145 W. 21st Realty LLC v First W. 21st St. LLC
2016 NY Slip Op 30149(U)
January 22, 2016
Supreme Court, New York County
Docket Number: 653241/12
Judge: Kelly A. O'Neill Levy
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 19
---X
145 W. 21st REALTY LLC,

Plaintiff,

- against -

FIRST WEST 21st STREET LLC,

Defendant.
---X

Index No. 653241/12

DECISION & ORDER

(Motion Seq. 003)

KELLY O'NEILL LEVY, J.:

Defendant First West 21st Street LLC moves, pursuant to CPLR 3211 (a) (1), (2) and (7), to dismiss, in part, the amended complaint.

FACTUAL ALLEGATIONS

Plaintiff is the owner of a five-story residential building located at 145 West 21st Street in Manhattan. The building is comprised of five apartments, a recreation room in the basement, and a backyard garden. There was also, at some point, an art/photography studio, which was used by the plaintiff's sole member and manager, Lili Almog. Plaintiff's building is directly adjacent to defendant's newly-constructed and much taller, 14-story residential building located at 153 West 21st Street (Chelsea Green).

In or about May 2011, defendant began its initial demolition of the existing structures located on its premises (Am. Cmplt., ¶ 16). Plaintiff alleges that, almost immediately, its building suffered multiple damage to the exterior wall and chimney and that waste from the construction project was allowed to fall onto the roof and backyard of plaintiff's premises (*id.*). Defendant was allegedly made aware of these problems, and did nothing to prevent or abate further damage (*id.*). Almog then discovered moisture, water and mold in the basement of her

building (*id.*, ¶ 17). Upon defendant's investigation, it was allegedly discovered that the demolition had damaged the wall of plaintiff's building and this allowed water to leak into the basement (*id.*). Defendant allegedly failed to make good on its promise to repair the damage, and one month later, the basement flooded (*id.*).

At some point prior to the commencement of this lawsuit, defendant approached plaintiff with a proposal to merge their premises into a single zoning lot in order to shift development rights between adjoining parcels of land that are separately owned (Am. Cmplt., ¶ 18). Plaintiff also requested, and defendant agreed, that defendant would make payments to plaintiff for lost rent as a result of flooding caused by the initial demolition work and plaintiff's inability to use the basement apartment and defendant also agreed to reimburse plaintiff for the expense of relocating Almog's art/photography studio (*id.*).

On September 26, 2011, the parties executed a Declaration to merge their two lots for zoning purposes and a Zoning Lot Development Agreement (the ZLDA) (Am. Cmplt., ¶¶ 19, 20). Pursuant to the ZLDA, plaintiff's excess "Floor Area Development Rights" were transferred to defendant for use in connection with its construction project (*id.*, ¶ 21). The ZLDA also granted defendant an easement so that measures could be undertaken to protect plaintiff's adjacent premises during the construction (*see* Berman aff, Ex. L at § XIII [A] [2]). Section VI (B) of the ZLDA requires defendant to furnish copies of all zoning analyses and drawings submitted to the New York City Department of Buildings (DOB) and section XIII (B) requires that plaintiff be named as an additional insured on defendant's builder's risk insurance policy for at least $5 million in coverage (Am. Cmplt., ¶¶ 22-23).

This lawsuit was commenced in September 2012, wherein plaintiff sought by order to show cause to enjoin the construction of Chelsea Green and damages for physical injury to

plaintiff's building and sidewalk caused by the demolition and construction work and lost rent. Specifically, plaintiff alleged that defendant has not taken the requisite steps to protect the building from future flooding and the flooding continued. Plaintiff also alleged that other damage to the exterior of the building was either not corrected or inadequately repaired and that defendant had not complied with its obligation to name plaintiff as an additional named insured on its builder's risk policy in accordance with section III (B) of the ZLDA.

Defendant responded with a cross motion seeking a license pursuant to RPAPL 871, and filed an answer with counterclaims alleging that plaintiff was in breach of the construction easement by its refusal to give access to its building and premises so that defendant's contractor could install the protective devices required by a site safety plan that had been approved by DOB in November 2011 (Answer, ¶¶ 109-114). According to the affidavit of Jacob Namer, sworn to on September 21, 2012 and submitted in opposition to the order to show cause and in support of defendant's cross motion, defendant and its contractor secured commercial general liability insurance policies for the construction project with liability coverage in the cumulative amount of $40 million, including at least $7 million of general liability coverage plus $25 million of excess liability coverage (the CGL coverage), which name plaintiff as an additional insured (NYSCEF Doc. 43, ¶ 16). Certificates of insurance were attached to Mr. Namer's affidavit as exhibit G (NYSCEF Doc. 50). Similar allegations were made in defendant's answer (Answer, ¶¶ 111, 113), a pleading which plaintiff never responded to. By letter dated September 26, 2012, the court was advised that the parties had resolved the pending order to show cause and cross motion (NYSCEF Doc. 56) and the construction proceeded.

In July 2014, plaintiff moved for leave to amend its complaint (motion seq. 002), which was granted by order dated January 20, 2015. In its amended complaint, plaintiff alleges that a

party wall separates its building from the old building that was 153 West 21st Street (Am. Cmplt., ¶ 40). As part of the construction project, defendant constructed a separate exterior wall to provide support for its new building (*id.*, ¶ 41). Plaintiff alleges that this new exterior wall was constructed "in the wrong place" (*id.*). Chelsea Green's new exterior wall allegedly encroaches on plaintiff's space in that it is cantilevered over plaintiff's building (*id.*, ¶¶ 3, 42). This allegedly prevents plaintiff from further extending the existing party wall (*id.*, ¶¶ 4, 42) and prevents plaintiff from adding additional floors to its building (*id.*). Plaintiff alleges that it had intended to construct an additional three floors onto its existing building, and received a "Zoning Resolution Determination" from the DOB authorizing a proposed enlargement of its building up to a maximum building height of 135 feet (*id.*, ¶ 4). Allegedly as a result of defendant's placement of its exterior wall, the only way to expand plaintiff's building would be:

> "through a complete demolition of the existing Building and reconstruction, which include construction of a new wall to replace the support previously provided by the shared Party Wall. Construction of the new wall would require using one foot, out of Plaintiff's 19-foot wide property, for that purpose"

(*id.*, ¶ 43).

Plaintiff also alleges that Chelsea Green does not comply with the plans previously submitted to the DOB, and was not constructed with the required seismic separation to the party wall, causing a dangerous situation in the event of an earthquake (Am. Cmplt., ¶ 44). When plaintiff brought the placement of the exterior wall to defendant's attention, defendant allegedly conceded in a letter dated March 28, 2014 that the wall had been misplaced, claiming that the exterior wall was built right up to the property line (*id.*, ¶ 45).

Finally, the amended complaint alleges that, in March 2014, defendant stopped making the agreed-upon monthly payments of $2,500 to plaintiff for the loss of the use of plaintiff's basement on the ground that the basement was now habitable (Am. Cmplt., ¶ 28). It is alleged

that defendant did not remedy the flooding problem and that the basement is still susceptible to flooding and, thus, uninhabitable and unsuitable for use by Almog for her photography and art business (*id.*).

The amended complaint now asserts the following causes of action: (1) an injunction enjoining and restraining defendant from: (a) trespassing on plaintiff's premises; (b) doing any further work at Chelsea Green until adequate safeguards are in place to protect plaintiff's property and until the damage already caused has been properly repaired; (2) trespass to chattel; (3) nuisance; (4) specific performance of section VI (B) of the ZLDA; (5) specific performance of section XIII (B) of the ZLDA; (6) breach of contract since March 2014 regarding lost rent for plaintiff's basement; (7) negligence and property damage; (8) an injunction pursuant to RPAPL 871 directing the removal of the exterior wall; (9) conversion regarding the exterior wall; (10) trespass regarding the exterior wall; and (11) negligence regarding the exterior wall. Plaintiff has voluntarily agreed to withdraw the first and ninth causes of action. The second, third, and sixth causes of action are not being challenged in this motion.

Construction of Chelsea Green has been completed. A temporary certificate of occupancy was issued by the DOB in January 2015 and a final certificate of occupancy (COO) on September 2, 2015.

DISCUSSION

Dismissal of the 8th, 10th and 11th Causes of Action Based on Documentary Evidence

Defendant argues that documentary evidence, namely the actual Zoning Resolution Determinations (known as ZRD1s) that plaintiff received in July and November of 2013, referenced in but not attached to the amended complaint, do not substantiate and, in fact, conclusively disprove plaintiff's claim that the construction of Chelsea Green wrongfully

forecloses plaintiff from constructing three additional floors to its building. This is because the November 2013 ZRD1 plaintiff received (*see* Berman aff, Ex. K) allegedly only approves the construction of a *new building* by plaintiff. Defendant further argues that the July 2013 ZRD1 (*see id.*, Ex. J) actually and expressly denied plaintiff's proposed hypothetical construction plan to add additional floors to its building up to a certain height, whether it be three or four floors, for reasons having nothing to do whatsoever with the construction of defendant's building.

According to plaintiff, the two ZRD1s it received in July and November of 2013 are nothing more than plaintiff's effort to obtain a determination from the DOB regarding the maximum height permitted at the site in accordance with applicable zoning rules (Almog aff, ¶ 2). New York City Zoning Resolution § 23-692 places height restrictions on narrow buildings less than 45 feet in width, which includes plaintiff's building as it has a street wall measuring only 19 feet (*id.*, ¶ 3; Berman aff, Ex. J). In both requests, plaintiff merely sought confirmation "that any development or enlargement of the Premises is not subject to the height limitations imposed by ZR Section 23-692" (Berman aff, Ex. J at 3 & Ex. K at 3). And in the November ZRD1, plaintiff specifically referenced that its proposed new building would be either an "enlargement or [a] new building" (*id.*, Ex. K at 2). In both instances, the DOB's response appears to interpret plaintiff's proposal as constructing a "new residential building in C6-3A district" and the initial denial appears only concerned with the fact that the proposed additional floors could not be set back from defendant's adjacent building (*see* Almog aff, ¶ 6). Thus, the documentary evidence upon which defendant relies does not conclusively prove that plaintiff received permission only to build a new building on its site and does not conclusively negate plaintiff's claim that it has been forced to abandon its plan to build additional floors on top of the existing building due to defendant's alleged negligence in the placement of its new exterior wall.

Defendant further argues that the representation in the amended complaint that plaintiff's plan to construct an additional three floors to its building was approved by the DOB (*see* Am. Cmplt. ¶ 39) is demonstrably false, in that a ZRD1 does not constitute a DOB approval to build a building and plaintiff has filed no actual construction plans with the DOB. Thus, in defendant's view, plaintiff's claim of damages regarding the exterior wall is based only on the hypothetical possibility that plaintiff may construct a building in the future. Plaintiff's injury is, therefore, something which never existed and may never occur, and thus, defendant argues that the court has no subject matter jurisdiction as it would be issuing an advisory opinion on a hypothetical state of facts. The court is not so persuaded.

First, paragraph 4 of the amended complaint specifies that what plaintiff received from the DOB was a ZRD1 "to authorize the proposed enlargement of its building up to a maximum height of 135'-00." According to the opposing affidavit of Lily Almog, plaintiff did not abandon its plan of adding an additional three floors to the building, but was in process of considering both options after receiving the November 2013 ZRD1 regarding height restrictions (Almog aff, ¶ 11). A few months later, in the course of moving ahead with the proposed development of plaintiff's site, whether it be by enlarging or replacing its building, plaintiff's architect allegedly discovered that Chelsea Green encroached onto plaintiff's property and this allegedly precludes plaintiff from building an additional three floors (*id.*, ¶ 12). Thus, plaintiff claims that the option to expand its existing building has been permanently foreclosed by defendant's actions. Plaintiff further contends that when it demolishes the building and rebuilds, now plaintiff's only development option, it cannot build its new western wall where it now stands, but must build a new western wall which would be required to be constructed one foot further to the east onto plaintiff's 19-foot wide property. Accepting plaintiff's allegation that any new building would

be significantly more expensive to construct than the intended three-floor enlargement and would contain 1/19th less square footage per floor, plaintiff has stated a claim for a real and present injury to its real property for which it seeks compensatory damages.[1]

Notably, most of the legal opinions upon which defendant relies for its ripeness defense relate to declaratory judgment actions as opposed to an action seeking damages for a direct injury to property. The amended complaint sufficiently describes "an actual controversy between genuine disputants with a stake in the outcome" (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C3001:3, p 356), and defendant's ripeness argument is denied.

For these reasons, defendant's motion to dismiss the eighth, tenth and eleventh causes of action based on documentary evidence is denied.

Seismic Gap Claim

Plaintiff contends that defendant did not follow its own DOB-filed and approved plans in constructing its now fully completed and occupied building, and that Chelsea Green was not constructed with the requisite seismic gap between the two buildings (Am. Cmplt, ¶ 44). However, the DOB has issued a COO for Chelsea Green, which presumably means that the structure comports with the building plans previously filed with the DOB and was constructed to withstand earthquakes and protect adjacent buildings during same. If there is any potential threat to the safety and integrity of plaintiff's building in the event of an earthquake as a result of defendant's failure to follow the building code, that is strictly a matter for the DOB (*see Cochard-Robinson v Concepcion*, 60 AD3d 800, 802 [2d Dept 2009]; *Matter of Seven D, LLC v New York City Dept. of Bldgs.*, 2012 Misc LEXIS 5399, 2012 WL 6087300 [Sup Ct, NY County

[1] Whether plaintiff will be able to prove the damages it seeks at trial is a different question, and not before the court on a motion to dismiss.

2012]; *East Sixties Prop. Owners Assn. v Cohane*, 11 Misc 3d 1065(A), 2006 NY Slip Op 50387(U) [Sup Ct, NY County 2006]). Indeed, it appears that the DOB has the power to waive the seismic gap requirement and plaintiff admits that the DOB can require defendant to implement some other earthquake-safety measures to compensate for any alleged failure to adhere to seismic gap rules (*see* Pls. Mem. of Law at 10-11). Thus, any claim relating to the seismic gap between the two buildings is, in reality, an attack on the DOB's issuance of a COO for Chelsea Green and the claim must be raised, in the first instance, with the DOB. Plaintiff must then exhaust its administrative remedies before it can bring an action challenging an adverse determination by the DOB.

Trespass Claim Regarding the Exterior Wall

In the tenth cause of action, plaintiff purports to assert a trespass claim against defendant based on its construction of the exterior wall in such a manner that forecloses plaintiff from adding three additional floors to her building (Am. Cmplt., ¶¶ 113-118). Defendant moves to dismiss this claim, pursuant to CPLR 3211 (a) (7), on the ground that trespass is an intentional tort, and the fact that the amended complaint also asserts negligence claims against defendant defeats the trespass claims as matter of law. However, contrary to the defendant's contention, CPLR 3014 permits claims to be stated "regardless of consistency." Thus, a cause of action is not subject to dismissal merely because it "contradicts the underlying theory" of one already pleaded (*Cohn v Lionel Corp.*, 21 NY2d 559, 563 [1968]; *see also On the Level Enters., Inc. v 49 E. Houston LLC*, 104 AD3d 500, 501 [1st Dept 2013]; *Gold v 29-15 Queens Plaza Realty, LLC*, 43 AD3d 866, 867 [2d Dept 2007]). Furthermore, since the requirement of willfulness can also be shown by gross negligence (*see Ivancic v Olmstead*, 66 NY2d 349, 352 [1985]), the trespass and negligence claims are not necessarily inconsistent.

The tenth cause of action is also claimed to be legally deficient, because it does not sufficiently allege that defendant's building crossed beyond plaintiff's property line and thus interferes with plaintiff's exclusive possession of her land. This argument is rejected. The amended complaint alleges that defendant "built the Exterior Wall in a manner that encroaches on Plaintiff's space, in that it is cantilevered over Plaintiff's building" (Am. Cmplt., ¶ 3). Since the owner of real property possesses the right to utilize all of its air space (*Macmillan, Inc. v CF Lex Assoc.*, 56 NY2d 386, 392-393 [1982]), the amended complaint sufficiently alleges an interference with plaintiff's use and possession of its real property.

Defendant's motion to dismiss the tenth cause of action on these grounds is denied.

Specific Performance of Section VI (B) of the ZLDA

Section VI (B) of the ZLDA provides, pertinent part, that:

> "Each party shall furnish to the other party copies of all zoning analyses and zoning drawings submitted to the [DOB] no later than ten (10) days after the submission of same to the [DOB] or any other City, state or federal agency or authority in connection with any approval related to the use of the Subject Floor Area Development Rights on the Combined Zoning Lot "

(Ex. L at 10). The fourth cause of action alleges that defendant failed to abide by this contractual requirement, despite due demand, and seeks an order directing defendant to provide copies of all zoning documents previously submitted to the DOB and to require defendant to continue to timely perform this contractual obligation going forward.

Defendant moves to dismiss this claim on the ground that it is moot since the defendant's building is now complete, a COO has been issued, and there are no open DOB violations. Defendant also argues that all of these documents have long been available directly from the DOB. Although plaintiff opposes dismissal of this cause of action, it does not refute any of defendant's arguments. To the extent that plaintiff is currently missing any relevant zoning

documents, that issue can be addressed during discovery. The fourth cause of action is, therefore, dismissed.

Claim for Specific Performance of Section XIII (B) of the ZLDA

Section XIII (B) of the ZLDA provides, in pertinent part, that:

> "Purchaser [defendant] shall include Seller [plaintiff] . . . as an additional named insured on Purchaser's builder's risk insurance for demolition/construction on the New Purchaser Building, for any replacement or corrective work on the Seller Building, for any replacement or corrective work on the New Purchaser Building which requires use of the Construction Easement. Such insurance shall be in the amount of no less than $5,000,000.00 and Purchaser shall provide proof of insurance to Seller on or before October 1, 2011"

(Ex. L at 14-15). The fifth cause of action alleges that defendant failed to abide by this contractual requirement, despite due demand, and that plaintiff will suffer irreparable harm unless defendant is compelled to perform this contractual obligation.

Citing the doctrine of impossibility of performance, defendant argues that, as a matter of insurance law, plaintiff, as a neighboring property owner with no ownership interest in Chelsea Green, was never eligible to be added as an additional named insured to defendant's builder's risk policy. Defendant also alleges that the claim is moot, since construction of Chelsea Green has been completed and plaintiff has not articulated a claim of injury that could be covered under a builder's risk insurance policy. Plaintiff opposes dismissal of the claim, arguing that defendant has not submitted any actual evidence that it tried and was not successful in actually complying with this contractual requirement or that compliance was not foreseeable at the time the ZLDA was entered into, and that it has articulated a claim of physical damage to its building that could be covered under a builder's risk policy. Neither party addresses the commercial general liability coverage that was allegedly afforded to plaintiff.

"Builder's risk insurance is a unique form of property insurance that typically covers only projects under construction, renovation, or repair and insures against accidental losses, damages or destruction of property for which the insured has an insurable interest" (*Rhino Excavating Corp. v Assurance Co. of Am.*, 20 Misc 3d 1107(A), *3, 2008 NY Slip Op 51254(U) [Sup Ct, NY County 2008]). It is considered "first-party property coverage" and is purchased by owners and contractors to provide them with insurance coverage to protect against a construction project being destroyed or damaged by fire, explosion or the like during the construction (*see Great N. Ins. Co. v Mount Vernon Fire Ins. Co.*, 92 NY2d 682, 688 [1999]; *Standard Constr. Co., Inc. v Maryland Cas. Co.*, 359 F3d 846, 853 [6th Cir 2004]). The risk of third-party personal injury or property damage claims arising from a construction project is normally shifted by the contractor purchasing a comprehensive general liability insurance policy (*see Standard Constr. Co., Inc. v Maryland Cas. Co.*, 359 F3d at 853; *Knutson Constr. Co. v St. Paul Fire & Mar. Ins. Co.*, 396 NW2d 229, 234 [Minn 1986]).

Thus, it appears that plaintiff, as a neighboring property owner with no insurable interest in the building under construction, is not currently eligible to be added on any builder's risk policy that defendant or its contractors may have obtained for the now completed construction of Chelsea Green. It also appears that defendant substantially complied with the insurance requirements of Section III (B) of the ZLDA by obtaining the CGL coverage referenced above. Specific performance is an equitable remedy, available in the court's discretion, only when a remedy at law is inadequate or impractical (*Matter of Burke v Bowen*, 40 NY2d 264, 267 [1976]; 96 NY Jur 2d, Specific Performance § 1). Since the relief plaintiff seeks regarding insurance coverage appears to be both impracticable as well as redundant, the fifth cause of action is dismissed.

RPAPL 871 Injunction Requiring the Removal of Chelsea Green's Exterior Wall

Plaintiff's eighth cause of action seeks an injunction, pursuant to RPAPL 871, directing the removal of the exterior wall of the Chelsea Green. "The granting of a mandatory injunction is an extraordinary remedy and the court must weigh the conflicting considerations of benefit to the plaintiff and harm to the defendant which would follow the granting of such a drastic remedy" (*Medvin v Grauer*, 46 AD2d 912, 912 [2d Dept 1974], citing *Lexington & Fortieth Corp. v Callaghan*, 281 NY 526, 531 [1939]). There is no dispute that the exterior wall is essential to the integrity of defendant's building, and that the harm to defendant and all of the unit owners and residents of Chelsea Green, by requiring essentially that the building be demolished outweighs any benefit the plaintiff would receive in reducing the costs of developing its building (*accord Hoffmann Invs. Corp. v Yuval*, 33 AD3d 511 [1st Dept 2006] [court would not order defendant to undertake expensive and difficult task of removing retaining wall that encroached onto plaintiff's property]; *Generalow v Steinberger*, 131 AD2d 634, 635 [2d Dept 1987] [court would not order removal of retaining wall necessary to defendant's building]).

While RPAPL 871 authorizes an injunction, it also expressly provides that "[n]othing herein contained shall be construed as limiting the power of the court in such an action to award damages in an appropriate case in lieu of an injunction or to render such other judgment as the facts may justify." An award of damages is available to address any diminution in value of plaintiff's property caused by the alleged encroachment of defendant's exterior wall. The eighth cause of action is dismissed.

Negligence Claims

The seventh cause of action alleges that defendant was negligent in its obligation to properly perform, supervise and inspect the demolition and construction work being performed

and that, as a result, the walls, ceilings, floors, foundations, fence, chimney, backyard and other portions of plaintiff's premises suffered damage (*see* Am. Cmplt., ¶¶ 94-100). The eleventh cause of action alleges that defendant did not exercise reasonable care in constructing the exterior wall and that plaintiff has been damaged thereby (*id.*, ¶¶ 120-125).

Defendant proffers two unpersuasive grounds for pre-answer dismissal of these tort claims. First, defendant argues that the amended complaint fails to allege any *legal duty* owed by the owner of a construction site to neighboring property owners. Quite to the contrary, there is no question that a party responsible for building a condominium has a duty to protect its neighbors from damage associated with the construction (*see 532 Madison Ave. Gourmet Foods v Finlandia Ctr.*, 96 NY2d 280, 290 [2001]; *905 5th Assoc., Inc. v Weintraub*, 85 AD3d 667, 667 [1st Dept 2011]; *Roundabout Theatre Co. v Tishman Realty & Constr. Co.*, 302 AD2d 272, 272-273 [1st Dept 2003]). In addition, section 3309 of the New York City Building Code imposes non-delegable duties on a developer performing construction work to protect the adjoining property.

Second, defendant argues that the claim, as it relates to plaintiff's eleventh cause of action that defendant did not use reasonable care in constructing the exterior wall, is foreclosed by the DOB's issuance of a COO for Chelsea Green and the fact that there are no outstanding DOB violations against the property. Defendant's sole support for this argument is *Matter of Minchew v City of New York* (6 Misc 3d 1038[A], 2005 NY Slip Op 50344[U] [Civ Ct, Richmond County 2005]). Notwithstanding the fact that the decision was reversed on appeal for lack of subject matter jurisdiction (*Matter of Minchew v City of N.Y. Dept. of Bldgs.* [12 Misc 3d 144(A), 2006 NY Slip Op 51436[U] [App Term, 2d & 11th Jud Dist 2006]), and the facts are not in common with the case at bar, the motion court there opined that section 27-214 of the New

York City Administrative Code permits the issuance of certificates of occupancy when there is only "substantial compliance" with the approved building plans and the building code and a new building still qualify for a final certificate of occupancy even if it was not constructed in a workmanlike manner. Unlike the seismic gap claim, plaintiff's claims regarding the encroachment of Chelsea Green's exterior wall is not a direct challenge to the DOB's issuance of a COO for Chelsea Green. Indeed, Almog avers that the DOB never examined whether defendant's new condominium encroached onto plaintiff's property since doing so would have required the DOB inspector to go to the roof of plaintiff's building, which did not occur (Almog aff, ¶ 15). As the DOB is not tasked with resolving disputes between adjoining landowners regarding encroachment and trespass claims and has no power to award monetary damages, dismissal of the eleventh cause of action on the basis of the issuance of the COO is not warranted.

Punitive Damages

Plaintiff seeks punitive damages on its trespass, nuisance and negligence claims, alleging that defendant's acts of trespass have been and are malicious, wanton, willful and/or in reckless disregard of plaintiff's rights, warranting the imposition of punitive damages (Am. Cmplt., ¶¶ 60, 119, 125). In addition to asserting physical damage to plaintiff's building, flooding, and the interference with plaintiff's development plans, the amended complaint also alleges that during the construction, defendant allowed garbage, wood and even pieces of cement to fall into the backyard and roof of plaintiff's premises, threatening the safety of plaintiff's tenants (*see id.*, ¶¶ 16, 29, 31). Further the complaint alleges at least ten stop work orders were issued by the DOB for defendant's failure to abide by the approved plans and safety issues (*id.*, ¶ 34).

Although the standard for imposing punitive damages is strict one and they will be awarded only in exceptional cases (*Marinaccio v Town of Clarence*, 20 NY3d 506, 511 [2013]), they may be awarded in construction cases where the defendant's conduct "'evinced a conscious disregard of the rights of others or [was] so reckless as to amount to such disregard'" (*11 Essex St. Corp. v Tower Ins. Co. of N.Y.*, 81 AD3d 516, 517 [1st Dept 2011], quoting *Wing Wong Realty Corp. v Flintlock Constr. Servs., LLC*, 71 AD3d 537, 538 [1st Dept 2010]; *see also Fonda v 157 E. 74th Co.*, 158 AD2d 297, 298 [1st Dept 1990]). In this case, at the pleading stage, it would not be appropriate to dismiss plaintiff's punitive damage claim.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that defendant's motion to dismiss the amended complaint is granted only to the extent of dismissing the fifth, seventh and eighth causes of action, and the motion is otherwise denied; and it is further

ORDERED that defendant shall serve and file an answer to the amended complaint within twenty (20) days of service of a copy of this order with notice of entry; and it is further

ORDERED that this matter is adjourned to March 2, 2016 at 9:30 a.m. for preliminary conference in Part 19 (111 Centre Street, Room 1164B).

Dated: January 22, 2016

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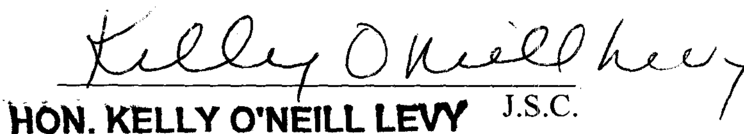

HON. KELLY O'NEILL LEVY J.S.C.