Kimball v Bay Ridge United Methodist Church
2022 NY Slip Op 33078(U)
September 12, 2022
Supreme Court, Kings County
Docket Number: Index No. 506107/2015
Judge: Debra Silber

At a Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, New York on the 12th day of September, 2022

PRESENT: HON. DEBRA SILBER
JUSTICE, SUPREME COURT

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DAVID S. KIMBALL and DORCAS C. KIMBALL,

Plaintiffs,

DECISION AFTER TRIAL
Index No. 506107/2015

-against-

BAY RIDGE UNITED METHODIST CHURCH,

Defendant.

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This is an action between formerly adjacent property owners for damage allegedly caused to plaintiffs' property by defendant. This action was commenced on May 18, 2015. The amended verified complaint [Doc 91] was filed on October 20, 2017, more than two years after this action was commenced. It sets forth one cause of action, Private Nuisance. The answer to the amended complaint [Doc 94] includes a counterclaim for Trespass. Plaintiffs replied to the counterclaim [Doc 96]. A bench trial was conducted on eight dates from January 24, 2022 to February 7, 2022. Part of the trial was conducted in the courtroom, part was conducted virtually, on consent. Some of the witnesses testified virtually, on consent. At the end of the trial, defendant's counsel moved for judgment, pursuant to CPLR 4401, dismissing the complaint based upon defendant's affirmative defense of the statute of limitations. The court reserved decision, as the attorneys had not provided any opening statements, closing statements, pre-trial briefs, or anything to

indicate what the legal issues were in the case. Then, counsel for both sides requested permission to submit written summations, which the court granted. The date set for submission was March 14, 2022. Both sides stipulated [NYSCEF Doc 343] to extend this date to March 31, 2022. On March 28, 2022, they stipulated to extend this date to April 14, 2022. Further stipulations took the final submission date to August 1, 2022, when the case was fully submitted and decision reserved.

Both sides waived opening statements. This is always a mistake, as the court must then discern the theory of the case and the theory of the defense from the testimony and exhibits as the trial proceeds. Plaintiffs each testified and called one witness, an engineer. Defendant called four witnesses, one of which is an engineer. Plaintiffs admitted approximately seventy-five exhibits. Defendant emailed about one hundred documents to the court, then only admitted about a dozen into evidence.

FINDINGS OF FACT

The plaintiffs are husband and wife. They purchased their home at 360 Ovington Avenue, Brooklyn, NY in 1994. It is a limestone row house in Bay Ridge. The very similar house to the east, then known as 362 Ovington Avenue, which shared a party wall with their home, was owned by the defendant when they bought their home in 1994, and was used as a parsonage and office for the defendant Church. The Church, then known as the "Green Church" because of the green serpentine stone it was made of, was located a little further east on the block, with a parking lot in between the parsonage row house and the Church. The easternmost side of the Church property was on Fourth Avenue. The property was an irregularly shaped parcel on the corner, roughly 225 feet by 178 feet. The Church building apparently had a number of structural issues, and its board decided to

tear it down, and to also demolish the parsonage adjacent to the plaintiffs' house, as well as all of the other structures on the site. The demolition took place in November of 2008.

The court takes judicial notice that the Church applied for court approval to sell all of its real property of this location, pursuant to a purchase agreement dated March 29, 2007, as is required by statute. The purchase agreement, included in the court file (Ind. 43305/2007), is more complex than the typical real estate transaction. One of the provisions is that $500,000 of the down payment would be released to the Church once the Church obtained the required approvals, as defined therein. The purchaser was to be a residential developer, to take title as "362 Ovington LLC, and the testimony was that its principal was a man named Abe Betesh. The Church's *ex parte* application was granted on January 9, 2008, by Justice Martin, and provides that the sale, for a purchase price of $9,750,000 was approved, with the net proceeds to be used "to fund the construction and operation of the New Church Facilities (as defined and described in the Petition) and to create a trust/endowment fund . . . [to support] the Petitioner's annual operational budget. . . enhancing local services to the elderly and children, supporting ecumenical and interfaith ministries in Brooklyn, supporting global ministries and supporting United Methodist ministries in New York." Annexed to the petition is a copy of the minutes of the 6/11/07 meeting of the Church Conference, which approved the sale. Plaintiff Dorcas Kimball's mother, Rachel Cortizo, was on the Church Council at this time. It, and the Board of Trustees, run the individual defendant Church. The Conference is a regional body. The District Superintendent, Gunshik Shim, sent a letter to the [then] pastor of defendant Church, Robert Emerick, dated 10/17/07, also annexed to the petition, which states that on behalf of the Long Island West District of the New York Conference of the United Methodist Church, he gives his permission to proceed with the sale and to develop

plans for the new building. Annexed to the petition is a copy of the contract of sale, which provides that the Church, as seller, "shall cause the demolition of the main Church Building, and the removal and carting of all debris therefrom, at Purchaser's sole expense, prior to Closing." To be clear, this agreement provided that the Church would deliver a vacant lot to the purchaser, but would use the purchaser's funds to accomplish this.

However, testimony that was given during the trial indicated that the Church did not actually sell the property to the prospective purchaser disclosed in the application to the court, because the purchaser had "financial problems" in the financial crisis of 2008. The contract of sale with the developer was amended, apparently, then Mr. Betesh assigned his contract, and defendant sold it to the NYC School Construction Authority by deed dated 9/11/2009. The School Construction Authority bought a smaller piece of property than was in the first contract with the developer. They retained the parsonage site and part of the parking lot. They did not return to court for approval of the revised sale. The court asked defendant's counsel about this, (Tr. 2/7/22 P. 896) but was not given any information.

At the trial, the testimony was that there are now only thirty-five members of this Church. They rent a space for worship and bought a parsonage elsewhere.[1] There is now a school building on the site where the Church was, and a "for sale" sign on the site where the parsonage and parking lot was. The Church originally took title to the property in 1907.

The plaintiffs each testified about their personal knowledge of the events that transpired. Dorcas Kimball testified first. She described the years of misery she and her

[1] At 39 Mackay Place, Brooklyn, NY.

husband endured as their home was slowly damaged by rainwater after the demolition of the parsonage, as it seeped into the exterior walls, into the basement and down from the roof. She authenticated many of the photos which were introduced into evidence. The first twenty exhibits admitted [Ex 1-20] consist of approximately one hundred photos taken by plaintiffs from 2008 to 2015, as they documented the damage to their home, and, in 2009 and commencing in the summer of 2015, they documented the work they had performed to repair the damage. Dorcas Kimball testified that there was no pre-demolition (of the Church building) inspection of her home done by the Church, and no written agreement between plaintiff and the Church regarding the demolition work. The Church structure was demolished first, in October 2008, and vibrations from the work caused cracks to her house, which she testified that she complained to the Church about. The parsonage was demolished next, which left plaintiffs' party wall exposed to the elements, and which also left plaintiffs' roof and chimney exposed, as the flashing, capping tiles and parapet wall were all altered so they did not provide the proper protection to the house, she testified. She took most of the photos that were introduced into evidence during her testimony.

David Kimball testified next. Chronologically, the first document in evidence is a letter from the Church's attorneys to the plaintiffs [Ex. 21] dated January 4, 2008, which states that "the demolition work will be done by licensed professionals in accordance with applicable law. In the unlikely event that your adjacent premises were to be damaged in any manner whatsoever as a result of the aforesaid demolition work, the Church's seven million dollar insurance policy on the Property would be sufficient to cover any and all loss to you resulting therefrom."

Exhibit 23 is the response to this letter from plaintiffs' counsel[2], dated 1/8/08, which states in part that the plaintiffs and Dorcas Kimballs' parents went to meet with the Board of Trustees and the Pastor on 1/7/08 and wanted to learn details of the Church's plans and to urge the Church not to demolish the parsonage in order to build a new church building. The writer indicates that the Kimballs did not receive any information at or after the meeting about the plans, and so he provided a list of the items they wanted to see, such as the contract of sale, construction plans, insurance information, the names of the contractors, and other information which the plaintiffs had requested. The minutes of this meeting of the board of trustees was admitted as plaintiffs' Ex 82.

Mr. Kimball testified that the response his lawyer received is Ex 23A, dated February 12, 2008, which repeats the statement in Ex 23 about the insurance, and says "the Church has an absolute right, as owner of the Property, to perform the demolition work, provided that such Demolition Work is handled by licensed professionals in accordance with applicable law and pursuant to a duly issued demolition permit."

Plaintiffs' Ex 83 are the minutes of the Church Council meeting held on 2/12/08. Dorcas Kimball's mother, Raquel Cortizo, and her father, Jorge Cortizo, were on this board at that time. The minutes reflect that the Church had located a building to purchase for the new parsonage, and they had obtained court approval for the sale of the Church. Raquel Cortizo stated, and requested that it be reflected in the minutes, that her daughter's house will suffer damage during the demolition of the parsonage, "with 100% certainty." These minutes also reflect that the Church's Board of Trustees was unhappy with the interaction between the Kimballs and the trustees at the meeting of the trustees held on January 8, 2008, and had decided that plaintiffs' attorneys should talk to the

[2] It must be noted that this attorney is not the plaintiffs' current attorney.

Church's attorneys and that they should not have any further direct communication with the Kimballs. Plaintiffs' Ex 84 is a copy of the minutes of the meeting of the Church Council held on March 31, 2008. Raquel Cortizo again brought up the Kimballs' concerns about the demolition. Pastor Emerick is quoted as saying "we will take every precaution. If there is any damage, it would have to be repaired in a timely fashion. We took out an insurance policy to cover any damages."

Apparently, the parties agreed at some point for an inspection to be conducted of the plaintiffs' home, and the Church agreed, according to Mr. Kimball, to pay for it. Mr. Kimball said the Church's attorney recommended the engineer. His name is Joseph Pasaturo, he is a licensed engineer, and the fee for the inspection was $1,500. His invoice was admitted as Plaintiffs' Ex. 74. His report was admitted as defendant's CC in evidence. It is dated 10/31/08. He did a "visual inspection" on 10/30/08, before the parsonage demolition work began, and he took some photos, which are attached to his three page report. He states that the demolition of the church building on the corner did not cause structural instability to the plaintiffs' home, but did cause cracks in the plaster walls, which "will need to be repaired." He also says in the report that the demolition of the church building caused cracking and chipping of the cement-based coating on the rear exterior brick wall of plaintiffs' home. He recommended that the brick be re-pointed, rather than re-coated. Mr. Pasaturo next states that the removal of the parsonage, an identical limestone house which shared a party wall with plaintiffs' house, "can cause significant damage to the subject property if not properly done. The brick party wall between the houses was not designed to be a free standing exterior wall, which is what it will become once the adjacent property is demolished. The exterior of this wall will also need to be

waterproofed below grade to prevent water infiltration into the cellar." He recommended that "crack monitors be installed . . . [to] determine if the building moves during demolition operations and how much. It is also recommended that a licensed design professional be contacted to design the proper modification to the party wall so that it can act as a free standing exterior wall after the adjacent building is taken down." The testimony demonstrated that his recommendations, many of which are required by the Building Code, were not followed.

On November 2, 2008, the Church's Board of Trustees had a meeting and the minutes were admitted as plaintiffs' Ex 85. The board decided at this meeting that plaintiffs had not been working with them in good faith, had made "outlandish" demands, and had not "cooperated" with the Church, so the Church would thereafter only do what is legally required. The minutes say, "if they continue with their outlandish demands, they will have to fight in court for them, which will cost them money."

A few days later, on 11/5/08, Mr. Kimball wrote to the NYC Department of Buildings to express his concerns about the demolition, which defendant Church had obtained a permit for. A copy was admitted as defendant's Exhibit AA. The Buildings Department did come to the site, but it is not clear whether they did anything in particular. Then, on December 7, 2008, after the demolition, Mr. Kimball wrote a letter to John Donlan, President of the Board of Trustees of the defendant Church, admitted as plaintiffs' Ex. 27. He asks to be reimbursed for the engineer (Mr. Pasaturo), and points out that the Building Code, in particular, "Section 3309.8 states very clearly the obligation of the Church to have a registered design professional investigate the stability and condition of the party wall and take all necessary steps to protect such wall. In addition, section 3309.9 addresses the obligation to weatherproof the integrity of the adjoining building.

Also, related to it, the front and back edges of the party wall where it meets the front and back walls need to be finished. Right now, we have unsightly jagged edges." Mr. Kimball testified that he did not receive any response to this letter. The demolition permit was issued to Christopher Lickman of Cavalier Construction Services Corp. on 10/24/2008. Mr. Lickman's brother Kenneth Lickman testified at the trial, discussed below.

Mr. Kimball testified that after the adjacent property was demolished, his family spent the whole winter "without any insulation and it was freezing," and "water was entering into the basement" from the now-exposed (east-facing) wall.

The court has re-arranged the evidence into chronological order. This is why the exhibit numbers jump around. The next item in evidence (not including the numerous photographs) is a heavily redacted copy of the minutes from the Church Council meeting held on January 13, 2009 [Ex 86]. One puzzling part says "The school authority has expressed an interest in buying the property that Abe owns. They are taking readings and samples. . . . But Abe has it until September. Our contract is with Abe. Whoever buys it from Abe – he collects and gives us our amount." Exhibit 87 are the minutes from the 4/23/09 meeting of the Church Council, also heavily redacted. Raquel Cortizo reported that 360, the Kimballs' home, "has a lot of cracks in the walls. Somebody has to be responsible to repair that." As this was only a few months after the demolition, the water damage had not become an urgent issue yet, or perhaps that part was redacted.

There is nothing else in evidence for 2009 until plaintiffs' Ex 28, a letter from the Church dated July 7, 2009, responding to plaintiffs' request for access to the property to do work on the exterior wall to stop water from entering the basement of plaintiffs' house. The letter says "please contact our attorney in writing. . . You will not be granted access until our attorney has reviewed your request."

The Church apparently granted the plaintiffs access, and plaintiffs' Ex 75 is an agreement with a company called A. Malek Contracting, Inc., which was engaged by plaintiffs in September 2009 to work on the exterior of the building. Specifically, the company was hired to apply stucco to the eastern wall of the building ("slurry coat of lime base cement followed by buildup scratch coat cement and smooth finish same area with lime base mortar") and then "apply Thorocoat over new stucco." Apparently, Thorocoat is a brand name. In addition, the company was tasked with applying wire mesh and stucco to the basement wall.

Mr. Kimball testified that nothing else happened in 2009, other than the ongoing water infiltration, which did not stop after the work that was done by A. Malek. The plaster was falling off the walls inside the rooms, mold was forming, it was damp and cold. The items they had stored in the basement were ruined. He testified that he learned that the demolition site was not graded away from his home, as it should have been, and the rainwater was pouring into his basement. Additionally, the roof flashings had not been properly adjusted once the adjacent building was removed, and water was coming from the roof into the east wall. The Kimballs concluded that the south wall, which had cracked and chipped as a result of the Church building demolition, needed to be repaired, and they hired Abbasi General Construction Corp. ("Abbasi") to do this work. The paid receipt and proposal [June 2010] are plaintiffs' Ex 76. It says they would "remove and replace all cracked bricks, repair peeling and cracking cemented stucco, will apply gray color Thorocoat, paint the top wooden cornice, seal all the window jams." Access for this work was from the plaintiffs' back yard. Also in 2010, Mr. Kimball testified that the plaintiffs had their roof membrane replaced.

Mr. Kimball testified that he contracted with Abbasi again, for work on the east wall, in June 2012, two years later, as the work done by Malek was not keeping the water out. Plaintiffs' Ex 32 is the contract he signed for the work, dated 6/13/12. It is for work on the foundation wall on the east side, to be done from scaffolding, and work to the basement walls. Mr. Kimball testified that the Church allowed Abbasi to inspect the property so it could do a proposal for the work. Abbasi agreed to obtain all necessary permits for the work, and Mr. Kimball paid a deposit of $15,000 towards the contract price of $36,200.00. The cancelled check is the last page of plaintiffs' Ex 76. Plaintiffs' Ex 90 is a copy of a letter from Mr. Kimball to John Donlon, dated June 3, 2012. It says, [plaintiffs' Ex 90] in pertinent part, "we will need access once again when the contractors' team comes back to do work on the wall and foundation of the house. Due to the uneven terrain of the Church property, rainwater slides down into our property and against our wall and foundation. In the years since the parsonage demolition, the water has not only ruined our wall, gone under the wall, and broken through the basement floor, but it has affected the foundation to the point that this matter needs to be urgently taken care of. Cracks have appeared on the wall as the walls shift. Water is also coming into the wall through them [the cracks]. This has resulted in efflorescence and mold along the interior side of the wall." Mr. Kimball testified that the Church would not consent to the work being done, so a permit could not be issued by the Department of Buildings (hereafter "DOB"). Abbasi engaged an architect to prepare the plans. Mr. Kimball wrote a letter to John Donlon, President of the Board of Trustees for the Church, dated 6/28/12, plaintiffs' Ex 91, which describes the work that the plaintiffs wanted to do to waterproof their house. One of the tasks was to excavate around the base of the plaintiffs' property, on the site of the demolished parsonage, to waterproof the foundation. Attached to the letter was the DOB

application form the Church needed to sign for the permit. On 7/6/12, Mr. Kimball wrote to Mr. Donlon again, and said "we don't have the luxury of waiting. . . . we're forwarding e-mails from our architect and contractor. . . It is only after this work is done that we can begin to repair the cracks on the wall and address and repair the many problems on the inside of the wall. There are too many safety and health issues to wait."

On June 18, 2012, the Church Board of Trustees met and the minutes are plaintiffs' Ex 88. They discussed the plaintiffs' letter and concluded "we should just refer them to our lawyer." On July 25, 2012, they met again, and the minutes are plaintiffs' Ex 89. They reflect that they interviewed a new attorney and discussed the pros and cons of granting access to the plaintiffs. As they were thinking they would be starting construction on the new church building shortly, the minutes state "We had told the Kimball's [sic] we would waterproof their property at the time of the demolition, but they refused it. We think it best to stretch this out until we start construction." Mr. Kimball then began corresponding by email directly with the Church's new attorney. On 9/13/12, the attorney wrote to Mr. Kimball and said "The last hurdle they had with the NYC DOB was resolved. The architect indicated to me that the construction work will resolve any issues with your foundation." [Plaintiffs' Ex 42]. Mr. Kimball responded "given the eleven weeks that have passed since we submitted our original request, the pastor and trustees . . are indifferent to the danger we face as the result of the damage to our foundation." The emails continued [plaintiffs' 45 and 46]. On October 21, 2012, the Church Council met, and the redacted minutes were admitted as plaintiffs Ex 92. It was acknowledged by their guest, Mr. Berg, their new architect, that the building permit had not yet been issued, that the issue holding it up was something about the ventilation system. Mrs. Kimball's mother Raquel Cortizo brought up the issue of the plaintiffs' house, and the minutes say "we have

retained an attorney and we are doing everything required by law. We tried to do more than required but our efforts were only met with hostility." The rest is redacted. The Church Council met on December 10, 2012, and the minutes [Ex 93] state that the architect said they still did not have a permit, and there was an outstanding item regarding the sewer connection, and the bathrooms had to be redesigned, and other items were also still outstanding. The rest of the minutes are redacted. Mr. Kimball testified that he has never seen any plans or permits for the new church building. It must be noted that plaintiffs had still not come to court for an access order or to sue for damages.

In 2013, it seems nothing took place until the fall. On September 23, 2013, the Church Council met, and the minutes were admitted as plaintiffs' Ex 97. The unredacted part related to plaintiffs' home says, "Mr. Donlon reported that there will be a meeting with the Dept. of Buildings on October 2, 2013, and then we can apply for the permits." It seems that perhaps the Board of Trustees, which Raquel Cortizo was not a member of, was more hostile to plaintiffs than the Church Council, which she was a member of. The remainder of the 9/23/13 minutes state, in full, the rest having been redacted:

> Raquel Cortizo and her daughter, husband and family need our help. After we took down the Parsonage they had had some water leakage problems and are suffering from mold. This was brought up to the Trustees previously; nothing has been done, and we now need to plan to take some action to help them in fixing their townhouse. It seems that, as part of the demolition, the lot, our Church property, should have been leveled to prevent leakage. It started out only as a crack, but it has since grown larger. There was some discussion previously between the trustees and the Kimballs, Raquel's daughter and her husband, who own the home. They wanted to have their own contractor do the work to shore up the side wall. They asked us for permission to go on our lot to do some of this work. We were afraid that this would hold up our construction; however, in hindsight—our construction was held up anyway and this could have been done a long time ago! But what can we do now to remedy this problem? The Kimballs had given the trustees two proposals to have this work done. They are not asking us to pay for the work. We need to have a letter from them and to know which plan they

> want to use and a time frame for the work. The pastor said that when we build it will shore up the wall on the side of their townhouse and that the problem will be resolved when we build. However, we need to have a meeting soon with the architect, contractor, and engineer to discuss this and how it can be resolved to help the Kimballs. We want to get this done for them, to be Good Neighbors. We are concerned. They need help in fixing their house. Raquel brought a letter from her daughter and her husband and she showed us pictures of the damage, leakage and mold that they are suffering from.

On October 15, 2013, the Board of Trustees had a meeting, and the minutes were admitted as plaintiffs' Ex 99. The meeting was about the Kimballs. The Board had received the Abbasi proposal to waterproof their outside wall, on the east side "next to" the Church's property. Their architect and contractor were present. The architect said the proposal was not specific enough. The Church's contractor, Chris Lickman, had stopped working at Cavalier, (the demolition company), and had started a new corporation named C.S. Scott Enterprises Corp. which was to be the contractor for the new church building. The Pastor asserted that "everything should be done through our lawyer." He added "we should stop trying to work with the Kimballs and just do everything we must do legally." It is stated that Pastor Emerick "clarified with [the architect] that it is a party wall, which should be waterproofed before the work begins." One board member, Frank Breuer, said "we should have everything in writing." They still did not have a permit for the construction of the new church building, and the architect expected it would take a few more weeks. It took almost two more years, the court notes.

On November 12, 2013, Mr. Kimball sent a letter to the Board of Trustees, plaintiffs' Ex 50, which states that it had been a month since the letter he had sent requesting that the Church sign-off on the DOB permit application, and noting that "the onset of inclement weather only makes the repairs more difficult. . . When can our crew begin to do the job that should have been done in the first place before the failure to

properly grade the property led to the damage to the foundation?" He did not receive a response to this letter, he testified.

On December 2, 2013, Christopher Lickman, on behalf of C.S. Scott Enterprises Corp., wrote to plaintiffs by certified mail, that "as the owner of record of an adjacent building . . . please be advised . . . that a permit application will be submitted to the NYC Department of Buildings for construction of the new building at the above address." The Department of Buildings website indicates that a permit was issued to Christopher Lickman of C.S. Scott Enterprises for a new building, a house of worship, Job number 320253872, with the first permit issued on 6/22/15. It was renewed a few times, and the last renewal expired on 9/28/20. The approved plan, which they had obtained the permit for, had an eight foot space between the two buildings, as required by the Building Code. The Church's understanding that the new building would abut the plaintiffs' building and end the water infiltration was clearly erroneous.

There were no documents admitted into evidence which reflect what, if anything, occurred in 2014. The court must conclude that nothing happened that year with regard to the plaintiffs' house. Since the 2008 demolition, the church and the parsonage have been located elsewhere. The Church's retained property was a vacant lot. Mr. Kimball testified that he and his wife were not granted access to the Church's property in order to repair their home, despite their numerous requests. They ultimately hired a lawyer, who went into court in 2015 to obtain an order granting them access. Under Index number 6153/2015, on May 15, 2015, the Kimballs brought a petition for a license pursuant to RPL §881, for access to do the work which they had obtained a contract for, and paid a $15,000 down payment for, in June 2012. Their petition was granted on June 17, 2015, by Justice Knipel. His order states that petitioner could work from 6/28/15 to 8/31/15, with

leave to move to extend the period of access, if needed. The parties were back in court in a matter of weeks, and Justice Knipel issued an order dated July 14, 2015 which states "Order to Show Cause for Temporary Restraining Order granted only to the extent that respondents are prohibited from taking any actions that in any way interfere with work permitted in relation to petitioner's building in order of this court dated 6/17/15. Cross motion to vacate order of 6/17/15 is denied." They were back in court again in October, and an order was issued (J. Knipel) on October 7, 2015 that states "Upon the credible evidence adduced at this hearing, the license herein in extended thru 11/13/15." The Church's cross motion, to terminate the license, was again denied.

On June 23, 2015, the NYC Buildings Department, issued a violation on the Church's property. Plaintiffs' attorney attempted to enter it into evidence as Ex 100, but it was not a certified copy and defendant's attorney objected. Mr. Donlon was shown this document during his testimony, and he said he did not recognize it. Plaintiffs' attorney then asked the court to take judicial notice of it, and the court declined to do so. However, it is available on the NYC Department of Buildings' website, and the court probably should have agreed to take judicial notice of it.[3] It is violation number FEU31001FF and states:

> "BLD DEMOLISHED UNDER PERMIT (JOB#31020513)
> & SIGNED OFF @ 12/06/08. THE SITE IS FILLED W/LOOSE
> MATERIAL & OLD CONTRUCT DEBRIS. THE SITE IS NOT
> PROPERLY LEVEL W/A DROP OF ELEVATION. THE OWNER HAS TO
> ENGAGE A NYSPE ENGINEER TO EVAL THE DRAINAGE OF THIS
> PROPERTY & PROVIDE PLANS/PERMITS TO PROPER DRAIN THE
> LOT AS PER NYC BLD CODE NO LTR THAN JULY 21, 2015."

The remainder of the evidence admitted by plaintiff during David Kimball's direct

[3] This is not a settled issue. See Hutter, Judicial Notice of Website Information, NYLJ 6/2/16; 1 New York Evidence Courtroom Manual § 3 (2021).

testimony consists of contracts, receipts and cancelled checks for the work plaintiffs had done in 2015. Also admitted were the cancelled checks for the pre-2015 work discussed above. Plaintiffs' contractors obtained the needed permits in 2015. The total amount the plaintiffs spent is $453,339.87. This of course does not include attorneys' fees.

The plaintiffs' engineer, Michael Schuller, P.E. testified after the plaintiffs. He is a structural engineer and is President of his firm, called Atkinson-Noland & Associates. They do a lot of work with historic buildings, he testified. He described the method of constructing row houses at the time these were built. The horizontal beams are the supporting beams, connected through the party walls, and the front and back facades are not supporting walls. The end houses of row houses have an "end wall" which is different than a party wall. A party wall is two bricks thick, while an end wall is three bricks thick, to resist wind and water. He testified that a party wall cannot become an end wall without adaptations. He explained, in essence, that when a row house is demolished and the steel straps are cut which had connected the horizontal beams, that anchors are required to keep the side wall attached to the exposed beams.

Mr. Schuller conducted an initial site visit to plaintiffs' house on April 29, 2015. This was five and a half years after the parsonage was demolished. He determined that the basement wall, which was 12 inches thick, was damp and had voids in the mortar. The concrete floor in the basement was cracked and buckled from hydrostatic pressure from wind and water. The party wall was 8 inches thick, two bricks (two "wythe") wide, above the basement. The moisture which had infiltrated had caused the plaster walls, which had been applied directly to the brick without lathe, to come away from the brick, cracking and peeling and showing efflorescence from the brick. Plaintiffs' Ex 77 is his report from his April visit. It includes photos. He used a borescope and other tools to evaluate the

situation. Mr. Schuller returned to the building on July 7, 2015. He concluded that the east wall of the house had been covered with stucco by plaintiffs, which had cracked at the floor lines. He reports that the steel straps that held the beams together through the party wall were cut when the parsonage was demolished, and the beams weren't properly anchored to the wall. He was tasked with designing an appropriate stabilization technique.

Mr. Schuller explained how the demolition should have been performed, and also discussed the required manner for leveling the ground after the demolition, so water would not collect or go downwards into the plaintiffs' basement, and how to protect the exposed walls. He said the ground was not leveled properly, the structural integrity of the east wall was not verified, and the wall was not properly weatherproofed. He cited the applicable sections of the 2008 Building Code, which was in effect when the demolition of the parsonage was done. He did not go to the Buildings Department to look at the file, and he did not know who had signed off on the demolition work, or if it had been self-certified by the Church's contractor. He said the Code does not require a property owner who demolishes a building to obtain a license from the adjacent property owner.

Another engineer at Mr. Schuller's firm came to the property on August 14, 2015. The report they generated was admitted as plaintiffs' Ex 78 in evidence. They did radar scans and used other technology to determine that the east wall was separating from the house. When the metal straps holding the beams in the parsonage were cut from the beams in plaintiffs' house, the Church's contractor did not attach the plaintiffs' beams to their wall. As a result, there was movement, demonstrated by the cracks in the stucco on the east wall, and the wall was subjected to water, wind and displaced loads after the parsonage was removed as a support. They recommended anchors be installed and the

bricks be pointed with appropriate mortar. He testified that there are many ways to anchor the beams to the wall, but it is necessary to do so. Here, Mr. Schuller said the Church did not secure the wall, did not make sure it was waterproof, did not follow the New York City Building Code with regard to the basement cavity at the excavation site or the proper levelling of the ground, that clean fill was not used, and that the floor slab of the parsonage was not broken up to prevent water from collecting. Once the foundation of the parsonage was backfilled with clean fill, it had to be sloped so the rainwater would drain away from the Kimballs' home. Here, he said that the former basement of the parsonage was not filled properly. He also opined that the stucco applied to the east wall in 2009 by plaintiffs was insufficient. He said the parking lot adjacent to the demolition site was higher than the demolition site, which caused the water from the parking lot to pour into the demolition site as well. He said this was not in compliance with the Building Code which requires proper drainage and ground leveling after demolition. This testimony is supported by the NYC Building Department's 2015 violation issued, as described above.

In addition to the east side wall separating from the house and the basement being inundated with water, Mr. Schuller testified that the roof flashing was not adjusted so the rainwater would be diverted. The place where the roof meets the wall requires protection so it sheds water. He said that once water gets into the walls, it enters an internal void network, and can cause voids in the mortar and efflorescence, which occurs when water causes the lime in the mortar to combine with the gypsum in the plaster. He said that the Building Code, §3309, requires the cost of waterproofing, stabilizing the building and adjusting the flashing to be borne by the party doing the demolition.

Mr. Schuller described the stabilization system he devised, which included filling the voids in the mortar and installing "sock anchors" and "helical screws." Plaintiffs Ex 80

is a drawing of the work proposal. He testified that the repair project was undertaken in 2015 by himself and Mr. Butler, an engineer who has since passed away. In addition to stabilizing the wall, a retaining wall was installed in the plaintiffs' basement, which took away some useable space in order to keep the water out. The parapet along the roof on the eastern side was raised, both for safety (to prevent people from falling off the roof) and to prevent water infiltration. The entire east wall was covered with insulated panels hung on tracks which were installed on the exterior wall. They are coated metal on the exterior and do not require painting. He acknowledged that this system of "cladding" is not the only manner that the side wall could have been protected, but this is what Mr. Butler chose to use, and he did not know if the other types of sheathing, or the installation of another layer of brick, would have been more or less expensive.

Plaintiffs rested after Mr. Schuller's testimony.

Defendant called former Pastor Robert Emerick to testify first. He retired on July 1, 2021 and lives in West Virginia. He started in 2005 at the Church. John Donlan was the President of the Board of Trustees since the day he started. The Board of Trustees has 9 members and the Church Council has about 15. He lived in the parsonage when he first started. A few weeks after he started, they decided to sell the Church. It was crumbling and there was a scaffold around it and netting. They hired an engineer who said it couldn't be fixed. They couldn't even afford to repair the roof. They decided to sell the property to a developer and build a new church in place of the parsonage. Cavalier was hired to demolish everything on the site. The Church building was demolished first, then the education building, which was leased to a not for profit and used as a homeless shelter, then the parsonage was demolished last. The Church bought another house to be the parsonage.

He has no background in construction. It was his understanding that the new Church building would use the plaintiffs' party wall, that it would be built right up against the plaintiffs' house. The developer was going to build housing. Then, the buyer backed out during the financial crash of 2008 and the Church started negotiating with the NYC School Construction Authority. Then the developer agreed to "flip" his contract to them. Now there is a school on the site.

The Church at some point selected a second architect, Barry Berg, and terminated the first one. When the plan for the new church building was approved, they started construction. The first phase was excavation. Plaintiffs made complaints and stop work orders were issued. They had put in a foundation before the last time the work stopped. It was not stopped because of the NY City Dept. of Buildings. He could not remember what year that was. They ran out of money and gave up on building a new Church. He could not remember if the plan required an eight foot space between the plaintiffs' house and the new building. He could not remember who the Church's engineer was, and he thought he knew who the Church's lawyer was, but wasn't sure. Pastor Emerick, who was very involved in the project as reflected in the minutes of the meetings, has clearly put all of this behind him now that he has retired, and could not remember much. He had apparently been deposed for two days, but his trial testimony was quite short.

John Donlan was the next witness. He was the "party" defendant's witness, and had been observing the entire trial remotely, and he testified virtually as well. He testified that he has been the President of the Board of Trustees of the Bay Ridge United Methodist Church for twenty-two years. He is a retired firefighter and lives in Fort Hamilton, which is a little south of the Church. He said that while the demolition was going on in 2008, he would stop by to open the gate each morning, but he had not been

involved with the work in any other way. In 2009 when the plaintiffs had the stucco coating put on by A. Malek, he opened the gate for them each morning. When plaintiffs obtained a court order in 2015 allowing them to do the work on their building, it delayed the Church from building the new Church. His direct testimony was brief.

On cross examination, he acknowledged that the first architect had told the Board of Trustees that an eight-foot "sideyard" between the Kimballs house and their new Church building was necessary. This is a crucial piece of information, as many of the Church Board's minutes talk about how the Kimballs' problem with the east wall of their home would end as soon as the Church built their new building up against the Kimballs' house. This was never in the plan for the new Church as it apparently would not be permitted by the 2008 NYC Building Code. Mr. Donlon claimed to have only partial memory of the events that had transpired with the plaintiffs' house. He did not remember if the Kimballs had asked to see the plans or for information about the new Church building. He did not remember if the Church had hired an engineer. Pastor Emerick had said they did, but he could not remember his name.

Mr. Donlon testified that Cavalier, the demolition contractor, was owned by the Lickmans, and had been hired by the "developer" who had purchased the Church property. He testified that the Church did not hire the contractor, but he had signed a lot of paperwork which had been given to him to sign. He testified that he did not know if there was a written contract with Cavalier to do the demolition, and if there was, who signed it, or what the cost was. He said he did not know which party was responsible for the insurance for the demolition work. He then said that he thought the developer may have asked him for a check, but he wasn't really sure who paid for the demolition. He testified that one of the Lickmans told him in 2008 that the Kimballs had told him that they did not

want Cavalier to waterproof their east-side wall. He himself had never been inside the Kimballs' home or inside their backyard except once with Ken Lickman before the demolition started. They took pictures during that visit, but he lost them. He did not go into the basement. He acknowledged that Dorcas Kimball had repeatedly told him about the water infiltration, dampness, peeling paint and mold, and her mother had told the Board about it as well. He never asked to see the inside of the plaintiffs' home and he referred them to the Pastor and the Church's attorney, he stated.

Mr. Donlan testified that he let the Kimballs' waterproofing company in to do the work in 2009, and he said that the Kimballs asked for access again in 2012. He did not remember if they were given permission then. He was told they were denied access and asked if he knew why and he said "no," and "it was all handled by the lawyers." He said he remembered that there was an issue with regard to the grading of the vacant lot after the demolition. The Kimballs had various complaints which were presented to the Trustees and voted on once they obtained their lawyers' advice. He did not personally investigate the complaints because nobody told him to. He could not say which lawyer the Church had in any given year. They had three different firms, if not more. He said the Pastor was the Church's liaison to the lawyers. In June of 2015 the Church first obtained the new building permit, he acknowledged. They had been trying to get one since 2010. Plaintiffs' lawyer asked him if a violation was issued by the Department of Buildings in 2015 for improper drainage on the lot where the parsonage had been, and he responded "No, I don't know that" [Tr. P 584].

Mr. Donlon then testified that the contract of sale was signed with Abe Betesh in 2007, and he thought that once the contract was signed that Abe Betesh owned the property. He signed all the forms that Mr. Betesh asked him to sign for the demolition and

construction, as he did not think the Church was still the owner. He did not discuss the work with Cavalier. Specifically, he said he did not ask about the waterproofing or work to the Kimballs' side wall, and said "before this trial, I never heard of Cavalier. It was Abe Betesh that hired them. Did I sign the papers for Abe? Maybe I did, but I don't recall signing a contract that they are going to take down the three buildings [Page 591]. He did not recall the Board of Trustees approving any demolition contractor or contract.

On redirect, Mr. Donlan stated that after 1/1/08, all communication between the Church and the Kimballs was between their lawyers. He said that Mr. Betesh and the Church changed "their deal" in 2008 and the Church would keep the parsonage. It is not clear if the parsonage had already been demolished at that point. He understood that in the first contract, the Church was going to sell the entire parcel. Why the Church did not then sell the parsonage, a limestone rowhouse, was not explored. They modified the sale contract with Mr. Betesh. Counsel attempted to admit a photocopy of this document, the amendment to the contract of sale, into evidence as defendant's Ex NNN, not that it would have been probative of anything relevant, but she had no way to authenticate it, and further, counsel did not have a copy of the original contract, which it modified.

On re-cross, Mr. Donlan had new recall of some facts and said the Church did not grant the Kimballs access the property in 2012-2015 because their construction of the new Church was "imminent." They did not want the Kimballs' work to interfere with their work. Even though they did not have a building permit until June 2015, he said they had relied on the advice of counsel, on their architect, their engineer, on the contractor, from the day they received the Kimballs' first letter in 2012 until the court order to give them access was issued in 2015 [Tr. P 905]. He said that perhaps the attorney holding the down payment issued a check to Cavalier from the down payment, but he had no recall of

this. He said "sometimes [Mr. Betesh] would put papers in front of me and said, John we need this signature" [Tr. Page 904] so he would sign. Finally, he said that the Kimballs started their work in June of 2015, and that around October or November of 2015, when the Kimballs' work was finished, their contractor, C.S. Scott Enterprises, started excavation for the new Church.

The next witness was Kenneth Lickman. He testified that he was a foreman for Cavalier in 2008. He had little recall of the job at issue. He did not know who hired Cavalier to demolish the Church property. He said he stopped into the site every so often to check on it. He said he had only spoken to Mr. Kimball once, and he was accused of damaging the plaintiffs' skylight. He told Mr. Kimball that Cavalier did not do so. He testified that Cavalier had applied stucco to the entire party wall after the demolition, with waterproof cement [Tr. Page 693]. He testified [P 696] that Cavalier also backfilled the site, and "graded one end of the excavation so that it drained off away from any structures."

Defendant's last witness was their engineer, Emanuel Necula, P.E. He testified on February 2, 2022 and February 3, 2022. He was hired for this litigation and was not involved with the project. He is a licensed engineer in New York, with an office in Suffolk County. His education was in Romania. He came to the U.S. in 1979. He first went to the site in the fall of 2015, when he was hired by defendant's engineer Mr. Schneider to "look at the wall." He described his work history. He has worked on a lot of "temples, churches, schools, courthouses" [Tr. P 731]. At some point, he went out on his own. He is a consulting engineer.

Mr. Necula said he was retained by another engineer, who called him to go to plaintiffs' property. He said to him "There is an issue in Brooklyn with a wall and

the only thing the lawyer wants to know is if that wall is sound and safe or if it is not" [Tr. Page 738]. He said he went to the site, and he took pictures. He did not bring anything with him to court. He did not write a report. He testified with a heavy accent. The court, when quoting him, has had to make minor corrections to his testimony, as the court reporter did not understand some of his words.

Counsel had a hard time keeping Mr. Necula focused on this one 2015 visit, seven years ago. He seemed more interested in talking about other projects he had worked on during his extensive career. He testified "I observed it was a typical row house with 20 feet in the front, 50 feet length and two and half stories. Brick walls on the exterior front and back, and wood beams supporting the floors" [Page 741]. He looked at the house both inside and outside. He was told that the building next door had been demolished. When he visited, the exterior wall had a scaffolding." He identified Exhibit QQQ as the photo he took of it. He climbed on the scaffolding and examined the wall. "It was finished with some sort of material on it, and there was some hairline cracks vertical hairline cracks in the middle of the building façade and horizontal hairline cracks going from left to right which I have concluded the reason for those hairline cracks were because of the material they installed was shrinking because being exposed to the sun and heat from the outside" [Page 744]. Next he identified RRR, and said it is "a picture I took near the chimney and it shows the parapet . . . And then these some sort of material exposed, not finished and I expected to see the roof membrane coming over and be covered with that tile, but it was not done that way. And then if you look at it you see, you know, you can see gaps between some gaps very thin gaps like you could put a pen in between the material and the existing brick behind. And you had these vertical cracks which is pretty

much I would say probably the middle distance between the south end and north end of the building. Basically, it is a shrinking crack" [P 745].

He then identified SSS as a photo he took. He said "What's interesting is the crack is a bit wider and as you go down, it disappears. If you see the picture at the top, there is something there that is very important. Do you see those marks in there, the vertical stripes in there that shows that there was a major flood on the roof flooded the roof, the water had no place to go and went over the existing parapets and keep on going." He continued, "Yes the water marks. To get these kind of water marks, the roof had to be flooded with water and the only time you get this kind of flood is when you have a heavy storm with at least three to five inches of rain. The drainage of the roof was not capable to drain this water so the water just went over before the water got to the face of the material, some of it got behind it, because there is a gap in there" [Page 747].

Mr. Necula identified a few more photos and made more comments on them. Regarding Exhibit UUU, he said "What you're seeing here parapet wall was never finished, it was supposed to be finished, it was not finished and it was exposed to the elements. This picture is of the skylight. It is very possible during the same storms, the water found its way in, it flooded the roof and found its way in. You see the water marks on the facade, that is what the water did. It washed the material on top and went down to the face of the wall down to the wall. If the water got outside of the wall, by passing the parapets, which was totally unprotected, some of it found its way in behind the material between the material and the face of the existing brick wall" [Page 748]. Regarding Exhibit BBB, he said "Also you could see in this picture, which is another reason I took the picture, there is a metal stud perpendicular to the facade which has no connection to the wall and I asked myself at that time, I said if there is no connection, positive connection

between that stud and the existing wall what is the purpose the scaffolding? The water is going nowhere. If it was going somewhere the scaffolding was installed to hold the wall in place and make it secure" [Page 749].

Mr. Necula next described the interior of the house. Defendant's Exhibit WWW is a photo he took of the first floor ceiling. He said "the beams look pretty dark, the color of the beams, like blackish usually wood when it is old, it is brownish. This was pretty dark and had a lot of spots on it. From water damage and perhaps mold dry rot, all caused by water. But more mold dry rot and other bacteria that's collected inside of these beams and outside takes years to happen." The court interrupted and asked the witness at this point [Page 754] if he knew that the adjacent building had been taken down seven years prior to his visit, and he said, "nobody told me." Then he said, "the dark beams are consistent with seven years or more of water damage."

The next photo was defendant's Exhibit XXX, which he described as "the beam, two beams actually sitting on the east wall and shows again a lot of damage caused by water infiltration that could have come from above from the roof and damage the beams, the wood beams. They were not damaged to such an extent to destabilize the wall. . . Well, when you see damage like this, in order to make sure the beam has retained at least 70 percent of its strength or 60 percent of its strength, you're supposed to take probes and send them to the lab and check them out" [Page 755]. The witness described Exhibit YYY "Well the picture shows it shows stains of water sitting on this beam. As you can see from the top, you see the stains which means that there was in my mind was tremendous flood that happened in the past, somewhere above this floor and most likely from the roof. Usually, we see this kind of damage if the roof was flooded by a heavy storm."

Mr. Necula was then asked, “Did you receive any evidence when were you at 360 Ovington house in September of 2015, that would form your opinion as to why the east wall was separating from the south wall?” and he responded “My suspicion was that at that end of the house that was where the drainage, where the gutter and the leader to collects the water from the roof. And looking from the scaffolding on the leader, it didn't look in good shape, so I suspected that the gutter was not in good shape and I suspected if gutter was not in good shape, the leader was not in good shape. The water was gushing. There is no parapet on that corner. I know this from one of my pictures. It was gushing outside of the house down the back side of the house on to the dirt below. And when something like that happens, it happens year after year, and when that water comes into the ground, saturates the ground because the ground is soil. And during a period of a week or so, the ground loses its bearing capacity to support vertical load, which was the loads from the corner of house. If that happens, the wall doesn't have any support and it cracks. It moves down. It doesn't move out, it doesn't move inward, it moves down.”

Mr. Necula then proceeded to speculate and imply that the Kimball’s house had to have been old and decrepit, poorly maintained and totally falling apart before the defendant’s demolition, and to opine that the removal of the defendant’s adjacent house seven years before his site visit was unrelated to the property damage which took place over the seven year period after the demolition. Specifically, defendant’s attorney asked, “would that [the separation of the south wall from the east wall] have anything to do with the demolition of the building that had to do with 360 Ovington Avenue?” and he responded “In my opinion, no. Because the demolition, the way this demolition occurred, the only time they touched the wall was when they took the beams out of the project and

they took the roofing material from the face of the parapet facing their house, that was the only time - they have not touched the wall any other way because this was a common wall. And for one wythe of this common wall belonged to the Church and the one wythe of this common wall belonged to the owner and the property line is an imaginary line between the two wythes of wall of brick. So the demolition guy had no reason whatsoever to touch this wall because the only time they touch the wall was when they are pulling the beam out and by the [City's] condition of the demolition approval, was to repair and fill the existing holes and finish them off with some sort of mortar [so] . . . the water would never get in, so that was the only time they touch it" [Page 764].

The witness was then asked more questions about the stucco which plaintiffs had applied, which did not solve the problems. His testimony was confusing. It is not clear whether he thought this stucco had been applied by the demolition contractor or the plaintiffs. He testified that "it was probably lime based material because it was whitish. Lime base mortar is white. If that was down without any drainage behind it to drain this water, the water is sucking out of the atmosphere or when it drains, when you have this heavy rain on the face of the wall, if there is no drainage material behind it, that water gets, because when they install the mesh to hold the mortar together, it penetrated the waterproofing and the water got into the existing brick. The problem is if the brick cannot breathe it cannot allow this water to evaporate, it has to go somewhere because the water is still liquid. So, what happens is the water finds its way through capillarity as I explained before or through the gaps which do exist inside of the joint, which is the collar joint and those holes are everywhere" [Pages 769-70]. He continues "by installing this material in there, it was job half done" [Pages 771-772].

Mr. Necula was asked about the report prepared by the plaintiffs' expert. He said he had read it, and the topic moved on to plaintiffs' claim of hydrostatic pressure which allegedly caused the concrete cellar floor slab to collapse. The witness defined this as "hydrostatic pressure is the weight of the water going upward because the water builds up and it raises and pushes out whatever is on its surface." He then said "you need I would say probably around eight inches of water, to be above your basement floor to push your slab upward and break it. Because the slab by gravity, not being enforced gives up cracks and then your basement is flooded. So that's hydrostatic pressure acting vertically" [Page 777]. He concluded that if there had been hydrostatic pressure on plaintiffs' house, it was from the two storms in 2014, which "dumped a lot of water throughout the New York area and produced a lot of damage to a lot of thousands of properties" [Page 784]. Perhaps he was referring to Hurricanes Sandy (2012) and Irene (2011).

Defendant's counsel moved on to a discussion of the anchors used to secure the east wall to the south wall. Mr. Necula said the movement of the wall had to have been caused by a hurricane. He then said he did not see the "sock anchors" installed at plaintiffs' house when he was there, as "it was not the entire ceiling open for me to have access to it" [Page 790].

Next, Mr. Necula was asked more questions about the plaintiffs' expert's report from Atkinson and Noland, and their photos. He said he had seen them. It had been admitted as plaintiffs' Exhibit 78. He was shown a photo and he described it as a photo of the metal bars (he called them anchors and plaintiffs' expert called them straps) from the original construction, which connected the beams from one building to the beams in the other. The demolition contractor had to cut them. He testified "they were cut by the contractors and bent them down to function like an L Hook to hold the back wall" [Page

792]. He was asked “do you know what was required of the demolition contractor in November of 2008 when the parsonage was demolished?” and he replied “So in order for them to make sure they're not going to damage the remaining structure, if they found anchors within the structure that they demolished, they had to cut it and they had to restore it at the end of the new wall which became an end wall. By bending it down or bending at 90 degrees put it that way” [Page 792].

The next question was “Anything else that needed to be done to the wall?” and Mr. Necula replied “It needed to be waterproofed. However, the code is not precise about that. Why? Because you can waterproof if the wall is block, wall made out of cement. But masonry you cannot waterproof because it is designed to take water and drain water and dry out. So, I think this the demolition contractor did what was required, but by adding waterproofing on the wall, reduced the capacity of the outer layer, outer brick to function as was designed originally” [Page 793]. Again, he assumed that the stucco which plaintiffs had applied in 2009 was applied by the demolition contractor. He elaborated “For them to come up with this perfect composition [brick] took them 2,000 years, the entire United States of America was built like that after the revolution and nothing happened. The only thing you are allowed to do is point the joints. Come in see where the joints are destroyed by time and come in and point them with the same cementitious material which is Portland cement” [Page 794]. What he concluded here, as the court understands his testimony, was that the NYC Building Code, as he interprets it, although he said he had not looked at it in preparation for his testimony, did not require anything to be applied to the outside wall after the demolition, as brick is supposed to breathe, other than repointing the mortar between the bricks. The court notes that no repointing was done before the stucco was applied. He continued “the existing pockets the original joists sitting

on them, they needed to be filled in with pieces of brick that were available on site and then parged. . . [parged] means mortar. You mortar them, you butter them with mortar and put them in and finish them up and it don't create pockets to allow the water, the rainwater to come in and flood the wall. So basically, those pockets, they restructure the wall as it was in the vicinity with the pocket with the same material, the pieces of brick they took from the demolition debris. . . There are other methods of maintaining the natural status of the brick and waterproofing is not one of them" [Page 795]. Defendant's counsel asked "Sir, if the exterior wall that was exposed during demolition was treated by the demolition contractor, was parged and treated by the demolition contractor during demolition and the entire wall was treated by the demolition contractor at the time of demolition, is it your opinion that anything else would have needed to be done to provide waterproofing of that now exterior wall? He responded "Nothing else. They should leave it like that with waterproofing on it" [Page 804]. There was no evidence that any repointing was done by the demolition contractor, the court notes.

Counsel then moved on to the roof. Mr. Necula was asked "do you have an opinion about whether the water infiltration problems that plaintiffs complain of were caused by conditions with the roof at 360 Ovington Avenue?" He then speculated that the roof membrane hadn't been replaced in a long time, and he went on to say that the roof seemed to have been painted white, but it should have been painted gray. He also said that there was evidence in the photo of water accumulating under the membrane, as "you can see there is a lower depression there which means something happens down below," and that "I'm sure if you go there and punch it, the water comes up" [Page 797].

Mr. Necula was next asked about water damage in the interior of the house. He said "There were a lot of areas of the existing wall and inside that show damage. Those

water damages could have come up the pocket to that joist we spoke about in the morning which is an open wound and water came in and got right behind the material they put down on the face of the wall. It could have come from the skylight and go left and right. Because this the way this roof slopes, it slopes from the front of the house continuously to the end of the house so any projection, vertical projection in the roof, in the middle of it, would have created conditions to accumulate the water accumulate the ice, accumulate the snow and that melts, the ice melts and get this weight on it, and the floor deflects and creates a pond effect and when the water evaporates and disappears and you don't see that pond effect any more" [page 800]. He was then shown plaintiffs' Exhibit 4, a photo, and he was asked "do you see any water infiltration in this picture?" He responded "Yes, around the pipe. It looks like there was water damage on the pipe and painter came in and painted the whole ceiling to look nice but the water was never dried out so it seeped through the paint and created that shady area, that's water damage" [Page 800].

Mr. Necula was then asked if the helical ties installed in the east wall were necessary. He said "It was not necessary because the builders of this house, they knew that a hundred years ago when they built this wall . . . every six rows of brick, they put one [strap] across. That was the reason for it to hold them together. And there was another five or six rows of brick and put another brick of course, and you see that everywhere. You think there was architecture design, no, that's the way, and 1906 building code, they tell you precisely word by word what they had to do" [Page 801].

Mr. Necula then testified that he learned after his site visit from the plaintiffs' engineer's report that shoring had been done on the interior wall in the basement, and said "there was no need for that, because the wall is not moving" [Page 803].

Counsel then asked more questions about the east wall, “Is it your opinion with a reasonable degree of engineering certainty that the east wall was able to function as an end wall at the time the neighboring property was demolished?” and he responded “one hundred per cent . . . these walls were built the same way. There is no difference between the end wall and party wall” [Page 804]. The court notes here that the plaintiffs’ engineer testified that the 1906 Code required an end wall to be three bricks wide, but a party wall could be two bricks wide.

Plaintiffs’ attorney then started her cross examination. She obtained clarification that his inspection was on September 4, 2015. Mr. Schneider was present, as were the parties’ attorneys. He said he had been retained a week earlier by Mr. Schneider, an engineer, who had been hired by the attorneys for the Church. He was told that the adjacent house had been demolished, but not that it was an identical row house. He was not told when the demolition had occurred [Page 807]. He did not ask to see the demolition permit or plan. He understands that Mr. Schneider did a report after the inspection. He has not seen it. He was asked by Mr. Schneider to put his opinion in writing, and he did so, which he described as a “note” to Mr. Schneider [Page 809].

Mr. Necula said that he had testified in court following the inspection, in Ind. 6153/2015, the petition by plaintiffs for a license to enter the defendant’s property to do work, pursuant to RPAPL §881. In that matter, discussed above, plaintiffs were granted an access order in June 2015, which was extended until November 13, 2015 after a hearing was held on October 7, 2015. Nothing further was filed. Thus, it would seem that Mr. Necula testified in court before J. Knipel on October 7, 2015.

Plaintiffs’ counsel asked Mr. Necula if his site visit included a visit to the basement of the plaintiffs’ property. He could not remember. He said “I think I did. I got out very fast

because there was not much light in there" [Page 813]. He was asked if he went into the rear yard, so he could look at the rear of the building, and he said no, he did not go through the house to the rear yard, he just "looked around the corner" from the scaffolding he climbed up, which was on the east wall. He did not conduct any tests. It was a visual assessment. Mr. Schneider did not go up on the scaffold.

Mr. Necula testified that he did not read all the applicable building code sections before coming to court to testify. He cannot state an opinion whether the demolition contractor "followed Code requirements when the building was demolished in November of 2008" [Page 820]. He has not looked at the demolition permit. He does not know if it was inspected by the DOB after completion, or if it was self-certified. He has not spoken to the demolition contractor.

Counsel then asked about the parapet wall on the roof. Mr. Necula said that the parapet wall could be six to eight inches high on a party wall, but had to be twenty-four inches high on an end wall. He agreed that at the site visit, the east wall of the plaintiffs' house only had a 6-8 inch high parapet wall. With regard to the roof, he said "you have to maintain the roofing membrane on top of the party wall and restructure or put back those tiles and fix them accordingly so there would be somewhat safe not fall down and kill anybody . . . the demolition contractor would have had to have maintained the membrane and restructure and put back tiles" [Page 824]. He continued "Terracotta tiles on top of all of these membrane that intersect over the party wall to hold the membranes together by gravity" [Page 824]. He agreed that he did not see any tiles, nor was the parapet wall built up, now that it is on the end of the row. But he then said that he does not know what the applicable Code requires [Page 831].

Mr. Necula's cross examination continued the next day.

The remainder of the cross examination of Mr. Necula was essentially a recitation by plaintiffs' counsel of the applicable New York City Building Code sections for demolition, which, the court must admit, was the clearest explanation of the theory of the plaintiffs' case. That is, that the demolition contractor had failed to do the enumerated items to protect the plaintiffs' home after the parsonage was demolished.

Defendant then rested.

DISCUSSION

Now that all the evidence has been submitted, along with the written summations, and memos of law, the court finds that defendant's motion to dismiss, made orally at the conclusion of the trial (Tr. Pages 915-922), and repeated in defendant's written summation, must be granted. Defendant's answer to plaintiffs' amended complaint asserts the statute of limitations as an affirmative defense. While it is not ideal to wait until a trial is concluded to make such a motion, the circumstances of this case may not have resulted in a grant of pre-answer dismissal, or summary judgment, had defendant made such a motion earlier. It is noted that no summary judgment motions were ever made in this case.

The sole cause of action in the complaint is private nuisance. As set forth in Pattern Jury Instruction 3:16, to recover for private nuisance, the plaintiff must prove that the defendant interfered with plaintiffs' right to use and enjoy their property, that the interference was substantial, that defendant's conduct was intentional, negligent or reckless, and that defendant's conduct was unreasonable under all of the circumstances. Interference may take the form of damage to a plaintiff's property. Defendant's conduct may be affirmative conduct or nonfeasance (inaction). Damages may be the cost of restoration, plus interest. But there are other ways to calculate damages. *See PJI 3:16*

Comments. Here, plaintiffs proved, by a preponderance of the evidence, that defendants negligently, ignorantly, even maliciously, substantially interfered with the plaintiffs' use and enjoyment of their property, which was unreasonable under the circumstances.

However, "damages are limited to the three year statutory period immediately preceding commencement of the action." CPLR 214 (4). That is, unless the damage is caused by the latent effects of exposure to a substance or substances, and if so, then the three year period is computed from the date of discovery of the injury, or the date when the injury should reasonably have been discovered. CPLR 214-c (2). Cases which apply this latter statute include, for example, injury to property which resulted from years of contamination from a factory emitting gasses (see *Tsakis v Keyspan Corp.*, 176 AD3d 1003 [2d Dept 2019]).

This is not a case involving a latent injury. Plaintiffs knew their house was being infiltrated by water in 2008, and testified that it was "freezing" in their house after the adjacent house was demolished and their basement was flooding. They hired a company to apply stucco to the outside wall less than a year after the demolition of the parsonage. Why they did not bring suit in 2008, or shortly thereafter, was never explained. Nor was there any explanation offered for waiting until 2015 to seek an order pursuant to RPAPL §881 permitting plaintiffs to enter the defendant's property to do the needed work. There was no evidence, it is noted, that defendant or any of its agents did anything on the site after the demolition contractor left in 2008[4] until 2015 when the Church obtained the new building permit, which was after this action was commenced. It is also necessary to point out that the plaintiffs' expert had not been to the site before 2015, and there was no evidence adduced at trial, by testimony or otherwise, that any damage to plaintiffs'

[4] Other than to take soil samples in 2010 for the new building permit application.

building first occurred in the three years before this action was commenced, and such that later damage was caused by the 2008 demolition. Instead, there was testimony that the plaintiffs' failure to act more quickly resulted in the exacerbation of the water damage, as hurricanes and significant storms damaged the house while plaintiffs did nothing. Plaintiffs had an obligation to mitigate their damages, and they did not do so.

It must also be noted that plaintiffs have another pending lawsuit against defendant. It is under Index Number 3685/2016, and is for damage caused by the work defendant performed in connection with the excavation and construction for the new church building, which was abandoned by defendant at some point. This court proposed trying the two cases together, but defendant did not want to do so, as it is represented by a different law firm in the other case. A motion to consolidate the two cases was earlier denied by another Justice of this Court.

The statute of limitations applicable to this case is the one in CPLR 214 (4), and it began to run from the date that the plaintiffs became aware that their house was being infiltrated by water. Plaintiffs' argument that the "continuing wrong" doctrine applies is inapposite. Whether the three years is calculated from the date the demolition was completed (November 2008) or the date the plaintiffs' contracted with Malek to apply a stucco coat to the east wall of their house (September 2009), or the date they had the roof redone (2010), or the numerous dates on which they wrote to the defendant, the statute of limitations ran well before this action was commenced in May of 2015. Here, neither the defendant nor the demolition contractor did anything that can be construed to be "a "continuing" tort resulting in successive causes of action. There was no evidence that the church or any of its agents or contractors set a foot on the property after the

closing with the School Construction Authority in 2009, other than for the taking of soil samples in connection with the building permit applied for in 2010.

This court has determined that equitable estoppel is not applicable to this set of circumstances. While “equitable estoppel will preclude a defendant from using the statute of limitations as a defense where it is the defendant's affirmative wrongdoing … which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding,” plaintiffs here were not prevented from bringing this suit earlier by any conduct on defendant’s part. (see *Putter v N. Shore Univ. Hosp.*, 7 NY3d 548, 552 [2006]). A plaintiff seeking to apply the doctrine of equitable estoppel must "establish that specific actions by defendants somehow kept [him or her] from timely bringing suit" (*Zumpano v Quinn*, 6 NY3d 666 at 674 [2006]). Equitable estoppel is appropriate where the plaintiff is prevented from filing an action within the applicable statute of limitations due to his or her reasonable reliance on deception, fraud or misrepresentations by the defendant (*Putter v N. Shore Univ. Hosp.*, 7 NY3d 548, 552-553 [2006]).

As the Court of Appeals explained in *Zumpano*, “[a]lthough sometimes imposing hardship on a plaintiff with a meritorious claim, statutes of limitations "reflect the legislative judgment that individuals should be protected from stale claims" (*McCarthy v Volkswagen of Am*., 55 NY2d 543, 548 [1982]). The time bar cannot be found “arbitrary or unreasonable solely on the basis of a harsh effect” *Id.* The doctrine of equitable estoppel applies only where it would be unjust to allow a defendant to assert a statute of limitations defense, and only applies "where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action" (*Simcuski v Saeli*, 44 NY2d 442, 448-449 [1978]). Moreover, the plaintiff must demonstrate reasonable reliance on the defendant's misrepresentations (*Zumpano v Quinn*, 6 NY3d 666, 674 [2006]). Here, there is no

evidence of any fraud, misrepresentation or deception which prevented plaintiffs from bringing suit. And it cannot be said they reasonably relied on defendant's obstructionist behavior.

There is a separate basis for equitable estoppel where the defendant had a fiduciary duty to the plaintiffs which they breached (*Gleason v Spota*, 194 AD2d 764 [2d Dept 1993]). Where concealment without actual misrepresentation prevented a plaintiff from commencing a timely action, the plaintiff must demonstrate a fiduciary relationship which gave the defendant an obligation to inform him or her of facts underlying the claim *Gleason v Spota*, 194 AD2d 764, 765 [2nd Dept 1993]. That is not applicable here.

"To dismiss a cause of action pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the action has expired" (*Jacobson Dev. Group, LLC v Yews, Inc.*, 174 AD3d 868, 869 [2d Dept 2019]). Here, the defendant established, prima facie, that the three-year statute of limitations had expired prior to the commencement of this action. Accordingly, the burden shifted "to the plaintiff to raise a question of fact as to whether the statute of limitations is tolled or is otherwise inapplicable" (*Jacobson Dev. Group, LLC v Yews, Inc.*, 174 AD3d 868, 869 [2d Dept 2019] citing *Collins Bros. Moving Corp. v Pierleoni*, 155 AD3d 601, 603, 63 NYS3d 478 [2017]; *see Stein Indus., Inc. v Certilman Balin Adler & Hyman, LLP*, 149 AD3d 788, 789, 51 NYS3d 183 [2017]).

Here, the plaintiffs have failed to raise a question of fact as to whether any conduct on defendant's part affirmatively induced them to refrain from commencing this action until the statute of limitations had expired. It is insufficient to merely allege that the defendant kept "putting them off," or delayed in responding to the plaintiffs' requests.

Rather, a "plaintiff seeking to invoke the doctrine of equitable estoppel must establish that . . . specific actions by defendants somehow kept [the plaintiff] from timely bringing suit" (*Jacobson Dev. Group, LLC v Yews, Inc.*, 174 AD3d 868, 870 [2d Dept 2019]). The plaintiffs have not done so here.

CONCLUSION

Defendant's CPLR 4401 motion is granted and the complaint is dismissed. Defendant established that all of its allegedly tortious conduct occurred more than three years prior to the commencement of this action.

Defendant's counterclaim for trespass is dismissed. There was no evidence adduced at the trial in support of this claim.

Defendant may enter a judgment with the County Clerk dismissing the complaint, together with the costs and disbursements of this action.

This shall constitute the decision and order of the court.

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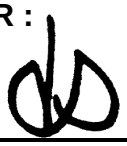

Hon. Debra Silber, J.S.C.