Travelers Indem. Co. of CT v A Superior Serv. & Repair Co., Inc.
2015 NY Slip Op 30560(U)
April 16, 2015
Sup Ct, New York County
Docket Number: 150153/11
Judge: Ellen M. Coin
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

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THE TRAVELERS INDEMNITY COMPANY OF CONNECTICUT a/s/o Rosenbaum, Rosenfeld, Sonnenblick, LLP,

Plaintiff(s),

-against-

Index No. 150153/11
(Action No. 1)

A SUPERIOR SERVICE AND REPAIR CO. INC., EXCALIBUR GROUP NA LLC, and HOME SYSTEMS ENGINEERING, INC.,

Motion Sequence Nos. 002 & 003

Defendant(s).

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FEDERAL INSURANCE COMPANY a/s/o Rosenbaum, Rosenfeld & Sonnenblick, LLP,

Plaintiff,

-against-

Index No. 150405/13
(Action No. 2)

A SUPERIOR SERVICE and REPAIR CO. INC., EXCALIBUR GROUP NA LLC, and HOME SYSTEMS ENGINEERING, INC.,

Motion Sequence Nos. 002 & 003

Defendants.

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ELLEN M. COIN, J.S.C.:

Motion sequence numbers 002 and 003 in Action No. 1, and motion sequence numbers 002 and 003 in Action No. 2 are consolidated for disposition.

In these related subrogation actions, plaintiffs Travelers Indemnity Company of Connecticut (Travelers) and Federal Insurance Company (Federal) seek to recover, as subrogees of their insured, for property damage resulting from the backup and overflow of water and/or waste that occurred on April 18, 2011 and April 23, 2011 at 1421 Third Avenue, New York, New York (hereinafter, the premises). The parties now make identical motions in both actions.

In Action No. 1, defendant Excalibur Group NA, LLC (Excalibur) moves, pursuant to CPLR 3212, for summary judgment dismissing the amended complaint as against it (motion sequence number 002). In Action No. 2, Excalibur similarly moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against it (motion sequence number 002).

In Action No. 1, defendant A Superior Service and Repair Co., Inc. (Superior) moves, pursuant to CPLR 3212, for summary judgment dismissing the amended complaint and any and all cross-claims against it (motion sequence number 003). Superior moves, in Action No. 2, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against it and any and all cross-claims against it (motion sequence number 003).

In Action No. 1 and Action No. 2, Excalibur cross-moves, pursuant to CPLR 3212, for summary judgment over and against Superior on its cross claims for common law indemnification, common law contribution, and contractual indemnification.

BACKGROUND

Nonparty R&R Third Party Properties, LLC was the owner of the premises. Rosenbaum, Rosenfeld & Sonnenblick, LLP (RRS) is a medical imaging practice that leased the first and third floors of the premises for a radiology clinic. Travelers insured RRS for its radiology practice. Federal insured RRS's medical equipment. Excalibur was hired as a contractor to perform work on the premises. Excalibur subsequently retained Superior as a plumbing subcontractor.

Stanley Rosenfeld, M.D. (Rosenfeld), RRS's representative, testified that in 2006 RRS needed new imaging equipment, and decided to lease equipment from Philips Medical Systems (Philips) (Rosenfeld EBT at 55, 57). Philips would provide the new imaging equipment and construct the space for the equipment (*id.* at 54-56). Rosenfeld testified that "[m]y understanding

was that Philips was a turnkey operation, which means Philips would be involved in supervising whatever contractor was going to be doing the renovations as well" (*id.* at 55-56).

On December 18, 2006, RRS received a turnkey proposal from Philips for design and construction work (Horn affirmation in support, exhibits B, C).

In accordance with Philips's request, Excalibur issued proposal #4178 to Philips to remodel the existing imaging center (*id.*, exhibit D). The proposal was based on "as built drawings prepared by Arthur Minner AIA along with concept drawings prepared by owner and Philips Medical typical schematics for planned equipment to include (1) 1.5 MRI system[,] (2) Gemini PET CT System[,] (2) Mamo Rooms[,] and (1) Ultrasound Room" (*id.*). Excalibur's proposal included the installation and renovation of six new bathrooms, including the furnishing of bathroom accessories and "Rough In Plumbing as per schematic" (*id.*). Excalibur was required to perform concrete work, and to "[p]atch floors after installation of plumbing, etc." (*id.*).

On June 28, 2007, Philips, as "owner," and Excalibur, as "contractor," entered into a turnkey construction agreement for construction work to prepare the space for the installation of the medical equipment supplied by Philips (*id.*, exhibit E). Drs. Rosenbaum/Rosenfeld are identified therein as the "customer" (*id.*). Excalibur's proposal #4178 was incorporated as part of the contract documents (*id.*). Paragraph 4.4 (b) of the turnkey construction agreement provides, in relevant part, as follows:

> "CONTRACTOR shall . . . assure that the WORK itself and CONTRACTOR's performance of the WORK comply with any statutes, ordinances, rules, regulations, building codes or other governmental requirements applicable to the WORK. The drawings and specifications CUSTOMER and OWNER have provided to CONTRACTOR as part of the Contract Documents are conceptual in nature.

> CONTRACTOR has overall responsibility for the construction work required for successful installation and operation of the Equipment and shall, in particular, be solely responsible for completing any necessary detailing or shop drawings, for assuring that the WORK is sufficient for the site to meet the Equipment installation requirements set forth in the Contract Documents and for compliance of the finished WORK with applicable building codes and other legal requirements"

(*id.*).

In a master lease agreement dated January 15, 2007, RRS leased a "System" from Philips as "specified in a lease schedule to be entered into from time to time" (*id.*, exhibit H). The master lease agreement contains an indemnification and hold harmless provision (*id.*). Master Lease Schedule No. 01 dated January 15, 2007 defines the "System" as "one (1) Philips Gemini GXL 16 PET CT Scanner with CUSTOMerCARE Service Agreement" (*id.*, exhibit F).

Geoffrey Pierini (Pierini), Excalibur's chief executive officer, testified that Philips sold equipment to the doctor group at the premises, and Philips hired Excalibur as the turnkey contractor (Pierini EBT at 10, 29-30). Pierini testified that, as a turnkey contractor, Excalibur "fit out the space, install[ed] the equipment, [and] . . . hand[ed] the keys to the doctors" (*id.* at 29). Prior to submitting its proposal, Excalibur visited the site and provided an estimate and scope of the work for the project, which Philips accepted (*id.* at 32). Pierini stated that "Philips would more or less supervise our installation, what we did"; Philips "would supervise our work to make sure we met the specific parameters to accept their piece of equipment" (*id.* at 27). Philips paid Excalibur directly for the work performed, and reviewed and approved the drawings for the renovations (*id.* at 86, 99). Excalibur subcontracted out the plumbing work to Superior (*id.* at 42). Excalibur checked that Superior was licensed and had insurance (*id.* at 43-44). When asked if Excalibur checked Superior's references, Pierini stated that "[w]e typically would . . . not take

somebody off the street" – "[e]ither it came from somebody at the hospital or a business associate or something" (*id.* at 44). In response to a question whether Excalibur checked to see if Superior was performing its job properly, Pierini stated that "[w]e are not qualified to second guess the master plumber" (*id.* at 53). Pierini explained that Excalibur relied on the City plumbing inspection to approve the "rough plumbing," and Excalibur then closed the walls and put the sheetrock up (*id.*).

Pierini further testified that, on April 18, 2011, a flood occurred from a toilet on the third floor after a rain storm (*id.* at 58, 59). Pierini stated that the toilet was overflowing, and that it was a "big mess" (*id.* at 59). Excalibur hired a plumber to start cleaning up the mess (*id.*). It was determined that there was "an enormous clog somewhere down in the basement"; "[t]he guy described it as almost concrete" (*id.* at 60). Pierini observed the clog himself, and stated that "it looked like concrete" (*id.* at 109). Pierini testified that the clog occurred in the basement on the horizontal piping going out toward the street (*id.* at 61). A few days later, on April 23, 2011, another flood occurred from the same toilet (*id.* at 73, 75). After Pierini learned that the third floor sanitary line for the toilet was connected to the storm drain, Superior re-piped the sanitary line into the correct riser (*id.* at 61, 62, 69).

Joseph Kerrigan (Kerrigan), Superior's president, testified that Excalibur hired Superior to perform plumbing renovations on two floors of the building (Kerrigan EBT at 9, 20). Kerrigan stated that Excalibur reached out to Superior based upon recommendations from other contractors (*id.* at 20-21). Superior obtained a permit for the plumbing work (*id.* at 36). When asked if Superior connected a sanitary line into a storm riser, Kerrigan stated, "No," and that he had no idea who made that connection (*id.* at 71). However, Kerrigan later testified that Superior

performed plumbing work that tied into the sanitary line that was connected to the storm riser (*id.* at 72). According to Kerrigan, the connection was located in the ceiling on the first floor (*id.*). Kerrigan testified that he did not know at the time that the sanitary line was connected to a storm riser (*id.* at 73). Kerrigan did not see anything on the drawings that led him to believe that the sanitary line was connected to a storm riser (*id.*). He also indicated that he visually traced the sanitary line to the four-inch cast iron riser to which the sanitary line was connected (*id.* at 75).

PROCEDURAL HISTORY

On May 16, 2011, RRS commenced Action No. 1 against Excalibur, Superior, and Home Systems Engineering, Inc., seeking recovery on two causes of action for breach of contract and negligence. Travelers subsequently reimbursed RRS $653,684.94 for the loss and damage to real and personal property, as well as for lost income. Thereafter, Travelers filed an amended complaint as subrogee of RRS, substituting itself as the plaintiff. The amended complaint alleges that defendants were negligent in:

> "(a) failing to properly install, repair, maintain, and/or inspect the plumbing system and/or plum[b]ing related lines/pipes at the premises;
>
> (b) failing to hire competent servants, contractors, agents, employees and/or workmen to properly install, repair, maintain, service, and/or inspect the plumbing system and/or pipes of the premises to avoid the backup of water;
>
> (c) failing to properly and adequately supervise the work being done by its contractors, servants, agents, employees and/or workmen in performing the plumbing work;
>
> ***
>
> (f) retaining incompetent, unlicensed employees, agents, servants, workers, subcontractors, without the requisite skill and abilities to install, inspect and detect the potential risk of improper installation of the sanitary and drainage lines as related to the plumbing system and/or pipes at the premises;
>
> ***
>
> (i) failing to ensure that its agents, servants, contractors and/or workmen abided by applicable codes, ordinances, rules and regulations concerning the safe installation, maintenance, service, inspection, and/or repair of the plumbing

system and/or drainage pipes at the premises;

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(o) otherwise failing to use due care and proper skill under the circumstances"

(amended complaint, ¶ 21).

Federal paid its insured $338,542.76 to repair the PET/CT scanner and other equipment.

On January 15, 2013, Federal brought Action No. 2, asserting two causes of action for negligence and breach of contract against Excalibur, Superior, and Home Systems Engineering, Inc. The complaint contains identical allegations of negligence against defendants.

In both actions, Excalibur asserted cross claims against Superior for common law indemnification, common law contribution, and contractual indemnification.

On October 18, 2013, the court granted a motion to consolidate Action No. 2 with Action No. 1 for the purposes of discovery and trial.

DISCUSSION

"[T]he proponent of a motion for summary judgment must demonstrate that there are no issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action" (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]). "On a motion for summary judgment, issue-finding, rather than issue-determination, is key" (*Shapiro v Boulevard Hous. Corp.*, 70 AD3d 474, 475 [1st Dept 2010]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

"Subrogation, an equitable doctrine, allows an insurer to stand in the shoes of its insured and seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse" (*Kaf-Kaf, Inc. v Rodless Decorations*, 90 NY2d 654, 660 [1997]; *see also Pennsylvania Gen. Ins. Co. v Austin Powder Co.*, 68 NY2d 465, 471 [1986]). "The insurer's rights against a third party are derivative and limited to the rights the insured would have against that third party" (*Westport Ins. Co. v Altertec Energy Conservation, LLC*, 82 AD3d 1207, 1209 [2d Dept 2011]). "Therefore, '[a]n insurer can only recover if the insured could have recovered and its claim as subrogee is subject to whatever defenses the third party might have asserted against its insured'" (*id.*, quoting *Humbach v Goldstein*, 229 AD2d 64, 67 [2d Dept 1997], *lv dismissed* 91 NY2d 921 [1998]).

A. Excalibur's Motion for Summary Judgment Dismissing the Amended Complaint in Action No. 1 (Motion Sequence No. 002)/ Excalibur's Motion for Summary Judgment Dismissing the Complaint in Action No. 2 (Motion Sequence No. 002)

1. Whether Plaintiffs' Insured Waived Any Claims Against Excalibur

Initially, Excalibur argues that RRS waived any claims against Excalibur based upon paragraph 11 of the master lease agreement between Philips and RRS, which provides as follows:

> "INDEMNITY FOR CLAIMS AND TAXES: Lessee assumes and agrees to indemnify, defend and keep harmless Lessor, its assignees, agents and employees (each, an 'Indemnitee') from and against any and all losses, damages, injuries, claims, demands and expenses, including without limitation, legal expenses (other than such as may directly and proximately result from gross negligence or willful misconduct of such Indemnitee), arising on account of the ownership, operation or return of the System or any portion thereof, including, without limitation, any environmental, strict liability and infringement claims"

(Horn affirmation in support, exhibit H).

Excalibur argues that: (1) the "System" includes the imaging equipment and a "turnkey"

project for Philips to monitor renovations of the space as part of the imaging system; (2) Excalibur merely acted as an assignee of Philips to perform the work at issue; and (3) plaintiffs may only file suit against it based upon gross negligence or willful acts.

In response, plaintiffs[1] contend that the indemnification and hold harmless provision pertains to the equipment that the doctors were going to use for their practice and has nothing to do with Excalibur's duties and responsibilities under the separate turnkey construction agreement.

"'[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms'" (*Signature Realty, Inc. v Tallman*, 2 NY3d 810, 811 [2004], quoting *R/S Assoc. v New York Job Dev. Auth.*, 98 NY2d 29, 32 [2002]; *see also W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]).

Contrary to Excalibur's contention, the master lease agreement does not bar recovery by plaintiffs and RRS for breach of contract and negligence against Excalibur. First, Excalibur is not a party to the master lease agreement. Although Excalibur argues that it was an "assignee" of Philips because it was hired by Philips to perform the work at issue, an "assignee" is defined as "[o]ne to whom property rights or powers are transferred to another" (Black's Law Dictionary [9th ed 2009]). Excalibur has failed to show that Philips transferred any property rights or powers to it.

Second, plaintiffs' breach of contract and negligence claims do not "aris[e] on account of the ownership, operation or return of the System or any portion thereof" (Horn affirmation in

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[1]Federal adopts the arguments made by Travelers in support of its own motion for summary judgment by reference (Serio affirmation in opposition, ¶ 5).

support, exhibit H). The master lease agreement states that "[t]his Agreement establishes the general terms and conditions under which Lessor may, from time to time lease a System (as hereinafter defined) to Lessee in a lease schedule to be entered into from time to time" (*id.*). Master lease schedule no. 01 defines the "System" as "one (1) Philips Gemini GXL 1 PET CT Scanner with CUSTOMerCARE Service Agreement" (*id.*, exhibit F). Plaintiffs' negligence and breach of contract claims do not arise on account of the ownership, operation or return of the PET CT scanner. Rather, plaintiffs' breach of contract and negligence claims flow from Excalibur's duties and responsibilities under the independent turnkey construction agreement.

Although Excalibur relies on *Westport Ins. Co.* (82 AD3d 1207, *supra*), a subrogation action to recover damages for negligence and breach of contract arising fom a fire at a hotel, that case is distinguishable. There the hotel hired a contractor to complete the installation of an electric generator system on its premises pursuant to a repair agreement (*id.* at 1208). The contractor disclaimed any warranties for the work pursuant to the repair agreement (*id.*). The repair agreement contained an indemnification/hold harmless clause which provided that the hotel indemnified and held the contractor harmless from and against all claims except any claims premised upon a theory of willful misconduct (*id.* at 1208-1209). The Court held that:

> "[s]ince the agreement clearly provided that [the contractor] would be held harmless by the hotel against all claims except any claims premised upon a theory of willful misconduct and [the contractor] disclaimed any warranties for the work, neither the plaintiff [insurer] nor the hotel could recover damages resulting from [the contractor's] negligence or breach of contract"

(*id.* at 1210). In addition, the Court held that the indemnification provision was not unenforceable under General Obligations Law § 5-322.1; protecting an owner, where it was free to contract in any manner it chose, did not serve the legislative purpose (*id.* at 1211). Here,

Excalibur, unlike the contractor in *Westport Ins. Co., supra*, was not a party to the master lease agreement, and plaintiffs' breach of contract and negligence claims do not arise on account of the ownership, operation or return of the PET CT scanner.

In light of the above, the branch of Excalibur's motion seeking dismissal of the amended complaint in Action No. 1, and the branch of Excalibur's motion seeking dismissal of the complaint in Action No. 2, based upon the language of the indemnification/hold harmless agreement, are denied.

2. *Breach of Contract (Second Cause of Action)*

Excalibur argues that plaintiffs cannot recover for breach of contract against it since there was no contract between Excalibur and RRS. Excalibur further contends that even if plaintiffs could maintain a breach of contract claim, plaintiffs cannot prove any breach of the turnkey construction agreement. According to Excalibur, there is no dispute that it performed the renovation, and the flood several years later was not caused by Excalibur's failure to abide by any of the terms of its contract with Philips.

In opposition, plaintiffs contend that RRS was an intended third-party beneficiary of the turnkey construction agreement. Plaintiffs argue that the turnkey construction agreement, which is entitled "Drs. Rosenbaum Rosenfeld – Gemini 16 Power Renovation Project," was clearly intended to benefit Drs. Rosenbaum and Rosenfeld, who are identified in the contract as the "customer" (Sheps affirmation in opposition, exhibit B [emphasis added]). As argued by plaintiffs, the entire focus and intent of the contract was to provide the doctors with a new, state-of-the-art facility that they could use as soon as possible to treat cancer patients. Plaintiffs further assert that Excalibur breached section 4.4 of the turnkey construction agreement.

In reply, Excalibur argues that: (1) RRS was not an intended third-party beneficiary of the turnkey construction agreement because the intention of the parties was to confer a benefit on Philips, and RRS cannot claim that it is the only beneficiary of the contract; and (2) it did not breach the turnkey construction agreement since it provided all of the services required under the agreement, and it was not obligated to second guess the licensed master plumber.

"Generally, a party alleging a breach of contract must 'demonstrate the existence of a . . . contract reflecting the terms and conditions of their . . . purported agreement'" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 181-182 [2011], quoting *American-European Art Assoc. v Trend Galleries*, 227 AD2d 170, 171 [1st Dept 1996]).

> "A party 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 [its] benefit and (3) that the benefit to [it] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [it] if the benefit is lost.'"

(*State of Cal. Pub. Employees' Retirement Sys. v Shearman & Sterling*, 95 NY2d 427, 434-435 [2000], quoting *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 336 [1983]).

A party is an intended beneficiary if "'performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary'" or "'the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance'" (*Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 66 NY2d 38, 44 [1985], quoting Restatement [Second] of Contracts § 302 [2]). "Among the circumstances to be considered is whether manifestation of the intention of the promisor and promisee is 'sufficient, in a contractual setting, to make reliance by the beneficiary both reasonable and probable'" (*id.*, quoting Restatement [Second] of Contracts § 302, comment d). It is well settled that the intention which controls in

determining whether a stranger to a contract qualifies as an intended third-party beneficiary is that of the promisee (*MK W. St. Co. v Meridien Hotels*, 184 AD2d 312, 313 [1st Dept 1992]).

Applying these principles, there is an issue of fact as to whether RRS was an intended third-party beneficiary of the turnkey construction agreement. Drs. Rosenbaum/Rosenfeld are identified in the turnkey construction agreement as the "customer" (Horn affirmation in support, exhibit E). It is undisputed that the work was to be performed within RRS's space (*id.*, exhibit E). Such circumstances indicate that Philips intended to give RRS the benefit of the promised performance (*see Gap, Inc. v Fisher Dev., Inc.*, 27 AD3d 209, 211 [1st Dept 2006]; *Rotterdam Sq. v Sear-Brown Assoc.*, 246 AD2d 871, 872 [3d Dept 1998]; *Facilities Dev. Corp. v Miletta*, 180 AD2d 97, 101 [3d Dept 1992]). "[W]here, as here, a genuine triable issue exists as to the parties' intention to benefit another, a triable issue of fact is presented which is not appropriate for summary disposition" (*MK W. St. Co.*, 184 AD2d at 313).

Furthermore, contrary to Excalibur's assertion, there are issues of fact as to whether Excalibur breached paragraph 4.4 (b) of the turnkey construction agreement, which required Excalibur to assure that the work complied with the building code and other legal requirements (*see International Gateway Exch., LLC v Western Union Fin. Servs., Inc.*, 333 F Supp 2d 131, 145 [SD NY 2004] [a party may breach a contract by not keeping its promise to perform in accordance with applicable laws and regulations]; *Dayton Tower Corp. v Leon D. DeMatteis & Sons, Inc.*, 212 AD2d 396, 396 [1st Dept 1995] [contractor breached contract requiring contractor to construct building in accordance with the Building Code; contractor used less than one-and-a-half inches of concrete on reinforcement bars where Code required at least one-and-a-half inches]). Plaintiffs' experts, Alan E. Fidellow, P.E. and George H. Pfreundschuh, P.E,

opine, based upon inspections of the site and their review of the record, that the work violated P110.8 of the New York City Plumbing Code in that a sanitary line from a third floor toilet was connected to a storm riser (Fidellow aff, ¶ 7; Pfreundschuh aff, ¶ 7).

Therefore, the branch of Excalibur's motion seeking dismissal of the breach of contract cause of action in Action No. 1, and the branch of Excalibur motion seeking dismissal of the breach of contract cause of action in Action No. 2, are denied.

3. Negligence (First Cause of Action)

Excalibur contends that there is no evidence that it was negligent as a subcontractor. As support, Excalibur argues that it reasonably relied on Superior's expertise as a licensed master plumber, since other contractors had recommended Superior because they were pleased with its work, and Superior's work passed the City plumbing inspection. Alternatively, Excalibur argues that the owner's failure to maintain the storm system and the flushing of paper towels down the toilet were superseding and intervening causes which preclude liability.

To support its position, Excalibur submits an affidavit from Derek Graham, a construction senior scheduler/chief estimator/project manager, who states, based upon his review of the building and construction codes, documents exchanged during this litigation, and the deposition testimony of Pierini, Rosenfeld, and Kerrigan, that Excalibur was not responsible for the back-ups and floods that occurred on April 18, 2011 and April 23, 2011 (Graham aff, ¶ 4). Graham states that as a subcontractor to Philips, Excalibur reasonably relied on the expertise of Superior in performing the plumbing work (*id.*, ¶ 5). According to Graham, Excalibur properly reviewed the qualifications of Superior, and Excalibur was not required to function as a second set of eyes on the plumbing work; Excalibur could not have reasonably known of any defects in

the plumbing work, since it would have required the expertise of a plumber (*id.*, ¶¶ 6-7).

Plaintiffs contend, in opposition, that: (1) Excalibur has failed to demonstrate that it did not create or exacerbate a dangerous condition, and RRS reasonably relied on Excalibur for the planning and installation of the entire project; (2) Excalibur failed to inspect the plumbing system prior to submitting its proposal to verify whether the plans it was relying on were accurate; (3) Excalibur has not demonstrated a superseding and intervening cause; and (4) Graham's affidavit is conclusory, unsupported, and inadmissible.

To establish a prima facie case of negligence, the plaintiff must show: (1) the existence of a duty of care owed by the defendant to the plaintiff; (2) breach of that duty; (3) that such duty was the proximate cause of the resulting injury; and (4) actual loss, harm or damage (*see Baptiste v New York City Tr. Auth.*, 28 AD3d 385, 386 [1st Dept 2006]; *Merino v New York City Tr. Auth.*, 218 AD2d 451, 457 [1st Dept], *affd* 89 NY2d 824 [1996]).

As a preliminary matter, Excalibur's reliance on CPLR 3212 (i), which provides standards for summary judgment in certain cases involving licensed architects, engineers, land surveyors or land architects, is misplaced. It is undisputed that Excalibur is not a licensed architect, engineer, land surveyor or landscape architect. Moreover, plaintiffs' claims do not involve an allegation of malpractice, only ordinary negligence. Malpractice is the negligence of a member of a profession toward his client (*see Cubito v Kreisberg*, 69 AD2d 738, 742 [2d Dept 1979], *affd* 51 NY2d 900 [1980]).

Generally, a contractor does not owe a duty of care to noncontracting third parties (*Church v Callanan Indus.*, 99 NY2d 104, 111 [2002]; *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]; *Timmins v Tishman Constr. Corp.*, 9 AD3d 62, 66 [1st Dep 2004]).

However, there are three exceptions to this general rule: (1) "where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk" (*Church*, 99 NY2d at 111); (2) "where the plaintiff has suffered injury as a result of reasonable reliance upon the defendant's continuing performance of a contractual obligation" (*id.*); and (3) "'where the contracting party has entirely displaced the other party's duty to maintain the premises safely'" (*id.* at 112, quoting *Espinal*, 98 NY2d at 140).

Under the first exception, a defendant owes a duty where it creates or exacerbates an unreasonable risk of harm to others (*id.* at 111). This exception was described in the landmark Court of Appeals case of *Moch Co. v Rensselaer Water Co.* (247 NY 160 [1928]) as "launch[ing] a force or instrument of harm" (*id.* at 168).

Although Excalibur argues that there is no evidence that it deviated from any standard of care required of a subcontractor, Excalibur has not demonstrated that it did not assume a duty of care to RRS. While Excalibur faults Superior for the plumbing work, Excalibur has not shown, prima facie, that it did not create or exacerbate a dangerous condition which caused the clogs in the plumbing system or the floods (*see George v Marshalls of MA, Inc.*, 61 AD3d 925, 929 [2d Dept 2009] [genuine issue of material issue off fact as to whether cleaning services subcontractor created dangerous condition in performance of its duties]). Excalibur's chief executive officer testified that the blockage "looked like concrete" (Pierini EBT at 109). Pursuant to Excalibur's proposal #4178, which was incorporated into the turnkey construction agreement, Excalibur was responsible for concrete work, to "[p]atch floors after installation of plumbing, etc.," and to "[r]emove and legally dispose of debris" (Horn affirmation in support, exhibit D).

"Generally, 'a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligent acts'" (*Brothers v New York State Elec. & Gas Corp.*, 11 NY3d 251, 257 [2008] [citation omitted]). This rule also applies when a general contractor engages a subcontractor (*Whitaker v Norman*, 75 NY2d 779, 782 [1989]; *Broderick v Cauldwell-Wingate Co.*, 301 NY 182, 187 [1950]). The reason for this rule is that one who hires an independent contractor does not have the right to control the manner in which the work is done (*Chainani v Board of Educ. of City of N.Y.*, 87 NY2d 370, 380-381 [1995]). "The numerous exceptions to this general rule, which, for the most part, are derived from public policy concerns, fall roughly into three basic categories: where the employer is negligent in selecting, instructing or supervising the independent contractor; where the independent contractor is hired to do work which is inherently dangerous; and where the employer bears a specific, nondelegable duty" (*Saini v Tonju Assoc.*, 299 AD2d 244, 245 [1st Dept 2002][internal quotation marks and citations omitted]; *see also Adams v Hilton Hotels, Inc.*, 13 AD3d 175, 177 [1st Dept 2004]).

Excalibur attempts to blame Superior for its negligent installation of the plumbing. However, it is well settled that an employer may be liable for the negligence of an independent contractor where it is shown that the employer was negligent in selecting or hiring a careless or incompetent independent contractor (*see Brothers*, 11 NY3d at 258; *see also Kleeman v Rheingold*, 81 NY2d 270, 274 n 1 [1993] ["although often classified as an 'exception,' this category may not be a true exception to the general rule, since it concerns the employer's liability for its own acts or omissions rather than its vicarious liability for the acts or omissions of the contractor"]).

In this case, Excalibur has not demonstrated that it made reasonable inquiries as to Superior's competence for this type of project. Pierini stated that Excalibur checked to determine whether Superior had a license and insurance (Pierini EBT at 43-44). However, when asked if he checked Superior's references, he said "[w]e typically would . . . not take somebody off the street," and that "either it came from somebody at the hospital or a business associated or something" (*id.* at 44).[2] Excalibur does not rely on any documents as to any investigation conducted into Superior's background. In addition, Kerrigan did not remember the individual who referred Superior to Excalibur (Kerrigan EBT at 99). Therefore, there are issues of fact as to whether Excalibur was negligent in hiring Superior to perform the plumbing work (*see Melbourne v New York Life Ins. Co.*, 271 AD2d 296, 299 [1st Dept 2000] [issues of fact as to exception for negligence in hiring company, including nature of investigation conducted before company was hired]; *Cichon v Brista Estates Assoc.*, 193 AD2d 926, 927 [3d Dept 1993] [issues of fact as to whether employer engaged an unqualified or careless independent contractor where only evidence of investigation was inquiry about individual to one of employer's own employees who had worked with him in past or "knew of him"]; *cf. Hesch v Seavey*, 188 AD2d 808, 810 [3d Dept 1992] [defendants met their burden that exception did not apply based on evidence that they had hired contractor on several prior occasions, and at no time did its work give any indication that its work was incompetent]).

Additionally, Excalibur has not shown that it cannot be held vicariously liable for the negligence of Superior based upon the services that it agreed to provide. "[A] defendant who

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[2]Initially, Pierini testified that "I think we may have worked with him on another project in Brooklyn. I would have to check my records," but later stated that he had to rephrase his answer (Pierini EBT at 44).

employs an independent contractor to perform services that the defendant has undertaken to perform, is liable for the negligence of the independent contractor" (*Mduba v Benedictine Hosp.*, 52 AD2d 450, 453 [3d Dept 1976], citing *Miles v R & M Appliance Sales*, Inc., 26 NY2d 451, 454 [1970]).

> "One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants"

(*id.*, quoting Restatement [Second] of Torts § 429). The rule subjects the employer of the contractor to liability where the contractor is careless or negligent in rendering the services the employer undertook to perform (*id.*, quoting Restatement [Second] of Torts § 429, comment b).

Here, Excalibur has not established that it cannot be liable for the negligence of Superior for services that Excalibur undertook to perform (*see Mduba*, 52 AD2d at 453). Indeed, Excalibur's proposal #4178, which was incorporated into the turnkey construction agreement, included "Rough In Plumbing as per schematic" (Horn affirmation in support, exhibit D). Dr. Rosenfeld testified that "Philips and the contractor were the ones who had the experience with setting up imaging centers and doctors' offices in the past. And we relied on their expertise to do the right thing" (Rosenfeld EBT at 61). Dr. Rosenfeld also testified that the flood related to work performed by Excalibur or under its supervision (*id.* at 73).

Moreover, Graham's affidavit is insufficient to eliminate triable issues of fact as to Excalibur's negligence. It is well settled that an expert's opinion "'must be based on facts in the record or personally known to the witness'" (*Hambsch v New York City Tr. Auth.*, 63 NY2d 723, 725 [1984], quoting *Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]. "An expert may not reach a

conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion" (*Rosato v 2550 Corp.*, 70 AD3d 803, 805 [2d Dept 2010]; *see also Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Santoni v Bertelsmann Prop., Inc.*, 21 AD3d 712, 715 [1st Dept 2005]). "In the absence of record support, an expert's opinion is without probative force" (*Guzman v 4030 Bronx Blvd. Assoc. L.L.C.*, 54 AD3d 42, 49 [1st Dept 2008]). Graham states that Excalibur is not required to function as a second set of eyes on the plumbing work performed by Superior; Excalibur reasonably relied on Kerrigan as a licensed master plumber; and that Excalibur's work did not cause or contribute to the floods on April 18, 2011 and April 23, 2011 (Graham aff, ¶¶ 6-10). However, Graham does not cite any industry standards, and did not conduct an inspection of the premises. Therefore, Graham's affidavit is speculative and conclusory, and is insufficient to demonstrate that Excalibur was not negligent (*see Tower Ins. Co. of N.Y. v M.B.G. Inc.*, 288 AD2d 69, 69 [1st Dept 2001]).

Furthermore, while Graham asserts that Excalibur did not deviate from its responsibility under the New York City Plumbing Code (Graham aff, ¶ 8), Graham has not demonstrated that he is qualified to opine on plumbing.[3] An expert "should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or that the opinion rendered is reliable" (*Matott v Ward*, 48 NY2d 455, 459 [1979]). The court has the discretion to qualify an expert, and this determination will not be disturbed absent serious mistake, an error of law, or an improvident exercise of discretion (*de Hernandez v*

[3]Notably, Graham's affidavit states he has over 50,000 hours of hands-on experience owning, operating and working in a construction company, building inspection company, and other related companies (Graham aff, ¶ 1). Graham further states that he was a mechanic for nine years; was a manager for 20 years; has testified as an expert witness since 2009; and published a textbook on project management (*id.*).

Lutheran Med. Ctr., 46 AD3d 517, 517-518 [2d Dept 2007]).

Finally, Excalibur has also failed to demonstrate that the owner's failure to maintain the storm system or the flushing of paper towels down the toilet were superseding and intervening causes as a matter of law.

> "Where the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the causal connection is not automatically severed. In such a case, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence. If the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct, it may well be a superseding act which breaks the causal nexus. Because questions concerning what is foreseeable and what is normal may be the subject of varying inferences, as is the question of negligence itself, these issues generally are for the fact finder to resolve"

(*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980] [citations omitted]).

Excalibur relies on Kerrigan's testimony that storm systems need to be periodically cleaned (Kerrigan EBT at 115). Excalibur also points to Dr. Rosenfeld's testimony, when asked if he knew whether individuals were flushing paper towels down the toilet on certain floors, that "I don't know of any building that that doesn't happen. So I don't know if there was anybody on one particular floor; but, yes, occasionally, that happens" (Rosenfeld EBT at 80). Dr. Rosenfeld further stated that there was a sign that said "do not flush paper towels" and to "please put sanitary napkins in the container provided" (*id.*). Based upon this evidence, Excalibur has not established that either of these events caused the clog, or that Excalibur's acts or omissions or Superior's allegedly defective plumbing work were not a proximate cause of the property damage.

Accordingly, the branches of Excalibur's motions seeking dismissal of the negligence

causes of action in Action No. 1 and Action No. 2 are denied, regardless of the sufficiency of plaintiffs' opposing papers (*see Winegrad*, 64 NY2d at 853).

B. Superior's Request for Summary Judgment Dismissing the Amended Complaint in Action No. 1 (Motion Sequence No. 003)/ Superior's Request for Summary Judgment Dismissing the Complaint in Action No. 2 (Motion Sequence No. 003)

1. Negligence (First Cause of Action)

Superior argues that it did not owe a duty of care to plaintiffs. As noted above, a contractor may owe a duty of care to noncontracting third parties "where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk" (*Church*, 99 NY2d at 111).

In support of its argument, Superior submits an affidavit from Kerrigan, in which he states that Superior did not connect the three-inch sanitary branch to the four-inch cast iron stack, and that its work did not include the connection or modification of the three-inch sanitary branch to the four-inch cast iron stack (Kerrigan aff, ¶ 6). Kerrigan defines a "stack" or "riser" as "any pipe that runs vertically up and down," and a "branch" as "a pipe that runs horizontally" (*id.*, ¶ 4). According to Kerrigan, the plumbing plans indicated that a new toilet was to be installed in a third floor bathroom and connected to an existing three-inch sanitary riser (*id.*, ¶ 12). The plans indicated that the three-inch sanitary riser needed to be relocated because it ran through a wall on the second floor that was being moved as part of the renovations (*id.*, ¶ 13). Prior to relocating the three-inch sanitary riser and installing the toilet, Kerrigan confirmed the location of the existing sanitary fixture and three-inch sanitary riser, and noted that they were standard pipes of the size and kind typically used in the plumbing industry for sanitary purposes (*id.*, ¶¶14, 15). Kerrigan states that there was no reason to believe that the four-inch cast iron stack into which

the pre-existing three-inch sanitary branch was connected was anything other than a sanitary stack as depicted by the plans (*id.*, ¶ 18).

Superior also provides an affidavit from Leonard Williams, a licensed master plumber, who states, based upon his review of the record, that Superior correctly installed the third floor plumbing, associated accessories, and water distribution, according to code (Williams aff, ¶ 3). Williams opines within a reasonable degree of certainty that Superior's installation of the third floor sanitary system and sanitary drain pipes did not deviate from the custom and practice in the plumbing industry, and was consistent with the standard of care of a reasonably prudent New York City-licensed master plumber (*id.*, ¶ 4). According to Williams, Superior's plumbing work and installation did not cause the overflow incidents on April 18, 2011 and April 23, 2011 (*id.*, ¶ 5). Williams states that as per the custom and practice in the plumbing industry, Superior visually confirmed that the existing lavatory sink was connected to a three-inch sanitary riser; the plans did not require Superior to modify the connection of the three-inch branch to the four-inch cast iron stack (*id.*, ¶ 9). Superior was not hired to trace or dye-test the sanitary or storm water plumbing system at the premises prior to the overflows of April 18, 2011 and April 23, 2011 (*id.*, ¶ 12). Williams opines that a reasonably prudent plumber would have had no reason to question the connection of the pre-existing sanitary branch based on its size, diameter, type, and location of the stack (*id.*, ¶ 13).

In opposition, plaintiffs contend that Superior created a dangerous condition due to its faulty plumbing installation work. Plaintiffs submit affidavits from engineers Fidellow and Pfreundschuh, who opine, based upon their review of the record and site inspections conducted on May 23, 2011 and June 7, 2011, that Superior improperly connected a sanitary line from a

third floor toilet into the storm water piping in violation of section P110.8 (a) of the 1968 New York City Plumbing Code (Fidellow aff, ¶ 7; Pfreundschuh aff, ¶ 7). According to plaintiffs' experts, the floods were entirely foreseeable because the improper connection allowed storm water from the sixth floor roof to be directed through the sanitary line and overflow from the third floor toilet, instead of overflowing from the sixth floor roof drain (Fidellow aff, ¶ 8; Pfreundschuh aff, ¶ 8).

Fidellow and Pfreundschuh state that: (1) Kerrigan failed to satisfy his duty as a licensed master plumber to adequately check the system after relocating and connecting piping to ensure that the pipes would be safe and that the connection complied with the code; and (2) Kerrigan failed to make critical, independent field observations in order to verify the identity and location of the plumbing lines prior to the commencement of the work (Fidellow aff, ¶¶ 9, 10; Pfreundschuh aff, ¶¶ 10, 18). For instance, the 1987 riser diagram does not correctly show separate storm and sanitary drain leading into the house trap, and the riser diagram (P-5) does not depict any three-inch sanitary "up-and-down" line between the third floor and second floor (Fidellow aff, ¶¶ 11, 12, exhibit B; Pfreundschuh aff, ¶¶ 13, 14). Therefore, according to Fidellow and Pfreundschuh, Kerrigan should have utilized industry-wide testing, including dye testing, to determine that the sanitary line was tied into a building storm riser (Fidellow aff, ¶ 13; Pfreundschuh aff, ¶ 20). Fidellow and Pfreundschuh further state that it was incumbent upon Kerrigan to ensure that the connections that he made during the course of the project were code-compliant, since he self-certified the work (Fidellow aff, ¶ 14; Pfreundschuh aff, ¶ 21). Superior also failed to perform any kind of testing prior to, or during, the installation of rough-in plumbing (Fidellow aff, ¶ 15; Pfreundschuh aff, ¶ 22).

Section P110.8 of the 1968 New York City Plumbing Code provides, in relevant part, as follows:

> "P110.8 LEADERS OR STORM WATER PIPING.-
>
> (a) Improper use of storm water piping.-Leader or storm water pipes shall not be used as soil, waste or vent pipes."

Here, although RRS did not contract directly with Superior, plaintiffs have raised an issue of fact as to whether Superior created an unreasonable risk of harm to the property. Fidellow and Pfreundshuh state that Superior improperly connected a sanitary line from a third floor toilet into the building storm water piping, and that Kerrigan failed to adequately check the system after relocating and connecting piping in violation of P110.8 (a) of the 1968 New York City Plumbing Code (Fidellow aff, ¶ 7; Pfreundschuh aff, ¶¶ 7, 10). Superior's proposal included the relocation of the cast iron waste lines at issue (Sheps affirmation in opposition, exhibit D). Fidellow and Pfreundschuh maintain, contrary to Superior's assertion, that the fact that Kerrigan tied the three-inch sanitary line into an existing three-inch line is irrelevant; the Code does not permit a storm line to be used as a sanitary line and does not eliminate the obligation of a master plumber to verify all connections and risers that lead downstream, since Kerrigan self-certified the plumbing work (Fidellow aff, n 1, exhibit B; Pfreundschuh aff, ¶ 12). Plaintiffs' experts further state that inconsistencies between the plumbing plans and actual site conditions should have alerted Kerrigan that there were two separate building systems in place (Fidellow aff, ¶ 11, exhibit B; Pfreundschuh aff, ¶ 15). While Superior argues in reply that plaintiffs' expert affidavits are not based on an adequate foundation, Fidellow and Pfreundshuh's opinions are based upon their review of the record and inspections of the site on May 23, 2011 and June 7, 2011 (*see Santoni*,

21 AD3d at 715).[4] In view of this evidence, there are issues of fact as to whether Superior negligently installed the plumbing, thereby launching a force or instrument of harm (*see Greater N.Y. Mut. Ins. Co. v ERE LLP*, 125 AD3d 417, 418 [1st Dept 2015] [issues of fact as to whether contractor negligently installed and maintained HVAC system, thereby launching a force or instrument of harm]; *St. Paul Travelers Cos., Inc. v Joseph Mauro & Son, Inc.*, 93 AD3d 658, 661 [2d Dept 2012] [contractor failed to demonstrate that while repairing electrical repair box, it did not create an unreasonable risk of harm to others or increase that risk]).

In addition, contrary to Superior's argument, it is for the jury to determine whether Superior's negligence was a substantial cause of the property damage (*see Derdiarian*, 51 NY2d at 315 ["it is for the finder of fact to determine legal cause, once the court has been satisfied that a prima facie case has been established"]). Even if the building was negligent in maintaining the storm or plumbing systems, "[t]here may be one, or more than one, substantial factor" (*Ohdan v City of New York*, 268 AD2d 86, 89 [1st Dept 2000], citing NY PJI 2:71).

Therefore, in Action No. 1 and Action No. 2, the branches of Superior's motions seeking dismissal of the negligence causes of action are denied.

2. Breach of Contract (Second Cause of Action)

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[4]Superior's other contentions do not require dismissal of the negligence causes of action. First, assuming, without deciding, whether section P110.8 of the Plumbing Code was violated, the violation would not constitute negligence per se but would only constitute "evidence of negligence" (*Elliot v City of New York*, 95 NY2d 730, 734 [2001]). Second, although Superior notes that "[t]he failure to perform a contract obligation is never a tort unless it is also a violation of a legal duty" (*Rosenbaum v Branster Realty Corp.*, 276 App Div 167, 168 [1st Dept 1949]), the record reveals issues of fact as to whether Superior created an unreasonable risk of harm. Third, to the extent that the complaints allege that Superior was negligent in supervising, hiring, and instructing other parties, there is no evidence that it hired, retained or instructed any other entities with respect to the plumbing work.

Superior contends that plaintiffs' breach of contract claims should be dismissed, because it did not have a contract with RRS. It is undisputed that Superior was hired by Excalibur. In response to Superior's motions, plaintiffs do not argue that RRS was an intended third-party beneficiary of Superior's contract (*see Strauss v Belle Realty Co.*, 98 AD2d 424, 427 [2d Dept 1983], *affd* 65 NY2d 399 [1985] [a party claiming to be a third-party beneficiary has the burden of demonstrating an enforceable right]). Accordingly, plaintiffs' breach of contract claims against Superior are dismissed.

C. Superior's Request for Summary Judgment Dismissing the Cross Claims Against it (Motion Sequence No. 003)/ Excalibur's Cross Motion for Summary Judgment

Superior argues that Excalibur's cross-motion for summary judgment on its cross claims is untimely. "Although a court may decide an untimely cross motion, it is limited in its search of the record to those issues or causes of action 'nearly identical' to those raised by the opposing party's timely motion" (*Guallpa v Leon D. DeMatteis Constr. Corp.*, 121 AD3d 416, 419 [1st Dept 2014], quoting *Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006], *appeal dismissed* 9 NY3d 862 [2007]). Even if Excalibur's cross-motion is untimely, it was made in response to Superior's motion, which sought dismissal of Excalibur's cross-claims. Accordingly, the court may consider Excalibur's cross-motion for summary judgment.[5]

[5]The court rejects Superior's contention that Excalibur's cross motion is procedurally defective because Excalibur has submitted the affirmation of an attorney without personal knowledge of the facts (*see Zuckerman v City of New York*, 49 NY2d 557, 563 [1980] ["(t)he affidavit or affirmation of an attorney, even if he has no personal knowledge of the facts, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide 'evidentiary proof in admissible form,' e.g., documents, transcripts]). Excalibur annexes documentary evidence to its cross motion, and references the deposition transcripts that Superior submitted in support of its motion.

1. Contractual Indemnification

Superior moves for summary judgment dismissing Excalibur's cross-claim for contractual indemnification. Specifically, Superior contends that there is no evidence that it intended to indemnify any party to this action. Excalibur argues that Superior promised to indemnify Excalibur through an insurance policy, as evidence by its letter dated November 7, 2007. In addition, Excalibur contends that Superior's summary judgment motion is the first time that it has taken the position that it would not be indemnifying Excalibur.

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]).

Although Excalibur argues that Superior agreed to indemnify it through an insurance policy, relying on Kerrigan's letter dated November 7, 2007 in which he stated that he would provide insurance certificates (Horn affirmation in support, exhibit 6), Excalibur has not shown that Superior intended to indemnify Excalibur. "An agreement to procure insurance is *not* an agreement to indemnify and hold harmless, and the distinction between the two is well recognized" (*Kinney v Lisk Co.*, 76 NY2d 215, 218 [1990]). Therefore, Excalibur's cross-claims for contractual indemnification in Action No. 1 and Action No. 2 against Superior are dismissed (*see Becarie v Union Bank of Switzerland*, 272 AD2d 162, 163 [1st Dept 2000] [tenant was not entitled to contractual indemnification from landlord based upon provision in rental agreement pursuant to which landlord agreed to provide property insurance]).

2. Common-Law Indemnification

Superior contends that Excalibur's cross-claim for common-law indemnification must be dismissed because Excalibur and Superior were sued for their own wrongdoing, not on a theory of vicarious liability. Superior further asserts that there is no evidence that it was negligent. For its part, Excalibur contends that Superior is required to indemnify it under the common law, because it had the authority to direct, supervise, and control the plumbing work at issue in this case.

Common-law indemnification is predicated on "'vicarious liability without actual fault on the part of the proposed indemnitee'" (*Aiello v Burns Intl. Sec. Servs. Corp.*, 110 AD3d 234, 247 [1st Dept 2013], quoting *Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 453 [1st Dept 1985]). "Common-law indemnification requires proof not only that the proposed indemnitor's negligence contributed to the causation of the accident, but also that the party seeking indemnity was free from negligence" (*Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 484 [1st Dept 2010], citing *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]).

Contrary to Superior's contention, plaintiffs have sued Excalibur based on a theory of vicarious liability (*see Mduba*, 52 AD2d at 453). In addition, there are issues of fact as to whether Excalibur and Superior were negligent in creating a dangerous condition that caused the clogs and floods (*see Martins*, 72 AD3d at 484). Thus, summary judgment on Excalibur's cross-claim for common-law indemnification against Superior is premature. Therefore, in Action No. 1 and Action No. 2, the branch of Superior's motion seeking dismissal of Excalibur's cross-claim for common law indemnification, and the branch of Excalibur's motion seeking common law

indemnification from Superior, are denied.

3. Common-Law Contribution

Superior moves for summary judgment dismissing Excalibur's cross-claim for contribution, arguing that there is no evidence that it was negligent. In its cross-motion, Excalibur contends that if plaintiffs prove that the pipes were negligently installed, then Superior must provide contribution to Excalibur.

"Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of such person" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003] [internal quotation marks and citation omitted]). Pursuant to CPLR 1401, "[t]wo or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them." A claim for contribution may be asserted even when the contributor owes no duty to the injured persons, as long as there has been a breach of duty that runs from the contributor to the defendant who has been held liable (*Raquet v Braun*, 90 NY2d 177, 182 [1997]). "The 'critical requirement' for apportionment by contribution under CPLR article 14 is that 'the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought'" (*id.* at 183, quoting *Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 603 [1988]).

As noted above, the court has found issues of fact as to whether Excalibur and Superior created a dangerous condition which caused the property damage at issue. Thus, Excalibur and Superior may "have had a part in causing or augmenting the injury for which contribution is sought" (*id.* [internal quotation marks and citation omitted]). Accordingly, in Action No. 1 and

Action No. 2, the branch of Superior's motion seeking dismissal of Excalibur's cross claim for contribution, and the branch of Excalibur's cross motion seeking summary judgment on its claim for contribution against Superior, are denied.

CONCLUSION

Accordingly, as to Action No. 1, it is hereby

ORDERED that the motion (sequence number 002) of defendant Excalibur Group NA, LLC for summary judgment dismissing the amended complaint as against it is denied; and it is further

ORDERED that the motion (sequence number 003) of defendant A Superior Service and Repair Co., Inc. for summary judgment dismissing the amended complaint and any and all cross-claims against it is granted to the extent of dismissing (1) the breach of contract claim (second cause of action) against it, and (2) defendant Excalibur Group NA, LLC's cross-claim for contractual indemnification against it, and is otherwise denied; and it is further

ORDERED that the cross-motion of defendant Excalibur Group NA, LLC for summary judgment on its cross-claims for contribution and indemnification is denied.

As to Action No. 2, it is hereby

ORDERED that the motion (sequence number 002) of Excalibur Group NA, LLC for summary judgment dismissing the complaint as against it is denied; and it is further

ORDERED that the motion (sequence number 003) of defendant A Superior Service and Repair Co., Inc. for summary judgment dismissing the complaint and any and all cross-claims against it is granted to the extent of dismissing (1) the breach of contract claim (second cause of action) against it, and (2) defendant Excalibur Group NA, LLC's cross-claim for contractual

indemnification against it, and is otherwise denied; and it is further

ORDERED that the cross-motion of defendant Excalibur Group NA, LLC for summary judgment on its cross-claims for contribution and indemnification is denied.

Dated: April 16, 2015

ENTER:

A.J.S.C.

HON. ELLEN M. COIN