

Mindel v Phoenix Owners Corp.

2003 NY Slip Op 30194(U)

October 10, 2003

Supreme Court, New York County

Docket Number: 118488/02

Judge: Shirley Werner Kornreich

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

PRESENT: Kornreich

PART 54

0118488/2002

MINDEL, SUSAN WEISS
vs
PHOENIX OWNERS CORP.

INDEX NO. 118,488/02
MOTION DATE 6/19/03
MOTION SEQ. NO. 2
MOTION CAL. NO. _____

SEQ 2

DISMISS ACTION

The following papers, numbered 1 to 3 were read on this motion to/for Dismiss

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	
1	
2	SCANNED
3	OCT 21 2003

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the annexed decision, order and judgment.

MOTION/CASE IS REFERRED TO JUSTICE

Dated: 10/10/03

SHIRLEY WERNER KORNREICH
[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----- X
SUSAN WEISS MINDEL and JOEL SIDNEY MINDEL,

Plaintiffs,

Index No.: 118488/02

-against-

**DECISION, ORDER
AND JUDGMENT**

PHOENIX OWNERS CORP.,

Defendant.

..... X
KORNREICH, SHIRLEY WERNER, J.:

Plaintiffs seek a declaratory judgment enforcing a prior settlement and \$35,000 in compensatory damages. This action arises from a longstanding dispute between next-door neighbors regarding the alteration and maintenance of chimney flues on the roof of plaintiffs’ residence. Plaintiffs are the owners of a brownstone building located at 185 East 64th Street in New York City (“Mindel Residence”). Defendant is the owner of an adjacent high-rise apartment building located at 160 East 64th Street (“Phoenix Building”). Plaintiffs allege that under a 1988 settlement and pursuant to New York City Administrative Code § 26-580, defendant is obligated to compensate them for alterations they made to their rooftop chimney flues and to maintain the flues at its cost.

Motion to Dismiss

Defendant now moves pursuant to CPLR 3211(a)(5) to dismiss plaintiffs’ complaint as time-barred under CPLR 214(2) and on the basis of documentary evidence. CPLR 3211(a)(1). Defendant submits the affidavit of its attorney, pleadings and numerous documents connected to several other legal actions between the parties going back to 1988. In opposition, plaintiffs submit

their attorney's affirmation, as well as documents connected with the parties' eventful relationship.

Background

The Phoenix Building was constructed in the 1960s, well after the Mindel Residence, but before the Mindels purchased the Residence.' When the Phoenix Building was constructed, New York City Building Code section C26-1501.5(a) (now embodied in New York City Administrative Code § 26-580) imposed certain requirements on the owner of any building erected or altered so as to make it taller than adjacent buildings. In broad terms, the Building Code imposed chimney height requirements in relation to the height of adjacent construction. Section C26-1501.5(a) required the owner of the taller, adjacent building to alter and/or maintain the chimneys of the lower building so as to conform to the chimney height requirements.

In 1987, when the Mindels purchased their Residence, all but one of the chimney flues on the roof of the Residence been closed off and were non-functioning. Fried *Aff. Ex. C*. The Mindels opened five of the original fireplaces during a 1987 construction. *Id.* At the time, the Mindels claimed the flues "had deteriorated and were in need of repair, and demanded that the Phoenix bear the cost of such repairs, relying upon Section C26-1501.5(a) of the Administrative Code." *Id.* at ¶ 14. The Mindels' demand did not result in the Phoenix either repairing the flues or bearing the cost of repairs. Instead, as described by defendant's counsel, the parties were "unable to resolve their differences." *Id.* The Mindels undertook the repairs on their own and instituted an action against Phoenix in Supreme Court, New York County, seeking recovery of the repair costs. *Id.*

The Mindels' 1987 action against Phoenix was resolved pursuant to a stipulation of

¹ Phoenix was not the owner of the Phoenix Building at the time of construction.

settlement, dated March 4, 1988, which provided, in relevant part:

Whereas Phoenix Corp. and/or its predecessor in title were required by, inter alia, §C26-1501.5(a) of the Building Code of the City of New York to alter the pre-existing and adjoining chimneys on 185 East 64th Street so that the chimneys would conform to the New York City Building Code, and

Whereas Phoenix Corp. and/or its predecessor in title altered the chimneys on the [Mindel Residence], and

Whereas the plaintiff contends that the chimneys degenerated into a state of disrepair, and

Whereas, plaintiffs expended over \$10,000 in repairs for the chimneys, and

Whereas the Building Code of the City of New York requires Phoenix Corp., as the owner of ~~an~~ adjoining, taller, newer building, to maintain and repair the chimneys on the [Mindel Residence] ...

Defendant Phoenix Corp. shall pay the sum of \$5,400 to the order of the plaintiffs. ...

Phoenix Corp. hereby agrees that to the extent required by the New York City Administrative Code and the laws of New York State, it will maintain and repair the chimneys on the [Mindel Residence] ...

Plaintiffs hereby release defendant from any and all claims...

The Court shall retain jurisdiction over the parties to this Stipulation for purposes of insuring compliance therewith.

Fried *Aff.* Ex. D.

The Phoenix Facade Work: The Mindels Seek and Receive Injunctive Relief

More or less contemporaneously with the foregoing, Phoenix was making required repairs to the facade of its building. The Mindels expressed concern about debris falling from the Phoenix facade and onto their roof and yard in a series of letters beginning in early 1991 through early 1992.² *Id.* at ¶ 41. In 1991, the Mindels refused Phoenix access to their property and sought a

²For example, by letter dated April 26, 1991, addressed to “Mr. Edmond Semel, President, The Phoenix,” plaintiff Joel S. Mindel complained that **his** roof and yard had been damaged by “debris and wet cement” falling from the Phoenix Building in connection with Phoenix’s repair work going back to 1988. Segal *Aff.* Ex. H. Mr. Mindel was concerned about “the safety and quality of the work” being done by Phoenix due to the fact that safety measures had been taken in

temporary restraining order preventing Phoenix from proceeding with alterations “at, over or adjoining the Mindel property line” and requiring Phoenix to remove a “swinging scaffold” over their property line. Segal *Aff.* at ¶ 37. The Court granted the temporary restraining order and “compelled the Phoenix to remove the swinging scaffold until the further order of the Court.” Id. In 1994, the Mindels brought a third action against Phoenix, to recover damages in connection with the Phoenix facade work. Id. at 146. That action was settled in 2000, with Phoenix agreeing to pay the Mindels \$350,000. Id. at ¶ 52.

Meanwhile, problems with the Phoenix facade work continued. By letter dated December 7, 1994, the Mindels complained that Phoenix’s scaffold had caused audible “thuds,” damaging the east wall of their Residence. The Mindels sought permission to enter the Phoenix property to perform repairs. See id. Phoenix’s attorney responded by letter, rejecting plaintiffs’ claims that the damage to their wall was caused by defendant’s scaffold. See Segal Aff. Ex. M. Phoenix indicated that it had “for several years taken pictures of that wall, which amply demonstrate that the problems of which [plaintiffs] complain has been longstanding” See id. Nevertheless, by written agreement dated January 23, 1995, Phoenix granted the Mindels a license to enter its property on the condition that the Mindels provide copies of contracts; certificate of insurance;

the past only after he had complained through **his** attorney. Id. Mr. Mindel referred to the safety measures Phoenix had taken as “a makeshift system of protective boards and weights placed on the roof,” and complained that several of the boards and weights had been blown to the ground and onto neighboring roofs by storm winds on July 10, 1991. Id. Mindel further complained that “no compensation was offered” to him for the damage and that “[s]ubsequent roof protection was also make-shift...” Consequently, Mr. Mindel requested that, “[b]efore the Phoenix commences any work affecting our properties, I expect the issue of past damages be resolved, that all information relevant to the proposed new work be submitted to us for approval, and that we meet with the professional engineers, contractors and the Board of Directors of The Phoenix to make certain past errors are not repeated.” Id.

plans filed with, and permits issued by, the Department of Buildings; an agreement from the contractor(s) holding Phoenix harmless for any worksite injuries; an explanation of how the scaffold would be constructed; and **an** agreement that the Mindels would be responsible for cleanup. See Segal Aff. Ex. N.

The Mindels' Renovation Plans

It is not clear from the record when repair work began on the Mindels' east wall. It appears that the work had not yet commenced when, by letter dated September 23, 1995, the Mindels informed Phoenix that work was shortly to commence on "the facade and east wall" of their brownstone. See Segal Aff. Ex. M. The work "was necessitated, in part," wrote Mr. Mindel, "by the damage caused during the repair of the Phoenix's facade." Id. However, it is undisputed that the work referred to in the September 23, 1995 letter was connected with the Mindels' larger plans "to upgrade the entire facade of their property, along with other enhancements to their home." Segal Aff. at ¶ 48. Plaintiffs contend that they had been developing these plans "since the early 1990s," but that the plans had been "necessarily on hold until the Phoenix facade repair was completed." Id. Plaintiffs submit no proof that the plans had been in development for several years or that the plans were hampered by the Phoenix facade work. The September 23, 1995 letter further informed Phoenix that the work would require the Mindels to install a scaffold "over a portion of [the Phoenix] driveway..." Id. The letter promised that "[p]rior to initiating such work, [Phoenix] will be sent a certificate of insurance..." Id.

Mr. Mindel's September 23, 1995 letter resulted in "a series of communications between counsel." See Segal Aff. at ¶ 49. The Mindels provided Phoenix with renovation plans, "which raised a number of concerns that were relayed to the Mindels." Fried Aff. at ¶ 18. The Mindels'

plans “showed substantial architectural and aesthetic changes to the chimneys and flues, which could affect the structural integrity of the chimney, cause deterioration or leakage or create other problems. The changes ... also created a more ornate chimney facade which was likely to deteriorate faster, and to be more expensive to maintain. Additionally ... the flue extensions were completely reconfigured to create unnecessary bends, which would affect their ability to operate properly.” Id. Phoenix took the position that “to the extent that the Mindels wished to alter the chimneys and the flues, they were, obviously perfectly free to do so, provided, however, that Phoenix would not be obligated to bear the cost of that alteration, particularly where there was no indication that the chimneys and flues were being altered for any reason other than aesthetics.” Id. at ¶ 19. Phoenix also took the position that by “drastically” altering the “quality and appearance of the flues,” the Mindels would waive the protections provided by the Administrative Code, which, according to Phoenix, would only require it to maintain the flues in the same “quality and appearance” as the original flues. Id.

The Mindels Again Seek And Receive Injunctive Relief

After several months of apparently ineffective communications, the Mindels brought another action in Supreme Court, New York County, Joel S. Mindel and Susan W. Mindel v. Phoenix Owners Corp., Index No. 102054/96, seeking a license to enter on the Phoenix property to undertake their renovations. The Mindels moved for a judgment granting the license and the Phoenix cross-moved for “an order declaring: (1) that the terms of the Stipulation of Settlement were null and void and of no further force and effect; and (2) that Phoenix was not obligated pursuant to the Building Code to maintain the Mindels’ chimneys and flues.” Fried Aff. at ¶ 21.

The Mindels submitted the affidavit of their architect, Kenneth H. Barricklo, who was then

engaged “in the architectural restoration of City Hall in Manhattan” and the “restorations of the facade of City Center and the original Museum Building of the New York Botanical Gardens.” Segal *Aff.* Ex. D at ¶ 3. In the August 1, 1996 affidavit, Mr. Barricklo explained the work on the chimneys and flues, relocation of the flues and “substantial decorative changes” taking place. *Id.* at ¶ 5. He averred that he had observed rust “on the base of each of the four front flue extensions where they enter the masonry chimney” and opined that “when each of the three rear flue extensions are opened, the same condition will be apparent.” *Id.* at ¶ 7. He described problems with smoke and soot “backing up” into the Residence from the chimneys, and further opined that the problem was caused by the angle of the flues, combined with “the long length of the flue extensions, exceeding 16 feet, virtually ensur[ing] that the resistance would be too great to overcome and some fumes will enter the Mindel home.” *Id.* at ¶ 8. Barricklo proposed removing “the single wall flue extensions and install[ing] double walled, insulated corrosive-resistant metal flue extensions on top of each masonry chimney with an electrified mechanical draft inducer at the far end of each flue.” *Id.* at ¶ 10. Barricklo’s proposal included adding a six-inch “metal offset extension” to the chimney flues, which would result in an additional “bend” to the flues. However, as a result of the Mindels’ plans to install a protective cage over the roof, Barricklo modified his recommendation, and recommended “installing horizontal double walled, insulated stainless steel extensions (in place of the existing ones now on the roof), so they can be covered by a horizontal metal mesh protective covering.” *Id.* at ¶ 12,

In opposition, Phoenix submitted the affidavit of its consultant Eugene Ferrara, dated March, 1996. *See* Fried *Aff.* Ex. I. Mr. Ferrara averred that, on March 12, 1996, he “examined the existing condition of the masonry chimneys, as well as the metal chimney extensions on the

roof top of the [Mindel Residence].” Id. at ¶ 1. Ferrara opined that the masonry chimney, the metal flue extensions and the flue pinwheel chimney caps in the front of the building were “in good condition.” Id. at ¶ 2. “At the present time, no repairs are required to either the masonry or the metal flue extensions in the front chimney.” Id. Ferrara further opined that there was “no structural reason” for the Mindels’ renovations plans, which they had submitted to Ferrara’s office. Id. at ¶ 4. He, therefore, concluded that “the masonry chimney, the concealed flue and the metal flue connection [were] being replaced for solely aesthetic reasons.” Id.

By order dated March 1, 1996, Justice Ramos granted the Mindels a license to enter the Phoenix property pursuant to certain terms and conditions, and reserved decision on the cross-motion. & Segal Aff., Ex. E. By order dated November 22, 1996, Justice Ramos denied the cross-motion as premature because the alteration had not yet been done. “It is therefore impossible,” stated the decision, for this court to determine to what extent the [Phoenix] will be relieved of its obligations. That determination must await completion of the alterations.” Segal Aff., Ex. F. The Mindels’ 1996 Action was discontinued pursuant to a Stipulation of Discontinuance dated March 27, 1998. Pursuant to the stipulation, Phoenix withdrew its counterclaim for a declaratory judgment without prejudice. Segal Aff., Ex. O.

The Mindels Commence Renovation Work

After obtaining the license in the 1996 action, the Mindels commenced what defendant’s counsel describes as a “dramatic alteration of the facades of their Building.” Fried Aff. at ¶ 23. The Mindels “removed the existing flue extensions, and substantially altered the appearance, character and quality of the flue and flue extensions.” Id. Defendant’s counsel argues that the flue extension work was undertaken in 1998, as evidenced by a “general release” and by

correspondence between the parties' attorneys containing "numerous demands" that Phoenix reimburse them for the costs of replacement of the flue extensions. See id. Plaintiffs do not deny that the work was performed in 1998 nor do they dispute defendant's description of the work. Indeed, plaintiffs admit that due to the history of falling debris, they decided to install "a protective cage over the roof and chimney flue extensions, which [was] designed to protect those systems if portions of the Phoenix facade spall, dislodge and crash onto Plaintiffs' roof in the future." Segal *Aff.* at ¶ 54. Because of the protective fencing, plaintiffs replaced the old vertical chimney flues with horizontal flues which could fit underneath the cage. Defendant also submits photographs which show, inter alia, very extensive aesthetic changes to the Mindel Residence. See Fried *Aff.*, Ex. B, E.

The Present Complaint

Plaintiffs' complaint, date stamped August 19, 2002, alleges that Phoenix is obligated under the 1988 settlement and under the New York City Building Code to maintain the chimney flues and to compensate plaintiffs for the repair work on the flues. The complaint states that in 1987, the Mindels "performed repairs to the chimney offset flue extensions" and Phoenix compensated them for that work pursuant to the 1988 settlement. Complaint at ¶ 8-11. However, the complaint further alleges, "the repairs performed did not function adequately. As a result, the Mindels determined the existing chimney offset flue extensions needed to be removed and replaced and motorized exhaust fans added." Id. at ¶ 16. Plaintiffs "removed and replaced the chimney offset flue extensions and added motorized exhaust fans..." Id. at ¶ 20. Plaintiffs sought compensation for the work, but Phoenix refused and took the position that "if and to the extent the Mindels proceeded with the removal and replacement of the chimney offset flue extensions, that

Phoenix Cooperative would no longer be obligated to maintain and repair the chimney offset flue extensions in the future.” Id., at ¶¶ 24.

The complaint sought a declaration that Phoenix remains obligated to “maintain and repair the chimneys and the flues at its expense” and a judgment against Phoenix in the amount of \$35,000.00 in compensation for the work performed by plaintiffs in repairing and replacing the chimney offset flue extensions. Id., at ¶¶ 27-34.

The Building Code

NYC Administrative Code § 27-860 (formerly Section 26-1501.5) provides:

(a) Responsibility of owner of taller building. Whenever a building is erected, enlarged, or increased in height so that any portion of such building, except chimneys or vents, extends higher than the top of any previously constructed chimneys within one hundred feet, the owner of such new or altered building shall have the responsibility of altering such chimneys to make them conform with the requirements of section 27-859 of this article.³ Such alterations shall be accomplished by one of the following means or a combination thereof:

(1) Carry up the previously constructed chimneys to the height required in section 27-859 of this article.

(2) Offset such chimneys to a distance beyond that required in section 27-859 of this article from the new or altered building, provided that the new location of the outlet of the offset chimney shall otherwise comply with the requirements of this subchapter.

(b) Protection of draft. After the alteration of a chimney as required by subdivision (a) of this section, it shall be the responsibility of the owner of the new or altered building to provide any mechanical equipment or devices necessary to maintain the proper draft in the equipment.

(c) Written notification. The owner of the new or altered building shall notify the owner of the building affected in writing at least forty-five days before starting the work required and request written

³Administrative Code Section 27-859 provides height requirements for chimney flues. The height requirements depend upon: 1) the height of adjacent buildings; 2) the distance between the flue and any adjacent “construction,” and 3) the temperature of the chimney.

consent to do such work. Such notice shall be accompanied by plans indicating the manner in which the proposed alterations are to be made.

(d) **Approval.** The plans and method of alteration shall be subject to the approval of the commissioner.

(e) **Refusal of consent.** ~~If consent is not granted~~ by the owner of the previously constructed building to do the alteration work required by subdivisions (a) and (b) of this section such owner shall signify his or her refusal in writing to the owner of the new or altered building and to the commissioner; and the owner of the new or altered building has submitted plans that conform to the requirements of this section, he or she shall thereupon be released from any responsibility for the proper operation of the equipment due to loss of draft and for any health hazard or nuisance that may occur as a result of the new or altered building. Such responsibilities shall then be assumed by the owner of the previously constructed building. Likewise, should such owner neglect to grant consent within forty-five days from the date of written request or fail to signify his or her refusal, he or she shall then assume all responsibilities as prescribed above.

(f) **Procedure.** It shall be the obligation of the owner of the new or altered building to:

(1) Schedule this work so ~~as~~ to create a minimum of disturbance to the occupants of the affected building.

(2) Provide such essential services as are normally supplied by the equipment while it is out of service.

(3) Where necessary, support such extended chimneys and equipment from this building or to carry up such chimneys within his or her building.

(4) Provide for the maintenance, repair, and/or replacement of such extensions and added equipment.

(5) Make such alterations of the same material ~~as~~ the original chimney so ~~as~~ to maintain the same quality and appearance, except where the owner of the chimney affected shall give his or her consent to do otherwise. All work shall be done in such fashion as to maintain the architectural esthetics of the existing building.

(g) **Existing violations.** Any existing violations on the previously constructed equipment shall be corrected by the owner of the equipment before any equipment is added or alterations made at the expense of the owner of the new or altered building.

(h) The commissioner may grant a variance in accordance with the provisions of section 27-107 of article one of subchapter one of this chapter.

NYC Administrative Code § 27-860 (2001)(emphasis added).

Conclusions of Law

Under CPLR 3211, “[a] party may move for judgment dismissing one or more causes of action asserted against him ...” Here, defendant moves for dismissal of plaintiffs’ complaint on the grounds that: 1) “a defense is founded upon documentary evidence” (CPLR 3211(a)(1)); and 2) plaintiffs’ complaint is time-barred under the applicable statute of limitations (CPLR 3211(a)(5)).

Dismissal Based on Documentary Evidence

“In order to prevail on a motion to dismiss based on documentary evidence pursuant to CPLR 3211(a)(1), the documents relied upon must definitively dispose of plaintiffs claim.” Bronxville Knolls v. Webster Town Ctr. Pshp., 221 A.D.2d 248 (1st Dept. 1995)(unambiguous “non-recourse clause” in integrated mortgage note precluded action on note). “[I]n keeping with the spirit of the remedy of summary judgment before answer to avoid a needless trial, a liberal interpretation is given to the term ‘documentary evidence.’” Gauthier v. Gabel, 44 Misc. 2d 887 (New York County, 1964)(Mangan, J.), aff’d 16N.Y.2d 720 (1965)(legislative and statutory history of New York City rent control law found to be documentary evidence under CPLR 3211(a)(1)).

Here, defendant relies upon Administrative Code Section 27-860 as the dispositive document. Defendant argues that plaintiffs’ claims are barred by Section 27-860 because five of the six chimney flues are excluded from the scope of the statute and the Mindels’ conduct in repairing the flues abrogated the obligation of defendant under the statute. The Court concludes that Section 27-860 does not “definitively dispose” of plaintiffs’ claims.

To begin, it is not clear that a “closed off” flue is beyond the scope of the statute. Section

27-860 provides, in relevant part: “A chimney that is no longer connected with a fireplace or combustion or other equipment for which a chimney was required, shall be exempt... .” There is no evidence to suggest that the Mindels’ “closed-off” flues were “no longer connected with a fireplace or combustion...” To the contrary, the affidavit of plaintiffs’ architect, submitted in plaintiffs’ **1996** action, suggested that the flues were connected to fireplaces in the Mindel Residence and the defendant’s architect did not suggest otherwise. Defendant cites no authority interpreting the statute’s exemption of “unconnected” flues and the Court is aware of none. Indeed, the matter seems to be one of first impression. The Court concludes, in the absence of any judicial authority interpreting the exemption, that insofar as Section 27-860 exempts “unconnected” flues only, a flue which remains connected to a fireplace but is “closed off,” as the Mindels’ flues may have been, is not exempted from the scope of the statute.

Defendant further argues that by undertaking the repair work on the flues, plaintiffs eviscerated its statutory obligation to maintain and repair. **As** with the issue of “unconnected” flues, the issue of whether, and to what extent, plaintiffs’ conduct here relieves defendant of liability under the statute is a matter of first impression. In support of its argument, defendant cites portions of the statute which demonstrate a legislative intent that: **1)** the owner of the taller adjacent building do any necessary alteration and maintenance work; **2)** the owner of the shorter building is entitled to written notification and copies of work plans; **3)** the plans shall be subject to approval by the commissioner; and **4)** any alteration and/or maintenance shall maintain the “architectural aesthetics of the existing building.” The Court agrees that the cited provisions, and the statute as a whole, appear to contemplate that the owner of the taller adjacent building—not the owner of the shorter one—take control of the alteration and maintenance work. However, viewing

the evidence in a light most favorable to plaintiffs, an issue exists as to the necessity of the work and whether it falls within the scope of the statute. In this context, it cannot be said that the statute “definitively” disposes of plaintiffs’ claims.

Dismissal Based on Statute of Limitations

An action “to recover upon a liability, penalty or forfeiture created or imposed by statute” must be commenced within three years of the time the cause of action accrued. See CPLR 214(2); Gaidon v. Guardian Life Ins. Co. of Am., 96 N.Y.2d 201 (2001). Defendant argues that plaintiffs’ claims are time-barred under the three-year Statute of Limitations provided in CPLR 214 (2). The Court agrees that CPLR 214(2) applies to plaintiffs’ claims and concludes that plaintiffs failed to commence this action within three years of the time their claim accrued. Defendant’s motion, therefore, is granted.

Time Limitation Period Applicable To Plaintiffs’ Claims

The Court is presented with another question of first impression, the applicable statute of limitations for a claim to enforce New York City Administrative Code § 27-860. But see Sovo v. Glasier, 192 A.D.2d 1069(4th Dept. 1993)(claims of building code violations for alleged building of garage too close to plaintiffs land were subject to 3-year statute of limitations under CPLR 214(2)). The statute does not specify a limitations period. At first blush, CPLR 214(2) would seem to apply to Section 27-860 because plaintiffs seek to “recover upon a liability, penalty or forfeiture created or imposed by statute,” i.e., the obligation of the owner of the taller adjacent building to alter and maintain the chimney flues of the shorter building. However, CPLR 214(2) “does not automatically apply to all causes of action in which a statutory remedy is sought, but only where liability ‘would not exist but for a statute.’” Gaidon, supra, quoting Aetna Life & Cas.,

Co. v Nelson, 67 N.Y.2d 169, 174 (1987). “Thus, CPLR 214 (2) ‘does not apply to liabilities existing at common law which have been recognized or implemented by statute.’ When this is the case, the Statute of Limitations for the statutory claim is that for the common-law cause of action which the statute codified or implemented.” Gaidon, supra (citations omitted).

Plaintiffs first dispute whether the statute imposes a “liability, penalty or forfeiture,” citing Sicolo v. Prudential Sav. Bank, 5 N.Y.2d 254 (1959)(General Municipal Law section 205-a, which provided fine of \$1,000 to be paid by those found negligently responsible for firefighter’s injury, did not impose “penalty” under Civil Practice Act 49 and, therefore, was subject to six-year limitations period). Defendant argues that the statute imposes a “liability” on defendant. The Court agrees.

The Court of Appeals has rejected an “overly restrictive construction of the phrase ‘recover upon a liability ... created or imposed by statute’” under CPLR 214(2). See Hartnett v. New York City Transit Auth., 86 N.Y.2d 438,444 (1995). The Court in Hartnett construed “liability” under CPLR 214(2) as “a ‘broad legal term’ having ‘the most comprehensive significance, including almost every character of hazard or responsibility.’” Id. (citation omitted). Section 27-860 imposes on the owner of a taller adjacent building an explicit responsibility for the alteration and maintenance of the chimney flues of its shorter neighbor and, therefore, imposes a legal “liability” under CPLR 214(2).

Even if a liability under CPLR 214(2) is imposed here, plaintiffs argue that CPLR 214(2) should not apply because Section 27-860 is “an extension of an adjoining landowner’s common-law duty not to make an unreasonable use of his premises to the injury of his neighbors.” In support of their argument, plaintiffs cite the case of McCarty v. Natural Carbonic Gas Co., 189

N.Y. 40 (1907), where the Court of Appeals held that the defendant's smokestack constituted a private nuisance because it interfered unreasonably with the plaintiff's residential use of his adjoining land. Nothing in McCarty, supra, however, or in the common law of nuisance, requires an adjoining property owner to enter upon the land of its neighbor to alter its chimney flues to bring them into compliance with local building codes, as does Section 27-860. Nor could it be said to be unreasonable under common law principles for an owner of land in New York City to erect a building taller than its adjacent neighbor, or for the shorter neighbor, once the taller is in existence, to continue using its existing chimneys. Such a result would fly in the face of the obvious existence in this City of adjacent buildings of different heights.

On the other hand, Section 27-860 of the Administrative Code, recognizing that the construction of a taller adjacent building creates an issue of compliance with Section 27-859 for the owner of the shorter building, requires the owner of the taller building to perform the necessary alteration and maintain the chimneys thereafter. Far from being an outgrowth of the common law, Section 27-860 reflects a legislative determination that where an owner of land causes the chimneys of its adjacent neighbor to fall out of compliance with the Building Code, the cost of bringing the chimneys back into compliance and maintaining them in compliance should be borne by the party who caused the noncompliance. Indeed, in the only case plaintiffs cite dealing with Section 27-860, the First Department held that "this is an area in which the Administrative Code has preempted the common law..." See Bondoc v. Zervoudis, 270 A.D.2d 105 (1st Dept. 2000)(Section 27-860 imposes no obligation on sole tenant of taller adjacent building, especially where tenant does not "supervise or control" construction). Thus, the Court concludes that CPLR

214(2) applies to plaintiffs' claims under Section 27-860.⁴

Accrual of Plaintiffs' Claims Under Section 27-860

“In general, a cause of action accrues, triggering commencement of the limitations period, when all of the factual circumstances necessary to establish a right of action have occurred, so that the plaintiff would be entitled to relief. In an action to recover for a liability created or imposed by statute, the statutory language determines the elements of the claim which must exist before the action accrues.” See Gaidon, supra at 210 (citations omitted). Here, subparagraph (a) of the statute provides that at the time of construction of the taller adjacent building, “the owner of such new or altered [taller] building *shall* have the responsibility of altering such chimneys to make them conform with the requirements of section 27-859 of this article.” See NYC Administrative Code § 27-860(a) (2001)(emphasis added).

⁴Plaintiffs also argue that the six-year limitations period under CPLR 213 should apply here because they seek enforcement of a contract, i.e., the 1988 settlement. “The general rule in New York is that when a plaintiff has several theories of recovery arising out of the same transaction, he is entitled to elect which theory he will proceed upon and have the benefit of the appropriate statute of limitations. Thus, where a claim for breach of contract exists, a plaintiff is entitled to plead it and assert the statute of limitations applicable to actions for breach of contract even where an action for conversion arising out of the breach would also lie.” Union Bank of Switzerland v. HS Equities, 423 F. Supp. 927 (S.D.N.Y. 1976). **An** exception to this rule is recognized where “the alleged contractual obligations add nothing to the defendant’s pre-existing common-law or statutory duty.” See European American Bank v. Cain, 79 A.D.2d 158 (2nd Dept. 1981)(action against car dealer for failure to record lien on car time-barred under CPLR 214(2) because alleged contractual obligations on note added nothing to dealer’s statutory obligation to record lien). In such a case, “the shorter period of limitation is applicable.” See id. Here, the 1988 settlement required Phoenix, in addition to making payment for the repairs already performed, to maintain and repair the Mindels’ chimneys “to the extent required by the New York City Administrative Code and the laws of New York State..” Thus, the settlement did not impose any obligation additional to that already provided under the Administrative Code. The Court rejects plaintiffs’ argument that the inclusion of the phrase “and the laws of New York State” reflects an intent to apply a six-year limitation period to the settlement. Such a construction does not follow from the plain language of the settlement.

Where, **as** here, the issue between the parties concerns the continuing obligation, under subparagraph (4), to “[p]rovide for the maintenance, repair, and/or replacement of such extensions and added equipment,” common sense dictates that the obligation to maintain the “extensions and added equipment” arises when such maintenance or repairs are needed. In disputes between adjacent building owners **as** to the necessity of maintenance or repairs, the time of accrual will necessarily be uncertain. On the other hand, the important policy considerations underlying statutes of limitations generally demand that a time of accrual be established. See Schmidt v. Merchants Despatch Transp. Co., 270 N.Y. 287,302 (1936)(statute of limitations reflects legislative determination that benefit of repose outweighs occasional hardship of barring legitimate claims). Otherwise, the mere fact of a dispute over the need for the work would preclude the accrual of the claim, preserving it indefinitely. Thus, the Court concludes that where, as here, the adjacent building owners dispute the necessity of maintenance or repair work under Section 27-860 and the owner of the shorter building actually commences the work, the cause of action under Section 27-860 accrues as of the time of completion of the work. This result is also consistent with the November 22, 1996 decision of Justice Ramos, holding that the extent the Mindels’ chimney work relieved Phoenix of its statutory obligation could not be determined until completion of the work,

Here, the record establishes that plaintiffs’ alteration of the chimney flues was completed in 1998. See Kuehne & Nagel, Inc. v. Baiden, 36 N.Y.2d 539 (1975)(“If a key fact appears in the movant’s papers and the opposing party makes no reference to it, he is deemed to have admitted it.”). Defendant submits a copy of a letter dated May 8, 1998 from plaintiffs’ counsel stating: “On behalf of my clients, I submit to you for delivery to your client a summary of the costs incurred by

my clients as same relate to the repair and replacement of the previous offsets that were no longer working properly. ...I would appreciate your prompt advice as to whether your client will continue to abide by the terms of the stipulation and arrange for the repayment of these charges to my client or whether further litigation is necessary.” See Fried Aff., Ex. K. Defendant also submits a copy of an unsigned, undated “Release” sent by plaintiffs’ counsel referring to “flue offsets installed by the Mindels in 1998..” See id., Ex. J. Plaintiffs attorney cites language from a release executed by his clients in December 2000 also referring to “flue offsets installed by the Mindels in 1998.” See Segal Aff. at ¶ 52. In the context of these documents, and in the absence of a denial by plaintiffs, the Court concludes that the plaintiffs’ work on the chimney flues was completed in 1998. Thus, plaintiff’s claim accrued, at the latest, on December 31, 1998. Applying the three-year statute of limitations under CPLR 214(2), plaintiffs’ claims herein were time-barred as of January 1,2002, at the latest. Plaintiffs summons and complaint are dated August 16,2002 and date-stamped August 19,2002. Consequently, the complaint is time-barred. Accordingly, it is

ORDERED that plaintiffs’ complaint is dismissed.

The foregoing constitutes the decision, order and judgment of the Court.

Date: October 10,2003
New York, New York



SHIRLEY WERNER KORNREICH