SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LORI S. SATTLER** **PART** **02M**

Justice

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16 WEST 8TH LLC,

Plaintiff,

- v -

THOMAS GLUCKMAN, ROBY GLUCKMAN, MATTHEW MODINE, INDIVIDUALLY AND AS TRUSTEE FOR THE MODINE FAMILY TRUST, CARIDAD MODINE, INDIVIDUALLY AND AS TRUSTEE FOR THE MODINE FAMILY TRUST, THE MODINE FAMILY TRUST

Defendant.

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INDEX NO. 162163/2014

MOTION DATE 02/03/2025, 02/03/2025, 02/03/2025, 02/04/2025

MOTION SEQ. NO. 017 018 019 020

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 017) 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 671, 794, 795, 796, 797, 798, 799, 800, 801, 818, 824, 825, 826, 827, 828, 835

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

The following e-filed documents, listed by NYSCEF document number (Motion 018) 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 672, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 819, 822, 823, 836

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

The following e-filed documents, listed by NYSCEF document number (Motion 019) 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 673, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 820, 829, 830, 831, 832, 833, 837

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

The following e-filed documents, listed by NYSCEF document number (Motion 020) 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 821, 834, 838

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

This is an action in which the Court must determine the property rights of the owners of three adjoining properties in Greenwich Village, whether and how those rights have been violated over the last twenty-five years, and the appropriate and equitable remedy under the circumstances. The motions now before the Court seek summary judgment by all parties on all claims, are all opposed, and are consolidated for disposition herein.

Plaintiff 16 West 8th Street LLC ("Plaintiff") is the owner of a commercial building located at 16-22 West 8th Street, on the south side of 8th Street between Fifth Avenue and MacDougal Streets ("8th Street Premises"). The building is one story with a basement and contains five commercial tenants. In addition to the doors providing entry on 8th Street, there is one door at the rear of the building ("Egress Door").

To the south is MacDougal Alley, a historic dead-end alleyway accessible from MacDougal Street, originally built for carriage houses serving the homes on 8th Street and Washington Square North. Over time, these carriage houses have been converted to private homes. Defendants Thomas and Roby Gluckman ("Gluckmans") are the owners of one of these homes, a residence located at 15 MacDougal Alley, on the north side of the alley. Defendants Matthew Modine, Caridad Modine, and the Modine Family Trust ("Modines") own a house located at 13 MacDougal Alley, just west of the Gluckmans' home. The Gluckmans and the Modines are collectively referred to herein as "Defendants." Their properties (collectively, "MacDougal Premises") are directly south of the 8th Street Premises such that the Egress Door opens out onto the backyard of 15 MacDougal Alley. On the eastern portion of 13 MacDougal Alley, adjacent to 15 MacDougal Alley, is a doored passageway providing access from the backyard of 13 MacDougal Alley to MacDougal Alley itself. Plaintiff annexes a digital tax map illustrating the relationship between the properties (*see generally* NYSCEF Doc. No. 533, 19).

In the 1960s, the three properties were owned by non-party Chisholm Realty Company ("Chisholm"). At the time, 16-22 West 8th Street consisted of four homes. Chisholm demolished these homes and constructed the 8th Street Premises. Thereafter, Chisholm created three easements affecting the 8th Street and MacDougal Premises, referred to in the papers as the "Egress Easement," the "Maintenance Easement," and the "Electrical Conduit Easement" (NYSCEF Doc. Nos. 548-550). The easements each contemplate that the properties may come under separate ownership in the future and indicate Chisholm's desire to establish certain rights in favor of the 8th Street Premises.

The Egress Easement (NYSCEF Doc. No. 548) acknowledges that Chisholm was in the process of constructing the 8th Street Premises and "in connection therewith requires the right to use a portion of the MacDougal Premises as a means of emergency egress from the 8th Street Premises" (*id.* at 1). It grants to the owners of the 8th Street Premises:

> [A] permanent right and easement to enter and cross the open yards at the rear of the MacDougal Premises, and then to enter and traverse the existing passageway which runs along the easterly portion of (and under the upper stories of the building on) No. 13 MacDougal Alley, all for the purpose of gaining access from the 8th Street Premises to MacDougal Alley, as and when such access may be necessary because of fire, casualty or other emergency occurring at the 8th Street Premises.

(*id.* at 2).

The Maintenance Easement (NYSCEF Doc. No. 549) grants to the owners of the 8th Street Premises the right to use and access certain aspects of the MacDougal Premises in order to maintain their property, including sewer and drain lines, lights on the roof and southern exterior wall of the 8th Street Premises, and the exterior of the southern wall and foundation of the building. It further grants:

> [T]he right and easement to maintain the encroachment of the southerly wall and foundations of the existing building on the 8th Street Premises upon some or all of

> the several parcels comprising the MacDougal Premises, including, without limitation, the encroachment of the engineer's exit in the rear yard of the parcel known as No. 15 MacDougal Alley, such right and easement to continue for so long as the existing building on the 8th Street Premises shall continue in existence; provided, however, that the right and easement to maintain an engineer's exit in the rear yard of the parcel known as No. 15 MacDougal Alley shall continue in respect of any new or replacement building erected on the 8th Street Premises.

(*id.* at 7).

The Electrical Conduit Easement (NYSCEF Doc. No. 550) grants the owners of the 8th Street Premises:

> [A] permanent right and easement to maintain an underground electrical conduit running from the 8th Street Premises across the rear yards of the MacDougal Premises and thence up the wall of Premises 13 MacDougal Alley and through or beneath the passageway running below a portion of Premises 13 MacDougal Alley, together with the right to maintain electric lights in such passageway and an exit light at or near the MacDougal Alley end of such passageway . . . .

(*id.* at 2). Both the Maintenance Easement and the Electrical Conduit Easement provide that, absent prior written consent:

> Chisholm, for itself and its successors in title to the several parcels comprising the MacDougal Premises and the 8th Street Premises, agrees that it will not erect any structure on its property or take any other action which would interfere with the rights and easements herein granted or the benefits intended to be conferred hereby.

(Maintenance Easement, 7-8; Electrical Conduit Easement, 5).

It is undisputed that the easements were duly recorded. According to the New York City Department of Finance Office of the City Register, the Egress and Maintenance Easements were also filed against the 8th Street Premises and the Egress and Electrical Conduit Easements were filed against 15 MacDougal Alley (NYSCEF Doc. Nos. 585).

In 1973, the 8th Street Premises was sold to Lawrence Friedland, Inc., Lawrence Friedland, and Melvin Friedland (*see* NYSCEF Doc. No. 551). Members of the Friedland family, through Plaintiff, remain the owner of this property today. The easements are referenced

in a rider annexed to the contract of sale therefor (NYSCEF Doc. No. 552, ¶ 6[m]). At some point, Chisholm also sold 13 MacDougal Alley and 15 MacDougal Alley. In 1984, Matthew and Caridad Modine purchased 13 MacDougal Alley from a subsequent owner (NYSCEF Doc. No. 554). A Certificate and Report of Title from the sale references the easements (NYSCEF Doc. No. 557, 3, 12). The property was transferred to the Modine Family Trust in 2018 (NYSCEF Doc. No. 555). In 1999, the Gluckmans began renting 15 MacDougal Alley from its prior owner, John Burstein ("Burstein"). Burstein and the Gluckmans then entered into an option agreement allowing the Gluckmans to purchase the property, which they exercised in 2001 (NYSCEF Doc. No. 556). Prior to the purchase, the Gluckmans obtained a title insurance policy and conducted a land survey. The easements are noted in the title insurance policy (NYSCEF Doc. No. 560, 5) and cited in the land survey documents (NYSCEF Doc. No. 561, 19, 24, 25, 31, 69-100). The land survey map, which refers to the title insurance policy, is annexed to the deed (NYSCEF Doc. No. 556).

The Gluckmans began construction of a two-story extension to the rear of their home in 2001, which enclosed the entirety of their backyard, obstructing the Egress Door (NYSCEF Doc. No. 539, T. Gluckman EBT, 85, 172-173). Mr. Modine testified to seeing a mason "bricking shut the doorway," and when he asked him about it being used as an emergency exit, the mason said, "not anymore" (NYSCEF Doc. No. 613, M. Modine EBT 1, 74-75; NYSCEF Doc. No. 614, Modine EBT 2, 337).

The extension contains the Gluckmans' kitchen, dining room, primary bedroom, and a bathroom (NYSCEF Doc. No. 590, T. Gluckman Aff., 2) and according to the expert Plaintiff retained for this litigation, was built without the proper permits from the Department of Buildings ("DOB") and approvals from the Landmarks Protection Commission ("LPC"), and

violates zoning regulations (NYSCEF Doc. No. 588, Bodnar Aff., 18-20). The permit application associated with the project describes the work performed as "interior renovation of existing one-family house. No change in use, egress or occupancy under this application" with an estimated cost of $33,000 (NYSCEF Doc. No. 562). Scott Weinkle ("Weinkle"), the Gluckmans' architect on the project, filed the application in 1999 prior to the property's sale, and Burstein was listed as the owner (*id.*; *see also* NYSCEF Doc. No. 544, Scott EBT, 40-43, 72-73) although Burstein testified he never authorized the work (NYSCEF Doc. No. 538, Burstein EBT, 87-89). Mr. Gluckman did not know whether permits were filed or whether permission was obtained from the LPC, stating that "the people who worked there, the architects or builders were responsible for filing for permits" (T. Gluckman EBT, 86, 89-91).

The Gluckmans testified they were unaware of the easements at the time they purchased 15 MacDougal Alley, although Mr. Gluckman conceded he received a copy of the title report (T. Gluckman EBT, 97, 111-112; NYSCEF Doc. No. 540, R. Gluckman EBT, 82). However, Weinkle testified, "I actually thought our plans were approved to build in the rear yard. I'm sorry, I don't recall if [Ms. Gluckman] obtained a variance, but I believe they went through formal channels to make it allowable. I'm actually surprised to see it wasn't all permitted" (NYSCEF Doc. No. 545, Weinkle EBT, 93, 105). Construction was completed in early 2003.

More than ten years passed without issue. Then, on September 3, 2013, Plaintiff's in-house architect, Marc LaPointe, was conducting an inspection of the 8th Street Premises as part of a potential new tenancy, when he found that the Egress Door could not be opened (NYSCEF Doc. No. 587, LaPointe Aff.). He maintains that as a result of this incident, he discovered for the first time that the Gluckmans had built their extension, after which he learned of the three easements (*id.*; *see also* NYSCEF Doc. No. 595, LaPointe EBT, 56-58). The parties dispute

whether Plaintiff could have reasonably been unaware of the extension during the course of its construction and for more than ten years after its completion. LaPointe maintains that the purpose of the Egress Door was for emergencies only, and there was never a reason for anyone to open it, despite the fact that the discovery was made during a non-emergency walk-through.

LaPointe also conceded that the door onto the roof of the 8th Street Premises faces the Gluckmans' extension, that renovations including roof work were done on the 8th Street Premises, and that he as well as others who worked for Plaintiff's property management company had been on the roof in the thirteen years from the time the Gluckmans began constructing the extension until the time Plaintiff commenced the action. Mr. Modine also testified it was very noisy throughout the construction (M. Modine EBT 2, 332-334). Based on this, the Gluckmans maintain that Plaintiff had ample opportunity to discover the extension even without attempting to open the Egress Door. According to LaPointe, there is a 63-inch wall on the roof of the 8th Street Premises that obscures the extension, and in any event, whatever portion of the extension can be seen from the roof is not necessarily indicative of whether or not the Egress Door remained accessible.

It is undisputed that following Plaintiff's discovery that the Egress Door was blocked, it made changes for the affected tenants and currently all tenants have the requisite number of exits to be code compliant without use of the Egress Door (NYSCEF Doc. No. 830, 6; NYSCEF Doc. No. 794, 11). Nevertheless, after LaPointe attempted to open the door in 2013 and prior to the commencement of this action, Plaintiff and the Gluckmans engaged in discussions to create a new door on the rear wall of the 8th Street Premises in the yard of the Modines' property at 13 MacDougal Alley (NYSCEF Doc. No. 598, Friedland EBT, 26). The Gluckmans engaged an architect who presented a proposal for this new egress at the Gluckmans' expense, and permits

were obtained to determine feasibility (*id.* at 34-38; LaPointe EBT at 113-119). Mr. Gluckman approached Ms. Modine to ask whether a door could be constructed in the yard of 13 MacDougal Alley and she said no (NYSCEF Doc. No. 615, C. Modine EBT, 131-132).

In 2014, Plaintiff commenced this action against the Gluckmans asserting three causes of action alleging breach of the easements, as well as a cause of action seeking a permanent injunction restraining the Gluckmans from interfering with the easements, compelling them to remove all offending structures, and prohibiting them from building any further structures that would contravene the easements (*see* NYSCEF Doc. No. 533). Plaintiff also asserted a fifth cause of action alleging entitlement to punitive damages.

The Gluckmans filed an Answer (NYSCEF Doc. No. 534) interposing 17 affirmative defenses and two counterclaims for injunctive relief compelling Plaintiff to allow relocation of the door. The pleading's primary contentions are first that the parties had previously planned to relocate the door at the Gluckmans' expense, a plan which Plaintiff allegedly reneged on when it commenced the action, and second that Plaintiff's claims are untimely insofar as the extension was completed in 2003 and the action was not filed until 2014. Plaintiff filed a Reply asserting its own affirmative defenses (NYSCEF Doc. No. 535).

Plaintiff indicates it is being harmed by the Gluckmans' extension insofar as it "always looks to optimize its real estate holdings, maximize the value of its properties, and bring its properties to the highest and best use," and that it has the right under zoning regulations to develop a multi-story commercial or mixed-use building on its property, or sell the property for that purpose, and that the Gluckmans' extension may prevent it from maximizing all potential uses (*id.* at 24-25; NYSCEF Doc. No. 586, Friedland Aff., 3). Even if it never develops the

Premises, Plaintiff's expert states that while the existing exits are code compliant for the current tenants, they may not be adequate for future tenants (Bodnar Aff., 23).

The Gluckmans' expert disagrees on the extent to which Plaintiff is allowed to further develop on its property (NYSCEF Doc. No. 795, Logan Report, 10-13). She further opines that despite taking the position that the Egress Door is necessary for the safety of occupants of the 8th Street Premises, Plaintiff has not historically maintained a legal egress to MacDougal Alley, pointing to building code sections requiring that exits be clearly visible, readily accessible and unobstructed at all times, and have appropriate lighting (NYSCEF Doc. No. 796, Logan Rebuttal Report, 11-12). She does not address whether the extension was built in compliance with DOB, LPC, and zoning requirements.

To that end, in 2015, the Gluckmans were cited with a DOB violation for their extension, which they were able to resolve (T. Gluckman EBT, 137, 143-144, 161). As part of that process, letters were submitted purportedly from Burstein and an individual named Larry Shinbaum stating the extension existed prior to the Gluckmans' purchasing the home (*id.* at 161). Mr. Gluckman and Burstein agree that Burstein was never asked to write such a letter (*id.*; Burstein EBT, 131-135), and neither knows a Larry Shinbaum (T. Gluckman EBT, 161; Burstein EBT, 135).

In 2017, the Gluckmans moved for summary judgment on the Complaint and their counterclaims. The Court (Mendez, J.) denied the motion except as to the cause of action for punitive damages, which was dismissed. That decision was affirmed by the Appellate Division, First Department, which also found issues of fact as to whether the Gluckmans' extension interferes with the Egress Easement as contemplated by the language therein, and as to whether

the parties ever reached an agreement relied on by the Gluckmans (*16 W. 8th LLC v Gluckman*, 168 AD3d 544 [1st Dept 2019]).

In 2018, the Modines prepared to undergo a construction project at 13 MacDougal Alley which included incorporating the passageway into the first floor of their home (*see* NYSCEF Doc. Nos. 575-576). Plaintiff annexes communications between Mr. Modine and the Modines' architect in which the existence of an easement is discussed (NYSCEF Doc. Nos. 643-644). The Modines hired an expediter who searched ACRIS and did not find any easements filed against 13 MacDougal Alley (M. Modine EBT 1, 71). The Modines concluded the easement no longer existed and decided to move forward with the project (*see* M. Modine EBT 2, 393-394). The interior wall of the passageway was demolished (*see* NYSCEF Doc. No. 603, 10). The Modines' expert states that the Modines obtained DOB approval for their project, and that the interior wall was "non-fire-rated" and "non-load-bearing" (NYSCEF Doc. No. 803, Cicalo Aff., 7-8, 10).

In 2019, Plaintiff commenced an action against the Modines, alleging that their enclosure of the passageway violates the easements (NYSCEF Doc. No. 536). Plaintiff maintains that although the plans preserve access between the rear yard and MacDougal Alley, permitting occupants from the 8th Street Premises to essentially walk through the Modines' living room is not the same quality of egress that existed previously. Plaintiff seeks declaratory judgments that the easements are valid and enforceable and that the proposed construction would violate the easements, and seek an injunction prohibiting the Modines from interfering with the easements, compelling them to remove anything that blocks the passageway, and requiring them to restore the passageway.

The Modines filed an Answer (NYSCEF Doc. No. 537) asserting nine affirmative defenses. Their primary contentions are first that the easements are no longer enforceable for the

reasons asserted by the Gluckmans, and additionally because they were never filed as against 13 MacDougal Alley, second that there is no basis to require the Modines to maintain a passageway from their yard to the street if the Egress Door is blocked by the Gluckmans' extension, and third, that even if occupants of the 8th Street Premises were to somehow find themselves in the Modines' rear yard in an emergency, they can still travel through the back door, across the Modines' living room, and out the front door onto MacDougal Alley. The Modines' expert disputes Plaintiff's contention that removing the interior wall of the passageway impedes the ability to exit onto MacDougal Alley (Cicalo Aff., 8). He notes that the new route is wider, and that the old wall was not fire-rated, was never required to be fire rated, and that "[t]he Dead and Live loads of the floor as well as the ratings of the floor and ceilings were never evaluated or rated" (*id.* at 8, 10). Finally, he opines that even were Plaintiff to create a new egress door directly into the yard of 13 MacDougal Alley, the space "would likely not accommodate safe passage" (*id.* at 14).

The actions were consolidated on March 3, 2020 (NYSCEF Doc. No. 220, Billings, J.). In 2022, Plaintiff moved to amend the Complaints to add causes of action for gross negligence against both sets of Defendants. That motion was denied by the Court (Latin, J.) and affirmed by the Appellate Division (*see 16 W. 8th LLC v Gluckman,* 222 AD3d 449 [1st Dept 2023]).

Plaintiff now moves, in Motion Sequence No. 017, for summary judgment granting its four causes of action against the Gluckmans and dismissing the Gluckmans' counterclaims and affirmative defenses. The Gluckmans oppose the motion, and move, in Motion Sequence No. 018, for summary judgment dismissing the Complaint against them and granting summary judgment on certain affirmative defenses. Plaintiff opposes the motion and cross-moves, again,

for summary judgment dismissing those affirmative defenses and granting its cause of action for a permanent injunction. The Gluckmans oppose the cross-motion.

In Motion Sequence No. 019, Plaintiff moves for summary judgment on its claims against the Modines and dismissing their affirmative defenses. The Modines oppose the motion, and, in Motion Sequence No. 020, move for summary judgment dismissing the Complaint against them. Plaintiff opposes the motion and cross-moves, again, for summary judgment dismissing certain affirmative defenses.

On a motion for summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Should the movant make its prima facie showing, the burden shifts to the opposing party, who must then produce admissible evidentiary proof to establish that material issues of fact exist (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact'" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], quoting *Alvarez*, 68 NY2d at 324). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004], quoting *Anderson v Liberty Lobby, Inc.*, 477 US 242, 255 [1986]).

"An easement appurtenant occurs when the easement (1) is conveyed in writing, (2) is subscribed by the creator, and (3) burdens the servient estate for the benefit of the dominant estate. The easement passes to subsequent owners of the dominant estate through appurtenance

clauses, even if it is not specifically mentioned in the deed. Once created, the easement runs with the land and can only be extinguished by abandonment, conveyance, condemnation, or adverse possession" (*Asaka Holdings, LLC v 214 Lafayette House, LLC*, 177 AD3d 103, 118 [1st Dept 2019] quoting *Djoganopoulos v Polkes*, 95 AD3d 933, 935 [2d Dept 2012]).

Plaintiff maintains that the easements are validly created. It further contends that, in the event of an emergency, the Egress Easement grants those inside the 8th Street Premises the right to exit the 8th Street Premises through the Egress Door, traverse the rear yards of 15 MacDougal Alley and then 13 MacDougal Alley in order to access the passageway under 13 MacDougal Alley, and ultimately arrive onto MacDougal Alley. They argue it cannot be disputed that the Gluckmans have blocked access to their yard from the Egress Door, that the Modines have destroyed the passageway, and that both must be restored to be in compliance with the easements and for the safety of the occupants of the 8th Street Premises.

The Modines individually argue that the easements are not enforceable as to them because they were not filed against 13 MacDougal Alley. This argument is unavailing. "It is well settled that a person who purchases the servient estate with actual or constructive notice of the easement is estopped from denying the existence of the easement" (*Breakers Motel v Sunbeach Montauk Two*, 224 AD2d 473, 474 [2d Dept 1996] citing *Bridger v Pierson*, 45 NY 601, 604-605 [1871]). The easements were validly created, recorded, and the Modines had actual notice when they took title and testified that they were aware of the easements (M. Modine EBT 1, 24; C. Modine EBT, 27-28).

The additional arguments in opposition to Plaintiff's motions and in support of Defendants' motions are made by both the Gluckmans and the Modines. Their arguments and the corresponding affirmative defenses based on statute of limitations, abandonment, waiver,

equitable estoppel, laches, and adverse possession stem from the position that Plaintiff knew or should have known about the Gluckmans' construction as early as 2001 when the work began, or at the latest by 2003 when it was completed, but did not seek to enforce its rights until 2014.

Defendants argue the action against the Gluckmans is time barred. In their papers, the parties dispute which statute of limitations applies, with all parties making arguments in their favor based on the statute of limitations for breach of contract, property damages, and RPAPL § 2001 claims. Defendants claim the causes of action accrued in 2003 when the work was complete, while Plaintiff maintains the extension is a continuing wrong and its claims are timely.

Regardless of whether the Court considers the causes of action against the Gluckmans to be breach of contract claims with a six-year time limit (CPLR § 213[2]) or claims alleging damage to property with a three-year time limit (CPLR § 214[4]), they remain timely under the continuing wrong doctrine (*Great Jones Studio Inc. v Wells*, 190 AD3d 587, 588 [1st Dept 2021]; *Bloomingdales, Inc. v New York City Tr. Auth.*, 13 NY3d 61, 66 [2009]). The easements Plaintiff seeks to enforce impose a continuing duty on the Gluckmans (*see Henry v Bank of Am.*, 147 AD3d 599, 601 [1st Dept 2017]) and, in the tort context, an unlawful encroachment on property gives rise to successive causes of action (*Bloomingdales*, 13 NY3d at 66). The argument that Plaintiff's claims are time barred by RPAPL § 2001 is unavailing as that section refers to negative easements (*Schoen v Bd. of Mgrs. of 255 Hudson Condominium*, 216 AD3d 536 [1st Dept 2023]).

With respect to the affirmative defenses of abandonment, an owner is under no obligation to make use of an easement by grant, and abandonment does not result by nonuse alone; it must be accompanied by an intention to abandon on the part of the owner (*Consolidated Rail Corp. v MASP Equipment Corp.*, 67 NY2d 35, 39 [1986] [citations omitted]). A party relying on

another's abandonment of an easement by grant must provide clear and convincing proof of an intention to abandon (*id.*). Neither the Gluckmans nor the Modines provide such proof.

For the same reasons, Defendants cannot succeed on their waiver, equitable estoppel, and laches arguments. "The intent to waive must be unmistakably manifested, and is not to be inferred from a doubtful or equivocal act" (*Ess & Vee Acoustical & Lathing Contrs., Inc. v Prato Verde, Inc.*, 268 AD3d 332 [1st Dept 2000] [quotation and citations omitted]). Proving equitable estoppel requires demonstrating conduct which amounts to false representation or concealment of material facts (*BWA Corp v Alltrans Express U.S.A., Inc.*, 112 AD2d 850, 853 [1st Dept 1985]). And the essential element of laches is unreasonable and inexcusable delay by a plaintiff in undertaking to enforce its rights, which results in prejudice to the opposing party (*214 Lafayette House LLC v Akasa Holdings LLC*, 227 AD3d 75, 82 [1st Dept 2024]). Defendants fail to show that Plaintiff unmistakably intended to waive its rights under the easements, made false representations or concealed material facts as to their intentions regarding the easements, or that there is an inexcusable delay in enforcing its rights.

With respect to the arguments that the easements have been extinguished based on adverse possession, Defendants are required to demonstrate, by clear and convincing evidence, that the use of the easement has been hostile and under a claim of right, actual, open and notorious, exclusive, and continuous for a period of 10 years (*Koudellou v Sakalis*, 29 AD3d 640, 641 [2d Dept 2006]; *see also Ray v Beacon Hudson Mt. Corp.*, 88 NY2d 154, 159 [1996] citing *Brand v Prince*, 35 NY2d 634, 636 [1974], *195E76 LLC v 197 E. 76th St., LLC*, 213 AD3d 543, 543 [1st Dept 2023]). Maintenance of a fence or structure across an existing right of way which bars its use as such for more than the statutory period will terminate an easement by adverse possession (*Castle Associates v Schwartz*, 63 AD2d 481, 487 [2d Dept 1978]).

The Court finds issues of fact exist as to whether the Gluckmans had a reasonable basis for the belief that they could brick over the Egress Door such that it was built under a claim of right. "A claim of right means a reasonable basis for the belief that the property belongs to the adverse possessor" (RPAPL § 501[3]; *see also Golobe v Mielnicki*, 44 NY3d 86, 94 [2025]). A rebuttable presumption of hostility arises from possession accompanied by the usual acts of ownership (*Golobe*, 44 NY3d at 94-95, citing *Estate of Becker v Murtagh*, 19 NY3d 75, 81 [2021]). Although the easements repeatedly appear in the sale documents, both Gluckmans testified they were unaware of their existence.

The parties also present conflicting testimony as to whether the extension is sufficiently open and notorious to put a reasonably diligent owner on notice. In addition to the common law elements required to prove an adverse possession claim, Defendants must show there have been "acts sufficiently open to put a reasonably diligent owner on notice" (*195E76 LLC*, 213 AD3d at 543-544, citing RPAPL § 522; *Houdek Real Estate Co., LLC v Bayport Postal Realty, LLC*, 180 AD3d 761, 762 [2d Dept 2020]). Plaintiff's employee, LaPointe, testified that he and other representatives of Plaintiff either did not see the extension or did not know that it blocked the Egress Door, and that they had no reason to use the door during the period in question. However, he also admitted that Plaintiff's representatives access the roof with relative frequency, and that construction was done on the 8th Street Premises' roof during the prescriptive period.

The Court notes that summary judgment has previously been denied due to issues of fact about the Egress Easement's language, which is not addressed further in the papers (*16 W. 8th LLC*, 168 AD3d 544). These issues prevent the Court from granting summary judgment on Plaintiff's claims for breach of contract, for declaratory judgment as to the validity and enforceability of the easements, and on Defendants' adverse possession affirmative defenses.

In light of these issues, a determination as to Plaintiff's causes of action seeking permanent injunctions against the Gluckmans and the Modines is premature. Even were it not, a permanent injunction is a drastic remedy which may be granted only where the plaintiff demonstrates that it will suffer irreparable harm absent the injunction (*Aponte v Estate of Aponte*, 172 AD3d 970, 974 [2d Dept 2019]). Irreparable harm means "any injury for which money damages are insufficient," therefore "where an injury can be adequately compensated by money damages, injunctive relief is inappropriate" (*Rockefeller v Leon*, 233 AD3d 904, 908 [2d Dept 2024]). Given that Plaintiff currently has an alternative means of emergency egress for all its tenants, and in light of the Modines' expert's opinion that the emergency exit envisioned by the easements is not code compliant (*see* Cicalo Aff., 14), there are triable issues of fact as to whether Plaintiff will suffer irreparable harm.

Additionally, success on a cause of action for a permanent injunction requires that the equities be balanced in Plaintiff's favor (*Caruso v Bumgarner*, 120 AD3d 1174, 1175 [2d Dept 2014]), and issues of fact exist with respect to the equities. These include the partial demolition of the Gluckmans' home as compared with restoring Plaintiff's ability to maximize its real estate investment; whether issues the Gluckmans may have with the DOB or LPC in the future will impact the extension; and the practicality of requiring the Modines to maintain the passageway if it remains inaccessible from the 8th Street Premises. Accordingly, summary judgment cannot be granted on Plaintiff's causes of action seeking injunctive relief.

Finally, summary judgment was previously denied on the Gluckmans' counterclaims, which seek to compel Plaintiff to create a new rear door, due to factual issues regarding whether an agreement to move the door actually existed (*16 W. 8th LLC*, 168 AD3d 544). Since then, discovery has been conducted and the Modines have been added to the case. The Gluckmans

now demonstrate that they and Plaintiff explored the feasibility of creating an exit from the 8th Street Premises leading to the Modines' yard, but do not present any evidence of an agreement to do so. Additionally, the Maintenance Easement plainly grants Plaintiff the right to maintain a door leading to the yard of 15 MacDougal Alley only (Cicalo Aff., 9; Maintenance Easement, 7 [granting the right to maintain "the encroachment of the engineer's exit in the rear yard of the parcel known as No. 15 MacDougal Alley" and providing that "the right and easement to maintain an engineer's exit in the rear yard of the parcel known as No. 15 MacDougal Alley shall continue in respect of any new or replacement building erected on the 8th Street Premises"]). Plaintiff and the Gluckmans would therefore have needed the Modines to consent to construction of a new door, and they do not. Therefore, Plaintiff's motion for summary judgment dismissing the Gluckmans' counterclaims is granted.

Accordingly, to the extent the motions seek summary judgment on Plaintiff's four causes of action against the Gluckmans, three causes of action against the Modines, and the Gluckmans' sixth affirmative defense and Modines' first affirmative defense based on adverse possession, they are denied.

As to the parties' affirmative defenses, Plaintiff's motion and cross-motion seeking dismissal of the Gluckmans' third (failure to record easements), fourth (laches), fifth (abandonment), seventh (estoppel), tenth and eleventh (statute of limitations), and fifteenth (waiver) defenses are granted, the Gluckmans' corresponding motion as to those defenses is denied, and those affirmative defenses are dismissed. Likewise, Plaintiff's motion and cross-motion seeking dismissal of the Modines' second (laches), third (waiver), fifth (estoppel), sixth (statute of limitations), and seventh (failure to record easements) defenses are granted, the Modines' corresponding motion as to those defenses is denied, and those affirmative defenses

are dismissed. The Gluckmans' second affirmative defense, failure to add the Modines as a necessary party, is dismissed as moot.

The remaining affirmative defenses that are the subject of this motion, i.e. the Gluckmans' first, eighth, twelfth, thirteenth, fourteenth, sixteenth, and seventeenth, the Modines' fourth, eighth, and ninth, and all of Plaintiff's affirmative defenses are boiler plate or consist of bare legal conclusions and are dismissed (*Chelsea 8th Ave. LLC v Chelseamilk LLC*, 220 AD3d 565, 566 [1st Dept 2023]; *Bd. of Mgrs. of Ruppert Yorkville Towers Condominium v Hayden*, 169 AD3d 569, 569 [1st Dept 2019]).

Finally, Plaintiff's motion seeking dismissal of the Gluckmans' counterclaims is granted and those claims are dismissed, along with the Gluckmans' related ninth affirmative defense.

Counsel shall appear for a Pre-Trial Conference on February 4, 2026 at 11:30 a.m. via Teams.

Any other relief sought, and all additional arguments made but not addressed herein, have nevertheless been considered and are denied.

This constitutes the Decision and Order of the Court.

12/12/2025
DATE

LORI S. SATTLER, J.S.C.

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