Hernandez-Ortiz v 2 Gold, LLC
2017 NY Slip Op 32029(U)
September 27, 2017
Supreme Court, New York County
Docket Number: 158155/2012
Judge: Ellen M. Coin
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63

---x
JOSE HERNANDEZ-ORTIZ and KEVIN SARDELLI,
individually and on behalf of all others similarly situated,

Plaintiffs, Index No. 158155/2012

—against—

2 GOLD, LLC, 201 PEARL, LLC, TF CORNERSTONE, INC.,
GOLD/PEARL PARKING CORP., and IMPERIAL PARKING
SYSTEMS, INC.,

Defendants.
---x

Ellen M. Coin, J.:

Motion sequence numbers 007 and 008 are hereby consolidated for disposition.

This class action seeks to recover damages for the loss and/or diminution in value of personal property allegedly sustained by the tenants of two New York City apartment buildings, 2 Gold Street and 201 Pearl Street (the Buildings) on October 29, 2012. Plaintiff's claims arise from a flood and oil leak at the Buildings, caused by the landfall of Hurricane Sandy.

In motion sequence number 007, defendants 2 Gold, LLC (2 Gold), 201 Pearl, LLC (201 Pearl) and TF Cornerstone, Inc. (Cornerstone) (collectively, defendants) move pursuant to CPLR 3212 for summary judgment dismissing the complaint.

In motion sequence number 008, plaintiffs Jose Hernandez-Ortiz and Kevin Sardelli, individually and on behalf of the class of all other similarly situated tenants of the Buildings (together, plaintiffs), move pursuant to CPLR 3211 (b) to strike portions of defendants' affirmative defenses.

BACKGROUND

The buildings known as 2 Gold Street and 201 Pearl Street (owned by 2 Gold and 201 Pearl respectively) share a common basement, lobby and third floor. As the plot of land upon which the Buildings are situated is sloped, portions of the Buildings are within the Flood Evacuation Zone A area of lower Manhattan (Zone A), an area that was hard hit by Hurricane Sandy. Cornerstone was the managing agent for both properties.[1]

Hurricane Sandy, purported to be the largest hurricane ever recorded in the Atlantic Ocean, measured over 1,000 miles in diameter. It made landfall in the New York area on October 29, 2012, depositing record-setting amounts of water in the area and causing record-setting storm surges and flooding throughout lower Manhattan, especially in the Financial District where the Buildings are located.

In fact, on the evening of October 29, 2012, Hurricane Sandy's floodwaters overtopped the Buildings' flood protections and rushed into their common basement, depositing hundreds of thousands of gallons of water into the basement and lobby and damaging the Buildings' mechanical and electrical systems. Ultimately, water filled the 26-foot deep basement, which caused the Buildings' 20,000 gallon oil tank to detach from the floor and release approximately 10,000 gallons of fuel oil into the floodwaters. The smell of diesel fuel filled the Buildings. After the hurricane, the Buildings were closed for repairs. No tenants were allowed to move back into the Buildings until February 15, 2013.

After plaintiffs returned to the Buildings, some members of the class allegedly found their personal property damaged by exposure to the petroleum fumes. In addition, some found their doors unlocked and personal property missing.

---

[1] The complaint was previously dismissed as against defendants Gold/Pearl Parking Corp. and Imperial Parking Systems, Inc. by order dated July 17, 2014.

INDEX NO. 158155/2012
RECEIVED NYSCEF: 09/27/2017

Zone A and the 100-Year Flood Plain

Zone A is the portion of New York City that has been designated by the Federal Emergency Management Agency (FEMA) as having the highest risk of flooding when a hurricane of any category makes landfall near New York City. The boundaries of Zone A are delineated by the height of the land and its proximity to coastal areas. Specifically, the land in Zone A is within the 100-year flood plain.

According to defendants' structural engineering expert, Dr. Robert Ratay, (and uncontested by plaintiffs) FEMA has defined the 100-year flood plain for New York City as 10 feet above the National Geodetic Vertical Datum of 1929 (NGVD), which is, essentially, what a lay person would describe as 10 feet above sea level.[2] A 100-year flood is defined as a flood of a certain magnitude that has a one percent chance of happening in any given year. Accordingly, the likelihood that flood waters would reach 10 feet NGVD in the New York City area in any given year is one percent.

Pursuant to section 1612 of the New York State Uniform Fire Prevention and Building Code, any building located within the 100-year flood plain must be built above, or be provided flood protection up to a minimum of, the 100-year flood plain (Ratay Aff, ¶ 4, 7). The Buildings are situated on a hill. The top of the hill – the 2 Gold side of the Buildings – is above the 100-year flood plain and outside of Zone A, while the bottom of the hill – the 201 Pearl side of the Buildings – is within the 100-year flood plain and inside Zone A.

---

[2] 10 feet NGVD is the equivalent of 7.25 feet above the Manhattan Borough Datum (MBD), which is also a value used in the New York area. Yet a third value that is the equivalent of 10 feet NGVD is 8.89 feet above the North American Vertical Datum of 1988 (NAVD88). Thus, the 100-year flood plain for New York City is 10 feet NGVD, 7.25 feet MBD and 8.89 feet NAVD88 (Ratay aff, ¶ 6). Ratay has provided a conversion chart for the various different Datum (*id.*). Plaintiffs do not challenge the accuracy of Ratay's conversion values, which the Court adopts.

The parties often discuss the relevant flooding in this action in one or more of these values, interchangeably. For ease of reference and clarity, the Court adopts the NGVD values and will convert all other values to NGVD throughout this decision, where applicable.

The Construction of The Buildings

The construction of the Buildings began in 2003. 2 Gold was completed in 2005, while 201 Pearl was completed in 2009. The Buildings consist of two separate towers that rise from the same base. The Buildings share (1) the lobby on the ground floor, (2) the third-floor common area (pool, clubroom, laundry), and (3) the subsurface areas (parking garage, basement, sub-basement, mechanical rooms).

Frank Vasta, executive vice-president of construction for nonparty TF Cornerstone QW 2 GC, testified that he was the manager of the Buildings during their construction. Vasta explained that, at the time, the New York City Department of Buildings (DOB) required that any portion of a building with a sidewalk level below the 100-year flood plain had to be flood proofed. Vasta noted that portions of 201 Pearl were below this level.

> The elevation of the sidewalk on Pearl Street is around [9.15 feet NGVD], so it is below the hundred year flood plain. Therefore, the [DOB] said we had to put in floodgates as part of the original building design

(Vasta tr at 48).

Accordingly, between 2007 and 2009, flood panels and seals – large water-tight removable panels that fit into pre-cast grooves built into the Buildings – were installed at several locations on the 201 Pearl side of the Buildings, including at the driveway entrance to the garage and at every retail storefront door on Pearl Street and Maiden Lane. The lowest grade of the sidewalk was the driveway to the parking garage, located on Pearl Street.

At his deposition, Vasta was presented with a copy of the DOB flood certificate for 201 Pearl, and confirmed that it required 201 Pearl to be equipped with flood proofing, such as floodgates, at a base elevation of "10 feet NGVD" (*id.* at 58). He also affirmed that, per the

certificate, 201 Pearl was actually equipped with said flood proofing "to an elevation of 12 feet NGVD," or two feet higher than the minimum requirements of the DOB (*id.*).

Vasta explained that floodgates were not installed on the 2 Gold side of the Buildings because that portion of the Buildings is situated at an elevation over a foot higher than the 100-year flood plain (*id.* at 66).

Historical Hurricane Flood Heights

In his affidavit, Ratay provided historical flood heights, which were measured at the Battery in New York City, for past hurricanes. Plaintiffs do not challenge the accuracy of the historical flood heights that Ratay provided. Specifically, Ratay stated, *inter alia*, that in 2011, Hurricane Irene measured at 7.85 feet NGVD, and that in 1960, Hurricane Donna measured at 8.35 NGVD. Notably, prior to Hurricane Sandy, an 1821 hurricane, which measured 9.71 NGVD, was documented as the highest flood height in recorded history.

Hurricane Sandy significantly overtopped the flood heights measured for all other hurricanes on record. Per a Consolidated Edison (Con Ed) report on Hurricane Sandy:

> Sandy's actual storm surge [] of 14.06 feet . . . exceeded all official forecasts, surpassing a reported historical record set in 1821 by nearly three feet

(Ratay aff, ¶ 14). Ratay explained that the value used in the Con Ed report is based on yet another separate Datum, called "mean lower low water," or "MLLW." Ratay states that 14.06 feet MLLW converts to 12.39 feet NGVD. Based on this, according to Ratay, during Hurricane Sandy, the established 100-year flood plain for the New York City area was overtopped by more than two feet.

The Weather Forecasts Prior to Hurricane Sandy

In the days leading up to Hurricane Sandy, the National Weather Service (NWS) and the National Hurricane Center (NHC) issued weather forecasts for the impending hurricane. Defendants first became aware of Hurricane Sandy's potential impact on the New York metropolitan area on Thursday, October 25, 2012, via an email from a building managers' association group, which indicated that "[o]ur region is expected to be affected by coastal flooding . . . storm surge, heavy winds and rain early next week" (plaintiffs' aff in opposition, exhibit Q).

That day, the NWS issued a forecast stating,

> There is an increasing chance that a strong coastal storm will track close to the Tri State Area early next week. . . . Significant impacts to the area could be felt as early as Sunday and last through at least Tuesday. . . . Significant coastal flooding will be possible with this storm

(plaintiffs' aff in opposition, exhibit Y). No specific flood estimates were included in this forecast.

On Friday, October 26, 2012, the NWS issued the following forecast:

> A dangerous coastal storm is expected to track close to the Tri State area early next week. Significant impacts to the area could be felt as early as Sunday and last through at least Tuesday. . . . Significant coastal flooding will be possible with this storm

(*id.,* exhibit Z). Again, no specific flood estimates were included in this forecast.

According to plaintiffs' meteorology expert, Dr. Lee E. Branscome, on Saturday, October 27, 2012, at 11:00 a.m., the NHC issued an advisory, warning that flood waters from

Hurricane Sandy could potentially "cause normally dry areas near the coast to be flooded by rising waters" (Branscome aff, ¶ 29).[3] Specifically, this advisory stated:

> Storm surge . . . The combination of a dangerous storm surge and the tide will cause normally dry areas near the coast to be flooded by rising waters. The water could reach the following depth above ground if the peak surge occurs at the time of high tide.
>
> * * *
>
> Ocean City MD to the CT/RI Border . . . 4 to 8 ft.
>
> * * *
>
> Surge-related flooding depends on the relative timing of the surge and the tidal cycle and can vary greatly over short distances.

According to Branscome, the average of this "4 to 8 ft." measurement, when converted to the values used by the parties in this action, would be 9.35 feet NGVD, which would be "above the elevation of the garage entry, or street level, at the property" (*id.*).

Further, according to Branscome, the NWS issued a coastal flood watch later on October 27, 2012, which predicted that once the hurricane began affecting the area in earnest, the Battery could reach a flood height of 11.11 feet NGVD (*id.*, ¶ 30). This flood height would be well above the garage entry, but still below the 12 feet NGVD height of the floodgates at the garage entry.[4]

The Day of the Hurricane

In advance of Hurricane Sandy's landfall, defendants provided various warnings to the tenants, directed the tenants to secure their terraces and windows, and performed general

---

[3] Though Branscome addresses this document, it is not annexed as an exhibit. It is available on the internet at the following website: *http://www.nhc.noaa.gov/archive/2012/al18/al182012.public.021.shtml?* (accessed July 18, 2017).

[4] It should be noted that while there were many more NWS and NHC reports and warnings from October 28 and 29, 2012, the parties do not annex them. Ratay discusses them briefly, stating that they forecast flooding below the Buildings' protections. Branscome does not address these forecasts.

preparations for the impending storm. These general preparations did not include the purchase or utilization of sand bags.

Derrick Komorowski, superintendent for the Buildings at the time of Hurricane Sandy, testified that he was present at the Buildings on the day of the hurricane, and that in advance of the hurricane's landfall, he installed the flood panels and shut the flood gate. These installations required locking down each of the panels at the storefront doors on the 201 Pearl side of the building and shutting the floodgate at the garage entrance. Then, using either a hand pump or an electric air compressor, he inflated a compression seal around each panel and floodgate. The seal around the edges of the panels, once inflated and pressurized, created a watertight barrier. He also testified that he secured the Buildings' elevators by parking them on the third floor to protect them from any potential floodwater infiltration.

Hurricane Sandy made landfall in the New York City area at around 7:30 p.m. on October 29, 2012. Komorowski testified that shortly after the hurricane made landfall, he first noticed water entering the Buildings' shared garage area, when he saw water running down an underground staircase near a service area located under the Buildings.

On October 29, 2012, at 7:53 p.m., Steven Phillips, Komorowski's direct superior, circulated an email (the Phillips Email), in which he wrote:

> There is almost a foot of water in the basement at [the Buildings]. The water is coming in from various areas including the connection between [the Buildings], ventilation in the garage and around/above the flood gates. There is several feet of water on Pearl Street and water up to the curb on Gold Street. There's already several feet of water in the garage. The flood gates are doing what they can but they can only do so much

(defendants' notice of motion, exhibit W, the Phillips Email). At this time, according to Komorowski, water had not yet overtopped the floodgates. At approximately 8 p.m.,

Komorowski took a video of water flowing down a staircase in the basement and accumulating in the sub cellar. Not long after that, the floodwater overtopped the floodgates completely and rushed into the Buildings' shared garage, depositing hundreds of thousands of gallons of flood water into the garage and basement areas of the Buildings. Water then began to enter the lobby area, rising from the basement and, separately, entering through the 2 Gold lobby doors.

The Aftereffects of Hurricane Sandy on the Buildings

Testimonial evidence indicates that flood water eventually entered and completely filled the Buildings' basement and sub-basement. Approximately 26 feet of water accumulated in those areas. As a result of this accumulation, the Buildings' 20,000-gallon heating oil tank detached from the basement floor and broke apart, releasing approximately 10,000 gallons of oil into the waters contained in the basement areas. The sea water damaged and corroded the Buildings' electronics. Water did not penetrate any of plaintiffs' apartments.

As a result of the damage to the Buildings, defendants shut down the Buildings for repairs, which took approximately four months. During that time, as plaintiffs were not allowed to reside in the Buildings, defendants abated their rent. On February 15, 2013, plaintiffs were allowed to resume their tenancies in the Buildings. However, the rent abatement continued through the end of February 2013.

Expert Affidavits

Affidavit of Robert T. Ratay, Ph.D., P.E. (Defendants' Structural Engineering Expert)

As noted, Dr. Ratay is a structural engineer with a doctorate in structural engineering. Relying on Building Code § 1612, Dr. Ratay stated that the generally accepted engineering practice in New York City is to design and construct buildings to "withstand reasonably foreseeable forces of nature, including weather and flooding, pursuant to the terms of the New

York State and City Building Codes" (defendants' notice of motion, Ratay aff, ¶ 7). He specified,

> With regard to flooding, the engineering and construction standard was to provide surface flood panels to the level of a 100-year flood (elevation 7.25 feet MBD [10 feet NGVD] as defined by the applicable FEMA Flood Insurance Rate Maps). This was the basis of the approval of [2 Gold] without flood panels because its perimeter elevations were above the 100-year flood level. Flood panels were required to be included in the design when [201 Pearl] was approved because its perimeter elevations are partly below the 100-year flood level

(*id.*). As the Buildings were designed to this standard, Ratay concluded that the Buildings were designed to withstand foreseeable levels of flooding.

Ratay also referenced the historical flood data from previous hurricanes. He noted that Hurricane Sandy far surpassed the historical highs. Ratay further asserted that "[v]irtually all of the buildings at the same elevation as [the Buildings] sustained damage to their infrastructure, mechanical systems and electrical service as a consequence of the storm" (*id.*, ¶15). He then opined that the flood protection measures that were required by the Building Code, which the Buildings had complied with, "were never meant to protect buildings against flooding of the magnitude which accompanied Hurricane Sandy" (*id.*). Further, Ratay maintained that "[f]rom an engineering perspective no property owner or manager would, in the exercise of reasonable care, have been able to protect [the Buildings] against the extreme tidal surge which accompanied Hurricane Sandy" (*id.,* ¶ 17), because:

> The exercise of reasonable care does not include planning for flood levels well above the design basis according to applicable building codes. The exercise of reasonable care likewise does not include planning for flood levels never before seen in recorded history

(*id.,* ¶ 23). Ratay concluded, accordingly, that the magnitude of flooding from Hurricane Sandy was unforeseeable.

Next, Ratay stated that the flooding that occurred in the Buildings, prior to the floodgates being overtopped, was caused, in part, by water flooding through "spaces below street level in downtown Manhattan," such as subway tunnels, utility tunnels, drains, sewers and abandoned structures. Ratay stated,

> Those spaces cannot be controlled by the contiguous property owners to whose buildings many of those structures connect. . . . The property owner would have no reliable means to prevent water from entering his building at significant depths below street level, and neither the Building Code nor any other standard requires that he do so. Such unusual and high levels of hydrostatic pressure can cause considerable water movement in subterranean spaces, and result in high rates of water intrusion to adjoining basements

(*id.*, ¶ 16). Ratay further noted that there is no way to effectively test whether attempts to seal off a property from such underground intrusions would be successful, except by creating a substantial flooding event (*id.*, ¶ 19).

Finally, with respect to the use of sandbags, Ratay asserted that they would have been useless under the circumstances, as water entered the Buildings from both subterranean and aboveground sources. He maintained that any barriers that could have been deployed, within the limited time prior to the storm, would have been insufficient and ineffective to prevent the flooding due to the "unprecedented height which the storm tide would reach" (*id.* ¶ 25).

Affidavit of Joseph A. Sage (Plaintiffs' Architectural Expert)

Joseph Sage is an architect with a specialty in waterproofing systems. In 2016, he inspected the Buildings, including the garage area and commercial spaces on the ground floor. Based upon his inspection, Sage opined that the Buildings' flood-proofing was "inadequate as there exists holes and penetration joints which are not sealed" and that "any reasonable standard of care would correct these deficiencies immediately which was not done" (Sage aff, ¶ 6).

Sage explained that the floodgate for the parking lot was improperly installed at a lower elevation than it should have been, as per the Buildings' design drawings. Sage asserted that this mispositioning exposed the floodgate to more pressure than had been estimated in the design drawings. Sage concluded that the fact that the premises began flooding, prior to the water rising above street level, is proof that the Buildings were not properly flood-proofed.

Sage also asserted that defendants' failure to add additional flood-proofing to the "gap" between the Buildings led to at least some water infiltration, and that this was "a deviation from the reasonable standard of care that is expected of an owner of a residential building located in a FEMA flood zone AE, in New York City" (*id.*, ¶ 12).

Relying on the Phillips Email, which referenced water penetration "around" the floodgate, Sage opined that the floodgates effectively failed, leading, in part, to the early entry of the floodwaters into the Buildings. He noted that if defendants had properly maintained the floodgate, by oiling it twice a year, it might not have failed.

Finally, Sage asserted that defendants did not (1) "take action once water entered the street on land in NYC (before reaching the building)," (2) "flood proof the oil tank room . . . [and] rooms housing critical equipment," (3) "shut the doors linking the garage to 2 Gold Street and to the sub-cellar" or (4) "call emergency services offered by defendant's insurance company . . . so it could deploy a work crew to mitigate" the flooding (*id.*, ¶ 23-25).

Affidavit of Lee E. Branscome, Ph.D, C.C.M. (Plaintiffs' Meteorologist Expert)

Branscome, a certified consultant of meteorology and a doctor of meteorology, maintained:

> The planning and preparation for the impacts, including flooding, of a hurricane like Sandy should not be based on prior experience alone. It must also be based on long-term susceptibility to such

> impacts and the forecasts that advise of such impacts from an approaching storm

(Branscome aff, ¶ 7).

Branscome stated that the low-lying areas of Manhattan are at a high risk of flooding from hurricanes, and that "[h]istorically, hurricanes . . . have made landfall along the New York . . . coastline[], causing storm surges up to 13 feet in the New York City area" (Branscome aff, ¶ 10).[5] Citing a 1995 Army Corps of Engineers study, Branscome maintained that the low-lying areas of New York City, such as that where the Buildings are located, are "susceptible to storm surge flooding" and that "it should have been no surprise that a very large and powerful storm like Sandy was capable of generating storm surge flooding in Lower Manhattan, including at the [Buildings]" (*id.*, ¶ 11). Branscome noted that the NWS and NHC forecasts establish that flooding in Zone A was foreseeable as early as October 25, 2012.

Ratay Reply Affidavit

Ratay opined that Sage failed to detail an alternate and accepted standard of care with respect to flood prevention tolerances, requiring flood protection in excess of the 100-year flood level. Ratay further asserted that even if every alleged omission Sage noted had been performed by defendants, such as utilizing sandbags at the "gap" between the Buildings, closing the basement doors, or calling defendants' insurer, the flood waters still would have entered the Buildings, as they rose "more than two feet above the level addressed by the prevailing standards" (Ratay reply aff, ¶ 6).

Ratay also noted that Branscome's conclusion, that the potential for flooding at the Buildings was foreseeable, is meritless, "because what was not foreseeable was the level of

---

[5] Branscome does not identify under which datum the 13 foot height was measured.

flooding far above historical levels, not the fact of storm driven coastal flooding which was predicted by the [NWS]" (*id.*, ¶ 11).

DISCUSSION

Preliminary Procedural Issues

Plaintiffs argue that defendants' summary judgment motion is untimely, as it was filed two days after the deadline set by the court (*Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 727 [2004] [absent good cause, summary judgment motion even one day late shall be denied as untimely]). Based on this delay, plaintiffs demand that the motion be denied.

"Since the Court of Appeals decision in *Brill v City of New York* (2 NY3d 648 [2004]), a party moving for summary judgment outside the statutory (CPLR 3212 [a]) or court-imposed time limit must show good cause for the delay" (*Pena v Women's Outreach Network, Inc.*, 35 AD3d 104, 108 [1st Dept 2006]). Good cause for a late summary judgment motion can be established where a discovery request relevant to the motion was outstanding until shortly before the motion was made *(e.g., Richardson v JAL Diversified Mgmt.*, 73 Ad3d 1012, 1012-13 [2nd Dept 2010]; *Kunz v Gleeson*, 9 AD3d 480, 481 [2nd Dept 2004]), where the movant was awaiting the receipt of a deposition transcript relevant to the motion (*Burnell v Huneau*, 1 AD3d 758, 759-60 [2nd Dept 2003]) or encountered a delay in securing a requisite expert opinion (*Perkins v AAA Cleaning*, 30 AD3d 790, 791 [3rd Dept 2006]).

Here, defendants have offered a reasonable explanation sufficient to establish good cause for their delay, i.e., that the delay was due to the difficulty in obtaining an executed copy of their expert's affidavit, as he had undergone knee surgery and was subsequently out of the country. This made contact with him difficult. Separately, a prior delay on plaintiff's part in producing a

copy of the deposition transcript of Sofia Estevez in admissible form also unnecessarily delayed defendants' filing of the motion (*see Pena supra.*; *see also Perkins*, 30 AD3d at 791). Once the executed expert affidavit was received, the motion was filed within the next two days. Thus, the Court finds good cause for the subject delay.

Next, plaintiffs argue that the Court should strike defendants' supporting motion papers, because the papers submitted exceed the page limit established in the court's part rules. However, the Court's rules do not indicate that the penalty for submitting overlong motion papers is to have the offending papers entirely stricken from the record, and the court declines to do so.

Plaintiffs also argue that the Court should not consider the affidavits of Antonio Rega and Mitchell Berg, respectively defendants' metadata expert and building management expert, because defendants did not disclose these experts prior to filing the instant motion. However, pursuant to CPLR 3212 (b), "[w]here an expert affidavit is submitted in support of, or in opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to [CPLR 3101 (d) (1) (i)] was not furnished prior to the submission of the affidavit." For the same reason, defendants' objection to plaintiffs' late disclosure of their meteorology expert, Dr. Lee E. Branscome, is unavailing.

Finally, plaintiffs filed a surreply in further support of their opposition to defendants' summary judgment motion. The surreply seeks to enter into evidence a notice to admit, which contains over 140 proposed admissions. Plaintiffs argue that defendants have essentially admitted each and every proposed admission because defendants' principals did not personally sign the response to the notice to admit. However, defendants' response, consisting primarily of tailored objections to the proposed admissions, was signed by defense counsel.

In addition, the notice to admit was prepared after the filing of defendants' motion, clearly in contemplation of said motion. The notice improperly seeks admissions of material issues of fact, including, *inter alia*, the amount of the alleged damages in this matter. It has long been understood that "[a] notice to admit pursuant to CPLR 3123 (a) is to be used only for disposing of uncontroverted questions of fact or those that are easily provable, not for the purpose of compelling admission of fundamental and material issues or ultimate facts" (*Meadowbrook-Richman, Inc. v Cicchiello*, 273 AD2d 6, 6 [1st Dept 2000]).

Where, as here, a notice to admit seeks admissions of material issues or ultimate facts, a defendant has "no obligation to furnish admissions in response to plaintiff's notice" (*id.*). Thus, an attorney's objection has been deemed to be a sufficient response to such a notice to admit (*Scavuzzo v City of New York*, 47 AD3d 793, 795 [2d Dept 2008]). Accordingly, defendants have not failed to respond to the notice to admit, and the purported admissions therein have not been admitted.

Objection to Plaintiffs' Motion to Strike Affirmative Defenses

Defendants argue that plaintiffs' motion to strike their affirmative defenses is, in actuality, a motion for summary judgment, and, as such, is untimely and should be denied. However, plaintiffs' motion is made pursuant to CPLR 3211 (b) to dismiss the affirmative defenses on the ground that they have no merit. As such a motion may be made at any time, it was not untimely (*Greco v Christoffersen*, 70 AD3d 769, 771 [2d Dept 2010]).

Defendants' Motion For Summary Judgment Dismissing The Complaint (Motion Sequence No. 007)

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial

of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must "'assemble, lay bare, and reveal his proofs in order to show his defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions'" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Plaintiffs' complaint alleges four causes of action, sounding in (1) negligence prior to Hurricane Sandy, (2) negligence after Hurricane Sandy, (3) breach of the implied warranty of habitability, and (4) gross negligence. The negligence claims are premised on several theories, including negligent planning and preparation, negligent maintenance, negligent design and construction, and the failure to mitigate damages. Plaintiffs seek damages for loss and diminution in value of their personal property, loss of income, costs of relocation, loss of business opportunities and business interruption, evacuation expenses, and the cost of maintaining monthly utilities for months without use. Defendants answered and interposed fourteen affirmative defenses and three "set-offs and counterclaim[s]."

Defendants move for summary judgment dismissing the complaint against them in its entirety.

The Negligence/Gross Negligence Claims

"In order to prevail on a 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. In the absence of a duty, as a matter of law, there can be no liability" *Pasternack v.*

Laboratory Corp. of Am. Holdings, 27 NY3d 817, 825 [2016] [citations and internal quotation marks omitted]; *Rodriguez v Budget Rent-A-Car Sys., Inc.*, 44 AD3d 216, 221 [1st Dept 2007]).

"The existence and scope of a duty of care is a question of law for the courts entailing the consideration of relevant policy factors" (*Church v Callanan Indus.*, 99 NY2d 104, 110-111 [2002]). "While a landlord has a duty to secure a building and make it reasonably safe, that duty is not unlimited. The existence and scope of the duty is, first, a legal question for determination by the courts. In making that determination . . . the focus is on the foreseeability of the risk or hazard" (*Michael Kane Color Litho v Willowtex, Inc.*, 305 AD2d 646, 646 [2d Dept 2003]; *Palsgraf v Long Is. R. R. Co.*, 248 NY 339, 344 [1928] ["The risk reasonably to be perceived defines the duty to be obeyed"]).

Ultimately, at the root of the claims sounding in negligence is the question of whether the record-breaking levels of flood waters that accumulated and, ultimately, entered the Buildings were foreseeable, so as to give rise to a duty to secure the Buildings from such a hazard.

> "Foreseeability of risk is an essential element of a fault-based negligence cause of action because the community deems a person at fault only when the injury-producing occurrence is one that could have been anticipated. Further, although virtually every untoward consequence can theoretically be foreseen 'with the wisdom born of the event,' the law draws a line between remote possibilities and those that are reasonably foreseeable because '[n]o person can be expected to guard against harm from events which are . . . so unlikely to occur that the risk . . . would commonly be disregarded'"

(*Di Ponzio v Riordan*, 89 NY2d 578, 583 [1997] [internal citations omitted]).

In making a determination regarding foreseeability, "the courts look to whether the relationship of the parties is such as to give rise to a duty of care, whether the plaintiff was within the zone of foreseeable harm, and whether the accident was within the reasonably foreseeable risks" (*id.*). Therefore, "the risk of injury as a result of defendant's conduct must not be merely

possible, it must be natural or probable" (*Pinero v Rite Aid of N.Y.*, 294 AD2d 251, 252 [1st Dept 2002]; *affd* 99 NY2d 541 [2002]). Accordingly, "[q]uestions of foreseeability are for the court to determine as a matter of law when but a single inference can be drawn from the undisputed facts" (*Pepic v Joco Realty*, 216 AD2d 95, 96 [1st Dept 1995] [internal quotation marks and citation omitted]).

Here, defendants argue that they are entitled to summary judgment dismissing the negligence and gross negligence claims against them, because the unprecedented level of flooding sustained during Hurricane Sandy was not reasonably foreseeable. Relying on the assertions in Ratay's affidavit, defendants argue that the Buildings were built in accordance with the Building Code, with flood protections sufficient to weather a 100-year flood, and that it was not foreseeable that further protections were necessary, because it was not foreseeable that Hurricane Sandy would deposit flood waters over two feet in excess of the 100-year flood level.

As Ratay proffers, at the time of Hurricane Sandy the standard of care for flood prevention in Zone A structures located in Manhattan, such as the Buildings, was to equip such structures with flood protection equipment, such as floodgates and flood panels, sufficient to protect against a 100-year flood – or a flood up to 10 feet NGVD. This standard was the same at the time that the Buildings were constructed. Vasta, who oversaw the construction of the Buildings, testified that those portions of the Buildings that were required to have flood protection possessed such protection to a height of 12 feet NGVD.

According to Ratay, the flood waters resulting from Hurricane Sandy reached a record high peak of 12.39 feet NGVD, which surpassed the previous record high of 9.65 feet NGVD set by a hurricane that struck the New York City area in 1821, and surpassed the flooding forecasts

predicted in the days prior to landfall. In fact, the flood overtopped the 12 foot NGVD flood protection of the Buildings.

Based on the above information, defendants have established, prima facie, that they could not reasonably have foreseen the subject flooding of the Buildings (*see Pinero*, 294 AD2d at 252).

In opposition to defendants' motion, plaintiffs, relying on the affidavits of Branscome and Sage, argue that the flood level experienced during Hurricane Sandy was foreseeable, in light of weather reports from October 27, 2012 – two days prior to the hurricane's landfall – which warned that flooding could be severe. Plaintiffs further allege that defendants were aware that the Buildings were in the low-lying Zone A, at a high risk of flooding, but failed to provide additional protections, such as sandbags, to adequately prepare for such flooding.

However, plaintiffs' argument, that the flood was foreseeable, ultimately fails. As discussed above, Branscome asserts that the foreseeability of flooding at a specific location must be based on (1) "long-term susceptibility" to flooding and on (2) "the forecasts that advise of such impacts from an approaching storm" (Branscome aff., ¶ 7).

Turning first to long-term susceptibility, while it is accepted that lower Manhattan is susceptible to flooding, FEMA addressed this risk through the establishment of the 100-year flood plain, as did the Building Code, which requires that all buildings built within the 100-year flood plain must be protected at least to that level. In other words, the mere fact that lower Manhattan is susceptible to any form of flooding is not the relevant inquiry. Rather, the analysis must be whether it was foreseeable that lower Manhattan was susceptible to flooding of the magnitude that occurred during Hurricane Sandy, which was far in excess of the 100-year flood standard. While plaintiffs argue that it was foreseeable that there would be some amount of

flooding, they have not provided any tangible evidence that it was foreseeable that the flooding would rise to a level that would overtop the Buildings' protections.

Regarding forecasts, Branscome maintains that the NWS forecasts and NHC reports from October 25, 2012 through October 27, 2012 (two to four days prior to landfall) effectively establish the short-term foreseeability of the severity of the flooding. As Branscome noted, various reports and forecasts indicated potential flooding that could rise as high as 11.11 feet NGVD, projections significantly higher than the elevation of the Pearl Street side of the Buildings. However, importantly, these projections were below the 12 feet NGVD that the Buildings were designed to withstand.

Accordingly, plaintiffs have not sufficiently refuted defendants' contention that the flooding at the Buildings during Hurricane Sandy was unforeseeable. Thus, defendants are entitled to dismissal of that portion of the negligence/gross negligence claims predicated on alleged failure to properly protect the Buildings from flooding.

Negligent Failure to Maintain and Prepare The Buildings For The Flood

Plaintiffs' negligence and gross negligence claims also include allegations that defendants failed to implement an emergency plan and failed to properly maintain or prepare the Buildings for flooding. Specifically, plaintiffs assert that the defendants failed to provide sandbags to protect the seismic joint, or "gap" between the buildings, or to secure the 2 Gold lobby entrance. However, it is noted that these areas of the Buildings were located well above the 100-year flood plain.

As it was unforeseeable that the floodwater would surmount the seismic joint, the floodgate or the 2 Gold lobby entrance, defendants are entitled to dismissal of that portion of the

negligence/gross negligence claims against them predicated on their alleged failure to properly maintain and/or prepare the Buildings for flooding.

The court has considered plaintiffs' remaining arguments with respect to this issue, including plaintiffs' argument that the floodgate was not properly oiled, and finds them to be without merit.

Negligent Design and Construction

Plaintiffs claim that regardless of the ultimate flood height, negligent design and construction of the Buildings caused them to flood. However, importantly, none of the defendants in this action built or designed the Buildings. Rather, defendants are the owners and managing agent of the Buildings. With respect to such entities, it has been held that "[i]f a building was constructed in compliance with code specifications and industry standards applicable at the time, the owner is under no legal duty to modify the building thereafter" (*Hotaling v City of NY*, 55 AD3d 396, 397 [1st Dept 2008]; *affd* 12 NY3d 862 [2009]).

Defendants sufficiently established that the Buildings were code compliant and properly flood proofed. Ratay maintained that the Buildings were designed and constructed in compliance with the Building Code with respect to flood protection, and that they were built pursuant to architectural plans approved by the DOB. Vasta's testimony confirmed Ratay's assertions. Although plaintiffs rely on Sage's assertion that "[a]ny reasonable standard level of care could correct" certain purported deficiencies, they fail to identify any data or industry standards to substantiate his assertion, and, thus, fail to raise a question of fact (*see e.g. Jones v City of NY,* 32 AD3d 706, 707 [1st Dept 2006). Accordingly, as plaintiffs have failed to raise a question of fact with respect to whether the Buildings were in compliance with the Building Code, or other applicable industry standard, defendants are entitled to dismissal of that portion of

the negligence/gross negligence claims that are predicated on the alleged negligent design and construction of the Buildings.

Negligent Failure to Mitigate Damages After Hurricane Sandy

Plaintiffs claim that defendants were negligent in failing to mitigate damages to the Buildings after the flooding. However, the record shows that defendants remedied the damage to the Buildings as quickly as possible, given the circumstances. The work included draining the Buildings and removing and replacing the damaged electronics in the basement. In fact, defendants reopened the Buildings to the tenants as soon as they received the authority to do so from DOB.

Plaintiffs argue that their claim remains valid, because defendants allowed tenants to move back into the Buildings even though there was a report indicating that bacteria had been detected in an air test of the Buildings. However, plaintiffs do not argue or provide evidence that any member of the class fell ill from such bacteria.

The Court has considered plaintiffs' remaining arguments with respect to this issue and finds them to be without merit. Thus, defendants are entitled to dismissal of that portion of the negligence and gross negligence claims that are predicated on the failure to mitigate damages.

As each aspect of plaintiffs' negligence and gross negligence claims against defendants have been dismissed, it is not necessary for the court to analyze those portions of this motion addressed to specific damages.

The Warranty of Habitability Claim

Defendants also move for summary judgment dismissing plaintiffs' claim for breach of the warranty of habitability. Real Property Law § 235-b provides, in pertinent part,

> "1. In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to

> covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety."

In support of their motion, defendants argue that even assuming *arguendo* that the warranty of habitability was breached, plaintiffs suffered no compensable damages resulting from such breach. Defendants fully abated the tenants' rent during the four months that the Buildings were uninhabitable, and abated rent for an additional two weeks after the tenants returned to the Buildings (*Walls v Prestige Mgmt., Inc.*, 73 AD3d 636, 636 [1st Dept 2010] [the measure of damages for breach of the warranty of habitability "is limited to rent abatement"]; citing *Park W. Mgt. Corp. v Mitchell*, 47 NY2d 316, 329 [1979] [*cert denied* 444 U.S. 992 [1979] ["the proper measure of damages for breach of the warranty is the difference between the fair market value of the premises if they had been as warranted, as measured by the rent reserved under the lease, and the value of the premises during the period of the breach"]).

Plaintiffs argue that defendants did not abate rent for the period between October 28, 2012 through October 31 of 2012, which consists of the day before, the day of, and the two days after the landfall of the hurricane. However, as plaintiffs' rent was abated for an additional two weeks after they returned to the Buildings, this amount exceeds rent for the four days at issue here.

Thus, defendants are entitled to summary judgment dismissing the breach of the warranty of habitability claim against them.

Plaintiffs' Motion To Strike Affirmative Defenses (Motion Sequence No. 008)

Plaintiffs move to strike 12 of defendants' 14 affirmative defenses. Eleven of the 12 affirmative defenses deal with the mitigation of damages. As the court has determined that

defendants are entitled to summary judgment dismissing the complaint as against them, the issues involving mitigation of damages need not be reached, and these affirmative defenses are moot. The final affirmative defense is a liability defense that was not relied upon in the above determination. Accordingly, it is not necessary to determine whether this defense is applicable.

Thus, plaintiffs' motion to strike defendants affirmative defenses is denied.

CONCLUSION AND ORDER

The court has considered the parties' remaining arguments and finds them to be without merit. The court notes that defendants three "set-off and counterclaim[s]" remain unresolved.

For the foregoing reasons, it is hereby

ORDERED that the motion of defendants 2 Gold, LLC, 201 Pearl, LLC and TF Cornerstone, Inc. (motion sequence number 007), pursuant to CPLR 3212, for summary judgment dismissing the complaint is granted, with costs and disbursements to defendants, as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly in favor of 2 Gold, LLC, 201 Pearl, LLC and TF Cornerstone, Inc.; and it is further

ORDERED that plaintiffs' motion (motion sequence number 008), pursuant to CPLR CPLR 3211 (b), to strike portions of defendants' affirmative defenses is denied; and it is further

ORDERED that the remaining counterclaims are severed and dismissed as moot, and the Clerk of Court shall enter judgment accordingly.

Dated: September 27, 2017

ENTER:

Ellen M. Coin, A.J.S.C.