SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH SUPREME COURT JUSTICE
Justice

PART 61

Index Number : 107554/2010
OBOLEWICZ, JENNIFER
vs.
CRP/EXTELL PARCEL I LP
SEQUENCE NUMBER : 002
PARTIAL 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 signed in accordance with the decision and order.

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED

DEC 05 2012

NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 11/30/12

HON. ANIL C. SINGH, J.S.C.
SUPREME COURT JUSTICE

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 61

----------X

JENNIFER OBOLEWICZ,

Plaintiff,

Index No.: 107554/10
DECISION/ORDER

-against-

CRP/EXTELL PARCEL 1, L.P.,
EXTELL DEVELOPMENT COMPANY,
PENMARK REALTY CORPORATION and
THE CORCORAN GROUP, INC. d/b/a
CORCORAN SUNSHINE MARKETING GROUP,

Defendants.

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HON. ANIL SINGH, J.S.C.:

In this residential real estate action, plaintiff Jennifer Obolewicz (Obolewicz) moves for partial summary judgment on the complaint, while defendant Penmark Realty Corporation (Penmark) cross-moves for summary judgment to dismiss the complaint as against it, and the remaining defendants - CRP/Extell Parcel 1, L.P. and Extell Development Company (the Extell defendants) and the Corcoran Group, Inc. d/b/a Corcoran Sunshine Marketing Group (Corcoran) - cross-move for summary judgment to both dismiss the complaint and to grant the Extell defendants' counterclaim (motion sequence number 002). Penmark also moves separately, via order to show cause, to compel plaintiff's deposition (motion sequence number 003). These motions are consolidated for disposition.

BACKGROUND

Obolewicz is the owner of residential condominium apartment unit 4V in a building (the building) located at 80 Riverside Blvd. in Manhattan. *See* Notice of Motion (motion

sequence number 002), Obolewicz Affidavit, ¶ 6. The Extell defendants are the building's sponsor and developer, respectively; Corcoran is the agent that brokered the sales of the building's apartment units; and Penmark is the building's managing agent. *Id.*

On June 27, 2007, Obolewicz and the Extell defendants executed an option contract (the Option Contract) for Obolewicz to purchase apartment 4V. *See* Notice of Motion (motion sequence number 002), Exhibit C. The relevant portion of the Option Contract provides as follows:

> 21. No Representations. Purchaser [i.e., Obolewicz] acknowledges that Purchaser has not relied upon any architect's plans, sales plans, selling brochures, advertisements, representations, warranties, statements or estimates of any nature whatsoever, whether written or oral, made by Sponsor [i.e., the Extell defendants], Selling Agent [i.e., Corcoran] or otherwise, including, but not limited to, any relating to the description or physical condition of the Property, the Building or the Unit, ... the services to be provided to Unit Owners, ... or any other data, except as herein or in the Plan specifically represented, Purchaser having relied solely on Purchaser's own judgment and investigation in deciding to enter into this Agreement and purchase the Unit. No person has been authorized to make any representations on behalf of Sponsor except as herein or in the Plan specifically set forth. No oral representations or statements shall be considered a part of this Agreement. Sponsor makes no representation or warranty as to the work, materials, appliances, equipment or fixtures in the Unit, the Common Elements or any other part of the Property other than as set forth herein or in the Plan. The provisions of this Article shall survive the closing of title.

Id. On that date, the Extell defendants also gave Obolewicz a copy of the building's offering plan, the relevant portion of which provides as follows:

> 10. Construction is a complicated process requiring the coordination of numerous, tasks, contractors and suppliers and the balancing of complex mechanical and architectural systems. No assurance can be given with regard to the accuracy of any projected completion dates set forth herein. During the first years of Condominium operations, construction workers and related personnel will be at the Property from time to time completing construction of

> the Building, making adjustments and corrections and performing various tasks related to the completion of construction, which may occur at all hours and could compromise the Building's security systems. During this period, various building systems, including but not limited to water supply, air conditioning, heating, cooling, ventilating and elevators, may need to be shut down temporarily.

Id.; Exhibit D. Obolewicz and the Extell defendants eventually closed the sale of apartment 4V on May 19, 2009. *Id.*; Obolewicz Affidavit, ¶ 10.

Obolewicz states that, when she first visited the building to view the apartments that were available for sale, she explained to Corcoran employee Melissa Ziweslin (Ziweslin) that she required "a quiet apartment with an unobstructed view," and asserts that Ziweslin specifically recommended unit 4V to her. *See* Notice of Motion, Obolewicz Affidavit, ¶¶ 3-4. Obolewicz further states that Ziweslin showed her a floor plan of the unit and a scale model of the building that indicated that apartment 4V would face out over an interior courtyard that would be covered only with grass. *Id.* Obolewicz also states that she repeated her requirements regarding quiet and an unobstructed view to the representatives of the Extell defendants when she signed the option contract. *Id.* Obolewicz acknowledges that, at the time of closing, construction of the building's common areas was not yet complete and the courtyard had not been landscaped, and that she observed these conditions at a pre-closing walk-through inspection. *Id.*, ¶ 9. Obolewicz also asserts that there were months of delays before the construction and landscaping were completed, and that three "structures" were finally built in the building's courtyard that emitted noise and odors that disturbed her peace and prevented her from opening her windows. *Id.*, ¶¶ 11-12, 16. Obolewicz claims that these "structures" (which she describes as a generator and vent fans) were not described in either

the building's offering plan or in her option contract, asserts that they were constructed illegally and/or improperly, and provides copies of six violations that were recorded by Environmental Control Board (ECB) inspectors against the building for these "structures" as a result of Obolewicz's complaints. *Id.*, ¶¶ 14-17; Exhibit E.

On June 21, 2011, dissatisfied with defendants' efforts to remedy her concerns, Obolewicz served an amended complaint that sets forth causes of action for: 1) fraudulent misrepresentation; 2) negligent misrepresentation; 3) breach of the covenant of quiet enjoyment; 4) breach of contract; 5) private nuisance; and 6) "diminished value." *See* Notice of Motion (motion sequence number 002), Exhibit J. The Extell defendants filed an answer with affirmative defenses to this complaint on July 25, 2011; Corcoran filed its answer with affirmative defenses on July 22, 2011; and Penmark filed its answer with affirmative defenses on November 29, 2011. *Id.*; Exhibits L, M, N. The Extell defendants' answer includes a counterclaim for attorney's fees. Thereafter, discovery ensued. Unhappy with the pace of compliance, on March 12, 2012, Penmark submitted an order to show cause to compel Obolewicz's deposition (motion sequence number 003). Obolewicz was originally deposed on March 31, 2011; however, she was also deposed a second time on March 22, 2012,[1] thus rendering Penmark's order to show cause moot. Now before the court are Obolewicz's

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[1] Counsel for Penmark asserts that it was retained on November 9, 2011, after Obolewicz's original deposition (in which it obviously did not participate), thus necessitating the instant order to show cause. *See* Pariser Affirmation in Support of Cross Motion (Penmark), ¶¶ 14-20. However, during a status conference held before this court on March 28, 2012, the parties acknowledged that Obolewicz had recently been deposed for a second time on March 22, 2012, with full participation by Penmark's counsel. *Id.*; Exhibits H, I. In the absence of any other missing discovery allegations, it is clear that the relief requested in Penmark's order to show cause is now moot.

motion for partial summary judgment on her first, second and fifth causes of action[2] and the cross motions of Penmark and of the Extell defendants and Corcoran that seek summary judgment dismissing the amended complaint (motion sequence number 002) and on their counterclaim.

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 (1st Dept 2003). Here, the court finds that all of the motions should be granted in part and denied in part.

Plaintiff's Motion

As previously mentioned, in her motion, Obolewicz seeks partial summary judgment on her first, second and fifth causes of action. The first of these alleges fraudulent misrepresentation, the proponent of which claim must demonstrate "misrepresentation or concealment of a material fact, falsity, scienter by the wrongdoer, justifiable reliance on the

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[2] In her moving papers, Obolewicz asserts that she is seeking summary judgment on her second, third and fifth causes of action; however, this is clearly a typographical error.

deception, and resulting injury." *Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495, 495 (1st Dept 2006). Here, Obolewicz merely recites these elements in her complaint without citing to any specific acts by defendants. *See* Notice of Motion (motion sequence number 002), Exhibit J (amended complaint), ¶¶ 17-20. In her memorandum of law, however, Obolewicz argues that "defendants - through their agents - knowingly misrepresented the facts relating to what was to be included in the [building's] courtyard in an attempt to induce plaintiff to purchase the specific unit that defendants suggested." *See* Plaintiff's Memorandum of Law (motion sequence number 002), at 13. The Extell defendants respond first, that the offering plan does, in fact, disclose the existence of the structures that Obolewicz complains of. *See* Defendants' Memorandum of Law, at 7-9. Defendants are correct. The drawings annexed to the offering plan clearly disclose two rectangular structures in the building's courtyard that are labeled as "vent opening" and "gravity vent opening," respectively. *See* Notice of Motion, Exhibit D. Defendants also argue that paragraph 21 of the option agreement precludes Obolewicz from proving the reliance element of her claim, as a matter of law, because that portion of the contract specifically disclaims the type of reliance that Obolewicz seeks to assert. *See* Defendants' Memorandum of Law, at 16-19. Again, defendants are correct. The option agreement plainly recites that "Purchaser has not relied upon any architect's plans, sales plans, selling brochures, advertisements, representations, warranties, statements or estimates of any nature whatsoever, whether written or oral, ... except as herein or in the [offering] Plan specifically represented," that "[n]o person has been authorized to make any representations on behalf of Sponsor," and that "[n]o oral representations or

statements shall be considered a part of this Agreement." *See* Notice of Motion, Exhibit C. Further, New York law has long held that such disclaimers "destroy[] the allegations in [the] complaint that the agreement was executed in reliance upon [defendants'] contrary oral representations," and render the claim subject to dismissal. *See e.g. Plaza PH2001, LLC v Plaza Residential Owners LP*, 79 AD3d 587, 587 (1st Dept 2010), quoting *Danann Realty Corp. v Harris*, 5 NY2d 317, 320-321 (1959). Thus, it would appear that Obolewicz's fraudulent misrepresentation claim is similarly unsustainable, as a matter of law.

Obolewicz nevertheless argues that her claim may survive pursuant to the exception that the law recognizes where "a plaintiff pleads a breach of duty separate from, or in addition to, a breach of contract." *See* Plaintiff's Memorandum of Law, at 12-14. However, this argument clearly misses the point. Defendants do not argue for dismissal on the ground that Obolewicz's fraudulent misrepresentation claim is duplicative of her breach of contract claim, but (as was just discussed) on the ground that it is legally deficient. Therefore, the exception that Obolewicz cites is inapposite. Obolewicz does not raise any other legal arguments in support of her fraudulent misrepresentation claim. However, the court notes that it is well settled that "'on a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on, and ... circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where ... the intention of the parties can be gathered from the instrument itself.'" *Maysek & Moran, Inc. v Warburg & Co.*, 284 AD2d 203, 204 (1st Dept 2001), quoting *Lake Constr. & Dev. Corp. v City of New York*, 211 AD2d 514, 515 (1st Dept 1995). Here, the

court finds that the plain language of the option agreement makes it clear that the allegedly fraudulent misrepresentations at bar in this action were *not* related to activity separate and apart from that contract, but rather constituted acts that the contract specifically *banned* Obolewicz from relying upon. Therefore, the court rejects Obolewicz's argument, and finds that the branch of her motion that seeks partial summary judgment on her fraudulent misrepresentation claim should be denied.

Obolewicz's second cause of action alleges negligent misrepresentation, the elements of which claim include: "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information." *MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 840 (1st Dept 2011), quoting *J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 (2007). Here, both Obolewicz and the Extell defendants argue the issue of whether or not a "special relationship" existed between them for the purposes of this claim. *See* Plaintiff's Memorandum of Law, at 10-12; Defendants' Memorandum of Law in Opposition (Extell), at 20-24. Although the court does not believe that the evidence at hand discloses the existence of such a relationship, it need not discuss this issue in detail, inasmuch as Obolewicz is precluded from establishing the reliance element of this claim for the same reasons that were reviewed in the preceding section of this decision. Therefore, the court again rejects Obolewicz's argument, and finds that the branch of her motion that seeks partial summary judgment on her negligent misrepresentation claim should be denied.

Obolewicz's fifth cause of action alleges private nuisance, the elements of which claim include "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act." *See Ewen v Maccherone*, 32 Misc 3d 12, 14 (App Term, 1st Dept 2011), quoting *Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 570 (1977). Here, Obolewicz argues that the six violations that the ECB issued against the building as a result of her complaints about the courtyard vent fans constitute prima facie proof of her private nuisance claim. *See* Plaintiff's Memorandum of Law, at 6-10. Obolewicz is correct. In *JP Morgan Chase Bank v Whitmore* (41 AD3d 433 [2d Dept 2007]), the Appellate Division, Second Department, rendered this exact holding. Thus, the court finds that Obolewicz has borne the burden of proving that she is entitled to partial summary judgment on her nuisance claim. Nevertheless, defendants raise a number of arguments in opposition to that claim.

The Extell defendants first argue that Obolewicz is unable to establish that she suffered any damages in connection with her private nuisance claim, or that she is entitled to injunctive relief. *See* Defendants' Memorandum of Law, at 24-26. They cite the decision of the Appellate Division, Second Department, in *Guzzardi v Perry's Boats, Inc.* (92 AD2d 250 [2d Dept 1983]) for the proposition that a plaintiff's "conclusory assertions" regarding damages for private nuisance are insufficient to support a claim, and require that claim's dismissal. *See* Defendants' Memorandum of Law in Opposition (Extell), at 24-26. *Guzzardi* indeed sets forth the rules for calculating the damages element of a private nuisance claim

that is "based upon the interference with the use or enjoyment of land," holding that:

> In such a case, the plaintiffs must demonstrate their entitlement to monetary damages or injunctive relief. Where the injury is permanent, the measure of damages for private nuisance is the diminution of the market value of the property, or where the injury is temporary, the reduction of the rental or usable value of the property. Insofar as injunctive relief is concerned, such relief is available only if plaintiffs demonstrate that damage resulting from the alleged nuisance is not insubstantial [internal citations omitted].

92 AD2d at 254-255. Further, in *Guzzardi*, the Second Department upheld the trial court's finding that the plaintiff's evidentiary submissions regarding damages, which consisted solely of affidavits containing conclusory statements, were insufficient to support her claim. Here, however, Obolewicz has yet to submit any evidence regarding damages, having thus far simply established defendants' liability to her for permitting a private nuisance to persist at the building. Now that she has done so, in accordance with the holding of *JP Morgan Chase Bank v Whitmore*, the court finds that the calculation of damages is a matter that can be submitted to a Special Referee to hear and report on. Therefore, the court rejects defendants' first argument.

Next, defendants argue that Obolewicz's private nuisance claim "presents no triable issue of fact concerning the substantiality and reasonableness of the alleged nuisance." *See* Defendants' Memorandum of Law in Opposition (Extell), at 26-31. However, this argument is unavailing under the instant circumstances, in which Obolewicz has already established all of the elements of her private nuisance claims by submitting proof of the six ECB violations issued to defendants. *See JP Morgan Chase Bank v Whitmore,* 41 AD3d 433, *supra.* Therefore, the court rejects defendants' second opposition argument as moot.

Finally, defendants argue that Obolewicz's private nuisance claim must be dismissed as against Corcoran, because "Corcoran never controlled the premises." *See* Defendants' Memorandum of Law in Opposition (Extell), at 31-32. Obolewicz opposes this argument on the ground that "Corcoran's sales representative knowingly and intentionally directed plaintiff when she ... informed plaintiff that unit 4V fulfilled the requirements she was looking for in a condominium." *See* Plaintiff's Reply Memorandum of Law, at 26-27. This argument appears to be directed at the reliance elements of Obolewicz's two misrepresentation claims rather than at any element of her private nuisance claim. In any case, it is inapposite. Also inapposite is the case law that Obolewicz cites in her memorandum - neither *Stiglianese v Vallone* (168 Misc 2d 446 [Civ Ct, Bx County 1995], *revd* 174 Misc 2d 312 [App Term, 1st Dept 1997], *revd* 255 AD2d 167 [1st Dept 1998]) nor *State of New York v Monarch Chems.* (90 AD2d 907 [3d Dept 1982]) holds that a property owner's sales representative can be held vicariously liable for a private nuisance that the owner permits to persist on its property. Indeed, the only decision that the court could discover that spoke directly to the issue of who are proper parties to a private nuisance claim, *Stanley v Amalithone Realty, Inc.* (31 Misc 3d 995, 998-999 (Sup Ct, NY County 2011), merely observed that "[t]ypically, those owning or holding interests in real property are necessary parties to a nuisance action affecting the property or to a proceeding to restrict its use." Obviously, Corcoran is neither. Therefore, in the absence of any evidence from Obolewicz demonstrating that Corcoran played a part in the creation or maintenance of the instant nuisance (consisting of the noise and odors emanating from the building's courtyard),

the court agrees with defendants that Obolewicz's claim cannot stand as against Corcoran.

Accordingly, the court concludes that Obolewicz's motion for partial summary judgment should be denied with respect to her first and second causes of action, and with respect to her fifth cause of action as against Corcoran only, but that it should be granted with respect to her fifth cause of action on the issue of liability only as against the remaining defendants, and that the damages element of that cause of action should be submitted to a Special Referee to hear and report.

Defendants' Cross Motions

The first defendants' cross motion was submitted by Penmark, which observes that it is only named as a defendant in Obolewicz's first and second causes of action, and argues that these claims (and, hence, the entire amended complaint) should be dismissed as against it because these claims are legally deficient. *See* Memorandum of Law in Support of Cross Motion (Penmark), at 11-17. Obolewicz disputes this, and asserts that Penmark is a defendant in all causes of action except her breach of contract claim. *See* Plaintiff's Memorandum of Law in Opposition to Cross Motions at 7-9.

At the outset, the court reiterates that Obolewicz's first and second causes of action fail, as a matter of law, because Obolewicz is precluded from establishing the reliance element of either of these misrepresentation claims. Therefore, the court finds that Penmark's cross motion should be granted with respect to Obolewicz's first and second causes of action.

With respect to Obolewicz's remaining claims for breach of the covenant of quiet

enjoyment, private nuisance and "diminished value," Penmark argues that Obolewicz cannot maintain them against it because they are each legally defective. *See* Memorandum of Law in Support of Cross Motion (Penmark), at 18-23. The court agrees. As regards the first of these, it is black letter law that a condominium owner has "no cognizable claim for breach of warranty of habitability against a condominium." *Linden v Lloyd's Planning Serv.*, 299 AD2d 217, 218 (1st Dept 2002), citing *Frisch v Bellmarc Mgt.*, 190 AD2d 383 (1st Dept 1993). Since Penmark is the Extell defendants' managing agent, it is clear that New York law will not recognize a condominium unit owner's breach of warranty of habitability against it, either. Therefore, the court finds that Penmark's cross motion should be granted with respect to Obolewicz's third cause of action.

As regards Obolewicz's private nuisance claim, Penmark correctly points out that, under New York law, a "managing agent acting on behalf of the condominium, is not liable to plaintiffs, third parties to the management agreement, for nonfeasance." *See Caldwell v Two Columbus Ave. Condominium*, 92 AD3d 441, 442 (1st Dept 2012). Obolewicz responds that Penmark instead engaged in active malfeasance with respect to the nuisance, and is, thus, not entitled to claim the protection of this law. *See* Plaintiff's Reply Memorandum in Opposition to Cross Motions, at 13-15. However, the only "acts of malfeasance" that Obolewicz describes in her memorandum are Penmark's "intentional and/or reckless failure to respond" to her inquiries. *Id.* The court finds that a "failure to respond" clearly describes a classic act of passive non-feasance rather than an act of malfeasance. Therefore, the court rejects Obolewicz's argument, and finds that Penmark's cross motion should be granted with

respect to Obolewicz's fourth cause of action.

As regards Obolewicz's "diminished value" claim, Penmark correctly points out that New York law does not recognize this as an independent cause of action, but merely as a measurement of damages in a private nuisance claim. *See e.g. Board of Mgrs. of Waterford Assn. Inc. v Samii*, 73 AD3d 617 (1st Dept 2010). Therefore, the court finds that Obolewicz's "diminished value" claim must fail, as a matter of law, and that Penmark's cross motion should be granted with respect to that cause of action. Accordingly, the court finds that Penmark's cross motion should be granted in full.

The second cross motion herein is by the Extell defendants and Corcoran, and it, too, seeks dismissal of the entire amended complaint as against them. However, the court has already determined that Obolewicz is entitled to partial summary judgment on her private nuisance claim as against the Extell defendants (but not Corcoran), and that her causes of action for fraudulent misrepresentation, negligent misrepresentation, breach of the warranty of habitability and "diminished value" are all legally deficient. Therefore, at the outset and for the reasons discussed above, the court finds that the Extell defendants and Corcoran's cross motion should be denied with respect to Obolewicz's private nuisance claim (as regards the Extell defendants, but granted as regards Corcoran), and granted with respect to the other causes of action.

With respect to Obolewicz's fourth cause of action for breach of contract, it is clear that Corcoran was not a party to the option agreement, and therefore cannot be held liable for its breach. Thus, the Extell defendants and Corcoran's cross motion should be granted as to

Corcoran with respect to Obolewicz's breach of contract claim.

The Extell defendants argue that that claim should be dismissed as against them, too, pursuant to the doctrine of merger. *See* Defendants' Memorandum of Law in Support of Cross Motion (Extell/Corcoran), at 33-34. Clearly, the option agreement contains a merger clause and an "as is" clause, in addition to the disclaimers that were discussed earlier in this decision. *See* Notice of Motion (motion sequence number 002), Exhibit C. Further, the Extell defendants are correct that a merger clause, in conjunction with such disclaimers, will be given effect to disallow a subsequent breach of contract claim. *See e.g. Board of Mgrs. of Chelsea 19 Condominium v Chelsea 19 Assoc.*, 73 AD3d 581 (1st Dept 2010). In response, Obolewicz cites the decision of the Appellate Division, First Department, in *Berenger v 261 W. LLC.* (93 AD3d 175 [1st Dept 2012]), for the proposition that "if there are issues as to whether the defendants' conduct was intentional, the defendants' liability could not be limited by the contract." Obolewicz clearly misreads this decision, which simply permitted the plaintiff's tort-based claims to survive summary judgment on public policy grounds, but did not address his breach of contract claim. Thus, *Berenger* does not support Obolewicz's argument, and the court rejects that argument on the ground that the option contract's merger clause and disclaimers bar her breach of contract claim. Accordingly, the court finds that the Extell defendants and Corcoran's cross motion should be granted with respect to Obolewicz's fourth cause of action.

The final branch of the Extell defendants and Corcoran's cross motion concerns the Extell defendants' counterclaim for attorney's fees incurred "in defending Sponsor's [i.e. the

Extell defendants'] rights under this [option] agreement." *See* Notice of Motion (motion sequence number 002), Exhibit C, ¶ 31. However, in their memorandum of law, the Extell defendants acknowledge that "if one or more of plaintiff's claims should survive the cross motion ... the issue of attorney's fees will not be ripe for summary judgment." *See* Defendants' Memorandum of Law in Support of Cross Motion (Extell/Corcoran), at 35. Here, Obolewicz's claim for private nuisance survives, and, therefore, the Extell defendants' counterclaim for attorneys' fees incurred is, indeed, not yet ripe. Accordingly, the court denies this branch of the Extell defendants and Corcoran's cross motion without prejudice.

Penmark's Order to Show Cause

As was discussed previously, the relief requested in Penmark's order to show cause – i.e., an order to compel Obolewicz's deposition – was afforded when Obolewicz was deposed for a second time on March 22, 2012. Accordingly, that order to show cause is now denied as moot.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of plaintiff Jennifer Obolewicz (motion sequence number 002) is granted solely to the extent of granting partial summary judgment in favor of plaintiff and against defendants CRP/Extell Parcel 1, L.P. and Extell Development Company on her fifth cause of action in the amended complaint (for private nuisance) on the issue of liability only, but is otherwise denied; and it is further

ORDERED that the issue of the determination and calculation of damages on the

aforesaid claim is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the party seeking the reference or, absent such party, counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,[3] upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date; and it is further

ORDERED that the cross motion, pursuant to CPLR 3212, of defendant Penmark Realty Corporation (motion sequence number 002) is granted and the amended complaint is dismissed as against said defendant with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the cross motion, pursuant to CPLR 3212, of defendants CRP/Extell Parcel 1, L.P. and Extell Development Company and the Corcoran Group, Inc. d/b/a

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[3] Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website.

Corcoran Sunshine Marketing Group (motion sequence number 002) is granted solely to the extent that the amended complaint is severed and dismissed as against the Corcoran Group, Inc. d/b/a Corcoran Sunshine Marketing Group with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs, and that the first, second, third, fourth and sixth causes of action in the amended complaint are dismissed with respect to defendants CRP/Extell Parcel 1, L.P. and Extell Development Company, but the cross motion is otherwise denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the order to show cause of defendant Penmark Realty Corporation (motion sequence number 003) is denied as moot.

Dated: New York, New York
11/30/12, 2012

ENTER:

Hon. Anil C. Singh, J.S.C.

FILED
DEC 05 2012
NEW YORK
COUNTY CLERK'S OFFICE

HON. ANIL C. SINGH
SUPREME COURT JUSTICE