

House 93, LLC v Lipton
2021 NY Slip Op 30084(U)
January 11, 2021
Supreme Court, New York County
Docket Number: 161159/2018
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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INDEX NO. 161159/2018

HOUSE 93, LLC,

MOTION DATE 09/18/2020

Petitioner,

MOTION SEQ. NO. 004 005

- v -

HEIDI LIPTON,

**AMENDED/RESETTLED
DECISION + ORDER ON
MOTION**

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 212, 213, 214, 215, 216, 231, 232, 233, 234, 235, 236, 237, 238

were read on this motion to/for CONFIRM/DISAPPROVE AWARD/REPORT

The following e-filed documents, listed by NYSCEF document number (Motion 005) 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230

were read on this motion to/for EXTEND - TIME

ORDER

Upon the foregoing documents, it is

ORDERED that the Order of January 11, 2021 resolving motion sequence 004 and motion sequence 005 in this action is VACATED, RESETTLED AND CORRECTED AS PURSUANT TO CPLR 5019 [see Kiker v Nassau County, 85 NY2d 879 (1995)]; and it is further

ORDERED that the motion of petitioner to confirm the Report of Judicial Hearing Officer Alice Schlesinger filed on January 6, 2020 (motion sequence number 004) is GRANTED; and it is further

ORDERED that the cross motion of respondent to disapprove such Report is DENIED; and it is further

ORDERED that that the motion of petitioner to extend the term of the license issued on June 25, 2019 (motion sequence number 005) is DENIED as moot; and it is further

ORDERED that the application of petitioner for sanctions against respondent and respondent's cross motion for sanctions against petitioner are DENIED; and it is further

ORDERED that this matter having come on before this court on September 18, 2020, on the cross motion of the respondent for an award of damages for alleged property damage, and the petitioner having been represented in connection therewith by Anthony John Novello, Esq., and the respondent having been represented in connection therewith by, Matthew C. Kesten, Esq., and, pursuant to CPLR 4317, the court having on its own motion determined to consider the appointment of a referee to determine as follows, and it appearing to the court that a reference to determine is proper and appropriate pursuant to CPLR 4317 (b), and involves an issue of damages separately triable and not requiring a trial by jury, it is now hereby

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

the issue of the amount of damages, if any, sustained by the Adjacent Property owned by respondent caused by the construction activity of petitioner under the license granted under Real Property Proceedings & Actions Law § 881 on June 25, 2019; 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 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 respondent 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

A review of the transcript of the undertaking hearing reveals that the Judicial Hearing Officer did not discount the amount of the undertaking to be posted for attorneys' fees incurred by respondent as the result of the license based upon respondent's failure to reach a compromise. Instead, the Referee made clear that she attributed much of the fees assessed by respondent's prior counsel to legal services that arose only due to respondent's lack of good faith and reasonableness in contesting the petition for a reasonable and minimal trespass

upon her property. Thus, this court finds the undertaking in the amount of \$18,000 for attorneys' fees is reasonable, especially in light of the evidence that petitioner has already paid to respondent \$20,000 in attorneys' fees for legal services incurred by respondent prior to the commencement of the proceeding at bar.

This court finds no grounds for awarding petitioner sanctions against respondent, as respondent had every right to defend against petitioner's application for an extension of the term of the license. Likewise, this court finds that sanctions against petitioner are unwarranted, as the work was only completed one month after petitioner filed its motion for an extension.

Neither side presents evidence that resolves the question whether the Adjacent Property suffered any damages caused by the construction activities of petitioner under the license. As the issue implicates questions of credibility, it must be resolved at an evidentiary hearing.

1/11/2021
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION GRANTED IN PART OTHER

APPLICATION: GRANTED SETTLE ORDER SUBMIT ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE