Whealon v Gramercy Park Residence Corp.
2020 NY Slip Op 34208(U)
December 17, 2020
Supreme Court, New York County
Docket Number: 651595/2019
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 15

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TIMOTHY WHEALON, DECISION AND ORDER

Plaintiff, Index No. 651595/2019

- against -

GRAMERCY PARK RESIDENCE CORP., THE BOARD OF DIRECTORS OF GRAMERCY PARK RESIDENCE CORP., and J&C LAMB MANAGEMENT CORP.,

Defendants.

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MELISSA A. CRANE, J.:

Motion sequence nos. 002 and 003 are consolidated for disposition.

This action involves black soot allegedly emanating from the boiler room in a cooperative building infiltrating the apartment where plaintiff Timothy Whealon resides. In motion sequence no. 002, plaintiff moves, pursuant to CPLR 3126, for sanctions against defendants Gramercy Park Residence Corp. (GPRC), the Board of Directors of Gramercy Park Residence Corp. (the Board), and J&C Lamb Management Corp. (J&C) (collectively, defendants) for spoliation of evidence. In motion sequence no. 003, defendants move under CPLR 3211, or in the alternative, under CPLR 3212, for an order dismissing the first four causes of action for breach of the proprietary lease, breach of the warranty of habitability, gross negligence, and breach of fiduciary duty. Defendants also move to disqualify one of plaintiff's experts, Dr. William Esposito, Dr.PH, CIH (Dr. Esposito) and to preclude plaintiff from relying on his reports.

BACKGROUND AND PROCEDURAL HISTORY

GPRC owns a cooperative apartment building located at 60 Gramercy Park North in New York, New York (the Building or Premises) (NY St Cts Elec Filing [NYSCEF] Doc No. 125, Justin B. Singer [Singer] affirmation, exhibit A [complaint], ¶ 10). The Board governs the Premises (*id.*, ¶ 11). J&C is the managing agent (*id.*, ¶ 12). Nelson Lopez (Lopez) is the resident manager (NYSCEF Doc No. 158, Seth Guiterman [Guiterman] affirmation, exhibit J, ¶ 2). Craig Lamb (Lamb) is J&C's building manager.

The Premises consists of two 16-story residential towers – a North Tower and a South Tower – connected via a common ground floor lobby and a common basement (NYSCEF Doc No. 163, Philip Smalley, PE, CFEI [Smalley] 12/18/19 aff, ¶ 7). A passenger elevator and a freight elevator in each tower provide service from the penthouse level to the basement (*id.*).

Two Federal Model FST-250 steel Scotch-marine type boilers with Industrial Combustion Model DEG-105(P) dual-fuel burners configured to burn heating oil no. 4 provide heat and hot water to the Premises (NYSCEF Doc No. 163, ¶ 8; NYSCEF Doc No. 145, Singer affirmation, exhibit U at 1). The boilers are located in a basement room in the North Tower (NYSCEF Doc No. 145 at 1). Two Acorn Air Model 454 industrial combustion air intake fans draw in air from an adjacent exterior courtyard into the boiler room (NYSCEF Doc No. 163, ¶ 9; NYSCEF Doc No. 199, Guiterman affirmation, exhibit E at 4). This air allows for the proper combustion of the burners and facilitates draft for the boiler flues (NYSCEF Doc No. 163, ¶ 9). The fans are "interlocked" to operate simultaneously with the boilers such that the boilers cannot operate if the fans malfunction (*id.*, ¶ 9). Each boiler is equipped with a Heat-Timer Model MLS-A smoke alarm that measures the opacity of exhaust emitted from that boiler (*id.*, ¶ 10). The boilers vent through a flue system connected to a horizontal brick chimney beneath the courtyard that leads to a vertical

chimney stack at the North Tower, where the exhaust exits at the penthouse level (*id.*, ¶ 11; NYSCEF Doc No. 199 at 4-5).

Plaintiff purchased shares in GPRC in January 2006, and at present, he is the proprietary lessee and resident of apartment PHC (NYSCEF Doc No. 125, ¶¶ 14-15). The apartment is located on the top floor of the South Tower and is surrounded by an outdoor wrap-around terrace (*id.*, ¶ 16). Section 2 of the proprietary lease, entitled "Lessor's Repairs," states, in part, that "[t]he lessor shall at its expense keep in good repair all of the building including all of the apartments … and its equipment and apparatus except those portions the maintenance and repair of which are expressly stated to be the responsibility of the Lessee pursuant to Paragraph 18 hereof" (NYSCEF Doc No. 206, Carolyn Lanzetta [Lanzetta] aff, exhibit A at 9).

Between 2006 and 2010, plaintiff complained repeatedly of water stains and mold in the apartment caused by leaks from the roof (NYSCEF Doc No. 207, Lanzetta aff, exhibit B at 1; NYSCEF Doc No. 203, Guiterman affirmation, exhibit I at 49-52, 62 and 96). Plaintiff testified that he first saw water infiltrating the apartment prior to closing (NYSCEF Doc No. 203 at 50 and 52). He was told that it was "a building issue" (*id.* at 58). GPRC later installed a roof on the existing roof membrane (NYSCEF Doc No. 207 at 1).

Plaintiff avers that shortly after taking possession, he noticed "black, soot-like dust" accumulating in the apartment (NYSCEF Doc No. 152, Guiterman affirmation, exhibit D [plaintiff 3/19/19 aff], ¶ 11), and "black dusting around all the walls" (NYSCEF Doc No. 203 at 96). The dust allegedly stained the apartment's ceilings and walls and damaged his furnishings and artwork (NYSCEF Doc No. 125, ¶ 36). From 2012 to 2013, plaintiff completely renovated the apartment (NYSCEF Doc No. 203 at 68). The work included the installation of a sheet rock drop ceiling, double-paned windows and exterior doors, and a central air conditioning (AC) unit without a

ducted return (NYSCEF Doc No. 152, ¶¶ 12-13). The new windows and doors purportedly made the apartment "airtight" (*id.*, ¶ 29). Plaintiff alleges that after completing the renovation, the appearance of black dust accelerated (*id.*, ¶ 16), and he started seeing "black dots" on the ceilings and walls in the bedroom (NYSCEF Doc No. 203 at 164-166).

Towards the end of December 2015 or early January 2016, he began "coughing up black phlegm, coughing up blood" every morning for three to four months (NYSCEF Doc No. 203 at 138-139, 256-257 and 260). Over the next year, he sought treatment from at least six medical professionals (NYSCEF Doc No. 152, ¶ 18). In January or February 2016, one of his doctors told him "to investigate my environment, where I'm sleeping" (NYSCEF Doc No. 203 at 139) and opined that his symptoms were caused by a condition in his living space (NYSCEF Doc No. 152, ¶ 20). Plaintiff's handwritten note summarizing his doctor's opinion partially reads that "[a]ll testing determined that there was nothing medically, physically wrong with me, so the black stuff coming up in my sputum was being caused by my environment" (NYSCEF Doc No. 203 at 266). After his doctor causally linked his physical complaints to his environment, plaintiff informed Lamb and others by email on February 12, 2016 that he wished to "move forward expeditiously to remedy issues in my apartment which are affecting my health and enjoyment of my apartment" (NYSCEF Doc No. 204, Guiterman affirmation, exhibit J at 4-5). In a separate email to Sallie Scripter (Scripter), a former Board member, on March 10, 2016, plaintiff wrote, "I am having health related issues due to the situation happening in the apartment" (*id.* at 1). Once he installed air purifiers in the apartment, his coughing ceased (NYSCEF Doc No. 203 at 260 and 274).

In 2016, plaintiff also started noticing a black, grid-like pattern forming on the apartment's ceilings and walls (NYSCEF Doc No. 152, ¶ 24). He retained Indus Architects PLLC (Indus) to investigate (*id.*, ¶ 49). By letter dated July 29, 2016, plaintiff advised the Board that Indus had

found evidence of "thermal bridging," that "develops when the exterior temperature transfers via uninsulated building materials and attracts dirt and dust particles on the warm side of the interior surface" (NYSCEF Doc No. 207 at 2). Indus attributed the condition to the lack of insulation in the roofing assembly and other roof defects (*id.* at 2-3).

The Board consulted its architect, Midtown Preservation Architecture & Engineering, P.C. (Midtown), and forwarded its findings to plaintiff on October 4, 2016. Midtown concluded that the roof work, performed in 2006, conformed with the version of the New York City Building Code in effect at that time (NYSCEF Doc No. 208, Lanzetta aff, exhibit C at 2). Midtown also observed that plaintiff had installed a sheet rock drop ceiling, whereas other owners who had retained the original plaster ceilings in their penthouse apartments did not experience any thermal bridging (*id.*). Midtown recommended installing insulation over the drop ceiling to remediate the condition (*id.* at 3).

Plaintiff rejected Midtown's recommendations, stating that a unit owner was not required to investigate and remediate deficient conditions caused by GPRC's work (NYSCEF Doc No. 209, Lanzetta aff, exhibit D at 1-2). He repeated the demand that GPRC bring the roof into compliance with all current municipal codes (*id.* at 1). GPRC responded on February 8, 2017, writing that plaintiff had not presented any evidence the roof work had caused the damage in the apartment (NYSCEF Doc No. 210, Lanzetta aff, exhibit E at 1). One week later, plaintiff served GPRC with a "Notice of Default and Breach of Fiduciary Duty" letter (NYSCEF Doc No. 211, Lanzetta aff, exhibit F at 1). The letter states that GPRC was negligent in failing to remediate the roof defects as required under sections 2 and 4 (a) of the proprietary lease and the "Rules and Regulations Governing Use and Maintenance of Terrace/Roof Areas Appurtenant to Certain Apartments" (*id.*

at 2). Plaintiff demanded that GPRC take immediate action to install insulation under the roof and to remedy the roof defects that Indus and Midtown had previously identified (*id.* at 4).

Shortly thereafter, defendants completed routine maintenance on the roof (NYSCEF Doc No. 205, Lanzetta aff, ¶ 20), and informed plaintiff of this work (NYSCEF Doc No. 212, Lanzetta aff, exhibit G at 1). By letter on June 1, 2017, plaintiff requested information concerning the recent roof work, including testing protocols (NYSCEF Doc No. 230, plaintiff 6/11/20 aff, exhibit E at 1-2). Lanzetta, the Board's current President, avers that the Board did not receive any further substantive complaints from plaintiff until September 2018 (NYSCEF Doc No. 205, ¶ 21).

Meanwhile, in August 2017, plaintiff installed a ducted return AC unit, that meant that all air inside the apartment cycled through that unit (NYSCEF Doc No. 152, ¶ 37). The unit did not ameliorate the dust condition in the apartment (*id.*, ¶ 39).

Plaintiff then retained an environmental expert, Olmsted Environmental Services, Inc. (Olmsted), to determine the source of the dust (NYSCEF Doc No. 152, ¶ 42). Olmsted analyzed the particulates that had accumulated on the AC unit's filter, and identified the matter as soot, not char or ash (*id.*, ¶ 43). Olmsted concluded the soot was "likely combusted fuel oil emanating from the … boilers [at the Premises]" (*id.*, ¶¶ 44-45). Olmsted also inspected the boiler room on March 9, 2018, and noted that the room lacked proper ventilation (*id.*, ¶¶ 46-48). Operation of the boilers required a significant supply of "makeup air," but there was no makeup air in the room (*id.*, ¶ 47). This led to less efficient combustion of the heating oil and produced more soot (*id.*). Olmsted determined that soot-laden air from the boiler room escaped into the adjacent basement hallway and traveled up the unventilated elevator shafts before discharging onto the penthouse floor (*id.*).

Plaintiff also hired Indus. On May 11, 2018, Indus conducted a site inspection of the roof and basement (NYSCEF Doc No. 231, plaintiff 6/11/20 aff, exhibit F at 1). In a memorandum

dated July 18, 2018, Indus noted that the "[b]oiler [r]oom … does not contain any ducted or vented exhaust system or dedicated pathway for combustion air" (*id.* at 1-2). Indus found several code violations, including the lack of a ducted fresh air intake and an exhaust duct in the boiler room and the lack of ventilation in the elevator shafts (*id.* at 2). These conditions allegedly contributed to the "stack effect," that occurs when air moves between different pressure gradients within a building (*id.*). Indus explained that air is "sucked" through an open grate in the boiler room door into the adjacent basement corridor and elevator shafts via the "pulling action of the stack effect and the pull from the rising elevator," rises up the unventilated shafts as the elevators move and escapes through unsealed doors and partitions into the common hallway on the upper floors and into plaintiff's apartment (*id.* at 2-4). The experts also took photographs of the boiler room (NYSCEF Doc No. 139, Singer affirmation, exhibit O).

Additionally, plaintiff learned that burning heating oil no. 4 generates large amounts of particulate matter below 2.5 microns (NYSCEF Doc No. 152, ¶ 51). The New York City Department of Environmental Protection (DEP) has determined to phase out the use of heating oil no. 4 by 2030 (NYSCEF Doc No. 127, Singer affirmation, exhibit C at 2).

Plaintiff disclosed his experts' findings to defendants by letter dated September 24, 2018 (the September Letter), that defendants:

> "willfully turned a blind eye to the fact that there is a lack of proper ventilation in the boiler room and the elevator hoistways - both of which constitute violations of applicable building codes - which is causing the piston-like motion of the elevators to draw enormous amounts of toxic soot from the boiler room up the elevator shaft, which is then being forced out of the shaftway at the top of the Building to then permeate throughout the Building, most noticeably in Mr. Whealon's apartment, where it has blackened the walls and ceilings and has caused Mr. Whealon to cough up blackened phlegm"

(NYSCEF Doc No. 126, Singer affirmation, exhibit B at 3). Plaintiff demanded they install proper ventilation in the boiler room and elevator hoistway; cease using heating oil no. 4; and pay him $271,710.87 for his out-of-pocket expenses (*id.* at 4).

Defendants responded on October 29, 2018, writing that the "claims are without basis in fact or science" (NYSCEF Doc No. 131, Singer affirmation, exhibit G at 1). They noted that plaintiff had not retained a mechanical engineer; indicated that he had not tested the matter found in the filter in the AC unit; rejected Olmsted's claim that there was no makeup air in the boiler room; and rejected the stack effect theory his experts advanced (*id.* at 1-2). Defendants gave no indication as to when they would cease using heating oil no. 4 (*id.* at 2). Attached to defendants' response was an email from James G. Mazzo (Mazzo) of Leardon Boiler Works, Inc. (Leardon), one of defendants' boiler service contractors, which states that the "boilers are maintained to comply with NYC DEP and DOB codes" and have passed annual mandated efficiency tests (*id.* at 4). Mazzo also wrote that two fresh air intake fans bring combustion air to the boilers (*id.*). In addition, defendants furnished plaintiff with a letter from Vertical Transportation Consulting & Engineering Analysis, which states that the elevator modernization project completed in 1988 had been approved by DOB (*id.* at 7).

Plaintiff subsequently retained Ambient Group Inc. (Ambient) and its principal, Dr. Esposito. Ambient's report from January 31, 2019 (the January Report) stated that its objective "was to determine if the air within the basement of the building is migrating into PHC and if that air contains combustion byproducts associated with boiler operation[s]" (NYSCEF Doc No. 217, Coreen A. Robbins, MHS, PhD, CIH [Dr. Robbins] 3/11/20 aff, exhibit B at 4). A pressure differential study established that air from the basement and ground floor flows up the vertical shafts and pipe chases and "rushes into PHC in a 'piston like' fashion" (*id.* at 4). Carbon monoxide

(CO) and ultrafine particle (UFP) air monitoring studies revealed the presence of combustion byproducts, or CBPs, in the Building (*id.* at 6). The CBP concentration was directly proportional to boiler operations and the outside air temperature (*id.*). In addition, the basement air mass traveled along a positive pressure gradient to the apartment via the elevator shafts and common areas (*id.* at 6). The January Report concluded with the following observation:

> "The experiments provide conclusive evidence that 1) combustion byproducts are present within the indoor air of the building, 2) the concentration of these byproducts is directly proportional to boiler operation and outside air temperature, and 3) the air mass within the basement will travel from the basement along a positive pressure gradient and into PHC via the core shaft ways and common areas of the building"

(*id.* at 5).

Plaintiff also retained Rand Engineering & Architecture, DPC (Rand). After engaging in discussions with plaintiff about granting Rand access to the boiler room and elevator shafts, defendants ultimately declined based upon advice from GPRC's liability carrier (NYSCEF Doc No. 130, Singer affirmation, exhibit F at 1-2). Rand's senior mechanical engineer, Patrick McDonald, P.E. (McDonald), proceeded with a site inspection on November 28, 2018. McDonald's February 12, 2019 reads, in part:

> "There is no vent opening or other system communicating directly to the exterior in the hallway, and for this reason the elevator shaft is the most likely source of any contaminants entering the hallway and subsequently Penthouse C. There is no vent opening or other system communicating directly to the exterior in the hallway, and for this reason the elevator shaft is the most likely source of any contaminants entering the hallway and subsequently Penthouse C. The elevator shaft is also observed to be positively pressurized with respect to the hallway. The most likely culprit is stack effect, the phenomenon whereby warmed air rising through the building will create negative pressure at lower floors and positive pressure at higher floors, especially the top of the building where Penthouse C is located. The stack effect is exacerbated by the fact that the elevator shaftways are not ventilated. In addition, the motion of the

> elevator also contributes to moving air up into the hallway. Stack effect would also produce low pressure at the cellar level where the boilers are located. The use of tracer gas in the Ambient Labs experiment confirms that air from the cellar level is in fact making its way to the Penthouse C apartment. It is therefore RAND's conclusion that the soot detected in the apartment originates from the boilers on the cellar level"

(NYSCEF Doc No. 145, Singer affirmation, exhibit U at 3). Although he did not visit the boiler room, McDonald opined that the presence of CBPs in the apartment implicated possible issues with the design or function of the combustion air and ventilation systems in the boiler room and the maintenance of the boiler and boiler room (*id.* at 4).

Plaintiff then commenced this action by filing a summons and complaint on March 19, 2019. The complaint pleads the following six causes of action: (1) breach of the proprietary lease against GPRC; (2) breach of the warranty of habitability against GPRC and J&C; (3) gross negligence against all defendants; (4) breach of fiduciary duty against the Board; (5) a judgment declaring that defendants are obligated to remedy the conditions causing the black soot to enter the apartment; and, (6) an injunction directing defendants to remedy those conditions.

In connection with an application for a preliminary injunction, plaintiff obtained an order dated March 20, 2019 requiring defendants to:

> "Provide Rand and Ambient access to all areas of the Building reasonably necessary (including but limited to the boiler, the boiler room, elevator hoistways and the roof) on or before March 27, 2019 for purposes of inspection and testing related to the infiltration of combusted fuel oil from the Building's boiler into Plaintiff's apartment"

(NYSCEF Doc No. 134, Singer affirmation, exhibit J at 2). The parties agreed an inspection would take place on March 25, 2019 (NYSCEF Doc No. 132, Singer affirmation, exhibit H at 1).

Leardon's records show that it worked on both boilers shortly before the court-ordered inspection. On March 21, 2019, Leardon installed a new fresh air intake and performed a complete

overhaul of burner no. 1 (NYSCEF Doc No. 136, Singer affirmation, exhibit L at 1-2). The next day, Leardon performed a complete overhaul of burner no. 2 (*id.* at 3). The overhauls entailed dismantling, cleaning and reassembling the oil burners and restarting and setting the boilers for "maximum efficiency" (*id.* at 2-3). Leardon had also replaced a defective fresh air intake fan on November 12, 2018 (NYSCEF Doc No. 137, Singer affirmation, exhibit M at 1).

Ambient summarized its findings from the inspection and the results from additional studies conducted at the Premises in an April 10, 2019 report (the April Report) (NYSCEF Doc No. 218, Dr. Robbins 3/11/20 aff, exhibit C at 4). Differential pressure testing between the boiler room, boiler exhaust and basement hallway indicated that the boilers operate in 50-minute cycles, at which time the boiler room becomes "positive" when the cycle initiates (*id.*). A daytime UFP monitoring study in the boiler room showed that particle generation correlated with boiler operations, with initial spikes observed at the start of each cycle (*id.* at 5). An overnight UFP study in the elevator machine room showed lower UFP concentrations than that observed in the boiler room, "but the same cycling observed in the boiler room" (*id.*). A tracer gas study revealed that boiler room air migrates into the basement hallway and up the South Tower elevator shafts (*id.*). The April Report concludes, in part, that:

> "The experiments reconfirm our original hypothesis and provide conclusive evidence that 1) combustion byproducts are present within the indoor air of the building; 2) the concentration of these byproducts is directly proportional to boiler operation; and 3) the air mass within the basement travels from the basement along a positive pressure gradient and into PHC via the core shaft ways and common areas of the building.
>
> The critical new finding is that the dominant pathway likely [sic] exists by way of the below grade horizontal exhaust shaft under the slab of the basement which provides a direct route for combustion byproducts to enter the basement and the South Tower elevator shaftways, via an unknown under slab utility chase network or crevices"

(*id.* at 6).

In a June 3, 2019 report (the June Report), Ambient discussed two different subgrade routes air from the boiler room travels to the apartment (NYSCEF Doc No. 219, Dr. Robbins 3/11/20 aff, exhibit D at 4). Differential pressure monitoring showed that air from the "positive" boiler room flowed into the "negatively pressurized" basement hallway and below ground utility chase (*id.* at 8). A robotic camera inspection of the exhaust shaft beneath the courtyard revealed a heavy layer of CBPs and "snow-like drifting of the sediment" within a "porous brick and mortar" chamber (*id.* at 7). Ambient resolved that boiler room air (i) seeps into the below-grade utility chases and into the basement of the South Tower through improperly sealed cavities and pipe penetrations in the boiler room and (ii) seeps through cracks in the brick and mortar in the below grade portion of the chimney system (*id.* at 4). A UFP monitoring study in plaintiff's living room also established a correlation between aerosol concentrations and boiler activity (*id.* at 9). Ambient reconfirmed its original hypothesis that CBPs generated during boiler operations migrated up the South Tower elevator shafts (*id.* at 10). It recommended sealing all cavities and pipe penetrations in the boiler room; installing a stainless-steel duct exhaust in the horizontal portion of the boiler chimney; ventilating the elevator shafts; and, switching to a less toxic heating oil (*id.*).

Defendants engaged J.S. Held LLC (JS Held), a firm specializing in forensic architectural and environmental consulting services, to investigate (NYSCEF Doc No. 166, Robert I. Leighton, CIH CSP [Leighton] 12/18/19 aff, ¶¶ 2-3; NYSCEF Doc No. 170, Leighton 12/18/19 aff, exhibit D at 3). On April 9, 2019, JS Held collected a total of 17 samples consisting of five ambient air samples, six surface wipe samples and six surface tape-lift samples, from the boiler room, the basement hallway near the elevator bank, the elevator landing outside of plaintiff's apartment, and the bulkhead space above elevator B (NYSCEF Doc No. 168, Leighton 12/18/19 aff, exhibit B

[Leighton 5/23/19 aff], ¶ 6). JS Held sent the samples to an independent laboratory, ESML Analytical, Inc. (EMSL), for "Level 1" presumptive analysis and "Level 2" confirmatory analysis (*id.*, ¶¶ 10 and 12). The samples revealed CBP levels within normal limits, with measurements ranging from non-detectable to less than two percent for soot or char (*id.*, ¶¶ 14-16). JS Held observed that the ambient air and settled dust concentration levels for soot or char "improve[d] with proximity to the apartment of concern" (NYSCEF Doc No. 170 at 8).

On May 7, 2019, JS Held took air and surface samples from within plaintiff's apartment (NYSCEF Doc No. 168, ¶¶ 18-19). Analysis of the 20 surface wipe and tape-lift samples revealed soot or char levels within normal limits, with measurements ranging from non-detectable to less than two percent for soot or char (*id.*, ¶¶ 23-25).

On May 15, 2019, JS Held took surface wipe and tape-lift samples from two used filters from plaintiff's AC unit (NYSCEF Doc No. 168, ¶ 29). The results showed that char levels were within normal limits (*id.*). Both filters contained elevated levels of soot, with one filter measuring 20% and the second measuring 50%, though Leighton, a senior vice president at JS Held, attributed the difference to the length of time each filter was in use (*id.*). Chemical analysis revealed the soot from each filter was "not chemically identical," and shared only two common chemical compounds; seven other compounds were "not know[n] to be used in fuels" (*id.*, ¶ 30) (emphasis in original). JS Held concluded the soot did not appear to originate from the boiler room (*id.*).

In June 2019, this court held a three-day hearing (the Hearing) on whether a preliminary injunction requiring defendants to install proper ventilation in the boiler room and elevator shafts and to remediate the infiltration of soot into the apartment should issue. This court denied the application on June 11, 2019 (NYSCEF Doc No. 115).

Plaintiff now moves for spoliation sanctions on the ground that defendants destroyed evidence despite having knowledge of the pending litigation and of the court-ordered inspection. Defendants move separately for dismissal or for summary judgment on the first four causes of action pled in the complaint.

DISCUSSION

Motion Sequence No. 002

On this motion, plaintiff argues that defendants materially altered the conditions of the boilers and the boiler room by installing two new fresh air intake fans and by completely cleaning and overhauling both burners less than four days before the March 25 inspection. Plaintiff argues that these changes prevented his experts from inspecting conditions typically present in the room to determine whether inadequate ventilation or an inefficient or defective boiler condition caused excessive soot to build up and migrate to his apartment.

Plaintiff relies on an affidavit from McDonald. McDonald avers that, because of Leardon's work, he has "no way of determining whether those systems were properly functioning prior to my inspection" and "no way of determining whether the boiler room was adequately ventilated" (NYSCEF Doc No. 146, McDonald 11/19/19 aff, ¶¶ 16 and 18). McDonald adds that "it was apparent … the boiler room had just recently been scrubbed and hosed down, with the floors still wet" (*id.*, ¶ 19). The presence of soot would have been indicative of inadequate ventilation or improperly functioning equipment, but defendants washed away any evidence of observable soot (*id.*). He surmises that these actions "accomplished the task of eliminating the production of soot in the boiler room" (*id.*, ¶ 21), and accounts for the fact there were no detectable amounts of soot found in subsequent air testing in the apartment and the Premises (*id.*). McDonald concludes that "while I am certain that the soot that is present in Mr. Whealon's apartment was emanating from

the Building's boilers …, as a result of the Defendants[']' actions, I now have no way of determining exactly why the boilers were producing abnormally high levels of soot (*id.*, ¶ 20).

Plaintiff also argues that defendants willfully and deliberately destroyed this crucial evidence, and points to events that have occurred since he delivered the September Letter as proof of a nefarious intent. First, Lanzetta, a former Board member, testified that the Board was aware of his threat of legal action as of September 2018 (NYSCEF Doc No. 128, Singer affirmation, exhibit D at 104). The September Letter expressly referenced the lack of proper ventilation in the boiler room (NYSCEF Doc No. 126 at 3), but defendants replaced one of the intake fans in November 2018. They refused to grant Rand access to the boiler room that same month.

Second, plaintiff claims that defendants have not produced any text messages between Lopez and Lamb because they have been deleted and cannot be recovered (NYSCEF Doc No. 147, plaintiff's mem of law at 13; NYSCEF Doc No. 192, oral argument tr at 32). Subpoenaed phone records reveal that Lopez called Leardon twice on March 19, 2019, at 11:39 a.m. and at 2:35 p.m. (NYSCEF Doc No. 133, Singer affirmation, exhibit I at 1), and texted Lamb once on March 20, 2019 at 4:15 p.m. (NYSCEF Doc No. 135, Singer affirmation, exhibit K at 1). These communications occurred on the day plaintiff filed the action and the day he moved for an injunction. Defendants confirmed the date and time for the court-ordered inspection only after these communications occurred. Over the next two days, Leardon replaced an intake fan and overhauled the boilers.

Third, plaintiff alleges that defendants failed to disclose the changes to the boiler system. Plaintiff's counsel affirms that at the March 25 inspection, defendants never informed him that new fans had been installed, with Lopez telling him that "the fans were not new and had been there

'for a long time'" (NYSCEF Doc No. 124, Singer affirmation, ¶¶ 2-3). Counsel also "uncovered an old fresh air intake fan hidden under a blanket in supply closet of the boiler room" (*id.*, ¶ 4).

Fourth, plaintiff contends that defendants did not inform Leardon of the court-ordered inspection and allowed Leardon to work on the boilers. Lopez testified that he had been advised that the court had ordered an inspection of the boilers, yet he never told anyone at Leardon about it (NYSCEF Doc No. 140, Singer affirmation, exhibit P at 88 and 94).

Plaintiff also questions the timing of the Leardon's work. At his deposition, Leardon's president, Mazzo, explained the differences between a boiler cleaning and an overhaul, with the latter task involving a dismantling, cleaning and reassembly of the oil burner (NYSCEF Doc No. 141, Singer affirmation, exhibit Q at 29). He testified that Leardon overhauls the boilers once a year (*id.* at 30). Though there is no set schedule for when an overhaul should be performed, Leardon will complete this task upon a client's request or based on the dates past overhauls were performed (*id.*). Mazzo expressed that Leardon was not required to overhaul the boilers in March 2019 and that he generally recommended that such work take place between July and October, outside of the heating season (*id.* at 32 and 130). Mazzo did not believe he advised anyone present at the court-ordered inspection about Leardon's work four days earlier (*id.* at 117).

In addition, plaintiff argues that the boiler work was not necessary because the time within which defendants had to complete a triennial inspection of the boilers, as required by the City of New York, had not expired. When asked whether Leardon had to complete a triennial inspection in March 2019, Lopez responded that "[t]hey just do it when they're ready to do it, I presume" (NYSCEF Doc No. 140 at 112). Lopez explained that the Leardon technician who responded to the March 21, 2019 service call told him "[w]e're having an inspection" and "[w]e have to prepare

the boiler because we're going to have an inspection" (*id.* at 105). However, Lopez admitted it was possible that Leardon could have completed this work in June or July (*id.* at 112).

For their part, defendants argue that plaintiff has not shown spoliation sanctions are warranted, since plaintiff cannot show his ability to mount a case has been compromised. Plaintiff's experts inspected the boiler room well before the alleged spoliation took place, as evidenced in the September Letter (NYSCEF Doc No. 126 at 2). They conclusively identified the boilers as the source of the soot infiltrating the apartment and opined that the stack effect theory caused exhaust from the boiler room to migrate up the elevator shafts in the South Tower. Defendants further contend that, prior to the Hearing, plaintiff was in possession of Leardon's records and was aware of Lopez's protocol of hosing down the boiler room every day. These disclosures did not hinder Dr. Esposito from concluding that the "actual particles … come from the basement, from the boiler room and go up into Mr. Whealon's apartment" (NYSCEF Doc No. 157, Guiterman affirmation, exhibit I at 102). Defendants also reject McDonald's contention that there was no observable soot in the boiler room at the inspection. McDonald could have collected surface samples from the top of the boiler, but chose not to do so.

Defendants also contend that replacing the intake fans was necessary, with Lamb testifying that "the requirement of heat for this building for 140 families … and hot water overrides what may be perceived as something that would be directly or indirectly involved with this case" (NYSCEF Doc No. 160, Guiterman affirmation, exhibit L at 130). As for the March 21, 2019 service call, Lopez explained there was an electrical short in one of the intake fans (NYSCEF Doc No. 159, Guiterman affirmation, exhibit K at 60-62), as shown on Leardon invoice no. 70832 (NYSCEF Doc No. 161, Guiterman affirmation, exhibit M at 103). Lopez testified that the Leardon technician indicated the fan motor had to be replaced (NYSCEF Doc No. 159 at 62).

Further, Lopez attests that regular maintenance protocols require the boilers to be checked and hosed down daily and their filters changed every week (NYSCEF Doc No. 158, ¶ 4). In addition to Leardon, Mack Heating & Cleaning Inc. provided cleaning services for the boilers (*id.*, ¶ 7). Defendants note that plaintiff had demanded the installation of proper ventilation in the boiler room and should not be heard to complain about that issue now.

Lopez also testified the overhaul work was performed in advance of a triennial inspection (NYSCEF Doc No. 159 at 101-102), as shown in Leardon invoice no. 70836 from May 1, 2019 (NYSCEF Doc No. 161 at 107). Although plaintiff objects to the timing, defendants argue this work has been performed outside the heating season once before. Leardon invoice no. 57607 from March 24, 2016 shows that Leardon "[f]urnished necessary labor and materials to perform a preliminary test for boilers #1 and #2 for Department of Environmental Protection triennial inspection" (*id.* at 54).

In reply, McDonald repeats his assertion that he has no way of knowing if the intake fans were operating properly. He observes that the service call to Leardon on March 19, 2019 involved a short circuit of the motor on the burner's blower, not the intake fan (NYSCEF Doc No. 182, McDonald 1/17/20 aff, ¶¶ 3-4). The intake fan is a separate component and runs on a separate circuit, and therefore, a defect with the blower would not have required replacing the fan (*id.*). McDonald maintains that he found an exhaust fan in a supply closet in the boiler room, and speculates that defendants had mistakenly used an exhaust fan in the room (*id.*, ¶ 6). He rejects the contention that the boilers could not have caused the soot condition in the apartment because they passed their annual inspections (*id.*, ¶ 8). The inspections generally take place after the boilers are overhauled, and "are not representative of the typical condition and operation of the boilers at the height of the winter heating season" (*id.*). McDonald also avers that he cannot determine

whether the smoke alarms were functioning properly because he could not inspect the alarms affixed to the boilers (*id.*, ¶ 9).

"Spoliation is the destruction of evidence" (*Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 173 [1st Dept 1997]). It occurs when "a litigant, intentionally or negligently, disposes of crucial items of evidence … before the adversary has an opportunity to inspect them" (*id.*). Sanctions may be awarded whether the evidence is destroyed negligently or intentionally (*China Dev. Indus. Bank v Morgan Stanley & Co. Inc.*, 183 AD3d 504, 505 [1st Dept 2020]). A party moving for spoliation sanctions must show that the offending party had an obligation to preserve the evidence destroyed, the evidence was destroyed with a "culpable state of mind," and the lost evidence was relevant to the moving party's claim or defense (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547 [2015], quoting *Voom HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 45 [1st Dept 2012]). The relevance of evidence that is intentionally or willfully destroyed is presumed, whereas the moving party must show that negligently destroyed evidence is relevant (*Pegasus Aviation I, Inc.*, 26 NY3d at 547-548, citing *Zubulake v UBS Warburg LLC*, 220 FRD 212, 220 [SD NY 2003]; *accord Voom HD Holdings LLC*, 93 AD3d at 46).

The court has the discretion to fashion an appropriate remedy against the offending party, including precluding that party from offering evidence at trial, awarding costs, granting an adverse inference, and imposing "the ultimate sanction of dismissing the action or striking responsive pleadings, thereby rendering a judgment by default against the offending party" (*Ortega v City of New York*, 9 NY3d 69, 76 [2007]). "[S]triking a pleading is usually not warranted unless the evidence is crucial and the spoliator's conduct evinces some higher degree of culpability" (*Russo v BMW of N. Am., LLC*, 82 AD3d 643, 644 [1st Dept 2011]). Evidence is considered crucial when

it is the "sole means by which plaintiff can establish his case" (*Alleva v United Parcel Serv., Inc.*, 112 AD3d 543, 545 [1st Dept 2013]), or "confront a defense" (*Melcher v Apollo Med. Fund. Mgt., L.L.C.*, 105 AD3d 15, 24 [1st Dept 2013]). Stated another way, the lost evidence must have left the moving party "prejudicially bereft of appropriate means" to present a claim or defense (*Kirkland*, 236 AD2d at 174 [internal quotation marks and citation omitted]). The moving party bears the burden of showing that sanctions are appropriate (*see Duluc v AC & L Food Corp.*, 119 AD3d 450, 452 [1st Dept 2014], *lv denied* 24 NY3d 908 [2014]).

Preliminarily, plaintiff's contention that defendants intentionally destroyed evidence lacks support. The proof demonstrates that the changes to the boilers or boiler room were in the usual course of GPRC's business. Lamb explained that the boilers provided heat and hot water to the Premises, and the invoices showed repairs and maintenance were completed when necessary to accomplish this. Similarly, Lopez testified that hosing down the boiler room each day was part of his regular maintenance protocol. At best, these actions implicate negligence.

While sanctions may be imposed for the negligent loss of evidence (*see Strong v City of New York*, 112 AD3d 15, 21-22 [1st Dept 2013]), here this is not the case. Plaintiff is not "prejudicially bereft of appropriate means" to present his claims (*Kirkland*, 236 AD2d at 174 [internal quotation marks and citation omitted]). Plaintiff complains that defendants refused to grant McDonald access to the boiler room and then made significant modifications. However, plaintiff ignores that Olmsted and Indus inspected the boiler room twice – on March 9, 2018 and May 11, 2018 – and concluded that soot from that room had infiltrated the apartment. Olmsted and Indus made these observations before any of the alleged spoliation occurred.

The changes to the boilers and boiler room also did not impede Ambient from causally connecting boiler operations to the soot condition in the apartment. Two months after defendants

replaced the first intake fan, Ambient stated in its January Report that studies provided "*conclusive evidence*" that CBPs generated in the boiler room migrated to the apartment (NYSCEF Doc No. 217 at 5) (emphasis supplied). In two subsequent reports after the alleged spoliation occurred, Ambient wrote that "*[t]he experiments reconfirm our hypothesis and provide conclusive evidence*" that an air mass containing CBPs migrates from the boiler room and boiler exhaust system to the apartment (NYSCEF Doc No. 218 at 6; NYSCEF Doc No. 219 at 10) (emphasis supplied). McDonald also ruled out outside air as the source of the soot, testifying at the Hearing that the soot originated from the boilers (NYSCEF Doc No. 156, Guiterman affirmation, exhibit H at 198).

Moreover, the changes did not hinder plaintiff's experts from identifying the potential pathways by which the air mass travels. Olmsted and Indus found the boiler room door, the basement hallway and the elevator shafts as the paths by which air is drawn up the South Tower. Testing confirmed the presence of soot in the shafts. Ambient and McDonald identified two subgrade routes, including an underground chimney shaft. An inspection showed the soot in the underground shaft had not been disturbed (NYSCEF Doc No. 182, ¶ 9).

McDonald's belief that defendants had previously used an exhaust fan in the boiler room (NYSCEF Doc No. 182, ¶ 6) contradicts Lopez's testimony that the discarded fan had been removed from the basement laundry room (NYSCEF Doc No. 178, Guiterman affirmation, exhibit C at 65-66). The Leardon invoices make no mention of an exhaust fan having been serviced or replaced, and Mazzo's email from October 3, 2018 expressly references intake fans. Incidentally, Indus noted the absence of an exhaust fan in the boiler room at its inspection in May 2018 (NYSCEF Doc No. 231 at 3).

Moreover, McDonald's averment that he cannot determine whether the boilers were producing abnormally high levels of soot (NYSCEF Doc No. 146, ¶¶ 13 and 20) directly

contradicts his earlier, sworn testimony at the Hearing that he was "not making any allegation that the boiler was not -- that that or any other boiler apparatus was malfunctioning or the boiler was functioning abnormally" (NYSCEF Doc No. 156 at 228). McDonald fails to clarify or correct his earlier testimony in his reply affidavit. Instead, he confirms that heating oil no. 4 "is known to produce elevated levels of soot" (NYSCEF Doc No. 182, ¶ 6). This statement, however, implies that elevated soot production was not entirely dependent on the boiler apparatus malfunctioning, and gives rise to the inference that elevated soot production is a normal result from combustion of this specific heating oil. McDonald does not ascribe a specific number to what is considered "elevated." Presumably, excessive soot production can affect the concentration of CBPs in the apartment, but plaintiff's primary theory rests on soot infiltration. Assuming the boilers produced excessive soot and the soot-laden air did not infiltrate the apartment in levels deemed hazardous, then plaintiff would likely have no claim.

Furthermore, even if the work performed on the boilers and in the boiler room affected the concentration levels of the soot emitted from the boilers, Olmsted has already found "heavy concentrations of soot consisting of 50%" in the filter of plaintiff's AC unit (NYSCEF Doc No. 152, ¶ 44) (internal quotation marks omitted). Ambient has also determined that the size of the UFPs found in the apartment are similar in size to those found in diesel emissions (NYSCEF Doc No. 217 at 12). Therefore, plaintiff has not established that the routine boiler and boiler room maintenance has impacted his ability to prosecute his claims. Insofar as plaintiff seeks spoliation sanctions based on these changes, the motion is denied.

Regarding the missing text messages between Lopez and Lamb, it is well settled that "[o]nce a party reasonably anticipates litigation, it must, at a minimum, institute an appropriate litigation hold to prevent the routine destruction of electronic data" (*Voom HD Holdings LLV*, 93

AD3d at 41). Each party and its counsel have a continuing obligation to ensure that relevant documents are retained and produced (*see Zubulake*, 229 FRD at 432; *see also* CPLR 3101 [h] [stating that each party has a continuing obligation to amend or supplement its discovery responses). The "failure to institute a litigation hold is but one factor that a trial court can consider in making a determination as to the alleged spoliator's culpable state of mind" (*Pegasus Aviation I, Inc.*, 26 NY3d at 553). The ultimate issue on whether spoliation sanctions are appropriate is proof the moving party has suffered prejudice from the loss of evidence (*see Pegasus Aviation I, Inc.*, 26 NY3d at 551).

Here, defendants have not adequately addressed why they have not produced any text messages between Lopez and Lamb. Nonetheless, plaintiff's proof of prejudice on this issue is woefully deficient. He points to one instance from March 20, 2019 where Lopez sent a text message to Lamb. Plaintiff has not set forth the content of this particular message nor has he demonstrated how this specific message is germane to his claim that soot from the boiler room has contaminated his apartment. Moreover, he has not shown that the absence of the text messages between Lamb and Lopez has left him "prejudicially bereft of appropriate means" to present his claims (*Kirkland*, 236 AD2d at 174 [internal quotation marks and citation omitted]). Thus, that part of plaintiff's motion seeking sanctions based on the missing text messages between Lopez and Lamb is denied.

Motion Sequence No. 003

A. Dismissal under CPLR 3211 (a) (5)

Defendants move for dismissal of the first four causes of action for breach for breach of the proprietary lease, breach of the warranty of habitability, gross negligence, and breach of fiduciary duty on the ground that they are time-barred. Defendants posit that the claims sound in

law, not equity, since plaintiff seeks to recover monetary damages for injuries to his person or property. Defendants contend these claims are subject to CPLR 214-c (2), which applies a three-year statute of limitations to claims arising from exposure to a toxic substance.

Defendants argue these claims arose when plaintiff first began to experience physical symptoms stemming from alleged soot inhalation in late December 2015 or early January 2016 (NYSCEF Doc No. 203 at 138-139). In February 2016, his doctor causally linked his physical complaints to an external condition in his sleeping environment. On February 12, 2016, plaintiff alerted defendants that issues in the apartment were affecting his health (NYSCEF Doc No. 204 at 4-5). He repeated the assertion that his health issues stemmed from a condition in the apartment in a separate March 10, 2016 email to Scripter (*id.* at 1). Therefore, plaintiff's claims began to accrue on February 12, 2016 or March 10, 2016 at the latest. Defendants maintain that plaintiff commenced this action on March 19, 2019, making these four claims time-barred.

Plaintiff argues the claims are timely. First, a six-year statute of limitations governs the cause of action for breach of the proprietary lease, which runs from the date of the breach or when one party fails to perform a contractual obligation. Defendants purportedly breached the proprietary lease in September 2018, and each day thereafter, by failing to remediate the conditions causing soot to infiltrate the apartment. He asserts that the same analysis applies to the breach of the warranty of habitability claim. Plaintiff also maintains that the gross negligence and breach of fiduciary duty claims are timely under CPLR 214-c (4), since he filed them within one year of discovery of the cause of the injury. He further contends that the doctrine of equitable estoppel precludes defendants from advancing a statute of limitations defense, as their misconduct about the cause of the condition delayed him from bringing his claims earlier.

A party moving to dismiss a claim as time-barred under CPLR 3211 (a) (5) "'bears the initial burden of establishing, prima facie, that the time in which to sue has expired'" (*Norddeutsche Landesbank Girozentrale v Tilton*, 149 AD3d 152, 158 [1st Dept 2017], quoting *Benn v Benn*, 82 AD3d 548, 548 [1st Dept 2011]). To meet this burden, it is incumbent upon the moving party to demonstrate when the claim accrued (*see Lebedev v Blavatnik*, 144 AD3d 24, 28 [1st Dept 2016]). In response, the non-moving party must show "whether the statute of limitations is inapplicable or whether the action was commenced within the statutory period … [and] must aver evidentiary facts establishing that the action was timely or … raise an issue of fact as to whether the action was timely" (*MTGLQ Invs., LP v Wozencraft*, 172 AD3d 644, 645 [1st Dept 2019], *lv dismissed* 34 NY3d 1010 [2019] [internal quotation marks and citations omitted]).

Under CPLR 203 (a), a cause of action begins to accrue "when all of the facts necessary to the cause of action have occurred so that the party would be entitled to obtain relief in court" (*Aetna Life & Cas. Co. v Nelson*, 67 NY2d 169, 175 [1986]). CPLR 214-c (2) provides:

> "Notwithstanding the provisions of section 214, the three year period within which an action to recover damages for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier."

The statute generally governs tort claims. In this action, only the gross negligence and breach of fiduciary duty claims sound in tort (*see Ganzi v Ganzi*, 183 AD3d 433, 433-434 [1st Dept 2020] [stating that a "[b]reach of fiduciary duty is a tort claim"]). Nevertheless, "[i]n applying the statute of limitations, courts must look to the reality or essence of a claim rather than its form" (*Annunziata v Quest Diagnostics Inc.*, 127 AD3d 630, 631 [1st Dept 2015]). It is the

remedy, not the theory of liability, that controls (*Matter of R.M. Kliment & Frances Halsband, Architects [McKinsey & Co.]*, 3 AD3d 143, 146 [1st Dept 2004], *affd* 3 NY3d 538 [2004]).

1. Breach of the Proprietary Lease against GPRC

Close scrutiny of the allegations for the first cause of action reveals that "the nature of the injury and the resulting harm sound in tort, but the manner in which the injury occurred sounds in contract" (*Gallup v Summerset Homes, LLC*, 82 AD3d 1658, 1660 [4th Dept 2011]). "[W]hen the action is one for damages to property or pecuniary interests only, where there is a contractual agreement between the parties, the general tendency is to allow a plaintiff to elect to sue in contract or tort, as he sees fit" (*Matter of Paver & Wildfoerster [Catholic High School Assn.]*, 38 NY2d 669, 675 [1976]). Hence, when the parties' relationship originates from a contract, a six-year statute of limitations applies to actions based on a defendant's failure to exercise due care in performing that contract (*see Baratta v Kozlowski*, 94 AD2d 454, 461-462 [2d Dept 1983]).

CPLR 214-c is inapplicable to this cause of action. Plaintiff averred that he is current on all his financial obligations to GPRC (NYSCEF Doc No. 225, plaintiff 6/11/20 aff, ¶ 32). He informed defendants of a harmful condition in his apartment in February 2016. Once his experts resolved that the dust originated from the boiler room, plaintiff demanded that defendants correct the condition, as required under the proprietary lease. GPRC rejected the demand, and the condition in the apartment persisted. Since the relationship between plaintiff and GPRC "had its genesis in contract, and the events giving rise to this action directly implicated the landlord-tenant relationship" (*Novita LLC v 307 W. Rest. Corp.*, 35 AD3d 234, 234 [1st Dept 2006]), CPLR 214-c does not apply. Furthermore, a six-year statute of limitations governs a claim for breach of a proprietary lease (*see Estate of Del Terzo v 33 Fifth Ave. Owners Corp.*, 136 AD3d 486, 488 [1st Dept 2016], *affd* 28 NY3d 114 [2016]; *Gross v 420 E. 72nd St. Tenants Corp.*, 21 Misc 3d 629,

632-634 [Sup Ct, NY County 2008] [reasoning that a claim for breach of a proprietary lease is subject to a six-year statute of limitations]). Because plaintiff commenced this action within six years from the date on the September Letter, this claim is timely (*see Gallup*, 82 AD3d at 1661 [denying summary judgment on a breach of contract claim where the plaintiff pled violations of specific contract provisions]). Therefore, dismissal of the first cause of action is denied.

2. Breach of the Warranty of Habitability against GPRC and J&C

The second cause of action is predicated on a violation of Real Property Law § 235-b, which "sets forth a minimum standard to protect tenants against conditions that render residential premises uninhabitable or unuseable" (*Kent v 534 E. 11th St.*, 80 AD3d 106, 112-113 [1st Dept 2010]). The statute applies to a tenant-shareholder in a cooperative corporation (*see Frisch v Bellmarc Mgt.*, 190 AD2d 383, 384-385 [1st Dept 1993]; *Suarez v Rivercross Tenants' Corp.*, 107 Misc 2d 135, 139 [App Term, 1st Dept 1981]). A claim for breach of this warranty of habitability is a separate claim from torts ordinarily pled against a landlord (*see Curry v New York City Hous. Auth.*, 77 AD2d 534, 536 [1st Dept 1980]). Moreover, while a plaintiff cannot recover for injuries to his or her person or property on this cause of action, the plaintiff may recover the difference between the maintenance paid and the rental value of the apartment (*see Elkman v Southgate Owners Corp.*, 233 AD2d 104, 105 [1st Dept 1996]).

Because the breach of the warranty of habitability arises from the parties' contractual relationship, it is subject to a six-year limitations period (*see Roman v Emigrant Sav. Bank-Brooklyn/Queens*, 111 AD3d 692, 694 [2d Dept 2013]). Hence, defendants have not met their burden of demonstrating that this cause of action is time-barred. Thus, dismissal of the second cause of action is denied.

3. Gross Negligence against Defendants

The third cause of action alleges that defendants willfully and deliberately breached their duty to maintain the Building by allowing soot to enter plaintiff's apartment, thereby threatening his health and safety.

The gross negligence claim is subject to CPLR 214-c. Plaintiff has alleged in his verified and supplemental bill of particulars that he "is greatly concerned about the probability of injuries he will face in the future as a result of his prolonged exposure to the soot infiltration in his apartment" (NYSCEF Doc No. 197, Guiterman affirmation, exhibit C at 13), and that his personal injuries from soot exposure are permanent (NYSCEF Doc No. 198, Guiterman affirmation, exhibit D at 12-13).

An "injury" for purposes of CPLR 214-c is an "actual illness, physical condition or other similarly discoverable objective manifestation of the damage caused by previous exposure to an injurious substance" (*Sweeney v General Print.*, 210 AD2d 865, 865-866 [3d Dept 1994], *lv denied* 85 NY2d 808 [1995]). "[A] 'cause of action for damages resulting from exposure to toxic substances accrues when the plaintiff begins to suffer the manifestations and symptoms of his or her physical condition, i.e.[,] when the injury is apparent, not when the specific cause of the injury is identified'" (*Vincent v New York City Hous. Auth.*, 129 AD3d 466, 467 [1st Dept 2015], quoting *Searle v City of New Rochelle*, 293 AD2d 735, 736 [2d Dept 2002]; *Ward v Lincoln Elec. Co.*, 116 AD3d 558, 559 [1st Dept 2014] [finding that "the statute of limitations began to run when plaintiff discovered the primary condition on which his claim is based, and not when he discovered the causation connection to the toxic substance"]). Likewise, a property damage claim under CPLR 214-c accrues upon the date the injury is discovered (*see Boswell v Leemilt's Petroleum*, 252 AD2d 889, 891 [3d Dept 1998] [reasoning that the claim for property damage caused by gasoline

contamination began to accrue "when black pigmentation inside the south wall of the home was first noticed"]).

Defendants have demonstrated that this cause of action is time-barred (*see Brightman v Sim*, — AD3d —, 2020 NY Slip Op 06846, *2 [1st Dept 2020]; *Vincent*, 129 AD3d at 466). Plaintiff's own testimony shows that the onset of his physical symptoms began in late December 2015 or early January 2016, when he started coughing up black phlegm and blood. In January or February 2016, his physician causally linked his physical symptoms to his environment. Plaintiff brought this action more than three years after he first became symptomatic.[1]

Plaintiff's reliance on CPLR 214-c (4) is unavailing. CPLR 214-c (4) extends the time within which a plaintiff may commence a personal injury action in a toxic tort case by one year after the date the plaintiff discovers the cause of the injury, but no less than five years after discovering the injury, provided that the plaintiff pleads and proves "that technical, scientific or medical knowledge and information sufficient to ascertain the cause of his injury had not been discovered, identified or determined prior to the expiration of the period within which the action or claim would have been authorized." The plaintiff bears the burden of showing that CPLR 214-c (4) has been satisfied (*see Pompa v Burroughs Wellcome Co*., 259 AD2d 18, 22 [3d Dept 1999]).

Plaintiff has not met this burden. He expounds at length on the time it took to discover the cause of his injuries, but "[t]he statute 'does not require medical certainty or information sufficient to prevail at trial'" (*Giordano v Market Am., Inc*., 15 NY3d 590, 601 [2010], quoting *Pompa*, 259 AD2d at 24). All that is needed is the existence of "sufficient information and knowledge … to enable the medical or scientific community to ascertain the probable causal relationship between the substance and plaintiff's injury'" (*id.*). His averment that he initially believed the "black stuff"

[1] Plaintiff does not allege in his bill of particulars whether he suffered property damage, and now concedes that he seeks only damages for personal injury (NYSCEF Doc No. 224, plaintiff's mem of law at 25).

on the walls was mold, not soot (NYSCEF Doc No. 225, ¶ 4), is unhelpful, because his physician identified his environment as the cause of his physical symptoms. Consequently, plaintiff has not shown that he lacked the technical, scientific or medical knowledge and information to ascertain the cause of his injury.

Nor has plaintiff demonstrated that the doctrine of equitable estoppel applies. Equitable estoppel requires a showing that "(1) conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intent that such conduct (representation) will be acted upon; and (3) knowledge, actual or constructive, of the true facts" (*Health-Loom Corp. v Soho Plaza Corp.*, 272 AD2d 179, 181 [1st Dept 2000] [internal quotation marks and citation omitted]). The doctrine will preclude a defendant from raising a statute of limitations defense where the plaintiff delays bringing an action because of some affirmative wrongdoing by the defendant (*see Putter v North Shore Univ. Hosp.*, 7 NY3d 548, 552-553 [2006]). A plaintiff's reasonable reliance on a defendant's deception, fraud or misrepresentation is a crucial element for invoking the doctrine (*id.*).

Here, plaintiff has not demonstrated that defendants actively misled him on the source of the soot. Correspondence shows that he rejected defendants' contention that his renovation work caused the condition, and that he placed GPRC on notice of its breach of the proprietary lease and the Board of its breach of fiduciary duty (NYSCEF Doc No. 211 at 4). Crucially, he advised defendants in the September Letter of his intent to "file a complaint … against the Corporation, the Board and J&C" (NYSCEF Doc No. 126 at 4). Plaintiff was aware as early as October 2018 of defendants' rejection of his demands (NYSCEF Doc No. 131 at 4). As such, equitable estoppel cannot salvage this claim (*see MBI Intl. Holdings Inc. v Barclays Bank PLC*, 151 AD3d 108, 117 [1st Dept 2017], *lv denied* 29 NY3d 819 [2017]), and the third cause of action is dismissed. The

court need not address defendants' arguments for dismissal of the punitive damages portion of the gross negligence claim.

4. Breach of Fiduciary Duty against the Board

The fourth cause of action alleges that the Board failed to remedy deficient conditions that have caused toxic soot to enter plaintiff's apartment (NYSCEF Doc No. 125, ¶ 92).

The CPLR does not provide a single limitations period for a breach of fiduciary duty (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009], *rearg denied* 12 NY3d 889 [2009]). Rather, the statute of limitations depends upon the type of relief the plaintiff seeks (*id.*). Where the plaintiff demands only money damages, the three-year statute of limitations set forth in CPLR 214 (4) applies (*id.*), but, "[w]here, as here, a suit alleging breach of fiduciary duty seeks both equitable relief and money damages, a six-year statute of limitations applies" (*DiBartolo v Battery Place Assoc.*, 84 AD3d 474, 476 [1st Dept 2011]). In this instance, defendants have not demonstrated that a three-year statute of limitations is applicable. In addition to monetary damages, plaintiff seeks equitable relief in the form of a permanent injunction and a declaratory judgment in the sixth and seventh causes of action. Thus, a six-year statute of limitations governs this cause of action (*id.*). Accordingly, that part of the motion seeking to dismiss the fourth cause of action as time-barred is denied.

B. Alternative Grounds for Dismissal or Summary Judgment

Defendants also move for summary judgment dismissing the gross negligence and breach of fiduciary duty claims. Because the court dismissed the gross negligence claim, the court need not address this branch of the motion.

Defendants assert that summary judgment is warranted on the breach of fiduciary duty claim because a corporation does not owe a fiduciary duty to its members or shareholders. Plaintiff

opposes, arguing that he has pled a claim for breach of fiduciary duty against the Board, not GPRC. In reply, defendants submit that plaintiff did not name the individual Board members as direct defendants or allege they committed a separate tortious act (NYSCEF Doc No. 277, defendants' reply mem of law at 28). They also contend that Business Corporation Law § 720 is rarely invoked under these circumstances and that plaintiff has not pled facts sufficient to overcome the business judgment rule.

A party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The movant's "failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013], citing *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

Defendants failed to meet their prima facie burden. They correctly observe that "a corporation does not owe fiduciary duties to its members or shareholders" (*Hyman v New York Stock Exch., Inc.*, 46 AD3d 335, 337 [1st Dept 2007]), but plaintiff did not plead a breach of fiduciary duty claim against GPRC. It is well settled that "the board of directors of a cooperative corporation owes its shareholders a fiduciary duty" (*see Stinner v Epstein*, 162 AD3d 819, 820-821 [2d Dept 2018], citing *Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 538 [1990]; *Stowe v 19 E. 88th St., Inc.*, 257 AD2d 355, 356 [1st Dept 1999] [stating that "[a] cooperative board owes a fiduciary duty to its shareholders"]). Here, plaintiff has pled the claim against the Board (NYSCEF Doc No. 125, ¶ 91). Defendants' reliance on *Baker v 40 E. 80 Apt.*

Corp. is misplaced because the plaintiff in that action pled the fiduciary duty claim against the cooperative corporation (2012 NY Slip Op 32634[U], *30 [Sup Ct, NY County 2012]).

Further, "the function of a reply affidavit is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of the motion" (*Ritt v Lenox Hill Hosp*., 182 AD2d 560, 562 [1st Dept 1992]). Defendants argue that plaintiff failed to adequately plead a fiduciary duty claim against the Board. However, defendants did not advance these arguments in their initial moving papers, and it would be improper to consider them in reply. Summary judgment on the fourth cause of action is denied.

C. Disqualification or Preclusion of Plaintiff's Expert

Defendants also move to disqualify Dr. Esposito as an expert and to preclude his reports or testimony from being introduced on the ground on that his opinion is not supported by generally accepted techniques within the scientific community. In support, defendants proffer an affidavit and a report from Dr. Robbins, a senior vice president and principal industrial hygienist at JS Held (NYSCEF Doc No. 215, Dr. Robbins 3/11/20 aff, ¶ 1), who reviewed the three Ambient reports.

Dr. Robbins opines that Dr. Esposito's conclusions are unreliable (NYSCEF Doc No. 215, ¶ 5). She states in her January 28, 2020 report that "[t]he scientific method is the well-defined and accepted procedure to characterize observations and potentially answer questions," and centers on "three steps: hypothesis, test, results" (NYSCEF Doc No. 216, Dr. Robbins 3/11/20 aff, exhibit A at 12). Scientific tests should be designed to support or refute a hypothesis (*id.*). Dr. Robbins opines that Dr. Esposito failed to follow these generally accepted procedures so he could arrive at a pre-determined result (*id.*). In particular, she notes that Dr. Esposito never tested the UFPs to determine whether they were composed of soot or CBPs (NYSCEF Doc No. 215, ¶ 7). She questions his knowledge of basic chemistry given his statement describing CO as an "odorless

gaseous vapor" when it is an odorless gas (NYSCEF Doc No. 216 at 14). Additionally, Dr. Esposito implied that exposure to UFPs from the boiler room posed a risk of adverse health effects, but failed to cite any health-based standards for comparison (*id.* at 25-26). She maintains that several graphs depict "meaningless, misrepresented or inaccurate data, and potentially spurious or insignificant correlations" (*id.* at 12). Other graphs are "largely uninterpretable" (*id.* at 13), "poorly labeled," or present "misleading" values (*id.* at 19).

Plaintiff proffers Dr. Esposito's affidavit in response. Dr. Esposito rejects Dr. Robbins's contention that he exhibited bias. Olmsted had already confirmed that the soot particles in the apartment originated from the boiler room and ruled out external sources in the process (NYSCEF Doc No. 235, Dr. Esposito aff, ¶ 4). In addition, he was not retained to opine on whether soot exposure could cause plaintiff to suffer any permanent injuries. Plaintiff has retained a board-certified pulmonologist to opine on the effects of toxic exposure (*id.* at 4 n 1). A DEP statement also indicates that burning heating oil no. 4 can decrease life expectancy and contribute to other physical ailments (NYSCEF Doc No. 240, Dr. Esposito aff, exhibit E at 1). Thus, his engagement was limited to determining the potentially pathways where soot from the boiler room traveled to the apartment (*id.*, ¶ 6). Dr. Esposito also observes that Dr. Robbins does not object to the accuracy or reliability of the testing methods he employed to assess the pressure differentials or smoke tube tests Olmsted performed (*id.*, ¶¶ 18-19).

Dr. Esposito avers that tracer gas and particle size distribution studies are generally accepted methodologies within the scientific community (*id.*, ¶¶ 21 and 36). He cites the use of tracer gas studies in reports released by the University of California, Berkeley, the Institute of Building Technology, the National Institute of Standard and Technology, and Northumbria University (NYSCEF Doc Nos. 245-248, Dr. Esposito aff, exhibits J-M). He also cites a February

22, 2012 article published in the Journal of the Air & Waste Management Association where the authors measured the particle size distribution for heating oil no. 6 in nanometers (NYSCEF Doc No. 250, Dr. Esposito aff, exhibit O at 2).

In reply, Dr. Robbins states that Dr. Esposito failed to address her critiques of his studies "which clearly establish his preconceived bias and failure to implement objective studies" (NYSCEF Doc No. 275, Dr. Robbins 8/26/20 aff, ¶ 7). She further opines that Dr. Esposito's conclusions were not based on objective science (*id.*, ¶ 10).

It is well established that "[e]xpert testimony is admissible provided that the principles and methodology relied upon by the expert have gained general acceptance as being reliable within the scientific community" (*Parker v Mobil Oil Corp*., 16 AD3d 648, 650 [2d Dept 2005], *affd* 7 NY3d 434 [2006], *rearg denied* 8 NY3d 828 [2007], citing *Frye v United States*, 293 F 1013, 1014 [DC Cir 1923]). Under *Frye*, the issue is "'whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally'" (*Parker*, 7 NY3d at 446, quoting *People v Wesley*, 83 NY2d 417, 444 [1994]). "The *Frye* test is not concerned with the reliability of a particular expert's conclusions, but rather, with 'whether the expert['s] deductions are based on principles that are sufficiently established to have gained general acceptance as reliable'" (*Nonnon v City of New York*, 88 AD3d 384, 394 [1st Dept 2011], quoting *Nonnon v City of New York*, 32 AD3d 91, 103 [1st Dept 2006], *affd* 9 NY3d 825 [2007]). Stated another way, the *Frye* test does not examine the weight of an expert's evidence (*see Guzman v 4030 Bronx Blvd. Assoc. L.L.C*., 54 AD3d 42, 47 [1st Dept 2008]).

"'[G]eneral acceptance does not necessarily mean that a majority of the scientists involved subscribe to the conclusion. Rather it means that those espousing the theory or opinion have followed generally accepted scientific principles and methodology in evaluating clinical data to

reach their conclusions" (*Sadek v Wesley*, 117 AD3d 193, 201 [1st Dept 2014], *affd* 27 NY3d 982 [2016], *rearg* denied 27 NY3d 1126 [2016], quoting *Zito v Zabarsky*, 28 AD3d 42, 44 [2d Dept 2006]). Proof that a particularl methodology is "generally accepted may be established by 'court opinions, texts, laboratory standards or scholarly articles'" (*Marsh v Smyth*, 12 AD3d 307, 311 [1st Dept 2004] [Saxe, J., concurring]), *rearg denied, lv denied* 2005 NY App Div LEXIS 2520 [1st Dept 2005] [internal citation omitted]). The query is limited to whether there is a substantive, objective basis for the expert's conclusion which would render that conclusion admissible (*id.* at 312). The burden rests with the party opposing a *Frye* challenge to show that the methodology employed is generally accepted within the scientific community (*see Sean R. v BMW of N. Am., LLC*, 26 NY3d 801, 812 [2016]). Where an expert's opinion is without basis in generally accepted scientific methodology and reasoning, it will be precluded (*see Frye v Montefiore Med. Ctr.*, 100 AD3d 28, 32 [1st Dept 2012]).

It is apparent from reviewing Dr. Robbins's report and affidavits that she does not contend Dr. Esposito employed any novel methodologies (*see Parker*, 7 NY3d at 447) or relied upon a novel theory (*see Vargas v St. Barnabas Hosp.*, 168 AD3d 596, 596 [1st Dept 2019]). To the extent Dr. Robbins characterizes Dr. Esposito's opinion as "novel," because it is not based on objective science, the argument is insufficient to implicate a *Frye* issue. This is because the complaints largely concern the manner in which he conducted the studies and how he presented or summarized the results. For example, Dr. Robbins states that Dr. Esposito "selected data and produced graphs … [with] meaningless, misrepresented or inaccurate data, and potentially spurious or insignificant correlations; some graphs have axis labels that are illegible. He does not provide complete information about how his measurements were obtained or provide the specific data analysis methods used" (NYSCEF Doc No. 216 at 12). She criticizes Dr. Esposito for

neglecting to furnish any information about instrument sensitivity or calibration (*id.* at 14), among other testing issues. These issues ultimately concern whether the "accepted methods were appropriately employed in a particular case" (*see Parker*, 7 NY3d at 447), which could lead to an unreliable conclusion. But, as discussed *supra*, the *Frye* test is not concerned with an expert's credibility or the weight of an expert's evidence (*see Frye*, 70 AD3d at 25 [stating that "[r]esolution of issues of credibility of expert witnesses and the accuracy of their testimony are matters within the province of the jury"]).

In addition, the three Ambient reports detail the results from the following experiments – pressure differential monitoring, UFP analysis, that includes CO monitoring, and tracer gas migration. A close reading of Dr. Robbins's report and affidavits reveals that she appears to agree that these types of experiments are generally accepted within the scientific community.

First, Dr. Robbins does not challenge the pressure readings presented in the reports or claim that pressure differential studies are not generally accepted. In fact, Dr. Robbins does not refer to the stack effect theory at all. She primarily attacks how Dr. Esposito depicted the changes in boiler room air pressure in relation to UFP concentrations by combining different data from different dates and times or unrelated data in the same graphs (NYSCEF Doc No. 216 at 20) and by failing to account for cyclical as opposed to continuous boiler operations (*id.* at 23).

Similarly, Dr. Robbins admits that a tracer gas migration study, which entails tracking the movement of sulfur hexafluoride gas, or SF_6, within a building, is "typically used to determine the ventilation rate in a building" (NYSCEF Doc No. 216 at 13). Consequently, she agrees that a tracer gas study is a generally accepted method used to track ventilation. The infirmities Dr. Robbins identified with the results of the tracer gas studies also relate to how Dr. Esposito conducted the experiments and plotted the results, not whether the use of such a test to track

ventilation is novel. For instance, Dr. Robbins criticizes Dr. Esposito for failing to set forth in the January Report where within the Building the gas was released or monitored, and by changing the parameters of the test by moving the SF6 monitor more than once (NYSCEF Doc No. 216 at 13). She notes that Dr. Esposito failed to disclose where within the Building he released the tracer gas in the April Report (NYSCEF Doc No. 216 at 21), and failed to monitor the tracer gas in the apartment for the June Report (*id.* at 24). Dr. Esposito, though, testified at the Hearing that he had released the SF_6 in the basement laundry room for the January Report (NYSCEF Doc No. 249, Dr. Esposito aff, exhibit N at 103-104). He also disclosed the specific sampling locations in the April and June Reports (NYSCEF Doc No. 235, ¶ 32). Moreover, Dr. Esposito states that SF_6 does not appear "naturally," and the fact that he detected the gas inside plaintiff's apartment supports his conclusion that boiler air migrates into that apartment from the basement (NYSCEF Doc No. 235, ¶ 23).

Regarding the UFP particle experiments, Dr. Robbins does not appear to question whether this type of study is a generally accepted methodology. She even cites a study conducted in Sweden that measured UFPs found in residential homes, and relies on the "well established [proposition] that urban areas such as New York City … have increased concentrations of UFPs compared to suburban or rural areas" in her report (NYSCEF Doc No. 216 at 18). Again, her concerns mostly address how Dr. Esposito performed or summarized the results. For example, she criticizes Dr. Esposito's failure to disclose the publication on which he relied to compare the size distribution of UFPs in the apartment to the size distribution of UFPs in emissions from diesel combustion and the boilers (NYSCEF Doc No. 216 at 16-17). Dr. Esposito, though, avers that the name of the publication was disclosed previously in plaintiff's CPLR 3101 (d) exchange (NYSCEF Doc No. 252, Dr. Esposito aff, exhibit Q, ¶ 8). Dr. Robbins also finds fault with Dr. Esposito's

failure to perform a compositional analysis of the particles in the apartment and the boiler room to demonstrate that the particulates are soot or CBPs and his failure to exclude other sources for the particulates (NYSCEF Doc No. 216 at 18). This contention, though, concerns the weight that should be afforded to Dr. Esposito's opinion. Notably, Olmsted had already determined that soot had infiltrated the apartment based on its analysis of the material found on the AC unit's filter.

Dr. Robbins also states that Dr. Esposito used a particle counter in the study, but a particle counter includes any particle measuring a sub-micrometer in size and does not differentiate between soot or other combustion particles caused by other sources (NYSCEF Doc No. 216 at 16 and 18). She also questions his use of measuring particle sizes in nanometers (*id.* at 18). Dr. Esposito, though, submits that measuring the particle size of a heating oil in nanometers is appropriate (NYSCEF Doc No. 250 at 2). Likewise, Dr. Robbins states that Dr. Esposito's use of a "ug/m^3" standard to measure CO levels is misleading (NYSCEF Doc No. 216. at 14), but Dr. Esposito claims that use of a ug/m^3 unit instead of "parts per million" or PPM is "a classic red herring" because they are interchangeable (NYSCEF Doc No. 235, ¶ 40).

Because defendants' arguments do not raise a *Frye* issue, the part of their motion seeking to disqualify Dr. Esposito as an expert and to preclude plaintiff from relying on his reports is denied, without the necessity of a hearing.

Accordingly, it is

ORDERED that the motion of plaintiff Timothy Whealon seeking sanctions for spoliation of evidence against defendants Gramercy Park Residence Corp., the Board of Directors of Gramercy Park Residence Corp. and J&C Lamb Management Corp. (motion sequence no. 002) is denied; and it is further

ORDERED that the motion of defendants Gramercy Park Residence Corp., the Board of Directors of Gramercy Park Residence Corp. and J&C Lamb Management Corp. for dismissal or summary judgment (motion sequence no. 003) is granted to the extent of dismissing the third cause of action for gross negligence and the third cause of action is dismissed, and the balance of the motion is otherwise denied.

Dated: December 17, 2020

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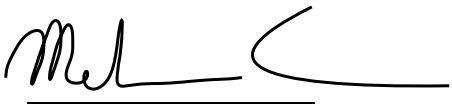

J.S.C.