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

PRESENT: LOUIS B. YORK J.S.C. PART 2

Index Number : 603046/2008

MILSTEIN, BROOKE L.

INDEX NO.

vs

ESSEX HOUSE CONDOMINIUM

MOTION DATE

Sequence Number : 004

MOTION SEQ. NO.

SUMMARY JUDGMENT

MOTION CAL. NO.

...ing papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

Dated: 12/13/10

J.S.C.

LOUIS B. YORK J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

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

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BROOKE L. MILSTEIN, as trustee of THE MANHATTAN L.B. LIVING TRUST and SANDRA M. MILSTEIN, as trustee of the SANDRA M. MILSTEIN FAMILY TRUST,

Plaintiffs,

Index No. 603046/2008

-against-

ESSEX HOUSE CONDOMINIUM and ESSEX HOUSE CONDOMINIUM BOARD OF MANAGERS,

Defendant.

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BOARD OF MANAGERS OF THE ESSEX HOUSE CONDOMINIUM,

Counterclaim Plaintiff,

Index No. 114290/08

-against-

THE MANHATTAN L.B. LIVING TRUST and THE SANDRA M. MILSTEIN FAMILY TRUST, SANDRA M. MILSTEIN, as trustee,

Counterclaim Defendants.

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LOUIS B. YORK, J.:

BACKGROUND

There are two lawsuits in this litigation and they have been joined for discovery and trial purposes. One is by the Brooke Milstein, Sandra Milstein and both the Manhattan L.B. Living Trust and the Sandra M. Milstein Family Trust against Essex House Condominium ("Condo") and Essex House Condominium Board of Managers ("Board"). The Court shall refer to this part of the litigation as the

Milstein Complaint. The other is by Board against both of the trusts mentioned above and against plaintiff Sandra M. Milstein. The Court shall refer to this part of the litigation as the Board Complaint. Finally, the Court shall refer to the Milsteins and the Trusts, collectively, as "plaintiffs," and to the Condo and the Board, collectively, as "defendants." Defendants have moved for partial summary judgment, and plaintiffs have cross-moved for summary judgment. For the reasons below, the Court grants the motion to the extent of dismissing two duplicative causes of action, but deny to the remaining extent and leave the claim for punitive damages intact; and, the Court denies the cross-motion in its entirety.

I. Milstein Complaint.

According to the Milsteins' Complaint and cross motion, the facts of this case are as follows:

On August 16, 2007, plaintiffs Brooke and Sandra Milstein purchased a condominium located at defendant Essex House Condominium on Central Park South for $5 million. However, a few days after Brooke Milstein moved into the unit she vacated it due to extreme mold contamination.[1] After she evacuated the apartment plaintiffs hired an expert to test the unit for contaminants. The expert found several forms of mold as well as asbestos in the unit, due to the building-wide HVAC system and other defects. The Complaint further states that the unit was declared uninhabitable. According to the Complaint, defendants Essex House Condominium ("Condo") and Essex House Condominium Board of Managers ("Board") were aware of the problem when plaintiffs purchased the apartment and they actively concealed it from plaintiffs.

The Complaint does not describe any of plaintiffs' requests to defendants to remediate but does indicate that they notified defendants of the problems. It further states that, over three months after this notification, defendants demanded that plaintiffs pay for repairs to the HVAC system. Plaintiffs allege

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[1] It appears that she stayed in the apartment for a total of several days, but was there one or two days at a time rather than consecutively.

that the system is a "common element" and thus defendants must pay for the repairs. Moreover, they state that according to their experts, the HVAC system was not the sole cause of the toxic substances in the apartment. Plaintiffs state that defendants have ignored their experts' reports, that they have not performed any remediation whatsoever; and as a result plaintiffs have not lived in and enjoyed their $5 million apartment.

In addition, plaintiffs state that between July 3, 2007, when they entered into the sales contract for the apartment, and August 16, when the purchase was complete, they realized that one of the bathrooms in the unit was damaged. Moreover, the experts whom they hired to examine the apartment stated that the damage, including water leakage, was due to construction work apparently designed to conceal the mold in the apartment. According to the Complaint, defendants admitted they were responsible for the damage[2] and agreed to repair the bathroom; plaintiffs allege they received a letter from Claudia Meneses, the building's Director of Condominium Services, guaranteeing that defendants would repair the bathroom. Plaintiffs further state that in a telephone conversation with Ms. Meneses in October 2007, Ms. Meneses said defendants were aware of the mold condition.

The Complaint relies on the expert report of Olmstead Environmental Services, Inc. ("Olmstead"), a certified environmental hygienist, which examined the apartment and issued a report dated November 30, 2007. The report details the mold problem and related water damage, including damage in the bathroom, around the windows and in the master bedroom. The report also identified the alleged signs of defendants' cover-up. Finally, the report stated that there should be immediate remediation by trained personnel, as follows: (1) wallpaper, mattresses, and other porous contents should be removed; (2) the entire ventilation system should be replaced; (3) the warped wood flooring should be replaced; (4) sheet metal in specified affected areas should be removed; and (5) certain portions of the ceiling should be removed. Plaintiffs also hired Carl Borsari of Carl Borsari Associates, Inc. ("Borsari")

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[2]The Complaint does not state defendants conceded a cover-up attempt.

to examine the apartment; Borsari's findings with respect to the HVAC system supported those of Olmstead.

Despite these reports, the Complaint states, in March of 2008 defendants stated they were not responsible for mold remediation or HVAC replacement. In support of this contention they cited to the report of Microecologies, Inc. ("Micro"), their experts. In addition, they currently annex a copy of a March 12, 2008 letter in which defendants claim no responsibility for the remediation work; according to the letter, the prior owner of the unit did work to the HVAC that caused the problems and thus plaintiffs were fully responsible.[3] The letter also threatened plaintiffs with litigation unless plaintiffs allowed access to perform what plaintiffs considered to be an incomplete and insufficient remediation of the mold condition.

Plaintiffs then hired another expert who filed a proposed remediation plan and an engineer who detailed problems with the windows and the HVAC system. The engineer also stated that the apartment had asbestos, lead and other problems in addition to the mold condition. Plaintiffs describe additional expert reports, all of which allegedly support their proposed remediation plan. Plaintiffs contend that the HVAC problems were system wide rather than unique to the apartment, and thus defendants are financially responsible for the work.

The Complaint also describes the parties' attempts to negotiate a solution. The Complaint states that plaintiffs gave defendants access to the apartment in August of 2008, but that defendants "did not want to touch the asbestos fibers and did not do any confirmatory testing of the asbestos material," Milstein Complt, at ¶ 70, and that the roofer found another possible source of water leakage. After the inspection, defendants allegedly reneged on their purported promise to fully repair the apartment, instead stating that on September 22, 2008 defendants would begin work on the apartment but based on its own,

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[3] The Court did not locate factual support for this contention in the current papers – perhaps because defendants are not moving for summary judgment on the first cause of action.

conflicting assessment of the problems in the apartment and of the scope of their responsibility with respect to those problems. As a result of all of the above, plaintiffs state that at least up to the date of the complaint, October 21, 2008, they had not been able to live in or rent their apartment.

As their causes of action, plaintiffs assert (1) breach of contract against Board, which was responsible under the bylaws for the operation, maintenance, repair and replacement of the common elements and for the utilities, including the HVAC; (2) breach of fiduciary duty by Board; (3) gross negligence against both defendants; and (4) private nuisance against both defendants, based on the intrusion of the mold, asbestos, and other substances into the apartment. Plaintiffs seek actual damages on all causes of action and punitive damages on the second, third and fourth causes of action.

II. Board Complaint.

According to the Board's complaint and current motion, the facts are dramatically different, not in terms of the problems with the apartment but in its description of the behavior of plaintiffs and defendants. The Board's complaint states:

Condo was not the owner of the condominium unit in question. Instead, Household Finance Corporation III sold the unit to plaintiffs around August 16, 2007. Plaintiffs inspected the unit prior to the purchase and certified that the unit was in acceptable condition. Moreover, according to the Board, plaintiffs waived their right to inspect the apartment for the presence of lead paint hazards.

In December 2007, four months after they purchased the apartment, plaintiffs notified defendants that there was a mold problem in the apartment. Plaintiffs contended that the problem resulted from the faulty design and installation of the HVAC system in the apartment. The Board contends that the Condo did not install the system – the suggestion being, apparently, that it was not responsible for the related problems -- but that the Board nonetheless promptly hired Micro to conduct its own inspection. Micro and its president inspected the apartment on January 30, 2008. On February 28, 2008 Micro's report confirmed that there was a mold problem in the apartment. The report also contained Micro's

remediation proposal.

On March 12, 2008, the Board suggested that Micro perform the proposed remediation. It further suggested that plaintiffs and defendants share the cost of the remediation, without any waiver of the right to reimbursement by either side. According to defendants, plaintiffs rejected the proposal outright and refused to allow the remediation. Moreover, though on April 4, 2008 the Board notified plaintiffs that starting April 14, 2008 it would require access to the apartment to perform the remediation work, plaintiffs denied defendants this access. As a direct result of plaintiffs' conduct, the Board was unable to enter the apartment and commence work.

In addition, plaintiffs rejected Micro's proposal, suggesting instead that remediation be performed in accordance with yet another proposal by plaintiffs. This latest proposal was prepared by a new expert, Maxons Restoration, Inc. ("Maxons"), and is dated March 20, 2008. Plaintiffs rejected Maxons on the expressed ground that it did not employ a certified industrial hygienist. Defendants also had Micro issue a new report, dated April 24, 2008, describing a four-part remediation plan. Defendants' complaint does not explain why a new plan was required or indicate whether it included additional proposed work.

The parties met on June 18, 2008 to discuss the problems in the apartment. Apparently, sometime between April 24 and June 18, 2008, plaintiffs – who had allowed access to Micro for its January 30 inspection – granted access to defendants' "newly retained professionals." Board Complt, at ¶ 30. These professionals acknowledged that there was mold growth behind certain baseboards and that the area near the baseboards, including the windows, also would have to be remediated.

The Board asked plaintiffs to provide photographs evidencing the items the parties discussed at the meeting. By June 27 – 11 days after the meeting – plaintiffs had not provided the photographs, and the Board wrote a letter to plaintiffs demanding access to the apartment in order to remediate the problems, commencing July 14, 2008. Again, plaintiffs refused access. Instead, prior to July 14, and

possibly in response to the June 27 letter, on June 30 plaintiffs purported to offer the Board's experts access on July 16 and 17, when plaintiffs' experts were to perform additional testing. However, and despite the Board's attempt to derive a new date for the remediation, plaintiffs' experts tested the apartment on July 1 instead of July 16 and 17. Moreover, plaintiffs did not notify the Board or invite its experts to observe or participate in the inspection and did not provide access to the Board on July 16 and 17, as promised. Plaintiffs' expert's new report concluded that in addition to the problems already described, asbestos and lead paint existed in and around an interior soffit. Plaintiffs did allow the Board access to the apartment on July 22, but did not allow the Board to perform any independent tests to confirm or reject plaintiffs' various expert reports.

The parties reached a standstill around this time. On August 1, the Board's attorney apparently wrote that it would retain Maxons to perform the work in question, at the Board's expense. The letter also stated that the Board reserved the right to demand reimbursement from plaintiffs for the cost of the work. Plaintiffs allegedly rejected this proposal. The Board also alleges that it wrote to plaintiffs on August 12, modifying its proposal, and that on August 20, plaintiffs' counsel wrote back, stating plaintiffs would not provide access to the apartment unless "the Board paid for substantial additional renovation work – the removal and replacement of all windows in the Apartment, the demolition and rebuilding of defendants' bathrooms and the replacement of all bathroom fixtures." Id., at ¶ 46. The Board's complaint states that its August 28 letter "demanded access to commence remediation work on September 22, 2008." Id., at ¶ 47. The letter of August 28, which is annexed, further states that "although the Board has, in the past, been willing to accommodate [plaintiffs'] wishes, it will no longer do so" based on what the Board perceived as plaintiffs' bad faith. Board letter dated Aug. 28, 2008 (annexed at Exh. J).

At this point, the parties' relationship further deteriorated, resulting in more letters, more demands for – and refusal of – access to the unit, and, ultimately, the two lawsuits before the Court. The

Board's complaint asserts (1) plaintiffs wrongfully refused access to the Board when the latter had the right to make repairs, at plaintiffs' expense; (2) the Board has the right to an order directing plaintiffs to maintain and repair the apartment as they have failed to do so in accordance with the condominium's by-laws; (3) the Board is entitled to reimbursement for its expenses in connection with the maintenance and repair of the apartment; (4) the Board is entitled to reimbursement of all expenses related to its attempts to gain access, perhaps indirectly referring to attorney's fees; and (5) plaintiffs are required to provide the Board with copies of keys to the locks on the apartment door.

In connection with the Board complaint, the Board brought a motion, by order to show cause, to compel plaintiffs to allow it access to the apartment so it could begin the remediation and repair process. Plaintiffs opposed the application and cross-moved for a protective order keeping the Board out of the apartment and preventing it from commencing what plaintiffs deemed to be inadequate repairs. As part of their cross-motion, plaintiffs sought to compel defendants to accept their remediation and repair proposal. In November 2009, as the result of this motion practice, the Court ordered plaintiffs to allow defendants to enter the apartment in order to commence remediation and repairs in the unit. The Court stated that its job was not to determine which plan was the best plan and that, under the business judgment rule, unless the Board's conduct appeared utterly unreasonable it had the right to implement its preferred remediation plan. The Court expressly left open the issue of which parties are responsible to pay for the remediation and repairs.

Defendants submit the affidavit of Peter Athenson, the owner of TAG Consultants, Inc. ("TAG"), which managed defendants' 2007 facade and exterior restoration project. Subsequent to the Court's order, TAG also managed the 2009-10 mold remediation project for the subject apartment, which Micro conducted; and 2009-10 asbestos abatement project, which Parker House Services, Inc. conducted. In his affidavit, Athenson describes the status of the remediation

and repair project. In the course of the experts' evaluation, they determined that, as plaintiffs had indicated in their expert report of November 2007, the windows had to be replaced and the roof had to be repaired. In addition, they determined that a new HVAC system would be installed and, when all other work was complete, "the interior of the apartment would be rebuilt." Athenson Aff at ¶ 8.

Southport Associates designed an allegedly code-compliant HVAC system; PJM & Sons prepared the system pursuant to this design. Israel Berger and Associates and Commercial Roofing Solutions worked on the facade. As of June 8, 2010, the date of the affidavit, the windows had been ordered, with an anticipated delivery date in August 2010. Athenson anticipated it would take two weeks to install the windows. The facade work was to begin by early July and Athenson anticipated it would take two months to complete the facade. Defendants also had provided a work proposal relating to the HVAC system, which plaintiffs rejected. Defendants "recently," id. at ¶ 12, provided plaintiffs with interior renovation plans, but plaintiffs had not had the time to respond.

III. Current Motion Practice.

A. Defendants' Motion and Plaintiffs' Cross Motion.

Discovery in this action is complete and plaintiffs filed the Note of Issue on April 20, 2010. Defendants subsequently made this motion for partial summary judgment, seeking dismissal of the second, third and fourth causes of action on the ground that they are duplicative of the first cause of action. As alternative relief, defendants ask the Court to strike the demand for punitive damages on the grounds that (1) punitive damages are not awarded for breach of contract claims, and (2) plaintiffs cannot show intentional wrongdoing, evil motive, outrageous conduct, or the purposeful disregard of plaintiffs' rights.

Plaintiffs oppose defendants' motion and also cross-move for summary judgment. As to the first point, they argue that defendants motion is actually an untimely motion to dismiss. In addition, plaintiffs state that defendants' motion for partial summary judgment must be denied because, according to

plaintiffs, the Board president has acknowledged that the Board did nothing to remediate and repair the apartment for a three-year period. Plaintiffs characterize the Board's conduct throughout as aggressive and litigation-oriented rather than mediation-oriented. Moreover, they allege that defendants actively concealed the toxic contamination of the apartment prior to its purchase by the Milsteins; according to plaintiffs, defendants have ignored allegations as to this history of concealment and thus implicitly acknowledged their accuracy. They claim that in an effort to intimidate plaintiffs, defendant ceased to perform even routine maintenance on the apartment. Finally, they claim that based on the affidavits and depositions of the parties and experts, along with the expert reports and other documents, there is no issue of fact on these points and summary judgment in their favor is proper.

B. Analysis.

Initially the Court notes that to some extent the parties' statements in connection with their motions are misleading. Defendants characterize plaintiffs' conduct as irrational in part because they continued to add to their list of remediation and repair demands. However, ultimately defendants apparently determined that most or all of the additional work plaintiffs demanded – including the window replacement, to which defendants objected strenuously – was necessary. On the other hand, plaintiffs' motion states that defendants only began remediation work when the Court forced them to in its prior order. However, the Court issued the order in response to the Board's motion to compel plaintiffs to provide access so the Board could perform the remediation work. Thus, it was the Board rather than plaintiffs who sought to remediate.

Also, the Court notes that it has considered the arguments raised by both sides and reviewed the applicable legal principles and prevailing case law. However, it shall discuss them in a relatively brief fashion in order to resolve this motion in advance of the imminent trial date. The Court's brevity does not indicate that it considered the motion in a perfunctory fashion.

1. Plaintiffs' Cross-Motion

Plaintiffs cross-move for summary judgment, stating that there are no issues of fact necessitating trial. To prevail, however, plaintiffs "must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact." Kwiecinski v. Sea Breeze II Condominium Ass'n, 21 A.D.3d 1064, 1065, 803 N.Y.S.2d 597, 598-99 (2nd Dept. 2005). In addition, because an order that grants summary judgment "deprives a party of his or her day in court . . . it is a drastic remedy that will only be awarded when there is no triable issue of fact and the court can render a decision as a matter of law." Del Puerto v. Port Royal Owner's Corp., 14 Misc. 3d 1214A, 836 N.Y.S.2d 434 (Sup. Ct. Kings County 2007)(avail at 2007 WL 38674, at *6)(citations omitted), aff'd, 54 A.D.3d 977, 865 N.Y.S.2d 258 (2nd Dept. 2008).

Here, as the description of the two complaints illustrates, the two sides present versions of the facts which are markedly different on the issue of which side is primarily responsible for the delays in remediation. Also, plaintiffs state the HVAC problem is system wide and defendants suggest the prior apartment owners did the work whcih caused the mold problems, there is an issue of fact as to which side is financially responsible for the work and as to whether defendants breached any duty. Moreover, both sides have presented evidence in support of their arguments. Plaintiffs have expert reports, deposition transcripts and affidavits supporting their contention that defendants had a duty to remediate from the start, that plaintiffs submitted information that was accurate regarding the scope of remediation, and that defendants deliberately tried to limit the scope of remediation, thus causing the delays which plaintiffs characterize as actionable. Defendants, for their part, submit letters, reports, and deposition transcripts which suggest that, even though they initially did not grasp the extent of the problems in the apartment, they tried from the start to make an accurate assessment and to work with the plaintiffs to remediate the

problem; they attempted to remediate the apartment even while the dispute over liability was ongoing, agreeing to split the cost, do the work immediately, and resolve liability issues later. From this, the fact finders can find that defendants acted reasonably and that plaintiffs' intransigence rather than defendants' conduct obstructed the remediation process -- or, even if the fact finders do not reach this conclusion, they may find that defendants are insulated from liability under the business judgment rule. See Levandusky v. One Fifth Ave. Apartment Corp., 75 N.Y.2d 530, 554 N.Y.S.2d 807 (1990).

Summary judgment on the issue of punitive damages obviously is premature because it is not yet clear which side will prevail in the two lawsuits. Moreover, the Court notes that plaintiffs concede in their Memorandum of Law that triable issues of fact mandate a trial on the issue of punitive damages. See Mem. in Opp. to Motion and in Support of Cross-Motion, at Point II, pp. 11-14.

2. Defendants' Motion.

Plaintiffs have asserted an adequate claim for breach of contract, and defendants do not challenge that an issue of fact exists as to the first cause of action. Therefore, the Court does not address the details and sufficiency of this cause of action. However, defendants allege that three of the causes of action – breach of fiduciary duty, the second cause of action; gross negligence, the third cause of action; and public nuisance, the fourth cause of action – should be dismissed as duplicative of the first cause of action, based on breach of plaintiffs' contract with the Board. If, as defendants contend, the second, third and fourth causes of action are duplicative of the breach of contract claim, then the claims should be dismissed. See Granirer v. The Bakery, inc., 54 A.D.3d 269, 272, 863 N.Y.S.2d 396, 399 (1st Dept. 2008). However, if sufficient facts are alleged to support a finding of bad faith, a claim for breach of fiduciary duty is appropriate. See Ackerman v. 305 East 40th Owners Corp., 189 A.D.2d 665, 666, 592 N.Y.S.2d 365, 367 (1st Dept. 1993).

After careful consideration the Court concludes that plaintiffs have stated a proper claim for breach of fiduciary duty. Here, plaintiffs claim that defendants delayed in making repairs to the

apartment and that they attempted to perform only a limited and inadequate remediation. It is undisputed, for example, that defendants protested some aspects of plaintiffs' proposed remediation which they ultimately deemed to be necessary, and that, in fact, they wrote a threatening letter to plaintiffs based on some of the suggestions they ultimately incorporated into their own plans. Plaintiffs refer to defendants' aggressive delay tactics. Moreover, plaintiffs point to the toxic nature of the mold, lead, and asbestos conditions in the apartment, which make defendants' purported delay[4] more egregious.

Arguably, the above conduct comprises breach of contract only. More significantly in terms of this additional cause of action, however, plaintiffs argue that defendants were aware of the extent of the mold problem and actively tried to hide it from plaintiffs. Also, contrary to defendants' assertion, these arguments are more than merely speculative. Plaintiffs base their allegations relating to defendants' concealment on their expert reports. First, page 5 of the Olmsted report states that"the grill [in the bedroom apparently] was recently taken of[f] and attempts made to clean the mold." Plaintiffs state that this raises an issue of fact as to whether defendants knew of the mold problem and attempted to clean it off, thus hiding the condition from plaintiffs. Plaintiffs point to paragraphs 8 and 9 of the March 26, 2008 report of Samuel E. Zinman, P.E. and Joseph M. Zinman, P.E., which state that there was a towel located inside the hung ceiling near one fan coil unit and a can of coil foam cleaning inside the hung ceiling near another fan coil unit. When they notified defendants of this fact the towel mysteriously disappeared. See Dep. Of Brooke Milstein, at p l . A third report, dated March 5, 2008 and prepared by Carl Borsari Associates, Incorporated, states at page 2 that some of the mold in the master bedroom was painted over. This further raises the issue of an attempt to hide the problem from plaintiffs. They also annex pictures of the towel and the can of coil foam cleaning to their papers.

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[4] The Court notes that there was a lengthy delay between the discovery of the mold and the remediation; however, as stated earlier, each party accuses the other of responsibility for the delay.

Defendants contend that they did not attempt to conceal any mold or toxic conditions in the unit. The implication is that the prior owners did this work and attempted to hide problems with their unit. However, the expert reports raise an issue of fact as to whether defendants attempted to conceal the complained of conditions. Even if the prior owner was responsible for some of the alleged concealment, the towel to which the Zinman report refers allegedly was removed in 2008, after the prior owners had evacuated the apartment. Taken together, therefore, plaintiffs' allegations are sufficient to "allege the requisite independent tortious conduct on the part of the [defendants] to preclude dismissal of the breach of fiduciary duty claim against them." Kleinerman v. 245 East 87 Tenants Corp., 74 A.D.3d 448, 449, 903 N.Y.S.2d 356, 358 (1st Dept. 2010).

However, the other two causes of action should be dismissed as duplicative. The gross negligence claim appears to rest on the same assertions as the claim for breach of fiduciary duty. In addition, the facts which form the basis of the nuisance claim stem entirely from Board's contractual obligations. Therefore, it is duplicative of the first cause of action and should be dismissed.

Finally, the Court considers the prong of the motion seeking to dismiss the claim for punitive damages. Punitive damages are awardable only if "a defendant's actions evince a high degree of moral culpability or demonstrate a wanton or reckless disregard for the rights of the plaintiff." Solis-Vicuna v. Notias, 71 A.D.3d 868, 871, 898 N.Y.S.2d 45, 48 (2nd Dept. 2010). The decision of whether to award the damages is reserved for a jury if the allegations and evidence are sufficient to raise a triable issue of fact. The allegations above – that defendants attempted to hide the mold problem in the apartment despite the known health risks associated with mold – are sufficiently egregious to support an award of punitive damages. See id. at 871-72, 898 N.Y.S.2d at 48 (involving failure to remediate lead paint condition); Gruber v. Craig, 208 A.D.2d 900, 901, 618 N.Y.S.2d 84, 84 (2nd Dept. 1994) (involving failure to remediate where problem caused emission of gas into apartment). Vitra, Inc. v. Soho House, LLC, 50 A.D.3d 529, 529, 856 N.Y.S.2d 100, 101 (1st Dept. 2008), on which defendants rely, is distinguishable

from the facts as alleged by plaintiff here. In that action, the First Department found dismissal of the punitive damages claim proper where the defendant "undertook to remediate the problems and accommodate plaintiff, albeit not to plaintiff's satisfaction." Id. In addition, the water leaks in Vitra apparently did not pose any major health risks. Here, on the other hand, plaintiffs allege that defendants actively attempted to hide the problem. Moreover, contrary to defendants' contention and as set forth in more detail above, plaintiffs' allegations are more than "speculative and conjectural." Park Royal Owners, Inc. v. Glasgow, 19 A.D.3d 246, 248, 797 N.Y.S.2d 458, 460 (1st Dept. 2005).

Conclusion

Based on the evidence submitted to the Court, it appears there is a legitimate dispute as to "what portion of the premises constitute 'common elements' of the condominium subject to the board's obligation to repair." Collins v. Hayden on the Hudson Condominium, 223 A.D.2d 434, 636 N.Y.S.2d 51 (1st Dept. 1996). There also are triable issues concerning defendants' "failure to make the required repairs and whether plaintiff[s] denied [them] access to the apartment" unreasonably. Granirer, 54 A.D.3d at 270, 863 N.Y.S.2d at 398. The Court notes that, in allowing the claim for punitive damages to proceed, it takes no position regarding the ultimate liability of the parties. Moreover, even if defendants ultimately are deemed liable for some or all of the costs of remediation and also must repay some or all of the maintenance costs which plaintiffs have paid throughout their dispute, this does not mean that plaintiffs can show that there has been a breach of fiduciary duty or deliberate misconduct, and/or that punitive damages are awardable. Indeed, a jury may well conclude that defendants' conduct was not tortious but an exercise of their sound business judgment. See Levandusky, 75 N.Y.2d 530, 554 N.Y.S.2d 807. Given these facts and given the prevailing law, it may serve the parties well to mediate and forego the additional time and expense of a trial.

For the reasons above, it is

ORDERED that defendants' motion is granted to the extent of severing and dismissing the third

and fourth causes of action and is otherwise denied; and it is further

ORDERED that plaintiffs' cross-motion is denied.

Dated: 12/13/10

ENTER:

LOUIS B. YORK, J.S.C.