its property. He further asserts that Mr. O'Buckley's survey does not indicate the location of the temporary construction fence, and therefore, cannot be a reliable source to support the contention that the construction fence encumbers plaintiff's property.⁵ He also states that his review of multiple land surveys indicates that the construction fence resides along the property line, not on plaintiff's property.

Defendant's principal argument is that plaintiff is not entitled to a preliminary injunction as it failed to prove that it would likely succeed on the merits of its causes of action. Defendant asserts beyond the self-serving affidavit of Ms. Feldman, plaintiff presents no evidence of an on-going pattern of noise and vibrations emanating from defendant's property constituting a nuisance. It further points to Mr. Agres' affidavit and exhibited monitoring data which it maintains demonstrates that the construction activity fell within the approved limits promulgated by the DOB. Thus, defendant contends that plaintiff is not likely to succeed on the merits of its nuisance cause of action.

Turning to plaintiff's trespass cause of action, defendant argues that contrary to Mr. Toung's affidavit, its survey and Mr. Pecheny's affidavit support its position that defendant's construction activities have not resulted in a trespass upon plaintiff's property. Further,

⁵ Mr. Pecheny's affidavit fails to include the county wherein he attested to his statements; however, the affidavit is notarized and no party raises this issue. As such, the court shall consider the affidavit (*see generally Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 202 [2d Dept 2019]).

defendant highlights not only the proffered affidavits rebutting plaintiff's assertions that the construction fence and laid foundation encumber its property, but also the various schematics of the construction site, which demonstrate the work is restricted to defendant's property. Finally, regarding plaintiff's negligence cause of action, defendant relies upon applicable regulations promulgated by the DOB, wherein it maintains that due to plaintiff's refusal to grant it a license to access its property to perform its construction work, that liability for any damages caused by its construction activities rest solely on plaintiff. Further, defendant submits that its exhibited pre-construction inspection report identifies the alleged damages to plaintiff's property as pre-dating its construction work.⁶ Accordingly, defendant argues any damage to plaintiff's premises cannot be attributed to its construction activities.

Defendant further maintains that preliminary injunction is inappropriate herein as plaintiff's alleged injuries are not within the class of injuries deemed to be irreparable. In this regard, defendant argues that each alleged injury is compensable by a monetary award. Beyond this, defendant argues the balance of equities do not favor plaintiff. Defendant asserts should the preliminary injunction be granted, its right to improve its property will be violated and it will sustain significant financial hardship. Thus, defendant argues that plaintiff's request for preliminary injunction relief must be denied for the aforementioned reasons.

⁶ Defendant rebuts all ten causes of action asserted by plaintiff; however, per the moving papers, plaintiff is seeking the enforcement of the preliminary injunction on the basis of its first three causes of action (negligence, nuisance, and trespass).

Alternatively, defendant asserts that in the event a preliminary injunction is granted, plaintiff must deposit an undertaking in an amount of \$504,000 pursuant to applicable statutory authority. Defendant contends it will suffer financial damages in the amount of \$42,000 per month if a preliminary injunction is granted. Defendant notes that the undertaking amount is based on its anticipation of a resolution of the action within twelve months of the filing of the motion.

Plaintiff's Reply

In reply, plaintiff proffers additional affidavits from Mr. Toung and Mr. Schwartz, and asserts that throughout the course of the construction work, defendant routinely failed to comply with applicable codes and statutes, which further necessitates the imposition of the preliminary injunction. It reiterates that defendant's excavation activities resulted in a permanent encroachment onto its property, the destruction of its driveway, and may have resulted in the premises' foundation shifting. Additionally, plaintiff rejects defendant's pre-construction survey. It argues the exhibit holds no evidentiary weight as it fails to account for the condition of the driveway prior to defendant's construction activities or the interior of plaintiff's building. Focusing on the excavation activities, plaintiff argues that, per defendant's own expert affidavits, defendant's excavation work deviated from the plans filed with DOB. Thus, plaintiff contends this conduct is evidence of misfeasance or an attempt to evade monitoring requirements. In any event, plaintiff argues that even accepting defendant's positions on the construction work, its foundation would still constitute a trespass and permanent encumbrance on its (plaintiff's) property.

Court Ordered Independent Reports

Pursuant to a court order, Murray Engineering, P.C. and Fehringer Surveying conducted independent reviews of the properties and produced independent reports encompassing the property lines of the premises and the impact, if any, defendant's construction activities had on plaintiff's property.

Fehringer Surveying Report

The Fehringer Surveying report (survey report), after reviewing various reports and surveys, established an independent property line for Murray Engineering to rely upon for the purposes of determining defendant's construction activities' effects on plaintiff's property. The survey report, based upon its determined property line, concluded that a trespass did exist by way of a wood lagging used in defendant's foundation work. The survey report found that the lagging extended beyond the property line onto plaintiff's property by a measurement of 3/4 of an inch.

Murray Engineering Report

The Murray Engineering report (engineering report) provides an independent review of the construction and excavation work performed by defendant, specifically those activities bordering the property line of the parties. The engineering report opines on the extent and cause of the damage to the driveway and the premises, and whether future monitoring is required for the construction work to be completed.

Summarizing its conclusions, the engineering report provides:

“[The report] identified several types of damage within 4 feet of the Plaintiff’s north property line including: 1) cracked asphalt pavement, 2) missing sections of asphalt pavement, 3) sunken portions of asphalt pavement, and 4) voids in the soil below the driveway. It is our professional opinion, within a reasonable degree of engineering certainty, that these driveway damages were caused by settlement resulting from the Defendant’s excavation work, and that the extent of this damage is limited to within 4 feet of the property line.

[The report] identified three areas of damage on the Plaintiff’s building facades adjoining the defendant’s construction work. These damages include: 1) mortar joint cracks, 2) steel lintel corrosion, and 3) corner separation. It is our professional opinion, within a reasonable degree of engineering certainty, that the facade damages listed above were not caused by vibration or subsidence resulting from the Defendant’s excavation work. Three points support our conclusion: 1) the Defendant’s excavation and pile driving work was wholly outside the zone of influence on the Plaintiff’s foundation, 2) the damage observed throughout the north facade are clearly the result of oxide jack (a.k.a. “rust jacking”) due to the oxidation of steel window and door lintels, and 3) despite its poor quality, the preconstruction survey does show damage” (NY St Cts Elec Filing [NYSCEF] Doc No. 154 at 3).

The engineering report asserts that a majority of the driveway damage is located within close proximity to the property line. The engineering report concludes that the specific activities which precipitated the damage were, among other things, defendant’s failure to thoroughly backpack the soil lagging during the installation of the soil retention system during the excavation work. Supporting its conclusion, the engineering report identifies distinct damage on the driveway’s north side (bordering defendant’s property) and

its south side (bordering the premises). The engineering report provides that while the south side is not free of damage, the defects are not consistent with the soil settlement attributable to defendant's construction activities. The engineering report does opine that the damage to the driveway would have likely occurred even if defendant complied with industry standards. Further, it states the damage is of the degree that is likely to occur with any significant excavation work to an adjacent property and a similarly constructed asphalt driveway.

Shifting to the premises damage, the engineering report found that the damage observed was not caused by defendant's construction activities. Beyond the aforementioned scope of influence and the oxide jacking, the report found the damage to be inconsistent with soil disturbance or vibrations. Thus, the engineering report concludes that defendant's construction activities did not cause any structural damage to plaintiff's premises.

Additionally, the engineering report made determinations as to, among other items, the depth of the excavation, encroachment, and the need of a seismic gap between defendant's construction and the property line. As to these issues, the engineering report determined the maximum depth of the excavation was 10.17 feet, that the bollards, which defendant removed, resided primarily on defendant's property, that the temporary wood construction fence encroaches plaintiff's property by a measure of .32 feet and that, as identified in the survey report, a wood lagging encroaches plaintiff's property by a measure of .06 feet.

Plaintiff's Response to Survey Report and Engineering Report

Plaintiff asserts that the survey and engineering reports establish the necessity to impose a preliminary injunction against defendant. Principally, plaintiff argues that the engineering report demonstrates that the construction activity caused damage to its driveway and that both reports conclude a trespass has occurred. Thus, plaintiff argues that in addition to its proffered evidence supporting the imposition of a preliminary injunction, the independent reports produced as a directive of the court support its position. Accordingly, plaintiff maintains that a preliminary injunction must be instituted.

***Defendant's Response to Survey Report and Engineering Report*⁷**

Defendant contends that the survey and engineering reports demonstrate that plaintiff is not entitled to a preliminary injunction and that the temporary restraining order should be lifted. Critically, defendant argues, the two encroachments (those being the wood lagging and the construction fence) that the reports reveal are both temporary in nature and de minimus. Further, defendant cites the reports as supporting its contention that the steel bollards it removed were on its property.

Defendant also argues that the reports demonstrates the property damage caused by defendant's construction activities do not warrant the imposition of a preliminary injunction. Focused initially on the premises, defendant stresses that the engineering report concluded

⁷ The court notes that defendant's response to the survey and engineering reports is in the form of a letter not an affirmation; however, as there is no prejudice to plaintiff the court shall consider it.

that no structural damage to plaintiff's premises was caused by defendant. As to the driveway, defendant reiterates the conclusions reached by the engineering report. Defendant highlights that while the engineering report opines that its construction activities caused damage to the driveway, the damage is of the degree and type which would be reasonably expected to occur with any like excavation work and similarly a situated driveway. Further, defendant maintains that the damage identified in the engineering report does not constitute irreparable harm. Accordingly, defendant's position is the preliminary injunction must be denied and the temporary restraining order lifted.

Discussion

The purpose of a preliminary injunction is to preserve the status quo during the pendency of an action (*see Zheng v City of New York*, 19 NY3d 556, 569 [2012]; *Matter of Wheaton/TMW Fourth Ave., LP v New York City Dept. of Bldgs.*, 65 AD3d 1051, 1052 [2d Dept 2009]). To be entitled to a preliminary injunction, the movant must demonstrate (1) a likelihood of ultimate success on the merits of the action; (2) irreparable injury absent the granting of the preliminary injunction; and (3) that a balancing of equities favor the movant's position (*see Mobstub, Inc. v www.staytrendy.com*, 153 AD3d 809, 810 [2d Dept 2017]). The party seeking the preliminary injunction must demonstrate the need for the inductive relief by clear and convincing evidence (*see Alayoff v Alayoff*, 112 AD3d 564, 565 [2d Dept 2013]). "The movant must show that the irreparable harm is 'imminent, not remote or speculative'" (*Family-Friendly Media, Inc. v Recorder Tel. Network*, 74 AD3d 738, 739 [2d Dept 2010], quoting *Golden v Steam Heat*, 216 AD2d 440, 442 [2d Dept 1995]). Further,

“[e]conomic loss, which is compensable by money damages, does not constitute irreparable harm” (*Matter of Rice*, 105 AD3d 962, 963 [2d Dept 2013]). “Where . . . a litigant can fully be recompensed by a monetary award, a preliminary injunction will not [be] issue[d]” (*Id.*, quoting *Dana Distribs., Inc. v Crown Imports, LLC*, 48 AD3d 613, 613 [2d Dept 2008]).

“[T]he balancing of the equities requires a court to determine the relative prejudice to each party accruing from a grant or denial of the requested relief” (67A N.Y. Jur. 2d Injunctions § 23, citing *Town of Riverhead v County of Suffolk*, 39 AD3d 537 [2d Dept 2007]; *Barbes Rest. Inc. v ASRR Suzer 218, LLC*, 140 AD3d 430 [1st Dept 2016]). Moreover, “[t]he decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court” (*Goldfarb v Town of Ramapo*, 167 AD3d 1009, 1010 [2d Dept 2018] [internal quotation marks and citation omitted]). Such discretionary authority must be guided by the principle that a preliminary injunction is a drastic remedy, which should be used sparingly and only issued based upon clear and convincing evidence (*see Alayoff*, 112 AD3d at 565).

The causes of action which form the basis for the imposition of a preliminary injunction are trespass, negligence, and nuisance causes of action. Thus, the court must examine the sought preliminary injunction in context of each cause of action. Only when plaintiff satisfies its burden of demonstrating that it is likely to succeed on the cause of action, suffer irreparable harm, and that the balance of equities are in its favor does the burden shift to defendant to rebut such a showing.

To succeed on a trespass cause of action, plaintiff must demonstrate that the defendant, as the offending party, intentionally entered onto its land without justification or permission (*see Marone v Kally*, 109 AD3d 880, 882 [2d Dept 2013], *lv denied* 24 NY3d 911 [2014]). Here, the evidence proffered by plaintiff, along with the independent reports, demonstrate that plaintiff is likely to succeed on the merits of its trespass action. Though minimal, the report identifies two trespasses by defendant: the first, its erecting and placement of the construction fence on plaintiff's property and the second, the installation of a subsurface wood lagging. Despite both being temporary and minimally invasive in nature, each is nonetheless a trespass. However, plaintiff fails to demonstrate that either of these encroachments constitute irreparable harm, or that the balance of equities favors the imposition of the preliminary injunction.

In fact, the court finds that a far greater hardship would fall upon defendant if it was estopped from continuing its construction activities, especially since its invasions onto plaintiff's property are minimal in nature and do not substantially interfere with plaintiff's property right or pose a significant safety risk. Additionally, both trespasses are temporary in nature. The engineering report specifically identifies the subterranean encroachment produced by the timber lagging as an encroachment of .06 feet onto plaintiff's property, and that the trespass is "temporary and not a component of the building . . . it may be readily moved if desired during any near-term future adjacent excavation, and it will eventually decay and disappear with the passage of time" (NYSCEF Doc No. 154 at 6). Further, the encroachment of the construction fence is likewise temporary and is a minimal intrusion,

measuring .32 feet beyond the property line. Thus, the balance of equities does not favor plaintiff. Finally, the trespasses are adequately compensable by monetary remedies and not of the continuing nature or resulting in the total destruction of plaintiff's enterprise that would be incalculable monetarily or rise to the level of irreparable harm (*cf. Latrieste Rest. & Cabaret v Village of Port Chester*, 212 AD2d 668, 669 [2d Dept 1995], *lv dismissed and denied* 86 NY2d 837 [1995]; 86 NY2d 838 [1995]; *see also Betesh v Jemal*, 209 AD2d 568, 568-569 [2d Dept 1994]).

Turning to the nuisance claim, plaintiff must demonstrate that it is likely to prove that defendant's alleged interferences were substantial in nature, intentional in origin, unreasonable in character, with plaintiff's property right to use and enjoy its land, caused by defendant's conduct in acting or failure to act (*see Aristides v Foster*, 73 AD3d 1105, 1106 [2d Dept 2010] [internal citations omitted]). Plaintiff failed to demonstrate with clear and convincing evidence that it is likely to succeed on the merits of its nuisance cause of action (*see generally East Coast Drilling, Inc. v Total Structure Enter., Inc.*, 106 AD3d 688, 689 [2d Dept 2013]; *cf. 84-85 Gardens Owners Corp. v 84-12 35th Ave. Apt. Corp.*, 91 AD3d 702, 702-703 [2d Dept 2012]). Among the evidence proffered are the affidavits of Ms. Feldman, Mr. Schwartz, and Ms. Vargas. None of these testimonials establish by clear and convincing evidence that defendant's conduct constitutes an actionable nuisance. Ms. Vargas simply provides that she observed defendant using "earth movers, excavators, and hammering, which caused loud noises and vibrations from where I was standing on Plaintiff's Property" (aff of Vargas at 2 ¶ 5). While Ms. Feldman avers that defendant's

construction work has “caused intense noise and, extreme vibrations” and that “the commercial [t]enants felt the building on [plaintiff’s] [p]roperty shake as a result, and that “intense noise and extreme vibrations substantially interfered with and diminished [plaintiff’s] and [plaintiff’s] commercial tenants’ quiet use and enjoyment of the [property]” (aff of Feldman 11 ¶ 61), these assertions are too vague and conclusory in nature to be a basis for granting a preliminary injunction (*see Schlossberg v DeFalco*, 163 AD3d 886, 888 [2d Dept 2018]). Further, plaintiff does not offer any affidavits from the commercial tenants, the entities purportedly most affected by the vibrations; nor does Ms. Feldman attest to how these alleged disruptions interfered with plaintiff’s business enterprise. Similarly, Mr. Schwartz conclusively opines “[b]ased on the documents I reviewed, on-going construction on the [defendant’s] [p]roperty will conclusively result in continued vibrations, at or near the [p]remises. Vibrations from [defendant’s property] continued construction will result in continued damage and worsening conditions to the [property], which includes the [d]riveway and the [p]remises” (aff of Schwartz at 4, ¶¶ 18, 19). However, such evidence fails to demonstrate clearly and convincingly that plaintiff is likely to succeed on the merits of its nuisance claim.

Even assuming, *arguendo*, that the aforementioned evidence clearly and convincingly demonstrates plaintiff’s likelihood of success on the merits, the engineering report contradicts plaintiff’s position that the injuries caused by the nuisance constitutes irreparable harm. While the injuries alleged are suitably non-economic in nature, the engineering report, to the extent it comments on the vibrations produced from defendant’s construction work,

states that though the monitoring implemented by defendant fell below industry standards, “[d]efendant’s work entails no other construction operations that require monitoring per [New York City Building Code], and no special circumstances exist that warrant consideration of monitoring above and beyond the code requirements. Therefore, it is our professional opinion that no future monitoring is required for completion of the proposed work” (NYSCEF Doc No. 154 at 3). Such an assertion raises questions of fact as to whether the alleged conduct creates a nuisance which is “imminent, not remote or speculative,” as the alleged nuisance-causing activity has been completed (*Family-Friendly Media, Inc. v Recorder Tel. Network*, 74 AD3d 738, 739 [2d Dept 2010], quoting *Golden v Steam Heat Inc.*, 216 AD2d 440, 442 [2d Dept 1995]).

Further, to the extent that plaintiff argues the vibrations have caused physical property damage, such injury is economically compensable. Regardless, the engineering report also contradicts these assertions by plaintiff, finding that none of the damage to plaintiff’s premises is attributable to defendant’s construction activities (NYSCEF Doc No. 154 at 3). Thus, assuming plaintiff is likely to succeed on the merits of its nuisance claim, any resulting damage cannot be deemed irreparable harm as the damages are economically compensable and/or cannot be deemed imminent.

As to plaintiff’s negligence claim, it must proffer sufficient evidence demonstrating that defendant owed it a duty, breached that duty and that plaintiff’s injuries were proximately and actually caused by the breach (*see Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016]). Plaintiff’s proffered evidence demonstrates, by clear

and convincing evidence, that it is likely to succeed on the merits on its negligence claim. The proffered affidavits of, among others, Mr. Schwartz and Mr. Toung, opine that based upon their observations, expertise, and review of relevant documents, defendant's construction activities failed to adhere to industry standards and caused damage to both plaintiff's premises and its driveway. Additionally, the engineer report supports plaintiff's position. Despite stating that the damages would have reasonably been expected to occur despite compliance with industry standards, the engineering report states:

“It is our professional opinion, within a reasonable degree of engineering certainty, that the driveway damages listed above were caused by settlement resulting from the [d]efendant's excavation work. The voids adjacent to the soil lagging . . . indicate the [d]efendant failed to thoroughly backpack the soil lagging during the installation of the soil retention system. These voids likely contributed to the settlement and resulting damages observed” (NYSCEF Doc No. 154 at 12).

Thus, plaintiff established that it is likely to succeed on the merits of its negligence action.

Plaintiff, however, fails to present clear and convincing evidence that its injuries resulting from defendant's alleged negligence constitute irreparable harm or that the balance of equities favor it. Where defendant's activities result in continuing property damage posing structural risks or complete destruction/frustration of the use of real property (e.g. driveway), such injuries are deemed irreparable (*see generally XXXX, L.P. v 363 Prospect Place, LLC*, 153 AD3d 588 [2d Dept 2017]; *Winzelberg v 1319 50th Realty Corp.*, 52 AD3d 700 [2d Dept 2008]; *Karabatos v Hagopian*, 39 AD3d 930 [3rd Dept 2007]). Where temporary impediments to a driveway occur and the harm suffered is compensable by a monetary

award, such harm is not irreparable (*see generally Rowland v Dushin*, 82 AD3d 738 [2d Dept 2011]; *Rosenberg v Trazzera*, 147 AD3d 1099 [2d Dept 2017]).

Here, the damage caused by defendant's alleged negligence, as reflected in both plaintiff's proffered evidence and the engineering report, is of the nature that is compensable through economic recovery, and not of the severity which renders the driveway completely destroyed. Additionally, considering the balance of equities, plaintiff fails to proffer affidavits of the commercial tenants who are allegedly the parties most seriously aggrieved by the damage to the driveway. Thus, plaintiff failed to establish that the injuries resulting from defendant's alleged negligence are irreparable in nature, or that balance of equities weigh in its favor warranting the imposition of a preliminary injunction.

Based upon the foregoing, plaintiff's motion seeking a preliminary injunction is denied and the temporary restraining order signed by this Court on January 8, 2019 is hereby lifted.

RPAPL § 881

Defendant cross-moves, in motion sequence no. 2, for an order, pursuant to RPAPL § 881, granting it a license to access and occupy plaintiff's property to permit it to perform improvements on its own property.

Defendant's Position

In support, defendant asserts that New York City Building Code requires it to erect certain safety apparatuses on plaintiff's property. Specifically, defendant maintains that it is required to place roof and parapet protection extending five-feet from the edge of

plaintiff's premises, consisting of fire-resistant plywood sheets and a high bridge approximately 12 feet in height. It further maintains that such devices will not impair the use of the driveway. Defendant contends that in order to erect these measures, it must access plaintiff's property for a period of eight consecutive months and occupy a space spanning approximately 100 feet in length and 11 feet in width.

Mr. Agres attests that he and Ms. Feldman engaged in protracted negotiations, wherein defendant sought to acquire a license to enter plaintiff's property for the purposes of erecting and maintaining the aforementioned apparatuses to complete the construction on defendant's property. Mr. Agres maintains that despite good faith effort by defendant, plaintiff refused to enter into a mutually agreeable license agreement. He contends Ms. Feldman made exorbitant demands, ultimately denying defendant access to plaintiff's property. Mr. Agres also attests that in furtherance of the negotiations and to acquire a license, defendant advanced plaintiff \$15,000. Additionally, Mr. Agres attests that defendant's proposed license agreement provides for indemnification, insurance coverage, and just compensation for access to plaintiff's property to erect the safety apparatuses.

Defendant also proffers the affidavit of Mr. Antonio Morales, the principle of United Industries and Construction Corp., the general contractor retained by defendant to perform its construction work. Mr. Morales attests that, among other duties, he created a site safety plan for plaintiff's property, pursuant to New York City Building Code (Administrative Code of City of NY, tit 28, ch 33) § BC 3309, with the aid of Salvus Group, a consulting firm licensed and authorized to conduct construction safety, emergency management, health, and

security services. Mr. Morales attests that based upon his and the Salvus Group's expertise, the safety plan was designed to adequately protect against any potential danger to plaintiff's property, and not interfere with access or use of said property. Mr. Morales also avers that the work on defendant's property cannot be completed without acquiring access to plaintiff's property and implementing the safety plan.

Defendant argues that RPAPL § 881 vests the court with power to issue a license to access an adjoining property, where such access is necessary for the purposes of making improvements or repairs on an owner's property and the adjoining property owner refused such access. Further, defendant asserts that parties failing to reach an agreement for the license is equivalent to refusal. Defendant maintains that, pursuant to RPAPL § 881, it need only show refusal by the adjoining property owner (plaintiff), that the purpose of accessing the adjoining property is to perform improvements to its (defendant's) real property, that such entry is necessary, and the period of time entry is required. Defendant argues that it satisfied its burden by proffering the affidavits of Mr. Agres and Mr. Morales, which demonstrate the required showing. As such, defendant asserts it is entitled to a court-issued license.

Plaintiff's Position

In opposition, plaintiff maintains that it did not oppose providing defendant with a license to access its property, but that defendant failed to negotiate an agreement in good faith. Principally, plaintiff asserts that during the course of the negotiations, defendant failed to convince it that the terms of the license agreement adequately compensated it or provided

for the protection of its property. Relying on the affidavits of Mr. Toung and Mr. Schwartz, plaintiff specifically argues that the safety plan designed by defendant is insufficient, failing to identify necessary information, such as how the apparatuses will be secured to the ground or detailing how the devices will not interfere with the driveway.

Plaintiff contends that should the court grant defendant's petition for a license, in order to adequately protect plaintiff's property interest and provide adequate compensation, its (plaintiff's) proposed license agreement should be adopted, rather than defendant's proposed license. Further, supporting this proposition, Ms. Feldman attests that defendant's misfeasance delayed and thwarted the issuance of an amicably agreed upon license, and that Mr. Agres' account of the negotiation process is inaccurate. Additionally, plaintiff contends that defendant failed to commence a special proceeding to acquire a court issued license, and therefore the relief, pursuant to RPAPL § 881, is improper.

Discussion

As an initial matter, the court notes that defendant's sought relief is brought improperly as a cross motion. Relief pursuant to RPAPL § 881 must be brought by way of a special proceeding. However, CPLR § 103 (c) provides the court authority, where jurisdiction has been obtained over the parties, to convert a motion into a special proceeding where it finds appropriate in the interest of justice and upon just terms. Accordingly, defendant's cross motion is hereby converted into a special proceeding.

RPAPL § 881 provides as follows:

“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.”

RPAPL § 881 is “a codification of well-settled principles of jurisprudence expounded by [New York] courts . . . dealing with conflicting interests of adjacent property owners” (*Chase Manhattan Bank v Broadway, Whitney Co.*, 57 Misc 2d 1091, 1096 [Sup Ct, Queens County 1968], *affd* 24 NY2d 927 [1969]).

“A proceeding pursuant to RPAPL 881 is addressed to the sound discretion of the court . . . which must apply a reasonableness standard in balancing the potential hardship to the applicant if the petition is not granted against the inconvenience to the adjoining owner if it is granted” (*Queens Coll. Special Projects Fund, Inc. v Newman*, 154 AD3d 943, 943-944 [2017] [internal citations omitted]), *lv denied*, 31 NY3d 901 [2018]; *see also Bd. of Managers of Artisan Lofts Condo. v Moskowitz*, 114 AD3d 491, 492 [2014]). “Courts are required to balance the interests of the parties and should 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” (*Bd. of Managers of Artisan Lofts Condo*, 114 AD3d at 492 [quoting *Chase Manhattan Bank*, 57 Misc 2d at 1095]). Further, among other factors that the court may consider in making its determination is nature of the access, the time frame the access is required, and the ability for adequate compensation to the adjoining property owner (*Queens Coll. Special Projects Fund, Inc.*, 154 AD3d at 944 [internal citations omitted]).

Here, defendant has demonstrated its entitlement to the issuance of a license to enter and occupy plaintiff’s property, pursuant to RPAPL § 881. Defendant satisfied its burden by proffering the affidavits of Mr. Agres and Mr. Morales. Mr. Agres sufficiently attests to defendant’s failure to gain access to plaintiff’s property and Mr. Morales affidavit sufficiently attests to the need and duration for which such occupancy is required. Thus, the burden going forward shifts to plaintiff to demonstrate that it will suffer a greater hardship by the issuance of a license as compared to the hardship defendant will experience if a license is denied. Plaintiff has failed to satisfy such burden. Considering the relevant factors, plaintiff’s proffered evidence does not demonstrate that it would suffer a greater hardship with the temporary placement of required safety apparatuses, as compared to defendant’s hardship of not being able to complete the development of its property. To the extent that the license must be modified by the court to provide for just compensation for the access, the court has the authority to craft the license to ensure justice is served (*see generally Matter of New York Pub. Lib. v Condominium Bd. of the Fifth Ave. Tower*, 170 AD3d 544 [1st Dept 2019]; *Matter of Van Dorn Holdings, LLC v 152 W. 58th Owners Corp.*, 149 AD3d

518 [1st Dept 2017]; *DDG Warren LLC v Assouline Ritz 1, LLC.*, 138 AD3d 539 [1st Dept 2016]; *see also* 1 N.Y. Jur. 2d Adjoining Landowners § 5). Accordingly, the license agreement as proposed by defendant (NY St Cts Elec Filing [NYSCEF] Doc No. 52) is incorporated by reference into this order and shall govern the parties by its terms. However, such license agreement is modified to the extent that the license fee provision, identified as item 11, shall hereby read:

License Fee: In consideration and contemplation of this Agreement and the Licensee and Developer Parties' entry to Licensor's Property and the Licensed Areas to perform the Access Work for the Term, Licensee shall tender to Licensor the sum of three thousand dollars (\$3,000.00) per month in lawful moneys or the United States or negotiable instrument (the, "License Fee"). The License Fee shall be prorated for any partial months in a per diem basis.

Such modification is to adequately compensate plaintiff based upon the size and scope of defendants intrusion onto its property.

Contempt

Plaintiff's Position

Plaintiff contends that defendant has violated multiple court orders. Specifically, and plaintiff's core position, is that defendant violated the court's bench decree, dated April 18, 2019.⁸ Plaintiff maintains that at an appearance before this court on April 18, 2019,

⁸ The proffered affidavits of Mr. Kushner and Mr. Toung, along with certain accompanying exhibits, make reference to defendant's construction activities violating the temporary restraining order imposed by this court. However, plaintiff's primary position is that defendant violated the April 30, 2019 bench order. Beyond this, the proffered evidence fails to demonstrate, clearly and

defendant raised the issue of an outstanding violation it received from the DOB due to defects in the construction fence it had erected, which required certain repair work. Due to the outstanding temporary restraining order, defendant sought permission from the court to make the necessary minor repairs to remedy the outstanding violation. The court, plaintiff maintains, ordered that defendant may complete the sought repairs, only after it provided insurance coverage and indemnification protections to plaintiff.

Plaintiff, by way of the affidavits of Mr. Toung and Mr. Kishner, assert that this directive was never complied with, and that defendant proceeded to remedy the defect without every providing the necessary protections to plaintiff. Mr. Kishner specifically asserts that he observed that the fence was painted and additional screws were placed into it. Mr. Kishner asserts that these repairs must have been completed by defendant in violation of the court's explicit order. Thus, plaintiff contends it demonstrated that defendant violated an express court order.

Defendant's Position

In opposition, defendant maintains that no court orders were violated. In support of this, defendant proffers the affidavits of Mr. Krupnik and Mr. Agres, along with the affirmation of its attorney, Mr. Restrepo. Each maintains that they are familiar with the operations of the construction activities on defendant's property and assert that neither the

convincingly, that defendant's construction activities violated the temporary restraining order. Specifically, Mr. Toung's affidavit, while asserting that he viewed workers within the restricted space, fails to affirmatively state that he observed actual construction work occurring in violation of the temporary restraining order.

temporary restraining order nor the bench decree were violated. Mr. Agres specifically attests that defendant was able to cure the violations without entering plaintiff's property and thus, defendant was in compliance with the court's order. Further, defendant argues that plaintiff's proffered evidence is inconclusive, failing to satisfy the heightened standard of clear and convincing evidence that it violated any court orders. Particularly, it contends that neither affidavit asserts to viewing any actual act violating the courts order, only attesting to circumstantial evidence.

Discussion

A motion to punish a party for civil contempt is addressed within the sound discretion of the court. The moving party bears the burden of proving the contempt by clear and convincing evidence (*see Louzoun v Montalto*, 162 AD3d 1004, 1005 [2d Dept 2018]; *Riverside Capital Advisers, Inc. v First Secured Capital Corp.*, 43 AD3d 1023, 1024 [2d Dept 2007]).

“In order to find that contempt has occurred in a given case, it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect. It must appear, with reasonable certainty, that the order has been disobeyed. Moreover, the party to be held in contempt must have had knowledge of the court's order . . . Finally, prejudice to the right of a party to the litigation must be demonstrated” (*Bennet v Liberty Lines Tr., Inc.*, 106 AD3d 1038, 1040 [2d Dept 2013] [internal quotation marks and citations omitted]).

Where the movant has established that a violation of a court order has occurred, the court must then determine the appropriate remedy for such an offense.

“Pursuant to Judiciary Law § 773, the amount of a contempt fine should be sufficient to indemnify the aggrieved party for actual loss or injury caused by reason of the misconduct. Unlike criminal contempt sanctions which are intended to punish, civil contempt fines are intended to compensate victims for their losses. The party seeking a contempt order must prove actual loss, failing which “the court may only impose a fine which does not exceed the complainant's costs and expenses, plus an additional \$250. Legal fees and disbursements are also recoverable (*Matter of Barclays Bank v Hughes*, 306 AD2d 406, 407 [2d Dept 2003], *affd mod Matter of Barclays Bank, PLC v Hughes*, 761 NYS2d 493 [2d Dept 2003]).

Here, plaintiff established, by clear and convincing evidence, that defendant violated the express court order. This court ordered that no repairs were to be done on the construction fence absent defendant providing indemnification and insurance coverage for plaintiff (*see* NY St Cts Elec Filing [NYSCEF] Doc No. 110 at 9-10). The affidavits of Mr. Toung and Mr. Kishner established that such repairs were completed and that plaintiff never received any form of insurance coverage or indemnification protection. In opposition, defendant fails to refute such claims, rather asserting that the repairs were achieved without interfering with plaintiff's property, which is wholly irrelevant to the court's order. However, plaintiff failed to demonstrate any actual loss. Accordingly, defendant is directed to pay to plaintiff the costs of making the instant motion. Plaintiff is directed to submit a proposed order on notice for such costs, legal fees, and disbursements, with supporting papers within 10 days of the entry of this order; any opposition, if any, shall be filed within 10 days of the filing of plaintiff's papers.

To the extent not specifically addressed herein, the parties remaining contentions were considered and found to be without merit and/or frivolous.

Accordingly, it is

ORDERED, that plaintiff's motion for a preliminary injunction (motion sequence no.

1) is denied; and it is further

ORDERED, that defendant's cross motion (motion sequence no. 2) is converted into a special proceeding and defendant's relief, pursuant to RPAPL § 881, is granted and the license agreement as proposed by defendant (NY St Cts Elec Filing [NYSCEF] Doc No. 52) is incorporated by reference into this order and shall govern the parties by its terms except to the extent that the license fee provision, identified as item 11, is modified and shall hereby read:

License Fee: In consideration and contemplation of this Agreement and the Licensee and Developer Parties' entry to Licensor's Property and the Licensed Areas to perform the Access Work for the Term, Licensee shall tender to Licensor the sum of three thousand dollars (\$3,000.00) per month in lawful moneys or the United States or negotiable instrument (the, "License Fee"). The License Fee shall be prorated for any partial months in a per diem basis.

and it is further

ORDERED, that plaintiff's motion for an order of contempt (motion sequence no.

3) is granted; and it is further

ORDERED, that defendant is directed to pay to plaintiff the costs of making the instant motion, with legal fees and disbursements; and it is further **ORDERED**, that plaintiff is directed to submit a proposed order on notice for such costs, legal fees, and disbursements, with supporting papers within 10 days of the entry of this order; and any opposition, if any, shall be filed within 10 days of the filing of plaintiff's papers.

The foregoing constitutes the decision and order of the court.

ENTER



J. S. C.
Hon. Leon Ruchelsman