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By NYSCEF

Hon. William Giacomo, J.S.C.
Westchester County Courthouse
111 Dr. Martin Luther King Jr. Blvd, Courtroom 102
White Plains, New York 10601

Re: *City of New Rochelle v. Flavio La Rocca, Maria La Rocca, Flavio LaRocca & Sons, Inc. a.k.a. F. LaRocca & Sons, Inc. and FMLR Realty Management LLC*, Index No. 54190/2016
File No: 07367.00101

Dear Judge Giacomo:

We represent the plaintiff, City of New Rochelle, in this matter. We write to request permission to file a sur-reply to address new arguments and issues raised in Defendant Flavio LaRocca's Reply Affidavit in further support of the Defendants' motion for summary judgment.

First, in his Reply Affidavit, Mr. La Rocca attempts to raise advice of counsel, either as a complete defense to trespass and encroachment, or as a mitigating factor against damages. *See* Doc. No. 198 at ¶¶6, 7, 9. Defendants should not be permitted to raise an advice of counsel defense in this matter where it was not pleaded and Defendants asserted attorney-client privilege in objection to discovery. It is well established that the privilege cannot be used as a sword and shield. *See Green v. Montgomery*, 95 N.Y.2d 693 (2001); *Village Bd. of Pleasantville v. Rattner*, 130 A.D.2d 654 (2d Dep't 1987). Having denied discovery on the contents of the advice Defendants received from their attorneys, Defendants cannot now make untested assertions about the content of that advice. If the City had notice of this defense, it could have pursued discovery which may have included interrogatories or a deposition of Defendants' counsel. Ultimately, Defendants' purported reliance on advice of counsel is irrelevant to the City's claims.

Second, Mr. La Rocca's Reply Affidavit alleges that the City has engaged in "harassment tactics" since he filed his opposition to the City's motion for summary judgment, including purported harassment in August 2022 when City police responded to complaints about Defendants' property. *See* Doc. No. 198 at ¶¶13-18. The City maintains that any "red herring" allegations of harassment are baseless and irrelevant to the issues raised by the motion, *i.e.* whether Defendants' actions in May 2015 constituted trespass, negligence, or nuisance, and whether their contractors' yard encroaches into East Street.

Accordingly, the City seeks permission to file a short sur-reply to address the new arguments and

allegations made in Defendants' reply affidavit.

Respectfully yours,



Peter A. Meisels

cc (by NYSCEF):

Katherine Zalantis, Esq.