

Reyes-Dawson v Goddu

2010 NY Slip Op 32268(U)

August 23, 2010

Sup Ct, NY County

Docket Number: 007687/2008

Judge: Louis B. York

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

LOUIS B. YORK

PRESENT: _____

J.S.C.
Justice

PART 2

Reyes Dawson

INDEX NO.

107687/08

MOTION DATE _____

- v -

Goddus et al.

MOTION SEQ. NO.

002

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
PAPERS NUMBERED

AUG 24 2010

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.**

Dated: _____

8/23/10

Ley

LOUIS B. YORK J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

-----X
MARGUERITE REYES-DAWSON,

Plaintiff, Index No. 107687/2008

-against-

JOSEPH GODDU, CYNTHIA Z. GODDU,
EDMUND LEWIS, EDMUND LEWIS LTD.,
EDMUND LEWIS CONTRACTING AND
PAINTING INCORPORATED d/b/a EDMUND
LEWIS PAINTING AND CONTRACTING OF
MANHATTAN, and JAMES WAGMAN
ARCHITECT, LLC,

Defendants.

-----X

Louis B. York, J.:

Defendants Joseph and Cynthia Goddu (collectively, the Goddus) move for an order granting them summary judgment dismissing plaintiff Marguerite Reyes-Dawson's (Reyes-Dawson) amended complaint and any cross claims. Alternatively, they seek relief pursuant to CPLR 3004. Codefendants Edmund Lewis (Lewis), Edmund Lewis Ltd., and Edmund Lewis Contracting and Painting Incorporated (collectively, the Lewis defendants) cross-move for the same relief¹.

Background

Since 1997, Reyes-Dawson has been the owner of a Manhattan

¹This action was previously dismissed as to James Wagman, Architect, LLC, the firm which allegedly supervised the installation of the fireplace in issue. The dismissal was affirmed. *Reyes-Dawson v Goddu*, 74 AD3d 417 (1st Dept 2010).

FILED
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townhouse, into which she moved in April 2002, after she completed extensive renovations. In May 2002, the Goddus purchased the adjacent townhouse, immediately to the west of Reyes-Dawson's, and embarked on a gut rehabilitation. According to their attorney, the Goddus hired Edmund Lewis Contracting and Painting to perform that work. The two townhouses share an eight-inch thick party wall, which has been the focus of an ongoing dispute.

On December 17, 2002, the New York City Department of Buildings (DOB) issued a construction violation to Reyes-Dawson, alleging that wooden joists from her premises were either stopping at or going through the Goddus' chimney flue on two floors. This violation was dismissed, because, according to Reyes-Dawson, the presence of her house's joists antedated the Goddus' construction of a second fireplace, chimney, and flue in the party wall.

On June 4, 2003, Reyes-Dawson commenced an action (the 2003 action) against the Goddus and Lewis, asserting two causes of action. The first cause of action alleged that the Goddus built a structure which encroached on Reyes-Dawson's four inches of the party wall, that such encroachment constituted an unlawful trespass, and that, as a result, Reyes-Dawson sustained damages. That structure was a masonry bulkhead on the roof. The second cause of action alleged that, beginning in October 2002 and

continuing for many days thereafter, the defendants' construction work and trespass caused damage to Reyes-Dawson's property. The complaint recited that such damage included, but was not limited to, that done to beams, ceilings, the sidewalk, and to the western wall stoop.

In response to item one of Lewis's demand for a bill of particulars contained in the County Clerk's file in the 2003 action, which demand sought the dates when the damages occurred, Reyes-Dawson indicated, "from the beginning of July 2002 until March 22, 2004." In response to item two of Lewis's demand for the exact location on plaintiff's premises where she will claim that damage to her property occurred, plaintiff asserted that there was damage to the roof; adjoining party wall; bulkhead; the mortar and cement of a wall in the cellar, basement and first floor; the western stoop wall; the sidewalks; and illegal installation of a fireplace. In response to Lewis's demand for Reyes-Dawson to reveal the manner in which her property was injured, she referred Lewis to the response given with respect to item two.

The Goddus served an answer to the 2003 complaint, which asserted cross claims against Lewis and counterclaims against Reyes-Dawson, including that she trespassed on the Goddus' property and damaged it by installing floor beams which allegedly protruded into the Goddus' hearths and chimney flues.

It appears that, shortly after the 2003 action was commenced, Reyes-Dawson filed a complaint with the DOB regarding the alleged installation of the aforementioned fireplace. See aff. in opp., ex. A. The Goddus were issued a violation for constructing a fireplace without a permit. A hearing was held in April 2004, at which the Goddus argued that they had merely installed a flue liner, so that a permit was not required. The Administrative Law Judge credited the evidence presented on the Goddus' behalf and dismissed the violation.

It further appears that another complaint relating to the fireplace was made by Reyes-Dawson's husband in late 2005. See Kasdan aff., ex. K (which indicates that the Goddus' neighbor complained that the chimney next door was heating his wall because the Goddus were not using heat-resistant brick, and that the neighbor had reported that he had gotten the inspector to look at the wall through his wall). After the DOB inspected the Goddus' fireplace in January 2006, following complaints regarding its alleged installation, and studied chimney sketches, evidently provided by the Goddus, Laura Osorio (Osorio), a DOB borough commissioner, wrote Mr. Goddu on February 22, 2006, delineating the fireplace's problems, including that it was not code compliant; that the flue and chimney were not surrounded by the requisite amount of brick masonry; and that the drawings did not match up to reality. In order to remedy the "condition,"

evidently referring to the lack of code compliance, the Goddus were directed to provide detailed plans showing the condition of the party wall before the fireplace was built, the construction details, and accurate as-built conditions. They were further directed to provide a report showing code compliance regarding the structural sufficiency, the thickness of masonry, and the clearance of combustible materials, including the wooden joists. The report was also to show the effect of the alteration on the fire rating and the integrity of the party wall. Mr. Goddu was instructed not to use the fireplace until the requested "documents have been submitted, approved and permitted" by the DOB, and that if he could not comply he was to either "restore to original condition," or seal the flue with brick and mortar, evidently as the circumstances warranted. Aff. in opp., ex. B.

Meanwhile, represented by other counsel, Reyes-Dawson commenced another action against the Goddus, by complaint dated December 29, 2005 (the 2005 action). In that action, as is relevant, Reyes-Dawson claimed that the Goddus had placed a planter with a trellis along the western wall of Reyes-Dawson's stoop, so that the Goddus could grow trailing vines, and that those vines had grown onto Reyes-Dawson's property, preventing her from restoring her stoop.

In an attempt to resolve the 2003 and 2005 actions, Lewis, Reyes-Dawson, and the Goddus agreed to mediate before National

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Mediation and Arbitration (NAMS). The issues raised in those actions, as well as other issues, were mediated in two sessions, one on April 3, and the other on May 1, 2006. On April 3, 2006, after the first session, Reyes-Dawson's attorney in the 2005 action, Spencer Gibbs (Gibbs), wrote to the Goddus' attorney, at Reyes-Dawson's request, attaching a copy of DOB Commissioner Osorio's February 22, 2006 letter to Mr. Goddu. Gibbs indicated that he had thought before the first session that all issues had been determined, but that he was convinced that all of the issues should be identified so that when the mediation reconvened on May 1, "the field will be defined." Kasdan aff., ex. L.

By letter dated April 28, 2006, Gibbs again wrote to the Goddus' counsel, this time in response to a letter from that attorney, which letter has not been provided here. As is relevant, Gibbs indicated, in connection with the "alleged full and lawful compliance" with the DOB requirements, that his office agreed with Commissioner Osorio's findings, in her February 22, 2006 letter, of the Goddus' noncompliance, and that certain remedial action was necessary. Reyes-Dawson's counsel, thus, sought copies of the reports on the effects of the Goddus' alterations on the party wall's integrity and fire rating; detailed, accurate plans showing the as-built conditions, and the construction details before the fireplace was built; and a report showing code compliance after February 22, 2006. Gibbs's letter

further provided, as to the Goddus' claims regarding the stoop wall encroachment, that he failed to see how the Dawsons' inscribing their name on the supporting wall's window opening, which was filled in by them, constituted an encroachment, since the property was the Dawsons'. Gibbs concluded by indicating that all documents referred to in his letter would be brought to the May 1 mediation session.

The mediation ended in a largely form agreement dated May 1, 2006, and an addendum dated September 26, 2006 (collectively, the Agreement), which resolved both actions, and resulted in the filings of stipulations of discontinuances of both actions, with prejudice. The Agreement's form language provided that "no party to this agreement shall at any time hereafter make any claim against the other, institute any lawsuit against the other or make any demands for payment from the other for any alleged reason or causes arising out of the facts and issues of the matter herein," and that the Agreement was binding on all parties and was enforceable in court. Kasdan aff., ex. C. Also, each party to the Agreement released the other parties "from any and all claims and/or liability arising from this matter." *Id.*

The Agreement further provided that the defendants were required to pay Reyes-Dawson \$122,500, which payment was contingent on Reyes-Dawson providing stipulations of discontinuance of both actions. Of that amount, the Goddus were

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to pay \$62,500, with the balance to be paid by Lewis. Those sums were to be held in escrow pending remedial work on the bulkhead, which the Goddus were required to make, and Reyes-Dawson was to approve in writing, if properly done. That written approval was ultimately provided. The Agreement required the Goddus to maintain the trellis and trim the vines, so that they would not grow on the western wall stoop.

Additionally, although not raised by the parties' pleadings in either the 2003 or the 2005 action, the Goddus seem to have objected to the fact that Reyes-Dawson and her husband had inscribed "The Dawsons" on the western wall stoop window, and therefore agreed that as long as the trellis covered that inscription it would remain, but that if the Goddus ever had a buyer for their property who objected to that inscription, the Dawsons were to remove it at their cost, but that if they failed to do so, the Goddus could remove it at their cost. Under the Agreement, the existence of the inscription could not be used in the future by the Dawsons to establish an adverse possession claim with respect to the western wall stoop, nor could any removal of that inscription by the Goddus be used by them in support of an ownership claim.

The Agreement further recited that the party wall was to be governed by this state's laws and was "subject to the rules and regulations promulgated by the" DOB. Also, the Goddus and Lewis

represented in that document that to the best of their knowledge the Dawsons' beams "allegedly jutting into the [Goddus'] chimney flues ... [had] not been cut." Kasdan aff., ex. C.

On June 3, 2008, Reyes-Dawson, allegedly after discovering in 2008 that her home's beams and joists had been cut throughout the length of the fireplace's flue, represented by a third law firm, commenced the instant action. This action asserts each of the 13 causes of action against the Goddus, only causes of action one, two, three, and six against Lewis, and cause of action six against the remaining Lewis defendants. No preliminary conference has been held, because of the pendency of the former codefendant's motion to dismiss and subsequent appeal of my order on that motion, and because of the pendency of the instant applications. Bills of particulars have not yet been served.

The Goddus now seek an order granting them summary judgment. Their papers suggest that they were under the belief that, in light of the first cause of action's allegations of fraud in the inducement of the Agreement, Reyes-Dawson is now seeking to rescind that Agreement, and thereafter will seek to have the stipulations of discontinuance in the two earlier actions vacated. The Goddus apparently urge that, since the fraud claim is without merit, Reyes-Dawson will be unable to rescind the Agreement and have the stipulations of discontinuance vacated. They therefore appear to assert that this action is time-barred,

because Reyes-Dawson's claims will not relate back to anything if she cannot get the Agreement rescinded and the stipulations of discontinuance vacated. Alternatively, the Goddus maintain that, since the present action is nothing more than a rehashing of the claims raised in the two prior actions and at the mediation, Reyes-Dawson's current claims are barred by principles of res judicata and by the language in the Agreement, which forbids future claims "arising out of the facts and issues of the matter [there]in." In the event that I do not grant their motion and dismiss this action, the Goddus seek an order, pursuant to CPLR 2601 and CPLR 3004, requiring Reyes-Dawson to pay the Agreement's settlement consideration of \$122,500 into court, since Reyes-Dawson is allegedly seeking to "cast aside" the Agreement. *Kasdan aff.*, ¶ 5. The Lewis defendants cross-move for the same relief as the Goddus and adopt all of their arguments.

Reyes-Dawson opposes the defendants' applications. She insists that she is not seeking to repudiate the Agreement, but is simply claiming that the Goddus and Lewis breached the Agreement and made a material false representation in that Agreement. In particular, Reyes-Dawson acknowledges that during the course of the 2003 action, she had concerns regarding damage concealed within the party wall, and that during the litigation she requested access to the Goddus' home to inspect, which was denied. She claims that the mediation resulted in a settlement,

based on the written representation that the beams had not been cut, and that, because that representation was false, she settled for an amount which was too low. Reyes-Dawson further claims that Lewis and the Goddus breached the Agreement's representation that the party wall would be governed by the applicable state laws and be subject to the DOB's rules and regulations. In this regard, she asserts in her opposing affidavit (¶ 1) that she is seeking to have the defendants comply with all applicable statutes and regulations. See also Reyes-Dawson's memo of law, at 9 (the Agreement's provision about the party wall being governed by the laws of the state and subject to the DOB's rules and regulations was breached by the defendants' failure to comply with "Code" requirements). In addition, Reyes-Dawson urges that her action asserts new claims with respect to the western² wall stoop.

Discussion

The law is well settled that a movant on a summary judgment application bears the initial burden of prima facie establishing its entitlement to the requested relief, by eliminating all material allegations raised by the pleadings. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986); *Winegrad v New York Univ. Med. Ctr.*,

²There is some confusion in the papers because the stoop wall is sometimes referred to as the eastern stoop wall. Apparently, that wall is Reyes-Dawson's western stoop wall and the Goddus' eastern stoop wall.

64 NY2d 851 (1985); *Kuri v Bhattacharya*, 44 AD3d 718 (2d Dept 2007). The failure to meet one's burden mandates the denial of the application, "regardless of the sufficiency of the opposing papers." *Winegrad*, 64 NY2d at 853. However, where a movant demonstrates its prima facie entitlement to summary judgment, the burden shifts to the other side to raise a material triable issue of fact warranting the motion's denial. *Alvarez v Prospect Hosp.*, 68 NY2d at 324. Also, "the remedy of summary judgment is a drastic one, which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable, since it serves to deprive a party of [its] day in court [internal citations omitted]." *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 (1st Dept 1987).

Payment of Settlement Funds into Court

Defendants seek an order, pursuant to CPLR 3004 and CPLR 2601, requiring Reyes-Dawson to pay the proceeds of the settlement into court prior to judgment. CPLR 3004 applies, as is relevant here, where a party seeks to rescind a transaction or have it declared or adjudged as void, or demands other relief that is dependent on a finding that the transaction was voidable or void. That statute permits a court, in those cases, to order, before the final judgment, the restoration of benefits received in a transaction, so as to adjust the equities and avoid unjust enrichment. In the instant case, Reyes-Dawson specifically

disavows that she is seeking to repudiate the settlement Agreement, and nowhere in her complaint does she directly ask to have the Agreement set aside. Reyes-Dawson aff., ¶ 4. Thus, this branch of the defendants' applications is denied. This leaves their applications to dismiss the complaint.

First Cause of Action

Reyes-Dawson's first cause of action attempts to plead fraud in the inducement of the Agreement, specifically that the Goddus and Lewis allegedly falsely represented in that Agreement that, to the best of their beliefs, Reyes-Dawson's townhouse's wooden joists, which jutted into the Goddus' chimney flues, had not been cut. The complaint further alleges that such representation was made to induce Reyes-Dawson to enter into the Agreement, and that she relied on it to her detriment, because she thereafter discovered that her beams and joists had been cut throughout the party wall's entire height. As a result of that fraud, Reyes-Dawson claims that she consented to inadequate compensatory damages when she entered into the Agreement. She therefore seeks damages of no less than \$360,000.

This cause of action must be dismissed, since if Reyes-Dawson believes that fraud on the part of Lewis and the Goddus caused her to settle for an inadequate amount, her remedy would be to seek to rescind the Agreement and move in the earlier actions to vacate the stipulations of discontinuance, so that she

could attempt to get, via a new settlement or verdict, the amount of compensation to which she believes she is entitled. See e.g. *National Conversion Corp. v Cedar Bldg. Corp.*, 23 NY2d 621 (1969) (landlord's fraudulent representation in lease that property lay in an unrestricted zone, constituted valid basis to rescind lease where tenant's lawyer, in reliance on that representation, did not verify the property's status). Here, Reyes-Dawson chooses to do neither, and is therefore bound by the settlement Agreement. Thus, the first cause of action is dismissed as to the Goddus and Lewis.

Second and Third Causes of Action

The second cause of action, which incorporates all previous allegations, alleges that the Goddus and Lewis have breached the Agreement's provision that the party wall shall be governed by the laws of New York and was subject to DOB's rules and regulations. Referring to the content of Commissioner Osario's February 22, 2006 letter, alleging that the Goddus have not complied with it, and asserting that the beams and joists had in fact been cut throughout the height of the party wall, the complaint in the 2008 action alleges that the party wall's illegal condition, in violation of the Agreement, has rendered it a potential fire hazard and structurally unsafe (complaint, ¶ 52). As a result, Reyes-Dawson seeks a declaration that the Goddus and Lewis must render the flue and fireplace legal or

restore the party wall to its original condition, so that it is fireproof and structurally sound; that the Goddus must comply with Commissioner Osario's directives, including that they refrain from using the fireplace until they submit the documents which she requested, and obtain the requisite approvals and permission from the DOB, and, if that cannot be done, then the fireplace and flue be sealed or restored to the original condition. Also, under this cause of action, Reyes-Dawson seeks an order enjoining the Goddus from using the fireplace in its present condition. The third cause of action re-alleges the foregoing and claims that, as a result, Reyes-Dawson is entitled to damages of not less than \$360,000 from the Goddus and Lewis.

The Goddus and Lewis seek dismissal of these two causes of action on the ground that they are barred by res judicata and by the three-year statute of limitations applicable to property damage claims. The Goddus' attorney adds that Joseph Goddu "is currently refraining from using his fireplace while considering whether he needs to seek reconsideration and clarification of the DOB position." Kasdan moving aff., ¶ 8; see also J. Goddu aff., ¶ 14 (in which he asserts that he is adhering to the DOB's "suggestion" that he simply refrain from using his fireplace).

The branch of movants' applications which seeks dismissal of the second and third causes of action is denied. Neither res judicata, nor the running of the three-year statute of

limitations from the completion of fireplace/flue work is relevant, since what Reyes-Dawson is seeking, under these two causes of action, is to enforce her rights under the 2006 Agreement, which she claims the Goddus and Lewis breached. She is entitled to do so under the Agreement, which recites that it "is enforceable in any court of law of general jurisdiction." *Kasdan aff., ex. C.*

While a stipulation of settlement ends the existing litigation, it "gives rise to a new superseding agreement which is the measure of each party's obligation to the other." *Crouse-Irving Mem. Hosp. v Moore*, 84 AD2d 954, 955 (4th Dept 1981); see also *Matter of Caruso v Ward*, 146 AD2d 22, 29 (1st Dept 1989). Such an agreement is governed by the principles applicable to contract interpretation. *Scherer v North Shore Car Wash Corp.*, 72 AD3d 927 (2d Dept 2010); *Savoy Mgt. Corp. v Leviev Fulton Club, LLC*, 51 AD3d 520, 520-521 (1st Dept 2008); *Matter of Stravinsky*, 4 AD3d 75, 81 (1st Dept 2003).

In construing a contract, it is the parties' intent which is controlling. *American Express Bank v Uniroyal, Inc.*, 164 AD2d 275, 277 (1st Dept 1990). Where that intent can be found from the agreement itself, summary judgment is appropriate, but if reference to extrinsic facts is required to discern the parties' intention, summary judgment is inappropriate. *Ibid.* A contract which "is complete, clear and unambiguous on its face must be

enforced according to the plain meaning of its terms." *Greenfield v Philles Records*, 98 NY2d 562, 569 (2002); *Bailey v Fish & Neave*, 8 NY3d 523, 528 (2007). Contracts "should be read as a whole to ensure that undue emphasis is not placed upon particular words and phrases," and the courts cannot, in construing a contract, add or subtract terms or distort their meanings. *Bailey*, 8 NY3d at 528. "[A]s between interpretations of an ambiguous term, that interpretation will be chosen which best accords with the sense of the remainder of the contract." *A & Z Appliances, Inc. v Electric Burglar Alarm Co.*, 90 AD2d 802, 802 (2d Dept 1982). A construction which renders a provision meaningless is to be avoided. *Spaulding v Benenati*, 57 NY2d 418, 425 (1982).

"Contracts are not to be interpreted by giving a strict and rigid meaning to general words or expressions without regard to the surrounding circumstances or the apparent purpose which the parties sought to accomplish. ... The court should ... consider the relation of the parties and the circumstances under which it was executed [internal citations and quotation marks omitted]."

Matter of Stravinsky, 4 AD3d at 81; see also *Scherer v North Shore Car Wash Corp.*, 72 AD3d at 929 ("court is to determine the intent and purpose of the stipulation based on an examination of the record as a whole" [citation and internal quotation marks omitted]).

In the instant case, the Agreement's provision, that the party will is to be governed by the laws of New York and is

subject to the DOB's rules and regulations, is ambiguous. Given Commissioner Osorio's February 22, 2006 letter requiring the Goddus to undertake certain steps to render the fireplace and flue code compliant, or that if that were not possible, to seal the flue and fireplace or restore the premises to the original condition; the commissioner's stated concern about the alteration on the party wall's integrity and fire rating; and the April 28, 2006 letter of Reyes-Dawson's attorney to the Goddus' attorney, in which counsel discusses "full and lawful compliance" with "DOB's requirements" and then immediately refers to Commissioner Osorio's February 22, 2006 letter to the Goddus, it does not appear that the Agreement was intended to constitute Reyes-Dawson's relinquishment of her right to have her party wall rendered compliant with the DOB's rules and regulations.

It is unclear whether the foregoing Agreement provision was simply one requiring the Goddus to comply with the DOB's directives, including those in the February 22, 2006 letter, which they evidently have not done, except to the extent that they seem to claim that they have refrained from using the fireplace. It is also not apparent what the parties intended as available enforcement mechanisms if there were a lack of compliance, for example, whether the plaintiff was limited to seeking relief only from the DOB. Also, it is not clear, on the record before me, whether the Agreement provision was meant to

apply only to the Goddus, since the February 22, 2006 letter was not addressed to Lewis. It is further unclear what has transpired at the DOB, relative to the February 22, 2006 letter, since it was issued; what measures, if any, have been undertaken by the Goddus to comply with that letter; or whether Reyes-Dawson has contacted the DOB in an attempt to have the Goddus comply. Further, since discovery has not progressed, and no bills of particulars have been exchanged, it is unclear which code provisions Reyes-Dawson is relying upon to establish that the Agreement was breached. See *Ramondi v Paramount Fee, LP*, 30 AD3d 396, 397 (2d Dept 2006) (defendant entitled to bill of particulars as to statutes, rules, and regulations claimed to have been violated). Given all of the foregoing, the Goddus' and Lewis' applications seeking orders granting them summary judgment dismissing these two causes of action are denied.

Fourth and Fifth Causes of Action

The fourth and fifth causes of action allege that the Goddus breached the Agreement by failing to maintain the trellis and trim the vines growing on it, thereby causing the vines to grow onto the western wall stoop. Under the fourth cause of action, Reyes-Dawson seeks declaratory relief with respect to that alleged breach, and, under the fifth cause of action, monetary damages are sought for that breach. Neither cause of action is barred by *res judicata*, since Reyes-Dawson is simply seeking to

enforce the Agreement and obtain damages for its breach. Nor are these causes of action barred by the six-year statute of limitations applicable to breach of contract claims, since six years have not passed between the Agreement's execution in 2006 and this action's commencement in 2008. CPLR 213 (2).

Accordingly, these branches of the Goddus' motion are denied.

Sixth Cause of Action

Reyes-Dawson's sixth cause of action alleges that all of the defendants were negligent with respect to the fireplace's installation, thereby resulting in a compromise to the safety and integrity of the party wall, the creation of a fire hazard, and progressive and continuous damage to the firewall and other parts of Reyes-Dawson's premises. The movants seek dismissal of this cause of action on res judicata and statute of limitations grounds.

Res judicata serves "to provide finality in the resolution of disputes [internal citation and quotation marks omitted]." *Matter of People v Applied Card Sys., Inc.*, 11 NY3d 105, 124 (2008), cert denied, US, 129 S Ct 999 (2009). Under New York's transactional approach, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred" *O'Brien v City of Syracuse*, 54 NY2d 353, 357 (1981). This is true even if different legal theories or variations in the facts are alleged

or different relief is sought, where the causes of action are "grounded on the same gravamen of the wrong upon which the action is brought [internal citation and quotation marks omitted]." *Smith v Russell Sage Coll.*, 54 NY2d 185, 192 (1981). The determination of what factual grouping is a transaction or series of transactions is dependent "on how the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether ... their treatment as a unit conforms to the parties' expectations [internal citations and quotation marks omitted]." *Id.* at 92-93. Res judicata applies to the parties to the prior action or proceeding and to those in privity with them. *Matter of State of New York v Seaport Manor A.C.F.*, 19 AD3d 609, 610 (2d Dept 2005); *Marinelli Assoc. v Helmsley-Noyes Co., Inc.*, 265 AD2d 1, 7 (1st Dept 2000).

Stipulations of discontinuance with prejudice are generally entitled to res judicata effect, thereby barring discontinued claims (*Pawling Lake Prop. Owners Assn., Inc. v Greiner*, 72 AD3d 665 [2d Dept 2010]; *Matter of State of New York v Seaport Manor A.C.F.*, 19 AD3d at 610; *Matter of Hofmann*, 287 AD2d 119, 123 [1st Dept 2001]; see also *Matter of Olympic Tower Assoc. v City of New York*, 81 NY2d 961 [1993] [res judicata effect given to settlement agreements]), as well as "relevant issues that could have been litigated" (*Nottenberg v Walber 985 Co.*, 160 AD2d 574, 575 [1st Dept 1990]). Nonetheless, the "with prejudice" language can be

"narrowly interpreted when the interests of justice, or the particular equities involved, warrant such an approach." *Dolitsky's Dry Cleaners v YL Jericho Dry Cleaners*, 203 AD2d 322, 323 (2d Dept 1994). Stipulations of settlement do not necessarily prevent a party from asserting causes of action which only arose after the stipulation became operative. *Pawling Lake Prop. Owners Assn., Inc. v Greiner*, 72 AD3d at 668. Also, where a stipulation of settlement reserves all future rights, res judicata will not apply. *Yanguas v Wai Wai Pun*, 147 AD2d 635 (2d Dept 1989).

Initially, it should be noted that neither Edmund Lewis Ltd. nor Edmund Lewis Contracting and Painting Inc. was a party to either prior action, to the mediation, or to the Agreement. None of the parties seeks to distinguish Lewis from the other Lewis defendants for purposes of these motions, or explain their relationship to Lewis. No one raises the issue of privity or addresses it. Therefore, on the record before me, these two Lewis defendants have not established that res judicata bars this action as to them, and they cannot be granted dismissal of this cause of action on that ground. As to Lewis and the Goddus, it is beyond dispute that the 2003 action involved claims that the fireplace and flue were improperly and illegally installed. Nevertheless, as previously discussed, there are issues regarding whether the parties reserved issues arising out of these movants'

compliance with DOB rules and regulations regarding the party wall. Neither the Goddus nor Lewis has addressed the complaint's allegations regarding the party wall being subject to the DOB's rules and regulations or whether they have been compliant. Thus, to the extent that this cause of action alleges negligence claims based on the Goddus' and Lewis's lack of compliance with those rules and regulations, in connection with the work on the fireplace, flue and chimney, the applications to dismiss this cause of action as to them on res judicata grounds is denied. All other negligence claims must be, and hereby are, dismissed on res judicata grounds. This leaves the movants' applications to dismiss, on statute of limitations grounds, what is left of this cause of action.

Preliminarily, it must be observed that this action does not relate back to the discontinued 2003 and 2005 actions. *Alharezi v Sharma*, 304 AD2d 414, 414-415 (1st Dept 2003) (doctrine of relation back unavailing where new pleading is not merely an expansion of "still-valid prior pleading[]"). The burden of prima facie establishing that an action is time-barred is on the movants. *Tsafatinos v Wilson Elser Moskowitz Edelman & Dicker, LLP*, _ AD3d _, 2010 NY Slip Op 06085 (2d Dept 2010). The statute of limitations for injury to property is three years (CPLR 214 [4]), and runs from the date of accrual, which, in this case, was when the injury occurred (*Barrell v Glen Oaks Vil. Owners, Inc.*,

29 AD3d 612, 613 [2d Dept 2006]; *Board of Mgrs. of Yardarm Beach Condominium v Vector Yardarm Corp.*, 109 AD2d 684 [1st Dept 1985]). For statute of limitation purposes, the time within which an action is required to be commenced is computed from the time the claim accrued to the date it was interposed. CPLR 203 (a). A claim is interposed when the action is commenced. CPLR 203 (c).

On the instant record, Reyes-Dawson has alleged in her complaint that the failure to properly construct the fireplace and flue has created a potential fire hazard. She does not claim that any such hazard ensued. Therefore any such claim accrued when the fireplace was completed. The complaint also seems to allege that the cutting of the joists and beams was an injury in and of itself, because it could lead to potential problems to her party wall's integrity. Again any such claim accrued when the fireplace was completed. However, it further appears that Reyes-Dawson is claiming that such cutting has caused progressive and continuous structural damage to the party wall, but it is unclear what precisely this injury was or when it occurred, and thus when such claim accrued, leaving open the possibility that this claim accrued within three years of this action's commencement. See e.g. *Mark v Eshkar*, 194 AD2d 356 (1st Dept 1993) (in property damage case, claim accrued when larger, allegedly structural cracks appeared on party wall, rather than when defective

underpinnings, which caused loss of lateral support, were placed, causing minor cracks to appear). In light of the foregoing, the movants have not met their burden of demonstrating that this latter claim is completely time-barred. Accordingly, this branch of the defendants' applications is granted solely to the extent that all of the negligence claims, which have not yet been dismissed on res judicata grounds, accruing more than three years before this action was commenced, are dismissed as time-barred.

Seventh Cause of Action

Reyes-Dawson's seventh cause of action alleges that, by creating an illegal fireplace in October 2002 and the weeks and months thereafter, the Goddus created a nuisance, when they cut the beams and joists, which rendered the party wall structurally unsafe, and that this has resulted in ongoing damage to the party wall. A further nuisance was allegedly created when the Goddus installed the flue, which is "hot" (complaint, ¶ 115), directly against Reyes-Dawson's home's wooden joists, resulting in a fire hazard in the party wall, in violation of DOB standards. Reyes-Dawson seeks monetary damages as well as a declaration permanently enjoining the Goddus from continuing these nuisances. The Goddus claim that this cause of action must be dismissed since it is barred by the three-year statute of limitations (CPLR 214 [4]), applicable to injury to property, and by principles of res judicata.

Again, to the extent that Reyes-Dawson's nuisance claims are based on violations of DOB standards, the Goddus have failed to establish that such claims are barred by res judicata principles. As to the statute of limitations, nuisance claims are governed by a three-year statute (*Sova v Glasier*, 192 AD2d 1069, 1069-1070 [4th Dept 1993]), except to the extent that there is a claim of a continuing nuisance, where the "wrong is continuous or recurring" (*id.* at 1070), in which case, claims accruing within three years of the commencement of the action are timely. *Lucchesi v Perfetto*, 72 AD3d 909 (2d Dept 2010); *Sova v Glasier*, 192 AD2d at 1071; *cf. Bloomingdales, Inc. v New York City Tr. Auth.*, 13 NY3d 61, 66 (2009) (same principle applied using the year and 90-day statute of limitations).

It appears that any fireplace and flue work, including the cutting of beams and joists, was finished in either 2002 (Kasdan moving aff., ex. J [which indicates that a violation was issued against Reyes-Dawson for having her home's joists stop at or go through the Goddus' chimney]; complaint, ¶ 100 [in about October 2002 "and upon many days thereafter," the fireplace was installed]) or 2003 (aff. in opp., ex. A, at 30 [at April 2004 hearing, resulting from Reyes-Dawson's complaints about the Goddus' fireplace, it was indicated that the fireplace had been completed the summer before]; see also Reyes-Dawson aff., ¶¶ 20, 24 [which indicate that a violation was issued to the Goddus in

January 2004 for installing the fireplace without a permit, and that a hearing was held on that violation in April 2004]- - - However, even if the fireplace and flue installation were completed on the date by which plaintiff's damages occurred, March 22, 2004, as alleged in her bill of particulars in her 2003 action, the instant action was commenced on June 3, 2008, clearly more than three years after the alleged cutting of joists and beams. Reyes-Dawson has failed to demonstrate that the cutting of the beams and joists, one basis for her nuisance claims, was continuous or recurring, so as to give rise to an exception to the usual accrual rule for nuisance claims. *Sova v Glasier*, 192 AD2d at 1070; cf. *Valenti v Trunfio*, 118 AD2d 480, 483 (1st Dept 1986) (plaintiff has burden of establishing exception to usual accrual rule). Accordingly, any nuisance claim arising out the cutting of beams and joists is dismissed as time-barred.

As to the nuisance claim arising out of the allegation that the operation of a fireplace and flue is not code compliant, because there is inadequate clearance between the flue and the wooden joists, while there is some question as to whether the Goddus have actually been operating the fireplace (see Reyes-Dawson aff., ¶ 38 [in which Reyes-Dawson seems to concede that the Goddus have not been operating the fireplace]), the complaint (¶ 115), personally verified by Reyes-Dawson, alleges that the flue is hot. For purposes of this motion, this is sufficient to

raise an issue that this alleged nuisance was continuing. Thus, the Goddus' motion, which seeks to dismiss this nuisance claim on statute of limitations ground, is denied.

Eighth and Ninth Causes of Action

Reyes-Dawson's eighth cause of action sounds in trespass and alleges, "on information and belief," that the Goddus' fireplace and flue were partially built on her property (complaint, ¶¶ 19, 136); that she did not give the defendants permission to build on her property; that such trespass is continuing; and that the defendants also trespassed on her property when they cut her home's beams and joists while engaging in the fireplace/flue construction in October 2002 "and many occasions thereafter" (*id.*, ¶ 125). Reyes-Dawson adds, in her opposing affidavit (¶ 48), that at the time she entered into the Agreement she was unaware of the "extent" of the intrusion of the fireplace/flue onto her property. Consequently, Reyes-Dawson's complaint seeks monetary damages and a judgment directing the Goddus to restore the party wall to the condition it was in prior to these alleged trespasses.

The ninth cause of action repeats these assertions, and observes that the Goddus, as a result of having allegedly built part of their fireplace on Reyes-Dawson's four-inch side of the party wall, may claim to have adversely possessed that portion of Reyes-Dawson's home where the fireplace allegedly encroaches.

Reyes-Dawson seeks a judgment, pursuant to RPAPL Article 15, declaring that the Goddus and anyone claiming under them are forever barred from claiming any interest in that portion of Reyes-Dawson's premises, and that "[p]laintiffs" (complaint, ¶ 141) be adjudged to be vested with unencumbered title to the premises. Additionally, under this cause of action, Reyes-Dawson seeks a judgment directing the Goddus to remove any structure placed on her premises. The Goddus seek dismissal of these two causes of action on statute of limitations and res judicata grounds.

The claim, under the eighth cause of action, that the Goddus trespassed on Reyes-Dawson's property by having the beams and joists cut, is dismissed as time-barred, since it was not commenced within three years of that alleged trespass, which is not a continuing one. See generally *Lucchesi v Perfetto*, 72 AD3d at 911-912. Reyes-Dawson's remaining trespass claim, which is based on the alleged construction of the fireplace and flue on a part of her premises, while a continuing trespass, which gives rise to successive claims that are not time-barred (*id.*), must be, and hereby is, dismissed on the basis of res judicata. See e.g. *Lighthouse 925 Hempstead, LLC v Citibank, N.A.*, 66 AD3d 846 (2d Dept 2009) (claim of continuing trespass barred by principles of res judicata due to prior action arising from same transaction).

Here, where Reyes-Dawson's complaint in the 2003 action, which was discontinued with prejudice, alleged two causes of action asserting trespass, the second of which also alleged that defendants' construction work damaged her property, and where Reyes-Dawson's bill of particulars alleged damages based on the installation of an illegal fireplace, it would not conform to the parties' expectations that Reyes-Dawson would be able to bring successive, piecemeal actions for varying improprieties with respect to the installation of the fireplace and its flue, where such claims arose out of the same transaction, namely the alleged illegal installation. This is especially true here, where it appears that the DOB inspected the fireplace and/or flue in January 2006 through Reyes-Dawson's part of the party wall, demonstrating that she could presumably have ascertained whether the fireplace and/or flue impinged on her four inches of the party wall. Accordingly, the eighth cause of action is dismissed.

Nonetheless, I decline to dismiss Reyes-Dawson's ninth cause of action, which essentially seeks to quiet title with respect to that part of her premises upon which the fireplace and flue allegedly encroach. It would be beneficial if this issue were to be resolved before the requisite period passes for the Goddus to make an adverse possession claim, rather than have it wait for that time period to pass or for the property to pass into the

hands of others, who may lack knowledge of the necessary facts.

Tenth Cause of Action

Reyes-Dawson's tenth cause of action is effectively a reiteration of her claim that she is entitled to damages because the fireplace and flue were built on her property. That cause of action then goes on to seek treble damages, pursuant to RPAPL § 861, based on the Goddus having entered onto her property and having destroyed it, evidently referring to the cutting of her joists and beams. The Goddus assert that this cause of action must be dismissed because RPAPL § 861 is inapplicable, and because this cause of action is barred by res judicata and by the three-year property damage statute of limitations. Reyes-Dawson urges that this cause of action asserts new claims and is therefore viable. She does not dispute that RPAPL § 861 is inapposite.

This branch of the Goddus' motion is granted. RPAPL § 861, which deals with actions brought against those who have entered onto the land of others and cut their trees or timber without their consent, is inapplicable, since no trees or timber within the intendment of the statute were cut. The balance of this cause of action is duplicative of Reyes-Dawson's eighth cause of action sounding in trespass. Accordingly the tenth cause of action is dismissed.

Eleventh, Twelfth and Thirteenth Causes of Action

These three causes of action relate to the western stoop wall. Reyes-Dawson claims that she learned that 6.5" of the western stoop wall, which supports her front steps, actually spill over her property line. She maintains that since May 13, 1997, she has openly, hostilely and notoriously, maintained and actually possessed the entire stoop wall to the exclusion of the Goddus, and evidently to their predecessors.

Thus, under the eleventh cause of action, Reyes-Dawson seeks a judgment that she is the stoop wall's owner, and forever barring the Goddus and any of their successors from claiming any interest in the stoop wall, or interfering with her right of quiet enjoyment to the stoop wall. Under the twelfth cause of action Reyes-Dawson seeks a determination under RPAPL Article 15, compelling a determination of any adverse claims as to the stoop wall, and adjudging that the Goddus and their successors are barred from any claim to an easement, or any other interest in the stoop wall. Under the thirteenth cause of action, Reyes-Dawson claims that, since she has exclusively possessed and controlled the stoop wall, she is entitled to a judgment declaring that she has an easement over and upon that stoop wall for ingress and egress to and from her property and to and from the street.

The Goddus' application to dismiss these three causes of action on res judicata grounds is denied, since they have failed

to prima facie establish that such doctrine applies. The 2005 action sought damages for the Goddus' failure to maintain their vines, which spilled over onto Reyes-Dawson's stoop. The bill of particulars in the 2003 action claimed unspecified damage to the stoop wall, but did not indicate that such damage was to a part of that wall which was over Reyes-Dawson's property line. There was no claim in either action that involved the ownership of the entire stoop wall.

It seems that, at the mediation, the Goddus raised an issue which was not part of either earlier action, the appearance of the Dawsons' inscription on the stoop wall window. However, it is clear from a reading of the Agreement that such issue was resolved without deciding who owned that wall, except that the Goddus and Reyes-Dawson agreed that the resolution as to the inscription could not be used by either side to support an adverse possession claim. The claims of an easement and of adverse possession, on other grounds, were not barred by the Agreement. Therefore, the Goddus' motion seeking an order dismissing these three causes of action on res judicata ground is denied.

Finally I note that, since the Agreement refers to the "Dawsons" it is unclear whether Reyes-Dawson's husband has any ownership interest in the townhouse. If he does, an appropriate application, under RPAPL § 1511, should promptly be made by

Reyes-Dawson to add him as a party in light of Reyes-Dawson's causes of action brought under RPAPL Article 15.

In conclusion, it is

ORDERED that the branch of Cynthia and Joseph Goddus' motion which seeks an order pursuant to CPLR 3004 and CPLR 2601 is denied; and it is further

ORDERED that the branch of cross motion of Edmund Lewis, Edmund Lewis, Ltd., and Edmund Lewis Contracting and Painting Inc. which seeks an order pursuant to CPLR 3004 and CPLR 2601 is denied; and it is further

ORDERED that the branches of Cynthia and Joseph Goddus' motion which seeks an order dismissing the first, eighth, and tenth causes of action is granted, and those causes of action are dismissed as to them; and it is further

ORDERED that the branch of cross motion of Edmund Lewis which seeks an order dismissing the first cause of action is granted, and that cause of action is dismissed as to him; and it is further

ORDERED that the branches of Cynthia and Joseph Goddus' motion which seeks an order dismissing the second, third, fourth, fifth, ninth, eleventh, twelfth, and thirteenth causes of action as to them is denied; and it is further

ORDERED that the branch of cross motion of Edmund Lewis which seeks an order dismissing the second and third causes of

action as to him is denied; and it is further

ORDERED that the branch of Cynthia and Joseph Goddus' motion which seeks an order dismissing the sixth cause of action as to them is granted to the extent that all claims accruing more than three years before this action was commenced are dismissed, as are all claims, other than those which accrued within three years of this action's commencement and are based on any violation of the DOB's rules and regulations to which the party wall was subject in connection with the work relating to the fireplace, its chimney, and its flue; and it is further

ORDERED that the branch of Edmund Lewis's cross motion which seeks an order dismissing the sixth cause of action as to him is granted to the extent that all claims accruing more than three years before this action was commenced are dismissed, as are all claims, other than those which accrued within three years of this action's commencement and are based on any violation of the DOB's rules and regulations to which the party wall was subject in connection with the work relating to the fireplace, its chimney, and its flue; and it is further

ORDERED that the branch of the cross motion of Edmund Lewis, Ltd. and Edmund Lewis Contracting and Painting Inc. which seeks an order dismissing the sixth cause of action as to them is granted to the extent that all claims accruing more than three years before this action was commenced are dismissed; and it is

further

ORDERED that the branch of Cynthia and Joseph Goddus' motion, which seeks an order dismissing the seventh cause of action as to them, is granted to the extent that any nuisance claim arising out of the cutting of the beams and joists in Reyes-Dawson's home is dismissed, as are all other nuisance claims, other than those which are based on a fire hazard arising from any violation of the DOB's rules and regulations, to which the party wall was subject in connection with the work relating to the fireplace, its chimney, and its flue; and it is further

ORDERED that if Marguerite Reyes-Dawson's husband has any ownership interest in her townhouse, she shall promptly move for leave to add him as a party; and it is further

ORDERED that the remainder of the action shall continue.

Dated: 8/23/10

ENTER:

Lly

FILED

AUG 24 2010

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