SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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TODD COURTNEY and 304 WEST 18, LLC, Index No.: 108499/07

Plaintiffs, Motion Seq. No. 005

-against-

18th& 8th, LLC, and BDG CONSTRUCTION CORP.,

Defendants.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action for property damage, plaintiffs Todd Courtney ("Courtney") and 304 West 18, LLC ("304 West) (collectively, "plaintiffs") move pursuant to CPLR 3025(b) for an order granting leave to serve and file an amended complaint.

Factual Background

According to the Complaint (filed in June 2007), Courtney is the managing member of 304 West, which is owner of the premises located at 304 West 18th Street in Manhattan as a rental property (the "Building"). Defendant 18th and 8th, LLC ("18th and 8th") owns an adjacent parcel of land located at 157-159 Eighth Avenue (the "18th and 8th Premises").

In May 2006, "during the course of major renovations and construction" at the 18th and 8th Premises, defendant BDG Construction Corp. ("BDG") allegedly "disconnected the sewer line that serviced both Plaintiff's and Defendant's premises without proper notice to Plaintiff and without Plaintiff's consent to same," causing water/sewer backup and flooding into the basement and ground floor of the Building. Plaintiffs brought three causes of action.

The first cause of action alleges that disconnection of the sewer line resulted in damages

to the Building "including but not limited to water damage, structural damage, damage to the contents of the basement, storage space and ground floor of the premises and the resulting environmental hazards of sewage backup" into the Building; the need to install a new sewer line; damage to the Building's masonry costing $40,000 to repair; and decontamination costs. The second cause of action seeks $100,000 for lost rents due to the inability to collect rents from certain tenants, who were forced to vacate their rental units as a result of the incident. The third cause of action adds that "In addition to damages . . . as a result of Defendant's disconnection of the sewer line. . . , Defendant's renovations" caused "ancillary damages to the structure" of the Building, "specifically including but not limited to damages to the roof" costing at least $70,000 in damages) in violation of plaintiff's February 21, 2007 Cease and Desist Letter barring defendants' access to roof. This was followed by plaintiffs' bill of particulars in April 2008.[1]

On December 20, 2012, plaintiffs served an amended bill of particulars, which asserted additional damages caused by the disconnected sewer line and defendants' access to the roof.[2] Plaintiffs also asserted additional damages caused by other acts performed during the construction (discussed *infra*).[3] On August 14, 2013, the court ordered that plaintiffs "may move

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[1] The bill of particulars added, *inter alia*, that the "repeated trespassing" by BDG's personnel on the roof" and "spray" of "Deposits of mortar from the bricklaying process on Defendants' construction site onto the roof of Plaintiffs' premises caused a blockage of the drainage system of the Plaintiffs' premises, resulting in extraordinary water retention." This led to water leaking through four floors of apartments in the Building to the basement, "inflicting damage along the way." "The roof" was damaged in the sum of $70,000. (Bill of Particulars, ¶2).

[2] Soil contamination (¶2) and the water leaked from the roof from masonry deposits made by defendants , overflowed through the skylights, cascaded through four floors which "necessitated the removal and remediation of floors, walls and ceilings due to mold," $2.4 million in reconstruction costs and costs to repair the chimneys and skylights. All of the damages prevented plaintiffs from refinancing the Building, loss of profits, devaluation of the property, and ultimate foreclosure and sale leading to a deficiency against plaintiffs.

[3] During the construction, defendants' left open and failed to seal a passageway between the two premises, causing accumulated rain water to flow into the Building, which required plaintiff to replace/repair the electrical system therein for $80,000.

to amend the complaint" within 30 days. Plaintiffs filed the instant motion to amend in December 2013.

The proposed amended complaint contains seven causes of action.[4]

The first cause of action asserts, *inter alia*, that BDG performed construction work at the 18th and 8th Premises, including "demolition to existing structures and excavation of earth below the foundation floor of [the Building]." As a result of BDG's "severance, disconnection and capping of the common sewer line," water and sewage backed up into the Building, causing damage to it contents, structure and environment, and Courtney, as its owner in 2006, was compelled to "expend money to remedy, repair and maintain [the Building]."

The second cause of action, based on lost rental income, claims further damages based on loss of use of the Building, diminution of the Building's market value, lost profits, lost business expectation, and "other economic damages." Courtney seeks compensatory and consequential damages related to these claims.

The third cause of action alleges that construction debris and mortar was expelled from the 18th and 8th Premises onto the roof area of the Building during the subject work, due to defendants' failure to provide adequate and necessary procedures and safeguards. The debris and mortar permeated the waterproof roof membrane, clogged the water drainage system from the roof and broke the skylights on the roof, resulting in water buildup and leakage throughout the

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Also, defendants' failure to properly underpin its premises during the excavation caused structural damage to the integrity of the Building. It "would" cost approximately $3 million for plaintiff to correct this condition *via* the use of design engineers, shoring/bracing, jacking existing foundation, and loss of occupancy during this process.

Defendants' trespass through the Building with heavy equipment caused damage to wooden stairs and stairwells.

[4] The proposed amended complaint erroneously numbers the seventh cause of action as the "eighth" cause of action.

Building, forcing Courtney to expend money to remedy, repair and maintain the Building.

The fourth cause of action incorporates the above allegations, and is otherwise identical to the second claim for compensatory and consequential damages for lost rental income.

The fifth cause of action alleges that throughout its performance of the subject work, BDG failed to utilize proper support and underpinning at the construction site. This caused the Building to sustain structural damage, including the cracking of brickwork and significant bowing. Such damage caused Courtney to sustain the economic loss related to lost rental income as described above.

The sixth cause of action alleges that in March 2007, Courtney was compelled to refinance the Building at extraordinary rates in order to pay the expenditures and costs of repairs, clean-up and maintenance of the damages, as well as the loss of revenue and cash flow caused by the incident. At the time of the refinance, Courtney transferred title of the property to 304 West and became its sole Managing Member. The damages caused by defendants allegedly continued while the Building was owned by 304 West.

The seventh cause of action mirrors the allegations of the second and fourth causes of action, but adds that the damages were sustained not only by Courtney, but also by 304 West.

Arguments

In support of their motion, plaintiffs argue that the proposed amended complaint seeks to include additional occurrences and damages sustained by 304 West and Courtney individually, all of which arise from the same facts and circumstances of the original complaint. Defendants are not prejudiced by the amendment, as they have engaged in significant and protracted discovery over the years, including five separate depositions of Courtney. The proposed pleading

does not add any parties or make any allegations that have not already been covered by the discovery in this action to date.

In opposition, BDG argues that plaintiffs fail to provide an affidavit of merit or an Amended Complaint that has been verified, or an excuse as to why they seek to amend the original complaint six years after its original filing. Moreover, the proposed amendments prejudice BDG. BDG also states that the motion should be denied to the extent the proposed pleading seeks to revive the action against 18th & 8th, which has not appeared in this action.

As to prejudice, the first, second, third and fifth proposed causes of action assert new factual bases for the cause of the damage, namely, excavation and underpinning, and failure to provide adequate procedures and safeguards to prevent the debris and mortar from traveling from 18th and 8th's premises to the Building. The new first cause of action adds that the construction work included excavation below the foundation floor that was negligently performed; the new second cause of action adds claims for lost use of the premises, diminution of market value, lost profits, loss of business expectation, and other economic damages, and singles out Courtney as the party harmed instead of 304 West; the new third cause of action adds that debris and mortar expelled to the Building, clogged the draining system, and caused leaks throughout the Building; and the fifth cause of action adds claims of improper underpinning and the various types of economic damages resulting therefrom.

These new allegations are based on information that was in plaintiffs' knowledge when the original complaint was filed in June 2007, and there is no indication that this information

recently came to light.[5] And, in response to defendants' demand for particulars as to the "exact geographical location of the excavation," plaintiffs replied, in the original bill of particulars, that "No excavation is applicable to the case at bar." Also, BDG cannot implead the entity responsible for the excavation and underpinning, Wilson & Blackwell Construction Corporation ("Wilson"), as it might have when the complaint was filed, since Wilson is now defunct.

Moreover, BDG may no longer have access to the records and witnesses concerning the excavation and underpinning, especially since Wilson is defunct. Furthermore, BDG could have sought insurance coverage from Wilson's carrier, and it is doubtful that Wilson's carrier would accept a tender of defense nearly eight years after the work at issue. Nor can BDG place its own carrier on notice of these new claims without the possibility of disclaimer.

Plaintiffs have not even placed a date or dates when the excavation/underpinning occurred; thus, BDG cannot effectively place its carrier on notice of this new claim without the possibility of disclaimer. Without an actual date of loss, the new claim is time-barred as well.

That such claims were included in the amended bill of particulars served in 2012 does not assist the plaintiffs, since Wilson went out of business two years earlier. Also, while plaintiffs can supplement their bill of particulars to include continuing damage claims arising from the pled causes of action in the complaint, a bill of particulars cannot be used to proffer new causes of action, because a bill of particulars is not a considered a pleading.

The new fourth cause of action is nothing more than a restatement of the second cause of

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[5] Non-party witness Jeffrey Serravezza was deposed in 2013, wherein he stated that he provided Courtney with three estimates to repair the Building, and advised Courtney to retain a surveyor to examine the Building to determine whether any structural damage had occurred. In 2007, Serravezza took photographs of the excavation /underpinning and opined it was being performed incorrectly, and gave the aforementioned photographs of facade cracks to Courtney. Thus, plaintiffs knew of the potential for a claim based on improper underpinning in 2007.

action, and appears to be "catch all" to assert that the tenants vacated the Building due to roof leak issues as well. This, however, is a completely new claim, since the original third cause of action was specifically confined to actual damages to the roof and not lost rents, which was allegedly due solely to the sewer line disconnection. Furthermore, as plaintiffs no longer own the Building, an inspection to verify the extent of the water damage caused by the roof leaks and how these leaks affected the individual apartments, is no longer viable. And, there is no affidavit of merit from a person with knowledge or an expert to substantiate the new fourth cause of action to evaluate its actual merits and the prejudice to BDG.

Moreover, plaintiffs' attempt to amend the second and fourth causes of action to allege Courtney as the sole person harmed by BDG is inaccurate, because Courtney testified that ownership of the premises was transferred to 304 West in March 2007. Since a limited liability company is a separate legal entity, a member has no interest in specific property of such entity.

As to the sixth cause of action, Courtney's refinance of the original mortgage in order to finance the costs of repairs, clean up and maintenance, as well as lost revenue and cash flow is nothing more than a damages claim and is not a cause of action. Moreover, the refinance allegedly occurred in March 2007, three months before plaintiffs served the original complaint and, plaintiffs offer no explanation for omitting this claim from the original complaint. And, to the extent it is based on an event which occurred in March 2007, the "claim" is time-barred.

The seventh cause of action restates the fourth cause of action, and merely substitutes Courtney with 304 West as the damaged party, and should be prohibited for the same reasons that the fourth cause of action should be prohibited.

Throughout discovery, Courtney has prevented any information relative to his economic

losses from being produced. The claims are speculative and have not been demonstrated or proven. At multiple depositions, Courtney was unable to state with any specificity the exact losses he incurred, and instead referred to various documentary records which he has failed to provide.

In reply, plaintiffs contend that the fact that the proposed amended complaint is not verified is of no moment, as it is a proposed pleading. If the motion is granted, the actual pleading would be verified, and a verified complaint may be provided in lieu of an affidavit of merit.[6] And, BDG does not represent 18th & 8th and its argument in this regard is of no moment.

The amended complaint merely seeks to particularize the damages claims of each individual plaintiff against the existing parties. Defendants were aware that the claims arose out of their negligence in the underlying construction project, and they were on notice of the facts and occurrences even before the initial pleadings. Further, BDG's purported claim of prejudice is belied by its opposition papers, which include plaintiffs' December 20, 2012 amended bill of particulars. In that document, plaintiffs set forth all allegations of facts and damages that arose from BDG's negligence during the subject construction, including all of the claims set forth in the proposed amended complaint. Thus, BDG was aware of the claims for more than a year before the present motion to amend.

Additionally, BDG served and received discovery throughout the litigation which put it on notice of the claims of damages and occurrences. For example, BDG's discovery response included emails from January 2007 between Courtney and BDG where Courtney alerted BDG to

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[6] In any event, Courtney provides verification of the proposed pleading, and attaches same to his reply papers.

the occurrence of mortar spraying from the premises where defendant was working onto the roof of plaintiff's premises causing water buildup and subsequent damage, and BDG responded by putting its "subcontractors on notice that you intend to file" a damage claim. The email cites continuing damages including losses incurred by plaintiff and loss of income. Thus, BDG knew about such claims before the original complaint was filed, and is not prejudiced by any claim that a purported third-party tortfeasor may be out of business since they were put no notice of the claim before the instant action was commenced. On this note, plaintiffs suggest that any subcontractor of BDG or other third-party that BDG intends to place blame on would likely have had an insurance policy in effect to cover negligence at the construction site. BDG is free to implead a third-party at any time, and can even commence a lawsuit against such party after the current action is resolved.

BDG acknowledges that all issues of damages raised in the proposed pleading were explored by BDG at Courtney's four depositions. Throughout the discovery in this action, BDG sought and received discovery related to plaintiff's lost income, loss of market value, necessity to refinance, repairs, and damages related to the roof damage, sewer line disconnection, and underpinning. Multiple discovery demands refer to portions of Courtney's deposition testimony on these topics. BDG may also pursue another deposition for further questioning.[7]

As to plaintiffs' individual ownership, the Building was owned, at all relevant times, by either Courtney or 304 West and the proposed pleading sets forth the dates during which each plaintiff owned the Building. The damage caused by defendants was ongoing throughout the

[7] BDG also subpoenaed and deposed Courtney's architect Serrevezza in August 2013. At that time, BDG possessed the amended bill of particulars and photographs of the alleged damage, and questioned the architect regarding all of the alleged occurrences and damaged resulting therefrom.

time when the Building was owned by Courtney and after it was transferred to 304 West.

BDG's remaining arguments go to the weight of the evidence and to Courtney's credibility, which must be determined at trial, and are not determinative or probative of the instant motion.

Discussion

CPLR 3025(b) provides that "[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading."

Generally, "leave to amend a pleading should be freely granted, so long as there is no surprise or prejudice to the opposing party" (*Kocourek v. Booz Allen Hamilton Inc.*, 85 AD3d 502, 504, 925 NYS2d 51 [1st Dept 2011] *citing* CPLR 3025(b) and *Solomon Holding Corp. v. Golia*, 55 AD3d 507, 868 NYS2d 612 [2008]). "Prejudice requires 'some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position' " (*Kocourek, supra, citing Cherebin v. Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365, 841 NYS2d 277 [1st Dept 2007] *quoting Loomis v. Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981]).

To "conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted" *(Megaris Furs, Inc. v. Gimble Bros., Inc.*, 172 AD2d 209, 568 NYS2d 581 [1st Dept 1991]). Thus, "a motion for leave to amend a pleading must be supported

by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment" (*Zaid Theatre Corp. v. Sona Realty Co.*, 18 AD3d 352, 355, 797 NYS2d 434 [1st Dept 2005]). And, a verified complaint may be used *in lieu* of an affidavit of merit (*see A & J Concrete Corp. v. Arker*, 54 NY2d 870 [1981]). In this regard, Courtney's verification of the proposed amended complaint, submitted to address BDG's opposition papers, is sufficient to support of the motion to amend (*see Gumbs v. Flushing Town Ctr. III, LP*, 114 AD3d 573, 981 NYS2d 394 [1st Dept 2014] ("the purpose of reply papers is to address arguments made in opposition to the position taken by the movant")).

In general, mere delay is not a barrier to the amendment; it must be lateness coupled with significant prejudice to the opposing party (*Edenwald Contracting Co. v New York*, 60 NY2d 957, 959 [1983]).

Nevertheless, *Edenwald* also provides that the decision to allow or disallow the amendment is committed to the court's discretion (*Edenwald*, 60 NY2d at 959). And, since *Edenwald*, the First Department has held that even in the absence of prejudice, a movant's failure to offer a reasonable excuse for a lengthy delay in seeking the amendment can itself provide sufficient grounds for denying leave to amend (*see Inwood Tower Inc. v. Fireman's Fund Ins. Co.*, 290 AD2d 252, 252-253, 735 NYS2d 762 [1st Dept 2002] ("As for the appellant's belated request to amend the amount of damages being claimed, as well as the theory underlying its claim for such damages, while leave to amend is, in the absence of prejudice or surprise to the opposing party, generally freely given, in view of appellant's utter failure to offer a reasonable excuse for its long delay in seeking amendment, the denial of its motion to amend constituted a proper exercise of discretion"); *accord*, *Oil Heat Institute of Long Island Ins. Trust v. RMTS*

Associates, LLC, 4 AD3d 290, 772 NYS2d 313 [1st Dept 2004] (stating that trial court should not have granted leave to serve amended complaint since plaintiffs failed to offer a reasonable excuse for their delay); *Hanford v. Plaza Packaging Corp.*, 284 AD2d 179, 727 NYS2d 407 [1st Dept 2001]) (motion to add cause of action under the New York City Human Rights Law denied due to plaintiff's failure to offer excuse for delay); *Spence v Bear Stearns & Co.*, 264 A.D.2d 601, 694 N.Y.S.2d 654 [1st Dept 1999]; *North River Restaurant, LLC v. Paratore*, 2011 WL 11074352 [Sup Ct New York Cty 2011]).[8]

Heller v Louis Provenzano, Inc., 303 AD2d 20, 756 NYS2d 26 [1st Dept 2003]), though not decided entirely on the grounds of unexcused delay, is also instructive. In *Heller*, plaintiff sought to amend the complaint to add a claim for punitive damages. In affirming the trial court's denial of the motion, the First Department stated: "while [plaintiff] does not seek to assert a new theory of liability, which, if that were the case, would be sufficient to warrant denial of the motion, given the six-year delay... no valid distinction can be drawn, either in law or in fact, between a new theory of liability and 'an additional request for relief,' particularly where, as here, such an amendment... *would involve different elements and standards of proof* and potentially subject defendants to a far greater and different dimension of liability than would otherwise have been the case" (*Heller*, 303 AD2d at 24) (emphasis added)).

Inwood Tower and *Heller*, *supra*, indicate that the failure to offer reasonable excuse for a lengthy delay may warrant denial of a motion to amend a complaint, even as to claims for

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[8] The court notes an apparent conflict between *Edenwald* and the cases cited herein, as *Edenwald* provides that mere lateness is not a bar to a proposed amendment. However, in the post-*Edenwald* cases, lateness coupled with the failure to offer a reasonable excuse for their delays. Thus, it was not "mere lateness" that provided grounds for denying the proposed amendments.

damages.

In such situations, the court should also consider how long the movant was aware of the substance of the proposed amendment before it sought leave to amend (*see Hanford, supra,* at 180 (despite lack of prejudice, leave to amend was not warranted, as "plaintiff has offered no excuse for her long delay in seeking the amendment. Indeed, she has not asserted, and apparently can make no assertion, that the proposed cause of action was not discoverable at the time the original complaint was served"); *JP Morgan Chase Bank v. Orleans*, 2007 WL 6882391 [Sup Ct New York Cty 2007]). A delay itself is often prejudicial insofar as the passage of time often "prevents an accurate reconstruction of the circumstances existing at the time" the alleged incident occurred (*see Sinuk v. City of New York*, 2014 WL 1280270 [Sup Ct New York Cty 2014] *citing Vitale v. City of New York*, 205 AD2d 636, 613 NYS2d 270 [2d Dept 1994]).

The parties' submissions demonstrate that all new facts in support of plaintiffs' proposed new pleading were known to plaintiffs, not just some months or even years back, but *before* they filed their original complaint in June 2007.

It is of no moment whether BDG would suffer prejudice as a result of these causes of action, or whether they have merit. The lengthy and unexcused delay alone justifies denial of the motion (*see Wassfam LLC v. Palacios*, 107 AD3d 493, 966 NYS2d 666 [1st Dept 2013]; *Oil Heat Institute of Long Island Ins. Trust v. RMTS Associates, LLC*, 4 A.D.3d 290, 772 N.Y.S.2d 313 [1st Dept 2004]; *Inwood Tower Inc. v. Fireman's Fund Ins. Co.*, 290 AD2d 252, 252-253, 735 NYS2d 762 [1st Dept 2002] (finding denial of "belated request to amend the amount of damages being claimed, as well as the theory underlying its claim for such damages" proper in the absence of an excuse for "long delay"); *Hanford v. Plaza Packaging Corp.*, 284 AD2d 179, 727 NYS2d

407 [1st Dept 2001]).

Plaintiffs offer no excuse -- let alone a reasonable one -- for their *six-year* delay in seeking to amend their complaint as to these additional claims. Plaintiffs also do not even attempt to validate their late submission of the instant motion, which the court required to be made within 30 days of its August 2013 order. Moreover, plaintiffs fail to cite any case law regarding the issue of delay.

Therefore, to the degree the proposed new first cause of action includes the reference to BDG construction work as "includ[ing] demolition to existing structures and excavation of earth below the foundation floor of the adjacent 304 West 18th premises," such additional allegation asserts a new basis for liability, separate and apart from the claim that BDG's disconnection of the common the sewer line resulted in costs to remedy, repair and maintain the premises. As such additional allegation is not simply a particularization of the damages previously alleged, the first amended cause of action shall not include such claim.

To the degree the second proposed cause of action incorporates the first proposed cause of action alleging BDG's sewer disconnection, and seeks lost rent as a result therefrom, the amendment is permissible. However, the remaining claim of damages, *to wit*: loss of use of premises, diminution in value of the Building, loss of profits, loss of business expectation and other economic damages assert new theories of recovery. As such additional damage claims do not simply particularize the damages previously alleged, the second amended cause of action shall not include such claim.

The third cause of action, which incorporates the first (repair/remedial/maintenance costs for sewer disconnection) and second causes of action (loss rent from sewer disconnection), adds

to the "negligence" theory, a new theory of liability, *i.e.*, that the mortar and debris was "due to the failure of the defendants to provide adequate and necessary procedures and safeguards, as required by law."(see ¶24) Such new claim of liability, separate and apart from the claim that the Courtney expended sums to remedy, repair and maintain the Building due to debris and mortar negligently expelled by BDG onto the Building's roof (¶28), asserts a new basis for liability. Therefore, leave to amend the third cause of action is granted, except as to such new claim.

As to the fourth cause of action, leave to add this claim is unwarranted, *in its entirety*. To the extent this cause of action seeks to recover lost rent based on the incorporated first cause of action (repair/remedial/maintenance costs for sewer disconnection), it becomes redundant of the second cause of action for loss rent. To the extent it seeks to recover lost rent from the incorporated third cause of action (debris/mortar roof damage), the lost rental damage claim is a new theory of recovery and is not "simply a particularization of the damages previously alleged as arising form the debris/mortar roof claim. Thus, such new damage claim cannot be included in the fourth cause of action. And, the remaining claim of damages, *to wit*: loss of use of premises, diminution in value of the Building, loss of profits, loss of business expectation and other economic damages assert new theories of recovery.

As to the fifth cause of action, leave to add this claim is unwarranted, *in its entirety*. This cause of action asserts that BDG failed to utilize *proper support and underpinning* at the construction site as required by law, and is a new theory of liability for the alleged damages. The damages sought are loss rent and loss of use of premises, diminution in value of the Building, loss of profits, loss of business expectation and other economic damages. Thus, contrary to plaintiffs' argument, this proposed amended claim contains a new cause of action, and a new

theory of recovery.

As to the sixth cause of action, leave to add this claim is unwarranted *in its entirety*. Here, it is alleged that Courtney was *compelled to refinance* the Building at higher rates in order to cover the costs of repair/remediation/maintenance, had transferred title of the Building to 304 West, which suffered damages previously suffered by Courtney, and that both plaintiffs expended money to repair, remediate, and maintain the Building and *incur additional liability and debts* are all new causes of action and new theories of recovery.[9]

Finally, as to the last cause of action, erroneously denominated as the eighth cause of action, to the extent this cause of action asserts claims of loss of use of premises, diminution in value of the Building, loss of profits, loss of business expectation and other economic damages, such new theories of recovery cannot be asserted. Therefore, leave to add this cause of action to permit 304 West to seek recovery as noted above, is limited in accordance with the above.

It is noted that the 2012 amended bill of particulars did not function to particularize the original three causes of action so as to permit the additional claims hereby prohibited. It is well-settled that a bill of particulars may not be used to supply a new cause of action or theory of liability that is not already included in a pleading (*see* Connors, McKinney's Practice Commentaries, C3042:4 ("Any party seeking to amend a bill of particulars pursuant to CPLR 3042(b) must also be aware that several courts have concluded that the bill of particulars generally may not supply a new cause of action that is not already included in a pleading...If there are any doubts as to whether the matter sought to be added in an amended bill of particulars

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[9] Furthermore, plaintiff failed to indicate that the sixth cause of action for losses related *refinancing* the Building at higher rates and incurring additional liability and debt are legally, cognizable damages, that are recoverable under the circumstances.

constitutes a new cause of action, *or even a new theory of recovery*, a party should make a motion to amend the pleading under CPLR 3025(b)" (emphasis added)); *Martinez v. Fields*, 74 AD3d 653, 902 NYS2d 361 [1st Dept 2010]) (amended bill of particulars cannot allege a theory or claim not originally asserted in the complaint); (*see* Siegel's New York Practice, 4th Ed., § 238) ("A bill of particulars in civil practice is an amplification of a pleading. It supplies more detail and therefore affords the adverse party a more thorough picture of the claim . . . being particularized...The bill is supposed to offer a more expansive statement of the pleader's contentions . . . ."); *cf. Scarangello v. State*, 111 AD2d 798, 799, 490 NYS2d 781 [2d Dept 1985] (in reversing trial court's denial of plaintiff's motion to file an amended bill of particulars, the court "noted that contrary to the State's position, the claimant is not seeking to add causes of action by amending her bill of particulars but rather is seeking to amplify and clarify allegations contained in her claim for damages and original bill of particulars", and also that the "proposed amendment involves the same transaction and set of facts" as alleged in the complaint).

Conclusion

Based on the foregoing, it is hereby

ORDERED that plaintiffs' motion is granted to the extent detailed herein; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon defendant within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: April 14, 2014

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD