EA 6/27/17 E

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 100346/2013

BARKLEE 94 LLC.

PART 19

OLIVER, AUGUSTUS

Sequence Number : 014

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Decided in accordance with the accompanying memorandum decision/order

RECEIVED
JUN 27 2017
NYS SUPREME COURT - CIVIL
GENERAL CLERK'S OFFICE

FILED
JUN 27 2017
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: JUN 20 2017

Kelly O'Neill Levy, J.S.C.
KELLY O'NEILL LEVY, JSC

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☑ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

----------x

BARKLEE 94 LLC,

Plaintiff,

-against-

AUGUSTUS OLIVER and LISBETH OLIVER,

Defendants.

----------x

Index No.100346/2013

Seq. No. 014

Decision and Order

Kelly O'Neill Levy, J.:

Defendants Augustus Oliver and Lisbeth Oliver (together, Defendants) move, pursuant to CPLR 3212, for an order granting summary judgment against plaintiff Barklee 94 LLC dismissing the remaining claims in the Verified Amended Complaint dated July 21, 2014.[1] Plaintiff, represented by its principal and attorney Barbara Kraebel, opposes. Plaintiff also cross-moves for an order, (1) pursuant to CPLR 2215, requiring Defendants to comply with requests for relief due now under the Verified Amended Complaint and (2) pursuant to CPLR 2221(a), modifying the court's order dated March 30, 2016 as to Motion Sequence 007 to reopen non-party discovery based on new facts which have arisen since the order was entered. Defendants oppose.

BACKGROUND

The parties own adjoining Manhattan townhouses with a common structural wall (the Party Wall). Plaintiff's townhouse is located at 24 East 94 Street, Manhattan (24 East), and Defendants' townhouse is located at 22 East 94 Street, Manhattan (22 East). Defendants

[1] Certain claims, as discussed below, were dismissed by the First Department. *Barklee 94 LLC v. Oliver*, 124 A.D.3d 459 (1st Dep't 2015).

purchased their townhouse in 2007 and shortly thereafter commissioned an extensive renovation. According to the affidavit of Mr. Oliver, Defendants advised Ms. Kraebel of their construction plans and provided her with the contact information for their architect and general contractor. Before the work began, Ms. Kraebel lodged complaints about Defendants' project, first during public hearings on Defendants' renovation and then to the Department of Buildings and the New York City Police Department. Notwithstanding, the Department of Buildings, the Landmarks Commission, and the local Community Board approved Defendants' plans.

In connection with the renovation, Defendants hired various licensed professionals. Among them, Lee H. Skolnick Architecture + Design Partnership, served as project architect and designed, oversaw and reviewed all work performed. Sweeney & Conroy served as general contractor to lead the construction. Robert Silman Associates, P.C. prepared the structural drawings and periodically inspected the construction to confirm compliance. Independent structural engineering inspector Henlia Chen conducted independent inspections of the structural work to confirm conformance with the Department of Buildings' approved construction documents.

While the parties have been engaged in litigation since 2008, Plaintiff commenced this action on February 15, 2013, making various claims arising from the renovation of Defendants' neighboring townhouse. Earlier in the litigation, Defendants moved, pursuant to CPLR 3211, to dismiss the seven causes of action contained in Plaintiff's complaint. The prior court (Tingling, J.), issued an order on May 16, 2014 denying Defendants' motion to dismiss. On appeal on January 15, 2015, the First Department unanimously modified the order to grant the motion as to the first, second, fourth, and fifth causes of action as time-barred, and as to parts of the third and

sixth causes of action, and otherwise affirmed. Thus, the causes of action that remain are parts of the third and sixth causes of action and the whole of the seventh and eighth causes of action[2].

The remaining claims in the third cause of action concern (1) violations of New York City Zoning Resolutions limiting the height of parapet walls[3] and the Building Code requiring rooftop materials to be made of noncombustible materials and (2) a trespass claim regarding wiring on the roof of 24 East.

The claims in the sixth cause of action concern (1) violations of Plaintiff's easement and property rights arising out of Defendants' alleged removal of Defendants' side of the Party Wall and replacement with a pillar inside the Party Wall that does not support 24 East and (2) installation of an anchor in the Party Wall and use of the Party Wall to Plaintiff's detriment.

The seventh cause of action concerns violations of the Building Code and Landmarks Code regarding an excavation in front of Defendants' residence, in which Plaintiff seeks permanent shoring, and resurfacing of part of 24 East's stoop.

The eighth cause of action, which was added in the Verified Amended Complaint, seeks a permanent injunction restraining Defendants from encroaching on 24 East and directing Defendants to rebuild their construction to remove encroachments and restore Plaintiff's easement in the Party Wall.

ARGUMENTS

Defendants contend that they have established a prima facie case showing that the remaining claims are meritless and most of them time-barred and further contend that Plaintiff has failed to raise a triable issue of fact. Defendants argue that the renovation was substantially

[2] The First Department did not rule on the eighth cause of action as it was newly added in the Verified Amended Complaint.

[3] A parapet is a protective barrier which extends from the top of the wall at the edge of the roof.

complete by January 2010, more than three years before Plaintiff commenced this action. In support of their motion, Defendants have submitted the testimony of four licensed construction professionals, including the architect, Lee H. Skolnick; two engineers, Nat Oppenheimer, the lead engineer, and Henlia Chen, an independent engineer; and the project manager for the general contractor Sweeney & Conroy, Joao Araujo, as well as the testimony of Ms. Kraebel, and the affidavits of zoning expert Peter Rissetto, and defendant Mr. Oliver.

In opposition, Plaintiff restates its allegations and offers several emails and photographs, and an unsworn letter from Elie Geiger of Geiger Engineering, PC as evidence.

DISCUSSION

On a motion for summary judgment, the moving party has the burden of offering sufficient evidence to make a prima facie showing that there is no triable material issue of fact. *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the movant makes that showing, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that there exist material factual issues. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). However, "only the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment." *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978). The court's function on a motion for summary judgment is issue-finding, rather than making credibility determinations or findings of fact. *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503, 505 (2012).

Under CPLR 214, any action to recover damages "for non-payment of money collected on execution; *for penalty created by statute*; to recover chattel; *for injury to property*; for personal injury; for malpractice other than medical, dental or podiatric malpractice; to annul a marriage on the ground of fraud" must be commenced within three years of substantial completion of the work (emphasis added). *See West Chelsea Building LLC v. Guttman*, 139 A.D.3d 39 (1st Dep't 2016) (the three-year statute of limitations accrues at the time the work is substantially completed and "construction may be complete even though incidental matters relating to the project remain open") (internal quotation marks omitted) (quoting *State of New York v. Lundin*, 60 N.Y.2d 987, 989 (1983); *see also Mindel v. Phoenix Owners Corp.*, 17 A.D.3d 227 (1st Dep't 2005) (plaintiffs' claims accrued at the time the defendant's repair work was completed).

Under RPAPL § 2001, an action to enforce certain covenants restricting use of land or for damages for breach must be commenced within two years, including those actions "to enforce the covenant or agreement by compelling the removal or alteration of a structure, or to recover damages for breach of the covenant or agreement, or to recover damages for infringement of an easement or other interest in the premises so restricted." RPAPL § 2001(2).

Defendants' Motion for Summary Judgment

The Third Cause of Action

The third cause of action concerns, in part, zoning violations regarding allegedly offending items installed in connection with Defendants' installation of a rooftop terrace as part of their renovation. Plaintiff alleges that a "wood wall," "retractable screen," and "hedges" each constitute part of an eight-foot parapet wall extending beyond the maximum height permitted

under New York City Zoning Resolutions.[4] Defendants offer Mr. Oliver's affidavit, in which he states that the "wood wall" and "retractable screen" are in fact a sheet of plywood screwed to planters and a freestanding shade umbrella, respectively.

Defendants also proffer the affidavit of Peter Rissetto, AIA, offered as an expert on New York City Zoning Resolutions, who states therein that moveable items, such as the plywood panel, the shade umbrella, and the plants on Defendants' roof, do not constitute part of a parapet wall and do not otherwise violate city zoning resolutions. Furthermore, Roger Miller, Defendants' gardener, testified at his deposition that the offending plants were installed on or prior to December 31, 2009, making the claim time-barred. Mr. Miller's statement was corroborated by his own invoices showing that the plants were installed on December 7, 2009. (Miller Tr. 11, 31-32); Frydman Aff., Ex. 9. Mr. Oliver further states in his affidavit that the plants were installed before Defendants moved into their townhouse on December 31, 2009 and that the umbrella was moved to the roof by December 31, 2009 as part of the move-in of Defendants' furniture and other personal belongings. See CPLR 214(2); *Inc. Vill. of Laurel Hollow v. Laverne, Inc.*, 24 A.D.2d 615 (2d Dep't 1965) (three-year statute of limitations applicable to action for violation of zoning ordinance).

In opposition, Plaintiff offers as evidence emails dated September 29, 2010 and December 14, 2011 to demonstrate that the claims concerning the plywood panel and plants are not barred by the statute of limitations. Aff. In Opp., Ex. D. Ms. Kraebel states in those emails that she "observed" the offending "wood panel" and "noticed" the offending "hedges." Her mere observation or notice of the offending items is insufficient to raise a triable issue of fact as

[4] Zoning Resolutions Section 23-62(j) limits the height of parapet walls to four feet.

to whether the wood panel or plants were installed prior to the expiration of the statute of limitations.

Even if there is a question of fact as to whether the plywood panel or plants were installed prior to the expiration of the statute of limitations, Mr. Rissetto's affidavit is sufficient to establish a prima facie case that the plywood panel, umbrella and plants do not violate applicable zoning resolutions. Plaintiff fails to establish through evidentiary proof in admissible form that there exists a material issue of fact with respect to possible zoning violations. Indeed, during oral argument, Plaintiff withdrew its remaining claims as to the alleged zoning violations stating "we don't claim that [zoning violations] any longer because it was resolved" and "He's [Peter Rissetto] given us an opinion that it doesn't violate the zoning but we accept that opinion."

Plaintiff also alleges that the plywood panel, hedges and umbrella violate Section 1509.8 of the Building Code, which requires certain rooftop materials to be made of noncombustible materials. Building Code Section 1509.8 (entitled "Protective guards") governs parapet walls, railings and fences and generally requires railings and fences to be made of noncombustible materials. This section of the Building Code is inapplicable to the case at bar. As discussed above, Plaintiff has failed to submit sufficient evidence to raise a triable issue of fact as to whether the plywood panel, hedges or umbrella constitute a parapet wall and Plaintiff does not address whether they constitute a railing or fence. Further, the plywood panel, hedges and umbrella clearly fall outside the definition of "guard" as set forth in the Building Code.[5] See *Buchholz v. Trump 767 Fifth Ave.*, 4 A.D.3d 178 (1st Dep't 2004); *aff'd*, 5 N.Y.3d 1 (2005)

[5] Section 1000.2 of the Building Code defines a "guard" as "[a] building component or a system of building components located at or near the open sides of elevated walking surfaces that minimizes the possibility of a fall from the walking surface to a lower level."

(defendant's summary judgment motion granted where plaintiff relied on section of New York City Administrative Code that by its terms does not apply to the facts of the case).

Plaintiff also alleges that Defendants installed wiring that encroaches upon 24 East. With respect to this trespass claim, Defendants offer as evidence a Certificate of Acceptance of Proposed Work dated June 20, 2011, in which Verizon advises Plaintiff that it is installing a portion[6] of the subject wires to service Plaintiff's building and the other buildings within the block. Frydman Aff., Ex. 10. In his affidavit, Mr. Oliver denies having personally installed the subject wires or instructing a third party to do so.

Plaintiff does not provide sufficient evidence to raise a question as to whether Defendants themselves installed or directed someone else to install the subject wires. Furthermore, Plaintiff admits that Time Warner Cable and Verizon installed the wires and that Defendants have consented to have the offending wires moved or cut. (Kraebel Tr. 125-129). Accordingly, the court dismisses the remaining claims in the third cause of action.

The Sixth Cause of Action

The sixth cause of action concerns violations of Plaintiff's easement and property rights. Plaintiff alleges that Defendants made changes to the Party Wall and to their building's foundation, undermining the structural integrity of Plaintiff's building. Specifically, Plaintiff alleges that Defendants removed their side of the Party Wall, replaced part of the Wall with a pillar which does not support 24 East, and installed at least one anchor in the bedrock of the Party Wall. Plaintiff then alleges that that work may undermine the structural integrity of 24 East and violate the Defendants' implied covenant not to use the Party Wall to Plaintiff's detriment. Defendants claim they removed the brick façade of the rear wall of their townhouse

[6] Plaintiff makes a complaint about two sets of wire(s), one of which was installed by Verizon and one by Time Warner Cable (together the "subject wires").

and installed a structural steel column in, and stabilizers such as steel plates along, the Party Wall, from which a new paneled rear façade was hung.

Defendants offer the deposition of engineer Henlia Chen as evidence that the steel column and steel plates stabilized in the column were installed by November 13, 2008. (Chen Tr. 54). Defendants also offer Sweeney & Conroy's January 13, 2010 Application for Payment, in which the licensed general contractor and architect provided an itemized list of work that had been "100%" complete by the "period to" date of December 30, 2009. Frydman Aff., Ex. 12. Item 15 shows 100 percent completion of the structural steel. Mr. Skolnick testified at deposition that "structural steel" under item 15 includes "all structural steel as specified in the construction project and document[s]." (Skolnick Tr. 77). He further testified that in accordance with the Application of Payment, if an itemized line item says 100 percent, it was therefore completed on or about December 30, 2009. (*Id.* at 77-78). Defendants further point out that Item 9 (Masonry) and Item 11 (Stone-Rear Facade) of the January 13, 2010 Application for Payment show that installation of the new rear façade was 100 percent complete by December 30, 2009, thus indicating that the removal of the prior façade and installation of steel supports was completed before said date. Furthermore, following his last inspection on January 18, 2010, Mr. Chen filed a form TR-1, dated February 1, 2010 certifying that the structural work was complete and properly performed. Frydman Aff., Ex. 14.

Defendants also offer the testimony of Ms. Kraebel to show that the complained-of work was completed no later than February 12, 2010. Ms. Kraebel had taken photographs of the work and testified that they were fair and accurate representations of that portion of the renovation at the rear wall. Defendants submit the affidavit of Mark Caracappa, a senior project manager of Epiq eDiscovery Solutions, Inc. with eleven years of experience in the field of electronic

discovery, including with respect to the extraction of metadata. Mr. Caracappa stated in his affidavit that the metadata from the photographs Ms. Kraebel took show that both were created on February 12, 2010. In addition, the photographs show the absence of a deck that Ms. Kraebel testified was removed on or before February 12, 2010.

Defendants argue that the foregoing constitutes a prima facie showing of a statute of limitations defense under the two-year period applicable under the RPAPL as to Plaintiff's claims of violations of its easement and property rights and the three-year period applicable under CPLR 214(4) in connection with Plaintiff's claims of injury to its property rights. See RPAPL 2001; CPLR 241(4). Plaintiff fails to submit evidence sufficient to raise a question of fact as to whether the renovations at issue were completed more than three years before this action began. However, Plaintiff argues that the statute should run from the time the certificate of occupancy was issued (April 4, 2011), not from the time the work was completed. This argument is unavailing. *See West Chelsea Building LLC v. Guttman*, 139 A.D.3d 39, 43 (1st Dep't 2016) ("for statute of limitations purposes the date of the final certificate is not controlling") (internal quotations omitted); *see also State of New York v. Lundin*, 60 N.Y.2d 987, 988 (1983) ("the cause of action generally accrues upon the completion of the construction, meaning completion of actual physical work"); *Mindel v. Phoenix Owners Corp.*, 17 A.D.3d 227 (1st Dep't 2005) (plaintiffs' claims accrued at the time the defendant's repair work was completed); *Board of Managers of 255 Hudson Condominium v. Hudson Street Associates*, LLC, 37 Misc.3d 1223(A) (Sup. Ct. N.Y. County 2012) (limitations period runs from the completion of work specified in contract with architect, not from the date of issuance of the certificate of occupancy absent contractual responsibility for its issuance).

Notwithstanding the statute of limitations defense, Plaintiff cannot survive summary judgment with respect to the sixth cause of action. Mr. Skolnick testified that none of the work encroached onto Plaintiff's side of the Party Wall. (Skolnick Tr. 26). Mr. Skolnick and Mr. Chen testified that none of Defendants' work would impede Plaintiff from using the Party Wall. (Skolnick Tr. 32, Chen Tr. 44). Mr. Chen testified that he was not aware of any work that touched any of 24 East's beams and/or other support (Chen Tr. 65-66) and Mr. Araujo testified that he was not aware of any cutting of any beams that came from 24 East. (Araujo Tr. 71).

Additionally, Defendants offer the deposition testimony of Mr. Skolnick, Mr. Oppenheimer, Mr. Araujo, and Mr. Chen to show that the purpose of the work was to ensure, if not improve, the overall structural stability of Defendants' townhouse (Skolnick Tr. 23-24, Oppenheimer Tr. 75, Araujo Tr. 74, Chen Tr. 35-36) and further testimony demonstrates that the work likely increased the stability of 24 East. (Skolnick Tr. 24, Chen Tr. 35-36, Araujo Tr. 70). Mr. Skolnick, Mr. Araujo, and Mr. Chen each further testified that they were not aware of any negative impact on Plaintiff's building from any of the work done (Skolnick Tr. 83, Araujo Tr. 70, Chen Tr. 64) and Mr. Skolnick, Mr. Oppenheimer, and Mr. Chen each testified that there were no signs of construction defects. (Skolnick Tr. 82-83, Oppenheimer Tr. 85-86, Chen Tr. 65) The foregoing evidence offered by Defendants is sufficient to establish a prima facie case that no triable issue of fact exists with respect to encroachment onto Plaintiff's property or undermining the structural integrity of 24 East.

Plaintiff fails to offer sufficient evidence to raise a question as to whether the renovation encroached onto its property or undermined the structural integrity of its building. Plaintiff only provides lay speculation about design plans and an unsworn letter from Elie Geiger of Geiger Engineering PC, which merely provides speculative and conclusory statements regarding the

allegedly "unfinished" part of the "lower part of the rear party wall" and is insufficient to raise a triable issue of fact. *See Abrahamsen v. Brockway Glass Co*, 156 A.D.2d 615, 617 (2d Dep't 1989) ("unsworn" letter failing "to outline the expert's qualifications" not admissible evidence sufficient to rebut defendants' case); *Adams v. Alexander's Dep't Stores of Brooklyn, Inc.*, 226 AD2d 130, 131-32 (1st Dep't 1996) (unsworn statement "devoid of probative value"); *see also Cedar & Washington Assocs., LLC v. Bovis Lend Lease LMB, Inc.*, 95 A.D.3d 448, 449 (1st Dep't 2012) (dismissing nuisance claim based on speculative and conclusory allegations failing to show actual harm). Ms. Kraebel also testified that Mr. Geiger did not advise her "that the pillar running the back of the party wall at the façade is a construction defect[,] risking the construction integrity of 24 [East]." (Kraebel Tr. 158).

Plaintiff alleges that Defendants' contractor cut beams that support 24 East. When Ms. Kraebel was asked at her deposition whether she could identify a beam or support that she would want the court to pass judgment on, she testified that she could not answer that question and when asked if anyone can, she testified "I assume the defendants' professionals who did the work can assure me of that." She then testified that the professionals would probably give the opinion that the "work is one hundred percent code compliant, safe, and free of defect." (*Id.* at 158-159). Plaintiff further admits that it has not suffered any damages. (*Id.* at 102); *see Am. Ry. Express Co. v. Lassen Realty Co.*, 205 A.D. 238, 240 (1st Dep't 1923) (claim for violation of easement requires use "detrimental to the other"); *Niagara Mohawk Power Corp. v. Ferranti-Packard Transformers, Inc.*, 201 A.D.2d 902, 903 (4th Dep't 1994) ("We reject plaintiff's invitation to broaden tort relief to allow recovery for potential harm in the absence of actual injury"); *see also Schwartzman v. Wertz*, 580 N.Y.S.2d 612, 613 (Sup. Ct., New York County 1991), *aff'd sub nom. Schwartzman v. 346 W. 22nd St. Corp.*, 179 A.D.2d 540 (1st Dep't 1992)

("Lawsuits are supposed to be brought by people who have complaints, not by people who are hoping to find a basis for a complaint.").

In addition to the claims discussed above, Plaintiff introduces in its opposition papers a new claim concerning three half inch diameter anchor bolts set in bedrock in an elevator pit that allegedly extend over the property line. The new claim having been raised four years after the commencement of this action and after discovery need not be considered. *See Lennar v. Chinkpoo Realty Holding Corp.*, 76 A.D.3d 1052, 1054 (2d Dep't 2010) ("plaintiff's claim, raised in her opposition papers, that title of the property should revert back to nonparty who previously owned the property, need not be considered because no such allegation was made in the complaint"); *see also Mainline Elec. Corp. v. Pav-Lak Indus., Inc.*, 40 A.D.3d 939, 939-40 (2d Dep't 2007) ("plaintiff's inexcusable delay in presenting the alternative cause of action four years after the action was commenced warranted the Supreme Court's rejection of this new theory of liability"); Frydman Affirmation; Chen Inspection Reports Nos. 6 (August 13, 2008: anchor bolts for elevator pit completed) and 20 (January 13, 2010: All structural work, including footing, walls, elevator shaft, steel frames, floor joists, stairs and handrails have been completed) (Frydman Aff., Ex. 5), January 18, 2010 Payment Application (elevator work 100 percent complete). As discussed above, Defendants have offered testimony that no improvements cross over the property line or interfere with Plaintiff's use of its property. Plaintiff does not offer evidence that the anchors were installed less than three years before the commencement of this action, nor does it offer any expert testimony evincing that the anchor bolts cross the boundary line and interfere with Plaintiff's use of its property. Furthermore, Plaintiff's claim for discovery, pursuant to CPLR 3212(f), of the claim concerning the three anchor bolts is unavailing.

The Seventh Cause of Action

The seventh cause of action concerns (1) violations of Building Code Sections 27-147, 27-165, 28-105.2, 28-3304.3.2, and 28-3304.4.1 for failing to obtain a permit and provide notice to Plaintiff of Defendants' excavation and failing to provide permanent shoring for 24 East following the completion of the excavation, (2) violations of Landmarks Code Section 25-305 for failing to obtain a permit for the excavation, and (3) damage to Plaintiff's property by repainting Plaintiff's stoop.

Plaintiff alleges that Defendants excavated more than five feet deep in front of 22 East. The excavation concerns a front yard tree well which was dug up in 2009 and 2013 to apply waterproofing to the surrounding walls. In his affidavit, Mr. Oliver states that the 2013 work involved removing the existing tree and four feet of soil from the tree well, applying waterproofing, refilling the tree well with dirt and planting a new tree. Ms. Kraebel at deposition admitted that she did not observe any physical damage rather she is claiming there is no shoring to support the building as required by Building Code. (Kraebel Tr. 180-181).

Plaintiff's claim regarding the resurfacing of 24 East's stoop is barred by the statute of limitations applicable to property damage. See CPLR 214(4). Ms. Kraebel testified that the resurfacing occurred during the "first excavation," which Mr. Oliver stated in his affidavit occurred in 2009. (*Id.* at 171). Plaintiff does not offer evidence demonstrating the first excavation happened anytime other than in 2009 or that the resurfacing happened during the 2013 excavation, and accordingly, the resurfacing claim is time-barred. Moreover, Plaintiff has not offered evidence that it suffered property damage because of the repainting. Additionally, Plaintiff's claims of violation of Landmarks Code are unavailing and notably the Landmarks Commission did not respond to its complaint.

With respect to Plaintiff's claim that the excavation in front of 22 East exceeded five feet in violation of the Building Code, Defendants offer as evidence the deposition testimony of their gardener, Mr. Miller (Tr. 35-36), Plaintiff's Interrogatories Response No. 3(8) (Frydman Aff., Ex 15), and Mr. Oliver's affidavit in support of their argument that the excavations did not exceed five feet. Mr. Oliver's affidavit describes a surprise inspection by city examiners after Plaintiff reported a suspected excavation in violation of the Building Code. No violation was issued to Defendants as a result of the inspection. The evidence proffered by Defendants is sufficient to establish a prima facie case that the excavation was not more than five feet deep.

In response, Plaintiff does not raise an issue of fact as to whether the excavation exceeded five feet in violation of the Building Code. Plaintiff only offers photographs of workers in the pit as evidence that the excavations exceeded five feet. Any determination made based on the unclear photographs which do not establish the depth of excavation would be purely speculative and thus said photographs are insufficient to defeat Defendants' motion for summary judgment. *See Mooney v. Turner*, 35 A.D.2d 674 (2d Dep't 1970) (finding that photographic evidence was insufficient to establish prima facie case of actionable negligence in that photograph did not establish extent of obviousness of hazardous nature of crack to present jury issue as to whether it was discoverable on reasonable inspection to be probative of actual notice).

With respect to Plaintiff's claim regarding Defendants' failure to provide permanent shoring to 24 East following the completion of the excavation, the First Department has held that the shoring requirement only applies during the excavation process and is not "intended to last in perpetuity," and the court reasoned that "[t]he duty under [the Building Code] is intended to apply to the activities during the excavation process and to any damages suffered by the adjoining owner proximately resulting from the excavator's failure to take adequate precautions

to protect adjoining structures during the excavation." *Cohen v. Lesbian & Gay Cmty. Servs. Ctr. Inc.*, 20 A.D.3d 309, 310 (1st Dep't 2005). Here, Plaintiff has not demonstrated that it suffered any damages "proximately resulting" from Defendants' excavations.

The Eighth Cause of Action

The eighth cause of action, seeking a permanent injunction restraining Defendants from encroaching on 24 East and directing Defendants to rebuild their construction to remove encroachments and restore Plaintiff's easement in the Party Wall, is time-barred and meritless. The claim is governed by the two-year statute of limitations period set forth in RPAPL 2001 for claims based on violation of an easement seeking to compel "the removal or alteration of a structure." As set forth above, work on 22 East—other than the waterproofing of the tree well in front of 22 East—was complete more than three years before Plaintiff commenced this action. Furthermore, Plaintiff fails to offer evidence of any element of the claim and alleges that there may be some damage to 24 East in the future as a result of Defendants' renovation. Defendants have offered sufficient evidence, including the sworn testimony of multiple licensed professionals, showing that the complained-of work was fully compliant with applicable codes and does not encroach onto 24 East. *See Hoffmann Inv'rs Corp. v. Yuval*, 33 A.D.3d 511, 512 (1st Dep't 2006) (affirming summary judgment dismissing claim for permanent injunction to rebuild retaining wall where claim based on speculative damage).

Plaintiff's Cross-Motion

Plaintiff cross-moves for an order, (1) pursuant to CPLR 2215, to require Defendants to comply with requests for relief due now under the Verified Amended Complaint and (2) pursuant to CPLR 2221(a), to modify the court's order dated March 30, 2016 (Mot. Seq. 007) to reopen non-party discovery based on new facts which have arisen since said order was entered.

Defendants correctly argue that in the first branch of this cross-motion, Plaintiff essentially seeks summary judgment. Notwithstanding that Plaintiff failed to move for summary judgment by the November 30, 2016 deadline set by this court, Plaintiff fails to establish a prima facie case necessary for summary judgment to be granted and does not demonstrate that Defendants must comply with its requests under the Verified Amended Complaint. Indeed, as discussed above, Defendants have established a prima facie case for summary judgment, which Plaintiff has failed to rebut.

Defendants also correctly argue that the second branch of the cross-motion to modify the order dated March 30, 2016 should be denied. In March of 2016, this court issued an order that, inter alia, denied the Plaintiff's motion to vacate the note of issue. Plaintiff then made a motion to renew its prior motion to vacate the note of issue and extend discovery. The court again denied Plaintiff's motion by order dated October 27, 2016. Now, Plaintiff makes a third motion to extend discovery, supported by duplicative facts and arguments made in its prior motion. In accordance with its order dated October 27, 2016, the motion to modify is denied. *See Marini v Lombardo*, 17 A.D.3d 545, 546 (2d Dep't 2005) ("'Motions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or mistakenly arrived at its earlier decision' [citation omitted]"); *Carrillo v PM Realty Group*, 16 A.D.3d 611, 611 (2d Dep't 2005); *see also Pryor Commonwealth Land Tit. Ins. Co.*, 17 A.D.3d 434, 435-436 (2d Dep't 2005) (explaining that a motion for leave to reargue is not designed to provide an unsuccessful party

with successive opportunities to present arguments different from those originally presented); *Amato v. Lord & Taylor, Inc.*, 10 A.D.3d 374, 375 (2d Dep't 2004).[7]

CONCLUSION AND ORDER

For the reasons stated above, the court finds that Defendants have offered sufficient evidence to make a prima facie showing that there is no triable material issue of fact as to the remaining causes of action, and Plaintiff failed to raise any triable material issues of fact in opposition. Furthermore, Plaintiff does not meet its prima face burden as to the first branch of its cross-motion and its arguments to modify the court's order dated March 30, 2016 are unavailing. Accordingly, it is hereby

ORDERED that defendants Augustus Oliver and Lisbeth Oliver's motion, pursuant to CPLR 3212, for an order granting summary judgment against plaintiff Barklee 94 LLC dismissing the remaining claims in the Verified Amended Complaint is granted; and it is further

ORDERED that plaintiff Barklee 94 LLC's cross-motion is denied.

The clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: June 20, 2017

ENTER:

Kelly O'Neill Levy

HON. KELLY O'NEILL LEVY J.S.C.

[7] Of note, Defendants also raise the following arguments: Plaintiff (1) fails to attach the motion papers from the prior motions; (2) admittedly failed to confer in good faith concerning the alleged discovery issues or to submit a good faith affirmation; and (3) failed to timely serve the motion.