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

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NEW LIFE HOLDING CORPORATION,

Plaintiff,

-against-

TURNER CONSTRUCTION COMPANY, BRODSKY ORGANIZATION, LLC, URBAN FOUNDATION/ENGINEERING, LLC, 118 CONSTRUCTION ASSOCIATES, LLC and EAST 118 DEVELOPER, LLC,

Defendants.

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TURNER CONSTRUCTION COMPANY, BRODSKY ORGANIZATION, LLC, URBAN FOUNDATION/ENGINEERING, LLC,

Third-Party Plaintiffs,

-against-

LJC DISMANTLING CORP.

Third-Party Defendants.

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Index No.: 650993/2011

Motion Seq. No. 007

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

MEMORANDUM DECISION

Defendants/third-party plaintiffs Turner Construction Company ("Turner"), Brodsky Organization, LLC, Urban Foundation/Engineering, LLC (the "direct defendants") move for partial summary judgment dismissing the complaint of the plaintiff, New Life Holding Corporation ("plaintiff"), as to (1) damages, including claims of nuisance, (2) claims of trespass,[1]

[1] The direct defendants contend that plaintiff countersigned a letter by "118 Construction Associates c/o The Brodsky Organization," requesting a license "In accordance with the New York City Building Code 3309.1 to 3309" to perform work to secure contiguous walls during the excavation in connection with the subject construction project. In response, plaintiff withdraws its trespass claim and consents to summary judgment on this claim. As

(3) claims for lost earnings/rental damages and (4) and claims for economic damages relating to a certain property owned by plaintiff located at 2162 Third Avenue. Third-party defendant LJC Dismantling Corp. ("LJC") joins in this request for dismissal.

In turn, plaintiff cross moves for partial summary judgment against the direct defendants for strict liability pursuant to Administrative Code 3309.4 for damages to its properties located at 2170 and 2172 Third Avenue.

Factual Background[2]

Plaintiff owns several connected, commercial buildings that run from south to north located at 2162, 2164,[3] 2166, 2168, 2170 and 2172 Third Avenue (collectively the "Premises").[4] The Premises consist of six units that plaintiff rents to commercial businesses; the eastern half of the Premises is four stories in height, and the western half is two. In early 2009, the Premises were fully occupied with tenants, including a restaurant and two furniture stores.

The Premises allegedly sustained damage as a result of construction by the direct defendants at adjacent addresses of a faculty residence hall (at 165 East 118th Street) and the

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Footnote 1, contd.

such, plaintiff's claims for trespass based on violations of the Building Code §§3309.1 to 3309.5, 3304.3 and 3301 are dismissed.

[2] The Factual Background is taken from the direct defendants' moving papers.

[3] 2162 and 2164 are one building with a wall between them at the basement level.

[4] The direct defendants' motion as to property damage pertains exclusively to the 2162 address; the motion as to nuisance applies to all buildings in the Premises. Plaintiff's cross-motion seeks relief only as to the 2170 and 2172 addresses.

Hunter College School of Social Work (at 2174 Third Avenue) (collectively, the "Project").[5] The Project also concerned pre-construction demolition of the former building at 2174 Third Avenue, which was performed by LJC. Turner was retained to be the construction manager, which hired Urban Foundation Engineering, LLC ("Urban") to conduct excavation and underpinning work.

In July 2009, the direct defendants conducted a pre-construction survey of the Premises before commencing construction to determine whether damage existed and whether any specific precautions would be necessary. Turner retained LFR, Inc. ("LFR") to conduct a geotechnical survey before construction commenced. LFR allegedly recommended that soldier piling and lags should not be used due to the presence of groundwater, and that excavation support should provide groundwater cutoff to mitigate the intensity of construction dewatering.

The demolition phase of the Project began in September 2009; further construction activities began in January or February 2010. The excavation and underpinning portions of construction were completed in approximately March 2010. Throughout construction, plaintiff allegedly received complaints from tenants due to excessive noise and vibrations.

During construction, vibration monitors were placed in various locations throughout the Premises.[6] On numerous occasions (including once during the underpinning), the recommended vibration limit was exceeded. Also, crack gauges were placed on existing cracks, but the data from them during significant periods of time was not produced. When new cracks appeared on the Premises, new gauges were installed at those locations.

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[5] These properties are owned by the State of New York, City University of New York, City University Construction Fund ("CUNY") and operated by direct defendant Brodsky Organization, LLC ("Brodsky"), through direct defendant 118 Construction Associates.

[6] Monitoring along the western wall of the Premises did not commence until approximately March 2010.

In March 2010, Premises tenants notified plaintiff of damage thereto, including cracks in the walls and basement foundation, falling debris, flooding, and that the back alley door could no longer close because the Premises had "shifted."

Upon further examination, extensive damage was evident throughout the Premises; subsequently, tenants were allegedly forced to move out of the various units. Plaintiff then undertook work to stabilize the Premises. Eventually, plaintiff was able to re-let the units at the 2166 and 2168 addresses, but the remaining units have allegedly been uninhabitable due to the structural damage.

Plaintiff's Bill of Particulars alleges that the direct defendants were negligent in the design, planning, monitoring and implementation of the Project, and failed to adequately design and follow procedures necessary to limit the impact of the Project on [the Premises] and to protect same from damage (¶3). With regard to the 2162 address, plaintiff claims the following damages: (a) separation in the brick wythe from the interior wythe walls on the southern side of [that] Building (the "Southern Wall"); (b) a vertical crack in the building's stucco; (c) a bulge in the Southern Wall; and (d) interior cracks on the fourth floor of the southwest corner of the building. Plaintiff further alleges that the direct defendants failed to follow LFR's recommendations. In addition, plaintiff alleges loss of rental income as a result of the property damage.

Arguments

In support of their motion, the direct defendants argue that all damages to the 2162 address preexisted any of their construction work. Structural engineer James Feuerborn ("Feuerborn") attests that based on his visits to the construction site and Premises on several

occasions from 2010 through 2014; his review of pre-construction documents prepared as a result of an inspection of the 2162 address conducted in July 2009; and his photographs, the direct defendants did not cause the alleged damage, which pre-existed construction.

Key pre-construction observations from Feuerborn's review included: separation between walls/chimneys as both the north and south masonry chimneys; a crack in the stucco finish on the Southern Wall; and large cracks on the fourth floor interior at the southwest corner of the 2162 address. Also, survey data recorded by Dayton confirms Feuerborn's finding, and shows no significant movement of the Southern Wall since the survey began in July 2009. And, even assuming that the damage was not observed prior to construction, the objective recorded levels of vibration at the southwest corner of the 2162 address that were related to the construction were not, within a reasonable degree of engineering certainty, high enough to be expected to cause cracking of either the stucco, brick masonry, or separation of the wythes of brick masonry. Moreover, the Southern Wall is far removed (approximately 121 feet) from the Project. On this note, the movement of heavy construction equipment or material delivery trucks would not be expected to produce significantly higher levels of vibration than what would be produced by normal truck traffic on the streets surrounding the 2162 address. And, the separation between wythes of brick masonry on the Southern Wall is unrelated to construction activities and appears to be due to poor initial building construction.

Steven Hirschberg ("Hirschberg") of defendant The Brodsky Organization, LLC/118 Construction Associates (the developer of the Project) testified at his deposition that the condition of the Southern Wall was unrelated to construction, but rather due to, among other things, "continued deterioration" of the building; water penetration on the roof; the building's

framing system; and the installation of a steel and concrete stair. These issues apparently resulted in a bulge in the coating on top of the building's exterior masonry wall which preexisted construction. Hirschberg also testified that the overall poor condition of the building is exemplified by the fact that his request to rent a portion of the 2162 address as an office was denied due to "extensive water damage" and unreliable electrical/fire alarm/sprinkler systems.

Adam Wall of Urban Foundation (the excavation and underpinning subcontractor) testified that the subject bulge preexisted construction work, and that it was present during the demolition phase of the Project.

Walter Murray of Turner Construction Company testified that before construction commenced, an investigation was conducted and revealed that the 2162 Building had previously been modified, which caused damage to it as well as disrepair to the roof, "copings and water, freeze thaw cycles, *et cetera*." Murray also testified that issues with the Southern Wall preexisted construction on the Project.

Sharif Omar ("Omar"), plaintiff's property manager, was shown, and testified as to, New York City Department of Buildings ("DOB") documents at his deposition indicating that the 2162 address had experienced shaking and vibrating that affected its structural stability in November 2008 -- prior to the construction). Additional DOB complaints regarding these issues date back to November 2004.

The direct defendants further contend that plaintiff's lost rent claims must fail. The affidavits of John Foley ("Foley"), CFF/CPA, and Eric Haims ("Haims"), a certified New York State Real Estate Appraiser, demonstrate that plaintiff's lost rent calculations are entirely speculative. For example, plaintiff's "homemade spreadsheet" used to calculate lost rent based

on undocumented and unverified phone calls to real estate agents with rental listings in the neighborhood is speculative and unsupported by the evidence. Omar cannot testify as to any offers that were made with respect to the renting of any of the vacant spaces, any lease agreements that were signed, or to having any prospective tenants refuse to rent the Premises because of damage thereto. Also notable is the fact that Omar prepared that document personally (without expert assistance), and plaintiff has not offered expert proof to support its claim of increasing rent prices per square footage as claimed.

Likewise, plaintiff has not provided any comparative market analysis to show its lost rents, and plaintiff's leases and tax returns (showing at most, $120,032 in gross yearly rents) contradict plaintiff's lost rent claims of $850,000 per year, especially in light of the unrentable condition of the premises. And, even if plaintiff could establish recovery for lost rents, lost rent should be limited to the period when plaintiff may be reasonably required to make necessary repairs.

Further, plaintiff's nuisance claim must fail, since noise emanating from pile driving and other construction activities does not give rise to such a claim. And, the direct defendants' alleged interference with plaintiff's physical enjoyment of the Premises during the Project does not support a nuisance claim, as plaintiff cannot show that their activities during construction were anything other than temporary and limited in duration. Moreover, New York does not recognize a nuisance cause of action for economic loss related to an activity that was not abnormally dangerous.

In opposition, plaintiff contends that based on its expert Steven Highfill's ("Highfill") review of the preconstruction survey and visits to the Project site in 2010 and 2011 (and on

photographs taken thereat), significant aspects of the damage to the 2162 Building occurred during the direct defendants' construction activities. The fact that there was some pre-existing damage present does not exculpate the direct defendants from liability for the damage to, and deterioration of, the Southern Wall, and new cracks in the stucco all of which were caused by the direct defendants during construction. Highfill concluded that the direct defendants' construction activities were a likely cause of the damage. Therefore, the conflicting expert opinions preclude summary judgment. And, plaintiff notes that the direct defendants did not address Highfill's prior conclusion in 2011, that the bulge in the Southern Wall was caused by construction.

Further, plaintiff's claim for lost rent will be testified to at trial by Omar, who is able to testify as to extent of plaintiff's damages. Thus, the premise of the direct defendants' motion, that plaintiff does not intend to call an expert and will rely solely on Omar, is incorrect, as lost rental income for commercial real estate is readily ascertainable. In any event, plaintiff intends to call an expert at trial to testify as to lost rents. And, under CPLR 3101(d), notice of plaintiff's expert is not required at this time.

The direct defendants' cases, which pertain to calculations of damages after testimony at trial, are therefore, inapplicable. There is no argument that plaintiff's notice of its experts is untimely. Moreover, the direct defendants cannot argue that CPLR 3101(d) notices were required prior to the filing to the note of issue in March 2013. In fact, the direct defendants served their notices after the note of issue was filed. At no time since serving their initial demands have they demanded disclosure of plaintiff's experts. Indeed, all defendants have continued to take discovery, including Omar's deposition, which did not conclude until April 2014. The direct defendants' and LJC's deposition are scheduled to be completed in the near

future. Thus, plaintiff cannot be faulted for waiting until the completion of party depositions to retain and identify its experts. Under these circumstances, the direct defendants have not been prejudiced by plaintiff not yet identifying its expert.

Furthermore, whether plaintiff's method of calculation is accurate cannot be resolved on summary judgment. The direct defendants do not argue as to a lack of causation, or that plaintiff's damages cannot be calculated with reasonable certainty. Rather, they contend that Omar's calculations were "inflated" and "poorly laid out" in his spreadsheet. Thus, the direct defendants appear to concede that plaintiff's lost rent damages could be calculated with reasonable certainty by reviewing plaintiff's tax returns to determine rents received in prior years. Thus, unlike the direct defendants' cited cases that deal with speculative lost future damages from prospective revenues, lost rental income for commercial real estate is readily ascertainable. All of those cases concern instances in which causation was not established or the extent of damages could not be calculated with any precision; thus they are unavailing in this action.

And, plaintiff mitigated its damages to the extent possible. Plaintiff paid for some remedial work, was able to re-let the two of the buildings, and does not have sufficient funds to pay for the over $1 million in repairs.

Plaintiff further argues that its nuisance claim must survive the motion, as the direct defendants' intentional and unreasonable actions during the excavation and construction at the Project caused flooding and structural damage to plaintiff's property. The direct defendants' disregard of the LFR report which recommended a dewatering system be implemented during the excavation, caused flooding the basement of the Premises. In addition, it is undisputed that some of the vibrations caused by construction were in excess of acceptable ranges. The structural

damages caused by the direct defendants have impaired, and continue to impair, plaintiff's use and enjoyment of the Premises, and plaintiff has been unable to rent out many of its units.

In support of its cross-motion for partial summary judgment on its damage claims regarding the 2170 and 2172 addresses, plaintiff argues that Administrative Code § 3309.4 and its predecessor statutes (including 27-1031(b)) impose strict liability on abutting owners and their contractors who damage adjacent property during the course of their construction. Both plaintiff's and direct defendants' engineers state that the construction undermined the foundation of the Premises, and that significant damage, including structural damage, was proximately caused to the 2170 and 2172 addresses during construction. Thus, the direct defendants are strictly liable for the damages caused to these two buildings.

In reply, the direct defendants argue that Highfill's opinion lacks probative value as to the 2162 address claims. None of Highfill's conclusions is made with a reasonable degree of engineering certainty, or is supported by the record. As such, his speculative conclusions do not raise an issue of fact. And, plaintiff has not countered the deposition testimonies submitted in support of dismissal. Furthermore, the direct defendants also point out that plaintiff does not challenge their contention that the Premises was in a state of disrepair and unrentable to give rise to a nuisance claim.

Also, plaintiff has not opposed the expert evidence submitted to defeat the lost rent claims. Although plaintiff may be afforded additional time to notice its expert witness, plaintiff submitted no further evidence in opposition to support its rental losses.

And, the caselaw cited by plaintiff to impose strict liability is not binding on this Court and is unpersuasive. Since section 3309.4 is a substantial revision of its predecessor which

expands the class of individuals potentially subject to strict liability and adds new duties, a violation of this section should operate as evidence of negligence, and not negligence *per se*.

In support of the motion by the direct defendants, LJC adds that the pre-construction survey photographs showing pre-construction damage to the 2162 address (upon which Feuerborn relies) were taken before demolition work was also performed by LJC. The submissions show that the shaking/vibrating of the 2162 address in November 2004 and November 2008 both occurred before and after LJC performed its demolition work.

LJC also argues that as to plaintiff's cross-motion, plaintiff's own expert opined that the damage to the 2170 and 2172 addresses "occurred during the excavation and underpinning of the building" and LJC had nothing to do with the excavation or underpinning work. And, the only "tie back" work Feuerborn refers to is the tie back work that occurred after 2009, and LJC workers only "continued to return to the work site until November 18, 2009."

In response, however, the direct defendants point out that should the Court find issues of fact as to the cause or timing of the damages to the 2170 and 2172 addresses, then issues of fact exist as to what, if any activities of LJC's demolition work caused such damages. Contrary to LJC's and plaintiff's contentions, Feuerborn never conceded that a portion of the work was caused by tieback work. And, that Feuerborn did not opine any of the damages alleged by plaintiff were caused by the demolition is not an issue in the direct defendants' motion, which only seeks relief as to the 2162 address. Also, LJC's intimations as to the claims not raised within the direct defendants' motion are premature and distracting. Additionally, following LJC's submissions, plaintiff supplemented its bill of particulars to clarify that the damages occurred from construction activities from 2009 through March 2010, and that plaintiff first

observed certain damages on March 15, 2010. LJC was on site from June 2009 through November 2009.

In reply as to its cross-motion, plaintiff argues that caselaw applying Administrative Code § 3309.4 holds that it is a negligence *per se* statute. Plaintiff also argues that it is undisputed that both parties' experts opined that damages to the 2170 and 2172 addresses occurred during excavation activities. Plaintiff further asserts that the direct defendants' discussion of the 2162 and 2164 addresses is irrelevant to the cross-motion, which only pertains to 2170 and 2172. Moreover, even if the direct defendants could point to the alleged poor condition of 2170 and 2172, which they cannot, the argument regarding the Premises' condition is irrelevant, as courts have held that a building's allegedly poor condition does not raise an issue of fact as to causation.

Discussion

It is well established that the "proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" (*Winegrad v. New York University Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]). However, the moving party must demonstrate entitlement to judgment as a matter of law (*see Zuckerman*, *supra*), and the failure to make such a showing will result in the denial of the motion, regardless of the sufficiency of the opposing papers (*Johnson v. CAC Business Ventures, Inc.*, 52 A.D.3d 327, 859 N.Y.S.2d 646 [1st Dept 2008]; *Murray v. City of New York*, 74 A.D.3d 550, 903 N.Y.S.2d 34 [1st Dept 2010]).

Once the proponent of the motion makes a *prima facie* showing of entitlement to

summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR §3212 [b]; *Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Carroll v Radoniqi*, 105 AD3d 493, 963 NYS2d 97 [1st Dept 2013]). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist," and the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 476 NYS2d 897 [1st Dept 1984]; *see also, Armstrong v Sensormatic/ADT*, 100 AD3d 492, 954 NYS2d 53 [1st Dept 2012]).

Direct Defendants' Motion

Property Damage regarding the 2162 Building

By the Feuerborn affidavit and the witnesses' deposition testimony, the direct defendants' establish *prima facie* their entitlement to summary judgment as to damages in connection with the 2162 address. Based on his observations and engineering experience, Feuerborn concludes, to a reasonable degree of engineering certainty, that the alleged property damage to the 2162 Building was preexisting and/or not caused by the direct defendants' construction activities. And, the direct defendants' witnesses' testimony supports Feuerborn's conclusions.

Nevertheless, plaintiff raises a triable issue of fact in opposition as to the following issues: (a) separation between the masonry chimney and south masonry parapet wall; (b) the

vertical crack in the stucco finish on the south facade; and (c) the bulge in the Southern Wall.[7]

Consistent with his earlier (February 17, 2011) report, Highfill concludes that the subject construction activities were a "likely contributing factor" to the damage and destabilization of the 2162 address and Southern Wall. Highfill notes that his conclusions in the 2011 report were based on a comparison of preconstruction photographs and his subsequent site inspection. In his affidavit submitted in opposition, Highfill notes that, although separation between the walls and chimney preexisted construction, a photograph he took in September 2010 shows that the separation had increased. Moreover, Highfill states that a vertical crack in the stucco (visible in December 2009) occurred after construction commenced, as it was not visible during the preconstruction survey. Also, Highfill notes that Feuerborn did not address Highfill's statement in his 2011 report that the bulge in the Southern Wall occurred during the construction activities.

As to Feuerborn's claim that "the objective recorded levels of vibration at the southwest corner of [the Premises] that were determined to be related to construction activities" were not high enough to have caused the damage, Highfill points out that there were several days "during the construction in which the monitors were either not working or the data from the monitors is not available." Because the data is incomplete, the vibration levels on those days (including whether the vibrations exceeded recommended limits) is unknown. Also, eight of the crack gauges were installed *after* construction began; thus, the fact that those gauges did not show significant movement once installed is not determinative of whether the cracks were caused by the construction. Additionally, it is undisputed that vibrations exceeded the recommended limits

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[7] Notwithstanding, as set forth below, plaintiff fails to raise a triable issue of fact as to the issue of the interior crack on the fourth floor of the southwest corner of the 2162 Building.

on multiple days during the construction period.[8]

The direct defendants' argument in reply that Highfill's affidavit fails to state any conclusions to a "reasonable degree of engineering certainty" is insufficient to render his affidavit invalid. An "expert's failure to employ the phrase 'reasonable degree of scientific certainty' does not render his affidavit invalid as a matter of law" *(Reis v Volvo Cars of North America, Inc.*, 73 AD3d 420, 901 NYS2d 10 [1st Dept 2010], citing *John v City of New York*, 235 AD2d 210, 652 NYS2d 15 [1997]). The direct defendants do not challenge Highfill's qualifications as an expert, and the court notes Highfill's unequivocal statements such as "the construction activities are a likely contributing factor to such damage and destabilization and that "[t]he growth of the separation clearly occurred during the construction process" (Highfill Aff., ¶¶ 8, 10).

Furthermore, the record itself confirms that triable issues of fact exist. As noted by Highfill, photographs submitted in opposition appear to show an increase in the separation between the chimney and south masonry parapet wall. In reply, the direct defendants contend that the pre-construction and post-construction photographs submitted were taken from different angles and cannot be used to determine an increase in crack size. Also, they point out that Highfill provides no measurements or dimensions regarding the purported increase. However, the direct defendants do not submit photographs or such measurements contradicting plaintiff's claims. On this note, it is the direct defendants' burden, not plaintiff's, to establish the absence of a triable issue of fact.

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[8] Plaintiff also points to evidence in the record in which the direct defendants' engineering firm's reports indicated that the Southern Wall's stability had significantly deteriorated during construction and that new cracks in the stucco had appeared.

With respect to the vertical crack in the stucco, it is undisputed that the crack was visible in December 2009, after construction activities had commenced. However, the purported pre-construction photographs submitted in reply by the direct defendants (Feuerborn Reply Aff., Exh. "B") are undated and, upon the court's inspection, are insufficiently clear as to show that such cracks pre-existed construction.

With respect to the bulge in the Southern Wall, the direct defendants, aside from pointing to deposition testimony by their own witnesses which indicates that the bulge may have preexisted construction, do not overcome Highfill's 2011 conclusions that the bulge occurred during construction activities in their moving papers And, Feuerborn's affidavit submitted with the moving papers did not directly further address the bulge. Thus, the direct defendants failed to meet their burden on summary judgment; their arguments in reply, raised for the first time in reply, cannot be used to meet their burden on this issue (*see McLean v 405 Webster Ave.* Associates, 28 Misc3d 1219(A), 957 NYS2d 637 [Sup Ct Kings Cty 2010]).

Notwithstanding, the direct defendants' motion is granted as to the interior cracks on the fourth floor of the southwest corner of the 2162 Building. Plaintiff concedes that such cracks preexisted the construction, and argues instead that a gauge (installed in May 2010) showed that two millimeters of movement had occurred as of September 2010. However, it is undisputed that all construction activities at issue concluded by March or April of 2010. Thus, with nothing more, the argument that construction activities exacerbated the preexisting cracks at this location is speculative, and plaintiff fails to defeat the motion in this regard (*see Rizzo v. Sherwin-Williams Co.*, 49 AD3d 847, 854 NYS2d 216 [2d Dept 2008]).

Economic Damages regarding the 2162 Building

Based on the above, the direct defendants' motion regarding economic damages, which, as the parties agree, is contingent on the finding that all property damage to the 2162 address pre-dated construction, must be resolved in accordance with the above rulings on the property damage claims.[9]

Nuisance

Nuisance focuses on "the consequences of conduct, the inconvenience to others, rather than the type of conduct involved" (*Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 569 [1977] [internal citation omitted]). While acknowledging that "[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word nuisance," the Court of Appeals has held that "one is subject to liability for a private nuisance if his conduct is a legal cause of the invasion of the interest in the private use and enjoyment of land and such invasion is (1) intentional and unreasonable, (2) negligent or reckless, or (3) actionable under the rules governing liability for abnormally dangerous conditions or activities" (*id.* at 569 [internal quotation marks and citations omitted]).

Liability for nuisance may be predicated by a failure to act, as well as an affirmative act (*id.* at 570; *see also Puritan Holding Co. v Holloshitz*, 82 Misc 2d 905, 906 [Sup Ct New York Cty 1975] [holding defendant liable for nuisance where she failed to properly maintain her property, leading to a diminution in the value of adjacent properties]).

Noise and vibration emanating from construction activities, with nothing more, do not

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[9] Accordingly, plaintiff's lost rent claim cannot be predicated on the issue of interior cracks on the fourth floor of the southwest corner of the 2162 address.

give rise to a nuisance claim (*see Celebrity Studios, Inc. v Civetta Excavating, Inc.*, 72 Misc2d 1077, 340 NYS2d 694 [Sup Ct New York Cty 1973]). Moreover, New York does not recognize a cause of action in nuisance for economic loss related to an activity that was not abnormally dangerous (*see Roundabout Theatre Co., Inc. v Tishman Realty & Construction Co., Inc.*, 302 AD2d 272, 756 NYS2d 12 [1st Dept 2003]).

Even assuming the direct defendants met their *prima facie* burden, plaintiff raises a triable issue of fact in opposition. Plaintiff asserts that its nuisance claim is based, not merely on temporal inconveniences from noise and vibration, but on flooding and structural damage to its property that rendered portions of the Premises unusable. As to vibrations caused by the construction, plaintiff asserts that they were in excess of acceptable ranges and caused structural damage which has and continues to impair plaintiff's use and enjoyment of the Premises. Moreover, plaintiff cites *Mastrobattista v Bores* (2012 NY Slip Op 32536(U) [Sup Ct New York Cty 2012]), which is factually similar to the case at bar (and in which defendant's motion to dismiss plaintiff's nuisance claim was denied), and which the direct defendants do not address in reply.[10]

As such, this branch of the direct defendants' motion is denied.

Lost Rents/Lost Profits

"Lost profits are recoverable as the natural consequence of a breach of contract or the commission of a tortious act . . . Although the amount of such damages need not be proven to exactitude, they must be demonstrated with sufficient certainty, and cannot be speculative or

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[10] The court further notes that three parts of plaintiff's property damage claim, which are similar in nature to those underlying the nuisance claim, survive the instant motion practice.

contingent" (*Levine v American Federal Group, Ltd.*, 180 AD2d 575, 577, 580 NYS2d 287 [1st Dept 1992]). Nonetheless, a lost profits claim must be capable of measurement with reasonable certainty, and the plaintiff must provide a basis for calculating such lost profits based on known, reliable factors (*see VBH Luxury, Inc. v 940 Madison Associates, LLC*, 100 AD3d 563, 954 NYS2d 528 [1st Dept 2012], *citing Ashland Management Inc. v Janien*, 82 NY2d 395 [1993]; *Kassis Management, Inc. v Verizon New York, Inc.*, 29 Misc3d 1209(A), 958 NYS2d 308 [Sup Ct New York Cty 2010]).

Moreover, "projections of future profits based upon 'a multitude of assumptions' that require 'speculation and conjecture' and few known factors do not provide the requisite certainty" (*see Lenard v Design Studio*, 889 FSupp2d 518, 536 [SDNY 2012], *citing Schonfeld v Hilliard*, 218 F3d 164, 172 [2d Cir 2000]; *see also Signature Health Ctr., LLC v State*, 28 Misc3d 543, 902 NYS2d 893 [Ct Cl. 2010]; *Malerba v Warren*, 96 AD2d 529, 464 NYS2d 835 [2d Dept 1983] (impossible for court to evaluate the accuracy of witness's estimate on allegedly comparable rental properties when alleged comparable properties not identified).[11]

The direct defendants establish *prima facie* their entitlement to summary judgment. They submit the expert affidavits of Foley and Haims, which support the claim that plaintiff's lost rent calculations were speculative and lacking evidence in the record for support any loss of rent. And, they note that plaintiff has not provided any information regarding ready tenants. Likewise, plaintiff has not actually identified allegedly comparable rental properties in support of its claim; Omar could not testify as to whom he allegedly called to ascertain the rental figures in his

[11] In *Lenard*, the court also found that the plaintiff failed to set forth a ready tenant and information about the market rates for rentals of comparable apartments to support her claim (*Lenard*, 889 FSupp2d at 536).

handmade document, and opaquely based his figures on "what the current rents are in the neighborhood." Further, plaintiff's tax returns indicate that its gross rental income from 2008-2009 was approximately between $101,279 and $120,000, which are far below the claimed amount of $850,796.25 in lost rents.

And, critically, Haims opined that, among other things, none of plaintiff's buildings was in rentable condition prior to the construction project.

Plaintiff fails to raise a triable issue of fact in opposition. Although, as plaintiff argues, Omar may be competent to testify to the extent to which he contends plaintiff was damaged (*see Tulin v Bostic*, 152 AD2d 887, 554 NYS2d 88 [3d Dept 1989], cited by plaintiff), this precept does not dispense of the direct defendants' contentions regarding the speculative nature of plaintiff's lost rent claims. Moreover, plaintiff's claim that certain party discovery remains outstanding, is unavailing.

And, plaintiff's claim that lost rental income, as a matter of law, cannot be calculated and determined by an expert who identifies comparable rental properties is belied by its own case citations (*see Rott v Negev, LLC*, 102 AD3d 522, 957 NYS2d 860 [1st Dept 2013] (in the absence of a proffer as to how plaintiff intended to establish lost rental income, trial court properly precluded plaintiff from offering evidence on this claim); *Gettner v Getty Oil Co.*, 266 AD2d 342, 701 NYS2d 64 [2d Dept 1999] (action did not concern issue of expert identifying comparable rental properties); *Tuchman v Deam Properties, LLC*, 2014 NY Slip Op 31227(U) [Sup Ct New York Cty 2014] (plaintiffs' evidence in support of lost rent claim was based on actual rental value of prior tenants of its property before damage occurred, not on claims based on unidentified allegedly neighboring properties)).

On this note, plaintiff's claim that a factual dispute exists based on Omar's methods of calculating damages is unavailing, as the direct defendants' demonstrate that the claim itself is speculative. Plaintiff cites no authority in opposition to the direct defendants' contentions in this regard.

In opposing the motion, plaintiff failed to "assemble, lay bare, and reveal his proofs in order to show his defenses are real and capable of being established on trial ... and it is insufficient to merely set forth averments of factual or legal conclusions," as it was required to do (*Schiraldi v U.S. Mineral Products*, 194 AD2d 482, 483, 599 NYS2d 572 [1st Dept 1993]). Plaintiff's claims that it is not required to disclose an expert or provide an expert affidavit at this juncture and that the direct defendants have not been prejudiced by plaintiff not yet identifying its experts are insufficient, in it failed to offer *any* evidence to rebut the direct defendants' experts' claims, including those related to the claim that the Premises were not in rentable condition before the construction project.

And, caselaw does not support plaintiff's claim that summary judgment motion cannot be decided under the circumstances herein (*cf. 317 West 54 Owners Corp. v Beta I, LLC*, 10 Misc3d 1055(A), 809 NYS2d 484 [Sup Ct New York Cty 2005] (plaintiff exchanged an expert affidavit); *Miller v Lasdon*, 78 A.D.2d 628, 432 N.Y.S.2d 707 [1st Dept 1980] (lost profits claim pertained to a new and untried business)).

Accordingly, plaintiff's claim for lost rents is dismissed.

Plaintiff's Cross-Motion regarding the 2170 and 2172 Buildings

New York City Administrative Code § 3309.4 provides, in pertinent part:

> Regardless of the excavation or fill depth, the person who causes

> an excavation or fill to be made shall, at all times and at his or her own expense, preserve and protect from damage any adjoining structures, provided such person is afforded a license in accordance with the requirements of Section 3309.2 to enter and inspect the adjoining buildings and property, and to perform such work thereon as may be necessary for such purpose.

As pointed out in *Cabrera v Green Complex, Inc.* (39 Misc 3d 1233(A), 972 NYS2d 142 (Table) [N.Y. City Civ.Ct. 2013]) the Court of Appeals in *Yenem Corp. v 281 Broadway Holdings* (18 NY3d 481, 490–91, 941 NYS2d 20, 964 N.E.2d 391 [2012]) "explained that Sec.27–1031(b)(1) of the Administrative Code, the predecessor to the current § 3309.4, was a *strict liability statute* despite the fact that it was a municipal ordinance since its language and purpose was virtually identical to its state law predecessor. 'Its original purpose of shifting the risk of injury from the injured landowner to the excavator of adjoining land has remained constant.... {This section} continued to embody the specific legislative policy that in New York City those who undertake excavation work, rather than those whose interest in neighboring land is harmed by it, should bear its costs.'" (Emphasis added).

The Court in *Cabrera* also pointed out that in *American Security Ins. Co. v Church of God of St. Albans* (38 Misc 3d 274, 956 NYS2d 799 [Sup. Ct., Queens Co. 2012]) "the court adhered to *Yenem* in holding that the new section 3309.4 constituted a strict liability statute. . . . The court rejected defendants' contention that plaintiff's building's allegedly poor condition raised an issue of fact as to causation, noting that 'though certainly relevant to any measure of damages, consideration of the building's prior condition does not factor into a proximate cause analysis.' The court also rejected the owner's contention that it could not be held liable since the subcontractor did not follow its underpinning plan. Section 3309.4 of the building code applies

to any person "who causes an excavation' to be made" and it was the owner defendant who had planned for excavation to occur under the plaintiff's property. . . . Therefore, owners and excavators are strictly liable under this statutory provision for work that "causes damage to adjoining property, regardless of the care exercised." (Internal citations omitted). And the direct defendants acknowledge, this court has reached similar conclusions (*see Brice v AB Designbuild*, 2013 WL 4013484 [Sup Ct New York Cty 2013]; *see also Harris v Bose*, 2014 WL 2879984 * 3 [Sup Ct New York Cty 2014] ("Here, the court finds no reason to depart from the holding in *Yenem* as Section 3309.4's language and purpose are virtually identical to former Section 27-103(b)(1) . . . Accordingly, plaintiffs are entitled to partial summary judgment against defendants on the issue of liability as it is undisputed that defendants violated Section 3309.4 by performing an excavation on an adjoining property that caused damage to plaintiffs' home")).

Therefore, since Section 3309.4 is a strict liability statute, plaintiff, to establish proximate cause, "is not required to exclude every other possible cause, but need only offer evidence from which proximate cause may be reasonably inferred" (*see Marbilla, LLC v Lexington LLC*, 2013 WL 1857680 [Sup Ct New York Cty 2013], *citing Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 550 [1998]). On this note, a building's allegedly poor condition does not raise an issue of fact as to causation, though it is relevant to an evaluation of damages (*Yenem*, *supra*).

Here, it is undisputed that the direct defendants excavated the area near the 2170 and 2172 addresses. Highfill opines that, based on his review of the pre-construction survey and his site review, damage occurred thereto due to the direct defendants' excavation and construction activities. He further contends that Feuerborn concedes (in an October 2010 report) that the construction activity contributed to various issues of damage to the Premises. Accordingly,

plaintiff has met its *prima facie* burden on summary judgment.

The direct defendants fail to raise a triable issue of fact in opposition. They contend, by way of a supplemental Feuerborn affidavit, that Feuerborn did not conclude or concede that construction activities were the cause or sole contributor of damage to the 2170 and 2172 buildings (but rather stated that movement "likely contributed to" damage). Further, Feuerborn points to the Premises' poor, pre-construction condition, and states that Highfill's conclusions are incomplete.

However, as seen in the controlling cases above, plaintiff need not establish that movement from the construction activities was *the* cause or *sole contributor* of damage; rather, all it must show, which it has, is that proximate cause may reasonably be inferred (*see Marbilla, Burgos, supra*). Moreover, courts have held that in the context of property damage cases based on construction activities, it is reasonable to infer causation based on the nature and timing of damages (*see Marbilla, supra*; *see also Victor A. Harder Realty & Const. Co. v. City of New York*, 64 NYS2d 310, 320 [Sup Ct New York Cty 1946] ("[The court finds] that the defendants' activities were the proximate cause of the various described movements of the plaintiff's buildings. It is more than mere coincidence that the described movements occurred during the same period as the excavations.")). And, as demonstrated above (*see Yenem, supra*), a building's poor condition alone does not alter a finding as to causation.

Moreover, even in reply, Feuerborn concedes that "some movement . . . may have contributed to the damages in [the 2170 and 2172 units]."

Accordingly, plaintiff's cross-motion for partial summary judgment on liability for damage caused to 2170 and 2172 Third Avenue is granted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendants/third-party plaintiffs for partial summary judgment dismissing the complaint of the plaintiff, New Life Holding Corporation as to (1) property damages, (2) claims of trespass, (3) claims for lost earnings or rental damages, (4) claims for all economic damages relating to a certain property owned by plaintiff located at 2162 Third Avenue, and (5) nuisance relating to the entire Premises, as joined by defendant LJC Dismantling Corp., is granted in part and denied in part as follows:

(A) the branch of the motion to dismiss plaintiff's property damage claims is denied (except that the claim regarding interior cracks on the fourth floor of the southwest corner of the building is stricken from the complaint);

(B) the branch of the motion to dismiss plaintiff's trespass claims is granted, and the claims are hereby severed and dismissed;

(C) the branch of the motion to dismiss plaintiff's lost earnings/rental damages is granted, and such claims are severed and dismissed with prejudice;

(D) the branch of the motion to dismiss plaintiff's economic damages claims is denied (except that the claim regarding interior cracks on the fourth floor of the southwest corner of the building is stricken from the complaint);

(E) the branch of the motion to dismiss plaintiff's nuisance claims is denied; and it is further

ORDERED that plaintiff's cross-motion for partial summary judgment against the moving defendants for strict liability pursuant to New York City Administrative Code § 3309.4

as to the 2170 and 2172 addresses is granted as to the issue of liability, and that damages as to this issue be assessed at the time of the trial or other disposition of this action. It is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry on all parties within 30 days of entry.

This constitutes the decision and order of the Court.

Dated: October 3, 2014

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

HON. CAROL EDMEAD