

**Chow v Kshel Realty Corp.**

2011 NY Slip Op 31149(U)

April 27, 2011

Supreme Court, New York County

Docket Number: 115033/02

Judge: Shirley Werner Kornreich

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

PRESENT: **SHIRLEY WERNER KORNREIGH**  
Justice  
S.C.

PART 54

Index Number : 101900/2001  
**CUBE BUILDING HOUSING**  
VS.  
**STARDIAL COMMUNICATIONS**  
SEQUENCE NUMBER : 010  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE 7/20/10  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED  
submitted on Seq  
010 - 014 & 8  
related actions

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

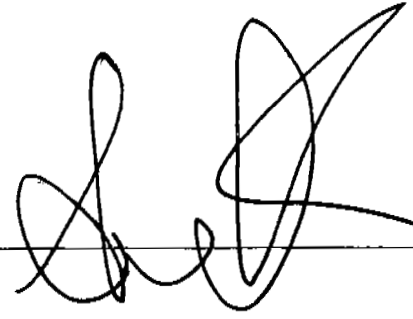
Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum.

**FILED**

APR 28 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 4/27/11

  
J.S.E.

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: IAS PART 54

-----X  
DIANE CHOW, JOSE FIGUEROA, KONG HUA JIAN,  
TSANA YU, TRACY DOYLE, OLGA VILLA,  
INOCENCIA TEJADA, GLADYS FELIPE, BARBARA  
GENTILES, JUAN ORTIZ, JENNY ESTEVEZ,  
SHARMAINE SOTOMAYER, NEGDA RIVERA,  
YI JIE LI, RENEE STALEY, MARITZA VILLAFANE,  
JASMINE GARCIA, PATRICIA THOMPSON,  
MARIA CASTILLO, CARMEN HERNANDEZ and  
JOHARI DANDRADE,

Index No. 115033/02

Plaintiffs,

-against-

KSHEL REALTY CORP., STARDIAL  
COMMUNICATIONS CORP. d/b/a  
IRREPLACEABLE ARTIFACTS, EVAN BLUM,  
and WALTER BLUM,

**FILED**

APR 28 2011

Defendants.

NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
KSHEL REALTY CORP.,

Third-Party Plaintiff,

-against-

Third-Party  
Index No. 591254/02

CITY OF NEW YORK and  
GATEWAY DEMOLITION CORP.,

Third-Party Defendants.

-----X  
GATEWAY DEMOLITION CORP.,

Fourth-Party Plaintiff,

Fourth-Party  
Index No. 590921/03

-against-

STARDIAL COMMUNICATIONS CORP. d/b/a  
IRREPLACEABLE ARTIFACTS and EVAN BLUM,

Fourth-Party Defendants.

-----X  
-----X

DIANE CHOW, JOSE FIGUEROA, KONG HUA JIAN,  
TSANA YU, TRACY DOYLE, OLGA VILLA,  
INNOCENCIA TEJADA, GLADYS FELIPE,  
BARBARA GENTLES, JUAN ORTIZ, DINO ORTIZ,  
JENNY ESTEVEZ, SHARMAINE SOTOMAYER,  
NEGDA RIVERA, YI JIE LI, RENEE STALEY,  
MARITZA VILLAFANE, JASMINE GARCIA,  
PATRICIA THOMPSON, MARIA CASTILLO,  
CARMEN HERNANDEZ, JOHARI DANDRADE  
and EDWARD KNOX,

Plaintiffs,

Index No. 112353/03

-against-

STARDIAL COMMUNICATIONS CORP. d/b/a  
IRREPLACEABLE ARTIFACTS and EVAN BLUM,

Defendants.

-----X  
-----X

MERCHANTS INSURANCE COMPANY a/s/o  
KSHEL REALTY CORP.,

Plaintiff

**FILED**

**APR 28 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

Index No. 118786/01

-against-

CITY OF NEW YORK,

Defendant.

-----X  
-----X

MERCHANTS INSURANCE COMPANY a/s/o  
KSHEL REALTY CORP.,

Plaintiff,

-against-

Index No. 112739/03

GATEWAY DEMOLITION CORP.,

Defendant.

-----X

GATEWAY DEMOLITION CORP,

Third-Party Plaintiff,

-against-

Third-Party  
Index No. 591011/04

STARDIAL COMMUNICATIONS CORP. d/b/a  
IRREPLACEABLE ARTIFACTS, EVAN BLUM,  
KSHEL REALTY CORP. and WALTER BLUM,

Third-Party Defendants.

-----X

-----X

STARDIAL COMMUNICATIONS CORP. d/b/a  
IRREPLACEABLE ARTIFACTS AND STARDIAL  
COMMUNICATIONS CORP., as agents for consignors,  
secured parties and title holders of personalty,

Plaintiffs,

-against-

Index No. 115483/00

THE CITY OF NEW YORK, NEW YORK CITY  
DEPARTMENT OF BUILDINGS, RONNY LIVIAN,  
Manhattan Borough Superintendant for Department  
of Buildings, RICHARD VISCONTI, Commissioner  
of Department of Buildings, MANHER SHAH, P.E.,  
Deputy Borough Superintendant for the Borough of  
Manhattan for the Department of Buildings, NEW YORK  
CITY DEPARTMENT OF HOUSING PRESERVATION  
AND DEVELOPMENT, NEW YORK CITY  
DEPARTMENT OF SANITATION, NEW YORK CITY  
POLICE DEPARTMENT, NEW YORK FIRE  
DEPARTMENT, NEW YORK CITY OFFICE OF  
EMERGENCY MANAGEMENT, and  
GATEWAY DEMOLITION,

Defendants.

-----X

THE CITY OF NEW YORK,

**FILED**

**APR 28 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

Third-Party Plaintiff,

-against-

EVAN BLUM, EVAN BLUM a/k/a IRREPLACEABLE ARTIFACTS, STARDIAL COMMUNICATIONS CORP. d/b/a IRREPLACEABLE ARTIFACTS and STARDIAL COMMUNICATIONS CORP., KSHEL REALTY CORP., KRC REALTY CORP., WALTER BLUM, CITIBANK, N.A., the Land and Building known as 14 SECOND AVENUE, Block 442, Lot 6, County of New York City and State of New York, and "JOHN DOE", and "JANE DOE", fictitious names, true names unknown, the parties intended being all other persons and/or entities claiming any right, title or interest in the real properties which are the subject of this action,

Third-Party Defendants.

-----X  
-----X

CUBE BUILDING HOUSING DEVELOPMENT FUND COMPANY, INC.,

Plaintiff,

-against-

STARDIAL COMMUNICATIONS CORPORATION, EVAN BLUM, WALTER BLUM, and KSHEL REALTY CORP.,

Defendants.

-----X  
KSHEL REALTY CORP.,

Third-Party Plaintiff,

-against-

CITY OF NEW YORK and GATEWAY DEMOLITION CORP.,

Third-Party Defendants.

**FILED**

**APR 28 2011**

**NEW YORK  
COUNTY CLERK'S OFFICE**

Index No. 101900/01

Third-Party  
Index No. 590647/02

-----X  
-----X  
CUBE BUILDING HOUSING DEVELOPMENT FUND  
COMPANY, INC.,

Plaintiff,

Index No. 112774/03

-against-

SECOND AVENUE AND HOUSTON CORPORATION  
and GATEWAY DEMOLITION CORPORATION,

Defendants.

-----X  
GATEWAY DEMOLITION CORP.,

Third-Party Plaintiff,

Third-Party  
Index No. 591112/03

-against-

STARDIAL COMMUNICATIONS CORP.,  
EVAN BLUM, WALTER BLUM, KSHEL REALTY  
CORP. and ANDREWS BUILDING CORP.,

**FILED**

APR 28 2011

Third-Party Defendants.

-----X  
-----X  
AMERICAN CHANDELIER CORP. and LES GOLD,

NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiffs,

Index No. 600481/01

-against-

KSHEL REALTY CORP., WALTER BLUM and  
EVAN BLUM,

Defendants.

-----X  
KSHEL REALTY CORP.,

Third-Party Plaintiff,

Third-Party  
Index No. 590651/01

-against-

CITY OF NEW YORK and GATEWAY  
DEMOLITION CORP.,

Third-Party Defendants.

-----X  
-----X

PEERLESS INSURANCE COMPANY, as subrogee  
of MAISON GERARD, LTD.,

Plaintiff,

Index No. 109587/03

-against-

KSHEL REALTY CORP., WALTER BLUM,  
EVAN BLUM and STARDIAL COMMUNICATIONS,

Defendants.

-----X  
KSHEL REALTY CORP. and WALTER BLUM,

Third-Party Plaintiffs,

-against-

THE CITY OF NEW YORK and GATEWAY  
DEMOLITION CORP.,

Third-Party Defendants.

-----X  
SHIRLEY WERNER KORNREICH, J:

Third-Party  
Index No. 590467/10

**FILED**

**APR 28 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

The following 9 actions and 26 motions are consolidated for disposition: motion  
sequence numbers 5, 6, 7, 8 and 9 under Index Number 115033/02; motion sequence number 2  
under Index Number 112353/03; motion sequence numbers 1 and 2 under Index Number  
118786/01; motion sequence numbers 2, 3 and 4 under Index Number 112739/03; motion  
sequence numbers 6, 7 and 8 under Index Number 115483/00; motion sequence numbers 10, 11,  
12, 13 and 14 under Index Number 101900/01; motion sequence number 2 under Index Number

112774/03; motion sequence numbers 4, 5, 6, 7 and 8 under Index Number 600481/01; and motion sequence number 2 under Index Number 109587/03.

These actions arise out of the partial wall collapse of the building located at 14 Second Avenue in New York City (the Building), on July 13, 2000. The collapse and, according to certain parties, the subsequent demolition work performed at the Building, caused damage to the Building, its commercial tenants, and the neighboring building at 16 Second Avenue (the Cube Building) and its residents. The parties in these actions seek to recover damages resulting from the collapse and the demolition work ordered by the City of New York (City) and performed by Gateway Demolition Corp. (Gateway), after the collapse. The various defendants assert cross- and counterclaims against each other for indemnification and contribution, in many instances commencing separate third and fourth-party actions.

Nearly all of the parties now move for summary judgment on liability and seek dismissal of the claims asserted against them. In addition, the City and Gateway request leave to amend their pleadings to assert the affirmative defenses of res judicata and collateral estoppel. Gateway also seeks leave to amend to add the statute of limitations as a defense in actions involving the Cube Building.<sup>1</sup>

The underlying facts of these cases were stated in detail in this court's decision and order in *Cube Bldg. Hous. Dev. Fund Co. v Stardial Communications Corp. et al.* (Sup Ct, NY County, Feb. 10, 2006, Kornreich, J., Index No. 101900/01) (2/10/06 Decision), in several other decisions issued by this court, and in a federal action styled *Kshel Realty Corp. v City of New*

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<sup>1</sup> The papers before the court on these motions are voluminous, comprising 40 litigation boxes. The motions range from direct and subrogated claims of injured building tenants to the City's claims for civil penalties flowing from a public nuisance.

*York* (2006 WL 2506389, 2006 US Dist LEXIS 62220 [SD NY 2006], *aff'd* 293 Fed Appx 13 [2d Cir 2008]) (Federal Action). The court presumes familiarity with these decisions, and the facts are not restated here, except as are necessary to resolve the instant motions.

*I. The First Cube Building Action (Index No. 101900/01)(Mot. Seq. Nos. 10, 11, 12, 13 & 14)*

The plaintiff in this action, Cube Building, is the owner of 16 Second Avenue, a residential cooperative apartment building situated to the north of and abutting the Building. Defendant Kshel Realty Corp. (Kshel) owns the Building, and defendant Stardial Communication Corp., d/b/a, Irreplaceable Artifacts (Stardial), was a Building tenant pursuant to a lease with Kshel. Evan Blum is Stardial's owner, and Walter Blum, Evan's father, owns Kshel. The Cube Building's two-count, amended complaint seeks recovery for property damage sustained when the Building collapsed. It alleges negligence by Kshel, Stardial and the Blums and asserts a separate negligence cause of action against Walter Blum. That action claims that Walter Blum provided defective architectural designs for Stardial and Evan Blum in connection with improvements made to the Building and that these designs caused the Building to collapse.

Stardial and Evan Blum assert a cross -claim against Walter Blum for indemnification and contribution. Walter Blum, in turn, seeks contribution from his co-defendants. Kshel answered the amended complaint and also commenced a third-party action against the City and Gateway, who demolished the Building after the wall collapse, claiming that any damage suffered by the Cube Building was caused by the negligence of the City and Gateway. Kshel asserts causes of action for contribution and common law indemnification against the City and Gateway.

The City counterclaims against Kshel, Stardial, and Walter and Evan Blum for: penalties for nuisance violations; negligence; restitution; indemnification; unjust enrichment for the cost of the demolition work; and compensatory and punitive damages. Additionally, the City asserts three cross-claims against Gateway for indemnification and apportionment of responsibility. Gateway cross-claims against Stardial, Kshel, the City, and Evan and Walter Blum for apportionment of responsibility and against Kshel for indemnification and contribution.

*A. Cube Building's Summary Judgment Motion on Liability (Mot. Seq. No. 13)*

Plaintiff, Cube Building, moves for summary judgment on liability against Kshel, Stardial and the Blums. It argues that the criminal convictions of Walter and Evan Blum for reckless endangerment, based upon the wall collapse (the Criminal Action), and the harm suffered by the Cube Building as a result, establishes their negligence.

“To establish a prima facie case of negligence, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom.” *Solomon v City of New York*, 66 NY2d 1026, 1027 (1985). “Issues of negligence, foreseeability and proximate cause involve the kinds of judgmental variables which have traditionally, and soundly, been left to the finders of fact to resolve even where the facts are essentially undisputed.” *Rotz v City of New York*, 143 AD2d 301, 304 (1st Dept 1988) (citations omitted).

Previously, in motion sequence number 9, Cube Building moved for summary judgment on liability, on the theory that defendants' liability for damages had been collaterally determined in the Criminal Action. This court denied the motion, finding that the issue of causation was not litigated in the Criminal Action (2/10/06 Decision, at 5-6) and that “issues of whether, and to

what extent, the damage to plaintiff's property was caused by defendants and/or third-party defendants, must be determined by the trier of fact." *Id.* at 6. The court's denial of the Cube Building's motion was without prejudice to renewal, once a decision was rendered in the Federal Action. *Id.* at 7.

The court in the Federal Action, however, did not resolve the issue of causation although it made a determination as to the City's and Gateway's negligence. Moreover, as discussed in further detail below, none of the evidence submitted on the 26 motions presently before the court, establishes causation as a matter of law.<sup>2</sup> Consequently, the Cube Building's motion for summary judgment on liability and motion seeking to hold Kshel, Stardial, and Evan and Walter Blum jointly and severally liable, are denied.

*B. Evan Blum's and Stardial's Motion for Summary Judgment (Motion Seq. No. 11)*

Evan Blum and Stardial (together, Stardial Defendants) argue that the Cube Building's injury was not a reasonably foreseeable consequence of their conduct. They also argue that the Cube Building's damages were caused solely by Gateway's negligent demolition of the Building, as supervised and directed by the City.

*1. Foreseeability*

The Stardial Defendants argue that there was no foreseeable risk, triggering a duty of care owed to the Cube Building, because the portion of the Building that collapsed was neither

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<sup>2</sup> The Cube Building concedes that "no damages were ever **observed** until well after the demolition had been ordered and undertaken." Observed. Not occurred. Observed." 7/9/10 Leavy Reply Aff., ¶ 15 (emphasis in original), quoting the brief of Evan Blum and Stardial. As discussed in greater detail below, the Cube Building's argument underscores the unresolved factual issue of whether the collapse damaged the Cube Building, or whether the Cube Building was damaged prior to the collapse and the damages were exposed only after the abutting north wall of the Building came down during demolition.

adjacent to nor in contact with the Cube Building. The collapse occurred on the south side of the Building; the Cube Building was situated to the north of the Building.

“The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension.” *Palsgraf v Long Island R. Co.*, 248 NY 339, 344 (1928). Moreover, “[a] landowner who engages in activities that may cause injury to persons on adjoining premises surely owes those persons a duty to take reasonable precautions to avoid injuring them.” *532 Madison Ave. Gourmet Foods v Finlandia Ctr.*, 96 NY2d 280, 290 (2001). Tenants, such as the Stardial Defendants, also owe a duty of care, as “[l]iability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of such premises.” *See Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 296 (1st Dept 1988). Thus, it is black letter law that the owner and tenants of the Building owed a duty of care to adjoining premises. *See Church v Callanan Indus.*, 99 NY2d 104, 110-11 (2002) (“[t]he existence and scope of a duty of care is a question of law for the courts”).

It cannot be seriously disputed that the collapse of a weight-bearing wall could compromise the structural integrity of the Building, creating a foreseeable risk of injury to other tenants of the Building and adjacent premises. *See e.g. Worth Distribs. v Latham*, 59 NY2d 231, 238 (1983) (“[t]he defect in this case involved a structural problem -- an ever-widening crack in a major weight-bearing wall -- that was central to the entire building. Likewise, the resulting collapse obviously affected the structure as a whole”). In addition, prior to the collapse, a “Notice of Violation and Hearing,” was issued by the City to the Building on May 3, 2000 for “work without a permit” (City Exhibits, Ex. O), and a “Stop Work Order,” issued on May 4,

2000 (Stop Work Order) (*id.*, Ex. P). The Notice and Stop Work Order should have alerted the Stardial Defendants to a “risk reasonably to be perceived,” defining “the duty to be obeyed” concerning the tenants of the Building and the Cube Building. *See Palsgraf*, 248 NY at 344. Indeed, Evan Blum admitted that, although he had been informed that the Stop Work Order had not been lifted, he nevertheless had his workers continue performing brickwork on the Building in the days preceding the collapse. City Exhibits, Ex. VV, at 563-65. The foreseeability argument, thus, fails.

## 2. Causation

The Stardial Defendants’ argument on causation fares no better because, as they affirmatively argue in their brief, “[t]he issue of ‘[p]roximate cause is a question of fact for the jury where varying inferences are possible.’” *Sweeney v Bruckner Plaza Assoc.*, 57 AD3d 347, 348 (1st Dept 2008) (citation omitted). Here, the evidence shows not only varying inferences but also contradictory factual assertions. The credibility issues raised cannot be resolved by this summary judgment motion. *See, Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-11 (1st Dept 2010) (“[t]he court’s function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues, or to assess credibility [internal citations omitted]”). In short, none of the evidence before the court conclusively establishes, as a matter of law, when the cracks in the Cube Building occurred or that the Stardial Defendants did not proximately cause damage to it.

The Stardial Defendants rely upon reports and deposition testimony from the City’s Department of Buildings (DOB) and the Department of Housing Preservation and Development (HPD) to demonstrate that damage to the Cube Building was caused by the City’s decision to

demolish the Building, or the demolition work performed by Gateway. Am Islam, the DOB's Assistant Chief Inspector for Manhattan Construction Division, reported a "total collapse" and "structural defects/cracks" of certain bearing walls of the Building. Boyce Aff., Ex. F. Islam reported that, "at some point," the Cube Building was leaning against the Building, and that "due to demolition of [the Building], the [Cube Building] started structural cracks at southeast corner." *Id.*, Ex. I. After the partial collapse, Islam "saw some cracks" in the southeast corner of the Cube Building, in the area of the elevator shaft that adjoined the Building. Islam Tr., *id.*, Ex. L, at 77, 79. However, Eugene McArdle (McArdle), HPD's Director of Demolition, and Kenneth Frohlick (Frohlick), Gateway's president, testified that a crack was discovered on the corner of the Cube Building the day after the partial collapse, but the crack was not visible at the time of the demolition because the two buildings were touching, so that the Building was "blocking" the Cube Building. McArdle Tr., Boyce Aff., Ex. J, at 129, 131, 191, 165, 201; Frohlick Tr., 65, 74-76, 194. Frohlick testified that, because the walls of the two buildings were attached, "[t]here is no way you could take down that wall [referring to the north wall of the Building] without taking down the rest of it [referring to the south wall of the Cube Building]." *Id.* at 79. None of these individuals knew what caused the cracks in the Cube Building. *See e.g.*, McArdle Tr., at 235; Islam Tr., *id.*, Ex. L, at 114 - 117.

The DOB's "Night Emergency Squad Log" contains several entries from July 13 to 16, 2000. One entry relied upon by the Stardial Defendants states that "[f]reight elevator shaft demolition approx. 3/4 complete when structural cracks develop at east rear corner between 5 & 6 stories and 6th & 7th stories." *Id.*, Ex. G. While this entry suggests that structural cracks may have developed during demolition, it is at odds with the above-referenced deposition testimony

of Islam, McArdle and Frohlick. It also is at odds with the deposition testimony of Diane Chow (Chow), a tenant in the Cube Building and a plaintiff under Index Numbers 115033/02 and 112353/03. Chow testified that, at the time of the collapse, she “heard a loud explosion with a lot of smoke,” and she “*saw the side wall broke off, like some of it went down in the shaft*, the stuff that came in through the window [of the Cube Building], that broken glass and stuff ... .” 5/1/03 Chow Tr., at 24, 26 (emphasis added). Yu, another resident of the Cube Building, stated that “[t]he Cube building suffered loose bricks, and penetration by floor joists from the adjoining building, 14 Second Avenue, immediately after the collapse, all along its south wall, at several levels.” Yu Aff., ¶ 6.

Photographs of the Building and the surrounding area, including the Cube Building, taken the day of the collapse and later in the month of July, show damage to the Building and the Cube Building, but fail to establish causation as a matter of law. Taken together, the evidence submitted presents conflicting explanations as to the proximate cause of damage to the Cube Building.

The expert report of Kimball J. Beasley, which states that the Building’s elevator shaft was “attached to” the Cube Building (Beasley Aff., ¶ 11), does not change this result. Beasley’s conclusions are based upon his review of: television and radio news coverage; the Grand Jury Indictment of Evan and Walter Blum; a report from the Occupational Safety and Health Administration, dated October 10, 2000; deposition transcripts; and inspection of the Building and the Cube Building after the collapse and demolition. Beasley testified that he “wasn’t able to tell with any certainty what caused the [southern wall to] collapse.” Kurland Aff., Ex. XX, at 1274. And, conspicuously missing from Beasley’s expert opinion are the specific facts revealed

by his investigation, the facts that he relied upon in reaching his conclusions, and any objective tests performed and the reasons for his conclusions. His affidavit fails to make a prima facie showing in support of the Stardial Defendants' motion. See *Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 533 (1991) (“[i]nasmuch as we read plaintiff’s expert’s affidavit as containing only bare conclusory assertions ..., it was insufficient to raise a triable issue of fact, sufficient to defeat [the] motion for summary judgment”); CPLR § 3101(d) (“each party ... shall disclose in reasonable detail ... a summary of the grounds for each expert’s opinion”). For the foregoing reasons, the evidence submitted by the Stardial Defendants fails to establish proximate cause or the lack thereof, but rather, underscores the existence of factual issues that require denial of summary judgment at this juncture in the litigation.

Nor is the Stardial Defendants’ intervening cause argument availing. The Stardial Defendants contend that the “wrongful” demolition ordered by the City and “improperly carried out” by Gateway constituted an intervening act and superseding cause that broke the causal connection between the acts of the Stardial Defendants and the damage sustained by the Cube Building. Although “[a]n independent intervening act may constitute a superseding cause and be sufficient to relieve a defendant of liability” (*Gordon v Eastern Ry. Supply* (82 NY2d 555, 562 [1993])), the Stardial Defendants are collaterally estopped from arguing that the City and Gateway were negligent in performing the demolition work, as discussed in further detail below. *I(D)(2) & (3), infra*. In any event, for the same reasons discussed above, the evidence does not establish the cause of the Cube Building’s damages.

### 3. *Contribution & Indemnification*

The Stardial Defendants also argue that the claims against them for contribution and

indemnification should be dismissed because they owed no duty to the Cube Building. To be entitled to contribution, a party must establish that the party against whom contribution is sought owed a duty to the plaintiff, a breach of that duty, and that the breach contributed to the plaintiff's injuries. *Schauer v Joyce*, 54 NY2d 1, 5 (1981). As discussed above [*I(B)(1)*, *supra*], the Stardial Defendants did owe a duty of care to the Cube Building. Moreover, "[t]he critical requirement for apportionment ... is that the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought." *Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 603 (1988). The factual issue of "the degree of responsibility each wrongdoer must bear for causing the injury" remains outstanding, further supporting denial of the motion. *See County of Westchester v Welton Becket Assoc.*, 102 AD2d 34, 46 (2d Dep 1984), *aff'd* 66 NY2d 642 (1985).

The only indemnification claim in this action asserted against the Stardial Defendants is the third counterclaim contained in the City's answer to Kshel's third-party complaint. "Indemnity ... involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another person who should more properly bear responsibility for that loss because he was the actual wrongdoer." *County of Westchester*, at 46-47. The City's indemnification claim is based upon allegations that the Stardial Defendants failed to maintain their property and safeguard the public and public property and, therefore, must indemnify the City for the cost of partially demolishing the Building. *Boyce Aff., Ex. E*, ¶¶ 67 - 73. The City's counterclaim is not based upon any liability to the Cube Building. It is a claim for damages for abatement of a public nuisance. Because summary judgment is granted on the City's second counterclaim for reimbursement based upon the abatement of a public nuisance

(discussed *infra* at *I(D)(4)*), the City's third counterclaim for indemnification in this action, is duplicative of the reimbursement counterclaim. Consequently, the City's third counterclaim is dismissed.

Gateway asserts a cross-claim for contribution against the Stardial Defendants, but fails to clearly plead a cross-claim for common-law indemnification. As argued by the Stardial Defendants in their reply, Gateway does not oppose the Stardial Defendants motion to dismiss any indemnification cross-claim asserted by it. Hence, any purported indemnification claim by Gateway is dismissed.

*C. Walter Blum's and Kshel's Motion for Dismissal (Motion Seq. No. 10)*

*1. Causation, Foreseeability & Intervening Cause*

Walter Blum and Kshel (together, Kshel Defendants) move for summary judgment dismissing the amended complaint. Their motion is based upon the same legal arguments and evidence submitted by the Stardial Defendants in motion sequence number 11, above. For the reasons discussed in connection with the Stardial Defendants' motion [*I(B)(1) & (2), ibid.*], none of this evidence conclusively establishes, as a matter of law, that the Kshel Defendants did not proximately cause damage to the Cube Building, lack of foreseeability, or that the conduct of the City and Gateway were intervening acts and the superseding cause of the damages.

The only additional evidence relied upon by the Kshel Defendants is the deposition testimony of Walter Blum and Gateway worker Brad Colucci. However, Walter Blum admitted that he was neither present at the Building on the date of the partial wall collapse nor aware of the work being performed that day. Walter Blum Tr. 7/9/10, Leavy Aff., Ex. 15, at 106. With respect to Colucci's testimony, the Kshel Defendants argue that "Colucci confirms that the

cracks developed when Gateway was truing [sic] to demolish the elevator shaft which was joined in some fashion with 16 Second Avenue.” Kshel Defendants’ 7/7/10 Opening Brief, at 8. In support of this statement, the Kshel Defendants cite their exhibit R generally, which contains nearly 100 pages of deposition testimony, some of which is barely legible for lack of copy ink. The court’s review of this deposition did not reveal Colucci’s purported confirmatory statement.

Colucci testified that he was an operating engineer hired by Gateway to perform excavation and demolition work at the Building.” Colucci Tr. 7/7/10, Donnelly Aff., Ex. R, at 14. He testified that he was operating an excavation boom for about an hour, when he was told to stop because there was a problem with the Cube Building, which he later learned was a crack. *Id.*, at 54-55. Colucci did not notice any cracks in the Cube Building before he started his demolition work, because the crack was located “in the center, where [he] couldn’t see before [he] started demolishing.” *Id.* at 55-56. He testified that the elevator shaft in the north wall of the Building was “tied into the adjacent building [the Cube Building] at the roof level,” using anchors. *Id.* at 67. Colucci’s testimony merely confirms that an issue of fact exists as to what caused the cracks.

## 2. *Out-of-Possession Landlord*

The Kshel Defendants further argue that, as an out-of-possession landlord, they owed no duty of care to the adjacent landowner. They rely upon *Worth Distribs.* (59 NY2d 231) and *Rosas v 397 Broadway Corp.* (19 AD3d 574 [2d Dept 2005]), which stand for the legal principle that, generally, owners are not liable for injuries when they part with possession and control of their leased premises. However, they may be liable if they retain control or the right to enter, or contract to repair or maintain the property. *Id.*

Here, Walter Blum testified that he was present at the Building as recently as four to six

weeks before the collapse (Walter Blum Tr., at 90), he is a licensed architect (*id.* at 11), and he signed two permit applications and prepared renovation plans for the Building (*id.* at 22, 57-58, 61). He visited the building three or four times a year. *Id.* at 36-37. Plus, in 1998 or 1999, he determined that waterproofing repairs were necessary at the Building (*id.* at 36), since there were “cracks in the building that had to be repaired,” and “we had a violation”. *Id.* at 37. According to Walter Blum, these cracks were in the southeast corner in the upper stories of the Building. *Id.* at 37-38. Less than a year before the collapse, he went to the Building to make several inspections of the waterproofing work that had been done. *Id.* at 90-91

What is more, according to Walter Blum, Second Avenue and Houston Corporation (Second Ave & Houston Corp) was formed to be a prospective tenant of the Building on the first floor, a portion of the basement and possibly a portion of the second floor. Walter Blum Tr., at 40. Second Ave & Houston Corp entered into a lease with Kshel in February 2000 (*id.*) and planned to operate a restaurant which envisioned modification or construction of the premises. *Id.* at 41-46. The two applications for building permits signed by Walter Blum were for plumbing and general construction work in connection with this restaurant. *Id.* at 61-62. One permit application was to be submitted in April of 2000, but according to Walter Blum, it was not filed by the expeditor. *Id.* at 62-63, 73. Nevertheless, the renovation work for the restaurant commenced in April or May of 2000. *Id.* at 65.

Walter Blum testified that, at some point prior to the collapse, additional work commenced at the Building, including removal of brick infill from existing arches (in approximately April of 2000), that he discussed this work with the expeditor and that he did not believe a permit was required for this work. Walter Blum Tr., at 68-69, 77, 85. Walter Blum

discussed with Evan Blum, his tenant, a principal of Second Ave & Houston Corp and his son, the methodology of tying the interior wythe<sup>3</sup> to the middle wythe of the Building (*id.* at 91) and how to install temporary columns to support the weight of the floors during the renovation work. *Id.* at 97-98. He testified that he learned from Evan Blum that a Stop Work Order had been issued with respect to the work being performed at the Building. *Id.* at 74. Presently before the court are: a copy of the DOB's Notice of Violation and Hearing, issued to the "owner" of the Building for work without a permit, dated May 3, 2000 (City's Ex. O); and the DOB's Stop Work Order (*id.*, Ex. P).

In sum, Walter Blum's own testimony demonstrates that, having returned to the Building various times to inspect it and make repairs, and having actively participated in renovation work in the weeks preceding the collapse, he did not "completely part with possession and control of the building." *Worth Distribs.*, 59 NY2d at 238. In fact, he had actual notice of defects in the property, made efforts to remediate them and may have been involved in conduct leading to the collapse.

### 3. Indemnification

The Kshel Defendants next argue that they are entitled to indemnification from the City and Gateway. To establish common-law indemnification, defendants must prove "not only that they were not negligent, but also that the proposed indemnitor ... was responsible for negligence

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<sup>3</sup> According to Walter Blum, the term "wythe" applies to brick work. Walter Blum Tr., at 86. He testified that, in "[m]asonry construction there's an outer wythe of brick which is the thickness of the brick ... , roughly three and a quarter inches." *Id.* at 86-87. In a 12-inch wall, there is "a middle wythe and then an inner wythe which is on the interior facing the building." *Id.* at 87. Blum stated that, "[w]hen you add them all up it's considered a 12-inch masonry wall" comprised of "three wythes of brick." *Id.*

that contributed to the accident or, in the absence of any negligence, had the authority to direct, supervise, and control the work giving rise to the injury.” *Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 808 (2d Dept 2009), quoting *Benedetto v Carrera Realty Corp.*, 32 AD3d 874, 875 (2d Dept 2006). “[T]he owner or contractor seeking indemnity must have delegated exclusive responsibility for the duties giving rise to the loss to the party from whom indemnification is sought.” *17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 80 (1st Dept 1999). If the party seeking indemnification is “held liable at least partially because of its own negligence,” common law indemnity is not a viable remedy and “contribution against other culpable tort-feasors is the only available remedy.” *Glaser v M. Fortunoff of Westbury Corp.*, 71 NY2d 643, 646 (1988); see also *Trump Vil. Section 3 v New York State Hous. Fin. Agency*, 307 AD2d 891, 895 (1st Dept 2003), *lv denied* 1 NY3d 504 (2003) (“[s]ince the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine”).

As yet, no determination has been made concerning the extent of the Kshel Defendants’ negligence, if any, in participating in the events that damaged the Cube Building. Moreover, as discussed more fully below, neither the City nor Gateway were negligent. *I(D)(2)& (3), infra*. Because the indemnitors’ responsibility for the damage must be established to support a claim for common-law indemnification, having determined that the City and Gateway were not negligent, there is no support for the Kshel Defendants’ indemnification claims and, therefore, their indemnification claims against the City and Gateway are dismissed.

In their reply papers, the Kshel Defendants argue for the first time that Walter Blum

should not be held liable in his individual capacity for any actions that caused damage to the Cube Building. Because this argument is improperly raised for the first time in their reply papers, it will not be considered by the Court. *See Leeds v Lenox Hill Hosp.*, 6 AD3d 232, 233-34 (1st Dept 2004); *see also Schultz v 400 Coop. Corp.*, 292 AD2d 16, 21 (1st Dept 2002) (“[t]he consideration of arguments advanced at a time when the opposing party has no opportunity to respond is a procedure that this Court condemned”). In any event, for the same reasons discussed below, *III(A), infra*, in motion sequence number 4 under Index Number 600481/01, factual issues exist which preclude summary judgment on this issue. The Kshel Defendants’ motion for summary judgment is denied in its entirety.<sup>4</sup>

*D. The City’s Motion for Leave to Amend and Summary Judgment (Mot. Seq. No. 12) & Gateway’s Motion for Leave to Amend and Summary Judgment (Mot. Seq. No. 14)*

The City requests leave to amend its third-party answer to add *res judicata* and collateral estoppel as affirmative defenses. It also moves for summary judgment dismissing all claims asserted against it on those grounds and seeks summary judgment on its claims for damages and civil penalties against the Stardial and Kshel Defendants.

Similarly, Gateway seeks to amend its third-party answer to assert collateral estoppel, *res*

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<sup>4</sup> The court notes that, in support of their motion, the Kshel Defendants also submit the deposition testimony of the following individuals: Livian; James Cheng (Cheng), a Plan Examiner for the DOB at the time of the incident that gave rise to this action and, at the time of his deposition, a Senior Auditor for the DOB’s technical compliance unit; Krzysztof Noga (Noga), a Gateway foreman and laborer; Mieczylaw Bielen (Bielen) and Andrzej Przytula (Przytula), employees of Evan Blum who performed renovation work at the Building in July 2000; Les Gold (Gold), the president of American Chandelier Corp. (American Chandelier); and Evan Blum. The Kshel Defendants refer to this testimony in their attorney’s supporting affidavit, but not in their memorandum of law. The court’s independent review of this testimony found nothing that would support granting the Kshel Defendants’ motion. If anything, this evidence further underscores the existence of factual issues that preclude summary judgment on the issue of causation.

judicata and the statute of limitations. Gateway also moves for summary judgment dismissing the various negligence claims asserted against it, and for dismissal of all third-party, counter and cross-claims asserted against it for contribution and indemnification, grounded in negligence.

*1. Leave to Amend*

Under CPLR 3025(b), leave to amend a pleading will be freely granted “in the absence of prejudice or unfair surprise.” *Aetna Cas. and Sur. Co. v LFO Constr. Corp.*, 207 AD2d 274, 277 (1st Dept 1994). “[L]eave to amend ... is not granted upon mere request without a proper showing. Rather, in determining whether to grant leave to amend, a court must examine the underlying merit of the causes of action asserted therein, since, to do otherwise would be wasteful of judiciary resources.” *Wieder v Skala*, 168 AD2d 355, 355 (1st Dept 1990). “Once a prima facie basis for the amendment has been established, that should end the inquiry ... .” *Hospital for Joint Diseases Orthopaedic Inst. v James Katsikis Envtl. Contr.*, 173 AD2d 210 (1st Dept 1991).

Here, the City’s and Gateway’s request for leave to amend to add res judicata and collateral estoppel has merit. As stated by the Court of Appeals:

res judicata, or claim preclusion, bars successive litigation based upon the same transaction or series of connected transactions if: (i) there is a judgment on the merits rendered by a court of competent jurisdiction, and (ii) the party against whom the doctrine is invoked was a party to the previous action, or in privity with a party who was.

*People ex rel. Spitzer v Applied Card Sys., Inc.*, 11 NY3d 105, 122 (2008) (internal quotation marks and citation omitted). “Generally, to establish privity the connection between the parties must be such that the interests of the nonparty can be said to have been represented in the prior proceeding.” *Green v Santa Fe Indus.*, 70 NY2d 244, 253 (1987).

Collateral estoppel is “a narrower species of res judicata,” which “precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same.” *Ryan v New York Tel. Co.*, 62 NY2d 494, 500-01 (1984). “What is controlling is the identity of the issue which has necessarily been decided in the prior action or proceeding.” *Id.* The issue in the prior action “must be the point actually to be determined in the second action or proceeding such that ‘a different judgment in the second would destroy or impair rights or interests established by the first.’” *Id.* at 501 (citations omitted). The doctrine of collateral estoppel “is a flexible one, and the enumeration of these elements is intended merely as a framework, not a substitute, for case-by-case analysis of the facts and realities.” *Buechel v Bain*, 97 NY2d 295, 304 (2001).

Kshel and Stardial were the plaintiffs in the Federal Action. The defendants were the City, the DOB, HPD, various City employees, Gateway, Noga, and John Does 1-X. The action arose from the City’s demolition of the Building after the wall collapse. The complaint in the Federal Action asserted claims against the City seeking: a declaration that section 26-127 of the New York City Administrative Code is unconstitutional; damages for violations of federal procedural and substantive due process; damages for violating the New York State Constitution; injury to property, conversion and wrongful demolition; forcible/unlawful entry and detainer; negligence; replevin; an accounting; indemnification; and attorneys’ fees. Claims for, *inter alia*, trespass, injury to property, wrongful demolition and conversion were alleged against Gateway. Kshel and Stardial moved for summary judgment on the claim for declaratory relief, and the City (including the DOB, HPD and the individual City employees) and Gateway cross-moved for

summary judgment dismissing the complaint.

The federal court denied Kshel and Stardial's motion but granted the City's cross-motion to dismiss the federal due process and state constitutional claims. The court also dismissed the state trespass claim, finding that "[t]he City's Immediate Emergency Declaration did not violate due process and provided the City and Gateway with the right to lawfully enter onto [the] property." *Kshel Realty Corp.*, 2006 WL 2506389, \*10, 2006 US Dist LEXIS 62220, \*36. Additionally, the court granted the City's motion for summary judgment dismissing Kshel and Stardial's claims of tortious conduct, including claims for conversion, forcible and unlawful entry and detainer, negligence, replevin, accounting, and indemnification. The court stated:

As for the torts relating to the City's demolition of Plaintiffs' Building, Defendants entered Plaintiffs' property lawfully and demolished the dangerous Building pursuant to a lawful Immediate Emergency Declaration (see discussion above). As for the torts relating to the theft of Plaintiffs' artifacts, there is no testimony suggesting that the City assisted or was even aware that these artifacts were being removed and sold to a competitor. As discussed above, [the competitor] testified that he was only at the Building one time, that it was at night, and that he was dressed like other demolition employees to avoid notice. He also testified that all the artifacts he bought were transported in the same demolition trucks used to remove debris and brought to another location a few blocks away, where he then allegedly paid [Gateway's employee] for them. As in the state trespass claim, while the complaint seeks to hold the City responsible for any tortious conduct on the basis of an alleged conspiracy, the "bald allegation of conspiracy simply is not enough at the summary judgment stage." *Wantanabe*, 315 F. Supp. 2d at 395. There is simply no evidence in the record from which a jury could draw a reasonable inference of tortious conduct by the City.

*Kshel Realty Corp.*, 2006 WL 2506389, \*11, \*37-38. The complaint in the Federal Action was dismissed in its entirety against the City.

The court denied Gateway and its employee's motion for dismissal of the claim for

tortious conduct, because the plaintiffs had “submitted evidence raising a triable issue of fact that at least two Gateway employees qualify as superior officers and engaged in or ratified intentional wrongdoing.” *Kshel Realty Corp.*, 2006 WL 2506389, \*12, 2006 US Dist LEXIS 62220, \*40. However, the court dismissed the trespass, injury to property and wrongful demolition claim against Gateway. The Second Circuit affirmed the decision. 293 Fed Appx 13 (2nd Cir 2008).

The Federal Action did not give rise to the proposed affirmative defenses of res judicata and collateral estoppel until decisions were issued by the Southern District in 2006 and the Second Circuit in 2008, long after the original pleadings were served and filed in this case. The Federal Action arose from the same incidents that gave rise to the instant actions, involved the same parties against whom the proposed defenses are now invoked, and raised issues at stake here. For that reason, this action was stayed pending the outcome of the motions in the Federal Action. The proposed amendments create no prejudice or surprise and require no further discovery. Consequently, the court grants the City’s and Gateway’s motions for leave to amend to add res judicata and collateral estoppel as affirmative defenses.

Gateway also seeks to supplement its third-party answer to assert the affirmative defense of the statute of limitations. This application is denied. Gateway’s proposed statute of limitations defense seeks to limit the damages claimed by Atlantic Mutual Insurance Company, on behalf of the Cube Building. However, for the reasons discussed below, Gateway is not liable for damages to the Cube Building (*I(D)(3), infra*), rendering its statute of limitations defense moot.

## 2. City’s Dismissal Motion

The complaint in the Federal Action alleged that the City “had no legitimate authority to

order the destruction of the Building” (City Exhibits, Ex. YY-1, ¶ 126) and “had no legal right to enter the premises or to demolish the Building (*id.*, ¶ 127), that the City’s “actions in entering upon Plaintiff’s property, removing property, and demolishing the Building were wrongful and constitute conversion, injury to property, and an unlawful trespass to property” (*id.*, ¶ 129), that the City “wrongfully ousted Plaintiff Stardial from lawful possession of the subject premises” (*id.*, ¶ 133), and that the City’s “actions in entering upon Plaintiff’s property, removing property, and demolishing the Building constitute wrongful eviction, forcible entry and detainer” (*id.*, ¶ 134). Also before the court in the Federal Action were allegations that the City “had a duty to minimize the damage to Plaintiff’s property in conducting the demolition” (*id.*, ¶ 139) and that the City’s:

actions in failing to shore the [B]uilding, failing to adequately supervise its workers, failing to take all reasonable safety precautions, utilizing mechanical demolition procedures and a crane in violation of the Building Code and Administrative Code of the City of New York, hastening work to avoid judicial injunction, and in failing to adequately protect the property of Plaintiffs, were negligent, reckless and careless under all the circumstances then and there existing.

*Id.*, ¶ 140.

In the Federal Action, Kshel and Stardial also included among their allegations of wrongful conduct committed by the City, the demolition of the Building, the conversion and destruction of their property, and the allegation that “adjoining structures were compromised.” *Id.*, ¶ 141. They claimed that “items of value were looted and unlawfully removed from the subject premises” and either “remain within the possession of the Defendants, or have been sold to the business competitors of Stardial” (*id.*, ¶¶ 145-46), and that Kshel and Stardial are entitled to indemnification as a result of third-party claims asserted, and litigation commenced, against

them. *Id.*, ¶¶ 150-51.

So, although the Cube Building was not a party to the Federal Action, the claims in the instant actions are the same claims and legal issues resolved in the Federal Action. The federal court explicitly found that the City was not negligent and did not engage in tortious conduct. These claims are barred by collateral estoppel and may not be relitigated here. The federal court, however, did not dismiss Gateway's cross-claim against the City for apportionment of responsibility and liability, declining to exercise jurisdiction over this claim. *Kshel Realty Corp.*, 2006 WL 2506389, \*14, 2006 US Dist LEXIS 62220, \*48-49. Because negligence must be established to support a claim for contribution or common law indemnification, there is no support for Gateway's cross-claim. *Schauer*, 54 NY2d at 5; *Trump Vil. Section 3, Inc.*, 307 AD2d at 895; *Bellefleur*, 66 AD3d at 808. For the same reason, there is no support for any claims against the City in the instant actions, all of which are based upon the City's negligence or theories of contribution and indemnification. Accordingly, the City's motion for dismissal is granted in its entirety.

### 3. Gateway's Dismissal Motion

Gateway too argues that it is not liable in tort for claims arising out of its performance of the Immediate Emergency demolition contract, based upon the decision in the Federal Action.

The court agrees.

In the Federal Action, the court held that:

Although Gateway was acting under the City's Immediate Emergency Declaration, *their acts did not involve any exercise of discretion*. Ken Frohlick, Gateway's President, was present during the entire demolition and testified that the City was the entity making the decisions at all times. (Frohlick Dep. 32, 13 (The City told Gateway what equipment and manpower was needed;

Gateway worked under their specific direction, supervision, and control.); 15 (Gateway followed the City's instructions on obtaining necessary permits.); 90 (The City was in charge of all access to the site during the demolition.)

*Kshel Realty Corp.*, 2006 WL 2506389, \*12, 2006 US Dist LEXIS 62220, \*42 (emphasis added). Moreover, the evidence submitted by the Kshel Defendants themselves supports the conclusion that Gateway employees, other than Frohlick, received their instructions from the City. 7/9/2010 Donnelly Aff., ¶ 77 (“Colucci received his instructions from Richard Lotito” of HPD) and ¶ 78 (Noga testified that “all of the instructions that he received were given by the City”). If Gateway was acting without discretion, then *a fortiori*, it could not have breached a duty by its work. Therefore, Gateway has made a prima facie showing of its entitlement to summary judgment of dismissal. *Quinn v Nigro Bros.*, 216 AD2d 281 (2d Dept 1995) (contractor awarded summary judgment based upon showing that the government provided “a lane closure plan and determined how it was to be implemented on the bridge”).

Notwithstanding, the Kshel Defendants, relying upon *Coakley v City of New York* (270 AD2d 150 [1st Dept 2000]) and *White v Humphrey* (245 AD2d 1068 [4th Dept 1997]), argue that, “[i]f directed by the City to act in a manner which is not in keeping with accepted industry standards, Gateway should not have blindly followed the City’s instructions but rather should have carried out the demolition in the appropriate manner.” 7/9/10 Donnelly Aff., ¶ 111. In essence, the opposition papers rely, generally, upon the legal principle that “[a] builder or contractor is justified in relying upon the plans and specifications which he has contracted to follow unless they are so apparently defective that an ordinary builder of ordinary prudence would be put upon notice that the work was dangerous and likely to cause injury.” *Peluso v ERM*, 63 AD3d 1025, 1026 (2d Dept 2009), citing *Ryan v Feeney & Sheehan Bldg. Co.*, 239 NY

43, 46 (1924).

Neither the Kshel Defendants nor the Stardial Defendants identify any evidence suggesting that the City's instructions and specifications were defective, such that Gateway would be put on notice that its work was dangerous and likely to cause injury. *Coakley* and *White* are distinguishable on their facts. As a result, these defendants fail to rebut Gateway's prima facie showing, and the negligence claims asserted by the Cube Building against Gateway are dismissed. Having determined that Gateway was not negligent, there is no support for the contribution and indemnification claims asserted against Gateway. Accordingly, Gateway's motion for summary judgment of dismissal is granted and the claims, third-party claims, counterclaims and cross-claims against it in the Cube Building action, are dismissed.

#### 4. *City's Counterclaims*

The City argues that it is entitled to summary judgment on its counterclaims against Evan and Walter Blum, Stardial and Kshel for reimbursement of demolition-related expenses (*e.g.*, \$247,351.44 paid by HPD to Gateway), civil penalties of \$1,000 per day for the maintenance of a nuisance, indemnification for any judgments obtained against it, and punitive damages. The City relies upon title 27, chapter 1, subchapter 1, article 6 of the New York City Administrative Code, which is titled "Maintenance." The City cites sections 27-127 and 27-128, both of which were repealed in 2008 but in effect in 2000, the time period relevant to this action. Section 27-127, titled "Maintenance requirements", provides:

All buildings and all parts thereof shall be maintained in a safe condition. All service equipment, means of egress, devices, and safeguards that are required in a building by the provisions of this code or other applicable laws or regulations, or that were required by law when the building was erected, altered, or repaired, shall be maintained in good working order.

Section 27-128, titled “Owner responsibility”, provides that “[t]he owner shall be responsible at all times for the safe maintenance of the building and its facilities.”

In addition, section 26-235 of the Administrative Code (also repealed and superseded by new provisions in 2008, but in effect in 2000) provides that “[a]ny structure or part of a structure or premises that from any cause may at any time become dangerous or unsafe, structurally or as a fire hazard, or dangerous or detrimental to human life, health or morals, shall be taken down and removed or made safe and secure.” *See Idlewild 94-100 Clark, LLC v City of New York*, 27 Misc 3d 1006, 1016 (Sup Ct, Kings County 2010) (“DOB has the authority to determine and declare buildings to be in a state of immediate emergency under, *inter alia*, New York City Charter § 643 and Administrative Code of the City of NY §§ 26-235, 26-243, and 26-127”).

Finally, section 7-703(d) of the Administrative Code provides that “[a]ny building, erection or place, other than a one- or two-family dwelling classified in occupancy group J-3 pursuant to section 27-237 of this code, which is in violation ... of article ... six... of subchapter one of chapter one of title twenty-seven of this code” shall be “declared to be a public nuisance[.]” In other words, violations of sections 27-127 and 27-128 constitute a public nuisance under the Administrative Code.

The City’s motion is granted as to the Kshel Defendants. The code “provisions generally impose a nondelegable duty upon an owner to safely maintain its premises.” *Beck v Woodward Affiliates*, 226 AD2d 328, 330 (2d Dept 1996), citing *Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 566-67 (1987). An owner is liable under the Administrative Code if it has actual or constructive notice of a defect or dangerous condition on the premises and the ability to remedy the defect, but fails to do so. *Guzman* 69 NY2d at 566-67 (although there was “no

evidence that [the owner] had actual notice of the claimed dangerous condition, its right to reenter the premises is sufficient to charge it with constructive notice,” and “[i]ts failure to act to remedy the defect as it could have done under the lease [was] the basis for its liability under the various provisions of the ... Administrative Code”).

Here, not only did the Kshel Defendants have the right to reenter the Building, Walter Blum testified that he did so in connection with the construction work leading up to the collapse. Walter Blum also admitted that he determined the necessity of maintenance work (Walter Bloom Tr., at 36), inspected the work (*id.* at 90-91), and generally visited the Building three to four times per year. *Id.* at 36-37. As discussed above under motion sequence 10, the Kshel Defendants were not out-of-possession landlords. *I(C)(2), supra*. Sections 27-127 and 27-128 clearly apply to the Kshel Defendants.

The City submits evidence of a violation issued as recently as May 3, 2000 – less than three months prior to the collapse – for violating section 27-147 of the Administrative Code. The “Description of Violation” was:

Noted: Two new door opening in progress penetrating south brick wall approx size 4' - 0" by 8' - 0" high. Application # 101772510 on file to change 1st FL to eating or drinking use which was disapproved 2/25/98 location – 1 FL.

Remedy: Stop all work immediately and obtain permits and approval from the Dept of Buildings.

(City Exhibits, Ex. O).<sup>5</sup> The next day, the parties requested dismissal of the Stop Work Order,

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<sup>5</sup> The City also submits evidence of DOB violations issued at the Building in November of 1993 for “failure to maintain,” in violation of section 27-127 (City Exhibits, Ex., M); and in December of 1997 for “failure to maintain exterior building wall,” also in violation of section 27-127 (*id.*, Ex. N).

but that request was denied with the notation: "not an ordinary repair." *Id.*, Ex. Q. Although Evan Blum admits he was informed that the Stop Work Order had not been lifted, he and his workers testified that they continued performing brickwork on the Building in the days preceding the collapse, between May 3 or 4 and July 13, 2000. *Id.*, Ex. VV, at 563-65; Ex. GG, at 15, 79-81; Ex. HH, at 28-29, 34-35, 91-95.

Furthermore, in September of 2003, Walter and Evan Blum were convicted by a jury of reckless endangerment in the second degree. This criminal conviction was based upon Walter and Evan Blum's conduct from April 2000 to July 13, 2000, the events leading up to and including the partial collapse of the Building. Moreover, the court in the Federal Action determined that there was "ample evidence in the record showing that the City's decision [to invoke an Immediate Emergency] was reasonable," "that the building did pose a danger," and that "the damage to the Building provides ample support that the City had a reasonable belief that the public was in immediate danger." *Kshel Realty Corp.*, 2006 WL 2506389, \*8, 2006 US Dist LEXIS 62220, \*28-29. Hence, any argument that the Building was maintained in a safe condition is barred by collateral estoppel.

In short, the City has made a prima facie showing that the Kshel Defendants failed to maintain the Building in a safe condition under sections 27-127 and 27-128 of the Administrative Code. Having violated sections 27-127 and 27-128 of the Administrative Code, the Kshel Defendants' conduct constituted a public nuisance under section 7-703(d), entitling the City to reimbursement for funds spent demolishing the Building. *See 4M Holding Co. v Town Bd. of Town of Islip*, 81 NY2d 1053, 1055 (1993) (local government "may summarily abate nuisances in this manner [removing debris from property] in appropriate circumstances and

compel property owners to bear the cost of abatement without prior notice”); *Lane v City of Mount Vernon*, 38 NY2d 344, 349 (1976) (“it has long been recognized that when a local government, in the proper exercise of its delegated powers, summarily abates a public nuisance, it may compel the owner of the property involved to bear the cost of abatement”).

The Kshel Defendants’ opposition papers rely upon the same purported expert opinion of Beasley relied upon by the Stardial Defendants above (*I(B)(2)*, *supra*), arguing that complete demolition of the Building was not required given the nature and extent of the wall failure and the structural integrity of the remaining portions of the Building. For the reasons discussed in *I(B)(2)*, *supra*, Beasley’s affidavit is conclusory and “insufficient to raise a triable issue of fact sufficient to defeat [the] motion for summary judgment.” *See Amatulli*, 77 NY2d at 533. In any event, even if accepted, Beasley’s conclusions fail to raise an issue of fact concerning the safe condition, good working order or structural integrity of the Building, all of which are negated by the collapse and the events leading up to it.<sup>6</sup>

The Kshel Defendants argue that Kshel’s corporate veil cannot be pierced to hold Walter

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<sup>6</sup> The Court in the Federal Action considered and rejected the same opinion of Beasley, in analyzing whether the City’s decision to invoke an Immediate Emergency was an abuse of discretion:

Given the overwhelming number of individuals -- individuals from various departments and sectors, including from the DOB, HPD, and the New York City Fire Department -- who testified to the imminent danger of the situation, Plaintiffs’ claims that the Building could have been shored (see Beasley Decl., Evan Blum Decl.) are insufficient to show the City’s decision was arbitrary ... multiple, qualified City officials agreed that there was imminent danger and that the demolition needed to take place immediately.

*Kshel Realty Corp.*, 2006 WL 2506389, \*8 n 13, 2006 US Dist. LEXIS 62220, \*28 n 13.

Blum personally liable. This argument is improperly raised for the first time in the Kshel Defendants' reply papers in motion sequence number 10. In any event, as discussed below [in motion sequence number 4 under Index Number 600481/01, *infra* at *V(A)*], an issue of fact exists as to whether Walter Blum is subject to liability in his personal capacity. Consequently, the City is entitled to summary judgment against Kshel on its claim for reimbursement, but the City's motion for summary judgment on this claim against Walter Blum is denied.

The City's motion also is denied as against the Stardial defendants, tenants of the Building. Sections 27-127 and 27-128 of the Administrative Code "are applicable only to owners of buildings." *Beck*, 226 AD2d at 330. The City's argument that the Stardial Defendants "sometimes claimed to be the owner" of the Building (City's Reply Brief, at 21) is unavailing. A letter from "the attorney for the owner of the building" objecting to its demolition and stating that "Irreplaceable Artifacts reserves its right to hold the City ... responsible for the losses that will be created by destroying the building and prohibiting the owner from first removing its contents" (City Exhibits, Ex. V), does not change this result. Nor does the fact that the Stardial Defendants supervised the construction work performed at the Building, make it an owner. This evidence must be viewed in the context of the family relationship between Walter Blum, as owner of Kshel (and landlord), and Evan Blum, as owner of Stardial (tenant).

The City submits evidence of funds paid by HPD to Gateway, totaling \$247,351.44, for the demolition work performed at the Building. City Exhibits, Ex. GGG. The City is entitled to reimbursement of these funds and any other costs associated with abating the public nuisance, from Kshel.

The City next seeks summary judgment on its counterclaim for civil penalties, costs and

disbursements under New York's Nuisance Abatement Law. Section 7-706(h) of the Administrative Code, provides:

Penalty. If, ... upon a motion for summary judgment in an action under this chapter, a finding is made that the defendant has intentionally conducted, maintained or permitted a public nuisance defined in this chapter, a penalty, to be included in the judgment, may be awarded in an amount not to exceed one thousand dollars for each day it is found that the defendant intentionally conducted, maintained or permitted the public nuisance. Upon recovery, such penalty shall be paid into the general fund of the city.<sup>7</sup>

Having already established the existence of the nuisance, the City is entitled to civil penalties from Kshel for each day the nuisance was permitted. However, because the City fails to provide evidence of the length of time that the public nuisance existed, the court cannot determine penalties at this time. The City also may be entitled to civil penalties against Walter Blum, in his personal capacity, if the corporate veil is pierced, an issue which remains unresolved at this juncture.

The City further seeks summary judgment on its counterclaim for indemnification against the Kshel and Stardial Defendants, arguing that the collapse was the result of their failure to maintain the Building in a safe condition and their careless, reckless and negligent conduct. But, the action is dismissed against the City, rendering its claim for indemnification based upon adverse judgments moot. Moreover, as discussed above, any claim for indemnification for the cost of demolition is dismissed as duplicative of the City's second counterclaim for

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<sup>7</sup> Section 7-706(a) of the Administrative Code allows the corporation counsel to "bring and maintain a civil proceeding in the name of the city in the supreme court to permanently enjoin a public nuisance within the scope of this subchapter, and the person or persons conducting, maintaining or permitting the public nuisance from further conducting, maintaining or permitting the public nuisance." The City's claims for injunctive relief are contained in its pleading under Index Number 115483/00, discussed in further detail below.

reimbursement, on which the City prevails. Ergo, the City's motion for summary judgment on its indemnification counterclaim is denied.

Finally, the City seeks summary judgment on its counterclaim for punitive damages. The City's entitlement to punitive damages is more appropriately examined after the underlying claims against the Kshel and Stardial Defendants have been resolved. Additionally, "[a] jury is particularly well suited to the expression of community attitudes, and the decision whether to award punitive damages should 'reside in the sound discretion of the original trier of the facts.'" *Fordham-Coleman v National Fuel Gas Distrib. Corp.*, 42 AD3d 106, 114 (4th Dept 2007), citing *Nardelli v Stamberg*, 44 NY2d 500, 503 (1978). This portion of the City's motion is denied.

*II. The Second Cube Building Action: Index Number 112774/03 (Mot. Seq. No. 2)*

In this action, the Cube Building asserts one cause of action against Gateway for damages resulting from its negligent demolition of the Building, and one cause of action against Second Ave & Houston Corp, a prospective tenant at the Building at the time of the collapse, for negligence. Gateway's answer asserts one cross-claim against Second Ave & Houston Corp for contribution. Gateway commenced a third-party action for contribution and indemnification, against the Stardial and Kshel Defendants, and Andrews Building Corp.<sup>8</sup>

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<sup>8</sup> Andrews Building Corp. is named as a party in several other actions presently before the court. The City states that, by court order dated March 15, 2002, Cube Building Housing Development Fund Company, Inc., was substituted as plaintiff for Andrews Building Corp. under Index Number 101900/01. City's 7/9/2010 Opp. Brief, at 7 n 3. The City fails to submit a copy of the order. Based upon the papers before the court, it is unclear whether Cube Building Housing Development Fund Company, Inc., was substituted as third-party defendant for Andrews Building Corp. under Index Number 112774/03. Andrews Building Corp. submits no papers in connection with Gateway's motion. In any event, all of Andrews Building Corp.'s counterclaims against Gateway are based upon Gateway's negligence. Because Gateway is not

Gateway does not submit the Kshel or Stardial Defendants' answers to the third-party complaint. Andrews Building Corp.'s answer to the third-complaint asserts three "cross complaints,": (1) breach of contract against Second Ave & Houston Corp and the Kshel and Stardial Defendants, averring that any damages suffered by the Cube Building were caused by these parties' breach of lease, contract or warranty, and Andrews Building Corp. seeks contribution and indemnification; (2) common law indemnity; and (3) negligence. Andrews Building Corp. also asserts three counterclaims against Gateway for common-law indemnity, contractual indemnity and negligence.

Gateway's motion is the only motion before the court under Index Number 112774/03. Gateway moves for the same relief sought in motion sequence number 14 under Index Number 101900/01. For the same reasons discussed above (*I(D)(3), supra*), Gateway's motion to amend its pleading is granted to the extent of adding the affirmative defenses of res judicata and collateral estoppel, its summary judgment motion is granted and its request for leave to amend is otherwise denied. This action as against Gateway is dismissed in its entirety, and as a result, its cross-claim and third-party action is dismissed.<sup>9</sup>

### *III. The First Chow Action: Index No. 115033/02 (Mot. Seq. Nos. 5, 6, 7, 8 & 9)*

The 21 individual plaintiffs in this action are residents of the Cube Building. The 40-count amended complaint alleges that, on July 13, 2000, Kshel, Stardial and Evan Blum engaged in construction and demolition work at the Building, which negligently caused the collapse of the

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liable for negligent performance of demolition work, these claims are properly dismissed and the status of Andrews Building Corp. has no impact on the court's decision.

<sup>9</sup> Nothing in the record supports Andrews Building Corp.'s claim for contractual indemnification.

wall, roof and building adjoining the Cube Building, thereby rendering the Cube Building structurally unsound and causing the individual plaintiffs personal property damage with temporary dispossession of their lawful residences, out-of-pocket expenditures for living and replacement costs, and mental anguish. Plaintiffs also claim that defendants' actions constituted a nuisance.

Kshel commenced a third-party action against the City and Gateway, asserting claims for indemnification and contribution.<sup>10</sup> The City's answer to Kshel's third-party complaint asserts one counterclaim against Kshel for apportionment of responsibility and indemnification. The City also asserts one cross claim against Gateway for apportionment of responsibility and indemnification. Gateway's answer to Kshel's third-party complaint asserts one cross claim against Kshel and the City for apportionment of responsibility, and one counterclaim against Kshel for apportionment, indemnification and contribution.

Gateway commenced a fourth-party action against Stardial and Evan Blum, claiming that any damages sustained by the individual plaintiffs or Kshel arose from the negligence of Stardial and Blum in connection with their illegal renovation and construction activities at the Building. Gateway's fourth-party complaint asserts claims for contribution and common law indemnification. Stardial and Evan Blum's answer to the fourth-party complaint asserts one counterclaim against Gateway, Kshel and the City for contribution and indemnification.

*A. Kshel's Motion for Summary Judgment of Dismissal (Mot. Seq. No. 5)*

Kshel moves for summary judgment dismissing the amended complaint for lack of

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<sup>10</sup> Kshel asserted identical claims, denominated "counterclaims," in its answer to the amended complaint, despite the fact that the City and Gateway were not parties in the main action.

causation because plaintiffs' injuries were not reasonably foreseeable, because of the City and Gateway's intervening acts, and because Kshel was an out-of-possession landlord. Although Kshel's notice of motion does not seek relief on its claims for indemnification, Kshel's opening brief argues that it is entitled to summary judgment on its claim for indemnification against the City and Gateway. Kshel also argues that it is entitled to relief on its third-party claim against the City, finding the City liable for the acts of Gateway. Kshel's motion and legal arguments are identical to the ones made in motion sequence number 10 under Index Number 101900/01. *I(C)*, *supra*. For the same reasons discussed there, Kshel's motion is denied.

*B. Stardial Defendants' Motion for Summary Judgment of Dismissal (Mot. Seq. No. 6)*

The Stardial Defendants move for summary judgment dismissing the claims asserted against them. Their motion and legal arguments are identical to the ones made in motion sequence number 11 under Index Number 101900/01. *I(B)*, *supra*. Again, for the reasons stated there, the Stardial Defendants' motion is denied.

*C. Individual Plaintiffs' Motion for Summary Judgment (Mot. Seq. No. 7)*

The individual plaintiffs move for summary judgment on liability, holding Kshel, Evan Blum and Stardial jointly and severally liable. They argue that Walter and Evan Blum's convictions in the Criminal Action are sufficient to demonstrate causation on their negligence claims in the instant action, entitling them to summary judgment on liability. However, as discussed above in connection with motion sequence number 13 under Index Number 101900/01 (*I(A)*, *supra*), this argument fails and the issue of causation remains and must be determined by the trier of fact. The remainder of the individual plaintiffs' motion and legal arguments – seeking to hold the Kshel and Stardial Defendants jointly and severally liable – are identical to

those made by the Cube Building in motion sequence 13 under Index Number 101900/01, and is denied.

*D. Gateway's Motion for Leave to Amend and Summary Judgment (Mot. Seq. No. 8)*

Gateway moves for leave to amend its responsive pleading and for summary judgment, the same relief it sought in motion sequence 14 under Index Number 101900/01, above. *I(D)(1)*, *supra*. For the reasons discussed there, Gateway's motion for leave to amend is granted to the extent of amending its pleading to add the affirmative defenses of res judicata and collateral estoppel and otherwise denied. Gateway's motion for summary judgment is granted, and all claims asserted against it in this action are dismissed. *See I(D)(3)*, *supra*.

*E. City's Motion for Leave to Amend and Summary Judgment (Mot. Seq. No. 9)*

The City moves for leave to amend its pleading to add the affirmative defenses of res judicata and collateral estoppel, and for summary judgment. The City's motion is based upon the same arguments made in motion sequence 12 under Index Number 101900/01. *I(D)(1) & (2)*, *supra*. For the reasons discussed there, the City's motion is granted, its pleading is amended and the claims asserted against it are dismissed.

*IV. The Second Chow Action: Index Number 112353/03 (Mot. Seq. No. 2)*

This action is brought by the individual residents of the Cube Building and the allegations of the complaint are nearly identical to the allegations of the amended complaint under Index Number 115033/02, *ibid*. The individual plaintiffs in this action are identical to the individual plaintiffs under Index Number 115033/02, *ibid*., except for the addition of two plaintiffs --Dino Ortiz and Edward Knox.

Plaintiffs here assert claims against the Stardial Defendants for property damage,

dispossession of residence, loss of use, out-of-pocket expenditures, replacement costs and mental anguish. They each seek damages of \$50,000. Plaintiffs also assert claims against the Stardial Defendants for nuisance, based upon their alleged negligence in causing the collapse of the wall adjoining the Cube Building and the resulting damages. The Stardial Defendants asserted no counterclaims and did not commence any third-party actions.

The Stardial Defendants, now, move for summary judgment. Their motion and legal arguments are identical to the ones made in motion sequence 11, under Index Number 101900/01. For the reasons discussed in *I(B)*, *supra*, the Stardial Defendants' motion is denied.

*V. The American Chandelier Action (Index No. 600481/01)(Mot. Seq. Nos. 4, 5, 6, 7, & 8)*

Plaintiffs, American Chandelier and its owner, Gold, were tenants in the Building pursuant to a lease for "APPROX. 2/3 OF SUBBASEMENT – EASTERN PORTION" of the Building. In their five-count amended complaint, American Chandelier and Gold (together, the American Chandelier Defendants) seek damages of \$1,250,000 from the Kshel and Stardial Defendants, asserting causes of action for breach of contract, negligence, conversion, failure to protect from crime, and individual liability for corporate action. Kshel commenced a third-party action against the City and Gateway, asserting claims for indemnification and contribution. The defendants and third-party defendants all assert cross and counterclaims for indemnification and contribution.

*A. Kshel Defendants' Motion for Summary Judgment of Dismissal (Mot. Seq. No. 4)*

The Kshel Defendants move for summary judgment dismissing the amended complaint. The only argument raised by the Kshel Defendants that they did not raise under Index Number 101900/01 (*I (C)*, *supra*) is that Walter Blum is a corporate officer not subject to individual

liability for the alleged conduct of Kshel.<sup>11</sup> In support of this argument, the Kshel Defendants rely upon *Aguirre v Paul* (54 AD3d 302, 304 [2d Dept 2008]), where the Second Department stated the uncontroversial legal principle that “[a] corporate officer is not held liable for the negligence of the corporation merely because of his official relationship to it,” but rather, “[i]t must be shown that the officer was a participant in the wrongful conduct.” (Internal quotation marks and citations omitted.)

Conspicuously missing from the Kshel Defendants’ argument are the next two sentences in *Aguirre*, where the Court stated that “[i]f a director or officer commits, or participates in the commission of, a tort, whether or not it is also by or for the corporation, he is liable to third persons injured thereby.” 54 AD3d at 304 (internal quotation marks and citations omitted). Here, Walter Blum admits that he formed Kshel in 1992 for the purpose of acquiring the Building, and that he is an officer of Kshel. *Walter Blum Tr.*, at 23. According to Walter Blum, he was the president of Kshel and the only other officer was his wife, who served as treasurer. *Id.* at 34. Kshel’s business address is the same as Walter Blum’s residence. *Id.* at 6; City Exhibits, Exs. J and K.

As in *Aguirre*, the Kshel Defendants fail to make a prima facie showing that Walter Blum did not participate in the alleged negligence that may have led to various plaintiffs’ injuries in these actions. If anything, Walter Blum’s testimony raises issues of fact concerning his

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<sup>11</sup> The Kshel Defendants’ Notice of Motion seeks dismissal of the complaint, but they make no legal arguments challenging American Chandelier and Gold’s first cause of action for breach of contract or the fourth cause of action for failure to protect from crime. Moreover, Point III of the Kshel Defendants’ memorandum of law argues in favor of dismissing the third-party complaint. Because Kshel itself is the third-party plaintiff, the court assumes this was an inadvertent error.

participation in the events that caused the collapse and the resulting damages. Thus, *Aguirre* supports the denial of Blum's motion for summary judgment of dismissal.

The Kshel Defendants also cite *Trenga Realty v Tiseo* (117 AD2d 951, 951-52 [3d Dept 1986]) for the axiomatic legal principle that "a corporation may be organized for the very purpose of avoiding personal liability provided the corporation really exists and is doing business as permitted by law." The Kshel Defendants then argue that the requirements for piercing the corporate veil, as stated in *Lawlor v Hoffman* (59 AD3d 499 [2d Dept 2009]), have not been satisfied. Under *Lawlor*,

[a] party seeking to pierce the corporate veil must establish that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury. It must also be established that the defendants abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against the plaintiff such that a court of equity will intervene.

*Id.* at 500 (internal quotation marks and citations omitted).

It is not clear to the court that Walter Blum was acting in his capacity as an officer of Kshel, as opposed to acting in a personal or a professional capacity as an architect, when he advised Evan Blum how to proceed with the renovation work that preceded the collapse. Indeed, Walter Blum testified that the purpose of his last visit to the Building before the collapse was "to visit [his] son and just for general information, to see what was going on," and "to inspect the [waterproofing] work done." Walter Blum Tr., at 90, 37. While it is undisputed that Walter Blum controlled Kshel, an issue of fact exists as to whether he dominated Kshel in respect to the transactions at issue, and used that domination to commit a wrong against the plaintiffs in these actions. Consequently, the Kshel Defendants' motion for summary judgment of dismissal as to

Walter Blum is denied.

The Kshel Defendants' remaining legal arguments are identical to those made in motion sequence number 10 under Index Number 101900/01 and are unpersuasive for the reasons discussed in *I(C)*, *supra*. For the foregoing reasons, Kshel Defendants' motion is denied in its entirety.

*B. American Chandelier's Motion for Summary Judgment on Liability (Mot. Seq. No.5)*

The American Chandelier Plaintiffs move for summary judgment on liability based upon the Kshel and Stardial Defendants' criminal convictions, relying on the Cube Building's moving papers in motion sequence number 13 under Index Number 101900/01. *I(A)*, *supra*. The first cause of action in the American Chandelier Plaintiffs' amended complaint asserts a claim for breach of the lease between Kshel and American Chandelier, by allegedly breaching the covenant of quiet enjoyment, warranty of habitability, and obligations to comply with State and City ordinances. Plaintiffs' third cause of action seeks to hold the Stardial Defendants liable for conversion, based upon the allegation that Evan Blum removed from the premises various valuable, antique chandeliers belonging to plaintiffs. The fourth cause of action is based upon the Kshel and Stardial Defendants' failure to protect American Chandelier from a reasonable risk of criminal activity. The fifth cause of action seeks to pierce the corporate veil and hold Walter and Evan Blum liable for Kshel and Stardial's conduct.

The American Chandelier Plaintiffs fail to show that the criminal convictions of Walter and Evan Blum warrant summary judgment on liability as to any of these causes of action. None of these causes of action or legal issues were addressed in the Cube Building's motion and supporting papers under Index Number 101900/01, and plaintiffs fail to provide "by affidavit, by

a copy of the pleadings and by other available proof” any evidence or legal arguments in support of this portion of their motion, as is required under CPLR 3212(b). As such, they have not made a prima facie showing that these “cause[es] of action [are] established sufficiently to warrant the court as a matter of law in directing judgment [in plaintiffs’] favor.” CPLR 3212(b). Their motion for summary judgment on the first, third, fourth and fifth causes of action is denied.

With respect to the American Chandelier Plaintiffs’ second cause of action for negligence, an issue of fact exists as to the extent of damages, if any, sustained by these parties and whether any damage was caused by the partial collapse or the demolition work. *I(A), supra*. Accordingly, the American Chandelier Plaintiffs’ motion for summary judgment on their second cause of action, also, is denied. The remainder of their motion and supporting arguments – which seek to hold the Kshel and Stardial Defendants jointly and severally liable and to sever the main action – are identical to those made under Index Number 101900/01 and are denied.

*C. Stardial Defendants’ Motion for Summary Judgment of Dismissal (Mot. Seq. No. 6)*

The Stardial Defendants move for summary judgment dismissing the amended complaint and all cross and counterclaims asserted against them. Three causes of action are asserted against them: the second cause of action for negligence; the third cause of action for conversion; and the fifth cause of action for individual liability, based upon piercing the corporate veil.<sup>12</sup> In support of their motion to dismiss the second cause of action, the Stardial Defendants argue that

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<sup>12</sup> The Stardial Defendants’ Notice of Motion seeks summary judgment of dismissal of all claims asserted against them, based upon the failure to establish a prima facie cause of action for negligence and conversion. The motion does not address the fifth cause of action or provide any basis for dismissing this claim. The fourth cause of action for failure to protect from crime seeks judgment against the Stardial Defendants, but fails to allege any wrongful conduct by them.

American Chandelier fails to establish that it sustained damages or that the Stardial Defendants were the cause of any alleged damages. The Stardial Defendants rely upon Gold's testimony that: he "was advised that everything in his shop was intact and, in fact, the chandeliers were still hanging"; and "his shop was in perfect condition, except for one end where there was dirt and concrete, but the rest of the shop was like he had left it." Stardial Defendants' Opening Brief, at 3.

However, the Stardial Defendants cite only portions of Gold's testimony. The full testimony is as follows:

Q Did you ever try to replace any of these items?

...

A No, because by the time I was able to get access into the building -- all these rings are made out of steel, they were rusty and broken up. I had a major theft happen in that shop and I believe it happened the night of July 13th.

Later on I had petty theft where I believe derelicts would come in and steel a roll of brass that maybe they would get \$20 for it and it cost me \$2,000.

In going through the shop and from what I saw, it looked to me like everything was busted up and ripped apart. They were just rifling through the shop trying to find stuff.

Gold Tr., at 53-54.

Gold also testified that he went back into the Building in August of 2000, and when asked about the condition of the "jigs," he responded that his "shop was perfect, there was no building and my shop was in perfect condition except for one end where my desk was there was a lot of dirt and a lot of concrete but the rest of my shop was just like I had left it on July 13th." *Id.* at 54. According to Gold, the machinery in his shop was wet from demolition and rain, causing "everything ... to rust" (*id.* at 55); "[a]t that point I don't know if anything was usable

anymore.” *Id.* Gold stated that Evan Blum gave him access to the Building, but then denied access, and that the only access to his shop, prior to when he was allowed into the Building in August, was “down the elevator shaft” and “[t]he elevator was down in the pit.” *Id.* at 56. Gold testified that someone called him in late July or early August to tell him that someone had been in his shop and “it’s like a sealed tomb, and that everything is intact, the chandeliers were hanging,” but that this individual “didn’t know that a lot of the very expensive items had been stolen.” *Id.* This testimony speaks for itself, refuting the Stardial Defendants’ argument of no damages.

The Stardial Defendants’ argument, that the partial collapse of the Building was not a proximate cause of the American Chandelier Plaintiffs’ damages, raises an issue of fact that precludes summary judgment, as discussed. However, the Stardial Defendants’ argument that the conduct of the City and/or Gateway in demolishing the Building caused American Chandelier and Gold’s damages, is without merit.

The Stardial Defendants seek dismissal of the American Chandelier Plaintiffs’ conversion claim, based upon the conclusory argument that “there has been no evidence produced nor does any evidence exist that establishes that Evan Blum stole American Chandelier’s property.” *Stardial Defendants’ Opening Brief*, at Point III. “A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person’s right of possession.” *Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 (2006). “Two key elements of conversion are (1) plaintiff’s possessory right or interest in the property and (2) defendant’s dominion over the property or interference with it, in derogation of plaintiff’s rights.” *Id.* at 50

(internal citations omitted). In *Pierpoint v Hoyt* (260 NY 26 [1932]), relied upon by the Stardial Defendants, the Court of Appeals makes clear that “the law of conversion is concerned with possession, not with title,” and that “[t]he right to possession, broadly speaking, may be infringed by a wrongful taking ... or by a wrongful detention ... or by a wrongful disposal ... .” 260 NY at 29 (internal citations omitted).

Here, the amended complaint alleges that, “at approximately 2:00am on the day that Plaintiffs discovered the missing property, Evan Blum showed up at the Building with a fifty (50) foot trailer,” and that “[o]nly the best and most valuable pieces were taken from the Premises.” Amended Complaint, ¶¶ 26-27. The pleading then alleges that Evan Blum “removed from the Premises various valuable and antique chandeliers belonging to Plaintiffs.” *Id.*, ¶ 29. Gold testified that his attorney informed him “[t]hat Evan Blum showed up with a tractor-trailer at around 2:00 in the morning.” *Gold Tr.*, at 155. Gold also testified that the superintendent of a nearby building informed Gold that Evan Blum “showed up with a tractor-trailer,” and “they loaded artifacts on the tractor-trailer and chandeliers,” and Gold stated that his daughter saw Evan Blum’s truck at the Building on a Sunday evening. *Id.* at 157. *See Rodriguez v Sixth Pres., Inc.*, 4 AD3d 406, 407 (2d Dept 2004) (hearsay evidence may be considered in opposition to summary judgment if it is not the only evidence submitted).

While some of Gold’s testimony is based upon hearsay, Gold testified that there was “a major theft” and that various items were stolen from his store. *Gold Tr.*, at 53-54. None of the evidence submitted by the Stardial Defendants negates the claimed theft or the American Chandelier Plaintiffs’ damages. Moreover, the Stardial Defendants seem to be arguing that the American Chandelier Plaintiffs’ failure to make a prima facie showing on the merits of the

conversion cause of action entitles the Stardial Defendants to dismissal. To the contrary, the burden remains on the Stardial Defendants, as the proponents of the summary judgment motion, to “make a prima facie showing of entitlement to judgment as a matter of law,” which they failed to do. *Santiago*, 35 AD3d at 185-86. Gold’s testimony merely raises factual issues concerning the alleged theft of the American Chandelier Plaintiffs’ property. Summary judgment on this ground is denied.

The Stardial Defendants also argue that they could not have exercised unauthorized dominion or control over the American Chandelier Plaintiffs’ property, because they were dispossessed of the Building on July 13, 2000 when the City ordered the Immediate Emergency demolition. In support of this argument, they submit the DOB’s Emergency Declaration Form and Peremptory Vacate Order, which ordered that the Building “remain vacant and unoccupied until such time as [it] is declared safe by the department.” Boyce Aff., Ex. J. These documents merely demonstrate the illegality of any entry into the Building. Neither document makes a prima facie showing that Evan Blum complied with the Peremptory Vacate Order or that he did not exercise unauthorized dominion or control over plaintiffs’ property.

The Stardial Defendants’ reply papers point out that the American Chandelier Plaintiffs failed to submit opposition papers, arguing that, therefore, their motion for summary judgment of dismissal should be granted as unopposed. However, the American Chandelier Plaintiffs’ failure to submit opposition papers does not vitiate the Stardial Defendants’ obligation “to meet their initial burden of making a ‘prima facie showing of entitlement to judgment as a matter of law [citation omitted].” *Butler v City of Gloversville*, 12 NY3d 902, 904 (2009) (holding that “[s]ummary judgment was ... not warranted since defendants failed to sufficiently demonstrate

that their alleged negligence was not a proximate cause of plaintiff's injuries"). In any event, the American Chandelier Plaintiffs' moving papers on their own summary judgment motion (in motion sequence number 5) are sufficient to rebut the argument that they defaulted by failing to oppose the Stardial Defendants' motion. For the foregoing reasons, the Stardial Defendants' motion for summary judgment is denied in its entirety.

*D. Gateway's Motion for Leave to Amend and Summary Judgment (Mot. Seq. No. 7)*

Gateway requests leave to amend its pleading and for summary judgment, based upon the same arguments made in motion sequence number 14 under Index Number 101900/01. For the reasons discussed above (*I(D)(1)*, *supra*), Gateway's motion for leave to amend is granted to the extent of amending the pleading to add the affirmative defenses of res judicata and collateral estoppel. Gateway's motion for summary judgment of dismissal is also granted with respect to all claims arising out of Gateway's performance of demolition work.

However, Gateway fails to make a prima facie showing that it is entitled to dismissal of claims asserted against it for indemnification and contribution, to the extent that these claims are based upon conversion. For the reasons discussed below, *infra* at *VI(B)*, Stardial's conversion claim against Gateway survives under Index Number 115483/00 and, as there is some evidence that American Chandelier was looted, should not be dismissed here.

*E. City's Motion for Leave to Amend and Summary Judgment (Mot. Seq. No. 8)*

The City requests leave to amend its pleading and summary judgment. Its motion is based upon the same arguments made in motion sequence number 12 under Index Number 101900/01. *I(D)(1)&(2)*, *supra*. For the same reasons discussed there, the City's motion for leave to amend the pleadings to assert the affirmative defenses of res judicata and collateral estoppel is

granted, its summary judgment motion is granted and the action is dismissed in its entirety against it.

*VI. The Stardial Action: Index Number 115483/00 (Mot. Seq. Nos. 6, 7 & 8)*

Stardial brings this action on its own behalf and as agent for consignors, secured parties, and title holders of personalty (together, Stardial), against the City and Gateway. The first cause of action in the complaint alleges that the City negligently determined that the Building required immediate demolition and improperly ordered the demolition, thereby causing the loss of property. Stardial also claims that Gateway negligently demolished the Building and violated its contractual obligations. The second cause of action alleges civil trespass and that the City and its agents negligently failed to keep the premises safe and free from theft and conversion. The third cause of action asserts a claim for conversion against the City and Gateway. The fourth cause of action alleges wrongful withholding and seeks the return of Stardial property from the defendants, plus damages. The fifth cause of action alleges civil conspiracy to take and remove Stardial's property. The sixth cause of action claims misappropriation of trade secrets and confidential client or supplier information. The seventh cause of action claims that defendants intentionally and negligently interfered with Stardial's business. The eighth cause of action is for commercial defamation and trade libel. The ninth cause of action asserts a claim for prima facie tort.

The City answered the complaint, asserting counterclaims and commencing a third-party action against the Kshel Defendants, KRC Realty Corp., the Land and Building known as 14

Second Avenue, the Stardial Defendants, Citibank, N.A. and John and Jane Doe.<sup>13</sup> The City's pleading asserts one cross-claim against Gateway for contribution and contractual indemnification. The City's third-party claims, denominated "counterclaims," are identical to the counterclaims asserted against the Kshel and Stardial Defendants under Index Number 101900/01, with additional claims seeking: costs, expenses and disbursements of the City in investigating, bringing and maintaining the third-party action; and to permanently enjoin the public nuisance and to direct the parties to complete the demolition of the Building and complete remaining repairs.

Gateway asserts one cross-claim against the City for contribution, and the Kshel Defendants assert one cross-claim against Gateway for indemnification and contribution.

*A. City's Motion for Leave to Amend and Summary Judgment (Mot. Seq. No. 6)*

The City moves for leave to amend its pleading and for summary judgment on its counterclaims and cross-claims. The City also moves for summary judgment dismissing the claims asserted against it. For the reasons discussed in *I(D)*, *supra*, the City's request for leave to amend is granted. Stardial's first, third, fourth, sixth and seventh causes of action are barred by res judicata and collateral estoppel, because these same claims against the City were dismissed in the Federal Action. *See I(D)(2)*, *supra*. While Stardial's claims for misappropriation and interference with Stardial's business were not expressly discussed by the court in the Federal Action, they were included among the dismissed tortious conduct before the court, because they were incorporated into Stardial's fifth and sixth causes of action in the Federal Action complaint.

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<sup>13</sup> Counsel for the Kshel Defendants states that Kshel was incorrectly sued in this action as KRC Realty Corp. 7/26/10 Donnelly Reply Aff., ¶ 1. Citibank, N.A. submits no papers in connection with any motions presently before the court.

The complaint in the Federal Action alleged that: Gateway and the City “loot[ed] the premises of its valuables” (Federal Action Complaint, ¶ 34), including “the rolodex, intellectual property, sales and marketing information and customer lists of Stardial for the purposes of selling such information to the competitors of Stardial” (*id.*, ¶ 35); that Gateway and the City “destroyed Plaintiff’s property to enrich the private contractors who own Gateway and to loot the subject premises of the valuables therein” (*id.*, ¶ 67); and that Gateway and the City “maliciously destroyed numerous artifacts which were stored in the outdoor vacant lot of the subject premises.” *Id.*, ¶ 69.

Moreover, the interference claim contained in Stardial’s seventh cause of action is subject to dismissal for the additional reason that it “fail[s] to plead the elements of that cause of action in a nonconclusory manner.” *Algomod Tech. Corp. v Price*, 65 AD3d 974, 975 (1st Dept 2009). This cause of action does not allege that the City or Gateway acted with the sole purpose of harming the plaintiff or used wrongful means (*see Carvel Corp. v Noonan*, 3 NY3d 182, 190-191 [2004]), that Stardial would have entered into a proposed business relation but for the City’s interference or that the interference was done in a wrongful manner. *NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614 (1996); *Guard-Life Corp. v S. Parker Hardware Mfg. Corp.*, 50 NY2d 183 (1980).

Stardial’s trespass cause of action also was litigated and dismissed in the Federal Action, where the court held that “[t]he City’s Immediate Emergency Declaration did not violate due process and provided the City and Gateway with the right to lawfully enter onto Plaintiffs’ property.” *Kshel Realty Corp.*, 2006 WL 2506389, \*10, 2006 US Dist LEXIS 62220, \*36. Therefore, Stardial’s second cause of action for trespass is dismissed.

Stardial's fifth cause of action for civil conspiracy is dismissed, because "New York does not recognize civil conspiracy to commit a tort as an independent cause of action." *Steler v Schreiber*, 25 AD3d 519, 522 (1st Dept 2006). Finally, the eighth cause of action for defamation and libel fails for lack of particularity and for failure to state a cause of action. The elements of defamation are "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se." *Dillon v City of New York*, 261 AD2d 34, 38 (1<sup>st</sup> Dept 1999) (citation omitted). Moreover, "CPLR 3016(a) requires that in a defamation action, the particular words complained of ... be set forth in the complaint. The complaint also must allege the time, place and manner of the false statement and specify to whom it was made." *Id.*

Here, Stardial's claim is based upon the allegation that "one ... or more defendants, upon information and belief, willfully and maliciously and intentionally communicated to third parties statements that concern the plaintiff's reputation and that were false, derogatory, misleading and placed plaintiff in a false light." Complaint, ¶ 72. According to the complaint, "third persons ... received these statements" and "understood ... these statements to be injurious, derogatory and concerning the plaintiff." *Id.*, ¶ 75. Stardial's amended response to the City's bill of particulars did little to clarify the claim. It merely stated that the alleged defamatory statements regarding Stardial's principals "were made orally to the public" (City Exhibits, Ex. B8, Response 20[a]) and that the particular words complained of are "within possession of Defendant" (*id.*, Response 20[b]); it described, generally, public statements allegedly made by the City. However, Stardial failed to specify the particular words complained of, to whom the statements were made, and their time, place and manner. The eighth cause of action is dismissed.

Nor can the ninth cause of action withstand dismissal. Prima facie tort requires a showing of “(1) intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, and (4) by an act or series of acts that would otherwise be lawful.” *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 332 (1983). “[M]alevolence” must be “the sole motive for defendant’s otherwise lawful act,” or the defendant must have acted “from disinterested malevolence, by which is meant that the genesis which will make a lawful act unlawful must be a malicious one unmixed with any other and exclusively directed to injury and damage of another.” *Id.* at 333. “An essential element of the cause of action is an allegation of special damages.” *Howard v Block*, 90 AD2d 455, 455 (1st Dept 1982); *see also Luciano v Hancock*, 78 AD2d 943, 944 (3d Dept 1980) (prima facie tort “damages must be alleged with sufficient particularity to identify actual losses and be related causally to the alleged tortious acts”).

Here, Stardial’s prima facie tort claim is based upon the conclusory allegations that the defendants “engaged in intentional infliction of harm to plaintiff” (Complaint, ¶ 80) and “acted without excuse or justification and were motivated by disinterested malevolence towards ... Stardial” (*id.*, ¶ 81) in “authorizing and conducting ... the demolition [work] which destroyed [Stardial’s] property ..., which acts would otherwise be lawful” (*id.*, ¶ 82). All of the evidence before the court leads to the inescapable conclusion that the City was not motivated by malice, but rather, was motivated to protect the public at large. This conclusion is consistent with that of the court in the Federal Action, which determined that “[t]here is nothing to suggest that the City did anything more than order the demolition of the Building, which had already collapsed, in order to protect the public safety,” and that “[a]bsent some evidence of a culpable state of mind

on the part of the City, which Plaintiffs do not provide ..., no reasonable trier of fact could find this demolition to be arbitrary, conscience-shocking or otherwise constitutionally oppressive.” *Kshel Realty Corp.*, 2006 WL 2506389, \*10, 2006 US Dist LEXIS 62220, \*36. Additionally, Stardial’s pleading fails to allege that the sole motivation for the alleged wrongful acts was malice. Nor do Stardial’s allegations sufficiently plead special damages. Therefore, the complaint is dismissed in its entirety against the City. In addition, for reasons stated under Index Number 101900/01 (*I(D)(2)*, *supra*), all claims against the City for indemnification and contribution are dismissed.

The City further moves for summary judgment on its counterclaims against the Stardial and Kshel Defendants.<sup>14</sup> Summary judgment on these counterclaims would duplicate the relief already granted on the same counterclaims under Index Number 101900/01. The City’s fifth counterclaim for indemnification is dismissed as redundant of the counterclaim for reimbursement. Thus, the City’s motion for summary judgment on its counterclaims is denied.

*B. Gateway’s Motion for Leave to Amend and Summary Judgment (Mot. Seq. No. 7)*

Gateway moves for the same relief sought in motion sequence number 14 under Index Number 101900/01. For the same reasons discussed in *I(D)(1)*, Gateway’s motion to amend its pleading to add the affirmative defenses of res judicata and collateral estoppel, is granted.

Also, for the reasons discussed above under Index Number 101900/01 [*I(D)(3)*, *supra*]

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<sup>14</sup> The counterclaims for injunctive relief were asserted in the City’s original pleading, which was dated November 9, 2000, less than four months after the collapse. Because the premises have been demolished, the City’s counterclaims that seek to enjoin the public nuisance and direct the parties to complete the demolition of the premises and remaining repairs appear to be moot. In any event, the City does not seek summary judgment on, and presents no legal arguments concerning, injunctive relief and the court makes no determination in this decision as to the merits of the claims for injunctive relief.

and in the City's motion under Index Number 115483/00, *ibid.*, Stardial's first, second, fifth, seventh, eighth and ninth causes of action are dismissed against Gateway based upon *res judicata*, collateral estoppel and for failure to state a cause of action.

Stardial's fourth cause of action for wrongful withholding is based upon the allegation that the City and Gateway "continue to wrongfully and unlawfully and maliciously and willfully retain certain property of the plaintiff from the [Building] despite due demand for the return thereof." Stardial Complaint, ¶ 50. "Interference with a person's property constitutes a trespass, while a denial or violation of the plaintiff's dominion, rights, or possession, is the basis of an action for conversion." *Sporn v MCA Records, Inc.*, 58 NY2d 482, 487 (1983) (internal quotation marks and citations omitted). "The question then becomes whether the defendant's alleged conduct constituted an interference with plaintiff's property or was a denial of plaintiff's rights to the property or possession of that property." *Id.* "The mere assertion of a continuing right ... will not be sufficient to have the cause of action deemed a continuing trespass if the facts as pleaded indicate that the defendant's alleged conduct, if proven, would constitute a taking of the property and a conversion of that property to his own." *Id.*

Although *Sporn* arose in the context of analyzing a statute of limitations defense, the Court of Appeals delineated the distinction between trespass and conversion, explaining that:

in deciding whether an action is one to recover for a trespass or a conversion, the primary consideration must be what the plaintiff claims the defendant did. If a review of the pleadings indicates that the defendant merely interfered with the plaintiff's property and thereby his property rights, then the complaint will be properly construed as an action to recover for trespass. ... If, however, the conduct the plaintiff seeks to recover for amounts to the destruction or taking of the property, then the action is properly deemed one for conversion.

*Id.* at 487-88.

Here, as in *Sporn*, the pleading alleges a complete “denial of both the plaintiff’s right to [its property] and a total usurping of plaintiff’s right to possess [its property],” and, thus, the cause of action asserted is for conversion and not trespass. *Id.* at 488. Stardial’s opposition papers do not respond to the argument that it cannot recover for wrongful withholding. Rather, Stardial merely reiterates that issues of fact exist that require a trial on the conversion claim, implicitly conceding that its claim is one for conversion and not wrongful withholding. Ergo, Stardial’s fourth cause of action for wrongful withholding is dismissed.

Stardial’s remaining tort-based claims against Gateway are conversion (third cause of action) and misappropriation, contained in Stardial’s (sixth cause of action). Gateway argues that these claims should be dismissed as a matter of law for lack of damages and because Stardial cannot prove that it owned the purportedly stolen items or is entitled to sue on behalf of the true owners.

By letter dated November 12, 2004, Stardial submitted a response to interrogatories, including an extensive table titled “Irreplaceable Artifacts Inventory on Website 7/13/2000”, which, according to Stardial, “contains a detailed description of the inventory items that were lost in the demolition.” Etkind Aff., Ex., 27. Using this table, together with Stardial’s additional interrogatory responses, Gateway prepared a spreadsheet showing that Stardial recovered a portion of its inventory, the cost of which totaled \$395,300. Stardial Response to City’s First Set of Interrogs., Etkind Aff., Ex. 23, Response 1(a) and (f), at 2-3; and Exs. 26 and 27. In addition, Stardial admitted that it has recovered \$100,095 from its insurance carrier. *Id.*, Response 1(x), at 4. Thus, Stardial recovered \$495,395 in combined inventory costs – presumably including items

allegedly stolen – and insurance proceeds.

Stardial also admitted that none of the recovered items were sold after the collapse on July 13, 2000 (Stardial Response to City’s First Set of Interrogs., Etkind Aff., Ex. 23, Response 3[m], at 15; Leslie Blum Tr., Ex. 28, at 13, 124 [testimony of Stardial’s “acting secretary” that items on Stardial’s inventory list website have not been sold]), which supports the conclusion that these items would be included in Stardial’s “[i]nventory at end of year” in its tax return for the tax year September 1, 1999 through August 31, 2000. Stardial Tax Return, Etkind Aff., Ex. 24. In other words, Stardial’s final inventory for the tax period ending August 31, 2000, represents the inventory Stardial owned at the time of the collapse on July 13, 2000.

Stardial’s tax return for the year September 1, 1999 through August 31, 2000, identified its cost of inventory as \$241,309 at the beginning of the tax period and \$279,256 at the end of the tax period. Etkind Aff., Ex. 24, Schedule A, at 2. Stardial admitted that these costs represent the “cost of acquisition of [Stardial’s] inventory.” 7/7/10 Evan Blum Aff., ¶ 56. Gateway concludes that, having recovered \$495,395, Stardial has recovered more inventory than it has reported on its tax return. According to Gateway, Stardial is now barred from recovering additional damages for lost inventory, because “[a] party to litigation may not take a position contrary to a position taken in an income tax return.” *Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422 (2009); *see also Naghavi v New York Life Ins. Co.*, 260 AD2d 252 (1st Dept 1999) (plaintiff “bound by his contrary representations in the income tax returns he filed for [certain] years”).

The main problem with Gateway’s argument is that it fails to account for property damaged as a result of the alleged conversion. Stardial claims that it carries its inventory at its acquisition cost and not at its market or retail value. If converted property was returned to

Stardial, its cost of acquisition would remain the same, while the wrongdoer would nevertheless remain liable for damages flowing from the conversion. In other words, it is possible that Stardial recovered \$495,395 in combined inventory costs and insurance proceeds, but that the inventory's market value is now substantially less as a result of the conversion. Therefore, Gateway fails to establish any conflict between Stardial's tax return and its claim for damages in this action. Accordingly, Gateway's argument that Stardial's remaining claims should be dismissed as a matter of law for lack of damages is unpersuasive.

With respect to Stardial's conversion claim as it pertains to loss of property or consignments owned by third parties, Gateway argues that Stardial failed to produce documents evidencing that it owns the inventory in question or has authority to sue on behalf of consignors. Gateway argues that, therefore, Stardial should be precluded from recovering damages pertaining to these items.

At a hearing before this court on January 12, 2010, Stardial was ordered to produce information concerning "all individuals who make claims for property that was on consignment at Stardial, and any documentation that those claims were paid by Stardial or permission from these claimants was given to Stardial to represent them in this lawsuit" (1/12/10 Order). 1/12/10 Tr., at 12-13. Stardial was also ordered to produce "[a]ny documentation Stardial has as to their ownership of any of the items they claim is lost," and the court ordered Stardial to respond to the City's interrogatories. The court informed Stardial that failure to comply with these orders within 14 days (that is, by January 26, 2010) would result in preclusion.

Stardial's February 11, 2010 response to the 1/12/10 Order (2/11/10 Response) identified various documents already produced in this litigation, and then claimed that Stardial had

“recently discovered items that require special handling as they are currently in a condition not presentable to the court but said items are being treated (water, mold, and mildew damage).” Etkind Aff., Ex. 35. Based upon the papers before the court, it appears that Stardial failed to produce any of the “recently discovered items” by January 26, 2010, or any other additional documents evidencing ownership of the items in question or authority to sue on behalf of the purported consignors. Therefore, Stardial is precluded from using evidence of the purported “recently discovered items” (*id.*) or asserting a “possessory right or interest in the property” of third parties (*Colavito*, 8 NY3d at 50), to the extent not already produced in these litigations by January 26, 2010, pursuant to the 1/12/10 Order.

Gateway next argues that any alleged damages from Stardial’s conversion claim be limited to the eight items and two photographs listed in Stardial’s 2/11/10 Response. Indeed, the 1/12/10 Order required Stardial to respond to Gateway’s December 10, 2008 interrogatory request “for the list of all items that Stardial claims [are] or [were] stolen,” and stated that “Stardial will be held to this list in their claim that a Gateway employee stole these items from the demolition site.” 1/12/10 Order Tr., at 17. Stardial’s 2/11/10 Response lists eight specific items that were allegedly removed from the demolition site and found in a competitor’s warehouse in Scranton, Pennsylvania. Etkind Aff., Ex. 35, ¶ 5, at 3. Stardial’s 2/11/10 Response also identifies a police report, two photographs that allegedly show Stardial “items seen at Flea Markets/Art Shows after the date of the demolition” (identified as D&M02456 and D&M02457), and refers generally to “[a]ll of the items depicted and described in [Stardial’s] website photo inventory,” which were “either stolen ... or destroyed in the demolition by Defendant Gateway.” *Id.*

This court's March 18, 2010 Compliance Conference Order states as follows: "Stardial, per the court's 1/12/10 Order, is limited to using as evidence of stolen items the schedule of items listed in response #5 and the 2 items D&M02456 and D&M02457, which Stardial shall specifically identify in a supplemental response." City Exhibits, Ex. EEE, at 3. Based upon the papers before the court, it appears that Stardial failed to submit a supplemental response specifically identifying the items in photographs D&M02456 and D&M02457. Instead, Stardial submits with its opposition papers the same two photographs which this court already found insufficient. Therefore, Stardial is precluded from using any evidence other than the eight items listed in response number 5 of its 2/11/10 Response.

The police report identifies the same eight items listed in Stardial's 2/11/10 Response. 7/710 Marotta Aff., Ex. J. Gateway claims that these items were returned to Stardial, and that, therefore, Stardial suffered no damages. In support of this argument, Gateway submits a receipt signed by "L. Blum," whereby Stardial purportedly accepted the return of these items from non-party Olde Good Things. *Id.*, Ex. H. However, while there is some overlap between the items listed as returned by Olde Good Things and Stardial's list of stolen items, the lists are not identical. For instance, among the 8 items listed in Stardial's 2/11/10 Response are "cast iron marquee pendent," "set of brass entry doors from the Paramount Theatre," and "large cast iron door," none of which are identified in the receipt submitted by Gateway.<sup>15</sup> *Id.* In addition, the receipt identifies "bronze trim PCs," "large arched cast iron transom," and a "cast iron pediment ctr. Pc (shield)," which are not listed in Stardial's 2/11/2010 Response. *Id.* Moreover, the

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<sup>15</sup> At his deposition, Evan Blum conceded that "the Paramount Theater doors [were] ... returned to the rightful owner." Etkind Aff., Ex. 25, at 13.

receipt contains several handwritten notations, identifying certain property as “damaged,” and other items as “not delivered” or “missing” altogether. *Id.* Significantly, the document is titled “PARTIAL INVENTORY OF ITEMS FROM IRREPLACEABLE ARTIFACTS.” *Id.* (emphasis added to show handwritten notation). Thus, at a minimum, issues of fact exist as to the existence and extent of damages flowing from Stardial’s conversion cause of action against Gateway.

Gateway cites *Kane v Caprara* (182 Misc 2d 572 [Schenectady City Court 1999]) for the general rule that damages for conversion “are either the lower of the amount required to replace the converted [item] at the time and place of the taking (*Wallingford v Kaiser*, 191 NY 392) or if plaintiff accepts return of the property, the loss flowing from the conversion (*Silverstein v Marine Midland Trust Co.*, 1 AD2d 1037).” *Id.* at 574. Thus, *Kane* merely confirms that Stardial would be entitled to damages upon proving conversion and that certain items were damaged or not returned. In short, if Stardial proves its conversion cause of action, damages will be determined by the trier of fact. *Lager Assoc. v City of New York*, 304 AD2d 718, 721 (2d Dept 2003) (“[i]t is peculiarly within the discretion of the trier of fact to assess the evidence and the persuasiveness of testimony as to estimates and evaluations of damage”).

Stardial’s sixth cause of action is based upon Gateway’s purported misappropriation of confidential and customer and supplier information, business records, and trade secret information, which was maintained at the Building at the time of the collapse. Gateway fails to make a prima facie showing that it is entitled to summary judgment of dismissal of Stardial’s misappropriation claim. Therefore, to the extent that Gateway moves for summary judgment of dismissal of this cause of action, the motion is denied.

For the reasons stated above, the sole claims remaining against Gateway in this action are

Stardial's third cause of action for conversion and its sixth cause of action for misappropriation.

*C. Kshel Defendants' Motion for Summary Judgment of Dismissal (Mot. Seq. No. 8)*

The Kshel Defendants move for summary judgment of dismissal of the third-party complaint. Their motion is based upon the same arguments made in their summary judgment motions under Index Numbers 101900/01 and 600481/01, *I(C) & V(A)*, *supra*. Therefore, for the reasons stated there, the Kshel Defendants' motion is denied.

*VII. The Peerless Insurance Action: Index Number 109587/03 (Mot. Seq. No. 2)*

Plaintiff Peerless Insurance Company (Peerless) brings this action, as subrogee of Maison Gerard, Ltd. (MG), against the Stardial and Kshel Defendants. MG allegedly left certain light fixtures in the possession of American Chandelier at the time of the collapse, and allegedly suffered damage as a result. Pursuant to an insurance policy that covered MG's business merchandise, Peerless paid MG \$10,368.50; there was a \$1,000 deductible. Peerless alleges that the Stardial and Kshel Defendants were negligent in performing renovations and construction, which caused the collapse and property damage. It seeks recovery of the \$11,368.50. The Kshel Defendants commenced a third-party action against the City and Gateway, asserting claims for indemnification and contribution, based upon their demolition of the building.

The Kshel Defendants move for summary judgment dismissing Peerless's complaint. Although not stated in their Notice of Motion, the Kshel Defendants' memorandum of law and attorney's affirmation also request summary judgment against the City and Gateway for the claims asserted in the third-party complaint.<sup>16</sup>

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<sup>16</sup> Certain papers before the court on this motion are marked with Index Number 30859/01, which is assigned to the Civil Court action, *Baechlor v Stardial Communications Corp. et al.*, not presently before the court. The court assumes that these papers are presented in

The Kshel Defendants' motion is based upon the same arguments made in their summary judgment motions under Index Numbers 101900/01 and 600481/01 (*I(C), (D) & V(A), supra*). For the reasons stated there, the Kshel Defendants' instant motion is denied, and the third-party action against the City and Gateway, is dismissed.

*VIII. The Second Merchants Insurance Action: Index Number 112739/03 (Mot. Seq. Nos. 2, 3 & 4)*

Plaintiff Merchants Insurance Company (Merchants) brings this action, as subrogee of Kshel, against Gateway. Merchants claims that it paid approximately \$1 million in claims presented by Kshel as its insured under a property insurance policy. Merchants seeks recovery of amounts paid to Kshel, based upon allegations that the partial collapse did not constitute an emergency creating immediate peril to the public health and safety, that Gateway had no right to enter the premises or demolish the Building, and that Gateway was negligent in the performance of its work. Gateway commenced a third-party action against the Stardial and Kshel Defendants, asserting claims for contribution and indemnification.

*A. Merchants' and the Kshel Defendants' Dismissal Motion (Mot. Seq. Nos. 2)*

Merchants and the Kshel Defendants move for summary judgment against Gateway and for summary judgment of dismissal of the third-party complaint. Their motion is based upon the arguments made in the Kshel Defendants' summary judgment motions under Index Numbers 101900/01 and 600481/01. For the reasons discussed there, Gateway was not negligent in its demolition of the Building; all of Merchants' allegations have been resolved in favor of Gateway. *I(D)(3), supra*. Therefore, the motion is granted to the extent that the third-party

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error and will not address these papers.

complaint is dismissed, and the motion is otherwise denied.

*B. The Stardial Defendants' Motion for Summary Judgment (Mot. Seq. No. 3)*

The Stardial Defendants move for summary judgment dismissing the third-party complaint. Because Gateway is not liable for any injuries relating to its demolition work, as alleged in Merchants's complaint, Gateway's third-party claims are moot and the third-party complaint is dismissed.

*C. Gateway's Motion for Leave to Amend and Summary Judgment (Mot. Seq. No. 4)*

Gateway moves for leave to amend its answer and for summary judgment of dismissal of the claims asserted against it. For the reasons discussed in *I(D)(1) & (3)*, *supra*, Gateway's motion for leave to amend is granted to the extent of amending the pleading to add the affirmative defenses of res judicata and collateral estoppel, and Gateway's motion for dismissal is granted and the action is dismissed.

*IX. The First Merchants Insurance Action: Index Number 118786/01 (Mot. Seq. Nos. 1 & 2)*

In this action, Merchants asserts the same allegations against the City as were asserted against Gateway under Index Number 112739/03, *VII, ibid.*, with the additional allegation that the City failed to give Kshel timely notice of its intention to demolish the Building, thereby violating Kshel's due process rights.

*A. Merchants' Motion for Summary Judgment (Mot. Seq. No. 1)*

Merchants moves for summary judgment on its claims against the City, based upon the City's purported negligence in the demolition of the Building. For the reasons discussed in *I(D)(2)*, *supra*, the City was not negligent and the motion is denied.

*B. The City's Motion for Leave to Amend and Summary Judgment (Mot. Seq. No. 2)*

The only allegation in this action not already discussed herein is Merchants' claim that the City failed to give Kshel timely notice of its intention to demolish the Building, thereby violating Kshel's due process rights. The City moves for leave to amend its answer to add the affirmative defenses of res judicata and collateral estoppel and for summary judgment dismissing the complaint. For the reasons discussed in *I(D)(1)*, *supra*, the City's motion to amend is granted. The court in the Federal Action determined both that the City did not violate Kshel's due process rights and that the City was not negligent. Therefore, this action is dismissed.

Accordingly, it is hereby

ORDERED that the motions under the First Cube Building Action, Index Number 101900/01, are decided as follows:

1. Defendants Kshel Realty Corp.'s and Walter Blum's motion for summary judgment (mot. seq. no. 10) is denied;
2. Defendants Stardial Communications Corporation's and Evan Blum's motion for summary judgment (mot. seq. no. 11) is granted to the extent of dismissing the City of New York's third counterclaim for indemnification and the motion is otherwise denied;
3. Third-party defendant City of New York's motion (mot. seq. no. 12) for leave to amend its third-party answer and for summary judgment of dismissal is granted, all claims asserted against it in this action are severed and dismissed, and the Clerk is directed to enter judgment accordingly; summary judgment on the City of New York's first counterclaim for civil penalties and its second counterclaim for restitution is granted on liability to the extent that the City of New York is entitled to (1) civil penalties of \$1,000 per day from Kshel Realty Corp. upon demonstrating the length of time that the public nuisance existed, and (2) reimbursement

from defendant Kshel Realty Corp. for the expense of demolishing 14 Second Avenue, New York, New York, and any other expenses relating to abating the public nuisance; and summary judgment on the City of New York's counterclaims is otherwise denied;

4. Plaintiff Cube Building Housing Development Fund Company, Inc.'s motion (mot. seq. no.13) for summary judgment is denied;

5. Third-party defendant Gateway Demolition Corp.'s motion (mot. seq. no.14) for leave to amend its third-party answer is granted to the extent of adding the affirmative defenses of res judicata and collateral estoppel and the request for leave to amend is otherwise denied; and Gateway Demolition Corp.'s motion for summary judgment is granted, all claims asserted against it in this action are severed and dismissed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the motions under the Second Cube Building Action, Index Number 112774/03, are decided as follows:

1. Defendant Gateway Demolition Corp.'s motion (mot. seq. no. 2) for leave to amend its answer is granted to the extent of adding the affirmative defenses of res judicata and collateral estoppel and the request for leave to amend is otherwise denied; and its motion for summary judgment is granted, all claims asserted against it in this action are severed and dismissed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the motions under the First Chow Action, Index Number 115033/02, are decided as follows:

1. Defendant Kshel Realty Corp.'s motion (mot. seq. no.5) for summary judgment is denied;

2. Defendant Stardial Communications Corporation's and Evan Blum's motion (mot. seq. no. 6) for summary judgment is denied;

3. Plaintiffs' motion (mot. seq. no. 7) for summary judgment is denied;

4. Third-party defendant Gateway Demolition Corp.'s motion (mot. seq. no. 8) for leave to amend its third-party answer to add the affirmative defenses of res judicata and collateral estoppel is granted, its motion for summary judgment is granted, all claims asserted against it in this action are severed and dismissed, and the Clerk is directed to enter judgment accordingly;

5. Third-party defendant City of New York's motion (mot. seq. no. 9) for leave to amend its third-party answer is granted, the City's motion for summary judgment is granted, all claims asserted against it in this action are severed and dismissed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the motion under the Second Chow Action, Index Number 112353/03, of defendant Stardial Communications Corporation and Evan Blum (mot. seq. no. 2) for summary judgment, is denied; and it is further

ORDERED that the motions under the American Chandelier Action, Index Number 600481/01, are decided as follows:

1. Defendant Kshel Realty Corp.'s and Walter Blum's motion (mot. seq. no. 4) for summary judgment is denied;

2. Plaintiff American Chandelier Corp.'s and Les Gold's motion (mot. seq. no. 5) for summary judgment is denied;

3. Defendant Stardial Communications Corporation's and Evan Blum's motion (mot. seq. no. 6) for summary judgment is denied;

4. Third-party defendant Gateway Demolition Corp.'s motion (mot. seq. no. 7) for leave to amend its third-party answer to add the affirmative defenses of res judicata and collateral estoppel is granted, and its motion for summary judgment is granted to the extent that all claims asserted against it in this action, except claims for indemnification and contribution based upon American Chandelier's and Les Gold's third cause of action for conversion, are dismissed;

5. Third-party defendant City of New York's motion (mot. seq. no. 8) for leave to amend its third-party answer is granted, its motion for summary judgment is granted, all claims asserted against it in this action are severed and dismissed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the motions under the Stardial Action, Index Number 115483/00, are decided as follows:

1. Defendant City of New York's motion (mot. seq. no. 6) for leave to amend its answer is granted, its motion for summary judgment of dismissal is granted, all claims asserted against it in this action are severed and dismissed, the Clerk is directed to enter judgment accordingly; the City of New York's motion for summary judgment on its counterclaims is denied, its second counterclaim for civil penalties and its fourth counterclaim for restitution are dismissed as duplicative of the relief awarded on its counterclaims in the First Cube Building Action under Index Number 101900/01, and its fifth counterclaim for indemnification is dismissed as duplicative of the relief awarded on its second counterclaim for restitution in the First Cube Building Action under Index Number 101900/01;

2. Defendant Gateway Demolition Corp.'s motion (mot. seq. no. 7) for leave to amend its answer to add the affirmative defenses of res judicata and collateral estoppel is granted; its

motion for summary judgment is granted to the extent of dismissing plaintiff Stardial Communications Corp.'s first, second, fourth, fifth, seventh, eighth, and ninth causes of action and all claims for indemnification and contribution asserted against it; its motion for preclusion is granted to the extent that Stardial Communications Corp. is precluded from 1) using evidence of any "recently discovered items" or of a "possessory right or interest in the property" of third parties to the extent not produced by January 26, 2010 and 2) using evidence of stolen items other than the schedule of eight items listed in response number 5 of its February 11, 2010 response to the court's January 12, 2010 decision and order; and the motion is otherwise denied;

3. Third-party defendants Kshel Realty Corp.'s and Walter Blum's motion (mot. seq. no. 8) for summary judgment is denied; and it is further

ORDERED that under the Peerless Insurance Action, Index Number 109587/03, defendants Kshel Realty Corp.'s and Walter Blum's motion (mot. seq. no. 2) for summary judgment is denied, the third-party action is dismissed in its entirety, and the Clerk is to enter judgment accordingly; and it is further

ORDERED that the motions under the Second Merchants Insurance Action, Index Number 112739/03, are decided as follows:

1. The motion of plaintiff Merchants Insurance Company, a/s/o, Kshel Realty Corp. and third-party defendants Kshel Realty Corp. and Walter Blum (mot. seq. no. 2) for summary judgment is granted to the extent that the third-party complaint is dismissed against Kshel Realty Corp. and Walter Blum, the Clerk is directed to enter judgment accordingly, and the motion is otherwise denied;

2. The motion of third-party defendants Stardial Communications Corporation and Evan

Blum (mot. seq. no. 3) for summary judgment is granted, the third-party complaint is dismissed against them and the Clerk is directed to enter judgment accordingly;

3. Defendant Gateway Demolition Corp.'s motion (mot. seq. no. 4) for leave to amend its answer to add the affirmative defenses of res judicata and collateral estoppel is granted, its motion for summary judgment is granted, the complaint is dismissed against it and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the motions under the First Merchants Insurance Action, Index Number 118786/01, are decided as follows:

1. The motion of plaintiff Merchants Insurance Company, a/s/o, Kshel Realty Corp. (mot. seq. no. 1) for summary judgment is denied;

2. Defendant City of New York's motion (mot. seq. no. 2) for leave to amend its answer is granted, its motion for summary judgment is granted, the action is dismissed and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that in all instances where the court has granted a party leave to amend its pleading, the amended pleading attached to the motion papers shall be deemed served on all parties upon service of a copy of this order with notice of entry, and the parties are directed to file a copy of the amended pleading with the County Clerk.

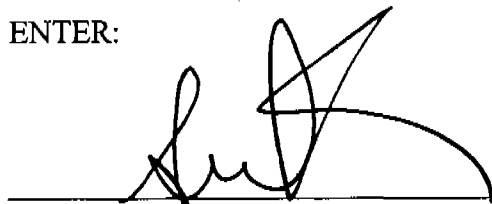
Dated: April 27, 2011

**FILED**

**APR 28 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

ENTER:

  
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J.S.C.