At an IAS Term, Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 26th day of October, 2020.

P R E S E N T:

HON. CAROLYN WADE,
Justice.

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BRETT E. WYNKOOP and KATHLEEN KESKE,

Plaintiffs,

- against -

622A PRESIDENT STREET OWNERS CORP., KYLE TAYLOR, HILARY TAYLOR, and RAJEEV SUBRAMANYAM,

Defendants,

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DECISION AND ORDER

Index No. 507156/13

The following e-filed papers read herein:	NYSCEF Doc. Nos.
Notice of Motion/Cross Motion and Affidavits (Affirmations) and Exhibits Annexed	1764, 1766, 1792-1793 1822, 1910-1912
Opposing Affidavits (Affirmations)	1946, 1951, 1956, 1970, 1999
Reply Affidavits (Affirmations)	

Upon the foregoing papers, defendants Kyle Taylor, Hillary Taylor and Rajeev Subramanyam (collectively referred to as "the Individual Defendants") and plaintiffs on the counterclaim, Kyle Taylor and Rajeev Subramanyam, move for orders, pursuant to CPLR 3212, granting them summary judgment, dismissing plaintiffs' claims against them; and granting Taylor and Subramanyam summary judgment on their counterclaims for breach of fiduciary duty and conversion (motion sequence number 50).

Defendant 622A President Street Owners Corp. ("Co-op Corp") moves for an order: (1) pursuant to CPLR 3215 (a), granting the Co-op Corp a judgment by default on each of its counterclaims, directing a judgment awarding the Co-op Corp the equitable relief sought in its second and sixth counterclaims, and referring the matter for an inquest for an assessment, and determination of damages on the remaining counterclaims; and (2) in the alternative, pursuant to CPLR 3212, granting the Co-op Corp summary judgment, dismissing the complaint as against it; and granting the Co-op Corp summary judgment on its fourth and fifth counterclaims (motion sequence number 51).

Plaintiffs Brett Wynkoop and Kathleen Keske cross-move for orders: (1) pursuant to CPLR 3212, granting them summary judgment dismissing the counterclaims against them to the extent that they have not already been dismissed by the Appellate Division, Second Department; (2) pursuant to CPLR 3212, granting them summary judgment in their favor on all of their claims against the Individual Defendants; and (3) granting a default judgment pursuant to CPLR 3215, or, in the alternative, summary judgment in their favor pursuant to CPLR 3212, with respect to all of plaintiff's claims as against the Co-op Corp (motion sequence number 52).

The Individual Defendants' motion (motion sequence number 50) is granted to the extent that: (1) the amended complaint is dismissed in its entirety as against defendant Hilary Taylor; (2) the fifth through six, eighth through nineteenth, and twenty-first through twenty-second causes of action of the amended complaint are dismissed in their entirety as against defendants Kyle Taylor and Rajeev Subramanyam; and (3) the seventh cause of action is

dismissed as against Kyle Taylor in its entirety and is dismissed as against Subramanyam to the extent that is premised on legal theories other than unjust enrichment.[1] The Individual Defendants' motion is otherwise denied.

The Co-op Corp's motion (motion sequence number 51) is granted to the extent that plaintiffs' second, third, fourth, twenty-second and twenty-fourth causes of action and the portion of plaintiffs' declaratory judgment cause of action (first cause of action) requesting a reallocation of their shares in Co-op Corp relating to apartment 1 are dismissed. The Co-op Corp's motion is otherwise denied.

Plaintiffs' cross-motion (motion sequence number 52) is granted only to the extent that plaintiffs are entitled to a declaration in their favor with respect to their use and occupancy of the cellar space, and they are directed to serve a proposed judgment relating to such declaration on defendants with notice of settlement within 60 days of service of this order with notice of entry. Plaintiffs' cross-motion is otherwise denied.

Background

This action involves an acrimonious dispute amongst the shareholders and proprietary leaseholders of a small, four-unit cooperative apartment building ("the Building") owned by the Co-op Corp. Plaintiffs jointly own 50 percent of the shares of the Co-op Corp; and are the proprietary leaseholders of apartments 1 and 2 in the Building. It is undisputed

[1] In other words, the portion of the Individual Defendants' motion requesting dismissal of the complaint as against them is only denied with respect to the eighth cause of action as against Subramanyam to the extent that it is premised on unjust enrichment and the twentieth cause of action for trespass as against Kyle Taylor and Subramanyam.

that plaintiffs purchased their shares in February 1995, that they live in apartment 1, which is located on the first floor of the Building, that they exclusively occupy the Building's cellar, and that they sublet apartment 2 from the time of their purchase of their shares for apartment 2 until at least 2015. Defendant Kyle Taylor purchased his 25 percent shareholder interest in the cop Corp and entered into his proprietary lease for apartment 3 in September 2010. Kyle Taylor lives in apartment 3 with his wife, defendant Hilary Taylor.[2] Defendant Rajeev Subramanyam, who holds a 25 percent shareholder interest in the Co-op Corp, purchased his shares and entered into his proprietary lease for apartment 4 in January 2006.

It is essentially undisputed that, from the time that plaintiffs purchased their interest in the Co-op Corp, the shareholders managed the Co-op Corp without following the corporate formalities required by the Co-op Corp's by-laws and by the Business Corporation Law. Upon becoming a shareholder, Wynkoop assumed the roles of treasurer and building manager and Keske assumed the roles of vice-president and secretary (Amended Complaint 23-25; 1/13/14 Wynkoop Aff. ¶ 9). Without the holding of any annual meetings or the election of board members or officers, plaintiffs continued in these roles even after Subramanyam and Taylor purchased their respective shares. Disputes eventually arose between plaintiffs and the Individual Defendants with respect to, among other things, the governance of the Co-op Corp, the right to access to the basement areas, and the maintenance of the Building, including a repair of a water leak in a skylight on the building's roof and water damage associated with the leak.

[2] All subsequent singular references to Taylor relate to defendant Kyle Taylor.

Unable to resolve their differences with plaintiffs, Taylor and Subramanyam, in March 2012, commenced an action (*Taylor v Wynkoop*, Index No. 6548/12) ("Prior Action"), styled as a shareholder derivative action, against the plaintiffs in this action, as well as plaintiffs' subtenant, James Borland; and the Co-op Corp as a nominal defendant. In the amended complaint in the Prior Action, Taylor and Subramanyam sought, *inter alia*, an order directing the holding of a shareholder meeting to elect a board of directors, the termination of Wynkoop and Keske's shares in 622A Owners and their ejectment from the Building, the ejectment of Wynkoop and Keske from the cellar, and alleged a cause of action based on a breach of fiduciary duty.

The court (Rivera, J.), in an order dated November 7, 2013, dismissed the Prior Action without prejudice, finding that Taylor and Subramanyam had failed to adequately plead demand futility as is required to excuse a demand upon the board of directors as is required by Business Corporation Law § 626 (c) to commence a shareholder derivative cause of action. In this same November 7, 2013 order; however, the court denied Wynkoop, Keske and Borland's cross-motion for summary judgment with respect to the breach of contract and breach of fiduciary duty causes of action based on, *inter alia*, assertions that Wynkoop and Keske, improperly acted as corporate officers, and misappropriated corporate funds. This November 7, 2013 order was thereafter affirmed (*Taylor v Wynkoop*, 132 AD3d 843, 845 [2d Dept 2015]).

Shortly after the dismissal of the Prior Action, plaintiffs commenced this action, alleging multiple causes of action against the Co-op Corp and the individual defendants. In

the amended complaint, plaintiffs, allege, among other things, that the Individual Defendants entered their cellar unit without permission; used the Prior Action to improperly attempt to oust plaintiffs from the cellar, and obtain control over the Co-op Corp despite the fact that defendants possessed the addendum to the proprietary lease, which documented plaintiffs' entitlement to the cellar.[3] Plaintiffs also claim that the Individual Defendants falsely asserted in the Prior Action that they used corporate funds for personal purposes such as legal expenses; that the Individual Defendants influenced building inspectors to issue violations against the Building based on the presence of Wynkoop's bicycle in the common hallway; and that through Taylor and Subramanyam's withholding of maintenance charges, and their refusal to conduct board business, they prevented necessary building maintenance, including the re-grouting of the building, which led to water damage in plaintiffs' apartment.

Plaintiffs further assert that, at some point in 2011, Taylor and Subramanyam used economic duress in the form of threats to withhold building maintenance payments in order to obtain an agreement from plaintiffs to pay half the costs of repairs to the roof and skylight; despite the fact that the obligation to maintain the roof falls solely on Subramanyam under the addendum to the proprietary lease. In view of these factual allegations, plaintiffs pleaded numerous causes of action against the Individual Defendants based on breach of fiduciary duty, different forms of fraud, contract rescission,[4] private nuisance, conspiracy, prima facie

[3] Plaintiffs' assert that defendants' improper actions in this respect include the submission of a sample unexecuted proprietary lease that did not include the addendum relating to the cellar that was appended to each of the shareholders' executed proprietary leases.
[4] To set aside plaintiffs' agreement to pay one half of the roof repair costs.

tort, attorney fraud by Kyle Taylor under Judiciary Law § 487, abuse of process, defamation, trespass, tortious interference with contract, and slander of title.

With respect to the Co-op Corp, plaintiffs seek a declaratory judgment against the Co-op Corp declaring, among other things, that the addendum/rider to the proprietary lease, titled "Section Seven A to the Proprietary Lease" is valid, that this rider entitles plaintiffs to exclusive use of the cellar, that the condition/use of the cellar complies with the relevant construction law and regulations, that plaintiffs are entitled to indemnification for their legal fees with respect to the Prior Action, and that plaintiffs have been issued additional shares in view of the cellar being incorporated into apartment "1". Plaintiffs relatedly request an injunction barring the Co-op Corp from increasing maintenance based on such indemnification of legal expenses from the Prior Action or the expenses of this action. The private nuisance action, premised on the water damage caused by the failure to re-grout the Building, is also alleged against the Co-op Corp, as is the slander of title cause of action based upon the Individual Defendants' allegations relating to the cellar in the Prior Action.

In the counterclaims asserted by Subramanyam and Taylor within the Individual Defendants' answer to the amended complaint, they allege derivative claims on behalf of the Co-op Corp asserting that plaintiffs breached the proprietary lease by subletting apartment "2" without board approval, violating governmental requirements in their use of the cellar, and failing to allow entry for repairs. Subramanyam and Taylor allege that they are entitled to damages based on these breaches (counterclaim count one), termination of shares and ejectment of plaintiffs from apartments "1" and "2" (counterclaim count two),

termination of the sublease and the ejectment of counterclaim defendant James Borland (counterclaim count three),[5] ejectment of plaintiffs from the cellar (counterclaim count four); causes of action for breach of fiduciary duty and conversion based on unauthorized use of Co-op Corp's funds to hire attorneys (counterclaims count five and six), injunctive relief against plaintiffs relating to their governance of the Co-op Corp (counterclaim count seven), and for attorney's fees (counterclaim count eight). Except for the claim against Borland, the Co-op Corp, repeats these assertions and claims in its own counterclaims that were first asserted in its answer served and filed on August 15, 2018.

Relevant to the instant motions, plaintiffs made a prior summary judgment motion to dismiss Taylor and Subramanyam's counterclaims. By an order dated July 25, 2016, the court (F. Rivera, J.) denied the motion. On appeal, however, the Appellate Division, Second Department reversed in part, and found that plaintiffs were entitled to an order dismissing the counterclaim, alleging breach of contract based on the improper use or occupancy of the cellar, finding that the rider to the proprietary lease allowed such use, and that plaintiffs demonstrated that their use of the basement complied with relevant laws, codes and regulatory requirements. Moreover, the defendants had failed to demonstrate an issue of fact with respect to plaintiffs' right to use the basement or the legality of its use (*see Wynkoop v 622A President St. Owners Corp.*, 169 AD3d 1106, 1107-1108 [2d Dept 2019]). The Second Department, however, affirmed the denial of the motion with respect to the

[5] Counterclaim Defendant James Borland is alleged to be the subtenant leasing apartment "2" from plaintiffs.

remainder of the counterclaims (*id.* at 1108). In so affirming, the Second Department held that the purported settlement between the plaintiffs and the Co-op Corp was not shown to be effective, as all parties were enjoined from acting on behalf of the Co-op Corp at the time of that settlement (*id.*).[6] The Appellate Division also affirmed the denial of plaintiffs' motion for a default judgment as against the Co-op Corp, finding that plaintiffs had failed to demonstrate proper service upon the Co-op Corp (*see Wynkoop v 622A President St. Owners Corp.*, 169 AD3d 1100, 1103 [2d Dept 2019]).[7]

Plaintiffs' Causes of Action – Individual Defendants

The portion of the Individual Defendants' motion seeking summary judgment dismissing plaintiffs' complaint is primarily addressed to the legal sufficiency of the amended complaint. Where a defendants' motion is premised on a defect or the adequacy of the pleading, they meet their initial burden by identifying the insufficiency or defect with same. The burden then shifts to the plaintiffs to submit evidentiary facts "curing the defect

[6] The Appellate Division, Second Department also affirmed an order (Schmidt, J.) finding that the a purported board election held on May 16, 2014 was not valid, and directing that a new election be held before a referee (*Wynkoop*, 169 AD3d at 1102), and affirmed orders (F. Rivera, J.) confirming a referee's report finding that Taylor and Subramanyam had been elected to the board of directors at the election held on May 27, 2015, and modifying a preliminary injunction barring the individual parties from acting on behalf of the corporation to the extent of allowing Taylor and Subramanyam to so act (*Wynkoop v 622A President St. Owners Corp.*, 169 AD3d 1103, 1105 [2d Dept 2019]).

[7] The court notes, with respect to the factual allegations, it has not deemed plaintiffs' statement of material facts admitted based on defendants' failure to submit their own statement of material facts because this part is not a commercial part where such statements are required, and because, even if the commercial part rules applied here, the court is not required to deem the facts admitted based solely on a failure to provide a statement of material facts (*see Matter of Crouse Health Sys., Inc. v City of Syracuse*, 126 AD3d 1336, 1338 [4th Dept 2015]; *Abreu v Barkin & Assoc. Realty Inc.*, 69 AD3d 420, 421 [1st Dept 2010]).

or supplying the deficiency" (*see Lindquist v County of Schoharie*, 126 AD3d 1096, 1097-1098 [3d Dept 2015]; *see also Alvord & Swift v Muller Constr. Co.*, 46 NY2d 276, 280-282 [1978]; *Seidler v Knopf*, ___ AD3d ___, 2020 NY Slip Op 04800, *2 [2d Dept 2020]; *Stengele v Bellino*, 174 AD2d 563, 564 [2d Dept 1991]). In the context of a summary judgment motion premised on the failure to state a cause of action, the court must consider evidentiary material in addition to the pleadings, and the ultimate inquiry is not whether the complaint states a cause of action, but whether plaintiff has one (*Seidler*, 2020 NY Slip Op 04800, *2; *Stengele*, 174 AD2d at 564).

Here, plaintiffs' several causes of action, which are pleaded under different theories, rely on the assertion that the Individual Defendants committed a fraud on the court by attempting to use the Prior Action to oust plaintiffs from their apartments and/or the cellar based on the illegal sublease and use of the cellar, despite their possession of plaintiffs' proof regarding the permission to sublet; and the addendum to the proprietary lease showing their entitlement to the cellar.

To the extent that the Individual Defendants' assertions in the Prior Action may be deemed to arise to perjury or fraud on the on the court, these allegations fail to demonstrate a basis for a separate civil action for damages, since the purported scheme, namely the ouster of plaintiffs from the Co-op Corp, was encompassed within the issues that were to be determined in the Prior Action and did not, in other than a conclusory fashion, show the purported perjury or falsity to be part of a broader scheme (*see Bulbin v O'Carroll*, 173 AD3d 825, 826 [2d Dept 2019]; *Yalkowky v Shedler*, 94 AD2d 684, 684-685 [1st Dept 1983];

Martell v Cohen Clair Lans Greifer Thorpe & Rottenstreich, LLP, 2019 WL 4572196, *5 [U] [SDNY 2019]; *cf. Newin Corp v Harford Acc. & Indem. Co.*, 37 NY2d 211, 217 [1975]).[8] The Individual Defendants assertions in the prior action thus cannot form a basis for plaintiffs' breach of fiduciary duty (fifth), fraud and deceit (eighth),[9] constructive fraud (ninth), fraudulent concealment (eleventh), negligent misrepresentation (thirteenth), fraudulent misrepresentation (fourteenth), prima facie tort (sixteenth),[10] and tortious interference with contract (twenty-first) causes of action. Further, the assertions made in the Prior Action regarding, *inter alia*, plaintiffs' misappropriation of Co-op Corp's assets for their own use are absolutely privileged, and cannot form a basis for plaintiffs' defamation (nineteenth), and slander of title (twenty-second) causes of action (*see Pezhman v Chanel*, 157 AD3d 417, 418 [1st Dept 2018], *lv denied* 31 NY3d 995 [2018], *lv dismissed* 32 NY3d 1018 [2018], *cert denied* ___ US ___, 139 SCt 489 [2018]; *Brown v Bethlehem Terrace Assoc.*, 136 AD2d 222, 224-225 [3d Dept 1988]; *Vevaina v Paccione*, 125 AD2d 392, 393 [2d Dept 1986], *lv denied* 69 NY2d 607 [1987]).[11]

Plaintiffs also have no cause of action for abuse of process (eighteenth cause of action) based on the Prior Action, as abuse of process does not lie based on an action commenced

[8] The court notes that, while the Individual Defendants did not directly raise this argument, plaintiffs' amended complaint cites to *Newin Corp.* (37 NY2d 211 [1975]) and thus placed the issue before the court.

[9] With respect to the eighth cause of action for fraud and deceit, the court further notes that General Business Law § 352-C (c) does not support such a cause of action, as plaintiffs' allegations do not involve the purchase or sale of securities or commodities.

[10] The prima facie tort cause of action is also barred for the reasons stated in *Curiano v Suozzi* (63 NY2d 113, 117-118 [1984]).

[11] As it finds that plaintiffs have no cause of action for tortious interference with contract and slander of title, it rejects plaintiffs' request for leave to withdraw those claims without prejudice.

with a summons and complaint (*see Curiano v Suozzi*, 63 NY2d 113, 116-117 [1984]). Moreover, plaintiffs have failed to identify how the process or any of the further proceedings interfered with their person or property (*see id.*; *Manhattan Enterprise Group LLC v Higgins*, 816 Fed Appx 512, 514-515 [2d Cir 2020]). Plaintiffs also do not have a cause of action premised on attorney fraud pursuant to Judiciary Law § 487 as against Taylor (seventeenth cause of action) because he was a party in the Prior Action, and did not act as an attorney therein (*see Siller v Brevoort Corp.*, 145 AD3d 595, 596 [1st Dept 2016], *lv denied* 30 NY3d 905 [2017]). Nor do plaintiffs have a cause of action for conspiracy (the tenth, twelfth, and fifteenth causes of action), as New York does not recognize conspiracy as an independent cause of action (*see McSpedon v Levine*, 158 AD3d 618, 621 [2d Dept 2018]; *see also Kovkov v Law Firm of Dayrel Sewell, PLLC*, 182 AD3d 418, 418-419 [1st Dept 2020]).

With respect to their fifth cause of action for breach of fiduciary duty, plaintiffs, in addition to the contentions made in the Prior Action, allege that the Individual Defendants breached this duty by informing the Department of Buildings that they had an illegal apartment in the cellar. This assertion does not make out a breach of fiduciary duty claim; however, damages directly caused by the misconduct is an element of such a cause of action (*see Rut v Young Adult Inst., Inc.*, 74 AD3d 776, 777 [2d Dept 2010]; *Greenburg v Joffee*, 34 AD3d 426, 427 [2d Dept 2006]); and plaintiffs have failed to identify any damages suffered by them. Plaintiffs' further averments that the Individual Defendants influenced building inspectors to issue violations against the Building based on the presence of Wynkoop's bicycle in the common hallway; and that Taylor and Subramanyam improperly

withheld maintenance charges,[12] similarly fail to make out a damage claim. Plaintiffs have failed to identify how these actions violated a duty owed to them individually, rather than to the Co-op Corp (*see Abrams v Donati*, 66 NY2d 951, 953 [1985]). Nor may the Individual Defendants be held individually liable for a breach of fiduciary duty based on the collective failure of the Co-op Corp to maintain the building, which plaintiffs allege caused the water damage to their apartment (*see Hersch v One Fifth Ave. Apt. Corp.*, 163 AD3d 500, 500 [1st Dept 2018]).

Plaintiffs' sixth cause of action for private nuisance against the Individual Defendants is based on their failure to act at board meetings to authorize the re-grouting of the Building. Such inaction, however, is not a basis to hold the Individual Defendants individually liable for a private nuisance based on the collective failure of the Co-op Corp (*see Liberman v Cayre Synergy 73rd LLC*, 108 AD3d 426, 427 [1st Dept 2013]; *see also Hersch*, 163 AD3d at 500).

As plaintiffs' complaint is deficient with respect to these causes of action, and they have failed to submit facts in opposition demonstrating that they have such causes of action; the Individual Defendants are entitled to dismissal of the fifth through six, eight through nineteenth, and twenty-first through twenty-second causes of action.

[12] Further, pursuant to April 2013 preliminary injunction in the Prior Action, the Individual Defendants began paying their maintenance charges to the court. As such, to the extent that the Individual Defendants' withholding of maintenance charges occurred after the April 2013 preliminary injunction in the Prior Action, the Individual Defendants cannot be deemed to have breached a fiduciary duty based on the withholding of maintenance charges.

Roof Repairs

In the seventh cause of action, plaintiffs seek to set aside their agreement, purportedly made around September 2011, to pay one half of the costs to repair the roof, despite the fact that the obligation to maintain the roof falls solely on Subramanyam under the addendum to the proprietary lease. Plaintiffs allege that Taylor and Subramanyam used economic duress in the form of threats to decline to pay building maintenance to obtain that agreement from them. Contrary to the contentions of the Individual Defendants, the claim is not a cause of action for economic duress, but rather a cause of action to rescind or void the agreement made to pay those costs based on the purported economic duress (*see Stewart M. Muller Constr. Co. v New York Tel. Co.*, 40 NY2d 955, 956 [1976]; *Sitar v Sitar*, 61 AD3d 739, 742 [2d Dept 2009]).

Nevertheless, this court agrees that plaintiffs' assertions are insufficient to establish economic duress. In an economic duress claim, a party must be compelled to agree to terms set by another party because of a wrongful threat that prevents it from exercising its free will (*see 805 Third Ave. Co. v M.W. Realty Assoc.*, 58 NY2d 447, 451 [1983]; *Sitar*, 61 AD3d at 742). A threat to breach a contract may only be deemed sufficient to prevent the exercise of free will where normal legal remedies for the breach will prove inadequate (*see Austin Instrument v Loral Corp.*, 29 NY2d 124, 130-131 [1971]; *CRG at Arnot Mall v Feehan*, 177 AD3d 1135, 1136-1137 [3d Dept 2019]).

Here, plaintiffs' assertions regarding the threat to withhold the maintenance payments did not violate a duty owed directly to them, but was a contractual duty owed to the Co-op

Corp. Even if the threat to withhold maintenance could ultimately affect plaintiffs' interest in the Co-op Corp, their complaint and affidavits submitted in opposition to the motion have failed to identify how such a withholding would have caused an immediate financial threat to the Co-op Corp such that there was no time to pursue legal remedies (*see CRG at Arnot Mall*, 177 AD3d at 1136-1137; *C & H Engineers, P.C. v Klargester, Inc.*, 262 AD2d 984, 984 [4th Dept 1999]; *Shang Zhong Chen v Kyoto Sushi, Inc.*, 2017 WL 4236556, *5 [EDNY 2017]). Indeed, it is unclear how much of a role the threat to withhold the maintenance fees really played in plaintiffs agreeing to pay half of the costs. The court notes that Wynkoop concedes in his own affidavit that at the time of their agreement, he did not understand that payment of the repair costs was Subramanyam's responsibility under the rider to the proprietary lease "because we had not reviewed the lease due to m[y] extensive travels for work and to care for my mother in Pennsylvania" (Wynkoop aff. ¶ 30 [NYSCEF doc. no. 1910]) (*see Oleg Barshay, D.C., P.C. v State Farm Ins. Co.*, 14 Misc 3d 74, 75-76 [App Term, 2d Dept 2006] [discussing the court's authority to review opposition papers for proof supporting the prima facie showing])."

Despite these issues, which are sufficient to preclude a finding of economic duress, the court finds that the factual allegations in this respect, which are not controverted as a matter of law by defendants, show that plaintiffs have a cause of action for unjust enrichment as against Subramanyam.[13] "To prevail on a claim of unjust enrichment, a plaintiff must

[13] The court notes that plaintiffs placed the unjust enrichment issue before the court through their assertion that they are entitled to a constructive trust, an element of which is unjust enrichment. Whether or not plaintiffs' factual allegation are sufficient to establish a constructive trust cause of

establish that the defendant benefitted at the plaintiff's expense and that equity and good conscience require restitution" (*Spector v Wendy*, 63 AD3d 820, 822 [2d Dept 2009] [internal quotation marks omitted]; *see also Sperry v Crompton Corp.*, 8 NY3d 204, 215 [2007]). A plaintiff's own negligence does not preclude recovery for unjust enrichment (*see Manufacturers Hanover Trust Co. v Chemical Bank*, 160 AD2d 113, 117 [1st Dept 1990]; *lv denied* 77 NY2d 803 [1991]) and an unjust enrichment claim does not require the performance of a wrongful act by the party enriched (*see Simonds v Simonds*, 45 NY2d 233, 24 2 [1978]). "A person may be unjustly enriched not only where he receives money or property, but also where he otherwise receives a benefit. He receives a benefit where his debt is satisfied or where he is saved expense or loss" (*Blue Cross of Cent. N.Y. v Wheeler*, 93 AD2d 995, 996 [4th Dept 1983]; *see also Manufacturers Hanover Trust Co.*, 160 AD2d at 117-118). Requiring the refund of the money may be deemed inequitable unless where the defendant has detrimentally relied upon the payment (*see Banque Worms v BankAmerica Intern.*, 77 NY2d 362, 366 [1991]; *Manufacturers Hanover Trust Co.*, 160 AD2d at 121-122), or the plaintiff has failed to act promptly in notifying defendant of the claim (*see Electric Ins. Co. v Travelers Ins. Co.*, 124 AD2d 431, 433 [3d Dept 1986]).

Based on these principles, courts have allowed an unjust enrichment claim for a plaintiff who mistakenly pays property taxes for the party responsible for the payment (*see Banco Popular N. Am. v Lieberman*, 75 AD3d 460, 461 [1st Dept 2010], *affirming, as*

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action, as discussed below, they are sufficient to show that plaintiffs have an unjust enrichment cause of action.

modified 22 Misc 3d 1 [App Term, 1st Dept 2008]; *Midwest First Fin. Ltd. Partnership III v First Am. Tit. Ins. Co. of N.Y.*, 14 AD3d 497, 497-498 [2d Dept 2005]; *Lake Minnewaska Mtn. Houses v Rekis*, 259 AD2d 797, 798 [3d Dept 1999]). Similarly, courts have allowed an unjust enrichment claim based on a health insurer's mistaken payment of medical expenses to a medical provider for the party responsible for the payment (*see Blue Cross of Cent. N.Y.*, 93 AD2d at 996; *see also Martin v Blue Cross & Blue Shield of Cent. N.Y.*, 167 AD2d 917, 917 [4th Dept 1990]).

Here, the addendum to the proprietary lease, which the Appellate Division considered sufficient to find that plaintiffs had a right to occupy the cellar (*see Wynkoop*, 169 AD3d at 1107-1108), places the obligation to maintain the roof on Subramanyam, who possessed the top floor apartment. As such, plaintiffs' assertion that they mistakenly paid half of the cost of the roof repair constitutes a cause of action as against Subramanyam, based on unjust enrichment. Since defendants Hillary Taylor and Kyle Taylor have no obligation to maintain the roof, they have not been unjustly enriched by plaintiffs' payment. Thus, they are entitled to the dismissal of the seventh cause of action against them.

Trespass

The essential elements of a cause of action sounding in trespass are the intentional entry onto the land of another without justification or permission (*see Korsinsky v Rose*, 120 AD3d 1307, 1309-1310 [2d Dept 2014]). While entry with permission is a defense to a trespass cause of action, liability may attach regardless of a defendant's mistaken belief that he or she has a right of entry (*see Hill v Raziano*, 63 AD3d 682, 683 [2d Dept 2009]; *State*

of New York v Johnson, 45 AD3d 1016, 1019 [3d Dept 2007]). Even a de minimis entry can make out a trespass claim (*see Arcamone-Makinano v Britton Property, Inc.*, 156 AD3d 669, 673 [2d Dept 2017], *lv denied* 31 NY3d 907 [2018]), and nominal damages are presumed for any trespass, even if the property owner suffered no actual injury to his or her possessory interest (*see Hill*, 63 AD3d at 683; *see also Strader v Ashley*, 61 AD3d 1244, 1248 [3d Dept 2009], *lv dismissed* 13 NY3d 756 [2009]).

In her affidavit submitted in the Prior Action, Hillary Taylor asserted that her entry into the cellar space was during a building inspection performed prior to Kyle Taylor's purchase of his apartment, and that this entry was made with plaintiffs' permission. This affidavit demonstrates, prima facie, that Hillary Taylor did not trespass in the cellar area. In fact, plaintiffs concede that this entry was made with their consent. Since they have failed to identify any other basis for asserting trespass against Hillary Taylor, plaintiffs have failed to demonstrate an issue of fact with respect to dismissal of the trespass cause of action as against her. Plaintiffs, however, have demonstrated the existence of factual issues with respect to trespass by Subramanyam and Kyle Taylor, by way of Subramanyam's affidavit from the Prior Action, in which he stated that he entered the cellar area with a meter reader (*see Hill*, 63 AD3d at 683). Plaintiffs also attest to Kyle Taylor partially entering their apartment when a plumber went there to perform a repair (*id.*).[14]

The branch of plaintiffs' cross-motion requesting summary judgment with respect to

[14] The court notes that the Individual Defendants, in reply, make no factual or legal arguments addressing the evidence relating to Subramanyam and Kyle Taylor.

the causes of action as against the Individual Defendants is denied for the reasons noted above that warrant dismissal of the majority of their causes of action. Notably, plaintiffs failed to demonstrate their prima facie entitlement to summary judgment in their favor with respect to the unjust enrichment and trespass causes of action.

Plaintiffs' Causes of Action – Co-Op Corp

The court now turns to the portions of the Co-op Corp's motion seeking summary judgment dismissing plaintiff's claims against it; and plaintiffs' cross-motion for summary judgment on those claims.[15]

The Co-op Corp is entitled to dismissal of plaintiffs' declaratory judgment (first cause of action) and specific performance causes of action (twenty-fourth cause of action), requesting a reallocation of their shares in Co-op Corp as to apartment 1 under Article V, §7 of the Co-op Corp's bylaws, as being untimely. Plaintiffs, who assert that they are entitled to additional shares because apartment "1" is significantly larger than the others in the building since it also includes the cellar space, knew that the unit was assigned the same number of shares as the smaller apartment "2" since 1995, when they obtained both proprietary leases. Similarly, in view of their admitted involvement in the management of the building from the time they arrived there, plaintiffs also knew that apartments "3' and "4" likewise were assigned the same number of shares as apartment "1". As such, their

[15] Plaintiffs' arguments regarding defendants purported default and the purported settlement between plaintiffs and the Co-op Corp are addressed below in the section addressed to the Co-op Corps assertion that plaintiffs defaulted in replying to the counterclaims. Given the findings below, plaintiffs are not entitled to a default judgment as against the Co-op Corp.

declaratory judgment and specific performance causes of action, which are subject to the six year statute for breach of contract or reformation of contract based on mistake, are untimely. This action was not commenced until 18 years after plaintiffs acquired their shares (*see* CPLR 213 [2], [6]; *see Stidolph v 771620 Equities Corp.*, 103 AD3d 705, 706-707 [2d Dept 2013]; *Akhunov v 771620 Equities Corp.*, 78 AD3d 870, 871 [2d Dept 2010]). Plaintiffs, who acceded to the allocation of shares for 18 years, are estopped from challenging the allocation of shares (*see Schultz v 400 Co-op Corp.*, 292 AD2d 16, 20 [1st Dept 2002]).

Moreover, contrary to plaintiffs' contentions, it is not clear that the Co-op Corp would have been required to allocate additional shares to them in view of the language of Article V, § 7. Section 7 does not expressly state that the acquisition of additional space requires the issuance of additional shares, but rather requires a determination regarding the allocation of shares in view of the additional space, and suggests that such a determination is discretionary.[16] Further, the Co-op Corp, in the exercise of this discretion, could have declined to issue additional shares, with the concomitant maintenance increase required under section 1 (e) of the proprietary leases, when apartment 1 acquired the right to the cellar,

[16] Article V, § 7, provides, as is relevant here, that: "The Board of Directors, upon the written request of the owner or owners of one or more proprietary leases covering one or more proprietary leases covering one or more apartments in the apartment building and of the shares issued to accompany the same, may in its discretion, at any time, permit such owner or owners, at his, her or their own expense . . . B: to incorporate one or more servant's rooms, or other space in the building not covered by a proprietary lease, into one or more apartments covered by a proprietary lease, whether in connection with any regrouping of space pursuant to subparagraph A of this Section 7 or otherwise, and in allocating shares to any such resulting apartment or apartments, shall determin (sic) the number of shares from its treasury to be issued and allocated in connection with the appropriation of such additional space."

and apartment 4 acquired the roof rights. To wit, addendum section seven A to the proprietary leases imposed additional maintenance obligations on both apartments 1 and 4 based on their respective roof and cellar rights.

Contrary to Co-op Corp's contentions, it is not entitled to dismissal of the remainder of the first cause of action for a declaratory judgment as those declarations requested by plaintiffs present a justiciable controversy (*see Minovici v Belkin BV*, 109 AD3d 520, 524 [2d Dept 2013]). The court, however, will treat this portion of the Co-op Corp's motion as one for declarations in its favor (*id.*; *see also 11 King Ctr. Corp. v City of Middletown*, 115 AD3d 785, 787 [2d Dept 2014], *lv denied* 24 NY3d 904 [2014]).

Initially, in view of the Second Department's finding that plaintiffs had demonstrated their right to occupy the cellar, and dismissal of the derivative counterclaim relating to their use (*see Wynkoop*, 169 AD3d at 1107-1108), plaintiffs are entitled to a declaration in their favor with respect to the portion of the declaratory judgment cause of action relating to the cellar.

With respect to the plaintiffs request for a declaration in their favor with respect to indemnification for costs and attorneys' fees incurred in defending the Prior Action under Article VII of the Co-op Corp's bylaws (as well as the twenty-third cause of action requesting specific performance of their right to indemnification), the court finds that a determination with respect to this request is premature. Plaintiffs were made parties to the Prior Action based on their status as de facto or actual officers or directors; thus, may be entitled to indemnification under the language of that section. However, the court (Rivera,

J.), in the November 7, 2013 order dismissed the Prior Action based on the absence of a showing of demand futility, granted the dismissal without prejudice, and, in a subsequent order, dated December 20, 2013, the court (Rivera, J.), granted the Individual Defendants leave to reassert their claims as counterclaims under a different index number. As such, since the Individual Defendants have reasserted their derivative claims as counterclaims in this action, and the issues relating to whether plaintiffs breached their duties to the Co-op Corp, which finding would preclude indemnification under Article VII, have not been determined in this action, the court cannot make a declaration regarding plaintiffs' entitlement to indemnification at this time. The court, however, finds that this reassertion of the derivative claims in this proceeding may also serve as reasonable excuse for plaintiffs' failure to assert their indemnification claim in the Prior Action (*cf.* Business Corporation Law § 724 [a] [2]).

For the reasons stated in the Second Department's decision denying the branch of plaintiffs' summary judgment motion addressed to the counterclaim with respect to the sublease (*see Wynkoop*, 169 AD3d at 1108), plaintiffs have failed to demonstrate their prima facie entitlement to a declaration in their favor with respect to their subleasing of the apartment "2".[17] As the Co-op Corp does not specifically address the sublease issue in its motion papers, it is not entitled to dismissal of this portion of plaintiffs' declaratory judgment

[17] While the fact that plaintiffs assert that the tenant is no longer subleasing apartment 2 may eliminate a remedy based on a tenants' current possession, it does not eliminate other possible remedies (*see Wynkoop v 622A President St. Owners Corp.*, 45 Misc 3d 1216 [A], 2014 NY Slip Op 51606, *11 [U] [Sup Ct, Kings County 2014], *affd* 169 AD3d 1100 [2d Dept 2019]).

cause of action.

The second cause of action for an injunction barring future maintenance increases or assessments relating to paying plaintiffs' legal fees with respect to the Prior Action and the instant action, or any other costs that may arise from this action or the derivative action is dismissed, as plaintiffs would have an adequate remedy at law with respect to such increases in the form of money damages (*see Simon v Francinvest, S.A.*, 178 AD3d 436, 438 [2019], *lv dismissed* 35 NY3d 1057 [2020]; *Mini Mint Inc. v Citigroup, Inc*, 83 AD3d 596, 597 [1st Dept 2011]; *1659 Ralph Ave. Laundromat Corp. v Ben David Enters.*, 307 AD2d 288, 289 [2d Dept 2003]).

The third cause of action requesting indemnification for any legal violations relating to the cellar; and the fourth cause of action for negligent misrepresentation relating to plaintiffs' right to the cellar are dismissed as moot in view of the Second Department's determination that plaintiffs are entitled to use the cellar, and that such use is legal.

Although the Individual Defendants have demonstrated their entitlement to dismissal of the sixth cause of action relating to alleged water damage caused by the failure to re-grout the exterior of the Building, the Co-op Corp has failed to demonstrate its prima facie entitlement to summary judgment with respect to this cause of action. Whether or not plaintiffs have pleaded sufficient facts to establish such claims as a nuisance, such allegations demonstrate that they have a cause of action against the Co-op Corp for negligence or breach of its maintenance obligations under the proprietary lease (*see Shackman v 400 East 85th St. Realty Corp.*, 161 AD3d 438, 438 [1st Dept 2018]; *Kai Chan*

v 1058 Corp., 200 AD2d 434, 434-435 [1st Dept 1994]; *Halkidis v Two East End Apt. Corp.*, 161 AD2d 281, 282-283 [1st Dept 1990], *lv denied* 76 NY2d 711 [1990]; *Dillenberger v 74 Fifth Ave. Owners Corp.*, 155 AD2d 327, 327 [1st Dept 1989]; *see also Yenreb v 794 Linden Realty, LLC*, 68 AD3d 755, 759 [2d Dept 2009]).

While defendants assert that plaintiffs own role in managing the building, after the stipulation, which made all of the shareholders building directors, demonstrates that plaintiffs have unclean hands with respect to the building repair issue, the doctrine of unclean hands is unavailable as a defense to an action at law for money damages (*see Greco v Christoffersen*, 70 AD3d 769, 771 [2d Dept 2010]). Further, even if defendants are correct that plaintiffs may not obtain damages based on the diminution of the value of the entire building, their request for the cost of repairs to their apartments that suffered water damage is a viable measure of damages for such a claim (*see Susskind v 1136 Tenants Corp.*, 43 Misc 2d 588, 594-565 [Civ Ct 1964]; *see also Shackman*, 161 AD3d at 438-439 [damages based on diminution in value of the plaintiff's unit and in the form of a rent abatement]). However, plaintiffs have failed to present factual evidence, other than their own conclusory assertions, that the failure to re-grout actually caused damage to their apartments. Consequently, they have failed to demonstrate a prima facie entitlement to summary judgment in their favor.

Finally, as noted above, with respect to the Individual Defendants, the assertions made in the Prior Action regarding, *inter alia*, plaintiffs' misappropriation of Co-op Corp assets for their own use are absolutely privileged, and cannot form a basis for plaintiffs'

slander of title (twenty-second) cause of action (*see Pezhman* , 157 AD3d at 418; *Brown*, 136 AD2d at 224-225; *Vevaina* , 126 AD2d at 393).

Counterclaims - Co-Op Corp's Motion for Default Judgment

Initially, the court agrees with the Co-op Corp that plaintiffs did not have a basis to reject the Co-op Corp's answer as untimely. Although the Co-op Corp did not serve its answer until August 2018, plaintiffs' argument that the answer was untimely relies upon the same affidavits of service that were before the court on plaintiffs' prior motion for a default judgment, which the Second Department found insufficient to demonstrate proper service on the Co-op Corp (*Wynkoop*, 169 AD3d at 1103). Plaintiffs also may not rely on a purported settlement of the claims against the Co-op Board given that this "settlement" was entered into at a time that an injunction barring any of the shareholders/directors from acting on behalf of the Co-op Corp was in effect. Thus, there was no one with authority to settle the action on behalf of the Co-op Corp at that time (*see Wynkoop*, 169 AD3d at 1108). Further, the Co-op Corp's current counsel was only able to act on its behalf after the court granted current counsel's motion to remove the prior counsel, who had been hired to represent the Co-op Corp on plaintiffs' authority, in a May 24, 2018 order (Knipel, J.). Plaintiffs ostensibly would been required to serve a reply to the counterclaims and may technically be deemed in default (*see* CPLR 3011; *P & L Group v Garfinkel*, 150 AD2d 663, 663-664 [1989]).

Despite this technical failure, the court is hard pressed to find plaintiffs in default under the circumstances here. Namely, the derivative claims belong to and are binding on

the Co-op Corp (*see Glen v Hoteltron Systs., Inc.*, 74 NY2d 386, 392 [1989]; *Parkoff v General Telephone & Electronics Corp.*, 53 NY2d 412, 420 [1981]; *Pawling Lake Prop. Owners Assn., Inc. v Greiner*, 72 AD3d 665, 667 [2d Dept 2010]; *Klein on behalf of Qlik Technologies, Inc. v Qlik Technologies, Inc.*, 906 F3d 215, 224 [2d Cir 2018], *cert dismissed* ___ US ___, 139 SCt 1406 [2019]; *In re Sonus Networks, Inc., Shareholder Derivative Litigation*, 499 F3d 47, 63-64 [1st Cir 2007]). In addition, the Co-op Corp's counterclaims here merely repeat the derivative counterclaims brought by Taylor and Subramanyam on behalf of the Co-op Corp, for which plaintiffs have served a reply and have actively litigated. Given these circumstances, finding a default based on plaintiffs' rejection of the Co-Op Corp's answer and counterclaims would simply constitute following form over substance. Thus, this court will deem plaintiffs' reply to Taylor and Subramanyam's counterclaims as a reply to the Co-op Corp's counterclaims (CPLR 2001).

Counterclaims - Summary Judgment Motions

Turning first to plaintiffs' motion, plaintiffs, as noted above, have already been granted summary judgment, dismissing the Individual Defendants' counterclaims, which alleged breach of contract based on the improper use or occupancy of the cellar. Plaintiffs are likewise entitled to dismissal of the Co-op Corp's counterclaim premised on the same allegations, whether based upon res judicata, collateral estoppel, or simply because the same proof is before this court on plaintiffs' current cross-motion. The Co-op Corp has failed to demonstrate a factual issue warranting denial of this portion of plaintiffs' cross-motion. With respect to the remainder of the Individual Defendants' counterclaims, plaintiffs have

failed to indicate how their motion is not an improper successive summary judgment motion by identifying newly discovered evidence that warrants a different finding (*see Hillrich Holding Corp. v BMSL Mgt., LLC*, 175 AD3d 474, 475 [2d Dept 2019]; *Ferguson v Shu Ham Lam*, 74 AD3d 870, 872 [2d Dept 2010]; *Rocky Point Drive-In, L.P. v Town of Brookhaven*, 37 AD3d 805, 808 [2d Dept 2007]). While perhaps not an improper successive motion as against the Co-op Corp's counterclaims, plaintiffs rely almost entirely on the same evidence that the Second Department found insufficient to demonstrate their prima facie entitlement to the dismissal of the Co-op Corp's counterclaims, and fail to identify how their current motion warrants a different finding.

On the other hand, the Individual Defendants and the Co-op Corp have failed to demonstrate their prima facie entitlement to summary judgment in their favor on their counterclaims for breach of fiduciary duty and conversion. In moving, the Individual Defendants and the Co-op Corp submit copies of checks that plaintiffs wrote to Corey Hardin from the Co-op Corp account from March 2013 to October 2013. The memo section of some of these checks identify the payments as being for legal expenses. As these payments occurred before the injunction issued in the instant action, barring any of the shareholders from acting on behalf of the Co-op Corp, the court is not convinced that the issuance of checks for legal expenses, in and of itself, establishes, as a matter of law, a breach of fiduciary duty or conversion.

The Individual Defendants and Co-op Corp also submit copies of a summons and complaint in an action brought by 622A President Street Owners Corp as against Kyle

Taylor, Hilary Taylor and Rajeev Subranyam under index number 504653/13, by which Corey Hardin is identified as the attorney for 622A President Street Owners Corp. Even assuming the action under index number 504653/13 was improperly brought on behalf of the Co-op Corp, and allowing an inference that at least some of the checks from plaintiffs covered the fees for the action under 504653/13, such assumptions and inferences do not establish that the entirety of Hardin's work on behalf of the Co-op Corp was improper.

In any event, if such evidence is deemed sufficient to satisfy the Individual Defendants and Co-op Corp's prima facie burden, plaintiff Wynkoop's affidavit presents factual issues in this respect, as he asserts that Hardin was hired to represent the Co-op Corp's interests in the Prior Action, which representation included participation in the successful motion to dismiss the derivative complaint, and in administrative proceedings relating to violations alleged against the Co-op Corp. In sum, there is an insufficient factual record to find that plaintiffs use of Co-op Corp funds to pay Hardin constitutes a breach of fiduciary or a conversion as a matter of law (*see Matter of Schwen*, 154 AD2d 601, 601-602 [2d Dept 1989]).

Finally, with respect to the counterclaims, without deciding whether it is legally appropriate for both the Individual Defendants and the Co-op Corp to continue to prosecute identical counterclaims for the benefit of the Co-op, an issue that is not directly addressed in the parties' papers, the court views this bifurcated representation of the Co-op Corp's interests to be extremely unwieldy. The court views it as preferable that the Co-op Corp's interests be represented either by the Individual Defendants through their derivative

counterclaim or by the Co-op Corp. This single representation of the Co-op Corp's interests may be accomplished, for example, by the Co-op Corp being substituted as the plaintiff on the derivative counterclaims, or by the Co-op Corp discontinuing its counterclaims.

This constitutes the Decision and Order of the court.

E N T E R

A.J.S.C.