SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES **PART** IAS MOTION 59EFM

Justice

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KENNETH ROSENBLUM and BERNICE ROSENBLUM,

Plaintiffs,

- v -

TRINITY HUDSON HOLDINGS, LLC and THE RECTOR, CHURCH-WARDENS AND VESTRYMEN OF TRINITY CHURCH IN THE CITY OF NEW YORK,

Defendants.

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INDEX NO. 160656/2014

MOTION DATE 02/21/2021

MOTION SEQ. NO. 006 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 260, 261, 262, 264, 265, 266, 267, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 308, 310, 311, 312, 313, 314, 315, 340

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 341, 342, 344, 345

were read on this motion to/for DISCOVERY.

ORDER

Upon the foregoing documents, it is

ORDERED that defendants' motion to compel discovery in accordance with the Decision & Order dated November 10, 2020 of the New York Supreme Court, Appellate Division, First Department (motion sequence number 007), is denied, as moot; and it is further

ORDERED that plaintiff Kenneth Rosenblum's cross motion to amend his complaint (motion sequence number 006) is denied; and it is further

ORDERED that defendants' motion for summary judgment (motion sequence number 006) is granted and the complaint, in its entirety, is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DECISION

Defendants move for summary judgment dismissing the complaint pursuant to CPLR 3212 and CPLR 3211(a)(3),(5) and (10).

Under CPLR 3211(a)(3), the cause of action must be dismissed if the party asserting such claim "has not legal capacity to sue", which has been interpreted to include the ground of lack of standing. See Bank of New York Mellon v Chamoula (170 AD3d 788 [2d Dept 2019]). Under CPLR 3211(a)(10), the complaint must be dismissed "in the absence of a person who should be a party", i.e., in the absence of a person who is indispensable to the lawsuit. See McKinney's CPLR § 3211, 2020, Supplementary Practice Commentaries, C3211:32. CPLR 3211(a)(5)

requires dismissal of a cause of action that is not brought within the applicable period of limitations.

With respect to lack of standing to sue or the absence of an indispensable party, defendants reference the trial testimony of the plaintiffs in a separate action between them for partition, entitled Kenneth Rosenblum v Bernice Rosenblum, Index No. 654177/2015 (Sup Ct NY Co). As pointed out by defendants, during the partition trial, Kenneth Rosenbloom, plaintiff in that case, consistent with his posture in the action at bar, testified that 23-25 Thompson is owned jointly by himself and plaintiff Bernice Rosenbloom. Adversely, Bernice Rosenbloom, who is the defendant in the partition case, testified that 23-25 Thompson Street is a partnership asset of Standard Realty Associates, as indicated on such partnership's federal tax returns. Defendants argue that the court should dismiss the herein action given the absence of an indispensable party, i.e. such partnership, or, alternatively, dismiss the action as to plaintiff Bernice Rosenbloom based upon her judicial admission that she has no ownership interest in the property that is the subject of this lawsuit.

In response to defendants' summary judgment motion, only one of the two plaintiffs, i.e., plaintiff Kenneth Rosenblum, submits opposition, including cross moving to amend the complaint. Such cross motion does not comply with CPLR 3025(b),

as it is not "accompanied by the proposed amended or supplemental pleading *clearly showing the changes or additions to be made to the pleading*" (emphasis added). Nonetheless, a comparison of the original complaint with the proposed amended complaint shows that the proposed amended claims and prayers for relief are now on behalf of plaintiff Kenneth Rosenblum solely. The proposed amended pleading contains only one factual reference to the co-plaintiff Bernice Rosenblum, stating her residence, "upon information and belief", though such co-plaintiff remains listed as a party plaintiff in the caption of the proposed amended complaint. In his supporting affidavit, plaintiff Kenneth Rosenblum offers no explanation or assertions concerning the merits of such change.[1] On that basis alone, the cross motion to amend the pleading must be denied. Goldfarb v 65 East 11th St Corp (40 AD2d 657 [1st Dept 1972]).

Moreover, plaintiff Kenneth Rosenblum asserts in his affidavit in support of his motion to amend that both he and his mother Bernice Rosenblum own 23-25 Thompson Street. The deed dated July 20, 1978 by which Bernice Thompson Realty Inc. conveyed the property to plaintiff Kenneth Rosenbloom and plaintiff Bernice Rosenbloom, which is appended to defendant's moving papers, along with plaintiff's Kenneth Rosenblum's

[1]Query whether the co-plaintiffs herein are united in interest, in light of their adverse positions in the partition action.

testimony in the partition trial, appended to defense counsel's supplemental affirmation, supports such assertion. On such basis, the proposed amended complaint that states that plaintiff Bernice Rosenbloom co-owns 23-25 Thompson Street but omits all claims of liability against defendants or prayers for any relief for alleged damage on her behalf, with no affidavit from her stating her intention, lacks merit.

The court also denies plaintiff's cross motion to amend his pleading as untimely made. In Bert G Gross & Co v Damor Realty Corp (60 AD2d 541 [1st Dept 1977]), reversing the trial court's grant of leave to amend the complaint pursuant to CPLR 3025(b), the court stated:

> "This action was commenced in October, 1973, and appellant was made a party the next month. In March, 1975, pursuant to court order, plaintiff served its first amended complaint and a note of issue and statement of readiness were served in March, 1976. Thereafter, the case was assigned to a Trial Part and appeared on the day Trial Calendar many times over a several month period. Finally, in May, 1977, following another adjournment, the present motion was made. While CPLR 3025 (subd [b]) does provide that "Leave [to amend pleadings] shall be freely given", this does not mean that such leave must be granted in the absence of any semblance of an excuse for the delay involved. Plaintiff, in its brief to this court states that 'the record in this action indicates that the cause of action for breach of contract against Goldberg is not based on any new factual material but was the subject of testimony at Gross' examination before trial in 1973'. Plaintiff having admittedly possessed such knowledge since at least 1973, it could not merely sit back and await the eve of trial before moving to again amend the complaint so substantially."

Here, the cross motion to amend of plaintiff was made five years and eight months after this action was commenced; eight months after plaintiff's motion for a trial preference was granted; and only in response to defendants' post note of issue motion for summary judgment. As in Bert G Gross & Co, supra, plaintiff at bar has not offered "any semblance of an excuse for [his] delay", until after his case appeared on the Trial Calendar, in adding an additional request for relief in the form of punitive damages, specifically in the amount of $75,000,000. See also Heller v Louis Provenzano, Inc. (303 AD2d 20, 23-25 [1st Dept 2003]) ("[N]o valid distinction can be drawn, in law or fact, between a new theory of liability and 'an additional request for relief'") and Kassis v Teacher's Ins and Annuity Assn (279 AD2d 265, 266 [1st Dept 2001]) ("plaintiffs fail to explain the sudden inclusion of punitive damages in their preexisting . . . causes of action").

The allegations of the proposed amendment that are the basis for plaintiff Kenneth Rosenblum's application for punitive damages are that such plaintiff retained Langan Engineering & Environmental Services, Inc. to prepare a report on the subsurface and groundwater conditions of defendants' property on October 11, 2011. Such plaintiff further alleges that such report, dated December 11, 2011, stated that "Disposal of groundwater into the city sewer is not permitted in accordance with the New York City

Department of Environmental Protection (DEP) rules and regulations", and was delivered to defendants. Such plaintiff also seeks to amend the complaint to cite such DEP rule(s). Clearly, such plaintiff possessed knowledge of the report several years before he commenced this action. Just as the plaintiff in Bert G Gross & Co, supra, who at the time it commenced such lawsuit, possessed knowledge of the factual material that was the basis of its proposed breach of contract claim, plaintiff herein was well aware of the alleged wanton breach of the DEP rule(s). Thus, as in Bert G Gross & Co, "[plaintiff Kenneth Rosenblum] cannot merely sit back and await the eve of trial before moving to . . amend the complaint so substantially." Moreover, this court agrees with defendants that plaintiff's proposed amended complaint, which does not cite the particular DEP rule(s)[2] that prohibit(s) the discharge of waters into New York City's sewage system, contains no allegation that such alleged violation resulted in injury to plaintiffs' building. Therefore, such amendments lack merit as they fail to support any of plaintiffs' causes of action or remedies therefor.

As stated in US Bank National Association v Clement (163 AD3d 742, 743 [2d Dept 2018]):

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[2] As argued by defendants, plaintiff does not cite the particular rule, which appears in actuality to be a local law, New York City Charter Title 15, § 19-20, entitled Disposal of Wastewater, Stormwater and Groundwater.

> "On a defendant's motion pursuant to CPLR 3211(a)(3) to dismiss the complaint based upon the plaintiff's alleged lack of standing, 'the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing as a matter of law' (New York Community Bank v McClendon, 138 A3d 805, 806 . . . 'To defeat a defendant's motion, the plaintiff has no burden of establishing its standing as a matter of law; rather, the motion will be defeated if the plaintiff's papers raise a question of fact as to its standing' (Deutsche Bank Nat Trust Co Ams v Vitellas, 131 AD3d 52, 60)".

In support of their motion to dismiss based upon lack of standing and absence of a necessary party grounds, defendants submit the 2017 US Return of Partnership Income of Standard Realty Associates. Such tax return lists the partnership's ownership of 23-25 Thompson Street and six other properties. The return also states that each plaintiff is a 50% partner in such partnership. However, given that such Return is not signed by either plaintiff (compare Gagen v Kipany Productions, Ltd [27 AD3d 1042, 1044 (3d Dept 20060] ["the tax returns signed by plaintiff under penalty of perjury"]), it does not constitute an admission that would require this court to disregard plaintiff Kenneth Rosenblum's subsequently proffered affidavit. Nor is the trial testimony of plaintiff Bernice Rosenblum, wherein she states that indeed Standard Realty Inc. owns 23-25 Thompson Street, dispositive, as it insufficient to overcome the record evidence of the deed of July 20, 1978. Furthermore, as defendants concede, the partition action has yet to be determined. Thus, defendants have not met their initial burden to establish prima facie that plaintiffs lack standing as

a matter of law. See U. S. Bank National Association, supra.

Pursuant to CPLR 3211(a)(5), defendants seeks summary judgment dismissing the complaint on the additional grounds that the action is time-barred, having been brought after expiration of the three-year statute of limitations prescribed by CPLR § 214(4).

As stated in Naccarato v Sinnot (176 AD3d 1467 [3d Dept 2019]):

> "'An action to recover damages for injury to property must be commenced within three years of the date of the injury' (EPK Props, LLC v Pfohl Bros Landfill Site Steering Comm, . . . [2018}. . . The cause of action accrues when the damages are apparent, not when the damages are discovered (see Cranesville Block Co v Niagara Mohawk Power Corp, 175 AD2d 444,. . .[1991]). A later accrual date may be applied where 'injuries to property [are] caused by a continuing nuisance involv[ing] a continuous wrong' (Town of Oyster Bay v Lizza Indus, Inc, . . .[2013}. . .and provided that 'the harm sustained by the complaining party is not exclusively traced to the day when the original objectionable act was committed'(Capruso v Village of Kings Point, 23 NY3d 631, 639, . . .[2015])."

In their complaint, plaintiffs allege their building known as 23-25 Thompson Street, New York City, suffered injury arising from (1) negligence on the part of defendants in the construction of their building known as 27-39 Thompson Street, New York City, specifically the underpinning of the foundation of 23-25 Thompson Street in the building and construction of the associated retaining wall of 27-39 Thompson, and in the operation of sump pumps discharging water onto and into plaintiffs' building (first cause of action); (2) continuing trespass as a result of movement of

earth and erosion of in-situ soils through ground and storm water discharge from the sump pump operations of 27-39 Thompson to below the foundation of 23-25 Thompson Street (second cause of action); (3) continuing nuisance caused by the sump pumping and other drainage operations of defendants in discharging ground and storm water into and/or onto plaintiffs' property (third cause of action); (4) negligence in strict liability on the part of defendants in substantially increasing by artificial means the quantity or rate of flow of surface water from 27-39 Thompson onto and/or into plaintiffs' property (fourth cause of action); and (5) negligence in strict liability on the part of defendants, having continued to obtain "ongoing and substantial" benefits from the underpinning operations conducted at 23-25 Thompson with respect to the construction of the retaining wall of defendants' building (fifth cause of action).

Certainly, with respect to any claims of negligence of defendants that took place with the underpinning of plaintiffs' building and construction of the foundation and retaining wall of defendants' building many decades ago, i.e., between 1929 through 1931, and injury therefrom that plaintiffs admit they discerned in the 1980s and 1990s after they purchased 23-25 Thompson Street, the statute of limitations long expired before plaintiffs commenced this action in November 2014. Plaintiffs do not allege that such underpinning and construction of the retaining wall

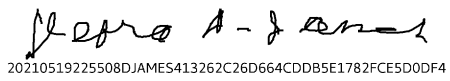
created an encroachment on their property, so neither negligence, nor trespass nor nuisance in that regard can be said to be continuing. Compare Bloomingdales, Inc v New York City Transit Authority (13 NY2d 61 [2009])(subway fiber glass conduit encased in concrete constituted a continuous encroaching structure on plaintiff's property); see also 509 Sixth Ave Corp v New York City Transit Authority (15 NY2d 48 [1964]). Nor did plaintiffs timely interpose their fifth cause of action for strict liability with respect to the excavation connected with the construction of the retaining wall by defendants' predecessor owners pursuant to NYC Administrative Code § 27-1031. Finally, plaintiffs raise no issue of fact with respect to the evidence proffered by defendants that defendants did not own 27-39 Thompson Street at the time that the excavation and underpinning took place, and therefore owed no duty, and no such cause of action could have accrued in favor of plaintiffs. See Livichusca v M&T Mtge Co (49 AD3d 822, 823 [2d Dept 2008]) and Cohen v Lesbian & Gay Community Services Center, Inc (20 AD3d 309 [1st Dept 2005]).

However, the court finds that plaintiffs' claims of negligence, nuisance, and trespass with respect to defendants' use of the sump pumps and other drainage operations assert continuing wrongs. Such allegations are distinguishable from Naccarato v Sinnott (176 AD3d 1467 [3d Dept 2019]), where the wrong alleged by plaintiff was the singular conduct of defendant's construction of

the drain system, resulting in an increase in surface water that, two years later, collapsed the adjoining property owned by plaintiff. In their bill of particulars, plaintiffs at bar allege that defendants negligently operated the sump pump on October 29, 2012 and thereafter. Therefore, the tort, as well as the trespass and nuisance claims herein were timely brought.

Defendants have, nevertheless, prima facie establish no liability on their part for tort, trespass, or nuisance with respect to discharge of surface, ground or wastewater or the operation of sump pumps and/or other artificial means, causing injury to 23-25 Thompson Street, through the affidavits of both eyewitnesses and experts. The affidavits of plaintiffs' experts are insufficient to refute the eyewitness evidence submitted by defendants that there was no electrical power to defendants' building during either Hurricane Irene or Superstorm Sandy and thus the sump pumps were not operational at the time. Nor does such experts' affidavits refute defendants' multiple eye witness statements under oath that during such storm events, the water removal efforts did not involve any pumping or water removal from the sump pits themselves, or access to any subsurface soils underneath either plaintiffs' or defendants' buildings. In their affidavits, plaintiff Kenneth Rosenblum and the superintendent admit that they did not observe where the alleged fine soil came from that they saw pumped into the street. Nor do plaintiffs raise

any issue of fact with respect to the eyewitness testimony of defendants' vendor that such vendor did not pump the water into the street but removed the flood waters through hoses connected to trucks, and then removed the water from the site. Finally, plaintiffs come forward with no evidence that refutes defendants' expert opinions, given under oath, that it was impossible, within a reasonable degree of engineering certainty, for the defendants, through artificial means, i.e. the sump pumps, to have discharged water onto, into and/or underneath plaintiffs' building, in an way that was materially different from drainage without the operation of such sump pumps, which is the standard for strict liability in such regard. See Batavia Turf Farms, Inc v County of Genesee (239 AD2d 903 [4th Dept 1997]). The conclusory affidavits of plaintiffs' engineering experts do not raise any issues of fact with respect to defendants' evidence that establishes the absence of any negligence, trespass, or nuisance on the part of defendants. See Romano v Stanley (90 NY2d 444, 451 [1997]).



5/19/2021
DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE