[* 1]

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

PRESENT: HON. PAUL WOOTEN PART 7
*Justice*

JANET GREENBERG BAKER and NORMAN BAKER,

Plaintiffs,

-against-

40 EAST 80 APARTMENT CORPORATION, PENMARK REALTY CORPORATION, SELVIN R. SILVER, BARBARA NAFISSIAN, JAY B. FISCHOFF, BENJAMIN S. KLAPER, MIRIUM H. WEINGARTEN, STEPHEN A. MARSHALL and BRAD BUTLER,

Defendants.

INDEX NO. 603683/03

MOTION SEQ. NO. 021

PENMARK REALTY CORPORATION,

Third-Party Plaintiff,

-against-

S. KRAUSS RESTORATION and YATES RESTORATION GROUP LTD.,

Third-Party Defendants.

3RD PARTY INDEX NO. 590339/06



YATES RESTORATION GROUP, LTD.,

Second Third-Party Plaintiff,

-against-

ETNA CONSULTING, ETNA CONSULTING STRUCTURAL ENGINEERING, ETNA CONSULTING SERVICES, INC. and EDY ZINGHER,

Second Third-Party Defendants.

SECOND 3RD PARTY INDEX NO. 590664/07

The following papers were read on this motion by defendant/third-party plaintiff for partial summary judgment pursuant to CPLR 3212.

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answering Affidavits — Exhibits (Memo) | |
| Replying Affidavits (Reply Memo) | |

Cross-Motion: ☐ Yes ■ No

Motion sequence numbers 021 and 022 are hereby consolidated for disposition.

Plaintiffs Janet Greenberg Baker and Norman Baker (hereinafter, the Bakers or plaintiffs), tenant-shareholders in a residential cooperative building, bring this action against the cooperative corporation and the building's managing agent, to recover for severe water leaks which allegedly rendered their apartment uninhabitable for long periods of time.

In motion sequence number 021, defendant/third-party plaintiff Penmark Realty Corporation (Penmark) moves, pursuant to CPLR 3212, for partial summary judgment dismissing the causes of action for gross negligence, injunctive relief, declaratory relief, and plaintiffs' request for punitive damages as against it. In motion sequence number 022, defendant 40 East 80 Apartment Corporation (40 East 80) moves, pursuant to CPLR 3212, for summary judgment: (1) dismissing the causes of action for negligence, gross negligence, breach of fiduciary duty, breach of the implied covenant of good faith and fair dealing, and constructive eviction asserted against it; (2) dismissing the causes of action for injunctive and declaratory relief as against it; and (3) dismissing plaintiffs' request for punitive damages as against it.

**BACKGROUND**

The following facts are undisputed unless otherwise indicated.[1] Plaintiffs are the owners of the shares assigned to Penthouse B at the residential cooperative building located at 40 East 80th Street, New York, New York (the premises). 40 East 80 is the cooperative corporation which owns the building. Penmark was the managing agent of the building until January 2010.

In July 2003, the Bakers discovered that severe water and/or moisture infiltration into the apartment had caused a severe mold condition in the apartment. The Bakers notified 40 East 80, Penmark, and the individual members of the board of directors. The owner of

[1] The facts are taken from the third verified amended complaint, affidavits, and documentary evidence filed by the parties.

Penmark, Bernard Friedman, and the building's property manager went to the apartment and conducted an inspection of the apartment.

On July 22, 2003, the Bakers retained, at their own expense, the Ambient Group, Inc. (Ambient), an environmental consultant, to conduct an initial inspection of the apartment. On July 22, 2003, Ambient performed a microbiological survey of the apartment and issued a report dated July 23, 2003 concerning their findings. The report states that:

> "Ambient Group recommends addressing the source of the moisture intrusion immediately. This should include an inspection of the roof, flashing and mortar between facade bricks, and should not be limited to the east side. . . The extent of water damage and potential microbial growth within the walls will not be revealed until removal begins, however Ambient Group, Inc. recommends removal of . . . [certain] walls in their entirety . . . In addition, the roof inspection revealed the strongest signs of leaks to the northeast corner, which could mean that the water traveled along the east wall" (Rosenstock Affirm., exhibit 11, at 2).

The Bakers allege that a copy of Ambient's report and recommendations was sent to Friedman and the cooperative's board of directors.

The Bakers assert that they were forced to retain, at their own expense, Action Environmental Group (Action) to perform remediation work in and to the interior of the apartment. The Bakers allege that they were also required to vacate the apartment for one hundred days from July 23, 2003 through October 2003. On July 31 and August 5, 2003, Ambient inspected the apartment and performed additional testing. Based upon Action's remediation work, in a report dated August 6, 2003, Ambient found that "[t]he microbial remediation procedures were successful, however, the source of the water intrusion needs to be identified and corrected to prevent further water leaks and possible subsequent microbial issues in the future" (Rosenstock Affirm., exhibit 14, at 2). The August 6, 2003 report also stated that "guidelines for fungal spore concentrations in an 'average' clean commercial building are less than 700 spores/m3 [and that] indoor fungal spore concentrations are comparable to the outside air sample concentrations" and that "two (2) indoor air samples revealed fungal spore counts of 4,744 spores/m3 and 1,167 spores/m3 respectively" (*id.* at 1, 2). The Bakers

provided a copy of the August 6, 2003 report to defendants.

Defendants subsequently retained Yates Restoration Group, Ltd. (Yates), which inspected the building and the Bakers' apartment. In a letter dated September 29, 2003 issued by Yates, defendants were advised that "the parapet coping and interior brickwork were deficient and likely allowing moisture to enter the wall . . . the aforementioned condition was notably worse at this location than elsewhere on the building" (Rosenstock Affirm., exhibit 18, at 1). Yates recommended that scaffolding be erected and that work be performed to the exterior of the building. However, the board decided against providing a scaffold for inspection of the building's exterior walls. In September 2003, the Bakers allegedly advised Barbara Nafissian, a board member, that they would be willing to pay for investigative work to be undertaken to the exterior of the building. According to the Bakers, the board ignored their offer.

In a subsequent report dated October 22, 2003, Yates indicated that "You may wish to have the engineer perform an on-site inspection with a scaffold in place in order to obtain his opinion on this matter. This work would require the installation of at least 40 feet of sidewalk bridging on Madison Avenue" (*id.*, exhibit 19, at 1). Defendants allegedly refused to install scaffolding to inspect the walls.

At around this time, defendants put their insurance carriers on notice. One of defendants' insurers arranged for Professional Claims Services Inc., a claims investigator, to retain an environmental firm, Environmental Compliance Control Inc. (ECC) to undertake an independent review of the matter. In a report dated November 17, 2003, ECC found that (i) "moisture was found infiltrating through deteriorated flashings and seals along the exterior face of the building," (ii) "[a]t the time of EEC's inspection, water had already reached interior wall panels near the ceilings of both the second-floor master bedroom and first-floor living room beneath it," and (iii) "[a] surface moisture survey of this duplex apartment evidenced elevated moisture within wall panels located in the second-floor master bedroom and first-floor living

room beneath it" (*id.*, exhibit 20, at 1, 2). The EEC report also concluded that "[i]rrespective of the moisture's source, however, the presence of the wet conditions will eventually cause fungal growth to recur in the dwelling if not addressed" (*id.*, exhibit 20, at 2). The EEC report stated that "all deteriorated exterior flashings and seals around the dwelling must be repaired to prevent continued moisture infiltration into the apartment" (*id.*, exhibit 20, at 3).

Frank E. Pannone, a professional engineer retained by defendants, inspected the Bakers' apartment on December 11, 2003. In a report dated December 14, 2003, Pannone indicated that "there is water penetrating during a storm that will leave water within the cavity which will seek relief of any sort, and I believe it has found cracks in the slab that is causing the mold within the Bakers' apartment" (*id.*, exhibit 21, at 3). Pannone also stated that "the difficulties that have developed . . . have achieved a status of a major repair to solve this serious problem[] that have developed due to neglect" (*id.*).

In March 2004, pieces of mortar fell off the building's facade onto the Bakers' terrace. In May 2004, the New York City Department of Buildings issued a series of hazardous violations to the building relating to this incident (*id.*, exhibit 22). Defendants subsequently retained ETNA Consulting (ETNA), a structural engineering consultant, to inspect the apartment and building and issue a recommendation. ETNA inspected the east facade wall of the Bakers' apartment. On June 1, 2004, Edy Zingher of ETNA wrote that "[w]e found the walls to be in poor condition with deteriorated spalling mortar joints, full of moisture, dirt and growth (moss)" (*id.*, exhibit 23, at 1). Zingher stated that "our previous survey revealed that the cavity is clogged and that the wall doesn't work as designed" (*id.*). Zingher recommended that the face bricks be removed and replaced, the back-up masonry joints be pointed, and that membrane waterproofing (such as Tyvec) be installed on the exterior face of the backup block prior to the installation of the brick veneer (*id.*).

Defendants subsequently hired S. Kraus Restoration Inc. (Kraus) to perform pointing

work on the building. However, Zingher testified that this was not the work that he recommended (Zingher EBT, at 57). Eichner testified that after Kraus performed the work, the water leakage problem increased substantially due to clogging in various weep holes (Eichner EBT, at 222-224).

The Bakers allege that, in July 2004, brown and brick-colored stains appeared on the carpet and around the staircase. In September 2004, the Bakers allegedly suffered major flooding in their apartment, with water pouring through an electrical panel and other locations. The New York City Fire Department inspected the apartment, turned off the electricity in the apartment, and issued a violation. The Bakers were allegedly required to vacate the apartment and live elsewhere at their own expense for 10 days that month. After additional rainstorms in late September and October 2004, the Bakers were again forced to vacate their apartment and live elsewhere on four occasions.

The Bakers contend that, by May 2005, significant and visible black mold appeared in areas of the apartment, including the walls, floors, carpet padding, carpet, and sheet rock ceilings. The Bakers claim that they were forced to move out and lease a temporary apartment in November 2005 because of the conditions in their apartment.

In February 2007, Zingher filed a Local Law 11 report deeming the building unsafe due to spalling concrete at the exposed face of the building's concrete floor slabs and recommending that work start and continue until all of the hazardous conditions were remedied (Rosenstock Affirm., exhibit 25, at 2, 5).

From September 2007 through November 2007, Goldreich Engineering, P.C. oversaw the rebuilding of parapet walls and the installation of waterproofing systems. In December 2007, defendants retained a contractor, Cortco Construction (Cortco) to repair the interior damage caused by the water damage and mold remediation. The Bakers allege that Cortco was not licensed as a home contractor in the City of New York, and was not qualified to perform

the repair and reconstruction work in their apartment. The Bakers allege that Cortco performed shoddy and inferior work, and damaged their stainless steel kitchen appliances, which required them to be replaced.

According to the Bakers, in February 2008, rusty brown water began pouring out of the exposed ceiling in the kitchen and out of the electrical outlets. Defendants retained a contractor to perform work on the terraces, parapets, and roof of the building. The Bakers further allege that, in early 2008, multiple inspections of the walls in the kitchen revealed extremely high moisture content. As a result of the heavy moisture infiltration, the kitchen cabinets were damaged and were no longer usable. According to the Bakers, despite due demand, defendants have refused to replace the kitchen cabinets or appliances. Plaintiffs allege that they still do not have a working kitchen (which resulted in a violation being issued by the New York City Department of Housing Preservation and Development against 40 East 80). Penmark hired Goldreich Engineering, P.C. and AM Maintenance to investigate leaks, design corrections, effectuate exterior repairs, and perform water tests (McGivney Affirm., exhibits PP, QQ). The Bakers allege that, in August 2009, there was another leak into the apartment. Another violation was issued to the building.

Plaintiffs commenced this action on November 20, 2003, asserting causes of action for breach of contract, negligence, and declaratory relief compelling 40 East 80 to remedy the moisture condition within their apartment. In March 2005, the Bakers served and filed a first amended complaint, alleging additional causes of action for gross negligence, breach of fiduciary duty, breach of the implied covenant of good faith and fair dealing, breach of the warranty of habitability, constructive eviction, and injunctive relief. In December 2005, plaintiffs served and filed a second amended complaint. On September 22, 2008, the Court (Stallman, J.) dismissed the causes of action asserted against the individual members of the cooperative's board of directors. The Court noted that "the co-op board members cannot be held personally

liable for the co-op's breach of its contractual duties 'simply because the officer took the challenged actions on the corporation's behalf'" (Shultz Affirm., exhibit G, at 2).

The Bakers previously sought leave to serve and file a third amended complaint. On September 27, 2010, the Court granted plaintiffs' application.[2] The third verified amended complaint asserts the following 10 causes of action:

(1) breach of the proprietary lease against 40 East 80;
(2) injunctive relief against 40 East 80 and Penmark;
(3) negligence against 40 East 80;
(4) negligence against Penmark;
(5) gross negligence against 40 East 80 and Penmark;
(6) breach of fiduciary duty against 40 East 80;
(7) breach of the covenant of good faith and fair dealing against 40 East 80;
(8) breach of the warranty of habitability against 40 East 80;
(9) constructive eviction against 40 East 80; and
(10) declaratory relief against 40 East 80 and Penmark.

The Bakers seek attorney's fees pursuant to the proprietary lease, in addition to punitive damages on their gross negligence, breach of fiduciary duty, breach of warranty of habitability, constructive eviction, and breach of the implied covenant of good faith and fair dealing claims.

On September 13, 2011, plaintiffs filed a note of issue requesting a nonjury trial.

In opposition to the motions, plaintiffs submit an affidavit from Michael G. Gurevich, the president of New York Brickwork Design Center and a design advisor on brick masonry issues (Gurevich Aff., ¶ 1). Gurevich states that, on December 27, 2011, he attended a meeting at the Bakers' duplex penthouse, Apartment 25B, with the Bakers and representatives of the current managing agent of the building, Douglas Elliman Management (Douglas Elliman) (*id.*, ¶ 2). According to Gurevich, the master bedroom is located on the upper floor of the Bakers' apartment, and the north wall of room has a large window with an adjacent door leading to a balcony (*id.*, ¶ 3). During his inspection, Gurevich observed water staining, flaking paint on the

[2] In moving for summary judgment, 40 East 80 argued that the third amended complaint had not been formally served and was therefore a nullity. However, in response to this argument, the Bakers served a copy of the third amended complaint (Plaintiffs' Mem. of Law in Opposition, at 1).

wall and ceiling above the door and window, and cracking on the soffit at the eastern portion of the wall of the adjoining bedroom (*id.*). On the balcony, Gurevich observed that the brick veneer outside of the master bedroom between the top of the balcony slab and window sill had been replaced; however, there were no weep holes at the base of the replaced brick veneer to allow water to exit and drain outside (*id.*, ¶ 4). Gurevich noted moisture staining and rusted ends of the vertical rebars underneath the concrete cornice/parapet above the 26th floor window (*id.*). Gurevich states that in the absence of weep holes and a proper drainage system, further water migration into the walls of the Bakers' apartment was likely, with continued damage (*id.*). Gurevich states that he had noted the same condition in January 2007, and that it was apparent that a proper drainage system had still not been installed between the top of the master bedroom window/doorframe and underneath the concrete cornice to avoid this condition (*id.*, ¶ 5).

**DISCUSSION**

A motion for summary judgment should be granted if "upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" (CPLR 3212 [b]). It is well established that the "'proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus. Inc.*, 10 NY3d 733, 735 [2008]). Once the proponent has made a prima facie showing, however, the burden shifts to the opposing party to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Sumitomo Mitsui Banking Corp. v Credit Suisse*, 89 AD3d 561, 563 [1st

Dept 2011]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

**A. Penmark's Motion for Summary Judgment**

1. *Gross Negligence*

Penmark argues that the Bakers cannot establish that its response to the water intrusions constitutes gross negligence. Penmark maintains that, between 2004 and 2008, it hired five engineering experts and weather proofing contractors who performed work on the exterior of the Bakers' apartment, which resulted in $333,269.00 in charges to 40 East 80. Penmark also points out that it approved the retention of contractors for testing, remediation, and renovation of the interior of the apartment, resulting in $183,061.00 in charges to 40 East 80.

The Bakers counter that the evidence is sufficient to support a claim of gross negligence against Penmark. According to the Bakers, nine years after they commenced this action, the facade drainage system is still allowing water intrusion into the apartment, and 40 East 80 and the managing agent have still not retained adequate contractors to repair the damage or remediate the leaks. The Bakers further argue that, in December 2007, 40 East 80 and Penmark hired an unlicensed contractor, Cortco, which provided sub-par work and caused additional damage to the premises.

Gross negligence "differs in kind, not only degree from claims of ordinary negligence" (*Colnaghi, U.S.A. v Jewelers Protection Servs.*, 81 NY2d 821, 823 [1993]). To constitute gross negligence, a party's conduct "must 'smack[] of intentional wrongdoing'" or "evince[] a reckless indifference to the rights of others" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 554 [1992], quoting *Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 385 [1983]). "Stated differently, a party is grossly negligent when it fails to exercise even slight care . . . or slight diligence" (*Ryan v IM Kapco, Inc.*, 88 AD3d 682, 683 [2d Dept 2011] [internal quotation marks and

citations omitted]).

"Ordinarily, the question of gross negligence is a matter to be determined by the trier of fact. . . . [W]here plaintiff's allegations amount, at most, to ordinary negligence, they do not meet the foregoing standard, and defendant is entitled to summary judgment dismissing plaintiff's claims for gross negligence" (*Lubell v Samson Moving & Stor.*, 307 AD2d 215, 216, 217 [1st Dept 2003]).

Here, there is no evidence that Penmark's actions "smack[ed] of intentional wrongdoing" or "evince[d] a reckless indifference" to the Bakers' rights. Between 2004 and 2008, Penmark hired five engineering experts and weather proofing contractors who performed work on the exterior of the Bakers' apartment. In addition, Penmark approved the retention of four contractors for testing, remediation, and renovation of the interior of the apartment. Thus, it cannot be said that Penmark failed to exercise even slight care or slight diligence. Accordingly, Penmark is entitled to dismissal of the fifth cause of action asserted against it.

2. *Punitive Damages*

Penmark argues, with respect to the Bakers' request for punitive damages, that the record is devoid of any evidence that it engaged in outrageous, vindictive, oppressive or intentional misconduct.

The Bakers contend, in opposition, that there is an issue of fact as to whether 40 East 80 and Penmark's actions warrant punitive damages – 40 East 80 and Penmark have consistently denied that they are entitled to any remedy, and have rejected their requests for an abatement of maintenance during a three-year constructive eviction. According to the Bakers, Penmark's own consultant, Edy Zingher, recommended that certain work be done to address damage and deterioration to the brickwork, facade, walls, and parapets, and 40 East 80 and Penmark simply ignored those recommendations. The Bakers further rely on the fact that Cortco was unlicensed, and caused damage to the apartment and their personal property.

The purpose of punitive damages is not to compensate the injured party, but to punish the tortfeasor and deter similar conduct on the part of others (*see Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 489 [2007]). Thus, "[p]unitive damages are available in a tort action where the wrongdoing is intentional or deliberate, presents circumstances of aggravation or outrage, evinces a fraudulent or evil motive, or is in such conscious disregard of the rights of another that it is deemed willful and wanton" (*Bishop v 59 W. 12th St. Condominium*, 66 AD3d 401, 402 [1st Dept 2009], citing *Prozeralik v Capital Cities Communications*, 82 NY2d 466, 479 [1993]).

Plaintiffs seek punitive damages on their gross negligence claim as against Penmark. Although the Bakers argue that defendants ignored their own consultant's recommendations, there is no evidence that Penmark intentionally or willfully disregarded the Bakers' rights. As previously noted, Penmark hired waterproofing contractors Yates, Kraus, and AM Maintenance, and also retained the services of structural engineers Edy Zingher of Etna Consulting and Goldreich Engineering, P.C. to oversee the investigative work and repair of the exterior walls. Accordingly, the Bakers' request for punitive damages is dismissed as against Penmark.

3 *Injunctive Relief*

Penmark argues that the Bakers' request for injunctive relief must be dismissed because the Bakers have an adequate remedy at law in the form of money damages, and is now moot because all necessary exterior repairs have been made to the apartment.

In opposition, the Bakers argue that, as of December 2011, there was still water intrusion into the Bakers' apartment, and that recommended remediation work (i.e., the weep holes) had still not been performed. The Bakers maintain that they are entitled to a mandatory injunction: (i) restoring the apartment to its original condition, before the water intrusions, including replacing the kitchen as the Bakers had it; and (ii) directing defendants to arrange and pay for the work recommended by Michael Gurevitch, to be started and completed within a reasonable time (Plaintiffs' Mem. of Law in Opposition, at 27). In reply, Penmark points out that

it is no longer the managing agent of the building and is, therefore, not in a position to make any repairs to the building.

A mandatory injunction is used to compel the performance of an act (*see Matos v City of New York*, 21 AD3d 936, 937 [2d Dept 2005]). "[T]he issuance of a mandatory injunction is appropriate only when such extraordinary relief is essential to maintaining the status quo" (*Lehey v Goldburt*, 90 AD3d 410, 411 [1st Dept 2011]; *see also St. Paul Fire & Mar. Ins. Co. v York Claims Serv. Co.*, 308 AD2d 347, 349 [1st Dept 2003]). In order to obtain a permanent injunction, the party seeking such relief must show irreparable injury and the absence of an adequate legal remedy (*see Town of Liberty Volunteer Ambulance Corp. v Catskill Regional Med. Ctr.*, 30 AD3d 739, 740 [3d Dept 2006]). A movant cannot establish irreparable injury if there is an adequate remedy at law, such as money damages (*see Schleissner v 325 W. 45 Equities Group*, 210 AD2d 13, 14 [1st Dept 1994]). In determining whether to grant a mandatory injunction, "'the court must weigh the conflicting considerations of benefit to the [plaintiff] and harm to the [defendant] which would follow the granting of such a drastic remedy'" (*Nat Holding Corp. v Banks*, 22 AD3d 471, 474 [2d Dept 2005], *lv denied* 6 NY3d 715 [2006] [citation omitted]). Given that Penmark is no longer the managing agent of the building, the Bakers' request for mandatory injunctive relief against Penmark is moot. Therefore, the second cause of action is dismissed as against Penmark.

4. *Declaratory Relief*

Penmark argues that the Bakers' request for a declaration must be dismissed, because there is no actual live controversy, since all necessary repairs have been made to the apartment. In response, the Bakers again point out that, as of December 2011, there was still water intrusion into their apartment and that certain remediation work had not been performed. The Bakers contend that they are entitled to a declaration that defendants are obligated to undertake the repairs, corrections, and remediation recommended by their experts. In reply,

Penmark responds that it is no longer the managing agent of the building, and that the Bakers must seek such relief from the present managing agent, Douglas Elliman.

A court "may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed" (CPLR 3001). "The primary purpose of declaratory judgments is to adjudicate the parties' rights before a 'wrong' actually occurs in the hope that later litigation will be unnecessary" (*Klostermann v Cuomo*, 61 NY2d 525, 538 [1984], citing *Matter of Morgenthau v Erlbaum*, 59 NY2d 143, 148 [1983], *cert denied* 464 US 993 [1983]). A declaratory judgment "requires an actual controversy between genuine disputants with a stake in the outcome and may not be used as a vehicle for an advisory opinion" (*Long Is. Light. Co. v Allianz Underwriters Ins. Co.*, 35 AD3d 253 [1st Dept 2006], *appeals dismissed* 8 NY3d 956 and 9 NY3d 1003 [2007] [internal quotation marks and citations omitted]). As discussed previously, Penmark ceased to be the managing agent of the building in January 2010. Therefore, the Bakers' request for a declaration against Penmark is moot and must be dismissed.

**B. 40 East 80's Motion for Summary Judgment**

1. *Negligence*

40 East 80 argues that the Bakers' negligence claim is duplicative of their breach of contract claim. Specifically, 40 East 80 contends that the second and third amended complaints repeat the allegations of the breach of contract cause of action and assert the exact same claim for damages. Additionally, 40 East 80 maintains that the duty allegedly breached by 40 East 80 is the duty contractually owed by the Bakers pursuant to the proprietary lease.

In opposition, the Bakers contend that the negligence is claim is based not only on 40 East 80's failure to satisfy its obligations under the proprietary lease, but also on its disregard of Multiple Dwelling Law § 78, Administrative Code §§ 27-2005 and 27-2027, and Local Law 11. The Bakers argue that the negligence claim is also premised on: (1) defendants' failure to

investigate the contractors they hired to attempt remediation of the defects in the roof, parapets, flashing, and walls comprising the outer shell of the building, defendants' failure to inspect the work, and defendants' failure to supervise the work; and (2) defendants' retention of Cortco, an unlicensed contractor, which caused additional damage to the apartment and the Bakers' possessions.

In reply, 40 East 80 argues that the court should ignore the Bakers' arguments relating to the statutory violations, since they only identified these statutes for the first time in opposition to summary judgment, eight years after commencement of this action and four months after the note of issue was filed. 40 East 80 points out that the Bakers did not make a cross motion to amend the bill of particulars. Thus, 40 East 80 argues, the Bakers fail to set forth any duty separate and distinct from a duty owed pursuant to the proprietary lease.

A court may consider an allegation of a specific statutory violation raised for the first time in opposition to a motion for summary judgment where the allegation raises no new theories of liability and causes no prejudice to defendants (*see Kelleir v Supreme Indus. Park*, 293 AD2d 513, 514 [2d Dept 2002]). "Prejudice requires 'some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position'" (*Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [1st Dept 2007], quoting *Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23, *rearg denied* 55 NY2d 801 [1981]).

Here, although the Bakers first alleged violations of Multiple Dwelling Law § 78, Administrative Code §§ 27-2005[3] and 26-2027,[4] and Local Law 11 in opposition to the motions

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[3] Multiple Dwelling Law § 78 states that "[e]very multiple dwelling, including its roof or roofs, and every part thereof and the lot upon which it is situated, shall be kept in good repair." Administrative Code § 27-2005 (a) provides that "[t]he owner of a multiple dwelling shall keep the premises in good repair."

[4] Administrative Code § 27-2027 (b) states that "[t]he owner of a dwelling shall provide and maintain drainage from all roofs to carry off storm water, to prevent it from dripping to the ground, or from causing dampness in walls, ceilings, and open spaces."

for summary judgment, the alleged statutory violations raise no new theories of liability. Indeed, the third amended complaint alleges that 40 East 80 violated "various statutes, codes, rules and regulations governing the conduct of owners of residential property" (Third Amended Complaint, ¶ 111). 40 East 80 has also failed to establish any prejudice from the belated identification. Therefore, the Court shall consider the alleged statutory violations.

"[A] simple breach of contract claim may not be considered a tort unless a legal duty independent of the contract – i.e., one arising out of circumstances extraneous to, and not constituting elements of the contract itself – has been violated" (*Brown v Brown*, 12 AD3d 176, 176 [1st Dept 2004], citing *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]). In *Duane Reade v SL Green Operating Partnership, LP* (30 AD3d 189 [1st Dept 2006]), a tenant's negligence claim was not duplicative of a contract claim. The tenant's negligence claim was based on allegations that the landlord reduced heat in the building, which allowed freezing temperatures to cause a sprinkler pipe to burst. The First Department held that "[t]he abrupt nature of the injury and the resulting damages are 'both typical of tort claims' and follow from the landlord's breach of its statutory duty to maintain the premises 'in good repair'" (*id.* at 191 [citations omitted]).

In *Anderson v Nottingham Vil. Homeowner's Assn., Inc.* (37 AD3d 1195 [4th Dept 2007], *amended on rearg* 41 AD3d 1324 [2007]), the plaintiff sought damages for water damage allegedly caused by defendant's failure to repair a leak above plaintiff's unit in a cooperative complex. The plaintiff moved for leave to amend the complaint to add a claim for negligence for noneconomic damages. The Court held that:

> "[t]he proposed amended complaint seeks to recover damages for property damage and personal injuries allegedly sustained due to a negligent failure to correct dangerous conditions on the premises, of which defendant had actual or constructive notice, and thus sufficiently alleges the breach of a duty of reasonable care independent of defendant's contractual duties and resulting in noneconomic damages to set forth a separate claim in tort" (*id.* at 1198).

In this case, the Bakers' negligence claim is not duplicative of the breach of contract

claim. As in *Duane Reade* and *Anderson*, the Bakers' claim for property damage arises from 40 East 80's alleged breach of its statutory duties to maintain the premises "in good repair" and to keep the roof drainage system in working order (Multiple Dwelling Law § 78; Administrative Code §§ 27-2005 [a], 27-2027 [b]). Therefore, the part of 40 East 80's motion seeking dismissal of the third cause of action is denied.

2. *Gross Negligence*

40 East 80 also argues that the Bakers' gross negligence claim is duplicative of the breach of contract claim. In response, the Bakers do not specifically oppose 40 East 80's contention that the gross negligence claim is duplicative of the breach of contract claim. Nonetheless, the Bakers argue that the evidence is sufficient to support a claim of gross negligence against 40 East 80. At oral argument, the Bakers relied on the statutory violations of the Administrative Code to establish a duty independent of the proprietary lease (Oral Argument Tr., at 5).

Here, the gross negligence claim alleges that defendants ignored, failed, and refused to effectuate the recommendations of several experts; failed to repair the apartment and building; and failed to rectify constant flooding, known electrical hazards, and a resultant mold condition in the Bakers' apartment (Third Amended Complaint, ¶ 121). However, the Bakers have failed to plead or establish in their opposition papers the existence of a duty independent of 40 East 80's obligations pursuant to the proprietary lease (*see Baker v 16 Sutton Place Apt. Corp.*, 2 AD3d 119, 121 [1st Dept 2003] [gross negligence claim which arose from defendants' failure to make repairs required by proprietary lease was duplicative of claim for breach of the lease]; *Wapnick v Seven Park Ave. Corp.*, 240 AD2d 245, 247 [1st Dept 1997] [tenant shareholder's gross negligence claim based on cooperative corporation's failure to make certain repairs and improvements was a breach of contract claim, absent an allegation of a duty owed independent of the contract (the proprietary lease)]). In any event, the Court finds that there is no evidence

that 40 East 80's conduct "smack[s] of intentional wrongdoing" or "evinces a reckless indifference" to the Bakers' rights (*Sommer*, 79 NY2d at 554 [internal quotation marks omitted]). Therefore, the gross negligence claim must be dismissed.

3. *Breach of Fiduciary Duty*

40 East 80 argues that the sixth cause of action for breach of fiduciary duty must be dismissed because it did not owe the Bakers a fiduciary duty and because it is duplicative of the negligence claim. The Bakers do not oppose this part of the motion.

"It is black letter law that 'a corporation does not owe fiduciary duties to its members or shareholders'" (*Stalker v Stewart Tenants Corp.*, 93 AD3d 550, 552 [1st Dept 2012], quoting *Hyman v New York Stock Exch., Inc.*, 46 AD3d 335, 337 [1st Dept 2007]). Thus, 40 East 80 owed no fiduciary duties to the Bakers. Accordingly, the sixth cause of action is dismissed.

4. *Implied Covenant of Good Faith and Fair Dealing*

40 East 80 argues that the Bakers' seventh cause of action must be dismissed as duplicative of the breach of contract claim. The Bakers do not oppose this part of the motion.

Implied in every contract is a covenant of good faith and fair dealing (*see Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 68 [1978]), which is breached when a party to a contract acts in a manner that, although not expressly prohibited by the contract, would deprive the other party of the right to receive the benefits of the contract (*see Skillgames, LLC v Brody*, 1 AD3d 247, 252 [1st Dept 2003]; *Jaffe v Paramount Communications*, 222 AD2d 17, 22-23 [1st Dept 1996]). A claim for breach of the implied covenant of good faith and fair dealing claim is duplicative of a breach of contract claim where it relies on the same facts and seeks identical damages (*see Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 [1st Dept], *lv denied* 15 NY3d 704 [2010]). Here, the Bakers' good faith and fair dealing claim merely repeats the allegations of the breach of contract claim, i.e., 40 East 80 failed to maintain the building and apartment "in good repair." Accordingly, the seventh cause of action

is dismissed.

5. *Constructive Eviction*

40 East 80 next asserts that the Bakers' constructive eviction claim should be dismissed, because it is improperly brought as an affirmative cause of action, and is redundant of the Bakers' breach of warranty of habitability claim. In opposition, the Bakers argue that a constructive eviction may be brought as an affirmative claim, and that their constructive eviction claim is not duplicative of their breach of contract claim.

To establish a constructive eviction, the tenant must prove wrongful acts by the landlord which "substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises" (*Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 83 [1970]). The tenant must abandon possession in order to claim a constructive eviction (*id.*). "Pursuant to Real Property Law § 235-b, every residential lease contains an implied warranty of habitability which is limited by its terms to three covenants: (1) that the premises are for 'fit for human habitation', (2) that the premises are fit for 'the uses reasonably intended by the parties', and (3) that the occupants will not be subjected to conditions that are 'dangerous, hazardous or detrimental to their life, health or safety'" (*Solow v Wellner*, 86 NY2d 582, 587-588 [1995], quoting Real Property Law § 235-b). The First Department has held that a constructive eviction claim is duplicative of a claim for breach of the warranty of habitability (*see Elkman v Southgate Owners Corp.*, 233 AD2d 104, 105 [1st Dept 1996]; *see also Phoenix Garden Rest. v Chu*, 245 AD2d 164, 166 [1st Dept 1997]). Based upon this authority, the Court dismisses the ninth cause of action.

6. *Injunctive Relief*

40 East 80 contends that the cause of action for injunctive relief repeats the allegations of the breach of contract claim, thus demonstrating that the Bakers have an adequate remedy at law. 40 East 80 also submits a transcript of a Housing Court proceeding, arguing that the

Bakers sought an order directing 40 East 80 to cure similar violations in that proceeding, but chose to discontinue the proceeding and forego the injunctive relief they seek in this action. 40 East 80 also contends that 40 East 80 has already performed the necessary repairs to the apartment and building.

The Bakers argue that they are entitled to a mandatory injunction: (i) restoring the apartment to its original condition, before the water intrusions, including the kitchen as they had it; and (ii) directing 40 East 80 to arrange and pay for the work recommended by Michael Gurevitch, to be started and completed within a reasonable period of time (Plaintiffs' Mem. of Law in Opposition, at 27). The Bakers also point out that the Housing Court proceeding (based on alleged violations of Administrative Code § 27-2070) was withdrawn without prejudice with leave to renew.

Where adequate relief may be obtained by money damages, there is no need for equitable relief, as the money judgment suffices (*see Foreign Venture Ltd. Partnership v Chemical Bank*, 59 AD2d 352, 356 [1st Dept 1977]). In this regard, a remedy at law may be considered inadequate where any damages sustained would be speculative or not capable of measurement, or difficult or complex to determine (*see Board of Higher Educ. of City of N.Y. v Marcus*, 63 Misc 2d 268, 273 [Sup Ct, Kings County 1970]).

40 East 80 has failed to meet its burden on summary judgment to dismiss the Bakers' cause of action for injunction relief. Contrary to 40 East 80's contention, the Bakers do not have an adequate remedy at law. The Bakers are seeking equitable relief against 40 East 80 resulting from the disruption and inconvenience from the persistent water leaks into their apartment. Furthermore, the fact that the Bakers commenced a Housing Court proceeding and subsequently withdrew that proceeding is of no moment. That proceeding was withdrawn "without prejudice with leave to renew at a later date" (Schultz Affirm., exhibit M, at 16). Moreover, the Bakers have disputed 40 East 80's position that all repairs have been made to

the apartment – according to Michael Gurevitch, there were no weep holes at the brick veneer to allow water to exit and drain (Gurevitch Aff., ¶ 4).

7. *Declaratory Relief*

40 East 80 argues, with respect to the Bakers' request for declaratory relief, that they are not entitled to an order directing defendants to undertake the repairs recommended by their experts, and that the Bakers have an adequate remedy of law in the form of money damages.

The Bakers respond that they are entitled to a declaration that 40 East 80 is obligated to undertake the repairs, corrections, and remediation recommended by their experts. Specifically, the Bakers seek a declaration determining that 40 East 80's legal obligations under Local Law 11 include remediating the conditions that its own consultant declared "unsafe and hazardous" in 2000, as well as undertaking "precautionary work" indicated in the Local Law 11 reports.

40 East 80 is not entitled to dismissal of the Bakers' request for declaratory relief. 40 East 80 has failed to show that the Bakers have an adequate remedy at law. Moreover, the court may issue a declaration "as to the rights and other legal relations of the parties of the parties to a justiciable controversy" (CPLR 3001), for the primary purpose of "stabiliz[ing] an uncertain or disputed jural relationship with respect to present or prospective obligations" (*Chanos v MADAC, LLC*, 74 AD3d 1007, 1008 [2d Dept 2010]).

8. *Punitive Damages*

40 East 80 argues that the Bakers' request for punitive damages on the gross negligence, breach of fiduciary duty, breach of the implied covenant of good faith and fair dealing, and constructive eviction causes of action must be dismissed as those causes of action are duplicative of the breach of contract and breach of warranty of habitability claims. In addition, 40 East 80 contends that the Bakers are not entitled to punitive damages on the breach of warranty of habitability claim because there is no public policy in this landlord-tenant

dispute. The Bakers maintain that there are issues of fact as to whether they are entitled to punitive damages on their gross negligence claim.

The Bakers seek punitive damages on their causes of action for gross negligence, breach of fiduciary duty, breach of the implied covenant of good faith and fair dealing, breach of the warranty of habitability, and constructive eviction. "[A] demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action" (*Entler v Koch*, 85 AD3d 1098, 1102 [2d Dept 2011], *lv dismissed* 17 NY3d 898 [2011], *lv denied* 18 NY3d 869 [2012] [internal quotation marks and citation omitted]). As indicated above, the Court has dismissed the gross negligence, breach of fiduciary duty, breach of the implied covenant of good faith and fair dealing, and constructive eviction claims. "[P]unitive damages may be awarded in breach of warranty of habitability cases where the landlord's actions or inactions were intentional or malicious" (*Minjak Co. v Randolph*, 140 AD2d 245, 249-250 [1st Dept 1988]). Here, there is no evidence that 40 East 80's actions were intentional or malicious, or rose to the level of high moral culpability or indifference to civil obligations. Accordingly, the Bakers' request for punitive damages is dismissed.

**CONCLUSION**

Accordingly, it is

ORDERED that the motion (sequence number 021) of defendant/third-party plaintiff Penmark Realty Corporation for partial summary judgment is granted, and the second, fifth, and tenth causes of action, and plaintiffs' request for punitive damages are dismissed; and it is further,

ORDERED that the motion (sequence number 022) of defendant 40 East 80 Apartment Corporation for summary judgment is granted to the extent of dismissing the fifth, sixth, seventh, and ninth causes of action, and plaintiffs' request for punitive damages, but is otherwise denied; and it is further,

ORDERED that the parties are directed to appear for a pre-trial conference in Part 7, 60 Centre Street, Room 341 on Friday November 30, 2012 at 11:00 A.M.; and it is further,

ORDERED that the parties are directed to submit all marked pleadings, proposed witness lists, and any motions in limine, if any, to the Court no later than November 23, 2012; and it is further,

ORDERED that counsel for Penmark Realty Corporation is directed to serve a copy of this order with Notice of Entry upon all parties.

This constitutes the Decision and Order of the Court.

Dated: 10/10/12

PAUL WOOTEN *J.S.C.*

**Check one:** ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

**Check if appropriate:** ☐ **DO NOT POST** ☐ **REFERENCE**