SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MELISSA A. CRANE **PART 15**

Justice

Richard Burbridge and Cecilia Burbridge,
Plaintiffs,

-against-

INDEX NO. 651495/2010
Decision After Bench Trial

Soho Plaza Corp. et al.

The following papers, numbered _ to _ were read on this motion to/for_____.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause — Affidavits — Exhibits …	
Answering Affidavits — Exhibits	
Replying Affidavits	

CROSS-MOTION: ☐ YES ☐ NO

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

This dispute centers around defendant Soho Plaza Corp's ("Soho Plaza" or "defendant") decision to install an eight-ton central air conditioning unit (the "Chiller") on the roof directly above plaintiffs' penthouse. Plaintiffs contend that the Chiller has made leaks into the penthouse significantly worse.

Even after ten years of litigation, a long bench trial with numerous exhibits, multiple witnesses, including experts, and a 120 page post trial brief (the court had interposed a generous 50-page limit), plaintiffs have still not carried their burden with the exception of proving that defendant breached the Roof Rider, because the Chiller takes up more than 50% of the "useable" space above plaintiffs' apartment.

FINDINGS OF FACT

Plaintiffs, as cooperative shareholders, own a penthouse at 66 Crosby Street, comprised of units 6A and 6B. Plaintiffs purchased unit 6B in 1997 and 6A in 1999. At the time plaintiffs purchased Unit 6B in 1997, plaintiffs renovated extensively. The construction lasted over a year. These renovations included piercing the roof membrane to install a skylight and a stairway bulkhead to lead to a roof deck built over rooftop dunnage beams. Defendant consented to this renovation work. The Alteration Agreement (pl ex 9 at paragraph 19) between the parties made plaintiff solely responsible for repairs to these items:

> I agree that **the responsibility for maintaining and repairing all the work remains with me,** including, but not limited to, the cost of removing or reinstalling all or any part of the work. I agree that I shall assume full

> responsibility for . . . any equipment installed as part of the work, including, without limitation, being responsible for any and all costs related to leakage and/or seepage in my unit and/or the Adjacent Premises"

(Co-op alteration agreement [pl ex 9 at paragraph 19]). Thus, plaintiffs, not the building, are responsible for repairing their own property.

The Department of Buildings has never signed off on the deck and skylight as required. At around the same time as plaintiffs' deck, bulkhead and skylight construction, defendant replaced the roof.

There is no dispute that plaintiffs' penthouse apartment has had a history of leaks. Indeed, as plaintiff admits in its post trial brief at pg 29, even prior to the placement of the chiller in 2009, there were leaks "especially as sixth floor tenants began to exercise their roof rights." Plaintiffs did not move into the apartment until the summer of 1999. By that winter, there were leaks around the bulkhead and the skylight (R. Burbridge Trial Tr. 7/3/2018 pg 95 line 10-25). Due to the need to preserve the warranty on the new roof, defendant required plaintiffs to use the building's roofer to repair these leaks. The building's roofer would coordinate with the roofing manufacturer of the roof's waterproofing membrane. Plaintiffs paid for the repairs that were complete towards the end of 1999 (R. Burbridge Trial Tr. 7/3/2018 pg 99 line 9-pg 100 line 18).

It was not until 2008/early 2009 that leaks reappeared. Again, the leaks were repaired with the building's roofer coordinating with the roof manufacturer. Plaintiffs again paid for these repairs.

Meanwhile, Soho Plaza had been exploring options to address heating, cooling and electrical consumption in the building. Ultimately, it settled on a central heating/air conditioning unit, because of several advantages. These advantages included the elimination of window air conditioning units and more even heat distribution. After a Board of Director's meeting on May 21, 2004, the building manager, Dan Dermer, sent notices to all shareholders soliciting their feedback about the installation of a chiller. Despite owning what amounted to two penthouse units, the Burbridges gave no feedback. After much deliberation, defendant's Board of Directors, in conjunction with Steve Rowland, the building's structural engineer, decided to place the chiller on the dunnage beam above unit 6A.

On October 30, 2007, defendant held a shareholder meeting to discuss the Chiller project. Prior to that meeting, defendant circulated a memorandum to all shareholders, dated September 15, 2007. This memorandum included the following:

> The Board of Directors has continued to research the installation of **central air conditioning throughout 66 Crosby** and 514 Broadway. The Board would like to bring together all the Shareholders of Soho Plaza Corp. on Tuesday, October 30, 2007 at 7:00 PM at the Puffin Room located at 435 Broome Street to review all of the issues related to the project. **It is very important that you attend this meeting so that you are aware of the issues. If you personally cannot attend the meeting, we ask that you**

assign someone to attend on your behalf so they can represent your interests and understand the impact this project would have on the building and your unit. (Def. Ex. EEE).

This notice also invited questions to Dan Dermer directly. Plaintiffs admit they received notice of this meeting, but did not think it was important enough to attend or to send someone to attend for them. In addition to this notice, defendant also circulated tenant worksheets related to the Chiller project. Steve Rowland personally met with Cecilia Burbridge to discuss the worksheet.

By winter 2009, after the installation of the Chiller, the leaks reappeared. Mr. Burbridge attempted to have the leaks fixed via the prior procedure (ie. coordinating with the building's roofer who would coordinate with the manufacturer). The relationship between the parties had deteriorated by this point, perhaps because plaintiffs wanted defendant to move the Chiller and believed defendant had placed it over 6A in derogation of plaintiffs' roof rights. Defendant appears at this point to have determined that plaintiffs had the sole responsibility to fix the leaks, but did not lift the requirement that plaintiffs use the building's contractor. As a consequence, plaintiffs received somewhat less cooperation than they had in the past.

Plaintiffs have insisted throughout this litigation that the leaks they suffer are because of the Chiller. They claim loading the dunnage beam with the Chiller was the straw that broke the camel's back in that this added weight drove the dunnage beam into the skylight and caused more leaks. Mr. Orlando, plaintiffs' expert testified that the reinforcement of the dunnage beam cut into the skylight in an up and down fashion, as the beam moved due to vibrations and temperature change. (F. Orlando Tr. 7/2/2018 at pg 57 line 20-24), The reinforcement was placed on the dunnage beam right before the installation of the Chiller. However, the reinforcement does not explain the leaks from the bulkhead. As plaintiff admits, "it is not easy to identify the source of the leaks." This is unfortunate for plaintiffs, because plaintiffs have the burden of proof.

Steve Rowland, the only person who viewed the area in question on the roof prior to the Chiller's installation, testified that the dunnage beam was touching the skylight well before the Chiller ever appeared on the scene. Def. Ex TTT is a report, dated 6/10/2010 from Steve Rowland containing a picture that he took in 2007, pre-Chiller, demonstrating the skylight in contact with the dunnage beam. In addition, Rodney Gibble, the mechanical engineer for Soho Plaza, testified that the reinforcement of the beam did not cause the dunnage to deflect downwards any more than previously and that because the skylight did not "quite fit" under the dunnage beam, the flashing was cut at installation to get it to fit.

CONCLUSIONS

1. Notice

It is undisputed that the Burbridges received notice of the October 30, 2007 meeting that clearly concerned the "central air conditioning" project and contained stark warnings to attend to protect one's rights. Yet, despite owning a two-unit penthouse apartment with a history of leaks and a roof deck, neither of the Burbridges attended the meeting on October 30, 2007. Knowing that central air conditioning would have to go on the roof, there being no other place for it, (even their own condenser was on the roof), the Burbridges never even asked where the building intended to place the Chiller. Cecelia Burbridge did not ask when she met with Steve Rowland specifically about the worksheet related to the project. Not until the Chiller was installed above their unit, at great expense to the building, did the Burbridges finally object.

Thus, plaintiffs' only have their own willful ignorance to blame for their alleged lack of notice about the location of the Chiller. Their argument that the notice about the meeting should have been sent via registered mail elevates form over substance, especially given that: (1) the Burbridges would have been even more likely to ignore notice by registered mail, than they would personal delivery and (2) they actually did receive notice, but still decided not to attend. Thus, plaintiffs have failed to demonstrate that registered mail would have made a difference. Rather, on these facts, the court finds that plaintiffs turned a blind eye to any attempts to notify them as to where the building intended to place the Chiller. Plaintiffs' decision not to attend the meeting, or not to make inquiries, were completely unreasonable considering their large penthouse was directly below the roof and they had installed a roof deck, stairs, and large skylight. Thus, plaintiffs have not carried their burden to show that defendant deprived plaintiffs of a fair opportunity to review and object to the location of the Chiller.

2. The Location of the Chiller was Reasonable

Further, it is difficult to understand how plaintiffs have damages from any failure to receive notice about the specific location of the Chiller. Defendant's Board of Directors chose the location of the Chiller after a long, deliberative process that included experts, several bids and plans. The Board considered alternative locations and reasonably decided that the best and most cost-effective location for the Chiller was on the pre-existing dunnage above unit 6A. Not only was this location near other mechanical equipment, but it also comported with Landmark requirements. Without more, such as bad faith towards plaintiffs, the Business Judgment Rule protects defendant's decision to place the chiller above unit 6A. The court will not second guess that decision (*see Matter of Levandusky v One Fifth Ave., Apt. Corp.*, 75 NY2d 530, 537 [1990]).

3. Breach of Obligations to Repair the Roof

Mr. Orlando's testimony that the added weight from the Chiller forced the dunnage beam into the skylight was not enough to overcome defendant's showing,

through Steve Rowland's testimony, that the skylight was already in contact with the dunnage beam before the Chiller was ever installed. Also, that there were already leaks from the skylight before the advent of the Chiller cuts against plaintiffs' theory. Given that plaintiffs have the burden of proof, their evidence was insufficient to overcome defendant's showing that the leaks all emanate from items plaintiffs have installed, namely the skylight, deck and stairway bulkhead.

Moreover, if the Chiller resting on the dunnage beam in turn resting on the skylight caused the leak, why are there so many more leaks than just the skylight. Why did JMA Consultants, who looked at a "water penetration problem in the Loft Bathroom" and generated a contemporaneous report back in 2009, state that:

> "the actual source of the water penetration cannot be determined, however there are several inadequate flashing details beneath and surrounding the exterior [stair] landing area. Unfortunately, it is near impossible to isolate the exact source of the problem due to the raised metal deck and metal paneling, although it is clear that the source of the problem is directly related to the raised deck/areas/enclosures and the flashing/roofing system". (Pl ex 62[a])

Thus, it is plaintiffs' own bulkhead and deck, and these items' interaction with the flashing, that is the likely source of the leaks from those areas. Plaintiffs have, therefore, not carried their burden to show that the added weight of the Chiller caused the leaks in the apartments. In turn, plaintiffs have, therefore, not demonstrated: (1) that defendants neglected the roof, (2) that defendant breached its contractual and statutory duties in the construction and installation of the Chiller on top of the rooftop dunnage beams, or (3) that defendants breached any fiduciary duties to plaintiffs or other shareholders with respect to fixing the leaks.

The proprietary lease in paragraph 18(a) states that "Any repairs to areas of the roof of the Building exclusively reserved for the use of a Lessee shall be repaired at the expense of such Lessee if the repairs are occasioned by the Lessee's misuse of such areas." Plaintiffs parse this language to mean that, while plaintiffs may have to pay for the repairs to the roof, it is up to defendant to undertake the repairs. However, plaintiffs have not carried their burden to demonstrate that it is the roof that is leaking. To the contrary, the evidence at trial demonstrated that it is plaintiffs' own skylight, deck and bulkhead that are leaking. These are plaintiffs' property and their responsibility to maintain under the Alteration Agreement (Pl. Ex. 9). Nevertheless, to the extent that plaintiffs need the cooperation of the building to arrange for repairs, the building must use its best efforts to coordinate or allow plaintiffs to coordinate with the various repair contractors.

4. Derivative Claims

In addition, the court dismisses plaintiffs' claims to the extent they are derivative. First, plaintiffs' claims allege only direct injury. Plaintiffs allegations are that they were singled out and suffered injury different from that of other shareholders. This is a quintessential direct claim. There is little to no proof that any other shareholder has complained about leaks that remain unresolved.

5. Roof Rights

The Roof Rider for 6A provides that Soho Plaza is allowed to place structures on the roof above 6A so long as 50% of the useable area remains available to plaintiffs:

> "Lessor reserves the right to complete construction on the roof for use by all shareholders, provided such construction shall result in at least fifty (50%) percent of the **useable** area over the apartment made available to Lessee as provided in this amendment."

The key term here is "useable." Plaintiffs HAVE carried their burden to show that the Chiller occupies more than 50% of the useable roof space above 6A. As plaintiffs demonstrate, not all the area is useable. For example, a roof deck for 6A would not be allowed to block the fire escape. Thus, certain areas around the fire escape are not "useable." Also, the area around the Chiller needs to remain free in order to service the Chiller. The area of the roof closest to the street slopes inward and, as a result, is also not "useable" as it is not level. Defendants' opposition failed to take into account these particulars. Thus, defendants have breached the terms of the roof rider that grants plaintiffs the right to have available to them 50% of the useable area over 6A and plaintiff is entitled to money damages for this breach. However, plaintiff is not entitled to injunctive relief to move the Chiller. This is because money damages suffice, plaintiffs squandered their opportunity to object to the Chiller's location before the building installed it and moving the Chiller would not be a fair expense to force on the building considering plaintiffs' lack of diligence.

Plaintiffs over litigate the roof rights issue to assert additional claims for trespass and conversion. However, trespass is not applicable. Not only is it duplicative, but defendant had a right to be on the roof to install equipment pursuant to the proprietary lease and the roof rider itself (see *Richstone v Bd. Of Managers of Leighton House Condominium*, 158 AD3d 551, 552 [1st Dep't 2018]; *Goulian v Gramercy 29 Apartments, Inc*. 199 AD2d 98 [1st Dep't 2003] The conversion claim is duplicative of the breach of contract claim (*Freesha v TD Waterhouse Inv Servs*, 305 AD2d 268, 269 [1st Dep't 2003]).

6. Punitive Damages

As it is not defendant's responsibility to repair plaintiff's property, punitive damages are not appropriate. However, even if defendant had the responsibility, it would not be liable for punitive damages. "Punitive damages are awarded to punish and deter behavior involving moral turpitude"][*Marinaccio v Town of Clarence*, 20 NY3d 506, 512 [2013]). Here, defendant's conduct does not come close to this level. Moreover, plaintiff has failed to demonstrate activities directed towards the public (see *Linkable Networks, Inc. v. Mastercard Inc.*, 184 A.D.3d 418, 419 (1st Dep't 2020).

7. Noise

Plaintiffs established at trial that the noise and vibrations from the Chiller interfered with their ability to enjoy their roof deck fully and that the mezzanine inside the apartment was noisy. However, plaintiffs did not establish that the noise was of such a continuous decibel level or the vibrations so severe that defendant somehow breached the warranty of habitability. Moreover, plaintiffs have insisted all along that the Chiller should be moved. It is unreasonable to commence litigation to force defendant to move the Chiller, while at the same time expecting them to go to great expense to reduce noise levels. These efforts would just go to waste were the Chiller moved. However, given that the court is not issuing a mandatory injunction to move the

Chiller, the building should now install the noise reduction mechanism they planned to install before plaintiffs asked for an injunction.

8. Attorney's Fees

As plaintiff is not the substantially prevailing party, the request for attorney's fees is denied.

Accordingly, the court conforms the pleadings to the proof and awards judgment as to liability on the cause of action for breach of the roof rider, orders the defendant to place the noise reduction material on the Chiller and otherwise denies all other requests for relief; and it is further

ORDERED THAT the parties are to contact the court, via email, no later than February 28, 2021, to schedule a meeting to discuss next steps, including moving on to the money damages phase for breach of the roof rider; and it is further

ORDERED THAT there shall be no motion practice without prior notice to the court; and it is further

ORDERED THAT plaintiff must e-file its post-trial brief; and it is further

ORDERED THAT all future briefs must comport with the limits in the Commercial Division rules and must contain a table of contents.

The clerk is directed to enter judgment accordingly.

DATED: February 4, 2021

MELISSA A. CRANE, J.S.C

Check one: ☐ **FINAL DISPOSITION** ☐ **X NON-FINAL DISPOSITION**

Check if appropriate: MOTION IS: ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE** ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **FIDUCIARY APPOINTMENT**