

<b>Archstone v Tocci Bldg. Corp. of N.J., Inc.</b>
2010 NY Slip Op 32615(U)
September 23, 2010
Supreme Court, Nassau County
Docket Number: 001018/2008
Judge: Ira B. Warshawsky
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

**SHORT FORM ORDER****SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NASSAU****PRESENT:****HON. IRA B. WARSHAWSKY,  
Justice.****TRIAL/IAS PART 8**

---

ARCHSTONE f/k/a ARCHSTONE-SMITH OPERATING  
TRUST AND TISHMAN SPEYER ARCHSTONE-SMITH,  
L.P. f/k/a ASN ROOSEVELT CENTER, LLC,

Plaintiff,

-against-

TOCCI BUILDING CORPORATION OF NEW JERSEY,  
INC., LIBERTY MUTUAL INSURANCE COMPANY,  
PERKINS EASTMAN ARCHITECTS, INC. and  
ELDORADO STONE, LLC,

Defendants.

Main Party Action

INDEX NO.: 001018/2008  
MOTION DATE: 07/21/2010  
MOTION SEQUENCE: 016

---

TOCCI BUILDING CORPORATION OF NEW JERSEY, INC.,

Third Party Plaintiff,

-against-

ADJO CONTRACTING CORPORATION, AMERICAN  
ENGINEERING SERVICES, P.C., APRO CONSTRUCTION  
GROUP, ATLAS COMFORT SYSTEMS, USA, L.P.,  
d/b/a ATLAS AIR CONDITIONING, BUILDERS HARDWARE,  
CLEM'S ORNAMENTAL IRON WORKS, DAVINCI  
CONSTRUCTION OF NASSAU, INC. d/b/a DAVINCI  
CONSTRUCTION, FOUR SEASONS INSULATION CORP.,  
HAVANA CONSTRUCTION CORP., HOUSTON  
STAFFORD ELECTRICAL CONTRACTORS, L.P., d/b/a  
HOUSTON STAFFORD ELECTRIC, KLEET LUMBER  
COMPANY, KNIGHT WATERPROOFING COMPANY, INC.,  
MANNING PLUMBING AND HEATING CORP.,  
METRO PAINTING, M.I. CONCRETE CORP., MID-ATLANTIC  
STONE, INC., PATTI ROOFING, LLC, SIDNEY B. BROWNE &  
SON, LLP, SIPALA LANDSCAPE SERVICES, INC., STAT FIRE  
SUPPRESSION, INC., SUPERSEAL MANUFACTURING CO.,  
THREE B'S PLUMBING HEATING AND AIR CONDITIONING

Third-Party Action

CORP. and UNIVERSAL FOREST PRODUCTS,  
Third Party Defendants.

---

FJR CONSTRUCTION, INC.,  
Plaintiff,

Joined Lien Action # 1

-against-

INDEX NO.: 005292/2007

ARCHSTONE-SMITH COMMUNITIES, LLC,  
TOCCI BUILDING CORPORATION OF NEW  
JERSEY, INC., et al.,  
Defendants.

---

DAVINCI CONSTRUCTION OF NASSAU, INC.,  
Plaintiff,

Joined Lien Action # 2

-against-

INDEX NO.: 006064/2007

ARCHSTONE-SMITH COMMUNITIES, LLC,  
TOCCI BUILDING CORPORATION OF NEW  
JERSEY, INC., et al.,  
Defendants.

---

TOCCI BUILDING CORPORATION OF NEW JERSEY,  
INC.,

Second Third-Party Action

Second Third-Party Plaintiff,

- against -

INDEX NO.: 001018/2008

MG CONSULTING SERVICES, INC., RMS  
ENGINEERING and ROBINSON, MULLER &  
SCHIAVONE ENGINEERS, P.C.,

Second Third-Party Defendants.

---

---

SIPALA LANDSCAPE SERVICES, INC.,

Fourth-Party Plaintiff/  
Third-Party Defendant,

Fourth-Party Action

-against-

INDEX NO.: \_\_\_\_\_

THOMAS BALSLEY ASSOCIATES LANDSCAPE  
ARCHITECTURE, PLLC, HINES & SAFFARESE  
LANDSCAPING, INC., JD CONSTRUCTION &  
LANDSCAPING, INC. and JOHN DIORIO  
LANDSCAPING, INC.,

Fourth-Party Defendants.

---

The following papers read on this motion:

Notice of Motion to Reargue .....	1
Affirmation in Support of Tocci’s Motion to Reargue .....	2
Reply Affirmation of Robert F. Silkey to Motion to Reargue by Tocci .....	3
Reply Affirmation in Further Support of Tocci’s Motion to Reargue .....	4
August 12, 2010, Amended Order .....	5

**PRELIMINARY STATEMENT**

Third party plaintiff, Tocci Building Corporation of New Jersey Inc. (“Tocci”), has moved pursuant to CPLR 2221 for an Order granting leave to reargue this Court’s Order that granted third party defendant Universal Forest Products (“UFPI”) motion for summary judgment, and upon granting leave to reargue, denying UFPI’s motion for summary judgment. The Court issued an Amended Order dated August 12, 2010, and provided the parties the opportunity to make further submissions thereafter. Neither party made any additional submissions. The Court, in rendering this Order, relied upon the above submitted documents.

**BACKGROUND**

Tocci acted as construction manager and/or general contractor in the construction of the Archstone apartment complex. Tocci entered into a contract with UFPI, whereby UFPI would supply prefabricated wood wall panels. After completion of the overall Archstone project,

problems related to water infiltration were discovered at the Archstone site. Tocci brought a third-party action against various suppliers and/or subcontractors including UFPI.

UFPI is a manufacturer of wood and wood alternative products used in the construction industry. UFPI's involvement in the project was limited to the manufacture and delivery of wood products. UFPI delivered these wall panels to the Archstone site, but had no involvement in the installation of any of the panels. UFPI began delivering the panels on July 30, 2004 and made its final delivery, at the latest, on September 4, 2005. UFPI was paid in full by Tocci for all materials delivered.

Davinci Construction of Nassau, Inc. ("Davinci") was a subcontractor and/or agent of Tocci for the Archstone project. Davinci specified the specific locations at the Archstone site for UFPI to make its deliveries. Davinci accepted these UFPI deliveries in proper quantity and without patent defects. The Wall Panels were then erected and installed to the complex by Tocci's agents and subcontractors. As part of the installation process, Tocci's subcontractors made changes to the panels, including adding holes through which piping would pass. UFPI was not involved in the installation of the wall panels, and to the extent UFPI had representatives at the site, they acted only to schedule the delivery of wall panels and resolve any quantity, quality or dimension concerns. While UFPI claims there were no complaints of defects during the construction process, Tocci claims it advised employees of UFPI of necessary changes to wall panels to conform to contract specifications. UFPI claims Tocci has not submitted proof that UFPI's panels were defective when they left UFPI's possession and control. Tocci claims gaps existed in and between UFPI's wall panels.

Tocci contracted with UFPI for the manufacture and supply of prefabricated wall panels. Each prefabricated wall panel consisted of oriented strand board and dimensional sized lumber. Oriented strand board is referred to in the industry as "OSB" and is similar to plywood. Varying sizes of OSB and dimensional lumber were manufactured and put together according to the contract specifications. Sharon Lobo (Tocci's expert) submitted a supplemental affidavit which explained that UFPI's prefabricated wall panels are the result of a manufacturing process which attaches smaller OSB panels in a manner that effectively creates a larger OSB panel. These larger prefabricated panels are what was shipped to the Archstone site. These prefabricated panels were then installed at the Archstone site, often adjacent to other prefabricated wall panels. Tocci's

subcontractors installed these larger panels. Tocci claims these larger panels contained gaps between the smaller OSB panels, which were greater than 1/8"; and such gaps were not called for in the contract specifications or drawings. UFPI claims any gaps greater than 1/8" exist as a result of Tocci's installation process, and are not a result of UFPI's manufacturing process.

More than two years after UFPI's final delivery, On November 21, 2007, Tocci first became aware of water infiltration problems at Archstone. In a November 30, 2007 letter, Tocci notified UFPI of these problems. This letter gave notice to UFPI that these water infiltration problems could have been caused, in part, due to gaps in, or between, the panels UFPI delivered.

Tocci inspected the project between April 2008 and October 2009. Tocci came to possess many photographs showing UFPI's panels after the exterior of the complex had been removed. Tocci retained Sharon Lobo to inspect Archstone. She is a principal of Erwin Lobo & Bielinski PLLC, which is a forensic architectural and engineering firm.

Sharon Lobo submitted two affidavits. In her first affidavit she states she observed "several gaps in the OSB sheathing both at openings and between sheets of OSB." She referred to Exhibit L and Exhibit M of Tocci's exhibits which she claims contain photos from several Archstone buildings.

She concluded, based on her personal observations and professional experience, that some of the documented gaps resulted from the wall panel manufacturing process, not field modifications. Her supplemental affidavit provides a more thorough discussion of the panelized construction method. Attached are copies of detailed wall panel manufacturing specifications, additional photos, and Sharon Lobo's curriculum vitae. In her supplemental affidavit she notes that "while some gaps between the OSB appear to be a result of field modifications, certain gaps are a result of how the wall panels were manufactured, not a result of field installation or modifications."(Supp. Affidavit Para. 8, lines 1-3) She further notes that "in certain instances the only cause of these gaps was the spacing of the pieces of OSB during panel manufacture."(Supp. Affidavit Para. 9, lines 1-2) She says the gaps exist between individual pieces of OSB that were affixed to framing during the manufacturing process and not in the field, and that these exceeded 1/8 of an inch. She points to attached exhibits E and F to show six specifications and corresponding six photographs in which this exhibited condition was seen. Neither of Sharon Lobo's affidavits mention or suggest a hidden defect in UFPI's wall panels.

Over the objections of UFPI and Archstone's Attorneys, the Court considered the document titled Executive Summary, Draft Report of Water Leaks and Damage prepared by Steven J. Wessling Architects, Inc. ("Wessling Report"). John Ducat (Plaintiff's attorney) submitted an affirmation objecting to the Court's consideration of the Wessling Report because Mr. Wessling is not their expert, they do not intend to call Mr. Wessling at trial, and they do not believe his report is admissible at trial. The Wessling report indicates that both the manufacturer and the building code required gaps of 1/8" between plywood which allows for expansion and contraction of the plywood. The report also notes the observation of gaps "much wider" than 1/8". Exhibit L of Tocci's exhibits contain photographs that appear to have been taken by the Wessling Firm.

In support of the instant motion to reargue, Tocci submitted, inter alia, a report from Mark Williams dated November 4, 2008. (Notice of Motion to Reargue, Exhibit G). Tocci does not direct the Court as to where in the record this document was previously submitted. The court will therefore treat this document as one introduced for the first time on this motion. Tocci submitted this Williams report to support its contention that Archstone claims gaps in UFPI's wall panels are a defect responsible in part for causing water damage.

Tocci's motion to reargue is based on its contention that the Court misapprehended claims made by Tocci and that the Court misapprehended the applicable law by shifting the burden of proof to Tocci despite UFPI's failure to submit competent evidence in support of its motion for summary judgment.

Tocci argues that it believes that the Court "overlooked the fact that it is [Archstone (first-party plaintiffs)], not Tocci, that claims the gaps in and between the wall panels were defects." (Affirmation in Support of Tocci's Motion to Reargue, para 3, lines 1-4). Further, Tocci makes clear that "[i]n no document submitted to this Court has Tocci, or its experts, ever adopted Archstone's allegations regarding any claimed defects at the [Archstone site]." (*Id.* at pg. 6, lines 4-6).

"All of Archstone's reports indicate that, at trial, Archstone will allege that gaps in the OSB panels manufactured by UFPI constitute defects contributing to water damage. Although Tocci will vigorously defend against such claims, should a jury credit Archstone's theory of construction defects causing damage at

Westbury, the party responsible for those defects will no longer be a party to the action because of the Court's finding that the alleged defects did not cause any water damage at the [Archstone site]." (Id at para 4, lines 4-9).

### DISCUSSION

Under CPLR 2221(d), a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include matters of fact not offered on the prior motion."

A defendant who moves for summary judgment to dismiss a plaintiff's cause of action must support the motion with an affidavit. CPLR 3212(b). "The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show ... that the cause of action ... has no merit." *Id.* "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Id.*

Tocci's arguments in its reargument motion are directed at Tocci's cause of action for breach of warranty. The court will therefore grant reargument, but will only reconsider its ruling as it relates to Tocci's cause of action for breach of warranty.

#### Summary Judgment Burden of Proof

"As a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense." (*Calderone v. Town of Cortlandt*, 15 A.D.3d 602 [2d Dept 2005]). *Calderone* involved a vehicle accident that the plaintiff alleged was caused by a defective or dangerous road condition. The defendant moved for summary judgment on the basis that the condition of the road was not a proximate cause of the accident. *Id.* The defendant "pointed to alleged contradictions and gaps in the plaintiff's proof, but failed to submit prima facie evidence demonstrating the roadway was in a reasonably safe condition." *Id.* Because the defendant relied solely on contradictions and gaps in the plaintiff's proof, the burden never shifted to the plaintiff to demonstrate that triable issues of fact do exist, and the Court ruled the defendant's motion for summary judgment was properly denied. *Id.*



### Breach of Warranty

UFPI submitted two affidavits of Kevin Dicello in support of its motion for summary judgment. Dicello's responsibilities include supervising UFPI manufacturing and assembly facilities. DiCello made many statements based on his personal knowledge that support UFPI's contention that there was no defect, including those that follow. The wall panels supplied by Tocci were manufactured "according to drawings and specifications for the Project and purchase orders received from Tocci" and when the wall panels left UFPI's control, "they met all required specifications and were fit for their intended purposes." (Dicello Affidavit, para's 11 & 27). UFPI only became aware of water infiltration problems approximately 30 months after the last delivery. (*Id.* at 23). UFPI's involvement in the construction project was limited to supplying wall panels, and photos received from Tocci showed wall panels that were "cut and altered ... to fit existing field conditions at the project" by "whoever erected the Wall Panels." (*Id.* at 26). "Alleged 'large gaps' such as those in photographs would be solely an installation issue, not a manufacturing issue." (DiCello Reply Affidavit, para 3). "Each and every irregular cut, hole or opening depicted in the photographs referenced in Tocci's opposition were made by Tocci's other subcontractors." (*Id.* at para 5). Had there been defects, UFPI would have been notified. (*Id.* at para 9). "All work was done and all materials were manufactured according to the plans, specifications, and approved shop drawings." (*Id.* at para 9).

Through DiCello's affidavits, UFPI submitted admissible evidence that there was no defect in UFPI's wall panels. UFPI met its burden to demonstrate the merits of its defense, by submitting prima facie evidence that the wall panels supplied by UFPI were not defective. Therefore, the burden to demonstrate triable issues of fact shifts to Tocci on the breach of warranty cause of action.

To succeed on a breach of warranty claim, Tocci has the burden to demonstrate a defect in UFPI's products. After examining Tocci's affirmations in support of this motion, it has become apparent that the Court misapprehended Tocci's position on this issue. While the court interpreted Tocci's pleadings and supporting documents as containing claims that alleged defects existed in UFPI's products this is not accurate. "In no document submitted to this Court has Tocci, or its expert, ever adopted Archstone's allegations regarding any claimed defects at the [Archstone site]." (Affirmation in Support of Tocci's Motion to Reargue, pg 6, para 8, lines 4-6).

Tocci’s expert, Lobo, “has never opined that the alleged defects contributed to or facilitated the damage that Archstone claims occurred at the Archstone [site].” (*Id.* at pg. 6-7, para 8). In sum, Tocci has not affirmatively claimed that a defect existed. Tocci’s position is, in effect, that Archstone claims there is a defect, and based on Archstone’s claims, there is a triable issue of fact requiring denial of UFPI’s motion.

Given Tocci’s position, which doesn’t affirmatively claim there is a defect, it is clear that there can be no triable issue of fact on the issue of defect.

Even if Tocci could demonstrate a triable issue of fact on the issue of a defect through Archstone’s experts claims, Tocci relies entirely on inadmissible evidence. The Court cannot find any evidence that the Williams report was introduced prior to the instant motion and therefore this report should not be considered on this motion to reargue.(See Notice of Motion to Reargue, Exhibit G). With respect to the Wessling report, John Ducat(Archstone’s attorney) represented in an affirmation to the Court, on the summary judgment motion, that “Mr. Wessling is not their expert, they do not intend to call Mr. Wessling at trial, and they do not believe his report to be admissible at trial.” (See Amended Order, pg. 7, lines 10-13). To the extent Archstone claims UFPI’s panels were defective, Tocci has not submitted admissible evidence to support the existence of these claims. Tocci did not meet its burden, as the non-movant to produce evidence in admissible form or demonstrate an acceptable excuse for failing to meet this strict requirement. (See *Friends of Animals v. Associated Fur Mfrs.*, 46 N.Y. 2d 1065 [1979]).

For the foregoing reasons, the Court adheres to its prior decision granting Universal Forest’s summary judgment motion dismissing Tocci’s third-party action against Universal Forest.

This constitutes the Decision and Order of the Court.

Dated: September 17, 2010

  
J.S.C.

**ENTERED**

**SEP 22 2010**

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**