At an IAS Term, Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 21st day of November, 2024.

PRESENT:

HON. CAROLYN E. WADE,
Justice.

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MARK A. NEWGARDEN and MEGAN CASH,

Plaintiffs,

-against-

Index No.: 524019/2020

HAVEMEYER ESTATES LLC, SUNSHINE CONSTRUCTION USA, INC., DAVID BLUMENKRANTZ, ELLIPSES DESIGN, INC., MEHANDES ENGINEERING CO. a/k/a MEHANDES ENGINEERING P.C., and JOHN DOES "1" through "10" said parties whose identity is currently unknown to Plaintiffs,

MS# 3,5,6,7,8

Defendants.

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HAVEMEYER ESTATES, LLC,

Third-Party Plaintiff,

-against-

BENTZYS CONSTRUCTION INC. d/b/a BENTZYS ROOFING AND WATERPROOFING, BRAGA CORP. and XOLLE DEMO LLC,

Third-Party Defendants.

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The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	111-113, 125, 165-167, 175, 177-178, 214-215, 246-247, 252
Opposing Affidavits/Answer (Affirmations)	174, 187, 198, 204, 211, 227, 260
Affidavits/ Affirmations in Reply	205, 239
Other Papers:	

Upon the foregoing cited papers, plaintiffs Mark A. Newgarden and Megan Cash move for an order, pursuant to CPLR 3212; (i) granting summary judgment on the issue of liability in their favor against defendant Havemeyer Estates LLC (Developer Havemeyer) on the first cause of action in the verified complaint for breach of contract; (ii) granting summary judgment on the issue of liability in their favor against defendant David Blumenkrantz (Blumenkrantz) and Developer Havemeyer on the second cause of action in the verified complaint for an account stated; (iii) upon granting summary judgment on the issue of liability against Blumenkrantz and Developer Havemeyer (the Havemeyer Defendants), granting summary judgment on the issues of damages and a money judgment in favor of plaintiffs against Blumenkrantz and/or Developer Havemeyer in the amount of no less than $267,350.00 through November 19, 2022, plus pre-judgment interest from April 20, 2020 and post-judgment interest; (iv) alternatively, in the event that summary judgment is granted on liability only, setting this action down for trial on the issue of damages on the breach of contract and/or account stated causes of action; (v) determining, pursuant to CPLR 3212 (f), that no facts are unavailable that would require denial of the motion; and (vi) granting plaintiffs reasonable attorneys' fees and expenses incurred in connection with their efforts to enforce the above-referenced

agreement and setting the matter down for a hearing to determine the extent of the legal fees and expenses to be awarded to plaintiffs (motion sequence number 3).

Defendant Blumenkrantz cross-moves for an order, pursuant to CPLR 3212, granting summary judgment in his favor and dismissing the causes of action interposed against him in the verified complaint (motion sequence number 8).

Plaintiffs move by Order to Show Cause for an order, pursuant to CPLR 2004, 2201 and 6513, (i) staying and/or tolling any expiration period of the Notice of Pendency filed on February 3, 2021 (the Notice of Pendency) against the property located at 20 Havemeyer Street, Brooklyn, New York 11211, (ii) extending the duration of the Notice of Pendency for a period of three years from February 2, 2024, (iii) filing and recording the extension order of the Notice of Pendency before expiration of the prior period of validity of the Notice of Pendency, or, in the alternative, deeming any post-expiration extension order, recording or filing a timely pre-expiration filing nunc pro tunc, and (iv) in the alternative, in the event the proposed Order is not signed or heard before the expiration of the Notice of Pendency, a declaration that the present application was timely filed prior to the expiration of the Notice of Pendency and that the instant application is sufficient to validly extend the Notice of Pendency (motion sequence number 5).

Developer Havemeyer cross-moves for an order, (i) pursuant to CPLR 6501 and 6514, directing the County Clerk to cancel plaintiffs' Notice of Pendency against the real property located at 20 Havemeyer Street, Brooklyn New York 11211 and (ii) pursuant to 22 NYCRR § 130-1.1, sanctioning plaintiffs for frivolous conduct and directing them to

pay Developer Havemeyer's attorneys' fees incurred in interposing its cross-motion, as well as directing plaintiffs to pay Developer Havemeyer's costs in connection with motions sequence numbers 5 and 7 (motion sequence number 7).

Third-Party Defendant Wifi Construction LLC (Wifi Construction) cross-moves for an order, pursuant to CPLR 1010, dismissing the amended third-party complaint as to Wifi Construction without prejudice (motion sequence number 6).

Plaintiffs' motion (motion sequence number 3) is **denied.**

Defendant Blumenkrantz's cross-motion (motion sequence number 8) is **denied with respect** to plaintiffs' account stated cause of action, and is **granted with respect** to (i) plaintiffs' fraud cause of action, (ii) plaintiffs' negligence cause of action, (iii) plaintiffs' gross negligence cause of action, (iv) plaintiffs' trespass cause of action and (v) plaintiffs' nuisance cause of action. Defendant Blumenkrantz's cross-motion is **otherwise denied**.

Plaintiffs' Order to Show Cause is **denied** (motion sequence number 5).

Developer Havemeyer's cross-motion (motion sequence number 7) is **granted to the extent** that the Kings County Clerk is hereby **ORDERED** to cancel plaintiffs' Notice of Pendency against the real property located at 20 Havemeyer Street, Brooklyn New York 11211. Developer Havemeyer's cross-motion is **otherwise denied**.

Wifi Construction's cross-motion (motion sequence number 6) is **stayed**. It is hereby **ORDERED** that Developer Havemeyer shall serve a copy of this decision and order, with notice of entry, upon the Clerk in Kings County Supreme Court Motion Support Office, along with a Notice advising the Clerk to transfer cross-motion sequence

number 6 to the severed third-party action, if any, between Developer Havemeyer, as third-party plaintiff, and Wifi Construction, as third-party defendant.

BACKGROUND

In this dispute pitting property owner against adjacent property owner, plaintiffs plead causes of action premised on breach of contract and account stated theories stemming from the alleged failure by Developer Havemeyer, the owner of a property abutting plaintiffs' property, and its member, Blumenkrantz, to remit payments to plaintiffs under the auspices of an Access Agreement dated June 19, 2019.

Plaintiff Mark A. Newgarden (Owner Newgarden), the owner of a property located at 18 Havemeyer Street in Brooklyn, New York (Plaintiffs' Property), resides on the property in question with plaintiff Megan Cash (Megan Cash). For its part, Developer Havemeyer owns the property located at 20 Havemeyer Street in Brooklyn, New York (Defendant's Property), which adjoins Plaintiffs' Property.

Blumenkrantz, a member of Developer Havemeyer, explains in an affidavit that in 2019, Developer Havemeyer embarked on a then-nascent construction project on Defendant's Property (the Project), consisting of building new residential housing and that, in connection with the Project, Developer Havemeyer was required to install protections on Plaintiffs' Property pursuant to the New York City Construction Code.

Blumenkrantz asserts in his affidavit that, in his capacity as a member of Developer Havemeyer, he oversaw the development of the Project and communicated with plaintiffs on behalf of Developer Havemeyer to negotiate a license agreement. Blumenkrantz recounts that the parties' negotiations culminated in the June 19, 2019

execution of the Access Agreement between Owner Newgarden and Developer Havemeyer (the Access Agreement).

Under the terms of the Access Agreement, Developer Havemeyer was provided access to Plaintiffs' Property for the purpose of performing the Project, as well as to protect Plaintiffs' Property from damage associated with the Project (*see* NYSCEF Doc No. 119, Access Agreement at Art. 1). Pursuant to the Access Agreement, Developer Havemeyer contracted to pay a base license fee (the Base Fee) amounting to $4,000.00 per month commencing on the effective date of the Access Agreement, namely, June 19, 2019 (the Effective Date), and continuing until so-called "Restoration" has been achieved (Restoration), which term signifies reverting to the pre-construction *status quo ante* with respect to Plaintiffs' Property.[1]

Plaintiffs assert that in March 2020, pursuant to the Access Agreement, Developer Havemeyer installed protections on Plaintiffs' Property (Protections). However, Plaintiffs allege that the $4,000.00 Base Fee remains due and owing monthly in that Restoration has not been achieved since Developer Havemeyer has not "restored and/or repaired [Plaintiffs' Property] to no less than its pre-Access condition" under the terms of the Access Agreement (*id.* at Art. 2 [C]).

Further, pursuant to the Access Agreement, Developer Havemeyer agreed, as an incentive to complete its work in a timely fashion, to an escalation clause (the Daily Fee

[1] The term "Restoration" is defined as follows in the Access Agreement: "[T]he date upon which all Protections, construction equipment, debris, and/or other Access Work related materials are removed from the Adjacent Property [Plaintiff's Property] and the Adjacent Property has been restored and/or repaired to no less than its pre-Access condition, including, but not limited to, the restoration of all plants, planters, furniture and other belongings on the low roof which had been relocated from the area where the Roof Protection was installed back to their original locations" (*id.* at Art. 2 [C]).

Clause),[2] pursuant to which it contracted to remit daily fees (Daily Fees) to Owner Newgarden should Developer Havemeyer fail to meet deadlines embedded in the Access Agreement. The Daily Fee Clause is triggered by the expiration of the License Term (the License Term), which is defined in the Access Agreement as "eight (8) months from the Effective Date or the earlier completion of the Access Work..." (*id* at Art. 2 [B] [i]).

Owner Newgarden asserts in his affidavit that since the Effective Date was June 19, 2019, the License Term expired eight months later on February 19, 2020, giving rise to the requirement on the part of Developer Havemeyer to pay the Daily Fee commencing on that date. Owner Newgarden alleges that, insofar as Restoration has not been achieved by Developer Havemeyer, the Daily Fee remains due and owing on a daily basis.

Owner Newgarden asserts that, following the Effective Date, Developer Havemeyer began paying the Base Fee on June 19, 2019 and thereafter consistently paid the Base Fee. However, Owner Newgarden alleges in his affidavit that Developer Havemeyer made its last Base Fee payment on April 19, 2020 and discontinued paying the Base Fee thereafter. Likewise, Owner Newgarden asserts that following the expiration of the License Term, Developer Havemeyer paid the Daily Fee from February 19, 2020 to March 18, 2020, at which juncture Developer Havemeyer discontinued payment of the Daily Fee.

[2] The Daily Fee Clause provides as follows: "In the event Developer [Developer Havemeyer] fails to complete the Access Work and related Restoration, by the initial License Term, Developer shall pay Owner the License fee plus an additional license fee as follows: the sum of $100 per day for the first sixty (60) days that the Access Work and/or Restoration has not been completed beyond the initial License Term, $125 per day for the next sixty (60) days that the Access Work and/or Restoration has not been completed beyond the initial License Term, and $150 per day for every day thereafter. This provision will survive the termination or earlier expiration of this Agreement until the date that the Restoration is completed" (*id.* at Art. 2 [D]).

Owner Newgarden opines in his affidavit that no justification exists under the Access Agreement for Developer Havemeyer's continued failure to pay either the Base Fee or the Daily Fee since "[p]rotections, construction equipment ... and/or other Access Work related materials"[3] continued to remain on Plaintiff's Property long after Developer Havemeyer allegedly ceased meeting its payment obligations. Plaintiffs assert that the Base Fee and Daily Fee, which continue to accrue since Developer Havemeyer's alleged default, amounted to $267,350.00, in the aggregate, as of November 19, 2022, shortly before plaintiffs' motion was filed.

Following discontinuation of Developer Havemeyer's payments, plaintiffs' counsel sent demands for payment of accruing outstanding license fees allegedly due under the Access Agreement on April 6, 2020, April 13, 2020, April 29, 2020, May 6, 2020, May 7, 2020, May 26, 2020, August 24, 2020, September 23, 2020 and November 11, 2020 (*see* NYSCEF Doc No. 122, Demands for Payment). Plaintiffs assert that on several occasions, Blumenkrantz, a member of Developer Havemeyer, acknowledged receipt of such demands but did not object to the demands in question. Blumenkrantz vehemently disputes this account, indicating that, on June 17, 2020, he sent an e-mail to plaintiffs' counsel questioning whether the COVID-19 pandemic falls within the ambit of the Force Majeure provision of the Access Agreement, obviating the need for Developer Havemeyer to continue making license payments to Plaintiffs (*see* NYSCEF Doc No. 231, e-mail at p. 2).

[3] *Id.* at Art 2 (C).

Blumenkrantz alleges in his affidavit that Developer Havemeyer was constrained to bring work on the construction site to a halt in March 2020 attendant to the COVID-19 pandemic, warranting its decision to cease remitting to Owner Newgarden the Daily Fee after its March 18, 2020 payment, as well as the Base Fee after its April 19, 2020 payment, amidst the vicissitudes associated with the Pandemic that befell the nation.

DISCUSSION

Plaintiffs' Breach of Contract and Account Stated Causes of Action

Plaintiffs' breach of contract and account stated causes of action revolve inexorably around a central axis, namely, plaintiffs' contention that they have sustained monetary damages stemming from the failure by Developer Havemeyer to restore Plaintiffs' Property to its pre-construction condition notwithstanding the alleged damage caused to such property attendant to Developer Havemeyer construction activities (*see* NYSCEF Doc No. 125, Newgarden Aff ¶¶ 21-23). Specifically, Owner Newgarden alleges in his affidavit that Developer Havemeyer's Project has severely damaged Plaintiffs' Property, including the roof and foundation, causing chronic leaks, as well as flooding beginning in July 2020, warranting Developer Havemeyer's continued obligation to pay the Base Fee and Daily Fee owing to its failure to achieve Restoration by reinstating Plaintiffs' Property to its pre-access condition (*id.* ¶¶ 21-22).

As Owner Newgarden crystallizes his position, in light of Developer Havemeyer's purported failure to address the damage wrought as a by-product of the construction project, "Havemeyer has certainly 'not restored and/or repaired [Plaintiffs' Property] to

no less than its pre-Access condition.' *Id.* As Restoration has not been achieved, the obligation for payment of the Base Fee or the Daily Fee continues" (*id.* ¶ 21).

That Plaintiffs have centered their breach of contract and account stated causes of action around the monetary damages they sustained concomitant with the Havemeyer Defendants' alleged failure to remediate the property damage to Plaintiffs' Property scarcely comes as a surprise since, as a pre-requisite to pleading viable breach of contract and account stated causes of action, a plaintiff must establish that she or he sustained monetary damages (*see Legum v Russo*, 133 AD3d 638, 639 [2d Dept 2015]; *Canzona v Atanasio*, 118 AD3d 837, 838 [2d Dept 2014]; *Episcopal Health Servs., Inc. v POM Recoveries, Inc.*, 138 AD3d 917, 919 [2d Dept 2016]; *Gurney, Becker & Bourne v Benderson Dev. Co.*, 47 NY2d 995, 996 [1979]).

An analysis of the record reveals that material issues of fact have emerged as to whether plaintiffs sustained monetary damages attendant to the purported damage to Plaintiffs' Property occasioned by the Havemeyer Defendants' construction work.

Plaintiffs' position that the Havemeyer Defendants' Project has resulted in damage to Plaintiffs' Property is in tension with evidence as to the genesis of the flooding and leaks that are alleged to mar such property. In a now-discontinued parallel action filed in 2016 - more than four years before the present action was commenced – to wit, *Newgarden v North 7-8 Investors LLC*, Sup Ct, Kings County, Index No. 506615/2016 (the Prior Action), Owner Newgarden alleged that "water infiltrations" (*see* NYSCEF Doc No. 2 in Prior Action, Verified Complaint ¶ 4) caused by a neighboring construction project led to significant damage to the "valuable films" stored on Plaintiffs' Property (*id.*

¶ 93). As Owner Newgarden alleged in the Prior Action, brought against the developer of the neighboring property: "This moisture has further compromised the condition of the interior walls. New areas (including the ceiling) have opened and plaster, peeled paint and dirt regularly rain down on the valuable films stored there" (*id.*)

Owner Newgarden echoes the "water infiltration" claims asserted in the Prior Action in the action before this Court, brought against another neighboring developer, claiming in the present action that the Project was the source of "leaks and flooding," as well as "water infiltration," and that such flooding has destroyed scores of items owned by plaintiffs, including "archival film reels" (*see* NYSCEF Doc No. 168, Verified Complaint ¶¶ 101, 113-114 and 190).

Albeit not fatal to plaintiffs' breach of contract and account stated causes of action, plaintiffs' Prior Action against another adjacent developer, which action features - as in the present action - claimed damage to Plaintiffs' Property allegedly caused via "water infiltration," gives rise to triable issues of fact as to the source of the property damage alleged in the present action, which issues of fact cannot be resolved on summary judgment (*see Gaither v Saga Corp.*, 203 AD2d 239, 240 [2d Dept 1994] [summary judgment motion denied given that issues of fact were found to exist as to whether defendant was the source of the greasy condition at issue in tort action]). Endeavoring to ascertain on summary judgment which, if any, neighboring developer, led to plaintiffs' water infiltration-related monetary damages would be all the more ill-advised in that the record is devoid of expert reports on the causal nexus issue.

Further raising issues of fact as to whether plaintiffs sustained monetary damages as a result of the alleged damage to Plaintiffs' Property brought about by the Havemeyer Defendants' Project, Owner Newgarden admitted as follows, in an e-mail sent to Blumenkrantz, that Plaintiffs' Property's basement flooding has historically been caused by a fire hydrant, as distinguished from the Havemeyer Defendants' Project:

> I just want to recap this mornings [sic] phone conversation with Israel Spielman re the fire hydrant at N 8th and Havemeyer near the garage.
>
> Please be aware as your project goes forward that this hydrant should NOT be opened under any circumstances. It leaks into the basement at 18 Havemeyer and causes flooding. The fire department, (who [sic] will need to be summoned if this hydrant is opened) is aware of the issue.

(NYSCEF Doc No. 233, August 15, 2019 e-mail at 2).

Plaintiffs further posit, in the context of their breach of contract and account stated causes of action, that they sustained monetary damages associated with the Havemeyer Defendants' Project as a result of said defendants' failure to restore Plaintiffs' Property to its pre-construction condition by virtue of their refusal to remove the protections they installed on the premises, which protections Owner Newgarden claims to have been constrained to remove from the premises at his expense (*see* NYSCEF Doc No. 125, Newgarden Aff ¶ 20). Developer Havemeyer controverts such claim, alleging that it repeatedly sought to affect the restoration of Plaintiffs' Property, to no avail, in light of plaintiffs' alleged refusal to allow Developer Havemeyer to enter the premises, giving rise to a further issue of fact as to whether plaintiffs sustained monetary damages on

account of the purported damage to Plaintiffs' Property caused by the Havemeyer Defendants (*see* NYSCEF Doc No. 227, Blumenkrantz Aff ¶ 28).

In sum, issues of fact have materialized as to whether plaintiffs sustained money damages as a result of the alleged damage to Plaintiffs' Property occasioned by the Havemeyer Defendants' Project, which issues bar the grant of summary judgment sought by plaintiffs as to their breach of contract and account stated causes of action[4] (*see Fleetwood Agency, Inc. v Verde Elec. Corp.*, 85 AD3d 850, 851 [2d Dept 2011]; *Triangle Fire Protection Corp. v Manufacturers Hanover Trust Co.*, 172 AD2d 658 [2d Dept 1991]).

Accordingly, plaintiffs' motion for an order granting summary judgment in their favor on the issue of liability against Developer Havemeyer as to plaintiffs' breach of contract cause of action is denied in light of the existence of material issues of fact. Likewise, the branch of plaintiffs' motion for an order granting summary judgment in their favor on the issue of liability against Blumenkrantz and Developer Havemeyer as to plaintiffs' account stated cause of action is denied given the presence of material issues of fact. The remainder of the relief sought by plaintiffs, which is contingent on the grant of plaintiffs' motion for summary judgment as to their breach of contract and account stated causes of action, is denied (motion sequence number 3).

[4] While the parties did not address this issue, the Court has the authority to search the record in the summary judgment context (*see Goldstein v County of Suffolk*, 300 AD2d 441, 442 [2d Dept 2002]; *Murray v Murray*, 28 AD3d 624, 625 [2d Dept 2006]).

Blumenkrantz's Cross-Motion for Summary Judgment to Dismiss the Complaint

Blumenkrantz has interposed a cross-motion for an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiffs' causes of action asserted against him. The causes of action asserted against Blumenkrantz in plaintiffs' verified complaint are as follows: (i) the account stated cause of action, which, as detailed above, gives rise to issues of fact barring the grant of summary judgment; (ii) a fraud cause of action; (iii) a negligence cause of action; (iv) a gross negligence cause of action; (v) a trespass cause of action; and (vi) a nuisance cause of action.

Plaintiffs' Fraud Cause of Action

In their fraud cause of action against Blumenkrantz, plaintiffs allege that Owner Newgarden notified defendants of various breaches of the Access Agreement and that, in the wake of such notification, Blumenkrantz misrepresented in writing that he would undertake to cure the breaches, inducing plaintiffs to delay filing suit, resulting in worsening damage to Plaintiffs' Property with each successive water infiltration during heavy storms (*see* NYSCEF Doc No. 168, verified complaint ¶¶ 211-212).

A fraud cause of action is not legally cognizable where the fraud claim relates to a breach of contract (*see Board of Mgrs. of Beacon Tower Condominium v 85 Adams St., LLC*, 136 AD3d 680, 684 [2d Dept 2016]; *WIT Holding Corp. v Klein*, 282 AD2d 527, 528 [2d Dept 2001]; *Courageous Syndicate v People-To-People Sports Comm.*, 141 AD2d 599, 600 [2d Dept 1988]). As a corollary, a mere misrepresentation of an intention to perform duties arising under a contract is insufficient to allege a viable fraud cause of

action (*WIT Holding*, 282 AD2d at 528; *Non-Linear Trading Co. v Braddis Assoc.*, 243 AD2d 107, 118 [1st Dept 1998]).

That plaintiffs' fraud allegations involve duties to be performed under the Access Agreement cannot be gainsaid. In their breach of contract cause of action, plaintiffs allege that, pursuant to the Access Agreement, Developer Havemeyer agreed to repair and restore Plaintiffs' Property and breached the Access Agreement by damaging Plaintiffs' Property and failing to repair or restore such property (*see* NYSCEF Doc No. 168, verified complaint ¶¶ 132 and 134). Plaintiffs' fraud cause of action echoes their breach of contract cause of action as the fraud claim alleges that Blumenkrantz failed to perform contractual promises on behalf of Developer Havemeyer to repair and restore Plaintiffs' Property in accordance with the terms of the Access Agreement (*id.* ¶¶ 211 and 213). Blumenkrantz's purported failure to effect repairs and restoration constitutes but a breach of contract to be enforced through a cause of action on the contract, as distinguished from a fraud claim (*see Westminster Constr. Co. v Sherman*, 160 AD2d 867, 868 [2d Dept 1990]; *C.B. W. Fin. Corp. v Computer Consoles*, 122 AD2d 10, 12-13 [2d Dept 1986]).

In short, in their fraud cause of action, plaintiffs do no more than recast their breach of contract claim using fraud-related nomenclature, warranting the dismissal on summary judgment of the fraud cause of action (motion sequence number 8).

Plaintiffs' Negligence and Gross Negligence Causes of Action

In their negligence and gross negligence causes of action, plaintiffs allege that Developer Havemeyer, as well as defendants Sunshine Construction USA, Inc., Ellipses

Design, Inc. and Mehandes Engineering Co. (collectively, the Construction Defendants),[5] were negligent and grossly negligent by failing to adequately waterproof, protect or repair the south wall of Plaintiffs' Property adjacent to the worksite on Defendant's Property, leading to property damage on Plaintiffs' Property, including flooding (*see* NYSCEF Doc No. 168, verified complaint ¶¶ 160-169 and 179-181).

Plaintiffs further aver that Blumenkrantz was negligent and grossly negligent by continuing to dispatch the Construction Defendants to the worksite to perform work in connection with the Project at or above Plaintiffs' Property, while defying plaintiffs' requests for payment and repairs, or other compliance with the Access Agreement (*id.* ¶ 174). Plaintiffs also assert that Blumenkrantz was negligent and grossly negligent in that he misrepresented that he would address the damage to Plaintiffs' Property and the breaches of the Access Agreement (*id.* ¶¶ 175 and 182).

To establish a claim of negligence, a plaintiff must show a duty owed to it by a defendant, a breach of such duty and injury proximately resulting from the breach (*see Moore Charitable Found. v PJT Partners, Inc.*, 40 NY3d 150, 157 [2023]; *Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016]). The duty must be independent of a duty existing pursuant to a contract (*see Kallman v Pinecrest Modular Homes, Inc.*, 81 AD3d 692, 693-694 [2d Dept 2011] [the Supreme Court properly dismissed the negligence causes of action interposed against the individual defendants in that plaintiffs failed to allege the violation of a legal duty independent of the parties'

[5] Sunshine Construction USA, Inc. was the general contractor on the Project retained by Developer Havemeyer, Ellipses Design, Inc. was a construction consultant subcontractor on the Project and Mehandes Engineering Co. was a mechanical engineering subcontractor on the Project.

contract]; *East Meadow Driving School v Bell Atl. Yellow Pages Co.*, 273 AD2d 270, 271 [2d Dept 2000] [since no duty was found to exist independent of the parties' alleged contract, plaintiff's gross negligence cause of action was held to be unavailing]).

In sum, the allegations in plaintiffs' negligence and gross negligence causes of action stem from plaintiffs' breach of contract cause of action, in which it is posited that Developer Havemeyer and the Construction Defendants failed adequately to protect and repair Plaintiffs' Property in conformity with the duties set forth in the Access Agreement. Inasmuch as plaintiffs failed to allege in the context of their negligence and gross negligence causes of action that Blumenkrantz owed plaintiffs a duty independent of Developer Havemeyer and the Construction Defendants' duties arising under the Access Agreement, plaintiffs' negligence and gross negligence causes of action against Blumenkrantz are not viable and must be dismissed on summary judgment (motion sequence number 8).

Plaintiffs' Trespass Cause of Action

Blumenkrantz has demonstrated, prima facie, that plaintiffs' trespass cause of action is unavailing. Insofar as plaintiffs have abandoned reliance on the trespass cause of action by failing to address it in their opposition papers, Blumenkrantz is entitled to dismissal of said cause of action (*see Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017]) (motion sequence number 8).

Plaintiffs' Nuisance Cause of Action

Plaintiffs allege that defendants, including Blumenkrantz, are liable for nuisance by virtue of having engendered a substantial interference with the use and enjoyment of

Plaintiffs' Property through the chronic water infiltration blighting such property attendant to defendants' Project (*see* NYSCEF Doc No. 168, verified complaint ¶ 188). Plaintiffs amalgamate their nuisance and breach of contract claims as follows in their nuisance cause of action:

> Owing to Defendant Blumenkrantz' [sic] misfeasance and foregoing willful misrepresentations that he would address the foregoing breaches, defaults and violations of both contract and law, has affirmatively worsened the extant damage conditions at Plaintiff's Property by allowing water infiltration conditions to persist thereat.

(*Id.* ¶ 192).

A breach of contract is not to be considered a tort unless a legal duty independent of the contract has been violated (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]; *Sargent v New York Daily News, L.P.*, 42 AD3d 491, 493 [2d Dept 2007]; *Campbell v Silver Huntington Enters.*, 288 AD2d 416, 417 [2d Dept 2001]). As such, in circumstances where a plaintiff's nuisance claim is duplicative of its breach of contract claim, the nuisance claim has been ruled to be unavailing (*see Calderoni v 260 Park Ave. S. Condominium*, 220 AD3d 563, 564 [1st Dept 2023] [condominium unit owners' nuisance claim against condominium board of managers and condominium defendants dismissed as duplicative of plaintiffs' breach of contract claim in that the nuisance claim was predicated on defendants' contractual obligations to make repairs]).

While recalibrated to feature nuisance phraseology, plaintiffs' nuisance cause of action is duplicative of the breach of contract cause of action in which it is alleged that Developer Havemeyer and the Construction Defendants failed to properly protect and

repair Plaintiffs' Property in compliance with the restoration and repair duties set forth in the Access Agreement. Accordingly, plaintiffs' nuisance cause of action must be dismissed on summary judgment (motion sequence number 8).

The Viability of Plaintiffs' Notice of Pendency

Plaintiffs move by Order to Show Cause for an order, pursuant to CPLR 6513, extending the duration of the Notice of Pendency against Defendant's Property for a period of three years. In turn, Developer Havemeyer cross-moves for an order, pursuant to CPLR 6501 and 6514, directing the Kings County Clerk to cancel the Notice of Pendency against Defendant's Property.

As set forth more fully above, in furtherance of the construction of a residential building, Developer Havemeyer entered into the Access Agreement with Owner Newgarden, pursuant to which Developer Havemeyer was granted a license to install protections on Plaintiffs' Property. At the core of the proceeding lies plaintiffs' contention that Developer Havemeyer's Project on Defendant's Property caused damage to plaintiffs' real property, which abuts Defendant's Property. In their verified complaint, plaintiffs allege that defendants breached the Access Agreement, trespassed onto Plaintiffs' Property, damaged their personal and real property and left an encroaching structure over plaintiffs' property line, the removal of which is sought in the verified complaint. In conjunction with this action, plaintiffs filed the now-disputed Notice of Pendency against Defendant's Property.

CPLR 6501 (a) provides that a "notice of pendency may be filed in any action ... in which the judgment demanded would affect the title to, incumbrance of, or the

possession, use or enjoyment of, real property...." The Court of Appeals has underscored that, in light of the extraordinary privileges conferred upon a party through a notice of pendency, which effectively permits such party to stymie the sale of real property without prior judicial review, courts are to adopt a narrow interpretation of CPLR 6501 (a) in determining whether the action affects the title to, or the possession, use or enjoyment of, real property by narrowly circumscribing their analysis to the face of the pleading (*see 5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d 313, 320-321 [1984]; *Matter of Sakow*, 97 NY2d 436, 441 [2002]; *Delidimitropoulos v Karantinidis*, 142 AD3d 1038, 1039 [2d Dept 2016]). The Court of Appeals in *5303 Realty* emphasized that, consistent with this restrictive approach, courts having wrestled with notices of pendency in controversies tangentially related to real property, but which did not necessarily seek to directly affect title to, or possession of, the land, have denied such provisional remedy (*5303 Realty*, 64 NY2d at 321; *Sealy v Clifton, LLC*, 68 AD3d 846, 847 [2d Dept 2009]; *Distinctive Custom Homes Bldg. Corp. v Esteves*, 12 AD3d 559 [2d Dept 2004]).

An analysis of the verified complaint reveals that the title to Defendant's Property is not implicated in the present proceeding since in none of plaintiffs' ten causes of action do plaintiffs seek a judgment that would affect the title to Defendant's Property, as would eventuate, for illustration purposes, in a mortgage foreclosure proceeding or a dispute relating to parties' ownership interest in real property (*see* NYSCEF Doc No. 168, verified complaint ¶¶ 134, 148, 155, 165, 183, 192, 201, 206, 212, 233).

Likewise, a review of the verified complaint establishes that in none of plaintiffs' causes of action do they assert a claim to the possession, use or enjoyment of Defendant's

Property. To the contrary, throughout the verified complaint, plaintiffs seek monetary and injunctive relief against defendants on account of alleged damage to Plaintiffs' Property, including (i) as a result of leaks at the basement level of Plaintiffs' Property (*id.* ¶ 134), (ii) owing to Developer Havemeyer's alleged failure to repair damage caused to Plaintiffs' Property (*id.* ¶ 155), (iii) due to the Construction Defendants' purported failure to repair or protect the south wall on Plaintiffs' Property (*id.* ¶ 164), (iv) as a result of alleged damage to the roof on Plaintiffs' Property (*id.* ¶ 165), (v) on account of purportedly chronic flooding on Plaintiffs' Property (*id.* ¶ 169), (vi) due to defendants' alleged failure to remove the property protections installed on Plaintiffs' Property (*id.* ¶ 170), (vii) as a result of the Construction Defendants' purported work conducted above Plaintiffs' Property (*id.* ¶ 174), (viii) due to defendants' alleged positioning of encroaching structures on Plaintiffs' Property (*id.* ¶ 197) and (ix) on account of the Construction Defendants' actions that purportedly led Plaintiffs' Property to sink (*id.* ¶ 206). As a result, plaintiffs seek monetary damages against defendants, as well as injunctive relief compelling defendants to restore Plaintiffs' Property to its original condition (*id.* ¶¶ [a] – [i]).

In sum, inasmuch as plaintiffs seek relief that affects Plaintiffs' Property, as distinguished from Defendant's Property, the judgment, if any, in the present action would not affect the title to, possession, use or enjoyment of, Defendant's Property, and, as such, the Notice of Pendency against Defendant's Property must be canceled as it does not fall within the purview of CPLR 6501 (a).

The controlling precedent in this unorthodox notice of pendency fact pattern is a seminal Court of Appeals decision. In the Court of Appeals case in question, which features facts mirroring the present case, plaintiffs alleged that defendants, owners and developers of an adjoining property, caused water damage to plaintiffs' property, leading plaintiffs to seek an injunction to compel defendants to eliminate conduits through which the water was allegedly dumped on plaintiffs' property, as well as monetary damages (*see Braunston v Anchorage Woods*, 10 NY2d 302, 304 [1961]). Plaintiffs, as in the present case, filed a notice of pendency against the property owned and being developed by defendants on the theory that the judgment sought would limit the use which defendants could make of their land and that, as such, it would affect "the title to, or the possession, use or enjoyment of real property" (*Braunston*, 10 NY2d at 304).[6] The Court of Appeals rejected this argument on the following basis:

> It goes without saying that this is not the classical case of authorization to file a lis pendens. Plaintiffs are claiming no right, title or interest in the lands of defendants against which the lis pendens was filed; they simply contend that defendants have created a nuisance to the detriment of plaintiffs' land by collecting and dumping surface water on it. This is actionable, not in order to determine a claim of title to real property but as a tort (Noonan v. City of Albany, 79 N.Y. 470).
>
> The cases hold that a notice of lis pendens cannot be filed where the party who has filed it claims no right, title or interest in or to the real estate against which it is filed, and

[6] Plaintiffs advance a similar atypical argument in the present case, opining as follows that, since Developer Havemeyer's use and enjoyment of its property will be affected if plaintiffs prevail in this action, this action comes within the scope of CPLR 6501 (a), warranting upholding the validity of its Notice of Pendency: "[T]he Complaint demonstrates that once Plaintiffs are afforded the relief on its [sic] claims, the property Defendant would then have would be different from the property it now has, so the action is clearly one that affects the title to, or the possession, use or enjoyment of Havemeyer's property" (*see* NYSCEF Doc No. 237, Plaintiff Memorandum of Law at 4).

> where the suit concerns simply some encroachment or wrong perpetrated by defendants on plaintiffs' land....

(*Braunston*, 10 NY2d at 304-305; *Whelan v Busiello*, 219 AD3d 778, 780 [2d Dept 2023] [since the complaint does not seek relief that would affect the title to, or the possession, use or enjoyment of, defendant's property and plaintiffs' causes of action, sounding in nuisance, merely seek to prevent defendant from committing a wrongful act against plaintiffs' property, the filing of the notice of pendency was improper]).

The Court of Appeals in *Braunston* articulated the following rationale underlying its decision to grant defendants' motion to cancel plaintiffs' notice of pendency, which applies with equal force to the present proceeding:

> Plaintiffs are claiming no interest in defendants' tract of land, they merely seek to prevent defendants from committing a wrongful act against plaintiffs. It does not give a right to file a lis pendens that the wrong is perpetrated by defendants in order to benefit their own real estate. The usual object of filing a notice of lis pendens is to protect some right, title or interest claimed by a plaintiff in the lands of a defendant which might be lost under the recording acts in [sic] event of a transfer of the subject property by the defendant to a purchaser for value and without notice of the claim. This is not that kind of situation. The object of plaintiffs here is either merely to embarrass the defendants or to tie up their real estate so as to obtain security for the payment of a judgment for damages if they succeed in obtaining it ... The theory of preventing sales of lots in the tract by defendants by a lis pendens is not that defendants are likely to become insolvent but rather that there is an issue affecting the title or right to enjoyment of the defendants' real property.

(*Braunston*, 10 NY2d at 305).

In short, Developer Havemeyer's cross-motion for an order directing the Kings County Clerk to cancel plaintiffs' Notice of Pendency against Defendant's Property is

granted in that plaintiffs seek relief in their verified complaint that affects Plaintiffs' Property, rather than Defendant's Property, and, as such, a judgment, if any, in plaintiffs' favor, would not affect the title to, possession, use or enjoyment of, Defendant's Property, warranting the cancelation of plaintiffs' Notice of Pendency as it does not come within the scope of CPLR 6501 (a). The branch of Developer Havemeyer's cross-motion in which sanctions for frivolous conduct are sought against plaintiffs pursuant to 22 NYCRR § 130-1.1 is denied as abandoned in light of Developer Havemeyer's failure to seek such relief in its Proposed Decision and Order (*see Debennedetto v Chetrit*, 190 AD3d 933, 936 [2d Dept 2021]) (motion sequence number 7).

Plaintiffs' Order to Show Cause in which an order is sought extending the duration of the Notice of Pendency against Defendant's Property for a period of three years is denied under the same rationale underlying the Court's cancellation of plaintiffs' Notice of Pendency. The remainder of the relief sought by plaintiffs, which hinges on the substantive viability of the Notice of Pendency, is denied (motion sequence number 5).

Wifi Construction's Cross-Motion to Dismiss the Amended Third-Party Complaint

Wifi Construction has cross-moved for an order, pursuant to CPLR 1010, dismissing the amended third-party complaint as to Wifi Construction without prejudice (motion sequence number 6). Pursuant to this Court's Order entered on February 23, 2024, Wifi Construction's cross-motion is stayed by virtue of Wifi Construction's ongoing parallel bankruptcy proceeding (*see* NYSCEF Doc No. 209, Order at 3). Moreover, pursuant to this Court's Order entered on February 23, 2024, plaintiffs' motion for an order granting severance of the third-party action brought by Developer

Havemeyer against Wifi Construction was granted (*id.*) and the Clerk of the Court was directed to issue a new Index Number, upon payment of applicable fees for the severed third-party action between Developer Havemeyer, as third-party plaintiff, and Wifi, as third-party defendant (*id.* at 4).

It is, therefore, hereby **ORDERED** that Developer Havemeyer shall serve a copy of this decision and order, with notice of entry, upon the Clerk in Kings County Supreme Court Motion Support Office, along with a Notice advising the Clerk to transfer motion sequence number 6 to the severed third-party action, if any, between Developer Havemeyer, as third-party plaintiff, and Wifi Construction, as third-party defendant.

This constitutes the decision and order of the court.

ENTER

HON. CAROLYN E. WADE, J.S.C.
HON. CAROLYN E. WADE
JUSTICE OF THE SUPREME COURT