SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. CAROL EDMEAD** **PART** **35**

Justice

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SJWA LLC,SUSAN HAAR,

Plaintiff,

- v -

FATHER REALTY CORP., CHELSEA 7 CORPORATION D/B/A SEXY BOUTIQUE, JOHN DOE, JANE DOE, XYZ CORP.,

Defendant.

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INDEX NO. 152033/2019

MOTION DATE 02/01/2022, 02/01/2022, 02/01/2022

MOTION SEQ. NO. 004 005 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 168, 169, 170, 171, 172, 173, 174, 227

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 228, 234, 235, 236

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 229, 230, 231, 232, 233, 237, 238

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

Upon the foregoing documents, it is

ORDERED AND ADJUDGED that the motion of Defendant Chelsea 7 Corporation d/b/a "Sexy Boutique" ("Chelsea 7") seeking summary judgment pursuant to CPLR 3212 dismissing Plaintiffs SJWA LLC and Susan Haar's claim for depreciation of market value and request for attorney's fees, and specifying that certain facts can be established (Motion Seq. 004) in *SJWA LLC and Susan Harr v Father Realty Corp. and Chelsea 7 Corporation d/b/a "Sexy*

Boutique," Index No. 152033/2019 ("Action One") is partially granted to the extent that Plaintiffs' request for attorney's fees is dismissed, and is otherwise denied; and it is further

ORDERED AND ADJUDGED that the motion of Defendant Father Realty Corp. ("Father Realty") seeking summary judgment pursuant to CPLR 3212 establishing certain facts (Motion Seq. 005) in Action One is partially granted to the extent that Plaintiffs' request for attorney's fees is dismissed, and is otherwise denied; and it is further

ORDERED AND ADJUDGED that the branch of Father Realty's motion seeking summary judgment pursuant to CPLR 3212 dismissing Chelsea 7's crossclaims and granting Father Realty's crossclaims against Chelsea 7 is granted to the extent that Chelsea 7's crossclaims for contribution and indemnification are dismissed, and is otherwise denied; and it is further

ORDERED AND ADJUDGED that the branch of Father Realty's motion seeking dismissal of the entire action of *Argonaut Insurance Company as subrogee of SJWA v Chelsea Seven Corporation d/b/a Sexy Boutique Corp. and Father Realty Corp.,* Index No. 152460/2020, ("Action Two," Motion Seq. 002) is denied in its entirety, and it is further

ORDERED AND ADJUDGED that the motion of Plaintiffs seeking summary judgment pursuant to CPLR 3212 finding Defendants liable for trespass, private nuisance, and negligence, issuing a permanent injunction against Father Realty, and awarding Plaintiffs compensatory damages in the amount of $1,800,000 and ordering a trial on punitive damages, or, alternatively, ordering a trial on both compensatory and punitive damages (Motion Seq. 006) in Action One is

partially granted to the extent that the Court finds Defendants liable for trespass and private nuisance, and orders a trial on compensatory and punitive damages. It is further

ORDERED AND ADJUDGED that with respect to the branch of Plaintiffs' motion seeking a permanent injunction against Father Realty, Plaintiffs are directed to produce the requisite New York City Department of Environment Protection ("DEP") approval detailed in this Order within sixty (60) days, after which the Court will issue a supplemental order granting the permanent injunction. It is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for Plaintiffs shall serve a copy of this Order, along with notice of entry, on all parties within ten (10) days.

MEMORANDUM DECISION

In *SJWA LLC and Susan Harr v Father Realty Corp. and Chelsea 7 Corporation d/b/a "Sexy Boutique,"* Index No. 152033/2019, ("Action One"), Defendant Chelsea 7 Corporation d/b/a "Sexy Boutique" ("Chelsea 7") seeks summary judgment pursuant to CPLR 3212 dismissing Plaintiffs SJWA LLC and Susan Haar's claim for depreciation of market value and specifying that certain facts can be established:

1. Plaintiffs' claim for $2,900,000[1] in damages for depreciation of property value is not recoverable as it is not the lesser than the claimed repair and replacement costs;
2. Plaintiffs' alleged depreciation of value claims are purely speculative;
3. Plaintiffs may only recover the difference between their out of pocket costs and those costs paid to them by Argonaut Insurance Company;
4. Plaintiffs are not entitled to attorney's fees.

(Motion Seq. 004). Plaintiffs oppose the motion.

Defendant Father Realty Corp. moves for summary judgment, pursuant to CPLR 3212, dismissing Chelsea 7's crossclaims and granting its crossclaims against Chelsea 7 for breach of contract, breach of a lease, and indemnification, as well as specifying that certain facts can be established:

1. Prior to December 10, 2018, the cause of the backups was unknown;
2. Prior to December 10, 2018, Father Realty was not placed on notice of any backup or a condition within the Plaintiffs' building from a backup of the combined sanitary line;
3. In 2006, Todd Courtney, the prior owner of 304 W. 18 Street and Father Realty Corp., entered into a license with Father Realty the owner of the building at 155 8th Ave. N.Y.N.Y. with regard to a combined sanitary line leading to the City Sewer, and that the combined sanitary line was capped per order of the Court in April 2019;
4. Plaintiffs' claim for $2,900,000 in damages in depreciation of property value is not recoverable as it is not the lesser than the claimed repair and replacement costs;

[1] In their motion, Plaintiffs only seek $1,800,000 in compensatory damages for depreciation of property value.

5. Plaintiffs are precluded from recovering for $2,900,000 in damages for depreciation of property value, as it is speculative;
6. Plaintiffs are not entitled to attorney's fees.

(Motion Seq. 005). Plaintiffs oppose the branches of the motion related to its claims, and Chelsea 7 opposes the branches of the motion pertaining to the crossclaims.

Plaintiffs move for summary judgment pursuant to CPLR 3121, finding:

1. Defendants are liable for trespass;
2. Defendants are liable for private nuisance;
3. Defendants are liable for negligence;
4. Issuing a permanent injunction enjoining Father Realty from attaching any of its sewage lines to those sewage lines of the Subject Property located at 304 W. 18th Street;
5. Awarding Plaintiffs compensatory damages in the amount of $1,800,000.00 and ordering a trial on punitive damages or, in the alternative, ordering a trial on compensatory and punitive damages.

(Motion Seq. 006). Defendants both oppose.

In the related action *Argonaut Insurance Company as subrogee of SJWA v Chelsea Seven Corporation d/b/a Sexy Boutique Corp. and Father Realty Corp.,* Index No. 152460/2020, ("Action Two"), Father Realty moves for summary judgment pursuant to CPLR 3212 granting the same relief sought under Motion Seq. 005 in Action One, as well as dismissal of Action Two against it (Motion Seq. 002). Plaintiff Argonaut Insurance Company ("Argonaut") opposes.

The motions in the related actions are consolidated for joint decision.

BACKGROUND

On October 29, 2010, Plaintiffs purchased the Subject Property, a townhouse located at 304 West 18th Street in Manhattan, at a foreclosure sale (NYSCEF doc No. 179[2] at 2). Plaintiffs

[2] References to the NYSCEF record are made under Action One unless otherwise noted.

thereafter performed a gut renovation on the Subject Property, which included the finishing of the basement and the replacement of the Subject Property's plumbing systems (*id.* at 2-3). The plumbing system's renovation included an excavation of the basement and new sewage lines connecting to the main sewage lines running under the street (*id.*). According to Donald Smith, the interior designer that oversaw the gut renovation, the plumbing system was "completely replaced" and the new system "was not connected to active plumbing systems of any other properties" (NYECEF doc No. 80). Following completion of the renovation, the Subject Property's systems, including the new plumbing, were satisfactorily inspected by the City (NYCEF doc No. 8).

Plaintiffs moved into the Subject Property following the completion of the gut renovation in 2013. Plaintiffs experienced no issues with their plumbing until on or about November 15, 2018, when the Subject Property's basement became repeatedly flooded with "raw sewage, human waste, and excrement" that included, *inter alia,* "condoms, rubber gloves, and construction debris" (*id.* at 3). The sewage invaded the entire square footage of the Subject Property's finished basement, and eventually reached a height of six inches off the basement's floor (*id.*). The sewage stained and ruined numerous items of personalty in Plaintiffs' finished basement and soaked into sheetrock walls rising to a height of six feet (*id.*).

The sewage caused the Subject Property to be pervaded with noxious odors, rendering portions of the Subject Property unlivable and causing Plaintiffs to be temporarily constructively evicted (NYSCEF doc No. 4 at 7). Plaintiffs had listed the Subject Property for sale in November 2018 but took it off the market following the backups (*id.*).

On or about December 8, 2018, Plaintiffs contacted the New York City Department of Environmental Protection (DEP) to investigate the situation (NYSCEF doc No. 4 at 4). On or about December 10, 2018, a DEP inspector gained access to a building around the corner from the Subject Property, 155 8th Avenue ("155 8th"). 155 8th is owned by Defendant Father Realty, and Defendant Chelsea 7, a commercial tenant of Father Realty's, owns and operates an adult erotic shop known as "Sexy Boutique" on 155 8th's second and third floors (NYSCEF doc No. 179 at 4). The DEP inspector performed a "dye test" wherein he poured red dye into the sink in 155 8th's second floor bathroom. Plaintiffs and the DEP inspector found the red dye in the sewage when they returned to the Subject Property (NYCSEF doc No. 4 at 4). Plaintiffs thus came to believe that the materials in the basement sewage came from Sexy Boutique's bathroom.[3]

Along with the DEP, Plaintiffs also retained Super Rooter, a professional drain cleaning company. On December 11, 2018, Super Rooter's technician, Mr. Nelson Soto, snaked the house trap sewer line in the Subject Property's basement and "hydro jetted" from said house trap to 155 8th. Mr. Soto conducted a CCTV (Camera/Video) inspection wherein 46 linear feet of camera was inserted into the house trap to 155 8th that showed the Subject Property's sewer pipes were connected to those of 155 8th (NYSCEF doc No. 6). Mr. Soto performed another inspection on January 14, 2019 where he snaked the combined line multiple times to clear the blockage (*id.*).

Plaintiffs represent that, upon learning of the shared sewer line, they attempted to contact Father Realty. On December 10, 2018, Plaintiffs left a voicemail on a Pakistani phone number

[3] A member of Father Realty testified that it received complaints "that people were going up to [Sexy Boutique] to have sex and do drugs" (NYSCEF doc No. 153 at 36, l: 11-14), which Plaintiffs argue is the reason materials such as condoms ended up in the sewage. Chelsea 7 denies these allegations.

that Plaintiffs were told belonged to one of Father Realty's principals (NYSCEF doc No. 4 at 6). On January 14, 2019, Plaintiffs' counsel sent a Cease and Desist Letter to Father Realty, demanding that Father Realty immediately cease and desist from any actions causing the sewage backups, including any use of 155 8th's second floor bathroom (NYSCEF doc No. 16). The letter was delivered via hand delivery and FedEx to 155 8th (*id.*).

On February 26, 2019, after receiving no response from Father Realty, Plaintiffs commenced Action One, moving by Order to Show Cause for injunctive relief restraining Defendants from utilizing 155 8th's second floor bathroom until the source of the sewer backup was definitively determined and remedied (NYSCEF doc No. 32; Motion Seq. 001). Plaintiffs also sought an order allowing them to employ self-help and remedy the backups should Defendants fail to take proper action. The Court initialized the Order to Show Cause, approving an order staying Defendants from utilizing the bathroom pending the hearing and determination of Motion Seq. 001.

The backups continued, and by interim order dated April 25, 2019, this Court granted Plaintiff authority to temporarily cap access to the flow of plumbing from 155 8th to the Subject Property and directed the parties to engage in subsequent testing and inspections to definitively determine whether there was a definitive flow of plumbing (NYSCEF doc No. 63).

Plaintiffs then capped the shared sewage line, at which point the backups in the Subject Property's basement ceased (NYSCEF doc No. 176). At a site inspection held May 8, 2019, the parties and their respective experts conducted a joint inspection of the sanitary and storm water drain lines for the Subject Property and 155 8th (NYSCEF doc No. 140). Defendants' expert engineer, Mr. Leonard Parkin, described four drain lines in the Subject Premises, including the

now-capped shared drain line running beneath the Subject Property's basement floor to 155 8th (*id.* at 2).

At a conference held May 15, 2019, this Court stated "I think there's a sufficient basis to show that the problem is coming from (155 8th). That has been sufficiently shown, and it hasn't been refuted." (NYSCEF doc No. 74 at 10, l: 17-19). The parties proceeded to start discovery on Action One.

On March 5, 2020, Argonaut, Plaintiffs' insurer, commenced Action Two against Father Realty and Chelsea 7, seeking damages for payments made under its policy to Plaintiffs for remediation of the property damage, totaling $35,0814.18 (Index No. 152460/2020, NYSCEF doc Nos. 1, 69).

On November 12, 2020, Father Realty moved to consolidate both Actions given the overlapping events and factual issues involved (Action One, Motion Seq. 002/Action Two, Motion Seq. 001). The Court granted the motion for consolidation by order dated January 27, 2021 and directed that all parties would engage in combined discovery (NYSCEF doc No. 106).

On November 12, 2021, following the completion of all discovery in both actions, Plaintiffs filed the Note of Issue and Certificate of Readiness for Trial (NYSCEF doc No. 129).

The Instant Motions

As outlined at the beginning of the instant decision, Father Realty, Chelsea 7, and Plaintiffs have now all filed partial summary judgment motions seeking certain declarations of fact pertaining to the issues herein.

The 2006 License and Related Litigation

As will be further discussed *infra*, Father Realty's arguments now before the Court are premised on the notion that Father Realty's connection to Plaintiffs' sewer line was pursuant to an irrevocable license it maintained with the prior owner of the Subject Property, Mr. Todd Courtney.

In June 2006, Mr. Courtney commenced an action against BDG Construction Corp. ("BDG"), arguing that the Subject Property was damaged by negligent construction performed by BDG at 157-159 8th Avenue, the property next to Father Realty's (*Todd Courtney and 304 West 18, LLC v 18th & 8th LLC and BDG Construction Corp*) (NYSCEF doc No. 141). Among Mr. Courtney's causes of action was an allegation that BDG improperly severed a sanitary line that led both to the Subject Property and to 155 8th, causing sewage backup in both buildings (NYSCEF doc No. 132 at 4). At the time, 155 8th's commercial tenant was a restaurant named Bombay Bar & Grill ("Bombay").

Shortly after filing his complaint, Mr. Courtney was served with a DEP violation and ordered to repair his sanitary line (*id.* at 5). In July 2006, Mr. Courtney and Father Realty jointly hired Alex Figliola Corp. to run a new combined line and repair the severed sanitary line that led to both properties (*id*). The connected line was inspected by the City and approved on July 27, 2006 (NYSCEF doc No. 147).

In 2007, Bombay and Father Realty commenced their own action against BDG in this Court (*Amin Kahandakar d/b/a Bombay Bar & Grill and Father Realty Corp v 18th & 8th LLC and BDG Construction Corp;* Index No. 108498/2007). As Mr. Courtney did in his action,

Father Realty alleged that BDG disconnected the shared sewer line without proper notice, causing water and structural damage to Bombay. By Decision and Order dated September 8, 2011, this Court granted BDG summary judgment dismissing the complaint, finding, *inter alia*, that Father Realty could not establish a cause of action based on the severed sewer line shared with Mr. Courtney as it could not demonstrate its right to use the sewer line[4]:

> "Plaintiffs cannot establish they have a right to use this sewer line by either express grant (easement) and implied and/or easement by prescription. Moreover, as there was no record, in the chain of title, for any sewer easement, BDG, as a good faith purchaser, had no obligation to maintain any sewer line across its property for the benefit of plaintiffs. Thus, the entire action must be dismissed since the proximate cause of all the damages claimed relate solely to the severance of this subterranean sewer line"
>
> (NYSCEF doc No. 204 at 6).

The Expert Report

As discussed *infra*, Plaintiffs seek compensatory damages for diminution in value of the Subject Property.[5] In support, Plaintiffs have submitted the report of Michael Vargas, a Certified Real Estate Appraiser (NYSCEF doc No. 214).

In his report, Mr. Vargas opined that the stigma associated with the sewage flooding constituted a form of depreciation called "external obsolescence" and found that properties in the area with similar detrimental conditions were sold at discounts ranging from 20 to 50 percent (*id.* at 5). Mr. Vargas surveyed agents with expertise in the sale of townhouses and also looked at

[4] It is not clear from the record whether Mr. Courtney's similar claim about the severed sewer line in his separate action was ever adjudicated.
[5] The Subject Property was previously on the market, but Plaintiffs are waiting to relist it pending the outcome of the instant litigation (NYSCEF doc No. 132 at 16).

comparable recently closed sales and specifically determined that the market stigma for this kind of depreciation results in a 25 percent discount (*id.* at 5-6).

Mr. Vargas concluded that the value of the Subject Property without the market stigma was $6,500,000, but with the stigma incorporated, the value of the Subject Property was only $4,700,000, meaning the diminution in value was $1,800,000 (*id.*).

Father Realty's Motion

Father Realty argues that any of Plaintiff's claims sounding in trespass, negligence, and private nuisance arising prior to December 10, 2018 must be dismissed as Father Realty was not placed on notice of any backup or condition related to the combined sewer line prior to that date, and the cause of the backups was completely unknown. Father Realty additionally argues that Plaintiff's private nuisance claim is duplicative of the negligence cause of action. Father Realty further argues that it did not illegally tap into Plaintiffs' sewer line, as the combined sewer line was in fact installed pursuant to its 2006 agreement with Mr. Courtney. Father Realty argues that this agreement created an "irrevocable license," and its use of the combined sewer line was not improper despite Plaintiffs' lack of knowledge. Father Realty argues that Plaintiffs' damages must be reduced as plaintiffs in property damage actions are limited to the lesser of the decline in market value and the cost of restoration. While Plaintiffs assert repair costs totaling $70,253, Plaintiffs seek $1,800,000 as compensatory damages for deprecation, which Father Realty argues both is not the lesser of the two values and is also unduly speculative. Father Realty also argues Plaintiffs are not entitled to punitive damages.[6]

[6] Father Realty additionally argues Plaintiffs are not entitled to attorney's fees on this matter, which Plaintiffs do not oppose.

Father Realty also seeks summary judgment on its crossclaims against Chelsea 7, arguing that Chelsea 7 owes contractual indemnification pursuant to the terms of the commercial lease, and is also liable for breach of contract for failure to procure insurance. Additionally, Father Realty argues Chelsea 7's crossclaim for contribution must be dismissed as the backups were definitively caused by Chelsea 7's misuse of its bathroom, and Father Realty can have no liability as an out-of-possession commercial landlord. In opposition, Chelsea 7 argues that as Plaintiffs contend Father Realty improperly tapped into its sewer line long before Chelsea 7 leased its retail space, Chelsea 7 cannot be found liable for indemnity, and Chelsea 7 did not agree to indemnify Father Realty for damage caused to a neighboring property.

Father Realty additionally argues that Action Two[7] should be dismissed against it, on the ground that Argonaut seeks damages related to Plaintiffs' loss dated November 21, 2018, but Father Realty was without knowledge of misuse of Chelsea 7's bathroom prior to December 10, 2018, and that it cannot be liable for negligence as an out-of-possession landlord. Argonaut opposes, arguing that there are numerous issues of fact pertaining to the first date of Father Realty's actual or constructive notice of the sewer conditions. Argonaut further argues that under the terms of its lease with Chelsea 7, Father Realty maintained responsibility for 155 8th's plumbing and cannot evade liability on the ground that it is an out-of-possession landlord.

Plaintiffs' Motion

Plaintiffs argue that they are entitled to summary judgment on their trespass claim as Father Realty trespassed on the Subject Property by attaching its sewage line to Plaintiffs', and

[7] Of the three motions before the Court, only Father Realty's was filed under both Actions One and Two. Although also named as a defendant in Action Two, Chelsea 7 does not move for its dismissal.

that Chelsea 7 trespassed by negligently polluting the subject property with its sewage as to constitute willfulness. Plaintiffs argue that Father Realty is collaterally estopped from arguing it had an easement to use Plaintiffs' sewage line given this Court's findings in *Bombay*. Plaintiffs further argue that even assuming Father Realty is correct that it had a license with Mr. Courtney, the license terminated upon the conveyance of the Subject Property to Plaintiffs. Plaintiffs argue that as this is not an ordinary property damage case but one involving trespass, they are entitled to the diminution of the value of the Subject Premises (as opposed to just the costs of repair), and that this Court should either consider their expert's report, award $1,800,000 in compensatory damages, and order a trial on punitive damages- or alternatively, order a trial on both compensatory and punitive damages.

Along with their trespass claim, Plaintiffs also seek summary judgment against Defendants on their private nuisance claim based on their willful failure to remediate the sewage backups, and on their negligence claim based on Defendants' breach of their duty to prevent injury to neighboring property owners and causation of Plaintiffs' damages. Plaintiffs additionally seek a permanent injunction enjoining Father Realty from connecting to Plaintiffs' sewage lines.

Chelsea 7's Motion

Chelsea 7's motion adopts the arguments raised by Father Realty with respect to dismissal of Plaintiffs' claims for trespass, private nuisance, negligence, and diminution of market value and putative damages, and similarly argues that Plaintiffs' expert's report on the lost value is unduly speculative. While as discussed *supra*, Chelsea 7 opposes the branch of

Father Realty's motion related to the crossclaims, Chelsea 7 does not move for summary judgment granting its crossclaims or dismissing Father Realty's crossclaims.

DISCUSSION

Summary judgment is granted when "the proponent makes 'a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the proponent has made a prima facie showing, the burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also, DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Here, since each side seeks summary judgment, each side bears the burden of making a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Bellinson Law, LLC v Iannucci*, 35 Misc 3d 1217(A) (Sup. Ct., N.Y. County 2012], aff'd, 102 AD3d 563 [1st Dept 2013], *citing Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (*Alvarez,*

supra, Zuckerman v City of New York, 49 N.Y.2d 557 [1980] and *Santiago v Filstein*, 35 AD3d 184 [1st Dept 2006]).

The function of a court in reviewing a motion for summary judgment "is issue finding, not issue determination, and if any genuine issue of material fact is found to exist, summary judgment must be denied" (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, [1st Dept 2012]). Where "credibility determinations are required, summary judgment must be denied" (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, [1st Dept 2012]). Thus, on a motion for summary judgment, the court is not to determine which party presents the more credible argument, but whether there exists a factual issue, or if arguably there is a genuine issue of fact (*DeSario v SL Green Management LLC*, 105 AD3d 421 [1st Dept 2013] (holding given the conflicting deposition testimony as to what was said and to whom, issues of credibility should be resolved at trial)).

The Court writes first to address the arguments between Plaintiffs and Father Realty regarding whether Defendants are liable for trespass, negligence, and private nuisance as a result of the damage to the Subject Property.

Trespass

On a trespass claim, the plaintiff has the burden of proving by the preponderance of the evidence that the defendant made an intentional entry upon its property and that such entry was unauthorized. *State v. Johnson*, 45 AD3d 1016, 1019 (2007) (citing *Phillips v. Sun Oil Co.,* 307 N.Y. 328, 331 (1954); *Trustco Bank N.Y. v. S/N Precision Enters*., 234 A.D.2d 665, 667 [1996]). Liability may attach regardless of defendant's mistaken belief that he or she had a right to enter (*Johnson* at 1019). A party is liable for trespass onto an adjoining landowner's property via underground flowing of polluting material where such encroachment was willful or so negligent

as to amount to willfulness (*Phillips, supra,* at 331). While the defendant does not need to intend the encroachment or expect damaging consequences, the defendant "must intend the act which amounts to or produces the unlawful invasion, and the intrusion must at least be the immediate or inevitable consequence of what he willfully does, or which he does so negligently as to amount to willfulness" (*id.*). Therefore, New York courts have held that a defendant in a trespass claim related to sewage must have "good reason to know or expect" that its subterranean actions may pass on to the plaintiff's land (*id.*).

Father Realty

Plaintiffs argue that Father Realty satisfies the "intentional" element of trespass by illegally connecting its sewer line with Plaintiffs' sometime after Plaintiffs' gut renovation was completed in 2013. Plaintiffs stress that between 2013 and November 2018, there were no issues with the sewage until the flooding began on a regular basis, and therefore it is reasonable to infer that Father Realty intentionally connected the lines sometime before November 2018. With respect to Father Realty's argument about the 2006 license with the Mr. Courtney, Plaintiffs further note that this Court has already held in *Bombay* that Father Realty has failed to establish it has an easement to a shared sewer line, and that any license it may have had terminated upon the conveyance of the Subject Property. In opposition, Father Realty argues that the lines were never disconnected following the creation of the shared sewer line in 2006, and that the 2006 agreement constituted an "irrevocable" license allowing Father Realty to continue to use the shared line even after the sale of the Subject Property.

Father Realty also disputes Plaintiffs' interpretation of this Court's holding in *Bombay,* arguing that this Court made no finding of lack of easement between Father Realty and the Subject Property, but rather between Father Realty and BDG's building. This interpretation,

however, is belied by the Court's language immediately preceding its holding, which states "[Father Realty] testified that his sewer line was shared by a neighbor, Todd Courtney, on West 18th Street, New York, New York. They both shared in the cost of repairing this sewer line with plaintiffs paying 50% of the cost. Plaintiffs cannot establish they have a right to use this sewer line…" (Index No. 108498/2007, NYSCEF doc No. 26, at 6). In any event, this dispute is not dispositive to the Court's present analysis, as Father Realty has introduced no documentation of an easement but rather maintains it had an irrevocable license.

Although there are similarities between easements and licenses, "an easement implies an interest in land ordinarily created by a grant and is permanent in nature, while a license is a mere personal privilege to commit some act or series of acts on the land of another without possessing any estate therein" (*Zotos v Marketspan Corp.*, 288 AD2d 308 [2nd Dept 2001] [internal citations omitted]). Black's Law Dictionary states that a "License with respect to real property is a privilege to go on premises for a certain purpose, but does not operate to confer on, or vest in, licensee any title, interest, or estate in such property." As such, a license does not run with the land, and when a licensor conveys the land, the licensee's license is revoked and terminated (*In re Trustees of Village of White Plains*, 124 AD 1, 5 [1908]).

Father Realty argues that as it allegedly shared the cost in installing the 2006 shared sewer line, an irrevocable license was created. In support, Father Realty relies on *Prosser v Gouveia,* 98 AD2d 992 (4th Dept 1983), where the court ruled against a plaintiff seeking a judgment that her property was not subject to a shared water line. Father Realty relies on this case for the court's finding that defendants may have established they had an "irrevocable license coupled with an interest" which "may be found where there is an agreement founded on consideration and the licensee altered his or her position in reliance on the license" (*id.* at 993).

However, the court also found that plaintiff admitted she entered into an oral agreement regarding the water line. Here, Plaintiffs were not a party to the alleged oral agreement with Mr. Courtney.

Father Realty also cites to *Sabella v 927 Fifth Ave Corp.*, 250 AD2d 506 [1st Dept 1998]), wherein the court upheld the denial of the plaintiffs' motion directing defendants to remove part of an inner gate easement, finding that the license given for the erection of the gate by plaintiffs' predecessor in interest was supported by consideration and relied on by the defendant. However, the First Department critically found that there were "factual issues as to whether plaintiffs purchased the property in question subject to defendant's license" given that plaintiffs' title may have been acquired subject to the prior agreement (*id.* at 507). Here, Father Realty has introduced no evidence suggesting that Plaintiffs purchased the Subject Property subject to the 2006 license.

Father Realty thus has cited to no caselaw controverting the well settled legal principle that licenses do not bind subsequent purchasers that do not acquire their property subject to said licenses. Therefore, while the Court finds Father Realty's representation that a license was created in 2006 with Mr. Courtney to be plausible, and the license may have been irrevocable *as to Mr. Courtney* given that Father Realty paid consideration, the license is still not binding on Plaintiffs, given that there is no evidence that Plaintiffs had notice of the license and purchased the Subject Property subject to the same.

Father Realty also has not introduced evidence refuting the affidavit of Plaintiffs' home renovation designer, Donald Smith, who attested that at the completion of the gut renovation, the Subject Property's plumbing "was not connected to active plumbing systems of any other properties" (NYECEF doc No. 80). Father Realty's only response to this claim is a reference to

the report of its expert, Leonard Parkin, who attests that at the May 2019 inspection of the Subject Property, there were four drain lines found, including one connected to 155 8th (NYSCEF doc No. 140). While Father Realty ostensibly quotes this report to show that the line was always connected and not reconnected after 2013, Mr. Parkin does not opine on when the shared line was connected or if the connection was ever severed.[8] Father Realty's failure to rebut Mr. Smith's affidavit supports an inference that Father Realty reconnected its sewer line at some point after Plaintiffs purchased the Subject Property.

Ultimately, regardless of whether Father Realty left its shared line intact or reconnected the line some in between 2013 and 2018, Father Realty's connection to Plaintiff's sewage lines is trespassory as any permission Father Realty may have had to connect the lines expired when the Subject Property was conveyed in 2010. Furthermore, Father Realty was on actual notice of the trespass at least as of December 10, 2018, after the dye test was conducted.

Given that the flooding in Plaintiffs' basement was the "inevitable consequence" of Father Realty improperly using a shared sewer line, and Father Realty represents that the line was always connected,[9] the Court finds that Father Realty is liable for trespass for all flooding that occurred in the Subject Property.

Chelsea 7

Plaintiffs argue that Chelsea 7's actions with respect to the material flushed in its plumbing system constitute gross negligence, such that its actions amounted to willfulness and resulted in trespass.

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[8] Father Realty also advances no hypothesis to explain, *assuming arguendo* the shared line was always connected, why the backups suddenly commenced in November 2018. While Father Realty blames the backups on Chelsea 7, Chelsea 7 had been operating its store for several years prior to November 2018.

[9] As Father Realty represents it maintained a shared line with the Subject Property from 2006 through 2019, it is liable for trespass for the backups that occurred prior to the first date of notice. Father Realty's misunderstanding of the law is not an excuse for its trespassory connection to the Subject Property.

As discussed *supra*, a defendant in a trespass action need not intend or have actual full knowledge of the encroachment, but rather must intend "the act which amounts to or produces the unlawful invasion, and the intrusion must at least be the immediate or inevitable consequence of what he willfully does, or which he does so negligently as to amount to willfulness" (*Phillips* at 331). While Chelsea 7 is correct that ordinarily, even negligent use of its own bathroom would not amount to a willful trespass of a neighboring property, Chelsea 7 was, at the latest, on notice that its sewage was polluting the Subject Property as of January 14, 2019, when Plaintiffs sent the Cease and Desist Letter.[10]

Chelsea 7 argues that it "was in its best interest" to maintain working toilets for its customers, and argues it took reasonable mediation steps such as posting signage telling users not to throw trash or throw paper towels in the toilet (NYSCEF doc No. 230 at 2). However, the fact remains that it was ordered by this Court to cease use of its bathroom in February 2019, and yet the backups continued until the shared line was capped in April 2019. Chelsea 7 cannot argue that the pollution of the Subject Property was not the "immediate or inevitable consequence" of its refusal to adhere to this Court's order to cease use of its bathroom, one month after it first received notice of the pollution. Chelsea 7's defense that, as a retail store, it was obligated to maintain a public restroom notwithstanding the commencement of this litigation is both unpersuasive and unsupported.

Therefore, the Court finds that Chelsea 7 is liable to Plaintiffs for trespass for all pollution of the Subject Property that occurred after January 14, 2019.

[10] Although Father Realty was on notice following the December 10, 2018 dye test, it is not clear that Chelsea 7 was informed of the results. The Cease and Desist Letter is thus the first evidence of notice to Chelsea 7 that is before the Court.

Private Nuisance

A private nuisance is an interference with the use or enjoyment of one's land. It is actionable by the individual person or persons whose rights have been disturbed (*Copart Indus., Inc. v Consol. Edison Co. of New York*, 41 N.Y.2d 564, 568, [1977] [internal citations omitted]). The Court of Appeals has held that the elements of private nuisance are "(1) an interference substantial in nature, (2) intentional in its origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, and (5) caused by another's conduct in acting or failing to act" (*id.* at 570). A cause of action alleging private nuisance is distinguishable from a cause of action alleging trespass in that trespass involves the invasion of the plaintiff's interest in the exclusive possession of its land, while a private nuisance involves the invasion of the plaintiff's right to the use and enjoyment of its land (*Volunteer Fire Assn of Tappan, Inc v County of Rockland*, 101 Ad3d 853 (2nd Dept 2012).

Here, the Court finds Father Realty and Chelsea 7 are liable to Plaintiffs for private nuisance based on their unreasonable failure to mitigate the conditions after being put on notice by, respectively, the December 10, 2018 test and Plaintiff's January 14, 2019 Cease and Desist Letter[11]. The Court limits its finding to after Defendants were on actual notice as the "intentional" prong of private nuisance requires that the actor "a) acts for the purpose of causing it; or (b) knows that it is resulting or is substantially certain to result from his conduct" (*Copart, supra,* at 571). As discussed under Plaintiffs' trespass claim, the failure of Defendants to remediate the conditions even after being put on notice constitutes a level of negligence that amounts to willfulness. Plaintiffs have also demonstrated that Defendants' conduct interfered

[11] In contrast to Plaintiffs' trespass claim, the parties did not advance separate arguments for private nuisance and negligence. Defendants' sole argument against Plaintiff's nuisance claim is that they lacked notice of the conditions of the first backups (NYSCEF doc No. 167 at 14).

with their right to use and enjoy the land, given that Plaintiffs were effectively forced to temporarily vacate the Subject Property until the backups abated due to the odors, and that the sewage caused significant damage to fixtures and other items of personalty. The sewage also interfered with Plaintiffs' right to sell the Subject Property in 2018, as Plaintiffs could not reasonably be expected to keep the Subject Property on the market once the backups started.

Accordingly, the Court holds that Father Realty is liable for private nuisance for all backups that occurred after December 10, 2018, and Chelsea 7 is liable for all that occurred after January 14, 2019.

Negligence

To establish negligence, a plaintiff is required to prove: "the existence of a duty, that is, a standard of reasonable conduct in relation to the risk of reasonably foreseeable harm; a breach of that duty and that such breach was a substantial cause of the resulting injury" (*Baptiste v New York City Tr. Auth.*, 28 AD3d 385, 386 [1st Dept 2006] citing, inter alia, *Palsgraf v Long Is. R.R. Co.*, 248 NY 339 [1928] [other citation omitted]).

Plaintiffs argue that Defendants breached their duty to prevent causing injury to neighboring property owners. Defendants argue that Plaintiff's nuisance and negligence claims are duplicative, and Plaintiffs should be limited to recovering for one harm.

A nuisance based on negligence is a single harm, whether characterized as negligence or nuisance (*Copart,* supra, at 569). Where a nuisance arises solely from negligence, "the nuisance and negligence elements may be so intertwined as to be practically inseparable" (*Murphy v Both*, 84 AD3d 761 [2nd Dept 2011]). Therefore, the plaintiff may recover for only one harm suffered, "regardless of how the causes of action are denominated" (*id.* [internal citations omitted]).

Here, Plaintiffs' argument regarding negligence essentially mirrors its argument regarding private nuisance- mainly, that Defendants allowed sewage to backup into the Subject Property and failed to abate it, leading to damages to Plaintiffs' Subject Property and furnishings, and depriving Plaintiffs of use and enjoyment of the Subject Property. Additionally, Plaintiffs characterize Defendants' actions as "gross negligence" (NYSCEF doc No. 178 at 15). Plaintiffs do not argue that Defendants acted with malice involving intentional wrongdoing, but merely that their negligent conduct amounted to a reckless disregard of Plaintiff's property rights (NYSCEF doc No. 238 at 7-8). Therefore, Plaintiffs' private nuisance cause of action appears to arise solely from negligence, and there is no need for separate recovery.

Accordingly, the Court finds that while Defendants acted negligently, Plaintiffs are not entitled to summary judgment on their negligence claim, and said claim is dismissed from this matter as Plaintiffs will instead recover on their nuisance claim.

Damages

The Court now addresses the parties' arguments with respect to the amount of compensatory and punitive damages, if any, that should be awarded to Plaintiffs.

Compensatory Damages

Defendants argue that Plaintiffs' compensatory damages should be limited to the cost of repairing the Subject Property, as the general measure for damages "for permanent injury to real property is the *lesser* of the decline in market value and the cost of restoration" (*Jenkins v Etlinger,* 55 NY2d 35, 39 [1982] [emphasis added]). However, the measure of damages for a continuing trespass that causes permanent injury to property is the "loss of market value, or the cost of restoration" (*Volunteer Fire Assn. of Tappan, Inc, supra,* at 857). Unlike with normal

property damage actions, there is no requirement that the lesser of the two damages be awarded. Notwithstanding this distinction, a plaintiff seeking damages for lost market value must demonstrate that the property suffered a "permanent injury," i.e. " a permanent diminution in the fair market value" of the property (*Behar v Friedman,* 180 AD3d 671, 676 [2020]). Unsupported speculation about potential lost value is insufficient to establish a permanent injury and limits damages to the cost of restoration (*id.*)

As this Court has now adjudicated that Defendants are liable for trespass, Plaintiffs are not limited to the cost of restoration per se, but most prove that the Subject Property suffered a permanent loss of value to be entitled to additional compensatory damages. [12]

The Court now addresses Defendants' argument that this Court should not consider the report of Mr. Vargas' Plaintiffs' expert appraiser since Mr. Vargas was not previously disclosed as an expert pursuant to CPLR 3101(d). Plaintiffs argue that the Court may still consider the report pursuant to CPLR 3212(b), which states: "[w]here an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court *shall not* decline to consider the affidavit because an expert exchange pursuant to [CPLR 3101(d (1)(i)] was not furnished prior to the submission of the affidavit." (CPLR 3212[b] [emphasis added].) However, Mr. Vargas' report was not submitted as a sworn affidavit, but rather as an appraisal "report" (NYSCEF doc. 214). Plaintiffs are thus correct that the unsworn report constitutes inadmissible hearsay not properly before the Court on a motion for summary judgment (*See Arce v 1704 Seldon Realty Corp.*, 89 AD3d 602 [1st Dept 2011]).

This dispute, however, is largely academic, as even were the Court to consider Mr. Vargas' report, it would decline to award lost market value damages pursuant to its findings. Mr.

[12] A plaintiff can also seek damages for the loss of use and enjoyment of property during the pendency of the injury even if no permanent loss is found (*id.* at 674), but Plaintiffs here do not seek "loss of use" damages.

Vargas states the Subject Property will permanently suffer from "external obsolescence" caused by the stigma of the sewage backups. Mr. Vargas states that he arrived at his determination by comparing the conditions of the Subject Property with determinantal conditions on other properties. However, he does not identify the determinantal conditions on the other properties in contrast with the conditions on the Subject Property, and it is thus unclear how he determined that the Subject Property would be subject to a 25% devaluation. Additionally, Mr. Vargas' report is dated August 1, 2021, and states that the "estimated reasonable exposure time required to achieve the opinion of as-is value is 12-18 months." Given that Plaintiffs do not plan to relist the Subject Property until the conclusion of this litigation, Mr. Vargas' report, assuming it was properly before the Court, would still be unduly speculative given the high likelihood of a different value for the Subject Property when it is eventually listed. Mr. Vargas' report also does not go into sufficient detail about why the stigma of the sewer backups will affect the Subject Property on a permanent basis, notwithstanding the fact that the shared line has been disconnected.

Therefore, the Court finds that the matter of compensatory damages for lost market value, if any, shall be determined at trial, where Defendants will have the opportunity to cross-examine Mr. Vargas and introduce testimony from their own real estate appraiser, such that the jury can reach a proper determination on the amount, if any, of permanent lost market value that the stigma of the sewage backups has caused the Subject Property. Should the jury determine that Plaintiffs cannot establish a permanent loss of market value based on the now repaired sewage backups, and there is thus no "permanent damage" to the Subject Property, Plaintiffs' compensatory damages shall be limited to the cost of repair.

Punitive Damages

"A party seeking to recover punitive damages for trespass on real property has the burden of proving that the trespasser acted with actual malice involving intentional wrongdoing, *or* that such conduct amounted to a wanton, willful, or reckless disregard of the party's right of possession" (*Arcamone-Makinano v. Britton Prop., Inc.*, 156 AD3d 669, 673 [2017]; *see also Litwin v Town of Huntington*, 248 AD2d 361, 362 [1998] [emphasis added]).

Defendants argue that punitive damages are not recoverable as "there is no evidence of actual malice" (NYSCEF doc No. 224 at 5). This argument is obviously contradicted by the above caselaw, and as discussed extensively above, the Court has determined that both Defendants acted with negligence amounting to a willful disregard of Plaintiffs' property rights after they were respectively put on notice of the backups.

Plaintiffs additionally argue that Chelsea 7 should be further subject to punitive damages given that they "allowed customers to behave in a way that far exceeds basic decency" (NYSCEF doc No. 238 at 8). The Court finds this argument superfluous and prejudicial, given that the (unsubstantiated) allegations of illicit activities in Chelsea 7's store do not directly bear on the instant proceeding. While Plaintiffs are entitled to punitive damages from Chelsea 7, it is solely Chelsea 7's failure to cease its improper bathroom use after being noticed that supports the Court's finding.

Accordingly, the Court directs that the matter of punitive damages owed by Defendants based on their disregard of Plaintiffs' right of possession shall be determined at trial.

Permanent Injunction

The final relief sought by Plaintiffs herein is a permanent injunction enjoining Father Realty from connecting to Plaintiffs' sewer lines.

The Court of Appeals has held that in cases of ongoing trespass, "where the injury is permanent in character, and the damages resulting therefrom continuous in their nature, and especially where, from the nature of the act and the injury suffered, it is impossible, or difficult, to ascertain and determine the extent of the injury which may flow from a continuance of the wrong, an injunction is the proper remedy" (*Poughkeepsie Gas Co. v Citizens' Gas Co.*, 89 NY 493, 497 [1882]).

Here, Plaintiffs argue that a permanent injunction is warranted based on Father Realty's trespass, and the fact that Father Realty was unable to remediate the flooding until the shared line was capped per the Court's order. In opposition, Father Realty states that Plaintiff has provided no requisite DEP filing certifying that the line will be properly capped with a cap installed and certified by the DEP (NYSCEF doc No. 220 at 2). Father Realty notes it would not oppose Plaintiffs' application should Plaintiffs provide proof of proper DEP filing, but none has been submitted in connection with the instant motions. Plaintiffs did not address this matter in their reply.

The Court thus directs Plaintiffs to, within sixty (60) days, submit proper proof of DEP approval of the permanently capped line. Following review, the Court will issue a supplemental order granting the permanent injunction.

Attorney's Fees

Defendants seek an order finding that Plaintiffs are not entitled to attorney's fees. Plaintiffs have asserted a claim for attorney's fees but do not develop this claim with any support in their papers, nor do they respond to Defendants' application. Attorney's fees are generally not recoverable unless authorized by agreement between the parties or by statute or court rule (*Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12, 21-22 [1979]).

Therefore, the Court grants the branch of Defendants' motions seeking a finding that Plaintiffs are not entitled to recover attorney's fees.

Crossclaims

The Court now writes to address the branch of Father Realty's motion seeking summary judgment on its crossclaims against Chelsea 7 for contractual indemnification and breach of contract, and dismissal of Chelsea 7's crossclaims for indemnity and contribution.

Contractual Indemnification

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.,* 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.,* 32 NY2d 149, 153 [1973]; *see also* Tonking *v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]). "In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability" (*Correia v Professional Data Mgt.,* 259 AD2d 60, 65 [1st Dept 1999]; *see also Murphy v WFP 245 Park Co., L.P.*, 8 AD3d 161, 162 [1st Dept 2004]). Unless the indemnification clause explicitly requires a finding of negligence on behalf of the indemnitor, "[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia,* 259 AD2d at 65).

Father Realty argues that under the terms of its lease with Chelsea 7, Chelsea 7 is obligated to indemnify it for all damages owed to Plaintiffs. In opposition,[13] Chelsea 7 argues it

[13] Chelsea 7's opposition papers were filed March 10, 2022, after February 28, 2022, the date for opposition stipulated by the parties. Father Realty thus argues that the Court must decline to consider its arguments (NYSCEF doc No. 236). The Court, however, has discretion to consider the arguments in the untimely opposition papers given that Father Realty filed a reply affidavit fully responding to the arguments (NYSCEF doc No. 234) and thus was not prejudiced (*See* CPLR 2004, 2214; *Lawrence v. Celtic Holdings, LLC,* 85 AD3d 874, 875 [2011]).

never agreed to indemnify Father Realty for damages to neighboring properties, and the provisions are thus inapplicable.

The 2017 Lease

The retail lease entered between Father Realty and Chelsea 7 on April 1, 2017 ("the 2017 Lease") provides that Chelsea 7 shall maintain in good condition and order all "plumbing, water, waste, heating….that serve only the Premises" (NYSCEF doc No. 155 at 14, Section 10.3). Chelsea 7 was obligated to maintain "any plumbing fixtures within the Premises (including sinks and toilets), and the plumbing lines, valves and pipes connected to or running from such fixtures to the point at which such lines, valves and pipes connect with the Building's common plumbing lines" (*id.*).

Exhibit D to the 2017 Lease is a list of Rules to be followed by Chelsea 7 during its tenancy. Rule 4 states:

> "Tenant shall not use the bathrooms or other Building systems or any plumbing fixtures for any purpose or in any manner other than for the purposes and in the manner they were intended to be used, and *no rubbish, rags, paper towels or other inappropriate materials shall be thrown therein*. Tenant shall keep the interior heat in the Premises at such a level that pipes will not freeze in the winter months. Any and all damage resulting from any failure to comply with the foregoing requirements shall be borne by the tenant who, or whose agents, employees, contractors, visitors, or licensees have, caused such damage."
>
> (*id.* at 38 [emphasis added]).

Section 23.9 of the 2017 Lease states:

> "Tenant shall not perform or permit to be performed any act which may subject Landlord, its partners, members, managers, shareholders, officers, directors and principals or Landlord's managing agent, if any, to any liability. Tenant shall, *to the extent not caused by the negligence or willful misconduct of Landlord* or its contractors or agents, indemnify, defend and hold harmless Landlord and Landlord's managing agent, if any, from and against all (a) claims arising from any act or omission of Tenant, its subtenants, contractors, agents, employees, invitees or visitors, (b) claims arising from any accident, injury or damage to any person or property in the Premises or any adjacent walkway during the Term or when Tenant is in possession of the Premises, and (c) Tenant's failure

> to comply with Tenant's obligations under this lease (whether or not a Default), and all liabilities, damages, losses, fines, violations, costs and expenses (including reasonable attorneys' fees and disbursements) incurred in connection with any such claim or failure."

(*id.* at 30 [emphasis added]).

Father Realty represents that pursuant to the above provisions, it is entitled to full indemnification from Chelsea 7 as Plaintiffs' damages were caused by Chelsea 7's misuse of its plumbing. However, this Court has now adjudicated that the backups were caused both by Chelsea 7's misuse and by the trespassory shared line that Father Realty improperly maintained in connection with the Subject Property. Plaintiff's damages thus resulted not just from Chelsea 7's use of its bathroom but also Father Realty's own negligent misconduct. Under the 2017 Lease, it appears Chelsea 7 is liable for violating Rule 4 with respect to improper materials being flushed and allegedly using the bathroom for unintended purposes, but said violation is not the sole cause of Plaintiffs' damages. It is thus unclear to what extent Chelsea 7 owes indemnity considering Father Realty's separate negligence. Furthermore, while Chelsea 7 was obligated to maintain the plumbing that served "the Premises" in good condition, the "Premises" is defined as only the Second and Third Floors of 155 8th (*id.* at 3). There is no allegation here that Chelsea 7 caused any damage to its own bathroom's plumbing, notwithstanding the fact that inappropriate materials were flushed. Rather, all damage alleged occurred in Plaintiffs' property, and nothing in the 2017 Lease supports the inference that Chelsea 7 assumed full liability for neighboring properties' plumbing pursuant to a trespassory shared line installed by its landlord that predates the 2017 Lease and was not disclosed.

Therefore, the language of the provisions and the "surrounding facts and circumstances" of this matter simply do not support summary judgment for full contractual indemnification at

this juncture (*Margolin*, *supra*, at 153). The amount of indemnification, if any, owed to Father Realty must be determined by the trier of fact.

Accordingly, Father Realty's claim for summary judgment on its contractual indemnification claim is denied, and the matter shall proceed to trial.

The Court now turns to Father Realty's claims that Chelsea 7 is additionally liable for breach of contract based on its failure to procure insurance, and failure to remedy past building code violations incurred under its prior tenancy.

Failure to Procure Insurance

Section 13.1 of the 2017 Lease states as follows:

> "Tenant shall, at Tenant's expense, maintain at all times… (a) commercial general liability insurance…on an occurrence basis, with a combined single limit (annually and per occurrence and location) of not less than three million ($3,000,000) dollars naming as additional insureds Landlord and any other person designated by Landlord… Such liability insurance shall include contractual liability, fire and legal liability coverage."
>
> (NYSCEF doc No. 155 at 17).

In support of its argument that Chelsea 7 breached its obligation, Father Realty has submitted a letter dated June 26, 2019 from Chelsea 7's insurer, United States Liability Insurance ("US Liability") declining to agree to defend Father Realty in connection with Plaintiffs' action (NSYCEF doc No. 157). US Liability states:

> "The "Additional Insured - Managers Or Lessors Of Premises" (CG2011) endorsement (the "Additional Insured Endorsement") provides additional coverage to Father Realty for liability arising out of the ownership, maintenance, or use of the Chelsea Premises. Plaintiffs allege damages caused by improperly connected sewer lines which are external to the Chelsea Premises. To the extent any of Plaintiffs damages do not arise out of the ownership, maintenance or use of the Chelsea Premises, US Liability has no obligation to provide coverage to Father as an additional insured under the policies for the Haar Order to Show Cause."
>
> (*id.* at 9).

This argument alone, however, is insufficient to render summary judgment in Father Realty's favor. If an insurance company refuses to indemnify under the coverage purchased, a party is not liable to another for breach of contract for the failure to procure insurance as long as that party "fulfilled its contractual obligation to procure *proper insurance* on behalf of" that other party (*Martinez v Tishman Constr. Corp.,* 227 AD2d 298, 299 [1st Dept 1996] [emphasis added]; *see also Perez v Morse Diesel Intern., Inc.*, 10 AD3d 497, 498 [1st Dept 2004] [denying a breach of contract for the failure to procure insurance claim because "[t]he insurer's refusal to indemnify Morse Diesel under the coverage purchased by Property Resources does not alter this conclusion"]).

Here, a copy of Chelsea 7's Additional Insured policy with US Liability has not been submitted to the Court separately from the denial letter. Therefore, the Court is unable to determine whether the policy Chelsea 7 purchased with Father Realty named as an Additional Insured properly satisfied the requirements set forth in the 2017 Lease and thus constituted "proper insurance" notwithstanding US Liability's refusal to indemnify Father Realty. Accordingly, Father Realty is not entitled to summary judgment on its breach of contract claim for failure to procure insurance at this juncture.

Past Violations

The Court next addresses Father Realty's argument that Chelsea 7 is additionally liable for breach of contract based on its failure to remediate past City violation that were issued to Chelsea 7 under its preceding lease. Father Realty alleges that Chelsea 7's renovations conducted during its prior tenancy, between 2014 and 2017, resulted in a number of DOB violations that have not been cured. Father Realty cites to Section 25.2 of the 2017 Lease, which states:

> "Tenant represents, that Tenant was in possession of and occupied the building prior to the commencement date of this lease. Tenant agrees to remain exclusively liable for any

> and all violations, penalties fees/costs, issued and or imposed by any local, county, city, state or federal agencies, with regards to Tenants prior occupancy of the building, which are in existence as of the commencement date of this lease. Tenant agrees to remedy any and all such violations, penalties fees/costs, at Tenants sole expense, to satisfaction of the issuing agency and the Landlord, on or before March 31, 2018."
>
> (NYSCEF doc No. 155 at 31).

Chelsea 7 argues that the violations alleged do not related to Plaintiff's claims and are not properly before the Court. However, under CPLR 3019(b), a crossclaim need not arise out of the same transaction or occurrence as the plaintiff's claim or otherwise be related. Rather, codefendants may assert any claims they have against each other.

Nevertheless, Father Realty's argument that Chelsea 7 failed to cure all prior violations is not supported by any evidence beyond the deposition testimony of Father Realty's representatives (see NYSCEF doc Nos. 152 at 24-31, 153 at 43-44, 89-93). Chelsea 7 disputes this account, arguing that the violations were for 155 8th's first floor, not the floors Chelsea 7 leased, and that Chelsea 7 made payments related to its work (NYSCEF doc Nos. 237 at 16 and 154 at 84).

Given the conflicting accounts between the parties and lack of evidence as to payment or lack thereof for specific violations, the matter of Chelsea 7's breach for failure to cure past violations, if any, must be determined at trial. (*See DeSario v SL Green Management LLC*, 105 AD3d 421 [1st Dept 2013] (holding given the conflicting deposition testimony and issues of credibility should be resolved at trial]).

Father Realty's claim for summary judgment on breach of contract against Chelsea 7 is thus denied in its entirety.

Chelsea 7's Crossclaims

The Court now discusses the branch of Father Realty's motion seeking dismissal of Chelsea 7's crossclaims for indemnity.

"To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (*Perri v Gilbert Johnson Enters., Ltd.,* 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.,* 259 AD2d at 65]); *see also Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 484 [1st Dept 2010]). In other words, a claim for common-law indemnification is actionable only where a party has been found to be "vicariously liable without proof of any negligence . . . on its own part" (*McCarthy v Turner Constr., Inc.,* 17 NY3d 369, 377-378 [2011]).

In contrast to indemnification, which requires a finding of no liability, common law contribution derives from the equitable theory "that one who is compelled to pay more than his aliquot share of an obligation upon which several persons are equally liable is entitled to contribution from the others to obtain from them payment of their respective share" (*Green Bus Lines, Inc. v Consol. Mut. Ins. Co.,* 74 AD2d 136, 148, [1980]). Pursuant to CPLR 1402, the amount of contribution to which a tortfeasor is entitled shall be "the excess paid by him over and above his equitable share of the judgment recovered by the injured party."

Here, the Court has already adjudicated that Chelsea 7 and Father Realty are both liable for damages in trespass and private nuisance amounting from gross negligence based on their failure to remediate the sewer backups and has ordered a trial on punitive and compensatory damages. Therefore, Chelsea 7's indemnification claim is meritless, and its contribution claim is

superfluous, as the proper allotment of damages between the two defendants will be determined at trial.

Therefore, the branch of Father Realty's motion seeking dismissal of Chelsea 7's crossclaims is granted.

Action Two

The Court now separately writes to address the branch of Father Realty's motion seeking dismissal of Action Two, the subrogation action commenced by Argonaut, Plaintiffs' insurer.

Father Realty argues Action Two should be dismissed as Plaintiff's first date of loss to Argonaut was November 21, 2018, but the first notice to Father Realty was December 10, 2018. Father Realty further argues it cannot be liable for Chelsea 7's bathroom misuse that caused the November 2018 backup as an out-of-possession landlord .[14] Argonaut, in opposition, maintains that Father Realty has not met its *prima facie* burden of dismissal given the numerous outstanding questions of fact pertaining to Father Realty's first constructive notice of the plumbing issues, as well as Father Realty's responsibilities under its retail lease.

In light of the Court's determinations under Action One, Father Realty's application to dismiss Argonaut's subrogation action is clearly without merit. As discussed extensively, the backups that began on the Subject Property in November 2018 were caused not only by Chelsea 7's misuse of its bathroom, but *also* by Father Realty's trespassory combined sewer line. While the Court has held that Father Realty is liable for private nuisance only after the agreed upon date

[14] "An out-of-possession landlord is generally not liable for negligence with respect to the condition of property . . . unless [it] is either contractually obligated to make repairs and/or maintain the premises or has a contractual right to reenter, inspect and make needed repairs at the tenant's expense and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision"(*Sapp v S.J.C. 308 Lenox Ave. Family L.P.*, 150 AD3d 525 [1st Dept 2017]).

of first actual notice, December 10, 2018, it is liable in trespass for all backups caused to the Subject Property given that it represents it maintained a connection to the Subject Property beginning in 2006, which became trespassory once Plaintiffs purchased the Subject Property in 2010. Liability for trespass may attach regardless of defendant's mistaken belief that he or she had a right to enter (see *Golonka v. Plaza at Latham,* 270 AD2d 667, 669 [2000]). While as discussed *supra,* there are questions of fact regarding whether Chelsea 7 owes partial indemnification to Father Realty based on its misuse of its own plumbing, Father Realty is still separately liable to Plaintiffs based on its trespass. Therefore, although the first date of loss, November 10, 2018 predates Father Realty's actual notice of the backups, Argonaut may pursue its subrogation action against Father Realty as the November 10, 2018 backup was caused in part by Father Realty's trespass.[15]

Given that Father Realty's trespassory connection to the Subject Property constitutes separate grounds for Father Realty's liability beyond Chelsea 7's misuse of its plumbing, the Court need not reach Father Realty's argument that it can have no liability to Argonaut for the damages as an out-of-possession landlord. Regardless, the Court notes that under the terms of the 2017 Lease, Father Realty reserved the right to use any part of the building at any time for any purpose, including renovations and improvements, and maintained control of Chelsea 7's business hours and operational standards (*See* NYSCEF doc No. 155, Sections 3 and 17). Chelsea 7 was also not allowed to make any changes of any sort to the premises absent Father Realty's consent (*id.* at Section 5). These provisions raise questions of fact as to the complete

[15] Argonaut details numerous Stop Work Orders issued by the DOB from 2016-2018 as further evidence that Father Realty had constructive notice of issues with the building's plumbing prior to the backups (NYSCEF doc No. 69 at 9-10). Father Realty disputes the applicability of these Orders. This dispute, however, is not germane to the Court's determination that Father Realty is liable due to its trespass, and thus not addressed.

scope of Father Realty's retention of rights under the 2017 Lease,[16] rendering dismissal for Father Realty as an-out-of-possession landlord prematurely speculative at this juncture even *assuming arguendo* Father Realty was not separately liable for trespass.

Therefore, the branch of Father Realty's motion to dismiss Action Two is denied, and Argonaut's subrogation action against Defendants shall proceed to trial.

Factual Findings

The Court finally notes that, in view of the determinations of law and identifications of open factual issues detailed in this decision, Chelsea 7 and Father Realty's applications for specific findings of fact are denied, with the aforementioned exception of this Court's finding that Plaintiffs are not entitled to attorney's fees.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED AND ADJUDGED that the motion of Defendant Chelsea 7 Corporation d/b/a "Sexy Boutique" ("Chelsea 7") seeking summary judgment pursuant to CPLR 3212 dismissing Plaintiffs SJWA LLC and Susan Haar's claim for depreciation of market value and request for attorney's fees, and specifying that certain facts can be established (Motion Seq. 004) in *SJWA LLC and Susan Harr v Father Realty Corp. and Chelsea 7 Corporation d/b/a "Sexy*

[16] When a landlord retains contractual obligations beyond the mere right of reentry, the landlord is deemed to have not relinquished control of the property, and constructive notice of a defective condition may be imputed even in the absence of a specific statutory violation (*(see Ritto v Goldberg,* 27 NY2d 887, 889 [1970]; *Dimas v 160 Water St. Assoc.,* 191 AD2d 290 [1993]; *Del Giacco v Noteworthy Co.,* 175 AD2d 516, 518 [1991]).

Boutique," Index No. 152033/2019 ("Action One") is partially granted to the extent that Plaintiffs' request for attorney's fees is dismissed, and is otherwise denied; and it is further

ORDERED AND ADJUDGED that the motion of Defendant Father Realty Corp. ("Father Realty") seeking summary judgment pursuant to CPLR 3212 establishing certain facts (Motion Seq. 005) in Action One is partially granted to the extent that Plaintiffs' request for attorney's fees is dismissed, and is otherwise denied; and it is further

ORDERED AND ADJUDGED that the branch of Father Realty's motion seeking summary judgment pursuant to CPLR 3212 dismissing Chelsea 7's crossclaims and granting Father Realty's crossclaims against Chelsea 7 is granted to the extent that Chelsea 7's crossclaims for contribution and indemnification are dismissed, and is otherwise denied; and it is further

ORDERED AND ADJUDGED that the branch of Father Realty's motion seeking dismissal of the entire action of *Argonaut Insurance Company as subrogee of SJWA v Chelsea Seven Corporation d/b/a Sexy Boutique Corp. and Father Realty Corp.,* Index No. 152460/2020, ("Action Two," Motion Seq. 002) is denied in its entirety, and it is further

ORDERED AND ADJUDGED that the motion of Plaintiffs seeking summary judgment pursuant to CPLR 3212 finding Defendants liable for trespass, private nuisance, and negligence, issuing a permanent injunction against Father Realty, and awarding Plaintiffs compensatory damages in the amount of $1,800,000 and ordering a trial on punitive damages, or, alternatively, ordering a trial on both compensatory and punitive damages (Motion Seq. 006) in Action One is

partially granted to the extent that the Court finds Defendants liable for trespass and private nuisance, and orders a trial on compensatory and punitive damages. It is further

ORDERED AND ADJUDGED that with respect to the branch of Plaintiffs' motion seeking a permanent injunction against Father Realty, Plaintiffs are directed to produce the requisite New York City Department of Environment Protection ("DEP") approval detailed in this Order within sixty (60) days, after which the Court will issue a supplemental order granting the permanent injunction. It is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for Plaintiffs shall serve a copy of this Order, along with notice of entry, on all parties within ten (10) days.

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7/8/2022
DATE

CAROL EDMEAD, J.S.C.

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