Index No. 153031/2020

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

240W35, LLC,

Petitioner,

-against-

243 WEST 34TH STREET LLC,

Respondent.

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR CONTEMPT

ADAM LEITMAN BAILEY, P.C.
Attorneys for Petitioner 240W35, LLC
One Battery Park Plaza, 18th Floor
New York, New York 10004
(212) 825-0365

[652034/1]

PRELIMINARY STATEMENT

This memorandum of law is being submitted on behalf of Petitioner 240W35, LLC ("Petitioner") in support of its Order to Show Cause seeking an order pursuant to (i) Judiciary Law § 753, finding Respondent 243 West 34th Street LLC ("Respondent") to be in civil contempt of the Court's May 4, 2020 order ("Order"); (ii) Judiciary Law § 750, finding Respondent to be in criminal contempt of the Order; (iii) Judiciary Law § 773, fining Respondent a sum sufficient to indemnify Petitioner for damages relating to the loss or injury, a fine, or, if Petitioner is unable to prove actual loss, fining Respondent the amount of Petitioner's expenses, and two-hundred and fifty dollars ($250.00) in addition thereto, for its misconduct, and failure to comply with the Order; (iv) Judiciary Law § 774, imprisoning Respondent until it has performed its duties under the Order, and paid the fine imposed; and (v) for such other and further relief as the Court deems just and proper.

As set forth below, and in the accompanying Affirmation of Joanna C. Peck ("Peck Aff."), and the supporting exhibits thereto, consistent with its pattern of obstructive and contemptuous conduct it has exhibited since the onset of the underlying RPAPL § 881 proceedings, Respondent has willfully refused to comply with the Order directing Respondent to provide Petitioner with limited licensed access to the building located at 243 West 34th Street, New York, New York ("Respondent Building") to "erect a roof protection on Respondent's roof and a restricted access zone," ("Roof Protections" and "CAZ," and collectively, "Temporary Protections") by conditioning access upon Petitioner's compliance with conditions outside the four corners of the Order.

As a result, in addition to the significant delay costs, and violations of the law, Petitioner is unable to abate the emergency structural conditions that could result in a partial building collapse, and result in irreparable harm to the public, and the occupants of the Petitioner's Building.

Accordingly, Petitioner is once again left with no choice but to seek this Court's intervention to adjudicate Respondent to be in contempt of this Court's May 5, 2020 Order or to cure such contempt by immediately providing Petitioner with access to install the temporary safety protections on the roof and rear yard. For the reasons set forth below, Petitioner's motion should be granted in its entirety.

STATEMENT OF FACTS

The Order by this Court mandated that Respondent provide Petitioner with licensed access to the Respondent Building as follows:

> request for a limited license to erect a roof protection on Respondent's roof and a restricted access zone with limited access for Respondent's tenant Monday through Friday 8:00 a.m. through 4:30 p.m. with limited access for respondent's tenant every day from 12:30 to 1:00p.m. . . . The Court further orders that, if the Respondent is able to obtain written confirmation from DOB that the overhead protection installed is a sufficient protection per the site safety plan, then and only then will the controlled access zone can [sic] be eliminated in lieu of the overhead protection. ***This order shall remain in effect until the completion of the necessary work*** (emphasis added) (Peck Aff. ¶ 4, Ex. 1).

Immediately following the filing of the Notice of Entry of the Order on May 5, 2020, Petitioner notified Respondent that it intended to install the Roof Protections and the CAZ on the Respondent Building on May 6, 2020, at 9:00 a.m., and that in order to do so, Respondent would need to temporarily remove the non-DOB approved or permitted Overhead Protections in the rear yard of the Respondent Building to allow

Petitioner temporary access to the roof of the Respondent Building through the rear yard (Peck Aff. ¶ 7, Ex. 3).

As was explained to the Court at the May 4, 2020 RPAPL § 881 hearing, Petitioner could not designate the CAZ with the Overhead Protections in place (Peck Aff. ¶ 8). In addition, because the Overhead Protections were not permitted, Petitioner could not safely use the Overhead Protections to access the roof of the Respondent Building (Peck Aff. ¶ 9).

That same day, Respondent rejected Petitioner's demand that the Overhead Protections be temporarily removed, thereby preventing Petitioner to install the Temporary Protections, as permitted under the Order (Peck Aff. ¶ 10, Ex. 4). Petitioner was now caught in a Catch-22: on the one hand, it is unable to designate the rear yard a CAZ in order to comply with its site safety plan because of the existence of the Overhead Protection; on the other hand, Petitioner was unable to amend its site safety plan to incorporate the Overhead Protections because they were not permitted by the DOB (Peck Aff. ¶ 11). In addition, because the Overhead Protections were not permitted, Petitioner's contractor could not safely use the Overhead Protections as a means of accessing the Respondent's roof to install the Roof Protections (Peck Aff. ¶ 11).

Petitioner promptly notified this Court of Respondent's violation of the Order, and requested a conference with the Court to resolve same (Peck Aff. ¶ 12, Ex. 5). The Court rejected our request for a conference, explaining: "The parties obligations as detailed in the Order are clear. As such, the Court declines to schedule an additional conference." (Peck Aff. ¶ 13, Ex. 6).

In an effort to amicably resolve the disputes between the parties concerning the installation of the Temporary Protections without further court intervention, between May 6th to late May, 2020, Petitioner repeatedly reached out to Respondent to coordinate access to the Respondent Building to install the Temporary Protections (Peck Aff. ¶ 16). Despite these good faith efforts by Petitioner, and the Order from this Court mandating that Respondent provide Petitioner licensed access to install the Temporary Protections, Respondent steadfastly demanded that Petitioner agree to multiple terms and conditions beyond the Order in exchange for access to the Respondent Building (Peck Aff. ¶ 17).

At the end of May, 2020, the DOB had still not issued a permit for the Overhead Protections, despite Respondent's representations at the hearing that a permit would be issued "in a day, or so." (Peck aff. ¶ 18, Ex. 7, p. 65/16-24), thereby preventing Petitioner from safely accessing the roof to install the Roof Protections. Given Respondent's obstinance, Petitioner was left with no choice but to modify its means of access to install the Roof Protections.

Accordingly, in or about late May, 2020, Petitioner commenced negotiations with 261 West 34th Street LLC ("261 Owner"), the owner of the vacant land directly adjacent to, and westerly of the Respondent Building having an address of 261 West 34th Street ("261 Premises") for a temporary access agreement ("261 Access Agreement") (Peck Aff ¶ 20, Ex. 8). The purpose of the 261 Access Agreement was to permit Petitioner to load the materials for the Roof Protections onto the roof of the Respondent Building from the 261 Premises, thereby avoiding the need to temporarily dismantle the Overhead Protections (Peck Aff. ¶ 21).

The 261 Access Agreement was finalized on June 3, 2020. That same day, Petitioner sent Respondent a certificate of insurance, and notified it that it would merely need access via the front door of the Respondent Building to permit approximately three individuals from the project crew to access the roof so that they could facilitate with the crew on the ground of the 261 Premises to hoist the materials from the 261 Premises to the Respondent's roof (Peck Aff. ¶ 22-23, Ex.9-10).

Consistent with the defiant course of conduct Respondent has exhibited since the onset of this litigation, on June 4, 2020, Respondent responded that it once again would not permit Petitioner access to the Respondent Building until Petitioner complied with a "list of key terms for an agreement between the parties . . .." (Peck Aff. ¶ 24).

These outrageous terms, including that Petitioner pay for Respondent's illegal self-help, included:

a. 250W35, LLC ("240W35") to reimburse 253 West 34th Street (34th Street LLC") for the cost of the installation of the Overhead Protection and 240W35's continued payment of rental fees in connection theretowith.
b. A license fee for access to 34th Street LLC's premises.
c. Reimbursement for 24th Street LLC's legal and engineering fees.
d. An agreed durational limit to the access.
e. 240W35 and its contractors and subcontractors to provide 34th Street LLC insurance coverage per the insurance requirements previously provided. ...
f. 240W35 and its contractors and sub-contractors to defend, indemnify and hold harmless 34th Street LLC per the previously provided Hold Harmless Agreement.
g. 240W35 to defend, indemnify and hold harmless 34th Street LLC from all claims by any tenants, subtenants or occupants of the 34th Street Building for a rent abatement or damages by reason of 24W35's use of 34th Street LLC's property. (Peck Aff ¶ 25, Ex. 11).

Respondent wholly ignores that the Court granted Petitioner access to install the Temporary Protections, and left "it to the parties to resolve the specifics of the licensing fee and costs." (Peck Aff. ¶ 4, Ex. 1). The grant of access was not contingent on such

"specifics." And certainly this Court did not direct Petitioner to compensate Respondent's engagement in illegal self-help relating to the installation of the Overhead Protections at the Respondent Building.

Clearly, Respondent has no intention of complying with this Court's Order to permit Petitioner to enter onto the Respondent Building to install the Roof Protections. Without a permit for the Overhead Protections, Petitioner also remains prohibited from designating the CAZ in the rear yard of the Respondent Building, and/or using the Overhead Protections to access the roof.

In the interim, Respondent also moved before the First Department for a stay of the Order (Peck Aff. ¶ 33). Justice Gishe promptly denied Respondent's application for a stay (Peck Aff. ¶ 34). The remaining application is currently pending (Peck Aff. ¶ 35).

Accordingly, for more than a month since the issuance by this Court of the Order, (and since January 2020 when Petitioner first requested that Respondent enter into a license agreement) Petitioner has been prohibited from addressing the unsafe conditions at the Petitioner Building, including the risk of a partial building collapse due to Respondent's willful, deliberate and contumacious violation of the Order (Peck Aff. ¶ 32).

POINT I:

RESPONDENT SHOULD BE FOUND AND PUNISHED FOR CIVIL CONTEMPT PURSUANT TO JUDICIARY LAW § 753

Judiciary Law § 753 entitled "Power of courts to punish for civil contempt" provides in relevant part:

> A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the

> court may be defeated, impaired, impeded, or prejudiced, . . . An attorney, counsellor, . . . or other person, in any manner duly selected or appointed to perform a judicial or ministerial service, . . . for disobedience to a lawful mandate of the court, or of a judge thereof . . ..

The Court of Appeals has stated: [c]ivil contempt has as its aim the vindication of a private right of a party to litigation and any penalty imposed upon the contemnor is designed to compensate the injured private party for the loss of or interference with that right." *McCormick v. Axelrod*, 59 N.Y.2d 574, 582 - 583 (1983); *see also McCain v. Dinkins*, 84 N.Y.2d 216, 226 (1994) ("Civil contempt has as its aim the vindication of a private party to litigate and any sanction imposed upon the contemnor is designed to compensate the injured private part to litigation and any sanction imposed upon the contemnor is designed to compensate the injured private party for the loss of or interference with the benefits of the mandate."); *Dep't of Envtl. Protection of City of N.Y. v. Dept. of Envtl. Conservation of State of N.Y.*, 70 N.Y.2d 233, 239 (1987) (civil contempt is "designed not to punish but, rather, to compensate the injured private party or to coerce compliance with the court's mandate or both.").

In *Dep't of Envtl. Protection of City of N.Y., supra*, the Court of Appeals laid out the elements for a finding of civil contempt:

> In order to find that contempt has occurred in a given case, it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect, it must appear, with reasonable certainty, that an order has been disobeyed. Moreover, the party to be held in contempt must have had knowledge of the court's order, although it is not necessary that the order actually have been served upon the party. Finally, prejudice to the right of a party to the litigation must be demonstrated. *Id*. at 582 (internal citations and quotations omitted).

Petitioner is not required to demonstrate actual damages for a finding of civil contempt where the Court's order has been undermined and defeated by Respondent's

violation of same. *State v. Unique Ideas, Inc.*, 44 N.Y.2d 345, 349 (1978).

Here, Petitioner has established to an absolute certainty the requisite elements of civil contempt. First, there is no dispute that a lawful and unequivocal order by this Court was, and remains, in full force and effect. In addition, Respondent had knowledge of the Order as the Notice of Entry was entered by Petitioner on May 5, 2020, and Respondent's attorneys received same via NYCEF on May 5, 2020 (Peck Aff. ¶ 5, Ex. 2).

It is also clear that Respondent has willfully disobeyed the Order. As set forth in the Peck Affirmation, and above, immediately following the issuance of the Order, Respondent willfully violated this Court's mandate by prohibiting Petitioner from obtaining the "limited license" to install the Temporary Protections absent the improper imposition of terms and conditions not provided under the Order.

As discussed, Respondent has demanded that Petitioner enter into a license agreement to reimburse it for all costs relating to the Overhead Protection, which, as this Court is aware, were illegally installed by Respondent, and, upon information and belief, remained unpermitted by the DOB as of the date of this Memorandum.[1] Notwithstanding the language of the Order, which provided that the term of access "shall remain in effect until the completion of the necessary work," Respondent also insists that Petitioner agree to a "durational limit" of access (Peck Aff. ¶ 25, Ex. 11). Respondent further demands that Petitioner agree to compensate it for all attorneys' and engineering fees, all conditions not contemplated by the Order (Peck Aff. ¶ 25, Ex. 11).

Such disobedience for this Court's directives should come as no surprise given Respondent's obstructive and contemptuous course of conduct it has exhibited since the

[1] The failure to obtain a permit directly contradicts the representations made by Respondent's witness David Malanga at the hearing that a permit would be obtained for the Overhead Protections from the DOB "in a day or so" (*See* Peck Aff. ¶ _).

onset of these proceedings, which included intentionally defying this Court's direction to the parties to attempt to resolve the disputes, and, instead, engaging in self-help by installing non-DOB approved and permitted Overhead Protections, and by illegally trespassing through the neighboring property to do so.

Finally, Petitioner has established that it has been prejudiced by Respondent's failure to comply with the Order. As discussed, Petitioner is unable to install the Temporary Protections because of Respondent's baseless demands, thereby prohibiting Petitioner from abating the structural defective conditions, resulting in the life and safety risks to the occupants of the Petitioner Building, and the public, and Petitioner's non-compliance with the law.

In sum, the Order has been rendered without any force and effect as a result of Respondent's deliberate and willful failure to comply with this Court's directives.

Accordingly, Petitioner has clearly established that Respondent should be held in civil contempt by this Court.

POINT II:

RESPONDENT SHOULD BE FOUND AND PUNISHED FOR CRIMINAL CONTEMPT

Judiciary Law § 750 entitled "power of court to punish for criminal contempts" provides in relevant part:

> A. A court of record has power to punish for criminal contempt, a person guilty of any of the following acts, and no others: . . .
>
> 3. Willful disobedience to its lawful mandate.
> 4. Resistance willfully offered to its lawful mandate.

The standard of proof to find criminal contempt is "proof beyond a reasonable doubt." *County of Rockland v. Civil Serv. Empls. Assn.*, 62 N.Y.2d 11, 14 (1984). Here,

the repeated failures by Respondent to comply with the Order, including demanding that Petitioner comply with conditions of access not required by the Order, smacks of a willful and deliberate refusal to comply with the Order, contempt, and bad faith.

The First Department has stated that "in order to be found guilty of criminal contempt, it must be shown that the accused violated the underlying order with a higher degree of willfulness (sic) and contumaciousness than is required in a civil contempt proceeding." *Matter of Murphy*, 98 A.D.2d 93, 99 (1st Dep't 1983); *See Matter of McCormick v. Axelrod*, 59 N.Y.2d 574, 583 (1983); Judiciary Law, § 750(A)[3].)

Petitioner has established beyond any reasonable doubt that Respondent's flagrant and brazen defiance of this Court's Order is willful and contumacious, meeting the heightened standard for criminal contempt. Accordingly, this Court should find Respondent to be in criminal contempt pursuant to Judiciary Law § 750.

POINT III:

THE COURT SHOULD IMPOSE FINES UPON RESPONDENT PURSUANT TO JUDICIARY LAW § 773

Judiciary Law § 773 provides in relevant part:

> If an actual loss or injury has been caused to a party to an action or special proceeding, by reason of the misconduct proved against the offender, . . . that an action may be maintained to recover damages for the loss or injury, a fine, sufficient to indemnify the aggrieved party, must be imposed upon the offender, and collected, and paid over to the aggrieved party, under the direction of the court. The payment and acceptance of such a fine constitute a bar to an action by the aggrieved party, to recover damages for the loss or injury.
>
> Where it is not shown that such an actual loss or injury has been caused, a fine may be imposed, not exceeding the amount of the complainant's costs and expenses, and two hundred and fifty dollars in addition thereto, and must be collected and paid, in like manner. *See also, Children's Vil. V. Greenburgh Eleven*

Teachers' Union Fedn. Of Teachers, Local 1532, AFT, AFL-CIO,
249 A.D.2d 435, 436 (2d Dep't 1998).

As set forth above, there is no doubt that Respondent has willfully violated the Order of this Court, thereby preventing Petitioner from installing the Temporary Protections so that it can proceed with the emergency repairs to the Petitioner Building. Aside from the significant delay costs and expenses relating to Petitioner's ability to proceed with the repairs, Respondent's conduct has resulted in the extremely hazardous conditions to persist, including the potential for a partial building collapse. Accordingly, this Court should impose fines pursuant to Judiciary Law § 773 upon Respondent.

POINT IV:

IMPRISONMENT OF RESPONDENT PURSUANT TO JUDICIARY LAW § 774 IS WARRANTED

Judiciary law § 774 permits the Court to imprison Respondent until such time that Respondent has performed the requirements pursuant to the Order, and paid the imposed fines. Accordingly, as set forth above, given that there is no doubt of Respondent's contempt concerning the Order, this Court should imprison Respondent until such time that it has complied with its obligations set forth in the Order.

CONCLUSION

For the reasons set forth herein, and in the accompanying Affirmation of Joanna C. Peck, and the supporting exhibits thereto, Petitioner 240W35, LLC respectfully requests that this Court grant Petitioner's motion finding Respondent in civil and criminal contempt pursuant to Judiciary Law §§ 753 and 750, impose fines and sanctions pursuant to Judiciary Law § 773, and imprison Respondent pursuant to Judiciary Law § 774, and grant such other and further relief as may be just and proper.

Dated: New York, New York
June 16, 2020

ADAM LEITMAN BAILEY, P.C.
Attorneys for Petitioner 240W35, LLC

By: s/Joanna C. Peck
Jeffrey R. Metz, Esq.
Joanna C. Peck, Esq.
One Battery Park Plaza, 18th Floor
New York, New York 10004
(212) 825-0365

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153031/2020
240W35, LLC v. 243 WEST 34TH STREET LLC,
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Documents Received on 06/16/2020 05:50 PM

Doc #	Document Type
52	ORDER TO SHOW CAUSE (PROPOSED), Motion #002
53	AFFIDAVIT OR AFFIRMATION IN SUPPORT OF PROPOSED OSC/EXPARTE APP, Motion #002 Affirmation of Joanna C. Peck, Esq in Support of Order to Show Cause
54	EXHIBIT(S) 0, Motion #002 Schedule of Exhibits
55	EXHIBIT(S) 1, Motion #002 Decision and Order dated May 5, 2020
56	EXHIBIT(S) 2, Motion #002 Notice of Entry dated May 5, 2020
57	EXHIBIT(S) 3, Motion #002 Petitioner's May 5, 2020 Letter
58	EXHIBIT(S) 4, Motion #002 Respondent's May 5, 2020 Letter
59	EXHIBIT(S) 5, Motion #002 Petitoner's May 6, 2020 Notice to Court
60	EXHIBIT(S) 6, Motion #002 Court's May 6, 2020 Response Email
61	EXHIBIT(S) 7, Motion #002 Transcript dated May 4, 2020
62	EXHIBIT(S) 8, Motion #002 Temporary License Agreement
63	EXHIBIT(S) 9, Motion #002 Petitioner's June 3, 2020 Letter
64	EXHIBIT(S) 10, Motion #002 Certificate of Insurance for 243 West 34th St LLC
65	EXHIBIT(S) 11, Motion #002 Respondent's June 4, 2020 Email

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Assigned Judge: Eileen Rakower

66	EXHIBIT(S) 12, Motion #002 Transcript dated May 4, 2020
67	MEMORANDUM OF LAW IN SUPPORT, Motion #002 Memorandum of Law in Support of Motion for Contempt

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Joanna C. Peck | jpeck@alblawfirm.com
1 Battery Park Plz Fl 18, New York, NY 10004

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BENSION D. DE FUNIS - BensionD@solil.com
JOANNA C. PECK - jpeck@alblawfirm.com

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