

Caldwell v Two Columbus Ave. Condominium

2010 NY Slip Op 33213(U)

October 12, 2010

Sup Ct, NY County

Docket Number: 123568/02

Judge: Marylin G. Diamond

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

DECEMENT.

MARYLIN G. DIAMOND

PART 48

Index Number : 123568/2002

CALDWELL, CLARA

INDEX NO. _____

vs

TWO COLUMBUS AVENUE

MOTION DATE _____

Sequence Number : 016

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is *to be denied pursuant to the attached decision and order.*

ENTER

FILED

OCT 22 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 10/12/10

MGD
MARYLIN G. DIAMOND J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

[*2]
SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY : TAS PART 48

-----X
CLARA CALDWELL AND JOHN CALDWELL,

Plaintiffs,

-against-

INDEX NO. 123568/02

TWO COLUMBUS AVENUE CONDOMINIUM et al.,

Defendants.

And Third-Party Actions.

-----X
MARILYN G. DIAMOND, J.:

Motion sequence numbers 016 through 024 and related cross
motions are consolidated for disposition.

Plaintiffs Clara and John Caldwell (the Caldwells) are the owners of a residential condominium unit, located in a building at 2 Columbus Avenue, New York, NY, that they purchased in or about June 1999. Plaintiffs allege that, shortly after they moved into their unit, they complained of leaks. They further allege that the leaks were not sufficiently addressed. Plaintiffs claim that they suffered property damage and that Clara Caldwell suffered personal injury from exposure to mold in the apartment that was caused by water infiltration into the unit.

This action was commenced on or about October 30, 2002. The defendants are Two Columbus Avenue Condominium (the Condominium), The Residential Board of Managers of Two Columbus Avenue, The Condominium Board of Managers of Two Columbus Avenue

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(collectively, with the Condominium, the Condominium defendants), Two Columbus Associates, LLC (the Sponsor), New York Urban Property Management Corporation and Urban Associate, LLC. The defendants, in turn, brought a third-party action against Lehrer McGovern Bovis Inc., Lehrer McGovern Bovis Group Inc., Lehrer McGovern Bovis Construction Management Corp., Bovis Lend Lease LMB, Inc., Bovis Lend Lease Inc. (collectively, Bovis), Schuman Lichtenstein Claman Efron (SLCE), I.M. Robbins, P.C., Desimone, Chaplin and Dobryn Consulting Engineers, P.C., Desimone Consulting Engineers LLC, Liberty Mechanical Contractors, LLC, EFCO Corporation, B&L Group Inc., Ice Cap Enterprises Corp., Pauly Windows Inc., and RSG Caulking & Waterproofing, numerous entities that were allegedly responsible for the design and construction of the building, as well as for the manufacture and installation of the unit's windows.

Bovis then brought a second third-party action against L. Martone & Sons, Inc., Centrifugal Mechanical Associates, Inc. and McNally Masonry, Inc.

Because of the multiplicity of motions addressed by this decision, facts that are primarily relevant to an individual motion will be addressed in the discussion of that particular motion.

MOTION SEQUENCE NUMBER 016

In motion sequence number 016, defendants Two Columbus

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Associates, L.L.C., New York Urban Property Management Corporation, and Urban Associates, L.L.C., and third-party defendants Lehrer McGovern Bovis Inc., Lehrer McGovern Bovis Group, Inc., Lehrer McGovern, Construction Management Corp., Bovis Lend Lease LMB, Inc., and Bovis Lend Lease Inc.

(collectively, movants) move, pursuant to CPLR 3211 and 3212 (e), for an order granting summary judgment and dismissing the personal injury and loss of consortium claims of plaintiffs, on the ground that they cannot show causation between Clara Caldwell's alleged illness and any supposed mold contamination in their apartment.¹ Alternatively, movants seek a hearing pursuant to *Frye v United States* (293 F 1013 [DC Cir 1923]).

In their amended complaint, plaintiffs allege that samples taken in their unit in July 2001 revealed the presence of the mold species *Stachybotrys Chartarum*, among others, in the walls, carpeting and floors. They further allege that after taking occupancy of the apartment, as a result of exposure to the mold, Clara Caldwell began to develop symptoms that required medical attention and that she has developed hypersensitivity to mold. In their bill of particulars, plaintiffs further state:

¹ With respect to the claim for loss of consortium, plaintiffs initially asserted that claim as a separate cause of action; however, in their papers responding to this motion and to motion sequence number 022, plaintiffs indicate that they are not treating the claim as a separate cause of action, but rather as a class of damages in connection with the nuisance and negligence causes of action.

Plaintiff Clara Caldwell suffers from Environmental Asthma and Hyper-Reactive Airways Disease with symptoms of headache, chest pain, shortness of breath, coughing, sneezing, rashes, chills and sweats, all of which may be permanent and lasting. As a result of her exposure to mold, Ms. Caldwell will suffer from a heightened sensitivity to mold for the remainder of her life, which has caused and will in the future cause her to have the symptoms described above.

Severe coughing and sneezing caused by plaintiff Clara Caldwell's symptoms from Environmental Asthma and Hyper-Reactive Airways Disease, have aggravated a pre-existing back condition, resulting in severe pain. As a result of plaintiff Clara Caldwell's coughing/sneezing caused by a heightened sensitivity to mold, the exacerbation of the back condition caused bone chips to break away from a herniated disk, which was diagnosed several years ago.

Bill of Particulars, dated 11/24/03, Response to question #10, at 7-8.

At deposition, Ms. Caldwell testified that she has been diagnosed as allergic to mold (see Deposition of Clara Caldwell, at 283-285), and that she now sneezes and coughs violently when she is exposed to any dust or mold. *Id.* at 241-242.

In support of their motion, movants submit the affirmation of Stuart H. Young, M.D., who has specialized in the diagnosis and treatment of allergy and asthma in adults and children from 1970 to the present. Young states that he is, among other things, a Fellow of the American College of Allergy, the American Academy of Allergy, Asthma and Immunology, the American College of Chest Physicians, and the American Academy of Pediatrics, and is a Clinical Associate Professor of Internal Medicine and

Pediatrics at the Mount Sinai School of Medicine, and a member of the Department of Allergy and Clinical Immunology at Mount Sinai Medical Center.

Dr. Young indicates that he has examined Clara Caldwell and has reviewed the medical records concerning the testing of Ms. Caldwell by her physicians. Dr. Young states:

First, there is no medical evidence that Ms. Caldwell is allergic and/or hypersensitive to mold or any other substance as all of the extensive testing for allergy and/or hypersensitivity to mold and/or any other substance is negative (normal). Patients who have allergies and or hypersensitivity reactions to mold and other substances have positive allergy tests to these substances.

Second and more importantly, allergies and asthma in a person not previously allergic cannot develop from indoor mold in a residential setting as such mold is too weak an allergen and does not induce allergies in anyone not previously allergic to it.

Affirmation of Stuart H. Young, M.D., dated February 3, 2010, ¶¶ 6 & 7.

Discussing the appropriate tests to determine the presence of allergies Dr. Young states:

The primary allergy-specific blood tests are the radioallergosorbent test (RAST) for the present of IgE antibodies and the hypersensitivity pneumonitis test (Ouchterlony double diffusions-assay) for the presence of IgG antibodies. These allergy-specific tests detect minute quantities of these antibodies. The presence of the antibody in the blood confirms exposure, but not when or where such exposure occurred. Elevated levels of such antibodies indicate an abnormal sensitivity or allergy to the foreign substance.

The environmental reviews of Ms. Caldwell's apartment reported that several specific types of mold were

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present. (Mold is generally present in both indoor and outdoor environments.) The blood tests that were done in this case included testing for the presence of IgE and IgG antibodies for the specific molds identified as present in these environmental reviews. The results of the multiple blood tests were negative (normal).

Id., ¶ 15 & 16.

Dr. Young also states that "[a]t present, there are no medical standards concerning the quantity of mold present at a given location and its potential clinical significance on human exposure generally." *Id.*, ¶ 21. In other words, according to Dr. Young, there is no threshold level of mold associated with clinical symptoms.

Dr. Young further states that he conducted a physical examination of Ms. Caldwell and that he

concluded that she has mild bronchial asthma with rhinitis. This condition, however, is unrelated to mold as bronchial asthma caused or triggered by mold would also result in positive RAST and/or positive skin tests for the mold involved. Ten percent of the population has asthma. There is some degree of inheritance in the illness, but smoking is recognized as one of the major contributing causes. Ms. Caldwell reported that she had smoked cigarettes in the past for many years which certainly can cause symptoms consistent with Ms. Caldwell's complaints in this case.

More important, allergies and/or asthma in a person not previously allergic cannot develop from indoor mold. There is no evidence in the medical literature that indoor mold is a major allergen. Mold that occurs indoors is a very weak allergen because the spores from the mold do not readily circulate into the air and it is unlikely that indoor mold is of any significance in inducing or aggravating any of the alleged illnesses and disability listed in Ms. Caldwell's verified bill of particulars.

Id., ¶¶ 19 & 20.

Finally, Dr. Young concludes:

Based upon the foregoing discussion, I conclude with a reasonable degree of medical certainty that the problems allegedly experienced by Clara Caldwell are not causally related to exposure to mold in her apartment at Two Columbus Avenue.

Moreover, I conclude with a reasonable degree of medical certainty that there is no objective medical or scientific support for the claim that indoor mold can cause or induce allergies and/or asthma in a person not previously allergic.

Id., ¶¶ 30 & 31.

Movants also rely on the decision of the Appellate Division, First Department, in *Fraser v 301-52 Townhouse Corp.* (57 AD3d 416 [1st Dept 2008]) which affirmed the decision of Kornreich, J. (2007 WL 2176698, 2007 NY Slip Op 32086[U] [Sup Ct, NY County 2007]), after a *Frye* hearing, excluding proffered expert testimony that dampness and mold in an apartment building caused a former tenant's respiratory problems. The Appellate Division specifically found that "the underlying causal theory lacks support in the scientific literature placed before us in the present record." 57 AD3d at 418. The Court further concluded that "the experts failed to specify the threshold level of exposure to dampness or mold needed to produce [the health] effects" alleged (*id.* at 419), and that "there is no standardized or recognized method of measuring "dampness," thus rendering it impossible for plaintiffs' experts to compare the level of

dampness in plaintiffs' apartment to that in the studies." *Id.* at 419-420. Finally the court found that the plaintiffs "failed to offer a reliable measurement of the level of the mold in the subject apartment." *Id.* at 420. Movants argue that all of those defects are present in this case as well, and further point to the fact that Dr. Eckardt Johanning, one of the experts relied on by the plaintiff in *Fraser*, and rejected by the Court in that case, has previously been relied on by plaintiffs here.

In response, plaintiffs argue that the Court in *Fraser* specifically stated that its holding was not intended to "set forth any general rule that dampness and mold can never be considered the cause of a disease, only that such causation has not been demonstrated by the evidence presented by plaintiffs here." *Id.* at 418. Plaintiffs further point out that there was a vigorous and lengthy dissent from the majority's decision in *Fraser*.

Regarding Dr. Johanning, plaintiffs contend that do not intend to use him as a causation expert at trial, that they have not yet selected an expert, and that, therefore, the notion of a *Frye* hearing is premature, since *Frye* does not come into play until the court reviews expert witness disclosures.

Rather than submit the affidavit of an expert to directly address the various assertions made by movants' expert, Dr. Young, plaintiffs submit the affidavit of Clara Caldwell, who

basically reiterates what she has stated in the amended complaint, her bill of particulars, and deposition, along with the unsworn reports of Dr. E. Neil Schachter, dated February 15, 2002, September 1, 2002, and May 22, 2009, Dr. Barth A. Green, dated January 21, 2004, and Dr. Roger A. Maxfield, dated July 28, 2008. All of the doctors' reports are based upon physical examinations of, and discussions with, Ms. Caldwell. None of the reports contain statements detailing expert credentials of the doctors.

In his February 15, 2002 report, Dr. Schachter concludes that "My impression is hyperactive airways disease secondary to her environmental exposures." In his September 1, 2002 report, Dr. Schachter states "[m]y impression continues to be environmental hyperreactive airways disease" and further states that Ms. Caldwell "was told of mild asthma" though he does not make that diagnosis himself, nor does he indicate who allegedly told Ms. Caldwell that she had asthma. Report of Dr. E. Neil Schachter, dated September 1, 2002, at 1. In his May 22, 2009 report, Dr. Schachter reiterates Ms. Caldwell's complaints, among others, of coughing, sneezing and shortness of breath, and in the Medical Decision Making, Data Review, portion of his report describes Clara Caldwell as follows:

Patient with a history of hyper-reactive airways and vocal cord dysfunction resulting from airway irritation in a water damaged apartment [sic]. Most recently she has experienced retinal damage as a consequence of

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coughing which is a residual of her irritant damage to the airways. Currently her lung function is normal and her Chest X-ray is clear.

Report of Dr. E. Neil Schachter, dated May 22, 2009, at 3.

Dr. Green, who performed a neurosurgical evaluation of Ms. Caldwell in connection with her complaint of back pain, reiterates Caldwell's description of her medical history, including her reports of back pain recurring after bouts of sneezing and coughing; however, he does not purport to evaluate whether her reported coughing and sneezing resulted from her exposure to mold or triggered her back pain.

Finally, Dr. Maxfield, who also conducted an examination of Ms. Caldwell and reviewed her medical records, noted her medical history and the various symptoms reported by Ms. Caldwell and concluded his report as follows:

In summary, Mrs. Caldwell is a former smoker with family history of asthma and allergies. She had evidence of chronic sinusitis on MRI six months before moving into her New York apartment. She reports upper and lower respiratory symptoms when exposed to musty environments in New York, Florida, Chicago, and Italy. Her lungs have been consistently clear without wheezing on examination. Her pulmonary function tests have never shown airways obstruction. All of her PFTs have been normal except for one with questionable effort. RAST testing for allergies including mold allergies has been consistently negative. IgE level has been normal. Hypersensitivity pneumonitis panel has been inconsistently, mildly positive for 1-2 molds. Her normal chest x-ray, examination, and PFTs are inconsistent with hypersensitivity pneumonitis.

In conclusion, Mrs. Caldwell has subjective respiratory symptoms which she relates to exposure to musty environments in multiple locations. There is no

objective evidence of mold allergy or mold related asthma. The weakly positive serologies for 1-2 molds are consistent with mold exposure. However, she has no evidence of hypersensitivity pneumonitis. Because her symptoms have occurred in multiple locations, I cannot conclude that her New York apartment specifically caused any of these symptoms. Based on her current normal examination and PFTs, she is not disabled. However, based on her subjective symptoms, I would advise that she avoid musty environments in the future.

Report of Dr. Roger A. Maxfield, dated July 28, 2008, at 4.

On the basis of the affirmation of Dr. Young, movants have made a prima facie case that Ms. Caldwell's claims of personal injury resulting from exposure to mold in her apartment should be dismissed. Having done so, the burden shifts to the plaintiffs to overcome that prima facie case with evidentiary facts that their defense to the motion is real and can be established at trial. *Indig v Finkelstein*, 23 NY2d 728, 729 (1968). Plaintiffs cannot meet their burden by merely repeating allegations contained in their bill of particulars. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 327 (1986). Furthermore, the unsworn, or unaffirmed, reports of an examining or treating physician do not meet the test of competent admissible evidence and are insufficient to defeat a motion for summary judgment. *Migliaccio v Miruku*, 56 AD3d 393, 394 (1st Dept 2008); *see also Spiercr v Bloomingdale's*, 43 AD3d 664, 666 (1st Dept 2007) (plaintiff's unsworn medical reports, based primarily on plaintiff's speculative statements, were not in admissible form and failed to raise triable issues of material fact and were insufficient to

defeat summary judgment). In any case, the unsworn reports that plaintiffs have submitted are far from solid evidence establishing a causative relationship between the mold found in plaintiffs' apartment and Ms. Caldwell's alleged condition. Dr. Schachter states that he has "an impression" that her condition is "secondary to environmental exposure." See Report of Dr. E. Neil Schachter, dated September 1, 2002. Dr. Maxfield's conclusions that "there is no objective evidence of mold allergy or mold related asthma [or] hypersensitivity pneumonitis" and that because her symptoms have occurred in multiple locations he "cannot conclude that her New York apartment specifically caused any of these symptoms" undermines her claim of mold-related illness resulting from her apartment. See Report of Dr. Roger A. Maxfield, dated July 28, 2008.

Plaintiffs having failed to meet their burden of opposing movants' prima facie showing, movants' motion to dismiss plaintiffs' personal injury and loss of consortium claims is granted. Thus, it is not necessary for this court to even reach the question of whether the decision of the Appellate Division in *Fraser* is controlling here.

MOTION SEQUENCE NUMBER 017

In motion sequence number 017, third-party defendant EFCO Corporation (EFCO) moves for summary judgment on its counter claim against third-party defendant, Pauly Windows, Inc. (Pauly),

based upon common-law and contractual indemnification.

Windows for the construction project at the Condominium, provided by EFCO, pursuant to a contract with third-party defendant Lehrer McGovern Bovis (LMB), were among the alleged sources of the leaks in the Caldwell's apartment. EFCO subcontracted with Pauly to install the windows.

Common-Law Indemnification

In support of its claim for common-law indemnification, EFCO contends that the alleged leaks did not result from the manufacture of its windows, and that, to the extent that the leaks resulted from the failure to properly install the windows, Pauly is responsible. EFCO submits the affidavit of Thomas Knott, a project manager with EFCO, who states that EFCO manufactured the windows based upon the drawings and specifications of the project architect. Knott further states that EFCO had nothing to do with the design or manufacture of the building's heating-ventilation-air conditioning (HVAC) system or the HVAC building sleeves, and did not directly or indirectly install the windows.

EFCO also relies on the testimony of Jacque Millery, who was employed by Pauly Windows during the construction project. Millery, who was trained as an architect/engineer, went to the Caldwell's apartment when Pauly was notified that there had been a complaint of a leak in the apartment. Millery testified that

there had been no problem with the installation of the windows, but that when he went to the Caldwells' apartment, he observed a wet carpet below a floor-to-ceiling window with an air conditioning sleeve. Deposition of Jacque Millery, at 189. Millery further testified that, after a water test, he observed a few drops of water coming through a bolt hole (*id.* at 176), and that most likely the water was coming in "because the caulking was not done properly."² *Id.* at 123. According to Millery, a Pauly worker then caulked the bolt and there was no more leaking after they fixed the caulking around the bolt. *Id.* at 211-212. Millery also stated that he saw no defects or insufficiencies with EFCO's drawings. *Id.* at 236.

Pauly's contention that EFCO submits only an attorney's affirmation, and not an affirmation from anyone with knowledge of the facts, is not correct. EFCO has submitted the affirmation of Thomas Knott, a project manager for EFCO, as well as the sworn testimony of Millery. Pauly's other, that it is EFCO'S responsibility to establish that its windows were free from fault, fails as well.

The principle of common-law indemnification permits a party which is found liable as a result of the wrong of another to recover damages from the wrongdoing. *17 Vista Fee Assoc. v*

² Millery also saw water coming from the A/C sleeve but testified that Pauly had nothing to do with the sleeve installation. *Id.* at 199.

16] *Teachers Ins. and Annuity Assn. of Am.*, 259 AD2d 75, 80 (1st Dept 1999). A party who has participated in the wrong may not, however, shift the burden. *Id.*

EFCO has submitted prima facie evidence that the leaks did not result from its manufacture of the windows and that the leaks did result from Pauly's faulty caulking work. It is, therefore, Pauly's responsibility to either rebut the evidence of its own negligence or submit evidence that the windows themselves were the source of the leak. This Pauly has failed to do. Therefore, EFCO is entitled to summary judgment on its claim for common-law indemnification.

Contractual Indemnification

In support of its claim for contractual indemnification, EFCO relies not on an indemnification provision in its subcontract with Pauly but, rather, on paragraph 6:1 of the subcontract, which only requires Pauly to obtain insurance and to name EFCO as an additional insured on its policy. "'An agreement to purchase insurance coverage is clearly distinct from and treated differently from the agreement to indemnify.'" *Longwood Cent. School Dist. v American Empls. Ins. Co.*, 35 AD3d 550, 551 (2d Dept 2006) (citation omitted). In its reply papers, for the first time, EFCO argues that summary judgment should be granted in its favor against Pauly on a claim of breach of contract to procure insurance, and that, therefore, any liability found

against EFCO based on water infiltration at, about or through the windows should be assessed against Pauly. EFCO cannot now raise an entirely new basis for its motion for summary judgment. Moreover, should it be able to recover on a breach of contract claim against Pauly for failure to obtain insurance, as a practical matter, if EFCO obtained its own insurance, its recovery would be limited to the cost of that insurance. See *Inchaustegui v 666 5th Ave. Ltd. Partnership*, 268 AD2d 121, 123 (1st Dept 2000), *affd* 96 NY2d 111 (2001). Nevertheless, EFCO's motion for summary judgment on its claim for contractual indemnification must be denied.

MOTION SEQUENCE NUMBER 018

In motion sequence number 018, third-party defendants Lehrer McGovern Bovis Inc., Lehrer McGovern Bovis Group, Inc., Lehrer McGovern Construction Management Corp., Bovis Lend Lease LMB, Inc. and Bovis Lend Lease, Inc. (all of which are now known as Bovis Lend Lease LMB, Inc. [Bovis]) move for summary judgment dismissing the claims of defendants/third-party plaintiffs Residential Board of Managers of Two Columbus Avenue and the Condominium Board of Managers of Two Columbus Avenue (collectively, the Condominium Boards) for contractual and common-law indemnity.³

³ In their opposition to Bovis's motion for summary judgment, the Condominium Boards state that they do not oppose the portion of Bovis's motion seeking dismissal of the following

Contractual Indemnity

Bovis argues that it contracted with Two Columbus Associates, the sponsor of the 40-story residential condominium tower located at Two Columbus Avenue, to serve as construction manager for the construction of the building. As part of that contract, Bovis agreed to indemnify and hold harmless the sponsor in connection with any claims, damages, losses and expenses arising out of its work with the construction of the building as follows:

To the extent permitted by law, Construction Manager shall indemnify, defend, save and hold the Owner, and its partners, members, officers, agents and employees (herein called "Indemnitees"), harmless from and against all liability, damage, loss, claims, demands and actions of any nature whatsoever (including attorney's fees and disbursements) which arise out of or are connected with, or are claimed to arise out of or be connected with

1. The performance of the Work, or any negligent act or omission of the Construction Manager, Contractors, or any party for whom they may be liable;
2. Any Accident or occurrence which happens or is alleged to have happened in or about the place where the Work is being performed or in the vicinity thereof (a) while the Contractor is performing the Work, either directly or indirectly through a Contractor, or (b) while any of the Construction Manager's property, equipment or personnel are in or about such place or the vicinity thereof by reason of or as a result of the performance of the Work.

Construction Management Agreement, Article 9.14, at 28, Exh. D to

three entities: Lehrer McGovern Bovis Group, Inc., Lehrer McGovern Bovis Construction Management Corp. and Bovis Lend Lease, Inc.

affirmation of Charles D. Cole, Jr., dated February 23, 2010.

The Condominium Boards do not contest Bovis's assertion that they are not parties to the contract between Bovis and the building owner. Nor do they appear to contest Bovis's argument that they lack privity of contract and have not shown that the parties to the contract intended to make them third-party beneficiaries to the contract. *Roosevelt Islanders for Responsible Southtown Dev. v Roosevelt Is. Operating Corp.*, 291 AD2d 40, 57 (1st Dept 2001) ("a third party seeking to enforce a contract ... [has] to establish that [it] was an intended beneficiary to the contract rather than merely an incidental beneficiary" [internal quotation marks and citation omitted]). In fact, the Condominium Boards do not specifically respond to Bovis's arguments relating to contractual indemnification. Bovis's motion for summary judgment is, therefore, granted and the claims for contractual indemnity are dismissed.

Common-Law Indemnity

Bovis argues that the claims of the Condominium Boards for common-law indemnity for negligence should be dismissed, because, as the construction manager for the project, Bovis did not perform work at the site. *Buccini v 1568 Broadway Assoc.*, 250 AD2d 466, 469 (1st Dept 1998) ("The general duty to supervise the work and ensure compliance with safety regulations does not amount to supervision and control of the work site such that the

supervisory entity would be liable for the negligence of the contractor who performs the day-to-day operations"). Bovis contends that any claims for negligence that the Condominium Boards might have should be brought against the contractors at the site.

The Condominium Boards argue that, under the contract between Bovis and the building owner, Bovis took on duties which could expose it to common-law indemnity for negligence. The scope of duties under the contract included:

3.3.30 Generally oversee, supervise and monitor the Work of the Contractors and the deliveries and installation of material and equipment to protect Owner against defects and deficiencies in the Work; stop and cause correction of Work and/or reject Work which is not in compliance with the Contract Documents; notify Architect of any Work of which Construction Manager believes is not in compliance with the Contract Documents, and, upon rejection of the Work by the Architect, stop and require correction of said Work.

Construction Management Agreement, *supra*, Article 3.3.30, at 12.

Additionally, under the Agreement, Bovis guaranteed the work at the project for one year:

3.3.13 Construction Manager hereby guarantees all Work performed and materials and equipment furnished under this Agreement against defects in materials and workmanship for a period of one (1) year from the date Owner receives a Temporary Certificate of Occupancy for the entire Project.

Id. Article 3.3.13, at 9.

The Condominium Boards challenge the testimony of Henry Marina, Bovis's Senior Superintendent for the project, that

Bovis's duties on the project were limited to coordination of trade activity, scheduling of work and safety, contending that Bovis's duties went far beyond those stated by Marina. They rely on the testimony of Gregory Krywosa, an assistant project manager for Bovis, to argue that Bovis was actively involved in post-construction remedial work related to water leaks in the Caldwell's apartment. The Condominium Boards cite Krywosa's testimony and his notebook entries indicating that on numerous occasions he was at the building, including the Caldwell's apartment, to deal with water leaks, and that it was his understanding that his specific assignment was to deal with the leak problems (Deposition of Gregory Krywosa, at 36). Krywosa testified that he was sent to the Caldwell apartment to stand by the work that was done and to "fix a problem." *Id.* at 92.

The Condominium Boards argue that Bovis undertook to perform services beyond those of a regular construction manager and that by doing so, it assumed a duty to act with care and would, therefore, be held liable for negligence in performing its duties. See *Ocampo v Abetta Boiler & Welding Serv., Inc.*, 33 AD3d 332 (1st Dept 2006) (defendant may assume a duty of care because it exacerbated a dangerous condition or because plaintiffs detrimentally relied on defendant's performance of contractual obligations to a third party).

The sections of the Construction Management Agreement relied

on by the Condominium Boards, as well as the testimony of Krywosa, raise questions of fact regarding the scope of Bovis's responsibilities for the project, which preclude summary judgment with respect to common-law indemnity.

MOTION SEQUENCE NUMBER 019

In motion sequence no. 019, defendant Urban Associates, L.L.C. (Urban Associates), moves for an order granting summary judgment and dismissing plaintiffs' claims for private nuisance, negligence and negligent misrepresentation on the basis that it had no duty of care to plaintiffs.

Urban Associates became the managing agent for the condominium located at Two Columbus Avenue, pursuant to the 16th Amendment to the Offering Plan dated April 22, 1999.

The amended complaint alleges that water infiltration into the apartment that the Caldwells purchased in June 1999, resulting from defective construction, caused physical damage to the apartment and caused Clara Caldwell to become ill; that repairs undertaken by defendants required to remedy the problem have been inadequate; that at various times after plaintiffs moved into their apartment, defendants falsely represented to plaintiffs that the water infiltration would be addressed; and that plaintiffs reasonably relied on those representations to their detriment. Plaintiffs assert causes of action against Urban Associates for private nuisance (third cause of action), negligence (fourth cause

of action), negligent misrepresentation (fifth cause of action) and loss of consortium (sixth cause of action).⁴

Condominium ownership is governed by Real Property Law § 339-d. The individual unit owner owns a real property interest in his/her unit as well as in the common elements appurtenant to that unit. Real Property Law § 339-g. In addition, the unit owner owns an undivided interest in common elements of the condominium. Real Property Law § 339-i.

The condominium is governed by a board of managers that may bring actions "on behalf of two or more of the unit owners, as their respective interests may appear, with respect to any cause of action relating to the common elements or more than one unit." Real Property Law § 339-dd.

Negligence

Citing *Caprer v Nussbaum* (36 AD3d 176 [2d Dept 2006]), Urban Associates argues that the unit owners have no standing to bring a claim for damages arising out of their interest in common elements. While that may be true, as the Court in *Caprer* also stated, "Real Property Law § 339-dd does not preclude an individual unit owner from suing the sponsor or the board of managers for wrongs to the unit owner's interest in his or her individual unit, because such actions seek to enforce a right

⁴ As noted in footnote 1, *supra*, plaintiffs are now treating their claims for loss of consortium as a class of damages rather than a separate cause of action.

unique to the individual owner." 36 AD3d at 185. Here, plaintiffs are suing with respect to damages which are alleged to have occurred to their own unit, thus, they do not lack standing to sue.

Urban Associates contends that plaintiffs' negligence claims should be dismissed because it owed no duty of care to the Caldwells. *Darby v Compagnie Natl. Air France*, 96 NY2d 343, 347 (2001) ("A finding of negligence may be based only upon the breach of a duty. If, in connection with the acts complained of, the defendant owes no duty to the plaintiff, the action must fail").

Urban Associates further contends that it contracted with the Condominium Board of Managers to maintain and operate the building and to keep its common elements in good repair, and that its contractual duty of care is to the Board of Managers, and it had no privity of contract with individual unit owners. Here they are on firmer ground.

A third party may recover as an intended beneficiary of a contract between others only if it is clear that the parties proposed to confer a benefit on that third party; furthermore, that benefit must be more than merely incidental to the benefits afforded the contracting parties. It must be such as to evince an intent to permit enforcement by the third party.

Chu v Dunkin' Donuts Inc., 27 F Supp 2d 171, 174 (ED NY 1998) (internal quotation marks and citations omitted).

Urban Associates argues that nowhere in the language of the condominium management agreement does it indicate that the

contracting parties intended to confer a direct benefit on the unit owners. See *id.* ("The best evidence of an intent to benefit a third party is to be found in the language of the contract itself").

Furthermore, as this court noted in its March 3, 2008 decision granting the summary judgment motion dismissing Gumley-Haft, L.L.C. as a defendant from a case brought by plaintiffs that is related to the instant case:

[i]t is well settled that a managing agent, acting on behalf of a disclosed principal, is not liable to a third party for nonfeasance, but only for affirmative acts of negligence or other wrongdoing. See *Pelton v 77 Park Ave.*, 38 AD3d 1, 11-12 (1st Dept 2007); *Brasseur v Speranza*, 21 AD3d 297, 299 (1st Dept 2005).

Caldwell v Gumley-Haft, L.L.C., 2008 WL 6053857, (Sup Ct, NY County, March 3, 2008, Diamond, J., index No. 108531/06, *affd* 55 AD3d 408 (2008). Furthermore, it has been held that a managing agent cannot be held liable for negligence where it is not in exclusive control of the building. *Brasseur v Speranza*, 21 AD3d at 299; *Rivera v Sebastian Enters., Inc.*, 243 AD2d 291, 292 (1st Dept 1997); see also *Caldwell v Gumley-Haft, L.L.C.*, 55 AD3d at 408.

Plaintiffs oppose Urban Associates' motion with the general assertion that nothing in Urban Associates' authority under its contract as managing agent "precludes" direct responsibility for inspection, maintenance, remediation and roof repair. However as Urban Associates indicates in reply, pursuant to its contract as

managing agent, it did not have complete authority to undertake any repairs or alterations in the building involving an expenditure over \$2,500, other than for emergency repairs or repairs to comply with a governmental notice or order, neither of which were involved here. See Management Agreement, at 2.

Urban Associates also submits the testimony of Sal Panico, the director of construction for the sponsor until approximately 2001 or 2002, who stated in response to the question "do you know what responsibility, if any, Urban Associates had for addressing Penthouse B's water infiltration complaints?" "I don't believe they had any." Deposition of Sal Panico, April 20, 2004, at 62-63.

Plaintiffs have failed to show that they were an intended beneficiary of the Management Agreement, that Urban Associates carried out any affirmative acts of negligence, or that Urban Associates had complete and exclusive control of the building or that it, in fact, undertook the work to remedy the various alleged leaks.

Thus, plaintiffs' cause of action for negligence fails.

Private Nuisance

"[O]ne is subject to liability for a private nuisance if his conduct is a legal cause of the invasion of the interest in the private use and enjoyment of land and such invasion is (1) intentional and unreasonable, (2) negligent or reckless, or (3)

actionable under the rules governing liability for abnormally dangerous conditions or activities." *Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 569 (1977).

Here, as Urban Associates argues, there are no allegations that its conduct was intentional, or that it engaged in abnormally dangerous conduct or activities. To the extent that plaintiffs allege private nuisance based on negligence, the cause of action is duplicative of the fourth cause of action for negligence and must be dismissed.

Negligent Misrepresentation

"A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information." *J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 (2007).

Citing *Mirandi v 210 W. 19th St. Condominium* (248 AD2d 198 [1st Dept 1998]), Urban Associates argues that this case involves an ordinary business relationship where a buyer and seller, both represented by counsel, negotiated an arms-length purchase of an apartment, and not one involving a special relationship approaching that of privity.

Plaintiffs have not shown that any special relationship

existed with Urban Associates on which a negligent misrepresentation claim could be based. Moreover, plaintiffs fail to even address their claim for negligent misrepresentation in their opposition to Urban Associates' motion for summary judgment. Their claims for negligent misrepresentation are, therefore, dismissed.

MOTION SEQUENCE NUMBER 020

In motion sequence 020, defendant New York Urban Property Management Corp. (New York Urban) moves for an order granting summary judgment and dismissing plaintiffs' claims against it on the basis that New York Urban was no longer the managing agent for the condominium located at Two Columbus Avenue when plaintiffs purchased their apartment.

The amended complaint alleges that plaintiffs purchased their apartment in or about June 1999, and that New York Urban was the property manager for the building until on or about April 30, 2002. Plaintiffs assert three causes of action against New York Urban, private nuisance (third cause of action), negligence (fourth cause of action) and negligent misrepresentation (fifth cause of action). Plaintiffs allege that water infiltration into the unit has caused damage to the unit, that repairs undertaken by defendants required to remedy the problem have been inadequate, and that at various times after plaintiffs moved into their apartment, defendants falsely represented to them that the water

infiltration would be addressed and that plaintiffs relied on those representations.

On April 6, 1999, New York Urban entered into a condominium-management contract with the Condominium Board of Managers of Two Columbus Avenue, to act as managing agent for the Condominium. New York Urban submits the 16th Amendment to the Offering Plan, dated April 22, 1999, pursuant to which Urban Associates, L.L.C. was substituted for New York Urban as the managing agent. See Affirmation in Support of Charles D. Cole, Jr., Exh. D. New York Urban also submits the deposition of Peter Peracchio, co-director of management at Urban Associates, which succeeded New York Urban as managing agent who stated that "New York Urban Property Management Corp. is disappearing and all their properties are being managed by Urban Associates. It's just a corporate change." Videotaped deposition of Peter Peracchio, April 19, 2004, at 13, Exh. E to Cole Affirmation. Peracchio further testified that, in 2007, New York Urban was a defunct company. Deposition of Peter Peracchio, November 7, 2007, at 68, Exh. F to Cole Affirmation.

Opposing New York Urban's motion, plaintiffs cite *Schumacher v Richards Shear Co.* (59 NY2d 239 [1983]), and argue that a managing agent's principle assets are its management contracts and that, therefore, there is a question of successor liability that precludes summary judgment. *Schumacher* is, however, inapposite, for there, the question was whether a successor company may be

sued for injuries resulting from the defective design and manufacture of a machine made by its predecessor company. Here, in contrast, plaintiffs seek to sue a predecessor company for wrongs alleged to have occurred after it ceased being managing agent for the building.

Plaintiffs fail to submit any evidence, or raise any question of fact to contest New York Urban's evidence that its role as managing agent ceased prior to plaintiffs' purchase of their apartment and prior to the wrongs alleged in the amended complaint. Therefore, New York Urban's motion for summary judgment dismissing the amended complaint is granted.

MOTION SEQUENCE NUMBER 021

In motion sequence number 021, second third-party defendant L. Martone & Sons (Martone) moves, pursuant to CPLR 3212, for an order granting summary judgment in its favor and dismissing the second third-party complaint of second third-party plaintiff Bovis Lend Lease LMB, Inc. (Bovis).

In 1998, Martone contracted with Bovis to perform roofing and waterproofing work at 2 Columbus Avenue.

Negligence

In the second third-party complaint, Bovis asserts causes of action against Martone for contractual and common-law indemnification, contribution, and breach of contract for failure to procure insurance coverage for Bovis.

The roof, which Martone installed on top of a concrete slab, consisted of an underlay material consisting of insulation board and a vapor barrier, then roofing material (an EPDM material) and above that, one or two layers of styrofoam or expanded polystyrene insulation, filter fabric, stone ballast and/or concrete pavers. Deposition of Nicholas Martone, at 28. The roofing membrane was made up of ten-foot wide rolls which are seamed together with an adhesive sealant. Sealing the seams was part of the roof installation carried out by Martone. *Id.* at 30.

On September 14, 1999, after the roof was installed, Martone was paid in full for its work by Bovis. Then, on September 21, 1999, the roof was inspected by an employee of Carlisle SynTec Inc. (Carlisle), the manufacturer of the roofing system, which approved the installation of the roof and granted the property owner a ten-year warranty. See Inspection Report/Repair For Warranty.

According to Martone, in 2005, six years after the initial installation of the roof, it was contacted by Bovis to discuss the issue of leaks at 2 Columbus Avenue. Martone contends that "the predominant feeling among the trade professionals was that any leaks were not coming from the roof, and the investigation revealed nothing to indicate that the roof was compromised in any way." Memorandum of Law Submitted in Support of L. Martone & Son's Motion for Summary Judgment, at 4.

Nonetheless, in 2006, Martone agreed to install a second membrane, according to Nicholas Martone, "in a good faith effort to maintain both good relations and to put a positive foot forward." Nicholas Martone Dep., at 60.

Martone argues that, since there is no evidence that its work caused the water infiltration into the Caldwell's apartment, summary judgment should be granted in its favor and the second third-party complaint dismissed against it.

Martone's position is undermined by the testimony of Richard Murphy, director of construction for the sponsor from 2002-2007. Murphy testified that he inspected the Caldwell's apartment in 2005, and observed evidence of ceiling leaks in three areas, the kitchen, the living room and the corridor to the master bedroom. According to Murphy, the sheetrock in the three areas was opened up and he could see the slab above the apartment ceiling. Deposition of Richard Murphy, at 103-104. He further stated that he saw staining on the kitchen slab and saw a leak in the living room slab. *Id.* at 104-05. He testified that when he inspected the roof, though he did not have a firm conclusion about the source of the leaks, it was his "assumption" that the sealing of the membrane was compromised in one or two locations. *Id.* at 119. According to Murphy, Martone agreed to repair the seams, but after the attempted repair, there was still water infiltration. *Id.* at 119-122. Murphy then directed Bovis to replace the roof, and in

discussions with Bovis and Martone, Martone agreed to replace the entire roof. *Id.* at 123-124. According to Murphy, Bovis did the work to expose the membrane and Martone installed an additional membrane over the existing one. *Id.* at 125. Murphy testified that after the second membrane was installed there were no additional leaks. *Id.* at 126.

Carlisle's 1999 approval of the roof installation notwithstanding, Murphy's testimony raises questions of fact regarding whether the ceiling leaks, which were discovered in 2005, resulted from Martone's work.

Common-Law Indemnification

Citing *Trump Vil. Section 3, Inc. v New York State Hous. Fin. Agency* (307 AD2d 891 [1st Dept 2003]), Martone seeks dismissal of Bovis's claims for common-law indemnification, arguing that common-law indemnification is not available where the party seeking indemnification actually participated to some degree in the wrongdoing. Quoting *17 Vista Fee Assoc. v Teachers Ins. and Annuity Assn. of Am.* (259 AD2d at 80), Martone argues that in order to obtain common-law indemnification, Bovis must have "delegated exclusive responsibility for the duties giving rise to the loss" to Martone. Martone contends that Bovis did not delegate exclusive responsibility for the roofing work, quoting the following provision, among others, of the contract between Bovis and 2 Columbus Associates, LLC, pursuant to which Bovis was

required to:

3.3.30: Generally oversee, supervise and monitor the Work of the Contractors and the deliveries and installation of material and equipment to protect Owner against defects and deficiencies in the Work; stop and cause correction of Work and/or reject Work which is not in compliance with the Contract Documents; notify Architect of any Work of which Construction Manager believes is not in compliance with the Contract Documents, and upon rejection of the Work by the Architect, stop and require correction of said Work.

Contract between Bovis and 2 Columbus Associates, LLC, § 3.3.30.

Relying on the testimony of Steven Ruggiero, vice president, project executive of Bovis, Martone contends that Bovis had three employees who were responsible to carry out Bovis's oversight and supervisory responsibilities. According to Ruggiero's testimony, however, the purpose of the inspections carried out by the Bovis employees was "mostly to expedite the completion of the punch-list work..." (Deposition of Steven Ruggiero, at 38), though Ruggiero also testified that the inspections were also to check on the quality of the finished work. *Id.* at 38-39. Thus, Martone contends that if there were defects in the roofing work, it was because Bovis failed to carry out its duties of oversight and supervision.

In response, Bovis quotes the Court of Appeals in *Broderick v Cauldwell-Wingate Co.* (301 NY 182, 187 [1950]) stating that:

[a]t common law, a general contractor is not responsible for the independent negligent act of his subcontractor, and it is true that the mere retention of the power of general supervision to see that the over-all work proceeds properly and to co-ordinate the actions of

several subcontractors on the site will not ordinarily cast him in damages for the negligence of any of the latter [citations omitted].

Furthermore, "[a] contract for construction work with a general contractor or construction manager is not, in itself, sufficient to establish that the general contractor or construction manager actually supervised or had direct control" over the work which ultimately damaged the plaintiff. *McCarthy v Turner Constr., Inc.*, 24 Misc 3d 1245(A), *4, 2009 NY Slip Op 51889(U) (Sup Ct, NY County 2009), *affd* 72 AD3d 539 (1st Dept 2010).

The court notes that Martone seeks to rely on the contract between Bovis and Two Columbus Assoc., LLC, and not the contract between Bovis and Martone, to establish that Bovis maintained control over the work in question. As the proponent of a motion for summary judgment, it is Martone's burden to establish that Bovis actually supervised and controlled Martone's work to such a degree that Martone was not exclusively responsible for the roofing work, such that common-law indemnification would be precluded. That it has failed to do. Martone's motion for summary judgment is, therefore, denied with respect to the claim of common-law indemnification.

Contractual Indemnification

Martone argues that the provision for indemnification in its contract with Bovis runs afoul of General Obligations Law § 5-

322.1, which prohibits an agreement to indemnify a party for its own negligence. See *Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786 (1997).

The indemnification provision in the contract at issue provides:

11.1: To the maximum extent permitted by law, Contractor hereby assumes the entire responsibility and liability for any and all damage (direct or consequential) and injury (including death), of any kind or nature whatsoever, to all persons, whether or not employees of Contractor, and to all property and business or businesses, caused by, resulting from, arising out of, or occurring in connection with (i) the Work; (ii) the performance or intended performance of the Work; (iii) the performance or failure to perform the Contract; or (iv) any occurrence which happens in or about the area where the Work is being performed by Contractor, either directly or through a subcontractor, or while any of the Contractor's property, equipment or personnel is in or about said area.

Trade Contract, Article 11, § 11.1, at 14.

Where an indemnification clause contains limiting language such as that contained in section 11.1 ("[t]o the maximum extent permitted by law"), the clause has been held not to violate General Obligations Law § 5-322.1. See *Cabrera v Board of Educ. of City of N.Y.*, 33 AD3d 641, 643 (2d Dept 2006) (indemnification permitted "to the fullest extent permitted by law"); see also *Jackson v City of New York*, 38 AD3d 324 (1st Dept 2007), citing *Dutton v Charles Pankow Bldrs., Ltd.*, 296 AD2d 321 (1st Dept 2002). Martone's argument that the indemnification provision in the contract violates the General Obligations Law fails.

Contribution

Relying on the facts, among others, that in September 1999, Bovis paid Martone in full and Carlisle approved the installation of the roof, that Martone was not notified of any problem with the roof until 2005, and that Bovis's initial investigations of the cause of the leaks did not reveal issues with the roof, Martone contends that Bovis cannot establish that Martone was negligent or that any damage to the Caldwell's apartment was connected to Martone's work. Therefore, according to Martone, it cannot be held liable for contribution. See *Trump Vil. Section 3, Inc. v New York State Hous. Fin. Agency*, 307 AD2d at 896 ("the contributing party must have had a part in causing or augmenting the injury for which contribution is sought" [citation omitted]). In light of Murphy's testimony regarding the his belief that problems with the seal caused the leaks and the fact that the leaks stopped when the additional membrane was installed by Martone, questions of fact exist regarding possible negligence by Martone.

Breach of Contract

Bovis asserts a cause of action for breach of contract, alleging that Martone failed to procure insurance coverage for Bovis, as required by the contract. Submitting a copy of the certificate of insurance listing Lehrer, McGovern, Bovis, Inc. as an additional insured, Martone contends that Bovis's cause of

action for breach of contract must be dismissed.

A party must be named on the face of the insurance policy to be entitled to coverage. *Moleon v Krcisler Borg Florman Gen. Constr. Co., Inc.*, 304 AD2d 337 (1st Dept 2003). A certificate of insurance is insufficient to establish insurance coverage where the policy does not name the party. *Id.* Martone may ultimately be able to prove that it did purchase insurance coverage for Bovis, however, it has failed to carry its burden of establishing that it procured insurance for Bovis for the purposes of its motion for summary judgment.

Finally, Martone alternatively argues that even if it fails on its motion for summary judgment, that the question of damages must be limited to damages alleged to have occurred between August 31, 2005, when it received notice that the roof was leaking, until the membrane was replaced in 2006. Because Bovis appears to agree that damages must be so limited, it is not necessary to reiterate the factual basis for Martone's argument. See Affirmation of David M. Reeve in Opposition to L. Martone & Sons, Inc.'s Motion for Summary Judgment, §13 ("Suffice it to say, once the seams were repaired and the second membrane was installed, the damage caused by the leaks emanating from elsewhere in the apartment, such as the window wall and the HVAC units, cannot be attributable to Martone. But damage that resulted post-notice and pre-repair can be.")

MOTION SEQUENCE NUMBER 022

The amended complaint essentially alleges that defendants Two Columbus Avenue Condominium, the Residential Board of Managers of Two Columbus Avenue and the Condominium Board of Managers of Two Columbus Avenue (collectively, the Condominium defendants) failed to properly remedy and/or repair construction defects in the building, which resulted in substantial water damage to the Caldwell's apartment, causing property damage and loss of quiet enjoyment to the Caldwell's, and personal injury to plaintiff Clara Caldwell and loss of consortium to John Caldwell. Plaintiffs assert causes of action for breach of contract (first cause of action), private nuisance (third cause of action), negligence (fourth cause of action), and negligent misrepresentation (fifth cause of action).⁵

Defendant Two Columbus Avenue Condominium moves, pursuant to CPLR 3025 (b), for an order granting it leave to amend its answer to the amended complaint in order to respond to the first cause of action for breach of contract, and the Condominium defendants seek leave to amend their answer to the amended complaint to respond to paragraph 80 of the loss of consortium claim. Plaintiffs consent to the request of the Condominium to file an amended answer with respect to the first cause of action, so that aspect of the motion

⁵ See footnote 1, *supra*, regarding the no longer asserted sixth cause of action for loss of consortium.

is moot.

The Condominium defendants also move, pursuant to CPLR 3211 and 3212, for summary judgment dismissing the first,⁶ third, fourth, and fifth causes of action; pursuant to CPLR 3211 and 3212 (e), for partial summary judgment dismissing the personal injury and loss of consortium claims, or alternatively, for a hearing pursuant to *Frye v United States*, 293 F 1013, *supra*; and, pursuant to 3211 and 3212, granting summary judgment dismissing plaintiffs' prayer for relief for attorneys' fees from the Condominium defendants.

The building at 2 Columbus Avenue is a condominium containing both commercial and residential units. Defendant Two Columbus Avenue Condominium (the Condominium) is an unincorporated association of condominium unit owners. The Residential Board of Managers is a board of managers, consisting of five persons elected by the residential unit owners, that represents the owners of residential units in the building, and the Condominium Board of Managers is the board of managers consisting of the five members of the Residential Board of Managers and two persons from the separate board of managers selected for the commercial unit in the building.

⁶ The first cause of action was previously dismissed as to the Residential Board and the Condominium Board in the decision of Justice Harold Beeler dated October 17, 2003, thus this motion addresses the cause of action as asserted against the Condominium association.

Breach of Contract, Negligence and Private Nuisance

In support of their motion, the Condominium defendants submit the affidavits of Gabriel A. Sara (Sara), the President of the Residential Board of Managers (Residential Board) for the Condominium from June 29, 1999 through December 4, 2001, and Robert V. Mazzola (Mazzola), a member of the Residential Board from 2000 to the present.

According to Sara, when the Residential Board of Managers was first elected in 1999, because the building's Sponsor still held unsold shares for the building, it exercised its right to appoint three members of the five-member board. All three were employees of Urban Associates, L.L.C., the managing agent for the building. When the Sponsor's remaining shares in the building were sold, a special election for the Residential Board was held in December 1999, and five residential unit owners were selected to be on the board.

Sara states that, from the beginning of the life of the Condominium, he received complaints from numerous unit owners, including plaintiffs, which, he concluded, were related to the original construction of the building, and not to routine maintenance. According to Sara, it is the responsibility of the Board of Managers to set policy for the well-being of the entire condominium community and not just individual owners, and the Board of Managers concluded that the Sponsor's construction team,

some of which were still actively working on the building, not the Condominium, should do the work to correct the defects, and that the Sponsor should be responsible for the costs of the work. Sara noted that in the Offering Plan for the condominium, the Sponsor had set aside only a modest amount of money in the capital reserve fund. Sara also stated that he had encouraged individual unit owners, including the Caldwells, to pressure the Sponsor concerning their various complaints. Sara indicated that by September 2000, the Board of Managers had become frustrated with the Sponsor's lack of success at remediating the various construction-related problems. It, therefore, retained Heitman & Associates as an independent engineering firm to represent the Board with respect to construction-related concerns, including preparing a detailed report concerning the condition of the building and attending an annual meeting of unit owners to discuss the construction-related concerns. The Board of Managers also hired a separate engineer, John Flynn (Flynn), to inspect the building and provide a report of his inspection. Flynn concluded that the problems of water infiltration in the building "arose from the original design and construction of the building (not routine maintenance and repair problems) and were matters that should be corrected by the Sponsor and its construction team." Affidavit of John J. Flynn, P.E., ¶ 8.

Finally, the Board hired the law firm of Wolf, Hadelstein,

Adler, Freeman & Hertz, LLP (Attorney Stuart Saft), to act as counsel to the Board and to advise the Board concerning the possible termination of the managing agent, Urban Associates, and to advise the Board concerning the Condominium's possible courses of action regarding the Sponsor.

According to Board member Mazzola, after Sara departed from the Residential Board, the board continued its policy of pursuing the Sponsor to correct the construction-related defects. As part of that approach, in August 2003, the Board authorized its attorney to seek the assistance of the New York State Attorney General's office, which regulates condominiums, in pursuing the Sponsor with respect to the remedial work in the building. As the statute of limitations for filing a civil action was approaching, the Board also authorized its attorney to file an action against the Sponsor and to pursue a tolling agreement, which he did.

In short, the Condominium defendants argue that they did not ignore the Caldwell's complaints, but rather, made a judgment that the best way of approaching the many construction-related problems in the building, including those of the Caldwells, was to pressure the Sponsor to carry out the remedial work with the contractors that had worked on the building from the outset. The Condominium defendants argue that under the principles established by the Court of Appeals in *Matter of Levandusky v One Fifth Ave. Apt. Corp.* (75 NY2d 530 [1990]) and *40 W. 67th St. Corp. v Pullman* (100

NY2d 147 [2003]), this court must apply the business judgment rule to the Condominium defendants' decisions to pressure the Sponsor with respect to remediating the construct-related defects in the building, rather than carrying out the remedial work themselves. Under that rule, judicial inquiry into the decisions of the Board of Managers is prohibited where the decisions are "'taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes.'" Matter of *Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d at 538 (citation omitted).

Though plaintiffs do not allege that the decisions of the Board of Managers were not taken in good faith or in the honest exercise in judgment, they nonetheless argue that *Levandusky* and *Pullman* are inapplicable to this case, which alleges breach of contract, negligence and nuisance. According to plaintiffs, "[t]he only thing these authorities would empower Movants to do is defend a claim, if it had been made in 1999, that they made a poor decision on how to respond to the leaks, and prevent the court from intervening. That has nothing to do with plaintiff's claims here that the common elements were defective and Movants failed in their duty to cure those defects." Affirmation of Richard Paul Stone, In Opposition To The Motion Of The Condominium And Its Boards, ¶ 29.

Plaintiffs appear to concede that the business judgment rule

would apply to an initial decision of the Condominium defendants that leaks in the building resulted from construction defects and that they should be remedied by the Sponsor. Plaintiffs also seem to agree that the leaks that occurred in their apartment in 2000 and again in 2005 were the result of defects in the design and construction of the building (see Amended Complaint, ¶ 26 ["This water infiltration was caused by defective construction and/or design of the Building involving the Residential and/or General Common Elements"]). They nonetheless contend that the decisions of the Condominium defendants that the Sponsor, rather than the Condominium itself, should be responsible to carry out the remedial work to address those leaks, should not be covered by the business judgment rule.

It is hard to see how the business judgment rule would apply to a 1999 decision by the Condominium defendants that the Sponsor should undertake to fix the leaks, but not apply to later decisions that the Sponsor should remain responsible for carrying out the remedial work to fix the original leaks and leaks which may have developed later. In essence, plaintiffs seem to contend that because the Sponsor was not initially successful in fixing those leaks, the decision of the Condominium to continue to pressure the Sponsor to remedy the defects is not protected by the business judgment rule.

However, these are just the sort of decisions that the

Levandusky court indicates must be protected from judicial scrutiny. As the Court of Appeals stated in *Levandusky*,

the cooperative or condominium association is a quasi-government--"a little democratic sub society of necessity." The proprietary lessees or condominium owners consent to be governed, in certain respects, by the decisions of a board. Like a municipal government, such governing boards are responsible for running the day-to-day affairs of the cooperative and to that end, often have broad powers in areas that range from financial decisionmaking to promulgating regulations regarding pets and parking spaces.

Id. at 536. The Court applied the business judgment rule to board decisions, concluding that "the chosen standard of review should not undermine the purposes for which the residential community and its governing structure were formed: protection of the interest of the entire community of residents in an environment managed by the board for the common benefit." *Id.* at 537. Furthermore, that standard must be applied, even if the decisions turn out to be unwise or inexpedient. *Id.* at 538.

Decisions regarding the performance of maintenance and repairs are within the scope of authority of the Condominium defendants and are shielded from judicial review under the business judgment rule. *Konrad v 136 E. 64th St. Corp.*, 254 AD2d 110 (1st Dept 1998); see also *Parker v Marglin*, 56 AD3d 374 (1st Dept 2008) (applying *Levandusky* to cooperative board's decisions regarding costs, means, allocation and methods employed in making repairs to a building); *Blumberg v Albicocco*, 12 Misc 3d 1045, 1050 (Sup Ct, Nassau County 2006).

To the extent that plaintiffs argue that the business judgment rule is not available to the Condominium as opposed to the defendant Boards of Managers, the court notes that the defendant in *Levandusky* was the cooperative association, rather than the board of the cooperative, and, thus, the principle established in that case is clearly available to the Condominium as well as its Boards of Managers. See also *Skouras v Victoria Hall Condominium*, 73 AD3d 902 (2d Dept 2010) (dismissing action for breach of fiduciary duty and conversion against condominium and condominium board based upon business judgment rule). Finally, the business judgment rule applies to the decisions made by the Condominium defendants even where the plaintiffs are claiming property damages and damages for personal injury. See *Kleinman v Point Seal Restoration Corp.*, 267 AD2d 430 (2d Dept 1999) (in action to recover damages for injury to property, decision of the condominium board of directors to hire a particular contractor to replace the roof is protected by the business judgment rule); *Skouras v Victoria Hall Condominium*, 73 AD3d 902, *supra* (rejecting damage claim for conversion when condominium "booted" plaintiff's car pursuant to board's newly established parking rules).

Thus, the Condominium defendants' motion for summary judgment dismissing the first, third, and fourth causes of action is

granted.⁷

Negligent Misrepresentation

With respect to the fifth cause of action for negligent misrepresentation, plaintiffs allege that "the defendants and/or their representatives falsely represented and assured plaintiffs that property damage and water infiltration issues in the Unit would be addressed and that the problem of water infiltration would be corrected and resolved." Amended Complaint ¶ 72.

In their responses to the bill of particulars, plaintiffs identify Peter J. Peracchio, Urban Associates property manager, and Sal Panico, the Sponsor's director of construction, as having made such statements. See Bill of Particulars, ¶ 8.

Specifically, plaintiffs state that:

On September 13, 1999, Peter J. Peracchio, Urban Associates' property manager, assured Ms. Caldwell that "every step available" was being taken to correct the water infiltration into PHB and that he; the Sponsor's Director of Construction, Mr. Sal Panico; and Urban's Building Manager, Mehrdad Ncmazzee were "all of us committed to correcting the water infiltration problem."

Id. Plaintiffs also assert that in a letter to unit owners dated October 12, 1999, Peracchio

⁷ The court notes that in his decision dated October 17, 2003, Justice Harold B. Beeler dismissed the first cause of action for breach of contract as to the Residential Board and the Condominium Board on the basis that plaintiffs have offered no evidence that the two Boards are parties to a contract with plaintiffs, stating that the Offering Plan and By-Laws lay out responsibilities of the boards but are not contracts. That reasoning applies equally to the Condominium association and thus the first cause of action is dismissed on that basis as well.

reported that the manufacturer of the building windows would perform field tests to address complaints of rain seeping through the windows. In addition, he misrepresented that the HVAC manufacturer had apparently determined that a replacement pan for the window wall units would solve the tendency of these units to drip condensation onto apartment floors.

Id. Interestingly, plaintiffs also state that "Urban [Associates] misrepresented to the Board and plaintiffs that leaks had been remedied and stopped in Units of Unit Owners who had threatened to sue the Board." *Id.*

According to Sara, Urban Associates was hired by the Sponsor, rather than the Condominium, under a three-year contract to be managing agent for the Condominium and to provide services to the Board. Thus, it is not clear if Urban Associates was the agent of the Sponsor or of the Condominium.

The only person mentioned in the response to the bill of particulars regarding negligent misrepresentation that was hired by the Condominium defendants is Stewart Saft, counsel to the Board. The response states that he "reported on January 2, 2001, that he had met with the representative of the Sponsor, Maggie Bergin, Dan Brodsky and Peter Paracchio, and discussed the list of complaints with them. Once again, the Sponsor promised 'full cooperation', although no progress was made in addressing the problems in PHB." *Id.*

None of the persons identified by plaintiffs are members of the Residential Board of Managers or the Condominium Board of

Managers, nor do plaintiffs allege that any misrepresentations were made by any members of the Board of Managers; thus, the statements cannot be the basis for a direct cause of action for negligent misrepresentation against the Board of Managers. The only question would be whether the Boards can be held responsible for the alleged statements of Saft or Urban Associates' employees.

"A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information." *J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d at, 148.

The Condominium defendants argue that, because Urban Associates was hired by the Sponsor to provide services to the Board, the unit owners were not parties to the contract, and there is no basis for a special privity-like relationship between Urban Associates and unit owners such as the Caldwells.

As the Condominium defendants further contend, the statements indicating that efforts were being made to correct the problems can be more accurately characterized as statements of reassurance than statements of fact. To the extent that they are statements of future intentions rather than statements of existing fact, they are insufficient to support a claim of negligent

misrepresentation. *Capricorn Invs. III, L.P. v CoolBrands Inc.*,
66 AD3d 409 (1st Dept 2009).

With respect to the statement regarding the field tests to be performed by the manufacturer of the windows, there is no evidence that that statement was a misrepresentation. Nor is there any evidence that the manufacturer did not report that the replacement pan would solve the problem. The fact that the manufacturer may have been proven wrong does not mean that Peracchio misstated the company's belief that it had solved the problem.

Furthermore, plaintiffs' bill of particulars response continues, "[o]nce again, the Sponsor promised 'full cooperation', although no progress was made in addressing the problems in PHB. Mr. Peracchio failed to exercise objectivity with regard to division of responsibility as between himself and the Sponsor and caused a conflict of interest between the Property Manager and the condominium." Bill of Particulars Response 8. This would suggest that even plaintiffs question whether the Condominium would be responsible for Peracchio's statements, even assuming they provided a basis for a negligent misrepresentation claim.

With respect to Saft's alleged statement regarding the sponsor's promise of cooperation, there is no evidence that Saft misrepresented what the Sponsor said. Thus, Saft's alleged statement does not constitute a basis for a negligent misrepresentation claim against the Condominium defendants.

The court also notes that plaintiffs have failed to respond to the Condominium defendants' motion to dismiss the negligent misrepresentation claims, and have not shown that a special relationship existed between Urban Associates and plaintiffs that is required for a cause of action for negligent representation. For all of these reasons, plaintiffs' cause of action for negligent misrepresentation is dismissed.

Personal Injury Claims

Finally, the Condominium defendants seek dismissal of Clara Caldwell's claims that she has suffered personal injury and illness as a result of exposure to mold in her apartment. However, Clara Caldwell's claims for personal injury, like John Caldwell's claims for loss of consortium, are merely forms of damages which they seek to recover in connection with the causes of action they have asserted. Since the motion for summary judgment of the Condominium defendants to dismiss the causes of action underlying those claims is granted, it is not necessary, in this motion sequence, for the court to reach the question of whether exposure to mold caused the illness and injury alleged by Clara Caldwell.

In any case, the court notes that, in connection with Clara Caldwell's personal injury claim, the Condominium defendants and the plaintiffs rely on the same motion papers for this motion and for motion sequence number 016. Since the court dismissed the

personal injury claims in motion sequence number 016, were it necessary to rule on those claims in this motion, the court would reach the same result.

MOTION SEQUENCE NUMBER 022 (CROSS MOTION)

In motion sequence number 022, third-party defendant RSG Caulking & Waterproofing, Inc. (RSG) cross-moves, pursuant to CPLR 3212, for an order dismissing the first cause of action (breach of contract for failure to procure insurance), the seventh cause of action (contractual indemnification), the eighth cause of action (common-law indemnification), and the ninth cause of action (contribution) of the third-party complaint.

On June 8, 1998, RSG entered into a Trade Contract with Lehrer McGovern Bovis, Inc. (Bovis) to perform caulking work at the building located at Two Columbus Avenue, as specified in the Scope of Work annexed to the contract and the Drawings and Specifications identified in the Scope of Work.

According to Robert Guerrerio, President of RSG,

RSG performed exterior perimeter caulking of metal to masonry joints at windows (where the installed metal sub frame of window meets masonry) and AC units (the perimeter of the installed unit where it meets masonry). Also, RSG caulked the brick to brick horizontal and vertical masonry joints (area of mortar in between brick, block or stone) and coping stones depending on the field conditions.

RSG's scope of work did not include perimeter caulking of curtain walls (also called window walls).

Affidavit of Robert Guerrerio, ¶¶ 3 & 4., see also Deposition of

Robert Guerrerio, at 17-18, 56; Deposition of Henry Marina, Lehrer McGovern Bovis, Inc., at 249 (RSG did the caulking on the masonry and the "regular punch windows"). RSG, did not, however, caulk the window wall/curtain wall of the Caldwells' apartment, PHB. See Marina Dep., at 250; see also Deposition of Gregory Krywosa, at 129 (Kings County was responsible for exterior caulking in area of window wall system).

RSG submits evidence that the Caldwells observed leaks in their apartment within a few months of their closing. In particular, they observed a leak in the master bedroom where the two windows join (the window wall system). See Letter of Clara Caldwell to Sal Panico (director of construction for the sponsor, the Brodsky Organization), dated September 13, 1999. In addition, a leak was observed in the ceiling.

According to RSG, Bovis requested RSG to assist with water testing of the entire building in September and October 1999, to determine the source of leaks throughout the building, and agreed that if RSG's work were not the source of the leaks, RSG would be paid for its labor and equipment. Bovis ultimately reimbursed RSG for the extra work performed by RSG employees, because it was determined that RSG's work was not responsible for the leaks. Guerrerio Affidavit, ¶ 6 & 7; see also work tickets/invoices, Exh. E to affirmation of Denise M. Bush, dated February 19, 2010. Rather, it was determined that the leak was in the window wall

system. Marina Dep., at 323.

RSG asserts that, in August 2000, it was again asked to assist in water testing, and again, it was determined that RSG's work was not the source of the leaks and RSG was reimbursed for its extra work. See Guerrerio Aff., ¶ 9, work tickets/invoices, Exh. F to Bush Affirmation, *supra*.

Nor was RSG found to be responsible for or involved with remedial work involving leaks related to the tank area of the window wall system. See Murphy Dep. at 112-116 (EFCO requested to and did remediate tank-related leaks).

Furthermore, according to Guerrerio, at no time was RSG informed that its caulking was defective, nor was it involved with the remedial efforts related to the Caldwell's apartment. Guerrerio Aff. ¶¶ 11 & 12.

In short, RSG argues that since its work was not found to be responsible for any of the leaks in the Caldwell's apartment, it was reimbursed for its involvement in water testing and was not asked to do remedial work, there is no evidence that it was at fault with respect to any of the leaks. Guerrerio Aff. ¶ 13.

Pursuant to its contract with Bovis, RSG agreed to indemnify the Owner (Two Columbus Ave. Associates, LLC), the Architect/Engineer (Schuman Lichtenstein Claman Afron Architects) and the Construction Manager (Lehrer McGovern Bovis) for any damage or injury sustained by them "caused by," "resulted from,"

"arising out of," or "occurring in connection with" RSG's work.

RSG argues that the contract did not name the third-party plaintiffs Two Columbus Avenue Condominium, The Residential Board of Managers, The Condominium Board of Managers (collectively, the Condominium defendants), New York Urban Property Management Corp., or Urban Associates, LLC, and therefore, their claims for contractual indemnification must be dismissed.

RSG next argues that, because there is no evidence that its work was responsible for any of the leaks in the Caldwells' apartment, any claims for contractual indemnification by Two Columbus Avenue Associates, LLC, as well as claims for common-law indemnification and contribution must also be dismissed.

Finally, with respect to the cause of action for breach of contract for failure to procure insurance, RSG argues that, as with respect to the contractual indemnification cause of action, it had no obligation under its contract with Bovis to procure insurance for the Condominium defendants. With respect to the three remaining third-party plaintiffs (Two Columbus Associates, LLC, Urban Property Management Corp. and Urban Associates), RSG argues that, pursuant to its contract with Bovis, it was required to cover the owner and its agents as additional insureds with respect to the indemnification provision of the contract. RSG further contends that because there is no evidence that it was responsible for the leaks, its obligation to indemnify these

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third-party plaintiffs and, therefore, its duty to procure insurance were not triggered and no damages can be established by the third-party defendants.

Third-party defendant Bovis⁸ opposes RSG's motion for summary judgment dismissing the indemnity and breach of contract claims against it, contending that there is an evidentiary basis for a jury to find that RSG negligently performed its caulking work, which allowed water to penetrate the Caldwell's apartment.

Bovis contends that Israel Berger & Associates, Inc., which was hired to lead the initial investigation into the source of the leaks, suspected that some of the caulked exterior joints for which RSG was responsible, were compromised. Deposition of Steve Ruggiero, at 161, 164. According to Bovis, during the tests for leaks, the slab edge cover and exterior caulk joints were removed and replaced. *Id.* at 163. Although RSG was not involved in repairing the joints, it was responsible for caulking them during the construction phase of the project. *Id.* at 164, 166.

Relying on the testimony of Richard Murphy, director of construction for the sponsor from 2002-2007, Bovis further

⁸ In its answer to the third-party complaint, Bovis asserted a cross claim against RSG and the other third-party defendants. Although RSG's motion did not expressly include Bovis's cross claim, in light of Bovis' opposition, that cross claim will be considered as part of the motion. It appears that third-party plaintiffs Two Columbus Associates, LLC, Urban Property Management Corp. and Urban Associates have not opposed RSG's cross motion.

contends that RSG was responsible for caulking joints in the western parapet wall that were found to be open and were considered possible sources of water infiltration. See Deposition of Richard Murphy, at 202-204.

Although Bovis concedes that RSG does not appear to be responsible for the majority of the damage to the Caldwell's apartment, Bovis contends that there are triable issues of fact with respect to whether RSG was negligent with respect to at least some of its caulking work that did result in leaks in the Caldwell's apartment. Since RSG's motion is based on the contention that its work was free from negligence, Bovis contends that RSG's motion for summary judgment must be denied.

Bovis further argues that, as general contractor, it did not control RSG's means and methods of performing its work and that, therefore, Bovis is not liable for the acts of RSG. *Melbourne v New York Life Ins. Co.*, 271 AD2d 296, 297 (1st Dept 2000) ("As a general rule, a principal is not liable for the acts of independent contractors because, unlike the master-servant relationship, principals cannot control the manner in which independent contractors perform their work"). Bovis further contends that pursuant to its contract with RSG, it is entitled to indemnification, and that RSG's failure to purchase insurance constitutes a breach of its contract with Bovis.

In response to Bovis's arguments concerning the caulking of

the exterior joints, RSG notes that Bovis relies solely on Ruggiero's testimony, and contends that Bovis mis-characterized Ruggiero's testimony by omitting portions of the testimony.

The following testimony of Ruggiero concerning the RSG's responsibility for problematic external caulk joints would appear to be, at best, speculative:

Q. To your recollection do you recall there being any problems with the exterior caulk joints when you did this inspection?

A. I didn't do the inspections. I don't recall.

Q. Okay. Well, when you were present during the leak investigation, do you recall there being any issues raised with respect to the exterior caulk joint?

A. I couldn't - you know, from standing only on the interior of a finished building, could not weigh in or pass judgment on the exterior, so....

Q. Okay.

A. That's - I wasn't involved.

Q. Do you recall anybody ever coming to you after the fact to address any issues with the exterior caulk joints?

A. No.

Ruggiero Dep. at 165.

Furthermore, to the extent that Ruggiero's testimony, relied on by Bovis, suggests that RSG was responsible for caulking around the window wall system, Ruggiero indicated that he did not actually inspect the caulking, because he was inside the building during the tests. Ruggiero Dep. at 165. Moreover, his testimony

is contradicted by that of Henry Marina, the Bovis representative who coordinated all trade activities and who testified that RSG did not perform any caulking on the window wall system, but rather, only caulked the punch windows. Marina Dep. at 250; see also Krywosa Dep. at 129 (Kings County was responsible for caulking of window wall system).

Particularly in light of the evidence submitted by RSG, including the work tickets paid by Bovis after the water testing in both September-October 1999 and August 2000, suggesting that Bovis did not believe that RSG was responsible for the leaks, Ruggiero's testimony is insufficient to raise a triable issue of fact regarding negligence by RSG.

With respect to Bovis's argument concerning an open caulk joint on the western parapet wall, RSG cites the continuation of Murphy's testimony, which indicated that the western parapet wall was not above Penthouse B. Murphy Dep., at 203. So again, Bovis has failed to raise an issue of fact sufficient to overcome RSG's motion for summary judgment.

The Condominium defendants also oppose RSG's motion for summary judgment, incorporating by reference Bovis's opposition. The Condominium defendants also rely on the September 13, 1999 letter of Clara Caldwell, which complains of leaks in the window wall system and leaks through the exterior wall. However, as RSG has argued, the water testing performed after Clara Caldwell's

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letter did not find RSG responsible for the leaks. Thus, Caldwell's letter fails to raise a question of fact which can overcome RSG's cross motion for summary judgment, and the motion is granted.

MOTION SEQUENCE NUMBER 023

In motion sequence number 023, second third-party defendant Centrifugal/Mechanical Associates, Inc. (Centrifugal) moves, pursuant to CPLR 3212, for an order granting summary judgment in its favor and dismissing all of the second third-party claims and cross claims against it.

Centrifugal was hired by Bovis Lend Lease LMB, Inc. (Bovis) to provide labor, service, and materials to install HVAC units manufactured by Ice Cap Enterprises Corp. (Ice Cap). It is undisputed that Centrifugal installed the sleeve for the air conditioning (HVAC) unit in the master bedroom of the Caldwell's apartment and placed the unit in the sleeve. The sleeves in the second bedroom, living and dining rooms were installed by second third-party defendant McNally Masory, Inc.

The sleeve in the window wall system is one continuous piece of sheet metal, that was fastened with sheet metal screws that went through a flange that was part of the sleeve assembly and was set in a bed of clear silicone sealant that fastened to the frame of the window. Support legs were then installed to give the sleeve pitch. Caulking was then to be applied by Centrifugal.

Centrifugal placed the HVAC units into the installed sleeves, both in the master bedroom and the other rooms in the Caldwell's apartment. Deposition of Henry Marina, dated 3/27/08, at 159.

Shortly after moving into their apartment, the Caldwell's complained about leaks, some of which were in the master bedroom in the area of the window wall system HVAC unit. Their complaints continued into the summer of 2000. See Letters from Clara Caldwell to Mehrdad Nemazee and Sal Panico, Urban Associates, LLC, dated June 7, 2000 and July 28, 2000.

Centrifugal contends that there is no evidence that its work was responsible for the leaks. To the contrary, Centrifugal asserts that on September 8, 2000, Gregory Krywosa, the Bovis employee involved with coordinating the repair of the problems, conducted water tests of the HVAC unit and sleeve in the Caldwell's bedroom and found no leaks and moved on to other possible sources of the leaks. Krywosa concluded that water was accumulating on top of the course of block underneath the window and entering the room from there. Deposition of Gregory Krywosa, at 64-68. Previously, in a September 2, 2000 inspection, Krywosa found that water was coming from the HVAC unit's condensation pan and spoke with Ice Cap, the manufacturer of the HVAC units, concerning a problem with the design of the condensation pan. See Contemporaneous notes of Gregory Krywosa, at 2. On September 5, 2000, Krywosa, and representatives of EFCO, Pauly, and Ice Cap

returned to the Caldwell apartment, removed the slab cover outside of the bedroom, removed the caulk joint between the top of the block and bottom of the window, and installed a new double-caulk joint, and replaced and sealed the slab cover. They also cleaned out the weep holes in the window. *Id.* at 2-3. Thus, according to Centrifugal, the Bovis employee overseeing the investigation of the leaks near the HVAC unit, concluded that the HVAC sleeve was not the source of the problem.

Bovis opposes Centrifugal's motion, contending that there are questions of fact which preclude summary judgment. Bovis relies on three items of evidence that suggest that the leak resulted from an improperly pitched sleeve.

It first relies on the affidavit of Gabriel Sara, the first president of the condominium's residential board of managers. Bovis quotes the portion of the Sara affidavit which indicates that, from the inception, he had received complaints from numerous unit owners, including the Caldwells, concerning the air conditioners and leaks and draining water into the apartments. Sara states that he wrote to the building owner complaining that many of the HVAC units were not functioning properly despite repairs by Ice-Cap technicians and stating that "[t]he units were supposed to be slightly tilted outwards so any condensate water overflow drains outside, however the majority is [sic] not tilted at all and some are tilted inwards resulting in the overflow water

entering the apartments." Letter from Gabriel A. Sara to Mr. Peter J. Peracchio, et al., dated 9/6/1999, annexed to Affidavit of Gabriel Sara as Exh. A.

Bovis next relies on a statement by Steve Ruggiero, a Bovis vice president and project executive who was the project manager of the 2 Columbus Avenue job. Ruggiero testified that he first went to the Caldwell's apartment after he was apprised of their complaint regarding water leaks, saw moisture on the carpet in front of the HVAC unit after a severe driving rain storm and opined that the "[p]itch [of the HVAC unit's sleeve] may have been the possible cause" of the leak. Deposition of Steven Ruggiero, at 107-108.

Finally, Bovis relies on an unsigned report of Israel Berger & Associates, Inc., which was hired to lead the initial investigation regarding water leaks in the building. Regarding an investigation of leaks which occurred during a rainstorm, the report states, "[a] significant amount of water entered to [sic] an improperly pitched air conditioner unit and caulk joints at the exposed slab edge covers. ... The window wall mounted air conditioner sleeve and unit were removed and replaced." Israel Berger & Associates, Inc., Leak Investigation Report, December 11, 2000 (Berger Report), Executive Summary, at 3. Bovis asserts that:

[d]espite the voluminous amount of conflicting testimony, the fact remains that at the time of the leak

investigation, representatives from Israel Berger, Bovis, EFCO, and Brodsky all saw water leaking through an improperly pitched HVAC unit in the plaintiffs' apartment. As a direct result of this work, the HVAC unit and sleeve Centrifugal had installed was immediately repaired and replaced, and the leaks stopped.

Affirmation of David M. Reeve in Opposition to
Centrifugal/Mechanical Associates, Inc.'s Motion for Summary
Judgment, ¶ 7.

Bovis fails, however, to cite the testimony of any person who actually determined that the sleeve was improperly pitched. Gabriel Sara's assertion was made nearly a year before the tests were conducted and his statement was a general one mentioning "the majority" of units in the building, and not the Caldwells' unit, specifically. Nor did Sara indicate any basis for his assertion. Ruggiero merely speculated that pitch "may have been the possible cause" of the leak, rather than stating that he determined that the sleeve was improperly pitched. Regarding pitch being the cause of the problem, Ruggiero further stated, "but we weren't sure." Ruggiero Dep., at 108. Of course, "speculation is insufficient to raise a triable issue of fact in order to overcome a motion for summary judgment." *Vega v Restani Constr. Corp.*, 73 AD3d 641, 649 (1st Dept 2010).

Furthermore, referring to a letter that he had written to Sal Panico in September 2000, Ruggiero testified that after the HVAC unit was replaced, they investigated further by cutting a hole in

the sheetrock, and found an area behind the window wall where there appeared to be signs of dripping from a bolt connection. He further stated that they inspected the outside to confirm whether the caulking was properly done and considered whether the slab cover over the window wall system needed to be reinstalled. *Id.* at 109-112.

In contrast with the Sara and Ruggiero speculations about possible problems with the pitch of the sleeve, when questioned about possible problems with the pitch of the air conditioner sleeves, Henry Marina, who at the time of the incidents in question was senior superintendent at Bovis, and was responsible for the coordination of the air conditioner installation, stated that "[s]ome pitch was given to the sleeve when they were installed." Deposition of Henry Marina, 4/1/08, at 266. In response to the question "[w]ere there issues with the pitching of the sleeves during this project?" Marina answered, "[n]o." *Id.* at 267. Marina further testified that it was concluded that the leaks resulted from a problem with a bolt in the window wall system. Deposition of Henry Marina, dated 3/27/08, at 97. Additionally, Krywosa testified that when they did the water test in September 2000, they found no problem with the HVAC unit or the sleeve and, therefore, moved on to other possible causes of the leak. Krywosa Dep., at 64-68.

Thus, neither the Sara letter, nor the Ruggiero statement,

are sufficient to overcome the testimony of Bovis employees Krywosa and Marina, based upon investigation of the leaks, that there was no problem with the pitch and that the HVAC sleeve was not connected with the leak.

That leaves Bovis with only the Berger Report. The court initially notes that the report is unsigned and is submitted not with the sworn affidavit of a person who can explain its content, but by the Bovis attorney, who has no personal knowledge of the content of the report. The report, thus, constitutes hearsay and it is impossible for the court to determine the basis for the assertions in the executive summary that the HVAC sleeve was improperly pitched or that the sleeve, along with the HVAC unit, were replaced. Though a hearsay document may be considered in opposition to a motion for summary judgment along with other admissible evidence, as the sole evidence, it is insufficient to defeat a motion for summary judgment. *Matter of New York City Asbestos Litig.*, 7 AD3d 285 (1st Dept 2004). Furthermore, contrary to the Berger Report assertion that both the window wall sleeve and the HVAC unit were replaced, according to Krywosa's contemporaneous notes, although a new HVAC unit was installed on September 18, 2000, a new sleeve was not installed. Krywosa Notes, at 7. Krywosa's notes further state that "Mrs. Caldwell upset that new sleeve was not installed. I explained to her that entire area was tested including the sleeve several times and no

leak was found @ the sleeve & that removing & replacing the existing sleeve that we know works would do more harm than good." *Id.*

Thus, Bovis fails to overcome the evidence relied on by Centrifugal in its motion for summary judgment, and Centrifugal's motion is granted.

MOTION SEQUENCE NUMBER 23 (CROSS MOTION)

In motion sequence number 023, third-party defendant Schuman Lichtenstein Claman Efron (SLCE) cross-moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the third-party complaint of third-party plaintiffs Two Columbus Avenue Condominium, The Residential Board of Managers of Two Columbus Avenue, The Condominium Board of Managers of Two Columbus Avenue, Two Columbus Associates LLC, New York Urban Property Management Corporation and Urban Associates LLC, as against SLCE and any and all cross claims against SLCE.

SLCE is an architectural firm that entered into a contract with Two Columbus Avenue Associates LLC in connection with the project. Agreement between 2 Columbus Avenue Associates LLC and SLCE, dated January 29, 1998 entitled Standard Form of Agreement Between Owner and Architect for Housing Services (the Agreement). Section 2.5.5 of the Agreement provided that SLCE (the Architect) would visit the site

to become generally familiar with the progress and quality of the Work and to determine in general if the

Work when completed will be in accordance with the Contract Documents. However, the Architect shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work.

Section 2.5.6 provides that the:

Architect shall not have control over, charge of, or responsibility for construct means, methods, techniques, sequences or procedures ... since these are solely the Contractor's responsibility under the Contract for Construction. The Architect shall not be responsible for the Contractor's schedules or failure to carry out the Work in accordance with the Contract Documents. The Architect shall not have control over or charge of acts or omissions of the Contractor, Subcontractors, or their agents or employees, or any other persons performing the Work.

Section 2.5.11 provides that:

Architect shall review and approve or take other appropriate action upon the Contractor's submittals, such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents... . The Architects approval of a specific item shall not indicate approval of an assembly of which that item is a component.

Section 7.1.1 of the agreement governing dispute resolution provides:

Claims, disputes or other matters in question between the parties to this Agreement, arising out of or relating to this Agreement or the breach thereof, shall be subject to and decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect....

Finally, section 9.7 of the agreement provides that "[n]othing contained in the Agreement shall create a contractual relationship with or a cause of action in favor of a third-party against either

Owner or Architect."

The third-party complaint contains nine causes of action, four of which are asserted against SLCE: 1) first cause of action for breach of contract against all third party defendants as Trade Contractors, alleging that the trade contractors agreed to indemnify and hold harmless third-party plaintiffs under their respective Trade Agreements and that they failed to fulfill their obligation to provide insurance coverage; 2) seventh cause of action for contractual indemnification against all third-party defendants other than Lehrer McGovern Bovis, based upon their respective Trade Agreements contracts with Bovis; 3) eighth cause of action for common-law indemnification against all third-party defendants; and 4) ninth cause of action for contribution against all third-party defendants.

With respect to the first cause of action for breach of contract, SLCE submits a copy of its contract with Two Columbus Avenue Associates LLC and argues that none of the third-party plaintiffs are party to that contract or have privity of contract with SLCE. SLCE further notes that section 9.7 of the Agreement specifically precludes a contractual relationship or a cause of action against SLCE (or the owner) in favor of a third party. Citing *M. Paladino, Inc. v J. Lucchese & Son Contr. Corp.* (247 AD2d 515 [2d Dept 1998]) (plaintiff may not maintain cause of

action for breach of contract where it has no contractual relationship and was not in privity with the party), SLCE argues that the first cause of action must be dismissed.

SLCE further argues that, assuming that the court finds privity of contract with any of the third-party plaintiffs, section 7.1.1 of the Agreement requires that any dispute under the Agreement must be resolved by arbitration. The court notes the similarity in the name of the contracting party, Two Columbus Avenue Associates LLC with that of the third-party plaintiff Two Columbus Associates LLC. It is not clear from these motion papers whether the two entities are one and the same. However, assuming that they are the same, and Two Columbus Associates LLC is a party to the architectural Agreement with SLCE, it is governed by the arbitration clause in section 7.1.1 of that agreement.

With respect to the seventh causes of action, SLCE argues that, since it was not a party to a contract with Bovis, that cause of action, based upon the Trade Agreements with Bovis, must be dismissed. SLCE, further, contends that its contract with Two Columbus Avenue Associates LLC did not contain an indemnification provision or a provision requiring the procurement of insurance. With respect to the eighth and ninth causes of action, SLCE submits the deposition testimony of Daniel Brodsky, one of the managing partners in Two Columbus Associates, LLC, and a partner of Urban Associates LLC and New York Urban Property Management

Corp.; Richard Murphy, P.E., director of construction for the Brodsky Organization beginning in October 2002; Gregory Krywosa, P.E., Assistant Project Manager for Bovis; Peter Peracchio, employee of Urban Associates, LLC; Sal Panico, director of construction at the Brodsky Organization until September 2002; Israel Berger, member of Israel Berger Associates LLC, which was hired by the building owner as consultant and inspector concerned with the skeleton or skin of the building, including the windows and outside walls of the building (the building envelope); Henry Marina, Senior Superintendent of Bovis for the project; and Mario Yao, ALA, an employee of SLCE.

The sum and substance of the testimony relied on by SLCE is to the effect that, although there were post-construction complaints regarding the building, including the complaints of the Caldwells, regarding punch-list items and water incursion, there were no complaints regarding the design of the building (see Deposition of Daniel Brodsky, at 96; Deposition of Richard Murphy, at 185; Deposition of Peter Peracchio, at 97, Deposition of Israel Berger, at 130); that Bovis, not SLCE, had the supervisory role for the construction project (see Murphy Dep., at 146; Deposition of Henry Marina, at 151-152); and that there was no problem with the architectural drawings for the windows (see Deposition of Gregory Krywosa, at 117-118).

SLCE also submits the testimony of Mario Yao, a New York

State registered architect and employee of SLCE, who testified that, as the architect, SLCE designed the layout for the locations of the apartments, including the dimensions of the windows. See Deposition of Mario Yao, employee of SLCE, at 41 and 21. SLCE designs specify that the windows be water and air-tight, but an exterior consultant was responsible for the water and air-tightness of the windows. Yao Dep., at 21-22.

Finally, SLCE submits the affidavit of Charles Spitz, AIA, a New York-licensed architect who states that "to a reasonable degree of architectural certainty, SLCE'S provision of Project services met the applicable standard of care for an architect under the circumstances presented in this matter, including the particular nature of the Project, and SLCE's scope of services as described in the contract under which SLCE was retained in connection with the Project." Affidavit of Charles Spitz, ¶ 4. Spitz further states, to a reasonable degree of architectural certainty, that "SLCE's construction documents for the Project are proper, comply with all applicable state and local building codes, and met the professional standard of care applicable under the circumstances." *Id.*, ¶ 6.

The eighth and ninth causes of action for common-law indemnification and contribution require a finding of negligence. "To establish a prima facie case of negligence, a plaintiff must establish the existence of a duty, a breach of that duty, and that

the breach of such duty was the proximate cause of his or her injuries. However, absent a duty of care, there is no breach and no liability." *Marasco v C.D.R. Elecs. Sec. & Surveillance Sys. Co.*, 1 AD3d 578, 580 (2d Dept 2003) (citation omitted).

SLCE contends that there is no evidence that SLCE has breached a standard of care applicable to an architect under the circumstances of this case, or that it has committed professional malpractice or professional negligence.

Rather than coming forward with evidence which raises questions of fact necessary for trial, third-party plaintiffs Two Columbus Avenue Condominium, the Residential Board of Managers and the Condominium Board of Managers (the Condominium defendants) oppose SLCE's motion based upon challenges to the form of SLCE's submissions. Third-party plaintiffs Two Columbus Associates, New York Urban Property Management Corp. and Urban Associates LLC (the Sponsor defendants) merely incorporate by reference the papers of the Condominium defendants.

With respect to the first cause of action based on contract, the Condominium defendants contend that the copy of SLCE'S contract with Two Columbus Associates is not in admissible form. They do not, however, explain the basis for their assertion. Nor do they respond to SLCE's argument that since it never contracted with Bovis, causes of action based on such a contract cannot stand.

With respect to the negligence causes of action, the Condominium defendants argue that SLCE may not rely on the various deposition transcripts because those transcripts are unsigned by the deponents and SLCE failed to submit proof that they were previously served on the witness and the witness's time to review and correct the transcript had passed and that, in any case, those witnesses merely deny knowledge of whether there were design defects. See *McDonald v Mauss*, 38 AD3d 727 (2d Dept 2007). SLCE responds that un-executed, though certified, transcripts used as admissions of opposing parties are, in fact admissible. See *Morchik v Trinity School*, 257 AD2d 534 (1st Dept 1999). Furthermore, SLCE notes that, in addition to testimony regarding the lack of complaints with its architectural work, it also cited testimony regarding the causes of the various leaks complained of, none of which involved the architectural plans, and the manner in which they were addressed. See e.g. *Murphy Dep.*, at 102-103 and 128 regarding causes of and solutions for ceiling leaks, and at 115-116 and 128 regarding leaks in window wall system.

Citing *McGuigan v Carillo* (150 Misc 2d 881 [Sup Ct, Queens County 1991]) the Condominium defendants further argue that a party may not use his own deposition (that of Mario Yao) on its case in chief. However, *McGuigan* deals with the question of when a party may use a deposition on trial, and not when it can be used in support of a summary judgment motion. Furthermore, SLCE is

merely using Yao's deposition to lay out the nature of the SLCE's responsibilities on the project, none of which are contested by the Condominium defendants.

Finally, the Condominium defendants contend that, though the Spitz affidavit is signed and notarized, none of the records relied on by him in arriving at his conclusion are in evidence. Spitz states in his affidavit that he reached his conclusions regarding the matter based upon:

- 1) SLCE'S architectural drawings and specifications; 2) SLCE'S contract; 3) SLCE's project file documentation, including project correspondence from and to various parties; 4) plaintiffs' Bills of Particulars; 5) the January 25, 2008 and October 19, 2009 deposition transcripts of Mario Yao, A.I.A; and 6) the parties' discovery responses and accompanying documentation, including, but not limited to, the January 11, 2001 report issued by Daniel F. Tangel, P.E. and the June 2002 report issued by John J. Flynn, P.E.

Spitz Affidavit, ¶ 2.

According to SLCE, however, all of the documents relied on by Spitz have been produced to all parties in discovery.

This is obviously a complex case with substantial motion practice, and voluminous submissions of documentary evidence have been made by the various parties in conjunction with those motions. This decision itself encompasses 11 motions and cross motions, many of which rely on the same documents that SLCE has relied on. Under these circumstances, certain of the Condominium defendants' objections based upon the form of those transcripts border on the frivolous. Even more disturbing, however, is the

failure of the Condominium defendants to respond substantively to SLCE'S motion with respect to the seventh cause of action seeking contractual indemnification based upon a Trade Agreement with Bovis. SLCE quite reasonably suggests that its inclusion in the seventh cause of action was merely a mistake by third-party plaintiffs, since it was not a party to a contract with Bovis.

The court notes that the first cause of action identifies all of the third-party defendants, including SLCE, as "Trade Contractors" and, like the seventh cause of action, identifies the contracts which form the basis of the cause of action as the "respective Trade Agreements." Amended Third-Party Complaint, ¶¶ 76 and 78. The court also notes that the "Trade Agreements," some of which have been submitted by the parties as exhibits in other motion sequence numbers encompassed by this decision, are contracts between Bovis and the various subcontractors. The court concludes that the first cause of action, like the seventh, is, therefore, based upon a purported contract between SLCE and Bovis. SLCE's motion for summary judgment seeking dismissal of both causes of action is granted.

Furthermore, because of the failure of the Condominium defendants to address the substance of what initially might have been an inadvertent error and to withdraw at least the first and seventh causes of action, SLCE was compelled to respond further to those causes of action, unnecessarily prolonging this litigation.

With respect to the eighth and ninth causes of action for common-law indemnification and contribution, respectively, both causes of action depend on establishing negligence by SLCE. SLCE has submitted testimony concerning the causes of the leaks in the Caldwell's apartment, that the architectural plans were not the cause of the leaks and further testimony from the sponsor, employees of the general contractor, and the consultant hired to inspect the building plans and the on-going construction, that they were unaware of any complaints regarding the work of SLCE. Finally, SLCE submitted the affidavit of an architect who reviewed the evidence in the case and concluded that SLCE's plans met the applicable professional standard of care.

The court concludes that SLCE has made out a prima facie case that its work was free from negligence. The third-party plaintiffs, having completely failed to submit any evidence that raises any question of fact regarding possible negligence by SLCE, SLCE's cross motion seeking dismissal of the eighth and ninth causes of action is granted.

MOTION SEQUENCE NUMBER 024

In Motion Sequence Number 024, defendant Two Columbus Associates, LLC (the Sponsor) moves for an order granting summary judgment dismissing the amended complaint and any cross claims against it.

The amended complaint alleges five causes of action against

the Sponsor: 1) breach of contract; 2) breach of fiduciary duty; 3) private nuisance; 4) negligence; and 5) negligent misrepresentation.⁹ Although the Sponsor addresses both the first and second causes of action in its motion, it appears that both causes of action were dismissed as against the Sponsor in the decision dated October 17, 2003, of Harold B. Beeler, J. Those causes of action will, therefore, not be addressed in this decision.

In its initial motion papers, the Sponsor fails to address either the private nuisance or the negligent misrepresentation causes of action. Normally the court would not consider arguments made for the first time in reply papers. However, on a summary judgment motion, the court may, at its discretion, consider arguments made on reply. *Burlington Ins. Co. v Guma Constr. Corp.*, 66 AD3d 622, 624 (2d Dept 2009). The plaintiffs have not submitted papers specifically directed to the Sponsors' motion and the Condominium Defendants, which have submitted opposition papers, have not objected to the additional arguments being raised on reply by the Sponsor. The court will, therefore, consider these arguments.

⁹ Initially, the complaint contained a sixth cause of action for loss of consortium; however, in their opposition to motion sequence number 022 of the Condominium Defendants, the plaintiffs indicated that they were now treating that cause of action as an aspect of their requested relief rather than a separate cause of action.

Private Nuisance

Here again, as discussed in motion sequence number 019, plaintiffs have not alleged that any actions of the sponsor were either intentional and unreasonable or that abnormally dangerous conditions or activities were involved. The remaining basis for private nuisance is conduct which is negligent. See *Copart Indus., Inc. v Consolidated Edison Co. of N.Y., Inc.*, 41 NY2d at 569. Thus the third cause of action for nuisance is duplicative of the cause of action for negligence and is dismissed.

Negligence

The Sponsor argues that plaintiffs' negligence claims should be dismissed for three reasons: 1) the contract documents expressly prohibit recovery for the damages alleged, 2) the negligence claim is duplicative of the contract claim because plaintiffs cannot show a duty of care independent of the Sponsor's obligations under the contract, and 3) even if the Sponsor had a separate duty of care to the Caldwells, under New York law, damages are limited to the cost of repair or replacement of damaged or defective property.

The Sponsor contends that the contract documents (the Offering Plan and the Purchase Agreement) expressly exclude damages for defects not specified in the inspection statement (see Purchase Agreement, Section 19 "Sponsor shall have no obligation to complete any work to the Unit which is not specifically

designated on the inspection statement by the Purchaser"). Even assuming that limitation was triggered here, where some of the leaks in question may not have developed until well after plaintiffs took possession of the unit, that limitation would, at best, apply to a cause of action based upon contract, not one alleging negligence in undertaking to repair the leaks.

With respect to the argument that the cause of action for negligence is duplicative of that for breach of contract, because the breach of contract claim was dismissed by Judge Beeler, the negligence claim now stands on its own. Moreover, where a party claiming it has no contractual duty undertakes to perform services, it assumes a duty to act with due care. *Ocampo v Abetta Boiler & Welding Serv., Inc.*, 33 AD3d at 822. Regardless of whether the Sponsor had the duty to undertake repairs after the closing, it did undertake to make the repairs. Thus, it was required to act with due care and the negligence cause of action will not be dismissed.

With respect to the measure of damages, citing *Fisher v Qualico Contr. Corp.* (98 NY2d 534, 539 [2002]), the Sponsor argues that the proper measure of damages is the cost of replacement or repair to damaged items, rather than the diminution in market value of the property. According to the court in *Fisher*, replacement costs and diminution of market value are merely two sides of the same coin, the lower of which should be utilized to

compensate the plaintiffs. However, at this point, it is not clear what the actual amount of damages should be under either method of calculation. Moreover, plaintiffs also seek damages for loss of quiet enjoyment of their property, which is not discussed by the Court in the *Fisher*. Thus, it is premature for the court to determine the appropriate measure of damages at this time.

Negligent Misrepresentation

In the fifth cause of action, plaintiffs allege that, at various times after they moved into their unit, defendants or their representatives falsely assured them that the leaks in the apartment would be fixed, that the leaks were not fixed, and that they relied on those representations and remained in the apartment and suffered damages as a result. In an affidavit submitted in opposition to the motion for summary judgment of the Condominium Defendants (motion sequence number 022), Ms. Caldwell states that before signing the contract to close on their unit, "[t]he agent for [the sponsor] represented to us through its Sales Agent that the water was only present because the building had not yet been 'sealed' but that that would be taken care of before we moved in." Affidavit of Clara Caldwell, dated 1, 2010, ¶ 3. Ms. Caldwell also testified that she had discussions with someone in the sales office concerning leaks. Ms. Caldwell testified as follows:

I had several [discussions], because after the building was enclosed, I did notice that there was leakage coming into the penthouse area. And I expressly told Martin that there was water coming into the penthouse area and

was concerned about it. And Martin told me not to be concerned because those areas would be addressed after the building was sealed, and those were his exact words, and that there would be no leakage and there would be no water penetration after the building was sealed.

Deposition of Clara Caldwell, at 20-21.

As previously discussed, a claim for negligent misrepresentation, requires, among other thing, "the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff." *J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d at 148. Here, as Judge Beeler has previously held, "[n]o special relationship of trust or confidence arose out of the purchase contract between the sponsor and plaintiffs." Decision & Order, October 13, 2003, Harold B. Beeler, J., at 3. Thus, the court need not even reach the evidentiary issues raised by the Sponsor in its reply affirmation, and the cause of action for negligent misrepresentation is dismissed.

Accordingly, it is hereby

ORDERED, in motion sequence no. 016, that the motion for summary judgment of defendants Two Columbus Associates, L.L.C., New York Urban Property Management Corporation, and Urban Associates, L.L.C., and third-party defendants Lehrer McGovern Bovis Inc., Lehrer McGovern Bovis Group, Inc., Lehrer McGovern, Construction Management Corp., Bovis Lend Lease LMB, Inc., and Bovis Lend Lease Inc. dismissing Clara Caldwell's personal injury

claims and John Caldwell's claims for loss of consortium is granted and those claims are dismissed; and it is further

ORDERED, in motion sequence 017, that third-party defendant EFCO Corporation's motion for summary judgment against third-party defendant Pauley Windows, Inc., is granted on its claim of common-law liability, and is otherwise denied; and it is further

ORDERED, in motion sequence number 018, that the motion for summary judgment of the Bovis defendants to dismiss the claims of the Condominium defendants for contractual and common-law indemnity is granted to the extent that the third-party claims of the Condominium defendants are dismissed as to Lehrer McGovern Bovis Group, Inc., Lehrer McGovern Bovis Construction Management Corp. and Bovis Lend Lease, Inc.; and it is further

ORDERED that the action is severed and continued as against the other defendants; and it is further

ORDERED that the claims for contractual indemnity are dismissed as to Lehrer McGovern Bovis Inc. and Bovis Lend Lease LMB, Inc., and the motion is otherwise denied; and it is further

ORDERED, in motion sequence number 019, that the motion for summary judgment of defendant Urban Associates to dismiss the complaint is granted and the action is dismissed against said

defendant with costs and disbursements as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the action is severed and continued as against the other defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED, in motion sequence number 020, that the motion for summary judgment of defendant New York Urban Property Management Corp. to dismiss the amended complaint is granted and the case is dismissed against said defendant with costs and disbursements with costs and disbursements as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the action is severed and continued as against the other defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED, in motion sequence number 021, that the motion for summary judgment of L. Martone & Sons, seeking dismissal of the second third-party complaint of Bovis Lend Lease LMB, Inc. is denied, except to the extent that the question of damages will be limited to those that resulted post-notice and pre-repair; and it

is further

ORDERED, in motion sequence number 022, that the motion of defendants Two Columbus Avenue Condominium, the Residential Board of Managers of Two Columbus Avenue and the Condominium Board of Managers of Two Columbus Avenue is granted to the extent that the first, third, fourth and fifth causes of action against them are dismissed, and it is otherwise denied as moot; and it is further

ORDERED, in motion sequence number 022, that the cross motion for summary judgment of RSG Caulking & Waterproofing, Inc. is granted, and the first, seventh, eighth and ninth causes of action in the third-party complaint and the cross claim of Bovis, are dismissed as against RSG; and it is further

ORDERED that the action is severed and continued as against the other defendants; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further

ORDERED, in motion sequence number 023, that the motion for summary judgment of second third-party defendant Centrifugal/Mechanical Associates, Inc., is granted and the second

third-party complaint and any cross claims against it are dismissed with costs and disbursements to second third-party defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the action is severed and continued as against the other defendants; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further

ORDERED, in motion sequence number 023, that the cross motion of third-party defendant Schuman Lichtenstein Claman Efron is granted and the third-party complaint is dismissed as to it with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the action is severed and continued as against the other defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED, in motion sequence no. 024, that the motion for summary judgment of defendant Two Columbus Associates LLC, is granted with respect to the causes of action for private nuisance and negligent misrepresentation, and those causes of action are dismissed; and it is further

ORDERED that with respect to the causes of action for breach of contract and breach of fiduciary duty the motion is denied as moot having already been dismissed in the decision of Beeler, J., dated October 13, 2003; and it is further

ORDERED that the motion is denied with respect to the cause of action for negligence.

The remaining parties shall appear before the court in Room 412, 60 Centre Street, New York, New York on November 9, 2010 at 2:15 p.m. for a pretrial conference.

Dated: October 12, 2010

ENTER:



MARYLIN G. DIAMOND
J.S.C.

FILED

OCT 22 2010

NEW YORK
COUNTY CLERK'S OFFICE