SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA

LADONNA MAY, *et al.,* *Plaintiffs,* v. STANTON VIEW DEVELOPMENT, *et al.,* *Defendants.*	2020 CA 004070B 2021 CA 000266B 2021 CA 002268B (CONSOLIDATED) JUDGE YVONNE WILLIAMS NEXT EVENT: PROPONENT'S RULE 26(a)(2)(B) REPORT October 3, 2023

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiffs LaDonna May, Ade Adenariwo, Theresa Brooks, Denine Edmonds, Ciera Johnson, and Robin McKinney, (collectively hereinafter "Plaintiffs"), by and though their undersigned attorneys, LaRuby May, Esq., and Je Yon Jung, Esq., May Jung LLP, hereby respectfully move this Court for an Order requiring the District of Columbia (the "District") and River East at Grandview Condominium Unit Owner's Association, Inc. ("HOA") to secure the structural integrity of the property located at 1262 Talbert Street, SE, Washington D.C. 20020 (the "Property").

INTRODUCTION AND BACKGROUND

Plaintiffs come before this Court once again seeking to compel the District to take responsibility for the Property it funded and developed.[1] The structural integrity of the Property,

[1] As this Court is well-aware, Plaintiffs allege the District funded this Property to be a part of its affordable housing inventory by providing over $6 million dollars from the Housing Production Trust Fund for the acquisition, construction, and development of the condominiums at the Property, reserved and dictated the "Eligible Purchasers" profile for 100% of the condominium units, and established detailed covenants and obligations related to the Property. With this funding, the Developer Defendants—selected by the District—and the Subcontractor Defendants proceeded to design, develop, and construct the structurally unsound, uninhabitable condominiums at the Property. Once completed, the District substituted Plaintiffs, among others, to assume the obligations of repayment, originally held by the Developer Defendants. Defendants' failures, individually and collectively, saddled Plaintiffs—Black, female, low- to moderate-income first-time homebuyers—with a mortgage for uninhabitable units from which they were evacuated in August 2021.

which the District holds in its Housing Production Trust Fund ("HPTF") Inventory and oversees for purposes of regulatory compliance, is at stake.

Plaintiffs also seek to compel the HOA to secure the Property and/or cooperate with the District in securing the Property because the HOA has control over the common areas of the condominium.

In a letter to the HOA dated September 12, 2023, and received by Plaintiffs on September 13, 2023, S-E-A, Ltd. ("S-E-A"), an expert retained by Subcontractor Defendant Skarda Associates, Inc., warned of an "Imminent Collapse Potential Hazard," that poses a risk to downslope properties and the general public, including a sidewalk, roadway (Morris Road SE), and multiple structures. *See* Declaration of LaRuby May ("LRM Decl."), ¶ 5, Exhibit 1.[2]

On September 13, 2023, Plaintiffs forwarded this letter to the District and requested the District inform them of its plan to address this imminent danger by close of business on Thursday September 14, 2023. *See* LRM Decl., ¶ 6, Exhibit 2. To date, the District has not responded to Plaintiffs. *See* LRM Decl., ¶ 7. Instead, on September 14, 2023, the District posted "Danger" placards on the residents' doors. *See* LRM Decl., ¶ 8 Exhibit 3; *see also* LRM Decl. ¶ 9, Exhibit 4. The notices amounted to nothing more than a performative exercise, because, less than twenty-four hours later, the President of the management company for the Property, Quality 1 Property Management, notified unit owners via email that the District authorized their removal. The email quoted DOB Chief Building Official, Garret Whitescarver, as follows:

> "We have not identified an elevated risk to the units that were allowed to be occupied by your previous engineering assessment. As such, removal of the DANGER placards and continued occupancy of those units is authorized. However, having a quick reassessment by Falcon to confirm their earlier recommendations is warranted in light of the recent SEA [sic] report."

[2] Plaintiffs request the Court take judicial notice of the exhibits attached to the LRM Declaration because they are government documents, opposing party records, and/or facts that are "well-known by all reasonably intelligent people or their existence is so easily determinable with certainty from unimpeachable sources." *See Poulnot v. District of Columbia*, 608 A.2d 134 (1992); *see also Griffin v. Acacia Life Ins. Co*., 925 A.2d 564, 569 n.14 (D.C. 2007) (taking judicial notice of agreement between EEOC and the DC Office of Human Rights); *Mody v. Ctr. for Women's Health, P.C*., 998 A.2d 327, 336 (D.C. 2010) (taking judicial notice of the content found at New York Times website). To the extent any opposing party contends any exhibit contains inadmissible hearsay, such content is admissible under the hearsay exception allowing admissions of a party opponent and/or present sense impressions.

See LRM Decl., ¶ 10, Exhibit 5. No evidence exists to show the District intends to take any action, despite the ominous warning contained in the S-E-A letter. In fact, the District's representations make it clear they do not intend to take any action.

Plaintiffs bring this motion for a temporary restraining order and preliminary injunction to compel the District and the HOA into action. History has shown that this Court's involvement is the only effective means of forcing the District to act. For instance, only after Plaintiffs commenced this litigation did the District cause the Property to be assessed in 2021, resulting in an order for evacuation of the Property. Then, only after Plaintiffs filed their first motion for Preliminary Injunction, seeking an extension of rental certificates, among other requests, did the District seek to extend the rental certificates for an additional nine months—an extension that is insufficient given the state of the Property and the pace of the District's actions. Through this motion, Plaintiffs seek an emergency temporary restraining order and preliminary injunction requiring the District and the HOA to secure the structural integrity of the Property. The history of this case and the District's response to recent developments make it abundantly clear that the District will take no action to protect the Plaintiffs or the public from the risk of imminent collapse of the Property without a court order.

ARGUMENT

I. THIS COURT SHOULD ORDER THE DISTRICT TO SECURE THE PROPERTY.

This Court has broad discretion to grant preliminary injunctive relief. *See* Sup. Ct. Civ. R. 65(a); *Simpson v. Lee*, 499 A.2d 889, 892 (D.C. 1985).[3] A preliminary injunction is properly granted where Plaintiffs clearly demonstrate: (1) Plaintiffs are in danger of suffering irreparable harm during the pendency of the action; (2) there is a substantial likelihood Plaintiffs will prevail on the merits; (3) more harm will result to Plaintiffs from the denial of the injunction than will result to the defendants from its grant; and, in appropriate cases; and (4) that the public interest

[3] Though an interlocutory appeal has been filed concerning the issue of whether the District and homeowner's association were properly dismissed, this Court retains jurisdiction over all issues which do not result in revocation or alteration of the judgment pending appeal. *See Stebbins v. Stebbins*, 673 A.2d 184, 189-90 (D.C. 1996). This motion is unrelated to the subject of the appeal and will not alter the judgment pending appeal.

will not be disserved by the issuance of the requested order. *District of Columbia v. Eastern Trans-Waste of Md.*, 758 A.2d 1, 14 (D.C. 2000).

As an interim measure to prevent irreparable harm prior to the hearing for a preliminary injunction, this Court is authorized to issue a temporary restraining order. *See* Sup. Ct. Civ. R. 65(b). The standard and factors for granting a temporary restraining order are the same as for granting a preliminary injunction. *Creative Mobile Techs. v. Dist. of Columbia*, No. 2012 CA 6873 B, 2012 WL 12986920, at *2 (D.C. Super. Ct. Aug. 27, 2012) (citing *Zirkle v. Dist. of Columbia*, 830 A.2d 1250, 1255 (D.C. 2003)).

Given the gravity and irreversibility of the impending harm, Plaintiffs need only establish a substantial case on the merits and a favorable balance of equities to warrant the relief sought. On the former point, the Court has before it compelling evidence of structural deficiencies, including the S-E-A letter, a report commissioned by the District, and a preliminary report supporting the claim that these structural shortcomings are attributable to the parties responsible for designing, developing, and constructing the Property, each of whom bears contractual and regulatory obligations to perform their work with reasonable care. Regarding the latter, the potential collapse of the Property presents an imminent and substantial risk to the general public, encompassing pedestrians on the downslope sidewalk, commuters on Morris Road SE, and occupants of adjacent structures. Moreover, a collapse would irretrievably alter and destroy evidence, in addition to destroying Plaintiffs' property still stored within Plaintiffs' condominium units. Given the risk to life and property, in addition to spoliation of evidence, the balance of equities weighs in favor of an injunction.

For these reasons, Plaintiffs respectfully request this Court grant emergency temporary injunctive relief and, after hearing, a preliminary injunction.

A. Plaintiffs Will be Irreparably Harmed if the Requested Relief Is Not Granted.

In considering a motion for preliminary injunction, "the most important inquiry is that concerning irreparable injury . . . because the primary justification for the issuance of a preliminary injunction 'is always to prevent irreparable injury so as to preserve the court's ability to render a

meaningful decision on the merits'" *District of Columbia v. Group Ins. Admin.*, 633 A.2d 2, 22 (D.C. 1993) (quoting *Wieck v. Sterenbuch*, 350 A.2d 384, 387-88 (D.C. 1976) (quoting *Canal Auth. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974))). First, harm must be "certain and great," "actual and not theoretical," and so "imminen[t] that there is a clear and present need for equitable relief to prevent irreparable harm." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (internal quotation marks omitted).[4] Second, harm "must be beyond remediation." *Id*. *Family Fed. Savings and Loan Ass'n v. King*, 497 A.2d 115, 118 (D.C. 1985) (Irreparable harm occurs where the party seeking redress "cannot be adequately, readily, and completely compensated by money."). However, "Damocles's sword does not have to actually fall on all [Plaintiffs] before the court will issue an injunction." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 7 (D.C. Cir. 2016) (granting mandatory injunction) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

In the absence of an order requiring the the Property be secured, crucial evidence necessary for determining liability for the breach of contract and negligence claims is at actual, imminent risk of spoliation, such that there is a clear need for equitable relief. Under both theories of liability, Plaintiffs assert the Developer and Subcontractor Defendants' work at the Property caused its structural failings.[5] *See* SAC, ¶¶ 65, 489, 492, 509, 514, 531, 534, 548, 550, 555, 565, 567, 585, 588. The Developer and Subcontractor Defendants deny causation and/or assert the absence of cause as an affirmative defense. *See* Maddox Answer, Fourth and Fifth Affirmative Defenses; M&F Answer, Twelfth Affirmative Defense; SGA Answer, Fourth and Eleventh Affirmative Defenses; Skarda Answer, Fourth, Fifth, Seventh, Ninth, Fifteenth, and Sixteenth Affirmative Defenses; CDDI Answer, Fourth, Eighth, and Ninth Affirmative Defenses; Stanton and Riverview Answer, Stanton View Development LLC and RiverEast at Anacostia, LLC Answer, Six Hundred

[4] As D.C. Superior Court Rule 65 is substantially similar to Rule 65 of the Federal Rules of Civil Procedure, this Court may look to cases construing Rule 65 in the Federal Rules of Civil Procedure for support and guidance in interpretation of Superior Court Rule 65. *See Thoubboron v. Ford Motor Co.*, 809 A.2d 1204, 1210 n. 6 (D.C. 2000) (citing *Bazata v. National Ins. Co. of Washington*, 400 A.2d 313, 314 n.1 (D.C. 1979)).

[5] As the Court knows, Plaintiffs' action against the District of Columbia was previously dismissed by the court and the matter is on appeal.

and Nineteenth Affirmative Defense. The Property is the evidence. The evidence is critical to the parties' claims and defenses. The Property's collapse, if allowed, will irretrievably destroy evidence.

Spoliation cannot be readily compensated by money due to the speculative nature of calculating damages for spoliation, which the D.C. Court of Appeals has described as "sheer guesswork." *See Holmes v. Amerex Rent-A-Car*, 710 A.2d 846, 852 (D.C. 1998) (citing *Williams v. Washington Hosp. Ctr.*, 601 A.2d 28 (D.C. 1991). As such, a party to a lawsuit has a cognizable right to the preservation of evidence which might assist the party in that suit. *Id.* at 852-853; *Battocchi v. Washington Hosp. Ctr.*, 581 A.2d 759, 766–67 (D.C. 1990)). The parties' right to preservation exists irrespective of whether the custodian is a party. *See Holmes*, 710 A.2d at 848. Indeed, an order for preservation of evidence is ever-more heightened when a non-party is the custodian because it would not be subject to court rules prohibiting spoliation of evidence. Here, pending the resolution of the case on appeal, at a minimum, the District is the primary custodian. The District's status as a party aside, the Property is in the District's HPTF inventory, within the District's regulatory oversight, as evidenced by the DOB's conduct described herein, and is a matter of significant public importance as the welfare and well-being of the community are at stake. In fact, contrary to the District's disingenuous disclaimers of responsibility for the Property throughout this litigation, the District has taken substantial efforts to exercise dominion and oversight of the Property, except to protect the integrity of the Property. The District's general contractors, Stanton View Development, LLC's and RiverEast at Grandview, LLC, have declared bankruptcy. The District is responsible for this Property. The HOA is additionally responsible as it is required to maintain the common areas, including the retaining wall, and to coordinate and communicate with residents regarding management of the Property. As such, both the District and the HOA are the proper subjects of a preservation order.

In addition to spoliation, the risk of life and property loss, including Plaintiffs' possessions still within the building, is imminent and not readily compensated by money. The financial burden of replacing lost belongings is one these low-income Plaintiffs can ill afford, nor should they be

required to suffer. Moreover, the sentimental value of Plaintiffs' possessions is irreplaceable. It also remains uncertain whether Plaintiffs or anyone else attempting to retrieve their belongings in the face of this impending collapse risk could inadvertently exacerbate the destabilization or introduce additional dangers when entering the building for moving activities, including deploying heavy equipment such as moving trucks.

The Court should not countenance the District's disregard of the conclusions in the S-E-A letter in favor of a 2021 assessment. The collapse of the Property not only risks spoliation, but also property belonging to Plaintiffs. Irreparable harm is clear.

B. Plaintiffs Are Likely to Prevail on the Merits.

A party seeking relief "need not show a mathematical probability of success on the merits." *In re Estate of Reilly*, 933 A.2d 830, 837 (D.C. 2007). Nor need a party show a likelihood of success on the merits of every claim. *Id.* (upholding injunction based on merits of just one of four counts); *see also M.G.U. v. Nielsen*, 325 F. Supp. 3d 111, 118 (D.D.C. 2018) (plaintiffs not required to prove their case in full at preliminary injunction stage, but only such portions that enable them to obtain injunctive relief they seek). Rather, it is enough for the moving party to demonstrate either a high probability of success on at least one claim and some injury or a substantial case on the merits of one claim and irreparable harm. *In re Estate of Reilly*, 933 A.2d at 837. Given the above-demonstrated threat of irreparable harm, Plaintiffs are required to, and can, demonstrate a substantial case on the merits of one or more claims against one or more defendants.[6]

[6] Plaintiffs allege twenty-five statutory violations or common law causes of action against Defendants. As the claims against the District are subject to appeal, in the interest of judicial economy, Plaintiffs only discuss the likelihood of success of the breach of contract and negligence claims against the Developer and Subcontractor Defendants. Plaintiffs can demonstrate a substantial case on the merits of their other claims. For instance, regarding misrepresentation claims, including Count IV (Misleading Statement in a Public Offering) and Count VIII (Negligent Misrepresentation) and Count XI (Fraud), Plaintiffs can readily demonstrate the Developer Defendants made statements in their Public Offering Statement and to Plaintiffs as to the quality of the condominium units and remedy for defects from the poor quality of construction that they knew, or should have known, were false and that induced Plaintiffs' reliance. *See Sundberg v. TTR Realty*, 109 A.3d 1123, 1130-31 (discussing elements of fraudulent and negligent misrepresentation). Plaintiffs can also demonstrate that such statements are misleading and unfair representations in violation of the CPPA, *see Parr v. Ebrahimian*, 70 F. Supp. 3d 123, 136-37 (D.D.C. 2014), and that the Developer Defendants breached their implied warranty of good faith and fair dealing by engaging in a pattern or practice of bad faith with all Plaintiffs regarding the complaints about the structural defects, *see TTR Realty*, 109 A.3d at 1133. Plaintiffs can also demonstrate that the Developer Defendants are strictly liable for their

To prevail on a claim for negligence, Plaintiffs must demonstrate: "(1) that the defendant[s] owed a duty to the plaintiff, (2) breach of that duty, and (3) injury to the plaintiff that was proximately caused by the breach." *Aguilar v. PR MRP Wash. Harbour, LLC*, 98 A.3d 979, 982 (D.C. 2014) (quoting *Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 793 (D.C. 2011)) (internal quotation marks omitted).

Here, the Developer and Subcontractor Defendants are required to exercise reasonable care in their work. *See, e.g.*, D.C. Mun. Regs. Tit 17, §§ 17-15 (professional engineers and land surveyors), 17-34 (architects), 17-39 (general contractors and construction managers); *see also Bell v. Jones*, 523 A.2d 982, 988 (D.C. 1986) (applying standard of care as to surveyors); *Noble v. Worthy*, 378 A.2d 674, 676 (D.C. 1977) (applying standard of care as to architects). The Property on which the Developer and Subcontractor Defendants worked—paid by over 6 million dollars from the District—suffers serious structural issues that required evacuation (and now imminent risk of complete destruction). *See* SAC, Exhibits C, D, E, F, G, H, I. The preliminary evidence is that "[i]n virtually every case of a construction failure, the causation, or fault, of the failure is due to a failure or failures of the parties responsible for the design and or construction of the project." *See* SAC, Exhibit I. Based on the foregoing, Plaintiffs can establish a substantial case that the Developer and Subcontractor Defendants breached their duty of care to Plaintiffs in designing, developing, and/or constructing a structurally unsound, uninhabitable, failing condominium building. As a result, Plaintiffs suffered damages, including emotional distress, the health effects of mold growth, and the loss and enjoyment of their homes. The "imminent collapse potential" of the Property itself is more than sufficient evidence that Defendants failed to exercise reasonable care. To prevail on a claim for a breach of contract, Plaintiffs "must establish: (1) a valid contract between the parties; (2) an obligation or duty arising out of the contract; (3) a breach of that duty;

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defective, unreasonably dangerous properties that are based on hazardous construction, as indicated by the multiple engineering reports. *See Wetzel v. Capital City Real Estate, LLC*, 73 A.3d 1000, 1006-07. Finally, Plaintiffs can demonstrate they suffered intentional infliction of emotional distress because of the Developer Defendants' conduct. *See Jonathan Woodner Co. v. Breeden*, 665 A.2d 929, 934-36 (D.C. 1995). Plaintiffs not only suffered deteriorating conditions as a result the Developer Defendants' conduct, but also harm to their health, stress arising from the known and unknown effects of mold and dismissal of their concerns, anxiety from witnessing severe structural cracks and foundational shifts in their homes and forced relocation and disruption of their lives.

and (4) damages caused by breach." *Tsintolas Realty Co. v. Mendez*, 984 A.2d 181, 187 (D.C. 2009). In the District of Columbia, "to sue for damages on a contract claim, a plaintiff must have either direct privity or third-party beneficiary status." *Silberberg v. Becker*, 191 A.3d 324, 332 (D.C. 2018) (quoting *Fort Lincoln Civic Ass'n v. Fort Lincoln New Town Corp.*, 944 A.2d 1055, 1065 (D.C. 2008)) (internal quotation marks omitted).

Without question, each of the Developer and Subcontractor Defendants entered into valid contracts to perform professional design, development, and/or construction services for the Property. Plaintiffs are substantially likely to prove these contracts gave rise to the Developer and Subcontractor Defendants' duty to Plaintiffs as third-party beneficiaries because, as this Court concluded, "Plaintiffs, through their participation in DC HPAP, were in an ascertainable group of individuals intended to benefit from the contracts or circumstances under which the contracts were executed." Order (Mar. 24, 2023) at 19. For the same reasons Plaintiffs are substantially likely to prove the breach and injury elements of a negligence claim, Plaintiffs are substantially likely to prove the breach and injury elements of their contract claims.

Given the foregoing, Plaintiffs can demonstrate a substantial case on the merits sufficient to satisfy the second consideration for injunctive relief.

C. The Balance of Equities Weighs in Favor of a Temporary Restraining Order.

To balance the equities of the parties, "the trial court 'must determine that more harm will result to the movant from the denial of the injunction than will result to the nonmoving party from its grant.'" *In re Estate of Reilly*, 933 A.2d at 840 (quoting *District of Columbia v. Greene*, 806 A.2d 216, 223 (D.C. 2002)) (internal quotation and punctuation omitted). Denying the injunction risks spoliation of critical evidence and the catastrophic loss of property whereas granting the injunction would require the District and the HOA to take prompt measures to secure the structural integrity of the condominium building, as advised by S-E-A. While this may entail some administrative and financial burden, it pales in comparison to the profound and irreparable harm that would befall the parties entitled to preservation of evidence and would befall Plaintiffs, in particular, whose personal possessions are at risk in the absence of such action.

D. The Public Interest Will Be Served by an Order Granting Injunctive Relief.

Granting the requested injunction serves the public interest. It ensures against the grave risk the Property collapse presents to the general public, including pedestrians on the downslope sidewalk, commuters on Morris Road SE, and occupants of nearby structures. Additionally, it preserves vital evidence crucial for a just resolution and upholds regulatory standards, reinforcing accountability and ensuring safe living environments. An order granting relief protects the broader community's well-being, underscores the importance of safety compliance, and safeguards the integrity of the legal process.

II. THE COURT SHOULD WAIVE RULE 65(C)'S REQUIREMENT THAT A BOND BE POSTED.

Plaintiffs request the Court waive the bond requirement because Plaintiffs are low-income. Courts have broad discretion in determining the security required. *Fed. Prescription Serv., Inc., et al. v. Am. Pharma. Ass'n*, 636 F.2d 755, 759 (D.D.C. 1980). Imposing a bond requirement here would almost certainly preclude Plaintiffs from pursuing this relief and effective rubber-stamp the District's continued disregard of the Property, the Plaintiffs, and public safety.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that they have met the criteria for issuance of a temporary restraining order and therefore urge this Court to grant such relief, without requiring a bond, and to set a hearing to consider Plaintiffs' request for a preliminary injunction.

Date: September 18, 2023

Respectfully submitted,

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