FILED: NEW YORK COUNTY CLERK 06/03/2014 INDEX NO. 652427/2013
NYSCEF DOC. NO. 65 RECEIVED NYSCEF: 06/03/2014

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

PRESENT: HON. PAUL WOOTEN **PART** 7
Justice

CITIZENS DEFENDING LIBRARIES, EDMUND MORRIS ANNALYN SWAN, STANLEY N. KATZ, THOMAS BENDER, DAVID NASAW, JOAN W. SCOTT, CYNTHIA M. PYLE, CHRISTABEL GOUGH, and BLANCHE WEISEN COOK,

Plaintiffs,

- against -

DR. ANTHONY W. MARX, NEIL L. RUDENSTINE, BOARD OF TRUSTEES OF THE NEW YORK PUBLIC LIBRARY, NEW YORK PUBLIC LIBRARY, ASTOR, LENOX, AND TILDEN FOUNDATIONS, MICHAEL R. BLOOMBERG, VERONICA WHITE, NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, CITY OF NEW YORK, ROBERT SILMAN ASSOCIATES, P.C., and JOSEPH TORTORELLA,

Defendants.

- and -

STATE OF NEW YORK, NEW YORK STATE OFFICE OF PARKS, RECREATION & HISTORIC PRESERVATION (NEW YORK STATE HISTORIC PRESERVATION OFFICE),

Nominal Defendants.

INDEX NO. 652427/13

MOTION SEQ. NO. 001

The following papers were read on this motion by plaintiffs for, *inter alia*, a preliminary injunction.

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

Cross-Motion: ☐ Yes ☒ No

Through this action, plaintiffs seek to prevent the demolition of what they characterize as an irreplaceable portion of the main branch of the New York Public Library (NYPL), located in Manhattan between 40th and 42nd Streets along Fifth Avenue (Central Library). Specifically, plaintiffs are challenging the "Central Library Plan" (CLP), which entails the proposed "destruction" of the steel book stacks (Stacks) at the Central Library, as well as the displacement of millions of books to remote storage facilities.

Plaintiffs include Citizens Defending Libraries, an unincorporated association of individuals and groups, dedicated to preserving public libraries; Edmund Morris, an author and scholar; Annalyn Swan, a biographer, critic and editor; Stanley N. Katz, President Emeritus of the American Council of Learned Societies; Thomas Bender, a humanities professor at New York University; David Nasaw, an author, biographer, and historian on the faculty of the Graduate Center of the City University of New York (CUNY); Joan W. Scott, a professor in the School of Social Science at the Institute for Advanced Study; Cynthia M. Pyle, Ph.D., an intellectual and cultural historian; Christabel Gough, secretary of the Society for Architecture of the City; and Dr. Blanche Weisen Cook, a professor at John Jay College of Criminal Justice and the Graduate Center of CUNY (complaint, ¶¶ 8-17).

Defendants include: (1) New York Public Library, Astor, Lenox and Tilden Foundations (NYPL); NYPL's Board of Trustees; Dr. Anthony W. Marx (Marx), president and chief executive officer of NYPL; Neil L. Rudenstine (Rudenstine), chairman of the Board of Trustees (collectively, Library Defendants); (2) New York City Department of Parks and Recreation (NYC DOP); Veronica White, NYC DOP's Commissioner; Michael R. Bloomberg, formerly Mayor of the City of New York; the City of New York (City), the owner of the Central Library building, subject to a lease with NYPL; (3) Robert Silman Associates, P.C., (Silman PC), a structural engineering corporation engaged by NYPL, and Joseph Tortorella, Silman PC's president; and (4) nominal defendants New York State Office of Parks, Recreation & Historic Preservation (State Parks), responsible for approving construction projects affecting landmarked properties such as the Central Library; and New York State Historic Preservation Office (SHPO), the bureau of State Parks directly responsible for the evaluation of construction projects affecting landmarked properties such as the Central Library (State Parks and SHPO together, State Defendants) (*id.*, ¶¶ 18-40).

Plaintiffs move for an order: (1) preliminarily enjoining defendants from removing any additional books and research materials from the Stacks; (2) preliminarily enjoining defendants

from applying for additional building permits, and from undertaking any construction work relating to the demolition and removal of the Stacks; (3) directing defendants to return to the Central Library all books previously shelved in the Stacks; and (4) directing defendants, within 10 days, to make the Stacks available to plaintiffs, through counsel, for inspection.

In connection with this application, this Court found that a temporary restraining order was not required, because defendants have represented that no demolition, construction, renovation or expansion work directly affecting any of the Stacks will be performed pending the hearing on the order to show cause for a preliminary injunction.

The Library Defendants cross-move, pursuant to CPLR 3211(a)(1) and (a)(7), for dismissal of the complaint on the grounds of a defense founded upon documentary evidence and failure to state a cause of action. The City Defendants cross-move for dismissal of the complaint, pursuant to CPLR 3211(a)(1), (2), (5), and (7), on the grounds of a defense founded upon on documentary evidence, the first cause of action is not ripe for judicial review, the second cause of action is barred by the statute of limitations, and the first and second causes of action fail to state a cause of action. Also before the Court is a cross-motion by the State Defendants, pursuant to CPLR 3211(a)(1), (2) & (7), for dismissal of the complaint, on the grounds that any putative claim against them is not ripe, and, therefore, the court lacks subject matter jurisdiction, plaintiffs lack standing because they are not intended third-party beneficiaries of the agreement referenced in the complaint, and the complaint fails to state a cause of action against the State Defendants as either actual or nominal defendants.

BACKGROUND

I. Complaint

NYPL, formally known as the "New York Public Library, Astor, Lenox and Tilden Foundations," resulted from the consolidation of three libraries - the Astor Library, the Lenox Library, and the Tilden Trust - into a single corporation, pursuant to an "Agreement of Consolidation," dated May 23, 1895 (Agreement of Consolidation). Pursuant to a "Lease and

Agreement," dated December 8, 1897 (Lease), NYPL occupies the Central Library, where the collections of the three consolidated libraries are maintained (*id.*, ¶¶ 18-40).

State Parks is party to a contract, dated June 2, 1978, with NYPL and the City (1978 Agreement), pursuant to which NYPL and the City agreed: (1) "to make no changes in the structure or improvements of said premises or additions thereto without the prior approval of [State Parks]"; and (2) "to protect and preserve the historical integrity of features, materials, appearance, workmanship and environment" of the Central Library. The Stacks are a component of the Central Library's internal structure. State Parks has not approved any changes in the structure or any construction related to removal of the Stacks. In addition, SHPO has not completed an evaluation of any changes in the structure or any construction related to removal of the Stacks as contemplated by the CLP (*id.*, ¶¶ 41- 44).

Nevertheless, under the CLP, NYPL intends to: (1) gut the Central Library of the seven stories of iron and structural steel Stacks; (2) displace the millions of books and other resource materials shelved in the Stacks to offsite storage facilities, in violation of NYPL's Charter and the purposes of NYPL; (3) sell off for private real estate development two branches of the NYPL - the Mid-Manhattan Library and the Science, Business and Industry Library; (4) shoe-horn the collections of these branches, or a significantly reduced version of those collections, into the area of the Central Library formerly occupied by the Stacks; and (5) convert the Central Library from one of the world's foremost research institutions, featuring on-site books, manuscripts and other original resource materials, into an oversized circulating library (*id.*, ¶ 85).

Plaintiffs claim that the demolition phase of the CLP is imminent, to be implemented surreptitiously by NYPL. Allegedly, this would be a breach of contract, contravene the trusts and indentures upon which NYPL was founded (Trusts) as well as New York law, and violate plaintiffs' rights and those of the general public, for whose benefit NYPL was established. Although NYPL continually characterizes its plans as preliminary, the Board of Trustees have been pressing to start demolition. NYPL has applied for, and received from the New York City

Department of Buildings (DOB), at least seven building permits since June 2013 (*id.*, ¶¶ 2, 4-5).

Plaintiffs allege that "[i]f the Stacks were to be removed and the books permanently displaced from the Central Library, the members of the public, including researchers, scholars, authors, students and others for whose benefit the NYPL was created, would be irreparably harmed," and, therefore, the Coalition had to commence this action, seeking injunctive relief (*id.*, ¶ 6).

The complaint contains four causes of action. The first cause of action alleges that, under the 1978 Agreement, NYPL and the City promised "to protect and preserve the historical integrity of features, materials, appearance, workmanship and environment" of the Central Library, and make no changes in the structure or improvements of the Central Library without the prior approval of [State Parks]. Defendants have breached the 1978 Agreement by planning to take action that threatens the imminent removal of the Stacks. Such action would constitute a structural alteration of the Central Library in violation of paragraphs 4 and 7 of the 1978 Agreement (*id.*, ¶¶ 90-105).

The second cause of action alleges that the removal and displacement of the books to off-site facilities violates the mandate of the Trusts that the Central Library's books "shall always remain in the library for use by readers there," as carried forward and incorporated by reference into the Agreement of Consolidation, the NYPL's Charter, the Lease with the City, and the 1978 Agreement. It would also contravene an address that the then Board of Trustees delivered on March 25, 1896, to the then Mayor of the City (Address), whereby NYPL applied to the City for a grant of land and building capital. In the Address, the Board of Trustees represented that the "charters of the individual corporations and the trusts assumed towards the founders of the libraries and other benefactors, render it necessary in any event that the Astor and Lenox collections shall always remain in the library for use by readers there" (*id.* ¶ 64). Displacement of the materials would constitute a breach of trust, causing plaintiffs and the public-at-large severe and irreparable injury (*id.*, ¶¶ 106-112).

The third cause of action alleges that Marx, Rudenstine, and the Board of Trustees breached their fiduciary duties by: (1) authorizing the removal of the Central Library's books; (2) engaging Silman PC regarding the demolition of the Stacks and removal of books; (3) implementing the displacement of books; (4) transforming the Central Library from a preeminent research institution into an oversized circulation branch; (5) destroying the principles and objectives upon which NYPL was established; and (6) violating the purposes of the Trusts (*id.*, ¶¶ 113-120).

The fourth cause of action alleges that the actions of Silman PC and Tortorella threaten to undermine the structural integrity of the Central Library, creating an imminent danger of serious injury to persons and property, and removal of the Stacks would constitute gross negligence. The action has been discontinued as against these defendants pursuant to a notice of discontinuance, dated August 13, 2013 (*id.*, ¶¶ 121-128).

Plaintiffs seek, as to the first three causes of action, an order: (1) permanently restraining all further demolition and construction work regarding the Stacks and other components of the CLP; (2) mandating that defendants return all books and other materials previously housed in the Stacks to the Central Library; (3) declaring that the Central Library not undergo any demolition, construction, and other work that may affect the structure of the building without consent of State Parks; and (4) voiding all unconsummated transactions pertaining to the CLP in which interested Trustees participated. As to the fourth cause of action, plaintiffs sought an order permanently restraining defendants Silman PC and Tortorella from taking any further action to demolish or otherwise perform work with respect to the Stacks and other components of the CLP. That request for relief is now moot (*id.*, ¶¶ 129).

II. Arguments

A. *Plaintiffs*

Plaintiffs argue that they have demonstrated irreparable harm in that the Stacks are irreplaceable. The seven stories of iron and structural steel Stacks are among the most

important early examples of a highly innovative book storage system, and have served as part of the structural skeleton of the Central Library since 1911. They structurally support floor 2 of the historic "Rose Reading Room," situated directly above them. Removal of the Stacks, and the offsite displacement of the materials they hold, endangers the Central Library's status as one of the world's leading research facilities, and would irrevocably alter the architectural integrity of the Central Library building. Moreover, removal of the Stacks while the Central Library, including the Rose Reading Room, remains open, imperils the public.

Plaintiffs also argue likelihood of success on the merits, because NYPL and the City have breached, and are threatening to continue to breach the 1978 agreement with State Parks to the detriment of plaintiffs and the public-at-large by planning for, and taking action that directly threatens, the imminent removal of the Stacks, which action would constitute: (1) a structural alteration of the Central Library without permission from State Parks, in violation of paragraph 17 of the 1978 Agreement; and (2) a breach of defendants' obligation under paragraph 4 of the 1978 Agreement, by which defendants are obligated "to protect and preserve the historical integrity of features, materials, appearance, workmanship and environment" of the Central Library.

B. *Library Defendants*

The Library Defendants argue that plaintiffs do not have standing to bring a claim under the 1978 Agreement, because they are not parties to, or third-party beneficiaries of, that agreement. Plaintiffs have not alleged any actual breach of the 1978 Agreement, because plaintiffs allege only that NYPL "threatens" to breach the agreement by "planning for, and taking action that directly threatens the imminent removal of the Stacks," without first obtaining the approval of State Parks for the removal of the Stacks. Yet, the Library Defendants are consulting with State Parks on plans for the Central Library under the CLP.

The second and third causes of action, for breach of trust and breach of fiduciary duties, respectively, should be dismissed because plaintiffs lack standing to bring those claims, and the

trustees' decisions are protected by the business judgment rule. Moreover, NYPL's governing charter grants the trustees wide discretion in the operation of NYPL's libraries and reading rooms.

The fourth cause of action for negligence should be dismissed because plaintiffs have not alleged any actual injury; they merely speculate that defendants may negligently renovate the Stacks if the CLP is implemented, thereby risking harm to members of the public.

C. *City Defendants*

The City Defendants argue that plaintiffs do not have standing, and that the first cause of action is not ripe for adjudication. The 1978 Agreement only restricts physical alterations to the Central Library, which have not yet occurred. NYPL is in the process of consulting with State Parks regarding the proposed CLP. Because State Parks is actively conducting its review of these proposed changes and, following this ongoing review, may ultimately approve or disapprove them, there is no basis to litigate the merits of this claim at this time.

Moreover, the public benefit guidelines incorporated by reference in paragraph 8 of the 1978 Agreement (and attached to the agreement as Appendix I) consist of a schedule outlining the level of public access required based on the type of property that is being funded, and purpose of the funding. The public benefit guidelines, at most, only require that NYPL and the City "insure that property will be open to public for interior visitation no less than 12 days a year on an equitably spaced basis and other times by appointment." Plaintiffs do not allege that the Central Library has not fulfilled this obligation.

The second cause of action fails to state a cause of action, as plaintiffs have not alleged an actual breach of the Lease, and the alleged requirement in the trust resolutions that the books remain in the Central Library is not incorporated into the lease. The Lease itself required the establishment of a circulation library within the Central Library, and NYPL affirms it has stored research materials at off-site locations for approximately 50 years. Thus, the claim is time-barred, because the alleged breach of contract took place, either in 1897 when the Lease

first required removal of books from the Central Library, or approximately 50 years ago when research materials were first stored off site.

As for the request for a preliminary injunction, having to wait, at most, a few days for some materials does not constitute irreparable harm. This inconvenience is greatly outweighed by the severe burden that would be imposed by NYPL if it were required to move millions of books back to shelves that, in their view, are outdated and deficient.

D. *State Defendants*

The State Defendants argue that the ripeness doctrine precludes any claim against State Parks, in that the complaint does not challenge final agency action, and State Parks is not a proper nominal defendant.

DISCUSSION

For the reasons discussed below, plaintiffs' motion for a preliminary junction is denied, and the three cross-motions for dismissal of the complaint is granted.

I. Standing

Standing is a "threshold determination that allows a litigant access to the courts to adjudicate the merits of a particular dispute that otherwise satisfies the other justiciability criteria" (*Roberts v Health & Hosps. Corp.*, 87 AD3d 311, 318 [1st Dept 2011], *lv denied* 17 NY3d 717 [2011]). "The general requirements for establishing standing are that the party must show injury in fact, that is, an actual stake in the matter to be adjudicated, so as to ensure that the party has some concrete interest in prosecuting the action, and the court must have before it a justiciable controversy" (*Lucker v Bayside Cemetery*, 114 AD3d 162, 169 [1st Dept 2013], citing *Schlesinger v Reservists Comm. to Stop the War*, 418 US 208, 220-221 [1974]). Plaintiffs have the burden of establishing that they have standing (*see Matter of Save the Pine Bush, Inc. v Common Council of City of Albany*, 13 NY3d 297, 306 [2009] ["standing requirements are not mere pleading requirements but rather an indispensable part of the plaintiff's case and therefore each element must be supported in the same way as any other

matter on which the plaintiff bears the burden of proof"] [internal quotation marks and citation omitted]; *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769 [1991] [In contrast to public hearings and publicly elected legislatures, "a litigant must establish its standing in order to seek judicial review"]).

"In an ordinary contract law context, a party who entered into an agreement would unquestionably have the legal authority to bring a legal action for its enforcement" (*Lucker v Bayside Cemetery*, 114 AD3d at 167). It is undisputed that plaintiffs are not parties to any of the operative agreements, trusts, or indentures governing the rights and obligations of NYPL. Plaintiffs recognize that to maintain this action they must show that they are intended third-party beneficiaries of these instruments upon which the complaint is based.

"A party asserting rights as a third-party beneficiary must establish '(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost'" (*State of Cal. Pub. Employees' Retirement Sys. v Shearman & Sterling*, 95 NY2d 427, 434-435 [2000], quoting *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 336 [1983]; *see also Alicea v City of New York,* 145 AD2d 315 [1st Dept 1988]). Courts generally rely on guidance from the Restatement (Second) of Contracts which "requires a clear intention to confer the benefit of the promised performance" (*PT. Bank Mizuho Indonesia v PT. Indah Kiat Pulp & Paper Corp.,* 25 AD3d 470, 471 [1st Dept 2006]). Section 302 of the Restatement (Second) of Contracts provides:

> "Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance."

The "newer standard articulated by the Court of Appeals in *State of Cal. Pub. Employees' Retirement Sys. v Shearman & Sterling* (95 NY2d 427, 434-435 [2000]) . . .

comports with the Restatement (Second) of Contracts § 302, and requires a clear intention to confer the benefit of the promised performance" (*PT. Bank Mizuho Indonesia v PT. Indah Kiat Pulp & Paper Corp.*, 25 AD3d at 471).

In the first cause of action, plaintiffs contend that they are intended third-party beneficiaries of the 1978 Agreement pursuant to which NYPL and the City explicitly "agree[d] to hold, maintain and administer [the Central Library] for the benefit of the public at large"; thus, they claim, they have legal standing to enforce the 1978 Agreement. The 1978 Agreement provides, in relevant part:

> "The APPLICANTS hereby agree to hold, maintain and administer such property *for the benefit of the public at large* according to the public benefit guidelines that shall be promulgated by the National Park Service pursuant to powers granted it by the National Historic Preservation Act of 1966 and shall be published from time to time in Historic Preservation Grants-in-Aid Policies and Procedures" (*id.* at ¶ 8) (emphasis added).

Plaintiffs argue that an intent to benefit the public, as a third party, is clear from the face of 1978 Agreement, which explicitly requires NYPL and the City "to hold, maintain and administer [the Central Library] for the benefit of the public at large," and in accordance with certain "public benefit guidelines" appended thereto. Plaintiffs also contend that "special interest" factors warrant a relaxation of the usual rules of standing in certain cases (plaintiffs' memorandum in reply at 34), citing *Alco Gravure, Inc. v Knapp Found.* (64 NY2d 458, 465 [1985], *amend denied* 67 NY2d 717 [1986]) for that proposition. According to plaintiffs, that their "special interest" is access to books and research material, whereas in *Alco Gravure, Inc.* it was money, is immaterial; the rationale is the same. But applying the rationale in *Alco Gravure, Inc.* demonstrates why plaintiffs do not have standing in this matter. Plaintiffs are, at best, incidental beneficiaries of the agreement with no right to enforce the particular contract (*Port Chester Elec. Constr. Corp. v Atlas*, 40 NY2d 652, 655 [1976]).

Alco Gravure, Inc. concerned the Knapp Foundation of New York, which was a nonprofit corporation established in 1923 by act of the Legislature, whose primary purpose was to assist employees of the founder's corporations and their families. When the number of applications by

such eligible persons declined, the New York Foundation used some of its income to benefit a broader class of charitable purposes, making contributions to numerous charities and nonprofit organizations. The New York Foundation's trustees also resolved that the original intent of the founder would best be served by the dissolution of the New York Foundation and the transfer of its assets to another Knapp Foundation (Knapp Foundation - North Carolina). The North Carolina Foundation made contributions to qualified tax-exempt organizations, but did not provide assistance to individuals. In 1983, the New York Foundation amended its certificate of incorporation to provide the trustees with discretion to apply principal and income of the New York Foundation to any other charitable organization founded by Joseph P. Knapp, including the North Carolina Foundation. The Attorney-General noted no objection to the amendment, and it was approved by a New York Supreme Court Justice (64 NY2d at 462-464).

The plaintiffs were a corporation claiming to be a "successor corporation," within the meaning of the 1923 act, whose employees were intended beneficiaries of the New York Foundation, as well as two individual employees of the corporate plaintiff. They sought a declaration that employees of the corporate plaintiff were beneficiaries of the New York Foundation, an accounting by the trustees, and a declaration invalidating the 1983 certificate of amendment, enjoining the New York Foundation from transferring its assets and from dissolving its corporate existence (*id.* at 464).

The Court of Appeals held that both the corporate and the individual plaintiffs had standing to maintain the action. As to the individual plaintiffs, the Court analogized the case to trust law. The Court stated that an exception exists to the general rule that one who is merely a possible beneficiary of a charitable trust, or a member of a class of possible beneficiaries, is not entitled to sue for enforcement of the trust. Instead, the Attorney-General has the statutory power and duty to represent the beneficiaries of any disposition for charitable purposes. The exception exists when a particular group of people has a special interest in funds held for a charitable purpose, as when they are entitled to a preference in the distribution of such funds

and the class of potential beneficiaries is sharply defined and limited in number. The Court found the presence of a class of beneficiaries, which is both well defined and entitled to a preference in the distribution of defendant's funds prior to the disputed amendment, namely, the employees of corporations in which Joseph P. Knapp was involved and the employees of successors to such corporations (*id.* at 465-466).

The Court also found that the policy reasons for limiting standing in the area of trusts were not applicable. Normally, standing to challenge actions by the trustees of a charitable trust or corporation is limited to the Attorney-General to prevent vexatious litigation and suits by irresponsible parties who do not have a tangible stake in the matter and have not conducted appropriate investigations. However, the action did not concern the ongoing administration of a charitable corporation, but the dissolution of that corporation and the complete elimination of the individual plaintiffs' status as preferred beneficiaries of the funds originally donated by Joseph Knapp (*id.* at 466).

Here, in contrast, the class is not well-defined; it consists of the amorphous "public at large" designation, and thus differs significantly from the "sharply defined" and "limited in number" class of "potential beneficiaries" that caused the Court of Appeals to find standing in *Alco Gravure, Inc.* To be sure, plaintiffs state that the "Complaint is not brought by generic members of the general public, by visitors from a foreign land or just any person off the city's streets" (reply memorandum at 5). Instead, it is brought by Pulitzer Prize-winners, professors, writers, and scholars who "have made regular use of the research materials previously housed in the Stacks, and who, by reason of NYPL's secretive removal to an off-site relocation of those materials, have attested that they no longer effectively can use the Central Library (*id.*, citing complaint, ¶¶ 9-17).

But to argue that the class of third-party beneficiaries (plaintiffs herein) is narrow, and that it consists of researchers and scholars who use the Central Library is to abandon reliance

upon the 1978 Agreement, because that is not the language used there. Because plaintiffs claim that the 1978 Agreement confers third-party beneficiary status upon them, then it is the "public at large" designation upon which they are defined. Hence, plaintiffs impliedly acknowledge that the "public at large" designation does not constitute a valid third-party beneficiary designation, because they have altered, substantially, the characterization of the class. Thus, it does not contain a "clear intention to confer the benefit of the promised performance" (*PT. Bank Mizuho Indonesia v PT. Indah Kiat Pulp & Paper Corp.,* 25 AD3d at 471).

Furthermore, plaintiffs' own reasoning could lead to an expansion of the class of third-party beneficiaries. For example, the first cause of action alleges that NYPL and the City promised "to protect and preserve the historical integrity of features, materials, appearance, workmanship and environment" and that they were to make no changes in the structure or improvements of the Central Library without the prior approval of State Parks, the breach of which would constitute a structural alteration of the Central Library in violation of paragraphs 4 and 7 of the 1978 Agreement. Thus, based on plaintiffs' own allegations, another group of potential plaintiffs could be persons who have no interest in conducting research, unlike the coalition of plaintiffs here. Rather, they could comprise persons who are solely interested in preserving the building's architecture from a historical perspective. Accordingly, plaintiffs' attempt to minimize the size and character of third-party beneficiaries of the 1978 Agreement to researchers and scholars who use the Central Library is unpersuasive.

Plaintiffs also cite *Fourth Ocean Putnam Corp. v Interstate Wrecking Co.* (66 NY2d 38 [1985]), quoting the Court of Appeals' statement:

> "we have emphasized when upholding the third party's right to enforce the contract that no one other than the third party can recover if the promisor breaches the contract (internal citations omitted), or that the language of the contract otherwise clearly evidences an intent to permit enforcement by the third party (internal citations omitted)" (*id.* at 45).

Plaintiffs rely on this language to assert that "the 1978 Agreement contains clear and unambiguous language identifying the public-at-large as an intended third-party beneficiary of the contract" (memorandum in support at 21 n 6). The facts and holding in *Fourth Ocean Putnam Corp.* do not further plaintiffs' position.

In *Fourth Ocean Putnam Corp.*, a property owner claimed to be the third-party beneficiary of a contract between a wrecking company, as promisor, and a municipality, as promisee. Plaintiff, Fourth Ocean Putnam Corp., owned a hotel that was so severely damaged by fire that the village where the hotel was located obtained a court order compelling Fourth Ocean to remove the structure as a public nuisance and unsafe fire hazard. Fourth Ocean failed to do so, and the village entered into a demolition contract with the defendant. When Fourth Ocean began construction of new buildings on the site, it discovered that the defendant had not demolished the hotel in conformity with its contract with the village. Fourth Ocean alleged that it was a third-party beneficiary of the demolition contract (*id.* at 39-40).

The Court stated that, when upholding a third party's right to enforce a contract, no one other than the third party can recover if the promisor breaches the contract or that the language of the contract otherwise clearly evidences an intent to permit enforcement by the third party, as by fixing the rate or price at which the third party can obtain services or goods, even though there was no duty of the promisee to the third party (*id.* at 45).

Fourth Ocean argued that because the demolition work was performed to satisfy its obligation, the contracting parties must have intended to benefit it. However, the work was not undertaken to benefit Fourth Ocean, but, rather, to remedy Fourth Ocean's default to protect the public against a public nuisance. The village had a contingent interest in its performance because if Fourth Ocean failed to reimburse it for its contract expenditures it would become owner of the property through forfeiture (*id.*).

As discussed above, plaintiffs have not met their burden of demonstrating that the

language of the 1978 Agreement "otherwise clearly evidences an intent to permit enforcement by the third party," as required by the Court of Appeals in *Fourth Ocean Putnam Corp.* They have also not met their burden of demonstrating the existence of the alternate basis for obtaining standing, as stated by the Court in *Fourth Ocean Putnam Corp.*, namely that no one other than the third party can recover if the promisor breaches the contract.[1]

Hoy v Incorporated Village of Bayville (765 F Supp 2d 158 [EDNY 2011]) also militates against a finding of standing here. In *Hoy*, defendants sought dismissal of the complaint regarding a covenant that prohibited conveyed property in the defendant village from being used for "public amusements, concessions, vending, restaurants or other commercial enterprises" (CE Covenant). They argued that plaintiffs lacked standing to enforce, and the alleged conduct did not violate, the CE Covenant. The Court agreed. The relevant portion of the restrictive covenant provided:

> "[The Property] shall be used for municipal uses and purposes and for recreational facilities for use by the People of Bayville, but no public amusements, concessions, vending, restaurants or other commercial enterprises shall be permitted thereon, and, in addition, no use of the premises shall be made or permitted which would be offensive, dangerous or obnoxious to the owners or any owner (now or hereafter) of land within a radius of one mile of the premises whether by reason of smoke, odor, fumes or any other use whatsoever offensive to such owners or owner of land" (*id.* at 162).

The Court determined that "[a]lthough the CE Covenant dedicates the Property for use by the public, it does not suggest that the Grantor had an intent to permit enforcement by each and every member of the public. Thus, plaintiffs, as members of the public, are at most, incidental beneficiaries of the CE Covenant and lack standing to enforce it" (*id.* at 173). Significantly, the Court stated that the "CE Covenant names no specific group of intended beneficiaries" and that "by its plain language the CE Covenant is not intended to benefit a

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[1] It should be noted that an "outdated, more narrow standard" in determining that a plaintiff could not show third-party beneficiary status involves an inability to show that only it could recover for the promisor's breach of contract or that the contract explicitly permitted the third party to enforce it (*PT. Bank Mizuho Indonesia v PT. Indah Kiat Pulp & Paper Corp.*, 25 AD3d at 471).

specific group of neighbors nor is it intended to permit enforcement of the CE Covenant by every resident of Bayville" (*id.*).

In the second cause of action, plaintiffs contend that "[m]embers of the Coalition, as well as the public-at-large, are intended third-party beneficiaries of the trust resolution requiring, *inter alia,* that 'the Astor and Lenox collections shall always remain in the library for use by readers there' . . . as carried forward and incorporated by reference into the Agreement of Consolidation, NYPL's Charter, the Address, the Lease with the City, and the 1978 Agreement" (complaint, ¶ 109).

Standing under the 1978 Agreement has been discussed. As for the Agreement of Consolidation, the complaint states that it:

> "was to establish and maintain a free public library and reading room in the City of New York, with such branches as might be deemed advisable, and was to 'continue and promote the several objects and purposes set forth in the several acts of incorporation of The Trustees of the Astor Library, The Trustees of the Lenox Library and The Tilden Trust.' It was distinctly provided that the new corporation [i.e., NYPL] should make appropriate provision for faithfully keeping and observing all the limitations, conditions or restrictions under which any of the funds or property of the several constituent corporations were to be used or enjoyed (NYPL Bulletin, I.1, 11)" (complaint at ¶ 61).

Notwithstanding the language about the purpose of the consolidation, it cannot be said that the above-quoted language "evidences an intent to permit enforcement by the third party" (*Fourth Ocean Putnam Corp. v Interstate Wrecking Co., Inc.,* 66 NY2d at 45).

The same is true for the Lease, entered into on December 8, 1897, between NYPL and the City for the Central Library. The Lease provides:

> "so long as [NYPL] shall use and occupy such building for the purpose of maintaining therein a public library and reading room and carrying on the objects and purposes of the said corporation, as provided by its said agreement of consolidation and the several acts incorporating the Trustees of the Astor Library, the Trustees of the Lenox Library, and The Tilden Trust, respectively" (complaint at ¶ 70).

Plaintiffs also refer to the NYPL Charter to establish standing for the second cause of action. NYPL's Charter was amended in 1975, however, to provide, among other things, that the "aforementioned special acts of the New York State Legislature and Agreement of Consolidation are being amended in their entirety in this restated charter." As part of the restatement, it provides:

> "The purposes for which the corporation is formed are to establish, operate and maintain a free public library and reading room in the city of New York, and such other libraries and reading rooms in such form or forms as the corporation's board of trustees shall from time to time determine in its discretion, and to undertake such other and further functions and activities as are consistent with the foregoing. Such libraries and reading rooms shall be at such locations, and accessible to the public at such times and under such conditions, as the corporation's board of trustees shall from time to time determine in its discretion."

This does not evidence an intent to confer third-party beneficiary status on plaintiffs.

Lastly, plaintiffs refer to the Address that the then Board of Trustees delivered on March 25, 1896, to the then Mayor of the City, whereby the Board of Trustees represented that the "charters of the individual corporations and the trusts assumed towards the founders of the libraries and other benefactors, render it necessary in any event that the Astor and Lenox collections shall always remain in the library for use by readers there" (*id.* ¶ 64). A speech given in 1895 does not prevail over the plethora of precedent developed since then pertaining to policy reasons for limiting the scope of third-party beneficiaries in a situation such as at issue here, including the rationale given by Justice Cardozo in the seminal case of *Moch Co. v Rensselaer Water Co.* (247 NY 160, 165 [1928] ["An intention to assume an obligation of indefinite extension to every member of the public is seen to be the more improbable when we recall the crushing burden that the obligation would impose"]).

Finally, plaintiffs' argument that they have standing to bring a claim for public nuisance is without merit. The complaint does not contain a cause of action for nuisance. The purported claim for nuisance is raised for the first time in plaintiffs' reply memorandum of law.

II. Validity of the Claims

Assuming arguendo that plaintiffs had standing, the Court finds that the motion to dismiss the complaint would still be granted, except as to the second cause of action which has merit, at least to withstand a pre-answer motion to dismiss.

The first cause of action is not validly stated. It alleges that, under the 1978 Agreement, NYPL and the City promised "to protect and preserve the historical integrity of features, materials, appearance, workmanship and environment" of the Central Library, and make no changes in the structure or improvements of the Central Library without the prior approval of State Parks, and that the intended action would constitute a structural alteration of the Central Library in violation of paragraphs 4 and 7 of the 1978 Agreement.

Alterations have not commenced. Plaintiffs' argument as to an anticipatory breach is unavailing. Anticipatory breach involves a "definite and final communication of the intention to forego performance" (*Rachmani Corp. v 9 E. 96th St. Apt. Corp.*, 211 AD2d 262, 267 [1995]). The announcement of an intention not to perform must be "positive and unequivocal" (*Tenavision, Inc. v Neuman,* 45 NY2d 145, 150 [1978]).

Contrary to plaintiffs' assertion in its memoranda of law, the complaint does not allege that defendants have declared that they intend to proceed with or without approval by State Parks. That defendants may have taken substantial steps in furtherance of the CLP, including obtaining at least seven building permits from DOB, that, by itself, does not constitute a "definite and final communication of the intention" to forego performance" under the 1978 Agreement.

The third cause of action alleges that Marx, Rudenstine, and the Board of Trustees breached their fiduciary duties by: (1) authorizing the removal of the Central Library's books; (2) engaging Silman PC regarding the demolition of the Stacks and removal of books; (3) implementing the displacement of books; (4) transforming the Central Library from a preeminent research institution into an oversized circulation branch; (5) destroying the

principles and objectives upon which NYPL was established; and (6) violating the purposes of the Trusts.

The third cause of action fails, because only the Attorney General has the right to take action against a not-for-profit based upon a claimed violation of its legal obligations (*Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 109 [1st Dept 2009], *lv denied* 15 NY3d 703 [2010]). Even if NYPL were deemed a charitable trust, plaintiffs would still not have standing to assert these claims (*Alco Gravure, Inc. v Knapp Found.*, 64 NY2d at 465; *Matter of Rosenthal*, 99 AD3d 573, 574 [1st Dept 2012]). The fourth cause of action is asserted against Silman PC and Tortorella, but the action has been discontinued as to these defendants.

As for the second cause of action, plaintiffs allege that the removal of the books from the Stacks to off-site facilities violates the mandate of the Astor, Lenox, and Tilden Trusts that the Central Library's books "shall always remain in the library for use by readers there." Plaintiffs allege that the remote displacement of millions of books to offsite storage facilities irreparably harms plaintiffs and the public at large.

Allegedly, plaintiffs rely upon the immediate availability of research materials at the Central Library for their scholarly work. As a result of the relocation of millions of books to remote offsite storage facilities previously contained at the Central Library, plaintiffs and the public at large are caused to wait days (at a minimum) to retrieve research materials that formerly were available to them in minutes. Plaintiffs contend that, as with the planned removal of the Stacks, no amount of money can compensate plaintiffs and the public at large for the impairment of their research. This claim is not without merit. As persuasively described by plaintiffs, the impact upon research could be substantial. The complaint alleges that such action conflicts with NYPL's legal obligations. Based on the foregoing, the request for a preliminary injunction is denied.

CONCLUSION

Accordingly, it is

ORDERED that the motion by plaintiffs for a preliminary injunction is denied; and it is further,

ORDERED that the cross-motions by the NYPL Defendants, the City Defendants, and the State Defendants are granted and the complaint is dismissed with costs and disbursements as taxed by the Clerk; and it is further,

ORDERED that counsel for the NYPL Defendants is directed to serve a copy of this Order with Notice of Entry upon the plaintiffs and the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 5-30-14

PAUL WOOTEN J.S.C.

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

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