

RLM TH LLC v 162 E. 70th St. Trust
2021 NY Slip Op 31573(U)
May 10, 2021
Supreme Court, New York County
Docket Number: 152235/2020
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

-----X

RLM TH LLC,

Petitioner,

- v -

162 EAST 70TH STREET TRUST,

Respondent.

-----X

INDEX NO. 152235/2020

MOTION DATE 04/30/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 26, 27, 29, 30, 31, 32, 33, 34, 35, 36, 37, 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, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90

were read on this motion to/for SPECIAL PROCEEDING-LICENSE.

ORDER

Upon the foregoing documents, it is

ORDERED and ADJUDGED that, effective upon the expiration of seven (7) days of service of a copy of this order with notice of entry, Petitioner RLM TH LLC (the Property Owner) is hereby granted a license, pursuant to RPAPL 881, to enter upon a portion of the land of Respondent 162 East 70th Street (Adjacent Property) Trust (Adjacent Owner), subject to the following terms and conditions, including certain terms and conditions upon which parties have agreed as set forth in their proposed and counter proposed Access Agreements submitted to this court on April 30, 2021:

1. Adjacent Owner hereby grants Project Owner a limited non-exclusive license for access to the Adjacent Property by Project Owner and the Construction Team.
2. **PRE-CONSTRUCTION SURVEY**
 - a. Project Owner's Construction Team shall conduct a Pre-Construction Survey on both the interior and exterior of the Adjacent Property at Project Owner's sole cost and expense.
 - b. Project Owner shall, at Project Owner's sole cost and expense, provide Owner with a copy of the Pre-Construction Survey, together with all accompanying color photographs, within ten (10) days of the Pre-Construction Survey being completed by Project Owner.
3. **TEMPORARY PROTECTIONS**
 - a. Project Owner has provided copies of the Temporary Protection Plans to Adjacent Owner for its review and comment.
 - b. Adjacent Owner consents to the installation, maintenance, inspection, and removal of the Temporary Protections by Project Owner in accordance with the Temporary Protection Plans, and grants Project Owner, together with the Construction Team, a non-exclusive, limited license to install, maintain, inspect, and remove same in accordance with the terms of this License until the Project is completed, or such earlier time as is permitted by Applicable Laws.
4. **WATER-PROOFING WORK**
 - a. Project Owner has provided initial copies of the Water-proofing Plans to Adjacent Owner for its review and comment.
 - b. Adjacent Owner consents to the installation, maintenance and inspection of the Water-proofing Work in accordance with the Water-proofing Plans, to the extent such Plans pertain to the Water-proofing of any surface or seam within Project Owner's side of any party wall, by Project Owner and the Construction Team, at Project Owner's sole cost and expense, and grants Project Owner, together with the Construction Team, a non-exclusive license to install, maintain and inspect same in accordance with this Agreement.
5. **MONITORING EQUIPMENT**
 - a. If Project Owner becomes aware that vibration has been recorded that is in excess of that legally permitted by Applicable Law, then Project Owner shall notify Adjacent Owner of such excess vibration and shall take such actions as set forth in the Monitoring Plan

6. PROJECT OWNER RESPONSIBILITIES

- a. Project Owner and/or its Construction Team shall be solely responsible for, at Project Owner's sole cost and expense, the installation, maintenance, inspection, and removal of the Temporary Protections.
- b. **Repairs to Adjacent Property**
 - i. Project Owner shall promptly, and at its expense, cause the repair of any damage to the Adjacent Property caused by any work performed by Project Owner or its Construction Team in connection with the Project.
 - ii. All such repairs shall be made using materials and workmanship of at least equivalent quality to what existed prior to the damage caused by Project Owner or its Construction Team.
 - iii. In the event a dispute between the Project Owner and Adjacent Owner regarding the causation of damages to the interior finishes of the Adjacent Property, and/or the quality, and/or standard of any repairs proposed to be performed due to such damages to the interior finishes of the Adjacent Property, arise(s), a hearing shall be held before this court at the expiration of the term of the License to determine the amount of any such damages, as well as any professional fees, including attorney's fees, with credits for reimbursement of any such fees already provided by the Project Owner to the Adjacent Owner, incurred by Adjacent Owner as the result of the Property Owner's entry upon the Adjacent Property pursuant to this License, which, upon application by show cause order, shall be referred to a Special Referee to hear and report, and which upon confirmation of such report by the court, shall be paid by the Project Owner.
- c. Project Owner and/or its Construction Team shall be responsible for obtaining and maintaining all necessary permits and other approvals, if required by any state, local, municipal or federal authority having jurisdiction over the Adjacent Property with respect to all services, access and licenses provided for pursuant to this License, and shall be responsible for the filing fees, copy expenses, expediting fees and all other costs and expenses associated with such permits or approvals. Adjacent Owner shall reasonably cooperate with Project Owner in obtaining any required permits and approvals and shall sign such forms and applications as may be required by Applicable Law to be signed by Adjacent Owner.
- d. Project Owner shall be solely responsible for all of its labor and material costs, professional fees and expenses and all other costs incurred with respect to the design and construction of the Project.
- e. Project Owner shall not commercially unreasonably interfere with the ingress or egress of Adjacent Owner and its invitees and guests from the Adjacent

Property, provided, however, that Adjacent Owner acknowledges that certain interference, such as noise, vibration, odors, dust, and other inconveniences are expected as a result of the Project. Project Owner shall use commercially reasonable efforts to limit noise, dust, debris, odors, and such other adverse effects and disruption associated with the Project and the access granted hereunder.

- f. The work undertaken upon the Adjacent Property pursuant to this License shall be performed in a safe manner and in accordance with all Applicable Law.

7. LICENSE FEES

- a. In consideration of Adjacent Owner granting of a temporary and revocable license to enter upon the Adjacent Property to install, maintain, and remove the Temporary Protections, upon the installation of any portion of the Temporary Protections, Project Owner shall pay to Adjacent Owner a license fee in the amount of \$ 2,500 per month, pro-rata per day for each partial month, while any portion of the Temporary Protections are installed upon the Adjacent Property or cantilevered across the property line shared by Project Owner and Adjacent Owner (the "License Fee"). The License Fee shall be paid in advance on the first of each month, prorated as necessary in the first and last months.

8. TERM.

- a. Subject to unavoidable delays, including, but not limited to, (a) weather-related delays, (b) additional work, which may be required after regulatory and governmental inspections, (c) labor shortages or strikes, (d) governmental orders, and/or (e) matters outside of the control of Project Owner (collectively, "Unavoidable Delays"), the "Term" of this License means the period commencing on the date of the installation of any of the Temporary Protections (the "Commencement Date") and ending upon the latter of the removal of the Temporary Protection Work, or performance of the Work, or twenty-four (24) months, **time being of the essence as to such date**, unless the License is sooner terminated as a result of a breach hereunder, or the Term is extended pursuant to a written amendment to this License executed by all of the Parties hereto, of which consent shall not be unreasonably delayed, withheld or conditioned by Adjacent Owner (the "Expiration Date").
- b. On or before the expiration of the Term, Project Owner shall, at its sole cost and expense, cause the Temporary Protections to be removed, and comply with all terms of this License.

9. INSURANCE BY PROJECT OWNER

- a. During the term of this License, Project Owner shall require its general contractor to maintain during construction of the Project, commercial general liability

insurance policy(s) with minimum limits (including excess/umbrella coverage) of \$2,000,000 per claim and \$5,000,000 in the aggregate (primary and excess) and Workers Compensation Insurance in the amount mandated by New York State. Project Owner's general contractor shall name Adjacent Owner as an Additional Insured on its commercial general liability policy on a primary and non-contributory basis.

- b. Any other contractor or consultant of the Construction Team accessing Adjacent Property shall, during the term of this License, maintain the following insurance: (i) commercial general liability insurance including personal injury, death and broad form property damage, and contractual liability coverages in the minimum amount of \$1,000,000.00 per occurrence and \$2,000,000.00 in the aggregate. Project Owner shall require all contractors and subcontractors performing work on the Project or accessing the Adjacent Property pursuant to this License to have Workers' Compensation Insurance in statutory limits required by the State of New York.
- c. Project Owner shall provide Adjacent Owner with a certificate of insurance evidencing compliance with this Paragraph prior to installing any of the Monitoring Equipment, or the Temporary Protections.

10. INDEMNIFICATION

Project Owner shall indemnify and hold harmless Adjacent Owner, and all residents of the Adjacent Property, together with their respective consultants, successors, assigns, agents, and estates (collectively, the "AO Indemnitees") from and against any and all causes of action, damages, claims, demands, judgments, liens, litigation, liability, penalties, orders, losses, costs, or expenses, including reasonable attorneys' fees (collectively the "AO Claims") which may be asserted against or incurred by the AO Indemnitees to the extent caused by (i) the acts or omissions of Project Owner, the Construction Team or others acting on Project Owner's behalf in connection with or as a result of the installation, maintenance or removal of the Monitoring Equipment, or the Temporary Protections, or the performance of the Work, or the access granted hereunder by Project Owner, the Construction Team or anyone acting on their behalf; or (ii) the negligence or willful misconduct of Project Owner or the Construction Team; provided, however, notwithstanding the foregoing, Project Owner shall not be responsible to indemnify the AO Indemnitees to the extent the AO Claims are caused by the gross negligence or willful misconduct of the party to be indemnified.

11. TERMINATION

- a. This License shall terminate upon the completion of the Project. Adjacent Owner may also terminate this License for a material breach of this License if Adjacent Owner provides Project Owner with written notice of such alleged default, and Project Owner fails to cure such alleged default within thirty (30) days after receipt of such written notice, except to the extent the default reasonably cannot be cured within such thirty (30) day period, provided that

Project Owner has commenced reasonable measures to cure such default within such thirty (30) day period and diligently continues such measures until cured.

- b. Notwithstanding the foregoing, Adjacent Owner acknowledges that Applicable Law may require that the Temporary Protections remain on the Adjacent Property, and or require that Project Owner complete the Work, and agrees that Adjacent Owner shall have the right to continue to install, maintain, repair, and/or remove such Temporary Protections, and/or perform the Work, as required by such Applicable Law.

12. NOTICES

Any notice, including, but not limited to, approval, consent, acceptance, request, or demand (a “Notice”) from either party to the other will be in writing and shall be deemed received (i) three (3) business days after being deposited with the United States Postal Service by certified or registered mail providing proof of delivery, or (ii) when delivered by hand to the other Party with an appropriate receipt obtained, or (iii) the next business days after being deposited with a nationally recognized carrier (such as FedEx or UPS), and in each case sent to the addresses set forth for Project Owner and Adjacent Owner set forth below:

If to Project Owner:

RLM TH LLC
160 East 70th Street
New York, New York 10021
Attention: James Lee

With copies to:

Adam Leitman Bailey, P.C.
One Battery Park Plaza, 18th Floor
New York, New York 10004
Attention: Joanna C. Peck, Esq.
jpeck@alblawfirm.com

If to Adjacent Owner:

162 East 70th Street Trust
c/o Alan Kroll
Davis & Gilbert
1675 Broadway
New York, New York 10019

With a copy to:

David N. Mair
Kaiser Saurborn & Mair, P.C.
30 Broad Street, 37th Floor
New York, New York 10004
+1.212.338.9100 x315
+1.646.607.9370 fax
mair@ksmlaw.com

13. MODIFICATIONS TO LICENSE

The terms herein set forth may only be changed or modified by written agreement signed by all Parties hereto, and so-ordered by the court.

14. ENFORCEABILITY OF LICENSE

In the event that any provision or provisions herein are determined to be illegal or unenforceable for whatever reasons, such provision or provisions shall be deemed excised from this document and the remaining provisions shall remain in full force and effect as if the excised provisions were never included herein.

15. SUCCESSORS, ASSIGNS, AND/OR BENEFICIARIES

This License shall be binding on the Parties hereto, their successors in interest, assigns and/or beneficiaries.

16. GOVERNING LAW

This License shall be governed by and interpreted under the laws of the State of New York, without giving effect to principles of conflicts of law. The Parties hereby agree that the venue of any dispute resolution proceeding arising out of or in connection with this License shall be in the State and County of New York.

17. ARBITRATION

If the Parties mutually agree, any claim, dispute or other matter in question arising out of or related to this License shall be subject to arbitration, which shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules.

DECISION

As for a reasonable license fee, see House 93, LLC v Lipton, 178 AD3d 545 (1st Dept 2019).

Respondent (Adjacent Owner) is correct that this court may not grant petitioner (Project Owner) a license pursuant to RPAPL 881 that would permit Project Owner to permanently encroach upon Adjacent Owner's property. See Broadway Enterprises, Inc. v

Lum, 16 AD3d 413, 413-414 (2d Dept 2005) and In re Tory Burch LLC v Moskowitz, 146 AD3d 528 (1st Dept 2017).

The court finds that, as a matter of law, the sections of any boundary wall in which joists of Project Owner's building are encased constitute the wall shared by Project Owner's and Adjacent Owner's buildings (i.e., the party wall), as described in the Deed dated January 6, 2006 conveying title to 162 East 70th Street to Adjacent Owner. Project Owner's construction upon its own side of any such party wall, subject to the easement for the support of Adjacent Owner's building, would not constitute a permanent encroachment upon Adjacent Owner's building. See Sakele, supra, pp 24-25. Therefore, the petitioner is entitled to a license to conduct waterproofing as to any such section, as it will not constitute a permanent encroachment upon Adjacent Owner's property. See Sunrise Jewish Center of Valley Stream, Inc v Lipko, 61 Misc2d 673 (Sup Ct Nassau Co 1969)

However, whether the portions of the wall that do not encase the joists of petitioner's building constitute an independent masonry wall belonging wholly to Adjacent Owner or are part and parcel of the party wall shared equally by both parties must be resolved in a declaratory judgment action. See Sakele Brothers, LLC v Safdie, 302 AD2d 20, 23-24 (1st Dept 2002) ("Defendant also asserted a first counterclaim seeking the issuance of a declaratory judgment to the same effect as her

affirmative defenses, and further declaring that defendant is entitled to enter plaintiff's property to 'remove' the remaining portion of the wall, or in the alternative, 'to use the wall as and when she desires'"). Adjacent Owner has not served any Answer, let alone, interposed a counterclaim seeking declaratory judgment relief. Alternatively, should Project Owner proceed with execution of the Parapet, Scupper, or Tree Work therefor and in fact encroach, Adjacent Owner's remedy would be "an action in ejectment or for damages" for trespass, as it sees fit. Lipko, supra, at p. 675-676.

Debra A. James
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<u>5/10/2021</u> DATE		<u>DEBRA A. JAMES, J.S.C.</u>
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" 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 type="checkbox"/> REFERENCE