

8 Jane St. LLC v Petrone
2020 NY Slip Op 33034(U)
September 11, 2020
Supreme Court, New York County
Docket Number: 653903/2013
Judge: James E. d'Auguste
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JAMES EDWARD D'AUGUSTE PART IAS MOTION 55EFM

Justice

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INDEX NO. 653903/2013

8 JANE STREET LLC,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 001 002

- v -

DEBORAH C. PETRONE AND JOSEPH J. PETRONE,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 54-108, 207-274 were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 002) 109-208, 275-300 were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, the motions are resolved as follows:

Motions bearing sequence numbers 001 and 002 are consolidated herein for disposition.

The parties in this action are the owners of adjoining townhouses in the West Village neighborhood of Manhattan and are engaged in a dispute over the boundary line between their properties. They move for partial summary judgment against each other, seeking, among other things, a declaration in their favor with respect to the location of the property line, injunctive relief and damages for trespass and other alleged tortious conduct.

Background

Plaintiff 8 Jane Street LLC ("8 Jane") is a New York limited liability company which maintains its principal place of business in New York County, New York. See, verified amended complaint filed August 19, 2016 ("Complaint") [NYSCEF Doc No. 24], ¶ 19. 8 Jane is the owner of the townhouse located at 8 Jane Street in New York County, New York ("Plaintiff's Premises").

Id. ¶ 21. Defendants Joseph J. Petrone (“Mr. Petrone”) and Deborah C. Petrone (“Ms. Petrone”) are a married couple who own, and reside at, 6 Jane Street, which is a townhouse adjacent to the townhouse located at 8 Jane Street. (“Defendants’ Premises”) *Id.* ¶ 23; *see also*, verified amended answer filed August 23, 2016 (“Answer”) [NYSCEF Doc No. 35], ¶ 2.

8 Jane claims, among other things, that Ms. Petrone repeatedly trespassed upon and vandalized Plaintiff’s Premises, by defacing with spray paint a bluestone coping 8 Jane installed on top of the party wall that Plaintiff’s Premises shares with Defendants’ Premises (“Party Wall”), as well as other surfaces of the walls and roof of Plaintiff’s Premises. Complaint ¶ 2. 8 Jane alleges that Ms. Petrone also destroyed portions of a parapet 8 Jane erected on top of the Party Wall, and removed siding that 8 Jane installed on the exterior of a bulkhead it built to house a stairway leading onto the roof of Plaintiff’s Premises. *Id.* ¶ 3.

8 Jane alleges that Ms. Petrone caused further harm to Plaintiff’s Premises by removing the caps installed on four chimneys in a north chimney stack on Defendants’ Premises, and by intentionally damaging the brick structures encasing the north and south chimney stacks on Defendants’ Premises, which caused leaks in the interior of Plaintiff’s Premises. *Id.* ¶¶ 4, 62-64.

8 Jane contends that Ms. Petrone also intentionally knocked down a surveillance camera it had installed on the roof, which resulted in the New York County District Attorney’s Office prosecuting Ms. Petrone for criminal tampering. *Id.* ¶ 5.

8 Jane further asserts that Ms. Petrone used a hammer and crowbar to lift the top off the entire north chimney stack on Defendants’ Premises and wedged several 2” x 4” wooden beams underneath, opening the structure. Ms. Petrone also allegedly removed four large steel chimney flues from this stack, installed an unstable replacement flue on one chimney and left the other three chimneys without caps, which actions not only created a smoke and fire hazard, but also exposed

the parties' premises to the elements, causing smoke damage to, and water leaks in, Plaintiff's Premises. *Id.* ¶¶ 6-12, 115-116.

Finally, 8 Jane asserts that Ms. Petrone has made false complaints to the New York City Department of Buildings ("DOB") regarding work on Plaintiff's Premises, resulting in unnecessary inspections, and has otherwise acted in a harassing manner to 8 Jane and its contractors and agents, causing delays in 8 Jane's renovations to Plaintiff's Premises, and other damages to 8 Jane, including lost rent. *Id.* ¶¶ 79-86.¹

8 Jane seeks to recover compensatory and punitive damages from Ms. Petrone, individually, for trespass and private nuisance, and seeks a permanent injunction against her, individually, to enjoin her from engaging in any further acts of trespass, vandalism and harassment. *Id.* ¶¶ 93-105, 125-147, 165-171. 8 Jane seeks to recover compensatory damages from Mr. and Ms. Petrone for negligence. *Id.* ¶¶ 106-124). 8 Jane further seeks mandatory injunction to compel Mr. and Ms. Petrone to repair, in a manner compliant with the DOB Code and the rules of New York City's Landmarks Preservation Commission (LPC), the chimney flues on Plaintiff's Premises that Ms. Petrone allegedly damaged. *Id.* ¶¶ 148-164. 8 Jane also asks to be granted a license to enter onto Defendants' Premises to fix the damage Ms. Petrone caused to Plaintiff's Premises, including removal of the spray paint defacing the coping on top of the Party Wall and other surfaces, repair of the north and south chimneys, and reinstallation of properly fitted steel chimney flues and missing chimney caps. *Id.* ¶¶ 164-181. Finally, 8 Jane asserts that an actual and justiciable controversy exists as to the location of the property line that separates Plaintiff's

¹ As another alleged incident of harassment, 8 Jane asserts in its motion papers that Mr. and Ms. Petrone installed an unpermitted fence that encroached on Plaintiff's Premises as a means to interfere with 8 Jane's renovations (*see*, Ruddy aff) [NYSCEF Doc No. 68], which Mr. and Ms. Petrone removed only after the DOB issued a violation in respect to the fence. Ruddy aff, exhibit 11 [NYSCEF Doc No. 79]. The DOB violation, however, indicates that the fence was ordered removed because it exceeded permitted height, not that it was erected on Plaintiff's Premises. *Id.*

Premises and Defendants' Premises and alleges that it is entitled, based on New York law relating to party walls and 8 Jane's survey, to a declaration stating that the property line is at the midpoint of the Party Wall. *Id.* ¶¶ 182-186.

In their Answer, Mr. and Ms. Petrone generally deny 8 Jane's allegations. While Mr. and Ms. Petrone concede that the common wall between Plaintiff's Premises and Defendants' Premises "is to be used as a party wall," they assert that the Party Wall is not built upon the property line, but rather, is located entirely on Defendants' Premises. Answer ¶ 5. Mr. and Ms. Petrone claim that the structures 8 Jane has erected on and over the Party Wall encroach on Defendants' Premises and wrongfully interfere with their lawful use and enjoyment of the Party Wall. *Id.* Mr. and Ms. Petrone further allege that an 8 Jane's surveillance camera was installed on Defendants' Premises and unlawfully filmed Mr. and Ms. Petrone with it. *Id.* ¶ 11. As one of several affirmative defenses, Mr. and Ms. Petrone assert that 8 Jane's allegations fail to state a cause of action because the structures involved in 8 Jane's claims are on Defendants' Premises. *Id.* ¶ 13.

Mr. and Ms. Petrone also assert four counterclaims. First, Mr. and Ms. Petrone request that they be granted a declaratory judgment stating that 8 Jane's structures are improperly built on Defendants' Premises, encroach on their use of the Party Wall, and must be removed immediately. *Id.* ¶¶ 16-19. Mr. and Ms. Petrone also request that they be granted preliminary and permanent injunctions, ordering 8 Jane to remove such structures, and an award of damages in an amount not less than \$ 1 million. *Id.*

Mr. and Ms. Petrone assert a cause of action for trespass as their second counterclaim. They contend that 8 Jane trespassed when it placed the bulkhead on the Party Wall, and when its agents entered Defendants' Premises, without permission and without necessary work permits, and made improper changes to their chimneys and flues. *Id.* ¶¶ 20-22.

In their third counterclaim, for negligence, Mr. and Ms. Petrone allege that 8 Jane failed to act with reasonable care in the work performed on their chimneys and flues, damaging them and impairing their function. *Id.* ¶¶ 24-25. In their motion papers, Mr. and Ms. Petrone also claim that 8 Jane acted negligently in its excavation of the cellar of Plaintiff's Premises and underpinning of the Party Wall, without Mr. and Ms. Petrone's consent or knowledge, claiming that 8 Jane's work undermined the Party Wall and caused cracks in her basement wall. *See*, unsworn declaration of Deborah C. Petrone, dated September 14, 2018, ¶¶ 5-6 [NYSCEF Doc No. 111]. Mr. and Ms. Petrone seek compensatory damages of not less than \$100,000.00 under their second and third counterclaims. Answer ¶¶ 23 and 26.

Mr. and Ms. Petrone assert that Ms. Petrone was misled into signing off on the LPC-approved plan to renovate the chimney stacks and flues on the roof of Defendants' Premises. Specifically, Ms. Petrone claims Mr. Ruddy showed her the plan, but that she objected to his proposal to offset her flues on an angle and insisted that they instead extend the flues directly upward. Ms. Petrone alleges that, in response, Mr. Ruddy amended the LPC plan in pencil, showing the flues rising directly upward, assuring her that they would comply with her demand. Ms. Petrone asserts that despite Mr. Ruddy's assurances, 8 Jane still offset the chimney as in the original proposal, in violation of her agreement with Mr. Ruddy. Petrone declaration ¶¶ 7-9 [NYSCEF Doc No. 111].

In their fourth counterclaim, Mr. and Ms. Petrone request that the Court issue an order declaring that the Party Wall is entirely on Defendants' Premises and that 8 Jane may not use the Party Wall "for the purposes that [it] is currently using" the Party Wall, "nor for any other uses other than as a party wall." *Id.* ¶ 28.

In its reply to Mr. and Ms. Petrone's counterclaims [NYSCEF Doc No. 36], 8 Jane generally denies Mr. and Ms. Petrone's allegations. 8 Jane also asserts several affirmative defenses, including estoppel and waiver. *Id.* ¶¶ 26-27. 8 Jane also contends that Mr. and Ms. Petrone failed to state a claim upon which relief can be granted, inasmuch as Mr. and Ms. Petrone's allegations that 8 Jane trespassed onto Defendants' Premises are untrue because the structures at issue in Mr. and Ms. Petrone's counterclaims are located on Plaintiff's Premises. *Id.* ¶ 25.

In its motion, 8 Jane seeks partial summary judgment as to liability on its causes of action for trespass, private nuisance and negligence, including punitive damages for trespass and private nuisance. 8 Jane also requests a judgment declaring that the boundary line between the two properties lies at the mid-point of the Party Wall, and a permanent injunction barring Ms. Petrone from trespassing upon Plaintiff's Premises, engaging in acts of harassment, constructing any unauthorized additions encroaching on Plaintiff's Premises, and causing any destruction or vandalism on Plaintiff's Premises.

8 Jane also requests that the Court issue an injunction affirmatively mandating Mr. and Ms. Petrone to repair the property they destroyed, which has caused further damage to Plaintiff's Premises, and to desist from any conduct that constitutes a nuisance. 8 Jane also seeks an injunction mandating that Mr. and Ms. Petrone repair the chimney flues on Defendants' Premises to ensure they are compliant with the DOB Code and LPC rules. 8 Jane further requests that the Court dismiss Mr. and Ms. Petrone's counterclaims and affirmative defenses in their entirety and with prejudice and to schedule a hearing to quantify Mr. and Ms. Petrone's liability to 8 Jane.

In their motion, Mr. and Ms. Petrone seek summary judgment, granting their counterclaim for a declaration that the Party Wall is located entirely on Defendants' Premises and denying 8 Jane's cause of action for a declaration that the property line falls at the midpoint of the Party Wall.

Mr. and Ms. Petrone also request that the Court direct 8 Jane to remove its bulkhead from the Party Wall and permanently enjoin 8 Jane from using the Party Wall “in any manner inconsistent with its use as a party wall.” *See*, Answer ¶ 28. Mr. and Ms. Petrone also seek partial summary judgment as to 8 Janes’ liability on their counterclaims for trespass and negligence. Mr. and Ms. Petrone further request that the Court grant summary judgment in their favor striking 8 Jane’s affirmative defenses, dismissing 8 Janes’ causes of action for trespass, negligence and private nuisance, denying 8 Jane’s causes of action for an injunction to compel Mr. and Ms. Petrone to repair the chimneys, and to prohibit Mr. and Ms. Petrone from engaging in any future acts of trespass, vandalism, and harassment.

Discussion

To prevail on a summary judgment motion, the movant must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in its favor. *GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965, 967 (1985); *see also*, *Stonehill Capital Mgt. LLC v Bank of the W.*, 28 NY3d 439, 448 (2016) (proponent of summary judgment “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”) (quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986)). If the moving party fails to make a *prima facie* showing of its entitlement to summary judgment, the motion must be denied, “regardless of the sufficiency of the opposing papers.” *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 (2013). If, however, the moving party makes its requisite showing, the burden shifts to the opposing party to submit evidence in admissible form sufficiently demonstrating that an issue of material fact exists requiring a trial. *Kosson v Algaze*, 84 NY2d 1019, 1020 (1995).

In deciding a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party. *Branham v Loews Orpheum Cinemas*, 8 NY3d 931, 932 (2007). Party affidavits and other proof must be examined closely “because summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue.” *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978) (quoting *Moskowitz v Garlock*, 23 A.D.2d 943 (1965)). Still, “only the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment.” *Id.*

Boundary Line Between the Parties’ Premises

“[I]n order to prove a boundary by a survey, there should be proof of the identity, competency and the authority of the surveyor in the particular case, and of the purpose of the survey.” *Sloninski v Weston*, 232 AD2d 913, 914 (3d Dept 1996), quoting 1 NY Jur2d, Adjoining Landowners, § 151, at 645; *see also Bergstrom v McChesney*, 92 AD3d 1125, 1126 (3d Dept 2012) (submission of deed, survey of property at issue, and affidavit of land surveyor who conducted it, which “detailed the means by which he located certain markers, monuments and lines referenced in the property description,” were sufficient to meet the moving party’s burden to make a prima facie showing of an entitlement to judgment as a matter of law with respect to the disputed property).

8 Jane makes its prima facie case for declaratory relief by submission of, *inter alia*, the deed to Plaintiff’s Premises (the “8 Jane Deed”) [NYSCEF Doc. No. 95], the deed to Defendants’ Premises (the “6 Jane Deed”) [NYSCEF Doc No. 96], a 2010 survey of the property (the “True North Survey”) [NYSCEF Doc. No. 94], and the affidavit of John J. Vida [NYSCEF Doc. No. 92], a New York State licensed surveyor and President of True North Surveyors P.C. who, “[i]n

addition to serving as an expert in this action,..., was also previously retained to perform an architectural survey for 8 Jane [Street] in connection with the renovation of Plaintiff's Premises."

Vida Aff at 7.

The 8 Jane Deed expressly states that the property line runs "through a Party Wall." *See*, The 8 Jane Deed, Vida Aff. at Ex. 3 ("THENCE northerly along said Lot No. 2 and part of the way through a party wall, 62 feet 1 inch to the point or place of BEGINNING."). Further, the 6 Jane Deed, although it does not expressly reference the party wall, refers to the same property line with the exact same measurements as the 8 Jane Deed ("THENCE northerly 60 feet 1 inch to the point or place of BEGINNING.").

Additionally, 8 Jane provides a survey (the True North Survey) conducted by a licensed surveyor (Mr. Vida), along with this surveyor's expert report [NYSCEF Doc. No. 93], that concludes, consistent with both deeds, that the property line runs through the party wall.² In this regard, Mr. Vida explains in detail the basis upon which he determined the property line is located at the midpoint of the Party Wall. Vida Aff at ¶¶ 7-14. Mr. Vida also explains that he "also reviewed previous surveys, various historical maps, final sections, and other historical records, to properly survey Plaintiff's Premises." Vida Aff at ¶ 11. Mr. Vida attests that "[o]n or around December 20, 2010, True North Surveyors prepared an architectural survey of Plaintiff's Premises, which is located on Block 615, Lot 73 in the Borough of Manhattan, New York, New York," that "[o]n or around November 14, 2012, True North Surveyors re-appraised the original survey of

² Contrary to Mr. and Ms. Petrone's assertions, Mr. Vida did not testify that an architectural survey like the one he performed should not be used to locate property lines or settle property disputes, and defendants offer no contrary evidence in support of this contention. In fact, Mr. Vida testified that an architectural survey is conducted the same way as a land survey, that it is actually more detailed than a land survey, and that it includes all of the elements of a land survey, plus additional details necessary for construction including vertical elevations, gas and electric information, sewer lines, etc. *See*, Sherman Reply Aff., Ex. 7 at 20:14-22:13.

Plaintiff's Premises and re-dated the survey of Plaintiff's Premises," and that "True North Surveyors again re-appraised the survey of Plaintiff's Premises on or around October 2, 2013." As a result, Mr. Vida concluded that "the Party Wall between Plaintiff's Premises and Defendants' Premises has a width of approximately eight (8) inches, and measuring the distances identified by the Deeds, as well as the additional measurements taken by True North, [he] concluded that the property line dividing Plaintiff's Premises and Defendants' Premises (the "Property Line") fell on the exact mid-point of the Party Wall." Vida Aff at 8, 14.

This finding, and that of the deeds, is also consistent with the City's 2014 Building Code definition of a party wall, which expressly defines it as "[a]ny wall located on a property line between adjacent buildings, which is used or adapted for joint service between the two buildings. . ." 2014 NY City Building Code [Administrative Code of City of NY, tit 28, ch 7] § BC 706.1.1. Taken together, 8 Jane has more than met its burden to make a prima facie entitlement to summary judgment.

In opposition to 8 Jane's motion for summary judgment, and in favor of their own motion seeking declaratory relief in relation to the same subject party wall, Mr. and Ms. Petrone contend that two prior surveys, the "1924 Survey" [NYSCEF Doc No. 117] and the "O'Buckley Survey" from 2010 [NYSCEF Doc No. 118], as well as the opinion of their expert, Brian Flynn [NYSCEF Doc. No. 225], prove, or at least raise triable issues of fact, that the Party Wall is erected entirely on Defendants' Premises.

Although the 1924 Survey shows the Party Wall falling entirely on Defendants' Premises, that survey plainly states, in handwriting on the face of the survey, that "[a]n absolute determination of the lots on Map of land belonging to the [original owner of 6 and 8 Jane Street] and filed [in the] Registers Office, is impossible. Referenced lines used above have been arbitrarily

assumed” [NYSCEF Doc No. 117]. The O’Buckley Survey also provides no support for Mr. and Ms. Petrone’s position as this purported survey not only also shows that the property line between 6 and 8 Jane Street runs down the center of the Party Wall, but there is a Schedule A Description to that survey that expressly states that the property line runs “through a Party Wall.” *See*, NYSCEF Doc No. 118. Thus, unlike 8 Jane, Mr. and Ms. Petrone fail to provide any survey that supports their assertions as to the location of the property line. Instead, all Mr. and Ms. Petrone submit in support of their assertions regarding the location of the property line is an expert report of Brian Flynn, a licensed engineer, who asserts that he “personally measured the property lines of 6 Jane Street and 8 Jane Street and [his] measurements confirm that the Boundary Wall lies entirely within 6 Jane Street.” *See* NYSCEF Doc No. 225 ¶¶ 1, 16-18). However, these purported measurements are unavailing. By not submitting a survey with a supporting affidavit of a licensed land surveyor who conducted the survey, Mr. and Ms. Petrone have failed to rebut 8 Jane’s prima facie submission with competent competing evidence sufficient to raise a triable issue of fact. *See*, 70 *Pinehurst Ave. LLC v RPN Mgt. Co.*, 123 AD3d 621, 621 (1st Dept 2014) (land survey not accompanied by affidavit of surveyor does not constitute competent evidence of location of property lines).

Accordingly, 8 Jane’s motion for a declaration stating that the boundary line between Plaintiff’s Premises and Defendants’ Premises lies at the midpoint of the Party Wall is granted, and Mr. and Ms. Petrone’s motion seeking a declaration in their favor on this issue is denied.

Trespass

8 Jane and Mr. and Ms. Petrone each move for partial summary judgment as to the liability of the other for trespass and request that the other’s claim for trespass be dismissed. Trespass to realty is “an intentional entry onto the land of another without justification or permission” *Marone*

v Kally, 109 AD3d 882, 882-883 (2d Dept 2013); *see also, Behar v Quaker Ridge Golf Club, Inc.*, 118 AD3d 833, 835 (2d Dept 2014) (“The essence of trespass is the invasion of a person's interest in the exclusive possession of land”) [internal quotation marks and citation omitted]).

Ms. Petrone asserts that the Party Wall lies entirely upon Defendants’ Premises as her sole defense to 8 Jane’s cause of action for trespass. This defense fails in view of the Court’s determination that the property line between the parties’ premises falls along the Party Wall.

In their counterclaims, Mr. and Ms. Petrone argue that the bulkhead 8 Jane built upon its roof, which extends by several inches onto the Party Wall, is a sufficient encroachment to be actionable as trespass.³ 8 Jane argues that the bulkhead wall is not an invasion of Mr. and Ms. Petrone’s rights, as it is entitled to build upon shared Party Wall.⁴

8 Jane is correct. Where one party places beams upon a party wall to support construction or equipment on its property, installation of the beams does not constitute an actionable trespass upon its neighbor’s property, even if they extend “beyond the party wall’s centerline,” absent an allegation that “the structural integrity of the [party] wall or 8 Jane’s property has been affected by the beams or that there is a possibility that the beams will prevent 8 Jane from using the party wall.” *Lei Chen Fan v New York SMSA L.P.*, 94 AD3d 620, 621 (1st Dept 2012), citing *Varriale v Brooklyn Edison Co.*, 252 NY 222, 224 (1929); *5 E. 73rd, Inc. v 11 E. 73rd St. Corp.*, 16 Misc 2d 49, 56-57 (1959), *aff’d* 13 AD2d 764 (1961); *American Ry. Express Co. v Lassen Realty Co.*, 205 App Div 238, 240-241 (1923); *Batt v Kelly*, 75 App Div 321, 322 (1902).

³ Mr. and Ms. Petrone also contend that 8 Jane trespassed by excavating and underpinning the Party Wall because the Party Wall is wholly on Defendants’ Premises. Of course, this argument is unfounded, in light of the Court’s determination of the location of the property line.

⁴ 8 Jane also asserts that the chimney and flue renovations it performed on Defendants’ Premises were made under defendants’ written consent and so could not constitute trespass. Mr. and Ms. Petrone’s counterclaim with respect to this work, however, sounds in negligence, which is addressed below.

Here, 8 Jane contends that the bulkhead and the adjoining parapet were built atop a portion of the Party Wall in such a way that would enable Mr. and Ms. Petrone to use the Party Wall as well. Affidavit of Shawn L. Ruddy (Ruddy aff) [NYSCEF Doc No. 68], ¶¶ 43-44.

Mr. and Ms. Petrone make several speculative allegations about how the bulkhead may interfere with their future use and enjoyment of the Party Wall. Their only particular objection is that if 8 Jane is not compelled to remove the bulkhead, Mr. and Ms. Petrone could not perform any renovations of their own at that section of the Party Wall because it would require them to open the siding on the bulkhead, to which they believe 8 Jane would not consent. As it appears, the parties intend to remain neighbors, it is incumbent upon them to find a way to cooperate with one another in the future. *See, Sakele Bros. v Safdie*, 302 AD2d 20, 26 (1st Dept 2002) (“a party wall, being for the common benefit of contiguous proprietors, should not be subjected by either owner to a use whereby it ceases to be continuously available for enjoyment by the other”) [internal quotation marks and citations omitted].

Accordingly, 8 Jane’s motion for partial summary judgment as to Ms. Petrone’s liability for trespass must be granted, and Mr. and Ms. Petrone’s motion for summary judgment as to 8 Jane’s liability for trespass must be denied.

Private Nuisance

“The elements of a private nuisance cause of action are an interference (1) 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.” *Behar v Quaker Ridge Golf Club, Inc.*, 118 AD3d at 835, quoting *Aristides v Foster*, 73 AD3d 1105, 1106 (2d Dept 2010).

8 Jane alleges multiple acts of vandalism and property damage by Ms. Petrone in support of its private nuisance claim.⁵ 8 Jane also alleges that Mr. and Ms. Petrone engaged in “harassment” by filing false complaints with the DOB. Complaint ¶¶ 79-86, 113, 131. Intentional property damage and harassment by means of unmerited complaints to city or state agencies may constitute elements of a private nuisance claim. *See, Chelsea 18 Partners, LP v Sheck Yee Mak*, 90 AD3d 38, 41-43 (1st Dept 2011) (“pattern of recurring objectionable conduct,” sufficient to establish landlord’s cause of action for private nuisance, included tenants’ complaints to DOB and Environmental Control Board for plumbing and electrical violations tenants created by their own unauthorized “handiwork,” which property damage they worsened by denying landlord access to the apartment to cure violations, to create a pretext so they could apply for rent reductions).

In opposition, Mr. and Ms. Petrone deny that they made any unmerited complaints to the DOB and assert that the documentary evidence bears this out. Mr. and Ms. Petrone do not contest 8 Jane’s allegations of vandalism and property damage other than to assert that all of these alleged incidents occurred on Defendants’ Premises and, accordingly, no such claims can lie. Answer ¶¶ 5-15.

8 Jane’s allegations of harassment do not establish a “pattern of recurring objectionable conduct” to provide grounds for a private nuisance claim, as 8 Jane cites only three complaints over an extended period of time, all of which were resolved by 8 Jane acting to cure the alleged

⁵ As 8 Jane’s cause of action for private nuisance alleges both intentional conduct, in the forms of vandalism and intentional property damage, and negligent conduct, in the form of Mr. and Ms. Petrone’s failure to repair the flues, chimney stacks and parapet wall, and to restore the chimney encasements, 8 Jane’s claim for private nuisance is not entirely duplicative of its negligence claim, and therefore dismissal of its nuisance claim on that basis is not required. *See, Trulio v Village of Ossining*, 153 AD3d 577, 579 (2d Dept 2017) (nuisance claim based on negligence in relation to the same alleged wrong should have been dismissed as duplicative as the plaintiff may recover only once for harm suffered, regardless of how the causes of action are denominated).

violations, not by the DOB finding that any of the complaints were unfounded. Ruddy aff in opposition, exhibit Ex N (DOB Records of Resolved Violations) [NYSCEF Doc No. 204]).

On the other hand, 8 Jane's evidence of vandalism and intentional property damage establish a pattern of recurring objectionable conduct. *See, e.g.*, affidavit of Deborah C. Petrone (Petrone aff) [NYSCEF Doc No. 210] ¶ 27 (containing Ms. Petrone's admission that she intentionally spray painted bulkhead and parapet on top of Party Wall); Deborah Petrone 2015 deposition excerpts [NYSCEF Doc No. 59] tr 55:6 to 56:2, 162:25 to 164:16 (containing Ms. Petrone's admission that she spray painted because she "was angry"); *id.*, tr 181:3 to 183:21 (containing Ms. Petrone's admission that she removed bulkhead siding without 8 Jane's consent); *id.*, tr 189:19 to 191:24, 198:19 to 199:18, Deborah Petrone 2017 deposition excerpts [NYSCEF Doc No. 60] tr 104:5-8 (containing Ms. Petrone's admission that she intentionally removed protective rubber flashing on the parapet wall and chimneys); and Deborah Petrone 2017 deposition excerpts [NYSCEF Doc No. 60] tr 104:20 to 105:2 (containing Ms. Petrone's admission that she tampered with 8 Jane's security camera).

Accordingly, 8 Jane's motion for partial summary judgment on its cause of action for private nuisance is granted, and Mr. and Ms. Petrone's motion to dismiss 8 Jane's private nuisance claim is denied.

Punitive Damages for Trespass and Private Nuisance

Punitive damages

“are penal in their nature and are different, both in nature and purpose, from compensatory damages. Such damages are allowed in addition to compensatory damages, and are awarded upon public consideration as a punishment of the defendant for the wrong in the particular case, and for the protection of the public against similar acts, to deter the defendant from a repetition of the wrongful act, and to serve as a warning to others”

Le Mistral, Inc. v Columbia Broadcasting Sys., 61 AD2d 491, 494 (1st Dept 1978), quoting 14 NY Jur Damages § 176.

“As a general rule, exemplary damages are recoverable in all actions ex delicto based upon tortious acts which involve ingredients of malice, fraud, oppression, insult, wanton or reckless disregard of the plaintiff’s rights, or other circumstances of aggravation, as a punishment of the defendant and admonition to others . . . Punitive damages have been allowed in actions for trespass . . .”

Le Mistral, Inc., 61 AD2d at 494-95, quoting 14 NY Jur. *supra* § 180.

“The award of punitive damages under circumstances warranting the allowance of same rests in the discretion of the jury, or in the court where the case is tried without a jury. The basis for an award of exemplary damages depends upon a showing that the wrong is aggravated by evil or a wrongful motive or that there was wilful and intentional misdoing, or a reckless indifference equivalent thereto”

Id. at 495.

“[A]lthough states possess considerable discretion over the imposition of punitive damages, the United States Supreme Court has emphasized that there are constitutional limitations on such awards, and that the Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments upon a tortfeasor.” *Matter of 91st St. Crane Collapse Litig.*, 154 AD3d 139, 157-58 (1st Dept 2017), quoting *Frankson v Brown & Williamson Tobacco Corp.*, 67 AD3d 213, 219 (2d Dept 2009). “Factors to be considered include ‘the degree of reprehensibility ...; the disparity between the harm or potential harm suffered ... and [the] punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases.’” *Matter of 91st St. Crane Collapse Litig.*, 154 AD3d at 158, quoting *BMW of N. Am., Inc. v Gore*, 517 US 559, 575 (1996).

While Ms. Petrone’s conduct was willful, the Court does not view it as sufficiently reprehensible to merit a punitive damages award and believes that the remedies available to 8 Jane will be a sufficient deterrent to avoid their repetition.

Negligence

8 Jane and Mr. and Ms. Petrone move for partial summary judgment on their respective claims for negligence. Each side also moves for summary judgment, dismissing the negligence claims against them.

8 Jane alleges all of the work it performed on Mr. and Ms. Petrone's chimneys was proper and compliant with applicable building codes and assert Mr. and Ms. Petrone acted negligently by failing to repair the damage Ms. Petrone caused to, among other things, the flues and chimney stacks and failing to restore the chimney encasements. 8 Jane also faults Mr. and Ms. Petrone for failing to repair the parapet and the bulkhead siding. For their part, Mr. and Ms. Petrone claim that 8 Jane's work on the roof of Defendants' Premises and under the party wall was negligently performed, not in compliance with applicable codes, and caused damage to Mr. and Ms. Petrone's property.

"To establish a prima facie case of negligence, a plaintiff must establish the existence of a duty owed by a defendant to the plaintiff, a breach of that duty, and that such breach was a proximate cause of injury to the plaintiff." *Irizarry v Heller*, 95 AD3d 951, 952-53 (2d Dept 2012), quoting *Nappi v Incorporated Vil. of Lynbrook*, 19 AD3d 565, 566 (2005). In general, where there are conflicting opinions between the parties' competent experts, those conflicts present issues of fact and credibility which preclude summary judgment (*See, Mercado-Arif v Garcia*, 74 AD3d 446, 447 (1st Dept 2010)). Here, the experts cannot agree upon basic facts.

8 Jane, through its expert architect and general contractor Shawn Ruddy, asserts that he obtained Ms. Petrone's approval and written consent to renovate the chimney stacks and flues on the roof of Defendants' Premises, in accordance with a written plan approved by the LPC. *See*, Ruddy aff in opposition [NYSCEF Doc No. 190] ¶ 14. Specifically, Mr. Ruddy avers that he

conferred with Ms. Petrone about planned renovations to her rooftop chimney flues and obtained her written consent to extend the flues offset at an angle, as depicted on approved LPC plans. Ruddy aff in opposition [NYSCEF Doc No. 190] ¶ 15. He further asserts that it was only after work had commenced that Ms. Petrone objected and refused to allow his workmen to complete construction in accordance with the LPC-approved plan. As a result, Mr. Ruddy's firm extended the flues directly upward, without offset *Id.* ¶ 16.

Mr. and Ms. Petrone counter by alleging that Ms. Petrone was misled into signing the consent by Mr. Ruddy. Specifically, Ms. Petrone claims that Mr. Ruddy showed her the LPC-approved plan but she objected to his proposal to offset her flues on an angle and insisted that they instead extend the flues directly upward. She alleges that, in response, Mr. Ruddy amended the LPC plan in pencil, showing the flues rising directly upward, assuring her that they would comply with her demand but 8 Jane still offset the chimney, in violation of her agreement with Mr. Ruddy. Petrone declaration ¶¶ 7-9 [NYSCEF Doc No. 111]. Additionally, in his expert report, Mr. and Ms. Petrone's expert engineer, Brian Flynn, attests that the flues were completed with the offset, which misalignment allegedly interferes with airflow and causes dangerous gases to back up into the fireplaces in the Defendants' Premises. Flynn Report ¶ 35 [NYSCEF Doc No. 225].

In light of this conflicting evidence, the parties' motions to be granted partial summary judgment on the issue of their opponents' liability for negligence and seeking dismissal of the other's negligence claims, are denied.

Mr. and Ms. Petrone's Motion to Strike 8 Jane's Seven Affirmative Defenses

The Court denies Mr. and Ms. Petrone's motion to strike 8 Jane's first affirmative defense for failure to state a claim on which relief may be granted, inasmuch as Mr. and Ms. Petrone's

counterclaims are premised on their mistaken belief that the property line falls entirely within Defendants' Premises.

The Court also denies Mr. and Ms. Petrone's motion to strike 8 Jane's second and third affirmative defenses, estoppel and waiver. 8 Jane premised these affirmative defenses on Ms. Petrone's signed letter of consent, agreeing to allow 8 Jane to renovate her chimneys and flues. Mr. and Ms. Petrone maintain that 8 Jane did not follow their agreement to extend their flues directly up and her express demand not to offset them. 8 Jane insists that it did comply with the plan as amended by Ms. Petrone's demand, which raises a question of fact requiring a trial.

8 Jane's fourth affirmative defense is that documentary evidence provides a complete defense. For reasons discussed herein, multiple documents, including the True North Survey, the O'Buckley Survey and the deeds of both properties, establish that the property line between 6 and 8 Jane Street falls in the center of the Party Wall and, thus, Mr. and Ms. Petrone's motion to strike this defense must be denied.

Similarly, the Court's determination regarding 8 Jane's causes of action for trespass and private nuisance precludes dismissal of 8 Jane's fifth and sixth affirmative defenses, for unclean hands and culpable conduct.

In its seventh and last affirmative defense, 8 Jane asserts that Mr. and Ms. Petrone's claim for removal of the encroaching bulkhead must be time barred under the one-year limitations period allowed under RPAPL § 61 (2). The motion to dismiss this affirmative defense is denied as moot.

Injunctive Relief

"Injunctive relief, which had its origins in the courts of equity, has always been perceived as discretionary, to be granted or withheld by our courts in the exercise of responsible judicial discretion." *Matter of Gerges v Koch*, 62 NY2d 84, 94-95 (1984). "The determination of the

availability of such relief depends not alone on the right of the party seeking it but as well on the appropriateness of its issuance in the circumstances in which it is sought.” *Id.* at 95.

“A permanent injunction is a drastic remedy which may be granted only where the plaintiff demonstrates that it will suffer irreparable harm absent the injunction.” *Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 403, 408 (2d Dept 2009), citing *Icy Splash Food Beverage, Inc. v Henckel*, 14 AD3d 595 (2003).

“To establish, prima facie, entitlement to a permanent injunction, a plaintiff must demonstrate: (a) that there was a violation of a right presently occurring, or threatened and imminent; (b) that he or she has no adequate remedy at law; (c) that serious and irreparable harm will result absent the injunction; and (d) that the equities are balanced in his or her favor”

International Shoppes Inc. v At the Airport, LLC, 131 AD3d 926, 938 (2d Dept 2015), citing *Caruso v Bumgarner*, 120 AD3d 1174, 1175 (2014) and *Elow v Svenningsen*, 58 AD3d 674, 675 (2009). “Injunctive relief is ‘to be invoked only to give protection for the future to prevent repeated violations, threatened or probable, of the plaintiffs' property rights.” *Merkos L'Inyonei Chinuch, Inc.*, 59 AD3d at 408, quoting *Exchange Bakery & Rest. v. Rifkin*, 245 NY 260, 264–265 (1927).

The motion to enjoin Ms. Petrone from trespassing on Plaintiff’s Premises, and from destroying or vandalizing Plaintiff’s Premises and/or otherwise harassing 8 Jane, is denied as 8 Jane offers no evidence that Ms. Petrone is presently trespassing or vandalizing Plaintiff’s Premises or presents an imminent threat of doing so.

Mr. and Ms. Petrone, however, are directed to perform the remaining repair and clean-up work on their chimneys, flues and other structures on their roof and the Party Wall, within 180 days of the date of entry of this decision and order. If Mr. and Ms. Petrone fail to perform this work in compliance with the DOB Code and LPC rules by that date, 8 Jane is granted the license to perform such work and shall be granted recovery of its reasonable expenses.

Conclusion

For the foregoing reasons, it is hereby

ORDERED that 8 Jane’s motion seeking a declaration with respect to the location of the property line separating Plaintiff’s Premises and Defendants’ Premises is granted and it is hereby DECLARED that such property line is located at the midpoint of the Party Wall between Plaintiff’s Premises and Defendants’ Premises, and that Mr. and Ms. Petrone’s motion, seeking a declaration that the Party Wall falls entirely on Defendants’ Premises, is denied; and it is further

ORDERED that Mr. and Ms. Petrone’s motion seeking a mandatory injunction, compelling 8 Jane to remove its bulkhead from the Party Wall and permanently enjoining 8 Jane from using the Party Wall in a manner inconsistent with its use as a party wall, is denied, as is its prayer therein for compensatory relief; and it is further

ORDERED that 8 Jane’s motion for partial summary judgment as to the liability of defendant Ms. Petrone for trespass and public nuisance is granted and Mr. and Ms. Petrone’s motion for summary judgment to dismiss such causes of action is denied; and it is further

ORDERED that 8 Jane’s motion seeking a mandatory injunction against Ms. Petrone, to enjoin her from engaging in acts of trespass, vandalism, and harassment, is denied; and it is further

ORDERED that 8 Jane’s motion to recover punitive damages against Ms. Petrone with respect to 8 Jane’s causes of action for trespass and public nuisance is denied; and it is further

ORDERED that 8 Jane’s motion for partial summary judgment as to the liability of Mr. and Ms. Petrone for its cause of action for negligence, and its motion for summary judgment, to dismiss Mr. and Ms. Petrone’s counterclaim for negligence, are denied; and it is further

ORDERED that Mr. and Ms. Petrone’s motion for partial summary judgment as to the liability of 8 Jane on their counterclaim for negligence, and its motion to dismiss 8 Jane’s cause of

action for negligence, are denied; and it is further

ORDERED that 8 Jane’s motion to strike Mr. and Ms. Petrone’s affirmative defenses of culpable conduct and failure to state a cause of action is granted; and it is further

ORDERED that Mr. and Ms. Petrone’s motion to strike 8 Jane’s affirmative defenses is denied; and it is further

ORDERED that 8 Jane’s motion to enjoin Mr. and Ms. Petrone to repair the damaged chimney flues and other damage Ms. Petrone caused on and around the Party Wall is granted to the extent that Mr. and Ms. Petrone are directed to perform the remaining repair and clean-up work on their chimneys, flues and other damaged structures on their roof and the Party Wall, within 180 days of the date of entry of this decision and order and that, in the event that Mr. and Ms. Petrone fail to perform this work in compliance with the DOB Code and LPC rules by that date, 8 Jane is granted the license to perform such work and shall be entitled to recovery of the reasonable expenses it may incur.

This constitutes the decision and order of this Court.



9/11/2020

DATE

JAMES EDWARD D'AUGUSTE, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: