SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES **PART 59**
Justice

610 WEST REALTY, LLC,

Plaintiff,

- v -

RIVERVIEW WEST CONTRACTING, LLC, B&V CONTRACTING ENTERPRISES, INC., A-1 TESTING LABORATORIES, INC., and ACE INSPECTION and TESTING SERVICES, INC.,

Defendants.

Index No.: 155357/2013

Motion Date: 06/19/15

Motion Seq. No.: 001

The following papers, numbered 1 to 7 were read on this motion for summary judgment

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	No(s).	1
Notice of Cross Motion/Answering Affidavits - Exhibits	No(s).	2 3 4 5
Replying Affidavits - Exhibits	No(s).	6, 7

Cross-Motion: ☒ Yes ☐ No

The undisputed facts are as follows. Plaintiff 510 West Realty, Inc. is the sponsor (Sponsor) of a condominium project located at 603 West 148th Street, New York, New York, comprised of forty-six residential condominium units and also known as The Riverbridge Court Condominium (the Building). Plaintiff Sponsor hired defendant Riverview West Contracting, LLC, as its general contractor, to construct the Building (Riverview West). Riverview West entered into a subcontract agreement dated June 2, 2005 with defendant B&V Contracting Enterprises, Inc. (B&V) (Subcontract) to, among other work, furnish and install all

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

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

drywall, ceilings, soffits and fire "fire safing and smoke seals".

In the complaint, plaintiff Sponsor alleges, inter alia, that B&V installed ineffective and inadequate fire stopping and/or fire proofing, and that defendant B&V thereby breached its contract and was negligent, and as a result of such breach and negligence, plaintiff suffered damages in the form of having to carry out repair work to correct the defective and inadequate work, incurring significant additional cost.

Defendant B&V moves for summary judgment dismissing the complaint against it. It argues that the third cause of action for breach of contract fails to state a claim because there is no privity between it and plaintiff. It also argues that plaintiff untimely interposed its breach of contract claim beyond the applicable six year statute of limitations. It argues that to the extent that the complaint alleges negligence against it, such claims are insufficient since only economic damages are sought.

Plaintiff[1] and co-defendants Ace Inspection and Testing Services, Inc. and A-1 Testing Laboratories, Inc. oppose B&V's motion. Defendant Riverview West has not appeared or answered.

This court agrees with B&V that the complaint states no cause of action for negligence against such defendant since the

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[1]Plaintiff also cross moved to compel discovery on the part of defendant B&V, which cross motion was withdrawn pursuant to the discovery conference order of June 9, 2015.

damages that plaintiff seeks against it are only economic, i.e., the benefit of its bargain under the Subcontract documents in the form of additional costs plaintiff incurred in repairing B&V's allegedly inadequate and defective work, rather than damages for any injury to property. See Facilities Dev. Corp. v Miletta, 180 AD2d 97, 102-103 (1st Dept 1992).

However, as for breach of contract, the Subcontract contains the following provision:

> The subcontractor warrants to the **Owner**, Architect and Contractor that materials and equipment furnished under this Subcontract will be of good quality and new unless otherwise required or permitted by the Subcontract Documents, that the Work of this Subcontract will be free from defects not inherent in the quality required or permitted, and that the Work will conform to the requirements of the Subcontract Documents. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. (Emphasis supplied.)

"[T]he intent of the parties, as gleaned from the language of the [warranty] ...suggest[s] ...[plaintiff Sponsor], as intended beneficiar[y] of the [warranty]". See Edward J. Minskoff Equities, Inc. v Crystal Window & Door Systems, Inc., 92 AD3d 469 (1st Dept 2012). Such language is arguably at odds with the language cited by B&V's counsel appearing in § 1.3 of the Subcontract:

> The Subcontract documents shall not be construed to create a contractual relationship of any kind (1) between the Architect and the Subcontractor, (2) between the owner and the subcontractor, or (3) between any persons or entities other than the Contractor and Subcontractor.

No copy of the contract between plaintiff Sponsor and defendant Riverview West, which the Subcontract refers to as the Prime Contract, is appended to any of the papers, which may further inform the terms of the Subcontract. In any event, the ambiguity in the provisions of the Subcontract raises an issue of fact with respect to the intent of the parties thereunder.

As for the statute of limitations for breach of contract, the action is commenced upon filing of the summons and complaint (CPLR § 304), which took place on November 26, 2013. B&V is correct that "[a] cause of action against a contractor for defects in construction generally accrues upon completion of the actual physical work" Cabrini Med. Ctr. v Desina, 64 NY2d 1059, 1061 (1985). Thus, plaintiff has no cause of action if the work under the Subcontract was completed on or before November 27, 2007.

By affidavit, B&V's principal states that the work was substantially completed no later than June 2007. § 9.3 of the Subcontract states "The Work of this Subcontract shall be substantially completed not later than SEE ATTACHMENT 'C' and 100% completion; Substantial Completion date: 22 weeks from commencement". Exhibit A, B and D of the Subcontract are appended to the various copies of the Subcontract before the court, but no tab for Exhibit C is appended and the attached copy

of the timeline document is unenlightening. In its opposition papers, plaintiff Sponsor raises a further issue of fact as to when the actual physical work was completed, by appending a copy of a Certificate of Payment from B&V to defendant Riverside West dated August 9, 2007, marked "Final" Distribution. Included in that Certificate is a Continuation Sheet that states "Application Date: June 11, 2007, Period to: June 11, 2007 and Application No.: 50% Retainage". The record is bereft of an affidavit of any person with knowledge to lay a foundation for the admissibility or import of such Certificate of Payment and therefore, an issue of fact arises as to when the actual physical work was completed under the Subcontract. See Sabatino v Turf House, 76 AD2d 945, 946 (4th Dept 1980).

Based upon the foregoing, it is

ORDERED that the motion for summary judgment of the defendant B&V Contracting Enterprises, Inc. is granted only to the extent that the fourth cause of action asserting negligence against such defendant is dismissed, and the motion is otherwise denied; and it is further

ORDERED that the cross motion is withdrawn per discovery conference order.

This is the decision and order of the court.

Dated: July 31, 2015 ENTER:

DEBRA A. JAMES J.S.C.