NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART **25**
---X

Index №. 801404/2021E

SAMARITAN-COMPASS VI HOUSING
DEVELOPMENT FUND CORPORATION,
Petitioner,

Hon. **MARY ANN BRIGANTTI**,
Justice of the Supreme Court

- against –

1293-95 RODMAN LLC,

Respondent(s).
---X

The following papers numbered _63_ to _159_were read on these motions (**Seq. No.** 2) for _**CONTEMPT**__ noticed on **_November 19, 2021_** and duly submitted as **Nos.** __ on the Motion Calendar of **_November 19, 2021_**

Sequence No.	NYSCEF Doc. Nos.
Notice of Motion – Exhibits and Affidavits Annexed	63-94
Cross Motion – Exhibits and Affidavits Annexed	95-105
Answering Affidavit and Exhibits, Memorandum of Law	
Reply Affidavit Additional submissions; Post-Hearing Memoranda and Exhibits	106-110; 113-159

This motion is decided in accordance with the accompanying memorandum decision.

Dated: MAY 25, 2022

Hon. ______________________
MARY ANN BRIGANTTI, J.S.C.

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1. CHECK ONE.. ☐ CASE DISPOSED IN ITS ENTIRETY ☒ CASE STILL ACTIVE
2. MOTION IS.. ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE...................... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE ☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
---X
In the Matter of the Application of:
SAMARITAN-COMPASS VI HOUDING DEVELOPMENT FUND CORPORATION,
Petitioner,

For an Order and Judgment pursuant to Section 881 of the Real Property Actions and Proceedings Law for access to adjoining property,

- against -

1293-95 RODMAN, LLC,
Respondent(s).
---X

DECISION AFTER HEARING
Index No. 801404/2021E

HON. MARY ANN BRIGANTTI

Upon the foregoing papers by way of order to show cause, the petitioner Samaritan-Compass VI Housing Development Fund Corporation ("Petitioner") moved for an order (1) pursuant to Judiciary Law §750, *et seq*., finding the respondent 1293-95 Rodman LLC ("Respondent") in contempt of (i) the Order and Judgment dated August 11, 2021 ("Order and Judgment"), and (ii) the "So Ordered" stipulation dated October 5, 2021 ("Stipulation"). Respondent opposed the motion and cross-moved for an order (i) holding Petitioner in contempt of court pursuant to Judiciary Law §753 for willfully disregarding the Order and Judgment and Stipulation. Petitioner opposed the cross-motion.

By decision and order dated January 24, 2022, this Court denied Respondent's cross-motion and granted Petitioner's motion to the extent of setting this matter down for a hearing to determine whether Respondent had a valid defense to the motion, whether Petitioner suffered prejudice as a result of Respondent's conduct, and whether Petitioner suffered actual damages as a result of the alleged contemptuous conduct. The hearing took place over two days: February 23, 2022, and March 9, 2022.

I. *Findings of Fact*

By decision and order dated July 30, 2021, reduced to the Order and Judgment, this Court awarded Petitioner a judgment in the form of a license to enter Respondent's premises for several purposes, including the installation and maintenance of a controlled access zone ("CAZ") in portions of the yard of Respondent's premises. The license was conditioned on Petitioner securing the New York

City Department of Building ("DOB")'s approval of a Joint Site Safety Plan ("JSSP"). The judgment further ordered that Petitioner pay Respondent a monthly fee of $3,000 during the term of the license, commencing on the date that the JSSP was approved by the DOB. The Order and Judgment also provided that the license access "shall also be in accord with the license summary" annexed to it (the "License Summary").

The License Summary states, in pertinent part:

> Petitioner shall provide Respondent with a copy of Petitioner's project schedule to allow the Parties to coordinate the required access contemplated in this license. Thereafter, on or before the 1st day of each month during the term of this Agreement, Petitioner shall provide Respondent with Petitioner's "look-ahead schedule" that outlines the access that will be required of the Adjacent Premises over the course of the following month. If the 1st day of the month falls on a Saturday, Petitioner shall exchange the schedule on the following Monday (License Summary at Par. 2[B]).

The License Summary also states:

> At all times, the Parties shall coordinate and execute the installation of a controlled access zone on the Adjacent Premises ("Petitioner CAZ") for the benefit of the Petitioner's project as set forth in the Joint Site Safety Plan. The Petitioner CAZ shall be defined by barriers, flag and/or ropes, depending on the Petitioner's and Petitioner Construction Teams' daily access requirements. Respondent shall be responsible for the implementation and maintenance of the Petitioner CAZ as set forth in the Joint Site Safety Plan, but the materials necessary to compose the Petitioner CAZ shall be provided at Petitioner's cost and expense. At all times, the Petitioner CAZ shall be supervised and coordinated between both Respondent's construction manager and Petitioner's site safety manager. The Parties shall install signage at both construction sites noting the daily details about the Petitioner CAZ. The Parties shall also ensure the daily details about the Petitioner CAZ are recorded in the daily logs for each of the Parties' projects. At all times, the Petitioner CAZ shall be maintained in accordance with applicable laws, including OSHA requirements (License Summary at Par. 2[C]).

After the Order and Judgment was entered, the parties had a dispute about whether the JSSP submitted in support of the petition was the same as the JSSP that was actually submitted and approved by the DOB. After further court conferences, the parties entered into a so-ordered stipulation agreeing that the JSSP approved by the DOB would be substituted for the JSSP annexed to the Order and Judgment (the Stipulation). The Stipulation also provided: "Respondent shall comply with all of the terms and conditions of the [Order and Judgment], including, but not limited to, allowing Petitioner access to the Adjacent Premises, failing which Respondent may be deemed in contempt of the [Order

and Judgment], upon further application to the Court…[1]"

When allegedly contemptuous conduct thereafter occurred, this motion practice ensued.

(1) Hearing Testimony - Nicholas Carroll

At the hearing, Nicholas Carroll ("Carroll") testified on behalf of Petitioner. Carroll testified that he is employed by Monadnock Construction as project manager (Hearing Transcript Part I at 5). Monadnock's current project is the construction on 1923-27 West Farms Road in the Bronx (*id*. at 6), a site owned by Petitioner (*id*.). Carroll typically visits the site 3-5 days per week (*id*.). The property adjacent to Petitioner's is 1293-95 Rodman Place, owned by Respondent (*id*. at 7).
Carroll explained that he has spoken with Vilson Lumaj ("Lumaj") and Stacey Golia ("Golia") of Respondent to coordinate access for a CAZ so that the project can be completed (*id*. at 7). CAZ's are a type of barrier, typically a rope with flags and signage that would prevent workers or pedestrians from accessing the zone without authorization (*id*. at 8). The CAZ had to be placed along the property line between the two premises to prevent any hazard within 20 feet of Petitioner's building (*id*.).

Carroll understood that the Court awarded Petitioner an access license in August, which allowed for access to Respondent's site with four conditions: Petitioner had to take out additional insurance, pay a monthly license fee, share a site-safety plan, and share a look-ahead schedule (*id*. at 10-11). Once the court order was entered, Petitioner immediately requested access to the adjacent property, but they were denied because the site safety plan did not match the one that was submitted to the Court (*id*. at 11). Carroll testified that there were no material changes in the site safety plans (*id*.).

In any event, Petitioner was eventually able to gain access to Respondent's site and install a CAZ on October 15, 2021 (*id*. at 12). Golia required license payments for August and September, despite the fact that Petitioner did not have access during those months. Petitioner nevertheless paid the fee to gain access and were permitted such access on October 15. Carroll explained that they paid the fee for August and September because they "had already received substantial delays" and "were not willing to receive anymore delays over the cost of the license" (*id*. at 12).

Petitioner installed the CAZ on October 15. The DOB subsequently lifted a partial stop-work

[1] The parties stipulated to admit the July 30, 2021 order, the Order and Judgment, and the Stipulation into evidence at the hearing (Stipulation dated February 22, 2022).

order that was put into place, and Petitioner began installing the superstructure next to the property line of the adjacent property (*id.* at 13). After about a week of work, workers from the adjacent property had entered into the CAZ, thus Petitioner had to halt work to prevent hazards to those workers (*id.*). Carroll identified a photograph from the construction site, time-stamped 2:01 on October 21 (*id.* at 14), which depicted a worker inside of the CAZ (*id.*). He testified that once a worker is inside the CAZ, they are exposed to any hazards such as falling debris and falling tools (*id.* at 14-15). Once he saw the photograph, Carroll tried to get the worker's attention and he ended up speaking to him on the sidewalk (*id.* at 15). Carroll warned the worker that it was unsafe to be in the CAZ, and the worker seemed to understand but said he had to speak with his boss, Lumaj (*id.* at 15-16). Carroll then spoke with Lumaj, who warned Carroll against speaking to his employees, and said he was not going to step aside at let Petitioner's work continue if he was not also able to work (*id.* at 16). Carroll identified an email exchange he had with Golia dated November 1, 2021. Carroll testified that he was trying to get confirmation from Golia that she was going to follow the site safety plan, and to confirm that no workers would be entering the CAZ. He noted that on October 30, 2021, Golia had sent him *Respondent's* "look-ahead" schedule, which was confusing because Carroll understood that the license order only required Petitioner to provide such a schedule to Respondent – not the other way around (*id.* at 17-18). In response to Carroll's email, Golia stated that Respondent needed access to Petitioner's property – specifically Petitioner needed to keep one foot away from the shared property line – which Carroll explained was not a DOB requirement (*id.* at 18). This was basically "requesting space" from Petitioner (*id.*).

Carroll testified that even after this email exchange, workers continued to enter the CAZ, and at one point DOB issued a partial stop work order because of it (*id.*). Carroll identified additional photographs dated November 5, 2021, showing workers in the CAZ, and a final photo showing that workers removed the CAZ, or at least part of it, to load material into the CAZ throughout the day (*id.* at 20-21). After the CAZ was removed, the DOB issued a partial stop work order on both properties since the CAZ was not implemented in accordance with the site safety plan (*id.* at 21). Carroll notified Golia, who claimed that they did not remove the CAZ, but the "winds and rain" removed it (*id.* at 21-22). Carroll was aware that after the CAZ was removed, Respondent continued work on its site. Since there was no CAZ, Petitioner was prevented from doing any work within 20 feet of the shared property line due to the dangers that would be created to any workers in the area (*id.* at 22). When the CAZ was

compromised, Petitioner would have to stop all work, demobilize or remobilize material that was going to be installed, and re-organize the workspace (*id.*). Petitioner also had to implement their own CAZ 20 feet on their own property line (*id.*). Petitioner was also prevented from installing a required second egress on the property (*id.* at 23). Petitioner was allowed to build on the rest of their property, only to a certain height, before the second egress for workers would be needed – thus preventing Petitioner from installing the second egress which also prevented continued work on the rest of the property (*id.* at 23). No one from Respondent coordinated this work with Petitioner's team (*id.* at 23-24), and the DOB eventually issued a partial stop work order on both premises due to the absence of a CAZ, preventing further work within 20 feet of the property line (*id.* at 25-26).

When the partial stop work order was issued, on November 10, 2021, Petitioner was able to continue work outside the stop-work area, but they were unable to continue certain critical work – i.e., creating that second egress – until the stop work order was lifted (*id.* at 28). Carroll identified another photograph dated November 11, 2021, showing the CAZ partially removed, and workers inside the CAZ installing materials (*id.*). To get the stop work order lifted, Petitioner had to show that the CAZ was re-implemented, and this photograph demonstrated that was not done, so DOB would not provide a re-inspection (*id.* at 29). Carroll then requested re-installation of the CAZ, which was done by Respondent's workers (*id.* at 30).

Carroll testified that Petitioner had provided "look-ahead" schedules to Respondent's team (*id.*). He identified a document (Petitioner's Exhibit "8"), which included the October look-ahead schedule (*id.* at 32). He explained that, since access to the premises was denied since August 18th, Petitioner was unable to build their building as one structure, but was caused to phase it in multiple structures, and creating inefficiencies on the work site (*id.* at 33-34). As a result of the initial access refusal in August, the project was delayed by forty-one (41) working days, excluding holidays and weekends (*id.* at 35). When the CAZ was removed on October 21st, that affected the super-structure phase of Petitioner's project as they were unable to install steel columns/beams and pre-cast concrete slabs right up against within 20 feet of the shared property line, and the steel beams were also supporting the area around the egress previously mentioned (*id.* at 36). That total delay amounted to ten (10) working days (*id.*).

Carroll identified a "delay schedule" that he prepared to track the progress of the project. The document was admitted as Petitioner's Exhibit "9." Using this document, Carroll explained precisely how the "delay days" were calculated when access was not granted to install the CAZ. He pointed to a

date range from October 21, 2021 to November 16, 2021, when the stop work order was lifted (*id*. at 44). During that range there were ten non-consecutive working days when Petitioner was unable to work, and therefore were delayed (*id*.). During that ten-day time frame, Petitioner was able to work on other portions of their property. Carroll explained that the delay to the super-structure work extended that work timeline because it was all critical path work, as Petitioner needed to create the egress staircase to even be able to finish work outside of the CAZ (*id*. at 45). Carroll testified that he had subsequent emails with Golia providing Petitioner's November look-ahead schedule (*id*. at 46).

Carroll explained that the 41-day and 10-day delays attributable to lack of access to Respondent's site created costs for Petitioner (*id*. at 46-47). Those costs included rentals for temporary protections, labor and supervisor costs, erection labor, and crane rental (*id*. at 47). Petitioner's accounting team prepared monthly cost transaction reports reflecting items such as project manager costs, site superintendent costs, office trailer rentals, sanitary facility rentals, and guard booth costs (*id*. at 51). Carroll also pointed to individual invoices that identified certain change orders that had to be implemented due to delays. An invoice from Rockledge Fence showed that Petitioner incurred additional costs to install a pedestrian fence (*id*. at 64-65, and Petitioner's Exhibit 16). Carroll also testified that another company called Urban Precast provided all of the erection for the super-structure phase of the project, including both steel and pre-cast concrete (*id*. at 72). Urban Precast was renting a crane for the erection work, therefore Petitioner would pay any additional rental costs upon delays of the crane usage (*id*.). Petitioner submitted a change order totaling $174,975.00 imposed by Urban Precast (Petitioner's Exhibit "19"). Carroll testified that this document confirmed that these costs were associated with the ten-day delays in super-structure erection (*id*. at 75).

Carroll reduced all of the delay costs into a document that was admitted into evidence as Petitioner's Exhibit "20." The document prorated the daily costs incurred for several categories of vendors and set forth the delay-days caused by Respondent's actions. The delay costs are broken down into specific date ranges: August – September delay costs, August – October 15 Delay Costs, October – November Delay Costs, and October 15-November Delay Costs. Carroll clarified that the ten-day delay that occurred from October to November was more specifically between October 15th and November 17th (*id*. at 92). The total delay costs that Carroll calculates in this document amounts to $325,740.11 (Petitioner's Exhibit "20"). Carroll testified that, had Petitioner been afforded access to install the CAZ as set forth in the original August 2021 order, it would not have incurred any of the costs set forth in

Exhibit 20 (*id*. at 97).

On cross-examination, Carroll confirmed that the October look-ahead schedule was shared with Respondent once access was granted around October 15 (Hearing Transcript Part II at 5). Referencing Petitioner's Exhibit 8, Respondent noted that the October schedule said "CAZ required at 1295 Rodman" and the next line was "180 days" (*id*. at 7). Carroll confirmed that as of October, this was the estimated amount of time that the CAZ needed to be put into place (*id*.). Carroll further explained that the CAZ was always a "critical part" of the project. When asked why there were no details as to the actual days of the particular month that CAZ access was required, Carroll responded that the work in the CAZ was critical, at that point they were already delayed and needed every day in October to catch up – it was estimated that 180 days was needed because Petitioner was already substantially behind schedule (*id*. at 9-10). Carroll understood that the two sites were required to coordinate safety, to ensure that every day there were no workers in the CAZ, in order for the work to proceed (*id*. at 10). In December, Petitioner was able to provide more specific daily look-ahead schedule because at that point they were able to make critical path progress, and they were able to work in multiple phases (*id*. at 11-12). He again confirmed that the delay days incurred between October and November amounted to ten non-consecutive days (*id*. at 16), between October 21st and November 16th (*id*. at 19). During that time, Petitioner continued to work, but not in the critical path areas – which was elevator work that was required to obtain a temporary certificate of occupancy (*id*. at 19-20).

On re-direct, Carroll further explained that look-ahead schedules change on a monthly basis because they are not able to predict how the adjacent property is going to react; they submitted an October look-ahead schedule, but there was no CAZ installed right away so Petitioner would not be able to really have a good perspective for November until they knew they would be granted access accordingly in October (*id*. at 37). Furthermore, there are general delays in construction due to weather delays and other delays that could happen (*id*.). While the October look-ahead called for 180 days of access, Petitioner has since been able to find ways to work alongside the adjacent property, but they still need 180 total days to get topped out, get to the elevator, to complete masonry along the shared property line (*id*. at 37). He explained that "critical path" items were those they had to be done in order for the project to be completed in the allotted time (*id*. at 38).

(2) Hearing Testimony – Stacey Golia

Golia testified that she performs construction consulting for Respondent (*id*. at 41). Golia was aware of a "license agreement" that Respondent had with Petitioner (*id*.). Golia's understanding of the "license agreement" was, for Petitioner to gain access to Respondent's premises, "we were supposed to have scheduling on construction schedules with each other to determine, you know, when everybody was going to be working" (*id*. at 42). Golia clarified that she was referring to the "look-ahead" schedules and she also noted that an access fee was part of the "license agreement" (*id*.). Golia recalled that she received a look-ahead schedule for October 2021, but she had complained to Carroll that it was "not a month-by-month schedule" but rather was four to five months out" (*id*. at 47). She understood that the "license agreement" required a more detailed look-ahead schedule so that they could "work safely side by side as the agreement called for us to work. Basically, we are going to be working at the same time simultaneously. So in order for us to do that the Order, we did say that we need to be provided with a Look-Ahead Schedule" (*id*. at 47-48). Golia claimed that Petitioner represented that they did not have to provide look-ahead schedules, that if Respondent wanted to be working, then Respondent had to apply for a license themselves- but Golia testified that Respondent would not apply for a separate license to work on their own property (*id*. at 48-49).

Golia testified that Petitioner's CAZ consisted of flags and on occasion, cones (*id*. at 49). Golia recalled receiving complaints from Carroll about somebody in the CAZ "delivering material" and another complaint "that some of the flags were down" (*id*. at 50). Golia stated that she received a photo alerting her to someone in the CAZ, "but at that point in time there wasn't a real schedule that was ever sent over and if we had to deliver materials, we had to have a schedule when they are going to be utilizing the controlled access. We have to work simultaneously" (*id*. at 50). Golia testified that they had "an Order to work together and build together with delivering materials, and it wouldn't be uncommon given the [CAZ] is in the middle of our property that we were constructing" (*id*. at 50-51). She testified that as Respondent built up their building, the CAZ would "go up with us" – so if the CAZ started on the first floor, and Respondent was going to the third floor, it would have to move along since Respondent "can't build half a building" (*id*. at 51).

Golia identified an email dated November 8, 2021 from Carroll alleging that the CAZ had been removed (admitted as Respondent's Exhibit "C"). Golia, however, did not recall that the CAZ was ever removed at that time, and she recalled inclement weather could cause flags to blow off since they were

not glued in place (*id*. at 55). Golia testified that between October 15, 2021 through November 16, 2021, there was no time where the CAZ was not in place (*id*. at 55). She recalled that there were stop work orders issued, but they had nothing to do with Respondent's property – they had to do with Petitioner's property (*id*.). Golia later admitted, however, that she had not seen the stop work orders (*id*. at 55-56).

Golia testified that she remained aware of what was happening on the job site between October 15th through November 16th, 2021 (*id*. at 57-58), through emails and phone calls with the "super" and from Lumaj (*id*. at 58). She recalled that Petitioner initially did not want to pay the licensee fee for August and September 2021 because they weren't starting construction yet (*id*. at 59).

On cross-examination, Golia was asked if she was aware that Petitioner requested access to the site as of August 18th, 2021 (*id*. at 60), and she testified that she did not recall (*id*). She did not recall if "October 15th" was indeed the date that Petitioner was first granted access to Respondent's property (*id*. at 61-62). Golia was asked to identify where, in the court orders and License Summary, it was provided that the parties would "exchange Look-Ahead Schedules" (*id*. at 64). Golia identified language requiring Petitioner to exchange a look-ahead schedule (*id*. at 64), but she did not identify language putting a reciprocal obligation on Respondent, or requiring an "exchange" of look-ahead schedules (*id*. at 65-67). Golia recalled that a CAZ was installed on Respondent's site some time in October 2021 (*id*. at 72-73). Golia was asked: "Did there ever come a time in October of 2021 when Rodman Place (Respondent) or you refused to maintain the Controlled Access Zone?" (*id*.at 73). She answered: "Not to my knowledge" (*id*.).

Upon redirect, Golia's attention was returned to the License Summary, paragraphs 2(B) and 2(C). Golia understood the word "coordinate" to mean, in the context of those paragraphs, that "both parties should be working with each other and coordinating their schedules" (*id*. at 77).

(3) Hearing Testimony – Vilson Lumaj

Respondent's next and final witness was Lumaj, one of the owners of Respondent (*id*. at 79). Lumaj recalled a time when a CAZ was installed onto his property (*id*.). He described the CAZ as "like rubber flags and always maintained by my guys. If it falls or something happens to it we make sure that no one enters into that zone" (*id*.). Lumaj testified that he was on the job site nearly every day (*id*. at 80). Lumaj was familiar with the court-ordered license in this case (*id*. at 80-81). Lumaj understood

that he was supposed to give Petitioner access to the CAZ "and to work with them pretty much" (*id*. at 81). He testified: "[t]he days that they work on my side, close to my side, because pretty much the CAZ Zone is in the middle of my property, if they are working on that side pretty much I cannot be close to the CAZ Zone or enter the CAZ Zone while they are building" (*id*.).

Lumaj was familiar with the License Summary annexed to the Order and Judgment, and he recalled first receiving a look-ahead schedule in "mid October or something like that" (*id*. at 84-85). Lumaj noted that Petitioner requested 180 days to work "nonstop" (*id*. at 85), and he responded by saying that request was "not by Court Order" and was "wrong" (*id*.). He testified that the 180-day request was "pretty much the middle of my building. That means I'm stopped completely and in the meantime we are both doing affordable housing. It's not fair for them or me to be stopped" (*id*. at 86). He stated that the CAZ was "in the middle of [his] building" (*id*.).

Lumaj was asked if there were complaints from Petitioner about the CAZ (*id*. at 87). Lumaj answered: "Yes, yes, because they thought: Put in the CAZ Zone in my property and they thought that they had 180-days to work and me not to do anything. So at one point in time when I had, I think a delivery coming in, and I had my guys check around and maintaining the property, Nick and some other guys, I was not there at the moment, but my foreman was there, and he just came in the side like screaming and yelling and acting like he owns my guys and my property" (*id*. at 87).

Lumaj testified that he never observed any stoppage of work that was being done on Respondent's premises (*id*. at 90). Lumaj recalled complaints from Carroll that Respondent "took the CAZ Zone," but he testified that overnight there had been "storms" and by the time Respondent got back to the job site the following day, "we put it back on and he thought we put it down" (*id*. at 92). Lumaj identified a video that he recorded on his phone, which was admitted into evidence as Respondent's Exhibit "D". The video is time stamped November 10, 2021 at 9:25. Lumaj testified that the video depicts "steel beams going across my property being installed into the building. Their crane is right behind my property. Every time they pick up the steel it swings above my property" (*id*. at 94). Lumaj denied ever receiving a license fee for the months of August and September 2021 (*id*. at 95). Some time in mid-October, they received a check (*id*. at 95-96).

On cross-examination, Lumaj testified that he did not grant access to his property to Petitioner in August 2021 (*id.* at 98). Lumaj was shown a copy of the License Summary annexed to the Order and Judgment. He conceded that Paragraph 2(C) made it clear that "the Controlled Access Zone was

intended to be installed in order to allow the petitioner to install the Controlled Access Zone as it needed" (*id*. at 100). Lumaj was asked if there was ever a time when he disagreed that Petitioner had the right to install the CAZ as long as they decided, and he responded "no" (*id*.).

(4) Hearing Testimony – Attorneys' Fees – Benjamin Tracy, Esq.

In support of its damages claim, Benjamin Tracy, Esq. testified as to the attorneys' fees incurred in these contempt proceedings, and Petitioner further supported that testimony with invoices reflecting amounts billed to their client from October 21, 2021, through March 8, 2022 – the day before the hearing concluded. Petitioner provided updated billing entries in supplemental submissions following the hearing.

II. *Conclusions of Law*

(1) *Contempt*

Judiciary Law §753(A) provides: "[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." To support the finding of civil contempt, the movant must establish: (1) a lawful order of the court, clearly expressing an unequivocal mandate, was in effect, (2) that it appears with reasonable certainty that the order has been disobeyed, (3) that the party held in contempt had knowledge of the court's order, and (4) there has been prejudice sustained by a party to the litigation (*El-Dehdan v. El-Dehdan*, 26 N.Y.3d 19, 29 [2015][internal citations omitted]). To carry their initial burden, the movant must "establish by clear and convincing evidence" that a court order has been violated (*id*.). There is no requirement that the alleged contemnor willfully disobeyed the court order (*id*. at 35). After the initial burden is satisfied, the burden shifts to the alleged contemnor to refute the movant's showing, or to offer evidence of a defense, such as an inability to comply with the order (*Mollah v. Mollah*, 136 A.D.3d 992, 993 [2d Dept. 2016]). A motion seeking contempt is addressed to the sound discretion of the motion court (*Chambers v. Old Stone Hill Rd. Assoc.*, 66 A.D.3d 944, 946 [2d Dept. 2009]).

In this matter, Petitioner established the first prong of the analysis – the existence of a lawful order expressing an unequivocal mandate. This Court, following a full evidentiary hearing, issued a

decision and order granting Petitioner's request for a license to access Respondent's property pursuant to RPAPL §881. The subsequently-entered Order and Judgment awarded Petitioner a license to enter Respondent's premises for various purposes, including installing, maintaining, accessing, and removing a controlled access zone in portions of Respondent's yard, installing, maintaining accessing, and removing an out-rigger needle beam system with supported scaffold over Respondent's premises, standing on the Respondent's premises to install a brick façade on Petitioner's new building, and installing a construction fence on portions of the Respondent' premises during various periods during the project. All of the above was granted to allow Petitioner to comply with requirements of the DOB and New York City Building Code, and all would be performed in accordance with a joint-site safety plan and retaining wall drawings, and the license access was to be in accord with a License Summary annexed to the Order and Judgment. The grant of a license was conditioned upon Petitioner's securing DOB approval of the JSSP. The Court further imposed a license fee of $3,000 per month from Petitioner to Respondent for the duration of the requested access license.

It is not disputed that on or about August 10, 2021, the DOB approved the Petitioner's JSSP (see Stipulation). Respondent allegedly refused to allow access to its premises notwithstanding the approval, based on a contention that the plans approved by the DOB were different than those annexed to the Order and Judgment. Petitioner maintained that the approved plans and those originally submitted were identical aside from some *de minimus* changes. Following a court conference on September 21, 2021, the parties entered into a stipulation whereby they agreed that the "approved" site safety plans were substituted for the JSSP that was annexed to the Order and Judgment and shall have the same force and effect. The parties also agreed that "Respondent shall comply with all of the terms and conditions of the [Order and Judgment], including, but not limited to, allowing Petitioner access to the Adjacent Premises, failing which Respondent may be deemed to be in contempt of the [Order and Judgment], upon further application to the Court ("Contempt Damages") (see Stipulation).

The above demonstrates conclusively that a clear unequivocal mandate was in effect as of the date of the original Order and Judgment and as of the date of the Stipulation. The Order and Judgment was conditioned upon DOB-approval of the JSSP. Although there was some disagreement as to the plans actually approved by the DOB, this disagreement was resolved by the October 5, 2021 Stipulation. The Stipulation, and the Order and Judgment, gave clear and unequivocal directives concerning Petitioner's ability to access Respondent's property. Respondent never challenged the July decision and

order or Order and Judgment by moving to renew or reargue, or taking an appeal. Thus, it is clear that at relevant times a lawful unequivocal mandate was in effect (*see generally*, *El-Dehdan*, 26 N.Y.3d at 31).

The next issue is whether it appears, by clear and convincing evidence, that this Court's orders have been disobeyed. "[I]t is not necessary that the disobedience be deliberate or willful; rather, the mere act of disobedience, regardless of its motive, is sufficient if such disobedience defeats, impairs, impedes or prejudices the rights of a party" (*Incorporated Vil. Of Plandome Manor v. Ioannou*, 54 A.D.3d 365, 366 [2d Dept. 2008][internal citations and quotation marks omitted]).

As an initial matter, this Court declines to find that Respondent's conduct that occurred prior to October 2021 was contemptuous, or in other words, violative of the Order and Judgment. The July 2021 decision and order, and the Order and Judgment, specifically conditioned Petitioner's license "upon approval of the submitted, proposed joint site safety plan by the New York City Department of Buildings" (July 2021 Decision and Order at Page 27; Order and Judgment at Page 3). Petitioner has alleged that Respondent wrongfully objected to the subsequent "approval" by the DOB on the grounds that the JSSP submitted were not the same as the ones annexed to Petitioner's original moving papers. However, the parties eventually resolved their differences following a court conference where they reduced their agreement to a fully executed stipulation. Petitioner fails to establish clearly and convincingly, on its present papers or at the hearing, that Respondent had no plausible objection to the JSSP that was ultimately approved by the DOB, or that their protestations to that filing were completely without merit.

The Court thus turns to the conduct that took place after October 15, 2021 – the date that Petitioner was ultimately permitted to install the CAZ onto Respondent's premises – and ending on or around November 16, 2021, when a partial stop-work order on the premises was lifted. The Court finds that Petitioner has established with clear and convincing evidence that Respondent disobeyed the lawful mandates contained in the Order and Judgment as further codified in the Stipulation dated October 5, 2021.

In the original papers submitted and at the hearing, Petitioner's project manager Carroll confirmed that the CAZ was implemented on October 15, 2021. On October 21, Carroll observed that someone had placed materials in the CAZ, and a worker for Respondent was standing within it. After speaking with that worker and explaining that it was unsafe to be where he was, Carroll was confronted by Respondent's project manager, Lumaj, who allegedly became agitated and threatened to rip down the

CAZ and throw it in Carroll's face. Carroll later spoke with Golia, who expressed in effect that Respondent had the right to continue their work and they were going to continue to allow workers to enter the CAZ. Petitioner thus discontinued steel work in close proximity to the Respondent's premises to avoid jeopardizing the safety of its workers or those of Respondent.

On October 30, 2021, Carroll received an email from Golia with a work schedule indicating that Respondent's construction team would again be entering the CAZ on the following Monday, November 1, 2021. This would defeat the purpose of the CAZ since it would be unsafe and unlawful for Petitioner's workers to work along the shared property line while other workers freely entered the CAZ. In this email, Golia further demanded that *Petitioner* maintain a one-foot controlled access zone on Petitioner's own premises despite not having any court-ordered license to do so. As Carroll explained at the hearing, Golia was "basically requesting space from" Petitioner. On November 5, Respondent's workers in fact entered the CAZ without coordinating such entry with Petitioner. Carroll testified that at one point, the DOB issued a partial stop work order on both properties due to these actions. Carroll identified photographs showing that workers removed at least a part of the CAZ to load materials being loaded into the area throughout the day.

Respondent's workers continued to work along the shared property line after the CAZ was removed. Plaintiff, therefore, had to stop its own work within 20 feet of the property line to avoid putting Respondent's workers at risk of hazards. Since the point of the CAZ was defeated by workers freely entering it from the Respondent's premises, Petitioner could not continue its steel work along the shared property line until the CAZ was reimplemented. Carroll explained that in fact, Petitioner had to implement its *own* CAZ, 20 feet on its own property line, so that none of its workers would be exposed to hazardous conditions like falling debris from the adjacent property. Petitioner provided a copy of the resulting partial stop work order issued on November 10, 2021. Notwithstanding this stop work order, Petitioner provided evidence that Respondent continued to work in the CAZ area, installing CMU block around a stairwell. Such work continued to prevent the DOB from lifting the stop work order and further delaying Petitioner's work. The stop work order was not lifted until November 16th.

The Court finds Carroll to be highly credible. Carroll competently established based on personal knowledge and his own observations that, despite being well-aware of the Order and Judgment and Stipulation, Respondent's workers freely disregarded the implementation of the CAZ, adversely affecting Petitioner's work. Carroll also identified photographs which, according to him, demonstrated

that Respondent's workers removed at least in part of the CAZ while engaging in activities near it. This conduct led to the issuance of a partial stop work order. In addition, Lumaj and Golia admitted at the hearing that Respondent's workers were entering the CAZ following its implementation in October 2021. Lumaj testified that his workers were in the CAZ dealing with materials despite Petitioner's protestations, because Petitioner "thought that they had 180-days to work and me not to do anything" (Hearing Transcript Part II at 87). Golia acknowledged that she received a photo and complaints about a worker in the CAZ delivering materials and flags were down (*id.* at 50), but she explained "but at that point in time there wasn't even a real schedule that was ever sent over and if we had to deliver materials, we had to have a schedule when they are going to be utilizing the controlled access. We have to work simultaneously" (*id*. at 50-51). The Court also declines to credit Respondent's testimony, in effect, denying that their workers ever partially removed the CAZ. Lumaj vaguely referred to "storms" that occurred "overnight," but he did not state for certain that no workers removed the CAZ. Golia only testified generally that inclement weather could have affected the CAZ. Her testimony that the CAZ always remained in place from October 15 – November 16 is belied by the photographs identified by Carroll.

Respondent's proposed justifications for intruding upon the CAZ are meritless. Counsel's original brief in opposition to this application initially contends that, in this Court's decision awarding the license, it found that Petitioner's project would not cause a shut-down of Respondent's construction activities. Respondent argues: "if the Court actually believed that Respondent's project would be halted as soon as the CAZ was erected… then it is respectfully submitted that the Court would have conditioned the license on different terms – e.g. damages – or denied the license sought based on the balancing of interests of the parties (noting that the Court presumed only temporary inconvenience in its July 30th Decision)." Respondent contends that, in issuing its decision, the Court "seemed clear that both projects can and would simultaneously move forward subject only to DOB approval…" Respondent alleges: "if Petitioner's interpretation of the Court's orders prevails, then in essence, Petitioner would not have to coordinate access to the CAZ, refuse Respondent the right to traverse and access parts of its own property (since the CAZ sits on its property and ingress and egress requires that traversing through the CAZ at times), and halt Respondent's project in its entirety since a decent portion of Respondent's construction activities must take place on the CAZ side of its property for at least a couple of days out of the month." Respondent argues that this Court's orders "compel coordination

such that neither project is halted – even assuming that Petitioner's project will sometimes inconvenience Respondent's project, which Respondent understands." Respondent continues to press these arguments in their post-hearing memorandum. Respondent argues that this Court's July 2021 decision granted the license because Petitioner's project would not cause a "shut-down of Respondent's construction activities" and would only "partially interfere" with those activities. Respondent asserts that the parties had differing interpretations as to what "coordinate" meant as set forth in the License Summary.

First, Respondent's interpretation of this Court's July 2021 decision is incorrect. In granting the petition and awarding the license, this Court, as it was required to do, balanced the interests of the parties and assessed the hardship that would be imposed if the license was refused. The Court specifically found that Petitioner was entitled to build on its property and to access Respondent's property to install protections required by the DOB and New York City Building Code (July Decision and Order at P. 22). Moreover, denying the petition would "indefinitely halt Petitioner's project" while, even "assuming Respondent indeed could not go forward with its work once Petitioner's project reached a certain height – granting the petition would only *temporarily* halt Respondent's project" (*id*. at 22-23 [emphasis in original]). The Court noted that Respondent had not established that a mutually-agreeable joint site safety plan and construction work schedule could not be achieved (*id*. at 23). However, this did not mean that, had Respondent made such a showing, the petition would have been denied. This portion of the decision was meant to emphasize that Respondent's opposition to the petition failed to provide convincing evidence to the Court that the balance of equities should tilt in Respondent's favor. The grant of the petition was not predicated upon a finding that both projects would be able to continue simultaneously. Indeed, the Court concluded, "[w]hile Respondent would be inconvenienced by the grant of the license, "such inconvenience is outweighed by the prejudice that Petitioner would endure if they are denied a license and construction is halted for an indefinite period of time" (*id*.).

Respondent's deficient showing that Petitioner's work would "cause a shut-down of Respondent's construction activities" was highlighted in that portion of the decision that awarded a reduced license fee to Respondent (*id*. at 26). Respondent could not rely on this aspect of the decision to justify its failure to abide by the decision, Order and Judgment, or the so-ordered Stipulation. Respondent did not appeal any of the prior orders, nor did it seek leave to reargue or renew. Respondent in fact sought no formal relief from the Court if it indeed encountered facts and

circumstances that it thought were contrary to those considered and decided in support of the original petition. Respondent instead took it upon itself to disregard the orders because, in its opinion, the circumstances had changed thus in effect rendering the orders inapplicable. It is well settled that, once a valid order is issued, "it is not for the recipient of that order to fashion its own remedy" (*Peters v. Sage Group Assoc.*, 238 A.D.2d 123, 123-24 [1st Dept. 1997], citing *Matter of Bonnie H.*, 145 A.D.2d 830, 831 [3rd Dept. 1988], *appeal dismissed*, 74 N.Y.2d 650 [1989][once an order is made, the respondent "has no discretion but to comply with that order"]).

Respondent further contends that it was *Petitioner* who failed to abide by the Order and Judgment by (1) depriving Respondent of the court-ordered license fee, and (2) failing to provide a look-ahead schedule so that there could be coordination of work to be performed on both projects in or near the CAZ.

Regarding the license fee, the evidence submitted, and adduced at the hearing, shows that Petitioner withheld the August and September fee because they were denied access to Respondent's premises during those months, despite the existence of the Court's orders. Furthermore, Petitioner has provided evidence that they in fact sent those payments under protest on October 14, 2021, before the CAZ was implemented. The parties subsequently stipulated that on October 15, 2021 (the date the CAZ was installed), Petitioner paid under protest to Respondent the sum of $9,000 representing license fee payments for August, September, and October 2021. No testimony was adduced at the hearing demonstrating that, in fact, Petitioner was granted any sort of access to Respondent's premises before October 15. Petitioner's alleged failure to remit license fee payments before that date, therefore, is no defense to this application.

Respondent argues that Petitioner failed to provide a "look-ahead schedule" as required by the License Summary "so there could be a coordination of work to be performed on both projects in or near the CAZ." Respondent argues that the Court orders and License Summary "compel coordination such that neither project is halted…" Respondent's original papers included an affidavit from Golia alleging that "[f]rom the date of the October 6th Order" she "repeatedly tried to work with [Carroll] to coordinate 'look-ahead' schedules so both Respondent and Petitioner's construction project can safely continue to move forward without issue." She contends that Carroll initially refused to give Petitioner's look-ahead schedule, and then "send us one which lacked the requisite details required in the license summary of the August 11th Order. In essence, the document just listed a couple August 2021 start date with several

finish dates that were hundreds of days out (indicative of Respondent's non-compliance)." Golia sent Carroll an email on October 20, 2021 concerning the issue. Golia alleges that the "failure on their part to coordinate access schedules led the DOB to issue partial stop-work orders, which were ultimately lifted on November 16, 2021, when DOB was supplied proper access schedules that Petitioner recently provided to me." She contends that as long as Petitioner supplies proper and detailed look-ahead schedules that make clear when they will be working around the CAZ, as Respondent has reciprocally done, there is no reason why the parties can't continue to make safe construction progress on each of their respective projects "which the court clearly envisioned."

Respondent's counsel states that, after the CAZ was erected, Petitioner did not provide a "look-ahead" schedule to Respondent. On October 18, 2021, Respondent's counsel wrote to Petitioner's counsel indicating same and requested that the look-ahead schedule be provided. The letter also explained that Petitioner's site safety manager should be coordinating the access to the CAZ with Respondent's client's construction manager, which the Order and Judgment, and license summary, required. In response to these contentions found in the original motion papers, Petitioner's counsel submitted an email he sent to Respondent's counsel dated October 18, 2021 stating that "[t]he look ahead schedule has been shared with your client multiple times and over two weeks ago at this point. I also shared the look ahead schedule directly with you on October 5th (see attached). I would also note that you received a copy of the overarching project schedule back in July during the hearing. Attached for your records, again, are copies of the look ahead schedule and project schedule." At the hearing, Respondent did not dispute prior receipt of this look-ahead schedule on October 5, 2021. Therefore, the entire contention that Petitioner failed to comply with the License Summary by not providing any "look-ahead" access schedule is without merit.

In its post-hearing brief, Respondent argues that the look-ahead schedules provided were deficient and not in compliance with the License Summary. The October 2021 look-ahead schedule that was provided sought access to the CAZ for a period of 180 days. Respondent contends that the November 2021 look-ahead schedule was equally defective. Respondent's witnesses testified that the CAZ took up some 40-50% of Respondent's property. Therefore, if Petitioner were granted such access to the CAZ, it would deprive Respondent of use of its own property and shut own Respondent's work progress during that time. Respondent notes that following the "defective" look-ahead schedules submitted in October and November, Petitioner provided a more detailed December 2021 schedule

which only requested several days of the month to access the CAZ. Respondent's ultimate position is that the "coordination" contemplated in the License Summary meant that the parties would exchange schedules, like they did in December, that consider both the needs of Petitioner and the safety/access concerns of Respondent on a monthly basis.

Respondent essentially alleges that the orders of this court and License Summary compel coordination such that neither project is halted. This again is a misreading and misinterpretation of this Court's order and the License Summary. The Order and Judgment states in pertinent part, "the license access shall also be in accord with the license summary annexed hereto as Exhibit D."

The License Summary provides at Part 2 (A):

> During the license term, Petitioner and Petitioner Construction Team shall be entitled to access the Adjacent Premises …in accordance with the requirements of the Code and in compliance with, to the extent applicable, the Joint Site Safety Plan and the Retaining Wall Drawings.

At Part 2 (B), the License Summary provides:

> Petitioner shall provide Respondent with a copy of Petitioner's project schedule to allow the Parties to coordinate the required access contemplated in this license. Thereafter, on or before the 1st day of each month during the term of this Agreement, Petitioner shall provide Respondent with Petitioner's 'look-ahead schedule' that outlines the access that will be required of the Adjacent Premises over the course of the following month.

Part 2 (C) of the License Summary states pertinently:

> At all times, the Parties shall coordinate and execute the installation of a controlled access zone on the Adjacent Premises ('Petitioner CAZ') *for the benefit of the Petitioner's project* as set forth in the Joint Site Safety Plan." "At all times, the Petitioner CAZ shall be supervised and coordinated between both Respondent's construction manager and Petitioner's site safety manager" [emphasis added]).

This Court's July decision was not conditioned upon a reality that both projects could continue simultaneously. In fact, as noted above, the decision specifically found that Petitioner was entitled to a license notwithstanding the fact that its access to Respondent's premises would interfere with and even temporarily halt Respondent's project.

Next, nothing in the Court's decision, the Order and Judgment, or License Summary requires that the parties agree on a mutually beneficial work schedule. The License Summary specifically

requires the implementation of the CAZ "for the benefit of the *Petitioner's project* as set forth in the site safety plan" (emphasis added). It requires that Petitioner provide Respondent a look-ahead schedule for the purpose of coordinating access to the CAZ, but it does not require Respondent to approve of or accept the look-ahead schedule, nor does it grant Respondent the ability to unilaterally reject the terms of the schedule if it found them to be inconvenient or lacking detail. In addition, the License Summary does not require Respondent to provide Petitioner with *its own* look-ahead schedule, as the license was issued for the benefit of Petitioner, not Respondent.

This is not a situation where the license agreement or accompanying order was ambiguous or susceptible to differing but reasonable interpretations (*see, e.g., Banks v. Stanford*, 159 A.D.3d 134, 145 [2d Dept. 2018]["Contempt findings are inappropriate where…there can be a legitimate disagreement about what the terms of an order or judgment actually mean"]). Respondent's proposed interpretation of the order and judgment and License Summary is not reasonable or logical. The entire purpose of the license was to permit Petitioner to install certain safety measures on Respondent's property in furtherance of Petitioner's project. The "coordination" indicated by the License Summary can only be reasonably interpreted as to permit Petitioner (who was awarded the license), to alert Respondent of when access to Respondent's premises would be required, and for Respondent to plan accordingly so that they would not interfere with Petitioner's court-ordered access on those days. If Respondent was indeed bestowed with the authority to reject the look-ahead schedule from Petitioner and essentially decide for itself whether proposed access was acceptable, the entire purpose of this special proceeding would have been defeated.

The Court finds that Respondent's witnesses utterly failed to refute the testimony of Carroll, or Petitioner's showing that valid orders have been disobeyed. The testimony from Respondent's witnesses demonstrated a cavalier attitude toward this Courts orders and the safety purposes of the CAZ. Golia freely admitted that Respondent's workers had entered the CAZ to deliver materials (Hearing Transcript Part II at 50). She testified as to stop work orders but then admitted she had never seen them. Golia also incredibly testified that, to her knowledge, Respondent never refused to maintain the CAZ in October 2021 (*id*. at 73). Respondent's claims that it reasonably interpreted the terms of the License Summary are further belied by the fact that Golia requested that *Petitioner* remain one foot away from the shared property line during Respondent's work in the area – something that Respondent certainly was not entitled to under any view of the various orders entered in this case. In addition, Lumaj

himself admitted that there was never a time that he "disagreed that Petitioner had the right to install the [CAZ] as long as [Petitioner] decided" (Hearing Transcript II at 100). This admission further undermines any possible contention that Respondent truly believed that their actions were justified and complied with the Order and Judgment.

If in fact Respondent believed, notwithstanding the plain language of the Order and Judgment, Decision and License Summary, that it was entitled to refuse Petitioner access to its premises and to continuously breach the CAZ, then Respondent should have formally sought the appropriate relief from the Court. Respondent instead decided that it did not have to comply with the orders because, in its opinion, the Court would not have wanted its project to be halted, and therefore the license order was rendered inapplicable. Respondent took these actions at their own peril, as even "subjective good faith in noncompliance is no defense to a motion for contempt" (*Peters*, 238 A.D.2d at 123). Petitioner has therefore conclusively demonstrated that the prior court mandates have been disobeyed. The third prong is clearly satisfied as well – there is no contention that Respondent was unaware of any of the Court orders at issue here.

Finally, Petitioner has established that Respondent's disregard of this Court's orders and the October 2021 stipulation have resulted in prejudice. Because of Respondent's conduct, a partial stop work order was issued with respect to the projects. At the hearing, Petitioner demonstrated that although it was able to work on other portions of its project, it was unable to complete certain "critical path" worth along the shared property line due to safety concerns about workers moving freely in and around the CAZ. Respondent's actions delayed the completion of Petitioner's project totaling ten (10) nonconsecutive working days. The testimony and evidence submitted by Respondent failed to competently rebut this showing. Lumaj's testimony and video, allegedly depicting Petitioner continuing to perform steel work with a crane in November 2021, does not disprove Carroll's testimony that Petitioner incurred overall delays in its project amounting to ten nonconsecutive working days – it simply showed that some work remained ongoing.

Petitioner has thus competently established by clear and convincing evidence that Respondent violated the prior orders of this Court and should be held in contempt (*see, e.g., Tishman Construction Corp. v. United Hispanic Construction Workers, Inc.*, 158 A.D.3d 436 [1st Dept. 2018]).

(2) *Damages*

Judiciary Law §773 provides:

> "[i]f 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, and the case is not one where it is specially prescribed by law, 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. A corporation may be fined as prescribed in this section."

With respect to civil contempt, the above statute provides two types of awards: one where actual damage has resulted from the contemptuous act in which case an award sufficient to indemnify the aggrieved party is imposed, and one where the complainant's actual rights have been prejudiced but an actual loss or injury is incapable of being established. In that situation, the fine is limited to $250, plus the complainant's costs and expenses (*Department of Housing Preservation and Development of City of New York v. Deka Realty Corp.*, 208 A.D.2d 37, 45 [2d Dept. 1995]).

The words "actual loss or injury" refer to such loss or injury as is the proximate or necessary result of the conduct complained of by the party feeling himself or herself aggrieved; it is not enough that the loss might possibly result, or even that it may probably result. There must be a causal connection between the failure to comply with the order directly causing the loss claimed before a civil contempt fine is warranted (NYJUR Contempt; §153 Compensatory Fine as indemnity for actual damages caused by civil contempt; New York Jurisprudence, Second Edition). "Where a party is able to show that he or she has suffered an actual loss or injury as a result of a civil contempt, a fine may be imposed in an amount sufficient to indemnify the aggrieved party" (*Matter of Beiny*, 164 A.D.2d 233, 236 [1st Dept. 1990]). Civil contempt penalties aim not to punish, but to vindicate the rights of private parties to litigation, and compensate the injured party for the loss or interference with the benefit of a court mandate (*see Thorsen v. Nassau County Civil Service Com'n*, 32 A.D.3d 1037, 1038 [2d Dept. 2006]).

In this case, Petitioner provided a detailed breakdown of delay costs incurred following October 15, 2021, through November 17, 2021, in the total amount of $210,449.14 – the result of 10 working days of delay between those dates. Carroll provided credible testimony that as a result of these delays,

Petitioner incurred additional daily costs from various sources. While Respondent attempted to challenge these calculations at the hearing, the Court finds that Petitioner established the amount of losses with reasonable certainty, and further established a causal connection between Respondent's contempt and the costs delay costs incurred, which were directly billed to Petitioner.

Judiciary Law §773 also permits the recovery of reasonable counsel fees from the offending party which are directly related to the contemptuous conduct (*see Jaimie v. Jamie*, 19 A.D.3d 330 [1st Dept. 2005]; *Matter of Claydon*, 103 A.D.3d 1051, 1054 [3rd Dept. 2013]; *Clinton Corner H.D.F.C. v. Lavergne*, 279 A.D.2d 339 [1st Dept. 2001]). Petitioner here contends that it is entitled to recover reasonable attorneys' fees incurred in prosecuting these contempt proceedings in the total amount of $98,131.50.

The general factors to consider in awarding fees are: "time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; the lawyer's experience, ability and reputation; the amount involved and benefit resulting to the client from the services; the customary fee charged by the Bar for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved" (*In re Freeman's Estate*, 34 N.Y.2d 1, 9 [1974]).

In this case, Petitioner expended a total of 210.2 hours prosecuting these contempt proceedings, beginning on October 21, 2021- the day that Petitioner's Order to Show Cause was filed – and ending on April 15, 2022 – the due date for post-hearing memoranda. The Court finds the hours devoted to prosecuting this matter from the onset of the contemptuous conduct through the final hearing date, to be reasonable. This matter is a complex dispute involving large simultaneous adjacent construction projects in New York City. Petitioner was required to demonstrate, as it did, the rights and obligations of the respective parties. Petitioner was required to prepare and present testimonial and documentary evidence. Petitioner produced extremely detailed and well-supported written submissions establishing precisely the effect of the contemptuous conduct had on their ongoing construction work and the tangible damages suffered as a result. All issues were sharply contested. Regarding the outcome of these proceedings, as held herein, Petitioner has established Respondent engaged in contemptuous conduct resulting in actual losses. While Petitioner has not recovered the complete amount it requested, it has been awarded a substantial sum thus ultimately Petitioner's counsel obtained a successful result (*see, e.g., 542 E. 14th Street LLC v. Lee*, 66 A.D.3d 18, 24-25 [1st Dept. 2009][award of fees where claimant prevailed on central claims advanced and consequential received substantial relief]).

Petitioner's total claim is supported by detailed contemporaneous time sheets documenting how these hours were accumulated over the course of roughly six months of litigation, as well as the testimony from its counsel at the hearing. In light of the above, the Court finds that the time billed on these proceedings to be appropriate and necessary (*see generally Casper v. Cushman & Wakefield*, 88 A.D.3d 556 [1st Dept. 2011]; *542 E. 14th St. LLC*, 66 A.D.3d at 24; *Tishman*, 158 A.D.3d 436).

Petitioner has also established that the hourly rates charged by its attorneys are commensurate with the customary fee charged by the Bar in this district for similar services. The billing records reflect rates of: $625/hour for managing partner Robert J. Braverman; $500/hour for counsel William J. Geller; and $425/hour for associate Benjamin Fox Tracy as of December 2021, and $450/hour commencing January 2022. The vast majority of the work billed on this matter was by Mr. Tracy, as by this Court's calculation, he billed 163.4 out of the 210.2 total hours charged. At the hearing, Mr. Tracy testified that he routinely reviews matters involving "access agreements" with reimbursement provisions involving similarly situated law firms, and the rates charged by his firm are consistent with those rates. Mr. Tracy further testified that the client regularly pays bills at the above rates. The Court is mindful that a reasonable hourly rate "is typically defined as the market rate a client would be willing to pay" (*Tatum v. City of New York*, US Dist. Ct., S.D.N.Y., No. 06-cv-4290 [PGG][GWG][2010]), and the actual rate charged to paying clients is persuasive evidence of reasonableness (*Medina v. Buther*, US Dist. Ct., S.D.N.Y., No. 15-cv-1955 [LAP] [2019]). Furthermore, the assessed rates here "fall within the range of those commanded by" similarly sized and experienced attorneys practicing within this district (*see, e.g., Elsevier v. Grossmann*, US Dist. Ct., S.D.N.Y., No. 12-cv-5121 [KPF][2019][collecting cases, including one approving rates ranging from $315-585 per hour for associates and $625-845 per hour for partners in the Southern District of New York]). The Court, however, finds that the rate of $305/hour charged by law clerk David Blessington to exceed the prevailing rate for individuals who have yet to be admitted to practice, and reduces his rate to $175 per hour (*Elsevier*, *supra*). Mr. Blessington billed a total of 6.9 hours at a rate of $305 per hour, for a total of $2,104.50. When applying the rate of $175, the total amount billed is reduced to $1,207.50, a reduction of $897. The total fee amount is therefore reduced to $97,234.50.

Respondent's post-hearing memorandum does not specifically address this issue. Respondent has made no specific contentions that the fees are unwarranted or excessive, or that work was duplicative or unnecessarily performed by an attorney when it could have been performed by a

paralegal. The Court thus finds that Petitioner is entitled to attorney's fees in the amount of $97,234.50.

III. *Conclusion*

Accordingly, it is hereby

ORDERED, that Petitioner's motion to hold Respondent in contempt for violating this Court's July 30, 2021 Decision, the August 11, 2021 Order and Judgment, and the October 5, 2021, So-Ordered Stipulation, is granted, and it is further,

ORDERED and ADJUDGED, that the Respondent's contempt was calculated to and actually did defeat, impair, impede, or prejudice the rights of Petitioner as described herein, and it is further,

ORDERED and ADJUDGED, that Respondent is fined for said contempt the sum of $210,449.14, which fine constitutes the actual losses sustained by Petitioner as a result of Respondent's conduct, as found by this Court herein, and it is further,

ORDERED AND ADJUDGED, that Petitioner is entitled to recover attorneys' fees in the amount of $97,234.50, and it is further,

ORDERED, that Respondent is to pay the above amounts to Petitioner at the office of its counsel Braverman Greenspun, P.C., 110 East 42nd Street, 17th Floor, New York, New York 10017, within thirty (30) days of being served with a copy of this Order, and it is further,

ORDERED, that Respondent is directed henceforth to comply with the terms of this Court's July 30, 2021 Decision, the August 11, 2021 Order and Judgment, and the October 5, 2021, So-Ordered Stipulation, and it is further,

ORDERED that service of a certified copy of this order with written notice of entry shall be made upon Respondent 1293-95 Rodman LLC by personal service, in accordance with Judiciary Law § 773, within 30 days from the date of entry of this order, and that service of this order with written notice of entry shall also be made upon counsel for Respondent Natraj S. Bhushan of Turturro Law, P.C., 1602 McDonald Avenue, Brooklyn, New York 11230, by first class mail.

E N T E R

Dated: MAY 25, 2022

Mary Ann Brigantti, J.S.C.