SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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AMERICAN INFERTILITY OF NEW YORK, P.C.
d/b/a CENTER FOR HUMAN REPRODUCTION,
and 21 EAST 69TH STREET LLC, Index No. 159892/2015

Plaintiffs

- against - DECISION AND ORDER

VERIZON NEW YORK INC.,

Defendant

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APPEARANCES:

For Plaintiffs
Steven M. Lester Esq.
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For Defendant
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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

In this action for trespass on commercial premises, plaintiffs American Infertility of New York, P.C. d/b/a Center for Human Reproduction (CHR), and 21 East 69th Street LLC are, respectively, the occupant and the owner of land and a building at 21 East 69th Street, New York County. Aff. of Norbert Gleicher M.D. in Supp. ¶¶ 1-3. Plaintiffs claim that defendant Verizon New York Inc. committed a continuing trespass by

installing and maintaining an unauthorized telecommunications cable on the exterior of the building and along the top of a fence in the yard at the premises. Id. ¶ 2. Plaintiffs allege that they first learned of defendant's cable in August 2015 while inspecting the premises to plan a construction project to expand their building. Id. ¶¶ 14-17. They claim that defendant's failure to remove the cable timely, until December 2015, delayed the project and caused them financial losses. Id. ¶¶ 18-22. Defendant claims that plaintiffs were responsible for the delay by preventing defendant from removing the cable sooner.

Plaintiffs and defendant separately move for partial summary judgment. C.P.L.R. § 3212(b) and (e). Plaintiffs seek summary judgment on defendant's liability for a trespass. Defendant seeks summary judgment dismissing categories of damages set forth in the complaint and in a compilation of damages that plaintiffs produced during disclosure.

II. STANDARDS FOR SUMMARY JUDGMENT

To obtain summary judgment, the moving parties must make a prima facie showing of entitlement to judgment as a matter of law through admissible evidence, eliminating all material issues of fact. C.P.L.R. § 3212(b); Friends of Thayer Lake LLC v. Brown, 27 N.Y.3d 1039, 1043 (2016); Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP, 26 N.Y.3d 40, 49 (2015); Voss v. Netherlands Ins. Co., 22 N.Y.3d 728, 734 (2014); Vega v.

Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012). Only if the moving parties satisfy this standard, does the burden shift to the opposing parties to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues. De Lourdes Torres v. Jones, 26 N.Y.3d 742, 763 (2016); Nomura Asset Capital Corp. v. Cadwalader Wickersham & Taft LLP, 26 N.Y.3d at 49; Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008); Hyman v. Queens County Bancorp, Inc., 3 N.Y.3d 743, 744 (2004). If the moving parties fail to meet their initial burden, the court must deny summary judgment despite any insufficiency in the opposition. Voss v. Netherlands Ins. Co., 22 N.Y.3d at 734; Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; Smalls v. AJI Indus., Inc., 10 N.Y.3d 733, 735 (2008); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373, 384 (2005).

The parties stipulated that the court consider all their exhibits as authenticated and admissible for purposes of their motions for partial summary judgment. In evaluating the evidence for purposes of the parties' motions, the court construes the evidence in the light most favorable to the opponents. Stonehill Capital Mgt. LLC v. Bank of the W., 28 N.Y.3d 439, 448 (2016); De Lourdes Torres v. Jones, 26 N.Y.3d at 763; William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh, 22 N.Y.3d 470, 475 (2013); Vega v. Restani Constr. Corp., 18 N.Y.3d at 503.

III. PLAINTIFFS' MOTION

As set forth above, plaintiffs' motion seeks summary judgment on defendant's liability for plaintiffs' continuing trespass claim. To prevail on this claim, plaintiffs must establish the "intentional entry onto the property of another without justification or permission," Schwartz v. Hotel Carlyle Owners Corp., 132 A.D.3d 541, 542 (1st Dep't 2015); Volunteer Fire Assn. of Tappan, Inc. v. County of Rockland, 101 A.D.3d 853, 855 (2d Dep't 2012), or "a refusal to leave after permission has been granted but thereafter withdrawn." Volunteer Fire Assn. of Tappan, Inc. v. County of Rockland, 101 A.D.3d at 855. Plaintiffs claim that defendant invaded plaintiffs' exclusive possession of their real property by locating on their land a telecommunications cable that served only premises other than plaintiffs' premises, intentionally, and without legal justification or plaintiffs' permission. Defendant does not seek dismissal of plaintiffs' trespass claim, but opposes summary judgment on the claim based on material factual disputes whether defendant was a licensee, rather than a trespasser, and whether defendant relocated its cable within the reasonable period to which defendant was entitled as a licensee after plaintiffs requested the cable's removal.

A license on real property "grants the licensee a revocable non-assignable privilege to do one or more acts upon the land of

the licensor," acts that would amount to a trespass absent such permission, but without granting any interest in the property. Ark Bryant Park Corp. v. Bryant Park Restoration Corp., 285 A.D.2d 143, 150 (1st Dep't 2001); Roman Catholic Church of Our Lady of Sorrows v. Prince Realty Mgt., LLC, 47 A.D.3d 909, 911 (2d Dep't 2008). The owner or landlord of real property may revoke a license at will and without cause. Z. Justin Mgt. Co., Inc. v. Metro Outdoor, LLC, 137 A.D.3d 577, 578 (1st Dep't 2016); American Jewish Theatre v. Roundabout Theatre Co., 203 A.D.2d 155, 156 (1st Dep't 1994).

Defendant's showing of its status as a licensee thus would prevent plaintiffs from maintaining a claim for trespass due to acts for which plaintiffs granted a license. Leavitt Enter., Inc. v. Two Fulton Sq., LLC, 181 A.D.3d 662, 663-64 (2d Dep't 2020). Defendant may establish licensee status with evidence that plaintiff owner or its agent orally granted permission or reasonably appeared to acquiesce to defendant's entry onto plaintiffs' real property. Corsello v. Verizon N.Y. Inc., 18 N.Y.3d 777, 791-92 (2012). See Curwin v. Verizon Communications (LEC), 35 A.D.3d 645, 646 (2d Dep't 2006). Once plaintiff owner or its agent revoked any license, moreover, as a former licensee defendant was entitled to a reasonable amount of time to comply with the removal request, after which the owner may recover only the value of the use of the real property to the licensee.

Cassata v. New York New England Exch., 250 A.D.2d 491, 491-92 (1st Dep't 1998); Curwin v. Verizon Communications (LEC), 35 A.D.3d at 646.

Although plaintiffs insist that defendant's senior manager, Anthony Montemarano, "admitted that Verizon did not have an easement or right of way giving Verizon permission to place the trespassing cable on Plaintiffs' Property," Aff. of Steven M. Lester in Supp. ¶ 8, Montemarano's own affidavit denies any such admission. Montemarano admits only that defendant does not possess any written permission, but explains that, while defendant prefers to obtain written permission to affix telecommunications cables to buildings owned by nonclients, "Oral permission is sometimes given and accepted. Verizon never installs equipment on private property without permission." Aff. of Anthony Montemarano in Opp'n ¶ 3.

Norbert Gleicher M.D., a managing member of 21 East 69th Street and the president of CHR, attests that he "never authorized or gave permission to Verizon or anyone else (such as a Verizon vendor or subcontractor) to locate the telephone cable on the Property." Gleicher Aff. in Supp. ¶ 24. Neither Dr. Gleicher nor any other witness attests that no one else from either plaintiff gave permission to defendant to locate the cable on plaintiffs' premises or, if no one else was authorized to give that permission, that defendant would have known that someone who

gave permission was unauthorized.

Thus, to the extent that Dr. Gleicher's affidavit, along with the absence of documentary evidence, indicates that neither plaintiff ever granted a license to defendant, Montemarano's affidavit that Verizon never installs equipment on private property without permission raises a factual question whether Verizon was a licensee at the premises. This question turns on the witnesses' credibility, which the court may not resolve via summary judgment. Alvarado v. Grocery, 183 A.D.3d 438, 439 (1st Dep't 2020); Evans v. Acosta, 169 A.D.3d 438, 439 (1st Dep't 2019); Capers v. New York City Hous. Auth., 161 A.D.3d 629, 630 (1st Dep't 2018); Genesis Merchant Partners, L.P. v. Gilbride, Tusa, Last & Spellane, LLC, 157 A.D.3d 479, 485 (1st Dep't 2018).

Evidence demonstrating that the telecommunications cable was readily visible to plaintiffs for years before August 2015 further supports the inference of their permission. The cable was hung on the exterior of plaintiffs' building and along a fence bordering their rear yard. The cable was not buried in the ground, hidden in a wall, on a roof, or otherwise unobservable. CHR's architect took photographs depicting the cable in 2013, the year it was installed and two years before the construction commenced. CHR's contractor and construction manager inspected the area of the cable between 2013 and 2015. Permission may be inferred from plaintiffs' failure to object to the observable

cable. See Corsello v. Verizon N.Y. Inc., 18 N.Y.3d at 791-92; Curwin v. Verizon Communications (LEC), 35 A.D.3d at 646.

Montemarano raises another factual question whether defendant relocated the cable within a reasonable time after being asked to do so. Montemarano attests that Dr. Gleicher requested the cable's removal August 10, 2015, and that defendant then investigated the cable's location and the buildings that the cable served, designed an alternative route that would not interrupt service, and dispatched a crew to start the relocation work October 8, 2015. Montemarano Aff. in Opp'n ¶¶ 9, 12. Defendant could not complete the job until December 3, 2015, however, because CHR's continued construction rendered the site surrounding the cable unsafe for defendant's crew, and because plaintiffs did not give the crew access to the premises' basement. Id. ¶¶ 13-15. This evidence of the continuing construction, specifically the preparation of the footings and the pouring of concrete, also indicates that defendant did not delay the construction.

Dr. Gleicher counters that defendant still took an inordinate amount of time to relocate the cable, which caused delays in the masonry and brick work and hence the interior work entailed in the expansion project that in turn increased the expenses for the project. Gleicher Aff. in Supp. ¶¶ 2, 13, 18-22. Whether defendant completed the relocation within a

reasonable time, as well as the measure of damages in the event that defendant did not do so, are issues to be determined by the trier of fact. Cassata v. New York New England Exch., 250 A.D.2d at 491-92.

In sum, the evidence at this juncture raises factual questions whether defendant was plaintiffs' licensee that preclude a determination of defendant's liability for trespass. Therefore the court denies plaintiffs' motion for summary judgment on defendant's liability for trespass. C.P.L.R. § 3212(b).

IV. DEFENDANT'S MOTION

As also set forth above, defendant's motion seeks summary judgment dismissing categories of plaintiffs' claimed damages from defendant's trespass in the event plaintiffs eventually establish that claim. Plaintiffs maintain that C.P.L.R. § 3212(e) does not authorize defendant's motion, but this position flies in the face of the recognition that the statute authorizes defendants' motions "for partial summary judgment seeking dismissal of claims for specified and distinct categories of damages." Koch v. Consolidated Edison Co. of N.Y., 62 N.Y.2d 548, 560 (1984). See Gallet, Dreyer & Berkey, LLP v. Basile, 141 A.D.3d 405, 406 (1st Dep't 2016); Bellinson Law, LLC v. Iannucci, 102 A.D.3d 563, 563 (1st Dep't 2013); Wathne Imports, Ltd. v. PAL USA, Inc., 101 A.D.3d 83, 88 (1st Dep't 2012).

The complaint seeks compensation for plaintiffs' "increased construction costs" and "lost profits" from delays to the expansion project caused by defendant's failure to remove the telecommunications cable timely. Lester Aff. in Supp. Ex. A (V. Compl.) ¶ 27. Plaintiffs' accountant Steven Mizrach later added charges for CHR's "staff time" and a "right of way" fee to the owner as categories of plaintiffs' damages. Aff. of John Van Der Tuin in Supp. Ex. F. Plaintiffs concede that no contract, statute, or court rule provides a basis for their claim for attorneys' fees in this action. Mt. Vernon City School Dist. v. Nova Cas. Co., 19 N.Y.3d 28, 39 (2012); Fleming v. Barnwell Home & Health Facilities, Inc., 15 N.Y.3d 375, 379 (2010); Reif v. Nagy, 175 A.D.3d 107, 131 (1st Dep't 2019); URS Corp.-N.Y. v. Expert Elec., Inc., 151 A.D.3d 520, 521 (1st Dep't 2017). The single category of damages that defendant does not seek to dismiss is plaintiffs' claim of $20,000.00 for increased fees to CHR's construction manager.

A. Increased Construction Costs

The contract between 21 East 69th Street and its contractor, American Residential Contractors, Ltd. (ARI), was a "fixed price contract" for $2,039,100.00, which was subject to increase only by the costs of additional work performed pursuant to change orders that 21 East 69th Street authorized. Van Der Tuin Aff. in Supp. ¶¶ 7, 11. See id. Exs. G, H. If the cost of materials or

labor for the originally contracted work inflated over the period of any delay, the contractor bore those costs. Therefore the only "increased construction costs" that plaintiffs incurred were in the change orders that plaintiffs approved. Dr. Gleicher at his deposition identified no change orders caused by defendant's delay, but ARI witness Jerry Wilezek at his deposition identified one: "Change order number 3," which authorized $5,750.00 to "remove additional tree in backyard," as a construction cost increased by defendant's delay. Id. Ex. V at 165.

Plaintiffs simply maintain, as set forth above, that defendant may not summarily establish as a matter of law that they are not entitled to recover on their claims for additional expenses relating to the project, like their claims for lost profits and additional internal staff costs, Aff. of Steven M. Lester in Opp'n ¶ 138: a proposition long ago rejected. Koch v. Consolidated Edison Co. of N.Y., 62 N.Y.2d at 560. See Gallet, Dreyer & Berkey, LLP v. Basile, 141 A.D.3d at 406; Bellinson Law, LLC v. Iannucci, 102 A.D.3d at 563; Wathne Imports, Ltd. v. PAL USA, Inc., 101 A.D.3d at 88. Defendant's motion is akin to enforcing a construction contract that prohibits damages for delay by seeking dismissal of a claim for damages based on delay. E.g., Corinno Civetta Constr. Corp. v. City of New York, 67 N.Y.2d 297, 315, 318 (1986); Welsbach Elec. Corp. v. Judlau Contr., Inc., 172 A.D.3d 585, 585 (1st Dep't 2019); Perini Corp.

v. City of New York, 165 A.D.3d 437, 437 (1st Dep't 2018); Polo Elec. Corp. v New York Law Sch., 114 A.D.3d 419, 419 (1st Dep't 2014).

If the cost of materials or labor for the additional work pursuant to the change orders inflated over the period of any delay, plaintiffs would be entitled to damages for those increased costs. Wilczek testified that the change orders were executed April 22, July 18, and October 6, 2016. Thus, assuming the trier of fact determines that defendant caused plaintiffs' construction to be delayed four months, for example, for those change orders executed April 22, 2016, plaintiffs would be entitled to any inflation in those change orders' construction costs over December 22, 2015, to April 22, 2016, if established by an expert economist. Similarly, for those change orders executed July 18, 2016, and October 6, 2016, plaintiffs would be entitled to any inflation in those change orders' construction costs over March 18 to July 18, 2016, and over June 6 to October 6, 2016, respectively, if established by an expert economist. Defendant does not present an economist or any economic data to establish that construction costs did not inflate between December 2015 and October 2016.

Consequently, the court grants so much of defendant's motion as seeks summary judgment dismissing plaintiffs' claim for damages based on "increased construction costs" except for any

increased costs in the work associated with "Change order number 3" and any inflation in the costs of change orders over the period of delay.

B. Lost Profits

Summary judgment pursuant to C.P.L.R. § 3212(e) dismissing damages claims based on lost profits, revenues, or labor productivity is warranted if the claims are speculative. Koch v. Consolidated Edison Co. of N.Y., 62 N.Y.2d at 561; Gallet, Dreyer & Berkey, LLP v. Basile, 141 A.D.3d at 406; Bellinson Law, LLC v. Iannucci, 102 A.D.3d at 563; Sanwep Rest. Corp. v. Consolidated Edison Co. of N.Y., 204 A.D.2d 71, 71 (1st Dep't 1994). In opposing defendant's motion for summary judgment dismissing the claim for lost profits, it is incumbent on plaintiffs "to come forward with . . . competent proof of lost profits," C.K.S. Ice Cream Co. v. Frusen Gladje Franchise, 172 A.D.2d 206, 208 (1st Dep't 1991), "capable of measurement with reasonable certainty," Locke v. Aston, 1 A.D.3d 160, 161 (1st Dep't 2003), based on evidence of "known reliable factors . . . without undue speculation." Id. at 162. See Ashland Mgt. v. Janien, 83 N.Y.2d 395, 403-404 (1993); Wathne Imports, Ltd. v. PAL USA, Inc., 101 A.D.3d at 87-88; Porter v. Saar, 260 A.D.2d 165, 166 (1st Dep't 1999). Plaintiffs' burden is "not met by an attorney's affidavit speculating as to . . . the ability of an expert to project lost profits on the basis" of plaintiffs' financial data, all of which

plaintiffs already have produced. C.K.S. Ice Cream Co. v. Frusen Gladje Franchise, 172 A.D.2d at 208. See Quik Park W. 57 LLC v. Bridgewater Operating Corp., ___ A.D.3d ___, 2020 N.Y. Slip Op. 07323, at *2 (1st Dep't Dec. 8, 2020).

To establish lost profits, CHR first must show that, once it completed its expansion project, its profits increased and that therefore, had the relocation of defendant's telecommunications cable not delayed the expansion, CHR would have reaped those increased profits sooner. Wathne Imports, Ltd. v. PAL USA, Inc., 101 A.D.3d at 88. See Ashland Mgt. v. Janien, 83 N.Y.2d at 405-406; Kenford Co. v. County of Erie, 67 N.Y.2d 257, 262 (1986). Lost profits thus would be calculated by multiplying CHR's average weekly or monthly profits after the expanded facility opened by the number of weeks or months defendant unreasonably delayed the opening.

During disclosure defendant repeatedly requested all plaintiffs' documents reflecting the profits plaintiffs lost as a result of defendant's actions. Plaintiffs eventually produced CHR's 2015 financial report, an analysis of CHR's financial data for 2014-2016, and 21 East 69th Street's 2015-2017 balance sheet summaries and profit and loss summaries. Van Der Tuin Aff. in Supp. Exs. L-T. CHR's documents are drawn from its tax returns, but the record does not include the tax returns themselves. Plaintiffs' accountant Steven Mizrach testified at his deposition

that CHR realized net profits of $268,187.00 in 2015, which increased to $420,221.00 in 2016, after defendant had relocated its cable, but decreased after CHR completed its construction in 2017. Id. Ex. W, at 96-98. Plaintiffs never showed that profits increased above their 2014-2016 levels in 2017 or ever afterward.

Plaintiffs base their claim for lost profits entirely on their attorney's insistence that "CHR will provide an expert financial analysis regarding its lost profits based on historical financial data" at trial. Aff. of Steven M. Lester in Opp'n ¶ 134. Plaintiffs' opposition includes no "expert's affidavit . . . to show that . . . an adequate basis would exist for computing the amount of lost profits" as required. C.K.S. Ice Cream Co. v. Frusen Gladje Franchise, 172 A.D.2d at 208. See Quik Park W. 57 LLC v. Bridgewater Operating Corp., ___ A.D.3d ___, 2020 N.Y. Slip Op. 07323, at *2; Porter v. Saar, 260 A.D.2d at 166. Moreover, defendant requested and plaintiff produced all the financial data on which any expert would base an opinion. As discussed above, the data do not support any lost profits. An expert may not now unearth or, worse, fabricate data that plaintiffs have not currently produced.

Thus plaintiffs' claim of damages due to lost profits is nothing more than speculation. C.K.S. Ice Cream Co. v. Frusen Gladje Franchise, 172 A.D.2d at 208. See Ashland Mgt. v. Janien, 83 N.Y.2d at 403-404; Quik Park W. 57 LLC v. Bridgewater

Operating Corp., ___ A.D.3d ___, 2020 N.Y. Slip Op. 07323, at *2; Wathne Imports, Ltd. v. PAL USA, Inc., 101 A.D.3d at 87-88; Porter v. Saar, 260 A.D.2d at 166. The court therefore grants so much of defendant's motion as seeks summary judgment dismissing plaintiffs' claim for damages based on lost profits.

C. Staff Time

Claims for damages due to diminished "labor productivity" are also subject to dismissal if they are "speculative." Sanwep Rest. Corp. v. Consolidated Edison Co. of N.Y., 204 A.D.2d at 71. Defendant maintains that plaintiffs' claim for damages due to increased staff time incurred to address relocation of the cable is speculative because, despite defendant's repeated requests for this information, no evidence shows what work plaintiffs' staff performed or what costs plaintiffs incurred to address the cable or any delay the cable caused. Van Der Tuin Aff. in Supp. ¶¶ 31-36. Significantly, plaintiffs never identify what work CHR's staff did not perform as a result of time being diverted to address the cable and how the neglected work decreased CHR's revenue. These data would be essential for any expert opinion regarding lost productivity, but again defendant requested these data, and plaintiff came up empty handed. Their expert may not now come up with such data.

Plaintiffs' only opposition is their same refrain that C.P.L.R § 3212(e) does not permit summary judgment dismissing a

category of damages. See Koch v. Consolidated Edison Co. of N.Y., 62 N.Y.2d at 560; Gallet, Dreyer & Berkey, LLP v. Basile, 141 A.D.3d at 406; Bellinson Law, LLC v. Iannucci, 102 A.D.3d at 563; Wathne Imports, Ltd. v. PAL USA, Inc., 101 A.D.3d at 88. Thus plaintiffs' claim of damages due to lost staff time, unsupported by any documentary evidence, is also speculative. The court therefore also grants so much of defendant's motion as seeks summary judgment dismissing plaintiffs' claim for damages based on lost staff time.

D. Right of Way

During disclosure, defendant requested production of all documents supporting a "right of way" fee to be paid to plaintiffs, and they produced none. Since they have failed to show that defendant's cable on their premises reduced the rental or usable value of their premises, a right of way fee will correspond to the value of the use of the real property to a licensee. See Cassata v. New York New England Exch., 250 A.D.2d at 492 (1st Dep't 1998); Curwin v. Verizon Communications (LEC), 35 A.D.3d at 646; Salesian Socy. v. Village of Ellenville, 121 A.D.2d 823, 825 (3d Dep't 1986). That value depends on where defendant's telecommunications cable ran and for what period. Defendant fails to establish that its use of plaintiffs' premises was of no value.

As an alternative to summary judgment dismissing plaintiffs'

claim for a right of way fee, defendant seeks to preclude plaintiffs from offering any documents supporting a right of way fee at trial, since defendant requested production of all such documents during disclosure, and plaintiffs produced none. Plaintiffs present no opposition to preclusion of this specific evidence. Therefore the court grants defendant's motion to the extent of precluding plaintiffs from offering any documents supporting a right of way fee at trial. C.P.L.R. § 3126(2). See Gibbs v. St. Barnabas Hosp., 16 N.Y.3d 74, 82-83 (2010); Northway Eng'g v. Felix Indus., 77 N.Y.2d 332, 335 (1991); Diaz v. Maygina Relaty LLC, 181 A.D.3d 478, 478 (1st Dep't 2020); Henry v. Lenox Hill Hosp., 159 A.D.3d 494, 495 (1st Dep't 2018).

V. CONCLUSION

For the reasons explained above, the court denies plaintiffs' motion for summary judgment on defendant's liability for a trespass and grants defendant's motion for summary judgment dismissing plaintiffs' damages claims to the following extent. C.P.L.R. § 3212(b) and (e). The court dismisses plaintiffs' claim for attorneys' fees, for lost profits, for staff time costs, and for increased construction costs, except so much of plaintiffs' claim for increased construction costs as may be ascribed to work entailed in "Change order number 3" and any inflation in the costs of change orders over the period of defendant's delay. The court denies defendant's motion for

summary judgment dismissing plaintiffs' claim for a right of way fee, but grants its motion to preclude plaintiffs from offering any documents supporting a right of way fee at trial. C.P.L.R. §§ 3126(2), 3212(b).

DATED: December 10, 2020

LUCY BILLINGS, J.S.C.