Madison 96th Assoc., LLC v 17 E. 96th Owners Corp.
2016 NY Slip Op 30383(U)
March 4, 2016
Supreme Court, New York County
Docket Number: 601386/2003
Judge: Shirley Werner Kornreich
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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MADISON 96th ASSOCIATES, LLC,

Plaintiff,

-against-

17 EAST 96th OWNERS CORP.,

Defendant.

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17 EAST 96th OWNERS CORP.,

Plaintiff,

-against-

MADISON 96th ASSOCIATES, LLC, and 21 EAST 96th STREET CONDOMINIUM,

Defendants.

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AMENDED

DECISION & ORDER

Index No. 601386/2003

Action 1

Index No.: 108695/2004

Action 2

SHIRLEY WERNER KORNREICH, J.:

Motion Sequences 016 and 017 in Action 2 and Motion Sequence 026 in Action 1 are consolidated for disposition.

Before the court are several motions in limine. Madison 96th Associates, LLC (Madison) moves (Motion Sequence 016) in Action 2 to preclude plaintiff, 17 East 96th Owners Corp. (17 East), from offering at trial: 1) evidence of property damage unrelated to underpinning of the foundation walls of 17 East's building (17 Building), other than $13,364.13 that it disclosed before the note of issue was filed; 2) evidence of Madison's alleged failure to comply with the Administrative Code of the City of New York (Building Code), §27-724; 3) evidence of structural damage to the 17 Building; and 4) evidence of the diminution of the value of the 17 Building as a result of the underpinning of its foundation walls. 17 East opposes.

17 East cross-moves to preclude Madison from offering at trial: 1) evidence that 17 East consented to the underpinning of its foundation walls; and 2) evidence that Madison complied with Building Code §27-724 with respect to the underpinning. Madison opposes.

Madison moves (Motion Sequence 017) to preclude 17 East from offering at trial: 1) the expert testimony of Mark Ellis and Ruth Agnese and their reports (respectively, Ellis Report and Agnese Report); and 2) evidence of fees paid by 17 East to engineering and architectural experts that were not disclosed during discovery. 17 East opposes.

17 East moves (Motion Sequence 026) in Action 1 to preclude Madison from introducing the testimony of Michael Vargas and his report, dated October 21, 2011 (Vargas Report) on the issue of Madison's damages. Madison opposes.

I. Background

The facts relating to the above-captioned actions are set forth in this court's decisions and orders, both dated May 23, 2013 and entered on May 29, 2013, (Action 1, Dkt 392 & Action 2, Dkt 70), which decided the parties' post note of issue summary judgment motions, and the Appellate Division's decisions, dated August 14 and October 30, 2014, which decided the appeals therefrom.[1] The facts will be repeated here only as necessary.

17 East is the fee owner of the premises located at 17 East 96th Street (17 Property). Madison owned a building formerly located on the adjacent lot, at 1380 Madison Avenue (Madison Property, with 17 Property, Properties), which it demolished to develop a new building housing a condominium. The Properties share a 100-foot common boundary (Boundary) and the buildings abut each other.

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[1] *Madison 96th St Assoc, LLC v 17 East 96th Owners Corp.*, 120 AD3d 409 (1st Dept 2014) (August 2014 AD Decision) & *Madison 96th St Assoc, LLC v 17 East 96th Owners Corp*, 121 AD3d 605 (1st Dept 2014) (October 2014 AD Decision).

Over the thirteen years of litigation, many rulings have been made in these actions that bear on the issues presented by the instant motions. In Action 1, commenced in 2003, Madison sued 17 East for trespass based on the encroachment of window air conditioners protruding from the 17 Property into the airspace of the Madison Property. Summary judgment on liability was granted to Madison on its trespass claim in 2013 (Action 1, Dkt 392). The Appellate Division affirmed in the August 2014 AD Decision. What remains to be tried is the amount of damages Madison may recover for the trespass.

As noted in the October 2014 AD Decision, in July 2004, the parties entered into a stipulation in Action 1 (July 2004 Stipulation). The Appellate Division described its terms as follows:

> Madison would not excavate further than 10 feet below ground without first retaining a licensed engineer or licensed architect who would not only supervise the work, but also confer with [17 East's] professionals regarding any issues that might arise. The parties stipulated further that [17 East] would be afforded one week's advance notice of any excavation deeper than 10 feet and that excavation would not proceed without Madison's first retaining the aforesaid professional.

Madison 96th 121 AD3d at 606. The First Department noted that Madison began and completed the underpinning of the foundation walls of 17 East in October 2004 and that 17 East's motion to halt the construction was denied. *Id.*

In Action 2, the 2014 AD Decision reinstated the third through fifth causes of action,[2] which had been dismissed on summary judgment, because there were issues of fact as to: 1)

[2] The third cause of action alleged trespass -- that Madison had conducted subsurface excavations beneath 17 East without permission. The fourth cause of action alleged that Madison's trespass was wilfull and entitled 17 East to an injunction. The fifth cause of action alleged that Madison did not obtain a permit or permission to perform the installation of underpinning and subsurface structures beneath 17 East and should be compelled to remove the encroachments or pay damages.

whether 17 East consented to the underpinning of its foundation walls; 2) whether Madison complied with the notice requirements prior to excavation as required by former section 27-195 of the Building Code; 3) whether Madison violated the July 2004 Stipulation; 4) whether 17 East's engineer conceded that underpinning was unavoidable or the only way to shore up and protect the 17 Building; and 5) whether Madison failed to consider non-encroaching alternatives to the underpinning. *Id*, at 607-608. The Appellate Division ruled that 17 East did not ***expressly*** consent to the underpinning and that the underpinning was a permanent encroachment. *Id*, at 608.[3] It declined to instruct this court on the proper measure of damages. *Id*, at 609.

In an October 18, 2007 decision (2007 Decision) in Action 2, Justice Cahn had: 1) denied 17 East leave to amend to assert a trespass claim, against Madison and the Condominium, based upon an encroaching foundation wall, on the ground that the claim was time-barred; and 2) granted partial summary judgment to Madison dismissing claims for structural damage to the 17 Building as a result of construction of the new building. Action 2, Dkt 166. 17 East did not appeal this ruling.[4]

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[3] 17 East states in numerous places that the underpinning is a permanent encroachment. Action 2, Dkt 202; 4/27/15 17 East Memorandum of Law (17 Cross-Motion MOL), pp 2, 3, 16 & 17; Action 2, Dkt 272, 6/1/15 17 East Reply Memorandum of Law (17 Cross-Motion Reply MOL), pp 4, 6, 7, & 9.3.

[4] 17 East erroneously argues that the First Department ruled, in a May 2014 decision determining insurance coverage, that there was damage to the 17 Property. *Madison 96th Associates, LLC v 17 East Owners Corp.*, 117 AD3d 482 (1st Dept 2014) (AD Coverage Decision). The AD Coverage Decision affirmed this court's judgment declaring that QBE was obligated to defend Madison, who was named as an additional insured under the underpinning contractor's policy. The First Department ruled that "Madison's alleged encroachment onto 17 East's property constitutes 'property damage' caused by an 'occurrence' within the meaning of [the insurance] policy." This was not a ruling that the underpinning caused damage to the 17 Property. What was decided was that the allegations of 17 East's pleading fell within the policy's coverage for defense costs.

Thus, 17 East's surviving Action 2 causes of action, numbered here as in the second amended complaint are: 2) trespass caused by construction debris; 3) trespass for Madison's subsurface excavation; 4) an injunction, pursuant to RPAPL §871, requiring Madison to restore the 17 Property to the condition it was in prior to the subsurface excavation; 5) trespass for encroaching underpinning seeking damages and an injunction directing Madison to remove the underpinning; 8) reimbursement of 17 East for the cost of installing an alarm system on a construction sidewalk shed, that Madison's contractor placed on the 17 Property; and 9) an injunction for removal of, or damages for, the underpinning.[5]

On June 8, 2015, this court entered an order (2015 Order) that denied 17 East leave to serve a third amended complaint containing claims for punitive damages and disgorgement of Madison's alleged profits from the underpinning of 17 East's foundation walls. Action 2, Dkt 273. Nevertheless, 17 East argues, again, that it is entitled to introduce expert evidence to support the theory that the measure of damages is the alleged increase in value and profit attributable to the underpinning that Madison made from selling condominiums in the new building.

II. Discussion

A. Action 2 Motions & Cross-Motion

1. Evidence of 17 East's Property Damage

Madison moves to preclude 17 East from presenting evidence of property damage in excess of the amount it disclosed in an itemization of damages that it served in 2006. Madison bases its motion on an order, dated October 30, 2006 (JHO Order), issued by Judicial Hearing

[5] This court makes no ruling on 17 East's entitlement to an injunction removing the underpinning of its foundation walls at this time, as that issue is not raised by the instant motions. The October 2014 AD Decision reinstated the fifth cause of action that sought such an injunction.

Officer Beverly S. Cohen, the JHO appointed by Justice Cahn to oversee discovery. Action 2, Dkt 164. In addition, it points to Justice Cahn's 2007 Decision granting partial summary judgment to Madison on the issue of structural damage to the 17 Property. Finally, Madison contends that expert fees reflected on invoices disclosed by 17 East after the note of issue was filed are not recoverable because they were not incurred in connection with any claimed property damage, and some of them were for litigation costs.

a. Structural Damage to the 17 Building

17 East is precluded from offering evidence of structural damage to the 17 East Building. That issue is foreclosed by the 2007 Decision of Justice Cahn, which was never appealed.

b. Non-Structural Damage Unrelated to Underpinning/Trespass

The JHO Order directed 17 East "to produce an itemization of all damages not resulting from claimed defective underpinning or trespass by 11/13/2006." *Id.* In response, on November 20, 2006, 17 East's present counsel, wrote a letter stating that, pursuant to the JHO Order, he was enclosing "copies of invoices representing out-of-pocket expenses incurred by my client due to the construction of a new building ...." Dkt 165. Five invoices dated in 2005 and 2006 were attached (Damage Invoices). *Id.* They were for window damage, painting, and alarm systems. *Id.* 17 East reserved the right to supplement in the event that additional out-of-pocket expenses were incurred or additional damage due to construction "was identified." *Id.* It is undisputed that 17 East never supplemented its response.

Madison's motion to preclude evidence in excess of the Damage Invoices for damage unrelated to the alleged underpinning or trespass is granted. In 2006, 17 East was required by the JHO Order to itemize damages unrelated to underpinning. As 17 East did not supplement its

response in the following years of discovery, motions, decisions and appeals, it cannot present additional proof of damages unrelated to the underpinning and trespass at this late date.

c. Expert Fees Related to Underpinning

In its exchange of pre-trial exhibits, 17 East included invoices from experts that had not been disclosed during discovery (Action 2, Dkt 209-211, collectively, Expert Invoices). The Expert Invoices are from Raphael Bassan, a consulting engineer; Cornerstone Architects (Cornerstone); and Mueser Rutledge Consulting Engineers (Mueser Rutledge). Madison claims that "only a fraction of the fees" pertain to underpinning. In addition, Madison argues that almost all of the invoices did not concern underpinning or efforts by 17 East to assure itself that the construction would not damage the 17 Building because: 1) the Mueser Rutledge invoices show that it was retained in December 2004, whereas the underpinning was completed on October 26, 2004 (the Underpinning Completion); 2) except for one invoice, Cornerstone's invoices begin in December 2004 and continue through December 2011, again after the underpinning; and 3) some of the Mueser Rutledge and Cornerstone invoices clearly indicate that their fees were incurred for litigation support.

17 East's opposition is that it was forced to hire Mueser Rutledge to determine whether the construction "posed an unreasonable risk of catastrophic building collapse" and its damages concerned Building Code violations committed by Madison. It cites three Supreme cases, all of which allowed damages to be recovered for experts hired to protect property from damage, to monitor work that had the potential to cause property damage, or to suggest methods for

restoring damaged property.[6] Only one of the authorities cited involved an action for trespass. *Id.*

Madison's motion to preclude is granted to the extent that 17 East seeks to introduce evidence of fees for services rendered after the Underpinning Completion, i.e., the fees on all but four of the Expert Invoices (the 4 Invoices). All of the cases cited by 17 East allow recovery of expert fees that were incurred for the protection, monitoring or restoration of property. Fees incurred after the underpinning was over are not recoverable because after the Underpinning Completion there was not need to protect or monitor the 17 Property. In addition, 17 East cannot recover damages for attempting to correct damage because Justice Cahn's unappealed 2007 Decision ruled that there was no structural damage and this court has ruled that 17 East is precluded from offering evidence of damages it did not disclose before the note of issue. Moreover, some of the Expert Invoices clearly reflect litigation support work for Action 2, which does not involve protection, monitoring or repair.

The court reserves decision until the time of trial on expert fees for services rendered before the Underpinning Completion. The 4 Invoices include three from Bassan and one from Cornerstone. Only one from Bassan mentions underpinning. Whether any of the 4 Invoices

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[6] *Matter of North 7-8 Invs. LLC v Newgarden*, 43 Misc3d 623, 630 (Sup Ct NY Co 2014)(in action for RPAPL 881 injunction for license to enter respondent's property, respondent's damages included architect's fees to review and modify plans, and monitor work, to ensure construction on adjoining parcel would not endanger respondent's property); *East 77 Owners Co, L.L.C. v King Sha Group, Inc.*, 40 Misc3d 1205(A), 1205A (Sup Ct NY Co 2013) (in negligence case, damages included fees of architect, engineer and project manager who examined damage to building caused by excavation, proposed safer methods, monitored work, and advised how to restore property); *Brooklyn Trust Co. v New York*, 109 Misc. 593, 597 (Sup Ct Kings Co 1919) (in trespass case, damages included expenses necessarily incurred or to be incurred to protect or restore property).

were for efforts to protect the 17 Property or to monitor the underpinning cannot be determined on this record.[7]

d. Diminution in Value

Madison argues that 17 East should be precluded from offering evidence of the diminution in value of the 17 Building because 17 East did not disclose any documents, deposition testimony or expert reports to prove that the 17 Building's value was diminished as a result of the construction. Madison's Memorandum of Law, Dkt 175, p 6. In opposition, 17 East argues that this is a disguised motion for summary judgment, not a motion in limine, because it limits 17 East's theories of liability.

CPLR 3101(d)(1) provides that, upon request, each party shall identify expert witnesses it expects to call at trial. The statute gives the court discretion, in the interest of justice, to permit testimony from an expert that was not disclosed in timely fashion upon a showing of good cause.[8] Similarly, Commercial Division Rule 13(c) provides that expert disclosure "shall be completed no more than four months after the completion of fact discovery"; the note of issue and certificate of readiness "may not be filed until completion of expert disclosure"; and "[e]xpert disclosure provided after these dates without good cause will be precluded from use at trial." 22 NYCRR 202.70, Rule 13(c).

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[7] To the extent that the Expert Invoices reflect services unrelated to the underpinning, they cannot be introduced to prove 17 East's damages because they were not disclosed before the note of issue was filed. See Discussion in Part II(A)(1)(b), *supra*.

[8] "[W]here a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just."

17 East is precluded from offering expert evidence of diminution in value of the 17 Building because it has not shown good cause for failing to disclose an expert or other discovery on this issue. This prong of Madison's motion is not in the nature of a disguised summary judgment ruling. Instead, it is a procedural ruling based on failure to timely disclose an expert on this issue. This court is not limiting 17 East's theories of liability; 17 East did that itself by not disclosing an expert on diminution in value during twelve years of litigation. Further, as previously noted, the 2007 Decision ruled that the 17 Building sustained no structural damage.

e. Ellis and Albanese Reports and Testimony

The Ellis Report hypothesizes that if the new building's elevator had been located 10 feet away from the Boundary, it would have been unnecessary to underpin the 17 Building. According to Ellis, an architect, if the elevator had been moved, Madison would have been able to build a [hypothetical] building with a less appealing layout of apartments than the new building that Madison actually built. The Albanese Report gives an appraisal of the difference in value between the hypothetical building and the new building. Albanese concludes that Madison made more profit from selling condominiums in the new building than it would have, if it had not underpinned the 17 Building. 17 East wants to introduce the testimony of Albanese and Ellis, and their Reports on the issue of damages caused by the underpinning. In other words, it wishes to tie its damages to profits earned by Madison.

The proper measure of damages for injury to real property is the lesser of the decline in market value and the cost of restoration. *Jenkins v Etlinger*, 55 NY2d 35, (1982); *Hartshorn v Chaddock*, 135 NY 116 (1892); *McDermott v Albany*, 309 AD2d 1004 (3d Dept 2003); *Property Owners Ass'n of Harbor Acres, Inc. v Ying*, 137 AD2d 509 (2d Dept 1988); see Comment to *New*

York Pattern Jury Instructions - Civil, 2:311. Otherwise expressed, the measure of damages is generally the diminution in value, *Slavin v State*, 152 NY 45 (1897), but if the cost of restoring the property to its former condition is less than the diminution in value, the measure of damages is the cost of restoration. *Hartshorn v Chaddock*, supra.

The measurement of damages in trespass focuses on compensating the property owner for the damage to ***his property***, or the use value ***of his invaded property***. *New York Pattern Jury Instructions - Civil* §3:8. Where the trespass does not cause damage, the measure of damages is the use value ***of the invaded property***. *Id* (collecting cases); *see Baumann v New York*, 227 NY 25, 33 (1919) (in continuing trespass measure of damages is diminution of usable value of property); *Volunteer Fire Assn. of Tappen, Inc. v County of Rockland*, 101 AD3d 853, 857 (2d Dept 2012) ("The measure of damages for permanent injury to property is loss of market value, or the cost of restoration, while the measure of damages for loss of use is the 'decrease in the property's rental value during the pendency of the injury.'"); *Salesian Soc. v Ellenville*, 121 AD2d 823, 825 (3d Dept 1986) ("'The measure of damages in a trespass action is the diminution in the rental or usable value of the premises caused by the trespass, taking the property as is and as zoned.'"). Notably, no authority cited by plaintiff, or found by the court's independent research, holds that the measure of damages is ***the increase in value of the trespasser's property.*** Use value means the value of the use of the property upon which the defendant trespassed. PJI, *supra.*

Three appellate New York courts have rejected the notion that the measure of damages includes profits made by the trespasser, as distinguished from use value of the property he invaded. In *Cassata v New York New England Exchange*, 250 AD2d 491 (1st Dept 1998), the

defendant telephone company trespassed by placing a telephone cable on the wall of the plaintiff's building. The plaintiff argued that he was entitled to the gross revenues the defendant generated from the use of the telephone cable. The First Department rejected that measure of damages, holding that the correct measure of damages was the value of the right of way on the plaintiff's roof. The First Department made clear that the ordinary measure of damages for a trespass is the value of the defendant's use and occupation or damage to the freehold and, as there was no damage caused by the placement of the cable, the correct measure was the value to the trespasser of the use of the ***plaintiff***'s property. *Accord*, *Salesian Soc. v Ellenville*, *supra*. Similarly, in *Granchelli v Walter S. Johnson Building Co., Inc.*, 85 AD2d 891 (4th Dept 1981), the appellate Court ruled that the plaintiff could not recover the profits made on a construction contract by a contractor who had trespassed. The plaintiff had argued that due to the trespass, the contractor saved money and increased his profit. The Fourth Department rejected that theory ruling that damages are intended to compensate the plaintiff for the value of the use of his property and that there was no authority allowing plaintiff to share in the trespasser's increased profits.[9]

Consequently, the court precludes the Agnese Report and Testimony. 17 East may not recover Madison's profits measured by the difference in value of the new building and the hypothetical building. That measure of damages would not compensate 17 East for the diminution in value of its freehold or the value of the use of the 17 Property for underpinning.

With respect to the Ellis Report and testimony, the motion to preclude is denied. The October 2014 AD Decision ruled there was a question of fact as to "whether Madison failed to

[9] In reality, 17 East is seeking reargument of this court's prior decision denying leave to file a third amended complaint. Dkt 273 in Action 2. The court in that decision addressed the measure of damages for trespass.

consider other, non-encroaching alternatives." Therefore, this court is constrained to admit the Ellis Report and his testimony on the issue of whether there were non-encroaching alternatives that Madison failed to consider.

2. Building Code 27-724

Building Code 27-724 (Regulation) provides:

> Except in cases where a proposed excavation will extend less than ten feet below the legally established grade, all underpinning operations and the construction and excavation of temporary or permanent cofferdams, caissons, braced excavated surfaces, or other constructions or excavations required for or affecting the support of adjacent properties or buildings shall be subject to controlled inspection. The details of underpinning, cofferdams, caissons, bracing, or other constructions required for the support of adjacent properties or buildings shall be shown on the plans or prepared in the form of shop or detail drawings and shall be approved by the architect or engineer who prepared the plans.

Madison seeks to preclude 17 East from offering evidence that Madison violated the Regulation on the ground that it is irrelevant to the trespass claim. 17 East seeks to preclude Madison from offering evidence that it filed engineering plans for the underpinning on the grounds that: 1) Madison failed to produce in discovery underpinning drawings that complied with the Regulation, although the JHO Order required their production; 2) the failure to file such plans is relevant to its claims for injunctive relief and damages; 3) the underpinning implicated public safety and Madison put its own profits above public safety, which is a ground for impeachment; 4) Madison had a non-delegable duty to file "detailed design underpinning drawings prepared by a licensed professional engineer"; and 5) drawings that comply with the Regulation do not exist. 17 Cross-Motion MOL, pp 2, 3, 6, 8 & 12.

17 East claims that Madison filed nothing that complied with the Regulation. Madison contends that it filed and turned over plans that complied. Madison also argues that whether or not it filed engineering plans is irrelevant to whether or not 17 East consented to the underpinning, which is the only issue.

The JHO Order required Madison to produce, by November 20, 2006, "the details of underpinning to be submitted" pursuant to the Regulation, which Madison was to obtain from Mayridge, the contractor who performed the underpinning. Action 2, Dkt 164. If "those details" were not produced, Madison was to produce an affidavit from Mayridge, offering an explanation. *Id.*

Madison's motion to preclude evidence relating to its failure to comply with the Regulation is denied. The October 2014 AD Decision ruled that it was an issue of fact whether Madison complied with the July 2004 Stipulation, which, as previously noted, obligated Madison, before excavating more than 10 feet below ground: 1) to give 17 East one week's notice; and 2) to retain an architect or engineer to supervise the work and confer with 17 East's professionals regarding any issues that might arise. Whether architectural or engineering plans that complied with the Regulation were filed by Madison bears on whether it retained the appropriate professional. As Building Department plans are publicly available, their filing may bear on the issue of notice to 17 East, which was required by the July 2004 Stipulation.

17 East's cross-motion is granted to the extent that Madison is precluded from offering evidence at trial that it filed plans with the Building Department in compliance with the Regulation that it did not produce during discovery, and this prong of 17 East's cross-motion is otherwise denied. There is an issue of fact, which cannot be resolved on a motion in limine,

concerning whether the plans that Madison filed were sufficient. However, Madison cannot surprise 17 East at trial with plans that were not exchanged before the note of issue was filed, and which the JHO Order required Madison to produce.

3. Consent

The court denies the prong of 17 East's cross-motion to preclude Madison from offering evidence that 17 East consented to the underpinning. This prong is based on the October 2014 AD Decision, which stated that 17 East did not "expressly" consent. However, the Appellate Division ruled that whether 17 East consented was a question of fact that this court improperly resolved on summary judgment. This court is bound by the ruling that consent is an issue of fact to be tried and Madison cannot be precluded from presenting evidence on a triable issue of fact.

4. Vargas Report & Testimony

17 East moves to preclude the Vargas Report and testimony on the ground that Vargas will offer an opinion using an improper measure of damages, i.e., the diminution in value of the Madison Property caused by the protrusion of air conditioners in the windows of the 17 Building into Madison's air space. 17 East argues that: 1) the air conditioners were a temporary trespass for which the only damages recoverable are the loss of use value of Madison's air space; 2) diminution of value is the measure of damages for injury to property from a permanent encroachment and the air conditioners were a temporary encroachment; and 3) Vargas is not qualified to render an opinion, misconstrued relevant contracts, failed to consider relevant factors that should be considered by an appraiser, and is unreliable under the standards set forth in *Frye v US*, 293 F 1013 (DC Cir 1923).

Madison opposes on the grounds that: 1) 17 East is liable for all consequential damages resulting from its trespass, including the reduced sale price; 2) Vargas is qualified to give an opinion on reduced market value; and 3) 17 East's other objections go to weight, not admissibility.

Vargas' qualifications demonstrate that he is a qualified real estate appraiser with many years of experience in the New York metropolitan real estate market. According to the Vargas Report, dated November 2, 2011 (Dkt 616), and Vargas' deposition (Dkt 617, p 21), the Madison Property's ***market value*** was decreased by $800,000 because of 17 East's refusal to remove the air conditioners and the pending litigation. Vargas opined that 17 East's refusal and the litigation increased the Buyer's costs and risks for developing the site. Vargas is not offered as a witness on diminution in value due to a permanent encroachment. Vargas based his opinion on a contract, its amendments, the legal history of Action 1, and his experience with the impact litigation has on the value of real estate.

A brief history of Action 1 is in order. In 2002, the Madison Property was owned by 1380 Madison Avenue, LLC (Seller), which entered into a contract, dated September 6, 2002 (Contract), to sell the property to Stuart Boesky (Buyer). After the title insurer refused to insure title without an exception for the air conditioners of 17 East protruding into the air space of the Madison Property, the parties amended the Contract on December 12, 2002 (Amendment). The Amendment required the Seller to deliver the Madison Property free and clear of the encroachment of 17 East's existing air conditioners since their presence impacted Madison's ability to build a building taller than the small, existing building. 17 East ignored an order of Justice Cahn, dated October 10, 2003, declaring that the air conditioners encroached on the

Madison Property. Action 1, Dkt 28. In December 2003, when the air conditioners still had not been removed, the Contract was amended again, on December 16, 2003 (2d Amendment). In the 2d Amendment, the contracting parties agreed to close with a purchase price reduction of $800,000. At the time of the closing, the air conditioners were still in place.[10] 17 East did not agree to remove the air conditioners until after it lost an appeal from that order. Action 1, Dkt 52. In a December 2004 stipulation, 17 East agreed to remove the air conditioners by January 2005. Action 1, Dkt 54.

Subsequently, a September 6, 2006, decision and order of this court (Cahn, J), ruled that:

> the reduction in the purchase price by $800,000 may be evidence of the reduction of the value of the property. Whether this amount is found to be the actual reduction in the value of property suffered by Madison solely as a result of defendants' trespass is an issue of fact for trial.

Action 1, Dkt 92.

There is scant New York precedent allowing recovery for consequential damages for trespass, but treatises and existing precedent agree that they are recoverable. The rule is that a trespasser is liable for all damages occasioned by the trespass, including actual special and consequential damages that result. 9-64A *Powell on Real Property*, §64A.05; 14-139 *Warren's Weed New York Real Property* §139.26[5]; 104 *NY Jur2d Trespass* §43 (trespasser liable for all injurious consequences); *Costlow v Cusimano*, 34 AD2d 196, 201 (4th Dept 1970) (damages for trespass limited to consequences flowing from interference with possession – finding no such damages proven at trial); *Malerba v Warren*, 108 Misc. 2d 785, 788-789 (Sup Ct, NY County, 1981), *mod on other grnds* 96 AD2d 529 (2d Dept 1983); *Van Alstyne v Rochester Tel. Corp.*, 163 *Misc* 258, 261 (Civ Ct Bx Co 1937); (telephone company which left lead on plaintiff's

[10] After the closing, Boesky conveyed the Madison Property to Madison, which was substituted as plaintiff in Action 1.

property without permission liable for death of dog that ate it); *Vandenburgh v Truax*, 4 Denio 464 (Sup Ct, NY County, 1847) (invasion of premises renders invader liable whether loss resulting is direct or consequential).

The motion to preclude Vargas' Report and testimony is denied. Here, it is law of the case that whether the air conditioners caused the $800,000 purchase price reduction is a question of fact. Contrary to 17 East's assertions, Vargas is qualified, as an experienced real estate appraiser, to testify that litigation and encroachments can affect market value of a property. *Frye*, *supra*, is inapplicable. It applies to scientific evidence that must be proven to be generally accepted and reliable in the relevant field. Real estate appraisal is not a novel field. A real estate expert with knowledge of the market for property in a particular area is qualified to express an opinion on the factors affecting market value. Whether Vargas used appropriate methodology goes to the weight of his opinion, not its admissibility. *Century Realty, Inc. v Comm'r of Fin.*, 15 AD3d 652, 653 (2d Dept 2005). Accordingly, it is

ORDERED that Motion Sequence 016 in Action 2 by defendant Madison 96th Associates, LLC, and the cross-motion of plaintiff 17 East 96th Owners Corp., are granted to the extent indicated above and otherwise denied; and it is further

ORDERED that Motion Sequence 017 in Action 2 by defendant Madison 96th Associates, LLC, is granted to the extent indicated above and is otherwise denied; and it is further

ORDERED that Motion Sequence 026 in Action 1 by defendant 17 East 96th Owners Corp. is denied.

Dated: March 4, 2016

ENTER:

J.S.C.

18

SHIRLEY WERNER KORNREICH
J.S.C