

Matter of CP VII 78th St. Owner, LLC v C3D E78 LLC
2022 NY Slip Op 33131(U)
September 19, 2022
Supreme Court, New York County
Docket Number: Index No. 156770/2022
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application of:

CP VII 78TH STREET OWNER, LLC,

Petitioner,

For an Order and Judgment pursuant to Section 881 of the
Real Property Actions and Proceedings Law for access to
adjoining property

Index No.: 156770/2022

Decision, Order and License

Part 37

Motion Sequence No. 1

-against-

C3D E78 LLC,

Respondent.
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Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1, 2 and 3 were used in this RPAPL Section 881 Proceeding:

	Papers Numbered:
Moving Papers	1
Opposition Papers	2
Answer	3

Upon the foregoing papers, and upon oral argument having been heard on September 9, 2022, the instant petition is hereby granted to the extent that the Court hereby issues the following license:

CP VII 78TH STREET OWNER LLC ("Project Owner"), the developer of the premises located at 1487-1493 First Avenue, New York, New York and designated in the Tax Map of the City of New York as Block 1452, Lots 27, 28 and 29 (collectively, the "Project Premises"), which is adjacent to the premises located at 354 East 78th Street, New York, New York and designated in the Tax Map of the City of New York as Block 1452, Lot 31 (the "Adjacent Premises"). The Adjacent Premises is owned by C3D E78 LLC ("Adjacent Owner").

Project Owner plans on demolishing the existing buildings at the Project (the "Project"). In connection with the Project, Project Owner intends to: (i) conduct a preconstruction survey of the Adjacent Premises (the "Survey"); (ii) perform eight (8) probes, two per floor, in the dry wall in the walls of the Adjacent Premises that are adjacent to the Project Premises in order to determine the required protections for the construction phase following the Project (the "Probes"); (iii) install maintain and remove vibration monitoring, optical survey targets and crack gauges (the "Monitoring Work"); (iv) install, maintain, and remove overhead protections over the rear yard of the Adjacent Premises and, to protect the windows of the Adjacent Premises, scaffolding with

debris netting thereon; (v) install, maintain and remove a construction fence enclosing the Project Premises; (vi) install, maintain and remove protections over the fire escape at the rear yard and front of the Adjacent Premises ((iv)-(vi) collectively, the "Temporary Protections"); and (vi) install weather protection on the exterior portion of the wall and/or foundation of Adjacent Premises exposed by the Project (the "Weather Protection").

Project Owner is hereby granted a license to: (i) perform the Survey; (ii) perform the Probes; (iii) install, maintain, and remove the Temporary Protections as identified in (a) Drawing Nos. DM-001.01, DM-002.00, DM-101.01, DM-102.01, DM-201.01, DM-301.01, DM-401.00, and DM-501.00, dated July 11, 2022 and prepared by Howard I. Shapiro & Associates Consulting Engineers, P.C. (NYSCEF Doc. No. 14) and (b) Drawing Nos. DM-001.01, DM-002.00, DM-101.01, DM-102.01, DM-103.01, DM-104.01, DM-201.01, DM-301.01, DM-401.00, DM-402.00 and DM-501.00, dated July 11, 2022 and prepared by Howard I. Shapiro & Associates Consulting Engineers, P.C. (NYSCEF Doc. No. 15); and (iv) install the Weather Protection. In connection with the Probes, Project Owner's engineer shall coordinate with Adjacent Owner's engineer to determine the location of the Probes.

In addition, Project Owner is further granted a license to install, maintain and remove the Monitoring Work. In connection with the Monitoring Work and pursuant to the monitoring plan (the "Monitoring Plan") annexed hereto as Exhibit A, during the course of the Project, Project Owner shall read, observe, document and provide copies of inspection and test reports to Adjacent Owner as follows: (i) Seismograph (i.e., vibration) measurements and data shall be provided on a real-time basis via automatic alerts to Ziad Maad, P.E. at ziadmaad@ges-pc.com, Dan George at dgeorge@ges-pc.com, Robert Proto at proto93@verizon.net, and Joanna C. Peck, Esq. at jpeck@alblawfirm.com; (ii) Vibration reports shall be provided to Adjacent Owner on a weekly basis; (iii) Optical data shall be provided on a twice a week basis via electronic transmission, unless there is a threshold exceedance pursuant to the Monitoring Plan, in which case, Project Owner shall notify Adjacent Owner and Adjacent Owner's Representatives immediately.

This license hereby covers and extends to the Project Owner and its successors, contractors, subcontractors, construction managers, architect and engineering consultants, employees and agents (the "Construction Team") who may access the Adjacent Premises as may be reasonably required in order to perform the Survey and the Probes; to install, maintain, and remove the Temporary Protections and Monitoring Work; and to install the Waterproofing in accordance with the terms of this license and as required by all laws, codes, rules, regulations and requirements of the New York City Department of Buildings ("DOB").

Project Owner shall only access the interior of the Adjacent Premises in connection with the following: (i) performing the Survey and the Probes; (ii) to inspect and/or repair any damages directly caused by the Project; and/or (iii) to install, maintain and remove the Monitoring Work.

When accessing the interior of the Adjacent Premises pursuant to this license, Project Owner and/or any members of the Construction Team accessing the Adjacent Premises shall comply or cause its Construction Team members entering the Adjacent Premises to comply with all applicable COVID-19 laws, including then-current protocols set forth by the Federal Government, the DOB, the Department of Health & Mental Hygiene, the State of New York. Project Owner

agrees that, upon request by Adjacent Owner, it will, and shall cause the Construction Team to, wear N-95 or KN-95 masks when accessing any interior portions of the Adjacent Premises.

The Adjacent Owner shall cooperate to effectuate the terms of this license, including, without limitation, providing all necessary executed applications, consents, sign-offs and other documents required by any governmental authority having jurisdiction over the Project, including the DOB.

The License is effective on October 3, 2022 and shall continue for five (5) months from such date (the "Term"). To the extent an extension of the License is required, Project Owner will contact Adjacent Owner to request an extension; however, to the extent the parties cannot agree to the terms of such an extension, Project Owner may contact this Court at least 30 days prior to the end of the Term to request an extension. Project Owner will cause the removal of the Temporary Protections from the Adjacent Premises as soon as permitted by the DOB.

To the fullest extent permitted by law, Developer agrees to indemnify, defend and save Adjacent Owner and Adjacent Owner's shareholders, board members, principals, beneficiaries, members, directors, officers, , employees, tenants, lenders and its successors and assigns (collectively, "Adjacent Owner Indemnitees") harmless from and against any and all claims, losses, liabilities, damages, judgments, costs and expenses, including reasonable attorneys' fees and expenses, and/or any architects', engineers' and consultants' fees and disbursements, and all other professional fees and disbursements and court costs and fees, incurred in connection therewith and in connection with the enforcement of this indemnification provision, (collectively, "Losses") arising out of or in connection with (i) the use, exercise or enjoyment by Developer and/or the Construction Team of the license granted hereunder, (ii) the performance of the Project, including, without limitation, any violations affecting the Adjacent Premises resulting therefrom, (iii) any bodily injury, including death, sustained by any person or persons and/or any actual verifiable damage to property, including any damage to the Adjacent Premises resulting from the Project, (iv) any breach by Project Owner (and/or the Construction Team), of any of the terms, covenants, conditions of the license granted hereunder; and (v) lost rents or rental abatements that are the direct result of damages to the Adjacent Premises that resulted in DOB ordering a partial or whole vacatur of the Adjacent Premises. This indemnity specifically contemplates full indemnity in the event that liability is imposed against Adjacent Owner Indemnitees without any negligence by Adjacent Owner Indemnitees and solely by reason of statute, operation of law or otherwise, and partial indemnity in the event of any actual negligence on the part of any Adjacent Owner Indemnatee causing or contributing to the underlying claim, in which case indemnification will be limited to any liability imposed over and above that percentage attributable to actual fault of the Adjacent Owner Indemnitees, whether by statute, operation of law or otherwise, to the fullest extent permitted by law.

Upon commencement of the Project and for the duration of the Term thereafter, Project Owner shall maintain or shall cause its demolition contractor shall maintain in full force and effect:

- (a) commercial general liability insurance with limits of no less than \$3,000,000 per occurrence and \$5,000,000 in the aggregate through primary and excess insurance (which coverage may include use of an umbrella policy), covering bodily injury and property damage, written on an occurrence basis including but not limited to broad

form property damage liability, contractual liability and fire legal liability, which policies and any renewals thereof shall name Owner and Additional Insureds (defined below) as additional insureds.

- (b) worker's compensation, employer's liability and New York State Disability insurance, in an amount that is no less than \$1,000,000.
- (c) Automobile Liability Insurance, including owned, non-owned and hired car liability insurance for combined limits of liability of \$1,000,000 and excess liability of \$1,000,000, which policies and any renewals thereof shall name Owner and Additional Insureds (defined below) as additional insureds by written endorsement. The limits of liability can be provided in a combination of an Automobile liability policy and an umbrella liability policy.

Developer shall provide the Owner with copies of the relevant policies, certificates of insurance and specific endorsement identifying the Adjacent Owner, and their respective principals, members, directors and board members, together with the tenants of any of the units located in the Adjacent Premises and any occupants thereof (collectively, "Additional Insureds"), as additional insureds on each of the above policies, and any other evidence reasonably requested by Adjacent Owner to ensure compliance hereunder prior to accessing the Adjacent Premise or performing any work thereon. No such insurance required herein shall contain any exclusionary language or limitations relating to any work contemplated under the Agreement. The above policies shall be issued by companies of recognized responsibility licensed to do business in the State of New York, having an AM Best rating of no less than A- VIII, shall not contain any New York Labor Law exclusions or limitations on suits between insureds and Additional Insureds, and shall be primary and non-contributory with regard to any insurance that may be available to Adjacent Owner and Additional Insureds. Waiver of subrogation endorsements are required for all workers' compensation, commercial general liability and umbrella policies. All policies required hereunder shall contain a provision whereby the same cannot be canceled or modified unless the Adjacent Owner is given at least 30 days prior written notice of such cancellation, or modification. Project Owner shall promptly deliver to Adjacent Owner true copies of renewal certificates when renewed and new or changed endorsements for any of the aforementioned policies.

Project Owner shall pay Adjacent Owner a license fee of \$3,500 per month (pro-rated for partial months), such fee commencing upon the installation of the first of the Monitoring Work or Temporary Protections and ending on the removal of the Temporary Protections.

Given that Project Owner or its demolition contractor shall maintain proper insurance (including naming Respondent as an additional insured thereon) for the duration of the Project, such insurance will sufficiently protect Respondent and its request for a bond is hereby denied.

This Court agrees to continue jurisdiction over this case and may be reached at 646-386-3222 if any problems arise.

9/19/2022

DATE

CHECK ONE:

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CASE DISPOSED

☒

GRANTED

☐

DENIED

APPLICATION:

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SETTLE ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

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NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

OTHER

☐

SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

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REFERENCE



Hon. Arthur F. Engoron