

FMC Co. v Driscoll

2021 NY Slip Op 32245(U)

November 9, 2021

Supreme Court, Kings County

Docket Number: Index No. 4934/2016

Judge: Wayne P. Saitta

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 29 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 9th day of November 2021.

P R E S E N T:
Hon. Wayne P. Saitta, Justice

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FMC COMPANY

Plaintiff,

Index No. 4934/2016

-against-

DECISION and ORDER

THE HONORABLE MATTHEW J. DRISCOLL, AS
COMMISSIONER AND ON BEHALF OF THE
NEW YORK STATE DEPARTMENT OF
TRANSPORTATION, THE STATE OF NEW YORK,
SKANSKA USA INC., KIEWIT INFRASTRUCTURE
CO., AND E.C.C.O. ENTERPRISES, INC.

Defendants

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The following papers read on this motion:

Notice of Motion/Order to Show Cause/
Petition/Affidavits (Affirmations) and
Exhibits/Memos of Law
Answering Affidavits (Affirmations)
and Exhibits
Reply Affidavit (Affirmation)/Memos
And exhibits

NYSCEF Doc Nos

4-25, 27-52 53-75

77,79,81,83,84-92 94-111

112-113 114-123 125-130 134,136

This action involves claims of trespass, nuisance and property damage to Plaintiff FMC Company resulting from the construction of the new Kosciuszko Bridge. Plaintiff is the owner of a property located at 470 Scott Avenue in Brooklyn. Part of the property lies beneath the new bridge.

Defendants SKANSKA USA INC., KIEWIT INFRASTRUCTURE CO., AND E.C.C.O. ENTERPRISES, INC. (SKE) designed and built the eastbound portion of the new Kosciuszko Bridge pursuant to a contract with Co-Defendants THE HONORABLE MATTHEW J. DRISCOLL, AS COMMISSIONER AND ON BEHALF OF THE NEW YORK STATE DEPARTMENT OF TRANSPORTATION and THE STATE OF NEW YORK (the State Defendants). The contract was a design-build contract which provided that SKE would both design the bridge and build it.

The State Defendants procured an aerial easement to allow SKE to construct part of the bridge in the air space over Plaintiff's property. The lower limit of that aerial easement was 13 feet above the ground of Plaintiff's property. The State Defendants also procured temporary construction easements to allow SKE to use on Scott Avenue and Thomas Street, both of which abut Plaintiff's property.

As part of the construction, SKE designed and installed a windbreak on Plaintiff's property at 470 Scott Avenue. The windbreak was designed to provide temporary support for the bridge while it was being constructed. The anchor of the windbreak included piles that were driven approximately 50 feet into the ground of Plaintiff's property.

The decision to employ a windbreak to support the bridge while it was being constructed and the decision where to install it were made by SKE. Neither the use of a windbreak or location of the windbreak was required by the contract to construct the bridge.

The State Defendants had personnel on site whose function was to ensure that the construction was done in accordance with the contract requirements and the State Defendants were aware that the windbreak was being installed.

The area where the windbreak was installed was not within any area covered by

the State's easements and the State Defendants never procured an easement to allow SKE to install the windbreak on Plaintiff's property. The Court has previously dismissed SKE's affirmative defense that it had a "legal right" to perform construction work on Plaintiff's property by virtue of its agreement with the State of New York and the aerial easements obtained by the State of New York.

No evidence of a written license from Plaintiff to allow SKE to put the windbreak on its property has been produced.

SKE asserts that Plaintiff granted SKE an oral license to install the windbreak and that Plaintiff knew of the construction of the windbreak over a period of several months and acquiesced in SKE installing it. Plaintiff denies that it ever granted SKE permission to put the windbreak on its property.

In December of 2016, SKE removed the above-ground portion of the windbreak, cut the remaining anchor to four feet below grade, and covered it. All that remains of the anchor are six below-ground piles that are covered.

SKE offered to remove the piles if Plaintiff wanted them removed. Plaintiff refused to grant SKE access to remove the pile and stated that Plaintiff did not trust SKE to remove the piles safely.

On April 3, 2018, SKE moved for an order permitting SKE to enter the Main Parcel to remove what remains of the anchor. Plaintiff opposed SKE's motion for access stating that SKE's methodology for removing the pile was defective and could result in damage to Plaintiff's building.

Both sides had engineers prepare plans for the removal of the piles. The methodology for removing the piles proposed by both engineers is essentially the same. Both proposed exposing the piles using a trench box, then loosening the surrounding soil

from the piles, and then removing the piles with a variable moment hammer.

SKE's motion for access was held in abeyance by the Court pending determination of these motions.

As part of the project SKE also regraded the adjoining streets. Plaintiff claims that SKE's regrading changed the pitch of the streets so that water from the street floods Plaintiff's property. In December of 2017, Plaintiff's tenant removed material from the street. It is disputed whether the tenant restored the streets to their condition before SKE regraded them. It is also disputed whether the alleged flooding still continues.

Plaintiff's engineers found that the new grade of the adjoining streets directed street storm water into 470 Scott Avenue. Plaintiff's appraiser reported that no drainage problems were noted during the inspection of the subject property.

Plaintiff commenced this action which seeks injunctive relief requiring the Defendants to remove all personnel, equipment, and material from the property including removing the piles left underground and to abate the nuisance caused by Defendants' construction activities. The complaint also seeks a money judgment for damages caused by Defendants alleged trespass.

Plaintiff claims that vibrations from the installation of the windbreak damaged its building. Plaintiff further claims that SKE's activities on the site and the abutting street interfered with access to its property and caused the tenant of its building to vacate. The tenant vacated the property in May of 2016, and it was not rented until January of 2018.

The Plaintiff has moved for summary judgment as to liability on its claims of trespass and nuisance and seeks a trial on damages. The SKE Defendants move for summary judgment dismissing the first two causes of action for injunctive relief and to limit portions of the third cause of action for monetary damages. The State Defendants

seek summary judgment dismissing the complaint as against them.

State Defendants' Motion

The State Defendants seek summary judgment dismissing the first and second causes of action against them on the grounds that they are not liable for any trespass or nuisance created by the SKE Defendants who were independent contractors.

The bridge was both designed and built by the SKE Defendants. The State Defendants did not control or direct the manner of the SKE Defendant's work. While the State did have consultants on the site, those employees and consultants did not work on the property and did not direct or control the means and methods of the work. The State consultant's role was to ensure that the work was performed according to the contract specifications.

Where the State's consultant's oversight was solely for the purpose of assurance that the contract was being performed, the State is not liable for the acts of its independent contractor. (*Caldwell v. State*, 39 Misc2d 898 [Ct of Cl 1963]; *Strickland v. State of New York*, 13 Misc 2d 425 [Ct of Cl 1958]; *Benning v. City of New York*, 279 AD 769 [2d Dept 1951]; *Uppington v. City of New York*, 165 NY 222 [1901]).

Plaintiff's reliance on *Bronxville Palmer, Ltd. v. State of New York et al.*, 18 NY2d 560 (1966) for the proposition that the State is vicariously liable for the trespass by its contractor is misplaced. In that case, the Court, in dismissing a case against the State as res judicata based on a prior case that found its contractor had not trespassed on that Plaintiff's property, merely stated that any liability on the part of the State would have been derivative from the acts of the contractors. The Court did not find that the owner was liable for the acts of its contractor.

There are exceptions to the rule that an owner is not liable for the trespass of its independent contractor. While an owner may be held liable for the trespass or creation of a nuisance where they direct the trespass or the trespass or nuisance is necessary to complete the contract, *Gracey v. Van Camp*, 299 AD2d 837 (4th Dept 2002), that is not the case here. There is no evidence presented that either the State Defendants or the contract required the SKE Defendants to install the windbreak or to regrade the streets in a manner that directed water onto Plaintiff's property.

By reason of the foregoing, the amended complaint should be dismissed against the State Defendants.

First Cause of Action for an Injunction to Remove Piles

Plaintiff's first cause of action, based in trespass, seeks an injunction requiring Defendants to remove certain structures, construction equipment, and personnel from Plaintiff's property. At this point, SKE Defendants have removed all structures, material and personnel from the property with the exception of the pile from the foundation of the wind bent.

The wind bent was installed as a temporary support for the bridge during its construction. The above ground portion of the wind bent was previously removed and what remains is the foundation which is buried underneath Plaintiff's property. The foundation consists of piles buried four feet below grade and extends approximately 50 feet below ground.

Thus, the remaining question before the Court as to the first cause of action is should the Court issue an injunction directing the Defendants to remove the remaining piles buried under Plaintiff's property.

It is disputed whether Plaintiff gave SKE permission to put the windbreak on its property. However, even if no permission had been granted, the equities do not weigh in favor of granting an injunction.

RPAPL § 871 provides Plaintiff with a statutory right for its causes of action seeking a permanent injunction for the removal of encroaching structures. It provides:

An action may be maintained by the owner of any legal estate in land for an injunction directing the removal of a structure encroaching on such land. Nothing herein contained shall be construed as limiting the power of the court in such an action to award damages in an appropriate case in lieu of an injunction or to render such other judgment as the facts may justify”.

“In order to obtain injunctive relief pursuant to RPAPL 871 (1), a party is ‘required to demonstrate not only the existence of [an] encroachment, but that the benefit to be gained by compelling its removal would outweigh the harm that would result to [the encroaching party] from granting such relief” (*Montanaro v. Rudchyk*, 189 AD3d 1214 [2d Dept 2020]; *Kimball v. Bay Ridge United Methodist Church*, 157 AD3d 877 [2d Dept 2018]).

A Court may deny an injunction even in the case of a continuing trespass if warranted by the circumstances. (*DiMarzo v. Fast Trak Structures*, 298 AD2d 909 [4th Dept 2002]).

Those facts set forth in the moving papers, which are not contested, establish that the balancing of the equities does not weigh in favor of granting an injunction to require Defendants to remove the piles for three reasons.

First, Plaintiff has refused to allow Defendants SKE to remove the piles.

By letter dated September 15, 2017, SKE asked Plaintiff if it wanted SKE to remove the piles. In April of 2018, SKE made a motion for an order to permit it to enter Plaintiff’s property to remove the piles, which Plaintiff opposed. That motion was held in abeyance

pending determination of this motion.

In opposing the motion for access, Plaintiff submitted an affidavit of Fred Carillo, the managing partner of Plaintiff, in which he stated that SKE should not be allowed to reenter the property and that the “sole recourse is to compensate FMC with money damages measured at prevailing wages required to properly remove the Foundation and pilings - if they can safely be removed”.

At a hearing on the motion on June 5, 2018, Plaintiff’s counsel, in response to a question by the Court as to whether Plaintiff did not want Defendants to remove the piles, stated “Correct, your Honor. We don’t want them on our property. If they want to give us compensation, we’ll be open to that concept.”

Subsequently, by letter dated January 22, 2019, SKE offered to remove the piles.

Plaintiff refused the offer stating:

As I have advised you and your associates on numerous occasions, FMC has no interest in permitting SKE to return to FMC’s property and conduct any activities thereon nor is FMC lawfully bound to do so. To date any and all acts by SKE that were conducted on FMC’s property were done with total disregard to the damages that such acts would cause of FMC. In simple words, FMC does not trust SKE.

Further, FMC has reviewed SKE’s alleged methodology and finds that methodology defective and would result in further damages to FMC’s property.”

However, the methodology for removing the piles proposed by both SKE’s and Plaintiff’s engineers is essentially the same. Both engineers propose exposing the piles using a trench box, then loosening the surrounding soil from the piles, then removing the piles with a variable moment hammer.

Thus, the basis of Plaintiff’s objection is not the methodology SKE proposes to use, but Plaintiff’s belief that SKE will not perform the work in a competent manner.

Plaintiff cannot credibly come before the Court and ask for equitable relief in the

form of an injunction requiring Defendants to remove the piles when Plaintiff consistently refuses to permit them to do so.

The second reason why the equities weigh in favor of not issuing an injunction is that Plaintiff has asserted that it does not know whether the piles can be removed safely without damaging the buildings. Plaintiff has asserted that removal of the piles will create vibrations that could undermine the friction piles supporting Plaintiff's building.

As the party seeking the injunction, the burden is on the Plaintiff to show that the equities weigh in favor of granting the injunction. A necessary element of that burden is demonstrating that the piles can be removed safely and that the benefit of removing the piles outweighs the harm it would cause. (*Montanaro v. Rudchyk*, 189 AD3d 1214 [2d Dept 2020]; *DiMarzo v. Fast Trak Structures*, 298 AD2d 909 [4th Dept 2002]). If Plaintiff cannot do so, it has failed to meet its burden.

As late as its reply memorandum of law to SKE Defendants motion, Plaintiff states that it does not concede that the piles can be removed safely.

The suggestion that, in this case, a hearing should be held to determine whether the piles can be removed safely is untenable. If Plaintiff does not know if the piles can be removed safely, who would produce evidence at a hearing that it is safe to do so?

The third reason why the equities weigh in favor of not issuing an injunction is that the remaining piles do not significantly interfere with Plaintiff's use of the property. The remaining piles are buried four feet underground and extend down approximately 50 feet underground.

Plaintiff has not demonstrated that the buried piles interfere with their use of the property. At most, Plaintiff has suggested that the piles may, in the future, interfere with its ability to expand its building or build a larger building. Such a possible contingent

interference can be remedied through monetary damages to compensate for the reduced value of the property. Thus, Plaintiff will not be unduly prejudiced if the injunction is not granted.

Second Cause of Action to Abate Nuisance

Plaintiff's second cause of action alleging nuisance seeks an injunction directing Defendants to remove all structures, equipment, and personnel from the property and restraining the Defendants from impacting Plaintiff's use of the property.

SKE has already left the property and removed all equipment and personnel from the site except for the above-mentioned piles.

Other than the piles, the only remaining nuisance that Plaintiff has alleged is that SKE created a nuisance when they regraded Scott Avenue and Thomas Street raising the grade of the street and changing the slope of the street towards Plaintiff's building which resulted in street storm water being directed onto Plaintiff's property.

Directing water onto another's property constitutes both a trespass and a nuisance. (*Zimmerman v. Carmack*, 292 AD2d 601 [2d Dept 2002]; *Dellaportas v. County of Putnam*, 240 AD2d 358 [2d Dept 1997]). Injunctive relief is an appropriate remedy in the case of a continuing trespass or nuisance if warranted by the circumstances. (*DiMarzo v. Fast Trak Structures*, 298 AD2d 909 [4th Dept 2002]).

Both Plaintiff and the SKE Defendants motions for summary judgment must be denied as to the second cause of action because there are questions of fact as to whether there is still flooding of Plaintiff's property caused by the regrading of the street done by the SKE Defendants.

In December of 2017, Plaintiff's tenant did some work on the streets to remedy the

flooding, but it is not clear whether the tenant restored the grade of the street to what it was before SKE's work, or whether there is still flooding caused by a change in the grade of the streets.

Fred Carillo testified at his deposition that in December of 2017 his tenant excavated the streets and removed the additional material that SKE placed on top of the prior grade of the streets and restored the streets to their original condition.

Q: So, in this December time period you're saying that Cholowsky went in and he excavated the street in this location?

A: Yeah, he pushed all the additional material that was placed on top of the prior grade away from his property across half of the street to put it back to its original condition.

Q: And when did he do this work?

A: More or less around that December date.

Q: December 2017?

A: Yes. (Carillo deposition at 270-27)

However, Carillo also testified later in his deposition that his tenant removed loose material that had been left on the street and left the streets at the elevation the SKE Defendants created. Specifically, he testified:

Q. Do you know whether or not he restored the grade back to how Skanska Kiewit had it after he did this work?

A. Yes.

Q. And did he restore it back to the grade that Skanska Kiewit and E.C.C.O. had had it?

A. Yes. (Carillo deposition at 278)

Further, while Plaintiff's engineers found that the streets were improperly pitched so that they direct water onto Plaintiff's property, Plaintiff's appraiser reported no drainage problems at the time of its inspection.

By reason of the foregoing, it remains to be determined at trial if the SKE Defendants regraded the street in such a manner as to direct water onto Plaintiff's property, whether that condition still currently exists, and whether an injunction

requiring the SKE Defendants to abate the conditions is warranted.

Third Cause of Action for Monetary Damages

Plaintiff's third cause of action seeks monetary damages against the SKE Defendants caused by their alleged trespass.

Plaintiff seeks summary judgment against Defendant SKE for trespassing on their property by entering their property with equipment, material, and personnel, by blocking access to their property during construction by installing the windbreak, and by directing water from the street onto their property.

The SKE Defendants seek partial summary judgment limiting the scope of Plaintiff's damages.

Plaintiff is not entitled to summary judgment finding that the SKE Defendants trespassed on its property because there remain questions of fact both as to whether Plaintiff gave the SKE Defendants an oral license or permission to install the windbreak, and also as to whether the SKE Defendants caused water to be redirected onto Plaintiff's property by the manner it regraded the streets.

Fred Carillo denies that he ever gave the SKE Defendants a license or permission to install the windbreak. The SKE Defendants submitted affidavits by Carter Masterson and Tolun Tuglu. Carter Masterson stated that he met with Carillo who gave SKE permission to install the windbreak. Tolun Tuglu stated that the wind-tie installation took place over many months and that Carillo witnessed the work on the property and did not object until after the windbreak was installed. It will be up to a trier of fact to determine which of the conflicting versions to accept.

The permission to install the windbreak, if given, did not have to be in writing

because it was a license that did not convey an interest in the land. Further, the license was revocable at will by the Plaintiff, unless the Plaintiff's conduct makes it inequitable to revoke the license. (*Ski-View Inc., v State*, 129 Misc2d 106 [Ct of Cl 1985]; *Miller v Seibt*, 13 AD3d 496 [2d Dept 2004]).

SKE Defendants' Motion to Limit Damages

The SKE Defendants seek to limit the damages which Plaintiff can seek at trial.

Plaintiff's claims can be divided into four categories of damages.

First, the cost of repair of physical damage to its building caused by vibrations during the installation of the windbreak.

Second, the cost of repairing the streets so they do not cause flooding to Plaintiff's property.

Third, lost rent for 19 months attributable to flooding, the installation of the windbreak and to negative externalities of bridge construction.

Fourth, reduction in value of property

Fifth, the cost of removing the piles.

As to the first category of damages, Defendant argues that Plaintiff cannot seek damages for the cost of repair for physical damage to its building caused by installation of the windbreak because Plaintiff plead a cause of action for trespass not negligence or property damage. However, a claim for trespass is based on intent, not negligence and encompasses physical damage caused by the trespass.

The SKE Defendants also argue that Plaintiff is not entitled to recover for damage to the building because it is a mere consequence of trespass, citing the case of *Costlow v. Cusimano*, 34 AD2d 196 [4th Dept 1970].

The SKE Defendants objection is misplaced because the damage is alleged to have been caused by the vibrations from the installation of the windbreak and thus resulted directly from the trespass. This damage is different from that in *Costlow* where the Court held that a claim of injury to reputation or for emotional disturbance by publishing photos after the trespasser left the property are not natural consequences of a trespass.

The installation of the windbreak on Plaintiff's property, if done without permission, itself constituted a physical invasion of the property inconsistent with Plaintiff's right of possession and any damage to the building caused by the vibrations which emanated from within Plaintiffs property by the installation are recoverable in an action for trespass (*see Volunteer Fire Association of Tappan v. County of Rockland*, 101 AD3d 853 [2d Dept 2012]).

As to the second category of damages alleging flooding caused by regrading of the streets, the redirection of water onto Plaintiff's property would constitute a trespass. (*Dellaportas v. County of Putnam*, 240 AD2d 358 [2d Dept 1997]; *Pilatich v. Town of New Baltimore*, 133 AD3d 1143 [3d Dept 2015]).

Negligence is not an element of trespass, which is based on an intentional invasion of another's interest in the exclusive possession of their land. (*Burk v. High Point Homes Inc.*, 22 Misc2d 492 [Sup Ct Nassau Cty. 1960]).

Any damage caused by that redirected water entering Plaintiff's property is a direct consequence of the trespass and thus recoverable. (*Volunteer Fire Association of Tappan v. County of Rockland*, 101 AD3d 853 [2d Dept 2012]).

Defendants also argue that the claim for damages from flooding should be stricken pursuant to CPLR 3126 based on spoliation, specifically that Plaintiff's tenant regraded the street before the SKE Defendants had a chance to inspect it.

As a preliminary matter, at this point, it is not clear whether Plaintiff's tenant actually regraded the streets or simply removed material that had been left on top off the street after the SKE Defendants regraded it. As discussed above, the deposition testimony of Carillo was inconsistent on that point. However, even if Plaintiff's tenant had changed the grading of the street from that which the SKE Defendants had left it, spoliation sanctions would not be appropriate.

Plaintiff's claim of flooding caused by regrading the street is based not in negligence, but in trespass; specifically that the SKE Defendants knowingly redirected water onto Plaintiff's property by raising the elevation of the street and not installing proper drainage. As it is the design of the street that is at issue, the SKE Defendants are not unduly prejudiced by an inability to inspect the streets after the work Plaintiff's tenants did.

The SKE Defendants were present on the site from the time they regraded the street until December of 2017 when the tenant is alleged to have restored the streets to their original condition. Paragraph 54 of Plaintiff's amended complaint, dated September 26, 2016, put the SKE Defendants on notice that Plaintiff was alleging that Defendants regrading of the street caused flooding of its property. Carillo also sent a letter to SKE dated September 28, 2017 complaining that their grading of the streets caused flooding to his property. Thus, the SKE Defendants had ample opportunity after the flooding claim was asserted to inspect the streets before the tenants work was performed.

Additionally, it was the SKE Defendants that designed and performed the grading of the streets and as such they would have design documents that memorialized the specifications concerning elevation, pitch, and drainage of their regrading of the streets. The SKE Defendants have not demonstrated that they do not have sufficient information

from their own records to be able to defend against Plaintiff's claims that SKE's regrading of the streets redirected water onto Plaintiff's property.

While the SKE Defendants may be liable for redirecting water onto Plaintiff's property when it regraded the streets, the Court has already held that the SKE Defendants are not liable for interference to the access of Plaintiff's property caused by their use of the streets.

A contractor working on the street pursuant to a public project is not liable for blocked access to private property unless the blocked access was total or the contractor was negligent. (see *MacArthur Properties, LLC v. Metro Transport Auth.*, 107 NYS3d 812 [Sup Ct NY Cty 2017] aff'd 81 NYS3d 897 [1st Dept 2018]; *Mishgy, LLC v. City of New York*, 17 Misc 3d 1132(A) [Sup Ct Kings Cty 2007]).

However, loss of access caused by the installation of the windbreak on Plaintiff's property or other activities of the SKE Defendants on Plaintiff's property, if done without permission, would be recoverable as damage for trespass.

Plaintiff's third category and fourth category of damages are apparently duplicative. The third category of damages is for lost rent from May of 2016 until January of 2018, attributed to flooding, the installation of the windbreak, and interference with access in and out of the property. Plaintiff's fourth category of damages is for diminution of value of the property caused by the trespass.

Plaintiff's appraiser calculates the diminution of value solely by deducting \$1,187,500 in lost rent, from June 2016 to January 2018, from the capitalized value of the property.

The SKE Defendants also seek to strike any claim for loss of value based on "negative externality of bridge construction on the grounds that such damages are not

actionable against a public contractor”. However, the phrase “negative externality of bridge construction” comes not from the complaint or bill of particulars but from Plaintiffs appraisal.

The appraiser stated that “A deduction must be made from the capitalized value (assuming no damage, site blocking, etc.) due to the loss of access and damage to the property. The property was in an unleaseable condition between June 2016 and January 2018, which represents 19 months of rent loss as a result of the negative externality of the bridge construction and associated effect on the property.”

The phrase negative externality of the bridge construction is not a separate category of damages but simply refers to the claims of physical damage to Plaintiff’s property and interference with access to the property.

As discussed above, any claim for loss of rent can not be based on interference with access from SKE’s use of street, but only on loss of access resulting from SKE Defendants’ use of Plaintiff’s property, from damage to the building, or from flooding of the property.

The SKE Defendants argue that damages in the categories of loss of rent and decrease in the property’s value should be limited to during the pendency of the injury, citing *Volunteer Fire Association of Tappan, Inc. v. County of Rockland*, 101 AD3d 853 [2d Dept 2012].

This argument has two components. First, that measure of damages should be limited to loss of rents or value rather than cost of repair, and second, that damages should be confined to a limited time frame.

The proper measure of damage to real property is the cost of repair or the loss of value whichever is lesser. (*DiLapi v. Empire Drilling & Blasting*, 62 AD3d 936 [2d Dept 2009]; *Property Owners Association of Harbor Acres v. Ying*, 137 AD2d 509 [2d Dept

1988)). A Plaintiff may seek the cost of repair, but the burden is on the Defendant to demonstrate that there is a lesser measure of damages that will adequately compensate the Plaintiff. (*Fisher v. Qualico Contracting Corp.*, 98 NY2d 534, [2002]; *Jenkins v. Etlinger*, 55 NY2d 35 [1982] *DiLapi v. Empire Drilling & Blasting*, 62 AD3d 936 [2d Dept 2009]; *Property Owners Association of Harbor Acres v. Ying*, 137 AD2d 509 [2d Dept 1988]). Thus, rather than limiting the Plaintiff from putting in evidence of the cost of repair, it is up to the Defendants to demonstrate that the diminution of value is less.

The SKE Defendants had also argued that the claim for diminution of value should be limited to the loss of use or decrease in the property's rental value during the pendency of the injury. However, in this case, the time frame of the injury has not been established. It has not been established whether all of the alleged trespasses have ceased. Plaintiff claims that there is still flooding from the regrading of the streets.

Defendants argue that any damages from the placement of the piles should be limited to the period up until Plaintiff denied Defendant access to remove the piles. However, Plaintiff's refusal to permit SKE to remove the piles goes to Plaintiff's duty to mitigate its damages. It is Defendant SKE's burden to demonstrate that Plaintiff unreasonably refused to allow Defendants to remove the piles and it is up to a jury to determine whether, in fact, the refusal was reasonable.

While the Court held above that Plaintiff's refusal to allow Defendants to remove the piles is a basis to deny it injunctive relief, at this point it has not been demonstrated that the piles can be removed without damaging the building. A jury could find that Plaintiff's refusal was not unreasonable in light of the dangers of removing the piles. In such event, Defendants could be liable to compensate Plaintiff for damages caused by the piles being permanently buried on its property.

WHEREFORE, it is hereby ORDERED that Plaintiff's motion for summary judgment is denied; and it is further

ORDERED that the Plaintiff's first cause of action is dismissed as to all Defendants; and it is further

ORDERED that Plaintiff's second caused of action is dismissed as against Defendants THE HONORABLE MATTHEW J. DRISCOLL, AS COMMISSIONER AND ON BEHALF OF THE NEW YORK STATE DEPARTMENT OF TRANSPORTATION and THE STATE OF NEW YORK; and it is further,

ORDERED that Defendants SKANSKA USA INC., KIEWIT INFRASTRUCTURE CO., AND E.C.C.O. ENTERPRISES, INC's motion to dismiss Plaintiff's second cause of action is denied; and it is further

ORDERED, that Defendants SKANSKA USA INC., KIEWIT INFRASTRUCTURE CO., AND E.C.C.O. ENTERPRISES, INC's motion for partial dismissal of Plaintiff's third cause of action is denied.

This constitutes the Decision and Order of this Court.

ENTER:



JSC