Musk v 13-21 E. 22nd St. Residence Corp.
2012 NY Slip Op 33021(U)
December 3, 2012
Supreme Court, New York County
Docket Number: 100985/10
Judge: Joan M. Kenney
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SCANNED ON 12/20/2012

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY J.S.C. Justice

PART 8

Index Number : 100985/2010
MUSK, MAYE
vs
13-21 EAST 22ND STREET
Sequence Number : 006
SUMMARY JUDGMENT

INDEX NO. 100985/10
MOTION DATE 7/3/12
MOTION SEQ. NO. 006

The following papers, numbered 1 to 59, were read on this motion to/for SJ motion

Notice of Motion/Order to Show Cause — Affidavits — Exhibits | No(s). 1-19
Answering Affidavits — Exhibits | No(s). 20-58
Replying Affidavits | No(s). 59

Upon the foregoing papers, it is ordered that this motion is

FILED
DEC 05 2012
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

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

Dated: 12/3/12

[signature], J.S.C.
JOAN M. KENNEY
J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

--X

MAYE MUSK,

Plaintiff,

-against-

13-21 EAST 22nd STREET RESIDENCE CORP., FRED SLATER, POLTEAM RENOVATION CORP., and SAWA ARCHITECTS,

Defendants.

Index .: 100985/10

DECISION AND ORDER

--X

POLTEAM RENOVATION CORPORATION, INC.,

Third-Party Plaintiff,

-against-

ROYAL AIR CONDITIONING, INC.,

Third-Party Defendant.

Third-party Index №.: 590908/11

--X

GREAT NORTHERN INSURANCE COMPANY a/s/o MAYE MUSK,

Second Third-Party Plaintiff,

-against-

12-31 EAST 22nd STREET, FRED SLATER, POLTEAM RENOVATION CORP. and SAWA ARCHITECTS,

Second Third-Party Defendants,

Third-party Index №.: 101755/12

--X

JOAN M. KENNEY, J.S.C.:

In a case involving noises and vibrations in a cooperative building, defendant/third-party plaintiff/second third-party defendant Polteam Renovation Corp. (Polteam) moves, pursuant to CPLR 3212, for summary judgment dismissing all claims and cross claims as against it (Motion Seq. No. 006). Defendant/second third-party defendant Fred Slater (Slater) moves, pursuant to CPLR 3211 and 3212, for: 1) dismissal of plaintiff's eighth cause of action for personal injury; 2) dismissal of plaintiff's eleventh cause of action for breach of contract; 3) dismissal of defendant/second third-

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party defendant 13-21 East 22nd Street Residence Corp.'s (the Coop) cross claim for contractual indemnification; 4) conditional contractual common-law indemnification, including attorney's fees, against Polteam; 5) conditional common-law indemnification against Polteam and third-party defendant Royal Air Conditioning, Inc. (Royal); and 6) dismissal of second third-party plaintiff Great Northern Insurance's (Great Northern) claims as against it (Motion Seq. No. 007). Meanwhile, Royal moves, pursuant to CPLR 3211 and CPLR 3212, to dismiss Polteam's claims as against it (Motion Seq. No. 008). Finally, the Coop moves for summary judgment dismissing plaintiff's claims for nuisance (third cause of action), breach of contract (fifth and twelfth causes of action), constructive eviction (sixth cause of action), and legal fees (seventh cause of action) (Motion Seq. No. 009). The motions are consolidated for disposition.

BACKGROUND

Plaintiff Maye Musk (Musk) lives in a building, owned by the Coop, located at 21 East 22nd Street in Manhattan. Slater is her neighbor. Between August 1999 and October 2007, Musk, a proprietary lessee, lived in apartment 10-G/H "without noteworthy incident" (Musk June 19, 2012 Affidavit, ¶ 5). However,

> "In October 2007 that all changed. Since then, I have been forced to endure unacceptable and unlawful levels of noise and vibration, soot, holes in the floor and ceiling, vibrating walls and floor, pebbles falling from the ceiling, cracked walls within my apartment, possibly carbon monoxide seepage from the defective chimney, and holes and an unsafe condition in the slab separating Slater's apartment from mine. I have been forced to endure these nuisances and safety hazards, and incur substantial expenses for inspections and repairs, even though the Co-Op knew by early 2008 that the problems plaguing my apartment were related to common elements of the building – the building's boiler and chimney – and were, therefore, the Co-Op's responsibility to investigate and remediate"

(*Id.*, ¶ 6).

Musk alleges that the noises at the center of her claim were caused by renovations commissioned by Slater, designed by defendant Sawa Architects (Sawa), and carried out by Polteam, as the general contractor. Musk filed her summons and complaint against the Coop and Fred Slater on January 25, 2010. On Sepetember 7, 2011, Musk filed an amended complaint, adding Polteam and Sawa as defendants. Plaintiff's amended complaint alleges:

> "For several years, no one was able to determine why Ms. Musk's apartment was the only unit in the Building to be plagued by unbearable vibration and noise. It was recently determined that Defendant Slater's contractor, Polteam, supervised by defendant's architect, Sawa, used a powder actuated gun to drive long nails into the masonry chimney when renovating the Slater Apartment. This caused large holes in the inside of the chimney that [were] the cause of the vibrations, noise, soot and holes in the ceiling by the chimney. It was improper to use a powder actuated gun, which should only be used on concrete and steel"

(Amended Complaint, ¶ 23).

In the first cause of action, plaintiff seeks a declaration that the defendants are responsible for remediation of the vibration and noise problem in Musk's apartment, and for damages that she has suffered as a result. The second cause of action, against the Coop and Slater, is for an injunction compelling them to remediate the noise and vibrations in her apartment, while the third cause of action, against all defendants, is for nuisance. The fourth, fifth, sixth, seventh, and twelfth causes of action, all brought only against the Coop, are for breach of the warranty of habitability, property damage, constructive eviction, legal fees, and breach of the proprietary lease. The eighth cause of action, brought against all defendants, is for personal injury. The ninth and the tenth causes of action are for negligence against Polteam and Sawa, respectively. Finally, the eleventh cause of action alleges that Slater breached the alteration agreement he executed with the Coop's management company (Alteration Agreement), of which Musk claims to be an intended third-party beneficiary.

On November 4, 2011, Polteam filed a third-party complaint against Royal, the subcontractor that installed the air-conditioning unit in Slater's apartment, for indemnification and contribution. On February 17, 2012, Great Northern filed a second third-party complaint, seeking damages as Musk's subrogee, and alleging negligence against the Coop, Slater, Polteam, and Sawa.

DISCUSSION

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

"When determining a motion to dismiss, the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005] [internal quotations and citations omitted]).

I. Polteam and Royal

Polteam brings its motion under CPLR 3212, and Royal brings its motion under CPLR 3212, as well as CPLR 3211 (a) (5). Royal argues exclusively that plaintiff's claims against Polteam are time-barred, and that, therefore, Polteam's claims against Royal are moot, and should be dismissed. While Polteam also argues that plaintiff's claims against it are time-barred, it argues, alternatively,

that plaintiff's claims should be dismissed on substantive grounds.

A. Negligence

Polteam argues that Musk's negligence claims against it must be dismissed, as it did not owe Musk a duty of care and it did not proximately cause harm to Musk or her property.

In order to establish negligence, a plaintiff is required to prove: "the existence of a duty, that is, a standard of reasonable conduct in relation to the risk of reasonably foreseeable harm; a breach of that duty and that such breach was a substantial cause of the resulting injury" (*Baptiste v New York City Tr. Auth.*, 28 AD3d 385, 386 [1st Dept 2006]). As to duty, it is well settled that a party, such as Polteam, that enters into a contract to provide services typically does not have a duty to third parties, such as plaintiff, absent three exceptions:

> "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely"

(*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002] [internal quotation marks and citation omitted]).

Polteam meets its prima facie burden on the issue of duty, by showing that Musk was not a party to the construction contract between Polteam and Slater. While Polteam contends that none of the *Espinal* exceptions apply, plaintiff argues that Polteam owed her a duty of care through the first *Espinal* exception. Specifically, Musk contends that Polteam has a duty to her because it launched a force of harm by using powder-actuated nails in attaching the frame of Slater's air-conditioning unit to the chimney wall, thus creating holes which caused noise and vibration in plaintiff's apartment. Here, plaintiff raises an issue of fact as to whether Polteam launched an

instrument of harm that would create a duty of care to Musk. As such, Polteam is not entitled to summary judgment based on its argument that it owed Musk no duty.

As to legal cause, "[o]rdinarily, issues of proximate cause are fact questions to be decided by a jury" (*White v Diaz*, 49 AD3d 134, 139 [1st Dept 2008] [internal citation omitted]), although the issue "may be decided as a matter of law" in circumstances "where only one conclusion may be drawn from the established facts" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]). However, "where there is any doubt, confusion, or difficulty in deciding whether the issue ought to be decided as a matter of law, the better course is to leave the point for the jury to decide" (*White*, 49 AD3d at 139).

Polteam submits an expert affidavit from Robert Nacheman (Nacheman), an engineer, which suggests that Polteam did not proximately cause the harm Musk alleges. Nacheman, who inspected Musk's apartment several times, most recently on March 29, 2012, when he inspected Slater's apartment as well, concluded:

> "In my opinion, whatever sounds or vibrations the plaintiff claims she has heard or felt or is hearing or feeling, are unrelated to any of the work performed in the Slater apartment, 9G. Support of the HVAC unit to the underside of the slab was done in conformity with good and accepted practice and has not compromised the slab in any way. The vibration isolators are performing their function and the unit is not transmitting significant vibration to the slab. None of the ductwork attached to the HVAC unit which I had access to, was vibrating or contributing to any excessive vibration or audible noise. The HVAC unit itself was not making excessive noise and could not be heard in the plaintiff's apartment but for the holes in the slab, which obviously must be closed and repaired. The strip of powder actuated nails identified by plaintiff is not embedded in the brick and have no detrimental impact on the integrity of the chimney. On the other hand, I noted that the plaintiff's exposed brick chimney had innumerable holes and craters throughout, apparently made by powder actuated nails which had apparently impacted and penetrated into the brick. It is my understanding that the plaintiff has erected and removed a wall adjacent to the masonry chimney during the course of her ownership"

(Nacheman May 14, 2012 Affidavit, ¶¶ 10-11).

As plaintiff submits her own inspection reports suggesting that installation of the air conditioner caused the harm Musk alleges, there is an issue of fact as to proximate causation. As such, the branch of Polteam's motion that seeks dismissal, on substantive grounds, of Musk's negligence claim against it is denied.

B. Nuisance

Polteam argues that plaintiff's nuisance claim must be dismissed, as Musk fails to allege that Polteam intentionally invaded her interest in land.

Common-law private nuisance has five elements: "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act" (*Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 570 [1977]). "It is well established that interference is intentional when the actor (a) acts for the purpose of causing it; or (b) knows that it is resulting or is substantially certain to result from his conduct" (*Chelsea 18 Partners, LP v Sheck Yee Mak*, 90 AD3d 38, 43 [1st Dept 2011] [internal quotation marks and citation omitted). Polteam argues that Musk fails to allege that it acted with intent, and the record, particularly the deposition testimony of Wojciech Cieszkowski (Cieszkowski), Polteam's president, shows that it did not act with the requisite intent.

In opposition, plaintiff argues that intent is not an element of private nuisance. In support of this proposition, Musk relies on *Essa Realty Corp. v J. Thomas Realty Corp.* (31 Misc 3d 1235 [A], 2011 NY Slip Op 51006 [U] [Sup Ct, NY County 2011]), which held that "[l]iability for nuisance may be predicated by a failure to act, as well as an affirmative act" (*id.* at *7, citing *Copart*, 41 NY2d at 570; *Puritan Holding Co. v Holloschitz*, 82 Misc 2d 905, 906 [Sup Ct, NY County

1975]). While *Essa Realty Corp.* illustrates that a failure to act, as well as an affirmative act, can be intentional, Musk misinterprets *Essa Realty Corp.* by conflating an affirmative act with an intentional act. As intent is a requirement of nuisance, and as Musk fails to raise an issue of fact as to whether Polteam intentionally interfered with her interest or enjoyment of her apartment, Musk fails to rebut Polteam's prima facie showing of entitlement to judgment on her nuisance claim against it. Thus, the branch of Polteam's motion that seeks dismissal, on substantive grounds, of Musk's nuisance claim as against it is granted.

C. Personal Injury

Polteam argues that Musk's eighth cause of action, for personal injury, must be dismissed as it is simply a claim for damages, not a separate cause of action. Musk argues that personal injury is recoverable under nuisance, and, therefore, the cause of action should not be dismissed.

"A cause of action is a set of operative facts which gives rise to a separate and distinct legal right and to a right to seek separate and distinct redress for a violation of that legal right" (*Benson v Cohoes School Bd.*, 98 Misc 2d 110, 113 [County Ct, Albany County 1979] [internal quotation marks omitted]). Here, plaintiff's eighth cause of action is not a cause of action, as personal injury does not, alone, grant a right to seek legal redress, and not all harm is recoverable (*see e.g. Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 [2003] ["an accident alone does not establish a Labor Law § 240 (1) violation or causation"]). However, it is also clear that personal injury is part of the damages plaintiff seeks for her negligence and nuisance claims. Accordingly, the court dismisses the eighth cause of action for personal injury as against Polteam, while consolidating the damages claims contained within it into the third cause of action, for nuisance, and the ninth cause of action, for negligence.

D. Declaratory Judgment

Polteam argues that Musk's declaratory judgment cause of action is dependant on Musk's claims for monetary damages, and since the latter fail, the declaratory judgment must fail as well. However, the court is not dismissing Musk's negligence claims against Polteam on substantive grounds. Thus, Polteam also fails to make a prima facie showing of entitlement to dismissal of plaintiff's first cause of action for a declaratory judgment on substantive grounds.

E. Timeliness

Polteam and Royal argue that the plaintiff's claims against Polteam must be dismissed as untimely. Musk filed her amended complaint against Polteam on September 7, 2011. The parties agree that the appropriate statute of limitations for Musk's claims against Polteam, under CPLR 214, is three years. However, they disagree as to when Musk's claims against Polteam accrued.

Musk argues that she did not know the source of the sounds and vibrations until a series of court-ordered inspections of her apartment revealed damage behind her walls and under her floors. On April 21, 2010, Musk's apartment was inspected by Flue Tech, Inc. (Flue Tech), which found holes inside of Musk's chimney. Rand Engineering, which also inspected the apartment on April 21, 2010, performed an additional inspection on March 21, 2011. In its report, Rand Engineering notes that:

> "it was observed that the apartment drywall framing was bolted to the building's brick chimney. Wood framing was attached to the building's brick chimney wall using powder-actuated fasteners (nails) ... Although we could not verify conditions along the inside of the building's brick chimney, it is very likely that during the framing installation, the powder actuated nails caused dislocation or damage to sections of brick and/or mortar joints on the inside of the chimney. Such damage could in fact weaken the building's chimney wall and increase the amount of vibration and noise transmitted into the apartments"

(Rand Engineering's April 29, 2011 Report, ¶ 3).

Musk argues that the April 21, 2010 inspection revealed the damage to the inside of her chimney, while the March 21, 2011 inspection connected that damage to the renovations Polteam conducted, as well as the noise and vibrations at the center of this case. Thus, Musk contends that her claims against Polteam accrued, at the earliest, on April 21, 2010.

Polteam and Royal argue that the claims accrued either when Polteam finished its work on Slater's apartment, in April 2004, or when plaintiff first began noticing noise and vibrations in her apartment. In support of the former method of measuring, Polteam relies on *City School Dist. of City of Newburgh v Stubbins & Assoc.* (85 NY2d 535, 538 [1995]), which held that "an owner's claim arising out of defective construction accrues on date of completion, since all liability has its genesis in the contractual relationship of the parties." Here, since Musk was not in contract with Polteam, this method of measuring is inapplicable.

Where the party whose property was damaged by a construction project is a bystanding neighbor, such as Musk, the cause of action accrues when the damage becomes "visible and apparent" (*Public Serv. Mut. Ins. Co. v 341-347 Broadway, LLC*, 96 AD3d 473, 473 [1st Dept 2012]; *see also Russell v Dunbar*, 40 AD3d 952, 954 [2d Dept 2007] [denying defendant's motion to dismiss on statute of limitations grounds where defendant failed to provide evidence that damage to plaintiff's apartment was apparent more than three years prior to commencement of the case]; *Mark v Eshkar*, 194 AD2d 356, 357 [1st Dept 1993] [holding, in a case involving damage to a party wall, that the damage was apparent, and therefore the cause of action accrued not when defendant's building was renovated and minor damage appeared in the party wall, but years later when "larger cracks, allegedly structural, became manifest in the wall"]).

While Musk contends that her claims against Polteam accrued on April 21, 2010, when inspections first revealed holes in the chimney, those holes possibly revealed Polteam's negligence, rather than damage to Musk. The damage that Musk alleges is not holes in a common area, but noises and vibrations in her apartment. Musk first heard the noises and vibrations in October 2007; at this time the damage was audible and apparent. As such, her cause of action against Polteam arose in October 2007, and the statute of limitations had run by the time she filed her complaint against Polteam. Thus, the branches of Polteam and Royal's motions that seek to dismiss Musk's complaint as against Polteam are granted.

However, neither Polteam nor Royal has made a showing entitling them to dismissal of Slater's cross claims for indemnification. Moreover, if Slater eventually succeeds on his contractual indemnification claim against Polteam, Polteam could seek contribution from Royal. Thus, while Royal argues that dismissal of plaintiff's claims against Polteam renders Polteam's third-party complaint moot, Polteam's contribution claim against Royal is not extinguished.

II. Slater

A. Breach of Contract and Contractual Indemnification

Musk's eleventh cause of action, which seeks recovery under the Alteration Agreement that Slater executed with Wallack Management Company, Inc. (Wallack), the Coop's agent, is divided into two parts: the first seeks damages, as a third-party beneficiary, for alleged breaches of the terms of the Alteration Agreement, while the second seeks recovery for contractual indemnification.

With respect to the former, Musk claims that Slater violated three provisions of the Alteration Agreement: sections 2 (D), 4 (A), and 9. Section 2 (D) provides that: "You agree that no Air-Powered tools will be used without written approval of the Alteration Committee – which approval

is beyond the scope of the Alteration Agreement." Section 4 (A) provides:

> "The Alteration and Materials used shall be of the quality and style in keeping with the general character of the Building. You are to take all precautions to prevent all damage to the Building and you assume all risks for damage to the Building, its mechanical systems, and property of all other tenants and occupants in the Building which result from or may be attributable to the Alteration."

Finally, section 9 of the Alteration Agreement between Slater and the Coop's agent provides: "If the operations of the Building or any of its equipment is in any way adversely affected by reason of the Alteration, you agree at your sole expense to promptly remove the cause thereof upon being advised by the Corporation or Managing Agent."

Slater argues that Musk is not a third-party beneficiary under the contract. The elements of a breach of contract for a plaintiff trying to recover as a third-party beneficiary are: "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [its] benefit, and (3) that the benefit to [it] is sufficiently immediate ... to indicate the assumption by the contracting parties of a duty to compensate [it] if the benefit is lost" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks and citation omitted]).

Slater contends that the Alteration Agreement was made for the benefit of Wallack and the Coop, and that Musk was not an intended beneficiary, as she is not named in the agreement. In support, Slater cites *LaSalle Natl. Bank v Ernst & Young* (285 AD2d 101 [1st Dept 2001]), which involved a third-party creditor's claims that an accounting firm breached its contract with plaintiff's debtor. In *LaSalle*, the Court noted that "[a]bsent clear contractual language evincing such intent, New York courts have demonstrated a reluctance to interpret circumstances to [establish a third party as an intended beneficiary])" (*id.* at 108-109). Applying this principle, the Court dismissed plaintiff's claim, finding that the retention letter signed between the accounting firm, and plaintiff's

debtor did not indicate that the audit would be shown to a third party, and that "[t]he engagement letter formalizing the contractual relationship makes no reference to any third party, nor even to the loan" (*id.* at 109). Slater argues that Musk, like the plaintiff in *LaSalle*, was, at best, an incidental beneficiary of the Alteration Agreement, as she was not specifically mentioned in the agreement.

Musk argues that she was a third-party beneficiary of the Alteration Agreement, as she, or, more specifically, a group of which she is a member, "tenants," is explicitly listed in section 7 of the Alteration Agreement . The section provides:

> "By executing this Agreement, you undertake to indemnify and hold harmless the Corporation, the Managing Agent and the Tenants and Occupants of the Building, against any claims for damages to persons or property suffered as a result of the Alteration, whether or not caused by negligence, and any expenses (including, without limitation, attorneys' fees and disbursements) incurred by the Corporation in connection therewith."

Here, Musk is clearly not an intended third-party beneficiary of the Alteration Agreement as whole, as the agreement was not executed for her benefit.

However, that does preclude Musk from enforcing the indemnification provision. While maintaining that Musk is not a third-party beneficiary to the Alteration Agreement as a whole, Slater concedes that she is a third-party beneficiary of the indemnification provision of the agreement. However, Slater argues that the indemnification provision is void, as it violates General Obligations Law (GOL) § 5-321. GOL § 5-321, entitled "Agreements exempting lessors from liability for negligence void and unenforceable," provides that:

> "Every covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable."

Slater relies on *Hadzihasanovic v 155 E. 72nd St. Corp.* (70 AD3d 637 [2d Dept 2010]), which, he contends, is controlling. *Hadzihasanovic* involved personal injury claims arising out of construction performed at a cooperative apartment building, and the Court held that an indemnification provision--between the building, and its management company, and the proprietary lessees who commissioned the renovations--violated GOL § 5-321: "A broad indemnification provision in a lease, such as the alteration agreement here, which is not limited to the lessee's acts or omissions, fails to make exceptions for the lessor's own negligence, and does not limit the lessor's recovery under the lessee's indemnification obligation to insurance proceeds, is unenforceable" (*id.* at 638). Slater contends that, as in *Hadzihasanovic,* the indemnification provision here fails to limit Slater's indemnity obligation to his negligent acts, and fails to make exceptions for the Coop's and Musk's own negligence.

Musk argues that GOL § 5-321 is not applicable to the Alteration Agreement, since there is no evidence that the Coop was negligent with respect to the renovations done at Slater's apartment. In support of this contention, Musk relies on *Correa v 100 W. 32nd St. Realty Corp.* (290 AD2d 306, 306 [1st Dept 2002]), which held that GOL § 5-321 "do[es] not bar enforcement of [a] lease's indemnification provision where there is no evidence of any negligence by the landlord . . . "

Moreover, Musk contends that GOL § 5-321 does not void the indemnification here because the Alteration Agreement required Slater to purchase liability insurance. The Alteration Agreement, at paragraph 3, provides that Slater's contractor procure insurance policies for comprehensive liability, as well as property damage, with the Coop and Slater to be named as insureds (Alteration Agreement, §§ 3 [a] and 3 [b]). In support of this argument, Musk relies on *Great N. Ins. Co. v Interior Constr. Corp.* (18 AD3d 371 [1st Dept 2005], *affd* 7 NY3d 412 [2006]), which held that:

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"While lease provisions purporting to exempt a lessor from liability for its own negligence are void as against public policy, where . . . sophisticated parties negotiating at arm's length have agreed to allocat[e] the risk of liability to third parties between themselves, essentially through employment of insurance, that agreement is enforceable" (*id.* at 372 [internal quotation marks and citation omitted]). Musk argues, citing to Slater's deposition testimony, that Slater is a sophisticated party, as he owns and runs a business that develops and manages industrial and commercial real estate (*See* Slater's Deposition, at 7-9).

Additionally, Musk focuses on "Exhibit B" of the Alteration Agreement, which is a letter, a copy of which was sent to all shareholders in the Coop, including Musk. The letter, signed by Slater, provides:

> "In accordance with the Alteration Agreement between me and [the Coop] covering the alterations to be performed in 9G, you are advised as follows: ... 2) I hereby agree to indemnify you for any damage caused by the alterations performed in my apartment. I agree to pay the reasonable cost of such damage. At your option, such repair may be performed, at my expense, by contractors of your choice or by my contractors. 3) In order to take advantage of the foregoing indemnification, you must permit my designated representatives to inspect your apartment prior to commencement of my alterations."

Musk contends additionally that GOL § 5-321 does not apply to Exhibit B, because it has nothing to do with a landlord-tenant relationship. Musk also argues that Exhibit B shows that Musk was an intended beneficiary of the Alteration Agreement as a whole. Slater contends that Musk cannot seek recovery under Exhibit B, since she did not mention Exhibit B in her amended complaint.

Slater also argues, in reply, that *Great Northern* is not applicable because the Alteration Agreement did not involve a commercial lease, or two sophisticated parties, and because it did not

impose an insurance procurement requirement on Slater, but instead placed one on Slater's contractor. In support of the last point, Slater cites to a trial court case that was recently modified by the appellate division (*Dwyer v Central Park Studios*, 2010 WL 5621150, 2010 NY Misc LEXIS 6594 [Sup Ct, New York County 2010], *affd as mod Dwyer v Central Park Studios, Inc.*, 98 AD3d 882 [1st Dept 2012]).

In *Dwyer*, both the trial court and the Appellate Division found that GOL § 5-321 was inapplicable. Importantly, the Appellate Division held that "[a]lthough the indemnification clause purports to indemnify CPS for its own negligence, it is nevertheless enforceable because there is no view of the evidence that CPS was actually negligent" (98 AD3d at 884). This holding, the same as the holding in *Correa* (290 AD2d at 306), trumps all of Slater's arguments supporting application of GOL § 5-321. As Slater fails to argue that the Coop was negligent, and as the record does not show any evidence that the Coop was negligent, GOL § 5-321 is not applicable.

Slater alternatively argues that the indemnification provision in the Alteration Agreement was not intended to apply between parties, and is thus not applicable to claims brought by Musk. However, the indemnification provision clearly refers to property damage incurred by Coop tenants such as Musk. Moreover, the two cases that Slater relies on, *Hooper Assoc. v AGS Computers* (74 NY2d 487 [1989]) and *Gotham Partners, L.P. v High Riv. Ltd. Partnership* (76 AD3d 203 [1st Dept 2010]), address the issue of attorney's fees within an indemnification provision, rather than the broader question of whether an indemnification provision itself is applicable (*see e.g. Gotham Partners, L.P.*, 76 AD3d at 209 ["a contract provision employing the language of third-party claim indemnification may not be read broadly to encompass an award of attorney's fees to the prevailing party based on the other party's breach of the contract; the provision must explicitly so state"]).

Here, where the applicability of the indemnification provision as a whole is at question, *Hooper* and *Gotham* are inapplicable.

Thus, although Slater is correct that Musk is not a third-party beneficiary with respect to the Alteration Agreement as a whole, Slater is not entitled to dismissal of Musk's indemnification claim. As such, the branch of Slater's motion that seeks dismissal of Musk's eleventh cause of action is denied.

Slater argues that even if its motion to dismiss Musk's indemnity claim is denied, as it has been, Musk's claim for indemnity should be limited to exclude attorney's fees. Slater notes that the portion of the indemnification provision that refers to attorney's fees is limited by the phrase "incurred by the Corporation in connection therewith" (Alteration Agreement, § 7).

In opposition, Musk relies on *Breed, Abbott & Morgan v Hulko* (139 AD2d 71, 74 [1st Dept 1988], *affd* 74 NY2d 686 [1989]), in which the Appellate Division held that "there is a long, uninterrupted line of decisions which have interpreted broadly worded indemnification clauses as embracing the right to reimbursement for counsel fees." However, the Alteration Agreement contains not just a broadly worded indemnification clause, but also a clause that refers specifically to attorney's fees, and only in relation to "the Corporation." *Hooper* is instructive here: "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (74 NY2d at 491). As the attorney's fees portion of the indemnification provision only refers to the "the Corporation," Slater is correct that the indemnification provision should be read to exclude reimbursement for Musk's legal expenses.

B. The Coop's Claim For Contractual Indemnification

Aside from the GOL § 5-321 argument discussed above, Slater contends that the Coop's cross claim for indemnification should be dismissed because the Coop was not a party to the agreement, or a third-party beneficiary. Slater relies on the opening paragraph of the Alteration Agreement, which states: "You have asked Wallack Management Co. (the 'Corporation') for its written consent for the making of certain alteration(s) ... to the above referenced cooperative apartment, in the premises known as 21 E 22nd–9a, New York, New York." Both "Wallack Management Co." and "21 E 22nd–9g" are written over blanks in what appears to be a form contract. The indemnification provision refers to "the Corporation, the Managing Agent and the Tenants and Occupants of the Building" (Alteration Agreement, § 7). Thus, Slater argues, as the Coop is not mentioned in the indemnification provision, or anywhere else in the Alteration Agreement, it is not entitled to indemnification.

The Coop argues that the unknown person who defined "the Corporation" as Wallack, instead of the Coop, committed a scrivener's error. The Coop contends that it is undisputed that Wallack is the Coop's management agent, that Slater's lease, at paragraph 21 (a), required Slater to get permission of the Coop before performing alterations, and that the Coop's account executive, Gail Wainer, signed the agreement on behalf of the Coop, "as agent." The Coop further argues that Slater received the benefit of the bargain, as he was allowed to perform the alterations, so he must also be bound by the burdens of the contract, such as indemnifying the Coop.

Moreover, the Coop argues that because the agreement distinguishes between Wallack and "the Corporation," defining them coextensively was clearly a scrivener's error. Not only does the indemnification provision refer separately to the "Managing Agent" and "the Corporation," section

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2A provides that "neither the Corporation nor the Managing Agent," are responsible for the alteration, while section 3B provides that Slater's contractor must submit a certificate of insurance naming Slater, as well as "Wallack Management Company and the Corporation," as additional insureds. The Coop argues that this repeated distinction must not be read as meaningless, and that the contract should be reformed to represent the intent of the parties. In support of the latter point, the Coop cites *Hadley v Clabeau* (161 AD2d 1141 [4th Dept 1990]), which held that "[w]hen an error is not in the agreement itself, but in the instrument that embodies the agreement, equity will interfere to compel the parties to execute the agreement which they have actually made, rather than enforce the instrument in its mistaken form" (*id.* at 1141 [internal quotation marks and citation omitted]; *see also Gramercy 222 Residents Corp. v Gramercy Realty Assoc.*, 209 AD2d 181, 181 [1st Dept 1994]).

While Slater contends in reply that the Coop has not proved that the parties intended "the Corporation" to refer to the Coop in the Alteration Agreement, it is Slater, not the Coop, that is moving for summary judgment on the Coop's cross claims. The Coop raises an issue of fact as to whether a scrivener's error resulted in Wallack, instead of the Coop, being defined as "the Corporation" in the agreement. As such, Slater is not entitled to dismissal of the Coop's cross claim for indemnification on the basis of its contention that the Coop is not referred to in the Alteration Agreement, or its indemnification provision. As the Court has already rejected Slater's alternate basis for relief, GOL § 5-321, the branch of his motion seeking dismissal of the Coop's cross claim for indemnification is denied.

Slater also argues that only Wallack is entitled to seek attorney's fees through the indemnification provision, as that provision refers to "the Corporation" (Alteration Agreement, § 7). However, since there is a question of fact as to whether "the Corporation" refers to Wallack or the

Coop, the indemnification provision cannot be read as a matter of law to exclude attorney's fees for the Coop.

C. Slater's Indemnification Claims Against Polteam and Royal

1. Contractual Indemnification

Slater contends that it should be granted conditional contractual indemnification against Polteam, citing to *Jamindar v Uniondale Union Free School Dist.* (90 AD3d 612 [2d Dept 2011]), which broadly sketches the outlines of such relief:

> "A court may render a conditional judgment on the issue of contractual indemnity, pending determination of the primary action so that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed. To obtain conditional relief on a claim for contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and [may be] held liable solely by virtue of ... statutory [or vicarious] liability"

(*id.* at 616 [internal quotation marks and citation omitted]).

Slater submits an indemnification provision, signed by Polteam's president, which was an exhibit attached to the Alteration Agreement. It provides:

> "The undersigned agrees that it will not make any claim against, or seek to recover from (a) Fred Slater (the "Shareholder") ... for any damage to persons or property by the perils within the scope of the policies described in that certain alteration agreement between the Corporation and the Shareholder dated______, unless the loss or damage is due to the carelessness or negligence of the Indemnified Party. The undersigned further agrees to defend, indemnify and hold harmless the Indemnified Parties and all other occupants of the building, against any and all liability, including legal costs and expenses on account of loss of life or injury to any person or the performance of the work unless such injury or loss of life or loss of damage to property is caused by the carelessness or negligence of that Indemnified Party"

(Alteration Agreement, Exhibit "A").

Slater argues that this scarcely grammatical provision places a broad duty to indemnify on Polteam, and that the duty is triggered when property or personal injury occurs due to "the

performance of the work." Further, Slater contends that he is entitled to conditional summary judgment on his contractual indemnification claims against Polteam because any possible liability would be purely vicarious, as Musk claims her property was injured as a result of work for which Polteam was the general contractor.

Polteam argues, among other things, that conditional summary judgment on Slater's contractual indemnification claim is inappropriate, as it is not clear that if Slater were to be found liable to Musk that it would be through vicarious liability stemming from work performed by Polteam. Specifically, Polteam contends that some of Musk's claims against Slater, such as the nuisance claim, do not arise from Polteam's work in Slater's apartment. For example, in Musk's response to Slater's demand for a bill of particulars, Musk, when asked about what intentional acts by Slater animated her claim, stated that, among other things, "Slater repeatedly refused access to his apartment thereby frustrating the plaintiff's attempts to find out the cause of the noise and vibrations in her apartment" (Plaintiff's Response to Slater's Demand for a Bill of Particulars, Response No. 21).

Here, Slater could be liable for nuisance for intentionally blocking Musk's attempts to investigate and address her noise complaints. Thus, Polteam raises a question of fact as to whether Slater's potential liability is solely vicarious. As such, Slater is not entitled to conditional summary judgment on its claim for contractual indemnity against Polteam.

2. Common-Law Indemnification

Slater contends that he is entitled to conditional common-law indemnification against Polteam and Royal, as it was, allegedly, their negligent actions that caused the noise and vibrations. Specifically, Musk alleges that Royal negligently installed the HVAC unit to the slab separating

Slater and Musk's apartments, and that Polteam negligently used powder actuated nails to affix brackets to the chimney.

Generally, common-law indemnification requires one party that is "actively at fault in bringing about the injury" to indemnify another party that "is held responsible solely by operation of law because of [its] relation to the actual wrongdoer" (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 375 [2011] [internal quotation marks and citation omitted]).

As yet, there has been no finding as to whether Polteam and Royal were negligent. Thus, it has not been established that they were actual wrongdoers for common-law indemnification analysis. Moreover, as discussed above, Slater may be liable for his own actions, e.g., blocking Musk's attempts to investigate and address the source of the noise and vibrations in her apartment. Thus, it has not been established that Slater, if liable, would be held responsible solely by operation of law because of his relation to Polteam and Royal. As such, Slater fails to make a prima facie showing of entitlement to summary judgment on his common-law indemnification claims against Polteam and Royal, and his application for conditional relief on this issue is denied.

D. Great Northern

Slater argues that Great Northern's subrogation action should be dismissed as time-barred. In its second third-party action, Great Northern seeks to recover $39,940.94 from defendants, the amount which it reimbursed Musk for damage in her apartment. In its complaint, filed on February 17, 2012, Great Northern brought one cause of action, alleging that the Coop, Slater, Polteam, and Sawa were negligent, either in carrying out or supervising the renovations in Slater's apartment.

Slater argues that Great Northern's action is time-barred, as the renovations were completed in 2004, the relevant statute of limitations period, under CPLR 214 (4), is three years, and Great

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Northern did not file its action until 2012. Slater correctly notes that Great Northern, as the subrogee of Musk, stands in her shoes with respect to her rights against Slater, and argues that any action for negligence relating to the renovation work accrued to Musk when the renovations were completed, rather than when Musk discovered the condition.

In support of his theory of accrual, Slater cites to *City School Dist. of City of Newburgh* (85 NY2d 535 at 538), which, as noted above in the discussion of Polteam's summary judgment motion, held that "an owner's claim arising out of defective construction accrues on date of completion, since all liability has its genesis in the contractual relationship of the parties." Great Northern argues that this standard is inapplicable, as Musk had no contractual relationship with any of Slater's contractors. Instead, Great Northern argues that Musk's negligence claims began to accrue when damage became apparent to Musk. In support, Great Northern cites to *Mark* (194 AD2d at 357), where the plaintiff's claims relating to a damaged party wall did not accrue when minor damage appeared, but later, when "larger cracks, allegedly structural, became manifest in the wall."

As discussed above in regard to Polteam's motion for summary judgment, Musk's negligence actions accrued in October 2007, when she began to hear noises and vibrations in her apartment. This is the time at which the damage alleged by Musk became apparent (*see Public Serv. Mut. Ins. Co.*, 96 AD3d at 473). Moreover, Slater is correct that the continuing harm doctrine, while possibly affecting accrual analysis for trespass and nuisance claims, is inapplicable to negligence claims (*see e.g. Essa Realty*, 31 Misc 3d at *3). Thus, as Great Northern did not file its complaint until February 2012, its action against Slater is time-barred, and the branch of Slater's motion seeking dismissal of Great Northern's second third-party complaint as against him is granted.

E. Personal Injury

As Polteam argued above, Slater contends that Musk's eighth cause of action, for personal injury, should be dismissed as it is merely a damages claims, rather than a substantive cause of action. Again, for the reasons detailed above, the Court dismisses the eighth cause of action as against Slater, while consolidating the damages claims contained in it with Musk's third cause of action for nuisance.

III. The Coop

A. Nuisance

The Coop argues that Musk's third cause of action for nuisance should be dismissed as duplicative of Musk's fourth cause of action for breach of the implied warranty of habitability. The Court of Appeals has held that

> "a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependant upon the contract"

(*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]; *see also Edelman v Emigrant Bank Fine Art Fin., LLC,* 89 AD3d 632, 633 [1st Dept 2011] [finding a fraud claim duplicative of breach of contract claim]; *Wapnick v Seven Park Ave. Corp.*, 240 AD2d 245, 247 [1st Dept 1997] [holding that plaintiff's negligence and gross negligence claims were duplicative where "[e]ach of these claims is fundamentally no more than a breach of contract claim, and, absent the allegation of a duty owed by defendant independent of the contract (the proprietary lease), a valid cause of action for negligence is not stated"]).

Musk argues in opposition that the duty to avoid creating or participating in a nuisance is not

dependant on any contractual obligation, citing *Penn Cent. Transp. Co. v Singer Warehouse & Trucking Corp.* (86 AD2d 826, 828 [1st Dept 1982]) for the proposition that "[e]very one who creates a nuisance or participates in the creation or maintenance thereof is liable for it."

Here, Musk's nuisance claim is not duplicative of her breach of the implied warranty of habitability claim. To make out a case for breach of the implied warranty of habitability, Musk must provide evidence of "conditions that render residential premises uninhabitable or unuseable" (*Kent v 534 E. 11th St.*, 80 AD3d 106, 112-113 [1st Dept 2010]). While the underlying facts animating both claims overlap, plaintiff is correct that the Coop has an independent duty not to participate in a nuisance against her. Moreover, Musk alleges intentional wrongdoing on the part the Coop, i.e., that it failed to remedy the noise condition in her apartment after becoming aware of it, and stymied her efforts to remedy the condition (*see Berenger v 261 W. LLC*, 93 AD3d 175, 180-181 [1st Dept 2012] [rejecting defendants' argument that plaintiffs' trespass and nuisance claims were in effect breach of contract claims because plaintiffs alleged intentional wrongdoing under those claims]). As intentional wrongdoing is outside the scope of Musk's breach of the implied warranty of habitability claim, Musk's nuisance claim against the Coop is not duplicative.

The Coop argues further that Musk's nuisance claim should be dismissed against it because it did not create the nuisance, and because it did not intentionally permit noises and vibrations to enter Musk's apartment. Musk argues that her expert reports show that the noise and vibrations emanated from the common spaces. With respect to intent, Musk argues that she began advising the Coop of the noise and vibrations in 2007, and continued to do so for years.

Musk is correct that the Coop can be held liable for failing to abate a nuisance arising in a common area, such as a chimney, and that the history of complaints and inspections at least raise a

question of fact as to whether the Coop knew the noises arose in a common area and failed to abate the problem. As such, the branch of the Coop's motion that seeks dismissal of Musk's third cause of action for nuisance is denied.

B. Constructive Eviction

As with Musk's nuisance claim, the Coop claims that Musk's sixth cause of action for constructive eviction is duplicative of her breach of the implied warranty of habitability claim. Here, the Coop is correct that the constructive eviction claim is duplicative of the breach of the implied warranty habitability claim (*see Elkman v Southgate Owners Corp.*, 233 AD2d 104, 105 [1st Dept 1996] [dismissing a claim for partial constructive eviction as duplicative of a cause of action for breach of implied warranty of habitability]). Moreover, the measure of damages for constructive eviction "is limited to rent abatement" (*Walls v Prestige Mgt., Inc.*, 73 AD3d 636, 636 [1st Dept 2010]) rather than the $1,000,000 in damages Musk seeks under this cause of action. Finally, constructive eviction "may only be asserted defensively" (*Elkman,* 233 AD2d at 105). Thus, as it is duplicative and improperly asserted, the branch of the Coop's motion that seeks dismissal of plaintiff's sixth cause of action for constructive eviction is granted.

C. Breach of Contract

The Coop also argues, without much specificity, that Musk's twelfth cause of action, for breach of contract, is duplicative of her fourth cause of action for breach of the implied warranty of habitability. The twelfth cause of action alleges that the Coop violated its duty under the proprietary lease to "at its expense keep in good repair the building and its common elements" (Amended Complaint, ¶ 165). Musk argues that the two claims are distinct, and involve different facts, as a claim of breach of the implied warranty of habitability, involving a noise violation, may be sustained

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even absent control by the landlord over the cause of the breach. In support of this proposition, Musk relies on *Sutton Fifty-Six Co. v Garrison* (93 AD2d 720, 722 [1st Dept 1983] [holding that "the statutory warranty of habitability can apply to conditions resulting from events beyond a landlord's control"]) and *Matter of Nostrand Gardens Co-Op v Howard* (221 AD2d 637, 638 [2d Dept 1995] [valid breach of warranty of habitability claim arose from noise emanating from a neighboring apartment). The Coop does not respond to this argument.

Here, in order to succeed on her breach of contract claim, Musk must show that the Coop failed to maintain a common element in good repair, whereas she can succeed on her breach of the implied warranty of habitability without such a showing. As the factual showing necessary for each cause of action differs, plaintiff's twelfth cause of action, for breach of contract, is not duplicative of her fourth cause of action for breach of the implied warranty of habitability. As such, the branch of the Coop's motion that seeks dismissal of plaintiff's claim for breach of contract is denied.

D. Property Damage

The Coop argues that, since Musk has already been compensated for her property loss by Great Northern, and that in receiving the payment she assigned all of her rights to Great Northern, she is no longer the real party in interest to any property damage claims. The Coop submits an unsigned, unsworn copy of Great Northern's "Sworn Statement in Proof of Loss," the "Subrogation Receipt" portion of which provides:

> "Received of the Great Northern Insurance Company, the sum of $39,940.94 in full settlement of all claims and demands of the undersigned for loss and damage by water occurring on the 20th day of December 2010 ... In consideration of and to the extent of said payment the undersigned hereby subrogates said Insurance Company, to all of the rights, claims and interest which the undersigned may have against any person or corporation liable for the loss mentioned above, and authorizes the said Insurance Company to sue, compromise or settle in the undersigned's name or

> otherwise all such claims and to execute and sign releases and acquittances and endorse checks or drafts given in settlement of such claims in the name of the undersigned, with the same force and effect as if the undersigned executed or endorsed them"

(Unsigned August 30, 2011 Proof of Loss, "Subrogation Receipt," ¶¶ 2-3).

Musk concedes that she received $39,440.94 from Great Northern on January 12, 2011.[1] However, Musk asserts that the subrogation was, by its own terms, partial, and that her property damage, along with the noise and vibrations, have been ongoing since the payment was made on January 12, 2011.

Where a subrogation clause limits its scope to the extent that the subrogor "received payment under the policy," claims for damages arising out of the same incident are not assigned to the subrogee (*Winkelmann v Hockins*, 204 AD2d 623, 624 [2d Dept 1994]). However, where a subrogor assigns all of its claims, the subrogee may seek "all of the compensation to which [the subrogor] is entitled" (*Spectra Audio Research, Inc. v Chon*, 62 AD3d 561, 564 [1st Dept 2009]).

The unsigned Subrogation Receipt refers to "loss and damage by water occurring on the 20th day of December 2010." Clearly, this does not cover all of Musk's property damage claims. As such, the Coop is not entitled to dismissal of Musk's property claims based on Great Northern's payment to Musk (*see Hopper v McCollum*, 65 AD3d 669, 670 [2d Dept 2009] ["plaintiffs are not precluded from maintaining this action against the defendant simply because they received payment from their insurance carrier"]).

[1] While Great Northern found reimbursable damages of $39,940.94, the figure was reduced by Musk's $500 deductible.

E. Attorney's Fees

The Coop argues that Musk's seventh cause of action, for attorney's fees under Real Property Law (RPL) § 234, should be dismissed, as plaintiff violated her lease.

RPL § 234 provides:

> "Whenever a lease of residential property shall provide that in any action or summary proceeding the landlord may recover attorneys' fees and/or expenses incurred as the result of the failure of the tenant to perform any covenant or agreement contained in such lease, or that amounts paid by the landlord therefor shall be paid by the tenant as additional rent, there shall be implied in such lease a covenant by the landlord to pay to the tenant the reasonable attorneys' fees and/or expenses incurred by the tenant as the result of the failure of the landlord to perform any covenant or agreement on its part to be performed under the lease or in the successful defense of any action or summary proceeding commenced by the landlord against the tenant arising out of the lease, and an agreement that such fees and expenses may be recovered as provided by law in an action commenced against the landlord or by way of counterclaim in any action or summary proceeding commenced by the landlord against the tenant. Any waiver of this section shall be void as against public policy."

The Coop and Musk agree that the proprietary lease between the parties contains provisions that require Musk to pay for attorney's fees under certain circumstances, such that RPL § 234 is, facially, applicable if Musk were to prevail on her breach of contract, or her breach of the implied warranty of habitability claims. However, courts have discretion to deny attorney's fees under RPL § 234 "based on equitable considerations and fairness" (*Kralik v 239 E. 79th St. Owners Corp.*, 93 AD3d 569, 570 [1st Dept 2012]). The Coop asserts that the court should deny Musk attorney's fees under Real Property § 234 because, it alleges, she breached the proprietary lease by withholding maintenance payments, and by failing to ask for the Coop's permission before doing inspections that involved removing floorboards and cutting into walls, and by failing to submit an alteration agreement for such work, or getting permits from the Department of Buildings. In light of these actions, the Coop argues, it would not be equitable for Musk to receive attorney's fees. Musk, on

the other hand, argues that her actions, allegedly amounting to breaches of the proprietary lease, were prompted by the Coop's own alleged breach of the proprietary lease, as well as its alleged breach of the implied warranty of habitability.

Here, where there has been no determination of whether plaintiff should prevail on her claims that the Coop breached the proprietary lease, Musk has not made a showing that the she is facially entitled to attorney's fees under RPL § 234. Accordingly, an equitable determination of whether any of Musk's actions would make it unfair to apply RPL § 234 is premature, and the branch of the Coop's motion seeking such a determination is denied.

F. Punitive Damages

The Coop argues that punitive damages are inappropriate in this action, and plaintiff's claims for such should be dismissed.

Punitive damages are allowed in tort cases "so long as the very high threshold of moral culpability is satisfied" (*Giblin v Murphy*, 73 NY2d 769, 772 [1988]). This threshold can be met by conduct that involves "a wanton or reckless disregard of plaintiff's rights" (*Zuckerman v Goldstein*, 71 AD3d 407, 407 [1st Dept 2010] [internal quotation marks and citation omitted]). "Such recklessness must be close to criminality" (*Camillo v Geer*, 185 AD2d 192, 194 [1st Dept 1992] [internal quotation marks and citations omitted]).

As to breach of warranty of habitability claims, punitive damages may be awarded where "the landlord's actions or inactions were intentional and malicious" (*Minjak Co. v Randolph*, 140 AD2d 245, 249-250 [1st Dept 1988]). Finally, while punitive damages are not typically recoverable for a breach contract, "where the breach of contract also involves a fraud evincing a high degree of moral turpitude and demonstrating such wanton dishonesty as to imply a criminal indifference to civil

obligations, punitive damages are recoverable if the conduct was aimed at the public generally" (*Mulder v Donaldson, Lufkin & Jenrette*, 208 AD2d 301, 308 [1st Dept 1995] [internal quotation marks and citation omitted]).

Here, nothing in plaintiff's allegations rises to the level of recklessness close to criminality, or shows malicious intent. Thus, plaintiff's claim for punitive damages are dismissed.

CONCLUSION

Accordingly, it is

ORDERED that defendant/third-party plaintiff/second third-party defendant Polteam Renovation Corporation, Inc.'s motion for summary judgment (Motion Seq. No. 006) is granted to the extent that plaintiff's complaint is dismissed as against it; and it is further

ORDERED that defendant/second third-party defendant Fred Slater's motion (Motion Seq. No. 007) is resolved as follows:

- The branch that seeks dismissal of the portion of plaintiff's eleventh cause of action that seeks recovery under a third-party beneficiary theory is granted;
- The branch that seeks dismissal of the portion of plaintiff's eleventh cause of action that seeks contractual indemnification is denied;
- The branch that seeks to limit plaintiff's recovery for her contractual indemnification claim to exclude attorney's fees is granted;
- The branch that seeks dismissal of defendant/second third-party defendant 13-21 East 22nd Street Residence Corp.'s cross claim for contractual indemnification is denied;
- The branch that seeks conditional summary judgment against defendant/third-party plaintiff/second third-party defendant Polteam Renovation Corporation, Inc. on the

issues of contractual and common-law indemnification is denied;

- The branch that seeks conditional summary judgment against third-party defendant Royal Air Conditioning, Inc. on the issue of common-law indemnification is denied;
- The branch that seeks dismissal of second third-party plaintiff Great Northern Insurance Company a/s/o Maye Musk's second third-party complaint as against defendant/second third-party defendant Fred Slater is granted; and it is further

ORDERED that third-party defendant Royal Air Conditioning, Inc.'s motion (Motion Seq. No. 008) is granted only to the extent that plaintiff's complaint is dismissed as against defendant Polteam Renovation Corporation, Inc.; and it is further

ORDERED that defendant/second third-party defendant 13-21 East 22nd Street Residence Corp.'s motion (Motion Seq. No. 009) is granted only to the extent that plaintiff's sixth cause of action for constructive eviction, and plaintiff's claim for punitive damages are dismissed; and it is further

ORDERED the remainder of the action shall continue; and it is further

ORDERED that the parties proceed to mediation and/or trial.

Dated: December 3, 2012

ENTER:

Hon. JOAN M. KENNEY