Stewart v Yorrick
2020 NY Slip Op 31652(U)
May 27, 2020
Supreme Court, Kings County
Docket Number: 524614/2019
Judge: Debra Silber

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

X

DECISION/ORDER

AINSLEY STEWART,

Plaintiff,

-against-

Index No. 524614/2019
Motion Seq. No. 1
Date Submitted: 5/21/2020

CAMILLE YORRICK,

Defendant.

X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiff's Order to Show Cause.

Papers	**NYSCEF Doc.**
Order to Show Cause, Affirmations, Affidavits and Exhibits Annexed…	1-18
Affirmation in Opposition, Affidavits and Exhibits Annexed.....	19-26, 37-54
Reply Affirmation.....	

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

Plaintiff Ainsley Stewart (Stewart) owner of 412 Midwood Street, Brooklyn, New York,[1] commenced this proceeding by Order to Show Cause, Summons and Complaint, seeking, *inter alia*, a permanent injunction against defendant Camille Yorrick (Yorrick), owner of the adjacent property at 410 Midwood Street, Brooklyn, NY, a declaratory judgment and damages. The Order to Show Cause seeks 1) a preliminary injunction enjoining defendant from performing construction or renovation activities at 410 Midwood, Brooklyn New York 11205 ("410 Midwood") until adequate protection measures are instituted to prevent any damage to 412 Midwood, Brooklyn New York 11205 ("412 Midwood"); 2) an order enjoining

[1] He is, to be precise, co-owner of the house with a woman named Elestene Houston, as joint tenants with rights of survivorship. He states in his affidavit in support that she is his wife.

and restraining defendant and her contractors, employees, agents, and any other person or entity acting on defendant's behalf or under her control, from removing the fire escape (the "Fire Escape") shared by 410 Midwood and 412 Midwood or blocking access to the Fire Escape roof ladder from 412 Midwood; and 3) an order directing defendant to perform the measures needed to repair and stabilize the wall on the south facade of 412 Midwood and to provide stabilization and lateral support to 412 Midwood.

In support of the motion, plaintiff provides an affirmation from counsel, an affidavit from plaintiff, an affidavit from an engineer, and numerous exhibits. On the return date of the Order to Show Cause, December 5, 2019, the motion was adjourned to February 25, 2020, and the court issued an Interim Order requesting the parties to “submit additional papers to establish more clearly what role the court can play in this dispute.” Prior to that return date, a stipulation was e-filed which adjourned the motion to March 26, 2020. Due to the court’s closing in March as a result of the Covid-19 Pandemic, the motion was adjourned to May 21, 2020. Both sides declined to orally argue the motion virtually on Skype, and instead requested that the motion be submitted without argument.

Defendant opposes the motion and provides an affirmation from counsel, an affidavit from defendant, an affidavit from defendant’s husband, affidavits from two engineers, and numerous exhibits.

To the extent the parties have objected to the submission of additional papers, the court specifically invited additional submissions in the order dated December 5, 2019, thus, as the court granted permission to submit additional papers, all of the papers submitted have been considered.

Background

As mentioned above, Stewart is the owner of real property located at 412 Midwood Street, Brooklyn, New York, which is a three-story pre-certificate of occupancy (pre 1938 Building Code) one-to-two family building. In 2017, Yorrick became the owner of the adjoining building, located at 410 Midwood Street. It is of similar size and is also a three-story pre-certificate of occupancy one-to-two family building.

It appears that during 2018, Yorrick applied for a building permit from the NYC Department of Buildings ("DOB") to change the house from a three-story building to a four-story building by adding a new floor on top of the building, and to perform certain other (interior) construction work on the property. It appears that defendant then changed her plans and also changed her architect/ engineer and filed different plans in April of 2019. The revised plans changed the use of the property from a two-family house with a garage to a two-family house with a garage and, also on the ground level, a "community facility," a "mixed use" which is permitted by the NYC Zoning Resolution in certain zones in the City. The Building Permit was issued on October 18, 2019 and work began.

Shortly after the work began, on November 11, 2019, Stewart commenced this action against Yorrick, asserting claims of trespass, nuisance, negligence and property damage, seeking a declaratory judgment that plaintiff has an easement by implication or by necessity with regard to the shared fire escape, and a permanent injunction requiring the defendant to keep the fire escape at the rear of the property and not remove it, and to restore the plaintiff's access to the fire escape from the roof. Plaintiff also claims that defendant installed metal joists in the party wall between the two houses without his permission, which installation damaged the party wall and his house, that defendant's contractors are storing materials and

equipment on his roof without his permission, and are working on defendant's house while standing on his roof, without his permission, and that the defendant's contractors have not installed any protections to protect the plaintiff's property during the work, all without providing him with any evidence of insurance.

Defendant answered the complaint and asserted counterclaims for tortious interference with contract and for prima facie tort. Defendant accuses plaintiff of making numerous and groundless complaints to the DOB and other governmental agencies, in an effort to stop her from finishing the project. Plaintiff has replied to the counterclaims.

Plaintiff Stewart first asserts that defendant's contractors started working on 410 without providing his property with proper protections, causing damage to the exterior façade of his property and to the roof membrane, which in turn caused water damage to the interior of the top floor apartment. Plaintiff consulted an engineer, Ana Sandoval, P.E. (Sandoval) who provides an affidavit dated November 11, 2019 (Doc. 3) which details the damage to plaintiff's property, with photos, and says the "metal joists" defendant installed in the party wall between the houses "are transferring the load onto 412, causing cracks and shifts in the façade." Ms. Sandoval also notes that the plans do not provide any information, as is usually required, to indicate that the foundation of the 410 property can support the new top floor. There is a second affidavit from Ms. Sandoval dated February 24, 2020 (Doc. #30) which repeats much of the same information and describes in more detail her opinion with regard to the cause of the cracking in the façade. She also addresses defendant's claim that plaintiff is intentionally preventing defendant from installing an extension on plaintiff's chimney so it does not exhaust into the new fourth floor on defendant's property, as defendant claims, as "it is not possible to even evaluate the sufficiency of Defendant's proposal to extend 412

Midwood's chimney for the purpose of preventing the rooftop of the Vertical Enlargement from being exposed to combustion heat at this time because Defendant has not provided any information of how she will address the other parts of the Stop Work Order and this information is required to evaluate the sufficiency of Defendant's chimney extension proposal." As described further below, defendant's engineer claims that the partial stop work order is solely because of the need to extend the chimney, and that it will not be lifted until the chimney is extended. The parties have reached an impasse, as is clear from the papers.

Defendant provides an affidavit from a Mr. Tulloch, who states that he is defendant's "representative" for the construction, and, by the way, is also her husband. He avers that plaintiff has called the Department of Buildings 77 times to complain about the work. He states that this action is motivated by animosity and not safety issues.

Defendant also provides affidavits from two engineers, Bryan Yudkin, P.E., dated December 3, 2019 and Benjamin Lavon, P.E., dated May 8, 2020 in her papers in opposition. Mr. Lavon specifically addresses the relief demanded in the Order to Show Cause, and the averments in Ava Sandoval's affidavits. He states that he inspected the premises on November 20, 2019 and "Defendant's construction work is not endangering or threatening to endanger the residents of Plaintiff's Premises. Defendant has not blocked or removed access to fire egress from Plaintiff's Premises where required by code. Defendant's construction is not harming Plaintiff's Premises, does not threaten imminent structural harm to Plaintiff's Premises, and does not threaten material harm to the finishes or habitability of Plaintiff's Premises. I have reached these conclusions with a reasonable degree of engineering certainty, based on my direct observations at the site, and my review of various documents, as explained below."

The Fire Escape

With regard to the fire escape, Mr. Lavon states as follows, in pertinent part:

> "Defendant's construction is not preventing code-required fire egress from Plaintiff's Premises. Defendant is not planning to remove the fire escape shared by Plaintiff's Premises and Defendant's Premises. This is confirmed by Defendant's plans, which the DOB approved on November 26, 2019 and show the fire escape remaining. (Defendant's architectural plans dated November 26, 2019, with DOB approval stamp, are attached as Exhibit B). The fire egress that Plaintiff complains it is losing-from the roof of Plaintiff's premises to a ladder descending from the roof of Defendant's Premises-is not required by code. The uninhabited roof of Plaintiff's Premises, which can only be reached through a roof hatch, does not have a requirement for fire egress under the Building Code under which it was constructed and as represented in Building Department files. Accordingly, Plaintiff is not entitled to such egress across Defendant's roof. Additionally, based on my review of the associated Building Codes, it does not appear this fire escape is required for Plaintiff's premises at all. I understand that the DOB has directed Defendant to construct a fire-separation parapet between Plaintiff's Premises and Defendant's Premises that is approximately three feet higher than the original low parapet wall between the buildings to maintain a fire division. Based on my review of Defendant's plans and the associated New York City Building Code, the Building Department most likely determined that maintaining the code-mandated fire division between the two properties was the primary safety concern."

Defendant's engineer acknowledges that Mr. Velasquez, the engineer who prepared the plans, seems to have forgotten to put the fire escape in the drawings. He states that this has been corrected, and that defendant is not going to remove the fire escape. A two-family house is not required to have a fire escape. A fire escape is required for a multiple dwelling, that is, three dwelling units or more, if there is no sprinkler system. Thus, there is no Building Code section which is violated here, and plaintiff has access to the fire escape from all three

floors of his property, by climbing out the window and going down to his rear yard. There is no requirement that there be access to or from the roof, as the property is not required to have a fire escape. Therefore, as defendant's papers, including her engineer's affidavit, all state that she is not going to remove the fire escape, the branch of the motion which seeks an order "enjoining and restraining defendant and her contractors, employees, agents, and any other person or entity acting on defendant's behalf or under her control, from removing the fire escape (the "Fire Escape") shared by 410 Midwood and 412 Midwood," as well as the branch which seeks an order "enjoining defendant from blocking access to the Fire Escape roof ladder from 412 Midwood," are denied. To be clear, plaintiff seeks a preliminary injunction restraining defendant from removing the fire escape, but she is not going to remove it. He also seeks an injunction restraining defendant from blocking plaintiff's access to the ladder on defendant's roof down to the fire escape, which required plaintiff to traverse defendant's roof to get to the ladder, which roof is now replaced by an additional floor on the building. Plaintiff has not shown a likelihood of success on his cause of action for a permanent injunction with regard to the fire escape, nor his causes of action for an easement by implication or an easement by necessity. He is therefore not entitled to an injunction.

The Other Relief Requested In The Order to Show Cause

Plaintiff next maintains that he is entitled to a preliminary injunction enjoining defendant from performing any construction or renovation activities at 410 Midwood until adequate protection measures are instituted to prevent any damage to 412 Midwood. He also maintains that he is entitled to an order directing defendant to perform the measures needed to repair and stabilize the wall on the south facade of 412 Midwood and to provide stabilization and lateral support to 412 Midwood. Plaintiff and his engineer maintain that

these repairs must be undertaken, so that further damage is abated or prevented. Defendant and her engineers deny that the construction caused any damage. They claim that the metal joists were only inserted into the layer of brick in the party wall which is adjacent to defendant's property, and that it is a two-brick-wide party wall, so their work did not intrude into any of the bricks which can be considered part of plaintiff's house.

Mr. Lavon states at paragraph 13 of his affidavit and in the following paragraphs as follows:

> "The need to extend the chimney on Plaintiff's Premises adjacent to the added floor on Defendant's Premises -- This is the portion of the Stop Work Order that is still in effect. It prevents exterior work on Defendant's Premises until the chimney of Plaintiff's Premises is extended. I have been informed that Defendant has been trying for several months to obtain Plaintiff's consent to perform this work. I understand that Defendant has tried to obtain Plaintiff's approval for extending the chimney, but Plaintiff has refused to even review the information Defendant provided. I understand that Defendant has provided Plaintiff with a drawing and product information concerning the extension of Plaintiff's chimney and has also sent a proposed access agreement at Plaintiff's request, but that Plaintiff, after making initial comments, is refusing to provide any further comments or grant its approval. See Exh. C, the drawing provided to Plaintiff, and Exh. E, product information provided to Plaintiff. Extending the chimney is an important safety issue and it is required by code. Plaintiff should be cooperating with Defendant so that the extension can be performed promptly."

In opposition, defendant's counsel Mr. Cramer provides an affirmation which adopts Mr. Tulloch's analysis and claims the entire action is based on animosity,[2] and avers that

[2] Presumably there is some issue with the intended use for the "community facility" on the ground floor, but nothing is stated in the papers.

plaintiff (Par. 17) has not established a prima facie case for a preliminary injunction, as he has failed to show imminent and irreparable harm absent the grant of the preliminary injunction, likelihood of success on the merits, or that the balance of hardships tips in plaintiff's favor. He also states, in agreement with Mr Lavon, that "there is currently a DOB Stop Work Order in place only with respect to work requiring the extension of Plaintiff's chimney."

Further, Mr. Cramer avers "Plaintiff's engineer is now simply refusing to provide comments on Defendant's drawings or proposed materials for the chimney extension, while Plaintiff's attorney has refused for months to provide any comments on the proposed access agreement—after insisting that one would be necessary for this minor work. Plaintiff is intentionally delaying the extension of his chimney simply to thwart Defendant's construction, and in the process is needlessly prolonging this court's involvement. Defendant respectfully proposes that this Court evaluate the legitimacy of Plaintiff's alleged reasons for refusing to cooperate with Defendant on the extension of Plaintiff's chimney, and that this Court set forth appropriate requirements for Plaintiff's cooperation with the chimney extension. Mr. Cramer also states that the chimney extension work does not require anything to be filed or approved in advance by the Buildings Department, contrary to Ms. Sandoval's statement in her affidavit.

Discussion

It must be noted that in addition to the Partial Stop Work Order in effect for this property, the New York City Department of Buildings has imposed a ban on non-essential

construction as a result of the COVID-19 Pandemic. [3] Thus, from the date this motion was adjourned to by stipulation, March 26, 2020, to the present date, no construction has been permitted in New York City unless it qualifies as “essential”. This project does not qualify.

A preliminary injunction is a drastic remedy, which should not be granted unless the movant demonstrates "a clear right" to such relief. (*City of New York v 330 Continental, LLC*, 60 AD3d 226, 234, 873 NYS2d 9 [1st Dep't 2009]; *Peterson v Corbin*, 275 AD2d 35, 713 NYS2d 361 [2d Dep't 2000], *lv dismissed* 95 NY2d 919 [2000].) Entitlement to a preliminary injunction requires a showing of (1) likelihood of success on the merits, (2) irreparable injury absent the granting of preliminary injunctive relief, and (3) a balancing of the equities in the movant's favor. (CPLR 6301; *Nobu Next Door, LLC v Fine Arts Hous., Inc*., 4 NY3d 839, 833 NE2d 191, 800 NYS2d 48 [2005]; *Aetna Ins. Co. v Capasso*, 75 NY2d 860, 552 NE2d 166, 552 NYS2d 918 [1990].) If any one of these three requirements is not satisfied, the motion must be denied. *Faberge Intern., Inc. v Di Pino*, 109 AD2d 235, 491 NYS2d 345 [1st Dep't 1985].) Moreover, "[p]roof establishing these [requirements] must be by affidavit and other competent proof, with evidentiary detail." *Scotto v Mei*, 219 AD2d 181, 182, 642 NYS2d 863 [1st Dep't 1996].)

Here, plaintiff is not entitled to a preliminary injunction mandating the defendant to stop all work, interior and exterior, at 410 Midwood until “adequate protection measures are instituted to prevent any damage to 412 Midwood”. Further, the nature of the protections plaintiff is demanding are not specified. The plaintiff is basically asking the court to grant a full stop work order after the Buildings Department did not see any need to do so. Additionally, despite plaintiff’s admitted complaints to the Department of Buildings, the Partial

[3] https://www1.nyc.gov/assets/buildings/pdf/essential_vs_non-essential.pdf

Stop Work Order is in fact due to the failure to install the vent pipe on his chimney.[4] The court notes that the Building Code provides that if plaintiff puts in writing that he refuses to consent, defendant is relieved of any obligation to install the ventilation pipe, which then becomes plaintiff's obligation (See BC 2113.6.1 *et seq.*, specifically 2113.6.5). With regard to the cracks in the façade of plaintiff's property, there is conflicting evidence in the record regarding the nature and extent of the damage, and the cause of the damage. As most of the construction work has been finished, as stated in the engineers' affidavits and as is clear in the photos, it is unclear what defendant's contractors still need to do which could cause further damage to plaintiff's façade. Next, as neither plaintiff nor his engineer explain why the ventilation pipe proposed by defendant should not be the one installed so the Partial Stop Work Order can be lifted, it cannot be said that the equities balance in plaintiff's favor. Plaintiff has not shown a likelihood of success on his cause of action for a permanent injunction with regard to the fire escape ladder, and, in any event, even if the cause of action for trespass, based on the contractors' temporary but uninvited access to his roof while the parapet wall was being built has merit, injunctive relief is not warranted here in the absence of a showing of irreparable harm and a balance of equities in plaintiff's favor. (*See Marsh v Hogan*, 81 AD3d 1241, 1242-1243, 919 NYS2d 536 [3d Dept 2011] [to be entitled to an injunction directing the removal of an encroachment of a structure on plaintiff's property, plaintiff must "demonstrate not only the existence of the encroachment, but that the benefit to be gained by compelling its removal would outweigh the harm that would result to the defendants from granting such relief" (internal quotation marks and citations omitted)].)

[4] Notice of Objections dated 1/13/20 in virtual file for project on the NYC DOB website at http://a810-bisweb.nyc.gov/bisweb/BScanJobDocumentServlet?requestid=4&passjobnumber=321697213&passdocnumber=01&allbin=3106954&scancode=ES449240385

What is clear to this court is that once the ban on non-essential construction is lifted, defendant should be able to extend plaintiff's chimney so she can finish her construction project. If plaintiff does not like the proposed ventilation pipe, he is free to agree in writing to do the work himself, which will enable defendant to have the Partial Stop Work Order lifted. Whether plaintiff is entitled to an award of monetary compensation for his property damage claims, all of which are disputed by defendant's engineers, is not before the court in this motion.

Document Number 54, filed by Mr. Cramer, attorney for defendant, is a proposed License Agreement. He makes no mention of it in either of his affirmations except to mention that he sent it to plaintiff's counsel and plaintiff would not sign it. He does not specifically ask the court to turn it into an order. Document 42 is a drawing of the proposed ventilation pipe, proposed to be attached to the top of the chimney on plaintiff's roof, which was prepared by defendant's engineer. Document 44 is the specifications sheet for the ventilation pipe in the drawing. From the record, these were sent to plaintiff's counsel quite a while ago, but not until after this action was commenced.

Therefore, the next issue for consideration by the court is whether conversion of this motion into a proceeding under RPAPL § 881 is appropriate. RPAPL § 881 allows property owners who seek "to make improvements or repairs to real property" to enter upon the premises of adjoining property owners where permission to do so has been denied and the property owners' real property is "so situated that such improvements or repairs cannot be made by the [property] owner[s] . . . without entering the premises of [the] adjoining [property] owner[s]." RPAPL § 881 further provides that "[s]uch license shall be granted . . . upon such

terms as justice requires [and that] [t]he licensee shall be liable to the adjoining owner . . . for actual damages occurring as a result of the entry."

A court may convert an action for a preliminary injunction into a proceeding under RPAPL § 881 where such conversion is appropriate. (*See Mindel v Phoenix Owners Corp*., 210 AD2d 167, 620 NYS2d 359 [1st Dep't 1994], *lv denied* 85 NY2d 811, 655 NE2d 400, 631 NYS2d 287 [1995] [finding that court's conversion of action for a preliminary injunction into a proceeding under RPAPL § 881 was proper].) "In determining the issue of whether to grant . . . a license pursuant to RPAPL § 881, the court must apply a 'standard of reasonableness.' " *Matter of Rosma Dev., LLC v South*, 5 Misc 3d 1014[A], 798 NYS2d 713, 2004 NY Slip Op 51369[U] [Sup. Ct. Kings County 2004] quoting *Mindel v Phoenix Owners Corp., supra* at 167.) The court must "consider the competing interests of the adjoining landowners, as well as the interests of the public at large . . .." (*Matter of CRP/Extell 99 W. Side L.P. v 808 W. End Ave. LLC*, Sup Ct, NY County, Jan. 24, 2006, Lippmann, J., index No. 117094/05, slip op at 2; *see also Deutsche Bank Trust v 120 Greenwich Dev. Assoc*., 7 Misc 3d 1006[A], 801 NYS2d 232, 2005 NY Slip Op 50467[U], *3, 2005 N.Y. Misc. LEXIS 637 (Sup. Ct. NY County 2005); *Ponito Residence LLC v 12th St. Apt. Corp.*, 38 Misc 3d 604, 605-614 [Sup Ct, NY County 2012]). "A court may also require that the licensee fulfill additional terms as a condition of the license, including posting a bond, [paying periodic license fees, and] obtaining insurance coverage . . .." (*Matter of CRP/Extell 99 W. Side L.P. v 808 W. End Ave. LLC* at 2; *see also Deutsche Bank Trust v 120 Greenwich Dev. Assoc. supra* at 3.

Here, defendant was unable to come to terms and sign a license agreement with plaintiff, although her attorney did draft one and send it to plaintiff's counsel after this action was started, but defendant did not come to court for an access order pursuant to RPAPL

§881. She did not provide an insurance certificate naming plaintiff as an insured, did not offer plaintiff an indemnification agreement, and now, her attorney submits a copy of the unsigned proposed license agreement as an exhibit (Doc. 54), but states it shouldn't have been necessary for such a limited amount of work. The court disagrees. The proposed agreement provides defendant with access to plaintiff's property in order to install the chimney ventilation pipe, to "install, maintain and remove temporary protection over portions of the roof of the property", whether required by the Department of Buildings or not, and provides for access to the roof of plaintiff's property so defendant's contractors may "perform minor completion work on the exterior of the defendant's property" which can only be accessed from the plaintiff's roof. The proposed agreement does provide for insurance, although it doesn't specify how much. It does provide for indemnification, but with some unnecessary restrictions, and it does provide for payment of plaintiff's engineer's fees, albeit only $1,000. Further, the proposed agreement prohibits plaintiff from complaining to the DOB without first complaining to defendant. A form of "gag order" by agreement—not very neighborly. It provides for $1,000 per month as a license fee, but only to start when the protections are installed, which would not be done unless the agreement was signed. The court finds that plaintiff's refusal to sign this license agreement as written was reasonable.

The court further finds that the best resolution of this dispute, at least with regard to what is necessary for defendant to complete the construction work and for plaintiff and his home to be properly protected, is to convert the remainder of the motion, except for the branch related to the fire escape, which has been decided, to a special proceeding under RPAPL § 881. That is, the court finds that the circumstances here warrant the conversion of this motion into a proceeding under RPAPL § 881, and such conversion is appropriate given

the need for plaintiff's chimney to be extended in order for the partial stop work order to be lifted, and the need for plaintiff's roof to be protected before that work is done and before any further work is done, including before the exterior of the new DOB-mandated parapet wall is pointed and sealed and/or whatever else may be required.

Moreover, the court finds that, in consideration of the fact that defendant failed to enter into a license agreement with plaintiff in the year that she was waiting for a building permit to be approved, and then failed to hire professionals to conduct a survey and take photos of plaintiff's exterior and exterior, as is usually done when there is a risk of causing damage to an adjoining property, and then failed to install any protections on plaintiff's roof before the work commenced, notwithstanding the delays that have been occasioned by plaintiff's failure to respond to defendant's proposal for installing a ventilation pipe on plaintiff's roof, the license fee ought to be imposed retroactively to the date the work started (*Matter of Rosma Dev., LLC v South*, 5 Misc 3d 1014[A], 798 NYS2d 713). To be clear, work started on the addition of the fourth floor in October of 2019, and defendant knew the work could damage plaintiff's property, but did not come to court and bring a RPAPL § 881 proceeding. Instead, she and her husband authorized the contractors to proceed without plaintiff's permission and without installing any protections for plaintiff's roof or obtaining any insurance for plaintiff.

As for the duration of the license, it should extend until the work on the exterior of defendant's building is completed, which should not be more than a month or two once the City lifts the ban on non-essential construction. The court has provided for a maximum of five months in the ordering provisions below.

Next, in the event plaintiff's property sustained or sustains any damage resulting from the work on defendant's property, he has a right to recover such damages. *Mindel v Phoenix*

Owners Corp., supra at 167.) However, at this juncture, it is premature to determine the amount of damages, if any, that plaintiff is entitled to. Nor is this requested in the motion papers.

Moreover, defendant must immediately name plaintiff and his wife, the co-owner, as additional insureds on her certificate of insurance for the work at issue, and as directed below, defendant shall provide plaintiff with proof of such insurance.

Conclusions

Accordingly, **IT IS HEREBY ORDERED** that this motion is converted to a special proceeding under RPAPL § 881; and it is further ordered that defendant Camille Yorrick is hereby granted a license pursuant to RPAPL § 881 to enter upon the roof of plaintiff's property, with access solely from the roof of defendant's property, as is necessary for the purpose of:

A. installing the chimney ventilation pipe specified in E-File Doc. 42, drawing prepared by Jose A. Velasquez, P.E. dated 1/15/20, with the product whose specifications are provided in E-File Doc. 44; and
B. installing, maintaining and removing temporary protections over such portions of the roof of the 412 Midwood property, whether required by the Department of Buildings or not, to protect said roof from any damage which may otherwise arise from the work that defendant's contractors must perform in connection with the project as it has been permitted by the NYC Department of Buildings pursuant to duly issued permits; and
C. accessing the roof of plaintiff's property from defendant's property, so defendant's

D. contractors may perform necessary completion work on the exterior of the defendant's property, work which can only be performed with access from the plaintiff's roof.

IT IS FURTHER ORDERED that the granting of such license is subject to the following terms and conditions:

1. Defendant shall be entitled to such license for a period of five months, commencing upon the date of entry of this decision and order, subject to extension with mutual written consent or with permission from the court, obtained by motion, on notice to plaintiff, and upon submission to the court of proof regarding the need for such extension.

2. Defendant Yorrick shall pay plaintiff, as and for a license fee, the sum of $1,000 per month, from November 12, 2019, the date of the commencement of this action, until the work under the license is completed, pro-rated for partial months.

3. Defendant Yorrick shall, within 15 days of the date of this decision and order, submit proof to plaintiff and plaintiff's attorney that she has named plaintiff and his wife Elestene Houston as additional insureds on her policy of insurance, with liability coverage of at least $2,000,000.

4. Defendant Yorrick shall be liable to plaintiff for any damage to plaintiff's property, if any, as a result of the work being performed on defendant's property since the DOB permit was issued on October 18, 2019, or which may in the future occur as a result of the work performed pursuant to this license, and at the end of the license, plaintiff may seek a trial, or a hearing before a special referee pursuant to CPLR 4317, to determine

the amount of actual damages incurred by plaintiff, if any, as a result of the work performed on defendant's property described herein, by defendant or her contractors, agents or employees.

5. Defendant Yorrick shall reimburse plaintiff for the reasonable engineering fees he incurred in connection with this action, including the review of the defendant's plans and permits, from the date the DOB permit was issued, October 18, 2019, to the date of this order, in a sum not to exceed $3,500. Plaintiff's attorney shall provide defendant's attorney with copies of reasonably detailed invoices within 30 days, and they shall be paid within 30 days thereafter.

Any relief requested but not specifically addressed herein is denied.

The parties are directed to appear in the Intake Part for a Preliminary Conference on August 4, 2020 to establish a discovery schedule with regard to plaintiff's Fourth cause of action, for property damage. Counsel should determine in advance if the conference will be conducted in person or virtually.

This shall constitute the decision and order of the court.

Dated: May 27, 2020

ENTER:

Hon. Debra Silber, J.S.C.