[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA PART 19

Index Number : 111452/2006
MASTROBATTISTA, JOHN D.
VS.
BORGES, RAQUEL MOURA
SEQUENCE NUMBER : 006
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

decided per the memorandum decision dated 9/28/12
which disposes of motion sequence(s) no. 007, 008 and 009.

FILED
OCT 04 2012
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/28/12

Saliann Scarpulla J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

---------- X

JOHN D. MASTROBATTISTA and
ANNE ROOME,

Plaintiffs,

Index No.: 111452/06
Submission Date: 2/29/12

-against-

RAQUEL MOURA BORGES, A2B LLC, PIER HEAD ASSOCIATES, LTD., LUKE LICALZI, P.E., LUKE LICALZI, P.E., P.C. and KARL BEITIN, P.E.,

DECISION AND ORDER

Defendants.

---------- X

For Plaintiff John D. Mastrobattista:
Becker Meisel LLC
211 East 43rd Street, Ste 1904
New York, NY 10017

For Plaintiff Anne Roome:
Stacy John Haigney, Esq.
1400 Broadway, 11th Floor
New York, NY 10018

For Defendant Raquel Moura Borges:
Richardson & Patel, LLP
750 Third Avenue, 9th Floor
New York, NY 10001

For Defendant A2B LLC:
Daniel Cobrinik, Esq.
276 Fifth Avenue, Ste 405
New York, NY 10001

For Defendant Pier Head:
Milber Makris Plousadis & Seiden, LLP
1000 Woodbury Road, Ste 402
Woodbury, NY 11797

For the Liz[illegible] Defendants:
Sinnreich Kosakoff & Messina, LLP
267 Carleton Avenue, Suite 301
Central Islip, NY 11722

For Defendant Karl Beitin, P.E.:
Schwartzman Garelik Walker & Troy, P.C.
355 Lexington Avenue
New York, NY 10017

HON. SALIANN SCARPULLA, J.:

This is an action for breach of property rights, defendant Karl Beitin, P.E. ("Beitin") moves, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss the complaint and all cross claims, and, pursuant to 22 NYCRR Rule 130-1.1, for legal fees, costs, expenses associated with making this motion and for sanctions against plaintiffs and their

attorneys. Defendants Luke LiCalzi, P.E. ("LiCalzi, P.E.") and Luke LiCalzi, P.E., P.C. ("LiCalzi, P.C.") (together, "LiCalzi") cross-move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted against them. (Motion sequence number 006.)

Plaintiffs John D. Mastrobattista ("Mastrobattista") and Anne Roome ("Roome") move pursuant to CPLR 3211 (a) (7), to dismiss defendant A2B LLC's ("A2B") counterclaims asserted against them. (Motion sequence number 007.)

A2B moves pursuant to CPLR 3212, for summary judgment dismissing the complaint. (Motion sequence number 008.)

Defendant Raquel Moura Borges ("Borges") moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted against her. (Motion sequence number 009.) Motion sequence numbers 006, 007, 008, and 009 are consolidated for disposition.

Background

Mastrobattista owns and resides in a townhouse located at 169 East 62nd Street ("169 Premises"). Roome owns and resides in a townhouse located at 165 East 62nd Street ("165 Premises"). (Mastrobattista and Roome are together referred to as "plaintiffs.") A2B owns the townhouse in between plaintiffs', located at 167 East 62nd Street ("167 Premises"), block 1397. (165 Premises, 167 Premises, and 169 Premises are together referred to as the "Townhouses.") Borges, a member of A2B, resides at 167

Premises. (A2B and Borges are together referred to as "Resident Defendants.") 167 Premises shares a party wall with 169 Premises on one side and a party wall with 165 Premises on the other.

All three Premises are subdivisions of a larger parcel of land originally owned by a common grantor, Henry Grossmayer ("Grossmayer"), who, erected the Townhouses in the late 1800's. Gideon Fountain ("Fountain") owned an adjacent plot of land. In November 1869, Grossmayer and Fountain entered into an agreement, recorded on November 29, 1869 (the "1869 Agreement"), which created certain restrictions as to what Grossmayer and his "heirs and assigns" could do on the land. The 1869 Agreement was not contained in plaintiffs' or A2B's deeds.

In 2004 and 2005, A2B built additions to the 167 Premises (the "Horizontal Addition" and the "Vertical Addition") (collectively, the "Project" or the "Additions"). The Horizontal Addition created additional residential space on the ground level and the second floor, as well as a third floor terrace. The Vertical Addition added a penthouse, built on top of the roof of the 167 Premises, as well as a roof deck and privacy fence.

Defendant Pierhead Associates, Ltd. ("Pierhead") was the contractor on the Project. LiCalzi, a New York State licensed engineer, and Licalzi, P.C., LiCalzi's firm, prepared and filed self-certified plans with the New York City Department of Buildings ("DOB") for the Additions. Beitin, a New York State licensed professional engineer,

repalced LiCalzi as the engineer of the Project in fall of 2005. (LiCalzi, LiCalzi, P.C., and Beitin are together referred to as the "Engineer Defendants.")[1]

During the course of work on the Project, the roofs of both plaintiffs' buildings were allegedly cut through and not properly sealed. As a result, rain water allegedly penetrated inside and caused damage to 169 Premises. Plaintiffs allege that they hired contractors to repair their damaged roofs and install new ones. Additionally, a crevice was created in the foundation of 169 Premises, which allowed water to penetrate into Mastrobattista's basement.

As part of the Vertical Addition, the pre-existing brick party wall shared by the 167 and 169 Premises was allegedly demolished. Plaintiffs allege that defendants "demolished and altered portions of [plaintiffs'] buildings' chimney, roof and walls, [and that] Pier Head reduced the size and configuration of the brick chimney of the 165 Premises and installed in its place upward venting piping substantially narrower than the brick chimney they demolished." As a consequence, the working fireplaces of the 165 Premises have an impaired, largely ineffective ventilation system."

Plaintiffs further allege that the walls of the new penthouse rest on old and unstable pre-existing brickwork which was not designed to be a load bearing wall. Additionally, plaintiffs allege that the wooden deck added as part of the Vertical Addition

[1] It appears that another entity, nonparty In Interior Design, prepared certain plans that were allegedly also used as part of the Project.

"operates as a barrier and blocks the ability of fire and rescue personnel to cross the rooftops of the adjacent brownstone structures" in case of emergency.

In their original complaint, filed on August 15, 2006, plaintiffs asserted the following causes of action against A2B, Borges and Pier Head: (1) trespass; (2) conversion; (3) encroachment; and (4) negligence. They asserted causes of action against LiCalzi, LiCalzi, P.E., and Beitin for: (5) negligence; and against all defendants for (6) creation and maintenance of a public nuisance and private nuisance, punitive damages and joint tortfeasor liability.

Previously, in motion sequence number 005, plaintiffs moved for leave to amend the complaint, seeking to add three causes of action for: (1) breach of the 1869 Agreement; (2) removal of encroaching structures under Real Property Action and Proceedings Law (RPAPL) § 871; and (3) a claim pursuant to New York Civil Rights Law § 76-a. Plaintiffs also sought to re-characterize their fifth cause of action for negligence against Engineer Defendants to sound in professional malpractice, as well as to add Banif Finance (USA) Corp., the holder of two mortgages with respect to 167 Premises, as a defendant.

By order dated March 16, 2011 ("March 16, 2011 Order"), I granted plaintiffs leave to assert the causes of action for breach of the 1869 Agreement and for removal of encroaching structures, denied leave to add a cause of action for professional malpractice and to add Banif Finance as a defendants, and permitted plaintiffs to "amend the facts

section of the complaint to conform to the evidence obtained through discovery in a clear, brief, plain and concise manner."

In the amended complaint filed on April 18, 2011, plaintiffs assert causes of action for: (1) breach of the 1869 Agreement and to enjoin against further violations of the 1869 Agreement as against A2B and Borges; (2) removal of encroaching structures as against A2B and Borges pursuant to RPAPL § 871; (3) negligence as against A2B, Borges, and Pier Head; (4) negligence as against Licalzi and Beitin; (5) trespass as against A2B, Borges, and Pier Head; (6) conversion as against A2B, Borges, and Pier Head; (7) creation and maintenance of a public nuisance as against all defendants; (8) creation and maintenance of a private nuisance as against all defendants; and (9) joint tortfeasor liability as against all defendants.

Discussion

To obtain summary judgment, the movant must tender evidentiary proof that would establish the movant's cause of action or defense sufficiently to warrant judgment in his or her favor as a matter of law. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). *See also Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 306 (1st Dept 2007).

A motion to dismiss, pursuant to CPLR 3211 (a) (1), "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002).

On a motion to dismiss, pursuant to CPLR 3211 (a) (7), the court "assumes the truth of the complaint's material allegations and whatever can be reasonably inferred therefrom [citation omitted]. The motion should be denied if 'from [the pleading's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" *McGill v. Parker*, 179 A.D.2d 98, 105 (1st Dept 1992), quoting *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977). "In assessing a motion under CPLR 3211 (a) (7), . . . the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994) (citations and internal quotation marks omitted).

A2B and Borges' Motions for Summary Judgment

First Cause of Action - Breach of the 1869 Agreement

Plaintiffs allege that the Resident Defendants had notice of the 1869 Agreement at the time A2B acquired title to the 167 Premises. Plaintiffs further allege that the 1869 Agreement is duly recorded; runs with the land underlying each parcel of land for each of the Townhouses; contains covenants that are valid and enforceable interests affecting title to each of the underlying lots of land and affecting the underlying land.

Plaintiffs further allege that: (1) the Vertical Addition violates the 1869 Agreement which purportedly requires that "the 167 Premises shall remain a building for dwelling 'but shall not be built upon or enlarged;'" and (2) the 1869 Agreement requires the use of brick or stone for walls and slate or metal as roofing materials, whereas Resident Defendants used concrete blocks for the Additions and removed "the metal components of the roof shared with neighbors."

Plaintiffs seek a declaration that the covenants contained in the 1869 Agreement restrict the Resident defendants and subsequent titleholders from: (1) adding the Additions and "from continuing to maintain the 167 Premises in such state and condition;" and (2) using the 167 Premises to operate a business or a short-term stay hotel. Plaintiffs also seek an injunction: (1) pursuant to RPAPL section 2001, directing the Resident Defendants to remove both Additions; and (2) enjoining them "from any additional and future violations of the Protective Covenants and other provisions of the Land Agreement."

The 1869 Agreement consists of two parts. The first part is a promise given by Fountain to Grossmayer to build a party wall. The second is a three-part promise given by Grossmayer to Fountain that Grossmayer would not: (1) build any building "except of brick or stone with the roof of slate or metal" (the "Materials Limitation"); (2) have any "noxious, dangerous or offensive trade or business . . . except dwelling houses" (the "Usage Limitation"); and (3) build upon or enlarge the preexisting building (the

"Expansion Limitation"). Grossmayer's promise is a negative restrictive covenant (the "Negative Covenant"), also referred to as a negative easement, because it provides that certain acts would not be performed on the Grossmayer's parcel. *See e.g. Columbia College in City of N.Y. v. Lynch*, 70 N.Y. 440, 447 (1877); *see also Witter v. Taggart*, 78 N.Y.2d 234, 237 (1991).

Plaintiffs claim that the Additions erected by Resident Defendants violate the Materials and Expansion Limitations of the Negative Covenant, and Resident Defendants' alleged use of the 167 Premises as a short-term stay hotel is a violation of the Usage Limitation of the Negative Covenants. Resident Defendants first argue that plaintiffs lack standing to enforce the 1869 Agreement, because they are neither in privity with Fountain's estate nor the intended beneficiaries of the 1869 Agreement.

Typically, where a restrictive covenant is contained in the deed, courts apply a three-pronged test to determine if the covenant may be enforced. *See e.g. Westmoreland Assn. v. West Cutter Estates*, 174 A.D.2d 144, 147-148 (2d Dept 1992) (the covenant should (1) run with the land, (2) touch or concern the land, and (3) there must be "'privity of estate' between the promisee or party claiming the benefit of the covenant and the right to enforce it, and the promisor or party who rests under the burden of the covenant") (citation omitted).

Here, A2B's deed apparently does not contain any restriction on the use of 167 Premises. At the same time, A2B does not deny that, at the time of the purchase of the

167 Premises, it was aware of the 1869 Agreement, which was duly recorded. As plaintiffs correctly maintain, the enforceability of a restrictive covenant that is not contained in a deed is treated in equity, not in law, and the following standard applies:

> In order to uphold the liability of the successor in title, it is not necessary that the covenant should be one technically attaching to and concerning the land and so running with the title. *It is enough that a purchaser has notice of it.* The question in equity being . . . not whether the covenant ran with the land, but whether a party shall be permitted to use the land inconsistently with the contract entered into by his vendor, and with notice of which he purchased.

Hodge v. Sloan, 107 N.Y. 244, 250 (1887) (emphasis added). *See also Wheeler v. Standard Oil Co.*, 263 N.Y. 34, 38 (1933). Even if the Negative Covenant is deemed only a personal obligation of Grossmayer, it may still be enforced in equity against subsequent purchasers with notice. *See Hodge*, 107 N.Y. at 251; *Columbia College in City of N.Y.*, 70 N.Y. at 448 ("Equity has jurisdiction to compel the observance of covenants made for the mutual benefit and protection of all the owners of lands, by those owning different parcels of the lands, and to secure to those entitled the enjoyment of easements or servitudes annexed by grant, covenant, or otherwise to private estates").

The Resident Defendants do not deny that they had notice of the Negative Covenant either before, or at the time of the purchase of the 167 Premises. *Cf. Deepdale Cleaners v. Friedman,* 16 Misc. 2d 716, 723 (Sup Ct. Queens Co. 1957), *aff'd* 7 A.D.2d 926 (2d Dep't 1959) (at the time when the lease was executed, the tenant was unaware of a restrictive covenant). Accordingly, the Negative Covenant is enforceable, and plaintiffs

have standing to enforce it. *See Columbia College in City of N.Y.*, 70 N.Y. at 448; *see also Korn v. Campbell*, 192 N.Y. 490, 495 (1908) (any grantee may enforce the covenants against any other because mutuality of covenant and consideration binds them).

Resident Defendants next contend that the Negative Covenant is unenforceable due to changes in the neighborhood that occurred since the 1869 Agreement was executed and recorded. However, their reliance on *Pulitzer v. Campbell*, 146 Misc. 700, 708 (Sup. Ct. NY Co. 1933) is unavailing. In *Pulitzer*, the issue was whether a covenant, which was contained in a deed and restricted the use of land to "first class private residences," barred the plaintiff from building either a multi-family apartment house or an apartment hotel. The *Pulitzer* court stated that the suggested interpretation, offered by the defendants, that the covenant meant "single family residences" clashed with "an extensive, radical and permanent change in the neighborhood," which no longer consisted of single family residences. *See id.* at 708.

By contrast, the Negative Covenant restricts: material used, usage to which the houses can be put, and expansion of the buildings. Resident Defendants have not shown how the changes in the neighborhood since the 1869 Agreement was executed, render these particular restrictions unenforceable. *Cf. Clintwood Manor v. Adams*, 29 A.D.2d 278, 279 (4th Dept 1968), *aff'd* 24 N.Y.2d 759 (1969) (holding that plaintiffs, who sought to operate a gasoline station on their property, are entitled to a declaration that a restrictive covenant, limiting the use of premises to only residential purposes, was

extinguished, because the surrounding neighborhood had been developed commercially since the covenant was created). Accordingly, the change of the neighborhood defense does not apply here.

The Expansion Limitation provides: "except that the buildings *now erected* upon the said piece of ground belonging to [Grossmayer] may remain but shall not be built upon or enlarged." (Emphasis added).

> [T]he policy of the law is to favor the free and unobstructed use of realty and that covenants restricting the use of property will be strictly construed against those seeking to enforce them. The burden of proof is on the party endeavoring to enforce a restrictive covenant and must be met by more than a doubtful right. Only where it has been established by clear and convincing proof will our court impose such a restriction.

Huggins v. Castle Estates, 36 N.Y.2d 427, 430 (1975) (internal citations omitted). *See also Witter v. Taggart*, 78 N.Y.2d 234, 237-238 (1991) (same).

> The primary rule of interpretation of such covenants is to gather the intention of the parties from their words, by reading, not simply a single clause of the agreement, but the entire context, and, where the meaning is doubtful, by considering such surrounding circumstances as they are presumed to have considered when their minds met.

Schuman v. Schechter, 215 A.D. 291, 293 (2d Dept 1926).

Here, if the broader context of the Negative Covenant is taken into account, the 1869 Agreement states that Grossmayer agrees not to build any new buildings that are not made out of specific materials or that are not used for residential purposes, except that the already existing buildings on the Grossmayer's property may remain but cannot be

altered. Strictly construing the Expansion Limitation, especially as it reads in the context of the Negative Covenant as a whole, it is obvious that the Expansion Limitation referred to particular buildings that, at the time when the 1869 Agreement was made, stood on the Grossmayer's property. *See Huggins*, 36 N.Y.2d at 430; *Schuman*, 215 A.D. at 293. Plaintiffs themselves identify these building as numbers 171 and 155 on East 62nd Street. The context of the Negative Covenant suggests that these buildings in some way may have not complied with the restrictions of the Covenant, thus the parties to the Covenant specified that they may remain but could not be altered.

It is undisputed that the 167 Premises did not exist at the time the 1869 Agreement was made. Plaintiffs contend that in 1869, Grossmayer already had specific drawings and designs for the 167 Premises, plaintiffs maintain was built in 1871. Plaintiffs seek to have the Expansion Limitation broadly construed, which goes against the case law requiring that the language be strictly construed. *See Schuman*, 215 A.D. at 293; *see also 9394 LLC v. Farris*, 10 A.D.3d 708, 709 (2d Dept 2004) ("the court must interpret the covenant to limit, rather than extend, its restriction"). Therefore, as strictly construed and read in the context of the Negative Covenant, the Expansion Limitation refers only to the buildings that stood on Grossmayer's property when the 1869 Agreement was executed and recorded. The 167 Premises was not one of those buildings. Accordingly, the Expansion Limitation contained in the Negative Covenant does not apply to the 167 Premises. *See Huggins*, 36 N.Y.2d at 430; *see also Schuman*, 215 A.D. 293. To the

extent that plaintiffs' first cause of action claims that the Additions violated the Expansion Limitation it is therefore dismissed.

The Materials Limitation reads as follows: "neither [Grossmayer] nor his heirs or assigns shall or will at any time erect upon the said piece of ground so belonging to him or any part thereof any buildings except of brick or stone with the roof of slate or metal." It is undisputed that concrete blocks were used as part of the Additions. Plaintiffs also allege that "the metal components of the roof shared with neighbors," apparently designed to provide an escape for rain water, were removed. This, plaintiffs urge, is a violation of the Materials Limitation of the Negative Covenant. Resident defendants do not deny that concrete blocks do not comply with the Materials Limitation. Rather, they argue that plaintiffs themselves are in violation of the Materials Limitation.

New York courts have applied the doctrine of unclean hands, which bans plaintiffs who are in violation of a restrictive covenant, from enforcing in equity the same covenant against other land owners. *See e.g. Wallack Constr. Co. v. Smalwich Realty Corp.*, 201 A.D. 133, 135 (1st Dept 1922); *see also Kaufman v Kehler,* 5 A.D.3d 564, 565 (2d Dept 2004); *Alvord v. Fletcher*, 28 A.D. 493, 494 (2d Dept 1898).

Resident Defendants claim that plaintiffs have rubber coating on their roofs as well as wooden and/or steel beams. Mastrobattista testified at his deposition that he replaced an old cross-beam on the first floor of the 169 Premises with a steel beam.

Construing the Materials Limitation according to the intention of the covenanting parties and within the context of the Negative Covenant, the limitation on "brick or stone" pertains to the outer walls of the buildings. *See Schuman*, 215 A.D. at 293. This limitation does not restrict the use, inside the individual houses, of cross-beams that are made out of wood or steel. Therefore, the wooden or steel cross-beams inside the 169 Premises[2] do not violate this restriction.

As to the other limitation, "the roof of slate or metal," plaintiffs admit that their roofs have a rubberized coating. Although Mastrobattista states in his affidavit that his roof "contains the metal flashing," protecting the 169 Premises from "exterior elements," it is unclear from the record what other materials are used on his roof. An appraisal report prepared for Roome, based on an inspection in November 2004, describes her roof's materials as: '[a]sphalt and felt composition cap roll sheeting." Roome, however, claims that, since then, she installed a new roof. Accordingly, an issue of fact exists as to whether plaintiffs themselves, with respect to the roofing materials, are in violation of the Materials Limitation. Resident defendants' motion for summary judgment dismissing the portion of plaintiffs' first cause of action for violation of the Materials Limitation is denied.

---

[2] In his affidavit, Mastrobattista states that the cross-beams and other types of supporting structures are used only inside of the 169 Premises and that the outer walls are made of only brick or stone.

Next, Resident Defendants move for summary judgment to dismiss plaintiffs' claim that Resident Defendants use the 167 Premises as a short-term stay hotel, in violation of the Usage Limitation which provides that the buildings on the Grossmayer Parcel may only be "dwelling houses."

In support of the motion, A2B offers two affidavits of its members, nonparties Antonio Peres ("Peres") and Rafael Aquino ("Aquino"). Both state that the they are residents of Brazil and "occupy apartments" in the 167 Premises when they are in New York, and that their friends and relatives "from time to time" "borrow [their] apartments on their trips to New York." They state that the 167 Premises are not used as a hotel, and that "[t]here are no advertisements of the Building as a hotel, there is no front desk, there are no hotel services or amenities, and there are no rentals."

In opposition, plaintiffs provide copies of two A2B internal e-mail messages which purportedly show that some of the units at 167 Premises have been rented. However, the first e-mail message, dated June 22, 2005, has no reference to hotel-type rentals. It only refers to the possibility of sale of the units at 167 Premises. The other e-mail message, dated May 26, 2005, does refer to the rental of the units; however, there is no indication that a hotel-type rental arrangement was contemplated.

In her affidavit, Roome states that she interviewed specific individuals who have stayed at 167 Premises and that they purportedly told her that they were "short-term

visitors," and that when she "asked them if this arrangement was akin to a hotel, they answered 'yes.'" Roome does not provide the names of these individuals.

Plaintiffs' showing is insufficient to raise a material question of fact. *See e.g. Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 967 (1988) ("'[mere] conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient'" to raise an issue of fact) (quoting *Zuckerman v. City of New York*, 49 N.Y.2d at 562). To the extent that plaintiffs' first cause of action claims that the Resident Defendants violate the Negative Covenant because the 167 Premises are used as a short-term stay hotel, it is therefore dismissed.

Second Cause of Action - Encroachment

Plaintiffs allege that "the penthouse and enclosed fence and deck on the roof of the 167 Premises" encroach onto the 165 and 169 Premises and, pursuant to RPAPL § 871, seek an injunction to remove the encroaching structures.

RPAPL § 871 (1) provides, in pertinent part, "An action may be maintained by the owner of any legal estate in land for an injunction directing the removal of a structure encroaching on such land." Resident Defendants attempt to characterize plaintiffs' claims of encroachment merely as enlargement of party walls.[3] Resident Defendants correctly argue that they may extend the party walls in length, *see e.g. Bull v Burton*, 227

[3] It is undisputed that the walls shared by 167 Premises with 165 and 169 Premises are party walls.

N.Y. 101, 108 (1919), and that they and plaintiffs have reciprocal rights in, and to the use of, the party walls.

However, this is not the nature of plaintiffs' encroachment claims. Rather, plaintiffs allege, and defendants do not deny, that the new structures that Resident Defendants built permanently encroach onto plaintiffs' sides of the respective party walls. Mastrobattista testified that defendants placed the cinder blocks of the penthouse on top of the entire width of the party wall with the 169 Premises, as well as the privacy fence on Roome's side of the party wall with the 165 Premises.

"Where a party wall runs directly over the boundary between the two parcels . . . each of the two adjoining owners . . . owns in severalty so much of the wall as stands upon his own lot, each having an easement in the other strip for purposes of the support of his own building." *Sakele Bros. v. Safdie*, 302 A.D.2d 20, 25 (1st Dept 2002) (internal quotations omitted). "[A] party wall, being for the common benefit of contiguous proprietors, should not be subjected by either owner to a use whereby it ceases to be continuously available for enjoyment by the other." *Id.* at 26 (internal citations omitted). Here, the new structures clearly deprive plaintiffs of enjoyment of their sides of their respective party walls.

Additionally, plaintiffs claim that the new cinder/concrete block wall, as part of the Vertical Addition, was placed on top of the preexisting old party wall, located on the roof

level, without determining whether the old party wall could withstand the added load. This additional load, they contend, is excessive and hazardous to their premises.

"A wall may be carried by either owner beyond its height as first erected, provided only it is strong enough to bear the weight and strain." *Id.* "[A]n owner may not weaken a party wall or encroach onto the property of the adjoining property owner." *Lei Chen Fan v. New York SMSA Ltd. Partnership*, 94 A.D.3d 620, 621 (1st Dept 2012).

Plaintiffs offer a report from architect Michael Macaluso ("Macaluso"), dated October 30, 2008 ("Macaluso Report"), in which Macaluso states that based on personal observation, the party wall between the 167 and 169 Premises was "in a condition commensurate with its age (over 100 years old)," with "washed out joints and loose joints." Macaluso opines that first this party wall had to be tested "to ensure the ability for the old wall to adequately withstand the new loads," that LiCalzi's plans/drawings for the penthouse do not show that such structural evaluation was done, and that "[t]his failure to provide the necessary due care and diligence for proper structural evaluation is substandard by any professional measure" The movants have not offered any evidence to rebut the conclusions in the Macaluso Report.

Accordingly, Resident Defendants have not refuted plaintiffs' claims that the Additions permanently encroach on plaintiffs' sides of the respective party walls, and that the Vertical Addition was built without taking into account whether the preexisting party walls could bear the weight and strain of the new masonry placed on top of it. The

Resident Defendants' motion for summary judgment dismissing plaintiffs' second cause of action is denied.

Third Cause of Action - Negligence

With respect to plaintiffs' cause of action for negligence, Resident Defendants challenge one of plaintiffs' claims that Resident Defendants misrepresented to the DOB facts "concerning the status and basis for certification of designs."

"In order to set forth a prima facie case of negligence, the plaintiff's evidence must establish (1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) that such breach was a substantial cause of the resulting injury." *Merino v. New York City Tr. Auth.*, 218 A.D.2d 451, 457 (1st Dept 1996), *aff'd* 89 N.Y.2d 824 (1996).

Plaintiffs allege in the amended complaint that Resident Defendants were negligent in "making multiple misrepresentations which involved negligently, recklessly or intentional false statements concerning the status and basis for certification of designs, when such applications were certified in errors or contained manifest defects as to which A2B and Borges were on legal or actual notice."

Resident Defendants contend that any claim arising from the alleged misrepresentations to the DOB must be dismissed because the DOB has exclusive jurisdiction over the certification of designs for improvements to buildings. However, the specific claim at issue is not whether Resident Defendants violated the Building Code in

constructing the Additions, but rather that the Resident Defendants made false statements to the DOB in order to get the DOB's approval.

Nevertheless, the Commissioner of the DOB has exclusive jurisdiction over the issue of whether defendant's application to the DOB contained misrepresentations.[4] *See e.g. Caprice Homes v. Bennett,* 148 Misc. 2d 503, 508 (Sup. Ct. NY Co. 1989) (controversies about the modification of certificates of occupancy, listed in NYC Charter § 645 (b), "are to be heard first by the DOB and resolved definitively by the [Board of Standards]"); *see also Matter of Brimberg v. New York City Bd. of Stds. & Appeals,* 44 A.D.3d 413, 413-414 (1st Dept 2007). The New York City Administrative Code provides a mechanism for plaintiffs to file a complaint with the DOB Commissioner. *See* NYC Admin Code § 28-103.18. It appears that plaintiffs have done so.

The case of *Chotapeg, Inc. v. Bullowa*, 291 N.Y. 70, 73 (1943), on which plaintiffs rely, is distinguishable because there the court held that "a remedy through the agencies of the City of New York . . . is not exclusive." By contrast, here, the statute provides that the remedy through the DOB is exclusive. NYC Charter § 645 (b)(1-2).

---

[4] The NYC Charter § 645(b) provides in pertinent part, "the commissioner shall have the following powers and duties *exclusively*,. . . (1) to examine and approve or disapprove plans for the construction or alteration of any building or structure . . . and to direct the inspection of such building or structure . . . in the course of construction . . . or alteration; (2) to require that the construction or alteration of any building or structure . . . shall be in accordance with the provisions of law and the rules, regulations and orders applicable thereto." (Emphasis added.)

Alternatively, plaintiffs' claim should be dismissed because it sounds in negligent misrepresentation, which fails because of lack of privity between plaintiffs and Resident Defendants. *See, e.g., Sykes v, RFD Third Ave 1 Assoc., LLC*, 67 A.D.3d 162, 166-167 (1st Dept 2009), *affd* 15 N.Y.3d 370 (2010). Therefore, plaintiffs' third cause of action that Resident Defendants made alleged misrepresentation to the DOB is dismissed.

Fifth Cause of Action - Trespass

"[T]he claim for trespass requires an affirmative act constituting or resulting in an intentional intrusion upon [plaintiff's] property." *Stage Club Corp. v. West Realty Co.*, 212 A.D.2d 458, 460 (1st Dept 1995). "The essence of trespass is the invasion of a person's interest in the exclusive possession of land." *Zimmerman v. Carmack*, 292 A.D.2d 601, 602 (2d Dept 2002).

Plaintiffs allege that Resident Defendants, by their agents "altered the foundation of the 169 Premises, tore down parts of common walls share[d] with both the 165 and 169 Premises, cut through portions of roofs extended over and supported by the top surface of such wall and destroyed other chattel affixed to the respective Plaintiffs sides and surface space and imposed upon the common wall their own structures and chattel . . . ."

In their Bills of Particulars, plaintiffs state that defendants as to 169 Premises (Mastrobattista), cut through and removed part of roof structure that served to prevent water damage and cut away bricks, creating a crevice in the cellar, leading to water leakage and seepage, and as to 165 Premises (Roome), cut through and removed part of

the roof, removed chimney pipes and caps and installed inadequate narrower chimney extensions. Resident Defendants do not explain how these alleged acts do not constitute trespass. Hence, the Resident defendants' motion to dismiss the fifth cause of action for trespass is denied.

Sixth Cause of Action - Conversion

Plaintiffs allege that Resident Defendants' actions "also constitute[] conversion of the Premise and of the Plaintiff's chattel [which was] removed and destroyed[,] and their . . . usage of the common wall to support each of the 165 and 169 Premises, such chattel as was affixed to such wall . . . ." As to the 169 Premises, the plaintiffs allege in the Bill of Particulars that conversion occurred when defendants cut through and removed the roof membrane, built a new wall and fence intruding on Mastrobattista's air, light and building rights. With respect to 165 Premises, plaintiffs allege that conversion occurred when defendants removed chimney caps, cut through and removed the roof membranes, and built a new structural wall and fence, intruding on Roome's air, light, and building rights.

Resident Defendants contend that plaintiffs have failed to state a cause of action for conversion. "An action for conversion lies only with respect to personal, not real, property." *Boll v. Town of Kinderhook,* 99 A.D.2d 898, 899 (3d Dept 1984). *See also Roemer & Featherstonhaugh v. Featherstonhaugh*, 267 A.D.2d 697, 697 (3d Dept 1999) ("the subject matter of a conversion action must constitute identifiable tangible personal property"). Additionally, "[p]laintiffs have no natural or inherent right to light or air and

may not complain that either has been cut off by the erection of buildings on adjoining land." *Blair v. 305-313 E. 47th St. Assoc.*, 123 Misc 2d 612, 612-613 (Sup. Ct. NY Co. 1983); *Chatsworth Realty 344 LLC v. Hudson Waterfront Co.*, 2003 NY Slip Op 50601[U], 12 (Sup. Ct. NY Co. 2003), *aff'd* 309 A.D.2d 567 (1st Dep't 2003). All of plaintiffs' claims pertain to either real property or to air and light rights. Accordingly, plaintiffs' sixth cause of action for conversion is dismissed.

Seventh and Eighth Causes of Action - Public and Private Nuisance

Resident Defendants argue that plaintiffs many not maintain claims for public and private nuisance. "[N]uisance, as a general term, describes the consequences of conduct, the inconvenience to others, rather than the type of conduct involved. It is a field of tort liability rather than a single type of tortious conduct." *Copart Indus. v. Consolidated Edison Co. of N.Y.*, 41 N.Y.2d 564, 569 (1977) (citations omitted).

Plaintiffs allege that "the erection of . . . a penthouse structure, roof deck and the wooden privacy fence[] interferes with the rights of all property owners along the north side of the contiguous block of East 62nd Street between Lexington Avenue and Third Avenue from unobstructed access for emergency and rescue personnel who may require to traverse such rooftops" in the event of emergency.

"A public . . . nuisance is an offense against the State and . . . [i]t consists of conduct or omissions which offend, interfere with or cause damage to the public [and] . . .endanger or injure the property, health, safety or comfort of a considerable number of

persons." *Copart Industries, Inc.*, 41 N.Y.2d at 568 (internal citations omitted). "[A]lthough an individual cannot institute an action for public nuisance as such, he may maintain an action when he suffers special damage from a public nuisance." *Id.*

The essence of plaintiff's public nuisance claim is that the Additions may obstruct rescue personnel in case of emergency, such as fire. Plaintiffs' have failed to submit evidence that the Additions would hinder an emergency rescue effort. The seventh cause of action for public nuisance is therefore wholly speculative, lacks basis in fact, and must be dismissed.

In the Amended Complaint, plaintiffs allege that "the conditions which represent the public nuisance also constitute a private nuisance . . . [and] said structures further violate provisions of the Covenants, including requirements for use of non-flammable brick or stone material and roofing of metal or slate, and further limitations which require the same space to remain free from further development."

If based on intentional and unreasonable conduct, "[t]he elements of such a private nuisance . . . are: (1) an interference substantial in nature; (2) intentional in origin; (3) unreasonable in character; (4) with a persons property right to use and enjoy land; (5) caused by another's conduct in acting or failure to act." *Copart Industries, Inc.*, 41 N.Y.2d at 570.

As previously discussed, issues of fact exists as to the structural soundness of the Additions that were placed atop an old brick wall, which, with time, may not be able to

withstand the added load and the lack of proper rain water removal. The movants have not adequately addressed these issues, which may be hazardous and cause significant damage to plaintiffs' properties. Therefore, the eighth cause of action for private nuisance survives as to the issues of structural soundness and water infiltration, and is otherwise dismissed. *See Vacca v. Valerino*, 16 A.D.3d 1159, 1160 (4th Dept 2005).

Plaintiffs' Motion to Dismiss A2B's counterclaims asserted against them

In the first counterclaim for abuse of process, A2B alleges that, beginning in August 2005, plaintiffs complained to the DOB, without justification or excuse, in order to stop A2B's construction work. The DOB inspected the work site and ordered an audit of the construction work, increasing the cost of construction in excess of $500,000. Asserting that plaintiffs' actions were "sufficiently vicious and malicious and a fraud upon the general public," A2B seeks exemplary and punitive damages, in addition to compensatory damages. Plaintiffs argue that A2B's allegations are insufficient to state a cause of action for abuse of process because plaintiffs' complaints to the DOB do not constitute "process."

"First, there must be regularly issued process, civil or criminal, compelling the performance or forebearance of some prescribed act." *Board of Educ. of Farmingdale Union Free School Dist. v. Farmingdale Classroom Teachers Assn., Local 1889, AFT AFL-CIO*, 38 N.Y.2d 397, 403 (1975) (internal citation omitted). "The gist of the action for abuse of process lies in the improper use of process after it is issued. Process is a

direction or demand that the person to whom it is directed shall perform or refrain from the doing of some prescribed act." *Williams v. Williams*, 23 N.Y.2d 592, 596 (1969) (internal quotation marks and citations omitted). Examples of "process" are "attachment, execution, garnishment, or sequestration proceedings, or arrest of the person, or criminal prosecution, or even such infrequent cases as the use of a subpoena for the collection of a debt." *Id.*, n. 1 (citation omitted).

Plaintiffs' complaints to the DOB about A2B's construction activities are clearly not "regularly issued legal process." *See e.g. Susser v. Fried,* 115 Misc 2d 968, 971 (Civ. Ct. NY Co. 1982) (request to appear in court is not "process" because "there is no penalty or other coercive action which can be taken for failure to appear in response to it"). Accordingly, A2B's claim for abuse of process is dismissed.

A2B's second counterclaim is for interference with property rights, and A2B alleges that plaintiffs' complaint to the DOB was "intended to harm A2B and to interfere with its lawful use and development" of the 167 Premises. A2B seeks both compensatory and punitive damages.

Plaintiffs correctly contends that interference with property is not a recognized tort and that A2B claim should be construed to plead a claim for intentional interference with prospective economic advantage, which A2B also failed to state. "Tortious interference with prospective economic relations requires an allegation that [counterclaimant] would have entered into an economic relationship but for the defendant's wrongful conduct."

Vigoda v. DCA Prods. Plus, 293 A.D.2d 265, 266 (1st Dept 2002). A2B must allege that plaintiffs acted solely out of malice or employed "wrongful means," which includes "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure" by Roome and mastrobattista. *American Preferred Prescription v. Health Mgt.*, 252 A.D.2d 414, 418 (1st Dept 1998) (internal citations omitted).

A2B's conclusory allegations, lacking any specificity, do not state any of the elements of this cause of action. Hence, A2B's second counterclaim is dismissed as well.

Beitin's Motion to dismiss the complaint and cross claims and LiCalzi's Cross Motion for summary judgment dismissing the complaint and cross claims

Plaintiffs allege negligence, public and private nuisance causes of action against the Engineer Defendants. As previously discussed, plaintiffs' claim for public nuisance as against all defendants is dismissed.

Beitin and LiCalzi contend that in the March 16, 2011 Order, I found that neither of them owed a duty of care to plaintiffs, and that based on the law of the case doctrine, plaintiffs are barred from pleading in the amended complaint a cause of action for negligence predicated on Beitin and LiCalzi's owing plaintiffs a duty of care.

"The doctrine of the 'law of the case' [prescribes that] when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned." *Martin v. City of Cohoes*, 37 N.Y.2d 162, 165 (1975).

In the March 16, 2011 Order, I denied plaintiffs' request to amend the complaint to add a cause of action for professional malpractice. In the Order, I stated that this cause of action requires, among other things, a showing of "the existence of contractual privity between the professional and client." Plaintiffs, however, failed to allege the existence of *contractual* privity between them and Engineer Defendants, or that plaintiffs were intended beneficiaries of the engineering services performed by Engineer Defendants for Resident Defendants. Accordingly, I denied leave to add a claim for professional malpractice. I did not determine the issue of whether, based on a different theory of liability, Engineer Defendants may owe a duty of care to plaintiffs. Denial of leave to amend a pleading is not a determination that, as a matter of law, Engineer Defendants owed no duty of care, on any ground, to plaintiffs. The March 16, 2011 Order and the law of the case doctrine do not bar plaintiffs' claims for negligence and private nuisance as against Engineer Defendants.

The Engineer Defendants further claim that, in the Amended Complaint, plaintiffs have substantially rewritten the negligence cause of action without having obtained leave of court to do so. In the March 16, 2011 Order, I held that "leave to amend the complaint beyond what is necessary to assert the causes of action for breach of protective covenants and violation of RPAPL § 871 is denied. In addition, Plaintiffs may amend *the facts section* of the complaint to conform to the evidence obtained through discovery in a clear, brief, plain and concise manner." (Emphasis added.)

In the original complaint, the essence of plaintiffs' claim was that the Engineer Defendants' failure, as self-certifying applicants, to ensure their applications' compliance with the Building Code and concealment of the actual scope of work, whereas, in the amended complaint, plaintiffs claim that these defendants failed to ensure that the party walls can withstand the added load of the Additions. As Engineer Defendants contend, in the March 16, 2011 Order, I did not grant plaintiffs leave to amend the cause of action for negligence in the way that it currently appears in the amended complaint. Accordingly, Engineer Defendants' motions are considered with respect to plaintiffs' claim for negligence as it was pled in the original complaint.

LiCalzi argues that it owed no duty of care to plaintiffs. Plaintiffs contend that LiCalzi owes them a statutory duty. "[I]n analyzing whether a violation of [an] Administrative Code section should be viewed as negligence per se or some evidence of negligence, we consider the origin of [the] provision." *Elliott v. City of New York*, 95 N.Y.2d 730, 733 (2001).

Moreover, where the theory of liability is based on a breach of a regulation designed to protect an adjoining property owner, the owner has a right to recover damages from a party that breached the regulation, including an architect or engineer in charge of a project. *See, e.g., Chotapeg Inc.*, 291 N.Y. at 74. *See also 11 Essex St. Corp v. 7 Essex St., LLC*, 2009 WL 3240376, 2009 NY Misc LEXIS 6186, 2009 NY Slip Op 32255[U] (Sup. Ct. NY Co. 2009), *affd 11 Essex St. Corp. v. Tower Ins. Co. of N.Y.*, 81 A.D.3d 516,

517 (1st Dept 2011); *27 Jefferson Ave, Inc. v. Emergi*, 18 Misc 3d 336, 341 (Sup. Ct. Kings Co. 2007).

Plaintiffs point to the Macaluso Report, which discusses the DOB memorandum issued on February 19, 1991 by the Deputy General Council to the Department of Buildings, Charles G. Sturcken (the "Sturcken Memorandum"). The Macaluso Report states that the Sturcken Memorandum "has been the de facto operating guide for the increase of the height of a shared common wall."

The Sturcken Memorandum, in relevant part, provides "either owner of a party wall may increase the height of the party wall, provided the wall is sufficiently strong to bear the additional weight and provided it can be done without injuring the adjacent premises. The addition to the party wall must be so constructed that it may be used by both owners." The Sturcken Memorandum is clearly aimed protecting an adjacent property owner. Engineer Defendants were aware of the Sturcken Memorandum, as Beitin's Septemebr 14, 2006 letter to the DOB Commissioner argues that the vertically extended party wall did not encroach on the 169 Premises.

Plaintiffs also maintain that Defendant Engineers breached the Building Code, former section 27-724, which states in pertinent part:

> constructions ... required for or affecting *the support of adjacent properties or buildings* shall be subject to controlled inspection. The details of ... constructions required for the support of adjacent properties or buildings shall be shown on the plans or prepared in the form of shop or detail drawings

> and shall be approved by the architect or engineer who prepared the plans.

NYC Administrative Code, formerly § 27-724, currently § C26-1112.6 (emphasis added). Administrative Code, former section 27-132 (a) provided that "all required inspection and tests of materials designated for 'controlled inspection' shall be made and witnessed by or under the direct supervision of an architect or engineer retained by . . . the owner," and the engineer shall file test and inspection reports together with his statement of compliance with the Building Code requirements. These regulations are designed to afford protection to an adjoining property owner. They may support a claim for negligence, *Chotapeg Inc.*, 291 N.Y. at 74.

LiCalzi, P.E. states in his affidavit that in July 2003, he entered into a contract with A2B ("July 2003 LiCalzi Contract") to provide consultant and professional services in connection with the filing of an Alteration Type I application with the DOB for the 167 Premises under the professional certification procedure. In July 2004, LiCalzi entered into another contract ("July 2004 LiCalzi Contract") with A2B for engineering, architectural, and expediting services in connection with the amendment of the Alteration Type I application for the addition of the penthouse. LiCalzi claims that the construction on the Vertical Addition was supposed to commence in early August 2005. However, from July 2005, he "was never contacted or consulted concerning the construction of the penthouse" and while remaining the engineer of record, he "was frozen out of any participation" in connection with the Vertical Addition. He claims that A2B prevented

him from performing his engineering duties and that he "had been relieved as the engineer of record" and "had no involvement with" the Vertical Addition.

However, plaintiffs submit evidence that LiCalzi prepared amended plans for the construction of the Vertical Addition which he filed with the DOB in June 2005. With respect to the Vertical Addition, the Macaluso Report states that the available amended plans prepared by LiCalzi do not adequately address the issue of proper connection between the preexisting party wall and the new masonry added on top of it. The Macaluso Report states, "[i]t is of great concern that the information available does not create a complete database to assure that the new masonry is properly tied to very old masonry. . . . This failure to provide the necessary due care and diligence for proper structural evaluation is substandard by any professional measure." LiCalzi does not address this issue raised by the Macaluso Report.

Additionally, in approximately November 2003, LiCalzi filed a Statement of Technical Responsibility ("TR-1 Form"), stating that it was the engineer of record and would supervise the project. LiCalzi indicated on the TR-1 Form that on June 19, 2003, he tested, among other items, shoring, structural stability, masonry units, and concrete.

Accordingly, LiCalzi has failed to show that it fully complied with the relevant provisions of the Building Code and the DOB regulation that are aimed at protection of an adjacent property owner. Hence, LiCalzi's motion, with respect to plaintiffs' fourth cause of action for negligence is denied.

With respect to nuisance, even if LiCalzi's involvement with the Additions ceased in July 2005, according to Mastrobattista, in 2004, the work on the Horizontal Construction took place and it was then that "the workmen tampered with the foundation of my building, creating an interior crevice into which water penetrated and caused basement flooding, and threatened to undermine the foundation of 169" Premises. This alleged damage happened while LiCalzi was the engineer of record. LiCalzi does not address these allegations. Nuisance may be based on intentional and unreasonable conduct. *See e.g. Copart Indus., Inc.*, 41 N.Y.2d at 570. LiCalzi's cross motion to dismiss plaintiffs' eighth cause of action for private nuisance is denied

Beitin states that he did not supercede LiCalzi as engineer of record until October 3, 2005, which was purportedly after the construction upon the common walls occurred.

In opposition, plaintiffs claim that on September 23, 2005, Beitin filed a work approval application with the DOB along with notice that he is the new applicant for job # 1036775221, which refers to the Vertical Addition. Beitin filed a TR-1 form, dated September 2, 2005, which provides that on September 2, 2005, Beitin inspected and tested, among other items, structural stability, masonry units and concrete of the cellar, basement, and roof at 167 Premises. On September 14, 2006, Beitin wrote to the DOB Commissioner arguing that there was no issue with the vertically extended party wall encroaching on the 169 Premises.

Accordingly, it is irrelevant whether Beitin's application for substitution was approved, in either September or October 2005. He clearly represented in the TR-1 form that he tested structural stability, masonry units and concrete as part of the Vertical Addition. Beitin has failed to show that he fully complied with the pertinent regulations aimed at protecting an adjacent property owner. Accordingly, his motion to dismiss the plaintiffs' complaint, and his request for sanctions, are denied.

Beitin and LiCalzi also move to dismiss the cross claims asserted against them by co-defendant Pier Head for contribution and indemnification. These motions are premature until there is a determination as to whether plaintiffs' alleged injuries were caused by any negligence by Beitin and/or LiCalzi, and are accordingly denied. *Gilbert v. Kingsbrook Jewish Center*, 4 A.D.3d 392, 393 (2d Dep't 2004); *Medina v. New York Elevator Co.*, 250 A.D.2d 656 (2d Dep't 1998).

In accordance with the foregoing it is

ORDERED that the motions by defendants Raquel Moura Borges (motion sequence no. 009) and A2B LLC (motion sequence no. 008) are granted only to the extent that plaintiffs' claims that (1) the additions violated the expansion limitation of the 1869 Agreement; (2) 167 East 62nd St is used as a short-term stay hotel; (3) for negligence based on an allegation that these defendants made misrepresentations to the NYC Department of Buildings; (4) for conversion; and (5) for public nuisance are dismissed; and plaintiffs' claim for private nuisance is dismissed, except as to the issues of the

penthouse wall structural soundness and water infiltration; and the motion is otherwise denied; and it is further

ORDERED that the motion by plaintiffs John D. Mastrobattista and Anne Roome (motion sequence no. 007) are granted and the counterclaims asserted by defendant A2B, LLC against plaintiffs are dismissed; and it is further

ORDERED that motion by defendant Karl Beitin, P.E. and cross motion by defendants Luke LiCalzi, P.E., and Luke LiCalzi, P.E., P.C. (motion sequence no. 006) are granted only to the extent that plaintiffs' claim for public nuisance asserted against these defendants is dismissed; and the motion and the cross-motion are otherwise denied; and it is further

ORDERED that all parties are to appear before the Court, 80 Centre Street, Room 279, on December 5, 2012, at 2:15 pm for a compliance conference

This constitutes the decision and order of the Court.

Dated: New York, New York
September 28, 2012

ENTER:

Saliann Scarpulla, J.S.C.