IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MAMIE PRESTON, **Plaintiff,** **v.** **ATEL DEVELOPMENT, LLC, et al.,** **Defendants.**	**2019 CA 001577 B** **Judge Yvonne Williams**

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

Before the Court is Defendants Atel Development, LLC, 1271 Morse Street LLC, 1220 Potomac Avenue LLC, 3 S Street NW LLC, 58 T Street LLC (collectively, "LLC Defendants"), 3644 13th Street LLC ("Defendant 3644"), and Fuad Todd Ragimov's Motion to Partially Dismiss the Complaint ("Motion"), filed May 20, 2019. Plaintiff Mamie Preston filed an Opposition to the Motion on June 4, 2019. For the following reasons, the Motion shall be **GRANTED IN PART** and **DENIED IN PART**.

I. BACKGROUND

Plaintiff's claims arise out of damages that occurred to her property at 3642 13th Street NW, Washington, DC ("Plaintiff-Property") after construction took place on the adjacent property at 3644 13th Street NW, Washington, DC ("Defendant-Property"). Compl. ¶¶ 2, 41. On approximately September 14, 2016, Mr. Ragimov visited Plaintiff at her property to inform her of the upcoming construction and to deliver a Notification Form. *Id.* ¶ 35. Pursuant to District of Columbia law, Mr. Ragimov was required to deliver written notice (the Notification Form) to adjoining property owners prior to commencing any work, and provide specific notice if the proposed work involved excavation or would impact the use of adjacent, stability or structural support. *Id.* ¶¶ 35, 38, 39. Mr. Ragimov informed Plaintiff that he planned to begin constriction

at Defendant-Property but stated, orally and in writing, that the work would not involve excavation and would not impact the stability or structural support of the shared wall between properties. *Id.* ¶ 42; Ex. A at 1. The Notification Form also stated, "Underpinning work will be performed by licensed Contractor & supervised by professional engineer." Ex. A at 2.

Plaintiff subsequently consulted an attorney regarding the construction who advised her to require Mr. Ragimov sign a written agreement in addition to the Notification Form. Compl. ¶¶ 48, 49. Accordingly, on September 29, 2016, Plaintiff and Mr. Ragimov entered into a written agreement, signed by Mr. Ragimov (hereinafter, "September Agreement"). *Id.* ¶ 50; Ex. B. In the September Agreement, Mr. Ragimov stated, "In the event if [sic] your property or items at your property are damaged or affected as result of the work at 3644 13th Str NW, we will fix them at our expense and your satisfaction." Ex. B. Additionally the September Agreement stated, "Todd will provide Ms. Preston with copies of Buider [sic] Risk & [General Liability] insurances." *Id.*

In June 2017, construction began on Defendant-Property. Compl. ¶ 58. Shortly after, Plaintiff began to notice "piles of construction debris" in her backyard. *Id.* ¶ 59. On the night of July 30, 2017, Plaintiff's basement flooded, causing her and her family to evacuate. *Id.* ¶¶ 60, 61. After evacuating, Plaintiff discovered that Defendant-Property was the source of the flood so she called Mr. Ragimov, who stated he was on vacation and unavailable, and the foreman overseeing construction, who did not answer. *Id.* ¶¶ 62–64. Plaintiff then called D.C. Water and Sewer Authority ("D.C. Water"). *Id.* ¶ 65. An official from D.C. Water arrived and investigated the flood, and determined that the cause was a water pipe on the Defendant-Property which had been damaged during construction. *Id.* ¶ 66.

Thereafter, Plaintiff again called Mr. Ragimov, informed him of the situation, and requested that he remedy the damage to her basement, including extracting the flood water. *Id.* ¶ 68. In response, Mr. Ragimov instructed Plaintiff to hire a professional to extract the water and he would reimburse her for the cost (hereinafter, "July Agreement"). *Id.* ¶ 69. Plaintiff hired 911 Restoration, a private company, who extracted the water out of the Plaintiff-Property basement for a total cost of $4,500.00. *Id.* ¶¶ 70, 71. Plaintiff paid for the extraction and sent Mr. Ragimov the invoice and a request for reimbursement. *Id.* ¶¶ 71, 74; Ex. E. Mr. Ragimov has not reimbursed Plaintiff for the services performed by 911 Restoration, or provided other compensation for the damages caused by the flood. Compl. ¶ 75.

At approximately 1:00 p.m. on August 10, 2017, a fire marshal ordered Plaintiff and her family to evacuate from Plaintiff-Property because of an imminent threat of a gas explosion and collapse of her home. *Id.* ¶¶ 76–78. Thereafter, Officials from the District of Columbia Department of Consumer and Regulatory Agency ("DCRA") investigated the neighborhood and determined that unauthorized excavation and demolition work had been conducted on Defendant-Property. *Id.* ¶ 83. Structural engineers evaluated Plaintiff-Property and determined that this unauthorized construction caused damage to her property walls and significant shifting of the foundation, which have resulted in a tilt of all floors of her home and damage to doors, ceilings, and support beams. *Id.* ¶¶ 87–90.

Plaintiff filed the Complaint on March 11, 2019 against the LLC Defendants, Defendant 3644, Mr. Ragimov, Romero Construction, and Abel Romero. The Complaint alleges thirteen counts against the Defendants, specifically: Breach of Contract (Counts I and II); Promissory Estoppel and Detrimental Reliance (Counts III); Fraudulent Misrepresentation (Count IV); Negligence (Count V); Violation of District of Columbia Municipal Regulation 12A § 3307A.1

(Count VI); Loss of Lateral and Subjacent Support (Count VII); Emotional Distress (Count VIII); Trespass (Count IX); Private Nuisance (Count X); Violation of District of Columbia Consumer Protection Procedures Act ("CPPA") § 28-3904 (Count XI); Negligent Supervision (Count XII); and Declaratory Judgment as to Existence of Easement and for Injunctive Relief (Count XIII).

The LLC Defendants, Mr. Ragimov, and Defendant 3644 filed a Motion to Partially Dismiss the Complaint on May 20, 2019.[1] The Motion seeks to dismiss all Counts against the LLC Defendants, as well as Mr. Ragimov personally. The Motion also seeks to dismiss Counts I–IV and VII–XIII against all Defendants for failure to state a claim. However, Defendants do not contest Counts V and XII solely as against Defendant 3644. Plaintiff filed her Opposition to the Motion on June 4, 2019.

II. LEGAL STANDARD

A complaint should be dismissed under Rule 12(b)(6) if it does not satisfy the requirement of Rule 8(a) that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Potomac Development Corp. v. District of Columbia*, 28 A.3d 531, 544 (D.C. 2011) (quotation and citations omitted). For the purposes of a motion to dismiss, the complaint must be construed in the light most favorable to the plaintiff and its allegations taken as true. *McBryde v. Amoco Oil Co.*, 404 A.2d 200, 202 (D.C. 1979). A complaint that passes muster under this standard is "specific enough to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Tingling-Clemons v. District of Columbia*, 133 A.3d 241, 245 (D.C. 2016) (quotation, brackets, and citation omitted).

[1] As of September 24, 2019, Plaintiff has not perfected service on Abel Romero and Romero Construction.

"A complaint should not be dismissed because a court does not believe that a plaintiff will prevail on its claim; indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." *Carlyle Investment Management, LLC v. Ace American Insurance Co.*, 131 A.3d 886, 894 (D.C. 2016) (quotations, brackets, and citations omitted). In addition, the Court should "draw all inferences from the factual allegations of the complaint in the plaintiff's favor." *Id.* (quotations and citations omitted). However, legal conclusions "are not entitled to the assumption of truth," *Potomac Development Corp.*, 28 A.3d at 544 (quotation and citation omitted), so "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Sundberg v. TTR Realty, LLC*, 109 A.3d 1123, 1128-29 (D.C. 2015) (quotation omitted). The "complaint must plead factual content that allows the court to draw the reasonable inference that defendant is liable for the misconduct alleged." *Poola v. Howard University*, 147 A.3d 267, 276 (D.C. 2016) (quotation omitted).

III. DISCUSSION

A. Claims Against LLC Defendants, Defendant 3644, and Mr. Ragimov as Alter Egos

The Court finds that Plaintiff has properly alleged claims against Mr. Ragimov in his personal capacity, but has failed to state a claim against the LLC Defendants upon which relief can be granted. As an initial matter, "corporate officers are personally liable for torts which they commit, participate in, or inspire, even though the acts are performed in the name of the corporation," and this liability does not require piercing the corporate veil. *Lawlor v. District of Columbia*, 758 A.2d 964, 974–75 (D.C. 2000).

To pierce the corporate veil and establish that one corporation is the alter ego of another or to impose liability on individual shareholders, the plaintiff mush show (1) unity of interest and

ownership between the corporations, and (2) use of the corporate form to perpetrate fraud or wrong. *Jackson v. Loews Wash. Cinemas, Inc.*, 944 A.2d 1088, 1095 (D.C. 2008). In making these determinations, courts consider factors such as "whether corporate formalities have been observed; whether there has been commingling of corporate and shareholder funds, staff and property; whether a single shareholder dominates the corporation; whether the corporation is adequately capitalized; and, especially, whether the corporate form has been used to effectuate fraud." *Lawlor*, 758 A.2d at 975; *see also Jackson*, 944 A.2d at 1095–96. No single factor is dispositive, and "considerations of justice and equity may justify piercing the corporate veil." *Lawlor*, 758 A.2d at 975.

Here, Plaintiff states that, at all times relevant to the Complaint, Mr. Ragimov owned, controlled, and managed each of the LLC Defendants and Defendant 3644. Compl. ¶¶ 6–11, 22. Defendants admit to this allegation in their Motion through their contention, "it appears that Plaintiff merely conducted a search of public records and determined that the [LLC Defendants] shared one trait: they were all managed by Mr. Ragimov personally." Mot. Dismiss at 4. To the extent that Mr. Ragimov should be held personally liable for the torts committed by Defendant 3644, Plaintiff explains that Mr. Ragimov conveyed that he was going to begin construction on property that he owned, and as the agent of Defendant 3644, Mr. Ragimov held himself out as personally liable for its debts and signed contracts on its behalf. *See* Compl. ¶¶ 41, 52, 54; Ex A; Ex B. These acts are sufficient for the Court to infer that Mr. Ragimov participated in the construction that led to the tortious claims in the Complaint and can be held liable in his personal capacity. *Lawlor*, 758 A.2d at 975 ("Sufficient participation can exist when there is an act or omission by the officer which logically leads to the inference that he had a share in the wrongful

acts of the corporation which constitute the offense."). These facts are also sufficient for the Court to infer that a unity of ownership and interest existed between the Defendants.

Additionally, Mr. Ragimov's alleged ownership, control, and management of Defendant 3644, as detailed above, permits the Court to infer that he dominates the corporation as a single shareholder. Compl. ¶¶ 6–11, 22; *Lawlor*, 758 A.2d at 975. Plaintiff alleges that Mr. Ragimov indicated that to complete construction on the Defendant-Property, he planned to hire licensed contractors who would be supervised by engineers, but the construction was not actually carried out by licensed contractors and engineers. Compl. ¶¶ 57, 99–101. Moreover, the Plaintiff explains that the DCRA investigation discovered that Defendants had been secretly conducting illegal excavation and demolition work. *Id.* ¶ 83. These assertions, taken as true, establish that there was a use of the corporate form of Defendant 3644 to perpetuate wrong. *Lawlor*, 758 A.2d at 975. As such, the allegations, coupled with considerations of justice and equity, are sufficient for the Court to infer that piercing the corporate veil to hold Mr. Ragimov liable as a shareholder is proper.

However, with respect to the LLC Defendants, Plaintiff makes a series of conclusory allegations to justify alter ego liability. Plaintiff states that Mr. Ragimov "used the corporate entities as mere shells, instrumentalities, or conduits for himself and/or his individual businesses;" manipulated the assets and/or liabilities between the corporate entities so as to concentrate the assets in one and the liabilities in another;" and "used the same office or business location and employed the same employees/agents for all the corporate entities." Compl. ¶ 23. While these are factors the Court considers when piercing the corporate veil between corporations, merely repeating these factors without further factual allegations to establish that Mr. Ragimov used the LLC Corporations to perpetuate the wrong at issue is insufficient. *See*

Sundberg, 109 A.3d at 1128–29 ("[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). Because the Complaint does not allege sufficient factual allegations against the LLC Defendants to support their involvement in this matter, the Court dismisses Atel Development, LLC, 1271 Morse Street LLC, 1220 Potomac Avenue LLC, 3 S Street NW LLC, and 58 T Street LLC.

B. Breach of Contract (Counts I and II)

Defendants' Motion seeks to dismiss Count I (breach of September Agreement) and Count II (breach of July Agreement). To state a claim for breach of contract, a plaintiff must establish (1) a valid contract between parties; (2) an obligation or duty arising out of the contract; (3) a breach of that duty; (4) damages caused by breach. *Tsintolas Realty Co. v. Mendez*, 984 A.2d 181, 187 (D.C. 2009). To survive a motion to dismiss, a description of the terms of the alleged contract and the nature of defendant's breach is adequate. *Francis v. Rehman*, 110 A.3d 615, 620 (D.C. 2015). Even if the promising party accrues no actual benefit, an exchange of promises is enforceable so long as the promisee incurs a legal detriment. *Hudson v. Ashley*, 411 A.2d 963, 970 (D.C. 1980); *see GLM P'ship v. Hartford Cas. Ins. Co.*, 753 A.2d 995, 1000 n. 10 (D.C. 2000) ("A promisee's surrender of a privilege which he has a legal right to exercise or assert is sufficient consideration for a promise, since it is a legal detriment irrespective of whether it is an actual detriment or loss to him.").

Regarding the September Agreement, Plaintiff alleges that when Mr. Ragimov was delivering the Notification Form to Plaintiff, he promised that, in the event Plaintiff-Property is damaged as a result of the construction at Defendant-Property, Defendants would repair the damage at no expense to Plaintiff. Ex. B. Additionally, the September Agreement stated that Mr. Ragimov would provide Plaintiff copies of the Builder's Risk and General Liability

insurances. *Id.* The District of Columbia Construction Code provided Plaintiff the right to raise an objection to the proposed construction. Compl. ¶ 40; D.C. Code Mun. Regs. tit. 12A § 3307.2.2.2. Plaintiff maintains that, in exchange for Mr. Ragimov's promises, she surrendered her right to raise an objection to the construction. Compl. ¶ 93. Mr. Ragimov delivered a signed writing of his promises to Plaintiff, and although Defendants allege that this does not constitute an enforceable contract because Plaintiff never signed it, a promisee need not sign a contract for that contract to be binding. *See Launay v. Launay, Inc.*, 497 A.2d 443, 448 (D.C. 1985) ("that one party has signed contract does not always require other party to sign in order to create enforceable contract; one party may sign and the other acquiesce without signing."). As a result, Plaintiff has sufficiently alleged the existence and the terms of a valid contract.

Pursuant to the September Agreement, Plaintiff asserts that Defendants had an obligation to repair and compensate Plaintiff for the damages caused by construction. Compl. ¶ 97. Nevertheless, the Complaint explains that Defendants have failed to repair or provide compensation for the structural damage that has occurred to Plaintiff-Property, leaving Plaintiff to bear the burden of the damages. *Id.* ¶¶ 103–05. The Court finds that Plaintiff has plausibly alleged all elements for a breach of contract claim concerning the September Agreement, and will not dismiss Count I at this stage.

Regarding the July Agreement, following the flood in Plaintiff's basement, Plaintiff alleges that Mr. Ragimov instructed her to hire a professional to extract the water and he would reimburse her for the cost. Compl. ¶ 69. Based on these terms of the alleged oral agreement, Plaintiff then hired 911 Restoration to extract the water for total cost of $4,500.00. *Id.* ¶¶ 70, 71. Plaintiff paid for the extraction and sent Mr. Ragimov the invoice and a request for reimbursement. *Id.* ¶¶ 71, 74; Ex. E. Plaintiff indicates that Mr. Ragimov has not honored his

obligation to reimburse her for 911 Restoration's services or provided other compensation for the damages caused by the flood. Compl. ¶ 75. These facts are sufficient to establish a breach of contract claim concerning the July Agreement, and the Court denies Defendants' motion to dismiss Count II.

C. Promissory Estoppel (Count III)

The Court determines that the Complaint plausibly alleges a promissory estoppel claim. "[T]o hold a party liable under the doctrine of promissory estoppel, there must be a promise which reasonably leads the promisee to rely on it to his detriment, with injustice otherwise not being avoidable." *Bender v. Design Store Corp.*, 404 A.2d 194, 196 (D.C. 1979).

With respect to the July Agreement, the Complaint alleges Mr. Ragimov instructed Plaintiff to hire a professional to extract the water in her basement after the flood, and promised to reimburse her for the cost. Compl. ¶ 69. Plaintiff reasonably relied on this reimbursement agreement, paid $4,500.00 for services from 911 Restoration, but has not been reimbursed by Mr. Ragimov for this expense. *Id.* ¶¶ 70, 71. Taking these facts as true, the Court determines that Plaintiff has alleged sufficient facts to establish a claim for promissory estoppel.

Plaintiff asserts that the promissory estoppel claim "is pled only in the alternative and only in the event that this Court were to decide Plaintiff cannot recover under the First and Second count [sic]." *Id.* ¶ 115. Although Plaintiff ultimately will not be permitted to recover for both breach of contract and promissory estoppel claims, the Court will allow Count III to move forward at this early stage.

D. Fraudulent Misrepresentation (Count IV)

The Motion argues that Plaintiff fails to adequately plead her claim for fraudulent misrepresentation, but the Court disagrees. To sufficiently allege fraudulent misrepresentations

at the motion to dismiss stage, a plaintiff must allege "facts showing that a person or entity (1) made a false representation of or willfully omitted a material fact; (2) had knowledge of the misrepresentation or willful omission; (3) intended to induce [another] to rely on the misrepresentation or willful omission; (4) the other person acted in reliance on that misrepresentation or willful omission; and (5) suffered damages as result of that reliance." *Sundberg v. TTR Realty, LLC*, 109 A.3d 1123, 1131 (D.C. 2015). A defendant's knowledge of a false representation may be inferred when the representation "involves his own business or property as to which he is bound and must be presumed to know the truth." *Howard v. Riggs Nat'l Bank*, 432 A.2d 701, 707 (D.C. 1981). In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. D.C. Super. Ct. R. Civ. P. 9(b); *Pyles v. HSBC Bank U.S.A., N.A.*, 172 A.3d 903, 907 (D.C. 2017).

Plaintiff alleges that when Mr. Ragimov visited her home on September 14, 2016 to deliver the Notification Form, he stated that the construction project carried insurance which would provide full coverage for any damage done to Plaintiff-Property. Compl. ¶¶ 34, 35, 45. Plaintiff indicates that Defendants did not, in fact, have this insurance. *Id.* ¶ 55. Plaintiff reasons that Mr. Ragimov knew that no such insurance existed at the time. *Id.* Based on the facts in the Complaint, the Court can infer this knowledge because Mr. Ragimov is the owner and agent of Defendant 3644 and so is presumed to know the truth. *See Howard*, 432 A.2d at 707. Plaintiff asserts that Mr. Ragimov made these representations with the intent to induce her to sign the required Notification Form and forgo her right to object to the construction. Compl. ¶¶ 40, 44, 45. Plaintiff further alleges that she relied on this misrepresentation, consented to the construction without raising an objection, and entered into the September Contract. *Id.* ¶¶ 50–

54. Finally, Plaintiff alleges that, as a result of this reliance, her property has been damaged and Defendants have not financially covered the damage. *Id.* ¶¶ 103, 135.

The Court finds that Plaintiff has alleged these facts with sufficient particularity to state a plausible claim for fraudulent misrepresentation upon which relief could be granted. Accordingly, the Court denies Defendants' Motion with respect to Count IV.

E. Violation of D.C. Municipal Regulations § 12A-3307A (Count VI)

Plaintiff alleges that Defendants violated District of Columbia Municipal Regulations ("DCMR") § 12A-3307A, which is a supplement to the District of Columbia Construction Code. D.C. Code Mun. Regs. tit. 12A § 3307A. However, Defendants allege that this claim is not one upon which relief can be granted because the Construction Code does not allow for private causes of action.

When a statute does not explicitly create a private right of action, a court can, at times, find that a statute creates an implied private right. *Coates v. Elzie*, 768 A.2d 997, 1001 (D.C. 2001). The District of Columbia Court of Appeals uses a three part test to determine whether a statute implies a private right of action: (1) "is the plaintiff one of the class for whose *especial* benefit the statute was enacted;" (2) "is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one;" and (3) "is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff." *Id.* (italics in original). Pursuant to this test, the Court of Appeals has determined that the Construction Code does not provide, or intend to provide, for a private right of action. *Chang v. D.C. Dep't of Regulatory & Consumer Affairs*, 604 F. Supp. 2d 57, 65–66 (D.D.C. 2009). In *Chang*, the court found that, despite the finding that the plaintiff was likely part of the class for whose benefit the statute was created, there was no indication of any legislative intent to create a

private right of action, and the statute did not suggest that a private action was appropriate. *Id.* at 65. For these reasons, the court dismissed the plaintiff's claim under the Construction Code. *Id.* at 66 ("The Court will not imply a private right of action where, as here, it is doubtful that such a remedy was intended to accompany the statute or conceive of as part of the legislative scheme.").

Here, Plaintiff claims that Defendants violated a number of provisions within DCMR § 12A-3307A, which requires certain measures be taken to protect adjoining property when carrying out construction. *See* D.C. Code Mun. Regs. tit. 12A § 3307A. These provisions are contained in the Supplement to the Construction Code. While Plaintiff has alleged facts that would support a violation of this provision, the Code does not explicitly or implicitly provide for private right of action. *See Chang*, 604 F. Supp. 2d at 66. As such, the claim is not properly before the Court, and Count VI must be dismissed.

F. Loss of Lateral and Subjacent Support (Count VII)

Defendants assert that there is no such cause of action for loss lateral and subjacent support, however, this assertion is false. A landowner is "strictly liable at common law for injury to a neighbor's unimproved land by landowner's withdrawal of lateral or subjacent support, but liable only for negligence for damage to improvements which would not have occurred if neighbor had not improved his land." *Levy v. Schnabel Foundation Co.*, 584 A.2d 125, 1256 (D.C. 1991); *see also Levi v. Schwartz*, 95 A.2d 322, 326 (Md. 1953) ("It is an established principle of law that every owner of land has the right to lateral support from the adjoining soil, and if a landowner removes the soil from his own land so near the land of his neighbor that his neighbor's soil will crumble away under its own weight, he is liable for damages so occasioned.").

Plaintiff explains that, as adjoining properties, Plaintiff-Property received lateral and subjacent support from Defendant-Property. Compl. ¶ 158. She indicates that the support has been damaged by the movement of the wall during Defendants' intentional or negligent construction. *Id.* This resulted in a "significant shift in Plaintiff-Property foundation causing a tilt and imbalance in all three floors of Plaintiff-Property." *Id.* ¶ 89. The Court determines this is sufficient to state a plausible claim for a loss of lateral of subjacent support, and will not dismiss Count VII at this stage.

G. Emotional Distress (Count VIII)

Plaintiff has failed to plausibly allege a claim for intentional infliction of emotional distress ("IIED"), but has plausibly alleged a claim for negligent infliction of emotional distress ("NIED").

To establish a prima facie case for IIED, a plaintiff must show (1) extreme and outrageous conduct on the part of the defendant which (2) either intentionally or recklessly (3) causes the plaintiff severe emotional distress. *Larijani v. Georgetown Univ.*, 791 A.2d 41, 44 (D.C. 2002). Courts have found liability for IIED only when the conduct is "so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* (quoting *Homan v. Goyal*, 711 A.2d 812, 818 (D.C. 1998).

To state a claim for NIED under the "zone of physical danger" rule, a plaintiff must allege that the defendant's conduct caused the plaintiff to be in danger of physical injury, and as a result, plaintiff feared for his own safety. *Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 796, 799 (D.C. 2011) (explaining that District of Columbia Courts have permitted claims to proceed only in instances where there was evidence that the plaintiff's concern for her own

safety or health arose from being in a "zone of physical danger" created by defendant's negligent conduct). Although the emotional distress must be serious and verifiable, the plaintiff need not experience a physical manifestation of the mental injury. *Id.* at 797.

Here, Plaintiff's factual allegations do not rise to the level of IIED. The Complaint alleges that Defendants disregarded municipal regulations meant to safeguard her property, and conducted excavation and construction which resulted in the subsequent damage to her home. *See generally* Compl. Although Plaintiff states that Defendants' acts and omissions were intentional and reckless, none of the conduct alleged in the Complaint rises to the high bar of "atrocious" and "utterly intolerable in a civilized community" required to state a claim for IIED. *Id.* ¶ 161; *Larijani*, 791 A.2d at 44.

However, Plaintiff has alleged sufficient facts to establish a prima facie case for NIED. The Complaint alleges that on August 10, 2017, the Plaintiff heard emergency sirens, which was followed by a fire marshal ordering Plaintiff and her family to evacuate the home immediately because of an imminent threat of a gas explosion and collapse of her property. Compl. ¶¶ 76–78. Present in the neighborhood because of the potential emergency were Department of Homeland Security Management Agency, D.C. Fire and Emergency Medical Service Department, an official from the Office of the Mayor, DCRA officials, police cars and officers, and fire trucks. *Id.* ¶ 81. The Court finds that these allegations plausibly establish that Plaintiff was in the "zone of physical danger" in which she had a legitimate fear for her safety. *See Hedgepeth*, 22 A.3d at 796. Taking the Complaint as true, the Plaintiff also alleges facts sufficient to establish that this zone of danger was caused by Defendants' negligence. Plaintiff asserts that the DCRA's investigation determined that the potential gas explosion and collapse of her property were due to

Defendants' illegal and unauthorized excavation and demolition work at Defendant-Property. Compl. ¶ 83.

Therefore, the Court finds that Plaintiff has stated a claim for NIED, and denies Defendant's request to dismiss Count VIII.

H. Trespass (Count IX)

Plaintiff has alleged sufficient facts to establish a claim for trespass. The tort of trespass is defined as an invasion or unauthorized entry of a person or thing onto property that results in interference with the property owner's possessory interest therein. *Sarete, Inc. v. 1344 U St. Ltd. P'ship*, 871 A.2d 480, 490 (D.C. 2005); *Carrigan v. Purkhiser*, 466 A.2d 1243, 1243 (1983). Surrounding jurisdictions have determined that causing the entry of objects or substances, including water, upon another's land constitutes a trespass. *See Kurpiel v. Hicks*, 284 Va. 347, 354–55 (2012) ("Any physical entry upon the surface of the land constitutes such an invasion, whether the entry is walking upon it, flooding it with water, casting objects upon it, or otherwise."); *JBG/Twinbrook Metro Ltd. P'ship v. Wheeler*, 697 A.2d 898, 909 (Md. 1997) (rationalizing that when an adjacent property is invaded by an inanimate object, the defendant must have some connection with or some control over that object).

Here, Plaintiff alleges that Defendants, through their intentional acts and omissions during excavation, struck an underground water pipe, and on July 30, 2017, her basement flooded with water. Compl. ¶¶ 163, 61, 66. Once D.C. Water investigated, they determined that the source of the flood was the water pipe damaged by Defendants. *Id.* ¶ 66. While Defendants seek to dismiss this claim and incorrectly cite law pertaining to criminal trespass, the Court find that Plaintiff's allegations, taken as true, establish a claim for the tort of trespass. *See* Defs.'

Mot. Dismiss at 17–18; *Sarete, Inc.*, 871 A.2d at 490. Accordingly, the Court will not dismiss Count IX at this stage.

I. Private Nuisance (Count X)

Defendants assert that Plaintiff's private nuisance claim is not one upon which relief can be granted, and the Court agrees. A private nuisance is a substantial and unreasonable interference with private use and enjoyment of one's land, "for example, by interfering with the physical condition of the land, disturbing the comfort of its occupants, or threatening future injury or disturbance." *Tucci v. District of Columbia*, 956 A.2d 684, 686 (D.C. 2008). As an independent tort, claims of nuisance have not been viewed favorably by District of Columbia courts. *Id.* Nuisance is "not a separate tort in itself but a type of damage, so that a plaintiff seeking to recover on a nuisance theory must allege and prove some sort of tortious conduct." *Ortberg v. Goldman Sachs Grp.*, 64 A.3d 158, 167 (D.C. 2013). As such, an action for private nuisance "can lie in circumstances in which no other tort doctrine provides a basis for liability." *Id.* at 172.

Plaintiff premises her private nuisance claim on the damage done to her property during the construction and excavation that took place on Defendant-Property. *See generally* Compl. Specifically, the flood in her basement, the cracks and structural damage to her property, the shift in the foundation of her property, the risk of a gas explosion, and the resulting emotional distress and expenses that went into repairing the damage. *See* Pl.'s Opp'n at 22–23. However, this alleged conduct serves as the basis for her negligence, emotional distress, and trespass claims. Compl. ¶¶ 137–45, 160–61, 162–65. Since these other tort doctrines provide a basis for liability, Plaintiff's private nuisance claim cannot lie and Count X must be dismissed at this stage. *Ortberg*, 64 A.3d at 172.

J. Violation of D.C. Consumer Protection Procedures Act § 28-3904 (Count XI)

Count eleven of the Complaint alleges that Defendants violated various provisions of the CPPA, in the course of activities on Defendant-Property. Compl. ¶¶ 169–173. However, Defendants insist that Plaintiff does not have standing to bring claims under the CPPA because she is not a "consumer." Mot. Dismiss at 19–20.

CPPA section 28-3904 establishes that "It shall be a violation of this chapter for any person to engage in an unfair and deceptive trade practice, whether or not any consumer is in fact misled, deceived, or damaged thereby, including to . . . violate any provision of title 16 of the District of Columbia Municipal Regulations." D.C. Code § 28-3904 (dd). Title 16 provides, in part, that Construction Code violations include: "failure to obtain required permit; working without a required permit;" "failure to protect adjoining property owner from damage;" and "allowing/creating unsafe structures, conditions or equipment." D.C. Code Mun. Regs. tit. 16 § 3306.1.1.

Under the CPPA, a "consumer may bring an action seeking relief from the use of a trade practice in violation of a law of the District." D.C. Code § 28-3905(k)(1)(A). The CPPA defines a "consumer" as "a person, who, other than for purposes of resale, does or would purchase, lease (as a lessee), or receive consumer goods or services. . . ." D.C. Code § 28-3901(a)(2)(A). Whether a plaintiff is in the class of plaintiffs who may sue under the CPPA is determined by two inquiries: "whether he is within the zone of interest protected by the CPPA and whether his injury is "proximately caused by violations of the statute." *Mann v. Bahi*, 251 F. Supp. 3d 112, 120 (D.D.C. 2017). The CPPA has long been construed and applied liberally to promote its purpose, and the main consideration is whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits. *Id.*; *Sundberg v. TTR Realty, LLC*, 109 A.3d

1123, 1129 (D.C. 2015); *see* D.C. Code § 28-3901(b)(1) (recognizing that the purpose of the CPPA is to "assure that a just mechanism exists to remedy all improper trade practices and deter the continuing use of such practices.").

Here, Plaintiff has alleged sufficient facts for the Court to conclude that she is a "consumer" in the class of plaintiffs who may sue under the CPPA. Applied liberally, Plaintiff is within the zone of interest protected by the CPPA because she is a person who *would* purchase or lease a property "flipped," or renovated, by Defendants. D.C. Code § 28-3901(a)(2)(A); *Mann*, 251 F. Supp. 3d at 120. Based on the Duty Officer Report issued by the DCRA on August 15, 2017, Defendants failed to obtain required permits, exceeded the scope of their permit, failed to protect adjoining property owners from damage, and allowed and/or created unsafe structures, all in violation of Title 16. Ex. G. Plaintiff has alleged proximate causation in that her injury, the substantial damage to her home, was as a result of these violations. Compl. ¶¶ 83–90; D.C. Code § 28-3904 (dd); *Mann*, 251 F. Supp. 3d at 120.

Construed in the light most favorable to Plaintiff, and due to the severity of her damages resulting from the alleged violations of the CPPA, the Court determines that Plaintiff does have standing to bring her claims under the Act, and has alleged sufficient facts to establish that Defendants violated the Act. As such, the Court will not grant Defendant's motion to dismiss Count XI.

K. Declaratory Judgment and Injunctive Relief (Count XIII)

Count thirteen of the Complaint seeks a declaratory judgment in favor of Plaintiff to establish that the wall shared by Plaintiff-Property and Defendant-Property constituted an easement. A party wall "is a wall that is built with the objective of supporting, or separating, adjoining properties." *Hefazi v. Stiglitz*, 862 A.2d 901, 911 n. 1 (D.C. 2004). The erection of a

party wall by one of the two adjoining owners leads to the establishment of a mutual easement or of servitude and benefit. *Kreuzer v. George Washington Univ.*, 896 A.2d 238, 243 (D.C. 2006). A party may seek a declaratory judgment in order for a court to establish the existence of an easement. *See Hefazi*, 862 A.2d at 909–10 (seeking judicial declaration of easement concerning shared party wall and associated rights). For a declaratory judgment to be proper, there must be a case or controversy between parties "having adverse legal interest, of sufficient immediacy and reality to warrant a declaratory judgment." *McIntosh v. Washington*, 395 A.2d 744, 754 n. 4 (D.C. 1978).

Here, Plaintiff alleges she is in possession of Plaintiff-Property and entitled to all rights and easements belonging to the property, and Defendants are the fee simple owners of Defendant-Property. Compl. ¶¶ 181–82. The two properties are adjacent to one another and share a wall. *Id.* ¶ 183. Plaintiff asserts that this shared wall constitutes an easement, which Defendants damaged during construction. *Id.* ¶ 184. Although Defendant views that this claim for declaratory judgment should be dismissed because there is exists no "case or controversy," Plaintiff's assertion that Defendants have caused damage to the wall and refuse to repair it suggests otherwise. Mot. Dismiss at 22–23; Compl. ¶ 185. Taken as true, Plaintiff's allegations clearly establish a controversy relating to the damage to her property. These allegations are sufficient to establish a claim for declaratory judgment regarding the existence of an easement at the shared wall, and the associated rights. For that reason, the Court will not dismiss Count XIII at this stage.

IV. CONCLUSION

In sum, the Court finds that Plaintiff has failed to state claims against the LLC Defendants upon which relief can be granted, and dismisses the LLC Defendants from this case.

Plaintiff has also failed to state claims for a violation of District of Columbia Municipal Regulation 12A § 3307A.1 and private nuisance upon which relief can be granted. Therefore, the Court finds good Cause to grant Defendants' Motion regarding these claims and dismisses Counts VI and X. The Court denies Defendants' Motion regarding all other counts and Mr. Ragimov's personal liability.

Accordingly, it is this 24th day of September, 2019, hereby,

ORDERED that Defendants' Motion to Partially Dismiss Complaint shall be **GRANTED IN PART** and **DENIED IN PART**; and it is further

ORDERED that Counts VI and X of the Complaint shall be **DISMISSED**; and it is further

ORDERED that all claims against Atel Development, LLC, 1271 Morse Street LLC, 1220 Potomac Avenue LLC, 3 S Street NW LLC, 58 T Street LLC shall be **DISMISSED**.

IT IS SO ORDERED.

Judge Yvonne Williams

Date: September 24, 2019

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