

**George v 327-329 Dev. LLC**

2023 NY Slip Op 32580(U)

July 17, 2023

Supreme Court, Kings County

Docket Number: Index No. 514430/20

Judge: Wavny Toussaint

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 17<sup>th</sup> day of July, 2023.

P R E S E N T:

HON. WAVNY TOUSSAINT,

Justice.

-----X  
DIANE GEORGE,

Plaintiff,

- against-

327-329 DEVELOPMENT LLC,

Defendant.  
-----X

Index No. 514430/20

**DECISION AND ORDER**

Mot. Seq. #03

2023 JUL 18 AM 9:39

KINGS COUNTY CLERK  
FILED

The following e-filed papers read herein:

NYSCEF Doc Nos.:

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Reply Affidavits (Affirmations) \_\_\_\_\_

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56-78  
\_\_\_\_\_  
84-136  
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141-142

Upon the foregoing papers in this breach of contract action, plaintiff Diane George (“plaintiff”) moves (Seq. 03) for an order, pursuant to CPLR 3212, granting her partial summary judgment on her First Cause of Action (for breach of contract) against defendant 327-329 Development LLC (“327-329”) and awarding her money damages in the amount of \$41,988.87 plus nine percent legal interest, liquidated damages calculated at a rate of \$1,500/month for each calendar month from August 1, 2020 through the date of judgment in this action, plus 9 percent legal interest, and plaintiff’s attorneys’ fees and disbursements incurred in this action. Defendant opposes the application.

### Background

Plaintiff is the owner of a home located at 331 20<sup>th</sup> Street, Brooklyn, NY (the “Adjacent Property”). On or about June 22, 2017, 327-329 purchased the house next door to her home and the house next to that and then informed her that it needed access to her property to demolish the two houses and construct a four-story apartment building in their place (the “Project”). On May 1, 2019, plaintiff and 327-329 entered into a License Agreement (“License Agreement”) in which plaintiff granted 327-329 a license to access her property to install and maintain monitoring equipment, temporary protections, a sidewalk shed, and weatherproofing in a manner consistent with the construction plans set forth in the License Agreement.

On or about May 28, 2019, 327-329 began a 15-month period during which it made use of the Adjacent Property to perform work on the Project. Plaintiff alleges 327-329 did not comply with the access plans in the License Agreement and repeatedly breached the License Agreement and/or damaged the Adjacent Property. Plaintiff alleges defendant did not perform its excavation work in compliance with the access plans outlined in the License Agreement, in breach of Sections 3 and 5 of same, which resulted in damage to the Adjacent Property. Specifically, plaintiff contends that on July 23, 2019, a sizable portion of the concrete rear patio at the Adjacent Property broke apart and collapsed into the ground due to the collapse of the soil from the walls of 327-329’s excavation and on the same date plaintiff witnessed and photographed a large gap under a portion of the foundation of the Adjacent Property where there was no soil or other support for the foundation. Plaintiff contends that due to the

damage that 327-329 caused to her property by its non-compliant excavation, she was forced to hire Ancora, an engineering firm, to investigate and report on the damage at substantial cost to her. Plaintiff now seeks reimbursement under the License Agreement for her engineering expenses.

Defendant erected a sidewalk shed that was not in compliance with the License Agreement which necessitated an amendment (“Amendment”). Plaintiff seeks reimbursement for the attorneys’ fees she incurred to secure the Amendment. Plaintiff also claims that she incurred a total of \$41,988.87 in legal and engineering costs due to 327-329’s breach of the License Agreement and damage it caused to the Adjacent Property and that defendant is required to reimburse her pursuant to Section 8 of the License Agreement. Additionally, plaintiff argues, that defendant has failed to repair damage it caused to the Adjacent Property while it was engaged in construction of the Project and thus is in violation of Section 9 of the License Agreement. Section 9 provides for \$1,500.00 a month in liquidated damages until defendant completes any repair and restoration work to the Adjacent Property required under the License Agreement. Plaintiff asserts that due to defendant’s failure to repair her property in the time allotted under the License Agreement, she is now owed liquidated damages. Plaintiff also alleges that pursuant to Section 8 of the License Agreement, she is entitled to be reimbursed for attorneys’ fees in this action because she was forced to resort to the instant litigation due to defendant’s breach of the License Agreement.

### *Procedural History*

On August 7, 2020, plaintiff commenced this action by filing a summons and complaint against defendant, asserting claims for breach of contract and contractual indemnification. On September 2, 2020, defendant joined issue by filing an answer with counterclaims for ejectment and trespass. On May 3, 2021, this Court issued an order (NYSCEF Doc. No. 54) granting plaintiff's motion (Seq. 02) dismissing defendant's counterclaims and denying plaintiff's motion for costs and attorney's fees with leave to renew at the time of the final determination of this action. Plaintiff has provided documents responsive to defendant's discovery demands. Plaintiff's discovery demands served on defendant remain outstanding, which is addressed by the Court herein.

On April 4, 2022, plaintiff filed the instant motion for summary judgment. Defendant submitted opposition on July 17, 2022 and plaintiff replied on September 14, 2022. The Note of Issue has not been filed.

### *The Parties' Positions*

#### Plaintiff's Contentions

Plaintiff argues that 327-329 should be found liable for breaching Section 8 of the License Agreement because plaintiff has not yet been reimbursed for professional fees by defendant, as required under the License Agreement. The reimbursable fees plaintiff incurred are allegedly allocable to three basic categories: defendant's failure to adhere to the agreed upon plans in the conduct of its excavation work and the resulting damage, amending the

License Agreement to address the non-compliant sidewalk shed, and other instances of breach and/or damages to the Adjacent Property.

Plaintiff alleges that on or about July 23, 2019, 327-329's excavation work caused a portion of the patio at the Adjacent Property to break apart and collapse into the ground and at the same time she observed a gap under the Adjacent Property where the foundation lacked support. As a result of the damage, plaintiff contracted with her engineering company, Ancora, to investigate and report on the excavation and foundation issues. According to plaintiff, Ancora's report of July 26, 2019 found that 327-329's excavation work was not in accordance with the approved plans attached to the License Agreement and that the risk of damage to her property from defendant's construction (that Ancora had specifically warned plaintiff about prior to the commencement of the Project) had occurred, undermining the structural integrity of the Adjacent Property. Plaintiff alleges that defendant breached section 3(i) of the License Agreement by failing to perform its excavation work in accordance with the agreed upon plans. Plaintiff claims that defendant had acknowledged the excavation related damage, expressly to plaintiff's counsel, and by repairing some of this damage. Plaintiff argues that under Section 8 of the License Agreement she is entitled to be reimbursed for the legal and engineering fees she incurred to address 327-329's damage to the Adjacent Property due to their non-compliant excavation work.

Plaintiff also alleges that she incurred reimbursable legal fees related to the negotiation of the Amendment to the License Agreement, which was at defendant's request, to address the erection of the sidewalk shed that encroached further onto the Adjacent Property than

agreed upon in the License Agreement. Plaintiff contends that the License Agreement contains a provision that entitles her to reimbursement of her attorneys' fees related to the negotiation of any amendment to the License Agreement if the amendment is at defendant's request. Plaintiff has requested that defendant pay for these expenses as required under the License Agreement, but defendant argues that it already compensated plaintiff for the Amendment to the License Agreement when it increased the monthly license fees payable to plaintiff for several months under the terms of the Amendment. Plaintiff asserts that the Amendment, by its terms, does not preclude her from seeking reimbursement for her attorney's fees incurred while negotiating the Amendment.

Plaintiff argues that there are other instances of damage to the Adjacent Property and/or breach of the Licensing Agreement for which she incurred professional fees. Plaintiff contends that 327-329 further breached the Agreement by repeatedly failing to pay the \$1,500.00 per month license fee, due in advance on the first of the month, as required by the License Agreement. Plaintiff annexes to her motion papers, a schedule of defendant's license fee payments which were due monthly under the License Agreement. The schedule shows that defendant was repeatedly late in remitting the fee to plaintiff. Plaintiff states that 327-329's failure to timely pay the license fee resulted in her incurring additional attorneys' fees as she resorted to her counsel to contact defendant to obtain the payments. Plaintiff alleges that in addition to the expenses incurred to secure the license fee payments, she incurred reimbursable attorney's fees resulting from defendant's multiple other breaches of the License Agreement which include defendant's failure to:

1. Comply with the plans annexed as Schedules to the License Agreement and/or modified those plans without providing notice or gaining approval from Plaintiff, in violation of Sections 3,4, and 5 of the License Agreement;
2. Clean construction debris from the Adjacent Premises on a daily basis in breach of Section 7(B);
3. Provide a project schedule every two weeks in breach of Section 7(C);
4. Comply with numerous Building Code and other legal requirements in breach of Section 7(E);
5. To repair damage within ten days of notice thereof in breach of Section 12;
6. Work timely, by repeatedly starting work well before and working well past the 9 a.m. to 5 p.m. limitation on work hours on the Adjacent Property in breach of Section 7(K);
7. Stop defendant's workers repeated loitering, smoking and littering just outside or in front of the Adjacent Premises, in breach of Section 7(I).

Plaintiff contends that the parties' respective counsel exchanged many e-mails, phone calls, and letters related to these enumerated breaches of the License Agreement which caused her to incur expenses for attorneys' fees. Further, 327-329 repeatedly accessed the Adjacent Property without authorization in breach of Sections 7(K) and 6(b) of the License Agreement. Despite notifying defendant of the unrepaired damage to the Adjacent Property defendant allegedly breached Section 12 of the License Agreement by failing to complete the repairs within 10 days as required. According to plaintiff, her attorneys spent time discussing the case with her, reviewing the License Agreement, photos, reports, and other documents in connection with 327-329's breaches of the License Agreement. Since all these professional fee expenses relate to defendant's breach of the License Agreement or damage to the Adjacent

Property, plaintiff argues that she is entitled to reimbursement of these expenses by the express terms of Section 8 of the License Agreement. Plaintiff contends that she has not been reimbursed for any legal or engineering fees she has incurred since the License Agreement was executed. Plaintiff asserts that she is owed \$41,988.87 in total reimbursable legal fees pursuant to Section 8 of the License Agreement and is entitled to 9 percent legal interest on that amount from the earliest possible ascertainable date of the defendant's breach, pursuant to CPLR 5001.

Moreover, plaintiff proffers that she is entitled to liquidated damages pursuant to the liquidated damages clause of Section 9 of the License Agreement. According to plaintiff, under the License Agreement she is entitled to liquidated damages in the amount of \$1,500 per month (payment of the license fee) until the removal and completion of all Adjacent Premises Access and the repair and restoration of the Adjacent Premises. Plaintiff contends that 327-329 caused damage to the rear patio of the Adjacent Property during its excavation work, made some repairs to her patio after it collapsed but that as to those repairs, the "repaired portion" did not match the existing patio, lacked expansion joints, and lacked adequate draining. Plaintiff maintains that defendant has also failed to repair:

1. The backyard patio draining system which is damaged as a result of its deficient repair of the backyard patio;
2. The paint work in the vestibule, where defendant's workers painted the wall a different color without plaintiff's permission;
3. The front brick wall, which is now collapsing as a result of defendant's demolition work;

4. The siding of the Adjacent Property, which defendant's construction caused to become scratched spotted and discolored; and
5. The downspout at the rear of the Adjacent Property, which was damaged during defendant's construction and repair activities and requires replacement.

Plaintiff claims that since 327-329 has refused to make these repairs after notice thereof it therefore owes her \$1,500.00 per month in liquidated damages from August 1, 2020 to the date of judgment in this action plus 9 percent legal interest.

Plaintiff also requests that this court grant her attorneys' fees and disbursements in this action pursuant to Section 8 of the License Agreement as this action was initiated due to defendant's breach.

### ***327-329's Opposition***

In opposition, 327-329 argues that there are myriad issues of fact that preclude the grant the of summary judgment. Defendant points out that before the Project began, the Pre-Survey Inspection Report and photographs therein unequivocally demonstrate that the Adjacent Property was in poor condition. Despite the premises being in poor condition, defendant contends that in the course of the Project, it made repairs to pre-existing damage to the Adjacent Property which plaintiff never elected to repair on her own and which was caused by the failure of plaintiff to maintain the Adjacent Property.

Further, defendant contends that plaintiff is not entitled to any professional, engineering or attorneys' fees for her allegations regarding the breach of the License Agreement related to its excavation. Defendant argues that the damage to plaintiff's patio was

not the result of its excavation activities but rather a severe rainstorm that led the patio, which was already in poor condition, to collapse. 327-329 asserts that the historical weather data on the evening of July 22, 2019 and early morning hours of July 23, 2019 indicate that a severe rainstorm occurred in Brooklyn. It contends the poor condition of the rear patio's concrete and roof of the Adjacent Property caused rainwater from the storm to drain onto its property causing significant flooding of the excavation pit and washed away some of the soil. 327-329 argues that the rear concrete patio's drain was inadequate, and the slope of the concrete slabs pushed water on its property. It maintains that the cracks in the concrete and the previously washed out or missing mortar caused water to seep under the slabs during the storm. According to defendant, this not only caused more water to drain onto its property, but the pre-existing damage was the cause for the more sever cracking and partial collapse of the concrete patio. Defendant claims that even though it knew that the defective rear patio's concrete was actually the cause of the patio's collapse (and subsequent flooding of the property) it repaired damages to both at its own expense. Defendant contends that because it did not cause the damage to the rear patio's concrete, plaintiff is not permitted to hold defendant liable for her attorneys' and engineering fees related to its collapse under Section 8 of the License Agreement.

327-329 avers that Section 8 of the License Agreement does not entitle plaintiff to recover for Ancora's engineering fees because this section does not require it to pay any of plaintiff's professional fees to investigate or review speculative damages. Defendant argues that plaintiff is disingenuous in her affidavit when she says that she noticed a gap underneath

the foundation of Adjacent Property and states that while plaintiff claims the hole is visible in one of the photos, included in the July 26, 2019 Ancora report, this image is not date stamped like the others that are included in the report and such a hole was not visible from the Adjacent Property. According to defendant, plaintiff is manufacturing the reason for including her counsel on e-mails and incurring the costs for the unauthorized Ancora report which is based in part of photographs plaintiff took when she accessed the Project site without authorization.

Defendant argues that plaintiff is not entitled to any attorney's fees related to the Amendment of the License Agreement. It contends that plaintiff agreed as part of the Amendment that she would not allege that defendant breached the Agreement with respect to the sidewalk shed. It points out that under the Amendment it agreed to compensate plaintiff an additional \$1,500.00 per month in license fees for the extension of the sidewalk shed and thus plaintiff was adequately compensated for this Amendment to the License Agreement and cannot recover attorneys' fees related to the Amendment. Defendant also avers that the plaintiff's attorneys' fees should be reduced because it finds the billing entries in the invoices submitted by plaintiff's counsel to be vague and devoid of an adequate description as to what work is actually being billed.

327-329 argues that plaintiff's claim for liquidated damages pursuant to Section 9 of the License Agreement should be denied because plaintiff has conceded that all outstanding repairs to the Adjacent Property have been completed. Defendant contends that in a meeting with defendant's counsel on July 7, 2020, plaintiff told defendant that the only repairs to the Adjacent Property that were outstanding were the removal of paint and concrete splatter on

the siding of the property and that she wanted the yard, back yard and area around the house swept. Defendant contends that these outstanding issues were immediately remedied. Defendant asserts that based on plaintiff's prior representations to defendant, plaintiff should be estopped from raising any claim that the work at the Adjacent Property or 327-329's responsibilities under the License Agreement are still ongoing.

### ***Plaintiff's Reply***

In reply, plaintiff, in addition to reiterating most of her initial arguments, asserts that despite voluminous pages of affidavits and other exhibits submitted in opposition, defendant has produced little evidentiary proof, in admissible form, that would establish the existence of material issues of fact requiring a trial in this action. 327-329, plaintiff contends, has either admitted or failed to oppose the facts demonstrating its liability and the amount of plaintiff's damages.

### **Discussion**

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). “[T]he proponent of a summary judgment motion 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” (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If a

movant fails to do so, summary judgment should be denied without reviewing the sufficiency of the opposition papers (*Derise v Jaak 773, Inc.*, 127 AD3d 1011, 1012 [2d Dept 2015], citing *Winegrad*, 64 NY2d 851). If a movant meets the initial burden, parties opposing the motion for summary judgment must demonstrate evidentiary proof sufficient to establish the existence of material issues of fact (*see Alvarez*, 68 NY2d at 324, citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The court must then evaluate whether the issues of fact alleged by the opponent are genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [2d Dept 1987]; *Assing v United Rubber Supply Co.*, 126 AD2d 590 [2d Dept 1987]; *Columbus Trust Co. v Campolo*, 110 AD2d 616 [2d Dept 1985], *affd* 66 NY2d 701 [1985]). Mere conclusory statements, expressions of hope, or unsubstantiated allegations are insufficient to defeat a motion for summary judgment (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Spodek v Park Prop. Dev. Assoc.*, 263 AD2d 478 [2d Dept 1999]).

“[T]o plead a cause of action for breach of contract, a plaintiff usually must allege that: (1) a contract exists; (2) plaintiff performed in accordance with the contract; (3) defendant breached its contractual obligations; and (4) defendant’s breach resulted in damages” (*34-06 73, LLC v Seneca Insurance Company*, 39 NY3d 44, 52 [2022] [internal citations omitted]). “In order to state a cause of action to recover damages for a breach of contract, the plaintiff’s allegations must identify the provisions of the contract that were breached” (*Barker v. Time Warner Cable, Inc.*, 83 A.D.3d 750, 751, [2d Dept 2011]).

### *Rear Patio Damage*

Plaintiff and 327-329 entered into the License Agreement to enable 327-329 to have access to the Adjacent property to complete the Project, and it is undisputed that plaintiff performed under the contract and allowed defendant access to the Adjacent Property in accordance with the agreement. Plaintiff asserts that defendant breached Section 3(i) of the License Agreement while conducting its excavation related construction at the Adjacent Property. Section 3(i) provides in pertinent part:

“Adjacent Owner grants Project Owner and its Construction Team a license to access the Adjacent Premises in order to install, maintain, inspect, repair and then remove temporary protection equipment on the Adjacent Premises (the “Temporary Protection”) in accordance with applicable laws, rules, regulations, codes and directives of governmental entities having jurisdiction over the Project (collectively, the “Laws”). Access shall be granted five (5) business days after written notice to the Adjacent Owner including signed and sealed drawings by a licensed professional engineer or architect identifying the Temporary Protections (the plans for the temporary protections are included as part of the Plans attached hereto as Schedule “B”)” (License Agreement at § 3(i), NYSCEF Doc No. 60).

Plaintiff cites as evidence, the July 26, 2019 report from Ancora which indicates that 327-329 did not perform its excavation of the Project site in accordance with the plans outlined in Schedule B of the License Agreement, resulting in a gap in the soil supporting the foundation of the Adjacent Property and the partial collapse of the rear patio at the Adjacent Property on or about July 23, 2019. Plaintiff has therefore established that defendant breached the License Agreement by its failure to adhere to the agreed upon excavation plan in violation of Section 3(i) of the License Agreement. Plaintiff has thus made a prima facie showing of

judgment as a matter of law on the issue liability for a breach of Section 3(i) of the license agreement and resultant damages (*see Manicone*, 75 AD3d at 537).

In opposition, 327-329 raises an issue as to a material fact regarding whether its excavation work caused the damage to the rear patio and foundation at the Adjacent Property and whether it is in breach of Section 3(i) of the License Agreement (*see Alvarez*, 68 NY2d at 324). Defendant denies deviating from the excavation plan and argues that a severe rainstorm combined with pre-existing patio damage was the cause of the partially collapsed patio. With respect to the alleged damage to the foundation, defendant argues that plaintiff is disingenuous in her affidavit when she says that she noticed a gap underneath the foundation of Adjacent Property and states that while plaintiff claims the hole is visible in one of the photos, included in the July 26, 2019 Ancora report, this image is not date stamped like the others that are included in the report and such a hole was not visible from the Adjacent Property.

Defendant submits historical weather data which reveal that a severe rainstorm occurred in Brooklyn on the night of July 22, 2019 into the morning of July 23, 2019 when plaintiff discovered the collapsed patio. Defendant also submits the affidavit of Ivan Bovkun, the project manager for the Project, who supervised the construction activities occurring at the Project and at the Adjacent Property. In his affidavit, Bovkun explains that the damage to the patio was not the result of defendant's excavation work but due to the heavy rains and pre-existing condition of the patio.

Bovkun argues that the Adjacent Property's rear concrete patio drain was inadequate, and the slope of the concrete slabs pushed water onto the Project site (*See* Bovkun Aff. at ¶¶ 17-18, NYSCEF Doc No. 102). Bovkun explains further that the pre-existing cracks in the concrete and the previously washed out or missing mortar caused water to seep under the slabs during the rainstorm and therefore the pre-existing damage was the cause for the more severe cracking and partial collapse of the concrete patio. Defendant also submits a photo taken on July 18, 2019, prior to the storm which shows the patio in a deteriorating condition (Exhibit 10, NYSCEF Doc No. 112). In his affidavit Bovkun, commenting on these photos, states:

“The mortar or adhesive between the slabs closest to the Premises is significantly washed out, missing or lacking. This is especially the case at the concrete slab shown collapsed in the photos from Plaintiff's July 23, 2019 email. That, in addition to cracks in the concrete slabs and curbs, depicted in the Before Photos, and Photograph Nos. 26, 27, and 28 of the Pre-Survey Inspection Report, are an obvious cause for water seeping underneath the concrete. This seepage not only caused the one slab to collapse but served as another conduit for the water to fill the Premises” (Bovkun Aff. at ¶ 18, NYSCEF Doc No. 102).

Defendant's submission raises a genuine question of material fact as to whether defendant caused the partial collapse of the concrete patio and damage to the foundation by conducting its excavation activities in manner inconsistent plans incorporated into the License Agreement. Plaintiff's motion for summary judgment is therefore denied as to liability for violating Section 3(i) of the Agreement and for damage to the Adjacent Property involving the foundation and collapsed rear patio (*see Gervasio*, 134 AD2d at 236).

### *Professional Fees*

Section 8 of the License Agreement provides in relevant part:

“No Cost to Adjacent Owner: After execution of this Agreement, the Project Owner shall reimburse Adjacent Owner for the following reasonable professional fees: (a) engineering fees associated with the review of: (i) monitoring data; (b) revised or addition plans provided by the Project Owner; or (c) damages and Repairs of such damages to the Adjacent Premises; and (b) attorney’s fees in connection with: (x) amendments to this Agreement requested by the Project Owner; (y) breaches of this Agreement by the Project Owner; or (z) damages to the Adjacent Premises. All such expenses shall be paid by Project Owner within fourteen (14) days of receipt of invoices with the required back up (substantiating) documentation, with permissible redactions for attorney-client privilege” (License Agreement at § 8, NYSCEF Doc No. 60).

The express terms of the License Agreement provide that when the project owner requests an amendment to the License Agreement, plaintiff is entitled to attorneys’ fees related to such amendment. Here, plaintiff has established through the submission of e-mails between her counsel and 327-329 that defendant requested the Amendment to the License Agreement to account for the sidewalk shed that defendant built which encroached further onto the Adjacent Property than initially agreed upon.

Defendant argues, however, that the language contained in the Amendment precludes plaintiff from recovery of her attorneys’ fees for the negotiation of the Amendment by pointing to paragraph “4” which provides: “In exchange for the foregoing, and except as otherwise set forth in this Amendment, Adjacent Owner agrees not to allege that Project Owner has breached the Agreement with respect to the current configuration of the Sidewalk Shed.” Plaintiff argues that in agreeing to this language, she never intended to waive her right to attorneys’ fees for the negotiation of the Amendment. While plaintiff agreed in the

Amendment not to assert that defendant breached the License Agreement with respect to the sidewalk shed, she is still permitted to assert her rights elsewhere under the License Agreement which expressly provide that the Project Owner is obligated to pay for her legal fees if it requests an Amendment to the License Agreement. The language in the Amendment does not preclude plaintiff from recovering for reimbursement of those fees because it does not constitute a waiver of her rights as set forth elsewhere in the License Agreement. “[W]aiver is an intentional relinquishment of a known right and should not be lightly presumed. It is well settled that mere silence or oversight does not constitute clear manifestation of an intent to relinquish a known right” (*Matthew Adam Props., Inc. v United House of Prayer for All People of the Church on the Rock of the Apostolic Faith*, 126 AD3d 599, 600-601 [1st Dept 2015] [internal quotation marks and citations omitted]). Nowhere in the language of the Amendment does plaintiff indicate that she waives her express right to reimbursement for her legal fees and the Amendment’s silence on the issue cannot be read to constitute waiver. Plaintiff has therefore made a prima facie showing that 327-329 is in breach of Section 8 of the License Agreement for failure to pay plaintiff’s attorneys’ fees related to the Amendment to the License Agreement and that she is entitled to judgment as a matter of law (*see Manicone*, 75 AD3d at 537).

In opposition, defendant has failed to raise a question of fact as to whether it is obligated under the License Agreement to pay plaintiff’s attorneys’ fees related to the Amendment. 327-329 offers no facts that would preclude this Court from granting plaintiff’s motion as to this issue (*see Alvarez*, 68 NY2d at 324). Plaintiff’s motion for summary

judgment is therefore granted as to defendant's breach of Section 8 of the License Agreement and defendant's liability under Section 8 for legal fees related to the Amendment to the License Agreement (*see Gervasio*, 134 AD2d at 236).<sup>1</sup> Defendant must pay plaintiff for her attorneys' fees related to the Amendment to the License Agreement plus 9 percent legal interest from August 1, 2020 – a single reasonable intermediate date pursuant to CPLR § 5001 (b).<sup>2</sup> 327-329 must therefore pay plaintiff a total of \$13,200.00 plus 9 percent legal interest from August 1, 2020 until the date of this decision for her attorneys' fees related to the Amendment.

Plaintiff claims that she commissioned Ancora's July 26, 2019 report as a result of the damage to the Adjacent Property's rear patio and foundation, and pursuant to Section 8, she is entitled to reimbursement for engineering costs and legal fees related to this damage. Since summary judgment is denied as to defendant's liability for damage to the rear patio and foundation of the Adjacent Property, plaintiff's motion for summary judgment must also be denied as to her claim for engineering fees related the July 2019 Ancora Report and legal fees related to the foundation and rear patio damage. According to the invoices plaintiff's attorney

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<sup>1</sup> Pursuant to CPLR § 3217(b) the remainder of this action including Plaintiff's second cause of action for Indemnification is discontinued.

<sup>2</sup> CPLR 5001 (b) provides: "Date from which computed. Interest shall be computed from the *earliest ascertainable date the cause of action existed*, except that interest upon damages incurred thereafter shall be computed from the date incurred. *Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date*" (emphasis added).

provided, she paid \$5,832.00 in legal fees and expenses related to Ancora's report and the patio/foundation damage. Defendant does not owe this amount pending a trial on the issue of whether it caused the patio and foundation damage to the Adjacent Property.

Plaintiff seeks reimbursement of legal fees related to defendant's breach of the License Agreement with respect to the monthly License Fee. Section 9 of the License Agreement provides:

“In consideration of the License granted by the Adjacent Owner herein, Project Owner shall pay the Adjacent Owner a monthly license fee of One Thousand Five Hundred Dollars \$1,500.00 (the “License Fee”) commencing from the date that the first exercise of Adjacent Premises Access is exercised until the removal and completion of all Adjacent Premises Access and the repair and restoration of the Adjacent Premises in accordance with this agreement. The License Fee shall be due in advance on the first of the month, pro-rated as necessary. The parties agree that the aforesaid license fees are reasonable liquidated damages and not a penalty and that the total actual losses sustained by the Adjacent Owner caused by Project Owner's delays are difficult to determine” (License Agreement at § 9, NYSCEF Doc No. 60).

It is undisputed that there were multiple instances where 327-329 breached the License Agreement by failing to pay the License Fee by the due date set forth therein. Plaintiff sought the services of her legal counsel to obtain payment of late license fees. Section 8 of the License Agreement expressly entitles plaintiff to reimbursement for legal fees when defendant is in breach of the License Agreement. Plaintiff has submitted documentation where defendant admits that it was late in paying the License Fee on several occasions. Plaintiff has therefore made a prima facie case for summary judgment on her claim for attorneys' fees based on defendant's late payment of license fees (*see Manicone, 75 AD3d at 537*).

In opposition, defendant has not raised a question of fact as to whether it was late in paying the License Fees on multiple occasions in breach of the License Agreement (*see Alvarez*, 68 NY2d at 324). Defendant is therefore liable to plaintiff for her legal fees incurred in connection with its failures to pay the License Fee when due. Consequently, plaintiff's motion for summary judgment as to reimbursement of legal fees in connection with obtaining the License Fee is granted (*see Gervasio*, 134 AD2d at 236). 327-329 is obligated to reimburse plaintiff for her attorneys' fees related to collection of the tardy License Fee payments, plus 9 percent legal interest from August 1, 2020. 327-329 must pay plaintiff a total of \$392.00 plus 9 percent legal interest from August 1, 2020, until the date of this decision.

Plaintiff alleges that she incurred an additional \$22,564.87 in legal fees because of 327-329's breaches of the License Agreement due to its failure to timely reimburse her for legal fees incurred and make necessary repairs, and for various instances of damage to the Adjacent Property. Section 8 of the License Agreement provides that plaintiff is entitled to reimbursement for attorneys' fees in connection with 327-329's breaches of the License Agreement and for damage to the Adjacent Property. Plaintiff has submitted numerous e-mails and text messages that indicate that at various times throughout the license term there was damage to the Adjacent property that required 327-329 to make repairs which were sometimes timely repaired but at other times were not (*see Liquidated Damages, infra*). Plaintiff demonstrates that she incurred legal fees in order to request certain repairs to the Adjacent Property that were eventually made as well as to repeatedly request that repairs be made that were never made. Throughout the license term plaintiff also incurred legal expenses

in connection with defendant's refusal to reimburse her for any legal fees. Plaintiff's counsel has also provided invoices with clear descriptions of his work on issues involving the Project and the License Agreement. Plaintiff has thus made a prima facie showing of judgment as a matter of law on her claim for reimbursable legal expenses under Section 8 of the License Agreement (*see Manicone*, 75 AD3d at 537).

In opposition, defendant fails to raise an issue of fact as to whether plaintiff incurred these legal expenses due to its breaches of the License Agreement and damage it caused to the Adjacent Property as provided for in Section 8 of the License Agreement (*see Alvarez*, 68 NY2d at 324). 327-329 asserts in opposition that the invoices from plaintiff's attorney do not provide enough detail to know what is being billed and therefore plaintiff's legal fees should be reduced. However, a review of the invoices submitted by plaintiff's attorney reveals that they provide great detail as to what legal issues plaintiff's attorney billed for. It is also worthy of note that Section 8 of the License Agreement provides that there is to be no cost to the Adjacent Landowner (plaintiff) for the Project and thus in the absence of compelling reasons to disregard any of the entries in the invoices submitted by plaintiff's attorney, her reimbursable legal expenses should not be reduced since it would mean that plaintiff has to incur out of pocket expenses as a result of entering into the License Agreement. With no facts in dispute, plaintiff's motion for summary judgment on her claim under Section 8 of the License Agreement for her remaining legal expenses is granted (*see Gervasio*, 134 AD2d at 236). 327-329 must pay plaintiff \$22,564.87 plus 9 percent legal interest from August 1, 2020, until the date of this decision for her remaining attorneys' fees.

### *Liquidated Damages*

Plaintiff alleges that defendant has failed to complete repairs to the Adjacent Property and is therefore in breach of Sections 9 and 12 of the License Agreement. Section 9 grants plaintiff liquidated damages in the form of a monthly license fee until such time as repairs to the Adjacent Property are completed. Section 12 of the License Agreement governs defendant's obligations to repair any damage it causes to the Adjacent Property due to its access to the property. Section 12 provides in pertinent part:

“Without limiting the generality or affecting the interpretation of any other provisions of this agreement, Project Owner shall cause the repair and/or replacement (“Repairs”), at its sole cost and expense, of any damage to the Adjacent Premises by the exercise of the Adjacent Premises Access or any other access, or any work performed by or on behalf of Project Owner of its Construction Team on or about the Project Premises or the Adjacent Premises. Project Owner shall be required to make Repairs within ten (10) days of notice of damage from Adjacent Owner. In the event that due to the nature of the damage and/or the Repairs, the Project Owner cannot, with the exercise of commercially reasonable diligence, make the repairs within (10) days and continues to diligently prosecute the repairs, provided that in no event shall the Project Owner not complete the Repairs within (30) days of notice. In the event that the Project Owner does not make the Repairs within the aforesaid time frames, the Adjacent Owner shall be permitted to make the Repairs at the Project Owner's expense. Project Owner shall pay for the cost of the Repairs within (14) days of the Adjacent Owner's submission of invoice(s) therefor. This section shall survive the expiration or earlier termination of this Agreement (License Agreement at § 12, NYSCEF Doc No. 60).

Plaintiff alleges that defendant did not complete repairs to the backyard patio draining system. However, as there is a material issue of fact concerning 327-329's liability for damage to the backyard patio and foundation, it is not liable to complete repairs to the backyard patio

and foundation until the question of whether defendant caused the backyard patio and foundation damage is resolved at trial.

Plaintiff also claims that 327-329's workers painted a portion of the vestibule of the Adjacent Property in a different color without plaintiff's permission. Plaintiff has submitted photos of the damage which show the wall was painted a different color by 327-329's workers and reveal that defendant has not made repairs. 327-329 does not dispute that the wall was painted by its workers and has not been repainted green—the original color. Additionally, plaintiff asserts that defendant caused damage to the siding of her house that it has not repaired. Plaintiff has submitted photographic evidence which indicates that the siding of the house which she installed in 2019 is now scratched, spotted, and discolored. Defendant does not dispute that the siding of the Adjacent Property has been damaged or raise a question of fact as to the source of the damage. Plaintiff has also established that a downspout is permanently damaged at the rear of the Adjacent Property. 327-329 does not dispute that this downspout is damaged or raise a question of fact as to the cause of the damage. Plaintiff also asserts that defendant's demolition work caused the collapse of a portion of a brick wall at the front of the Adjacent Property and running along the shared property line from the street to the front door. Plaintiff states that defendant caused the damage to the brick wall with its work related to the sidewalk shed which has caused the wall to collapse. 327-329 argues that the wall had pre-existing damage as noted in its the Pre-Survey Inspection Report which identified "cracking and spalling" of the wall. However, photographs included in that survey show that the wall was intact and not missing any bricks while more recent photos supplied

by plaintiff show that the wall sustained damage and is now buckling and missing bricks. Plaintiff has therefore demonstrated that defendant damaged the wall and defendant has failed to raise a question of fact as to whether it caused the damage.

As noted above, 327-329 asserts generally that the necessary repairs to the Adjacent Property have been completed. It contends that in a meeting with defendant's counsel on July 7, 2020, plaintiff told defendant that the only repairs to the Adjacent Property that were outstanding were the removal of paint and concrete splatter on the siding of the property and that she wanted the yard, back yard and area around the house swept. 327-329 avers that these outstanding issues were immediately remedied. Defendant argues that based on plaintiff's prior representations to it, plaintiff should be estopped from raising any claim that the work at the Adjacent Property or 327-329's responsibilities under the License Agreement are still ongoing. Plaintiff denies having made the statements regarding the repairs that she is alleged by defendant to have made in the July 7, 2020 meeting. Defendant's claim is insufficient to raise a question of material fact because the License Agreement contains a provision rendering an oral waiver of rights under the License Agreement invalid. Section 14 (a) of the License Agreement provides:

This Agreement may not be changed, modified, terminated or discharged, in whole or in part, nor any of its provisions waived, except by a written instrument which (i) shall expressly refer to this Agreement, and (ii) shall be executed by the party against whom enforcement of the change, modification, termination, discharge or waiver shall be sought (License Agreement at § 14 (a), NYSCEF Doc No. 60).

This provision of the License Agreement means that in order for plaintiff to waive her right to have the outstanding repairs completed, defendant must obtain a waiver in writing, otherwise plaintiff's rights under the License Agreement continue as provided. As it stands, plaintiff has demonstrated that 327-329 is in breach of Sections 9 and 12 of the License Agreement for failure to continue paying the monthly license fee until repairs are completed, and timely complete the repairs, respectively. Plaintiff has established a prima facie showing of entitlement to summary judgment (*see Manicone*, 75 AD3d at 537). In opposition, defendant has failed to raise a question of material fact regarding its liability for the outstanding repairs to the Adjacent Property and is obligated to complete them (*see Alvarez*, 68 NY2d at 324). Plaintiff's motion for summary judgment is therefore granted as to her claim that defendant breached Sections 9 and 12 of the License Agreement with resultant damages (*see Gervasio*, 134 AD2d at 236).

While not being found liable at this time for the rear patio damage, 327-329 has been found liable to plaintiff under the License Agreement for not making the other repairs to the Adjacent Property described herein or reimbursing plaintiff for the cost of those repairs. Since plaintiff has established that defendant has failed to make the outstanding repairs and more than 30 days has elapsed since notice thereof, the liquidated damages clause of the License Agreement is triggered. Section 9 of the License Agreement, *supra*, provides that the license fee shall remain in effect until such time as all access to, repair and restoration of the Adjacent Property is complete and serves as liquidated damages. Plaintiff is therefore entitled to

liquidated damages from 327-329 in the amount of \$1500.00 per month, plus 9 percent legal interest thereon, from August 1, 2020 until the date of this decision.

***Plaintiff's Discovery Demands***

Since there is a question of fact remaining as to whether 327-329 caused the damage to the rear patio and foundation of the Adjacent Property and the issue must be resolved at trial, the parties are directed to appear for a preliminary conference in the PC/Intake Part, to set the appropriate discovery schedule.

***Attorneys' Fees***

Plaintiff argues that she should receive attorneys' fees in this action which she has brought due to 327-329's breach of the License Agreement. Section 8 of the License Agreement entitles plaintiff to recover attorneys' fees in connection with, "...breaches of the License Agreement." Since 327-329 has been found to have breached the License Agreement on numerous occasions, plaintiff is entitled to attorneys' fees and disbursements incurred in bringing this action under Section 8 of the License Agreement. Accordingly, 327-329 must reimburse plaintiff for all of her attorneys' fees and disbursements incurred in bringing this action upon a full accounting at the time of trial.

The Court has considered the parties' remaining contentions and finds them to be without merit. All relief not specifically granted herein has been considered and is denied.

**Conclusion**

Accordingly, plaintiff's motion (Seq. 03) for summary judgment is resolved as follows; and it is hereby

**ORDERED** that the motion is denied as to 327-329's breach of Section 3(i) of the License Agreement; and it is further

**ORDERED** that defendant must pay plaintiff for her attorneys' fees related to the License Amendment, in the amount of \$13,200.00 plus 9 percent legal interest from August 1, 2020; and it is further

**ORDERED** that defendant must pay plaintiff for her remaining attorneys' fees and related expenses incurred by plaintiff due to defendant's breaches of the License Agreement and for damage it caused to the Adjacent Property in the amount of \$22,564.87 plus 9 percent legal interest from August 1, 2020 until the date of this decision; and it is further

**ORDERED** that defendant must pay plaintiff for attorney's fees relating to plaintiff's attorney's efforts to secure payment of the monthly License Fee in the amount of \$392.00 plus 9% legal interest from August 1, 2020 until the date of this decision; and it is further

**ORDERED** that defendant must pay plaintiff as liquidated damages \$1500.00 per month, plus 9 percent legal interest thereon, from August 1, 2020 until the date of this decision; and it is further

**ORDERED** that summary judgment is denied as to defendant's liability for damage to the rear patio and foundation of the Adjacent Property under Section 3(i) of the License

Agreement and the related claim for engineering and legal fees regarding the July 2019 Ancora Report; and it is further

**ORDERED** that defendant shall pay plaintiff's attorneys' fees and disbursements, incurred in bringing this action, upon a full accounting at the time of trial; and it is further

**ORDERED** that the parties shall appear for a preliminary conference in the PC/Intake Part on August 14, 2023.

This constitutes the decision and order of the court.

E N T E R

  
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J. S. C.

**HON. WAVNY TOUSSAINT**  
**J. S. C.**

2023 JUL 18 AM 9:39

KINGS COUNTY CLERK  
FILED