Archstone v Tocci Bldg. Corp. of New Jersey
2011 NY Slip Op 30166(U)
January 19, 2011
Supreme Court, Nassau County
Docket Number: 001018/2008
Judge: Ira B. Warshawsky
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SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 7

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

Plaintiff,

- against -

INDEX NO.: 001018/2008
MOTION DATE: 9/30/10
SEQUENCE NO.: 17

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

Defendants.

The following documents were read on this motion:

Motion for Partial Summary Judgment on Archstone Claims 1
Eldorado Stone Affirmation and Exhibits in Support of Motion for Partial Summary Judgment 2
Eldorado Stone's Memorandum of Law in Support of Motion 3
Perkins Eastman Architects Affirmation in Opposition to Motion 4
Archstone's Memorandum of Law in Opposition to Eldorado Stone's Motion for Partial Summary Judgment Motion 5
Archstone's Affirmation by Crewdson in Opposition to Eldorado Stone's Motion for Partial Summary Judgment 6
Eldorado Stone's Reply Affirmation to Archstone's and Perkins Memoranda in Opposition to Motion 7
Archstone Sur-Reply to motion 8
Eldorado Stone response to Sur-Reply 9

PRELIMINARY STATEMENT

Eldorado Stone moves to dismiss claims made by Archstone, other than those for indemnification, reserving their rights to move for that relief as well in the future. They contend that plaintiff's negligence claim is barred by the "economic loss rule", and that recovery under this theory is barred by the legal principal stated in *Weiss v. Polymer Plastics Corp.,* 21 A.D. 3d 1095 (2d Dept. 2005). With respect to Archstone's allegation of breach of express warranty, they claim that plaintiff has failed to plead the essential elements as to the formation of an express warranty, that Eldorado's warranty was not the basis of the bargain, and, in any event, there has been no breach of an express warranty. They claim entitlement to summary judgment on plaintiff's UCC-based claims of implied warranty because the UCC does not apply to the Eldorado Stone Product at the point that Archstone received it, that plaintiff has no implied warranty claim against Eldorado because of lack of privity, and because there is no special purpose to support Archstone's claim of lack of fitness for a particular purpose.

BACKGROUND

This litigation arises from the project of construction known as Archstone Westbury, consisting of 20 apartment buildings, 13 garage buildings, and a clubhouse. The project was designed by Perkins Eastman Architects, Inc. ("Perkins"). The general contractor was Tocci Building Corporation of New Jersey ("Tocci"). Eldorado Stone, LLC ("Eldorado") was a subcontractor who provided an artificial stone product known as Manufactured Stone Veneer ("MSV"), utilized as an exterior veneer for the buildings.

On or about June 25, 2004 Tocci contracted with Mid-Atlantic Stone, Inc. ("MAS"), which agreed to supply and install the Eldorado MSV product. MAS purchased the MSV from Allied Building Products Corp. ("Allied"), an independent distributor. The material contained a 50-year manufacturer's limited warranty.

Installation began in mid-August 2004. By June 2007 it was determined that the buildings were suffering from persistent water intrusion and entrapment, leading to deterioration and mold conditions. Archstone has faced numerous lawsuits from tenants who allegedly suffered personal injury and property damage due to these water intrusion and mold conditions. According to the Second Amended Complaint, significant repair and reconstruction work was

required, including the removal and replacement of the exterior walls at all 20 apartment buildings; and that the far-reaching nature of the work required the vacating of the apartments. Archstone further asserts that in the course of the reconstruction effort, it became aware of additional items of defective work associated with the original construction project, including structural, plumbing and electrical components.

As a consequence, Archstone claims damages in the form of consulting and design reconstruction expenses; demolition, construction and remediation costs; lost rental income; contribution and indemnification for the tenant suits; and other damages to be identified, as well as lost interest costs, and legal fees and expenses in the pursuit of this action.

STANDARD

Summary judgment terminates a case before a trial, and it is therefore a drastic remedy that will not be granted if there is any doubt with regard to a genuine issue of material fact, since it is normally the jury's function to determine the facts. (*Sillman v. Twentieth Century-Fox Film Cor.*, 3 NY2d 395 [1957]). When summary judgment is determined on the proof, it is equivalent to a directed verdict: if contrary inferences can reasonably be drawn from the evidence, then genuine issues of material fact preclude summary judgment. (*Gerard v. Inglese*, 11 AD2d 381 [2d Dep't 1960].

It is not the court's function to weigh the credibility of contradictory proof on a motion for summary judgment. (*Ferrante v. American Lung Assoc.*, 90 NY2d 623 [1997]). Thus the evidence will be considered in the light most favorable to the opposing party. (*Tortorello v. Carlin,* 260 A.D.2d 201, 206 [1st Dept. 2003]). However, a material issue of fact "must be genuine, bona fide and substantial to require a trial." (*Leumi financial Corp. v. Richter*, 24 AD2d 855 [1st Dep't 1965] quoting *Richard v. Credit Suisse*, 242 NY 346 [1926]).

If a party has presented a prima facie case of entitlement to summary judgment, because no triable issues of material fact exist, the opposing party is obligated to come forward and bare his proof by affidavit of an individual with personal knowledge, or with an attorney's affirmation to which appended material in admissible form, and the failure to do so may lead the court to believe that there is no triable issue of fact. (*Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 [1980]).

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DISCUSSION

Economic Loss Doctrine

Eldorado Stone, LLC contends that the economic loss doctrine bars Archstone's negligence claims against Eldorado. The economic loss doctrine rests on the principle that "[t]ort law should not... allow[] tort lawsuits where the claims at issue are in all relevant respects, essentially contractual, product-failure controversies." (*Bocre Leasing Corp. v. General Motors Corp.*, 84 NY2d 685, 694 [1995]). Such contractual, product failure controversies are best left to the law of warranty and contract "because the parties may set the terms of their own agreements. The manufacturer can restrict its liability, within limits, by disclaiming warranties or limiting remedies. In exchange, the purchaser pays less for the product." (*East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 872-73 [1986]). The economic loss doctrine is thus particularly sound for protecting parties' contractual bargain when the risks of loss can and should be allocated by contract. The New York Court of Appeals thus adopted the economic loss rule of *East River,* because it found that "the allocation of risk was fixed by the parties at the time of purchase...[therefore the] Court should not later modify plaintiff's commercial contractual risks by interposing a belated tort benefit or potentiality..." (*Bocre*, 84 NY2d at 689).

The parties on this motion disagree on the content of the economic loss rule or standard that arises from the case law and that this court should apply. The last principal case from the New York Court of Appeals, *Bocre*, *supra*, sought the brightline rule adopted by the U.S. Supreme Court in *East River*, *supra*, that "a manufacturer in a commercial relationship has no duty under either a negligence or strict products-liability theory to prevent a product from injuring itself." (*East River*, 476 U.S. at 871). The Court of Appeals rephrased this rule as holding that "no tort recovery can be had against the manufacturer for contractually based economic loss, whether due to injury to the product itself or consequential losses flowing therefrom." (*Bocre*, 84 NY2d 685, 693). While the U.S. Supreme Court expressly rejected other tests from case law that sought to define the economic loss rule, including an intermediate expectations-based test, the New York Court of Appeals did not expressly overrule cases, including two earlier cases of the Court of Appeals, which applied a disappointed expectations

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test. (*See Belleview S. Assocs. v. HRH Constr. Corp.*, 78 NY2d 282, 294-95 [1991], *Schiavone Constr. Co. v. Elgood Mayo Corp.*, 81 AD2d 221 [1st Dept. 1981] [Silverman, J. dissent], *rev'd on dissent below*, 56 NY2d 667). Neither did the Court of Appeals expressly overrule the many cases that had developed in the Appellate Division concerning the application of the economic loss doctrine when the safety of persons was at issue. (*See, e.g. Trustees of Columbia University v. Mitchell/Giurgola Ass.*, 109 AD2d 449 [1st Dept. 1985] [allowing tort recovery where defective construction materials created an impending danger of building collapse], *Village of Groton v. Tokheim Corp.*, 202 AD2d 728 [3d Dept. 1994] [permitting tort recovery where a defective fuel storage system caused a fuel spill). Several post-*Bocre* cases, particularly in the Third and Fourth Departments, therefore continue to use a version of the disappointed expectations test, or at least analyze whether the claimed damages are contractual in nature. (*See, e.g. Hodgson, Russ, Andrews, Woods & Goodyear, LLP v. Isolatek Intern. Corp.*, 300 AD2d 1051, 1052-53 [4th Dept. 2002] [allowing tort claims where fire-proofing material malfunctioned], *Flex-O-Vit USA, Inc. v. Niagara Mohawk Power Corp.*, 292 AD2d 764 [4th Dept. 2004]) [allowing tort claims where ventilation system malfunction caused a fire], *Adirondack Combustion Tech., Inc. v. Unicontrol, Inc.*, 17 AD3d 825 [3d Dept. 2005] [allowing tort claims where boiler exploded due to defective control]).

Eldorado argues that the economic loss rule that this court should apply is the brightline rule applied in *Bocre Leasing Corp. v. General Motors Corp.*, 84 N.Y.2d 685, 694 (1995) and *Weiss v. Polymer Plastics Corp.*, 21 A.D.3d 1095 (2d Dept. 2005). Eldorado asserts that these cases indicate that tort claims are barred whenever the plaintiff acquired the allegedly defective product as part of a larger purchase or as part of a service contract, and the damages only extend within the larger purchase or whatever was acquired as part of a service contract. In this case, the "purchase" would be the apartment complex which Archstone contracted with Tocci to build; and, Eldorado contends, since Archstone's damages extend only within the apartment complex acquired, tort damages would be barred by the economic loss doctrine. In opposition, Archstone and Perkins argue that the economic loss rule does not apply where there is damage to other property beyond the defective part, citing *Adirondack Combustion Technologies, Inc. v. Unicontrol, Inc.* (17 A.D.3d 825, 826 [3d Dept. 2005]), and that the economic loss doctrine does

not bar tort recovery for economic damages when the damages are caused by a latent design defect, rather than a product malfunction, citing *Hodgson, Russ, Andrews Woods & Goodyear, LLP v. Isolatek Intern. Corp.* (300 A.D.2d 1051, 1053—1054 [4th Dept. 2002]).

While the cases cited by the Eldorado and Archstone appear to conflict, they can be reconciled in part by looking at Prosser's description of the early economic loss doctrine:

> There can be no doubt that the seller's liability for negligence covers any kind of physical harm, including not only personal injuries, but also property damage to the defective chattel itself, as where an automobile is wrecked by reason of its own bad brakes, as well as damage to any other property in the vicinity. But *where there is no accident, and no physical damage, and the only loss is a pecuniary one, through loss of the value or use of the thing sold, or the cost of repairing it*, the courts have adhered to the rule ... that purely economic interests are not entitled to protection against mere negligence, and so have denied the recovery. (Emphasis added).

(Prosser, Law of Torts Sec. 101 [4th ed. 1971] as cited in *Schiavnoe Constr. Co. v. Elgood Mayo Corp.*, 81 AD2d 221 [1st Dept. 1981] [dissent opinion], *rev'd on dissent below*, 56 NY2d 667). Prosser's statement of the rule is concrete and specific, and thus easier to apply. Yet it accurately incorporates the courts' concerns about limiting tort recovery when only "contractually based economic loss" (*Bocre*, 84 NY2d 685, 693) is at issue or when the "tort claims [are]... properly characterized as being for 'economic loss' due to product failure," (*Weiss v. Polymer Plastics Corp.*, 21 AD3d 1095, 1096 [2d Dep't 2005]). Contractually based economic damages due to product failure comprise either loss of value, loss of use (and profits), or cost of repair. Any "consequential damages" as described in *East River* and *Bocre,* include only these contractual damages, since damage to "other property," even if it stems from product failure, is recoverable in tort. (*Saratoga Fishing Co. v. J.M. Martinac & Co.*, 520 US 875 [1997] [allowing recovery in tort for damages to equipment installed on a ship after an engine room fire caused the ship to sink]). Indeed, such economic losses for loss of value, loss of use and profits, and costs of repair, can and should be allocated in contract, since such risks of loss can be bargained for and the risk allocation is reflected in the purchase price. (*See Bocre*, 84 NY2d at 689).

A chief problem in this case is determining the "product" that is the subject of the analysis, since the allegedly defective MSV was acquired as part of a broader construction project. If the product is the apartment complex which Archstone "purchased" from Tocci, then

only economic damages from loss of value, loss of use, and cost of repair have occurred. If the product is only the defective MSV that Eldorado provided, then damage to other parts of the apartment complex is damage to "other property." This problem is particularly difficult in the context of construction, since construction involves a contract for services, rather than delivery of a product. Jurisdictions that have applied the economic loss rule to service contracts and construction disputes have struggled with the development of the case law (*see* 5 Bruner & O'Connor Const. L. §§ 17:91, 17:97, 17:96), and surveys of the case law suggest that "defects in construction projects and building materials represent a borderline area for application of the economic loss rule." (Am. L. Prod. Liab. 3d § 60:59).

Normally in the purchase of a completed "product," the buyer and seller can allocate the risk of loss from product malfunction, as the *East River* and *Bocre* opinions indicated. However, in the service context the contract may not address the risk of loss from malfunction of any products used in the service. In the construction context, some construction contracts may thus warrant the quality of the construction labor, but not the quality of the products used—relying instead on product liability or manufacturer warranties to protect the project owner. The public policy of leaving parties to the benefit of their bargain for the risk of product failure is therefore less congruous in the context of service contracts. (*Cf. Cargill, Inc. v. Boag Cold Storage Warehouse, Inc.*, 71 F.3d 545 [6th Cir. 1995], *Ins. Co. of North America v. Cease Elec. Inc.*, 276 Wis.2d 361 [2004]).

Application of the economic loss doctrine to defective products that are acquired as part of a service contract, appears unresolved in New York. While a Second Department decision extended the economic loss doctrine, as it existed before *Bocre*, to shield construction professionals from liability for purely economic unless there was privity (*see Key Internat. Manuf., Inc. v. Morse/Diesel, Inc.*, 142 AD2d 448 [2d Dept. 1988]), the case does not address the issue whether the doctrine of *East River* and *Bocre* should be extended to bar tort claims against the manufacturer of a defective product, where the defective component causes damage to other property that, along with the defective component, was built or acquired as part of a contract for construction services. Also, *Weiss v. Polymer Plastics Corp.* (21 AD3d 1095 [2d Dept. 2005]), only held that claimed damages for the failure of an exterior insulation finish system (EIFS) in a

home did not raise any actionable tort claims, because such claims were better "characterized as being for 'economic loss' due to product failure." (21 AD3d at 1096). However, the parties there did not raise any issue regarding the application of the economic loss doctrine when the plaintiff is not a "purchaser" of a "product," and the plaintiff received the defective component through a contract for services rather than a purchase contract. Therefore, *Weiss* had no occasion to specifically address the issue.

Eldorado asks this court to follow *Casa Clara Condominium Ass., Inc. v. Charley Toppino & Sons, Inc.* (620 So.2d 1244 [1994]) which analyzed the issue of applying the economic loss doctrine to the purchase of a house. The basis of applying the economic loss doctrine in that case related to the various statutory warranties that protect a home buyer, beside the contractual warranties that he was entitled to. In the construction context, the project owner does not necessarily receive the benefit of these warranties (as in this case), and the project owner may or may not be involved in the process of selecting various construction materials. The other cases that Eldorado urges this court to follow have either similarly dealt with the purchase of a completed building, or they have reasoned that the project owner could be analogized to the purchaser of a completed project, because he had no interest in selecting or bargaining for individual components.

The application of the economic loss doctrine is inapposite to the facts of this case, and in any case the court need not resolve the issue whether the economic loss doctrine in New York applies to defective products acquired through construction contracts. The economic loss doctrine does not apply where there is physical damage to other property, which should not be confused with pecuniary "consequential damages," such as lost profits or increased operating costs. As the Court of Appeals articulated, "damages relating to the safety of persons and property [were] simply not in issue in this case [*Bocre*]. These consumer safety concerns are accounted for by holding manufacturers ultimately liable... for those kinds of personal or property injuries and losses which are outside the scope of the contractually based economic losses..." (*Bocre*, 84 NY2d at 691). In contrast, the circumstances of the present case do implicate the tort concern for safety, rather than the contractual concern of leaving parties to the benefit of their bargain. The sort of wide-ranging and catastrophic damages that were suffered by the structures

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in the apartment complex as well as the tenants who resided in it, are not the sort of foreseeable damages whose risk can be concretely allocated in a contract. Rather, they are the sort of safety-related damages that the law of tort seeks to address. (*Cf. Trustees of Columbia University v. Mitchell/Giurgola Ass.*, 109 AD2d 449 [1st Dept. 1985], *Hodgson, Russ, Andrews, Woods & Goodyear, LLP v. Isolatek Intern. Corp.*, 300 AD2d 1051, 1052-53 [4th Dept. 2002]).

Eldorado urges this court to disregard the personal injuries that were allegedly suffered by the tenants, because Archstone itself is an entity. However, because the tort concern for safety is involved whenever personal injuries are at issue, regardless of the status of the plaintiff, courts have permitted tort claims for economic loss in such cases. For example, in *Silvanch, Inc. v. Celebrity Cruises, Inc.* (171 F.Supp. 2d 241, 271-72 [SDNY 2001]), the Souther District permitted tort claims against the manufacturer of defective whirlpool filters which caused cruise passengers to contract Legionnaire's Disease, even though the plaintiff and purchaser of the product was not one of the parties physically injured. (*See also Tioga Public School District # 15 v. United States Gypsum Co.*, 984 F.2d 915, 918 [8th Cir.1993]; *City of Greenville v. W.R. Grace & Co.*, 827 F.2d 975, 977-78 [4th Cir.1987]). The Restatement Third of Torts: Products Liability § 21 permits recovery for economic loss if there was harm to "(b) the person of another when harm to the other interferes with an interest of the plaintiff protected by tort law." In citing examples of types of "harm to the person of another" that are protected by tort law, the Restatement notes that a doctor's "interest in her professional reputation is an interest protected by tort law against economic loss arising from harm to a patient in her care." (*Comment c*, R3d Torts: Prod. Liab. § 21). A landlord's interest in its service reputation to the tenants in its care can be viewed similarly.

The "other property" exception to the economic loss doctrine, as articulated in the Restatement 3rd of Torts: Products Liability § 21 also suggests that any damage by a component part to surrounding property, unless the component is part of an integrated machine or discrete operational system, is damage to other property. (*See Comment e*, R3d Torts: Prod. Liab. §21). Under this view, the property damage to the structures of the apartment complex due to water infiltration would most certainly be damage to other property, which would preclude application of the economic loss doctrine to this case.

Finally, Archstone is also suing Eldorado Stone for indemnification of any damages that Archstone has paid or will pay to its tenants. To the extent the economic loss doctrine would otherwise apply to its tort claims against Eldorado Stone, it would not apply to its indemnification claims against Eldorado Stone, since those claims would be asserted in the position of the tenants.

For the above reasons, the economic loss doctrine is not applicable to the facts as developed, and in any event, issues of fact remain regarding any damage to "other property" outside the purchase product, and whether the damages arise only from product failure. (*See Praxair, Inc. v. General Insulation Co.*, 611 F.Supp.2d 318 [WDNY 2009]) For example, damage to other equipment or installations beyond the construction materials and bare buildings that Archstone "purchased" from Tocci, would trigger an exception to the economic loss doctrine. (*See Saratoga Fishing Co. v. J.M. Martinac & Co.*, 520 US 875 [1997]). The court notes that the parties did not argue the merits of Archstone's negligence claims against Eldorado, and therefore the court has not considered the merits of Archstone's allegations that Eldorado Stone was negligent in designing an unreasonably dangerous decorative wall veneer. Defendant Eldorado Stone, LLC's motion for summary judgment dismissing plaintiff's tort claims as barred by the economic loss doctrine, is denied.

Express Warranty Claims

Eldorado contends that plaintiffs have failed to plead and substantiate the warranties which Archstone claims have been breached; that any warranties Archstone may find were not the basis of the bargain between Eldorado and the purchaser; and that Archstone cannot establish any breach of any such warranties. The basic elements for a claim of breach of express warranty are representations or promises of product quality extending to the plaintiff, reliance by the plaintiff on such representations or promises in purchasing the product, and breach of promises or representations. (*See* 93 NY Jur2d Sales §§ 176, 177).

In its Second Amended Complaint, Archstone asserts in an Eighth Cause of Action that Eldorado made "certain express warranties" of which it was an intended beneficiary, and that Eldorado breached those express warranties "by, among other things, designing, manufacturing,

marketing and distributing a defective product that permitted water intrusion and entrapment issues at the Project, and which has caused, among other things, damage to property of Archstone when used in its customary, usual, and reasonably forseeable manner." (Archstone Second Amended Complaint ¶¶ 73 — 80).

In opposing summary judgment, Archstone has a burden to come forward and bear its proof, since otherwise the court may be led to believe that there are no genuine issues of material facts that require a trial. (*See Silberstein, Awad & Miklos, P.C. v. Carson,* 10 A.D.3d 450 [2d Dept. 2004], *Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 [1980]). If, as it must, plaintiff seeks to prove that it relied upon an express warranty, it cannot avoid setting forth in detail what form the express representation took.

In its papers, Archstone does not avail itself of Eldorado's Limited Manufacturing Warranty, and Archstone presumably makes no claim of manufacturing defects under this express warranty. Instead, Archstone offers proof that Eldorado's technical data submitted to Tocci contained representations about the MSV's compliance with the International Building Code. It also offers the Williams report to indicate that this representation was false.

On the undisputed facts, Eldorado does not have any claim for breach of express warranty. The representation that the MSV complied with the International Building Code was made subject to various important conditions, including that the MSV must be installed "in accordance with the manufacturer's installation instructions," that "all exterior wall substrates shall be covered with a minimum of one layer of a water-resistive barrier complying with the requirements of the applicable code," and that "rigid, corrosion-resistant flashing and a means of drainage shall be installed at all penetrations and terminations of the stone cladding." (Crewdson Aff., Ex. 16 "ICBO Evaluation Report No. NER-602" ¶¶ 7.1, 7.4, 7.5). Eldorado's own installation instructions indicate that "[i]t is important to divert water run-off away from stone surfaces..." and that "[r]etaining walls must be water-proofed at the fill-side and incorporate provisions for adequate drainage." (Crewdson Aff., Ex. 16 "Eldorado Stone Installation Procedures" Section 4). The installation instructions also warn that "[u]se of OSB [oriented strand board sheathing] as backing material for our stone may cause cracking. (*Id.* at Section 2). Archstone's own expert report, indicates that "[a] review of the Architectural Design/Details

does not reveal any 'means for draining water' behind the exterior veneer. The most rudimentary prescriptive method to provide a 'means for draining water' would have been to provide two layers of a WRB [water resistant barrier] with weep screeds and through-wall flashings. These features were not designed, detailed, or specified by the Architect." (Crewdson Aff., Ex. 17 "Williams Building Diagnostics Inc. Preliminary Building Enclosure Report," p. 11). Further, Archstone's expert report notes that the asphalt felt that was actually installed on the project as the water-resistant barrier behind the MSV, "appear[s] to be of a lighter weight than the mandated ASTM D-226 No.15 felt product," and tested samples of cladding did "not meet the ASTM D-226 standard as mandated by the code." (*Id.* at pp. 10-11). Finally, the report notes that the MSV was installed over oriented strand board sheathing despite Eldorado's warning that it may cause cracking of the mortar or rock product, making it more porous. (*Id.* at p. 12). Archstone's Williams report thus establishes that the MSV was not installed in accordance with the conditions upon which ICBO represented that the MSV would comply with the International Building Code, since the felt used was a non-compliant water resistant barrier and flashing and water drainage was not used behind the MSV; in fact, the MSV was installed over oriented strand board sheathing despite Eldorado Stone's warning that it would cause the MSV to crack. Therefore, Archstone cannot prove any breach of the representation made in the ICBO Evaluation Report, since the representation does not apply to the Eldorado stone veneer as installed on Archstone's properties.

While the court need not consider the parties' other arguments, it notes that Archstone has admitted that it relied upon its architect, Perkins, to test the MSV and analyze the technical data. Therefore, any other representation that may have been made regarding the technical specifications of Eldorado's MSV product were not representations directed to Archstone, and Archstone did not rely upon them as the basis of any bargain.

Defendant Eldorado Stone, LLC's motion for summary judgment dismissing the breach of express warranty claims is granted.

Implied Warranties of Merchantability and Fitness for Particular Purpose.

Eldorado Stone, LLC also moves to dismiss Archstone's claims for breach of implied

warranty of merchantability and warranty of fitness for a particular purpose. While a claim for breach of an *express* warranty does not require privity when the promise or representation is directed to the plaintiff, (*see Randy Knitwear, Inc. v. American Cyanamid,* 11 N.Y.2d 5 [1962]), a claim for economic loss under the UCC implied warranties (UCC § 2-314) requires privity, unless the claimant also suffered personal injury. (*Pronti v. DML of Elmira, Inc.*, 103 A.D.2d 916 [3d Dept. 1984], *Regatta Condominium Ass. v. Village of Mamaroneck*, 303 AD2d 739 [2d Dept. 2003], *Coffey v. U.S. Gypsum Co.*, 149 AD2d 960 [4th Dept. 1989]). The very language of UCC § 2-318 exempts claimants from the privity requirement only for natural persons who are third-party beneficiaries.

> **UCC § 2-318: Third Party Beneficiaries of Warranties Express or Implied**
> A seller's warranty, whether express or implied, extends to any *natural person* if it is reasonable to expect such person may use, consume or be affected by the goods and who is injured in person by the breach of warranty.

The courts have been hesitant to erode the privity requirement any further, particularly in claims for UCC implied warranties. (*See, e.g., Cahill v. Lazarski*, 226 AD2d 572 [2d Dept. 1996], *Catalano v. Heraeus Kulzer, Inc.*, 305 AD2d 356 [2d Dept. 2003], *Jesmer v. Retail Magic, Inc.*, 55 AD3d 171 [2d Dept. 2008]). Further, it is not clear that the common law third-party beneficiary doctrine applicable to breach of contract claims, extends to statutory UCC implied warranties. (*Cf. Regatta Condo. Ass'n v. Village of Mamaroneck*, 303 AD2d 739 [2d Dept. 2003]).

As in the economic loss doctrine, the concern is to leave the parties to the benefit of their bargain. Permitting a claimant to reach through the distribution chain for claims of implied warranty tends to erode confidence in such arrangements, particularly since a distant manufacturer does not generally have control over the quality of the product as it is distributed to distant purchasers. Here, Archstone is not in privity with Eldorado Stone and thus cannot claim that the quality of the MSV, when Archstone received it, was not merchantable.

Archstone's claims for implied warranty of merchantability and particular purpose also fail on the merits. The implied warranty of merchantability and fitness for an ordinary purpose does not mean that a product will fulfill a buyer's every expectation, but provides for a minimal level of quality. (*Denny v. Ford Motor Co.*, 87 NY2d 248, 259 n. 4 [1995]). Merchantable can

mean "of fair average quality," (*Raymond v. VanDeusen*, 183 Misc.2d 81 [1998]), and of such quality as "pass[es] without objection in the trade," (UCC § 2-314[2][a]). The implied warranty of fitness for a particular purpose requires evidence that the parties in the transaction knew of some exceptional or otherwise non-ordinary use for which the product was required. (UCC § 2-315). A claim for implied warranty of fitness for a particular use also requires that the claimant was "relying on the seller's skill or judgment to select or furnish suitable goods." (*Id.*)

In this instance, Perkins inspected samples of the product and received various information regarding the MSV's technical data. Archstone admits that it relied on Perkins' evaluation of the samples and data. Moreover, there is no evidence that the MSV would be installed or used in a way that was exceptional or non-ordinary for the class of goods in which the MSV belonged, that is, decorative wall veneers. Therefore, there was is no implied warranty at issue of fitness for a particular use. The product is a decorative wall veneer, which was purchased as such without objection by Perkins as architect. Archstone has not argued as to these claims that the MSV failed to meet minimal levels of quality as a decorative wall veneer.

The motion by Eldorado Stone, LLC for summary judgment dismissing the causes of action for breach of implied warranties is granted.

This constitutes the Decision and Order of the Court.

Dated: January 19, 2011

J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE