

Shah v 20 E. 64th St. LLC
2019 NY Slip Op 34169(U)
March 7, 2019
Supreme Court, New York County
Docket Number: 156305/2015
Judge: Joel M. Cohen
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DECISION AND ORDER OF THE HONORABLE JOEL M. COHEN,
DATED MARCH 7, 2019, APPEALED FROM [A-20 - A-51]

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SUPREME COURT OF THE STATE OF NEW
YORK NEW YORK COUNTY

PRESENT: HON. JOEL M. COHEN PART IAS MOTION 45

-----X
HEMANT SHAH, VARSHA SHAH,

Plaintiff,

- v -

20 EAST 64TH STREET LLC, TRI STAR CONSTRUCTION
CORP., URBAN FOUNDATION/ENGINEERING, LLC,
ABELOW SHERMAN ARCHITECTS LLC, RA
CONSULTANTS LLC

Defendant.
-----X

INDEX NO. 156305/2015

**DECISION IN
NON-JURY
TRIAL**

JOEL M. COHEN, J.S.C.:

This is a breach of contract case. It arises out of damage done to Plaintiffs' home by construction and excavation work at the adjacent home owned by Defendant 20 East 64th Street LLC ("20 East").

Trial was held from December 10 through December 19, 2018. For the reasons described below, the Court finds in favor of Plaintiffs Hemant and Varsha Shah (collectively "the Shahs" or "Plaintiffs") on their claims against 20 East for breach of contract and contractual indemnification. The Court further finds that the Shahs are entitled to: (i) damages for the cost of repairing their home in the amount of \$6,255,007; (ii) alternative living expenses during repair in the amount of \$1,152,000; (iii) costs and reasonable attorneys' fees as provided by the parties' contract in an

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amount to be determined by a Judicial Hearing Officer; and (iv) statutory interest from November 21, 2014 to the date of entry of judgment.¹

Background

The basic story is straightforward. In 2011, 20 East purchased a home located at 20 East 64th Street in Manhattan. It sought to make substantial renovations to the property, including excavation beneath the existing basement to construct a recreational facility for personal use. Prior to beginning the excavation work, 20 East and the Shahs entered into an Agreement Granting License, Access and Indemnity (the "Agreement"). The Agreement permitted 20 East and its contractors to have temporary access to the Shahs' adjacent home at 22 East 64th Street to undertake "Protective Measures and Repairs," including the installation of "underpinning" to safeguard the Shahs' home

¹ The parties stipulated to have two separate trials. (NYSCEF 521)

In the first trial, a jury was to determine the damages component for Plaintiffs' First Cause of Action (strict liability) against 20 East and Defendant Urban Foundation/Excavation LLC ("Urban") and Second Cause of Action (negligence) against 20 East, Urban, and Tri-Star Construction Corp. ("Tri-Star"). In parallel, the Court was to determine the liability and damages components of Plaintiffs' Fourth and Fifth Causes of Action (breach of contract and contractual indemnification) asserted against Defendant 20 East, to the extent issues had not already been decided in prior orders, along with Plaintiffs' entitlement to attorneys' fees and costs as provided in the indemnification provision of the contract between the parties. The evidence presented to the Court on the contract claims during the December 10-19, 2018 trial largely overlapped with the evidence presented to the jury.

On December 18, the jury entered a verdict setting damages on the First and Second Causes of Action at \$5 million to repair Plaintiffs' home and \$500,000 for alternative living expenses while the home is being repaired. (NYSCEF 635)

The second trial will address the merits of claims of negligence asserted against 20 East, Urban, and Tri-Star, as well as cross-claims among the defendants.

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against potential damage from the excavation. In return, 20 East undertook various obligations with respect to the excavation and construction work.

Despite the protective measures, the west wall of the Shahs' home – the wall that faced the excavation site – sunk (or "settled") into the ground by at least one-quarter inch during construction. Cracks in the walls and ceilings appeared throughout the Shahs' home and floors shifted to render certain doors inoperable. Disputes ensued regarding repair of the Shahs' home. When those disputes could not be resolved, this lawsuit was brought.

On summary judgment, this Court (Kotler, JSC) held that 20 East and Urban Foundation/Excavation LLC ("Urban") were strictly liable for the damage to the Shahs' home because of their failure to protect the Shahs' home from damage as required by New York City law and regulations. Justice Kotler further found that the Shahs would be entitled to contractual indemnification from 20 East for their losses if it is found at trial that 20 East breached the Agreement. (See NYSCEF 361).

Against that backdrop, the Court now turns to its Findings of Fact and Conclusions of Law with respect to the Shahs' claims against 20 East for breach of contract and for contractual indemnification arising out of that breach.

Findings of Fact

Upon the evidence submitted at trial, the Court makes the following findings of fact:

The Players

1) The Shah residence at 22 East 64th Street is a 5-story Italian renaissance home that was built over 110 years ago. (Trial Transcript ("Tr.") at 56 – 58).

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2) In 2011, 20 East purchased a home located at 20 East 64th Street, adjacent to the Shah home. After purchasing the home, 20 East planned a gut renovation, including the excavation and construction of a recreational facility below the existing basement (the "Project").

3) Gregg Hymowitz is the owner and sole member of 20 East.

4) Tri-Star Construction Corp. ("Tri-Star") was the general contractor for the Project. It hired subcontractors to perform the work. Kevin Muessig ("Muessig") was Tri-Star's senior project manager for the Project.

5) Urban was retained by Tri-Star as a subcontractor to perform the excavation and foundation work for the Project, including the underpinning that was designed to protect the Shahs' home against damage from the adjacent excavation. (*Id.* at 55).

The Agreement

6) Prior to excavation for the Project, 20 East obtained the permission of the Shahs for 20 East to have access to their home to install a support system under the foundation, called "underpinning," to protect against the Shahs' home sinking into the adjacent excavation. (Tr. at 55).

7) On September 9, 2014, Mr. Shah and 20 East executed the Agreement. (Trial Ex. P-1).

8) In exchange for obtaining temporary and limited access to the Shahs' home, 20 East made certain payments to the Shahs and undertook numerous obligations designed collectively to ensure that the Shahs would be protected from

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potential harm or loss caused by the Project. Specifically, 20 East (as "Owner")

promised *inter alia* that:

a) "[t]he Work . . . pursuant to this Agreement shall be performed in a good and workmanlike manner and ***in compliance with all applicable laws, codes, rules and regulations.***" (Trial Ex. P-1 ¶ 3) (emphasis added);

b) It would "cause its contractors to ***promptly repair***, or if agreed by Shah in lieu of making a repair, ***compensate Shah*** (in advance of the performance of the work) for any temporary repairs ("Temporary Repairs") and any permanent repairs ("Permanent Repairs") required as a result of damages caused by the Work, the Protective Measures and Repairs and/or any other construction activities which damage the Shah Property or any persons in or about said premises." (*Id.* ¶ 19) (emphasis added);

c) It would "***indemnify, defend and hold harmless*** Shah and the other occupants of the Shah Property from and against any and all causes of action, damages, claims, demands, judgments, liens, litigation, liability, penalties, orders, ***losses, costs, or expenses including reasonable attorneys' fees***, which may at any time be asserted against or incurred by Shah or the other occupants of the Shah Property, ***arising from . . . Owner's breach of any of its obligations under this Agreement.*** (*Id.* ¶ 18) (emphasis added); and

d) It would "***be responsible for the failure of Owner's Contractor and all other subcontractors*** performing the Work and the Protective Measures and Repairs to take all necessary and proper measures to ensure the safety of the occupants of the Shah Property." (*Id.* ¶ 14) (emphasis added)

9) For their part, the Shahs *inter alia*:

a) Granted 20 East a "temporary license . . . allowing Owner and Owner's Contractor to enter the portions of the Shah Property reasonably

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required to perform the Work and the Protective Measures and Repairs during business hours . . . The License shall expire on the date which is one hundred eighty (180) days from the date of this Agreement, subject to a request from Owner and Owner's Contractor for an extension of time, due to construction exigencies, Force Majeure . . . , but in all events not to exceed three hundred and sixty (360) days from the date of this Agreement." (*Id.* ¶ 1); and

b) Released claims for any damages or costs incurred because of work done prior to the date of the Agreement. (*Id.* ¶ 11)

10) The Agreement further provided in relevant part that:

a) "Kevin Muessig shall oversee the Temporary Repairs and Permanent Repairs at all times subject to another senior staff member providing such oversight in the event Muessig is unable to do so" (*Id.* ¶ 19)

b) "Owner's Contractor [Tri-Star] has designated Kevin Muessig, a senior member of its staff (and acceptable to Shah) to oversee the Restorations at all times subject to another senior staff member providing such oversight in the event Muessig is unable to do so" (*Id.* ¶ 12); and

c) "Any notice, statement, demand, consent, approval or other communication required or permitted to be given" to the Owner is deemed to be "properly given" if addressed to Mr. Hymowitz and 20 East "c/o Jack Irushalmi, Tri-Star Construction, Inc.," with a copy to counsel Barry B. LePatner. (*Id.* ¶ 29)

The Shahs' Home Was Damaged

11) On November 20, 2014, the Shahs awoke to discover that their home was damaged. Mr. Shah testified that the bedroom door was "jammed tight," and he had had to pull the door open to get out of the room. (Tr. at 70). He went into another room

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in the house to check for additional damage. Once inside that room, he was unable to get out because the door was stuck. After several minutes of trying, he called his wife on the house intercom and asked her to get help. She was able to find an Urban supervisor (Jim Santori), a Tri-Star supervisor (identified as Tyrone), and two others at the construction site who came to the house to force the door open. After being freed from the room, Mr. Shah toured the house and saw "a lot of cracks." Fearing that the house might collapse, the Shahs left the building. Ms. Shah testified that she was terrified. (Tr. at 70, 73, 191).

12) The next day, the Shahs contacted an inspector for the New York City Department of Buildings. The inspector and Mr. Shah toured the house and saw additional damage, including jammed doors and additional cracks throughout the house. (Tr. at 72-75).

13) Mr. Shah promptly contacted, among others, Kevin Muessig of Tri-Star, the individual designated in the Agreement to oversee the Project, to report on the damage to his home. (Tr. at 86, 628, 633.).

14) In the ensuing days and months, hundreds of photographs were taken of the interior and exterior of the Shahs' home.

15) The photographs plainly show substantial damage throughout the Shahs' home. As described below, it is readily apparent that all of the interior damage and most of the exterior damage identified in the "after" pictures was not present in the set of "before" pictures that were taken prior to the excavation.

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The "Work" Caused Damage to the Shahs' Home

16) Varsha and Hemant Shah each testified credibly that there was no physical damage to the interior of their home, and only minor cracks on the exterior of their home, prior to November 20, 2014. (Tr. 191-192, 101-102). The objective evidence supports that testimony.

17) From August 13 to 14, 2013, an entity called Vibranalysis Inc. ("Vibranalysis") conducted a pre-construction inspection of the Shahs' home at the behest of Tri-Star to identify and document any pre-existing damage prior to excavation. (Trial Ex. P-22a). This report and accompanying photographs show, consistent with the Shahs' testimony, that there was no interior damage to the Shahs' home and only minor cracks to the front façade prior to the excavation. (Trial Ex. P-22a).

18) As noted above, in the aftermath of the excavation, hundreds of photographs were taken to identify the damage identified throughout the home.

19) Aside from a few exterior cracks in the front of the house, the damage shown in the "after" pictures was not present in the "before" pictures. The only significant event that occurred between the two sets of pictures is the excavation at 20 East 64th Street.

20) The Shahs' expert witness, Benjamin Cornelius, testified convincingly that the excavation caused "settlement" of the Shahs' home that exceeded the one-quarter inch limit permitted by New York City Building Code regulations (described below), and by as much as 11/16 of an inch. Mr. Cornelius carefully explained how the movement of the wall on the side of the Shahs' home facing the excavation would exert pressure on the entire structure that would explain the damage observed throughout the home,

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including in sections on the opposite side of the home. (Tr. 545 et seq.). Cornelius explained in detail how the movement of the home caused physical damage to the Shahs' home. (*Id.* 503-512). He testified that each category of damage identified during the trial (and for which the Shahs seek compensation) was caused by the excavation at 20 East and the resulting movement of the Shahs' home. (*Id.* 520-521).

21) Consistent with this testimony, Justice Kotler made an earlier finding (based on Mr. Cornelius' earlier affidavit testimony) that "the record reflects that plaintiffs have made out a prima facie case that their home was damaged by the excavation work carried out by Urban, at 20 East's behest." (NYSCEF 359 at 14). Justice Kotler also held that "[o]verall, the [pre-excavation] inspection disclosed no existing damage to the Shah's home, other than minor cracks in the exterior." (*Id.* at 6). The testimony at trial confirmed those findings.

22) 20 East did not introduce convincing evidence to challenge Cornelius's testimony regarding causation. 20 East's expert, Bernard Lorenz, P.E., quibbled as to whether the scale of Cornelius's handwritten drawings accurately showed the extent of the damage to the Shahs' home (which was not what the drawing was represented to be), but he did not dispute the basic point that physical damage to the Shahs' house was caused by the excavation. (Tr. at 895, 905-06, 971-73, 993). Instead, he limited his opinion largely to whether the physical damage was structural. (*Id.* at 894-95)

23) Significantly, although Mr. Lorenz testified as to what alternative explanations there *might be* for cracking in the Shahs' home (age of the building, improper maintenance of the home, etc.) and referenced his own "after" photographs taken during his examination, he conceded that he had not measured the amount of

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settlement of the Shahs' home (*id.* at 956), that he had no opinion as to whether various elements of damage were caused by the excavation (*e.g.*, *id.* at 992), and that his opinion could change if he knew that damage visible during his inspection was not present before the excavation (which the evidence and testimony plainly showed was the case). (*E.g. id.* at 971, 973-75). Overall, the Court did not find Mr. Lorenz's testimony to be as persuasive as Mr. Cornelius' testimony with respect to causation.

24) In sum, the evidence overwhelmingly supports a finding that the physical damage for which the Shahs are seeking compensation in this case was proximately caused by the excavation at 20 East 64th Street.

Violation of New York City Building Codes, Rules, and Regulations

25) The evidence also overwhelmingly supports a finding that the excavation work violated applicable New York City Building Codes, Rules, and Regulations, consistent with Justice Kotler's findings in her summary judgment opinion. (NYSCEF 361 at 8-9, 13-17).

26) The City of New York Department of Buildings ("Department of Buildings" or "DOB") dictated pursuant to Technical Policy and Procedure Notice # 10/88 that the "maximum permissible vertical and horizontal movement [of adjacent buildings] shall be one-quarter in. (6mm.)." (Trial Ex. P-18, ¶ 5.1).

27) The evidence at trial showed that the movement of the Shahs' home exceeded the one-quarter inch limit and was as much as 11/16 of an inch at certain points.

28) New York City Building Code, (2014 Construction Codes Tit. 28, ch. 33) Section 3309.1 provides that property adjoining the construction site "shall be protected

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from damage and injury during construction or demolition work.” (Trial Ex. P-19, Buildings Code § 3309.1).

29) Administrative Code § 3309.4 provides that, “[w]henver soil or foundation work occurs, . . . the person who causes such to be made shall, at all times . . . and at his or her own expense, preserve and protect from damage any adjoining structures, including but not limited to footings and foundations.” (Buildings Code § 3309.4). Further, “[t]he person causing the excavation shall support the vertical and lateral load of the adjoining structure by proper foundations, underpinning, or other equivalent means where the level of the foundations of the adjoining structure is at or above the level of the bottom of the new excavation.” (*Id.*).

30) On November 21, 2014, the New York City Department of Buildings issued a Notice of Violation and Hearing for the Project, which states that the work at 20 East violated Section 3309.4 by the “failure to preserve and protect adjoining structure affected by excavation operation.” (Trial Ex. P-3).

31) On December 2, 2014, Kevin Muessig, Tri-Star’s project manager, signed an affidavit in which he “admitted the existence of the violation(s) charged.” (Trial Ex. P-6).

32) On December 2, 2014, Kevin Muessig also signed a letter stating: “The concerns about the adjoining property settlement have been addressed in the attached letter by Urban Foundation. . . .” (Trial Ex. P-7).

33) On January 8, 2015, Kevin Muessig also signed a Pre-Hearing Stipulation Offer from the Department of Buildings in which he “[a]dmits the facts stated on the

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ticket are true," which states that the excavation violated the Building Code. (Trial Ex. P-9).

34) On May 15, 2015, Kevin Muessig stated: "that the above mentioned violation [34982577L], issued on 11/21/14 [Trial Ex. P-3], has been corrected. The concern about the adjoining property settlement have been addressed with our TPPN 10/88 jobsite monitoring program." (Trial Ex. P-10).

35) In sum, the trial testimony supports Justice Kotler's earlier finding that both 20 East and Urban were strictly liable for the damage to the Shah's home as a result of the violation of the applicable building codes and regulations. Tri-Star was found not to be strictly liable because it did not perform or supervise the excavation work and did not make the decision to excavate, which placed it outside the coverage of the applicable codes and regulations. (NYSCEF 361 at 16)

The Shahs Promptly Provided Notice of the Damage

36) 20 East argues at length that the Shahs failed to provide it with timely notice of damage and request for repairs as purportedly required under the Agreement, and that they prevented 20 East from making timely repairs. The record demonstrates otherwise.

37) On or about November 21, 2014, the morning after being awoken by the indications that the home had been damaged, Hemant Shah contacted Tri-Star's Kevin Muessig. (Tr. at 86).

38) Mr. Muessig confirmed that he received this notice from Mr. Shah. (Tr. at 633). He also confirmed this notice in an email dated December 2, 2014. (Trial Ex. P-

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51). He further testified that he told his boss, Jack Irushalmi, about the damage. (Tr. at 1286).

39) Mr. Muessig confirmed in an Affidavit dated June 29, 2015 that: "On November 21, 2014, the Plaintiffs advised Defendant's representative, including myself, of complaints regarding cracks in their wall and misaligned door frames." (Trial Ex. P-45 ¶ 28). The affidavit also indicates that Tri-Star was still analyzing the damage to the Shahs' house as of the end of June 2015, which is seven months after first receiving notice of the damage. (*Id.*)

40) As noted above, Mr. Muessig was designated *by name* in paragraphs 12 and 19 of the Agreement to oversee repairs "at all times," as well as the Work as a whole. Moreover, the "Notice" provision in the Agreement (upon which 20 East heavily relies in arguing that it did not receive prompt notice of the damage to the Shahs' home) specifically provides that notices to 20 East's owner Mr. Hymowitz should be sent "c/o Jack Irushalmi" of Tri-Star. (Trial Ex. P-1 ¶ 29). Mr. Muessig testified at trial that he notified Mr. Irushalmi about the damage. Even assuming Mr. Muessig's testimony that he understood that Mr. Irushalmi thereafter notified 20 East is inadmissible, it is difficult for the Court to credit the assertion by 20 East that despite the flurry of regulatory activity and obvious seriousness of the issue that 20 East was not promptly made aware – by Tri-Star or another source – of what was going on until April 2015, five months after the damage was discovered.² In any event, it is not necessary to make a finding that Mr. Hymowitz was notified personally by Tri-Star or anyone else. It is undisputed that

² In his testimony, Mr. Hymowitz was unable to recall when he first learned about the damage to the Shahs' home.

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notice was given almost immediately to Mr. Muessig and Mr. Irushalmi (identified in the Agreement by name as the point of contact for notifications to Mr. Hymowitz and 20 East).

41) The Shahs offered to hire a contractor (I-Grace) to undertake the repairs directly if they received payment equal to the amount required by Bielins and I-Grace to perform the repairs. (Tr. at 1206). The Shahs also made it clear that Defendants³ could hire their own contractor at a lower price if they so desired. (*Id.*).

42) After waiting months without any repairs or payments being made, on April 30, 2015, the Shahs directed their lawyers (Winston & Strawn) to send 20 East a notice to cure the breach of the Agreement.⁴

43) On May 6, 2015, 20 East responded to the Shahs' letter. (Trial Ex. P-12).

44) On May 6, 2015, the Shahs sent another letter, demanding that 20 East make the repairs. (Trial Ex. P-13).

45) On May 14, 2015, the Shahs (through counsel) sent several communications concerning continued access to their property in connection with the Project. First, by cover letter and Notice to Cease and Desist addressed to Tri-Star, Urban, and Abelow Sherman Architects, the Shahs advised that the 180-day license granted in the Agreement to permit access to the Shahs' property had expired and that no further work was to be performed on or under the Shahs' property without their

³ Defendants Tri-Star and Urban are not parties to Plaintiffs' claim for breach of contract and thus are not subject to or bound by this Decision and Order. References to "Defendants" in this opinion reflect the fact that certain testimony, evidence, and arguments relate to or were advanced collectively by all three Defendants.

⁴ Although the letter itself was not introduced into evidence because the copy that was tendered did not have the exhibits attached, the testimony that a letter was sent is credible and bolstered by the fact that 20 East responded to it.

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express written consent. Mr. Hymowitz and 20 East's counsel were copied on the communications. (Trial Ex. P-15).

46) Second, the Shahs' counsel sent a letter to Mr. Hymowitz and his counsel. That letter noted, again, that the license set forth in the Agreement had expired and that no further work was to be done on or under their property without their express written consent. The letter went on to assert that 20 East was in breach of its obligation to undertake "timely" repairs, and that the Shahs "will permit entry upon [their] property for that purpose by a reputable and experienced contractor acceptable to Mr. Shah, who is capable of performing the Repairs identified in the I-Grace reports and other attachments to [counsel's] April 30, 2015 correspondence." (Trial Ex. P-14).

47) In sum, the record does not support 20 East's contention that the Shahs failed to provide adequate notice of the damage or that they prevented 20 East from making repairs. Indeed, they had been working with 20 East's chosen general contractor (Tri-Star) and Urban for months preceding the lawyers' correspondence. The record simply does not support a finding that the Shahs "repudiated" the Agreement or that they prevented 20 East from making repairs at any time. Instead, the record is clear that the Shahs had been requesting, demanding, and pleading for the repairs to be made since the damage became evident in November 2014. Under the circumstances, the fact that they insisted that any contractor assigned to enter their property (after expiration of the access license) to perform the repairs be reputable, experienced, and acceptable was not unreasonable or a repudiation of the Agreement.

Cost of Repairs

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48) The only persuasive evidence presented at trial regarding the cost to make the repairs required to compensate the Shahs for the damage to their home came from the Shahs' expert witness Mr. Bielins, a contractor who specializes in the construction of high-end homes like the Shahs' home and who stands ready with his current employer to repair the home.

49) Based on his personal observations, prior experience in constructing high-end homes, and his involvement in creating a contemporaneous estimate for cost of repairs (at a time when he had a competitive incentive not to overstate the estimate), Bielins estimated the cost of repairing the damage on a detailed, line item by line item basis. Based on that analysis, Bielins testified that the cost of repairing the damage to the Shah's home is \$6,255,007. (Tr. at 256; Trial Exs. P-27 and P-33). In their post-trial brief, the Shahs have reduced their request for damages by \$24,769 to account for certain fee, insurance and tax amounts. Accordingly, the total claim for cost of repairing the home is \$6,255,007.⁵

50) In response, Defendants offered the testimony of Sean D'Angiolillo, a licensed architect. While attending college part-time for his degree in architecture, Mr. D'Angiolillo worked in the construction industry primarily as a carpenter (also doing some electrical work and "minor plumbing") dealing with renovations to private homes

⁵ Defendants elicited testimony on cross-examination that Mr. Bielins may have had a personal economic incentive to inflate the amount of the estimate because his bonus payments were tied in part to the dollar amount of the contracts he obtained. There was also testimony that he was the subject of allegations of improprieties while he worked at I-Grace. Although such testimony does provide some basis to impeach his testimony, the Court (based on observation of Mr. Bielins on the stand and the supporting evidence) finds that Mr. Bielins' testimony as to the cost of repairs was credible and convincing.

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and light commercial spaces. He testified as an expert in "architecture and general construction." (Tr. at 700). He testified that the Shahs' home could be repaired for a total of \$952,000. (*Id.* at 705)

51) The Court did not find Mr. D'Angiolillo's estimate for repair cost or time required to complete those repairs to be convincing. For example, when asked how he would go about repairing the Shahs' home if someone gave him a check for one million dollars, Mr. D'Angiolillo testified that he would reach out to various contractors, through family members, neighbors, online services and the like. (Tr. at 737). When asked whether specialty contractors would actually perform the required work for his estimated amount, he said he was not tasked with locating contractors, but that he is "sure they would," without providing any testimony or evidence to support that speculation, thus leaving to the Shahs to take the risk that a \$952,000 check would be sufficient to actually get the required work done. (*Id.* at 738). When asked about how he determined which cracks were pre-existing, he deferred to an un-named engineer as having made that assessment. Moreover, his testimony that it would be reasonable to measure repair costs for an ultra-high end historic home such as the Shahs' (with gold leaf moldings, "specialty finishes," "higher-end specialty doors" with "exquisite" hardware, and the like) by patching holes in walls without ensuring that it matched the rest of the room and cutting and sanding the bottoms of "higher-end specialty doors," leaving them asymmetrical, would not, in the Court's view based on Bielins' more credible testimony and other evidence (photographs, Shah testimony, etc.), be a reasonable approach to compensating the Shahs for their damage in view of the value and nature of the home. The Court finds that Mr. D'Angiolillo's testimony does not

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provide a credible basis for determining a real-world estimate of what it would take to repair the Shahs' home.

52) In sum, based on the testimony and documentary and photographic evidence, the Court concludes that the cost of repairing the Shah home, based on the only convincing and credible testimony presented at trial, is \$6,255,007.

Expenses for Alternative Housing

53) Mr. Bielins testified that it will take approximately 18 months to complete the repairs to the Shahs' home and that the home would not be habitable during that time. Although Defendants suggested at trial that the repair work might be done more quickly, and that the Shahs might be able to remain living in certain parts of the home while work was being done in other parts, Mr. D'Angiolillo's testimony along those lines was conclusory and not persuasive.

54) Defendants also suggested that the Shahs did not require alternative living arrangements at all because they could reside in another house they own in New Jersey. The Shahs testified, credibly, that living in New Jersey would not be a reasonable substitute for living in their Manhattan home which is, among other things, closer to where their children live. The Court does not find that requiring the Shahs to move to a different (albeit adjacent) State for 18 months would compensate them for being forced to evacuate their Manhattan home because of damage caused by the Project.

55) The Shahs' expert, Michael Vargas, testified that comparable alternative housing near their present home would cost the Shahs \$64,000 per month. (Tr. at 595-

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597; Trial Ex. P-39). Using that testimony as a guide, the Shahs' total rental expense for an 18-month period would be \$1,152,000. (*Id.*).

56) 20 East did not introduce any evidence to counter Michael Vargas' calculation.⁶ Thus, Michael Vargas' valuation is the only credible estimate of alternative living expenses before the Court.

CONCLUSIONS OF LAW

The elements of a claim for breach of contract are well-established. A plaintiff must establish: (1) the existence of a valid contract, (2) plaintiff's performance of the contract, (3) defendant's breach of the contract, and (4) damages resulting from defendant's breach. See, e.g., *Harris v. Seward Park Housing Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010); *Morris v. 702 E. Fifth St. HDFC*, 46 A.D.3d 478, 479 (1st Dep't 2007).

20 East breached Paragraph 3 of the Agreement

Plaintiff has convincingly established that 20 East breached Paragraph 3 of the Agreement.

First, there is no dispute that the Agreement was a valid and enforceable contract between Shah and 20 East. (Trial Ex. P-1). Second, the Shahs performed under the Agreement by permitting 20 East to access their home for more than the agreed-upon 180 days to facilitate protective measures and repairs. Third, the evidence established

⁶ Mr. Hymowitz testified that the cost of the home he is renting in a different neighborhood on the Upper East Side pending completion of construction on 20 East is approximately \$40,000 per month. Defendants offered no evidence, however, to suggest that his rental home is comparable to the Shahs' home either in square footage, quality, or otherwise.

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that 20 East breached the terms of Paragraph 3 of the Agreement, which required that "[t]he Work ... pursuant to this Agreement shall be performed in a good and workmanlike manner and in compliance with all applicable laws, codes, rules and regulations." (*Id.*). Consistent with Justice Kotler's decision finding 20 East to be strictly liable, and proven by the evidence introduced at trial, 20 East breached Paragraph 3 because "the Work" was not done in compliance with New York City Building Code, Sections 3309.1 and 3309.3, and the Department of Buildings' Technical Policy and Procedure Notice # 10/88, as described above. Finally, the Shahs have established that the damage to their home was caused by the conduct constituting the breach of the Agreement.

20 East does not seriously dispute the point. In its post-trial brief, 20 East argues that the breach of Paragraph 3 is "technical and non-material." (NYSCEF 641 at 9). That argument is frivolous. There can hardly be a more material provision in the Agreement than that the Work would be performed in accordance with law, which in this context means among things that the Work would be done without causing the movement of the Shahs' home that was the cause of the damage to the home.

The evidence established that the Shahs suffered damages resulting from 20 East's breach. As noted above, there is little doubt that the damage done to the Shahs' house, and the resulting need to be displaced from their home, was caused by the excavating and resulting settlement of the west wall of the home. That fact is supported by, *inter alia*, the "before" and "after" photographic evidence and the convincing testimony of the Shahs and Mr. Cornelius.

20 East breached Paragraph 19 of the Agreement

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The analysis with respect to the breach of Paragraph 19 of the Agreement (the obligation to cause contractors to “promptly repair”) is more complicated. On the one hand, it is indisputable that the Shah house was not promptly repaired. Indeed, the house is still not repaired. On the other hand, 20 East argues strenuously that it was prevented from discharging its obligation to promptly repair the damage because the Shahs failed to notify 20 East promptly that the home had been damaged and then refused – albeit months later – to permit 20 East or its contractors to have access to the home to effect repairs. In fact, 20 East goes so far as to suggest that the Shahs’ failure to provide prompt notice, coupled with their exclusion of 20 East from the premises and the Shahs’ insistence on terms not provided in the Agreement (namely, that the Shahs could pick their own contractor rather than Tri-Star), constituted a “repudiation” of the Agreement.

Based on the evidence introduced at trial, the Court concludes that 20 East breached Paragraph 19. Moreover, the evidence does not support a defense that the Shahs “repudiated” the Agreement.

New York courts have generally waived strict compliance with contractual notice provisions where the notice clauses at issue do not state the consequences of failure to comply. See, e.g., *Abax, Inc. v. Lehrer McGovern Bovis, Inc.*, 8 A.D.3d 92, 93 (1st Dep’t 2004) (holding that since claims were the subject of sufficient correspondence to put the defendant on notice, “complete technical compliance with the notice of claim requirements was not necessary”); *Barsotti’s, Inc. v. Consol. Edison Co. of N.Y., Inc.*, 254 A.D.2d 211, 212 (1st Dep’t 1998).

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Here, the Agreement does not contain a provision requiring that the Shahs provide notice to 20 East within any specific timeframe in order to trigger 20 East's obligation to "promptly repair," let alone one that specifies harsh consequences for failing to do so. That said, it would not be reasonable to permit the Shahs to enforce the "promptly repair" provision of Paragraph 19 if they took no steps to provide notice that repairs were needed. But that is not what happened.

The Shahs provided reasonable notice by immediately contacting Mr. Muessig (identified *by name* in the Agreement in Paragraphs 12 and 19 as the person in charge of the Work *and* repairs), who then not surprisingly contacted Mr. Irushalmi (the individual identified *by name* in Paragraph 29 of the Agreement as the contact person for 20 East). The Court does not read the Agreement to absolve 20 East of its obligation to promptly repair the Shahs' home because the Shahs contacted Mr. Muessig (and through him Mr. Irushalmi) rather than contacting Mr. Hymowitz directly (which explicitly is *not* envisioned under Paragraph 29 of the Agreement). In the circumstances, under Paragraph 19 of the Agreement, 20 East had the obligation to make repairs beginning on November 21, 2014, the date on which Hemant Shah contacted Tri-Star's Kevin Muessig. (Tr. at 86). If 20 East has an issue with failing to receive notice that something needed to be done to repair the Shahs' home, the target of its disappointment should be its own contractor (who indisputably had notice and had taken steps to evaluate the damage), not the Shahs. The notion that the Shahs should forfeit the core entitlements of the Agreement to receive prompt repair of their property based on a purported failure to directly notify 20 East promptly is not sustainable.

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Moreover, the evidence established that the Shahs relentlessly pursued evaluation of the damage and prompt repair, beginning immediately after the damage was discovered. Tri-Star was notified immediately; hundreds of pictures were taken to assess damage; there were follow-up meetings with Mr. Muessig; correspondence through counsel; and the like. The notion that the Shahs remained silent or somehow frustrated efforts by 20 East or its contractors to repair damage is simply not supported by the record. Instead, the record shows a pattern of repeated inspection and delay, rather than action on behalf of 20 East and its contractors.

Accordingly, the Court concludes that 20 East's obligation to cause its contractors to promptly repair the Shahs' home was triggered on November 21, 2014. It failed to honor that obligation even before the lawyers' letters started to fly in 2015.

20 East's assertion that the Shahs "repudiated" the Agreement is not supported by the law or the evidence. To repudiate a contract, "there must be [among other things] some express and absolute refusal to perform, or some voluntary act on the part of the individual which renders it impossible for him [or her] to perform." *QK Healthcare, Inc. v. InSource, Inc.*, 108 A.D.3d 56, 63 (2d Dep't 2013) (quoting *Ga Nun v. Palmer*, 202 N.Y. 483, 489 (1911)). Moreover, "the expression of intent not to perform by the repudiator must be 'positive and unequivocal.'" *Princes Point LLC v. Muss Dev. L.L.C.*, 30 N.Y.3d 127, 133 (2017) (quoting *Tenavision, Inc. v. Neuman*, 45 N.Y.2d 145, 150 (1978)).

By May 2015, the Shahs' frustrations led them to restrict 20 East's contractors from continuing to perform work at the Shah house without their consent, which was their right given that the 180-day license granted in the Agreement had expired.

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Notwithstanding their "cease and desist" letter, the Shahs made clear that access *would* be permitted to effect repairs by a reputable, experienced and acceptable contractor. (Trial Ex. P-14). In these circumstances, it cannot be found that the Shahs repudiated the Agreement.

Moreover, even if there had been a repudiation by withdrawing permission to enter the Shah home, which there was not, a party to a contract may retract a repudiation so long as the position of the other party has not changed. See, e.g., *Dembeck v. Hassler*, 248 A.D.2d 148, 149 (1st Dep't 1998) ("The effect of the seller's wrongful repudiation was an anticipatory breach that did not put the contract out of existence but merely relieved the buyer of her future obligation to perform, and entitled her to a remedy if her position materially changed before the retraction had issued.") (citation omitted). Even were the Court to conclude that the Shahs had repudiated the Agreement by preventing 20 East's contractors from entering their home (Trial Ex. P-15), the Shahs retracted that repudiation the same day through their second letter dated May 14, 2015, in which the Shahs demanded that 20 East make repairs. (Trial Ex. P-14).

Although the breach of Paragraph 19 did not by itself cause the underlying damage to the Shahs' home, it provides an alternative ground for requiring 20 East to compensate the Shahs for the expense of repairing the home. Paragraph 19 provides that Shah may agree to receive compensation "in advance of the performance of the work" in lieu of repair by 20 East. By failing to cause its contractors to promptly repair the Shahs' home, 20 East permitted the Shahs to undertake the repairs and receive compensation for that work in advance of making the repairs. (The evidence also

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demonstrated that Mr. Shah had offered to have another contractor do the work, if Defendants thought it could be done more inexpensively). Moreover, if 20 East had timely and adequately repaired the Shahs' home, the matter would have been concluded several years ago and it would not have been necessary to have a protracted dispute, providing an independent basis for an award of the costs of litigation.

Damages resulting from the breach of contract

Under New York law, "a breaching party is liable for all direct and proximate damages which result from the breach." *Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc.*, 487 F.3d 89, 110 (2d Cir. 2007) (citing *Wakeman v. Wheeler & Wilson Mfg. Co.*, 101 N.Y. 205, 209 (1886)). "The damages, however, 'must be not merely speculative, possible, and imaginary, but they must be reasonably certain and such only as actually follow or may follow from the breach of the contract.'" *Id.* "'Certainty,' as it pertains to general damages, refers to the fact of damage, not the amount. For 'when it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach. A person violating his contract should not be permitted entirely to escape liability because the amount of the damage which he has caused is uncertain.'" *Id.*

"[T]he burden of uncertainty as to the amount of damage is upon the wrongdoer. . . ." *Tractebel Energy Mktg.*, 487 F.3d at 110 (quoting *Contemporary Mission, Inc. v. Famous Music Corp.*, 557 F.2d 918, 926 (2d Cir. 1977) (applying New York law)). And, in evaluating uncertainty regarding damages, "the benefit of the doubt must be given to the innocent party, not the contract violator." *Hirschfeld v. IC Sec., Inc.*, 132 A.D.2d

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332, 337 (1st Dep't 1987). Moreover, "the difficulty of ascertaining damages does not excuse their determination." *Cristallina S.A. v. Christie, Manson & Woods Int'l, Inc.*, 117 A.D.2d 284, 295 (1st Dep't 1986) (quoting *Tobin v. Union News Co.*, 18 A.D.2d 243, 245 (4th Dep't 1963), aff'd. 13 N.Y.2d 1155 (1964)).

"While damages may not be determined by mere speculation or guess, evidence that, 'as a matter of just and reasonable inference,' shows their existence and the extent thereof will suffice, even though the result is only an approximation." *Id.* (quoting *Story Parchment Co. v. Paterson Parch. Paper Co.*, 282 U.S. 555, 563 (1931)). At trial, the Shahs proved the violation of the Department of Buildings' Code directly caused the physical damage to the Shahs' home.

Accordingly, the Shahs are entitled to all damages that naturally and directly follow from 20 East's breach of the Agreement. As Justice Kotler found, a recovery based on a breach of Paragraph 3 of the Agreement is independent of 20 East's "repair" obligation under Paragraph 19. See NYSCEF 359 at 28 (finding that the "Agreement, however, nowhere provides that this provision [Paragraph 19] is plaintiffs' exclusive remedy.")

As noted in the above Findings of Fact, based on the only credible evidence adduced at trial, the Court concludes that the Shahs are entitled to damages for the cost of repairing their home in the amount of \$6,255,007 and alternative living expenses in the amount of \$1,152,000.

In response, 20 East argues that repair costs should be no more than \$210,000 or, in alternative (by incorporating Urban's motion to set aside the jury verdict) no more

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than \$3 million because evidence of damages above that amount was inadmissible.

(NYSCEF 641 at 13, incorporating NYSCEF 643.) The Court disagrees.

Bielins' testimony that repair costs will be \$6,255,007 is amply supported by the record, including his testimony as an expert in managing constructions projects on this scale for houses such as the Shahs *and* his testimony as a fact witness as to his personal observations and estimates as a contractor for this specific project. He did not, as Defendants' suggest, simply read statements from prior estimates into the record. Using a demonstrative exhibit drawn in part from his earlier estimate of damage, he testified credibly and in detail as to a reasonable estimate of what it will take to repair the Shahs' home.⁷ He confirmed that his opinion extended to all items on the list. (*E.g.*, Tr. at 310-311). As noted above, the Court finds Bielens' testimony to be substantially more persuasive than the testimony offered by 20 East and the other Defendants.

Plaintiffs are entitled to contractual indemnification

Finally, in addition to the common law bases for awarding the Shahs damages flowing from 20 East's breach of contract discussed above, the Agreement also imposes a separate obligation upon 20 East to "indemnify, defend, and hold harmless Shah . . . against any and all losses, costs, or expenses, including reasonable attorneys'

⁷ Mr. Bielins used a demonstrative exhibit (a list of line items and corresponding cost estimates) as a means of making the testimony easier for the jury and the Court to follow. Defendants' expert, Mr. D'Angiolillo, did the same. Bielins did not simply read the findings of his earlier written estimate into the record. Defendants' argument that Mr. Bielins' use of a demonstrative exhibit to assist the jury and the Court in following his detailed and complex testimony was inappropriate and prejudicial is meritless.

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fees, which may at any time be asserted against or incurred by Shah . . . arising from . . . Owner's breach of any of its obligations under this Agreement. (Trial Ex. P-1 at ¶ 18).

In her summary judgment opinion, Justice Kotler rejected 20 East's argument that the indemnification provision applied only to protect the Shahs against claims by third parties, rather than harm suffered by the Shahs themselves, at least insofar as the indemnification obligations arise from a breach of the Agreement. (NYSCEF 361 at 17). She also rejected the argument that 20 East's sole obligation was to *repair* the damage caused to the Shah home, not to compensate the Shahs for their losses, costs, and expenses. (*Id.*) As Justice Kotler noted, the plain language of the Agreement provides indemnification for losses and costs incurred by the Shahs arising from 20 East's breach of the Agreement.

Justice Kotler expressly held that the Shahs were entitled to judgment under the indemnification provisions of the Agreement upon a finding that 20 East breached the Agreement. The Court has now made that finding based on the evidence adduced at trial. Accordingly, the Court finds that 20 East is liable to indemnify the Shahs for all losses, costs, expenses, and reasonable attorneys' fees arising out of 20 East's breach of the Agreement.

In addition, the Shahs are entitled under Paragraph 18 of the Agreement to be reimbursed for costs and expenses, including reasonable attorneys' fees, arising from the Work and 20 East's breach of the Agreement. The language of the indemnification provision is broad enough to cover the costs that will be imposed upon the Shahs because of being displaced from their home for 18 months.

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Plaintiffs are directed to submit a statement of such costs within two weeks of the date of this Opinion. The amount to be awarded will be determined by a Judicial Hearing Officer.

CONCLUSION

In summary, the Court finds that:

- Plaintiffs have prevailed in proving their Fourth Cause of Action for breach of contract:
 - 20 East breached Paragraph 3 of the Agreement. The damages in respect of that breach are in the amount of \$6,255,007 for the cost of repairing their home and \$1,152,000 for the cost of alternative living expenses while the repairs are being made;
 - 20 East breached Paragraph 19 of the Agreement. The damages in respect of that breach are the same as for the breach of Paragraph 3.
- Plaintiffs have prevailed on their Fifth Cause of Action for contractual indemnification:
 - 20 East is liable under Paragraph 18 of the Agreement to indemnify and hold harmless Plaintiffs for all losses, costs, and expenses arising out of the above-referenced breaches of the Agreement. This provides an alternative basis for recovery of the damages amounts set forth above, and adds the reasonable costs and

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expenses of litigation, including reasonable attorneys' fees in connection with pursuing repairs and compensation.

Based on the foregoing, it is:

ORDERED AND ADJUDGED that Plaintiffs have prevailed on their Fourth Cause of Action for breach of contract; it is further

ORDERED AND ADJUDGED that Plaintiffs have prevailed on their Fifth Cause of Action for contractual indemnification; it is further

ORDERED AND ADJUDGED that judgment shall be entered against Defendant 20 East 64th Street LLC in the amount of \$6,255,007 for the cost of repairing their home and \$1,152,000 for the cost of alternative living expenses while the repairs are being made; it is further

ORDERED AND ADJUDGED that Plaintiffs are entitled to statutory interest from November 21, 2014 to the date of entry of judgment; it is further

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to determine the amount of costs and reasonable attorneys' fees owed to Plaintiffs; and it is further

ORDERED that the powers of the JHO/Special Referee to determine shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at

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www.nycourts.gov/suptmanh at the "Local Rules" link), shall assign this matter to an available Special Referee to determine as specified above; and it is further

ORDERED that plaintiffs' counsel shall serve a copy of this order with notice of entry on defendants within five days and that counsel for plaintiffs shall, after thirty days from service of those papers, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at <http://www.nycourts.gov/courts/1jd/suptmanh/refpart-infosheet-10-09.pdf>) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR § 4318) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and that the parties shall appear for the reference hearing, including with all such witnesses and evidence as they may seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee's Part in accordance with the Rules of that Part; and it is further

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ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion.

This constitutes the Decision and Order of the Court.

03/07/2019
DATE

CHECK ONE: CASE DISPOSED
 GRANTED DENIED
 APPLICATION: SETTLE ORDER
 CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
 GRANTED IN PART OTHER
 SUBMIT ORDER
 FIDUCIARY APPOINTMENT REFERENCE


 JOEL M. COHEN, J.S.C.