

Feldman v 3588 Nostrand Ave. LLC
2020 NY Slip Op 32755(U)
August 24, 2020
Supreme Court, Kings County
Docket Number: 526048/2018
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 24 of August 2020

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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MARTIN FELDMAN, as Trustee of the
MARTIN FELDMAN FAMILY REVOCABLE
TRUST,

Index No. 526048/2018

Mot. Seq. 001, 002, 003

Plaintiff,

-against-

AMENDED DECISION AND ORDER

3588 NOSTRAND AVENUE LLC,

Defendant.

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UPON conferring with counsel for Plaintiff Martin Feldman, as Trustee of the Martin Feldman Family Revocable Trust (“Plaintiff”) and Defendant 3588 Nostrand Avenue LLC (“Defendant”), the Court hereby amends as follows its Decision and Order dated May 6, 2020, and entered with the Clerk of the Court on May 7, 2020:

With respect to Defendant’s Cross-Motion (Mot. Seq. 002) for access to Plaintiff’s real property known as and located at 3590 Nostrand Avenue, Brooklyn, New York, pursuant to RPAPL § 881, Defendant’s Cross-Motion is granted under the following terms and conditions:

1. The following items, annexed hereto as **Exhibit “A,”** and made part of this Amended Decision and Order: (1) the reports, including all addenda, of Murray Engineering, P.C., dated September 23, 2019 and December 10, 2019; (2) Site Safety Plan (“SSP”) (NYSCEF Doc.

162); (3) amended work sequence annexed hereto as **Exhibit “B”**; and (4) survey report and single line survey of Fehring Surveying, P.C., dated September 17, 2019 (collectively, “Reports”).

2. Defendant, Defendant’s contractors, subcontractors, architects, surveyors, engineers, agents, representatives, and workers (collectively, the “Developer Parties”) shall be granted a temporary license to access the Plaintiff’s property known as and located at 3590 Nostrand Avenue (“Trust Property”) to place, erect, install, repair, maintain and remove certain temporary property protections required by the New York City Building Code, in accordance with the Defendant’s SSP and work sequence approved by Murray Engineering, P.C., and in furtherance of the construction at the Defendant’s property known as and located at 3588 Nostrand Avenue, Brooklyn, New York (“Site” and/or “Project”), which adjoins the Trust Property. In particular, the terms of the temporary license shall be as follows:

(i) **License Term:** The License Term shall commence upon delivery to the Plaintiff of ten (10) days’ notice of commencement (the, “Commencement Date”), and shall extend, subject to “Unavoidable Delays,” as defined hereinafter, for eight (8) months from and after the Commencement Date (together with the Commencement Date, the “Term”), subject to a one-time (6) month extension, if necessary, which extension shall be conditioned on the ongoing payment of the License Fee as set forth in section (viii)(e) below (the, “Renewal Term”). The notice of commencement shall be delivered no earlier than April 30, 2021, but no later than July 31, 2021. “Unavoidable Delays” shall be defined as delays resulting from any acts of God, cold weather conditions below 40 degrees Fahrenheit, governmental restriction, or preemption, acts of public enemy, riots, civil commotions, strikes, storms, fire, floods, earthquakes, or any other matter which shall be beyond the reasonable control of the Developer and Developer Parties, and delays resulting directly from Licensor, or Licensor’s commercial tenants, agents, employees or assigns.

ii) **License:** The Plaintiff, and Plaintiff’s agents, shall grant the Developer Parties unfettered and unobstructed access as approved by Murray Engineering P.C., to undertake and perform the scope and sequence of work annexed to this Amended Order as part of Exhibit A and Exhibit B, and to place, erect, install, repair, maintain inspect, and remove any other property protection ordered to be placed by the New York City Department of Buildings, and defined herein as, the “Access Work”).

iii) **Indemnity.** To the fullest extent permitted by law, Defendant agrees to indemnify and save harmless the Plaintiff, and its trustees, affiliates, employees and agents, successors and assigns (the “Indemnified Parties”) from and against any and all liability (statutory or otherwise), claims, suits, demands, actual damages, loss (excluding consequential punitive damages),

judgments, costs, fines, penalties, interest and expense (including, without limitation, reasonable attorneys' fees and disbursements) to which the Indemnified Parties actually incur and arising from, (i) any liability or claim of injury, or death of, any person or persons, or damage to Trust Property which is directly caused by the Developer Parties; (ii) any violation of any law, mechanic's lien, order, rule or regulation of any Federal, State or local governments, departments, commissions and boards, issued in connection with the property protection and access to the Trust Property; and (iii) any liability or claim resulting from any acts or omissions of the Developer Parties during the License Term. The Defendant's indemnity obligations as set forth herein shall not extend to any liability, claims, suits, demands, damages, judgments, costs, fines, penalties, interest and expense which are the result of the Indemnified Parties' own acts or omissions or willful misconduct.

iv) **Insurance.** The Developer shall require the general contractor for the Project to carry at its own cost and expense, throughout the License Term:

a) Workmen's Compensation insurance in accordance with the requirements of the State of New York.

b) Comprehensive general liability insurance, including ISO contractual liability coverage (containing the so-called "occurrence clause") against claims for personal injury, death and property damage occurring the Trust Property, covering all operations, in limits of not less than One Million Dollars (\$1M) with respect to personal injury or death or property damage occurring or resulting from an occurrence, Two Million Dollars (\$2M) in the aggregate, and Five Million dollars (\$5M) umbrella and/or excess coverage.

During the Term of this License, all policies of such insurance (except for workers compensation insurance) shall name the Plaintiff, and its trustees, and commercial tenants at the Trust Property as an additional insureds (without exclusion for cross-claims among the named and additional insureds, as their interests may appear), and shall be issued by companies authorized to do business in the State of New York. ACORD certificates of such insurance, and a NYSIF Workers Compensation certificate shall be delivered to the Plaintiff evidencing the insurance coverage required together with the notice of commencement pursuant to section (i) above. Property.

v) **Repairs/Maintenance.** From and after the Commencement Date, all damage or injury to the Trust Property, directly caused by or resulting from the erection of the property protection and access to the Trust Property, shall be repaired or caused to be repaired promptly by the Defendant, at the Defendant's sole cost and expense (the, "Repair Work"). The Repair Work shall be conducted in a workmanlike manner and in compliance with all applicable laws.

vi) **Driveway Repairs:** Repairs to the Plaintiff's driveway in accordance with the Murray Engineering report dated December 10, 2019, shall be conducted following the completion of the south wall, as certified as complete by the Project's Architect (the, "Driveway Repairs"). The Parties shall mutually confer and agree on a proposed course of action to diligently complete the Driveway Repairs, including but not limited to, (i) choosing and executing a proposal with a third-party contractor tasked with completing the Driveway Repairs; (ii) agreeing on the final

estimate and cost of the Driveway Repairs, and (iii) agreeing on Defendant's share of the cost of the Driveway Repairs and Plaintiff's share of said costs. It is anticipated that the Driveway Repairs will be conducted in the Spring of 2022. Therefore, the Parties' shall agree on the foregoing items no later than March 31, 2022. If an agreement is not reached by March 31, 2022, either Party may request the Court's intervention informally via e-mail.

vii) **Liens/Violations.** Defendant shall remove or to cause to be removed by payment, bonding, or other lawful means, any liens placed on Trust Property arising out of or connected in any way with the Project within sixty (60) days after the filing of such liens, or within thirty (30) days after notice is delivered to the Defendant, whichever is sooner. With respect to any violations placed on the Trust Property by the New York City Department of Buildings, or any other municipal agency with jurisdiction over the Project, Defendant shall pay for and take all commercially reasonable efforts to remove said violations of record within such time as required by law.

viii) **Miscellaneous.**

a) **Default/Termination.** In the event of a breach of any of the terms and conditions of this Decision/Order, beyond any applicable notice and cure period, the Plaintiff may deliver to the Defendant ten (10) calendar days' written notice to cure said breach. If the Defendant shall fail to cure the complained condition within ten (10) calendar days after receipt of said notice, or, with respect to a breach which by its nature cannot be reasonably be cured within ten (10) calendar days, if the Defendant or the Developer Parties fail to commence to cure such breach, and thereafter diligently cure said breach, the License granted herein shall terminate after delivery to the Defendant of a five (5) days' written notice of termination, upon the expiration of which, this License shall be revoked and come to an end, as fully and completely as if had expired on its own terms. In such event, the Defendant and the Developer Parties shall vacate the Trust Property, and remove all machinery, equipment and personal property from the Trust Property, if any.

b) **Complaints to the Defendant.** The Plaintiff, in good faith and in the spirit of maintaining a cordial and civil relationship with the Defendant, shall notify the Defendant, the Project's General Contractor, and simultaneously Defendant's counsel, of any construction related conditions encountered during the License Term which affect the safety or integrity of the Trust Property, tenants, guests and invitees. For a period of ten (10) calendar days, the parties shall attempt to review and remediate the complained condition in good faith as a condition to and prior to seeking to terminate the License or seeking the Court's intervention.

c) **Pre-Construction Survey.** Prior to the installation of the property protection to the Trust Property, and following the Commencement Date, Plaintiff shall grant access to the interior and exterior of the Trust Property, including the roof, at a mutually agreeable date and time, to allow for the preparation of a pre-construction survey (the, "Pre-Con Survey"). The Pre-Con Survey will be prepared by John V. Dinan and Associates, Inc., consulting Engineers and Seismologist (the, "Pre-Con Surveyor"), in accordance with Murray Engineer's P.C. December 10, 2019 report. The Parties shall seek and enter into an updated proposal with John V. Dinan and Associates, Inc. to conduct the Pre-Con Survey reasonably in advance of said Pre-Con Survey being conducted. The Pre-Con Survey shall consist of a photographic and written report.

26 Sparkill Ave
Staten Island, New York 10304

With a courtesy copy to:


RICHTER RESTREPO, PLLC.
Attn: Juan C. Restrepo, Esq.
55 Broadway, Suite 405
New York, New York 10006
Juan@RichterRestrepo.com

Either party shall have the right to substitute addresses for such notices upon prior written notice to the other party, given in the manner set forth above, provided that notice of such change of address shall be effective only upon receipt. Notices shall be deemed given when received, if by hand delivery, overnight mail or e-mail, or three (3) business days after being postmarked and addressed if by certified mail.

5. The Parties shall reserve all other claims and defenses and remedies in relation to this action.

6. All other terms of this Court's May 6, 2020 Decision and Order shall remain in unchanged and in full force and effect.

This constitutes the Amended Decision/Order of the Court.

ENTER: 

Hon. Leon Ruchelsman, J.S.C.

Exhibit A
Murray Engineers P.C. reports and Fehringer reports

Exhibit B
Amended Work Sequence