

October 28, 2008, plaintiffs seek to hold defendants in contempt of the TRO and request counsel fees in the amount of \$15,000.

On a motion for a preliminary injunction, movants must demonstrate the likelihood of success on the merits, irreparable injury and the balancing of equities in their favor. (See, Aetna Ins. Co. v Capasso, 75 NY2d 860 [1990]; Gluck v Hoary, 55 AD3d 668 [2008].) In the instant case, defendants do not dispute the allegations of trespassing upon plaintiffs' property as well as the damage to the abutting concrete walkway albeit for the stated purpose of carrying out a construction project on their own property. Defendants acknowledge that RPAPL 881 provides a mechanism for adjoining landowners to seek court intervention to make improvements to their premises which by necessity require entry on to a neighboring property, when permission to do so has been refused. Upon the institution of a special proceeding, a court in an appropriate case, may grant a license upon such terms as are just. (See, McMullan v HRH Constr., LLC, 38 AD3d 206 [2007]; Matter of Broadway Enters. v Lum, 16 AD3d 413 [2005].) Here, as in McMullan, defendants have declined to pursue available legal remedies. Defendants have instead unilaterally entered plaintiffs' property, destroyed a concrete walkway, removed a fence, caused a temporary shutdown of electricity and left construction materials and debris. Plaintiffs have, therefore, established a clear right to relief (McMullan v HRH Constr., LLC

at 206) which is not ameliorated by defendants' declaration that they are responsible for all damages incurred and have adequate insurance. At this juncture, the balancing of equities requires that plaintiffs' exclusive possession and quiet enjoyment of the subject premises be protected. (See, Katimbang v 719 Ocean View Ave., LLC, 13 Misc 3d 1215A [2006].) The papers before the court are, however, inadequate to determine whether any shoring or underpinning utilized by defendants is unsafe or has in any manner created a permanent encroachment upon plaintiffs' property. (See, Matter of Broadway Enters. at 413-414; Foceri v Fazio, 61 Misc 2d 606 [1969].)

Accordingly, a preliminary injunction is granted to the extent that defendants, their agents and employees are enjoined from trespassing, damaging, installing beams or fencing, undermining the structural support on or to plaintiffs' property located at 28-40 38th Street, Long Island City, New York or otherwise interfering with their use and quiet enjoyment and from engaging in any acts which jeopardize the integrity of the subject premises. To the extent any materials, equipment or debris remain on plaintiffs' property, it shall be removed within 10 days after service of a copy of the order to be entered hereon. The foregoing is conditioned upon plaintiffs filing an undertaking in accordance with CPLR 6312, in an amount to be fixed in the order to be entered hereon. Upon settlement of the order, the parties may submit proof

and recommendations as to the amount of the undertaking.

With respect to the contempt application, plaintiffs have submitted photographs dated October 23, 2008 in which workers involved in defendants' construction project are standing on and utilizing plaintiffs' three-foot walkway. Defendants concede they entered plaintiffs' property to perform shoring necessary to protect the property and to remove a fallen fence. Defendant Dris states, "[t]he limited entry on Plaintiffs' walkway was unintentional, minimal and necessitated by the fact that the three foot wide walkway is the only portion of property separating Defendants' lot from Plaintiffs' building." Defendants further assert that none of their actions taken after the issuance of the TRO jeopardized the lawsuit or caused additional damage.

A civil contempt will be sustained when a party disobeys an unequivocal mandate of the court and that violation prejudices the rights of a party to the litigation. (See, McCain v Dinkins, 84 NY2d 216, 226 [1994]; Matter of Department of Env'tl. Protection of City of N.Y. v Department of Env'tl. Conservation of State of N.Y., 70 NY2d 233, 240 [1987].) Defendants were aware of the unequivocal terms of the TRO, but nonetheless violated them. (Casavecchia v Mizrahi, ___ AD3d ___, 2008 NY Slip Op 9938 [2d Dept 2008].) Moreover, no attempt was made to seek a license to enter the subject property nor have they established an emergency situation existed which precluded seeking court relief. Contrary

to defendants' assertions, plaintiffs have demonstrated defendants' disobedience of the TRO directives and that this conduct impaired plaintiffs' exclusive possessory rights to the subject property. (See, Alsol Enters., Ltd. v Premier Lincoln-Mercury, Inc., 11 AD3d 494 [2004].)

Accordingly, defendants are found in contempt of the August 19, 2008 TRO and shall each pay \$250 to plaintiffs. In addition, plaintiffs may submit an affidavit setting forth in detail the costs, expenses and attorney's fees incurred in connection with the application to punish for contempt and the amount to be awarded shall be fixed in the order. Payment of the fines, costs, expenses and fees shall be made within 10 days after service of a copy of the order to be entered hereon and upon payment, defendants shall be purged of their contempt.

All other requests are denied at this time.

Settle one order.

Hon. Charles J. Markey
Justice, Supreme Court, Queens County

Dated: Long Island City, New York
January 15, 2009

Appearances:

For Plaintiffs: Michael J. Reilly, Esq., 123-40 83rd Avenue [suite 1K], Kew Gardens, NY 11415

For Defendants: Lopresto & Barbieri, by Guy Barbieri, Esq., 22-07 Steinway Street, Astoria, NY 11105

