

**Board of Mgrs. of 40 W. 20th St. Condominium v  
Hajdar Holding Ltd.**

2020 NY Slip Op 32126(U)

July 1, 2020

Supreme Court, New York County

Docket Number: 160543/2019

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

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THE BOARD OF MANAGERS OF 40 WEST 20TH STREET
CONDOMINIUM,

Petitioner,

INDEX NO. 160543/2019

MOTION DATE 03/10/2020

MOTION SEQ. NO. 001

- v -

HAJDAR HOLDING LTD.,

Respondent.

DECISION + ORDER ON
MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 30, 32, 33, 34, 35,
36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

were read on this motion for

MISC. SPECIAL PROCEEDINGS

ORDER

Upon the foregoing documents, it is

ORDERED that reply of petitioner seeking dismissal of
respondent's affirmative defenses and counterclaims is granted
and the affirmative defenses and the first (private nuisance),
second (trespass), third (negligence), fourth (strict liability)
and fifth (permanent injunction) counterclaims interposed in
respondent's answer are dismissed in their entirety; and it is
further

ORDERED that pursuant to RPAPL § 881, the petition for a
license, with a license term of five months from the
commencement of access by petitioner as set forth hereunder, is
granted; and it is further

ORDERED that, commencing, no less than thirty days from, service of this order with notice of entry, or from the issuance of the additional insured endorsement in the name of respondent on the policy of commercial general liability insurance, which policy provides coverage in an amount not less than \$2 million, whichever is later, petitioner is hereby granted a license, pursuant to RPAPL 881, to enter upon a portion of respondent's land (Adjacent Property) to (1) perform an initial inspection of the roof and backyard area of the building located at 48 West 20<sup>th</sup> Street, New York, New York ("48 West") for the purpose of determining the appropriate protection for both areas; (2) erect and/or install, maintain and thereafter remove protective materials on the backyard area of the building located at 48 West ("Roof Protection Work"); (3) erect and/or install, maintain and thereafter remove protective materials on the backyard area of the building located at 48 West ("Backyard Protection Work"); (4) erect and/or install, maintain, and thereafter remove suspended scaffolding on the roof of the building located at 48 West; (5) access and use the roof and the afore-described roof protection and scaffolding once erected for the purpose of performing repair and maintenance work to the façade of the building located at 40 West 20<sup>th</sup> Street, New York, New York (the "FISP Repair Work"); and it is further

ORDERED that the Roof Protection Work, Backyard Protection Work and FISP Repair Work shall be carried out as aforesaid pursuant to the customary and standard practices used in the building construction industry as certified by an engineer licensed in the State of New York and retained by petitioner; and it is further

ORDERED that the granting of the foregoing license is subject to the following terms and conditions: (1) petitioner shall take the necessary steps, measures, and precautions to prevent and avoid any damage to the Adjacent Property; (2) upon the completion of the term of the license, the Adjacent Property within such license area shall be returned to its original condition, and all materials used in construction and any resultant debris shall be removed from such license area; (3) petitioner shall save respondent harmless from any damages occurring within the license area, during the period of this license, and a policy of commercial general liability insurance, including but not limited to, coverage for contractual liability, personal injury, bodily injury and property damage, which names respondent as additional insured, shall be maintained by petitioner during the period of this license; and (4) petitioner shall be held liable to respondent for any damages which it may suffer as a result of the granting of this

license and all damaged property shall be repaired at the sole expense of petitioner; and it is further

ORDERED that petitioner shall tender, as the licensing fee, the amount of \$ 3,000.00 monthly payable to respondent, which payment shall be delivered to the office of respondent's attorney, on the 1st day of each such month until completion of the term of the license; and it is further

ORDERED that petitioner shall post with the Clerk of New York County an undertaking in the amount of \$ \_\_\_\_\_ to be determined by a JHO/Special Referee, to cover reasonable attorneys' and professional engineers' fees incurred by respondent as the result of such license and petitioner's entry upon the Adjacent Property pursuant to such license, and upon the completion of the term of the license, such amount shall be paid by petitioner to respondent; and it is further

ORDERED that this matter having come on before this court on March 10, 2020, on application of the petitioner for a license pursuant to Real Property and Proceedings Law § 881 at oral argument of the written submissions, and the petitioner having been represented in connection therewith by Jeremy E. Deutsch and Elliot J. Coz, Esqs., and the respondent having been represented in connection therewith by Jeffrey F. Cohen, Esq., pursuant to CPLR 4317, and it appearing to the court that a reference to determine is

proper and appropriate pursuant to CPLR 4317 (a), it is now hereby

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to determine the following individual issue of fact, which is hereby submitted to the JHO/Special Referee for such purpose

(1) the issue of the amount of an undertaking, to cover reasonable attorneys and professional engineering fees incurred by respondent as the result of petitioner's entry upon the Adjacent Property pursuant to such license, to be posted with the Clerk of New York County, and such amount to be paid by petitioner to respondent upon termination of the license;

and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR unless otherwise indicated; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at [www.nycourts.gov/suptctmanh](http://www.nycourts.gov/suptctmanh) at the "References" link ), shall assign this matter at the initial appearance to an available

JHO/Special Referee to determine as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly.

DECISION

With respect to its counterclaim for private nuisance, respondent submits no evidence that raises an issue of fact with respect to the photographic evidence submitted by both parties, which reveal not only that the show windows are not unreasonably obstructed, but also that such windows are not obstructed at all, by the sidewalk shed. Thus, as argued by petitioner, the essential element of private nuisance that the sidewalk shed erected by petitioner unreasonably interferes with respondent's use of its land, has been refuted as a matter of law. See 22 Irving Place Corp. v 30 Irving LLC, 57 Misc.3d 253, 256 (Sup. Ct., N.Y. County 2017).

Likewise, respondent's counterclaim for trespass is defeated by the irrefutable documentary evidence that the sidewalk shed is required by law and is for public safety. See 22 Irving Place, supra.

Respondent's counterclaim for negligence fails to state a meritorious cause of action as respondent does not allege any physical harm to its land. See Caronia v Philip Morris USA, Inc., 22 N.Y.3d 439, 446 (2013).

This court likewise concurs with petitioner that respondent's strict liability (sounding in negligence) counterclaim fails as it alleges only a violation of a local law



and does not allege any violation of a State statute. See Elliott v City of New York, 95 N.Y.2d 730, 734 (2001).

On the counterclaim for injunctive relief pursuant to RPAPL § 881 interposed in this special proceeding (see In the Matter of the Port of New York Authority v 62 Cortlandt Street Realty Co., Inc., 18 NY2d 250, 255 [1966]), this court finds that petitioner has met its prima facie burden of demonstrating that the harm that would result in the removal of the sidewalk shed outweighs the benefit to be gained by respondent in compelling its removal. Respondent has failed to even assert that the contrary is the case. See Kimball v Bay Ridge United Methodist Church, 157 AD3d 877, 878 (2d Dept. 2018).

As petitioner has demonstrated the reasonableness and necessity of the trespass, the petition for a license pursuant to RPAPL § 881 shall be granted. See Van Dorn Holdings, LLC v 152 W. 58<sup>th</sup> Owners Corp., 149 AD3d 518 (1<sup>st</sup> Dept. 2017); Moskowitz v Pavarini McGovern, LLC, 83 AD3d 438 (1st Dept 2011); and DDG Warren LLC v Assouline Ritz 1, LLC, 138 AD3d 539 (1<sup>st</sup> Dept. 2016).

It is within this court's discretion to award respondent contemporaneous license fees as well as reasonable attorneys' and engineers' fees that it has incurred in connection with review of the plans and in connection with this proceeding. See Van Dorn Holdings, supra.

7/1/2020  
DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE