NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: IAS PART 7

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154 E. 62 LLC,

Plaintiff,

Index No.: 155966/2016

-against-

Mot. Seq. No. 001

156 E 62ND STREET LLC,

Defendant.

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Gerald Lebovits, J.S.C.:

Plaintiff 154 E. 62 LLC moves under CPLR 3125, for a default judgment on its complaint against defendant 156 E 62nd Street LLC, for an injunction directing the removal of the alleged permanent encroachments on plaintiff's property and enjoining further construction work at the premises, and for an inquest on damages.

Defendant cross-moves under CPLR 317, 2001, 2004, 3012 (d), and 5015, to vacate any default attributable to it, and to compel plaintiff to accept defendant's answer to the complaint. Defendant also cross-moves under CPLR 3211 (a) (1) and (a) (7), to dismiss plaintiff's third and seventh causes of action seeking injunctive relief, for failure to state a cause of action. Finally, defendant cross-moves under CPLR 6514 to cancel plaintiff's notice of pendency.

Background

Plaintiff is the owner of a townhouse located at 154 East 62nd Street, New York, NY (the adjacent premises) (Kargman aff dated 10/11/16, ¶ 1). Defendant is the owner of the adjoining townhouse at 156 East 62nd Street, New York, NY (the project premises) (*id.*, ¶ 4), and has a mailing address of "c/o The Limited Liability Company, P.O. Box 1376, Midtown Station, New York, New York, 10018" (*id.*, ¶ 3).

Plaintiff purchased the adjacent premises, a three-story townhouse with a basement, in February 2014 (Kargman aff, ¶¶ 3-4).

Defendant purchased the project premises, a four-story townhouse with a basement (Nigri aff dated 12/5/16, ¶ 13), in May 2014 (Kargman aff, ¶ 5). Beginning in February 2015, defendant began renovating the project premises "by horizontally extending [the project premises] into its rear yard by constructing a new five-story addition[,] . . . [by] lowering of [the project premises] cellar slab[,] . . . [and by performing] a wholesale 'gut' renovation of the interior . . . and a complete upgrade of the exterior with a new façade and finishes" (*id.*, ¶ 7; *see also* Cicalo aff dated 10/11/16, ¶ 4).[1] To support the newly lowered cellar slab, plaintiff alleges that defendant

[1] Plaintiff also alleges that the entirety of the fifth floor of the project premises is a newly built

excavated and supported the four walls of the project premises by installing underpinning that extended over the property line into plaintiff's property (Kargman aff, ¶ 8; Cicalo aff, ¶ 5). Defendant performed soil and excavation work as part of the project, but plaintiff claims that it failed to provide plaintiff with any notice, to provide safeguards to avoid damage to the adjacent premises, or to perform any inspections of the adjacent premises before construction began, all of which plaintiff claims are violations of the New York City Building Code (*id.*, ¶¶ 9-10). As the project continued, plaintiff claims that defendant left "debris, stucco and cement" on the roof of the adjacent premises, and that cracks began to form inside and on the façade of the adjacent premises (*id.*, ¶¶ 12, 21).

Plaintiff claims that defendant has refused to provide it with any information regarding the extent of the construction, and that the extent of the damage to the adjacent premises is unknown (*id.*, ¶ 13). Plaintiff, however, alleges damages to the adjacent premises. First, plaintiff states that some portion of the fifth floor of the project premises extends over the property line onto the adjacent premises' roof, encroaching on plaintiff's property and compromising the waterproofing and integrity of the roof (*id.*, ¶¶ 14-15; Sens aff dated 10/7/16, ¶ 5; Cicalo aff, ¶ 12). The encroachment also impedes plaintiff's ability to expand its property vertically (Kargman aff, ¶ 16). Second, defendant's underpinning of the foundation walls is six feet wide, a portion of which extends over the property line and under the adjacent premises (Kargman aff, ¶ 18). The underpinning of the walls was done without adequate safety measures, has already caused cracking in the adjacent premises, undermines the structural integrity of the adjacent premises, and prevents plaintiff from expanding the property vertically (*id.*, ¶¶ 18-19; Cicalo aff, ¶¶ 6-10). Third, plaintiff states that exhaust vents from the project premises are now within ten feet of the windows and doors of the adjacent premises, in violation of "applicable law," and pose a health risk to anyone in the adjacent premises (Kargman aff, ¶ 20; Cicalo aff, ¶ 13). Fourth, plaintiff claims that defendant's workers have repeatedly entered plaintiff's property, specifically the rear yard and the roof, without plaintiff's consent, to perform work on the project premises (*id.*, ¶ 21). These workers have left behind construction debris, stucco, and excess cement, and continue to enter plaintiff's property (*id.*).

In addition to the above damages, plaintiff also sets forth the following additional injuries as a result of the construction: "damage to the roofing system, parapets, front and rear façade, and/or rubble foundation" (*id.*). Finally, plaintiff asserts that several of defendant's acts or omissions in undertaking the renovation violate the Building Code, violate the New York City Mechanical Code, or otherwise fail to comply with the New York City Department of Buildings (DOB) rules and regulations (Cicalo aff, ¶¶ 4, 8-9, 12-13).

Plaintiff further alleges that, because of defendant's renovation, and its continuing failure to provide plaintiff with information about the renovation, plaintiff was forced to "retain

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addition that extends almost a foot over the roof of the adjacent premises, a permanent encroachment that was erected without plaintiff's consent (complaint, ¶¶ 41-45). Plaintiff now states that whether the top floor of the project premises previously existed in some form is not the basis for its claim (Plaintiff's reply memorandum of law at 18). In any case, the record reflects that the project premises was one story higher than the adjacent premises before defendant's renovation (*e.g.*, Nigri aff, exhibit 3, title survey).

architects and engineers to review the site conditions, assess the damages at the [a]djacent [p]remises, and determine whether proper safeguards have been implemented" (complaint, ¶ 46). Defendant has consistently failed to provide any information about the construction to plaintiff, its counsel, or its architects and engineers, or to allow any of plaintiff's personnel to inspect the construction site (*id.*, ¶ 48). Thus, plaintiff claims that it does not currently know the full extent of its damages.

On July 18, 2016, plaintiff filed a complaint against defendant (NYSCEF Doc No. 1, complaint). The complaint alleges seven cause of action: trespass, continuing trespass/encroachment, encroachment, strict liability for violations of the Building Code, negligence, private nuisance, and a preliminary and permanent injunction. The requested injunction would require defendant to cease all construction activity until defendant removes any encroachment of the additions to the top floor and the underpinning in the basement; to provide plaintiff with certain construction documents; to allow plaintiff's architect, engineer, or surveyor to inspect any work that affects the adjacent premises; and to install adequate protections and waterproofing to protect the adjacent premises (complaint, ¶ 117 [a-g]).

Plaintiff served defendant in this action on July 28, 2016, pursuant to Limited Liability Company Law (LLC Law) § 303 (a), by personally delivering two copies of the summons and complaint, and a notice of pendency for the project premises, to an authorized person in the office of the Secretary of State of the State of New York in Albany (Smee affirmation dated 10/11/16, exhibit C, affidavit of service dated 8/3/16). The Secretary's office then sent copies of those documents to defendant at its designated address, PO Box 1376 Midtown Station, New York, NY 10018 (Londoner reply affirmation dated 12/22/16, exhibit B, letter dated 12/14/16 from Secretary of State to Kassoff, PLLC). According to the United States Postal Service (USPS), the copies were delivered to PO Box 1376 on August 8, 2016, and signed for by Renee Nigri (Londoner reply affirmation, exhibit C, USPS Tracking; exhibit D, letter dated 12/14/16 from USPS to Londoner). Plaintiff maintains that defendant's time to answer or move with respect to the complaint expired on August 28, 2017.

Benjamin Nigri, defendant's manager, claims that he never received notice from his office's mail collector about a certified letter from the office of the Secretary of State (Nigri aff, ¶ 4). He further states that he never signed for such a letter, nor was he aware that anyone else had picked it up or signed for it (*id.*). He claims that no member of defendant ever received the summons and complaint in this case until plaintiff informed defendant that it was in default on October 3, 2016 (*id.*, ¶¶ 5-8).

On October 11, 2016, plaintiff filed the instant motion for a default judgment. Defendant then made two attempts to answer the complaint on October 18 and 20, 2016 (NYSCEF Doc Nos. 25, 27), both of which were rejected (Nigri aff, ¶ 9). On December 6, 2016, defendant cross-moved to vacate any default attributable to it, to dismiss plaintiff's claims for injunctive relief, and to lift the notice of pendency on the project premises.

Discussion

I. Default Judgment

Plaintiff now moves under CPLR 3215 for a default judgment on its complaint. CPLR 3215 provides that a plaintiff may seek a default judgment against a defendant who has failed to appear or plead in an action. Plaintiff must submit proof of service of the summons and complaint, proof of the defendant's default, and proof of the facts constituting the claim by a party affidavit (CPLR 3215 [f]).

Defendant cross-moves under CPLR 317 and 5015 (a) to preemptively vacate any default attributable to it, and under CPLR 2004 and 3012 (d) to extend its time to file an answer.[2]

CPLR 317 provides that parties who are served other than by personal delivery and do not appear in an action may defend the action within one year after they learn of the default, provided that they did not receive notice of the summons "in time to defend" and have a meritorious defense. Denying receipt of the summons and complaint is insufficient: "The mere denial of receipt of the summons and complaint is . . . insufficient to establish lack of actual notice for the purpose of CPLR 317" (*Wassertheil v Elburg, LLC*, 94 AD3d 753, 754 [2d Dept 2012] [internal quotation marks and citations omitted]). In contrast, CPLR 5015 (a) provides that a court may vacate a default on grounds of excusable default within a year of the judgment being served with notice of entry. The defaulting party "must demonstrate both a reasonable excuse and the existence of a meritorious defense" (*Mutual Mar. Off., Inc. v Joy Constr. Corp.*, 39 AD3d 417, 419 [1st Dept 2007]). And "[a]bsent a reasonable excuse, vacatur is not appropriate regardless of whether defendant has a meritorious defense" (*Citibank, N.A. v K.L.P. Sportswear, Inc.*, 144 AD3d 475, 476–77 [1st Dept 2016]). A court has discretion: "The determination of the sufficiency of the proffered excuse and the statement of merits rests within the sound discretion of the court" (*Goldman v Cotter*, 10 AD3d 289, 291 [1st Dept 2004]).

CPLR 2004 provides that a court may extend the time for any required act "upon such terms as may be just and upon good cause shown."

Similarly, CPLR 3012 (d) provides that a court may "extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." Also, "[t]o compel the plaintiff to accept an untimely answer as timely, a defendant must provide a reasonable excuse for the delay and demonstrate a potentially meritorious defense to the action" (*HSBC Bank USA, N. A. v Lafazan*, 115 AD3d 647, 648 [2d Dept 2014] [internal quotation marks and citations omitted]). A court has the discretion to determine "what constitutes a reasonable excuse" (*id.* [internal quotation marks and citations omitted]).

Plaintiff argues that it has successfully met its burden under CPLR 3215 by submitting

[2] Defendant also cross-moves under CPLR 2001 that allows a court to correct a "mistake, omission, defect, or irregularity." But the record does not reflect a mistake by defendant in failing to answer the complaint.

proof of service on defendant, an attorney affirmation detailing defendant's default, and affidavits from plaintiff's member Harry Kargman, architect James A. Cicalo, and land surveyor James D. Sens, setting forth facts entitling it to relief. Further, plaintiff claims that defendant had actual notice of the summons in time to respond to the complaint and has failed to set forth a reasonable excuse for failing to do so. Although plaintiff contends that this failure alone is sufficient to defeat the cross-motion, plaintiff also argues that defendant has failed to establish a meritorious defense to the action.

Defendant responds that it did not receive a copy of the summons and complaint until after its time to answer had elapsed. Once defendant became aware of the action, it contends that it promptly provided notice to its insurers, obtained counsel, and attempted to answer the complaint. Also, defendant argues that less than two months elapsed between defendant's alleged default and plaintiff's motion and public policy dictates that actions should be resolved on the merits. Defendant further argues that plaintiff has not been prejudiced by the default. Finally, defendant claims that it has a meritorious defense to each of plaintiff's claims.

Here, plaintiff has successfully met its burden under CPLR 3215. Plaintiff's process server served the Secretary of State, as agent for defendant, on July 28, 2016 (Smee affirmation, exhibit C, affidavit of service dated 8/3/16). Service on a limited liability company pursuant to LLC Law § 303 (a) is complete upon delivery to the office of the Secretary of State (*Paez v 1610 St. Nicholas Ave. L.P.*, 103 AD3d 553, 553-54 [1st Dept 2013]). A process server's affidavit of service creates a rebuttable presumption of proper service (*Trini Realty Corp. v Fulton Ctr. LLC*, 53 AD3d 479, 479 [2d Dept 2008]). In addition, plaintiff has also submitted affidavits showing that, among other things, defendant's construction project has permanently encroached onto plaintiff's property under the basement and over some portion of plaintiff's roof (Kargman aff, ¶ 14-16; 18-19; Sens aff, ¶ 5; Cicalo aff, ¶¶ 6-12), that defendant trespassed onto plaintiff's property in order to conduct the renovation (Kargman aff, ¶ 21), that construction debris entered plaintiff's property (*id.*, ¶¶ 12, 21), that defendant failed to give adequate notice or take adequate precautions against damage to the adjacent premises (*id.*, ¶¶ 9-10), that defendant violated the Building Code in several respects (Cicalo aff, ¶¶ 4, 8-9, 12-13), and that the adjacent premises has sustained damage (Kargman aff, ¶ 21).

Defendant's proffered explanation for its failure to timely answer the complaint is neither reasonable nor credible. As set forth above, a bare denial of receipt of the summons and complaint is not sufficient to excuse a default under CPLR 317 (*Wassertheil*, 94 AD3d at 754). Defendant claims that, as a result of using a Post Office Box and sending an employee from another company that worked in defendant's space to retrieve the mail, the summons and complaint were not received until after defendant's time to answer had expired (Nigri aff, ¶¶ 4-7). But defendant does not deny that its address on file with the Secretary of State is correct, and thus its explanation is insufficient (*Trini Realty Corp.*, 53 AD3d at 480 ["The defendant, however, did not contend that the address on file with the Secretary of State was incorrect, and the mere denial of receipt of the summons and the complaint was insufficient to rebut the presumption of proper service created by the affidavit of service"]). Further, denial of receipt when the address on file is proper is not a reasonable excuse sufficient to excuse a default under CPLR 5015 (a) (*Hamilton Pub. Relations v Scientivity, LLC*, 129 AD3d 1025, 1025 [2d Dept 2015]). Defendant's reliance on *Li Xian v Tat Lee Supplies Co., Inc.* (126 AD3d 424, 424-425

[1st Dept 2015]), is unavailing, as in that case, there was misconduct or misrepresentation by the plaintiff regarding an additional address that they could have used for service. Here, plaintiff submitted copies of mail sent to the project premises that was returned as undeliverable, showing that the project premises was not a feasible address for service (Londoner reply affirmation, exhibit F, canceled mail).

Further, the record reflects that defendant's excuse is, at best, disingenuous. The office of the Secretary of State sent a copy of the summons and complaint by certified mail to defendant's address (Londoner reply affirmation, exhibit B, letter dated 12/14/16 from Secretary of State to Kassoff, PLLC). USPS tracking data and other records show that it was delivered to defendant's post office box on August 8, 2016 (Londoner reply affirmation, exhibit C, USPS Tracking), and signed for by Renee Nigri, who shares a last name with Benjamin Nigri, defendant's manager (Londoner reply affirmation, exhibit D, letter dated 12/14/16 from USPS to Londoner). Moreover, the letter was signed for twenty days before defendant's time to answer expired. This suggests that defendant's explanation is incomplete. In any event , the record does not support the kind of good cause or reasonable excuse necessary to compel plaintiff to accept defendant's answer (*see EHS Quickstops Corp. v GRJH, Inc.*, 112 AD3d 577, 578 [2d Dept 2013] [holding that accepting a late answer is compelled where "defendant [did not] willfully or deliberately ignore[] notice of the summons and complaint, which . . . was returned to the Secretary of State as 'unclaimed' . . . [and defendant was not] on notice of the fact that there was an incomplete address on file"]). Having failed in all respects to offer a reasonable excuse or lack of actual notice for its failure to timely answer the complaint, the court need not determine whether defendant has a meritorious defense to the action (*Bank of Am., N.A. v Agarwal*, 150 AD3d 651, 652 [2d Dept 2017]; *Citibank, N.A.*, 144 AD3d at 476–477).

Accordingly, plaintiff's motion for a default judgment is granted to the extent discussed below, and defendant's cross-motion to vacate the default is denied. Having defaulted, defendant has conceded liability: "It is well established that, by defaulting, a defendant admits all traversable allegations contained in the complaint, and thus concedes liability, although not damages" (*Christian v Hashmet Mgt. Corp.*, 189 AD2d 597, 598 [1st Dept 1993]). Moreover, as set forth further below, the record establishes that plaintiff is entitled to the majority of relief sought in the complaint.

II. Trespass (First Cause of Action)

Plaintiff's first cause of action is for trespass: "[T]he invasion of a person's right to exclusive possession of his land, and includes the entry of a substance onto land" (*Berenger v 261 W. LLC*, 93 AD3d 175, 181 [1st Dept 2012] [internal citations omitted]). "Trespass does not require an intent to produce the damaging consequences, merely intent to perform the act that produces the unlawful invasion" (*id.*). Here, the record reflects that defendant's construction workers entered plaintiff's property intentionally, during defendant's construction work, without plaintiff's consent (Kargman aff, ¶¶ 12, 21). Kargman's affidavit states that workers have entered the rear yard and the roof of the adjacent premises on multiple occasions, leaving construction debris behind (*id.*, ¶ 21). Accordingly, plaintiff's motion for a default judgment on its first cause of action for trespass is granted as to liability.

III. Continuing Trespass (Second Cause of Action)

Plaintiff's second cause of action is for continuing trespass based on defendant's additions to the top floor of the project premises and on the underpinning underneath the walls between the adjacent premises and the project premises. An unlawful encroachment constitutes a continuous trespass on a party's land (*Bloomingdales, Inc. v New York City Tr. Auth.*, 52 AD3d 120, 124 [1st Dept 2008]).

Here, plaintiff has established that some portion of defendant's improvements to its fifth floor and the underpinning of its cellar wall encroaches on the adjacent premises (Kargman aff, ¶¶ 14-15; 18-19; Sens aff, ¶ 5; Cicalo aff, ¶¶ 6-12; Smee affirmation, exhibit H, DOB violation dated 4/14/15). While plaintiff admits that it cannot be certain that the underpinning extends under its wall,[3] it is undisputed that the DOB cited defendant for installing six feet of underpinning, which was not in conformity with defendant's approved plans (Cicalo aff, ¶ 7; Smee affirmation, exhibit H). The blueprints offered by defendant show that the proposed underpinning for the project was to be twelve inches under its own wall (Smee affirmation, exhibit G, underpinning blueprint). Thus, it is implausible that six feet, or seventy-two inches, of underpinning would not encroach under the adjacent premises to some extent (Cicalo aff, ¶ 7). Similarly, while the parties now agree that some portion of defendant's top story existed before the construction, plaintiff has shown that the new construction of defendant's top floor wall overhangs plaintiff's roof over the property line. Specifically, the new exterior insulation and finishing system (EIFS), stucco, and façade that were installed as part of the construction overhang the plaintiff's roof (Cicalo aff, ¶ 12; Nigri aff, ¶ 22).

Defendant's papers are not to the contrary. The court also notes that defendant does not consistently describe the wall or walls between the properties. Defendant argues in its papers that there is a shared party wall for both properties (Nigri aff, ¶ 23). Defendant's blueprints, however, clearly show a separate wall within defendant's property line that was to be underpinned (Smee affirmation, exhibit G, underpinning blueprint). The blueprints indicate "that the project contemplated lowering the existing cellar slab . . . which necessitated underpinning of the existing foundation walls, including the foundation wall with the [a]djacent [p]remises" (Cicalo aff, ¶ 5). The underpinning blueprint specifically requires that "[a]t the time of the excavation the contractor [was] to verify the depth of the adjacent [premises], and notify the architect of record if underpinning [was] required. This [was] subject to a controlled inspection" (Smee affirmation, exhibit G, underpinning blueprint). This instruction would be superfluous if there was a shared party wall for both properties. While defendant argues that the record does not conclusively prove that the underpinning extends beneath the adjacent premises, or that any of the new construction overhangs plaintiff's roof, defendant has forfeited the right to contest these issues by defaulting on the complaint (*See Christian*, 189 AD2d at 598).

Accordingly, plaintiff's motion for a default judgment on its second cause of action for continuing trespass is granted on liability.

[3] The reason the record is unclear about the extent of the underpinning is due to defendant's refusal to allow a survey of the project premises (Sens aff, ¶ 6).

IV. RPAPL 871 (Third Cause of Action)

In its third cause of action, plaintiff seeks under RPAPL 871 an injunction requiring defendant to remove any encroachments above or below the adjacent premises. RPAPL 871 provides that a landowner may maintain an action "for an injunction directing the removal of a structure encroaching on such land." The landowner must establish, prima facie, that it is the owner of the land and that the defendant's building is constructed, at least in part, on its land (*Salerno v C.E. Kiff, Inc.*, 119 AD3d 1104, 1106 [3d Dept 2014]). Also"[i]n order to obtain the injunctive relief it seeks, . . . [plaintiff is] required to demonstrate not only the existence of the encroachment, but that the benefit to be gained by compelling its removal would outweigh the harm that would result to the defendants from granting such relief" (*Town of Fishkill v Turner*, 60 AD3d 932, 933 [2d Dept 2009]). A court should consider "the extent of impairment created by the encroachment, the defendant's hardship in removing the encroachment, whether any alternatives would afford more equitable relief, or whether money damages would have been a just and adequate remedy" (*Marsh v Hogan*, 81 AD3d 1241, 1243 [3d Dept 2011]).

As set forth above, with respect to the second cause of action, plaintiff has adequately established that it is the owner of the adjacent premises and that some portion of the additions to the top floor and the cellar of the project premises encroaches upon its property. But plaintiff has not established that it is entitled to the "drastic remedy of a mandatory injunction to compel the defendant[] to remove the encroaching structure[s]" (*Generalow v Steinberger*, 131 AD2d 634, 635 [2d Dept 1987]). With respect to the encroachment on the roof, the wall of defendant's property extends between eight and ten inches over the property line (Sens aff, ¶ 5). A mandatory injunction is generally not warranted for such a de minimis encroachment (*see Generalow*, 131 AD2d at 635 [finding injunction not warranted where driveway and retaining wall extended 8.4 inches onto plaintiff's property and wall was necessary to defendant's property]; *Christopher v Rosse*, 91 AD2d 768, 769 [3d Dept 1982] [finding defendant not required to remove roof eaves, which encroached on plaintiff's property by 16 to 25.2 inches, where money damages were an adequate remedy]). With respect to the underpinning under the adjacent premises' foundation wall plaintiff has not established that the removal of either encroachment would not cause damage to defendant's property, or to plaintiff's property (*Hoffmann Invs. Corp. v Yuval*, 33 AD3d 511, 512 [1st Dept 2006] ["The record discloses no non speculative ground to support a finding that defendant's rebuilt retaining wall presents a danger to plaintiff that would warrant mandating the expensive and difficult work required to remove the rebuilt wall and build yet a third wall"]).

The cases plaintiff relies on are not persuasive. In two of the cases, the encroachment was significantly larger (*see Hullar v Glider Oil Co.*, 219 AD2d 825, 826 [4th Dept 1995] [noting defendant constructed two large concrete islands in the middle of plaintiff's easement]; *Hedden v Bohling*, 112 AD2d 23, 25 [4th Dept 1985] [noting that defendant's boathouse encroached eight to nine feet onto plaintiff's property]). The third case is not an encroachment case at all, but instead, concerns a contract for the sale of real property (*see Ostreicher v Nakazawa*, NYLJ, Oct. 8, 2003 at 20, col 1 [Sup Ct, Rockland County 2003]).

Plaintiff has not demonstrated on this record that its benefit from the removal of defendant's encroachment would outweigh the potential damage and cost of removal. Thus,

plaintiff is not entitled to a permanent injunction requiring the removal of the encroachments. Because defendant has conceded liability by default, the issue of "whether any alternatives would afford . . . equitable relief, or whether money damages would [be] a just and adequate remedy" (*Marsh*, 81 AD3d at 1243), will be referred to a Special Referee.

V. Strict Liability (Fourth Cause of Action)

In its fourth cause of action, plaintiff asserts that defendant is strictly liable for violations of the Building Code, specifically, that defendant failed to "preserve and protect" the adjacent premises from damage caused by its excavation and improvements to its cellar (complaint, ¶¶ 76-79). The Building Code provides that, "[w]henever soil or foundation work occurs, . . . the person who causes such to be made shall, at all times . . . and at his or her own expense, preserve and protect from damage any adjoining structures, including but not limited to footings and foundations" (New York City Building Code [Administrative Code of City of NY tit 28, ch 7] § BC 3309.4). Courts interpreting the predecessor statute to this provision have imposed strict liability on owners and contractors who excavate a property in a manner that damages an adjacent property (*Yenem Corp. v 281 Broadway Holdings*, 18 NY3d 481, 490-491 [2012]). Here, plaintiff has shown that the adjacent premises suffered external and internal damage because of defendant's excavation, as established by plaintiff's architect's affidavit, in which he discusses the cracking of the exterior front and rear façades and "cracking and signs of movement at the stairwell leading to the first floor" (Cicalo aff, ¶ 10). Accordingly, plaintiff's motion for a default judgment on its fourth cause of action, for strict liability, is granted on liability.

VI. Negligence (Fifth Cause of Action)

For its fifth cause of action, plaintiff alleges that defendant's negligence in performing the renovation has damaged it in various ways. Specifically, that defendant violated the New York City Building Code (Administrative Code of City of NY tit 28, ch 7) by failing to: prevent damage to plaintiff's property during the excavation (*id.*, § BC 3309.4), provide adequate notice of the construction, conduct an inspection of the adjacent premises prior to the construction (*id.*, § BC 3309.4.3), monitor the adjacent premises during the excavation (*id.*, § BC 3309.4.4), and maintain the integrity of the shared party wall between the properties (*id.*, §§ BC 3309.4.2; 3309.8; 3309.9). Further, plaintiff alleges, defendant failed to prevent construction debris "from entering and damaging the [a]djacent [p]remises" (complaint, ¶ 90).

To prove its negligence claim, "a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom" (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016] [internal quotation marks and citations omitted]). An adjacent landowner owes the following duty: "As an adjacent land owner, defendant owed [plaintiff] a duty to exercise reasonable care in the maintenance of its property to prevent foreseeable injury that might occur on the adjoining property" (*Associated Mut. Ins. Coop. v 198, LLC*, 78 AD3d 597, 597 [1st Dept 2010] [internal quotation marks and citations omitted). More specifically, violations of the Building Code are, at a minimum, evidence of negligence, and, in the case of the duty to safeguard adjacent properties when

excavating (Administrative Code § BC 3309.4), constitute negligence per se[4] (*Yenem Corp.*, 18 NY3d at 490).

Here, the record reflects that defendant was negligent per se by causing damage to the adjacent premises during the excavation (Cicalo aff, ¶ 10), and by failing to comply with the Building Code, defendant violated its duty of care, as a landowner whose property borders an adjoining structure, to prevent the injuries set forth above (*id.*, ¶¶ 6-10; Kargman aff, ¶¶ 12-21). The damage to the adjacent premises, as set forth in the affidavits presented by plaintiff (Kargman aff, ¶¶ 22-23), were the foreseeable consequence of defendant's negligent construction practices. Accordingly, plaintiff's motion for a default judgment on its fifth cause of action for negligence is granted on liability.

VII. Private Nuisance (Sixth Cause of Action)

In its sixth cause of action for private nuisance, plaintiff alleges that defendant's construction has compromised the waterproofing and structural integrity of the roof and shared party wall of the adjacent premises, littered the adjacent premises with construction debris, encroached upon the adjacent premises, and violated the New York City Mechanical Code by installing exhaust outlets too close to the adjacent premises (complaint, ¶¶ 99-104). All of these actions have "caused and continue to cause a substantial and unreasonable interference with [p]laintiff's right to use and enjoy the [a]djacent premises" (*id.*, ¶ 98).

A common-law claim for a private nuisance is defined as "'(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act'" (*Berenger*, 93 AD3d at 182 [citation omitted]). Here, plaintiff has established a substantial interference with its right to use and enjoy its property, through the above-described encroachments, continuing trespasses, construction debris, damage to the adjacent premises, and risk of further damage to the impaired waterproofing and structural integrity of the roof and shared party wall (Kargman aff, ¶¶ 12-21; Cicalo aff, ¶¶ 6-12). This interference is traceable to defendant's construction and defendant's unreasonable failure to take proper safety measures to ensure the interference did not occur, as set forth above. Accordingly, plaintiff's motion for a default judgment on its sixth cause of action, for private nuisance, is granted on liability.

VIII. Preliminary and Permanent Injunction (Seventh Cause of Action)

In its seventh cause of action, plaintiff seeks under CPLR 6301 a preliminary injunction halting construction at the project premises until defendant complies with the following

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[4] A statutory or regulatory violation that is negligence per se satisfies the elements of duty and breach, and requires only proof of causation and damages (*see Sheehan v City of New York*, 40 NY2d 496, 501 [1976] ["[P]roximate cause is no less essential an element of liability because the negligence charged is premised in part or in whole on a claim that a statute or ordinance, here a traffic regulation, has been violated"]).

conditions: that defendant remove its encroachments above plaintiff's roof and below plaintiff's cellar, provide plaintiff with certain documentation, install permanent waterproofing and protections for the adjacent premises at the points of new construction, and allow plaintiff's professionals to inspect construction that affects the adjacent premises (complaint, ¶ 117). Plaintiff also seeks that this injunction be made permanent.

A court may grant a preliminary injunction "in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action" (CPLR 6301). A court will grant a preliminary injunction "when the party seeking such relief demonstrates a likelihood of ultimate success on the merits, irreparable injury if the preliminary injunction is withheld, and a balance of equities tipping in favor of the moving party" (*1234 Broadway LLC v West Side SRO Law Project, Goddard Riverside Community Ctr.*, 86 AD3d 18, 23 [1st Dept 2011]). A court has the discretion to grant or deny a preliminary injunction (*Gilliland v Acquafredda Enters., LLC*, 92 AD3d 19, 24 [1st Dept 2011]).

Because of defendant's default, plaintiff has established that it is likely to succeed on the merits, as defendant has conceded all factual issues, as set forth above. Further, plaintiff has established the likelihood of irreparable injury if the injunction is withheld, by showing that the structural and waterproofing integrity of the adjacent premises have been compromised, that defendant's workers and construction debris continue to enter on its property without its permission, and that defendant installed exhaust outlets dangerously close to plaintiff's property (Cicalo aff, ¶¶ 7-13). These injuries cannot be made whole solely by money damages, as the possibility of future harm is not "capable of calculation" (*see Chiagkouris v 201 W. 16 Owners Corp.*, 150 AD3d 442 [1st Dept 2017] [internal quotation marks and citations omitted] ["Damages compensable in money and capable of calculation, albeit with some difficulty, are not irreparable"]). Further, the balance of the equities lies in plaintiff's favor, as the injunction will preserve the status quo and prevent further damage to the adjacent premises, while the record does not reflect that defendant will suffer any significant hardship (*see Melvin v Union Coll.*, 195 AD2d 447, 448–49 [2d Dept 1993] ["Further, the respondent has not shown that it will suffer any harm as a result of the appellant continuing her studies during the pendency of this matter"]).

Accordingly, plaintiff's motion for a default judgment on its seventh cause of action for a preliminary injunction is granted. Defendant, its employees, its agents, and its contractors, are hereby enjoined from any further construction work at the project premises pending further hearing before a special referee, to determine what conditions are necessary to lift the injunction, and whether to make said injunction permanent.

Turning to the remaining branches of defendant's cross-motion, defendant's motion to dismiss the third and seventh causes of action for injunctive relief is denied. As defendant defaulted on answering plaintiff's complaint, and defendant's cross-motion to vacate that default has been denied, defendant may not cross-move to dismiss the complaint (*see Conklin v Wilbur*, 26 AD2d 666, 666 [2d Dept 1966] ["[D]efendant's motion to dismiss the second action could not have been granted until defendant first had successfully moved to open his default therein"]).

That branch of defendant's cross-motion under CPLR 6514 to cancel the notice of pendency on the project premises is also denied. CPLR 6501 provides that a notice of pendency "may be filed in any action in a court of the state or of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property." CPLR 6514 (b) provides that "[t]he court, upon motion of any person aggrieved and upon such notice as it may require, may direct any county clerk to cancel a notice of pendency, if the plaintiff has not commenced or prosecuted the action in good faith."

Here, defendant fails to demonstrate that plaintiff commenced this action in bad faith. Further, plaintiff seeks a judgment requiring the removal of parts of defendant's property that encroach on plaintiff's property. As such, this action affects the use of real property (*Claremont E. 12, LLC v 189 Avec Moi LLC*, 21 Misc 3d 1140 [A], *3, 2008 NY Slip Op 52431 [U], *3 [Sup Ct, NY County 2008], citing *Lafayette Forwarding Co., Inc. v Rothbart Garage Operators, Inc.*, 205 AD 247 [1st Dept 1923]).

Accordingly,

Due deliberation having been had, and it appearing to this court that a cause of action exists in favor of the plaintiff and against the defendant and that plaintiff is entitled to a preliminary injunction on the ground that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual, as set forth above, it is hereby,

ORDERED that defendant, its agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of defendant, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of the defendant or otherwise from any and all further construction on the building located at 156 East 62nd Street, New York, NY; and it is further

ORDERED that plaintiff 154 E. 62 LLC's motion for a default judgment is granted with regard to liability; and it is further

ORDERED that a Special Referee shall be designated to hear and report to this court on the issues of money damages for plaintiff's first, second, fourth, fifth, and sixth causes of action; the proper form of relief on plaintiff's third cause of action; and whether the aforesaid preliminary injunction should be extended and made permanent; and it is further

ORDERED that that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another, and counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the rules of that part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320 [a] [the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.]) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; and it is further

ORDERED that any motion to confirm or disaffirm the report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that, except with regard to the preliminary injunction and as set forth below, the issues presented in the instant motion shall be held in abeyance pending submission of the Report of the Special Referee and the determination of this court thereon; and it is further

ORDERED that defendant's cross-motion to vacate its default, to dismiss the third and seventh cause of action, and to lift the notice of pendency, is denied in all respects.

Dated: July 21, 2017

J.S.C.

HON. GERALD LEBOVITS
J.S.C.