SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12
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MATHIAS BERENGER and CHRISTINE HARRIS n/k/a CHRISTINE BERENGER,
Plaintiffs,

against

261 WEST LLC, BH 261 MANAGER, LLC, EVAN A. HAYMES, MATTHEW BRONFAN, EDWARD CURTY, ONYX CHELSEA CONDOMINIUM, and BOARD OF MANAGERS FOR THE ONYX CHELSEA CONDOMINIUM,
Defendants.
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Index Number 110744/2009

DECISION AND ORDER AFTER TRIAL

APPEARANCES:

FOR PLAINTIFFS:
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PAUL G. FEINMAN, J.:

A non-jury trial of this action commenced on May 2, 2011, and continued on May 3, May 5, May 6, May 9, May 10, May 17, May 19, May 24, May 26, May 31, June 3, June 6, June 7, June 9, June 20, June 23, and June 24, 2011.

At the conclusion of the presentation of evidence, the court instructed the parties to submit post-trial memoranda with proposed findings of fact and conclusions of law pursuant to CPLR 4213, and materials were provided. On February 2, 2012, prior to this court issuing its

decision, the Appellate Division, First Department issued its Decision and Order from the appeal by 261 West LLC and the individual defendants of this court's decision and order entered on June 15, 2010 resolving their motions for summary judgment. *Berenger v 261 West LLC, et al.*, 93 AD3d 175 (1st 2012), modified this court's decision to the extent that the complaint was dismissed in its entirety as against the individual defendants Haymes, Bronfman, and Curty, and the first cause of action for fraud and misrepresentation was dismissed as against 261 West LLC.

The parties appeared on May 22, 2012 to present closing arguments addressing the remaining issues sounding in nuisance and trespass against 261 West LLC (second and third causes of action), and the Board of Managers for the Onyx Chelsea Condominium (fifth and sixth causes of action). At the conclusion of oral argument, the attorney for the plaintiffs stated on the record that while his clients contend there was a trespass, namely a series of leaks into the unit, they do not claim sustainable damages (Doc. 267 at 84). Accordingly, this decision and order addresses the remaining claim of nuisance against the two defendants as well as various counter claims and cross claims. The court has reviewed the parties' submissions, as well as the exhibits admitted into evidence. The court found the witnesses generally credible, with the partial exception of Evan Haymes. The court makes the following finding of facts, and reaches the conclusions of law set forth below.

FINDINGS OF FACT

In November 2006, plaintiffs Mathias and Christine Berenger entered into a purchase agreement to buy a penthouse unit in a residential condominium then under construction on West 28th Street in New York, New York called the Onyx Chelsea Condominium. Its sponsor was defendant 261 West LLC whose principal members were former defendants Evan Haymes and Matthew Bronfman. These two men, together with former defendant Edward Curty, the

chief financial officer of a real estate company, formed the initial sponsor-controlled board of managers which came into existence in the fall of 2007.

Ms. Berenger had learned about the new condominium project through her broker. She was particularly taken by the private rooftop terraces included with each of the three penthouse units, as portrayed in the floor plans and a model of the building which she saw at the condominium showroom, and described in the Offering Plan. The Berengers entered into a purchase agreement for the unit denominated as PHC for $2.5 million, a space that included what would be a 700-square foot roof terrace with unobstructed views of the Empire State Building.

Unknown to the Berengers at the time of signing the purchase agreement, the building design included an 18-foot high cooling tower located on the roof within less than three feet of the private roof space and directly over the bedrooms of PHC. The cooling tower was not represented in the floor plans or the model of the building, although the complaint indicates that in the Architect's Plan there was mention of a "roof mounted air cooled AC, gas-fired, outside air unit," and as pointed out by defendants, in the Plans and Specifications included as part of the Offering Plan, the unit is seen in position on theroof. Ms. Berenger visited the apartment on four occasions prior to closing, twice with access to the roof terrace; she recalled seeing the "obstruction" during a pre-closing inspection in December 2007, and thought it was a generator; neither she nor her husband asked any questions about it. She testified that upon seeing the "generator," she assumed it would not be completely quiet.

The cooling tower services the entire building. It is equipped with a variable fan drive (VFD), which allows the tower's fan to run as needed, at different speeds as needed, between "0" and a set maximum up to 100 percent. If the fan is set manually, it runs either at 100 percent, or

at "0." Even at "0," the cooling tower is never off, as it still circulates water. As the outside temperatures increase and residents seek to remain cool inside, the cooling tower's fan speeds increases. The increased speed also increases the noise level emanating from the tower. The cooling tower and VFD was chosen by the mechanical engineering company Dagher Engineering, who designed the condominium's cooling system.

In January 2006, near the commencement of construction, the project's acoustical engineering firm, Cerami & Associates, prepared a report based on the architectural mechanical plans and the relevant data from the manufacturer of the cooling tower that raised concerns about potential noise issues and should have appropriate sound attenuation. In February 2006, the architect for the project recommended a sound barrier. The cooling tower was installed in mid- to late November 2006 with no sound amelioration. The minutes from the regular meetings of the construction project team show the attendees were aware that the project's acoustical engineer was recommending sound attenuation. A second report issued on November 10, 2006, by Cerami, assesses the projected noise impact on the rooftop terraces and interior residences, and suggested several methods to reduce the noise from the cooling tower, including installation of the tower manufacturer's intake sound attenuation package, an acoustic wall, or three- or five-foot wide "silencers."

The construction manager directed Cerami to perform an acoustical test of the tower once it was fully operational with the VFD in place. The test was done on March 13, 2007. Cerami reportedly concluded, as stated in the construction project meeting minutes of March 28, 2007, that no sound barrier was needed on the side of the cooling tower closest to what would be the Berengers' terrace. By email dated March 30, 2007, Cerami wrote to the building's architect and owner suggesting that instead of focusing on the cooling tower, an additional sheet of glass

be incorporated into the skylight on what was the Berengers' apartment, as a way to address interior sound issues.

The sponsor was very concerned with the project being over-budget. A report from the April 4, 2007 construction project meeting included the statement by the sponsor's representative Even Haymes, that the sponsor would not pay for any testing of cooling tower acoustics.

As spring 2008 arrived, plaintiffs hired landscapers and bought furniture and plants to design what Ms. Berenger termed the additional room in the apartment. She contacted the managing agent on March 13, 2008 to ask if the "generator" had been tested for noise, and received an affirmative reply.

On their return from Europe in June 2008, the cooling tower was fully functioning; this was the first time the Berengers had heard it in operation. Ms. Berenger testified that it sounded "like an airplane hangar," the stairs shook from the main floor up to the terrace, the noise could be heard in the dining room and the master bathroom connected to the master bathroom, and it was audible through the nighttime hours. Over the next few weeks, Ms. Berenger made three complaints by email to the managing agent detailing the level and the effects of the noise, and the Berengers' attorney wrote twice on their behalf demanding a solution. Ms. Berenger conceded that the noise level was sometimes "acceptable" that summer, but felt that her real concerns about the ongoing disruptive sound levels were not seriously addressed by the building. The managing agent's response was to send a representative along with the building's superintendent on three occasions, for an aural inspection. The inspections were all made during the weekdays, when there was less demand on the cooling tower, as compared with a weekend afternoon and evening. The managing agent's representative reported to the sponsor and board

of managers that there was no noise issue. The Berengers then filed a complaint about "unacceptable noise levels" with the New York State Attorney General's Office; that office forwarded the complaint to the condominium in November 2008. Based on this letter, the board of managers had Cerami & Associates conduct another noise test of the cooling tower. The test was performed on December 8, 2008 with the cooling tower operating at 80 percent, which Cerami described as "a safe margin above the expected maximum of 72 % of the full speed." Cerami concluded that the noise levels were within legal limits both inside the penthouse unit and on the terrace. This report was forwarded by the sponsor to the Attorney General's office, along with an explanation from Dagher Engineering indicating that a load calculation had been performed prior to the cooling tower's installation, and it had been determined that the cooling tower need never operate at more than 72 percent of its capacity to sufficiently serve the entire building. The actual load calculation documentation has disappeared.

In early June 2009, the cooling tower suffered a mechanical malfunction, requiring the VFD to be switched to "manual." This meant the cooling tower constantly operated at 100 percent. According to Ms. Berenger, the noise in the summer of 2009 made the roof deck unusable and the living room nearly so, and penetrated throughout the apartment, including the master bedroom, often awakening her from her sleep. Plaintiffs again complained to the managing agent and continued to feel frustrated with the building's lack of response. Ms. Berenger called in a noise complaint via the New York City "311" system. In August 2009, the city's Department of Environmental Protection (DEP) sent its inspector Philip Liscitra to investigate on two separate days. During the second visit, Liscitra took several readings while the fan was running and when it was off. He did not know at what frequency the cooling tower was running. The DEP readings showed that at all locations measured, the cooling tower fan

generated a level of noise greater than the 42 dBA permitted under the Code. In some locations the fan's noise was "unreasonable" as defined under the Noise Control Code, because there was more than a 10 decibel-difference between the ambient level and the level recorded with the tower fan on. Based on these readings, the building was issued a Noise Control Code violation on August 11, 2009, specifically indicating a violation of section 227A of the Noise Control Code (NYC Admin. Law Title 24, ch. 2), based on the readings from the "living room/dining room," all exceeding the permissible limit of 42 dBA.

Plaintiffs also hired an acoustical engineer, Bonnie Schnitta who first visited the premises on July 20, 2009 at night. Her "[i]nitial impression was shock," that it sounded like an airplane taking off. She testified that because the cooling tower was oriented toward the terrace, its noise could lead to hearing loss, and was a safety issue because any cries for help would likely be unheard. She took a series of readings from both inside and outside on the deck, during the day and at night. They showed noise levels in excess of the New York City Noise Control Code.

Plaintiffs commenced this litigation on July 29, 2009.

The cooling tower's mechanical problem was resolved as of September 14, 2009, and the VFD was again switched to variable speed. Around the time plaintiffs commenced this action, the unit owners also commenced a litigation against the sponsor. They took control of the managing board from the sponsor at the October 8, 2009 first annual meeting of the new board of managers. Unit holder Michael Patten was elected president, and Ms. Berenger became an officer. The make-up of the first board consisted of two members from the sponsor, and five elected unit owners. Under the By-Laws, a representative from the sponsor will always be on the board, representing the commercial spaces in the building.

In September 2009, after the lawsuits had been commenced, the sponsor offered to

provide a sound attenuator for the cooling tower and indicated it was designed and ready to be installed at that time. The court takes judicial notice that on September 17, 2009, this court issued an order in *Ackerman v 261 West LLC*, Index No. 113176/2009, prohibiting the board of managers or sponsor from performing any construction work at the condominium. In any event, the new board of managers did not agree to install the sound attenuator. In early 2010 the board of managers hired a new acoustical firm, Hansen Associates which concluded based on its review that the sound attenuator would insufficiently reduce the noise level. Evan Haymes wrote in February of 2010 on behalf of the sponsor that if the board would not agree to install the sound attenuator as the sponsor proposed, costing around $30,000, all future costs and any damages would be the sole responsibility of the board.

The new board of managers acknowledged a problem with the cooling tower's noise level. It hired a new mechanical engineer, Mark Velzy, in early 2010. In April 2010, a new round of sound readings was performed by engineers hired by plaintiffs, the board, and the sponsor. The cooling tower was run at different speeds. The results were consistent with each other. At the 75 percent speed, readings on the terrace and at the top of the stairs with the door open were above legal noise limits; the living room area was noisy but within limits, the master bedroom was within limits. In the opinion of all the engineers, there needed to be sound amelioration and a consensus that the cooling tower needed to be moved to allow a barrier, and perhaps reoriented. These and other ideas were discussed with the board members. By the end of April, Ms. Berenger was no longer communicating with the rest of the members of the board of managers; she remained on the board until October 2010.

In May 2010, the board of managers proposed to plaintiff's counsel that an acoustic barrier wall be erected between the tower cooler and the Berengers' terrace. However, no

structural analysis of the wall's roof-bearing weight had been done, and the wall's impact on the cooling tower's function was unknown as was whether a wall was acceptable under the building code. Plaintiffs hired an engineer to analyze whether a wall could be built; the engineer determined that the roof could not bear the weight of such a wall and in any event, the cooling tower would have to be set back several feet in order to properly function. Further studies determined that a new roof could support a wall but that the tower cooler would still need to be moved. It is agreed by all that moving the tower cooler would be a very expensive undertaking.

The Berengers moved out from their apartment in May 2010, as their third year living with the cooling tower commenced. By letter from their counsel dated June 21, 2010, plaintiffs advised the condominium that they had vacated the apartment because of the noise condition. In about September 2008, they moved to London. They continue to pay their monthly common charge for PHC.

On June 30, 2010, this court visited the apartment, along with the parties and their attorneys. The court was unaware that the Berengers were no longer living in the unit. During this visit, the cooling tower was run at variable speeds from 25 percent up to 100 percent. This court found that on the terrace, the cooling tower at full power was undeniably so loud as to render the space unusable and that the characterization of the noise of the cooling tower at 100 percent like an airplane taking off was not hyperbolic; operating at lower levels, the fan noise remained quite audible but conversation was possible and the sound tended to merge with the various neighborhood sounds, in particular vehicular traffic. Inside the apartment, with the door to the terrace and the skylight closed, the noise from the cooling tower at lower frequencies was unnoticeable or at worst, tolerable.

Beginning in late June 2010, several unit owners reported problems with their air

conditioning. After consultation, the board of managers raised the cap on the cooling tower from 72 to 78 percent, which is where it remains. However, according to board of managers president Michael Patten, from the end of June through the end of July 2010, the actual speed of the cooling tower fan on VFD was never greater than 44 percent and was as low as 21 percent. Even when the temperature was 95 degrees at 5:00 p.m., the VFD was running only in the high 30s or 40s. In Patten's opinion, the noise from the cooling tower in 2010 was much reduced from that in 2009, and closer to what it was in 2008 when he found it generally not noticeable, at least to those not living in PHC. The mechanical engineer hired by the new board of managers, Mark Velzy, testified that if the defective sealing of the building's glass to the facade was corrected, the cooling tower would never need to operate above 75. At this rate, the noise is not discernible inside the apartment when the skylight and terrace door are shut.

As of a few weeks before commencement of this trial, no amelioration of the cooling tower's fan noise had apparently been undertaken.

CONCLUSIONS OF LAW

1. Nuisance

A private nuisance arises from an individual's interest in the use and enjoyment of property. The elements of a common-law claim for a private nuisance are that there is a "substantial" interference with a person's property right to use and enjoy land that is "intentional in origin," "unreasonable" in character, and caused by another's conduct in acting or failure to act (*Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 570 [1977]). Nuisance is characterized by recurring instances of the objectionable conduct (*see*, *Broxmeyer v United Capital Corp.*, 79 AD3d 780 [2d Dept 2010]). It is not dispositive whether or not a violation has been issued as to the particular noise at issue (*61 W/ 62 Owners Corp. v CGM EMP, LLC*, 16

NY3d 822, 823 [2011]). Whether the nuisance is "substantial" is determined based on what an ordinary reasonable person would experience; in other words, it must interfere with the physical comfort of the ordinary reasonable person (*Matteliano v Sktkzi*, 85 AD3d 1553, 1553 [4th Dept 2001]). "An invasion of another's interest in the use and enjoyment of land is intentional when the actor (a) acts for the purpose of causing it; or (b) knows that it is resulting or is substantially certain to result from his conduct" (*Higgins v Village of Orchard Park*, 277 AD2d 989 990 [4th Dept 2000] *quoting Copart Indus.*, 41 NY2d at 571, quoting Restatement of Torts § 825). "Trespass does not require an intent to produce the damaging consequences, merely intent to perform the act that produces the unlawful invasion." *(Berenger v 261 West LLC, supra,* 93 AD3d at 181).

A nuisance is deemed to be temporary in nature unless the plaintiff demonstrates that it cannot be abated or that abating would be "outrageous and inappropriate" (*Boomer v Atlantic Cement Co., Inc.* 26 NY2d 219, 226 [1970], citation omitted). A permanent nuisance is one that is brought by an individual against a defendant creating a condition that is continuing and recurrent and cannot be rectified without great economic damage to the defendant and often the wider community. In *Boomer*, the plaintiffs were substantially damaged by air pollution caused by defendant's cement plant; the Court found that a permanent injunction against the plant would have far reaching negative consequences, including the loss of 300 workers' jobs, and that compensating the plaintiffs for their injuries for the harm by awarding permanent damages would benefit them and allow the business to continue.

Although plaintiffs argue that the noise from the cooling tower is a permanent nuisance, based on the inability of the sponsor or the board of managers to effectively reduce the sound of the cooling tower's fan in more than four years, and that the solution of moving the cooling

tower may be prohibitive in cost, several expert witnesses testified that there are solutions short of moving the cooling tower that would reduce the noise level. Plaintiffs argue that defendants have engaged in foot-dragging, and point to the promise of the board of managers in 2010 that remediation would be completed by late summer 2010, and yet nothing has been done. They analogize the facts here to *Tom Sawyer Motor Inns v County of Chemung, Inc.*, 39 AD2d 4 (3d Dept 1972), in which the Court found a permanent nuisance based on five years of inaction to remediate the nuisance and that it did not appear that the defendant would be able to successfully correct or abate the nuisance.

This court does not find that there is in essence no feasible solution or combination of solutions to prevent excessive noise from the cooling tower, and recognizes that the bitter litigations underway between the sponsor and board and many of the unit holders, has had many unfortunate effects. Moreover, based on the reasonable person standard that is foundational to a finding of nuisance, the court does not agree that there is an ongoing noise problem, and although it is possible the cooling tower could violate the Noise Control Code at some future point, suppositions are insufficient to accord damages.

The totality of the evidence establishes, and the defendants have essentially conceded at trial, that the cooling tower's noise level constituted a private nuisance from June 9, 2009 to September 14, 2009. During the months when the cooling tower was running at 100 percent, the roof terrace was not useable, and the enjoyment taken in their home by plaintiffs was greatly diminished due to the constant loud noise. This is corroborated by the DEP readings, and by the readings of acoustic engineer Bonnie Schnitta. Plaintiffs have not sufficiently established a nuisance in 2008. That Ms. Berenger made several complaints is insufficient, without additional corroborating evidence, to establish nuisance (*Armstrong v Archives LLC*, 46 AD3d 465 465 [1st

Dept 2007] [a showing that many complaints were made is not alone sufficient to establish a breach of the warranty of habitability]). The engineering report closest in time to May 2008, from Cerami & Associates, indicates that the noise levels were within legal limits and that there was no need for an acoustical barrier on the side of the cooling tower closest to PHC.

Having determined the existence of a private nuisance, the court turns to assessing damages. Where the nuisance was temporary, damages are determined by awarding the amount equal to the rental value of the portion of or all of property suffering the nuisance. For example, in *JP Morgan Chase Bank Whitmore*, 41 AD3d 433 (2d Dept 2007), the Court determined that as concerned the plaintiff's condominium unit, the excessive noise from rooftops fans constituted a private nuisance which affected 37 percent of her unit. The rental value of the unit between the years 2000 through 2005, the years for which the plaintiff established a nuisance, was agreed upon by the parties, and the plaintiff was awarded damages based upon a 37% diminution in the rental value of the unit for this period.

Plaintiff provided two experts. Rob Gross from Prudential Douglas Elliman, a licensed real estate broker, estimated that the 2010 value of the unit without any issues, and including the separate storage space and the parking space, would be about $2,000,450, based on comparisons with other units with signed contracts. Based on comparable apartments, though not in the same neighborhood, he thought that in 2010 the apartment would have rented for $10 - $12 thousand a month. He had no figures for 2008 or 2009. He assigned the value of the roof deck as $300.000 minimally. Michael Vargas, a state certified real estate appraiser, was asked to provide two appraisal values, both for 2010, one with all the detrimental conditions claimed by the Berengers, namely excessive noise, mold, and water and glycol leaks, and one assuming no detriments. With no detriments, he calculated its worth as $ 2.8 million, including the parking

and storage spaces. With the detriments, Vargas concluded the unit's value would be $1.4 million.

Defendants produced Eric Haims, a senior vice president at Jerome Haims Realty, a real estate appraisal and consulting company, appraised the apartment with the terrace in July 2010 at $2.1 million with the terrace, and $1.9 million without the terrace. He based his calculations on the noise level of the cooling tower during the four-month period at issue, to be the same as the day of the purchase, that the offering plan disclosed the cooling tower . For 2009, June to September, he calculated the total rental value of the unit including the terrace would have been $44,600; without the terrace rent for those four months would have been $37,300. Thus, the fair market value of the potential loss in rent from June through September 2009, was $7,300.00.

Neither of the experts is completely of assistance. Plaintiffs' failed to provide any figures for the 2009 period of time at issue. Defendants gave figures for 2009, but while calculating that the terrace was unusable during those four months, made no calculations for the loss of quality of the rest of the unit, although in July 2009, the DEP inspector found noise violations in every room he measured, that is the living room/dining room area, the stairway to the terrace, and the master bedroom. Neither party gave any break out of the unit's sale value subtracting out the extra storage and parking spaces.

Because plaintiffs' expert opined that the unit could have rented in 2010 for $10,000 to $12,000 a month, while defendants' expert stated that in 2009, the unit would have rented for $11,150 a month, the court will use defendants' figure of $11,150 a month, and conclude that the apartment without the noise nuisance would have rented for a total of $44,600 for the period of time from June through September 2009. To calculate the impact of the loss of use of the roof terrace during the months of June through September 2009, defendants determined that a

comparable apartment with no roof deck would have rented for $37,300.00 for those four months, that is $9,325 a month. This figure, however, does not reflect the loss suffered by plaintiffs living in their apartment during the four months contending with the illegal noise level of the cooling tower continuously operating at 100 percent velocity. This court deems the loss of use of the terrace, given its size and that this loss occurred in the summer, along with the ever-present excessive noise throughout the unit, reduced the rentability of the unit by approximately 25 percent. This is to say, the monthly rent for the unit should be calculated as $8,363, or $33,452 for the four-month period. The difference between $44,600 and $33,452 is $11,148.

In addition to damages of $11,148, plaintiffs should be repaid the common charges for those four months, at $3,000 per month.

2. Indemnification and Contribution

The sponsor 261 West LLC cross-claims against defendants claiming common law and contractual indemnification, and contribution. The board of managers cross-claims against the sponsor also seeking common law and contractual indemnification and contribution.

To establish a claim for common-law indemnification, the party seeking indemnity is required to prove both that it was not guilty of any negligence and that the proposed indemnitor was guilty of some negligence that contributed to the occurrence or accident (*Correia v Professional Data Mgt. Inc.*, 259 AD2d 60, 65 [1st Dept 1999]; *see Picchione v Sweet Constr. Corp.*, 60 AD3d 510, 513 [1st Dept 2009]).

Contractually based indemnity is governed of course by contract law, but also by General Obligations Law § 5-322.1, which provides in relevant part that,

> "1. A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including

> moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable; provided that this section shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by an admitted insurer. This subdivision shall not preclude a promisee requiring indemnification for damages arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of a party other than the promisee, whether or not the promisor is partially negligent."

In contractual indemnification, the party seeking indemnity must only establish that it was free from any negligence and is liable solely based on statutory provisions (*Correia v Professional Data Mgt., Inc.*, 259 AD2d at 65).

Contribution is available when the injury is caused by actions or inactions of two or more tortfeasors; it is calculated by assessing the relative culpability of each (*Godoy v Abamaster of Miami, Inc.*, 302 AD2d 57, 61 [2d Dept 2003], *lv dismissed* 100 NY2d 614 [2003]). Where the contractual language is sufficiently clear that the intention to indemnify can be implied from the language and purpose of the entire agreement as well as the surrounding facts and circumstances, the proposed indemnitor will be entitled to full contractual indemnification for damages incurred in a personal injury action (*Drzewinski v Atlantic Scaffold & Ladder Co., Inc.* 70 NY2d 774, 777 (1987).

The First Department has already held that the Offering Plan set forth the rights and obligations of the sponsor, 261 West. The Plan states that the sponsor "will correct, repair, or replace any and all defects relating to construction of the [b]uilding, [c]ommon [e]lements or the [r]esidential [u]nits," and that "nothing contained in this section will be construed so as to render sponsor liable for money damages (whether based on negligence, breach of contract, breach of warranty, or otherwise." *(Berenger, supra*, 93 AD3d at 178). In addition, the First Department

has held that under the Offering Plan, the board of managers is responsible for the operation, maintenance and repair of the cooling tower (*Berenger, supra,* 93 AD3d at 185).

261 West LLC is not entitled to any indemnification. As the entity ultimately responsible for the decision to install a cooling tower, its placement, and that no sound attenuation was necessary, it bears some liability. It is entitled to contribution.

The board of managers is not entitled to any indemnification. Although there is no suggestion that the mechanical defect that required setting the cooling tower in manual mode at 100 percent for four months was caused by any action of the board, the board was on notice since 2008 that the cooling tower was objectionably loud according to plaintiffs, but made no effort to address the sound issue. The testimony by the then-board members is that the board did not even hold any meetings, and that one board member Evan Haymes, attended most of the construction project meetings, although whether he was appearing on behalf of the board or the sponsor, or both, is not self-evident.

3. Counterclaim

261 West LLC counterclaims against plaintiffs claiming legal fees, costs and disbursements incurred in its defense of this action pursuant to Article 30 of the Purchasing Agreement which states that the purchaser is obligated to reimburse the sponsor for any legal fees and disbursements incurred by the sponsor in defending its rights under the agreement. This claim has not been argued by defendants or by plaintiffs, and it is deemed waived.

CONCLUSION

Plaintiffs Mathias Berenger and Christine Harris, now known as Christine Berenger, having established a nuisance from June through September 2009, are entitled to damages representing an abatement in the amount of $11,148 plus the amount paid in common charges

for those four months at $3,000 per month, payable by defendants who are each equally liable.

Accordingly, it is

ORDERED that the Clerk of Court shall enter judgment in plaintiffs' favor in the amount of $11,148 as an abatement and $12,000 in a refund of common charges, together with costs and disbursements.

This constitutes the decision and order of the court after trial.

Dated: October 5, 2012
New York, New York

J.S.C.

Berenger DAT