INDEX NO.31510-2007

SUPREME COURT - STATE OF NEW YORK
SPECIAL TERM, PART 19 SUFFOLK COUNTY

Present:
Hon. SANDRA L. SGROI

Mot Seq: 007 MG
Mot Seq: 008 MotD
Mot Seq: 009 MotD
Adj. Date: 3-5-09
Return Date: 6-18-08

ACTIVE RETIREMENT COMMUNITY, INC. d/b/a JEFFERSON'S FERRY,
Plaintiff,

-against-

TRITEC/KLEWIN CONSTRUCTORS, L.L.C., TRITEC BUILDING COMPANY INC., CASHIN ASSOCIATES, P.C., CASHIN TECHNICAL SERVICES, INCORPORATED, KLEWIN BUILDING OF NEW YORK, L.L.C., f/k/a E&F WALSH BUILDING COMPANY, L.L.C., and C.R. KLEWIN INTERNATIONAL, INC.,

Defendants.

GARFUNKLE, WILD & TRAVIS, P.C.
Attorney for Plaintiff
111 Great Neck Road
Great Neck, New York 11021

ZETLIN & DeCHIARA, L.L.P.
Attorney for Defendants Cashin Associates and Cashin Tech
801 Second Avenue
New York, New York 10017

MILBER MAKRIS PLOUSADIS & SEIDEN, L.L.P.
Attorney for Defendants Tritec
1000 Woodbury Road, Suite 402
Woodbury, New York 11797

LEWIS & GREER, P.C.
Attorney for Defendants Klewin
510 Haight Avenue, Suite 202
Poughkeepsie, New York 12603

Upon the following papers numbered 1 to 46 read on these Motions: Notice of Motion and supporting papers(#007) 1-11; Notice of Cross Motion and supporting papers (#008) 12-15; Notice of Cross Motion and supporting papers (#009) 16-20; Affirmation in opposition and supporting papers 28-30; Affirmation in Reply and supporting papers 33-36; Affirmation in Reply and supporting papers 37-38;Exhibits (Memoranda of Law) 21-22; 25-27; 31-32; 39-40; 41-42; 43-44; 45-46; it is,

***ORDERED*** that motion sequence #007 of the Defendants Cashin Associates, P.C. and Cashin Technical Services, Incorporated for an order pursuant to ***CPLR*** 3211 (a)(1), (a)(5) and (a)(7) to dismiss the Plaintiff's complaint or, in the alternative, for an order for summary judgment dismissing the complaint pursuant to ***CPLR*** 3212 is granted to the extent that all claims in the first amended complaint interposed against these Defendants are dismissed pursuant to ***CPLR*** 3212; and it is further

***ORDERED*** that the cross claims interposed against the Defendants Cashin Associates, P.C. and Cashin Technical Services, Inc. are dismissed; and it is further

***ORDERED*** that cross motion sequence # 008 of the Defendants Tritec/Klewin Constructors, L.L.C., Klewin Building Company of New York, L.L.C. f/k/a E & F Walsh Building Company, L.L.C., and C. R. Klewin International, Inc. for an order pursuant to ***CPLR*** 2215 and ***CPLR*** 3211 (a) (7) dismissing the fifth and sixth causes of action in the First Amended complaint is granted to the extent that the fifth and sixth causes of action are dismissed; and it is further

***ORDERED*** that the request in cross motion sequence # 008 to dismiss the seventh cause of action is granted to the extent that this claim is derived from fraud and/or negligence but the seventh cause of action is not dismissed to the extent that it seeks damages for a breach of performance of a contract by the Defendants; and it is further

***ORDERED*** that cross motion sequence #009 of the Defendant, Tritec Building Company, Inc., for an order pursuant to ***CPLR*** 3211 (a)(7) and ***CPLR*** 3016(b) dismissing the seventh cause of action in the Plaintiff's First Amended complaint is granted only to the extent that the seventh cause of action is derived from claims for fraud and negligence; and it is further

***ORDERED*** that the Plaintiff's demand for attorneys fees contained in the "ad damnum" or "wherefore" clause of the first amended complaint as subdivision "h" is stricken; and it is further

***ORDERED*** that the caption of this action is deemed amended to reflect the deletion of certain parties in this action and the parties are directed to file with the Court the previously signed stipulation permitting the Plaintiff to delete Defendants C.R. Klewin Northeast, L.L.C., Klewin Building Company, Inc., C.R. Klewin, Inc., Daniel Root, and James L. Coughlan from this action and the action is discontinued against those Defendants; and it is further

***ORDERED*** that the caption in this action is amended with various Defendants deleted from the caption

in accordance with this order and the caption shall henceforth read:

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ACTIVE RETIREMENT COMMUNITY, INC. d/b/a JEFFERSON'S FERRY,
Plaintiff,

-against-

TRITEC/KLEWIN CONSTRUCTORS, L.L.C., TRITEC BUILDING COMPANY INC., KLEWIN BUILDING OF NEW YORK, L.L.C., f/k/a E&F WALSH BUILDING COMPANY, L.L.C., and C.R. KLEWIN INTERNATIONAL, INC.,
Defendants.

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and; it is further

***ORDERED*** that the remaining parties to this action are directed to complete discovery in this matter and file a note of issue after all of the parties agree by written stipulation that discovery has been completed.

The Plaintiff herein, Active Retirement Community, Inc. d/b/a Jefferson's Ferry, initially commenced this action to recover damages for the alleged breach of contract with respect to the design and construction of a new facility known as Jefferson's Ferry Care Retirement Community (hereinafter "the Project" or "the retirement community") located at the intersection of Route 347 and Wireless Road in the Town of Brookhaven. The Plaintiff filed the summons and complaint on October 10, 2007. The original complaint subsequently was superceded by service of a first amended complaint.

Although the parties to this action entered into a written stipulation dated May 6, 2008, that stipulation was never submitted to the Justice formerly assigned to this matter and its contents were not "so ordered". Pursuant to that stipulation, the Plaintiff voluntarily discontinued this action as against the Defendants C.R. Klewin Northeast, L.L.C., Klewin Building Company, Inc., C.R. Klewin, Inc., Daniel Root, and James L. Coughlan. This Court directs that this action against Defendants C.R. Klewin Northeast, L.L.C., Klewin Building Company, Inc., C.R. Klewin, Inc., Daniel Root, and James L. Coughlan shall be discontinued by this order and this order directs that the caption be amended to reflect the deletion of these parties as Defendants in this action.

The Defendants, Cashin Associates, P.C. and Cashin Technical Services, Inc. (hereinafter "the Cashin Defendants"), have moved for dismissal of the action pursuant to ***CPLR*** 3211 and ***CPLR*** 3212 (motion sequence #007). The Plaintiff served its first amended complaint, dated June 5, 2008, after the motion to dismiss made by the Cashin Defendants under sequence # 007 was served upon all parties. The first, second and third causes of action in the amended complaint allege claims against the Cashin Defendants. On this motion, the Cashin Defendants allege that the Plaintiff's claims are time barred by the statute of limitations.

Generally, the service of an amended complaint moots the motion to dismiss, and if the moving party

still objects to the sufficiency of the superceding amended pleading, that party then would bring a second motion to dismiss that addressed the new amended pleading (see, ***Samide v. Roman Catholic Diocese of Brooklyn***, 194 Misc.2d 561, 754 N.Y.S.2d 164).

However, the Plaintiff has submitted a memorandum of law addressing the merits of the motion to dismiss (sequence # 007) brought by the Cashin Defendants to the extent that the arguments in the motion to dismiss apply to the amended complaint. Since the Cashin Defendants and the Plaintiff have elected to address the issues of fact and law raised by the claims interposed in the first amended complaint without submitting a new motion and the other parties have not objected, the Court will consider the motion to dismiss the causes of action interposed against the Cashin Defendants without requiring these Defendants to re-move for the same relief (see generally ***IDT Corp. v. Morgan Stanley Dean Witter & Co.***, 16 Misc.3d 1127(A), 847 N.Y.S.2d 902).

The statute of limitations issues are not affected by the service of the amended complaint and the Court is not restricted from addressing motion sequence # 007 on its merits. Parties are given great latitude to chart their own course through litigation, and, since the parties wish to submit these issues following this procedure, there is no reason for this Court not to address the points raised by motion sequence # 007 (see, ***Stevenson v. News Syndicate Co.***, 302 N.Y. 81, 87, 96 N.E.2d 187; ***Chemical Bank v. Buxbaum***, 76 A.D.2d 850, 428 N.Y.S.2d 523).

In addition to the motion by the Cashin Defendants, two other motions to dismiss by the remaining Defendants are returnable. The Defendants Tritec/Klewin Constructors, L.L.C., Klewin Building Company of New York, L.L.C. and C.R. Klewin International, Inc. have moved to dismiss the fifth, sixth and seventh causes of action of this amended complaint (motion sequence # 008). These causes of action allege claims sounding in fraud, negligent misrepresentation and breach of contract. The seventh cause of action in the first amended complaint also alleges that Tritec Building Company, Inc., C. R. Klewin International, Inc. and Klewin Building Company of New York, L.L.C. failed to complete work under a guaranty agreement.

The Defendants Tritec/Klewin Constructors, L.L.C., Klewin Building Company of New York, L.L.C. f/k/a E & F Walsh Building Company, L.L.C. and C. R. Klewin International, Inc. allege in motion sequence # 008 that the fifth and sixth causes of action for fraud and negligent misrepresentation, respectively, and the seventh cause of action under the guaranty should be dismissed as against them because no such claims exist as a matter of law when the only fraudulent and negligent misrepresentations relate to the performance of the contract. These Defendants have not moved to dismiss the breach of contract claim interposed by the Plaintiff.

The Defendant Tritec Building Company, Inc. is represented by different counsel than the other Defendants in this action and the attorneys for Tritec Building Company, Inc. have cross moved under motion sequence # 009 to dismiss the seventh cause of action in the Plaintiff's first amended complaint on the same grounds that the Defendants in motion sequence # 008 have raised.

Prior to determining the motions to dismiss on their merits, the Court will address the facts and allegations of the parties to this litigation and their attorneys as set forth in the motion papers.

The Plaintiff alleges that the Defendant Tritec/Klewin Constructors, L.L.C. (hereinafter "Tritec") and Cashin Associates, P.C. constructed the retirement community that is the subject of this action[1] without adequate drainage and this failure has resulted in water damage, mold and other damage to the property of the Plaintiff. Further, it is alleged in the amended complaint that after the construction of the project was completed, the representatives of the Defendants lied to the Plaintiff when they informed Plaintiff that the drainage problems were caused by substandard design. It is alleged that the Defendants "knew that and intended that Jefferson's Ferry would rely upon their false and negligent statements regarding the quality of the Work, the responsibility for any deficiencies in the Work, and the extent to which deficiencies in the Work had been corrected." (First Amended Complaint)

Plaintiff alleges that this deception prevented it from uncovering both the scope and the cause of the drainage problems for several years and that, as a result, the Plaintiff did not commence this legal action until after the applicable statute of limitation for malpractice and breach of contract applicable to the Cashin Defendants had expired.

In March of 1997, the Plaintiff retained the Defendant Cashin Associates P.C. (hereinafter "Cashin") to prepare drainage and grading plans, to prepare road profiles showing drainage structures and vertical alignment, and to serve as the site engineer on the project. Cashin also agreed to serve as site engineer with respect to the construction of the retirement community. According to the first amended complaint, Cashin was obligated to provide:

A. the design of all of the grounds of the Project;
B. plans, drawings and design for the grading of the property of the Project;
C. plans, drawings and design for all sidewalks and roadways within the Project; and
D. plans, drawings and designs for the landscaping of the Project.

(Plaintiff's first amended complaint).

In or about July of 1999, the Plaintiff retained Tritec to provide services in connection with the construction of this project for a retirement community in Brookhaven. The first amended complaint alleges that this contract required Tritec:

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[1]This facility is located at the intersection of Route 347 and Wireless Road in the Town of Brookhaven in Suffolk County. According to a letter attached as Exhibit "A" to motion #007, the project involved "the development of 50 acres into a facility with 60 assisted care units and 60 nursing home beds and 200-240 PRC units, 32 of which will be cottages and the rest garden apartments."

A. "to review the Project drawings and specifications and notify the architect and Jefferson's Ferry of any error, inconsistency, or omission Tritec discovered in the Project drawings and specifications";
B. "to perform the Work in accordance with the project drawings and specifications";
C. to be "responsible for the acts and omissions of Tritec's subcontractors";
D. to warrant that the "work would be free from defects not inherent in the quality required or permitted, and that the Work would conform with the requirements of the project drawings and specifications";
E. to correct any non-conforming or defective work promptly; and
F. "to substantially complete the Work by March 30, 2001."

(Plaintiff's first amended complaint).

It is clear from a review of the obligations of Tritec and Cashin as stated in the amended complaint that Cashin was hired to plan and design the project and Tritec was hired to construct the project using the plans developed by Cashin.[2]

In October of 1999, Tritec, Klewin Building Company of New York f/k/a E & F Walsh Building Company, L.L.C. and C.R. Klewin International, Inc. (hereinafter "Klewin International") signed a guarantee wherein they unconditionally agreed, jointly and severally, to perform and discharge Tritec's contractual obligations with the Plaintiff.

As noted previously, the project involved the construction of a main building, residential cottages, and landscaping. Cashin alleges that it completed all of its services on the project on December 28, 2001, and that a final invoice was sent to the Plaintiff on January 7, 2002. On July 24, 2002, Skip West, a representative of the management for Jefferson's Ferry, wrote to Cashin addressing Plaintiff's refusal to pay this invoice. The letter stated in part:

> I have completed my review relative to the site drainage issues at Jefferson's Ferry. As you know, the community has been dealing with standing water at various locations throughout the property since the residents began moving in over a year ago. The urgency to resolve this condition was first and foremost in the minds of the Board of Directors and Executive Staff***. ***The community hired J. Murphy's Sewer & Drain Inc. from Medford, NY as the remediation contractor. To date, Jefferson's Ferry has incurred $49,250.00 with an expectation that an additional $20,000.00 may be necessary.

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[2]None of the parties have submitted the entire written contracts or the guarantee as an exhibit to this motion. However, no party has disputed the veracity of the allegations in the complaint with regard to the terms of the contracts and guarantee.

> ***In my opinion, drainage problems existed at Jefferson's Ferry, which put the Board of Directors and Executive Staff in an unmanageable position with the residents we all serve. Health issues, safety concerns, and general site appearance were all paramount in the decision to resolve the problems quickly. Therefore, as an advisor to the Board of Directors and member of the Management Staff, I cannot at this time recommend the approval of outstanding Cashin invoices totaling $46,964.25. In short, responsible people at Jefferson's Ferry were forced to resolve a problem that should not have occurred. This decision in no way should be construed as an opinion on your abilities or the abilities of Cashin Associates whom I hold in the highest regard.

As of July 24, 2002, the Plaintiff was aware that it had a drainage problem, that it was significant, that a remediation contractor had been hired, that monetary damages of at least $50,000.00 allegedly attributable to the drainage problem had resulted, and that the problem had existed for at least one year. Plaintiff also was refusing to pay almost $50,000.00 to Cashin because of this problem.

In May of 2001, the first tenants began to move into Plaintiff's facility although it is undisputed that construction of the project was not complete at that time. The Plaintiff alleges that Tritec denied responsibility for the improper drainage of water at the site and that Cashin was responsible for this water problem. Plaintiff alleges that when Cashin was approached to address the improper drainage, Cashin denied responsibility and alleged that Tritec was responsible for the drainage issues. Further, according to the Plaintiff's attorney, representatives of Cashin stated to them that they had taken steps to remedy the drainage problem and that the drainage problem was eliminated. Plaintiff's attorney has not identified the persons allegedly involved in these conversations, exactly when they occurred or where they occurred.

This law suit was not commenced against the Defendants by the Plaintiff until October of 2007.

The Defendants, Cashin Associates, P.C. and Cashin Technical Services, Incorporated, have moved for dismissal of the complaint pursuant to ***CPLR*** 3211(a)(1), (a)(5) and (a)(7) and for summary judgment pursuant to ***CPLR*** 3212 under motion sequence # 007. Frank Cashin, III, the Executive Vice President of Cashin Associates, P. C. and the Vice President and Treasurer of Cashin Technical Services, Incorporated, alleges in his affidavit that although Cashin Technical Services, Incorporated has been named in the caption of the complaint as a Defendant, the Plaintiff has not alleged any claims against this Defendant and that Cashin Technical Services, Incorporated did not perform any services for the Plaintiff. Under these circumstances, the motion to dismiss the action against Cashin Technical Services, Incorporated is granted and the caption is deemed amended to reflect the deletion of this Defendant from this action. Therefore, the Court will consider the merits of motion to dismiss and for summary judgment under sequence #007 with regard to the only Cashin Defendant remaining in this action, Cashin Associates, P.C. (hereinafter the Court will refer to this Defendant as "Cashin").

In motion sequence #007, Cashin alleges that it initially was retained by Mather Hospital/St. Charles Hospital Life Care Committee to provide professional engineering and environmental impact analysis

in connection with the development of an assisted care facility and nursing home. This first agreement for professional services for this project defined Cashin's role to include retention of a surveyor, preparation of documents for a petition for re-zoning, preparation of environmental impact forms, development of plans for the Suffolk County Department of Health Services for the design of a water distribution system, preparation of a design report and development of a plan for a water waste treatment plant (see, Cashin's Exhibit "A"). These services on the project were completed by September of 1999.

In September 1999, a second contractual agreement was entered whereby Cashin agreed to perform additional services for the construction project (see, Cashin's Exhibit "B"). These services included attending pre-construction meetings with the Suffolk County Department of Public Works, reviewing drawings of the sewage collection system, conducting periodic visits to inspect the installation of the sanitary system and, when requested, attending construction meetings. Cashin alleges that it completed its responsibilities under this agreement by December 28, 2001.

On this motion, it is unclear if the alleged errors in the plans concerning water drainage occurred under the first contract where services were completed in 1999 or the second contract where Cashin's services were allegedly completed in 2001. Since this issue has not been discussed by the parties, the Court must assume that the alleged errors occurred in the performance of the second contract, and in any event, the two contracts are so interconnected, that for statute of limitations purposes, they will be treated as one contract with a later termination date (see, ***Greater Johnstown City School Dist. v. Cataldo & Waters, Architects, P.C.***, 159 A.D.2d 784, 551 N.Y.S.2d 1003).

Cashin states that the first complaint served by the Plaintiff alleged a claim for breach of contract and that the claim for breach of contract interposed against it is barred by the running of the statute of limitations. This complaint also alleged breach of contract claims against the other Defendants in this action who were involved in the construction of the project.

The Plaintiff, after receiving the motion to dismiss the complaint from the Cashin Defendants, served and filed an amended, superceding complaint that added causes of action for fraud and misrepresentation in addition to the cause of action for breach of contract against the Cashin Defendants. This amended complaint alleges a first cause of action for breach of contract, a second cause of action sounding in fraud and a third cause of action averring generally that:

> Cashin made materially false representations to Jefferson's Ferry in that Cashin informed Jefferson Ferry that the grading and drainage work Cashin had performed pursuant to the Cashin Contract was not deficient, that any deficiencies in the grading and drainage of the project were not the responsibility of Cashin, and that Cashin had successfully remediated any deficiencies in the grading and drainage of the project.
>
> Cashin recklessly and negligently made these materially false and negligent representations, and should have known them to be false at the time Cashin made them.

In addition to the three causes of action interposed against the Cashin Defendants by the Plaintiff, the amended complaint added causes of action against the other Defendants named in this action. The fourth cause of action in the amended complaint alleges a breach of contract claim against the Defendant Tritec/Klewin Constructors, L.L.C., one of the movants in the motion to dismiss under sequence # 008, and the building contractor for the project. The Defendant Tritec/Klewin Constructors, L.L.C. has not moved to dismiss this cause of action.

The fifth and sixth causes of action in the amended complaint allege causes of action sounding in fraud and misrepresentation against Tritec/Klewin Constructors, L.L.C. and the allegations supporting those causes of action mirror closely the claims interposed against Cashin in the second and third causes of action of the same amended complaint.

The seventh cause of action in the amended complaint is interposed against Tritec Building Company, Inc., C. R. Klewin International, Inc. and Klewin Building Company of New York, L.L.C. f/k/a E & F/Walsh Building Company, L.L.C. as Defendants alleging that these entities breached their written guaranty of Tritec/Klewin Constructors' proper performance of work on the retirement project known as Jefferson Ferry.

The Plaintiff alleges in the amended complaint and in the affirmations and memorandums in opposition to the motions to dismiss that in 2006, it discovered mold in some of the buildings at the Jefferson Ferry retirement community and that an investigation revealed that the mold was caused by excess moisture in the buildings created when water had leaked into the buildings. A consultant was hired, and according to the Plaintiff, he found that the ground surrounding the structures was not properly pitched away from the structures, that the finished floors of some of the structures were below the surrounding grade, and that the elevation levels of the walkways and the roadways surrounding the buildings were too high. The Plaintiff states in the amended complaint that the cost of remedying these errors will cost approximately two million dollars and the Plaintiff seeks this sum in damages in this action.

Although a reading of the amended complaint seems to allege that the Plaintiff did not discover the water drainage problems and the mold growth until 2006, by a letter dated July 24, 2002, (that was quoted extensively earlier in this decision) Mr. Skip West of New Life Management and Development, the management agency for the Plaintiff Jefferson Ferry, stated that the Plaintiff had been "dealing with standing water at various locations throughout the property since the residents began moving in over a year ago."

It is clear from that letter from Mr. West that the Plaintiff has been aware of the drainage problems on site for a prolonged period of time and it has had knowledge that the pooling of water was a significant difficulty at the project since at least the year 2002, when the above referred to letter was sent to Frank Ribaudo, an employee of Cashin.

In support of its motion to dismiss, Cashin has submitted affidavits by persons with actual knowledge

of the facts surrounding the Plaintiff's claims. In contrast, the Plaintiff has submitted only affirmations from its attorney and has attempted to set forth factual allegations in its memorandum of law. The affirmation by the attorney for the Plaintiff who has no personal knowledge of the actual facts is without probative value as to those facts (see, ***Bendik v. Dybowski***, 227 A.D.2d 228, 642 N.Y.S.2d 284).

Francis D. Ribaudo, the Vice President of Cashin Associates, P.C., states in his affidavit that he never made any fraudulent statements to the Plaintiff's representatives and that the drainage and water issues were not caused by any act or omission of Cashin. In opposition, the Plaintiff has failed to provide the Court with any affidavits from an employee or agent upon which the Court could conclude that a triable issue of fact existed. There are no affidavits from experts connecting the drainage problem with the work performed by Cashin on the project. While expert affidavits certainly would not be required to defeat a motion to dismiss based upon the statute of limitations, Cashin has also moved for summary judgment to dismiss pursuant to ***CPLR*** § 3212. The affirmation by an attorney having no knowledge of facts is without probative value and cannot defeat the motion for summary judgment (see, ***Bendik v. Dybowski***, 227 A.D.2d 228, 642 N.Y.S.2d 284). The Plaintiff has not provided the Court with the actual statements upon which the Plaintiff based its claims for fraud and misrepresentation.

Therefore, the motion of Cashin for summary judgment will be granted by the Court. However, the Court still will address the other issues raised by Cashin concerning the accrual of the claim, the appropriate statute of limitations to apply to these facts, and the sufficiency of the fraud claims interposed by the amended complaint.

Even if the Court did not grant summary judgment dismissing the action, the claims against Cashin sounding in malpractice also would be dismissed because the statute of limitations within which to commence that action had expired when the Plaintiff filed its original complaint in 2007.

When a Plaintiff moves to dismiss a cause of action pursuant to ***CPLR*** 3211 (a) (5) on the ground that the cause of action is barred by the statute of limitations, that party bears the initial burden of establishing the affirmative defense by prima facie proof that the time within which to commence a law suit expired prior to the commencement of the litigation (see, ***Siegel v Wank***, 183 AD2d 158, 589 N.Y.S.2d 934). This burden has been met by Cashin with the submission of affidavits and documentary evidence.

Actions for malpractice against non-medical professionals are governed by the three-year statute of limitations set forth in ***CPLR*** § 214 (6) (see, ***In re R.M. Kliment & Frances Halsband, Architects (McKinsey & Co., Inc.)***, 3 N.Y.3d 538, 788 N.Y.S.2d 648, 821 N.E.2d 952; ***Town of Wawarsing v. Camp, Dresser & McKee, Inc.***, 49 A.D.3d 1100, 855 N.Y.S.2d 691). Actions for breach of contract

against non-professionals are governed by the longer period of a six year statute of limitations.[3] Here, the statute of limitations applicable in the first cause of action against Cashin is three years since here "the underlying complaint is one which essentially claims that there was a failure to utilize reasonable care or (one) where acts of omission or negligence are alleged or claimed"(***In re R.M. Kliment & Frances Halsband, Architects (McKinsey & Co., Inc.)***, 3 N.Y.3d 538, 788 N.Y.S.2d 648, 821 N.E.2d 952).

A cause of action alleging professional malpractice against an engineer or architect "accrues upon the completion of performance under the contract and the consequent termination of the parties' professional relationship" ( see, ***Frank v. Mazs Group, L.L.C.***, 30 A.D.3d 369, 815 N.Y.S.2d 738; ***County of Rockland v. Kaeyer, Garment & Davidson Architects***, 309 A.D.2d 891, 766 N.Y.S.2d 359). It has been held that completion of the project occurs when premises is occupied for its intended use (see, ***DiSunno Architecture v. Sheppard***, 795 N.Y.S.2d 678, 679, 18 A.D.3d 751).

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[3] In the Court of Appeals Case of ***In re R.M. Kliment & Frances Halsband, Architects (McKinsey & Co., Inc.)***,( 3 N.Y.3d 538, 788 N.Y.S.2d 648, 821 N.E.2d 952), Judge Ciparick stated for a unanimous Court that:

> (p)rior to the 1996 amendment, we determined the appropriate statute of limitations in nonmedical malpractice actions based upon the proposed remedy instead of the theory of liability ( see e.g. ***Santulli v. Englert, Reilly & McHugh, P.C.***, 78 N.Y.2d 700, 708, 579 N.Y.S.2d 324, 586 N.E.2d 1014 [1992]; ***Sears, Roebuck & Co. v. Enco Assoc., Inc.***, 43 N.Y.2d 389, 394-395, 401 N.Y.S.2d 767, 372 N.E.2d 555 [1977] ). These cases held that liability would not have existed between the parties without the contractual relationship and that there was an implied agreement to perform professional services using due care ( see ***Santulli***, 78 N.Y.2d at 707, 579 N.Y.S.2d 324, 586 N.E.2d 1014; ***Sears***, 43 N.Y.2d at 396, 401 N.Y.S.2d 767, 372 N.E.2d 555). Parties were permitted to maintain a malpractice action under a breach of contract theory within the six-year statute of limitations, but were limited to damages available in a contract action if the three-year malpractice limitations period had expired ( see ***Santulli***, 78 N.Y.2d at 709, 579 N.Y.S.2d 324, 586 N.E.2d 1014). It is the effect of these decisions that the amendment to ***CPLR*** 214(6) was intended to change. The legislative history makes clear that "where the underlying complaint is one which essentially claims that there was a failure to utilize reasonable care or where acts of omission or negligence are alleged or claimed, the statute of limitations shall be three years if the case comes within the purview of ***CPLR*** 214(6), regardless of whether the theory is based in tort or in a breach of contract" (Revised Assembly Mem. in Support, Bill Jacket, L. 1996, ch. 623).

As a preliminary matter, claims against certain professionals are governed by the malpractice statute of limitations while claims against certain other persons, even though they may be highly trained and licensed by professional organizations, are governed by the statute of limitations for breach of contract or negligence, depending on the allegations in the complaint. Therefore, the occupation of aircraft mechanic is not one that should be considered as "professional" under the standards set forth in ***Chase Scientific Research v. NIA Group,*** (96 N.Y.2d 20, 28-30, 725 N.Y.S.2d 592, 749 N.E.2d 161) and that an action against an aircraft mechanic is governed by the "limitations periods applicable to negligence actions (***CPLR*** 214[4] ) and breach of contract actions (***CPLR*** 213[2] )" (***Parker v. Leonard***, 24 A.D.3d 1255, 807 N.Y.S.2d 774 citing ***Chase Scientific Research v. NIA Group***) not the limitations period applicable to malpractice actions ( see, ***CPLR*** 214 [6]; ***Gelmac Quality Feeds, Inc. v. Ronning***, 23 A.D.3d 1019, 804 N.Y.S.2d 174, reargument denied by 26 A.D.3d 904, 808 N.Y.S.2d 127).

However, actions brought against architects, such as the Cashin Defendant and engineers have been held to be malpractice claims governed by ***CPLR*** § 214-c (see, ***In re R.M. Kliment & Frances Halsband, Architects, McKinsey & Co., Inc.***, 3 N.Y.3d 538, 788 N.Y.S.2d 648, 821 N.E.2d 952; ***In re Clark Patterson Engineers, Surveyor, and Architects, P.C., City of Gloversville Bd. of Water Com'rs***, 25 A.D.3d 984, 809 N.Y.S.2d 247, lv. to app'l den'd, 6 N.Y.3d 714, 823 N.Y.S.2d 355, 856 N.E.2d 919). In fact, a trial Court has held in an unrelated but reported case that Cashin is a professional corporation and that the three year statute of limitations should be applied in a Plaintiff's law suit against them (see, ***Tyree Organization, Ltd. v. Cashin Associates, P.C.***, 14 Misc.3d 1220(A), 836 N.Y.S.2d 490).

In 1996, "the Legislature amended ***CPLR*** § 214(6) to apply a three-year limitations period to all non-medical malpractice actions, whether based on tort or contract" ( ***Chase Scientific Research v. NIA Group,*** 96 N.Y.2d 20, 25, 725 N.Y.S.2d 592, 749 N.E.2d 161). Thus, except for a claim alleging breach of a contract to obtain a particular bargained-for result, the applicable statute of limitations against a non-medical professional for professional misfeasance is three years and that is the statute of limitations that will be applied to the first cause of action ( see, id., at 25, 725 N.Y.S.2d 592, 749 N.E.2d 161).

Cashin established that its employment by the Plaintiff terminated no later than the year 2002, at which time the project was completed, Cashin's final invoice for services was submitted to the Plaintiff for payment, and Plaintiff refused final payment. In opposition to this motion to dismiss, the Plaintiff has failed to provide any facts by a person with actual knowledge to dispute the time when Cashin's employment by the Plaintiff terminated. Some sporadic or random communications after the year 2002, alleged to have occurred by the attorney for the Plaintiff in his opposition to this motion, will not serve to establish a different and later date for the accrual of the statute of limitations (see, ***M.G. McLaren, P.C. v. Massand Engineering, L.S., P.C.***, 51 A.D.3d 878, 858 N.Y.S.2d 340; see generally, ***Williamson v. PricewaterhouseCoopers LLP,*** 9 N.Y.3d 1, 9, 840 N.Y.S.2d 730, 872 N.E.2d 842).

A toll of the statute of limitations created by the continuous representation doctrine does not apply in this case because the record does not show that Cashin provided continuous services to the Plaintiff and

there was no ***mutual*** understanding that the Plaintiff required further work after the Defendant's submission of the final invoice for Cashin's services ( see, ***Williamson v. Pricewaterhouse Coopers LLP,*** supra; ***National Life Ins. Co. v. Hall & Co. of N.Y.,*** 67 N.Y.2d 1021, 1023, 503 N.Y.S.2d 318, 494 N.E.2d 449). The sporadic communications between the parties which Plaintiff relies upon to establish the toll took place between the parties in the years 2003, 2005, and 2006, and are insufficient to establish that there was a continuous contractual relationship that tolled the running of the statute of limitations ( see, ***Williamson v. Pricewaterhouse Coopers, LLP***, supra).

The cause of action for professional malpractice asserted against Cashin accrued upon completion of performance of the contract with the client, and completion was when the professional's relationship with the owner "ended" no later than 2002 (see, ***Parsons Brinckerhoff Quade & Douglas v. Energypro Constr. Partners,*** 271 A.D.2d 233, 234, 707 N.Y.S.2d 30; ***Methodist Hosp. v. Perkins & Will Partnership,*** 203 A.D.2d 435, 610 N.Y.S.2d 572). ***County of Rockland v. Kaeyer, Garment & Davidson Architects, P.C.***, 309 A.D.2d 891, 766 N.Y.S.2d 359).

The term "end" is not construed so strictly as to prevent all professional contact between the professional and the client after the main purpose or result bargained for has been achieved. As noted before, the running of the statute of limitations is not tolled simply because the engineer's client communicated with the engineer to inform him that there were problems with the completed project and some cursory review by the engineer or architect occurred. Even if there was sufficient communication and services performed on behalf of the Plaintiff by Cashin in 2003 to extend the statute of limitations through that year, the three year statute still would have run by the time this action was commenced by the Plaintiff in 2007 (see generally, ***M.G. McLaren, P.C. v. Massand Engineering, L.S., P.C.***, 51 A.D.3d 878, 858 N.Y.S.2d 340; ***Manhattanville College v. James John Romeo Consulting Engineer, P.C.***, 5 A.D.3d 637, 774 N.Y.S.2d 542).

In summary, the first cause of action, which alleges that Cashin breached its contract with the Plaintiff, is governed by the three statute of limitations in ***CPLR*** § 214(6) and, since this civil action was commenced on October 10, 2007, and the cause of action accrued in 2002, the first cause of action against Cashin for breach of contract would be dismissed as untimely even if the Court did not grant the motion for summary judgment.

There have been amendments to the ***CPLR*** that extend the time period to commence an action in a situation where a Plaintiff incurs damages because of exposure to a substance but that Plaintiff is unaware that an injury will result. ***CPLR*** § 214-c is the section of the ***CPLR*** that addresses the time limitations for commencing an action based upon exposure to a toxic substance. ***CPLR*** § 214-c, states:

> Notwithstanding the provisions of section 214, the three year period within which an action to recover damages for personal injury or injury to property caused by the latent

> effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property must be commenced shall be ***computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier***. (emphasis provided by the Court)

***CPLR*** § 214-c applies to actions to recover damages caused by contamination by any substance (see, ***Curry v. D'Onofrio***, 29 A.D.3d 727, 816 N.Y.S.2d 144; ***DiStefano v. Nabisco, Inc.***, 282 A.D.2d 704, 724 N.Y.S.2d 444).[4] In ***MRI Broadway Rental, Inc. v. United States Mineral Products Co.***, (92 N.Y.2d 421, 681 N.Y.S.2d 783, 704 N.E.2d 550 ), the Court of Appeals stated that "(f)or purposes of ***CPLR*** § 214-c, discovery occurs when, based upon an objective level of awareness of the dangers and consequences of the particular substance 'the injured party discovers the ***primary condition*** on which the claim is based" ' (emphasis provided by this Court; Court of Appeals citing, ***Matter of New York County DES Litig.***, 89 N.Y.2d 506, 655 N.Y.S.2d 862, 678 N.E.2d 474; see also ***Whitney v. Quaker Chemical Corp.,*** 90 N.Y. 2d 845, 660 N.Y.S.2d 862, 683 N.E.2d 768).

According to all of the papers submitted, the Plaintiff became aware of the alleged improper grading and elevation of the roadways and buildings in the retirement community in 2002, and this knowledge was stated in the letter, referred to previously, that was sent from Skip West to Frank Ribaudo, an employee of Cashin. Therefore, it is this date that the Court is using to calculate the time that the statute of limitations began to run because Plaintiff was aware of both the problem, the need to remediate the problem, and that damages were occurring as of the drafting and mailing of the letter from Skip West.

The second and third causes of action in the amended complaint allege claims sounding in both negligence and fraud against Cashin. To the extent that these causes of action in the amended complaint seek to recover damages based on pure negligence, those claims must be dismissed because the Plaintiff fails to allege facts which, even if proven, would establish that the Defendants breached a duty of care independent of any purported contractual obligation that Cashin owed to the Plaintiff ( see, ***Clark-Fitzpatrick, Inc. v. Long Island Rail Road Co.***, 70 N.Y.2d 382, 389, 521 N.Y.S.2d 653, 516 N.E.2d 190; ***Wiernik v. Kurth***, 59 A.D.3d 535, 873 N.Y.S.2d 673; ***Muldoon v. Blue Water Pool Servs.***, 7 A.D.3d 496, 497, 775 N.Y.S.2d 583). Since the amended complaint alleges that Cashin performed substandard or incomplete work in the planning and review of construction work at the retirement community, it sounds in breach of contract not negligence and all negligence claims must be dismissed

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[4]***CPLR*** 214-c applies to tort actions ,continuing trespass and nuisance (***Scheg v. Agway, Inc.***, 229 A.D.2d 963, 645 N.Y.S.2d 687; ***Pfohl v. Amax, Inc.***, 222 A.D.2d 1068, 635 N.Y.S.2d 880 leave to appeal denied 88 N.Y.2d 1038, 651 N.Y.S.2d 12).

( see, ***Albstein v. Elany Contr. Corp.***, 30 A.D.3d 210, 818 N.Y.S.2d 8).

Similarly, the causes of action interposed against Cashin sounding in fraud must be dismissed because the claims of fraud are based on the same allegations as the breach of contract claim (see, ***McKernin v. Fanny Farmer Candy Shops***, 176 A.D.2d 233, 574 N.Y.S.2d 58). As the attorney for Cashin states, the Plaintiff cannot classify a cause of action for professional malpractice or for breach of contract as a fraud claim in an attempt to avoid the consequences of an expired statute of limitations (see, ***Cabrini Medical Center v. Desina***, 64 N.Y.2d 1059, 479 N.E.2d 217, 489 N.Y.S.2d 872; ***Ruffing v. Union Carbide Corp.***, 764 N.Y.S.2d 462, 308 A.D.2d 526).

Further, the alleged misleading and/or untrue sporadic communications by representatives of Cashin with representatives of Cashin after the year of 2002, does not save these causes of action in the amended complaint because "mere conclusory language, without specific and detailed allegations establishing material misrepresentations of fact, is insufficient to state a cause of action to recover damages for fraud " (***Heffez v. L & G General Const., Inc.***, 56 A.D.3d 526, 527, 867 N.Y.S.2d 198- citing see, ***Old Republic Natl. Tit. Ins. Co. v. Cardinal Abstract Corp.***, 14 A.D.3d 678, 790 N.Y.S.2d 143). Since no affidavits have been submitted in opposition to the motion to dismiss, this Court cannot look to any statements by a person with actual knowledge to supplement Plaintiff's conclusory averments in the amended complaint.

With regard to the causes of action sounding in fraud, special pleading rules apply that are stricter than those that apply to other causes of action. To state a cause of action for fraud, the allegations of which must be pleaded with particularity ( see, ***CPLR*** 3016[b] ), the Plaintiff must show, by clear and convincing evidence ( see, e.g., ***Callahan v. Miller***, 194 A.D.2d 904, 905, 599 N.Y.S.2d 145) that the Defendants made "a representation of fact, which is either untrue and known to be untrue or recklessly made, and which is offered to deceive the other party and to induce them to act upon it, causing injury" ( ***Jo Ann Homes at Bellmore v. Dworetz***, 25 N.Y.2d 112, 119, 302 N.Y.S.2d 799, 250 N.E.2d 214; see, ***Franco v. English***, 210 A.D.2d 630, 632, 620 N.Y.S.2d 156, 159). The elements constituting a cause of action in fraud are "misrepresentation of a material fact, falsity, scienter, deception and injury"(; see also, ***Barclay Arms v. Barclay Arms Assocs.***, 74 N.Y.2d 644, 646-647, 542 N.Y.S.2d 512, 540 N.E.2d 707; ***Atlantic Welding Servs. v. Westchester Steel Fabricators Corp.***, 173 A.D.2d 1073, 1074, 570 N.Y.S.2d 410). In other words, as the Appellate Division, Second Department stated in ***Iannucci v. Viscardi***, (251 A.D.2d 379, 672 N.Y.S.2d 816):

> in order to sustain an action for fraud, the plaintiffs must prove (1) that the defendant made a representation, (2) as to a material fact, (3) which was false, (4) and known to be false by the defendant, (5) that the representation was made for the purpose of inducing the other party to rely upon it, (6) that the other party rightfully did so rely, (7) in ignorance of its falsity, (8) to his injury ( see, ***Brown v. Lockwood***, 76 A.D.2d 721,

730, 432 N.Y.S.2d 186).

The second and third causes of action in the Plaintiff's amended complaint contain allegations sounding in fraud. This Court would have dismissed these claims on statute of limitations grounds if those causes of action were not dismissed for other reasons previously elucidated. While the statute of limitations for fraud actions is six years (***CPLR*** § 213 subdiv. 8), the holding in case of ***New York Seven-Up Bottling Co. v. Dow Chemical Co.***, 96 A.D.2d 1051, 466 N.Y.S.2d 478, *affd. for reasons stated* 61 N.Y.2d 828, 473 N.Y.S.2d 973, 462 N.E.2d 150). In ***New York Seven-Up Bottling Co. v. Dow Chemical Co.***, would require dismissal. In that case the Plaintiff, New York Seven-Up Bottling Co., sued Dow Chemical Co., the manufacturer and marketer of allegedly defective styrofoam insulation, for damages Plaintiff claimed was caused by this styrofoam insulation installed in the roof of Plaintiff's bottling plant. When the roof of the building began leaking, New York Seven-Up Bottling Co. commenced an action that asserted causes of action in both strict products liability and fraud against the Defendant. The Defendant manufacturer moved to dismiss both causes of action on statute of limitations grounds. In reversing the Supreme Court's denial of that motion to dismiss, the Appellate Division, Second Department held that the 3-year statute of limitations for strict products liability governed *both* causes of action since the allegations of fraudulent misrepresentations as to the suitability of the product were merely incidental to the products liability claim. The Appellate Division stated that the six-year fraud statute of limitations could be invoked only "when there would be no injury but for the fraud (citation omitted)" ( ***Seven-Up***, *supra,* at 1053, 466 N.Y.S.2d 478).

Here, as in ***Seven-Up***, the Plaintiff was injured first and foremost by the alleged defects in the performance of the construction contract, and the additional allegation that Cashin knew its performance was defective does not entitle the Plaintiff to the longer limitations period ( id.; see also, ***Queensbury Union Free School Dist. v. Jim Walter Corp.***, 101 A.D.2d 992, 993, 477 N.Y.S.2d 475, *affd.* 64 N.Y.2d 964, 488 N.Y.S.2d 652, 477 N.E.2d 1106). Therefore, in this case, the three year statute of limitations applies to the fraud action, the same statute of limitations as the cause of action for non-medical professional malpractice.

Cashin has also alleged that the fraud claims cannot stand because the alleged damages traceable to the fraud are the same as the measure of damages for breach of contract or professional malpractice. Addressing the separate damage issue, the Court notes that " damages sustained by virtue of a fraud must be different or additional to those sustained by virtue of any malpractice" ( ***La Brake v. Enzien,*** 167 A.D.2d 709, 711-712, 562 N.Y.S.2d 1009; see, ***Simcuski v. Saeli,*** 44 N.Y.2d 442, 452-453, 406 N.Y.S.2d 259, 377 N.E.2d 713; ***Harkin v. Culleton,*** 156 A.D.2d 19, 25, 554 N.Y.S.2d 478, *lv. dismissed* 76 N.Y.2d 936, 563 N.Y.S.2d 64, 564 N.E.2d 674). Therefore, in addition to the requirement

that the Plaintiff must allege in detail each of the traditional elements of intentional fraud,[5] the Plaintiff must demonstrate that the damages incurred as a result of the fraud were different than the damages incurred as a result of the malpractice.

Plaintiff must also demonstrate that it failed to pursue an available remedy which would have corrected or alleviated the condition caused by the malpractice had it not been diverted from doing so by its reliance upon defendant's alleged misrepresentation (see, ***Simcuski v. Saeli***, *supra,* at 453-454, 406 N.Y.S.2d 259, 377 N.E.2d 713; ***La Brake v. Enzien***, supra, at 711, 562 N.Y.S.2d 1009; ***Harkin v. Culleton***, supra, at 25, 554 N.Y.S.2d 478). Notably, the Plaintiff has not alleged the existence of a possible remedy. Therefore, the measure of damages for each cause of action interposed against Cashin is the same, i.e., the cost of repairs to the project. Since the Plaintiff has not established a fraud "separate from and subsequent to the malpractice claim" ( ***Simcuski v. Saeli***, supra, at 452, 406 N.Y.S.2d 259, 377 N.E.2d 713), the second and third causes of action in the amended complaint must be dismissed.

Cashin's motion to dismiss the cross claims interposed by the other Defendants must also be granted. First, it is undisputed that there is no contract between Cashin and the remaining Defendants in this action. Therefore, since there is no contractual agreements between Cashin and the remaining Defendants, all cross claims for indemnification or contribution based upon contract must be dismissed.

The damages sought by the Plaintiff in this action relate solely to the projected cost to complete and repair the alleged defective work in the retirement community and the costs related to lost revenue allegedly caused by the drainage problems at that retirement community. These claims for damages are also known as "economic loss damages"(see, ***Residential Bd. of Managers of Zeckendorf Towers v. Union Square-14th Street Associates***, 190 A.D.2d 636, 594 N.Y.S.2d 161). Since the damages sought are "economic loss damages, all indemnification and contribution claims based upon common law also must be dismissed because, as noted above, there is no contractual relationship between Cashin and any other named Defendant and economic loss damages require a contractual relationship (see, ***Wecker v. Quaderer***, 237 A.D.2d 512, 655 N.Y.S.2d 93; ***Rockefeller University v. Tishman Const. Corp. of New York***, 240 A.D.2d 341, 659 N.Y.S.2d 460; 23 ***New York Jurisprudence 2d Contribution, Etc.*** §§ 28, 48,49; see also, ***Elkman v. Southgate Owners Corp.***, 246 A.D.2d 314, 668 N.Y.S.2d 11 ).

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[5]The elements of this cause of action are "misrepresentation of a material existing fact, falsity, scienter, deception and injury" ( ***Callahan v. Callahan***, 127 A.D.2d 298, 300, 514 N.Y.S.2d 819; see, ***Channel Master Corp. v. Aluminium Ltd. Sales***, 4 N.Y.2d 403, 407, 176 N.Y.S.2d 259, 151 N.E.2d 833).

As far as the Court can ascertain from these motions, the possible liability to the Plaintiff of Cashin's Co-Defendants in this action is based upon contract theory and not upon the commission of a tort by those Defendants. Therefore, all of the cross claims for indemnification and contribution interposed against Cashin by the Co-Defendants in their answers to the amended complaint must be dismissed (see, ***Board of Educ. of Hudson City School Dist. v. Sargent, Webster, Crenshaw & Folley***, 71 N.Y.2d 21, 523 N.Y.S.2d 475, 517 N.E.2d 1360; ***Briar Contracting Corp. v. City of New York***, 156 A.D.2d 628, 550 N.Y.S.2d 717; ***NewYork Prac. Comm. Lit. in NY State Courts*** § 86:24, Indemnification and contribution, 2009; see generally, ***Tower Building Restoration, Inc. v. 20 East 9th Street Apartment Corp.***, 295 A.D.2d 229, 744 N.Y.S.2d 319).

In summary, the first three causes of action in the amended complaint and all of the cross claims interposed by the Co-Defendants against Cashin are dismissed by this decision and order.

The Defendants Tritec/Klewin Constructors, L. L. C., Klewin Building Company of New York, L.L.C. f/k/a E & F Walsh Building Company, L.L.C. and C.R. Klewin International, Inc. (hereinafter "Klewin Defendants") have cross moved for dismissal of the fifth, sixth and seventh causes of action in the amended complaint. This cross motion to dismiss (motion sequence # 008) is directed only to these three causes of action and the movants do not seek dismissal of the fourth cause of action for breach of contract.

The Klewin Defendants were responsible for constructing and building this retirement project working from the plans drawn and approved by Cashin. The Klewin Defendants are contractors or entities related to the main contractor for the project and the claims interposed against them are not governed by the three year statute of limitation in ***CPLR*** 214 for malpractice by a non-medical professional. Instead, the breach of contract claim is covered by the six year statute of limitations for contract actions set forth in ***CPLR*** 213.

The fifth and sixth causes of action in the amended complaint which allege fraud and actionable misrepresentations by the Klewin Defendants must be dismissed for the same reasons that the fraud and misrepresentation claims interposed against Cashin were dismissed (see, ***Weitz v. Smith*** 231 A.D.2d 518, 647 N.Y.S.2d 236). The Plaintiff's fifth and sixth causes of action for fraud and misrepresentations cannot survive the scrutiny of a motion to dismiss unless (1) the alleged fraud and misrepresentations are independent, collateral or extraneous to the underlying contract between the parties and (2) the allegations in the amended complaint are "stated in detail" (***CPLR 3016 (b)***).

The fifth cause of action states that Tritec/Klewin Constructors, L.L.C. made false and fraudulent statements with respect to its performance of work in that it informed "Jefferson's Ferry that the grading and drainage work Tritec had performed pursuant to the Tritec Contract was not deficient, that any deficiencies in the grading and drainage of the project were not the responsibility of Tritec, and that Tritec had successfully remediated any deficiencies in the grading and drainage of the project."

The sixth cause of action in the amended complaint alleges that Tritec/Klewin "made materially false

and negligent representations to Jefferson's Ferry that the grading and drainage work Tritec had performed pursuant to the Tritec contract was not deficient, that any deficiencies in the grading and drainage of the project were not the responsibility of Tritec, and that Tritec had successfully remediated any deficiencies in the grading and drainage of the project."

The tort of negligent misrepresentation cannot be independently asserted within the context of a breach of contract action unless a special relationship exists between the Plaintiff and the Defendants, and the alleged misrepresentation concerns a matter which is extraneous to the contract itself ( see, ***Kimmell v. Schaefer,*** 89 N.Y.2d 257, 652 N.Y.S.2d 715, 675 N.E.2d 450; ***Alamo Contract Builders, Inc. v. CTF Hotel Co.***, 242 A.D.2d 643, 663 N.Y.S.2d 42). The issue involved herein, the alleged defective grading and improper drainage, is an integral part of the work required to be performed for the Plaintiff under the contract. Further, conceptually it is difficult for the Court to find that the Plaintiff could have relied on the non-specific alleged misrepresentations of the Klewin Defendants that Cashin was responsible for the drainage difficulties when, allegedly during the same time frame, representatives of Cashin were blaming the Klewin Defendants for the water problem. In actuality, the factual representations point to a situation where first, the Plaintiff was aware that it had a water problem, second, knew that the architect or professional engineer and the contractor were blaming each other, and, third, despite being aware of the drainage problem, did not commence a timely action against Cashin (see, ***CPLR*** § 216 subdiv. 6).

Causes of action sounding in fraud cannot be sustained when the only fraud charged relates to a breach of contract (see, ***Kaufman v. Torkan***, 51 A.D.3d 977, 859 N.Y.S.2d 253; ***Ross v. DeLorenzo,*** 28 AD3d 631, 813 N.Y.S.2d 756). Moreover, a fraud claim must be dismissed as duplicative of the contract claim unless the fraud claims arise from representations, acts or omissions that are collateral or extraneous to the parties' obligations under the contract ( see, ***Tsilogiannis v. 53-11 90th St. Assoc.,*** 293 A.D.2d 468, 469; ***Alamo Contract Bldrs. v. CTF Hotel Co.,*** 242 A.D.2d 643, 643 ).

As noted previously in this opinion, it has long been held that an action for fraud may not be maintained when it relates to a breach of a contractual obligation ( ***Heffez v. L & G General Const., Inc.***, --- N.Y.S.2d ----, 2008 WL 4889880, 2008 N.Y. Slip Op. 08709; ***McGee v. J. Dunn Const. Corp.***, 54 A.D.3d 1010, 864 N.Y.S.2d 553; ***Gibraltar Mgt. Co., Inc. v. Grand Entrance Gates, Ltd.***, 46 A.D.3d 747, 749, 848 N.Y.S.2d 684;). In order to recover damages for fraud, the fraud alleged cannot relate to a breach of contract ( see, ***Ross v. DeLorenzo,*** 28 A.D.3d 631, 636, 813 N.Y.S.2d 756; ***Weitz v. Smith,*** 231 A.D.2d 518, 647 N.Y.S.2d 236 ). The reason for this rule is that "(i)t is a well-established principle 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 Island R.R. Co.,*** 70 N.Y.2d 382, 389, 521 N.Y.S.2d 653, 516 N.E.2d 190). The "legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be dependent upon the contract" ( *id.* at 389, 521 N.Y.S.2d 653, 516 N.E.2d 190). If the allegations of negligence and fraud are the same as those underpinning the breach of contract cause of action, and "allege nothing more than a breach of contract and [a breach of] any covenants implied," the fraud claims will be dismissed (***New York Univ. v. Continental Ins. Co.,*** 87 N.Y.2d 308, 318, 639 N.Y.S.2d

283, 662 N.E.2d 763). Since the Plaintiff's claims against Tritec and Klewin arise out of the alleged deficient performance of the underlying construction contract, the fifth cause of action for fraud must be dismissed.

Here, the fraud claims are both dependent upon and arise out of the breach of contract claim. If the Plaintiff is unable to prove that the Klewin Defendants improperly performed construction work at the retirement community, not only would the breach of contract claim fail, but the fraud claim also would be dismissed. As noted before in this decision, the damages sought, with the exception of the claim for attorneys fees, are the same for both the fraud action and the breach of contract action. Therefore, the motion to dismiss the fifth and sixth causes of action for fraud and misrepresentation must be granted because those claims are directly related to the breach of contract cause of action interposed against the Klewin Defendants and the fraud claims are independent of the contract cause of action.

Second, the conclusory and non-specific language in the fifth and sixth causes of action of the amended complaint is insufficient to state causes of action sounding in fraud and require dismissal for the same reason that the similar language used by the Plaintiff in the second and third causes of action interposed against Cashin were found deficient and dismissed (see, ***New York Med. Coll. v. Histogenetics, Inc.***, 6 A.D.3d 410, 774 N.Y.S.2d 356; ***CPLR*** 3016[b]). Dismissal is warranted because the fifth and sixth causes of action in the amended complaint based on alleged misrepresentations lack "the requisite particularity" (***Orix Credit Alliance v. Hable Co.***, 256 A.D.2d 114, 116, 682 N.Y.S.2d 160; ***Eastman Kodak Co. v. Roopak Enters.***, 202 A.D.2d 220, 608 N.Y.S.2d 445; CPLR 3016[b] ).

The lack of specificity in the amended complaint has not been corrected by the Plaintiff by the submission of affidavits from persons with actual knowledge. Therefore, even if this Court found that the fraud was extraneous to the underlying contract [6], the fifth and sixth causes of action would be dismissed for failure to state a claim because the alleged fraud was not stated and pled with specificity in the amended complaint. The allegations in the amended complaint do not allege what fraudulent statements were made, who made those statements, to whom they were made and where or when they were made with any particularity or specificity and the amended complaint is not supplemented by any affidavits from the Plaintiff's representatives to supply that information or explain the omissions.

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[6]The expiration of the statute of limitations is not an issue for these Defendants. The statute of limitation for fraud and misrepresentation in ***CPLR*** 213(8), provides that the Plaintiff's causes of action must be asserted within "the **greater** of six years from the date the cause of action accrued or two years from the time the plaintiff ... discovered the fraud, or could with reasonable diligence have discovered it" (emphasis supplied ). Therefore, if the allegations supporting the fraud claims were sufficient, the statute of limitations would not have expired for these claims. The attorneys for the Klewin Defendants have not moved to dismiss the fraud based causes of action on statute of limitation grounds.

The Plaintiff is not relying on the silence of the Klewin Defendants to support its fraud claims. Instead, the amended complaint alleges that the Defendants made affirmative statements misrepresenting the cause of the moisture problem with the intent to deceive Plaintiff and to prevent the Plaintiff from discovering the existence of the moisture problem (see, ***Gould v. Syracusa***, 677 N.Y.S.2d 854, 855, 254 A.D.2d 800).[7] Factually, the problem with these allegations rest on the written correspondence submitted as part of the record wherein the representatives of the Plaintiff acknowledged the water, drainage and moisture problem on July 24, 2002. Therefore, it is clear that the problem was discovered by that date.

In motion sequence #009, the Defendant Tritec Building Company Inc.(hereinafter "Tritec Building") moves for dismissal of the seventh cause of action in the Plaintiff's first amended complaint. The seventh cause of action alleges that Tritec Building, C. R. Klewin International, Inc. and Klewin Building Company of New York, L.L.C. f/k/a E & F Walsh Building Company, L.L.C. had the obligation to complete the work under the guaranty agreement signed with the Plaintiff.

The seventh cause of action based upon the contractual guaranty given to Plaintiff by Tritec Building Company, Inc., C. R. Klewin International, Inc., and Klewin Building Company of New York, L.L.C. f/k/a E & F Walsh Building Company, L.L.C. must be dismissed as against C. R. Klewin International, Inc., and Klewin Building Company of New York, L.L.C. f/k/a E & F Walsh Building Company, L.L.C. pursuant to the motion under sequence #008 only to the extent that this cause of action is based upon the fraud and misrepresentation allegations in the amended Complaint because those fraud and misrepresentation claims have been dismissed by this order. To the extent that the seventh cause of action seeks relief for contractual damages based upon a written guaranty, the seventh cause of action is not dismissed.

To the extent the seventh cause of action for breach of the guaranty seeks damages for fraud and negligent misrepresentation, it is dismissed because all of the fraud and misrepresentation claims interposed by the Plaintiff in the amended complaint have been dismissed by this decision. The fourth cause of action in the complaint for breach of contract remains a viable claim and, therefore, the seventh cause of action will not be dismissed to the extent that the Plaintiff seeks to collect under the guaranty for contractual damages. Since all of the damages sought appear to be economic loss damages, the amount sought for damages under the seventh cause of action is not affected by this decision.

Finally, the Defendants' motion that the demand for attorneys fees contained in the ad damnum or "wherefore" clause of the first amended complaint as subdivision "h"on page 18, must be stricken is granted. To the extent that the Plaintiff may seek attorneys fees as contractual damages, the Court notes that unless a contract specifically provides that a party may collect attorneys fees, the Plaintiff

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[7]However, there is no allegation that the Defendants committed any other affirmative act to deceive the Plaintiff and actively conceal the drainage problem.

may not seek counsel fees as part of its damages for breach of the agreement (see, ***Culinary Connection Holdings, Inc. v. Culinary Connection of Great Neck, Inc.***, 1 A.D.3d 558, 769 N.Y.S.2d 544 lv. to app'l den'd 3 N.Y.3d 601, 782 N.Y.S.2d 404, 816 N.E.2d 194; see generally, ***Hooper Assocs. v. AGS Computers***, 74 N.Y.2d 487, 549 N.Y.S.2d 365, 548 N.E.2d 903; ***Matter of A.G. Ship Maintenance Corp. v. Lezak***, 69 N.Y.2d 1, 511 N.Y.S.2d 216, 503 N.E.2d 681; ***Equitable Lumber Corp. v. IPA Land Development Corp.***, 38 N.Y.2d 516, 344 N.E.2d 391).

While a Plaintiff may collect attorneys fees as part of its damages in an action sounding in fraud (see, 60A N.Y. ***Jurisprudence 2d Fraud and Deceit*** § 256), all of the fraud claims in the first amended complaint interposed by the Plaintiff against the Defendants have been dismissed by this decision and there is no authority in the underlying contract or the guaranty to support an award of attorneys fees against the Defendants remaining in this action (see, ***Equitable Lumber Corp. v. IPA Land Development Corp.***, 38 N.Y.2d 516, 344 N.E.2d 391; ***Desiderio v. Devani***, 24 A.D.3d 495, 806 N.Y.S.2d 240; ***Coniglio v. Regan***, 186 A.D.2d 708, 588 N.Y.S.2d 887; ***Pipiles v. Credit Bur. of Lockport***, 2d Cir., 886 F.2d 22).

Therefore, the motion to strike the demand for an award of attorneys fees in the Plaintiff's ad damnum or damage clause in the first amended complaint must be granted.

Dated: 5/5/09

SANDRA L. SGROI, J. S. C.