Madison 96th Assoc. LLC v 17 E. 96th Owners Corp.
2018 NY Slip Op 30824(U)
April 26, 2018
Supreme Court, New York County
Docket Number: 601386/2003
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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MADISON 96TH ASSOCIATES, LLC,

Plaintiff,

-against-

17 EAST 96TH OWNERS CORP.,

Defendant.

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Index No.: 601386/2003
(Action No. 1)

DECISION & ORDER

17 EAST 96TH OWNERS CORP.,

Plaintiff,

-against-

MADISON 96TH ASSOCIATES, LLC, and 21 EAST 96TH STREET CONDOMINIUM,

Defendants.

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Index No.: 108695/2004
(Action No. 2)

SHIRLEY WERNER KORNREICH, J.:

I. Introduction

This is a long-running, contentious litigation between neighboring buildings on the Upper East Side of Manhattan, which share a property line. What remains for decision are the buildings' competing trespass claims. Madison 96th Associates, LLC (Madison), which owned a building located at 1380 Madison Avenue (Madison's Property), was granted summary judgment on liability on its trespass claim against 17 East 96th Owners Corp. (17 East), which owns a residential cooperative building located at 17 East 96th Street (17 East's Property). *See Madison 96th Assocs., LLC v 17 E. 96th Owners Corp.*, 120 AD3d 409 (1st Dept 2014) (*Madison I*). Summary judgment was denied on 17 East's trespass claims against Madison. *See Madison 96th Assocs., LLC v 17 E. 96th Owners Corp.*, 121 AD3d 605 (1st Dept 2014) (*Madison II*). Hence, a damages trial was required on both parties' claims, but a liability trial was only required on 17

East's claims. For reasons the court will not repeat, it decided to reverse bifurcate and first hold a damages trial on both claims, to be followed by a liability trial on 17 East's claims. A three-day damages trial began on August 2 and 3, 2017. *See* Dkt. 719 (8/2/17 Tr.); Dkt. 720 (8/3/17).[1] After the parties' settlement negotiations failed in early 2018, the damages trial concluded on March 13, 2018. *See* Dkt. 721 (3/13/18). The parties filed post-trial briefs on April 6, 2018. *See* Dkt. 722 (17 East's brief);[2] Dkt. 730 (Madison's brief).

For the reasons that follow, the court holds that (1) Madison, who was assigned the Seller's damage claim, is entitled to recover the amount the purchase price was decreased ($800,000) due to 17 East's refusal to remove air conditioners that were trespassing on the Seller's property, thereby impeding development; and (2) if 17 East establishes Madison's liability at trial, 17 East will be entitled to recover its admissible out-of-pocket damages ($24,402.83) plus $2 in nominal damages.[3] In light of these holdings, the parties are again urged

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[1] Citations to Dkt. refer to documents filed on NYSCEF in Action No. 1.

[2] The court will not address 17 East's arguments based on evidence the court precluded pursuant to its prior *in limine* decisions. *See, e.g.*, Dkt. 722 at 6 (advocating for higher damages based on documents "not in evidence due to the Court's preclusion of same.").

[3] While not at issue in this decision, it is worth noting that the court previously ruled that injunctive relief to remove the allegedly trespassing foundation and underpinnings would not be issued because the benefit to 17 East is significantly outweighed by the cost to Madison and, more importantly, presents an unwarranted danger to both the public and the condominium owners. *See 22 Irving Place Corp. v 30 Irving LLC*, 57 Misc3d 253, 255-56 (Sup Ct, NY County 2017) ("Since removal of the shed would result in a violation of the Code and would constitute a threat to public safety, plaintiff cannot win on a balance of the equities."); *Ponito Residence LLC v 12th St. Apts. Corp.*, 38 Misc3d 604, 611 (Sup Ct, NY County 2012) ("as there is evidence tending to show that removal of the Sidewalk Bridge at this stage could cause a threat to public safety it cannot be said that the equities balance in Ponito's favor."); *see also Kimball v Bay Ridge United Methodist Church*, 157 AD3d 877, 878 (2d Dept 2018) ("[i]n order to obtain injunctive relief pursuant to RPAPL 871(1), a party is 'required to demonstrate not only the existence of [an] encroachment, but that the benefit to be gained by compelling its removal would outweigh the harm that would result to [the encroaching party] from granting such relief."); *In re Metroplex on the Atl., LLC*, 545 BR 786, 796 (Bankr EDNY 2016) ("New York

to talk settlement. That said, since findings at the liability stage as to whether a trespass by Madison in regard to the underpinnings was intentional could affect Madison's insurance coverage from QBE (e.g., the litigation costs QBE has been compelled to advance),[4] any settlement discussions should involve QBE.

II. Madison's Trespass Claim

In 2002, Stuart Boesky agreed to purchase Madison's Property from 1380 Madison Avenue, L.L.C. (Seller), an LLC whose members were non-parties Elinor and George Munroe (the Munroes). Boesky and Seller entered into a Sale and Purchase Agreement dated September 5, 2002. *See* Dkt. 737 (the SPA). Closing was to occur on March 1, 2003. *See id.* at 15. Section 2.1 of the SPA provides that the purchase price had two components: (1) $8 million, which was due at Closing; and (2) Additional Payments of up to $2.6 million payable based on conditions set forth in section 2.1.3. *See id.* at 2. Section 2.1.3, in effect, is an earn-out provision that obligates Boesky to pay Seller, subject to certain conditions, 50% of the Net Sale Proceeds of the units in the condominium that Boesky planned to develop on the property. *See id.* at 3.[5]

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courts are reluctant to issue an 'injunction merely for the purpose of protecting a technical right where ... it will produce great public or private mischief."), quoting *Andrews v Cohen*, 221 NY 148, 154-55 (1917), and citing *Garvey v Long Island R.R. Co.*, 159 NY 323 (1899) ("[A] court of equity 'is not bound to issue an injunction when it will produce great public or private mischief merely for the purpose of protecting a technical or unsubstantial right.'"); compare *2225 46th St., LLC. v Hahralampopoulos*, 55 Misc3d 621, 624 (Sup Ct, Queens County 2017) (grating injunction because "[t]his is not a case where the petitioner sought to conduct underpinning or other prospectively dangerous activities to respondent's property."). Moreover, as discussed herein, the court also precluded 17 East from seeking punitive damages or disgorgement of profits, rulings which were affirmed by the Appellate Division. *See 17 E. 96th St. Owners Corp. v Madison 96th St. Assocs., LLC*, 144 AD3d 452 (1st Dept 2016) (*Madison III*).

[4] *See Madison 96th Assocs., LLC v 17 E. Owners Corp.*, 117 AD3d 482 (1st Dept 2014).

[5] Seller and Madison entered into an agreement dated February 6, 2007 in which Seller would receive $2.35 million instead of the maximum possible Additional Payments of $2.6 million. *See* Dkt. 748 (the 2007 Agreement). There is no evidence that this agreement, unlike the

At the time, there was a two-story commercial building on the property with a billboard on its roof. Boesky planned to demolish that building and build a high-rise with luxury, residential condominium units.[6] The SPA provides conditions to closing, such as the requirement in section 3.1.3 that the property be free of all tenancies and the requirement in section 3.1.4 that the billboard be removed. *See id.* at 10.

Pursuant to sections 6.2 and 6.3, Boesky conducted due diligence prior to Closing [*see id.* at 12-14], which revealed that air conditioners protruded from windows of 17 East's building onto Madison's Property.[7] This trespass [*see Madison I*, 120 AD3d 409] presented a major problem for Boesky. If the air conditioners were not removed, the new building would have to be built eight feet narrower, resulting in a loss of 25% of the total buildable square feet – "a deal killer" according to Boesky. *See* Dkt. 720 (8/3/17 Tr. at 264).[8] To address this concern, Boesky

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reduction of the initial $8 million sales price (discussed herein), was affected by the air conditioners issue (also discussed herein), nor has 17 East proffered evidence of how much the Additional Payments would have actually totaled. As set forth in the 2007 Agreement, while the initial amount was reduced from $8 million to $7.2 million, the Additional Payments still had a maximum value of $2.6 million. *See id.* at 2.

[6] The tenants in 17 East's building were unhappy that their windows which had previously overlooked the two-story commercial building would face a wall. Their unhappiness engendered this over-long, aggressive litigation. The bad blood apparently has not simmered enough to permit settlement.

[7] As noted earlier, the buildings shared a property line, and the air conditioners protruded into Madison's airspace.

[8] The court found Boesky to be a highly credible witness. His demeanor, the candid manner in which he testified, and the consistency of his testimony with the documentary evidence suggest he was telling the truth. To the extent 17 East's counsel attacked Boesky's credibility on cross examination, the court finds that the badgering nature of 17 East's counsel's questions, many of which were repetitive and dealt with matters that are irrelevant to the damages portion of the trial (the same also is true of 17 East's counsel questioning of the other witnesses), did not impugn Boesky's credibility. *See Glenbriar Co. v Lipsman*, 11 AD3d 352, 356 (1st Dept 2004) ("It is well established that findings of fact rendered by a court after a bench trial 'should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached

and Seller entered into an amendment to the SPA dated December 12, 2002. *See* Dkt. 739 (the First Amendment). The First Amendment added a new condition to Closing – that the property must be "free of the encroachment of the existing air conditioners over the west property line." *See id.* at 2. It further required Seller to resolve a dispute with a holdout tenant – a bagel shop (the Bagelry). *See id.* at 2-3. A portion of the purchase price was to be used to address the air conditioners issue (up to $150,000) and removal of the Bagelry (up to $70,000). *See id.* at 3. The First Amendment, however, did not extend the Closing date, which remained March 1, 2003.

By letter dated January 8, 2003, Seller's attorney demanded that the manager of 17 East's Building ensure removal of the trespassing air conditioners. *See* Dkt. 740. That demand was refused. This scuttled the March 1, 2003 closing, and litigation ensued. Seller commenced Action No. 1 in early May 2003, alleging that the air conditioners were trespassing on its property. The litigation, unfortunately, did not result in a swift resolution. *See* Dkt. 730 at 9 ("As of August 12, 2003, the Munroes [Seller] had satisfied all but three of the conditions to closing: (1) the presence of 17 East's encroaching air conditioners; (2) [the Bagelry] that had not yet vacated …; and (3) the presence of the encroaching advertising billboard."). "By letter dated August 12, 2003, [Seller] wrote to Boesky, offering to reduce the purchase price by $800,000 if Boesky would waive [Seller's] obligation to satisfy [the three outstanding] conditions." *Id.*; *see* Dkt. 743 (8/12/03 letter enclosing proposed second amendment to the SPA). Boesky rejected this offer. He testified that he met with the Munroes and "explained to them the seriousness of the air conditioning encroachment and what it meant if they weren't removed, and we explained

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under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses.'"), *aff'd*, 5 NY3d 388 (2005), quoting *Thoreson v Penthouse Int'l, Ltd.*, 80 NY2d 490, 495 (1992).

to them that there was – it was impossible for us to go forward unless we had some comfort beyond what we had at that time that the air conditioners would be removed." *See* Dkt. 720 (8/3/17 Tr. at 213).[9] That said, while the air conditioners issue was a "deal killer", Boesky felt that the two other outstanding issues could be overcome.[10]

Boesky's view of the air conditioners issue changed two months later when, by order dated October 10, 2003, the court (Cahn, J.) held that Seller "has the exclusive right to the immediate use, possession, and enjoyment of the air space above its real property ... and that [17 East] is currently in violation of that right by virtue of the air conditioning units presently protruding from its property into [Seller's] aforesaid air space." *See* Dkt. 28 (the October 2003

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[9] As noted earlier:

> Boesky understood that if the encroaching air conditioners were not removed, he would have to leave a gap of at least eight feet between any new building constructed on the 1380 Madison Avenue property and [17 East's Property]. Zoning for fire access required this [eight-foot] separation where the new construction was not built flush with an adjoining structure. Because 17 East's [B]uilding was on the property line, this meant that any new building on the 1380 Madison Avenue property would lose eight feet in width. As the 1380 Madison Avenue property was 32 feet wide, an [eight-foot] loss in width would result in a loss of 25% of total buildable square feet, as well as dimensions that were too narrow for luxury condominiums. Losing 25% of the square footage was a deal killer. **To Boesky, an $800,000 price reduction was too little compensation for the increased risk presented by 17 East's encroaching air conditioners.**

Dkt. 730 at 10 (emphasis added; internal citations and quotation marks omitted).

[10] *See* Dkt. 730 at 10 ("As distinguished from the air conditioners, [Boesky testified that] the presence of the [B]agelry 'was a typical construction issue' which would not by itself have deterred Boesky from closing. The situation with the [B]agelry was 'fairly common with development sites where the tenant has to be given an incentive to leave,'" and that "The fact that you had to pay a tenant to leave the premises is a common and typical occurrence Development.") (citations omitted).

Order) at 9.[11] Notwithstanding Justice Cahn's ruling, 17 East refused to remove the air conditioners. Nonetheless, Boesky felt that Justice Cahn's decision "changed the playing field a little bit between the seller and the buyer because the[] order itself was progress in the sense that it demonstrated that the air conditioners were in violation, which enabled the [seller and buyer] to have what ultimately may become more productive conversations around reaching an agreement pursuant to which the deal could close." *See* Dkt. 720 (8/3/17 Tr. at 169). Boesky became amenable to closing because "Justice Cahn gave us a requisite level of certainty that ultimately the air conditioning units would be removed. It didn't give us absolute certainty, but we made a business decision that the risks/reward were reasonable." *See id.* at 265-66.

Pursuant to an agreement dated November 3, 2003, the billboard company agreed to remove the billboard by December 15, 2003 in exchange for $12,000. *See* Dkt. 746. Hoping to close, Boesky and Seller then entered into a second amendment to the SPA, dated December 16,

[11] Three issues are worth noting regarding the October 2003 Order. *First*, while it is dated October 10, 2003, a stamp on it indicates that it was "filed" on October 15, 2003, and entered on NYSCEF on October 20, 2003. In any event, the parties do not contend that this discrepancy is material. *Second*, Justice Cahn denied 17 East's motion for reargument by order dated December 8, 2003 (which was entered on December 12, 2003). *See* Dkt. 49. *Third*, while the October 2003 Order granted partial summary judgment on 17 East's trespass, Justice Cahn did not order any injunctive relief at that time. Although Seller later sought a preliminary injunction in a November 19, 2003 proposed order to show cause (OSC) [*see* Dkt. 38], the OSC signed by Justice Cahn on November 20, 2003 did not include a temporary restraining order. *See* Dkt. 40. Justice Cahn merely set the motion down for oral argument on December 8, 2003. *See id.* To be sure, while Justice Cahn, in a September 6, 2006 decision, stated that "[on] November 20, 2003, [Seller] obtained an Order to Show cause ***restraining*** [17 East] from continuing to [trespass]" [*see* Dkt. 92 at 3 (emphasis added)], the November 20, 2003 OSC did not actually enjoin 17 East from doing anything but merely set a return date for oral argument on the motion. According to Justice Cahn, while he ruled on December 8, 2003 that a hearing was necessary, as of the September 6, 2006 decision, "[n]o hearing has been held on that issue." *See id.* That said, the fact that an injunction was never issued is not determinative. As discussed herein, what matters is that 17 East was adjudicated in October 2003 to have been trespassing on Seller's property, which it knew was affecting the sale. 17 East does not cite any authority for the proposition that damages for trespass are available only if an injunction was violated. That 17 East continued to willfully trespass after the October 2003 Order was issued is sufficient to hold it liable for the damages caused by its trespass – namely, the resulting reduction in the purchase price.

2003. *See* Dkt. 747 (the Second Amendment). The Second Amendment reduced the first component of the purchase price by $800,000, from $8 million to $7.2 million. *See id.* at 2.[12] The Second Amendment specifically provides for how the Bagelry and air conditioners issues are to be resolved – Boesky was to pay $200,000 to the Bagelry in a settlement that required the Bagelry to vacate by January 15, 2004 [*see id.* at 6];[13] and the parties would continue litigating the air conditioners issue, as 17 East appealed the October 2003 Decision. *See id.* at 5. A new closing date was set for February 2, 2004. *See id.* at 4. Section 10 of the Second Amendment provides that, "[a]fter the Closing, in the current litigation with respect to the Air Conditioners, the Bagelry and the Scaffolding, if still ongoing, Seller and Buyer covenant and agree to cooperate with each other to petition the court to effect a substitution of the parties upon transfer of the ownership interest in the Property." *See id.* at 7. Thus, the Second Amendment was an agreement for Boesky to pay Seller $800,000 less than the original purchase price in consideration for undertaking the risk and responsibility of litigating with 17 East after closing. Fifteen years of bitter litigation ensued.

As per the Second Amendment, the sale closed on February 2, 2004, despite 17 East still not having removed the air conditioners. That said, rather than Boesky personally acquiring the Madison Building, he acquired it through Madison, an LLC in which he is a member. *See* Dkt. 751. Consistent with the Second Amendment, Seller assigned its trespass claim against 17 East

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[12] It should be noted that the "[Second Amendment] increased the maximum 'General Payment' [to the Bagelry and 17 East] from $150,000 to $220,000, but also eliminated the separate payment of up to $70,000, making this change a 'wash.'" *See* Dkt. 730 at 14.

[13] The $200,000 settlement with the Bagelry was finalized shorty after the Second Amendment was executed, by stipulation dated December 19, 2003. *See* Dkt. 749.

to Madison. *See* Dkt. 750.[14] By order dated March 12, 2004, Madison was substituted for Seller in these actions. *See* Dkt. 50. Nine months after closing, on November 4, 2004, the Appellate Division affirmed the October 2003 Order. *See 1380 Madison Ave., L.L.C. v 17 E. Owners Corp.*, 12 AD3d 156 (1st Dept 2004). Nonetheless, 17 East did not agree to remove the air conditioners until December 21, 2004. *See* Dkt. 759 (stipulation agreeing to remove all air conditioners by January 7, 2005).

The court is convinced from the terms of the SPA and its amendments, as well as Boesky's credible testimony, that the purchase price was reduced by $800,000 due to the development risk and the delay posed by 17 East's trespassing air conditioners. Boesky's concern about the significant financial impact the air conditioners posed to his development plans is highly plausible, and the court credits his testimony to this effect. Importantly, Boesky's testimony was corroborated by Matthew Golden, the attorney, then employed by Debevoise & Plimption LLP, who represented Seller. The court found Mr. Golden to be a highly credible witness. As a result, the court concludes that the Munroes agreed to an $800,000 decrease in the purchase price as consideration for closing while the air conditioners and concomitant litigation delay threatened Boesky's development plans.

While the court would have come to this conclusion were this the only evidence presented by Madison, this conclusion is bolstered by the credible testimony of Madison's expert witness, Michael Vargas.[15] Vargas is a certified real estate appraiser with 25 years of

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[14] Consistent with the contentiousness and length of this litigation, 17 East challenged this assignment. Its validity was affirmed by both Justice Cahn [*see* Dkt. 92 at 5-6] and the Appellate Division. *See Madison I*, 120 AD3d at 410-11.

[15] By order dated March 4, 2016, the court held that "Vargas is qualified, as an experienced real estate appraiser, to testify that litigation and encroachments can affect market value of a

experience. While he did not submit an appraisal,[16] he persuasively testified that in the subject arm's length transaction, which may be assumed to be sufficient evidence of market value,[17] the uncertainty caused by the air conditioners warranted (and indeed resulted in) an $800,000 purchase price decrease. Vargas' testimony further confirms that the $800,000 purchase price decrease was fully attributable to the air conditioners issue, and not the Bagelry issue (which was resolved more than a month before closing).

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property." *Madison 96th Associates, LLC v 17 East 96th Owners Corp.*, 2016 WL 951518, at *9 (Sup Ct, NY County 2016) (the March 2016 Decision).

[16] "An expert may instead ground his opinion on facts in evidence, as was the case here." *Admiral Ins. Co. v Joy Contractors, Inc.*, 19 NY3d 448, 457 (2012). It should be noted that 17 East's cross examination of Vargas misguidedly attacked him for allegedly not following applicable rules concerning appraisals. Since it is undisputed that Vargas did not submit an appraisal, and since Vargas' testimony is both credible and persuasive due to it being based on his experience and consistent with the other documentary evidence and credible testimony, the court rejects all of 17 East's arguments based on Vargas' supposed failure to apply applicable appraisal standards (which, as he testified, are baseless accusations). That said, while the court finds Vargas to be credible, the court reiterates that it would have come to the same conclusion even if the only evidence were the contracts and the testimony of Boesky and Golden. Vargas simply confirmed what the record already made clear – that 17 East's trespass is the reason for the $800,000 purchase price decrease.

[17] This principle is well settled under New York law. *See CF HY LLC v Hudson Yards LLC*, 124 AD3d 490 (1st Dept 2015), citing *Plaza Hotel Assocs. v Wellington Assocs., Inc.*, 37 NY2d 273, 277 (1975) ("the purchase price set in the course of an **arm's length transaction** of recent vintage, if not explained away as abnormal in any fashion, is evidence of the 'highest rank' to determine the true value of the property at that time.") (emphasis added). 17 East did not present any evidence suggesting the $800,000 amount was not the product of an arm's length agreement to value the risks posed by the air conditioners. Hence, pursuant to Vargas's testimony and settled New York law, the court is permitted to conclude that the best evidence of market value, including the risks associated with the extant trespass and pending litigation, is the amount agreed upon by the arm's length counterparties. This is especially true if, as here, the transacting parties desired to close the sale, but were not compelled to do so. *See Metro. Transp. Auth. v Washed Aggregate Resources, Inc.*, 102 AD3d 787, 790 (2d Dept 2013) ("A property's market value is defined as 'the amount which one desiring but not compelled to purchase will pay under ordinary conditions to a seller who desires but is not compelled to sell.'"), quoting *936 Second Ave. L.P. v Second Corp. Dev. Co.*, 10 NY3d 628, 632 (2008).

As noted at the outset, Madison has been granted summary judgment on liability on its trespass claim against 17 East. *See Madison I*, 120 AD3d 409. Moreover, it is the law of the case that 17 East may be held liable "for all damages occasioned by [its] trespass, including actual special and consequential damages that result." March 2016 Decision, 2016 WL 951518, at *9 (collecting authority). Likewise, "it is law of the case that whether the air conditioners caused the $800,000 purchase price reduction is a question of fact." *Id.*[18] As discussed, the court finds that the $800,000 purchase price reduction was the direct and foreseeable consequence of 17 East's trespass. Accordingly, Madison is entitled to a judgment against 17 East in the amount of $800,000.

Additionally, since trespass "is an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property" [CPLR 5001(a)], Madison is entitled to mandatory prejudgment interest of 9% [CPLR 5004]. *See Flamm v Noble*, 296 NY 262, 268 (1947) ("Under a long-settled New York rule, interest is recoverable of right in actions for trespass."); *M.C.D. Carbone, Inc. v Town of Bedford*, 98 AD2d 714 (2d Dept 1983) ("plaintiff is entitled **as a matter of right** to an award of interest in a trespass action **from the time the cause of action accrued**.") (emphasis added); *see also N. Main St. Bagel Corp. v Duncan*, 37 AD3d 785, 787 (2d Dept 2007) (same), citing *Prop. Owners Ass'n of Harbor Acres, Inc. v Ying*, 137

[18] The court again rejects 17 East's argument that Madison, who stood in the shoes of Seller, did not suffer damages or that they are speculative. *See* Dkt. 722 at 15-17. It is not speculative that the purchase price was reduced by $800,000 due to 17 East's trespass – that fact is clear based on the credible evidence presented at trial. To the extent 17 East invokes equitable considerations by complaining that the sale did not have to close in February 2004, the court notes that the equities do not lie with 17 East. Seller not only demanded that 17 East remove their trespassing air conditioners two months before the original closing, but 17 East continued to refuse to do so even after Justice Cahn granted summary judgment to Seller (more than four months prior to the eventual closing date). If 17 East had complied with Justice Cahn's decision, it would not have faced any liability. Simply put, 17 East has no one to blame but itself for its liability, as it had every opportunity to cease its trespass prior to the sale price reduction.

AD2d 509, 511 (2d Dept 1988). While the trespass began prior to the date of closing, February 2, 2004, Madison only asks for pre-judgment interest to run from that date. *See* Dkt. 730 at 21.

Madison, however, cannot recover punitive damages [*see* Dkt. 730 at 21-22] because 17 East's trespass neither was directed at the public nor caused public harm. *Rocanova v Equitable Life Assur. Soc. of U.S.*, 83 NY2d 603, 613 (1994) ("a private party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also **that such conduct was part of a pattern of similar conduct directed at the public generally**.") (emphasis added); *see Madison III*, 144 AD3d at 452

Furthermore, while Madison's case against 17 East is now over, it is nonetheless premature to permit the entry of judgment. The instant actions have been litigated together for more than a decade, and since 17 East cannot yet set off the judgment against it with the recovery it would be entitled to if it prevails on its own trespass claims, judgment shall not be entered until after 17 East's liability trial. *Cf. Bartfield v RMTS Assocs., LLC*, 283 AD2d 240, 241 (1st Dept 2001) ("we exercise our discretion and direct a stay of the execution of the judgment on the breach of contract claim pending determination of the counterclaim."), accord *Robert Stigwood Organisation, Inc. v Devon Co.*, 44 NY2d 922, 923 (1978) (The trial court ... , [has] wide discretion in imposing conditions upon the grant of partial summary judgment so as to avoid possible prejudice to the party against whom that judgment is granted. The device used in this case, a stay of execution pending resolution of the remaining claims and counterclaims, is an appropriate method of effectuating that objective.") (citations omitted); *see Inner City Telecommunications Network, Inc. v Sheridan Broad. Network, Inc.*, 260 AD2d 257, 258 (1st Dept 1999) ("The record does not support the claim that in the absence of the sought stay

defendant's remedy, should it prevail upon its counterclaim for breach of the Affiliation Agreement, will be jeopardized."). To be sure, the set-off (less than $25,000) pales in comparison to Madison's judgment (more than $1 million including interest). However, QBE, the insurer who has paid for much of the defense, must be considered. There is a real possibility that Madison, a single purpose LLC, might have to disgorge a portion of the legal fees advanced to it by QBE if, at the liability trial, it is adjudicated to have willfully trespassed in regard to the underpinnings.

III. 17 East's Trespass Claims

While Madison's trespass claim concerned events prior to the construction of its new building, 17 East's trespass claims concern what happened during construction.[19] The relevant[20] undisputed facts as to underpinning claim are set forth in the Appellate Division's October 30, 2014 decision denying summary judgment:

> It is alleged that in the process of constructing its new building, Madison excavated more than 10 feet below the curb level and installed underpinning on [17 East's] property, which constitutes a permanent encroachment. [17 East] seeks both injunctive and monetary relief for the claimed trespass.
>
> There was extensive litigation during the demolition phase of this project. [17 East claims] that Madison failed to comply with applicable notice requirements before obtaining demolition and foundation permits from the New York City Buildings Department. [17 East] sought injunctive relief, and ... [in July 2004, Madison stipulated that it] would not excavate further than ten feet below ground without first retaining a licensed engineer or a licensed architect who would not only supervise the work, but also confer with [17 East's] professionals regarding any issues that might arise. The parties stipulated further that [17 East] would be afforded one week's advance notice of any excavation deeper than 10 feet and

[19] 17 East asserts 3 trespass claims – actual damages and costs to its property caused by the construction, the placement of underpinnings under its building, and the foundation of Madison's building encroaching 4 to 5 inches, several feet underground onto 17 East's Property.

[20] At the liability trial, the relevant factual record will include the circumstances of the alleged trespasses and an examination of the applicable regulations. That detail, however, is irrelevant to the question of 17 East's damages.

> that excavation would not proceed without Madison's first retaining the aforesaid professional.
>
> In September 2004, Madison requested permission "to enter and inspect" [17 East's] property "as it pertains to the pending adjacent excavations." It also requested that 17 East "accept this letter as formal notice to proceed with excavation and foundation work at [Madison's Building]." In response, [17 East] granted Madison "a license in accordance with § 27–1026 of the New York City Building Code to enter and inspect 17 East 96th Street as it pertains to proposed excavations at 1380 Madison Avenue." [17 East] also reiterated in its response many of the terms of the July 2004 stipulation, stating that Madison could not excavate 10 feet below grade without its permission and without giving it advance notice so that its own professionals could review the plans and specification for the work.
>
> Subsequently, in October 2004, Madison began and completed the underpinning of 17 East 96th. Although [17 East] brought a motion for injunctive relief to halt the construction, it was denied.

Madison II, 121 AD3d at 606.

By order dated May 23, 2013 (Action No. 2, Dkt. 72), this court granted summary judgment to Madison on 17 East's trespass claims because this court "found that [17 East] had either consented to the underpinning of its property by giving Madison permission to enter and inspect its property in September 2004, or, having had sufficient notice of the work being done next door and below its property, was barred, as a matter of law, from objecting to it for failure to act sooner." *Id.* at 607. The Appellate Division reversed, finding that this court "improperly resolved issues of fact" regarding whether "[17 East] had sufficient notice of the work being done to bar it from objecting." *See id.* The Appellate Division further held that "Madison did not have the right, in the absence of an agreement with [17 East], to erect permanent structures extending beyond the property line, either above or below the surface, and thus encroaching on [17 East]." *Id.* at 608. The Appellate Division, however, expressly declined to instruct this court on the proper measure of damages. *See id.* at 609. That said, in *Madison I*, 120 AD3d at 411,

"the Appellate Division noted that nominal damages may be awarded on a trespass claim." *See 17 East 96th Owners Corp. v Madison 96th Assocs., LLC*, 2015 WL 3546069, at *2 (Sup Ct, NY County 2015) (the June 2015 Decision), *aff'd*, *Madison III*, 144 AD3d 452.

This court's holdings in the June 2015 Decision, which were affirmed in *Madison III*, are key to determining the proper measure of 17 East's damages on its trespass claims. The June 2015 Decision denied 17 East's motion for leave to amend its complaint to assert claims for punitive damages and disgorgement of Madison's profits. While both proposed amendments were denied, only the latter is relevant here. 17 East was not permitted to assert a profit disgorgement claim because "it is well established that damages on a trespass claim - a claim for injury to real property – 'is the **lesser** of the decline in market value and the cost of restoration." 2015 Decision, 2015 WL 3546069, at *5 (emphasis in original; collecting cases), quoting Action No. 2, Dkt. 72 at 20; *see Madison III*, 144 AD3d at 452-53 ("the court correctly determined that profits realized by defendant are not the proper gauge of damages in a trespass action, and that the proper measure is the **lesser** of the decline in market value and the cost of restoration.") (emphasis added), citing *Jenkins v Etlinger*, 55 NY2d 35, 39 (1982).

In *Jenkins*, the Court of Appeals held that "the plaintiff need only present evidence as to one measure of damages, and that measure will be used when neither party presents evidence going to the other measure." *Jenkins*, 55 NY2d at 39. At trial, 17 East presented evidence of the alleged decline in market value of its property due to Madison's trespasses. As noted earlier, restoration via injunctive relief is not proper under these circumstances due to the alleged trespasses not presenting any danger to 17 East's Building or affecting its use. By contrast, the dangers to the public presented by removing the trespasses militate strongly against doing so.

Hence, 17 East's damages are limited to the decline in the market value of its building due to Madison's trespasses.

17 East failed to present any credible evidence that Madison's trespasses caused a decline in the market value of its property. 17 East relied on an expert appraiser, Ruth Agnese, who submitted a report that "assumed the [underground] encroachment [in the back yard of the building] was 5 inches wide by 100" and that "the market value of a [5-inch] wide by 100 foot long strip of 17 East's property (41.67 square feet) was $187,500 as of October 14, 2004." Dkt. 730 at 24; *see* Dkt. 757 at 1 (Agnese's 12/19/11 Dep. Tr.), 80 (Agnese's 10/18/11 report).[21] This figure was not based on the value of the cooperative apartments in this landmarked, pre-war cooperative. Rather, it assumed redevelopment or sale of the entire property, an implausible and at best speculative probability.

Agnese's analysis is unpersuasive. The premise of her opinion is that the negative market value of Madison's underground encroachment in the building's yard is equal to the total square footage of the encroachment, divided by the total square footage of 17 East's Property, times the total market value of the property. *See* Dkt. 730 at 24 ("At her deposition, [Agnese] testified that her report was 'to determine what the value of the 5 inch by 100 foot encroachment was,' not to determine the diminution in value to 17 East's property-if any-resulting from the encroachment. The premise of her report was that due to the 5 inch wide encroachment, 17 East lost buildable area totaling 416.7 square feet, calculated by multiplying 5 inches times 100 feet times the floor area ratio of 10."). In other words, Agnese assumed that if 17 East's Property

[21] Agnese passed away prior to trial, but 17 East was permitted to rely on the portions of her report and deposition in which she opined on how Madison's trespass supposedly caused a decline in the market value of 17 East's Property.

was worth $100 without the encroachment, and the encroachment covered 10% of the property, the encroachment lowered the value of the property by 10%, to $90.

If the subject encroachment actually affected 17 East's Property or restricted its use in any material way (for instance, if it was in the lobby or in tenants' apartments), perhaps Agnese's approach might make sense. However, it is undisputed that the subject encroachment is several feet underground in the yard, is unseen, and does not adversely affect the building or it tenants.[22] Neither Agnese nor 17 East cite any empirical evidence to suggest that market value of real estate is diminished in *exact* proportion to the square footage of an encroachment if the encroachment does not adversely affect the use of the property. Ergo, there is no basis for the court to reach this conclusion. *See Wing Wong Realty Corp. v Flintlock Const. Servs., LLC*, 95 AD3d 709 (1st Dept 2012) ("[the expert] failed to establish that he possessed the necessary evidentiary basis for his conclusion."). By contrast, Madison's expert, Vargas, persuasively rebutted Agnese's analysis. *See* Dkt. 730 at 25. Vargas testified that "[t]he encroachment being subsurface has absolutely no impact on the value of the apartments in the building" and explained that given the location of the underground encroachment, it would not matter in the event 17 East was to redevelop its property.[23] *See id.* at 26, citing Dkt. 721 (3/13/18 Tr. at 102).

That said, even if Agnese was relying on actual data (which she was not), the court still would reject her analysis as unpersuasive. *Cornell v 360 W. 51st St. Realty, LLC*, 22 NY3d 762,

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[22] As previously addressed, the underpinning encroachment does not present any danger to the building. *See* 2015 Decision, 2015 WL 3546069, at *3 ("DOB vetted 17 East's concerns and concluded that the building's foundation was safe" and "DOB inspected the underpinning and approved it.").

[23] Indeed, he posited that the foundation of Madison's building could be cut. Consequently, if the property were to be developed, injunctive relief might be appropriate. At that point, the equities would be different, and a court would consider whether the underground foundation of Madison could be safely cut.

781 (2014) ("even though the expert is using reliable principles and methods and is extrapolating from reliable data, a court may exclude the expert's opinion if there is simply too great an analytical gap between the data and the opinion proffered.") (citation and quotation marks omitted); *see Wathne Imports, Ltd. v PRL USA, Inc.*, 101 AD3d 83, 87 (1st Dept 2012) (finder of fact "must decide whether or not [expert's] methodology was appropriate."). Agnese's opinion is unpersuasive because it is implausible to believe that in an arm's length sale, a prospective purchaser aware of the encroachment would discount his offer in this manner. To be sure, the court does not mean to suggest that a prospective purchaser might not discount his offer at all due to the encroachment. While the court is highly skeptical that such a discount would be material under these circumstances (or that the landmarked cooperative would be sold or redeveloped), the court cannot guess as to the proper discount. There is nothing in the record to inform the court as to a proper discount. Courts are not permitted to speculate about damages, especially, where, as here, the computation requires expert evidence. *See Racwell Const., LLC v Manfredi*, 61 AD3d 731, 734 (2d Dept 2009) ("The opinion testimony of an expert must be based on facts in the record or personally known to the witness ... An expert may not reach a conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion."), quoting *Quinn v Artcraft Const., Inc.*, 203 AD2d 444, 445 (2d Dept 1994), citing *Cassano v Hagstrom*, 5 NY2d 643, 646 (1959); *see Guzman v 4030 Bronx Blvd. Assocs. L.L.C.*, 54 AD3d 42, 49 (1st Dept 2008) (same, noting that "[i]n the absence of record support, an expert's opinion is without probative force.").

In this case, the court does not award any actual damages based on the decline in the market value of 17 East's property because 17 East has not submitted any persuasive expert

evidence on this issue. Agnese's opinion grossly overstates the market effect of the subsurface, foundation encroachment. The court cannot (and will not) simply make up a number. For this reason, 17 East has failed to meet its burden of proving damages on this trespass claim. *See O'Malley v Campione*, 70 AD3d 595 (1st Dept 2010) ("Since plaintiff thus failed to meet his burden of proving the extent to which he was harmed, he may not recover damages for the harm."), citing *Berley Indus., Inc. v City of New York*, 45 NY2d 683, 686 (1978) ("It is fundamental to the law of damages that one complaining of injury has the burden of proving the extent of the harm suffered."). Nor is there evidence in the record demonstrating that the underpinnings, which in no way damaged the 17 East building and is not visible, caused any harm. Therefore, even if 17 East establishes Madison's liability, it may only recover $1 in nominal damages for each trespass. *See Madison I*, 120 AD3d at 411, citing *Shiffman v Empire Blue Cross & Blue Shield*, 256 AD2d 131 (1st Dept 1998) ("Although plaintiff failed to allege any actual damage ... nominal damage is always presumed from a trespass.").

That said, Madison does not dispute that just as it is entitled to recover the damages caused by 17 East's trespass, so too may 17 East recover actual costs and property damages caused by Madison's trespasses. It is undisputed that, based on the admissible evidence, these damages total $24,402.83.[24] Hence, if 17 East prevails at trial, it will recover $24,404.83.[25]

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[24] *See* Dkt. 730 at 27-28 ("17 East seeks two other categories of damages. First, it claims that the demolition and early construction process caused it to expend $13,364.13 to remedy various items of property damage. [Madison] has stipulated to the authenticity and admissibility of the invoices supporting this claim, and is not presently aware of any basis upon which to dispute a representation that the invoices were paid. Second, 17 East seeks reimbursement for fees paid to experts retained by it to assist it in examining and overseeing the implementation of the underpinning. [Madison] stipulated to the authenticity and admissibility of invoices of experts submitted by 17 East in support of this claim. [Madison] presently is aware of no basis upon which to dispute a representation that the invoices were paid.") (internal citations omitted), citing Dkt. 754 (invoices dated 3/6/05, 9/8/05, 10/10/06, 11/1/06, and 11/3/06, totaling $13,364.13), and Dkt. 744 (invoices dated 7/14/04, 10/11/04, 11/29/04, and 12/18/04, totaling $11,038.70).

Aside from this amount, 17 East has not proven that it suffered any other damages due to Madison's alleged underpinning and foundation trespasses.[26] Accordingly, it is

ORDERED that after a liability trial on 17 East's damages, the Clerk will be directed to enter judgment in favor of Madison and against 17 East in one of the following amounts: (1) in the event Madison is not held liable on 17 East's trespass claim, $800,000 plus 9% pre-judgment interest from February 2, 2004 to the date judgment is entered; or (2) in the event Madison is held liable on 17 East's trespass claim, (a) $800,000 plus 9% pre-judgment interest from February 2, 2004 to the date judgment is entered, (b) minus $24,402.83 plus 9% pre-judgment interest from September 1, 2005 to the date judgment is entered, (c) minus $2; and it further

ORDERED that the parties and QBE are directed to engage in further good faith settlement negotiations within 30 days of entry of this order on NYSCEF; and it further

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[25] Neither Madison nor 17 East address the proper date of pre-judgment interest on 17 East's claim. However, where, as here, the judgment corresponds to amounts paid on different dates, it is appropriate to select a reasonable intermediate date. CPLR 5001(b); *see Solow Mgmt. Corp. v Tanger*, 43 AD3d 691 (1st Dept 2007). As noted above, the subject invoices are dated between July 14, 2004 and November 3, 2006. Hence, the court selects September 1, 2005 as the date from which pre-judgment interest shall run.

[26] *See* Dkt. 730 at 27 ("[Madison] did not 'take' any part of 17 East's fee simple ownership of the property. It merely replaced subsurface sand, gravel and earth with a mixture of sand, gravel and concrete. There is not a shred of evidence that this replacement, whether or not it constitutes a trespass, harmed 17 East's building in any way. Indeed, despite two amendments of its complaint, 17 East never even alleged that its building was physically damaged by the encroachment or that its value was diminished."). It should be noted that nothing herein should be construed as permitting the parties to reopen the record on damages or to reargue any of the court's prior holdings (e.g., whether injunctive relief may be issued). The only matters that may be further tried are questions concerning Madison's liability.

ORDERED that if the parties have not settled, they shall jointly contact the court to set dates for a liability trial on 17 East's claims.

Dated: April 26, 2018

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C