SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon Joan A. Madden PART 11
Justice

Index Number : 109371/2009
KLEINBERG, PAUL
vs.
516 WEST 19TH STREET
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order.

Dated: January 24, 2012

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

FOR THE FOLLOWING REASON(S):

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN PART 11
Justice

Klienberg, Paul

INDEX NO. :

Plaintiff,

MOTION DATE:

- v -

MOTION SEQ. NO.: 008

516 West 19th Street

MOTION CAL. NO.:

Defendant.

The following papers, numbered 1 to ____ were read on this motion to/for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the Memorandum Decision + Order filed under motion Seq. 006

Dated: January 24, 2012

J.S.C.

Check one: [ ] **FINAL DISPOSITION** [X] **NON-FINAL DISPOSITION**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

----------x

PAUL KLEINBERG, CAROL KLEINBERG, MASSY GHAUSI and DENISE DORN,

Plaintiffs, Index Number 109371-2009

-against-

516 WEST 19th LLC, THE J CONSTRUCTION COMPANY LLC, SLCE ARCHITECTS LLP, and THE BOARD OF MANAGERS OF THE WEST 19th STREET CONDOMINIUM,

Defendants.

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516 WEST 19th LLC,

Third-Party Plaintiff, Third-Party Index Number 591008-2009

-against-

I.M. ROBBINS, P.C.,

Third-Party Defendant.

----------x

THE J CONSTRUCTION COMPANY LLC,

Third-Party Plaintiff, Third Party Index Number 590362-2010

-against-

INTERSTATE INDUSTRIAL CORP., FCI CONSULTING CORP., RCI PLUMBING CORP., INTERSTATE DRYWALL CORPORATION, ABCO PEERLESS SPRINKLER CORPORATION, ABSOLUTE ELECTRICAL CONTRACTING CORP., CUSTOM METAL CRAFTERS INC. a/k/a A&S WINDOW PRODUCTS LLC f/k/a CUSTOM METAL CRAFTERS & ERECTORS LLC, GARDEN STATE COMMERCIAL SERVICES, KNS BUILDING RESTORATION CORP., RONALD T. VASS CORP., GRACIANO CORPORATION, CITY ELEVATOR, JANSONS ASSOCIATES INC., DELTA TEST LABORATORIES INC., and JAM CONSULTANTS INC.,

Third-Party Defendants.

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JOAN A. MADDEN, J.:

This action was commenced by the owners of two luxury

penthouse units in a newly-constructed condominium building against the sponsor and the board of managers of the condominium, as well as the general contractor and the architect retained by the sponsor for the construction project (the Project). Plaintiffs seek monetary damages on account of the alleged construction defects in their apartments. The general contractor on the Project, the J Construction Company LLC (J-Con), commenced a third-party action against its many subcontractors.

J-Con now moves for an order granting it summary judgment dismissing plaintiffs' Second Amended Complaint, dismissing the cross-claims asserted against it by the sponsor and board of managers of the condominium, and granting it summary judgment on certain of its cross claims and counterclaims (motion sequence number 006). Defendant SLCE Architects, LLC (SLCE)cross moves to dismiss the claims of the plaintiffs, as well as the cross claims of the sponsor, the general contractor and the various subcontractors.

KNS Building Restoration Corp. (KNS), the roofing subcontractor separately moves for summary judgment dismissing J-Con's third-party claims against it for breach of contract, breach of implied warranty of fitness and merchantability, contribution, indemnification and negligence (motion sequence number 008). KNS's motion engendered other cross motions and oppositions, which are all consolidated herein for disposition.

BACKGROUND

In 2006, 516 West 19th LLC, as the sponsor and developer (the Sponsor), and J-Con, as the general contractor and/or construction manager, entered into a construction management agreement (the CM Agreement) to construct a luxury condominium building in the Chelsea section of Manhattan (the Building). In turn, J-Con entered into trade contracts with various subcontractors, who are third-party defendants in this action. Construction of the Building was substantially completed in or about August 2008, and a temporary certificate of occupancy was issued by the New York City Department of Buildings (DOB) in September 2008. Thereafter, the plaintiffs closed title on their respective penthouse units (collectively, the Units).

After taking title to the Units, plaintiffs began to perform a significant or gut renovation to their respective Units, allegedly without obtaining the approval of the board of managers of the condominium, which is controlled by the Sponsor.[1] During renovation and/or demolition of their Units, plaintiffs allegedly discovered various defects, including substandard electrical and plumbing works, and more importantly, a leaky roof that was installed by KNS, a subcontractor of J-Con. The roof was manufactured by The Johns Manville Company (JMC) and carried a

[1] Unless otherwise indicated specifically, the Sponsor and the board of managers of the condominium will be referred to hereinafter, collectively, as "the Sponsor."

20-year warranty. The offering plan provided not for the JMC roof, which was a built-up roof assembly system, but for a roofing system know as an Inverted Roof Membrane Assembly (IRMA"); however, the Sponsor maintains that it was permitted to make the change.

Plaintiffs notified the Sponsor of such conditions, and retained the engineering firm of Erwin Lobo Bielinski (ELB) as consultants. In April 2009, ELB inspected the Units on several occasions and prepared reports of its findings. Upon hearing the issues raised by plaintiffs, the Sponsor met with them (and ELB) to discuss how to remediate such issues, and, at the same time, told them that gut renovation of the Units was not permitted and that they should cease and desist. In June 2009, various representatives of the Sponsor, J-Con, ELB and KNS discussed the multiple conditions affecting the Building and the Units (including the JMC roofing system) to determine the types of remedial actions to be undertaken.

According to the affidavit of Keith Jacobson, a member of the Sponsor, plaintiffs took steps to disrupt or prevent access to their Units by the Sponsor and J-Con to perform repair work for "a variety of reasons, some of which were likely motivated by genuine concern for their Units and some were likely to gain a tactical advantage ...." Jacobson Affidavit, dated February 16, 2011, ¶ 26. However, the Sponsor also acknowledges that, setting

aside access to the Units, J-Con "at all times had access to the Building roof, which is under the control of [the] Sponsor." *Id.*, ¶ 27. About one week into the repair process, plaintiffs complained to the Sponsor that the repairs were "inadequate and substandard." *Id.*, ¶ 28. On July 1, 2009, plaintiff commenced this action, and sought a preliminary injunction to enjoin the Sponsor and J-Con from making allegedly "substandard" repairs. *Id.*, ¶ 29. By letter dated July 9, 2009, and pursuant to the CM Agreement, the Sponsor demanded indemnity from J-Con and tendered the defense of this action to J-Con. *Id.*, ¶ 30. The Sponsor then retained Gilsanz Murray Stefickek (GMS), as consultants, to ascertain the condition of the JMC roofing system. *Id.*, ¶ 32.

On July 29, 2009, while the Sponsor and J-Con accessed the Units to inspect and repair the electrical and other alleged defects, the Sponsor noticed that "the roof was still leaking," despite J-Con's prior assertion that the roof had been repaired. *Id.*, ¶¶ 31-32. On July 30, 2009, the Sponsor sent a notice to J-Con stating that J-Con was in material breach of its contractual obligation, and demanded that it promptly repair the roof and other defects alleged by plaintiffs. *Id.*, ¶ 33. Several water tests were done in August 2009, which indicated that the JMC roof installed by KNS was still leaking at that time. *Id.*, ¶¶ 35-36.

Based on the water test results, and with input from GMS, J-Con distributed an "action plan" that listed the roof defects and

proposed solutions. Behnke Affidavit,[2] dated December 29, 2010, ¶ 64. In September 2009, GMS issued its "Roof Assessment Report" to the Sponsor, who agreed to share it with J-Con only upon the execution of a confidentiality agreement. *Id.*, ¶¶ 74, 81. Due to the plaintiffs' refusal of access or imposition of conditions of access to their Units for inspection and repair, this Court conducted conferences with the parties so as to resolve their impasse, and on September 24, 2009, issued an order setting forth the terms and conditions of access. *Id.*, ¶ 87. Despite such order and subsequent orders, plaintiffs continued to impose various access conditions upon J-Con and its subcontractors and, as a result, on November 19, 2009, the Sponsor obtained an order to show cause as to why the plaintiffs and their counsel should not be held in contempt of violating the court orders. *Id.*, ¶¶ 95, 132.

By agreement dated November 24, 2009, the Sponsor and the plaintiffs settled their disputes regarding access to the Units as well as the design and construction conditions of the Units (the Settlement);[3] a copy of the Settlement was provided to J-Con in the spring of 2010. *Id.*, ¶¶ 137, 142. Under the Settlement Agreement, the Sponsor agreed to replace the JMC roof with an

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[2] Keith Behnke is J-Con's project manager for the Building.

[3] Due to the Settlement, plaintiffs no longer are pursuing their claims against the Sponsor.

IRMA roof. Pursuant to the Notice of Termination, dated December 9, 2009 (the Termination Notice), the Sponsor terminated J-Con as the general contractor and/or construction manager of the Building. *Id.*, ¶ 145.

While access issues were litigated and attempts to resolve them were made, J-Con filed a motion seeking to dismiss the amended complaint, and plaintiffs cross moved to amend it. By order dated May 18, 2010 (the May 2010 Order), this Court denied J-Con's motion to dismiss plaintiffs' breach of contract and warranty claims,[4] and granted plaintiffs' cross motion for leave to serve a second amended complaint. The Second Amended Complaint asserts causes of action against J-Con for breach of contract (second and third causes of action), breach of express and implied warranties (fifth and sixth causes of action) and against SLCE for breach of contract (third cause of action) and negligence (fourth cause of action).

After engaging in document discovery, which plaintiffs assert is incomplete, J-Con made this motion.

DISCUSSION

"'[T]he 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

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[4]The court granted J-Con's motion to the extent of dismissing plaintiffs' negligence claims against and also dismissed those claims that plaintiffs' agreed were duplicative.

of any material issues of fact (citation omitted)'" *Ayotte v Gervasio*, 81 NY2d 1062, 1062 (1993); *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853; *see also Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982 (1993).

The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact (*Rinaldi v Holt, Rinehart & Winston, Inc.*, 42 NY2d 369, *cert denied* 434 US 969 (1977); *Indig v Finkelstein*, 23 NY2d 728 (1968). The court is required to examine the evidence in a light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192 [1st Dept 1997]). Summary judgment may be granted only when it is clear that no triable issues of fact exist (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986], and "should not be granted where there is any doubt as to the existence of a triable issue" of fact. *American Home Assur. Co. v Amerford Intl. Corp.*, 200 AD2d 472, 473 (1st Dept 1994).

I. J-Con's Motion Seeking Dismissal of Plaintiffs' Claims against it, and Plaintiffs' Cross Motion for Partial Summary Judgment

J-Con argues that plaintiffs' claims against it must be dismissed as (1) plaintiffs failed to provide access to J-Con and its subcontractors to repair the alleged defects, and (2)

plaintiffs settled with the Sponsor, which has agreed to pay for the repair cost, and therefore they have no money damages for the defective construction claims.

Plaintiffs counter that the motion violates the "single motion rule" and the "law of case doctrine," since J-Con seeks to reargue issues that were decided in the May 2010 Order. Plaintiffs also contend that they did not deny J-Con access but rather conditioned access on obtaining approval for the work from their consultants, and that their conduct was consistent with the condominium's by-laws and governing documents. In their cross motion, plaintiffs seek partial summary judgment as to liability with respect to their breach of contract claim against J-Con.

As a preliminary matter, plaintiffs' reliance on the "single motion rule" or the "law of the case doctrine" is misplaced as J-Con does not dispute that plaintiffs are third-party beneficiaries of the CM Agreement and the warranties contained therein, the issues decided by the court in the May 2010 order. Instead, J-Con argues that plaintiffs are not entitled to damages based on their alleged refusal to provide J-Con with a reasonable opportunity to cure the defects, and based on the settlement with the Sponsor.

These arguments, however, do not provide a basis for granting J-Con summary judgment. While the record reflects that plaintiffs' conduct in refusing or conditioning access has

required this Court to mediate and/or resolve access issues on several occasions, material issues of fact exist as to whether plaintiffs' denial of access was inappropriate under the circumstances and based on the condominium's by-laws, and whether plaintiffs gave J-Con a reasonable opportunity to cure the defects in the roof under the circumstances here.

Moreover, J-Con's reliance on *Pronti v DML of Elmira, Inc.* (103 AD2d 916, 917 [3d Dept 1984]) is misplaced. In that case, the determination that plaintiffs' refusal to permit defendant to repair the alleged defects stripped them of any remedy for the alleged breach of express warranty was made after a jury trial, and the court described the issue of whether there was a breach as "a factual [one] for jury determination." Here, J-Con prematurely seeks relief prior to the completion of discovery and without the benefit of deposition testimony.

J-Con's reliance on *Hole v. General Motors Corp.*, 83 AD2d 715 (3d Dept 1981) is also unavailing as in that case there was uncontroverted evidence that plaintiff rejected the defendant's repeated offers to repair its car under a limited express warranty. In contrast, here, plaintiffs maintain that J-Con was given unlimited access to make the repairs for four months and that plaintiffs only sought to limit its access after they allegedly concluded that J-Con could not make the repairs

competently.[5]

Next, contrary to J-Con's position, it cannot be said at this stage of the litigation that plaintiffs' entry into the Settlement with the Sponsor in which the Sponsor agreed to pay the cost of the roof repair demonstrates, as a matter of law, that plaintiffs have not suffered any damages. In determining damages for breach of a construction contract, it has been held that "an injured party may recover as damages the amount which will put him in as good a position as he would be in if the contract had been performed in accordance with its terms" *Manniello v. Dea*, 92 AD2d 426, 428 (3d Dept 1983). "Application of this rule allows an injured party to recover as damages the cost to complete performance or to remedy defects in such performance." *Id. see also,* O'Malley *v. Campione*, 70 AD3d 595 [1st Dept 2010]).

However, the cost of repair is not the only possible measure of damages and additional and/or consequential damages may be recovered when the injured party suffers such damages and/or when the failure to repair led to damages to the plaintiffs beyond the cost of repair, including increased renovation costs, and/or

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[5]J-Con also argues that Real Property Action and Proceedings Law (RPAPL) § 775 provides a statutory defense to plaintiffs' claims. However, this section pertains to summary landlord tenant proceedings and, in any event, and while there is a defense based on refusal of access, such defense does not eliminate the factual issues here regarding the circumstances surrounding the denial of access.

consequential damages within the contemplation of the parties under the relevant agreement. See, *Board of Educ. Plainview-Old Bathpage Cen. School Dist. v. Celotex Corp.*, 151 AD2d 536 (2d Dept 1989)(holding that school district's damages in action against roofing material supplier for breach of contract when defendant failed to repair roof after being notified of leaks could include the cost of replacing the roof, interior ceiling tiles, damaged text books and lighting fixtures);*but see, Weisberger v. Goldstein*, 242 AD2d 622 (2d Dept 1997)(holding that purchasers of residence not entitled to award of consequential damages because of lack of proof of such damages.).

Likewise, in the event plaintiffs prevail on their breach of warranty claims, they would be entitled not only to damages based on the cost of repair but also consequential damages. *Clearview Concrete Products Corp. v. S. Charles Gherardi, Inc.*, 88 AD2d 461, 469 (2d Dept 1982); *Cohen v. Bratt & Doxley Supply Co.*, 51 AD2d 719 (2d Dept), *appeal denied*, 39 NY2d 706 (1976).

Plaintiffs' cross motion for summary judgment as to liability on the breach of contract claim is also denied. Although plaintiffs are third-party beneficiaries of the CM Agreement, there are triable issues of fact precluding summary judgment in their favor, including issues raised with respect to their alleged refusal to provide reasonable access to the Units for inspection and repair. *Water Street Dev. Corp. v City of New*

York, 220 AD2d 289, 290 (1st Dept 1995), *lv denied* 88 NY2d 809 (1996) ("one who frustrates another's performance cannot hold that party in breach").

Accordingly, J-Con's motion seeking dismissal of plaintiffs' claims against it is denied, and plaintiffs' cross motion seeking partial summary judgment as to liability against J-Con is also denied.

II. J-Con's Motion to Dismiss the Cross Claims of the Sponsor

J-Con also moves for summary judgment dismissing the Sponsor's first (breach of the CM Agreement), second (breach of the Bonus Fee Agreement), fourth (breach of warranty), fifth (professional negligence), seventh (indemnification) and ninth (contribution) cross claims. J-Con's motion also seeks summary judgment in its favor as to its fourth counterclaim/first cross claim (breach of contract: no access), fifth counterclaim/second cross claim (declaratory judgment: no access), as well as its third (improper termination), fourth (breach of covenant of good faith), sixth (accounting for the bonus fees), seventh (breach of fiduciary duty as to the contingency fund) and eighth (specific performance or declaratory judgment as to the contingency fund) cross claims against the Sponsor.

At issue on this aspect of J-Con's motion are sections of the CM Agreement regarding J-Con's guarantee of its work and its right to cure any work found to be defective. Section 19.1 of

the CM Agreement, provides, in relevant part, that:

> (a) Construction Manager hereby guarantees to Owner all Work performed and materials and equipment furnished under [t]his Contract against defects in materials and workmanship for a period of one year from the date of Substantial Completion of the Project, or such longer period as set forth elsewhere in the Contract Documents, provided, however, that is such materials or equipment or portion of the Work are found after Substantial Completion to be defective or not to comply with the Contract Documents, the guarantee period thereon shall commence with the date it is correct to comply with the Contract Documents.
>
> (b) Construction Manager shall, within a reasonable time after receipt of notice thereof, make good any defects in materials, equipment, and workmanship to its Work which may develop within the period for which said materials, equipment, and workmanship are guaranteed, and also make good any damage to other Work caused by such defects at his own expense, and without additional reimbursement under the Contract.

Section 18.1, provides, in relevant part, that:

> If Construction Manager neglects to prosecute the Work properly, omits or fails to perform properly any provision of the Contract Documents...Owner may, without terminating this Agreement, after (3) days prior written notice to the Construction Manager and reasonable opportunity to cure...perform or make good any such portion of the Work and correct any omissions or deficiencies.

J-Con argues that these provisions grant it a right to cure any defects, and that it is entitled to summary judgment as the record establishes that it was not given an opportunity to cure

the defects as it was barred from access, and that the Sponsor improperly interjected itself into the remediation process even though the CM Agreement provides that J-Con solely controls the means of construction, including remediation.

However, even if J-Con made a prima facie showing that it was not given a right to cure the defects at issue, the Sponsor has controverted this showing by providing evidence that J-Con was given unfettered access to perform roof repair work, and that access was only conditioned or denied with respect to the interior of the Units and that such access was not necessary to repair the roof. Whether having access to the roof would be sufficient to carry out the roof repair raises triable issues of fact that may require expert testimony. Notably, J-Con does not argue that it was never given access to the Units; it merely argues that it did not have a reasonable opportunity to perform the repair.

Whether a party was given a reasonable opportunity to cure is not proper for resolution on a pre-discovery motion for summary judgment, because "[w]hat constitutes a reasonable time for performance depends upon the facts and circumstance of the particular case." *Zev v Merman*, 73 NY2d 781, 783 (1988). Moreover, the reasonableness under the circumstances is determined by the "nature and object of the contract, the previous conduct of the parties, the presence or absence of good

faith, the experience of the parties and the possibility of prejudice or hardship to either one, as well as the specific number of days provided for performance." *Id.* In addition, the record indicates that plaintiffs, and not the Sponsor, who conditioned or refused access to the Units, and that the Sponsor commenced proceedings against plaintiffs seeking to gain access.[6]

For the same reason, there are triable issues of fact precluding summary judgment with respect to whether J-Con's termination was proper and/or made in "bad faith." Additionally, the cases cited by J-Con in support of its motion are inapposite as in those cases the record established that the contractor was given no opportunity to correct the defects at issue. *See e.g., Hole v. General Motors Corp.*, 83 AD2d at 717 (the uncontroverted record established that defendant "made several offers of repair and since plaintiff rejected those offers and never presented defendant with opportunity to comply with express warranty, he cannot be heard to complain of a breach").

Furthermore, there are factual questions as to whether J-Con failed to construct a defect-free Building, thus breaching the express and implied warranties given to the Sponsor and the various unit owners, which was an additional basis for the

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[6] Access was required to cure certain DOB violations - which were imposed upon the Building when DOB inspected the Units at plaintiffs' behest - such as replacement of the defective fire-stopping, plumbing, electrical and other installations.

termination, and whether J-Con breached its indemnity obligation under the CMA Agreement by refusing to accept the Sponsor's tender demanding that J-Con defend it in this action.

That being said, however, the claim for professional negligence against J-Con must be dismissed as a party to a contract cannot assert a claim for negligent performance of a service since the failure to perform a contract does not give rise to a tort claim. *Megaris Furs, Inc. v. Gimbel Bros., Inc.*, 172 AD2d 209, 211 (1st Dept 1991).

J-Con also argues that the Sponsor waived its right to recover damages when it entered into the Settlement Agreement with the Plaintiffs and agreed to an entirely different roofing system than that provided for under the CM Agreement before giving J-Con an opportunity to repair it. J-Con notes that under the CM Agreement the roof was subject to a twenty year warranty issued by JMC which certified that it was water tight and free from leaks.

J-Con's position is unavailing as triable issues of fact exist as to whether the defects in the roof could have been corrected without replacing the entire roof. *Compare Thompson v. McCarthy*, 289 AD2d 663 (3d Dept 2001)(granting summary judgment in favor of plaintiffs, where there was "no support in the record for the conclusion that the defects in defendant's work could not be corrected without removing and replacing the...roof"). In this

connection, the Sponsor submits evidence that a JMC service representative inspected the roof in October 2009, and issued a report which stated, inter alia, that water entered the JMC roof through leaks in the HVAC equipment mounted on the roof, and that for the JMC guarantee to remain intact, all wet areas must be removed and the leaks repaired. The report also stated that "latent damages to roof system due to residual moisture will not be covered under the guarantee," and "repairs must be inspected by [JMC] for [the] guarantee to be reinstated." MacKiw Affidavit, Exh. J.

Upon review of such report and after consultation with GMS, the Sponsor decided to replace the JMC roof with an IRMA roof. Notably, in its Roof Assessment Report, GMS, based on its expert opinion, recommended such replacement instead of wide-scale repairs of the JMC roof. J-Con does not challenge the recommendation; yet it argues that "nowhere in the GMS Report does it state that the [JMC] roof was fundamentally unsound and should not or could not be repaired" to support its conclusory assertion that the JMC roof should have been repaired. Werth's Omnibus Affirmation, ¶¶ 74, 193.

J-Con's other argument, that repairing the roof would not cost any party any money due to the 20-year JMC guarantee, is equally unpersuasive, as the JMC report stated, inter alia, that damages to the JMC roof due to residual moisture is not covered

under the guarantee. Thus, J-Con's motion seeking a declaratory or summary judgment that it has no liability for the expenses incurred in connection with replacing the JMC roof with the IRMA roof must be denied.

J-Con also argues that it could have used the $1.5 million contingency fund under the CM Agreement to conduct remediation. The Sponsor submits evidence the contingency fund no longer exists since after entry into the CM Agreement, the parties amended it by converting it from a "guaranteed maximum price" to a "cost plus" contract, and that based on the payments to J-Con, the contingency fund was exhausted. Jacobson Aff. ¶'s 55-56. In any event, as under the CM Agreement, assuming the contingent fund even exists, no sums may be charged against the fund for costs that arise out of J-Con's misconduct or breach of the CM Agreement, and as there are triable issues of fact as to whether J-Con was terminated for cause under the Termination Notice, J-Con is not entitled to summary judgment on its counterclaims and cross claims related to the contingency fund.[7]

As for the bonus fees, J-Con can only recover such fees in the event its termination was improper and as there are triable issues of fact in this regard, summary judgment is not properly

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[7]The court notes that it appears that the Sponsor has produced neither documents to show the alleged amendment to the CM Agreement nor accounting documents relating to the contingency fund.

granted with respect to either sides cross-claims/counterclaims regarding such fees.[8]

Accordingly, J-Con is granted summary judgment only to the extent of dismissing the Sponsor's cross claim for professional negligence, and is otherwise denied as to the Sponsor's cross claims, and insofar as it seeks summary judgment on its own cross claims and counterclaims.

III. SLCE's Cross Motion to Dismiss

SLCE, the architect retained by the Sponsor to provide design and construction administrative services in connection with the construction Project, cross moves for an order dismissing (a) plaintiffs' third and fourth claims against it; (b) the Sponsor's third, fourth, sixth, eighth and ninth cross claims; (c) cross claims of J-Con and I.M. Robbins, P.C. (Robbins), the mechanical/electrical engineer retained by the Sponsor; and (d) cross claims of certain second third-party defendants, including Interstate Industrial Corp. and Interstate Drywall Corp. (Interstate), RCI Plumbing (RCI), Ronald T. Vass Corp. (RTV), City Elevator (CE), JAM Consultants, Inc. (JAM), and any other cross claims that may or can be asserted against SLCE.

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[8] The Sponsor has asserted a cross claim against J-Con (second cross claim) seeking to recover the bonus fees paid to J-Con in December 2008, which payment took place prior to its issuance of the Termination Notice in December 2009.

A. Plaintiffs' Claims

As a threshold matter, plaintiffs contend that SLCE's cross motion should be denied pursuant to the "single motion rule," since SLCE did not seek dismissal of these claims when J-Con moved to dismiss plaintiffs' claims in October 2009, and that in ruling upon J-Con's motion as well as plaintiffs' cross motion for leave to amend their prior complaint, this Court stated in the May 2010 Order that "in the absence of opposition from defendant SLCE Architects, plaintiffs shall also be permitted to amend their complaint to add the third cause of action ... for breach of contract against SLCE Architects." May 2010 Order, at 8.

Plaintiffs' "single motion rule" argument is unavailing. First, SLCE was not the movant as to J-Con's prior motion filed in October 2009, and SLCE's instant cross motion is not directed at plaintiffs' prior complaint. *Nassau Roofing & Sheet Metal Co. v Celotex Corp.*, 74 AD2d 679 (3d Dept 1980)(single motion rule inapplicable where defendant moved to dismiss plaintiff's claim and then moved to dismiss co-defendant's cross claim). Moreover, SLCE's failure to oppose the motion to amend does not preclude it from challenging the merits of the amendment on a motion for summary judgment.[9]

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[9]Plaintiffs' argument that, because SLCE served its answer, it waived its right to move to dismiss pursuant to CPLR 3211 (a)(1) (documentary evidence), (a)(3) (lack of legal capacity)

SLCE next argues that the breach of claim must be dismissed as plaintiffs have no contractual privity with SLCE, and plaintiffs are not third-party beneficiaries of the architectural service agreement between SLCE and the Sponsor. ("the SLCE Agreement"). In support of its argument, SLCE relies on Section 1.3.6.4. of the SLCE Agreement which provides that "[n]othing in [the SLCE Agreement] shall create a contractual relationship with or cause of action in favor of a third party against either the Owner and Architect."

Plaintiffs counter that Section 1.3.6.8 of the SLCE Agreement provides that "[a]ny entity which shall succeed in the rights of the Sponsor shall be entitled to enforce its rights hereunder," and argue that they are entitled to succeed to the rights of the Sponsor under this more specific provision, which is controlling here. Significantly, SLCE does not challenge plaintiffs' interpretation of this provision.

One is an intended beneficiary if one's right to performance is appropriate to effectuate the intention of the parties to the contract and ... the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. *Edge Management Consulting Inc. v. Blank*, 25 AD2d

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and (a)(5) (collateral estoppel, waiver, etc.) is unavailing as SLCE preserves its defenses in its answer. In addition, as plaintiffs acknowledge, an objection based on failure to state a cause of action is not waived, nor is a summary judgment motion.

364, 368 (1st Dept), *lv dismissed*, 7 NY3d 864 (2006)(internal citations and quotations omitted). There is no requirement that the non-party seeking status of a third-party beneficiary be named in the agreement's text as long as the surrounding circumstances evidences a clear intent to confer an immediate benefit on that non-party. *Newin Corp. v. Hartford Acc. & Indem. Co.*, 37 NY2d 211, 219 (1975); *see also Internationale Nederlanden (U.S.) Capital Corp v. Bankers Trust Co.*, 261 AD2d 117, 123 (1st Dept 1999). That being said, however, "the best evidence...of whether the contracting parties intended a benefit to accrue to a third party, can be ascertained by words of the contract itself." *Alicea v. City of New York*, 145 AD2d 315 at 318 (1st Dept. 1988).

Here, the SLCE Agreement expressly indicates that SLCE was informed that the project involved a residential condominium and that SLCE would be providing the necessary information, documents and certifications for the offering plan. *See* Section 2.7.1. In compliance with its obligation under the SLCE Agreement, SLCE issued a certification stating that:

> We [i.e. SLCE] have examined the building plans and specifications that were prepared by SLCE ... and prepared the Report...a copy of which is intended to be incorporated into the offering plan so that prospective purchasers may rely on the report.... We have read the entire Report and investigated the facts set forth in the Report and investigated the facts in the Report and the facts underlying it with due diligence in order to form a basis for this certification. This certification is made for the benefit of

all persons to whom this offer is made.

Notably, in denying motions by an architect seeking dismissal of third-party beneficiary claims by condominium owners, courts have relied upon the certifications provided to architects in connection with offering plans as proof of a sponsor's intent to benefit plaintiffs. *See e.g. Board of Mgrs of Astor Terrace Condominium v. Schuman, Lichtenstein, Claman & Efron*, 183 AD2d 488 (1st Dept 1992)[10](documentation including selling documents and offering plan sufficiently show sponsor's intent to make unit owners the intended beneficiaries of design contracts); *Board of Mgrs of Marke Gardens Condominium v. 240/242 Franklin Ave. LLC*, 20 Misc3d 1138 (A) (Sup Ct. Kings Co. 2008)(denying defendant architect's motion to dismiss plaintiffs' breach of contract claim on theory that plaintiffs were incidental beneficiaries of the contract where its certification in the offering plan stated that it was intended to benefit plaintiffs).

Moreover, while, as SLCE notes, section 1.3.6.4 of the SLCE Agreement provides a disclaimer of certain liability in favor of

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[10]That part of the holding *in Board of Mgrs of Astor Terrace Condominium v. Schuman, Lichtenstein, Claman & Efron*, 67 AD3d 162 (1st Dept 2009), which reversed the trial court's dismissal of negligence claims has been implicitly overruled by Sykes v. RFD Third Ave. 1 Associates, LLC, 67 AD3d 162 (1st Dept 2009). However, its holding concerning intended third party beneficiaries remains good law.

third-parties, SLCE does not challenge plaintiffs' argument that under section 1.3.6.8, the more specific provision, plaintiffs, allegedly as Sponsor's successors, are entitled to succeed to the Sponsor's rights and that this section controls. In any event, to the extent it is unclear whether plaintiffs are successors under section 1.3.6.8, any ambiguity cannot be resolved at this juncture.

Under these circumstances, and taking into consideration the certifications provided by SLCE in accordance with its obligations under the SLCE Agreement, the documentary evidence is insufficient to resolve the issue of whether plaintiffs were intended third-party beneficiaries of the SLCE Agreement such that dismissal of the breach of contract claim is warranted at this juncture. *See Board of Mgrs of Estate of the Hillcrest Condominium IV v. Hillcrest Estate Development Corp.*, 205 AD2d 487 (2d Dept 1994)(allegations in the complaint sufficiently alleged that appellants were intended third party beneficiary of agreement with sponsor); *Acquista v. New York Life Ins. Co.*, 285 AD2d 73, 76 (1st Dept 2001)(internal quotations and citations omitted)(dismissal based on documentary evidence is only warranted when it has been shown that a material fact alleged by the pleader is "not a fact at all and no significant dispute exists regarding it").

SLCE next argues that the breach of contract claim is

without merit as in a "modification proposal" to its contract with the Sponsor (the Modification), it was indicated that SLCE's services would not include "observation or inspection" of the Project work; and in their purchase agreements, plaintiffs acknowledged that they have "not relied upon any architect's plans ... relating to the description or physical condition" of the Building/Units, and that such "no representation" clause negates plaintiffs' claim that they relied upon the installation of an IRMA roof at the Building[11] when they decided to buy their Units. Taylor Reply Affirmation, dated March 28, 2011, at 6, 18-19. Based on such documentary evidence, SLCE argues that the breach of contract claim must be dismissed.

Dismissal based on documentary evidence may result "only where 'it has been shown that a material fact as claimed by the pleader…is not a fact at all and … no significant dispute exists regarding it.'" *Acquista v. New York Life Ins. Co.*, 285 AD2d at 76, quoting, *Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 (1977). In this case, SLCE has not met this standard.

With respect to the Modification, its terms do not eliminate factual issues as to whether SLCE breached its obligations under

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[11] The record reflects that (1) in the condominium offering plan, an IRMA roof was originally contemplated for the Building, but the change to JMC roof was based upon a decision made by the Sponsor, apparently after consultation with SLCE, and (2) the offering plan gave the Sponsor the right to make such change. Taylor Affirmation, dated February 16, 2011, at 9-12.

the Modification and/or the SLCE Contract. Thus, while the Modification states, in one part, that SLCE's services did not include "observation or inspection of the work or visits to the site, except such visits as may be requested by the [Sponsor] for purposes of interpretation of [the] plans and specification," another part stated that during the construction phase, SLCE was to "visit the site as required to clarify drawing content, and inspect field conditions and mock-ups." Modification, at 2.

Also, while one part of the SLCE Contract[12] states that SLCE would not be required to make exhaustive on-site inspections to verify the quality of the Work or be responsible for the methods in connection with the Work, another part stated that SLCE would be required to visit the site at intervals appropriate to the stage of the Project, keep the Sponsor informed of the progress and quality of the Work, and guard the Sponsor against defects and deficiencies in the Work.[13] SLCE Contract, § 2.6.2.1.

As for the "no representation" clause in the purchase agreement between the plaintiffs and Sponsor, there is no indication or assertion that SLCE is the intended third-party beneficiary of such a clause. Furthermore, while the CM

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[12] The subject contract, a standard AIA form agreement with the Sponsor, was dated as of February 15, 2005 (SLCE Contract).

[13] Even though the Modification is dated September 8, 2005, it appears that it was not signed by the Sponsor until 2008, after construction of the Building was substantially completed.

Agreement provides that SLCE will not "have control over or charge of and will not be responsible for construction means and methods [and] will not be responsible for [J-Con's] failure to carry out the work in accordance with the Construction Documents," the record raises factual questions as to whether SLCE breached the contractual obligations under the SLCE Contract, including to prepare construction documents that "set forth in detail the requirements for construction."

In particular, plaintiffs submit the expert affidavit of Sharon Lobo, a licensed registered architect who bases her opinion on her review of the documents relating to construction and the plans and specifications prepared by SLCE, and the report issued by ELB, a consultant hired by the Sponsor. Lobo notes that the ELB report identified "patent code violations." Lobo Aff. ¶ 5. She also states that "detailed drawings...indicating the precise installation of specific portions of [the roof] assembly, such as flashing to be installed around penetrations, were practically non-existent." *Id.* ¶ 10. She further states that "as the drawings and specifications were changed during the course of construction SLCE failed to update and issue revised drawings." *Id.* ¶11.

As for the roof, she states that the change from an "IRMA" roof to a "built-up" roof assembly "does not mean that the roof would subsequently be defective; however the transition between

the two designs was apparently mishandled in a manner that significantly contributed to the ultimate failure of the 'built-up' roof that was installed." *Id.* Lobo also opines that "there was no reason for SLCE's failure to identify the substandard workmanship on the roof [and that] any reasonably competent architect who was present on the roof during construction should have identified the missing or improperly installed components." *Id.* ¶ 12. She also states that upon visual inspection of the units she noticed "numerous penetrations were not firestopped correctly and numerous shaftwalls were not constructed in a code-compliant manner.[14]" *Id.* ¶ 13.

SLCE also argues that the Settlement with the Sponsor has made plaintiffs whole and that any alleged damages sustained by plaintiffs (e.g., living expenses) were "waived" because of their conduct in thwarting access to the Units. As the court indicated in connection with J-Con's motion, these arguments are insufficient to provide a basis of summary judgment as the defendants may be liable for damages beyond the cost of the repair of the roof, and issues of fact exist as to whether the plaintiffs' denial of access was reasonable.

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[14]Contrary to SLCE's position, Lobo's opinion is adequately supported by the record and is not speculative or conclusory. Moreover, that a previous affidavit submitted by Lobo identified substandard installation and construction as a cause of the defects in the roof is not dispositive as such affidavit did not identify such installation and construction as the only cause of the roof defects.

As for the negligence claim, SLCE argues that it owed no legal duty of care to plaintiffs, the absence of which cannot support a tort claim sounding in negligence. This argument has merit. "[T]he rule is well settled in New York that a plaintiff has no tort cause of action, sounding in...negligence for economic loss suffered as a result of a defective product; the sole remedy is breach of contract...[and] this rule [applies] to defective buildings as well." *Key Intern. Manufacturing, Inc. v. Morse/Deisel, Inc.*, 142 AD2d 448 (2d Dept 1988); *see also, Board of Managers of Riverview at College Point Condominium III v. Schorr Brothers Dev. Corp.*, 182 AD2d 664, 665-666 (2d Dept 1992). Moreover, plaintiffs have not shown that any of the three exceptions to the general rule that breach of a contract itself does not give rise to a duty of care in favor of a third-party apply here. *see generally, Espinal v. Melville Snow Contractors, Inc.*, 98 NY2d 136 (2002); *May* 2010 Order at 3-4.

Accordingly, with respect to plaintiffs' claims, SLCE's motion is granted only to the extent of dismissing plaintiffs' negligence claim against it.

B. Sponsor's Claims and Opposition

In its cross motion, SLCE also seeks to dismiss the Sponsor's third (breach of contract), fourth (breach of implied warranty), sixth (professional negligence), eight (indemnity), and ninth (contribution) cross claims.

With respect to the breach of contract claim, SLCE argues that such claim must be dismissed since (1) the Sponsor has failed to allege any design defects by SLCE; (2) the Sponsor has made "judicial admissions" that the alleged defects arise solely from construction defects; and (3) the SLCE Contract and the Modification stated that SLCE is not responsible for construction means and methods.

These arguments are unavailing. First, SLCE's assertion that the Sponsor's cross claims did not allege any design defects is without merit. *See* Sponsor's Amended Cross Claims and Amended Third-Party Complaint, dated September 17, 2010, ¶¶ 45, 48, 68 and 87 (where the Sponsor alleged, inter alia, that the Building's roof, roof drains, trash chutes, storm drain pipes, sidewalk, etc. were constructed and/or designed defectively). Furthermore, the allegations of defective design are substantiated in the affidavits of Susanne Mackiw (of GSM) and Todd Poisson (of BKSK), engineers who were retained by the Sponsor.

Without submitting any opposing expert affidavit, SLCE, by its counsel, argues that the Sponsor's reliance on the two experts' affidavits is "misplaced" because documentary evidence in this case - such as the SLCE Contract, the Modification, and the prior pleadings filed by the Sponsor in reply to plaintiffs' 2009 motion for a preliminary injunction to enjoin the Sponsor

and J-Con from making repairs - contradicts the Sponsor's allegation of "construction and/or design defects." Taylor Supplemental Reply Affirmation, dated May 10, 2011, at 22-23.

As noted above, the documentary evidence does not establish as a matter of law that SLCE did not breach the SLCE Contract and/or the Modification. Next, while the Sponsor in the injunction proceeding took the position that it has the right under the offering plan to alter the Building's roof from an IRMA roof to the JMC roof (based on its belief that the latter was an acceptable replacement), such a position does not contradict the allegation that SLCE might have defectively designed the JMC roof, nor does the position constitute a "judicial admission," as SLCE urges. Therefore, SLCE's request to dismiss the breach of contract cross claim is denied.

With respect to the breach of implied warranty claim, as SLCE argues, New York law does not recognize such claim against a design professional, such as SLCE. *See Sears, Roebuck & Co. v Enco Assoc.*, 43 NY2d 389, 398 (1977)(no action lies for breach of implied warranty against an architect). Accordingly, the fourth cross claim must be dismissed.

As to the professional negligence claim, SLCE asserts that such claim is no more than a breach of contract claim as it is based on its breach of the SLCE Contract, and seeks only economic losses. In general, a party to a contract cannot assert a claim

for negligent performance of service since the failure to perform a contract does not give rise to a tort claim. *Megaris Furs, Inc. v. Gimbel Bros., Inc.*, 172 AD2d at 211.

That being said, professionals, like architects, may be subject to tort liability for a negligent failure to perform their contractual obligations; however, in these instances "it is policy and not the parties' contract, that gives rise to a duty of care." *Sommer v. Federal Signal Corp.*, 79 NY2d 540, 551 (1992). Moreover, in the construction context, a viable claim for tort has only been found when the professional's negligence allegedly resulted in property damage to a building or structure which potentially endangered the public. *Verizon New York, Inc. v. Optical Communications Group, Inc.*, 2011 WL 5985036, *3, 2011 N.Y. Slip Op. 08685, 08685+ (N.Y.A.D. 1 Dept. Dec 01, 2011); *see Castle Village Owners Corp. v. Greater New York Mut. Ins. Co.*, 58 AD3d 178 (1st Dept 2008)(professional malpractice claim stated against firms providing engineering service based on collapse of retaining wall).

As this case involves "solely financial harm" resulting from SLCE's alleged breach of its contractual obligations, and not property damage which threatened harm to the public, the cross claim for professional malpractice against SLCE must be dismissed. *Verizon New York, Inc. v. Optical Communications Group, Inc.*, 2011 WL 5985036, *4.

As to the indemnity cross claim, SLCE argues that since the Sponsor failed to stop plaintiffs from making "gut renovations" of the Units (which purportedly damaged the Units), the Sponsor cannot seek indemnity against SLCE as New York law does not permit a contract to provide for indemnity of one's negligence. General Obligations Law § 5-322.1. This argument is unavailing as SLCE points to no evidence establishing whether such gut renovation damaged the Units, or whether the Sponsor acted negligently by allegedly failing to stop such renovation, or whether the damages that affected the entire the Building (not just the Units) were the result of construction or design defects, as discussed above. *Bennett v Bank of Montreal*, 161 AD2d 158 (1st Dept 1990), *lv denied* 81 NY2d 704 (1993)(holding that as the extent to which the indemnitee's acts might have caused plaintiff's injury was undetermined, indemnitor's motion for summary judgment dismissing indemnitee's claim for indemnity should be denied). Thus, SLCE's motion to dismiss the Sponsor's indemnity claim is denied.

As to the contribution claim, SLCE, argues, inter alia, that, while CPLR 1401 permits contribution in cases of joint liability for the same injury to property, "purely economic loss resulting from a breach of contract does not constitute injury to property," and plaintiffs seek compensation for economic loss. *American Home Assur. Co. v Nausch, Hogan & Murray, Inc.*, 71 AD3d

550, 552 (1st Dept 2010) (internal quotation marks and citation omitted).

CPLR §1401 provides, in relevant part, that:

> two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought.

"[T]he existence of some form of tort liability is a prerequisite to application of [CPLR 1401]." *Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 28 (1987).

Here, as indicated above, there no basis for finding SLCE liable in tort, Sponsor's contribution claim must be dismissed.

C. J-Con's Claims and Opposition

In opposition to SLCE's motion to dismiss J-Con's cross claims for indemnity and contribution, J-Con submits an affidavit of its president, Allan Brot, who states that (1) construction is a result of design, and if something is constructed according to an architect's design but not in conformance with the Building Code, it is a design (not construction) defect; (2) the JMC roof was approved by SLCE, and if the constructed roof is defective, the fault lies with SLCE in its design; (3) the SLCE Contract and the Modification require SLCE to visit the Project site, inspect and evaluate the work, and guard the Sponsor against defects; and

(4) SLCE cannot argue that its scope of work did not include inspection, when in August 2008, it signed off on the substantial completion letter for the Building. Brot Affidavit, at 2-3.

In reply, SLCE contends that (1) "there are actually no allegations specifically pointing to a design defect," SLCE cannot be held liable for J-Con's failure to follow SLCE's plans; (2) as to the roof, "every person has attributed the problems ... to improper installation and otherwise faulty workmanship;" and (3) SLCE has no contractual duty to conduct "exhaustive inspections" and "any suggestions that additional visits to the Project site by SLCE may have uncovered the Alleged Defects during construction are insufficient to demonstrate culpability on SLCE's part for construction related errors." Taylor Supplemental Reply Affirmation, at 19-21.

With respect to the claim for indemnification, the right of a party to shift its entire loss to another party may be based upon an express contract or an implied obligation. *Bellevue South Assoc. v HRH Constr. Corp.*, 78 NY2d 282, 296 (1991). However, a party cannot recover under a theory of implied indemnification, unless such party has delegated exclusive responsibility for the duties giving rise to the loss to the party from whom indemnity is sought. *Guzman v Haven Plaza Housing Dev. Fund Co.*, 69 NY2d 559 (1987); *17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 80 (1st Dept

1999). Thus, the predicate for implied indemnity is vicarious liability without actual fault on the part of the indemnitee. *Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 453 (1st Dept 1985); *Iannucci v Kucker & Bruth, LLP*, 25 Misc 3d 1223 (A), 2009 NY Slip Op 52258 (U) (Sup Ct, Kings County 2009). In this case, there is no contractual indemnity between J-Con and SCLE, and it is undisputed that J-Con did not delegate its responsibilities to SLCE. Accordingly, J-Con's indemnity claim must be dismissed.

As stated above, a defendant may not seek contribution from other defendants where there is no tort liability. *Board of Educ. of Hudson City School District v Sargent, Webster, Crenshaw & Folley*, 71 NY2d at 26. Here, plaintiffs argue that they are third-party beneficiaries of the contract between the Sponsor and J-Con, and have asserted breach of contract claims against J-Con. Therefore, J-Con's contribution claim against SLCE must also be dismissed.

D. SLCE's Motion to Dismiss Other Cross Claims

SLCE seeks to dismiss all other cross claims which may or can be asserted against it solely on the ground that such cross claims are derivative of the claims of the plaintiffs and the cross-claims of the Sponsor. Only third-party defendant Ronald T. Vass Corp. ("RTV"), the subcontractor that installed the HVAC

system for the Building, opposes this aspect of the motion.

Here, since the court has found that plaintiffs have a viable claim for breach of contract against SLCE and the Sponsor has viable cross claims against SLCE, it is premature to dismiss the claims of RTV or the other cross claimants.

IV. JAM's Cross Motion to Dismiss J-Con's Third-Party Complaint and J-Con's Cross Motion for Leave to Amend

Third-party defendant JAM Consultants, Inc. (JAM) moves for summary judgment dismissing all of J-Con's third-party claims against it, including breach of contract, breach of warranty, contribution and indemnification. JAM argues that it is entitled to summary judgment as it had no role in the design or construction of the Building According to Robert Anderson, JAM's president, JAM is commonly known in the construction industry as an "expediter," which holds no ownership or financial interest in construction projects, and only works for a fee in providing services in connection with facilitating the required municipal filings, such as applications for permits. Anderson Affidavit, ¶¶ 3 and 4. In March 2005, JAM was retained by non-party Horizon Realty & Development (Horizon), as an expediter, in connection with the DOB filings for the Project, and JAM never entered into any contract with J-Con. *Id.*, ¶¶ 5 and 6. Consistent with its limited retention role by Horizon, JAM was never involved in any architectural design, construction or

renovation activities related to the Building or Project. *Id.*, ¶¶ 8-11.

In response, while admitting that it "inadvertently" named JAM as one of its many subcontractors for the Project, J-Con cross moves for leave to further amend its third-party complaint against JAM. In support of its cross motion, J-Con alleges that JAM was hired by the Sponsor as an expediter, and JAM's responsibilities also included verifying that the various construction systems which have been built were in compliance with the DOB's building code. J-Con argues that (1) since JAM was involved in various aspects of the Project, JAM was "directly responsible for some of the damages alleged by Plaintiffs and the Sponsor in their pleadings, to the extent any damages are found to exist"; (2) as there is no prejudice to JAM, J-Con should be allowed to amend its impleader (by deleting the breach of contract claim, but adding professional malpractice and negligence claims); and (3) this Court should deny JAM's cross motion seeking summary dismissal of J-Con's third-party action. Werth Affirmation, dated March 14, 2011, ¶¶ 9-14.

In reply, JAM submits the Reply Affidavit of Anderson who states that (1) JAM was hired by Horizon, not the Sponsor, as expediter, for the Project; and (2) contrary to J-Con's allegation that JAM served as a "code consultant," JAM "was never retained to act and did not act as a code consultant." Anderson

Reply Affidavit, dated March 28, 2011, ¶¶ 2 and 4.

JAM's position has merit. Before granting leave to amend, a court must consider whether the proposed amendment is "not palpably insufficient or clearly devoid of merit." *MBIA Ins. Corp. v Greysteone & Co., Inc.*, 74 AD3d 499, 500 (1st Dept 2010). Here, JAM has submitted evidence that the proposed amendments lack merit, and J-Con has failed to provide any evidentiary or legal basis for finding to the contrary, summary judgment is granted in favor of JAM dismissing J-Con's cross claims against JAM, and the cross motion to amend is denied.

V. ABCO's Cross Motion to Dismiss Cross Claims of J-Con

ABCO-Peerless Sprinkler Corporation (ABCO) entered into a subcontract with J-Con. ABCO was to perform sprinkler installation work for the Building, and related work in the Building and Units and it is alleged that it failed to install fire-stopping as part of its work. ABCO seeks to dismiss J-Con's cross claims sounding in negligence, contribution, indemnification, breach of contract (including express warranty), and breach of implied warranty.

J-Con opposes dismissal of the negligence claim, arguing that this court's dismissal of plaintiffs' negligence claim against J-Con (in the May 2010 Order) was based on the lack of legal duty owed by J-Con to plaintiffs (as third parties), but

there is contractual privity between J-Con and ABCO here. This argument is without merit, as it is well established that a "simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated." *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 (1987)(legal duty must arise outside of the contract, although it may be connected with the contract). As J-Con has failed to identify any independent legal duty or offer any opposing case law, the negligence claim is dismissed.

As to its contribution claim, J-Con has failed to address the settled rule of law that "purely economic loss resulting from a breach of contract does not constitute 'injury to property' within the meaning of New York's contribution statute." *Board of Educ. of Hudson City Sch. Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d at 26 (contribution does not apply to a breach of contract action between two contracting parties where the only potential liability to a third party is for contractual benefit of the bargain). Here, J-Con does not dispute that its contribution claim is based upon its subcontract with ABCO, and its near-privity relationship with plaintiffs, who seek recovery against J-Con for their alleged economic loss. Therefore, the contribution claim should be dismissed.

J-Con's contractual indemnity claim against ABCO is based on section 12.5 of its subcontract with ABCO, which provides as

follows:

> To the fullest extent permitted by law, Contractor [ABCO] shall indemnify, defend and hold harmless...Construction Manager...from and against all losses, claims (including, but not limited to, those alleging injury to third parties or damage to property of third parties), causes of action, lawsuits, costs, damages and expenses, including without limitation attorneys' fees and disbursements) due to: (i) any personal injury, sickness, disease or death, or damage or injury to, or destruction of property..., (ii) any negligent or wrongful act or omission of [ABCO]....Such obligations will arise regardless of any claimed liability [on] the part of the indemnified party, provided, however, [ABCO] shall not be required to indemnify any Indemnitee to the extent attributable to the Indemnitee's negligence.

ABCO argues that its claim is based on, in part, section 12.5 (a)(ii) of the ABCO subcontract, which requires ABCO to indemnify J-Con for "any negligent or wrongful act or omission" of ABCO, and that as it seeks "money damages against ABCO for breach of contract and warranty," to the extent J-Con is found liable to plaintiffs or the Sponsor for ABCO's work J-Con would be entitled to indemnity from ABCO. Such argument has no merit. In *Dormitory Auth. of State of N.Y. v Scott* (160 AD2d 179 [1st Dept 1990]), the third-party defendant agreed to indemnify the third-party plaintiff for claims on account of bodily injury or damage to property caused by its act, omission or improper performance of engineering services. The Appellate Division,

First Department court held that such language was only intended to cover third-party claims "due to bodily injury or death of a person or damage to property" and "the economic losses claimed by [the third-party plaintiff] do not ... fall within the scope of the contractual indemnification clauses." *Id.* at 181. In this case, as the ABCO subcontract uses similar language, and the indemnification claim is predicated upon economic losses, as opposed to claims due to personal injury or injury to property, such claim must be dismissed.

As to the breach of implied warranty claim, J-Con points to the fact that ABCO has expressly warranted that "all materials and equipment under this contract will be new unless otherwise specified and that all Work will be of first-class quality, free from faults and defects, and in conformance with the contract documents." ABCO Subcontract, ¶ 16.1. However, New York law does not recognize an implied warranty claim based on an express warranty in the context of a service-oriented contract, and there is no dispute that ABCO's subcontract with J-Con was predominantly service oriented. *Milau Assoc. v North Ave. Dev. Corp.*, 42 NY2d 482 (1977).

In *Milau*, the subcontractor installed a sprinkler system tailored to the needs of the plaintiffs, and was sued under a theory of breach of the implied warranty, even though it had given them an express warranty. The Court of Appeals affirmed

the appellate court's ruling, which held that neither the Uniform Commercial Code (governing the sale of goods) nor the case law could be invoked to grant the extension of express warranty protection via an implied warranty claim. As in *Milau*, in this case, the contract at issue is primarily service oriented, and the implied warranty claim is based on an express warranty. Therefore, the breach of implied warranty claim is dismissed.

With respect to the breach of contract claim(which includes the breach of express warranty claim), ABCO argues that such claim should be dismissed as (1) J-Con has not shown that it had suffered actual damages; and (2) J-Con "does not seek independent recovery based on a theory that is separate from a contribution or indemnification cause of action." ABCO Reply, at 9-11. These arguments are without merit, as in its pleadings, J-Con seeks damages against ABCO "in an amount to be determined at trial but believed to be in excess of $2 million." At this stage of the litigation, J-Con is not required to establish or quantify actual damages.

Next, its breach of contract claim does not depend on contribution or indemnification theories, but rather on the ABCO subcontract. Thus, ABCO's cross motion seeking dismissal of J-Con's breach of contract claim is denied.

6. Delta's Cross Motion to Dismiss Cross Claims of J-Con

In its cross motion, Delta Testing Laboratories Inc. (Delta) moves for summary judgment dismissing all cross claims of J-Con sounding in negligence, contribution, indemnification, breach of contract, and breach of implied warranty. Delta was retained by J-Con, as a subcontractor, to perform inspections of the fire-stopping installation at the Building for conformance to approved drawings and specifications. Petersen Affirmation, ¶¶ 8-9.

Delta argues that because J-Con has asserted in its pleadings that the plaintiffs in this action had gutted their Units and removed fire-stopping materials therefrom, such assertions are "completely at odds" with J-Con's cross claims against Delta, alleging that Delta either failed to inspect or inadequately inspected the fire-stopping installation in the Units, which resulted in damages to the Units. *Id.*, ¶¶ 11-16. Delta also argues that J-Con's assertions are "admission against interest," and thus should be "adjudged to be dispositive of the validity of those [cross claims against Delta]." *Id.*, ¶¶ 17-18.

In opposition, J-Con contends, inter alia, that (1) it was the subcontractors (such as Delta) which did the construction work, and under the subcontracts, J-Con can hold them liable; (2) Delta was responsible for inspecting and approving the fire-stopping installations, and the Sponsor and the plaintiffs had averred that the installations were deficient; and (3) even if J-Con's assertions were "completely at odds," they are insufficient

to support a finding that there are no disputed issues of fact to warrant summary judgment, as J-Con merely asserted that the plaintiffs had removed "substantial fire and safety mechanism" from the Units, which did not address all fire-stopping installations in the Units or the entire Building, and such an assertion cannot be used to summarily dispose of all of J-Con's cross claims. Werth Opposition Affirmation, at 3-6.

While both parties argue the "completely at odds" issue, neither address the substance of J-Con's various claims, which are identical in nature to those asserted against ABCO. Thus, as a threshold matter, and consistent with the rationale discussed in ABCO, all of J-Con's cross claims against Delta, except with respect to the breach of contract claim, should be dismissed. As to the breach of contract (express warranty) claim, the issue is whether there are disputed material facts which would preclude the entry of summary judgment in favor of Delta. In such regard, it is noteworthy that in its papers, the Sponsor alleged, inter alia, that the Building, as constructed and/or designed, had "inadequate fire-stopping, especially at plumbing and duct penetrations through concrete slab." Amended Cross Claims and Amended Third-Party Complaint, dated September 17, 2010, ¶ 45.g. In its reply to J-Con's opposition, Delta failed to address the above allegation made by the Sponsor, which is similar to that made by J-Con. Thus, there is a material issue as to whether

fire-stopping material installed in the Building (as opposed to just the Units) was inadequate, which, in turn, raises an issue as to whether Delta fulfilled its duty under its subcontract in performing a full inspection of the fire-stopping installations in the Building. Accordingly, Delta's motion for summary judgment is denied to the extent it seeks to dismiss J-Con's breach of contract claims against it.

VII. KNS's Motion to Dismiss

KNS, the roofing subcontractor that installed the JMC roof, moves for summary judgment dismissing all cross claims asserted by J-Con against it, including breach of contract (express warranty), breach of implied warranty, contribution, indemnification and negligence.

KNS argues that the breach of contract/express warranty claim must be dismissed (1) as J-Con failed to pay it the remaining $44,050 owed under the subcontract and such failure "excused" KNS's further performance, and (2) based on J-Con's position that it and KNS did not have a reasonable opportunity to cure the alleged defects of JMC roof (as the Sponsor and the plaintiffs had refused access for repair work).[15]

[15] With respect to the breach of contract (express warranty) claim, which refers to the subcontract and warranty between KNS and J-Con, KNS also argues that it is "not a proper party" with respect to the warranty between the Sponsor and JMC (the JMC Warranty), J-Con's breach of warranty claim must be dismissed. However, this argument is unavailing as the warranty that is

These arguments are without merit. First, KNS's "payment application," a copy of which is attached as "Exhibit A" to the Reply Affirmation, was not certified by an architect, and the certification appears to be a pre-requisite to trigger J-Con's obligation to pay the full amount requested. In any event, KNS has not established that it performed its work in a defect-free manner, or that the allegedly wrongful failure of J-Con to pay it $44,050 (out of the subcontract amount of over $300,000) excused its performance. In addition, whether KNS had a "reasonable opportunity" to cure the roof defects is a factual issue that is in dispute, as discussed above. Thus, KNS's motion seeking dismissal of the breach of contract (express warranty) claim must be denied.

With respect to the breach of implied warranty claim, KNS argues that it has no liability because New York law provides that a party which is not a manufacturer, seller or distributor of a product cannot be held liable for the defective product, and KNS is not a manufacturer, seller or distributor of the JMC roof. *Ito v Marvin Windows of N.Y., Inc.*, 54 AD3d 1002, 1003 (2d Dept 2008)("Liability may not be imposed for breach of warranty upon a party that is outside the manufacturing, selling or distribution chain"); *Joseph v Yenkin Majestic Paint Corp.*, 261 AD2d 512 (2d

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claimed to have been breached by KNS is not the JMC Warranty, but KNS's own warranty for workmanship under its subcontract with J-Con.

Dept 1999). J-Con neither disputes the cited case nor contends that KNS is a manufacturer or seller of the JMC roof; in fact, J-Con has acknowledged that KNS only installed the roof. As there is no issue of disputed fact, the breach of implied warranty claim must be dismissed.

As for the negligence and contribution claims, as discussed above, a "simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has not been violated." *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d at 389. Here, there is no allegation or showing that KNS owes J-Con a legal duty outside of the parties' subcontract. Thus, the tort claim sounding in negligence is dismissed. As to the contribution claim, J-Con does not dispute the settled law that "purely economic loss resulting from a breach of contract does not constitute 'injury to property' within the meaning of New York's contribution statute," and there is no assertion by J-Con that its contribution claim is not based on the subcontract. *See Board of Educ. of Hudson City Sch. Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d at 26. Therefore, the contribution claim is also dismissed.

In connection with its indemnification claim against KNS, J-Con makes the same argument made in opposition to ABCO's cross motion, *supra*, by pointing to its subcontract with KNS, which required KNS to indemnify J-Con for "any negligent or wrongful

act or omission" of KNS. Werth Affirmation in Opposition, ¶¶ 36-37.[16] As explained in the discussion of ABCO's cross motion, the indemnity claim against KNS should be dismissed because it seeks recovery for economic losses. *Dormitory Auth. of State of N.Y. v Scott*, 160 AD2d at 181.

Conclusion

Based on all of the foregoing, it is hereby

ORDERED that aspect the motion of The J Construction Company LLC (J-Con) (Motion Sequence Number 006) that seeks dismissal of the plaintiffs' claims is denied; and it is further

ORDERED that plaintiffs' cross motion seeking partial summary judgment as to liability on their breach of contract claims against J-Con is denied; and it is further

ORDERED that all aspects of J-Con's motion seeking summary or declaratory relief against 516 West 19th LLC and the Board of Managers of the West 19th Street Condominium (collectively, the Sponsor) are denied, except with respect to the Sponsor's fifth cross claim against J-Con (professional negligence), which is dismissed; and it is further

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[16] J-Con's subcontracts with ABCO and KNS apparently used similar, if not identical, language for indemnity. However, J-Con inadvertently failed to name the applicable party, as it named ABCO, instead of KNS, in its opposition papers. *Id.*, ¶ 36.

ORDERED that the cross motion of SLCE Architects LLP (SLCE) seeking dismissal of Plaintiffs' claims is denied, except with respect to the fourth (negligence) claim, which is dismissed; and it is further

ORDERED that SLCE's cross motion seeking dismissal of the Sponsor's cross claims is granted only to the extent that the fourth (breach of implied warranty), sixth (professional negligence) and ninth (contribution) cross claims are dismissed, and is otherwise denied; and it is further

ORDERED that SLCE's cross motion seeking dismissal of J-Con's contribution and indemnification cross claims is granted; and it is further

ORDERED that SLCE's cross motion seeking dismissal of Ronald T. Vass Corp.'s cross claims and of all other cross claims that may or can be asserted against it is denied; and it is further

ORDERED that the cross motion of JAM Consultant, Inc. (JAM) seeking summary judgment dismissing the cross claims of J-Con is granted; and it is further

ORDERED that J-Con's cross motion seeking leave to further amend its third-party complaint against JAM is denied; and it is further

ORDERED that the cross motion of ABCO-Peerless Sprinkler Corporation seeking dismissal of J-Con's cross claims is granted

to the extent that the negligence, contribution, indemnification and breach of implied warranty cross claims are dismissed, and is denied with respect to the breach of contract cross claim; and it is further

ORDERED that the cross motion of Delta Testing Laboratories Inc. seeking dismissal of J-Con's cross claims is granted to the extent that the negligence, contribution, indemnification and breach of implied warranty cross claims are dismissed, and is denied with respect to the breach of contract cross claim; and it is further

ORDERED that, with respect to the motion by KNS Building Restoration Corp. (Motion Sequence Number 008) seeking dismissal of J-Con's cross claim, such motion is granted to the extent that the negligence, contribution, indemnification and breach of implied warranty cross claims are dismissed, and is denied with respect to the breach of contract cross claim; and it is further

ORDERED that the remainder of this action shall continue, and counsel for the parties are directed to appear for a status conference before this court on February 16, 2012, at 9:30 am.

Dated: January 24, 2012

J.S.C.