

**Matter of Lotus Residences LLC v New York City
Dept. of Bldgs.**

2020 NY Slip Op 31389(U)

May 15, 2020

Supreme Court, Kings County

Docket Number: 505644/2020

Judge: Katherine A. Levine

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This opinion is uncorrected and not selected for official publication.

At an IAS Part 25 of the Supreme Court of the State of New York, held in and for the County of Kings, located at the Courthouse at 360 Adams Street, Brooklyn, New York on the 15th day of May, 2020.

PRESENT:

HON. KATHERINE A. LEVINE
Justice

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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In the Matter of the Application of

LOTUS RESIDENCES LLC, ROSE CASTLE
REDEVELOPMENT II LLC, and RIVERSIDE
DEVELOPERS USA INC.,

ORDER

Petitioners,

Index No. 505644/2020

For a Judgment Pursuant to Article 78 of the CPLR, and for a
Declaratory Judgment Pursuant to Section 3001 of the CPLR

-against-

NEW YORK CITY DEPARTMENT OF BUILDINGS, and
MELANIE E. LA ROCCA, in her capacity as Commissioner
of the New York City Department of Buildings,

Respondents.

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WHEREAS, on March 31, 2020, Petitioners Lotus Residences LLC, Rose Castle
Redevelopment II LLC, and Riverside Developers USA Inc. (“petitioners”) submitted by e-mail
their application to alter the March 13, 2020 Order of this Court (the “TRO”) so as to expand the
work permitted thereby to include the building of a superstructure frame (“petitioners’
application”) so as to stabilize the foundation once the dewatering process ceased (“Abatement”);
and

WHEREAS, at the request of the Court, video conferences on petitioners' application were held with the parties, their engineers, and their counsel on April 14th solely to determine what must be done to abate the problem of the hydraulic pressure that could potentially compromise the foundation if sufficient dead weight was not put on top of the foundation, and this Court issued an Order on April 17, 2020 (the "April 17 Order") requiring the parties and their engineers to meet and confer to resolve whether additional construction was necessary at the subject premises so that foundation would be stabilized and dewatering could cease; and

WHEREAS, during this meeting and subsequently during video conferences held before the Court on May 6, and May 13, petitioners argued that predicated on the combination of the design groundwater elevation ("El.") +4 feet and 60% of structure weight required in the NYC Building Code (the "60% Standard"), it was necessary to complete the construction of the superstructure frame of eight stories in order to establish the dead load needed to stabilize the now-completed foundation and permit petitioners to cease the dewatering operations (and thereby remove the threats of soil destabilization and pollution mobilization associated with continued dewatering operations), and Respondents DOB and LaRocca ("respondents" or "DOB") argued that the combination should utilize 100% of structure weight rather than the 60% Standard, and that the dead weight could be accomplished by pouring one foot of sand on top of the foundation; and

WHEREAS, the engineers for both parties came to agree that the appropriate design groundwater average is El. +4 feet, but that they could not agree upon the utilization of 60 % as opposed to 100 % dead weight because the DOB deemed the goal of the dead weight to be solely a short term abatement of any damage that might occur to the foundation during the pendency of these hearings; and

WHEREAS, in response to the Court's direct question during the May 13th hearing

respondents could not point to one provision of the NYC Building Code or DOB's internal rules which permitted the use of DOB's proposed 100% percent of structure weight for an abatement situation, and conceded that there was no precedent to deviate from the 60% Standard and use the 100% of structure weight; and

WHEREAS, in response to the Court's direct question, respondents conceded that to be in accord with the required combination of El. +4 feet and 60% of structure weight, the DOB's proposed use of sand would require at least three or more feet of sand on the foundation and that it would be arduous to lay and maintain this amount of sand; and

WHEREAS, petitioners argued that they could be held strictly liable if anyone suffered bodily injury or property damage while they were building a portion of the superstructure frame that did not comply with the NYC Building Code's requirement to use 60% of structure weight to calculate dead load, even for an abatement; and that petitioners' engineers could not ethically sign off on a project which did not comply with the Building Code; and

WHEREAS, respondents have refused to indemnify petitioners were the Court to deviate from the 60% Standard; and

WHEREAS, after hearing the foregoing and additional arguments from counsel for all parties, testimony from the engineers for the respective parties, and reviewing emails, affidavits and exhibits submitted to the Court by each party since March 31, 2020, and upon all the papers and proceedings heretofore had herein, and after balancing the equities of each party's position in the context of an abatement, and having carefully considered and acknowledged the DOB's contention that allowing petitioners to construct the building structure in full would partially give petitioners the ultimate relief they are seeking; it is hereby

ORDERED, that the equities inure in favor of petitioners' need to establish the condition necessary to cease the dewatering operations and to establish a dead weight sufficient to alleviate

any damage that might occur to the foundation by the cessation of the dewatering process, in accordance with the 60% standard mandated by the NYC Building Code in light of the strict liability that would be imposed upon them by permitting a solution that did not comply with the Code; and it is further

ORDERED, that petitioners' application is granted in part, so that the TRO is modified to permit the scope of the work at the site to be expanded to include the construction of only five (5) additional floors above the ground floor of the remaining superstructure frame, and that the work will be conducted under the operative equations providing for a El. +4 feet groundswell and 60% of structure weight, provided that as each such floor is completed petitioners will, to the extent feasible, scale back or modulate the dewatering operations in order to reduce the independent threats posed by continuing the dewatering operations (i.e., soil destabilization and pollution mobilization), while at the same time ensuring that there is sufficient dewatering to prevent any hydraulic uplift causing the foundation to either float or fracture); and it is further

ORDERED, that petitioners must keep the dewatering process operating at a minimum so as to prevent any further motions by petitioners before this Court that they must complete the additional three stories of the building structure to ensure the stability of the foundation before this court hears arguments on the substance of the CPLR Article 78 proceeding; and it is further

ORDERED, that except as expressly modified hereby, the TRO and the April 17 Order both remain in full force and effect; and it is further

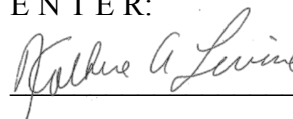
ORDERED, that the modification hereby of the scope of work permitted by the TRO is without prejudice to arguments made by respondents in response to the Petition, and that petitioners may not in the future use the partial completion of the superstructure frame permitted herein to argue that equity requires the superstructure frame to remain in place and/or that more stories need to be built until the underlying Article 78 proceeding (as described in the following

paragraph) is argued and decided; and it is further

ORDERED, that a framed-issue hearing will be held by video conference on a date and time to be decided to determine whether the Structural Permit issued by DOB to petitioners on September 12, 2019, identified as Permit Number B00222615-I1-ST, was obtained by means consistent with DOB procedure, custom, and practice, or alternatively, as contended by DOB, by fraud or any other impermissible means; and any other issues pertinent to the issuance of the permit to be determined by the court prior to the holding of the framed issue hearing; and it is hereby further

ORDERED, that this Order shall be effective upon delivery by email to counsel for each party, regardless of either filing or service by means other than email.

E N T E R:

A handwritten signature in cursive script, reading "Katherine A. Levine", is written over a horizontal line.

Katherine A Levine

Justice Supreme Court