

419 BR Partners LLC v Zabar
2023 NY Slip Op 30001(U)
January 2, 2023
Supreme Court, New York County
Docket Number: Index No. 156089/2022
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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419 BR PARTNERS LLC,

Plaintiff,

- v -

ELI ZABAR, AS TRUSTEE OF THE DEVON
FREDERICKS 2012 FAMILY TRUST DATED OCTOBER
10, 2012, SONDR A ZABAR, AS TRUSTEE OF THE
DEVON FREDERICKS 2012 FAMILY TRUST DATED
OCTOBER 10, 2012, SONDR A ZABAR, AS TRUSTEE OF
THE ELI ZABAR 2012 FAMILY TRUST DATED OCTOBER
10, 2012, DEVON FREDERICKS, AS TRUSTEE OF THE
ELI ZABAR 2012 FAMILY TRUST DATED OCTOBER 10,
2012, THE DEVON FREDERICKS 2012 FAMILY TRUST
DATED OCTOBER 10, 2012, THE ELI ZABAR 2012
FAMILY TRUST DATED OCTOBER 10, 2012

Defendant.

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INDEX NO. 156089/2022

MOTION DATE 07/21/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 21, 22, 25, 26, 27, 28, 29, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 47, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 73, 75, 77, 78, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93

were read on this motion to/for MISC. SPECIAL PROCEEDINGS.

Upon the foregoing documents, it is

Petitioner 419 BR Partners LLC moves by OSC pursuant to RPAPL §881 for a license: (1) to inspect the roof of 421 East 91st Street, New York City (the Adjacent Premises) and perform any required probing thereon in order to confirm the load-bearing capacity of the roof; and (2) once inspection has occurred and petitioner has issued to adjacent owner a signed and sealed letter stating that the roof can safely handle the loads to be imposed thereon, to (a) perform a preconstruction survey of the Adjacent Premises, which will consist of photographing the existing conditions; (b) install, maintain, and remove roof protection over the roof of the Adjacent Premises; (c)

install, maintain, and remove a standard overhead protection system over the bulkhead on the roof; (d) install, maintain, and remove cantilevered overhead protection into the airspace of the Adjacent Premises; and (e) install, maintain, and remove pipe scaffolding with debris netting in the airspace of the adjacent premises, which will be supported by the cantilevered protections, and to perform exterior finishing work on the eastern wall of plaintiff's premises, requiring Adjacent Premises access, which shall be maintained for approximately thirty months from the date that this court grants such license. (NYSCEF 1, Petition ¶¶3.)

Respondents¹ own the Adjacent Premises (NYSCEF 3, Deeds) and (1) object that petitioner fails to allege that the work is necessary (NYSCEF 36, Verified Answer, Counterclaims and Objections of Law ¶¶58); (2) object to petitioner underpinning respondents' premises (*id.* ¶¶60); (3) demand (a) compensation "for the invasion of [respondents'] property, in the form of a license fee, and for costs incidental to the work to be performed by the developer, including, but not limited to, indemnification, provision of insurance coverage, reimbursement for the fees of attorneys, engineers, consultants, etc. engaged to advise the adjoining landowner during the negotiation, compensation for any damage to or alteration of property, compensation for cessation of business and/or impingement of tenants' leaseholds, etc." (*id.* ¶¶63) and (b) conditions such as "covenant to work lawfully, i.e. with all proper permits and approvals, with all legally

¹ Respondents are Eli Zabar, as Trustee of the Devon Fredericks 2012 Family Trust Dated October 10, 2012, Sondra Zabar, as Trustee of the Devon Fredericks 2012 Family Trust Dated October 10, 2012, Sondra Zabar, as Trustee of the Eli Zabar 2012 Family Trust Dated October 10, 2012, Devon Fredericks, as Trustee of the Eli Zabar 2012 Family Trust Dated October 10, 2012, The Devon Fredericks 2012 Family Trust Dated October 10, 2012, and The Eli Zabar 2012 Family Trust Dated October 10, 2012.

mandated insurance coverage, including action over provisions, with work performed only during lawful business hours, etc.[,] and to conduct work so as to minimize disruption for neighbors, their tenants, and their invitees, with measures including, but not limited to, measures to abate noise, dust, traffic, and other nuisances, agreements to notify neighbors in advance of particularly disruptive entries or operations, etc.” (*id.* ¶¶64); (4) assert the petition is barred by petitioner’s bad faith and unclean hands because (a) underpinnings of respondents’ building constitute a permanent taking (*id.* ¶¶67) and (b) petitioner is abusing the legal system to get a license to which petitioner is not otherwise entitled by filing more than one lawsuit and thwarting respondents’ right to negotiate (*id.* ¶¶68, 76); (5) object that (a) the plans are vague (*id.* ¶¶72, 100, 104, 151) and “do not account for vertical and lateral support of Respondents’ foundation despite confirmation that they are digging deeper than the foundation on Respondents’ Property in violation of Building Code §§ 1803.1, 1805.4 and 3309.4.1” (*id.* ¶73), (b) do not account for settling (*id.* ¶73) and (c) “there is no indication that these heavy structures can be supported by the roof on Respondents’ Property” (*id.* ¶¶73, 74); and (6) object that respondents have a right to negotiate, but petitioner must first provide legally compliant plans. (*Id.* ¶76.) Respondents’ first counterclaim is for “judgment (a) declaring the rights of the parties; (b) declaring that the foundation and excavation plans do not adequately consider and/or account for the protection of the foundation of Respondents’ Property; (c) a preliminary and permanent injunction restraining and enjoining Petitioner, its agents, servants, representatives and employees from performing any work in contravention of Building Code §§ 1803.1, 1805.4, 3309.1, 3309.4, 3309.4.1 and 3309.10; and (d) directing the amendment of plans to account for

protection compliant with those sections" (*Id.* ¶128.) In their second counterclaim, respondents seek reimbursement of attorneys' fees and engineering fees for this proceeding and a prior proceeding, *419 BR Partners LLC v Zabbar, et al.*, Index No. 156867/2021, before Hon. Verna L. Saunders.² (*Id.* ¶¶130-137.)

Petitioner is renovating an existing building to create a seven-story facility to provide homeless services (Project) at 419 East 91st Street in New York City on a 25 foot by 100 foot lot (419 Property). (NYSCEF 77, Hearing tr at 41:5-6 [witness Vachagan Grigoryan]; NYSCEF 43, Alt 1 Project Application.) The New York City Building Code requires petitioner to conduct a pre-construction survey of the adjacent premises, provide roof protection, and overhead protection. (Building Code §§3309.3, 3309.1, 3309.13, 3308.1, 3308.2, and 3308.8.)

The Adjacent Premises is an 1880s building currently used to grow crops in greenhouses on the roof which are sold in respondents' stores producing annual revenues of \$684,195. (NYSCEF 77, Hearing tr at 89:14-90:7, 103:19 [witness Eli Zabbar]; see *also* Index No. 156867/2021, NYSCEF 34, Howe³ aff ¶15.) The building also houses large industrial ovens which were used to heat the greenhouses causing a fire in 2004 destroying half of the roof. (NYSCEF 77, Hearing tr at 91:3-92:7 [witness Eli Zabbar]; NYSCEF ___, R3⁴, Photos.)

² During the pendency of this action, respondents' request for fees in the prior proceeding was denied by the Appellate Division, First Department. (*419 BR Partners LLC v Zabbar*, 209 AD3d 604 [1st Dept 2022].)

³ Janine Howe is respondents' CFO. (Index No. 156867/2021, NYSCEF 34, Howe aff ¶1.)

⁴ The parties shall file exhibits in evidence in NYSCEF and identify them by their exhibit number with a description of the document – "R3 in evidence, Photos."

On October 7, 2022, the court found that petitioner established the need to enter the Adjacent Premises to inspect and protect its roof consistent with the New York City Building Code. (NYSCEF 47, Interim Order.) The court also determined that issues of fact existed which required a hearing as to whether petitioner's proposed protections (roof and foundation) are inadequate, as respondents assert, or whether respondents' objections to the Project are baseless and strategic, as petitioner asserts. (*Id.*) Respondents' engineer Spencer Goroff attacked petitioner's plans to protect the roof and foundation. (NYSCEF 44, Goroff aff.) Because the court was troubled particularly by respondents' assertions that Goroff could not tell from petitioner's plans if there was underpinning under respondents' building, the court determined that the engineers should meet and confer to quickly resolve any such questions. Accordingly, before such a hearing could proceed, the court directed the parties' engineers to (1) meet and confer; (2) inspect the Adjacent Premises together, if agreed;⁵ and (3) perform probes, if agreed. (NYSCEF 47, Interim Order.) The court scheduled a hearing for November 14,

⁵ The court notes petitioner's request to respondents for the current roof load. (NYSCEF 10, Feb. 15, 2022 email.) The court also notes petitioner's four requests to inspect the Adjacent Premises. (NYSCEF 12, March 9, 10, 15 and 16, 2022 emails.) Again, the court is not considering petitioner's efforts prior to January 20, 2022. However, in the absence of such an inspection, petitioner found an alternate source of information—the 2021 Certificate of Occupancy – submitted to the Department of Buildings by respondents - which states that the live load of the second floor is 120 lbs. per square foot. (NYSCEF 60, Rabinowitz aff ¶13; NYSCEF 62, Feb. 19, 2021 Certificate of Occupancy; NYSCEF 64, Oct. 20, 2022 email.) Nevertheless, the court directed the inspection for confirmation that petitioner's calculation of the live load of the roof is accurate. The live load of the roof has now been confirmed by three engineers: Lampert (NYSCEF 13, Lampard aff; NYSCEF 14, July 28, 2021 Roof Protection Plans; NYSCEF 15, Site Safety Logistics March 19, 2021), Weinstein (NYSCEF __, R2, Weinstein aff) and Grigoryan (NYSCEF 55, Report) and all agree that the roof load is sufficient for the weight of the roof protection.

2022, which continued on November 16, 2022.⁶ In the meantime, the court appointed Hon. Robert Kalish (ret.) to mediate.⁷ While the mediation was unsuccessful, the mediator designated November 8, 2022 as the date for the inspection. However, the engineers did not inspect the roof together and never conferred regarding the foundation in violation of the court order.

RPAPL § 881 provides:

“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.”

The granting of a license under this section “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 Theater Owner, LLC v WR Universal, LLC*,

⁶ Respondents’ request to reopen the hearing (NYSCEF 79) is denied. In addition to misrepresenting the court’s concern stated on the record on November 22, 2022 (NYSCEF 78, Hearing tr at 42:22 - 43:18), respondents’ request lacks any citations to the record and fails to identify or explain any prejudice. Respondents’ assertion of insufficient time to review 3 objections (NYSCEF 77, Hearing tr at 130:1, 149:6, and 159:25) is disingenuous; the parties had one week after receipt of the transcript to notify the court of any requests to call back witnesses and giving the basis therefor. (NYSCEF 78, Hearing tr at 73:22-24.) Rather, respondents’ unsupported request appears to be a delay tactic. The court reminds the parties to alert the court by email when a party files a letter in NYSCEF or seeks immediate court action other than by motion. The parties failed to do so.

⁷ The court thanks Justice Kalish for his efforts.

192 AD3d 690, 690 [2d Dept. 2021].) The court hearing such an application “may consider [] the nature and extent of the requested access, the duration of the access, the protections to the adjoining property that are needed, the lack of an alternative means to perform the work, the public interest in the completion of the project, and the measures in place to ensure the financial compensation of the adjoining owner for any damage or inconvenience resulting from the intrusion.” (*Matter of Voron v Board of Mgrs. of the Newswalk Condominium*, 186 AD3d 833, 835 [2d Dept. 2020].) Petitioner’s RPAPL 881 petition does not define the scope of the court’s review. Accordingly, the court has authority to consider respondents’ objections to petitioner’s support of excavation (SOE) plans and denies petitioner’s request to limit this proceeding to roof protection only. (NYSCEF 1, Petition ¶14.)

Failure to Allege Necessity of Work

The court rejects respondents’ first objection that petitioner fails to allege that the “work” is necessary. To the extent that respondents object to the protective work, again the court finds that the work to protect the roof is required by New York City Building Code (Building Code §§ 3309.3; 3309.1, 3309.13, 3308.1, 3308.2 and 3308.8) which also requires protection of the foundation (Building Code §§1803.1, 1805.4, 3309.4, 3309.4.1; NYSCEF 61, Oct. 7, 2022 Oral Argument tr at 25:21-25 [Daniel Schneider, Esq.⁸]; NYSCEF 44, Goroff aff ¶¶19 - 22, 33.)⁹ To the extent respondents’ “work”

⁸ Schneider is respondents’ attorney.

⁹The court directed petitioner to get the transcript and send it to the court to be so ordered. (NYSCEF 61, Oct. 7, 2022 Oral Argument tr at 73:21-22, 74:23-25, 75:23.) Instead, petitioner never emailed it to the court and buried it as an exhibit to a client’s affidavit in support of its OSC. (*Id.*) Petitioner is directed to refile NYSCEF 61 and label it as “Transcript” with the date of the argument, consistent with the Part 48 Procedures.

objection is to the Project itself, respondents fail to offer any authority that would allow respondents to stop, interfere, or thwart the Project because respondents find the “work” – to build a homeless shelter— contrary to the zoning law or otherwise objectionable. (NYSCEF 77, Hearing tr at 85:23-86:9 [witness Eli Zabar].) RPAPL §881 is not a vehicle for neighbors to thwart the development next door. (*Matter of Rosma Dev., LLC v South*, 5 Misc 3d 1014(A), *4 [Sup Ct, Kings County 2004] [“Petitioners' development plans may not be impeded or interfered with by adjoining property owners' resistance to development. To allow otherwise would spell doom to the development process.”].)

Roof Protection

AE Design Solutions Inc. prepared the temporary protection plan for the Adjacent Premises and ZV Drafting prepared the Site Safety Logistics Plan. (NYSCEF 14, Temporary Protection Plan [signed and sealed by Paul Perdek, P.E.]; NYSCEF 15, Site Safety Plan.) AE Design Solutions Inc. also prepared the load calculations letter. (NYSCEF 16, Load Calculation Letter).¹⁰ Petitioner provided respondents (1) roof load calculations on February 18, 2022 and (2) revised roof protection and load calculations on March 1, 2022. (NYSCEF 10, emails.)

Herbert Weinstein, a licensed civil engineer, testified for petitioner regarding the roof protection plans which consists of scaffold independently supporting plywood cantilevered over respondents' roof structures and planks and plywood to cover the roof itself. (NYSCEF 77, Hearing tr at 61:8-19 [witness Herbert Weinstein].) Weinstein

¹⁰ Stephen J. Lampard, P.E. reviewed the plans and the load calculations and describes the roof protection work in detail. (NYSCEF 13, Lampard Aff ¶¶ 2, 3, 4, 6.) The court relied on this affidavit at the initial appearance for argument on motion 01 to determine that access for an inspection was necessary.

testified that he observed a structural slab of concrete on top of metal decking (*id.* at 65:20-66:14) and that the greenhouses are on an “independent structural steel framing, so it doesn’t impact the existing roof.” (*id.* at 67:10-12.) Because of this independent support system, Weinstein did not find boring and testing necessary based on his field inspection. (*id.* at 76:6-18.) The roof was repaired with structural steel beams following the 2004 fire. (*id.* at 91:3-21 [witness Eli Zabar]; NYSCEF ___, R3, [a] to [e] photos.) Though Weinstein was not aware of the fire, he found the roof “structurally very sound” based on his observations of the underside of the beams and metal decking and his walk on the roof with Zabar and two others. (NYSCEF 77, Hearing tr at 63:24-64:24 [witness Herbert Weinstein].) Zabar’s failure to disclose the 2004 fire to Weinstein and Goroff (*id.* at 141:1-5) does not undermine Weinstein’s testimony as to the current state of the roof which Weinstein observed.

As to the roof, Goroff objects to petitioner’s conclusions as unsupported. (*id.* at 136:7-8 [witness Spencer Goroff].) For example, Goroff attacked petitioner’s roof protection plans arguing that petitioner failed to incorporate or consider the weight of the protection equipment and greenhouse structures already on the roof, wind, and snow. (*id.* at 136:9-137:2.) Goroff also attacked the inspection he admittedly failed to attend. (NYSCEF ___, R4, Goroff’s Nov. 14, 2022 Letter.)

The court credits Weinstein’s testimony, but not Goroff’s testimony. As to Goroff’s objection to inspecting the roof from the second floor, he was unaware of the parties’ agreement to do so. In any case, and regardless of the agreement, Weinstein inspected the roof by walking on the roof with Zabar, the contractor and Zabar’s companion. Goroff’s assertion that the inspection he did not attend was rushed and

inadequate conflicts with Weinstein's credible testimony of a thorough inspection. (*Id.*) Respondents failed to corroborate Goroff's testimony as to the date and time of his arrival for the inspection by inquiring of Zabar, who Goroff allegedly called when he arrived at 10 a.m. and found no one there. (NYSCEF 77, hearing tr at 128:17-129:22 [witness Spencer Goroff]; see also NYSCEF ___, R4, Goroff's Nov. 14, 2022 Letter.)¹¹ Curiously, respondents imply that Goroff was on vacation or that petitioner prevented Goroff from participating on the date designated by the mediator.¹² (NYSCEF 77, Hearing tr at 75: 20-22 [witness Herbert Weinstein]; *id.* at 96:13-14 [Michael Jagiani, Esq.¹³].)

Goroff was also simply wrong when, in September 2022, he denied having the load calculations when the calculations were in respondents' possession since February 18, 2022 and March 1, 2022. (NYSCEF 44, Goroff aff ¶¶31; NYSCEF 10, emails.) Similarly, according to Goroff, as of September 20, 2022, petitioner had refused a roof inspection. (NYSCEF 53, Goroff aff ¶¶12, 17.) However, petitioner repeatedly requested access for such an inspection. (NYSCEF 12, March 9, 10, 15, 16 2022 emails.) Accordingly, petitioner asked respondents to provide buildings loads. (NYSCEF 10, February 15, 2022 emails.) Finally, petitioner used the Certificate of

¹¹ Respondents shall file all documentary evidence in NYSCEF labeling documents with document description and trial exhibit number.

¹² The court notes that the parties had almost one month, October 7 to November 14, 2022, to conduct the inspection together. The mediator selected November 8, 2022 for the inspection. (NYSCEF 72, November 3, 2022 Order.) If Goroff was unavailable November 8, 2022, and the mediator did not adjourn the date after being informed of Goroff's vacation, then respondents should have engaged a different professional.

¹³ Jagiani is respondents' attorney.

Occupancy, not an ancient document as Goroff opines, filed with the Department of Buildings by respondents in 2021. (NYSCEF 53, Goroff aff ¶11.)

As evidence that the roof lacks load capacity to support petitioner's roof protection plan, Zabar testified that he would not feel safe standing on the roof but with a few people. (NYSCEF 77, Hearing tr at 92:5-7 [witness Eli Zabar].) This testimony is contradicted by Zabar's testimony that, during the last 15 years, he has walked on the roof "all the time." (*Id.* at 103:4-5.) Moreover, respondents' photos of the roof after the fire show as many as eleven bakers on the roof. (NYSCEF __, R3, Photos.) It is inconsistent to say that the roof was safe enough for respondents' employees in 2004, but not for Zabar himself in 2022 after the roof was renovated with structural steel. Zabar's testimony that "if [the roof protection] blocks the light" respondents cannot grow crops (NYSCEF 77, Hearing tr at 90:2-7 [witness Eli Zabar]) was equivocal and seems to overlook that the roof protection is cantilevered.

The court also rejects Goroff's demands for roof probing. Prior to the inspection, the parties agreed to inspect the roof from the second floor with no probing. (NYSCEF 72, Nov. 3, 2022 Order.)

The court finds that petitioner has established the "exact nature, timing and extent of the [work] requiring the license" for the roof protection plan and rejects Goroff's objections as unreliable. (*Deutsche Bank Tr. v 120 Greenwich Dev. Assoc.*, 7 Misc 3d 1006[A] [Sup Ct, NY County 2005].) Goroff's objections seem contrived and undermined by his failure to provide calculations to support his objections insisting that it was not his job. (NYSCEF 77, Hearing tr at 155:5-11 [witness Spencer Goroff].) In the absence of his own calculations, Goroff's criticism of petitioner's calculations and

design are rejected as speculation. Finally, springing the 2004 fire at the hearing instead of disclosing it to Weinstein during the inspection demonstrates gamesmanship and that respondents' goal was not to protect respondents' building, but rather either delay or leverage for license fee negotiations.

Accordingly, there is no factual basis that the roof protection plan will be anything but a slight inconvenience to respondents while the potential hardship to petitioner in not developing its property and to the community is crushing. (*See AIH Group, LLC v C.J.F. & Sons Enterprises, Inc.*, 63 Misc 3d 1231[A] [Sup Ct 2019] [finding petitioner's construction of a nine-story hotel near JFK had "the potential to benefit greatly the surrounding businesses in th[e] area."].) Providing homeless services during a crisis could not be more important at this time.

Underpinning

In their September 2022 answer, respondents object that (a) the plans are vague and "do not account for vertical and lateral support of Respondents' foundation despite confirmation that they are digging deeper than the foundation on Respondents' Property in violation of Building Code §§ 1803.1, 1805.4 and 3309.4.1;" and "(b) do not account for settling." (NYSCEF 36, Verified Answer, Counterclaims and Objections of Law ¶¶73- 74). As of September 2022, respondents also objected to petitioner underpinning respondents' premises. (*Id.* ¶60.) However, at the November 2022 hearing, respondents reversed their position and demanded underpinning based on a

Geotechnical Evaluation Report [Geo Report].¹⁴ (NYSCEF 78, Hearing tr at 67:7-21 [Michael Jagiani, Esq.]; NYSCEF ___, R1, Oct. 30, 2022 Geo Report.)

Vachagan Grigoryan, a structural engineer of 25 years, currently employed by York Tower Consulting Engineering, designed petitioner's SOE system. (NYSCEF 77, Hearing tr at 14:8, 14:21, 18:7-18, 19:17-19 [witness Vachagan Grigoryan]; NYSCEF 9, Feb. 4, 2022 SOE Drawings.) He has designed 60-70 SOE systems. (NYSCEF 77, Hearing tr at 17:12-13 [witness Vachagan Grigoryan].) He has experience with projects with differentials between building foundations as much as 13 feet and involving buildings from the 1920s. (*Id.* at 48:21-49:4.)

Grigoryan testified to his process to prepare the SOE plan including assembling geotechnical information, boring tests, test pits,¹⁵ and performing inspections. (*Id.* at 18:15-19:15.) He also testified to protecting the Adjacent Premises by sequencing the pouring of the foundation, excavating four-foot strips across the property, providing reinforcement and pouring concrete before moving to the next strip. (*Id.* at 21:3-22:2, 48:8-20.) Grigoryan has used this system of installing the foundation seven or eight times. (*Id.* at 17:21-18:4, 48:21-49:4.) He opines that, as long as the contractor follows his sequence and the 419 Property is underpinned, underpinning of the Adjacent Premises is not necessary. (*Id.* at 22:3-17.) Indeed, Grigoryan testified that underpinning the Adjacent Premises, as respondents now request, would undermine the integrity of both buildings and create a dangerous condition. (*Id.* at 24:2-25:13.)

¹⁴ Grigoryan prepared Appendix 4 to the Geo Report. (*Id.* at 54:1-10 [witness Vachagan Grigoryan].)

¹⁵ Test pits are used to find the elevation of the foundation. (NYSCEF 77, Hearing tr at 44:11-12 [witness Vachagan Grigoryan].)

Grigoryan reviewed Lampard's letter and the loads calculations letter (NYSCEF 13 and 16) to ensure that the SOE plan adequately accounts for the loads. (NYSCEF 55, Grigoryan aff ¶¶11.) While the roof protections and excavation work are separate events, Grigoryan's "SOE Drawings were designed to account for proposed additional loads imposed by the [roof] Protections." (*Id.* ¶¶13, 16.)

According to Grigoryan, the differential between the Project and the Adjacent Property is two feet and nine inches. (NYSCEF 77, Hearing tr at 55:6-10 [witness Vachagan Grigoryan].) Grigoryan testified credibly that he complied with New York City's Building Code §§ 1803.1, 1805.43, 3309.4.1, all of which are triggered when the foundation of the development property is lower than the adjoining property, and he accounted for vertical and lateral loads. (*Id.* at 30:20-31:19.) Grigoryan testified that since "calculations are not part of drawings," the absence of calculations in his drawing, to which Goroff objects, is not meaningful; Grigoryan has accounted for loads. (*Id.* at 48:13-15.)

Grigoryan has called for daily optical monitoring and continuous seismic vibration monitoring 24 hours a day 7 days a week; certain building movement would trigger an immediate notification to Grigoryan and others by email and text. (*Id.* at 33:24-34:14; Building Code §3309.4.4.) In SOE 002, Grigoryan indicates that if movement approaches 0.2, he is alerted and at 0.25, work stops. (NYSCEF __, P54, email with attachments [NYSCEF 54 is the email without attachments].)¹⁶

Grigoryan discussed the Project with Goroff in August 2021. (NYSCEF 77, Hearing tr at 26:5-17 [witness Vachagan Grigoryan].) On February 22, 2022, following

¹⁶ Petitioner shall file the entire document in NYSCEF.
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Judge Sanders' decision, Grigoryan sent Goroff updated SOE plans and invited a call if Goroff had questions, but Goroff never called. (*Id.* at 28:6-11; NYSCEF ____,¹⁷ P64, email.) In September 2022, when the engineers next spoke, Goroff requested a Geo Report. (NYSCEF 77, Hearing tr at 32:10-19 [witness Vachagan Grigoryan].) Grigoryan testified credibly that he had never received such a request before. (*Id.*)

Respondents object to the method and manner of petitioner's construction. Initially, respondents complained that they could not determine petitioner's scope of work calling the plans "vague." (NYSCEF 44, Goroff aff ¶¶9.) Having experienced damage during petitioner's demolition, respondents are understandably concerned about petitioner's construction practices. (NYSCEF 77, Hearing tr at 104:8-16 [witness Eli Zabar].) Since filing their answer on September 20, 2022, wherein they demanded no underpinning, as previously stated, respondents have reversed their position; Goroff now insists that petitioner underpin the Adjacent Premises. (*Id.* at 113:19-114:1, 114:9-13, 148:1-22 [witness Spencer Goroff].) Goroff also objects to petitioner's system of installing the foundation in 10-foot strips instead of as a single unit. (*Id.* at 158:10-13.) Specifically, Goroff explained that he is concerned that Grigoryan has not considered settling caused by the pouring of the foundation.

“Q With regard to this settling that you just testified to, would that settling have an effect on Mr. Zabar's property, the respondents' property?

A Absolutely.

Q What kind of effect would it have?

A If a building of that age were to settle a half inch, which is roughly .4 inches, you would probably wind up with walls cracking, floors cracking, doors that don't close properly, and windows that may not be able to be opened.

Q Would you consider that significant damage?

A That's pretty bad.”

¹⁷ Petitioner shall file in NYSCEF.

(*Id.* at 118:16-119:1.)

During his almost 50-year engineering career, Goroff has worked on 10 to 15 projects with foundation differentials all of which had underpinning. (*Id.* at 114:17-115:8.) While Goroff understood that petitioner's foundation construction in a particular sequence was intended to mitigate damage to the Adjacent Premises from sand or dirt falling away from the foundation, he objected to it, insisting instead on underpinning. (*Id.*) Goroff's opinion is primarily based on his impression of the Geo Report and specifically his reading of Appendix 4 which contains the word "assumed." (*Id.* at 117:21-25.) Goroff also objects to petitioner's failure to provide an updated Geo Report so that "the geotechnical engineer reissue the report and that the report would indicate that the building -- that Mr. Zabar's building was not being underpinned and that there would be no additional effect or that it would change." (*Id.* at 119:4-120:17.) In his September 20, 2022 affidavit, Goroff complained that the SOE plans do not show where the underpinning will occur. (NYSCEF 44, Goroff aff ¶10.)

The court rejects respondents' opinion that the Geo Report presumes underpinning under the Adjacent Property. Grigoryan drafted the last page of the report, not Goroff and not the author of the Geo Report. Grigoryan credibly explained that he used the word "assumed" to illustrate why underpinning was not necessary. (NYSCEF 77, Hearing tr at 39:12-22 [witness Vachagan Grigoryan].) In the absence of testimony from the Geo Report's author, the court rejects Goroff's opinion about what the author believed. Respondents' failure to call the Geo Report's author to testify is even more surprising in light of respondents' declaration that they reversed their underpinning position based on the Geo Report. The court, however, does not give the

Geo Report such weight, particularly in light of Grigoryan's testimony that Goroff's request for the Geo Report was highly unusual, implying that respondents' request was unnecessary, and Grigoryan obtained geotechnical information, conducted boring tests and test pits when he initially prepared the SOE plans. Contrary to respondents' concern, Grigoryan has clearly considered settling.

The court finds that petitioner is not underpinning the Adjacent Premises; there is no taking of respondents' property.¹⁸ Respondents' request for underpinning is denied based on Grigoryan's credible testimony that petitioner is underpinning its own building, not the Adjacent Premises. Further, based on Grigoryan's credible testimony explaining how the foundation system works to mitigate damage to the respondents' foundation, underpinning of the Adjacent Premises is not only unnecessary, but potentially dangerous. Accordingly, Goroff's request for a new Geo Report that declares that the Adjacent Premises "is not being underpinned and that there would be no additional effect or that it would change" is denied as redundant of Grigoryan's SOE plans and a waste of time and money.

Goroff's testimony is given little to no weight due to its many conflicts. The primary conflict is Goroff's demand to underpin the Adjacent Premises after vociferously objecting to underpinning the Adjacent Premises based on allegedly "vague" plans. Second, Goroff testified that he first became involved in the Project in September 2022 (NYSCEF 77, Hearing tr 111:7-12 [witness Spencer Goroff]), but this testimony is contradicted by Justice Saunders' reliance on Goroff's affidavit in January 2022. (Index

¹⁸ Accordingly, the court denies respondents' demand for a monthly license fee based on underpinning as moot.

156867/2021, NYSCEF 35, Jan. 20, 2022 Decision.) Third, Goroff, testified that the first time he spoke to Grigoryan was October 2022 (NYSCEF 77, Hearing tr 13-14 [witness Spencer Goroff]), but Grigoryan credibly testified that they spoke in August 2021 (*id.* at 28:6-11 [witness Vachagan Grigoryan]) and again on February 22, 2022. (NYSCEF ___, P64, email.) Finally, Goroff’s dramatic testimony of significant damages from settlement of .4 is contradicted by the Building Code which allows for movement of .4.

Essentially, Goroff and Grigoryan have a professional dispute about the interpretation of the Building Code § 3309.4 which provides that

“Whenever soil or foundation work occurs, regardless of the depth of such, the person who causes such to be made shall, at all times during the course of such work and at his or her own expense, preserve and protect from damage any adjoining structures, including but not limited to footings and foundations, provided such person is afforded a license in accordance with the requirements of Section 3309.2 to enter and inspect the adjoining buildings and property, and to perform such work thereon as may be necessary for such purpose. If the person who causes the soil or foundation work is not afforded a license, such duty to preserve and protect the adjacent property shall devolve to the owner of such adjoining property, who shall be afforded a similar license with respect to the property where the soil or foundation work is to be made.”

Building Code §3309.4.1 entitled “Additional Safeguards During Excavation”

provides:

“The following additional requirements shall apply during excavation:

1. The person causing the excavation shall support the vertical and lateral load of the adjoining structure by proper foundations, underpinning, or other equivalent means where the level of the foundations of the adjoining structure is at or above the level of the bottom of the new excavation.
2. Where the existing adjoining structure is below the level of the construction or demolition, provision shall be made to support any increased vertical or lateral load on the existing adjoining structure caused by the construction or demolition.
3. Where the construction or demolition will result in a decrease in the frost protection for an existing foundation below the minimums established in

Section 1809.3.1, the existing foundation shall be modified as necessary to restore the required frost protection.”

Goroff insists that the Building Code requires underpinning. However, §3309.4.1 clearly allows for “other equivalent means.” The court finds that Grigoryan’s credible testimony establishes that the foundation system he has designed constitutes such an alternative. Goroff’s unfamiliarity with different techniques does not make them “unsound.”

(NYSCEF 77, Hearing tr at 159:5-9 [witness Spencer Goroff].)

The court’s concern about Goroff’s admitted confusion in reading Grigoryan’s SOE plans was not diminished by his testimony and lack of awareness of essential facts. He accused petitioner of failing to disclose the depth of the foundation (NYSCEF 44, Goroff aff ¶19), but the SOE plans clearly provide that the excavation will be 12 feet, 4 inches. (NYSCEF ____, P54, SOE 100.00; NYSCEF 77, Hearing tr at 153:15-154:10 [witness Spencer Goroff].) Goroff believed that Grigoryan told him that the excavations would be in 10-foot sections, but the plans call for four-foot sections. (NYSCEF 77, Hearing tr at 124:17-25, 152:7-14 [witness Spencer Goroff].) It is troubling to the court that Goroff would rely on what he remembered Grigoryan telling him instead of checking the plans. Finally, Goroff believed that one eighth of an inch was the maximum allowable movement of a building, but the Building Code allows for up to one quarter of an inch of movement. (*Id.* at 155:22-156:22.)

Respondents have not established that petitioner’s method and manner of construction threatens the integrity of the foundation of the Adjacent Premises.¹⁹

¹⁹ To the extent that respondents object to the scope of the Project as inappropriate for the site, this zoning issue is not before this court.

Therefore, respondents' request to deny the petition unless petitioner underpins the Adjacent Premises is denied.

Conditions

Respondents request conditions such as "covenant to work lawfully, i.e. with all proper permits and approvals, with all legally mandated insurance coverage, including action over provisions, with work performed only during lawful business hours, etc.[,] and to conduct work so as to minimize disruption for neighbors, their tenants, and their invitees, with measures including, but not limited to, measures to abate noise, dust, traffic, and other nuisances, agreements to notify neighbors in advance of particularly disruptive entries or operations, etc." (NYSCEF 36, Verified Answer, Counterclaims and Objections of Law ¶¶64.) However, respondents have not supported their requests for conditions with any specificity. Accordingly, petitioner is directed to comply with the law, which petitioner has already declared that it would do (see NYSCEF 1, Petition), and respondents' request for special conditions is denied.

Bad Faith and Unclean Hands

Respondents assert the petition is barred by petitioner's bad faith and unclean hands because (a) underpinnings of respondents' building constitute a permanent taking; and (b) petitioner is abusing the legal system to get a license to which petitioner is not otherwise entitled by filing more than one lawsuit and thwarting respondents' right to negotiate.

Respondents' request is denied. Since there is no underpinning under respondents' property, there is no taking. Respondents cite no authority that bars

petitioner from filing more than one action. Rather, petitioner's two actions are grounded in law.

This is petitioner's second application for this license. (See *419 BR Partners LLC v Zabar*, Index No. 156867/2021 [initiated July 22, 2021, motion submitted September 22, 2021] [Saunders, J.]) Justice Saunders denied the application finding (1) "this court cannot determine based on the plans petitioner submitted, and given the subsequent changes to the same, whether the work petitioner intends to perform will result in only a slight inconvenience to respondents," and (2) a procedural problem, petitioner having failed to serve all of the owners of the Adjacent Premises. (Index No. 156867/2021, NYSCEF 35, January 20, 2022 Decision at 5; NYSCEF 88, Appellate Division, First Department Decision [affirming Justice Saunders' denial of respondents' attorneys' fees to respondents].) Access to the Adjacent Premises was an issue back in 2021 too. (Index No. 156867/2021, NYSCEF 35, January 20, 2022 Decision at 5.) Justice Saunders found that respondents' attempt to negotiate a license fee and questions about the construction plans "belied" petitioner's claim that respondents have refused access (*id.*), but that decision does not prevent this court from considering this new application based on petitioner's efforts since January 20, 2022.²⁰

While petitioner in this action, filed July 21, 2022, relies on the same roof protection plans (NYSCEF 14, Temporary Protection Plans [dated July 28, 2021]; NYSCEF 15, Site Safety Plans [dated March 19, 2021]), petitioner provided respondents with revised roof protection plans and load calculations. (NYSCEF 10,

²⁰ Accordingly, the court disregards respondents' R5 dated June 22, 2021, R8 dated August 23, 2021, R9 dated August 23, 2021 and R10 dated August 23, 2021.

March 10, 2022 email at 15/22.) Petitioner also revised its SOE plans subsequent to Justice Saunders' decision. (See NYSCEF 9, SOE Plans [revised November 26, 2021 and February 4, 2022]; NYSCEF ___, P64, Feb. 22. 2022 Updated SOE; NYSCEF 10, March 10, 2022 email with updated SOE.) Finally, this case differs from the previous case because this court has had the benefit of hearing the testimony of three engineers to resolve conflicts and assess credibility.

Petitioner's negligence action is based on respondents' alleged failure to cooperate with petitioner's efforts to protect the Adjacent Premises. (Index No. 656485/2022.) Building Code §3309.13 provides that "otherwise, the duty of protecting such adjoining equipment and spaces shall devolve upon the owner of such adjoining property." While petitioner alleges negligence, the action is effectively seeking a declaratory judgment that under these circumstances, respondents are responsible for protecting the Adjacent Premises, not petitioner. Petitioner's theory is that respondents' failure to do so constitutes negligence. Respondents cite no authority barring petitioner from initiating an action based on the Building Code for a finding that petitioner's duty is waived by the circumstances.

Clearly, petitioner's litigations have not thwarted negotiations as respondents complain. Negotiations began before the first RPAPL §881 action was filed in July 2021. In the absence of successful negotiations, RPAPL §881 is the legal remedy because respondents' right to negotiate is not infinite.

Rather, the court finds that, since January 2022, respondents have engaged in bad faith efforts to delay the Project. Respondents have made the same document requests repeatedly even when the document is already in their possession, e.g., roof

load letters or not responded to petitioner for months. For example, on March 15, 2022, petitioner addressed respondents' prior engineer's objections with revised plans, but respondents failed to respond until September 8, 2022. (NYSCEF ___, R6, Respondents' Sept. 8, 2022 email.) Respondents have requested serial adjournments. For example, on November 7, 2022, by letter, respondents requested an adjournment to submit comments to the Geo Report, which was provided on October 31, 2022, interfering with court ordered mediation. (NYSCEF 73, November 7, 2022 Letter.) Respondents have taken unfair advantage of the court's overwhelming caseloads when on August 4, 2022, respondents requested an adjournment of this special proceeding, claiming that they needed more time to review the "new project plans" when in reality they were provided the protection plans and SOE plans in March 2022. (NYSCEF 25, Respondents' August 4, 2022 Letter; NYSCEF 29, Petitioner's August 4, 2022 Letter.)

Respondents have engaged in shameful tactics that were anything but good faith. For example, respondents claimed petitioner waived the inspection which could not be further from the truth. (NYSCEF ___, P81, March 23, 2022 emails; NYSCEF 66, P82, Oct. 20, 2022 email.) Despite this court's October 7, 2022, order directing a joint inspection, respondents demanded another order to give petitioner access to the roof. (NYSCEF 66, P82, Oct. 22, 2022 email.) Similarly, respondents blame petitioner for Goroff's failure to participate in a court ordered inspection when it was Goroff who failed to appear and delayed the inspection while the punctual parties waited for him. (NYSCEF 77, Hearing tr at 63:3-67:19 [witness Herbert Weinstein].)

Finally, and perhaps most disturbing, on October 9, 2022, respondents' counsel misrepresented facts to the court regarding petitioner's efforts to inspect causing further

delay while the parties unnecessarily argued about that fact. (NYSCEF 61, Oral Argument tr at 49:5-8, 12 [Daniel Schneider, Esq.].) On October 18, 2022, respondents informed the Court by letter that petitioner did not pay for the October 7, 2022, transcript which was not true. (NYSCEF 49, Respondents' October 18, 2022 Letter; NYSCEF 52, Petitioner's October 19, 2022 Letter). Respondents' suggestion in its closing statement at the conclusion of the hearing that the court engage a fourth engineer to assist the court in assessing the party's engineers is rejected as yet another delay tactic. (NYSCEF 78, Hearing tr at 68:18-25 [Michael Jagiani, Esq.].) The tardiness of the request undermines its authenticity. While the court does not have authority to order the parties to engage such an expert, putting the parties to such an additional expense is unfair and unnecessary. In any case, the court finds that the hearing evidence was sufficient to clarify the evidence before the court on motion 001, and the experts assisted the court on issues in which their expertise was needed.

Petitioner's request for fees is granted because respondents have interfered with a development project essential to the community: providing homeless services during a crisis. (See *AIH Group, LLC v C.J.F. & Sons Enterprises, Inc.*, 63 Misc 3d 1231[A], *5 [Sup Ct, Queens County 2019] [respondent's attorney ordered to pay attorneys' fees for keeping petitioner's attorney waiting].) Petitioner seeks \$222,861.77 in legal fees and \$5,168.75 in professional fees. While petitioner is not entitled to reimbursement of all of its fees, it will be reimbursed for the excessive fees it was compelled to incur. A separate decision will follow with the amount of the fees awarded to petitioner.

Compensation

Respondents are entitled to compensation in the form of a license fee because “[e]quity requires that the owner compelled to grant access should not have to bear any costs resulting from the access.” (*Van Dorn Holdings, LLC v 152 W. 58th Owners Corp.*, 149 AD3d 518, 519 [1st Dept. 2017]). However, “[t]he Court must be mindful of the fact that it is called upon to grant access after the parties have failed to reach an agreement and must not allow either party to overreach and use the Court to avoid negotiating in good faith.” (*Matter of N. 7-8 Invs., LLC v Newgarden*, 43 Misc 3d 623, 628 [Sup Ct, Kings County 2014].)

Here, respondents seek a monthly license fee of \$5,000 for the first 24 months, \$7,000 for the next six months and \$9,000 thereafter. (NYSCEF 84, Jagiani aff ¶8.) Respondents also demand reimbursement for the fees of attorneys, engineers, consultants, engaged to advise respondents during the negotiation, compensation for any damage to or alteration of property, compensation for cessation of business and/or impingement of tenants’ leaseholds, etc.” (NYSCEF 36, Verified Answer, Counterclaims and Objections of Law ¶63). Specifically, respondents seek \$150,000 in legal and engineering fees. (NYSCEF ___, R7, Respondents’ Nov. 16, 2022 email.)

Petitioner suggests that a license fee of \$500 per month is consistent with similar cases. (See *26 East 78 Street LLC v Mark Propco LLC*, 2021 WL 4198088, * 2-3 [Sup Ct, NY County 2021] [awarding a \$500 monthly license fee for placing a scaffold on the adjacent property’s roof]; *Brown v City of New York*, 2020 NY Slip Op. 32937, *5 [Sup Ct, NY County 2020] [awarding a \$500 monthly license for roof protection].)

While it is true that respondents have a right to negotiate a fair license fee, they do not have the right to use the RPAPL §881 proceeding to extract an unfair license fee from petitioner. “[T]he award of such fees to a respondent owner is not automatic, but rather dictated by concerns of equity.” (*26 E. 78 St. LLC*, 2021 WL 4198088, *2.) Accordingly, the monthly license fee for roof protection will be \$500 per month during the 30-month license and increase by \$500 per month thereafter for 3 months. Parties shall return to court to request an extension of the license fee thereafter, if necessary.

Respondents’ request for attorneys’ fees and reimbursement of professional fees is denied. (*Matter of Meopta Props. II, LLC v Pacheco*, 185 AD3d 511, 512 [1st Dept. 2020] [not an abuse of discretion to “decline[] to award attorneys' and expert's fees under the circumstances”]; see *Matter of Meopta Props. II, LLC v Pacheco*, Index No. 157339/18, NYSCEF 43, Shternfeld aff and NYSCEF 44 Schear aff [explaining how respondent failed to negotiate in good faith or even respond].) Respondents’ objections were exaggerated and excessive. Instead of reimbursement of fees, respondents’ recompence is having successfully delayed the Project for 1.5 years.

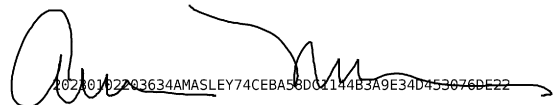
Respondents seek \$22,806.50 per month for 30 months or \$684,195 for lost revenue caused by the blockage of air and light to respondents’ greenhouses and crops. (Index No. 156867/2021, NYSCEF 34, Howe aff ¶15.) Zabar opined that he would suffer a financial loss if petitioner’s roof protections block light to the greenhouses. (NYSCEF 77, Hearing tr at 89:14-90:7 [witness Eli Zabar].) Since respondents failed to inquire of the engineer witnesses whether the protection would block light to the greenhouses and how much, Zabar’s testimony is speculative. Because the roof protection is cantilevered over the greenhouses, it is possible that

the roof protection will not interfere with respondents' crops growing. To avoid speculation, it is appropriate to wait until the Project concludes to determine if the roof protection actually interfered with respondents' crop growing to calculate the actual value of the loss. Indeed, respondents have a counterclaim for such damage.

Accordingly, it is

ORDERED and ADJUDGED that the petition is granted, and petitioner shall have a license for 30 months from service of this decision with notice of entry during which it shall pay respondents a license fee of \$500 per months for 30 months increasing by \$500 per month thereafter for 3 months after which the parties shall return to court for extension of the license; and it is further

ORDERED that the parties are directed to comply with Part 48 Trial Procedures 6(B), 8 and 14(C) and file in NYSCEF exhibit charts and all exhibits entered into evidence within 7 days of this order. The documents filed in NYSCEF shall be described with meaningful labels including the trial exhibit number.



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1/2/2023
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
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CHECK IF APPROPRIATE:

<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN
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