SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 43

TIMOTHY LLOYD MAH and JAMES M. CARTER III, and CRYSTAL CASH,

Plaintiffs,

- against -

40-44 WEST 120th STREET ASSOCIATES, LLC, WARBURG REALTY PARTNERSHIP LTD., CHARLIE LEWIS JR., ALICIA CORPENING, SHUPACK & HARDY, LLP, JEFFREY S. SHUPACK, and SHERYL D. JASSEN,

Defendants.

Index No.: 650927/2016
Motion Sequence No.: 004, 005, 006

DECISION/ORDER

ROBERT R. REED, J.:

Motion sequence numbers 004, 005, and 006 are consolidated for disposition and resolved as follows:

In this action, plaintiffs seek damages against the sponsor, the sponsor's exclusive listing agents, and the attorneys who represented plaintiffs in their purchases of apartments Penthouse A (PHA) and Penthouse D (PHD) in the Park Place Condominium in Manhattan. Plaintiffs Timothy Lloyd Mah and James M. Carter III purchased PHA around September 5, 2012, and plaintiff Crystal Cash purchased PHD around September 7, 2012. The seller of both apartments was defendant 40-44 West 120th Street Associates, LLC (the Sponsor). Defendant Warburg Realty Partnership Ltd. (Warburg) was the exclusive broker for the Sponsor, and defendants Charlie Lewis Jr. and Alicia Corpening worked for Warburg during the pertinent period (collectively, the

Warburg defendants). Defendant Sheryl Jassen was the attorney for Mah and Carter in their transaction. Defendants Jeff Shupack and his law firm Shupack & Hardy (collectively, the Shupack defendants) represented Cash in her transaction.

The Sponsor offered to undertake a gut renovation of the apartments or to sell them to the purchasers in "as is" condition. Mah and Carter selected the first option, while Cash selected the second. Both Purchase Agreements contained the following clause: "This Purchase Agreement supercedes any and all understandings and agreements between the parties and constitutes the entire agreement between them and no oral representations or statements shall be considered a part hereof" (NYSCEF Doc. No. 94 [Mah-Carter Purchase Agreement] ¶ 23; NYSCEF Doc. No. 95 [Cash Purchase Agreement] ¶ 23). However, both contracts also provided, in riders, that the Sponsor would "construct a private, non-contiguous roof deck[1] as part of the renovations as further described in the 4th Amendment to the Offering Plan" (NYSCEF Doc. No. 94 [Mah-Carter Purchase Agreement], *18 ¶ 4; NYSCEF Doc. No. 95 [Cash Purchase Agreement], *15 ¶ 2).

Paragraph 8 (c) of the Fourth Amendment to Offering Plan of Condominium Ownership of Premises Known as Park Place Condominium (the Fourth Amendment) states that "Sponsor shall have the right to renovate and/or decorate and perform any construction work within or to any Unit owned by it, including the installation of roof [decks] to be used as Limited Common Elements for PHA and PHD" (NYSCEF Doc. No. 96 [Fourth Amendment]).[2] The Sponsor's rights with respect to the roof were subject to its duty "to comply with all appropriate laws and regulations of governmental agencies and the obligation not to prevent or unreasonably interfere with the use of the Units for their permitted purposes" (*id.*). Further, this provision states that the

[1] The parties refer to the "roof terrace" and "roof deck" interchangeably, including in their contracts. The court uses the phrase "roof deck" for consistency as the parties use it most often.
[2] This provision replaced sub-paragraph (g) on page E-15 of the Offering Plan.

owners of PHA and PHD would have an easement which allowed them to use the roof deck (*id.*). Moreover, the deeds for PHA and PHD purport to convey the roof deck to the purchasers (NYSCEF Doc. No. 1 [Complaint] ¶¶ 28-29).

It is undisputed that neither the offering plan nor the purchase agreements contained descriptions of the proposed deck or stated that there would be electricity and running water. Plaintiffs contend that Lewis orally represented that the roof deck would have electricity and running water (*see id.*, p 18 lines 12-22; NYSCEF Doc. No. 98 [Carter Dep excerpt] at 22, lines 4-14; NYSCEF Doc. No. 99 [Cash Dep excerpt] at 15, lines 6-14). The parties also agree that plaintiffs were not satisfied with the deck that the Sponsor provided, that plaintiffs undertook to make additional renovations, and that in September 2014 the New York City Department of Buildings (the DOB) issued a stop work order to plaintiffs. When plaintiffs sought approval of their plans for the roof deck, the DOB denied the application (NYSCEF Doc. No. 1 [Complaint] ¶¶ 31-32). Plaintiffs assert that this was because any use of the roof would further overbuild the usable space for the building, in violation of Zoning Regulation ZR 54-31 (*see id.* ¶ 48). Therefore, they contend, the Sponsor improperly sold them access to the roof deck. Plaintiffs sue the Sponsor and the Warburg defendants based on breach of contract and fraud; these are the first five causes of action. In addition, in the sixth and seventh causes of action, plaintiffs sue their respective lawyers for professional malpractice because they allegedly did not review the pertinent certificates of occupancy (COs) or advise their respective clients that their apartments could not legally include a roof deck.

Defendants answered the complaint, denying that they were liable on any of the causes of action. Subsequently, the parties completed discovery. Plaintiffs filed the note of issue on September 20, 2018. All defendants have moved for summary judgment dismissing the claims

against them. The court heard oral argument on May 2, 2019 and, for the reasons below, grants motion sequence 004 to the extent of dismissing the fraud claims and denies the other motions in their entirety.

A motion for summary judgment will be granted only where there are no triable issues of material fact (*see Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25 [2019]). The court considers the facts in the light that is most favorable to the nonmovants, and it draws any reasonable inferences in their favor (*Maheras v Ayaz Awan*, 151 AD3d 643, 645 [1st Dept 2017]). "[T]he moving party must set forth evidence that there is no factual issue" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]). Once the movant has established its *prima facie* right to summary judgment, the burden shifts to the opposing party to produce admissible evidentiary proof "sufficient to require a trial of material questions of fact" (*Prevost v One City Block LLC*, 155 AD3d 531, 533 [1st Dept 2017] [internal quotation marks and citation omitted]). The court does not assess the credibility of the evidence, as "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions" (*Forrest*, 3 NY3d at 315 [internal quotation marks and citation omitted]).

In motion sequence number 004, the Sponsor argues that the first cause of action, for breach of contract, must be dismissed. It points out that "the Purchase Agreements with the Sponsor contained merger clauses which state that the Purchase Agreements constitute the entire agreement between the Plaintiffs and the Sponsor" (NYSCEF Doc. No. 91 [Penn Aff in Support] ¶ 27; *see Board of Mgrs. of the Chelsea 19 Condominium v Chelsea 19 Assoc.*, 73 AD3d 581, 581 [1st Dept 2010] [*Chelsea 19*]). Therefore, the Sponsor contends, the statements or guarantees they allegedly made to the purchasers about the roof deck are not actionable. This argument lacks merit, however, because it ignores the statement in the riders to the agreements that the Sponsor would provide

PHA and PHD with a roof deck (NYSCEF Doc. No. 94 [Purchase Agreement for PHA], Rider ¶ 4; NYSCEF Doc. No. 95 [Purchase Agreement for PHD], *15 ¶ 2).

The Sponsor furthers argue that because the contracts did not precisely describe the roof deck, the simple decks that it provided satisfied its contractual obligations to plaintiffs. This argument fails because it misconstrues the nature of the breach of contract claim. At oral argument, the court explained that plaintiffs' argument is not that the roof deck was inadequate but "that the roof deck as initially presented was not lawful" (NYSCEF Doc. No. 206 [Transcript] at 9 lines 19-20). Moreover, plaintiffs support this contention with an expert affidavit (NYSCEF Doc. No. 165). Thus, plaintiffs' challenge is to the purported conveyance of the roof deck, and the alleged oral promise to convey a deck with electricity and running water is irrelevant to the breach of contract claim.[3] Furthermore, like the Purchase Agreement, the Offering Plan, including the Fourth Amendment and other amendments, comprise "a contract between the sponsor and the unit purchasers" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 285 AD2d 244, 247 [1st Dept 2001], *affd insofar as appealed from* 98 NY2d 144 [2002]). Thus, plaintiffs' arguments relating to the breach of both agreements are valid.

Next, movants argue that plaintiffs cannot establish their causes of action for fraud against the Sponsor because they are duplicative of plaintiffs' breach of contract claims. Where the alleged fraud relates to a misrepresentation in or collateral to the contract, the fraud claim must be dismissed on this basis (*Board of Mgrs. of Loft Space Condominium v SDS Leonard, LLC*, 142 AD3d 881, 882 [1st Dept 2016] [citing *Chelsea 19*, 73 AD3d at 581]). Courts also consider whether the only damages caused by the alleged fraud are those caused by the contractual breach (*see Sasson v CDx Diagnostics, Inc.*, 172 AD3d 617, 718-619 [1st Dept 2019]; *Cronos Group Ltd.*

[3] Plaintiffs do suggest that this is relevant to their asserted damages.

v XComIP, LLC, 156 AD3d 54, 62-63 [1st Dept 2017]). A distinct claim for fraud exists only where the breach of duty is "separate from or in addition to the contract duty" (*Wyle Inc. v ITT Corp.*, 130 AD3d 438, 439 [1st Dept 2015]).

After careful consideration, the court determines that the fraud claims against the Sponsor, which constitute both second causes of action,[4] are duplicative of the breach of contract claims and must be dismissed. These causes of action assert that the Sponsor misrepresented the legal status of the roof deck in the Purchase Agreements and marketing materials for PHA and PHD in order to induce plaintiffs to sign their respective contracts (NYSCEF Doc. No. 1 [Complaint] ¶¶ 45-60). As the false or misleading statements either are related to the performance of the contracts or induced plaintiffs to sign the contracts, they are duplicative (*see Fairway Prime Estate Mgt., LLC v First Am. Intl. Bank*, 99 AD3d 554, 557 [1st Dept 2012]). Plaintiffs underscore this fact in their opposition papers when they argue that the roof deck is what enticed Mah and Carter to purchase PHA, and that Cash bought PHD because of the roof deck (NYSCEF Doc. No. 161 [Resko Aff in Opp] ¶¶ 20-21 [citing deposition transcripts]).

Among other cases, *Iken v Bohemian Brethren Presbyt. Church* (162 AD3d 594 [1st Dept 2018]) is instructive. In *Iken*, plaintiffs leased a space which they intended to use as a preschool. Plaintiffs alleged that, among other things, the landlord breached the lease by refusing to clear building code violations – which, in turn, prevented plaintiffs from obtaining the Letter of No Objection which they needed in order to run the preschool, and by failing to install an adequate fire alarm system (*id.* at 594). In addition, plaintiff alleged fraudulent inducement. The First Department affirmed the dismissal of the fraud claims concerning promises to provide "assistance

[4] There are two second causes of action, one on behalf of PHA for Mah and Carter, and the other on behalf of PHD for Cash.

operating the preschool, the working fire alarm, and use of the stroller area, area near the kitchen, and upstairs gym" because they "directly related to a specific provision of the contract [and were] not collateral to the lease" (*id.* at 595 [internal quotation marks and citations omitted]). The Court reached a different conclusion regarding the alleged material misrepresentations that plaintiffs only needed the 2004 "letter of no objection" to gain approval for the preschool, and that homeless individuals who resided on the property were there legally because "[p]laintiffs properly pled that, as a result of these statements, which plaintiffs allege were made with the intention to deceive them, they signed the lease and developed the property" (*id.*). In the case at hand, the Sponsor's obligations regarding the construction of the roof deck and their representations that plaintiffs' apartments included the deck are part of the contracts or appurtenant to it. There are no alleged misrepresentations here that are as distinct from the agreement as those sustained in *Iken*.

The two third causes of action[5] assert fraud against the three Warburg defendants. These claims assert that the Warburg defendants' marketing materials and the information on the Warburg website misrepresented that the two apartments had usable outdoor space, and that the defendants made these assertions to induce plaintiffs to enter into their respective Purchase Agreements (NYSCEF Doc. No. 1 [Complaint] ¶¶ 68-80). To prevail,

> plaintiffs must demonstrate that (1) the defendant[s] made material representations that were false, (2) the defendant[s] knew the representations were false and made them with the intent to deceive the plaintiff[s], (3) the plaintiff[s] justifiably relied on the defendant[s'] representations, and (4) the plaintiff[s were] injured as a result of the defendant[s'] representations

(*Heaven v McGowan*, 40 AD3d 583, 584-585 [2d Dept 2007]). Movants bear the burden of showing there is no factual basis for these claims.

[5] There are two third causes of action, one for Mah and Carter, and the other for Cash.

Movants argue that the merger clause in the Purchase Agreements bars the fraud claims against Warburg. This argument lacks merit for several reasons. Movants' contention that the Warburg defendants' statements that the roof deck merged into the contract fails because the merger clause only applies to the parties to the contract (*see* (NYSCEF Doc. No. 94 [Mah-Carter Purchase Agreement] ¶ 23; NYSCEF Doc. No. 95 [Cash Purchase Agreement] ¶ 23). Even if the merger clause were somehow applicable, the merger language (*see supra*, p 2) refers broadly to the provisions of the agreements and does not specifically refer to the roof deck or to the Sponsor's renovations. According to settled precedent, a general merger clause usually is "insufficient to bar parol evidence of a fraudulent misrepresentation" (*Hobart v Schuler*, 55 NY2d 1023, 1024 [1982]; *see Remediation Capital Funding LLC v Noto*, 147 AD3d 469, 471 [1st Dept 2017] [citing *Hobart*]).

Movants also argue there is no factual basis for the fraud claims against the Warburg defendants. However, they do not explain their position that the Warburg defendants are not liable for fraud because they were agents for the Sponsor, and they do not provide any evidence regarding the relationship between the Warburg defendants and the Sponsor. Similarly, they do not amplify or present evidence supporting their conclusory assertion that the Warburg defendants did not deliberately misrepresent any facts about the roof deck. The fact that Carter stated that he did not know whether anyone associated with the Sponsor had deliberately misled him goes to credibility, which is a jury question (*see Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 48 [2015]). Therefore, movants have not satisfied their burden of proof (*see Forrest*, 3 NY3d at 315) or shifted that burden to plaintiffs (*see Prevost*, 155 AD3d at 533).

In motion sequence number 005, Jassen, the attorney for Mah and Carter, moves for summary judgment dismissing the malpractice claim against her. Initially, the court notes that her

arguments relating to the adequacy of the roof deck and to plaintiffs' decision to renovate it are not relevant to the allegations against her. Instead, Mah and Carter claim that the roof deck in any form was illegal and that Jassen failed to discover and inform them of this.

A legal malpractice claim requires a showing that the attorney was negligent, that her negligence proximately caused the loss in question, and that the plaintiffs sustained actual damages (*Bishop v Maurer*, 33 AD3d 497, 498 [1st Dept 2006], *affd* 9 NY3d 910 [2007]). The complaint as against Jassen states a claim for malpractice (*see Widlitz v Douglass Elliman, LLC*, 55 Misc 3d 1214 [A], 2017 NY Slip Op 50576 [U], *3 [Sup Ct, NY County 2017] [plaintiff stated claim by arguing that attorney "negligently advised plaintiff about the apartment's views" and thus CPLR § 3211 motion was denied]). To prevail on a summary judgment motion, the attorney must show that she exercised an "ordinary [degree of] skill and knowledge" (*Bakcheva v Law Offs. of Stein & Assoc.*, 169 AD3d 624, 625 [2d Dept 2019]).

Jassen argues that Mah and Carter did not begin their renovations until after the closing, when her representation had ended. She states that Mah and Carter chose to close before the roof deck was completed, and thus she bore no liability for their disappointment in the deck that the Sponsor provided. In addition, Jassen annexes emails which show that Mah and Carter were aware that they may not have had permission to obtain electricity and running water on the roof (*see, e.g.*, NYSCEF Doc. No. 119 [Sep 5 email chain]). Jassen raises additional arguments relating to the subsequent conduct of Mah and Carter, such as their decision to undertake further renovations to the deck without obtaining DOB and condominium board approvals. None of these arguments relate to the allegation in the complaint that it was illegal to create a roof deck appurtenant to the apartment. Therefore, they are not relevant or persuasive.

As plaintiffs note, the complaint alleges that Jassen did not exercise "the degree of care, skill, and diligence commonly possessed and exercised by ordinary members of the legal community in performing pre-contract and post-contract 'due diligence' and review of title" (NYSCEF Doc. No. 181 [Resko Aff in Opp] ¶ 14 [quoting complaint]). To prevail on summary judgment, Jassen must show that the activities she has described are consistent with legal standards. As Jassen has not produced evidence showing that "she exercised an ordinary [degree of] skill and knowledge" for real estate lawyers in the community, she has not sustained her burden on this motion (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Bakcheva*, 169 AD3d at 625).

In addition, Jassen contends, Mah and Carter have not shown that she had access to information which showed that the roof deck was illegal. As plaintiffs' opposition indicates, however, Jassen bears the initial burden in the context of her motion (*see* NYSCEF Doc. No. 181 [Resko Aff in Opp] ¶ 16] [citing, *inter alia*, *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). She states that she was not negligent in checking the Certificate of Occupancy (CO) for the building because until the roof deck was constructed, the document would not include it as a permissible use. *Department of Building's Guide to: Certificate of Occupancy*, which Jassen annexes, states although a building must update a CO if it changes or expands the building's use, a final CO is issued only "when the completed construction work matches the submitted plans" (NYSCEF Doc. No. 121). This does not vitiate Mah and Carter's contention, however, as there is an issue of fact as to whether Jassen should have taken any further steps, especially as the roof deck was a particular area of concern for her clients (*see, e.g.*, NYSCEF Doc. Nos. 115-119 [email chains]). Jassen's statement that that she "diligently reviewed the transaction documents" and went over the documents with Mah (NYSCEF Doc. No. 104 [Jassen Aff in Support] ¶¶ 16-17) may support her

argument at trial but does not refute the argument of her former clients (*cf. Bakcheva*, 169 AD3d at 625). Furthermore, Jassen's statement that she explained that the CO "could not and did not reflect use of the roof deck" (NYSCEF Doc. No. 104 [Jassen Aff in Support] ¶ 43) merely raises an issue of fact in light of the affidavits of Mah and Carter, which state that Jassen provided no such explanation (*see* NYSCEF Doc. No. 186 [Mah Aff in Opp] ¶¶ 5, 8; NYSCEF Doc. No. 187 [Carter Aff in Opp] ¶¶ 6, 8).

Jassen argues that Mah and Carter additionally cannot show proximate cause. However, Mah and Carter claim that, if Jassen had not been negligent, she would have learned of the problem with the use of the roof and they would not have purchased the apartment or undertook to renovate the roof (*compare Stackpole v Cohen, Ehrlich & Frankel, LLP*, 82 AD3d 609, 610 [1st Dept 2011] [after a nonjury trial, the court properly dismissed the claim because plaintiff did not show that "but for defendant's negligence, she would not have purchased the apartment"]). This creates an issue of fact and renders summary judgment improper.

Finally, Jassen argues that Mah and Carter lack standing to sue because they transferred the apartment into the Carter Mah Family Revocable Trust. However, as Mah and Carter explain, they are the trustees of the trust. Mah and Carter clearly have standing to sue on behalf of the trust (*see* CPLR § 1004 [trustees need not join beneficiaries when they commence lawsuits on the trust's behalf]; *see also Rivera v Markowitz*, 71 AD3d 449, 450 [1st Dept 2010] [although plaintiffs lacked the capacity to sue, a new action could be commenced by the trustee].[6] Jassen's objection that Mah and Carter did not support their argument with case citations, moreover, is misguided.

[6] The court notes that neither Jassen nor Mah and Carter have submitted any evidence concerning the transfer to the trust, the existence and nature of the trust, and the names of Mah and Carter as trustees. However, no one questions the veracity of the statements the parties have made about the trust and the court accepts them as true for the purposes of this motion.

Jassen, who carries the burden of proof, also did not provide legal support for her position. In any event, the court quickly found sufficient legal precedent relating to this issue.

In motion sequence number 006, the Shupack defendants move for summary judgment dismissing the malpractice claims against them. They argue that their job was to "perform due diligence relating to the Unit purchase, to negotiate the terms for the Unit purchase, to review the title report, and to represent her at the closing" (NYSCEF Doc. No. 130 [Proscia Aff in Support] ¶ 26 [citing NYSCEF Doc. No. 1 (Complaint) ¶ 27]). The alleged negligence, the Shupack defendants assert, was not within the scope of their responsibilities. Furthermore, they point out that Cash and the other plaintiffs received the DOB violation and stop work order many months after their work for Cash was over. They argue that, because Cash and her husband inspected the premises with their realtor, the Shupack defendants are not liable for any problems with the roof deck.

For many of the reasons that Jassen's motion fails, the court denies the motion of the Shupack defendants. The arguments of the Shupack defendants do not undermine Cash's claim that her attorneys should have determined whether it was legal to have a roof deck in the building. In opposing this motion, Cash submits an excerpt from her deposition in which she states that she discussed the roof deck with her counsel, noting its importance to her (NYSCEF Doc. No. 175 [Cash Dep excerpt] at 17, lines 22-24). Cash also points to Shupack's deposition testimony, in which he misstates the law, in particular by stating that he did not think any changes to the CO were necessary to build the roof deck (NYSCEF Doc. No. 176 [Shupack Dep excerpt] at 31-38).

In addition, the Shupack defendants rely on cases which are distinguishable. For example, they point to *Bishop v Maurer* (33 AD3d 497 [1st Dept 2006]) to state that Cash cannot assert malpractice because the terms of the contracts were clear. In *Bishop*, however, the plaintiff signed

a contract which expressly acknowledged that he was aware of the attorney's potential conflict of interest and waived any potential objections he might have based on this conflict. The contract here did not include an analogous waiver.[7] In *Matter of Augustine v BankUnited FSB* (75 AD3d 596, 597 [2d Dept 2010]), the Shupack defendants correctly note, the Court stated that parties have the obligation to read documents before they sign them, "and cannot generally avoid the effect of the document on the ground that he or she did not read it or know its contents." The documents Cash signed, however, did not discuss the illegality of the roof deck. Furthermore, in *Matter of Augustine*, the petitioner had attempted to set aside the entirety of a deed and mortgage she had signed. Here, on the other hand, Cash makes no such attempt, but alleges her attorneys are guilty of malpractice due to their failure to point out what she viewed as a major problem with the building.

The Shupack defendants state that the violation related only to the renovations to the roof deck plaintiffs undertook and in no way reflected upon the legality of the roof deck itself. The Shupack defendants also submit an expert affidavit by an attorney, which states that the roof deck originally provided was legal, and also that their conduct was within the ordinary standards. Moreover, he suggests that because Cash inspected the apartment and still closed, she misled counsel as to pertinent facts (NYSCEF Doc. No. 156). However, Cash counters with the expert affidavit of plaintiffs' engineer, who states that the roof deck was not compliant with the applicable codes (NYSCEF Doc. No. 165), and with an expert affidavit by an attorney who states that the Shupack defendants incorrectly set forth the purported limitations of their duties; points out that the Shupack defendants incorrectly stated that the roof deck complied with the CO, although they

[7] The court does not address the issue of the enforceability of a contract in which the client waives her right to assert any possible legal malpractice or other claims against her attorney.

allegedly read the document; and that in these and other ways the Shupack defendants did not protect their client and were professionally negligent. These conflicting expert opinions create issues of fact sufficient to require denial of the motion (*see Urias v Daniel P. Buttafuoco & Assoc., PLLC*, 173 AD3d 1244, 1246 [2d Dept 2019]).

The Shupack defendants also allege that Cash cannot show proximate cause. The court rejects this argument for the same reason it found Jassen's argument to this effect unpersuasive. In addition, the Shupack defendants claim that Cash cannot show damages, but their argument – that Cash herself is responsible for any economic loss she sustained – is conclusory.

The court has considered the parties' arguments even if it has not addressed them explicitly in this decision. The court further notes that this decision does not reflect the court's opinion on the strength or weaknesses of the parties' positions, but instead finds that issues remain for determination by the trier of fact.[8]

For the reasons above, therefore, it is

ORDERED that motion sequence number 004 is granted to the extent of severing and dismissing both of the second causes of action and is otherwise denied; and it is further

[8] At argument, the court acknowledged that it might be difficult for a jury to determine whether it was legal to construct a roof deck in the first place (*see* (NYSCEF Doc. No. 206 [Transcript], p 15 lines 11-18). However, it will be possible for the jury to determine whether plaintiffs satisfied their burden of showing the legality of the deck – and, if so, whether defendants refuted this claim by a preponderance of the evidence.

ORDERED that motion sequence numbers 005 and 006 are denied.

Dated: October 10, 2019

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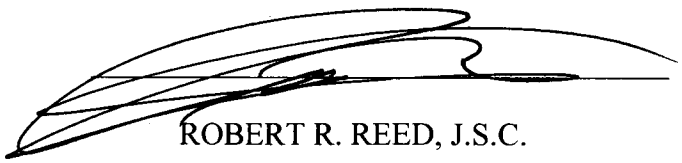

ROBERT R. REED, J.S.C.