

**Dormitory Auth. of the State of N.Y. v Samson  
Constr. Co.**

2013 NY Slip Op 34183(U)

February 27, 2013

Supreme Court, New York County

Docket Number: 403436/06

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Bransten, J. Justice

PART 3

Index Number : 403436/2006
DORMITORY AUTHORITY
vs.
SAMSON CONSTRUCTION
SEQUENCE NUMBER : 008
DISMISS

INDEX NO. 403436/06
MOTION DATE 9/25/12
MOTION SEQ. NO. 8

The following papers, numbered 1 to 6, were read on this motion to/for dismiss & cross-motion to dismiss
Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s) 1, 4
Answering Affidavits — Exhibits No(s) 2, 5
Replying Affidavits No(s) 3, 6

Upon the foregoing papers, it is ordered that this motion is

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 2-27-13

[Signature] J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART THREE

-----X

DORMITORY AUTHORITY OF THE STATE OF  
NEW YORK, NEW YORK CITY HEALTH AND  
HOSPITALS CORPORATION and THE CITY OF  
NEW YORK,

Plaintiffs,

-against-

SAMSON CONSTRUCTION CO. (a/k/a SAMSON  
CONSTRUCTION CO., INC. d/b/a SAMSON  
CONSTRUCTION COMPANY, SAMSON  
CONSTRUCTION CO., INC. and SAMSON  
CONSTRUCTION, INC.) and PERKINS EASTMAN  
ARCHITECTS, P.C.,

Index No. 403436/06  
Motion Seq. Nos.: 008,  
009, 010, 011, and 013  
Motion Date: 9/25/12

Defendants.

-----X

SAMSON CONSTRUCTION CO., INC.,  
Third-Party Plaintiff,

-against-

HAYWARD BAKER, INC.,  
VACHRIS ENGINEERING, P.C. and  
AKRF ENGINEERING, P.C.,

Third-Party  
Index No. 590732/08

Third-Party Defendants.

-----X

VACHRIS ENGINEERING, P.C.,  
Fourth-Party Plaintiff,

-against-

MUESER RUTLEDGE CONSULTING  
ENGINEERS,

Fourth-Party  
Index No. 591020/09

Fourth-Party Defendant.

-----X

-----X  
PERKINS EASTMAN ARCHITECTS, P.C.,  
Second Third-Party Plaintiff,

-against-

SEVERUD ASSOCIATES CONSULTING  
ENGINEERS, P.C., GILBANE BUILDING  
COMPANY, TDX CONSTRUCTION  
CORPORATION, GILBANE BUILDING  
COMPANY/TDX CONSTRUCTION  
CORPORATION, A JOINT VENTURE, and  
PILE FOUNDATION CONSTRUCTION  
COMPANY, INC.,  
Second Third-Party Defendants.  
Second Third-Party  
Index No. 591133/10

-----X  
SAMSON CONSTRUCTION CO., INC. And  
PILE FOUNDATION CONSTRUCTION  
COMPANY, INC.,  
Third Third-Party Plaintiffs,

-against-

ROADWAY CONTRACTING, INC.,  
SOIL SOLUTIONS, INC.,  
CONSOLIDATED EDISON COMPANY  
OF NEW YORK, INC.,  
KLINE IRON & STEEL CO., INC.,  
A.J. MCNULTY & COMPANY, INC. and  
SPX CORPORATION,  
Third Third-Party Defendants.  
Third Third-Party  
Index No. 590318/12

-----X  
**EILEEN BRANSTEN, J.:**

Motion sequence numbers 008, 009, 010, 011, and 013 are consolidated for disposition.

This action arises out of the construction of a forensic biology laboratory (the “DNA Lab”), for the New York City Office of the Chief Medical Examiner, on New

York City-owned land adjacent to Bellevue Hospital, in the vicinity of First Avenue and East 26<sup>th</sup> Street in Manhattan. Plaintiffs Dormitory Authority of the State of New York (“DASNY”), New York City Health and Hospitals Corporation (“HHC”), and the City of New York (the “City”) allege that defendant Samson Construction Co., the excavation and foundation contractor, and defendant Perkins Eastman Architects, P.C., the project’s architect, failed to perform their contractual obligations and failed to exercise reasonable care in performing their contracts, causing damage to adjacent structures and facilities, including the C&D Building of Bellevue Hospital.

In motion sequence number 008, defendant/third-party plaintiff/third third-party plaintiff Samson Construction Co. d/b/a Samson Construction Company (a/k/a Samson Construction Co., Inc. d/b/a Samson Construction Company, Samson Construction Co., Inc. and Samson Construction Inc.) (“Samson”) moves, by order to show cause, pursuant to CPLR 3211, for an order dismissing plaintiffs’ claims for property damage that accrued prior to August 25, 2003 as time-barred.

Third third-party defendant A.J. McNulty & Company, Inc. (“McNulty”) cross-moves for an order: (1) pursuant to CPLR 3211(a)(5), dismissing the third third-party complaint and all cross claims asserted against it on the ground of laches; and (2) pursuant to CPLR 3211(a)(7), dismissing the third third-party claims for common-law indemnification against it.

In motion sequence number 009, third third-party defendant Soil Solutions, Inc. (“Soil Solutions”) moves, by order to show cause, for an order dismissing the third third-party complaint and all cross claims against it, or in the alternative, severing the third third-party complaint.

In motion sequence number 010, third third-party defendant Kline Iron & Steel Co., Inc. (“Kline”) moves, by order to show cause, for an order dismissing the third third-party complaint and all cross claims against it, or in the alternative, severing the third third-party complaint.

In motion sequence number 011, defendant/second third-party plaintiff Perkins Eastman Architects, P.C. (“Perkins Eastman”) moves, by order to show cause, pursuant to CPLR 3024(b), 3211(a)(1) and (7) and 3212, for an order dismissing the fifth and sixth causes of action and granting it leave to assert a statute of limitations defense.

In motion sequence number 013, third third-party defendant Roadway Contracting, Inc. (“Roadway”) moves, by order to show cause, for an order dismissing the third third-party complaint and all cross claims against it on the ground of laches.

### **BACKGROUND**

Bellevue Hospital is operated by HHC. The portion of Bellevue Hospital known as the C&D Building is located directly north of the site. The planning, design, and

construction of the DNA Lab was financed initially and managed by DASNY, pursuant to a project management agreement between DASNY and the City dated August 2, 2001 (the “Project Management Agreement”).

Under the Project Management Agreement, DASNY was authorized to enter into contracts with consultants, construction contractors, and a construction manager. In an agreement dated July 25, 2001 (the “Perkins Eastman Contract”), DASNY retained Perkins Eastman as the architect for the project. Perkins Eastman was required to prepare construction documents and cost estimates and to provide construction administration.

By agreement dated January 11, 2002 (the “Samson Contract”), DASNY engaged Samson to perform excavation and foundation work on the project. Samson was required to excavate the building footprint to a depth of approximately 35 feet. Prior to excavation, Samson was required to design and install an excavation support system to provide lateral support for the structures and facilities adjacent to the perimeter of the excavation site and to provide a barrier to the entry of groundwater into the excavated pit and permit proper dewatering.

In 2002, Samson began installation of the excavation support system, which consisted of a series of interlocking steel sheets driven into the ground to a depth of approximately 35 feet. Vibration from the installation of the steel sheeting system allegedly caused a significant settlement of the south wall of the C&D Building.

According to plaintiffs, Samson failed to properly install the steel sheeting system, and the system, as installed, was insufficient to provide foundation support and allow for proper dewatering. Plaintiffs allege that additional settlement resulted from Samson's failure to control dewatering, which caused interior and exterior damage to the C&D Building. Plaintiffs maintain that, as a result of the improper installation of the steel sheeting system, it was necessary to employ an additional method of waterproofing known as jet grouting.

On or about August 26, 2003, Samson damaged the steel sheeting system by removing a section of steel plating which had been placed too close to an opening in the steel sheeting system. When the plating was removed, water and soil rushed into the excavation site. As a result, the foundation of the C&D Building was affected and a portion of the C&D Building abruptly settled several additional inches. The settlement also caused damage to nearby sewers and water mains. Plaintiffs allege that temporary emergency repairs and permanent repairs were performed at great expense. On September 26, 2003, the New York City Department of Buildings issued a notice of violation, directing that work be stopped due to Samson's failure to safeguard public and private property. Plaintiffs claim that, as a result of the August 2003 inundation of water into the construction site, the completion of the project was delayed by more than 18 months, which resulted in significant additional costs to plaintiffs.

Plaintiffs allege that Perkins Eastman failed to complete an accurate analysis of the existing foundation of the C&D Building and related subsurface conditions, sufficient to determine whether vibration from the installation of the steel sheeting system was likely to cause damage to structures near the site and increase costs to plaintiffs, and also failed to make appropriate design recommendations regarding the excavation support system. Perkins Eastman allegedly failed to warn DASNY of the risks to the C&D Building posed by the installation of the steel sheeting system and failed to take precautions against such risks. According to plaintiffs, Perkins Eastman failed to provide construction monitoring necessary to ensure that Samson's work complied with design recommendations and specifications.

### **PROCEDURAL HISTORY**

Plaintiffs commenced this action by filing a summons with notice naming Samson as a defendant on August 25, 2006. On February 2, 2007, plaintiffs filed a supplemental summons and complaint adding Perkins Eastman as a defendant. The complaint alleges four causes of action against Samson for breach of contract, negligence, liquidated damages for delay, and increased costs to the project. The complaint also alleges two causes of action against Perkins Eastman for breach of contract and for professional negligence or malpractice.

Subsequently, Samson commenced a third-party action against Vachris Engineering, P.C. (“Vachris”), the designer of the steel sheeting system, AKRF Engineering, P.C. (“AKRF”), the designer of the dewatering system, and Hayward Baker, Inc. (“HBI”), the subcontractor who provided chemical grouting services.

Vachris brought a fourth-party action against Mueser Rutledge Consulting Engineers (“Mueser Rutledge”), the geo-technical consultant retained by Perkins Eastman.

Perkins Eastman thereafter commenced a second third-party action, asserting claims against Severud Associates Consulting Engineers, P.C., its structural engineering consultant, and Gilbane Building Company/TDX Construction Corporation (“G-TDX”), the project’s construction manager, and Pile Foundation Construction Company, Inc. (“Pile”), Soil Solutions’s subcontractor.

On April 18, 2012, Samson and Pile brought a third third-party action for contribution and common-law indemnification against Roadway, Soil Solutions, Consolidated Edison Company of New York, Inc., Kline, McNulty, and SPX Corporation. Specifically, Samson and Pile allege that Roadway and its subcontractor, Soil Solutions, negligently drove timber piles, causing excessive vibrations in the soil and breaking down the substrata beneath the soil, resulting in settlement to the C&D Building and nearby structures and facilities. (Third Third-Party Complaint, ¶¶ 56, 57, 75, 76).

Samson and Pile further allege that Kline and its subcontractor, McNulty, installed a crane on 26th Street, which caused the roadway to sink and caused damage to the street, sewers, water main, and sidewalks. (*Id.* ¶¶ 117, 126).

### ANALYSIS

#### **A. Samson’s Motion Pursuant to CPLR 3211(a)(5) to Partially Dismiss Plaintiffs’ Claims (Motion Sequence Number 008)**

Samson was engaged by DASNY to perform the excavation and foundation work on the project. The first cause of action against Samson alleges that Samson breached its contract by “failing to complete the work it was required to perform under the contract, in a timely manner and in accordance with the terms of the contract.” (Verified Complaint, ¶ 27). The second cause of action alleges that Samson was negligent “in performing work under its contract, causing the excavation site to become flooded with water and resulting in the settlement of the adjoining [C&D] Building and damage to other nearby structures and facilities.” *Id.* ¶ 31. In the third and fourth causes of action, plaintiffs seek, pursuant to section 9.01 of the general conditions of the Samson Contract, liquidated damages for delay for the “[loss of] beneficial use of the facilities due to Samson’s failure to timely complete its work” and “actual monetary damages, including but not limited to increased

costs for materials and equipment and labor escalation paid or to be paid to other contractors working on the Project” *Id.* ¶¶ 39, 42.

Samson has moved, pursuant to CPLR 3211(a)(5), to dismiss plaintiffs’ claims as time-barred in part.

““On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired. In considering the motion, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff.”” *Benn v. Benn*, 82 A.D.3d 548 (1st Dep’t 2011) (quoting *Island ADC, Inc. v. Baldassano Architectural Group, P.C.*, 49 A.D.3d 815, 816 (2d Dep’t 2008)). Once the defendant meets this burden, the plaintiff must raise a question of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, *Williams v. New York City Health & Hosps. Corp.*, 84 A.D.3d 1358, 1359 (2d Dep’t 2011), or that the cause of action was actually interposed within the statute of limitations. *Krichmar v. Scher*, 82 A.D.3d 1164, 1165 (2d Dep’t 2011).

Here, there is no dispute that this action was commenced on August 25, 2006, when plaintiffs filed a summons with notice with the New York County Clerk’s Office. CPLR 203(a) provides that “[t]he time within which an action must be commenced . . . shall be computed from the time the cause of action accrued to the time the claim is

interposed.” Although the complaint was not filed until February 2, 2007, plaintiffs’ claims against Samson are considered interposed at the time the action was commenced, on August 25, 2006. Pursuant to CPLR 304(a), an action is “commenced” by filing a summons and complaint or summons with notice.

Samson contends that the essence of plaintiffs’ claims is for negligence and that the three-year statute of limitations in CPLR 214(4) for “injury to property” therefore applies to plaintiffs’ claims for property damage. In addition, Samson argues that plaintiffs’ claims accrued when the damage became visible and apparent. Thus, according to Samson, any subsidence to the C&D building that was apparent three years before plaintiffs filed a summons and notice on August 25, 2006 is time-barred. Specifically, Samson maintains that four of the five instances of settlement to the C&D Building, which occurred on May 24, 2002, July 15, 2002, July 16, 2002, and January 24, 2003, are untimely.<sup>1</sup>

Plaintiffs counter that their claims against Samson sound in both tort and contract. Plaintiffs contend that Samson’s obligation to properly perform its work in a professional manner, without damaging plaintiffs’ property, arose from the Samson Contract, of which the City and HHC were third-party beneficiaries. Therefore, plaintiffs maintain that the

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<sup>1</sup> Samson points out that the fifth instance of settlement occurred on August 26, 2003. Samson maintains that, since the summons with notice was filed on August 25, 2006, plaintiffs’ property damage claims resulting from this event appear to be timely.

six-year limitations period in CPLR 213(2) based upon a “contractual obligation or liability, express or implied” applies. Plaintiffs further assert that their claims accrued upon completion of Samson’s work, which occurred in 2004, and therefore, their claims are timely.

The choice of the applicable statute of limitations relates to the remedy, rather than the theory of liability. *Loengard v. Santa Fe Indus.*, 70 N.Y.2d 262, 266 (1987). In *Novita LLC v 307 W. Rest. Corp.*, 35 A.D.3d 234 (1st Dep’t 2006), an action brought by a landlord against tenants for property damage to a load-bearing wall, the First Department held that:

[t]he Court of Appeals has refused to apply a shortened negligence statute of limitations to a claim seeking breach-of-contract damages on a claim for property damage (*see Matter of Paver & Wildfoerster [Catholic High School Assn.]*, 38 NY2d 669, 676 [1976] [“if the claim . . . is substantially related to the subject matter of the substantive agreement . . . it will not be barred merely because it also would permit recovery in a tort action at law”]). The relationship between these parties had its genesis in contract, and the events giving rise to this action directly implicated the landlord-tenant relationship. Accordingly, the six-year statute of limitations was correctly applied (*see Baratta v Kozlowski*, 94 AD2d 454, 463 [1984])

*Id.*

The *Novita* Court cited to *Matter of Paver*, *supra*, which arose out of a building owner’s demand for arbitration for breach of contract by architects in supervision of construction of the building and for failure to exercise reasonable care in the performance

of the contracts. *Matter of Paver*, 38 N.Y.2d at 674. The architects opposed the demand on the ground that it was barred by the statute of limitations. *Id.* at 672. The Court of Appeals noted that in prior cases the courts had looked to the “reality” or “essence” of the action and not its form. *Id.* at 674. The Court observed that many of these cases were decided in the context of personal injury, and that “when the action is one for damages to property or pecuniary interests only, where there is a contractual agreement between the parties, the general tendency has been to allow the plaintiff to elect to sue in contract or tort, as he sees fit.” *Id.* at 675. Thus, the Court held that “if the claim sought to be arbitrated is substantially related to the substantive agreement, as in this case, it will not be barred merely because it also would permit recovery in a tort action at law.” *Id.* at 676.

In *Sears, Roebuck & Co. v Enco Assoc.*, 43 N.Y.2d 389 (1977), the Court revisited the issue of whether the three-year or six-year statute of limitations should be applied to property damage claims. In that case, an owner brought an action against architects more than three years but less than six years after completion of a ramp system for breach of contract based on the alleged improper design of ramps and for negligence in preparing the design and engineering plans for the ramps. *Id.* at 393. The Court held that:

All obligations of the architects here, whether verbalized as in tort for professional malpractice or as in contract for nonperformance of particular provisions of the contract, arose out of the contractual relationship of the

parties – i.e., absent the contract between them, no services would have been performed and thus there would have been no claims. It should make no difference then how the asserted liability is classified or described, or whether it is said that, although not expressed, an agreement to exercise due care in the performance of the agreed services is to be implied; it suffices that all liability alleged in this complaint had its genesis in the contractual relationship of the parties

*Id.* at 396 (citations omitted). Therefore, plaintiff’s claims were governed by the six-year statute of limitations applicable to contract claims. *Id.* at 395. However, since the action was not commenced within the three-year period applicable to tort claims, plaintiff’s damages were limited to those recoverable as contract damages. *Id.* at 396-397.<sup>2</sup>

1. *DASNY and the City*

In view of these principles, the six-year statute of limitations applies to DASNY and the City’s property damage claims, since all liability alleged in the complaint arises out of the contractual relationship of these parties. DASNY retained Samson to perform

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<sup>2</sup>While Samson argues that *Matter of Paver* and *Sears, Roebuck* were overruled, Samson is incorrect. In response to *Sears, Roebuck*, the legislature amended CPLR 214(6) in 1996 to provide that the statute of limitations in cases of *nonmedical malpractice* would be three years, regardless of whether the underlying theory is based in contract or tort. *Matter of R.M. Kliment & Frances Halsband, Architects [McKinsey & Co., Inc.]*, 3 N.Y.3d 538, 541 (2004). However, courts continue to rely on both Court of Appeals decisions outside of nonmedical malpractice. See *Novita LLC*, 35 A.D.3d at 234; *Bank of Nova Scotia v. Structure-Tone, Inc.*, 303 A.D.2d 273, 274 (1st Dep’t 2003) (“a six-year statute of limitations applies to any cause of action seeking contract damages regardless of whether the legal theory alleged is negligence or breach of contract”).

excavation and foundation work on the project. (Capasso Affirm. in Support, Ex. AA.) Plaintiffs have also shown that the City was an intended third-party beneficiary under the contract. A plaintiff asserting rights as a third-party beneficiary must establish: (1) the existence of a valid and binding contract between other parties; (2) that the contract was intended for the plaintiff's benefit; and (3) that the benefit is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate the plaintiff if the benefit is lost. *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (2011). Section 20.19 of the general conditions of the Samson Contract states that "it is understood that the Client is an intended third party beneficiary of the Contract for the purpose of recovering any damages caused by [Samson]." (Capasso Affirm. in Support, Ex. AA.) In section 1.01, "Client" is defined as "[t]he entity for whom the Dormitory Authority is performing services." *Id.* Pursuant to the Project Management Agreement, the City retained DASNY to finance and manage the design and construction of the DNA Lab. (Wagner Affirm. in Opposition to Perkins Eastman's Motion, Ex. A.)

Although Samson cites several cases in support of its argument that the three-year statute of limitations should be applied (*see Klein v. Parke-Bernet Galleries*, 21 A.D.2d 772 (1st Dep't 1964); *D'Amico v. Winkelman Co.*, 51 Misc. 2d 205, 208 (Sup. Ct. Onondaga Cty 1966); *Hayunga Holding Corp. v. Rodgers & Hagerty, Inc.*, 82 N.Y.S.2d

340, 341 (Sup. Ct. N.Y. Cty 1938), the Court finds these cases to be unpersuasive because they predate *Matter of Paver*, which applied “essence of the action” test.

Having determined the appropriate statute of limitations, the court must next consider when plaintiffs’ claims accrued. Generally, a claim for defective construction accrues upon substantial completion. *See City School Dist. of City of Newburgh v. Stubbins & Ass’n*, 85 N.Y.2d 535, 538 (1995) (“no matter how a claim is characterized in the complaint – negligence, malpractice, breach of contract – an owner’s claim arising out of defective construction accrues on date of completion, since all liability has its genesis in the contractual relationship of the parties”); *Cabrini Med. Ctr. v. Desina*, 64 N.Y.2d 1059, 1061 (1985) (“(a) cause of action against a contractor for defects in construction generally accrues upon completion of the actual physical work”); *Rite Aid of N.Y., Inc. v. R.A. Real Estate, Inc.*, 40 A.D.3d 474 (1st Dep’t 2007) (same). This rule applies to third-party beneficiaries of a contract. *City School Dist. of City of Newburgh*, 85 N.Y.2d at 538-539; *see also Village of Lindenhurst v. J.D. Posillico, Inc.*, 94 A.D.3d 1101, 1102 (2d Dep’t 2012), *lv granted* 20 N.Y.3d 854 (2012).

Here, Samson has failed to make a prima facie demonstration that the time for DASNY and the City to sue has expired. *See Benn*, 82 A.D.3d at 548. Samson has not pointed to any evidence indicating when its work was complete on the project. In any case, Edward Wagner, DASNY’s senior project manager, avers that Samson’s work

achieved substantial completion in July 2004, and that final completion occurred in or about February 2005. (Wagner Affirm. in Opposition to Samson’s Motion, ¶ 16).

Accordingly, plaintiffs have raised a question of fact as to whether DASNY’s and the City’s claims for property damage are timely, to the extent that they seek contract damages. *See Williams*, 84 A.D.3d at 1359.

The court finds Samson’s reliance on cases holding that property damage claims accrue when the damage becomes visible and apparent, *see Public Serv. Mut. Ins. Co. v. 341-347 Broadway, LLC*, 96 A.D.3d 473, 473-474 (1st Dep’t 2012); *Mark v. Eshkar*, 194 A.D.2d 356, 357 (1st Dep’t 1993), to be misplaced as to DASNY and the City, because these cases did not arise out of a contractual relationship of the parties.

## 2. HHC

However, HHC,<sup>3</sup> the adjoining landowner, was not an intended third-party beneficiary of the contract between DASNY and Samson. Although plaintiffs rely upon section 14.04 of the general conditions of the Samson Contract, which states that Samson “shall protect all adjoining property and shall repair or replace any said property damaged

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<sup>3</sup>The court notes that HHC and the City are separate entities. *See Unconsolidated Laws § 7381 et seq.; Matter of Haynes v Giuliani*, 238 A.D.2d 257 (1st Dep’t 1997) (“The New City Health and Hospitals Corporation is an entity separate and distinct from the City of New York”).

or destroyed during the progress of the Work” (Wagner Affirm. in Opposition to Samson’s Motion, Ex. B), they have failed to establish that the contract was intended for HHC’s benefit. Accordingly, the three-year statute of limitations for “injury to property” applies to HHC’s property damage claim. CPLR 214(4). As an adjoining landowner, HHC’s claim accrued when the damage to the C&D Building became apparent. *See Public Serv. Mut. Ins. Co.*, 96 A.D.3d at 474 (plaintiff’s claims for “damage to the ground floor, cellar and subcellar” accrued when the damages first “became visible and apparent in March of 2005”); *Russell v. Dunbar*, 40 A.D.3d 952, 953 (2d Dep’t 2007) (cause of action for injury to property accrues “when the damage [is] apparent”) (internal quotation marks and citation omitted); *Eshkar*, 194 A.D.2d at 357 (building owner’s cause of action for property damage against owner of adjacent building, based on damage to party wall, accrued when structural cracks appeared in the wall).

Samson submits the following evidence to demonstrate that the damage to the C&D Building was visible and apparent before August 25, 2003 (or three years before plaintiffs commenced this action).

- *May 24, 2002 Settlement*

The first instance of settlement allegedly occurred after Samson commenced steel sheet driving. According to an e-mail dated May 24, 2002 from Stephen Sarnow of G-

TDX, Samson was advised that G-TDX, the project's construction manager, had received complaints about possible damage to the C&D Building, and that approximately eight doors had jammed as a result of pile driving and that a crack had developed in a wall on the first floor of the building. (Capasso Affirm. in Support, Ex. W, Tab 1, at 30). A memorandum dated May 30, 2002 from Mueser Rutledge, the geo-technical consultant retained by Perkins Eastman for the project, estimated that the C&D Building had settled up to three-fourths of an inch as a result of Samson's driving of steel sheets. *Id.* Ex. Y. G-TDX thereafter issued a stop work order. *Id.* Ex. W, Tab 2, at 8. G-TDX's project manager, John McCullough, testified that the the stop work order was issued because of the settlement that was observed in the existing C&D Building in the hospital. *Id.*, Ex. X at 507 (McCullough Deposition).

- *July 2002 Settlement*

From July 11, 2002 through July 13, 2002, Samson performed steel sheet driving along the north wall of the excavation site. *Id.* Ex. V at 2487 (Wagner Deposition). On July 15, 2002, a surveyor noted that the C&D Building had settled five-eighths of an inch and settled another three-eighths of an inch by noon that day. *Id.* Ex. V at 2487-88. There was "an additional  $\frac{3}{8}$  [of settlement on 16 July [2002]]." *Id.*, Ex. W, Tab 3, at 6 (McCullough Deposition). G-TDX issued another stop work order on July 15, 2002. *Id.*,

Ex. W, Tab 2, at 8. G-TDX directed Samson to stop installation of all sheet piling for a second time on July 15, 2002 *Id.* According to McCullough, the stop work order was issued due to “an increase in settlement of the CD [sic] Building” that he “presume[d] the installation of the sheet piling caused.” *Id.*, Ex. X at 547.

- *January 2003 Settlement*

Samson began dewatering the site in early December 2002 through January 2003. *Id.*, Ex. W, Tab 2, at 10. G-TDX meeting minutes dated January 24, 2003 indicate that the C&D Building experienced settlement of approximately one-quarter to three-eighths of an inch by that date. *Id.*, Ex. W, Tab 6, at 1. Plaintiffs allege that this instance of damage to the C&D Building was caused by the dewatering work. *Id.*, Ex. V at 461 (Wagner Deposition).

In light of this evidence, the court finds that Samson has established, *prima facie*, that these instances of settlement were visible and apparent more than three years before HHC brought its property damage claim against Samson on August 25, 2006. *See Benn*, 82 A.D.3d at 548. Plaintiffs have failed to raise a question of fact as to whether HHC’s property damage claim was tolled or was actually commenced within the three-year statute of limitations. *See Williams v. New York City Health & Hosps. Corp.*, 84 A.D.3d 1358, 1359 (2d Dep’t 2011); *Krichmar v. Scher*, 82 A.D.3d 1164, 1165 (2d Dep’t 2011).

Therefore, Samson's motion is granted only to the extent of dismissing the second cause of action brought by HHC for damage that occurred prior to August 25, 2003.

**B. Perkins Eastman's Motion for Summary Judgment (Motion Sequence Number 011)**

Perkins Eastman was retained by DASNY to be the architect for the project. The fifth cause of action alleges that Perkins Eastman breached its contract by: (1) "failing to provide adequate designs for the Project"; (2) "failing to properly supervise the subcontractors and subconsultants that it retained with regard to the Project"; (3) "failing to monitor the progress of the Work to ensure that it was being completed properly and in substantial compliance with the design recommendations, specifications and their intent"; (4) "failing to ascertain the actual field conditions, including the subsurface conditions at the Site and foundations beneath [C&]D Building"; and (5) "failing to advise DASNY of the risks of the [C&]D Building posed by the installation of the Steel Sheeting System and taking precautions against such risks" (Verified Complaint, ¶ 45).

In the sixth cause of action, plaintiffs allege that Perkins Eastman failed to comply with professional standards of care by: (1) "fail[ing] to provide adequate designs for the Project"; (2) "fail[ing] to properly supervise the subcontractors and subconsultants that it retained with regard to the Project"; (3) "fail[ing] to monitor the progress of the Work to

ensure that it was being completed properly and in compliance with the design recommendations, specifications, and intent”; (4) “fail[ing] to ascertain the actual field conditions, including the subsurface conditions at the Site and beneath [C&]D Building”; (5) “fail[ing] to advise DASNY of the risks of the [C&]D Building imposed by the installation of the Steel Sheeting System”; and (6) “fail[ing] to take precautions against such risks.” *Id.*, ¶ 49.

The standards for summary judgment are well settled. On a motion for summary judgment, the proponent of the motion must establish its claim or defense “sufficiently to warrant the court as a matter of law in directing judgment in [its] favor.” CPLR 3212(b). “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985) (citations omitted). Once the proponent of the motion has made a prima facie showing, the burden shifts to the party opposing the motion to demonstrate, through admissible evidence, the existence of a factual issue requiring a trial of the action. *Vermette v. Kenworth Truck Co.*, 68 N.Y.2d 714, 717 (1986); *Forrest v. Jewish Guild for the Blind*, 309 A.D.2d 546, 553 (1st Dep’t 2003), *aff’d* 3 N.Y.3d 295 (2004). The court’s function on summary judgment is “issue-finding

rather than issue-determination.” *Mayo v. Santis*, 74 A.D.3d 470, 471 (1st Dep’t 2010).

1. *DASNY*

Perkins Eastman argues that DASNY’s sixth cause of action impermissibly rephrases the fifth cause action, sounding in breach of contract, as a duplicative tort cause of action.

It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract.

*Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 389 (1987) (citations omitted). “[M]erely alleging that the breach of a contract duty arose from a lack of due care will not transform a simple breach of contract into a tort.” *Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540, 551 (1992). However, “[p]rofessionals . . . may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties.” *Id.* In that case, “it is policy, not the parties’ contract, that gives rise to a duty of care.” *Id.* at 552. In addition to considering the relationship between the parties, the court must also consider “the nature of the injury, the manner in which the injury occurred and the resulting harm.” *Id.* In accordance with these principles, the court finds that DASNY’s sixth cause of action does not duplicate its fifth cause of action. Plaintiffs allege that, in

violation of generally accepted standards of members of its profession, Perkins Eastman failed to provide adequate designs for the project, and failed to properly supervise the subcontractors and subconsultants it retained, and that such failures resulted in increased costs to complete the project and costs to remediate the damage (Verified Complaint, ¶¶ 49, 50). DASNY's allegations against Perkins Eastman, an architect, fall within the professional malpractice exception to the general rule.

Perkins Eastman next contends that DASNY cannot recover for purely economic losses. In this regard, Perkins Eastman points out that DASNY sustained no real property damage.

Pursuant to the "economic loss" rule, a plaintiff may not recover for economic losses, absent property damage or personal injury. *See Bellevue S. Assoc. v. HRH Constr. Corp.*, 78 N.Y.2d 282, 294-295 (1991). However, the economic loss doctrine does not apply to negligence claims arising out of the "violation of a professional duty." *Assured Guar. (UK) Ltd. v J.P. Morgan Inv. Mgt., Inc.*, 80 A.D.3d 293, 306 (1st Dep't 2010), *aff'd* 18 N.Y.3d 341 (2011) (quoting *Hydro Invs., Inc. v. Trafalgar Power Inc.*, 227 F.3d 8, 18 (2d Cir. 2000); *see also 17 Vista Fee Assoc. v. Teachers Ins. & Annuity Assn. of Am.*, 259 A.D.2d 75, 83 (1st Dep't 1999) ("(T)he fact that 17 Vista suffered pecuniary losses only is of no significance in this malpractice claim against a professional. Many types of malpractice actions, such as those against an accountant or attorney, will frequently result

in economic loss only”) (citation omitted). Therefore, Perkins Eastman is not entitled to dismissal of DASNY’s sixth cause of action.

## 2. *HHC and the City*

Perkins Eastman presents several arguments in favor of dismissing the breach of contract and malpractice claims (counts five and six) brought against it by HHC and the City. First, Perkins Eastman contends that it never entered into a contract with Plaintiffs and therefore cannot be found liable for breach of contract. Second, Perkins Eastman argues that Plaintiffs’ malpractice claim is untimely under the three-year statute of limitations in CPLR 214(4). Each of these arguments is examined below.

- *Breach of Contract Claim*

Perkins Eastman contends that HHC and the City’s breach of contract cause of action should be dismissed because they never entered into a contract with Perkins Eastman. Here, it is undisputed that DASNY retained Perkins Eastman to provide architectural services on the project pursuant to the Perkins Eastman Contract (Lutz Affirm. in Support, Ex. 3), and that neither the City nor HHC was a party to the contract.

Plaintiffs argue that the City was a third-party beneficiary of the Perkins Eastman Contract, pursuant to Appendix “A” of the contract, which states that:

The Project will consist of demolishing two existing buildings (the unoccupied one story Med Plan Building and two story occupied EMS garage) and constructing a new state-of-the art Forensic Biology Laboratory Building. The labs in the new building will be operated by OCME for the analysis of DNA for forensic identification gathered from crime scenes. The building will have below grade levels and eleven floors above grade. Each floor will have 24,760 square feet, for a total of 321,620 square feet. The superstructure will include an EMS facility, administration and training space, two floors or archive file storage, and seven floors of labs [sic] casework lab, high sensitivity DNA labs, and in situ neuro labs. Below grade the building will have a parking level and a floor for archives.

The Scope of Services includes detailed program development and further confirmation, architectural and engineering design, two value-engineering sessions, production of construction documents, cost estimates and construction administration. The initial phase of the Architect's services will be further development and confirmation of a detailed space program produced from structured interviews with appropriate Client (OCME, NYCPD, and NYCFD) staff. The program and planning process will evaluate the most effective space utilization within the budget constraints and maximum net assigned area.

(Wagner Affirm., Ex. B, at A1.) Plaintiffs point out that the City was the ultimate user of the DNA Lab, and that it funded the DNA Lab project.

“The best evidence [] of whether the contracting parties intended a benefit to accrue to a third party can be ascertained from the words of the contract itself.” *Alicea v. City of New York*, 145 A.D.2d 315, 318 (1st Dep’t 1988). In addition, an intent to benefit a third party may be found where: (1) “no one other than the third party can recover if the promisor breaches the contract”; or (2) “the language of the contract otherwise clearly

evidences an intent to permit enforcement by the third party.” *Id.* (internal quotation marks and citation omitted).

In determining whether a third-party beneficiary exists, it is permissible to look at the surrounding circumstances as well as the agreement. *Fourth Ocean Putnam Corp. v. Interstate Wrecking Corp., Inc.*, 66 N.Y.2d 38, 45 (1985).

The Perkins Eastman Contract, unlike the Samson Contract, does not refer to the City as an intended third-party beneficiary. The City has not pointed to any provision which clearly evidences an intent to permit enforcement by the City. Appendix A of the Perkins Eastman Contract provides a description of the type of building that Perkins Eastman was requested to design. In addition, the Perkins Eastman Contract provides that “[f]inal payment shall be made to the Architect upon satisfactory completion and acceptance by [DASNY] of all services required by the Architect pursuant to this Contract.” (Lutz Affirm. in Support, Ex. 3.) Indeed, “it has been held that the ordinary construction contract – i.e., one which does not expressly state that the intention of the contracting parties is to benefit a third-party – does not give third parties who contract with the promisee the right to enforce the latter’s contract with another. Such third parties are generally considered mere incidental beneficiaries.” *Port Chester Elec. Constr. Corp. v. Atlas*, 40 N.Y.2d 652, 656 (1976). Although the Office of the Chief Medical Examiner may have been consulted to provide Perkins Eastman with information needed to design

the building, that did not make the City an intended third-party beneficiary. “[C]ontract language referring to third parties as necessary to assist the parties in their performance does not therefore show an intent to render performance for the third party’s benefit . . .” *Subaru Distrib. Corp. v. Subaru of Am., Inc.*, 425 F.3d 119, 126 (2d Cir. 2005). Plaintiffs have also not disputed that there was no privity of contract between HHC and Perkins Eastman and that HHC was not a third-party beneficiary of the Perkins Eastman Contract. Accordingly, the fifth cause of action brought by HHC and the City is dismissed.

- *Malpractice Claim and the Statute of Limitations*

Perkins Eastman argues that HHC and the City’s sixth cause of action is barred by the three-year statute of limitations in CPLR 214(4) for “injury to property.”<sup>4</sup> Plaintiffs contend that, since the City was a third-party beneficiary of Perkins Eastman’s contract, the City’s sixth cause of action is governed by the three-year statute of limitations for malpractice in CPLR 214(6), which accrued when Perkins Eastman’s professional relationship ended in 2007.

“[M]alpractice, in its strict sense, means the negligence of a member of a profession in his relations with his client or patient.” *Cubito v. Kreisberg*, 69 A.D.2d 738, 742 (2d Dep’t 1979), *aff’d* 51 N.Y.2d 900 (1980); *see also Chase Scientific Research v.*

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<sup>4</sup>Perkins Eastman does not argue that DASNY’s sixth cause of action is time-barred.

*NIA Group*, 96 N.Y.2d 20, 24 (2001) (“malpractice is professional malfeasance toward one’s client”). “On the other hand, the wrongful conduct of the professional in rendering services to his client resulting in injury to a party outside the relationship is simple negligence.” *Cubito*, 69 A.D.2d at 742. Here, HHC and the City were not clients of Perkins Eastman and were not intended third-party beneficiaries of the Perkins Eastman Contract. Thus, the sixth cause of action brought by HHC and the City is a claim for simple negligence.

Claims by adjacent landowners for property damage are subject to a three-year statute of limitations under CPLR 214(4), and accrue when the damage becomes apparent. *See Public Serv. Mut. Ins. Co.*, 96 A.D.3d at 473-474; *Russell v. Dunbar*, 40 A.D.3d 952, 953 (2d Dep’t 2007). Perkins Eastman offers evidence that the latest instance of settlement occurred on or about August 26, 2003, when Samson removed a section of steel plating, which caused the foundation of the C&D Building to settle several inches. *See Verified Complaint*, ¶ 21; Lutz Affirm. in Support, Ex. 18 at 772-73 (Wagner Deposition); Lutz Affirm. in Support, Ex. 6 at 1859 (Wagner Deposition).

Here, plaintiffs filed a summons with notice on August 26, 2006 naming only Samson as a defendant. The supplemental summons and complaint naming Perkins Eastman as a defendant were filed on February 2, 2007 (or more than three years after the

last instance of settlement).<sup>5</sup> As to a newly added defendant, it “is the filing of a supplemental summons and complaint which commences an action against a newly-joined defendant.” *Benn v. Losquadro Ice Co., Inc.*, 65 A.D.3d 655, 656 (2d Dep’t 2009); *see also* CPLR 305(a).

In order for the “relation back” doctrine to apply to a newly added party, the plaintiff must show that:

(1) both claims arose out of the same conduct, transaction or occurrence, (2) the new party is ‘united in interest’ with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits and (3) the new party knew or should have known that, but for an excusable mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well.

*Buran v. Coupal*, 87 N.Y.2d 173, 178 (1995) (citation omitted).

As for the second prong, as a general matter, “[u]nity of interest will not be found unless there is some relationship between the parties giving rise to the vicarious liability of one for the conduct of the other.” *Mercer v. 203 E. 72nd St. Corp.*, 300 A.D.2d 105, 106 (1st Dep’t 2002). The test has been stated as whether the interest of the parties in the subject matter is “such that they stand or fall together and that judgment against one will

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<sup>5</sup>Although DASNY’s project manager claims that settlement may have continued after the distinct occurrences that initially caused the settlement (Wagner Aff. in Opposition to Perkins Eastman’s Motion, ¶¶ 15-16), claims for property damage accrue when the signs first become apparent. *See Public Serv. Mut. Ins. Co.*, 96 A.D.3d at 473-474.

similarly affect the other.” *Lord Day & Lord, Barrett, Smith v Broadwell Mgt. Corp.*, 301 A.D.2d 362, 363 (1st Dep’t 2003). Here, Perkins Eastman was not united in interest with Samson. Nor can it be said that the third prong of the test has been satisfied, which focuses on “whether the defendant could have reasonably concluded that the failure to sue within the limitations period meant that there was no intent to sue that person at all and that the matter has been laid to rest as he [or she] is concerned.” *Buran*, 87 N.Y.2d at 181 (internal quotation marks, emphasis and citation omitted). Plaintiffs have failed to show that Perkins Eastman knew or should have known that, but for an excusable mistake as to the identity of the parties, this action would have been brought against it as well. Plaintiffs also do not assert that any other toll applies. Therefore, HHC and the City’s sixth cause of action is untimely.

Accordingly, the fifth and sixth causes of action brought by HHC and the City are dismissed. Therefore, the court need not reach: (1) Perkins Eastman’s contention that the fifth and sixth causes of action brought by HHC and the City should be dismissed because they did not sustain any damages; and (2) Perkins Eastman’s request to amend its answer to add an affirmative defense of statute of limitations as to HHC and the City, which

Perkins Eastman requested in the alternative. (Perkins Eastman’s Mem. of Law in Support, at 32.)<sup>6</sup>

**C. Soil Solutions and Kline’s Motions to Dismiss (Motion Sequence Numbers 009 and 010)<sup>7</sup>**

Soil Solutions was a subcontractor retained by Roadway to perform utility relocation and to erect a utility platform at the project. Kline was DASNY’s subcontractor, retained to perform structural steel work on the project. Soil Solutions and Kline each move to dismiss the indemnification and contribution claims asserted against them in the third third-party action in their entirety, as well as all cross claims asserted against them. On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must “accept the facts as alleged in the complaint as true, accord [plaintiff] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). However, “bare legal conclusions, as well as factual claims either inherently incredible or flatly

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<sup>6</sup> Defendant McNulty filed a cross-motion to Perkins Eastman’s motion for summary judgment. McNulty’s cross-motion seeks to dismiss the contribution and indemnification claims brought against it by Samson in the third third-party complaint. While McNulty’s motion was filed as a cross-motion to Motion Sequence Number 8, it will be dealt with separately in this opinion below at Point D.

<sup>7</sup> The court considers these motions together because they make the same arguments.

contradicted by documentary evidence, are not presumed to be true and accorded every favorable inference.” *M & B Joint Venture, Inc. v. Laurus Master Fund, Ltd.*, 49 A.D.3d 258, 260 (1st Dep’t 2008), *aff’d as mod.* 12 N.Y.3d 798 (2009) (internal quotation marks and citation omitted).

Where extrinsic evidence is submitted in connection with the motion, the appropriate standard of review “is whether the proponent of the pleading has a cause of action, not whether he has stated one.” *IIG Capital LLC v. Archipelago, LLC.*, 36 A.D.3d 401, 402 (1st Dep’t 2007) (internal quotation marks and citation omitted). This entails an inquiry into whether or not a material fact claimed by the pleader is a fact at all and whether a significant dispute exists regarding it. *See Biondi v. Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 81 (1st Dep’t 1999), *aff’d* 94 N.Y.2d 659 (2000) (“where the court has considered extrinsic evidence on a CPLR 3211 motion, ‘the allegations are not deemed true . . . . The motion should be granted where the essential facts have been negated beyond substantial question by the affidavits and evidentiary matter submitted’”) (citation omitted).

In opposing Soil Solutions and Kline’s motions, Perkins Eastman contends that the motions are procedurally defective, because the movants failed to request that Perkins Eastman’s cross claims be dismissed in their orders to show cause. However, both motions requested that the third third-party complaints and “all cross claims” against them

be dismissed. (Soil Solutions's Order to Show Cause, at 3; Kline's Order to Show Cause, at 3). In any event, Perkins Eastman clearly received notice that both motions sought dismissal of Perkins Eastman's cross claims against Soil Solutions and Kline.

1. *Laches*

Soil Solutions and Kline separately move to dismiss Samson and Pile's third third-party complaint on the ground of laches. In particular, Soil Solutions argues that it will be prejudiced in defending the third third-party complaint because: (1) it has a seven-year document retention policy; (2) its work was complete on July 30, 2004; (3) it had no knowledge of the main action or third-party actions until it was served with a third third-party complaint on April 16, 2012, almost ten years after its work was complete and well past its retention schedule; (4) it has no documentation or evidence regarding the project site; (5) the majority of its employees who worked on the project no longer work for Soil Solutions, and it has no contact information for those employees; and (6) it would have to rely on documentation kept by opposing parties.

Kline similarly argues that: (1) none of its employees who worked on the project are currently employees of Kline; and (2) it would be prejudiced in relying on documentation kept by opposing parties.

Laches is defined “as such neglect or omission to assert a right as, taken in conjunction with the lapse of time . . . and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity.” *Matter of Schulz v. State of New York*, 81 N.Y.2d 336, 348 (1993) (internal quotation marks and citation omitted). Prejudice may be demonstrated “by a showing of injury, change of position, loss of evidence, or some other disadvantage resulting from the delay.” *Matter of Linker*, 23 A.D.3d 186, 189 (1st Dep’t 2005) (internal quotation marks and citation omitted).

In *McDermott v. City of New York*, 50 N.Y.2d 211, 217 n.2 (1980), *rearg. denied* 50 N.Y.2d 1059 (1980), the Court of Appeals noted that “although remedies such as indemnity are derived from equitable notions, the action is and has been an action at law.” *See also Vasiliades v. City of New York*, 7 A.D.3d 697 (2d Dep’t 2004) (“(a)n action for indemnification such as third-party action in this case, is an action at law”). “The defense of laches is unavailable in an action at law commenced within the period of limitation.” *Matter of American Druggists’ Ins. Co.*, 15 A.D.3d 268 (1st Dep’t 2005), *lv. dismissed* 5 N.Y.3d 746 (2005). Claims for indemnification and contribution do not accrue until payment is made to the injured person. *McDermott*, 50 N.Y.2d at 217; *Ruiz v. Griffin*, 50 A.D.3d 1007, 1010 (2d Dep’t 2008). Therefore, the doctrine of laches does not apply to the third third-party claims for indemnification and contribution.

Even if the doctrine of laches applied, Soil Solutions and Kline did not provide any evidence to support their claim of prejudice. *See Zaveta v. Portelli*, 127 A.D.2d 760, 760-761 (2d Dep't 1987) (motion to dismiss on basis of laches was properly denied where delay in serving third-party complaint had not resulted in prejudice to plaintiff or to co-defendant). In reply, Soil Solutions submits, for the first time, an affidavit from one of its officers regarding its document retention policy and its employees. Christofides Reply Affirm., Ex. E, ¶¶ 3, 4. However, "[t]he function of the reply papers is to address arguments made in opposition to the position taken by the movant, and not to permit the movant to introduce new arguments in support of, or new grounds for the motion." *Dannasch v. Bifulco*, 184 A.D.2d 415, 417 (1st Dep't 1992). Therefore, the affidavit submitted by Soil Solutions with its reply papers will not be considered by the Court. Likewise, Kline submitted an attorney affirmation in reply offering new arguments that will not be considered by the Court. (Sommer Affirm. in Support, ¶¶ 41, 42).

## 2. *Common-Law Indemnification*

Soil Solutions and Kline next argue that the third third-party claims for common-law indemnification must be dismissed, because there is no claim in the underlying complaint that Samson will be vicariously liable for the negligence of either Soil

Solutions or Roadway. Alternatively, Soil Solutions and Kline contend that the common-law indemnification claims are time-barred.

“Indemnity involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another party who should more properly bear responsibility for that loss because it was the actual wrongdoer.” *Trustees of Columbia Univ. v. Mitchell/Giurgola Assoc.*, 109 A.D.2d 449, 451 (1st Dep’t 1985). Common-law indemnification is predicated on “vicarious liability without actual fault” on the part of the indemnitee. *Edge Mgt. Consulting, Inc. v. Blank*, 25 A.D.3d 364, 367 (1st Dep’t 2006), *lv dismissed* 7 N.Y.3d 864 (2006) (internal quotation marks and citation omitted); *Trump Vil. Section 3 v. New York State Hous. Fin. Agency*, 307 A.D.2d 891, 895 (1st Dep’t 2003), *lv denied* 1 N.Y.3d 504 (2003).

The underlying complaint alleges Samson’s *own* failures in performing its work. (Verified Complaint, ¶¶ 16-24.) The third third-party complaint alleges that Roadway entered into a contract with DASNY to perform utility relocation at the project and to erect a utility platform, and that Roadway, in turn, retained Soil Solutions to perform, among other things, utility relocation and to erect a utility platform. (Third Third-Party Complaint, ¶¶ 25, 26.) The third third-party complaint also alleges that Kline entered into a contract with DASNY to erect structural steel on the project. *Id.* ¶¶ 30, 31. Since Samson was sued for its own negligence, and not for any vicarious liability, Samson and

Pile cannot maintain their third-party claims for common-law indemnification against Soil Solutions or Kline. See *Richards Plumbing & Heating Co., Inc. v. Washington Group Int'l, Inc.*, 59 A.D.3d 311, 312 (1st Dep't 2009) (construction manager did not have a viable third-party claim for common-law indemnification against architect since plaintiff's and owner's cross claims did not allege vicarious liability attributed solely to the fault of the architect); *Esteva v. Nash*, 55 A.D.3d 474, 475 (1st Dep't 2008) (“(a) party sued for its own alleged wrongdoing . . . cannot assert a claim for common law indemnification”) (citation omitted). Accordingly, the third third-party claims for common-law indemnification against Soil Solutions and Kline are dismissed.

### 3. *Contribution*

Soil Solutions and Kline contend that the third third-party contribution claims should also be dismissed, because these claims seek recovery for purely economic loss. In the alternative, Soil Solutions argues that the contribution claims are time-barred.

Contribution is available only for damage due to “personal injury, injury to property or wrongful death.” CPLR 1401. However, purely economic loss resulting from a breach of contract does not constitute “injury to property” within the meaning of New York’s contribution statute. *Board of Educ. of Hudson City School Dist. v. Sargent*,

*Webster, Crenshaw & Folley*, 71 N.Y.2d 21, 26 (1987). “[T]he existence of some form of tort liability is a prerequisite to application” of CPLR 1401. *Id.* at 28.

Here, contrary to Soil Solutions and Kline’s argument, the claims for contribution are not barred by the economic loss doctrine. While plaintiffs assert a breach of contract cause of action against Samson, plaintiffs also assert a cause of action for negligence in causing injury to property through the negligent performance of its work. As indicated above, the court has only dismissed HHC’s property damage claims against Samson to the extent they were visible and apparent prior to August 25, 2003. In addition, the City seeks damages for repairs to sewer lines, water mains, and for street paving. *See Verified Complaint*, ¶ 21; *Wagner Affirm. in Opposition to Perkins Eastman’s Motion*, Ex. E (Plaintiffs’ Response to Perkins Eastman’s First Set of Interrogatories, at 2). Thus, at this juncture, a tort claim remains pending against Samson, “and, thus, the necessary predicate tort liability for a contribution action remains in the case.” *Tower Bldg. Restoration v. 20 E. 9th St. Apt. Corp.*, 295 A.D.2d 229, 230 (1st Dep’t 2002) (internal quotation marks and citation omitted). Moreover, Soil Solutions’s contention that the contribution claims are time-barred is also without merit. A claim for contribution accrues at the time of payment of the underlying claim, and is subject to a six-year statute of limitations. *Ruiz v. Griffin*, 50 A.D.3d 1007, 1010 (2d Dep’t 2008).

4. *Severance*

Finally, Soil Solutions and Kline request that the third third-party complaint be severed. According to Soil Solutions and Kline, they will be prejudiced because they will have to expedite discovery and review previously-provided disclosure.

CPLR 1010 grants the court discretion to dismiss or sever a third-party action without prejudice. “[T]he court shall consider whether the controversy between the third-party plaintiff and the third-party defendant will unduly delay the determination of the main action or prejudice the substantial rights of any party.” *Id.* However, the Court of Appeals has held that “[a]lthough it is within a trial court’s discretion to grant a severance, this discretion should be granted sparingly.” *Shanley v. Callanan Indus.*, 54 N.Y.2d 52, 57 (1981). Thus, severance should not be ordered where “[t]here are common factual [and legal] issues involved in the claims . . . , and the interests of judicial economy and consistency will be served by having a single trial.” *Ingoglia v. Leshaj*, 1 A.D.3d 482, 485 (2d Dep’t 2003), *lv denied* 2 N.Y.3d 705 (2004).

As noted by the First Department in *Rothstein v. Milleridge Inn*,

“Severance of a third-party action is within the discretion of the trial court. However, severance is inappropriate absent a showing that a party’s substantial rights would otherwise be prejudiced. To avoid the waste of judicial resources and the risk of inconsistent verdicts, it is preferable for related actions to be tried together, such as in a tort case where the issue is the respective liability of the defendant and the third-party defendant for the plaintiff’s injury”

251 A.D.2d 154, 155 (1st Dep't 1998) (citations omitted); *see also Cole v. Mraz*, 77 A.D.3d 526, 527 (1st Dep't 2010).

In the exercise of its discretion, the court finds that severance is unwarranted in this case. Soil Solutions and Kline have failed to show that they will be prejudiced if the court does not order severance. In addition, unlike *17 Vista Fee Ass'n v. Teachers Ins. & Annuity Ass'n of Am.*, 226 A.D.2d 298 (1st Dep't 1996), a case cited by Soil Solutions and Kline, the complaint and third third-party complaints share common questions of fact and law, and judicial economy and consistency of verdicts will be served by having a single trial. Both the main action and third-party actions concern responsibility for damage to the C&D Building and adjacent structures and facilities. The court also notes that a note of issue has not yet been filed in the main action.

**D. McNulty's Cross Motion to Dismiss (Motion Sequence Number 008)**

McNulty was the structural steel subcontractor for the project. McNulty seeks dismissal of the contribution and indemnification claims asserted against it by Samson in the third third-party complaint and all cross claims asserted against it.

1. *Laches*

McNulty also moves to dismiss the third third-party complaint and all cross claims asserted against it based on the doctrine of laches. To support its position, McNulty submits an affidavit from its president, Lawrence Weiss, who states that McNulty completed its work in early 2005, and that it has a five-year document retention policy. (Weiss Aff. ¶¶ 5, 6.) According to Weiss, its documents for the project were disposed of in 2010. *Id.* ¶ 7. However, Weiss admits that McNulty has an electronic file for the project. *Id.* ¶ 8. In addition, Weiss states that it employed more than 40 iron workers on the project; however, only four are still employed with the company. *Id.* ¶ 11. The four employees who are still employed by McNulty allegedly have no recollection about any extensive damage to roadways, sidewalks, water mains, and sewer mains on 26th Street arising from McNulty's work. *Id.* ¶ 12. McNulty asserts that it was unaware that a claim would be asserted against it until it was served with the third third-party summons and complaint. *Id.* ¶ 13.

Contrary to Perkins Eastman's contention, McNulty's cross motion is not procedurally defective. McNulty's cross motion seeks dismissal of "all cross claims" against it. (McNulty's Notice of Cross Motion, at 3.)

Nevertheless, McNulty is not entitled to dismissal of the claims for indemnification and contribution based on laches. As previously noted, "[t]he defense of

laches is unavailable in an action at law commenced within the period of limitation.”

*Matter of American Druggists' Ins. Co.*, 15 A.D.3d at 268. Contribution and indemnity are actions at law. *See Vasiliades v. City of New York*, 7 A.D.3d 697 (2d Dep't 2004).

Even assuming that the doctrine of laches applied, McNulty has also failed to demonstrate any prejudice, in light of its president's admission that it has an electronic file for the project (Weiss Aff. ¶ 8), and that it may request discovery from other parties.

## 2. *Common-Law Indemnification*

McNulty also moves, pursuant to CPLR 3211(a)(7), to dismiss the third third-party claims for common-law indemnification. McNulty argues that plaintiffs' underlying claims against Samson are not for vicarious liability for McNulty's acts, but rather for Samson's active negligence.

The complaint seeks to hold Samson liable in negligence for its own failures. (Verified Complaint, ¶¶ 16-24.) The third third-party complaint alleges that Kline entered into a contract with DASNY to erect the structural steel on the project, and that after the C&D Building continued to settle in 2002, Kline performed the jacking work on the C&D Building. (Third Third-Party Complaint, ¶¶ 30, 31.) Kline allegedly retained McNulty to perform the work, including the erection of the structural work and jacking work on the C&D Building. *Id.* ¶¶ 32, 33. Thus, McNulty was Kline's subcontractor to perform

structural steel erection, and was not Samson or Pile's subcontractor. Therefore, neither Samson nor Pile may be held vicariously liable for McNulty's work. Therefore, the third third-party claims for common-law indemnification against McNulty must be dismissed. *See Beck v. Studio Kenji, Ltd.*, 90 A.D.3d 462, 463 (1st Dep't 2011) (third-party claim for common-law indemnification failed because third-party plaintiff did not allege mere vicarious liability).

**E. Roadway's Motion to Dismiss (Motion Sequence Number 013)**

Roadway Contracting, Inc. entered into a contract with DASNY to perform utility relocation and to erect a utility platform at the project. Like McNulty, Soil Solutions, and Kline, Roadway moves to dismiss the contribution and indemnification claims asserted against it in the third third-party complaint on the ground of laches. In support of its position, Roadway submits an affirmation from its attorney, indicating that, on March 30, 2010, Roadway was forced into involuntary bankruptcy in the U.S. District Court for the Eastern District of New York, and that the bankruptcy proceeding was dismissed on July 9, 2010. (Richman Affirm. ¶ 16, Ex. F.) Roadway thereafter ceased operations as a corporation. *Id.* According to Roadway's counsel, "[u]pon information and belief, all records maintained by Roadway with respect to its work on the DASNY DNA Lab

project have been disposed of or destroyed.” *Id.* ¶ 17. Roadway further asserts that the recollection of available witnesses is likely dimmed.

Initially, the court rejects Perkins Eastman’s contention that Roadway’s motion is procedurally defective. As previously indicated, Roadway’s order to show cause requested dismissal of all cross claims asserted against it. (Roadway’s Order to Show Cause, at 2.)

As discussed above, the doctrine of laches is unavailable in an action at law commenced within the statute of limitations. *Republic Ins. Co. v. Real Dev. Co.*, 161 A.D.2d 189, 190 (1st Dep’t 1990). Contribution and indemnity are actions at law. *See Vasiliades*, 7 A.D.3d at 697. In any case, Roadway has failed to demonstrate any injury or disadvantage resulting from any delay in serving the third third-party complaint. *See Zaveta*, 127 A.D.2d at 760-761. Therefore, Roadway’s motion is denied.

### CONCLUSION

Accordingly, it is

**ORDERED** that the motion (sequence number 008) of defendant/third-party plaintiff/third third-party plaintiff Samson Construction d/b/a Samson Construction Company (a/k/a Samson Construction Co., Inc. d/b/a Samson Construction Company, Samson Construction Co., Inc. and Samson Construction Inc.) to dismiss the second

cause of action brought by plaintiff New York City Health and Hospitals Corporation for damage that occurred prior to August 25, 2003 is granted, and is otherwise denied; and it is further

**ORDERED** that the cross motion of third third-party defendant A.J. McNulty & Company, Inc. to dismiss the third third-party for common-law indemnification against it is granted, and is otherwise denied; and it is further

**ORDERED** that the motion (sequence number 009) of third third-party defendant Soil Solutions, Inc. to dismiss the third third-party claims for common-law indemnification against said it is granted, and is otherwise denied; and it is further

**ORDERED** that the motion (sequence number 010) of third third-party defendant Kline Iron & Steel Co., Inc. to dismiss the third third-party claims for common-law indemnification against said it is granted, and is otherwise denied; and it is further

**ORDERED** that the motion (sequence number 011) of defendant/second third-party plaintiff Perkins Eastman Architects, P.C. to dismiss the fifth and sixth causes of action brought by plaintiffs City of New York and New York City Health and Hospitals Corporation is granted, and is otherwise denied; and it is further

**ORDERED** that the motion (sequence number 013) of third third-party defendant Roadway Contracting, Inc. to dismiss is denied; and it is further


*DASNY et al v Samson and Perkins,*  
*Samson v Roadway, Soil Solutions, Con Ed, Kline, McNulty, and SPX*

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**ORDERED** that the parties are directed to appear for a status conference on  
Wednesday, March 20, 2013 at 2:15 p.m.

Dated: February 27, 2013

ENTER:

  
Hon. Eileen Bransten, J.S.C.