STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

PEARL TECHNOLOGIES,

Plaintiff,

v.

MONOLITHIC COATINGS, INC., and TECHNICAL ROOFING SOLUTIONS d/b/a ROOF-TEK,

Defendant.

DECISION AND ORDER

INDEX No. 63057

2009

The record reflects that Mark Boolukos of Monolithic signed a Roof-Tek Request for System Warranty on 8/23/05, which specifically read that the warranty was a "commercial 10-year material" warranty for this job. Further, the Franklin Consulting Services Inspection Report, which contains the date September 1, 2005, reads, "Supply the requested 10-year warranty as requested." The subject warranty itself is a "10-Year Material Warranty," which limits liability solely to the replacement of any of Roof-Tek's products.

Also, Franklin's Manufacturer's Representative Agreement (Miller Aff. Ex. 1), clearly and distinctly contains language which reads that Franklin should not consider himself an agent of Roof-Tek, nor hold himself out to be so. Moreover, it specifically denies him the authority to create any contract or obligation or responsibility on Roof-Tek's behalf. He is in all

aspects identified as an "Independent Contractor."

The fourth cause of action alleges negligent misrepresentation. In pertinent part plaintiff alleges that Roof-Tek made statements which it knew were false, such as stating that the roof was properly prepped for the job, that the job was properly completed and that the materials were appropriate for this job. Roof-Tek establishes it's right to judgment as a matter of law on this count. First, it did not enter into a contract with plaintiff. The contract was with Monolithic and plaintiff was aware that the materials would be provided by someone other than Monolithic. There is no proof that plaintiff requested a contract with Roof-Tek. Further, there is no special relationship between plaintiff and Roof-Tek, even if one were to suppose that privity could be found. This is a case in which roofing material is supplied. It does not lend itself to the expertise analysis of situations in which attorneys or engineers are used. This is a standard business relationship, such as the court found in Wright v. Selle, 27 A.D.3d 1065, 1066-67 (4th Dept. 2006). Plaintiff fails to raise an issue of fact by presenting sufficient facts to show that a contractual relationship other than the 10-year materials warranty existed between the parties, or that it had developed a special relationship with Roof-Tek which would warrant closer scrutiny. Accordingly, the motion for summary judgment dismissing the

fourth cause of action grounded in negligent misrepresentation is granted.

The third cause of action alleges a breach of express warranty in that Roof-Tek warranted that the roofing system was properly installed in conformance with its standards. A review of the facts show that, although Roof-Tek did affirm that the roofing had been sufficiently performed so that the warranty could be issued, the verification of that was produced by Monolithic which had "punch listed" that each phase of its work was performed under the guidelines set by Roof-Tek. No one from Roof-Tek ever went to the site prior to the execution of the materials warranty. There is no proof that Roof-Tek ever verified Monolithic's work when the job was finished. It did not assume any warranty for the workmanship of Monolithic. Moreover, Franklin, as a contractual independent agent with no authority to further obligate Roof-Tek, O'Brien v. Miller, 60 A.D.3d 555 (1st Dept. 2009); McGuire v. Parties, Picnics & Promotions, LLC, 45 A.D.3d 1264, 1265 (4th Dept. 2007) cannot be seen to extend warranties which did not exist. The representations which Franklin made were that he was in the consulting business and that he advised clients how to get work such as this done by recommending installers and products. There is no evidence that plaintiff had any interaction with the manufacturer per se, and there is no proof that any sales literature about the product was ever given to plaintiff which would have led plaintiff to believe

that there was any expectation other than the express warranty of the materials which it received from Roof-Tek. Roof-Tek took no action upon which plaintiff could rely which would serve to extend a warranty benefit beyond that which was written and contained in the 10-year materials warranty in effect. For that matter, Clark testified that he knew what the materials warranty was when he got it and there is no evidence that any action was taken by plaintiff to seek additional protection. Additionally, while plaintiff did select the product, all contact regarding the project was through Monolithic. Moreover, the record shows that Clark testified that if there was a problem, that Boolukos stated that he would cover it. Plaintiff established that it did not warrant that the the roofing system was properly installed and there is no viable conclusion to be drawn that such a warranty was ever extended to plaintiff by any action taken by Roof-Tek. Plaintiff fails to raise an issue of fact as to this claim of breach of warranty, so Roof-Tek's motion for summary judgment dismissing the third cause of action is granted.

The remaining cause of action is the second, which claims a breach of express warranty by Roof-Tek, this being that the roofing materials did not conform to the affirmations and promises which Roof-Tek had made about the product. In making that claim, plaintiff refers directly to the 10-Year Materials Warranty. Plaintiff further asks that the limitation of damages to the cost of materials be disregarded as the warranty failed in its essential purpose and the costs associated with stripping the

roof should be included. However, the facts adduced show that the warranty which plaintiff received was only a materials warranty. There was no labor and materials warranty which would have been a more expansive one and would have triggered an inspection by Roof-Tek. Plaintiff got the benefit of its bargain, receiving the "lesser" job for less money and consequently, being willing to live with a "lesser" materials only warranty. There is no reason to conclude from these facts that Roof-Tek would warrant that it would pay for the cost of stripping the old roofing materials as well as its material and then pay for the cost of a new roof when all Roof-Tek did was provide the materials through an independent contractor. Plaintiff attempts to raise an issue of fact by postulating that Franklin, and thereby Roof-Tek, warranted that Roof-Tek's product could be used successfully without the more costly method of stripping the old roofing off first. The facts establish that Monolithic and plaintiff entered into a contract with a full understanding that the new roofing material would be placed over the existing roofing and that there was a "10 manufactures warranty (sic)". (see, Ex. B to Complaint). In this respect, plaintiff's representative, Clark, testified that he believed that the term "manufacture's warranty" had a definitive meaning, which would be that Roof-Tek would repair if there was a problem, including materials and labor. The warranty which plaintiff received subsequently was a materials warranty, which Clark knew was not as all encompassing. This is the point in which he

testified that Boolukos told him that he would take care of this if there was a problem.

With these being the facts, the issue goes to whether plaintiff has raised an issue of fact on this cause of action because of this situation. The court does not find an issue of fact because Monolithic wrote the contract which stated "manufacturer's warranty," Roof-Tek did not. Roof-Tek generated the warranty which it believed was to be used. The issue of fact would go to what Monolithic did, not what Roof-Tek did. There is no basis in fact to extend Roof-Tek's warranty beyond what is found in a clear language of the warranty. However, Roof-Tek will be subject to liability under the warranty which will be the cost of the materials in the event that liability ultimately is found. Roof-Tek's motion with respect to the second cause of action is granted only in its alternative request, that being that damages are limited to the cost of materials as stated in the warranty.

Compare Simmons & Washing Equip. Tech, 51 A.D.3d 1390 (4th Dept. 2008), whereas here there is no evidence that frankly ever provided plaintiff with any warranty literature supplied by Roof-Tek. See Luciano v. Volkswagen Corp., 127 A.D.2d 1, 3-4 (3d Dept. 1987).

SO ORDERED.

KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: December 4, 2009
Rochester, New York