SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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OCEANHOUSENYC, LLC, PRASHANT LAL,

Plaintiffs,

- v -

140 WEST STREET (NY), LLC, BENJAMIN SHAOUL, VERIZON NEW YORK INC.,

Defendants.

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INDEX NO. 656345/2020

MOTION DATE 03/13/2023

MOTION SEQ. NO. 005 006 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 363, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 499

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 288-307, 364, 453-497, 500, 511 were part of the motion for

SUMMARY JUDGMENT.

Motion Sequence Numbers 005, 006 and 007 are consolidated for disposition.

Defendants 140 West Street (NY) LLC and Benjamin Shaoul's motion (MS005) for summary judgment is granted only to the extent that the fifth, sixth, seventh, eighth, ninth, tenth and eleventh as well as the claim for legal fees included in the first and second claims are severed and dismissed and the motion is denied with respect to the remaining requests for relief.

Plaintiffs' motion (MS006) for summary judgment is denied.

Defendant Verizon's motion (MS007) for summary judgment is granted only to the extent that plaintiffs may not seek damages against Verizon on the eighth and tenth causes of action that accrued prior to February 1, 2019 and plaintiffs may not seek legal fees from Verizon.

Background

Plaintiffs live in a mixed used condo building (a building with both commercial and residential units). The building formerly was exclusively occupied by defendant Verizon New York Inc. ("Verizon"). Verizon sold the upper floors to co-defendant 140 West Street (NY) LLC ("140 West") which was the sponsor and built residential condominiums (defendant Benjamin Shaoul is a member of defendant LLC). Now the building houses both Verizon and residential apartments. Plaintiffs claim that noise and shaking from a certain bank of elevators (the "C" bank) makes it unbearable to live in part of their apartment.

Plaintiffs live on the 19th floor, which is the first floor of the residential part of the building. Plaintiff's apartment is directly above Verizon's C bank's elevator machine room, which is on the top floor of the commercial space operated by Verizon. Plaintiffs complain about the machine room, which they allege is excessively noisy and causes vibrations in their apartment. They insist there is substantial interference with the quiet use and enjoyment of their apartment. Plaintiffs allege that the family's two daughters cannot use their bedrooms because of the noise and so the entire family has to sleep in the primary bedroom.

MS005- the Sponsor's Motion

In this motion, defendants Shaoul and 140 West move for summary judgment dismissing the third, fourth and fifth causes of action in the amended complaint as well as the sixth, seventh,

ninth, tenth, and eleven causes of action in the amended complaint and the portions of the first and second causes of action that seek legal fees.

140 West seeks to dismiss the remaining three causes of action asserted against defendant Shaoul and all causes of action against 140 West except for the first and second breach of contract claims. In a prior motion to dismiss (NYSCEF Doc. No. 155) the Court dismissed the first, second, sixth, seventh, eighth, ninth, tenth and eleventh causes of action against Shaoul. The third, fourth and fifth claims remained. 140 West emphasizes that it has no control over the elevators in question, which are owned and operated by defendant Verizon. Defendant Shaoul argues that the fraud claims (the third and fourth causes of action) also fail because he had no personal involvement with the plaintiffs prior to the purchase of the unit and the fraud claims are duplicative of the breach of contract claims against the corporate defendant.

Defendant Shaoul submits an affidavit in which he contends he had no personal dealings with plaintiffs prior to the start of this lawsuit. He points out that plaintiffs purchased the unit in October 2017 but did not move in until February 2019 and he only learned about their complaints sometime after February 2019.

In opposition, plaintiffs contend that 140 West exercised control over the elevators and had many internal discussions about them. They insist that 140 West exercised control and responsibility over the elevators and so claims against them should not be dismissed.

To be entitled to the remedy of summary judgment, the moving party "must make 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 from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers

(*id*.). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Third and Fourth Claims

Mr. Shaoul seeks dismissal of the third and fourth causes of action against him because plaintiffs had no communications with him prior to their purchase of the apartment. The third cause of action is based upon fraud in the inducement and the fourth claim is a fraud in the inducement pled in the alternative.

Plaintiffs contend that a member of a limited liability company can be liable in his or her individual capacity for any torts committed by him, even if the torts on done on behalf of an LLC. They stress that this Court denied this branch of defendants' motion to dismiss these claims. Plaintiffs assert that Shaoul made misrepresentations as "President" of the sponsor and as "Principal" by asserting the truthfulness of the statements in the offering plan. Plaintiffs

emphasize that the offering plan insisted the noise levels would never exceed 35 decibels in residential areas and not exceed 30 decibels in the bedrooms.

"To sustain a claim for fraudulent inducement, there must be a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury," (*GoSmile, Inc. v. Levine*, 81 AD3d 77, 81, 915 NYS2d 521 [1st Dept 2010] [internal quotations and citations omitted]).

The Court denies this branch of the motion. "[M]embers of limited liability companies, such as corporate officers, may be held personally liable if they participate in the commission of a tort in furtherance of company business" (*Rothstein v Equity Ventures*, LLC, 299 AD2d 472, 474, 750 NYS2d 625 [2d Dept 2002]). The material issue of fact, as noted by plaintiffs, is the certification in the offering plan. This statement, signed by plaintiff as principal of 140 West and on behalf of the sponsor, claims that "We have investigated the facts set forth in the offering plan and the underlying facts. We have exercised due diligence to form a basis for this certification. We jointly and severally certify that the offering plan does, and that documents submitted hereafter by us which amend or supplement the offering plan will: . . . 3. not omit any material fact; 4. not contain any untrue statement of a material fact; 5. not contain any fraud, deception, concealment, suppression, false pretense or fictitious or pretended purchase or sale; 6. not contain any promise or representation as to the future which is beyond reasonable expectation or unwarranted by existing circumstances" (NYSCEF Doc. No. 405).

The offering plan states that noise levels in living spaces would not exceed 35 decibels and not exceed 30 decibels in the bedrooms (NYSCEF Doc. No. 413). Based on this record, the Court observes that a fact finder could conclude that Shaoul knew or had reason to know that the elevators were loud and he should not have made promises about the noise levels could not be

met. Certainly, the various reports by Cerami suggest that many unit owners raised complaints about the noise emanating from the elevators. Although this evidence, as noted in a subsequent motion, is hearsay, it can be considered because it is not the only evidence submitted in opposition (*Feinberg v Sanz*, 115 AD3d 705, 985 NYS2d 133 [2d Dept 2014]). Moreover, the key part is the promises made by 140 West and Shaoul were all made in the context of selling apartments – and plaintiffs paid $8.5 million for their apartment. 140 West and Shaoul made certain representations as part of a package to induce potential buyers to purchase a luxury apartment. And plaintiffs raised an issue of fact about whether certain of those representations were not true.

In other words, plaintiffs raised an issue of fact by claiming that they relied on the statements in the offering plan about the noise levels and that Shaoul knew that the elevator noise was an issue and exceeded the noise levels in the plan. It may be that the fact finder believes Shaoul, that he had no idea about the elevator noise, or may believe 140 West's attempt to blame Verizon. Or a fact finder might not credit plaintiffs' assertions that they relied upon the noise promises when they bought the property (140 West and Shaoul argue that plaintiffs were in the apartment prior to purchasing it and did not allegedly complain about the elevator noise). But, on these papers, there is an issue about whether Shaoul made certain misrepresentations as part of an effort to induce plaintiffs to buy the apartment.

The Court also declines to dismiss either of these causes of action as duplicative. "A fraud-based cause of action is duplicative of a breach of contract claim when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract. A fraud-based cause of action may lie, however, where the plaintiff pleads a breach of a duty separate from a breach of the contract. Thus, where the plaintiff pleads that it was induced to

enter into a contract based on the defendant's promise to perform and that the defendant, at the time it made the promise, had a preconceived and undisclosed intention of not performing the contract, such a promise constitutes a representation of present fact collateral to the terms of the contract and is actionable in fraud" (*Manas v VMS Assoc.*, LLC, 53 AD3d 451, 453, 863 NYS2d 4 [1st Dept 2008] [internal quotations and citation omitted]).

Here, the plaintiffs adequately raised an issue of fact that the sponsor and Mr. Shaoul never intended to comply with their promise about the sound levels, which creates a claim separate and apart from the contract claim.

Fifth Cause of Action

This claim seeks relief based upon a violation of General Business Law § 349. The Court severs and dismisses this claim against both 140 West and Shaoul because plaintiffs failed to raise an issue of fact about these defendants' actions as "consumer oriented." "As shown by its language and background, section 349 is directed at wrongs against the consuming public. General Business Law article 22–A, of which section 349 is a part, is entitled 'Consumer Protection from Deceptive Acts and Practices'" (*Oswego Laborers' Local 214 Pension Fund v Mar. Midland Bank, N.A.*, 85 NY2d 20, 24-25, 623 NYS2d 529 [1995]).

The Court finds that making alleged misrepresentations to a potential buyer of an apartment does not have the required public focus necessary to sustain this cause of action. "Private contract disputes, unique to the parties, for example, would not fall within the ambit of the statute" (*id*. at 25). That is exactly what the instant dispute between these parties is - a private dispute between the purchasers of an apartment and the sponsor defendants.

Sixth through Eleventh Causes of Action

These claims, which were all previously dismissed as against Shaoul, allege causes of action for negligence, nuisance, trespass, code violations and for injunctive relief. 140 West asserts that these claims should be dismissed against it too because it has no control over the elevators, which are indisputably under the control of Verizon.

The Court dismisses these causes of action against 140 West. Although plaintiffs make numerous arguments about how 140 West exercised control over the elevators, they did not sufficiently address the fact that the elevators are located in the part of the building under Verizon's control. Plaintiffs' reliance on emails about cost proposals for the remediation of noise from the C-bank elevators might prove important for other claims, but it does not adequately explain how 140 West could be liable for elevators it does not operate.

To put another way, even if Verizon authorized 140 West to do work on the elevators (as plaintiffs allege), that does not mean 140 West was suddenly responsible for the noise from Verizon's elevators. Nor does it mean 140 West acquired a duty to monitor and control the noise emanating from Verizon's elevators. No party disputes the fact that these elevators are used exclusively by Verizon on its part of the building. That plaintiffs blame 140 West, in part, for the alleged excessive vibrations in their apartment is understandable. But that does not adequately raise an issue of fact for these claims against 140 West as each cause of action depends on the unfounded assertion that 140 West had control over the elevators.

First and Second Causes of Action Regarding Legal Fees

140 West seeks summary judgment dismissing the portions of the first and second causes of action that seek legal fees. It asserts that the contract at issue does not contain a basis upon which legal fees are awarded.

Plaintiffs did not oppose this branch of the motion and so the portions of these claims are severed and dismissed.

MS006- Plaintiffs' Motion

In this motion, plaintiffs move for summary judgment on their first and second causes of action against defendant 140 West, on their third, fourth and fifth causes of action against both 140 West and Mr. Shaoul, and on their sixth, seventh, eight and tenth causes of action against both 140 West and Verizon.

Breach of Contract

With respect to the breach of contract claims (the first two causes of action), plaintiffs contend that there is no dispute that they entered into a contract for a luxury apartment and that the apartment failed to meet the specifications in the offering plan and the purchase agreement. They emphasize that 140 West insisted that the decibel levels would remain below 35 and 30 for living spaces and bedrooms, respectively, and 140 West failed to do that.

Plaintiffs point to purported expert reports from 140 West as well as a report from its own acoustical consultant, which they claim demonstrate sound levels far and above the promised levels.

140 West claims in opposition that the noise criteria were merely guidance suggested by the architect and should not be considered sound limit levels. It asserts that plaintiffs "invented" these as maximum levels. 140 West also claims that the noise levels were outside its reasonable control and so it cannot be liable under a breach of contract theory.

As an initial matter, the Court observes that there is no dispute that the offering plan contains all manner of sound criteria (NYSCEF Doc. No. 314) and that bedrooms are listed as having a maximum of 30 decibels. Moreover, the purchase agreement specifically references the

offering plan (NYSCEF Doc. No. 317) and there is no dispute that the offering plan was distributed to potential buyers, including plaintiffs, as part of the marketing efforts. 140 West's attempt to claim that the noise levels were merely recommendations is not a basis to deny this branch of the motion. 140 West offered a luxury apartment for sale with an offering plan that decided to incorporate an architect's promise to keep decibel levels at very specific and low levels (levels far below the levels in the NYC Building Code). It cannot make such promises and then insist it had no obligation to fulfill them.

Plaintiffs. however, did not meet their burden to show they are entitled to summary judgment. The SoundSense report (NYSCEF Doc. No. 352), plaintiffs' acoustic service, is not in admissible form; plaintiffs simply uploaded the report and did not include an affidavit from someone with personal knowledge from this entity to make claims about the noise levels from this report. Contrary to plaintiffs' assertions in reply, the Court cannot accept a report for the truth of the matter asserted (which makes the allegations hearsay) without someone either making these allegations or establishing a proper foundation for an exception to the hearsay rule (such as the business records exception). An attorney cannot lay the proper foundation for a business records exception for a document produced by a non-party. This point is crucial because plaintiffs' breach of contract claim relies, in part, upon the specific noise levels cited in the offering plan. Without those readings, they cannot establish a breach of contract.

The Cerami reports (reports generated by parties at the direction of 140 West), which also deal with noise levels from the elevators, do not compel the Court to grant summary judgment. These reports (which are also not in admissible form) suggest that there were problems with the noise in plaintiffs' apartment (*see* NYSCEF Doc. No. 349) and other apartments but do not compel the Court to grant this branch of the motion as a matter of law.

To be clear, the Court finds that, even if these reports were submitted in admissible form, a few isolated readings of noise levels above the promised levels do not entitle plaintiffs to summary judgment as a matter of law. While a fact finder could certainly conclude that these reports (if they are admitted into evidence at trial) along with plaintiff Lal's testimony constitute a breach of contract, this Court cannot make such a credibility finding as a matter of law. This is not a situation where plaintiffs submitted noise readings demonstrating overwhelming evidence that the noises exceeded the promised amounts routinely over a substantial period of time. The Court makes no finding as to what might constitute a breach of contract; it merely finds that it cannot make such a ruling as a matter of law based on this record.

To the extent that the first two causes of action rely on a basis other than the noise levels from the offering plan, the Court finds that there are issues of fact about the extent of the noise and vibration levels. Plaintiffs' account of the unbearable conditions inside the apartment, while compelling, is not a basis to grant summary judgment. To do so would require the Court to make a credibility finding, something it cannot do on this motion.

Third and Fourth Causes of Action

The Court denies this branch of plaintiffs' motion. As detailed above, these claims concern allegations about fraudulent inducement. A fact finder is required to consider whether it believes plaintiffs assertion that 140 West and Shaoul made promises that they never intended to fulfill or credit the developers' position that no one knew about the excessive noise prior to plaintiffs' move into the apartment in 2019. Of course, the fact finder could also find something else altogether. 140 West and Shaoul raised numerous issues of fact about what exactly they knew and when they knew it. Plus, it is undisputed that plaintiff Lal did not personally speak

with Shaoul prior to purchasing the apartment. All of these factors must be considered by the fact finder.

These defendants also raised other issues of fact by pointing out that plaintiffs were in the apartment prior to purchasing it and a fact finder could conclude that fraudulent inducement is not appropriate where plaintiffs were in a position to know about the purported excessive noise prior to buying the apartment. As 140 West points out, plaintiffs claim that the noise is continuous and incessant, and therefore would likely have been present on their pre-purchase visits (although plaintiffs speculate that the offending elevators were conveniently not in use during these times).

Fifth Cause of Action

In connection with motion sequence 005, the Court already dismissed plaintiffs' claims under General Business Law § 349 as this claim is not consumer-oriented.

Sixth, Seventh, Eighth and Tenth Causes of Action

The Court observes that it already dismissed these claims against 140 West in motion sequence 005.

Plaintiffs, however, also seek summary judgment on these claims against Verizon. Plaintiffs are not entitled to summary judgment against Verizon for the sixth cause of action—for negligence—because it is not alleged against Verizon. It is only alleged against 140 West and Shaoul (NYSCEF Doc. No. 311 at 19).

The seventh and eighth causes of action allege a nuisance. "[A] claim of private nuisance arises from an interest in the use and enjoyment of property. The elements of a common-law claim for a private nuisance are: (1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused

by another's conduct in acting or failure to act" (*Berenger v 261 W. LLC*, 93 AD3d 175, 182, 940 NYS2d 4 [1st Dept 2012] [internal quotations and citation omitted]).

Plaintiffs contend that the excessive noise constitutes a nuisance and that Verizon should be liable because it caused the nuisance and failed to remediate the elevator noise. The Court finds that there is an issue of fact with respect to the reasonableness issue. A nuisance claim "generally turns on questions of fact that include the degree of interference and the reasonableness of the use under the circumstances" (*Ranney v Tonawanda City School Dist*., 160 AD3d 1461, 1462, 76 NYS3d 70 [4th Dept 2018]).

The Court cannot conclude as a matter of law, on this record, that the interference was so excessive in order to grant this branch of plaintiffs' motion. A fact finder must consider the record and plaintiffs' account. The fact is that the element almost always requires a trial. And here, there are numerous issues about how often and when the excessive noise condition existed.

The Court also denies plaintiffs' motion to the extent it seeks damages based on violations of the New York City Building Code. As Verizon points out, plaintiffs cannot pursue a claim based solely on a violation of the Building Code (*Schwartz v 170 West End Owners Corp.*, 2022 WL 2612439, 2022 N.Y. Slip Op. 32166(U), 9 [Sup Ct, NY County 2022]). "It is the general rule that if a statute does not explicitly provide for a private cause of action, recovery may be had under the statute only if a legislative intent to create such a right of action is fairly implied in the statutory provisions and their legislative history" (*id*. [internal quotations and citations omitted]). There is no basis to find that these portions of the Building Code provide a private right of action. Certainly, they are relevant for the nuisance cause of action, but it does not constitute a separate and independent cause of action under the Building Code.

The Court denies plaintiffs' motion to the extent it seeks summary judgment against Verizon for the ninth cause of action for trespass and the eleventh claim. Neither plaintiffs' notice of motion nor the memorandum of law in support mention these claims, although plaintiff's wherefore clause in reply seeks summary judgment on all of its causes of action against Verizon.

MS007- Verizon's Motion

In this motion, Verizon seeks partial summary judgment dismissing the eighth cause of action for nuisance (pled in the alternative) and plaintiffs' tenth cause of action based upon purported Building Code violations to the extent that they seek damages from Verizon prior to February 1, 2019 or after April 7, 2022 and to the extent plaintiffs seek legal fees.

Verizon argues that plaintiffs moved in on February 1, 2019 and contends that plaintiffs did not suffer any impact from the allegedly excessive noise prior to the point that they moved into the apartment. It also insists that plaintiffs are not entitled to any recovery after April 7, 2022, the date of plaintiff Lal's deposition where he allegedly claimed the condition was abated.

In opposition, plaintiffs insist that the date they moved into the apartment is irrelevant and that they still had a right to enjoy and use the apartment from the time they had the right to move in. They also insist that plaintiff Lal never claimed at his deposition that there was no longer a problem with the elevator noise.

In reply, Verizon contends that the opposition contains irrelevant arguments and does not address the issues raised in this motion. Verizon maintains that a recent brake job on the elevators has lessened the noise and that it has not received additional complaints about the elevator since March 2022.

The Court grants this motion only to the extent that plaintiffs may not seek damages for the nuisance claim (eighth cause of action) and for violation of the New York City Building Code (the tenth claim) for conditions that existed prior to February 1, 2019. There is no dispute that is the day when plaintiffs moved into the apartment and plaintiffs did not sufficiently show how they could recover for either cause of action for a time when they were not living in the apartment. As noted above, a claim for nuisance requires a showing that there was substantial interference with the use of the property and that interference was unreasonable. Plaintiffs cannot meet those elements for a time period prior to living in the unit. That other unit owners may have complained about the existence of noisy elevators does not permit plaintiffs to pursue a claim before February 1, 2019.

The Court also grants the motion to the extent Verizon sought to preclude plaintiffs from seeking legal fees as plaintiffs did not oppose this branch of the motion in their opposition.

However, the Court denies this motion to the extent it seeks to set a "cut off date" for damages as of April 7, 2022 (plaintiff Lal's deposition"). At the deposition, he was asked what "getting the situation fixed look[ed] like" (NYSCEF Doc. No. 465 at 282). He responded that "it's in a good place, and it will stay in a good place. Like, and I'd be shooting myself in the foot here, but honestly, if I know that we are in the current state, as we have been the last four, five days, and this is the future state, then that is a good state" (*id*.). Plaintiff Lal also speculated that certain, offending elevators were simply turned off (*id*. at 281). The Court finds that is not a definitive statement that the problem was fixed for good or somehow an admission that plaintiffs cannot recover after April 7, 2022. Certainly, defendants will likely point to this statement at trial for a variety of reasons, but it does not compel the Court to grant Verizon summary

judgment on this point. And Verizon did not submit conclusive evidence, such as noise readings, to show the problem no longer exists.

Summary

The Court observes that many individuals, including a witness for Verizon and Shaoul himself, all testified that the noise is a problem in plaintiffs' apartment. But that recognition does not mean that plaintiffs are entitled to summary judgment as a matter of law on their motion. As noted above, the law on nuisance requires findings that are almost always resolved by a fact finder. Questions about reasonableness necessarily involve credibility findings, something this Court cannot do on a motion for summary judgment. While the Court is sympathetic that the plaintiffs' daughters allegedly cannot use their bedrooms and plaintiffs paid eight and a half million dollars for an apartment which appears to sound and feel almost as if a train is running right below them, a trial is necessary.

A finder of fact will have to hear the testimony and consider, among other things, what 140 West and Shaoul knew about the noise and when, why they built bedrooms directly over that noisy elevator machine room (as opposed to possibly building something else, such as a gym or storage room, near the machine room), what if anything they did to try to quiet the noise and vibration that prompted them to write in the offering plan that the decibel levels would be way under what the building code deems acceptable. The factfinder will also have to consider whether the plaintiffs knew or should have known that being above the machine room would be noisy, and exactly how noisy it is, and how often. And the factfinder will also have to determine Verizon's duty, knowing they had an old, noisy elevator machine room right below what they knew were going to be luxury residential apartments, and they continued to operate those elevators despite their neighbor's pleas.

Accordingly, it is hereby

ORDERED that the motion (MS005) by defendants 140 West Street (NY) LLC and Benjamin Shaoul for summary judgment is granted only to the extent that the fifth, sixth, seventh, eighth, ninth, tenth and eleventh as well as the claim for legal fees included in the first and second claims are severed and dismissed and denied with respect to the remaining requests for relief; and it is further

ORDERED that plaintiffs' motion (MS006) for summary judgment is denied; and it is further

ORDERED that defendant Verizon's motion (MS007) for summary judgment is granted only to the extent that plaintiffs may not seek damages against Verizon on the eighth and tenth causes of action that accrued prior to February 1, 2019 and plaintiffs may not seek legal fees from Verizon.

3/21/2023
DATE

ARLENE P. BLUTH, 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