SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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PAUL KLEINBERG, CAROL KLEINBERG, MASSY GHAUSI and DENISE DORN,

Plaintiffs, Index Number 109371-2009

-against-

516 WEST 19th LLC, THE J CONSTRUCTION COMPANY LLC, SLCE ARCHITECTS LLP, and THE BOARD OF MANAGERS OF THE WEST 19th STREET CONDOMINIUM,

Defendants.

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516 WEST 19th LLC,

Third-Party Plaintiff, Third-Party Index Number 591008-2009

-against-

I.M. ROBBINS, P.C.,

Third-Party Defendant.

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THE J CONSTRUCTION COMPANY LLC,

Second Third-Party Plaintiff, Third Party Index Number 590362-2010

-against-

INTERSTATE INDUSTRIAL CORP., FCI CONSULTING CORP., RCI PLUMBING CORP., INTERSTATE DRYWALL CORPORATION, ABCO PEERLESS SPRINKLER CORPORATION, ABSOLUTE ELECTRICAL CONTRACTING CORP., CUSTOM METAL CRAFTERS INC. a/k/a A&S WINDOW PRODUCTS LLC f/k/a CUSTOM METAL CRAFTERS & ERECTORS LLC, GARDEN STATE COMMERCIAL SERVICES, KNS BUILDING RESTORATION CORP., RONALD T. VASS CORP., GRACIANO CORPORATION, CITY ELEVATOR, JANSONS ASSOCIATES INC., DELTA TEST LABORATORIES INC., and JAM CONSULTANTS INC.,

Second Third-Party Defendants.

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RCI PLUMBING CORP.,

Third Third-Party Plaintiff,

-against-

P.A.C. HEATING INC. d/b/a PAC PLUMBING
HEATING & AIR,

Third-Party Defendants.
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JOAN A. MADDEN, J.:

Defendant SLCE Architects LLP ("SLCE") moves for summary judgment dismissing all remaining claims against it, including the cross claims asserted by defendant/second third-party plaintiffs 516 West 19th LLC and The Board of Managers of the 520 West 19th Street Condominium, third-party defendant I.M. Robbins, P.C. ("IMR") and second-third party defendants KNS Building Restoration Corp. ("KNS"), and Interstate Drywall Corporation (Interstate). The Sponsor and KNS oppose SLCE's motion.

Background

This action was commenced by the owners of two luxury penthouse units in a newly-constructed 11-story condominium building ("the Building") against 516 West 19th LLC, the sponsor and developer, and the Board of Managers of the condominium (together "the Sponsor"), J Construction Company, LLC ("J-Con"), the construction manager for the construction project ("the Project"), and SLCE, the Project's architect. The main action sought monetary damages on account of the alleged construction defects in plaintiff's penthouse units. J-Con commenced a second third-party action against its many subcontractors.

Construction on the Project commenced on or about May 31, 2006, and was substantially completed on or about August 21,

2008. After taking title to the penthouse units, plaintiffs began to perform gut renovations to their respective units. During the renovation and/or demolition of the units, plaintiffs allegedly discovered various defects, including substandard electrical and plumbing work, and that the roof was leaking. The roof was manufactured by The Johns Manville Company ("the JMC roof"). The offering plan provided not for the JMC roof, but for an Inverted Roof Membrane Assembly roof ("the IRMA roof").

By agreement dated November 24, 2009, the Sponsor and the plaintiffs settled their disputes, including those related to the design and construction conditions of the penthouse units ("the Settlement"). Under the Settlement, the Sponsor agreed to replace the JMC roof with an IRMA roof. The Sponsor subsequently settled with J-Con, which assigned its claims against the second third-party defendants/subcontractors (hereinafter "the subcontractors") to the Sponsor. After settling with plaintiffs and J-Con, the Sponsor continued to pursue claims against SLCE, and various subcontractors, including the roofing subcontractor, KNS, and against third-party defendant IMR.[1]

Discovery is complete, and SLCE now seeks summary judgment

[1]While this motion was pending, the Sponsor entered into stipulations with third party defendant IMR and second third party defendants Interstate and Custom Metalcrafters, a/k/a A&S Window Products LLC, in which the parties agreed to discontinue the claims asserted against each other with prejudice. See Document Nos. 583, 587, 588.

dismissing the Sponsor's third and eighth cross claims, for, respectively, breach of contract and contractual indemnification,[2] and any cross claim asserted by third party IMR and the subcontractors, including KNS, for contractual indemnification and common law indemnification and contribution.

Of relevance to this motion, SLCE entered into a contract with the Sponsor dated February 15, 2005, to provide architectural services in connection with the Project ("the SLCE Contract"). The SLCE Contract provides that "[SLCE] represents to [Sponsor] that it possesses the requisite skill and ability to discharge its responsibilities to the Project in a professional and efficient manner, and that it is familiar with what is required in connection with projects of the type and character of this Project."

Under the Agreement SLCE agreed, *inter alia*:

1. To respond to contractor requests for information based on the Construction Documents. § 2.6.1.5;

2. To design the Building in conformity with applicable laws, codes, and regulations. § 1.2.3.8;

3. To visit the Project site at regular, appropriate intervals.

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[2]In its decision and order dated January 24, 2012, the court granted SLCE's motion for summary judgment seeking dismissal of the Sponsor's cross claims to the extent of dismissing the fourth (breach of implied warranty), sixth (professional negligence) and ninth (contribution) cross claims.

§ 2.6.2.1;

4. To advise Sponsor of any work not in conformity with the Construction. § 2.6.2.2;

5. To reject work that did not conform to the Construction documents. § 2.6.2.4.

The SLCE Contract also included certain limitations on SLCE's obligations including, *inter alia*, that "[SLCE] shall be entitled to rely on the accuracy and completeness of services and information furnished by the Sponsor" (§ 1.2.3.9),"[SLCE]...shall not be responsible for acts or omissions of the Contractor [i.e. J-Con]" (§ 2.2.2) and "[SLCE] shall neither have control over or charge of, nor be responsible for, the construction means, methods, techniques, sequencing of the work..." (§ 2.6.2.1).

Under section 1.3.6.9 of the SLCE Contract, SLCE agreed "to the fullest extent permitted by law," to:

> defend, indemnify and hold Owner (i.e. "the Sponsor") and its construction lender, and their officers, directors, members, employees, shareholders and anyone who might be liable by, through or under Owner or its construction lender (collectively, "Indemnitees") harmless from any and all claims, damages, losses and expenses, however characterized (collectively, "Exposure"), including but not limited to attorneys' fees and disbursement, arising out of or resulting from Architect's (i.e. SLCE's)activities under the agreement provided, that such Exposure was caused, in whole or in part, by Architect or anyone for whose acts Architect legally is liable, regardless of whether or not the Exposure is caused in part by an Indemnitee.

(hereinafter "the Indemnity Provision"),

The SLCE Contract was modified and supplemented by letter from SLCE dated September 8, 2005, which was executed by a representative of SLCE and the Sponsor on September 8, 2005 ("the SLCE Letter"). The SLCE Letter provides that SLCE would prepare schematics, detailed drawings, final working drawings and specifications during various phases of the Project and would coordinate structural, electrical and mechanical engineering. In addition, the SLCE Letter excluded from SLCE's scope of work, *inter alia*, "Structural, Mechanical, Electrical, Plumbing and Civil Engineering...Supervision, observation or inspection of the work or visits to the site, except such visits as may be requested by the [Sponsor] for interpretation of plans and specifications....[3]" However, the SLCE Letter also provides that during the construction phase, SLCE was to "visit the site as required to clarify drawing content, and inspect field conditions and mock-ups."

SLCE's Motion

At issue on SLCE's motion is whether SLCE can be held liable for breach of contract, indemnity and/or contribution, based on five categories of alleged design defects related to the roof, the sidewalk, firestopping, HVAC placement, and electric wiring.

[3]The SLCE Letter also provided that the Sponsor was "to furnish and pay for Full Architect's Survey."

SLCE argues that the record demonstrates that its architectural services were consistent with accepted standards of architectural practice, and that it cannot be held liable for the alleged design defects based on the express limitations in the SLCE Contract, and the exclusions from its scope of work in the SLCE Letter. SLCE also argues that the provisions of Sponsor's contracts with J-Con and IMR and J-Con's trade contracts with the subcontractors demonstrate an intent to limit SLCE's responsibility with respect to the defects at issue.[4] SLCE argues that as it is not responsible for any of the alleged defects, the Sponsor's cross claim for contractual indemnification must be dismissed as the Indemnity Provision is only triggered in the event that the Sponsor's damages are "caused in whole, or in part, by [SLCE]."

As for the subcontractors' cross claims for contractual indemnification, including those asserted by KNS, and the claims asserted against SLCE by IMR (together "the third-party claims"),

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[4]In particular, SLCE notes that the J-Con Contract and the trade contracts, provide that SLCE does not have control over and is not in charge of "the construction means, methods, techniques and sequences of procedures" (J-Con Contract, § 4.4, Trade Contracts § 5.2)). SLCE also notes that in its letter agreement with the Sponsor, IMR agreed that its scope of work included furnishing "mechanical and electrical engineering services for electric, gas, water, sprinkler, storm and sanitary," and made IMR responsible for "[p]lans and specifications for Plumbing, Sprinkler, HVAC, Electrical, Standpipe and Fire Alarm Systems" and "Final inspection to ascertain systems comply with intent and of Plans and Specifications."

SLCE argues that they must be dismissed as neither the subcontractors nor IMR have a contract with SLCE.

KNS, the only party asserting third-party claims against SLCE opposing SLCE's motion, argues that there are issues of fact as to whether it is entitled to be indemnified by SLCE under the Indemnity Provision of its contract with the Sponsor based on KNS's status as a third-party beneficiary of the SLCE Contract, citing Capstone Enterprises of Port Chester v. Bd. Of Education, Irving Union Free School Dist, 106 AD3d 853, 855-856 (2d Dept 2013). In support of its position, KNS relies on language in the Indemnity Provision under which SLCE agreed to defend and indemnify not only the Sponsor and its construction lender, and their officers, directors, members, employees, shareholders but also "anyone who might be liable by, through or under Owner (here defined as the Sponsor) or its construction lender," and argues that SLCE is potentially obligated to indemnify KNS as a party who may be liable by, through, or under the Sponsor.

KNS's argument is unavailing. "One is an intended beneficiary if one's right to performance is appropriate to effectuate the intention of the parties to the contract and ... the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. Edge Management Consulting Inc. v. Blank, 25 AD3d 364, 368 (1st Dept), lv dismissed, 7 NY3d 864 (2006)(internal citations and

quotations omitted). There is no requirement that the non-party seeking status of a third-party beneficiary be named in the agreement's text as long as the surrounding circumstances evidences a clear intent to confer an immediate benefit on that non-party. Newin Corp. v. Hartford Acc. & Indem. Co., 37 NY2d 211, 219 (1975); see also Internationale Nederlanden (U.S.) Capital Corp v. Bankers Trust Co., 261 AD2d 117, 123 (1st Dept 1999). That being said, however, "the best evidence...of whether the contracting parties intended a benefit to accrue to a third party, can be ascertained by words of the contract itself." Alicea v. City of New York, 145 AD2d 315, 318 (1st Dept 1988).

Under this standard, the court finds that KNS is not a third-party beneficiary of the SLCE Contract. As noted by SLCE, section 1.3.6.4 of the SLCE Contract states: "Nothing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either the Owner (i.e. "The Sponsor") or the Architect (i.e. SLCE)." Nor do the circumstances evidence a clear intent to confer an immediate benefit on KNS or the other subcontractors, including based on the Indemnity Provision.

As for the language of the Indemity Provision on which KNS relies, the court finds that such language is insufficient to give rise to a contractual duty on the part of SLCE to indemnify KNS and/or the other subcontractors or IMR.

As the Court of Appeals has written:

> Words in a contract are to be construed to achieve the apparent purpose of the parties. Although the words might seem to admit of a larger sense, yet they should be restrained to the particular occasion and to the particular object which the parties had in view... This is particularly true with indemnity contracts. When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed ... The promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances.

Hooper Associates, Ltd v. AGS Computers, Inc., 74 NY2d 487, 491-492 (1989)(internal citations and quotations omitted).

Under these principles, SLCE's agreement to defend and indemnify the Sponsor and its construction lender and "anyone who might be liable by, through or under [the Sponsor] or its construction lender," cannot be construed to impose a duty on SLCE to indemnify KNS, which does not have a contractual or other relationship with the Sponsor that would make KNS liable by, through or under the Sponsor. In this connection, KNS was not retained by the Sponsor but by the Sponsor's construction manager's, J-Con, to perform roofing work. See e.g. Tonking v. Port Authority of New York and New Jersey, 3 NY3d 486 (2004)(indemnification clause in contract between Port Authority, as owner, and contractor was insufficiently clear to give rise to a duty by the contractor to indemnify company as an agent of the

owner); see also Trawally v. City of New York , 137 AD3d 492, 492 (1st Dept 2016)("the right to contractual indemnification depends upon specific language of the contract")

Moreover, KNS's reliance on Capstone Enterprises of Port Chester v. Bd. Of Education, Irving Union Free School Dist 106 AD3d 855 is misplaced. While in Capstone Enterprises supra, the Appellate Division, Second Department did find that issues of fact existed as to whether an architect was entitled to contractual indemnification from an HVAC contractor, in that case, unlike the facts here, there was no dispute that the indemnification provision inured to the benefit of the architect. In particular, in Capstone Enterprises supra, the indemnity clause, provided, *inter alia*, that the HVAC contractor "was obligated to indemnify the architect...from any claims, damages losses or expenses 'arising out of or resulting from performance of the Work..." Id. at 855.

As for any third-party claims for common law indemnification, including those asserted by KNS, these claims must be dismissed as the subcontractors and IMR have been sued for their own alleged wrongdoing. See e.g. Trump Village Section 3, Inc. V. New York State Hous. Fin. Corp., 307 AD2d 891, 895 (1st Dept), lv denied 1 NY3d 504 (2003)("a party who actually participates the wrongdoing can not received the benefit of the doctrine [of common law indemnity]").

With respect to any third-paty claims for common law contribution, including those asserted by KNS, such claims must be dismissed since contribution, which is codified under CPLR 1401[5], is not available when, as here, the action seeks "purely economic losses" arising from a breach of contract. See Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley, 71 NY2d 21, 28 (1987)(holding that"[t]he existence of some form of tort liability is a prerequisite to application of [CPLR 1401]."); Children's Corner Learning Center v. A. Miranda Constr. Corp., 64 AD3d 318, 323 (1st Dept 2009)(dismissing common law contribution claims against architect noting that when the underlying claim seeks purely economic damages).

Accordingly, the third-party claims asserted by KNS, the subcontractors and IMR for contractual and common law indemnification, and contribution must be dismissed.

The remaining issues concern SLCE's summary judgment motion seeking to dismiss the Sponsor's claims against it for breach of contract and contractual indemnification with respect to the

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[5]CPLR §1401 provides, in relevant part, that:

> two 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 whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought.

alleged five categories of design defects which are addressed below.

As the proponent of summary judgment, SLCE "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (citation omitted)'" Ayotte v Gervasio, 81 NY2d 1062, 1062 (1993); Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" Id at 853. Upon SLCE making such a showing, the burden shifts to the Sponsor, as the party opposing summary judgment, to present "evidentiary facts sufficient to raise triable issues of fact." Rinaldi v Holt, Rinehart & Winston, Inc., 42 NY2d 369, cert denied 434 US 969 (1977).

Here, as noted above, the underlying claim by the Sponsor against SLCE is for breach of contract, and "[t]he essential elements of [such a claim]... are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach." 143 Bergan Street LLC v. Ruderman, 144 AD3d 1002, 1003 (2d Dept 2016)(internal citations omitted). "[A] breach of contract action for professional services may be based on an implied promise to exercise due care in performing the services required by the contract." Ackerman v. Price

Waterhouse, 252 AD2d 179, 196 (1st Dept 1998). In support of such a claim against an architect, a party "may introduce evidence, including expert testimony, to demonstrate that the architect failed to use due care in the performance of its contract obligations or that the architect's performance fell short of the applicable professional standards." Brushton-Moira Cent. Sch. Dist. v. Fred H. Thomas Assocs.,P.C., 91 NY2d 256, 261 (1998)(internal citation omitted).

Roof

The Sponsor alleges that the JMC roof was defective and/or improperly installed causing water leaks in the penthouse units and elsewhere, and that SLCE's failure to abide by industry standard practices materially contributed to the failure of the roof.

SLCE argues that it is entitled to summary judgment dismissing the claims related to the roof as the record establishes, as a matter of law, that the choice of the JMC roof was approved by the Sponsor and J-Con and that, in any event, the JMC roof was an appropriate choice for the Building's roof, and that the leaks were not the result of a defective architectural design by SLCE but were caused by the means and methods of construction by J-Con and its subcontractors.

In support of its position, SLCE cites the deposition testimony of Allan Brot, on behalf of J-Con, and Keith Jacobson

("Jacobson"), on behalf of the Sponsor, that the design change of the roof from an IRMA roof to the JMC roof was approved and accepted, not only by SLCE, but by J-Con, and the Sponsor (Brot EBT at 63; Jacobson EBT at 43-44). SLCE also points to testimony from Jacobson and Anthony Ballato ("Ballato") of KNS, that the JMC roof, although less expensive, was an acceptable choice for a roof and was capable of keeping the Building watertight (Jacobson EBT at 224-225; Ballato EBT at 52).

With respect to allegations that the number and location of mechanical penetrations in the roof contributed to the leaks, SLCE maintains that the record shows that the decisions regarding the location of these penetrations were decisions made by the mechanical engineer, IMR, and J-Con, and not by SLCE. In support of its position, SLCE relies on the deposition testimony of a registered architect and partner in SLCE, Luigi Russo, who denies that SLCE designed the location of the mechanical equipment and testified that the location was restricted by zoning resolution and that the design was the job of IMR (Russo EBT at 45-46). SLCE also relies on the testimony of Mark Robbins, of IMR, that while SLCE was able to move a mechanical units a few inches in one direction or another, the mechanical engineer would be involved in a decision to take a unit from one side of the roof to the other side (Robbins EBT at 143).

SLCE also asserts that the record shows that "[t]here was a

consensus that design and layout of the roof was not the reason for the leaks. Rather it was poor coordination and policing of the trade contractors by J-Con that caused the leakage." In this connection, SLCE cites the deposition testimony of Ballato of KNS in which he confirmed that it was his opinion that it was possible to install a JMC roof that was watertight, even though there were a lot of mechanicals close together in a confined space (Ballato EBT at 258). SLCE also points to Ballato's testimony that the sequencing of work, which was controlled by J-Con, was not ideal since "all the subcontractors worked in unison" instead of in turn(Ballato EBT 242-243). SLCE also cites the deposition testimony of Ronald T. Vass, the HVAC contractor, that due to the lack of proper supervision by J-Con, that other contractors on the roof "stepped on" and "mutilate[d]" the HVAC work on the roof (Vass EBT at 72-74). Additionally, SLCE notes Robbins' testimony that it was the job of J-Con and the subcontractors "to ensure that the roof specified can accommodate a congested rooftop mechanical and other design" (Robbins EBT at 166-167).

In opposition, the Sponsor argues that SLCE is not entitled to summary judgment as its arguments that roof's defective design was not responsible for the roof leaks is not supported by an expert's opinion and that, instead, SLCE relies on the self serving testimony of its own employee, Russo. With respect to

evidence that the Sponsor and J-Con approved the JMC roof, the Sponsor maintains that as the architect, SLCE was responsible for approving the roof design and that, in any event, the approval of the roof by the Sponsor and J-Con does not eliminate issues of fact as to SLCE's liability for the roof's faulty design.

In support its opposition, the Sponsor submits the affidavit of Susanne Mackiw ("Mackiw"), a partner at Gilsnz Murray Steficek, LLP ("GMS") and an AIA certified architect registered in New York State. Mackiw was retained by the Sponsor in July 2009 to review roof installed at the Building, at which time she was informed that there were water and air leaks into the penthouse units below the main floor.

Mackiw opines that SLCE:

> should not have approved the built-up roof [i.e. the JMC roof][6] over the American Hydrotech IRMA roof,[7] which would have maximized the amount of

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[6]Mackiw states that "[a] built-up roof begins with the structural concrete slab, to which a vapor-barrier/temporary membrane is applied. This membrane is not the watertight element of the roof. Insulation is installed over this and cover board is added, then finished with the watertight membrane that is installed with either cold adhesive, hot-applied with bitumen, or, as in this case, a torch-applied (a torch is used to melt preinstalled bitumen on the back of the roofing sheet providing adhesion to the substrate). The watertight membrane of a built-up roof is thus at the very top of the assembly, providing the least amount of vertical height between the membrane and roof penetrations to allow for flashing."

[7]Mackiw describes the The American Hydrotech System as an "'inverted (insulated) roof membrane assembly' or IRMA roof, which is a protected roofing system where the watertight membrane is hot-applied directly onto the structural deck of the roof and

> vertical height between the waterproof membrane and any elements on the roof (e.g. HVAC units, ducts) for flashing because the membrane lies at the lowest point of the assembly. The IRMA roof would also have provided better waterproofing because it is installed as a hot-applied system, forming a complete bond with roof and the base of penetrations.

Mackiw Aff.¶ 5.

Mackiw states that she inspected the JMC roof on August 3, 7, and 18, 2009 to determine the cause of the leaks. She observed that the roof was a built-up roof and that upon her recommendation, the Sponsor retained a firm to perform an infrared scan of the roof which "confirmed that water had penetrated the roof in many locations" (Id ¶ 7) She also said that roof was "unable to pass a flood test to certify that it was water tight" (Id).

Mackiw opines that:

> SLCE's approval of the roof substitution without the necessary design modifications and the execution and choice of flashing utilized in the [JMC] roof contributed to the majority of the leaks that were experienced in the Plaintiffs' apartments.[8] The flashing details, as installed,

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then protected with drainage board, insulation, filter fabric, and pavers or stone ballast to protect it from foot traffic."

[8]With respect to the flashing used on the roof, Mackiw further opines that:

> The lack of flashing customization proved an especially poor choice here because the roof was rife with unusual flashing conditions. For example, mechanical equipment vibration isolators sat directly on the roof, there were low equipment

> were not customizable enough to the unusual conditions on the roof to adequately seal it from water penetration. SLCE could and should have selected different flashing designs and materials, in conformance with industry standard, if it wanted to assure that the [JMC] roof remain watertight.

(Id ¶11).

Mackiw also states that with respect to the flashing used that:

> penetration pockets at conduit and pipe penetrations are no longer generally considered an acceptable flashing installation in modern-day roofing systems of this type, precisely because they often leak and are prone to requiring extensive maintenance. SLCE should have reviewed the available flashing options and chosen a different method, such as a resinous product that could work among the unusual roof penetrations and vertical-to-horizontal roof junctures.

(Id ¶ 12)

She further opines that "SLCE should have reviewed shop drawings to the roof at least the flashing details, with the needed customizable flashing types, to guide the roofers in preparing the flashing ..[and that] [w]ithout such guidance, the the flashing decisions were left up to the roofer, with no or little oversight from SLCE" (Id ¶ 15). She opines that "[o]n any project these decisions should be made by the architect...[and

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> curbs, extremely narrow clearances between adjacent equipment curbs and/or bulkhead walls, access stair stringer penetrations and ductwork supports with unusual configurations. SLCE should have taken these into consideration when SLCE approved the roof substitution.

that] [o]n this project, it was even more important...given the uniquely difficult nature of the combination of roof penetrations and roof type" (Id).

Mackiw also asserts that SLCE's position that it was not responsible for inspecting the roof is without merit "as industry standards require that an architect should inspect a roof before confirming its acceptance to the owner" (Id ¶ 16). She also rejects Ballato's statement that there was no functional difference between the JMC roof and the IRMA roof, and that insofar as there is evidence that either roof could be made watertight, she opines "SLCE should have chosen the IRMA roof, as it would have made sealing the roof easier; but, if they chose to use a [JMC] roof, [SLCE] should have used a different flashing design (e.g. liquid resin) that would have accounted for the difficulties of the roof and roof penetration configurations" (Id ¶ 17).

As for Robbins' testimony that it was the responsibility of J-Con and its subcontractors to ensure the room could accommodate the congested rooftop mechanicals, Mackiw disagrees stating that "SLCE should have accounted for how crowding the mechanical and other roof elements may affect the permeability of the roof membrane to water in their design choice for the roof which includes their approval of the roof system substitution" (Id ¶ 18).

In reply, SLCE argues that it has demonstrated that the JMC roof design was consistent with the architectural standard of care. SLCE further argues that the record shows that its original design called for an IRMA roof, but that the Sponsor approved the change to a JMC to save money. Moreover, SLCE asserts that contrary to the Sponsor's argument, the court should credit the testimony of its employee, Russo, who is a registered architect.[9] In addition, SLCE urges the court to reject Mackiw's opinion that the roof leaks were caused by the defective design of the roof, asserting that this opinion contradicts her opinion in an earlier affidavit, dated February 16, 2011 ("the February 2011 affidavit") that the leaks were caused by the roof's improper installation.

Assuming *arguendo* that SLCE has made a prima facie showing that it complied with its contractual obligations, including its duty to exercise due care in providing architectural services, the Sponsor has controverted this showing based on Mackiw affidavit. In particular, triable issues of fact are raised by Mackiw's opinion that SLCE did not act in conformity with architectural standards, in approving the JMC roof over the IRMA roof and/or in failing to make appropriate design modifications to the JMC roof, including a different flashing design, and in

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[9]Russo also submits an affidavit in support of the motion; however, he does not address the roof in his affidavit.

failing to inspect the roof.[10] Moreover, evidence that the acts and omissions of J-Con, and the various subcontractors in connection with installing the roof may have contributed to the defects in the roof does not eliminate SLCE's potential liability for SLCE alleged role in the roof's faulty design as described by Mackiw.

Furthermore, contrary to SLCE's argument, that Mackiw's February 2011 affidavit focused on the roof's improper installation as opposed to its faulty design does not provide a basis for rejecting Mackiw's opinion. Notably, SLCE's argument ignores that in Mackiw's second affidavit dated April 19, 2011, Mackiw opined that the leaks were caused by a combination of the design and construction defects, including installation of the roof, and that in her most recent affidavit submitted in opposition to this motion, Mackiw confirmed that this was her opinion.

Accordingly, as the Sponsor as raised triable issues of fact as to whether SLCE was responsible, in whole or in part, for the leaking roof, summary judgment with respect to Sponsor's claims for breach of contract and for contractual indemnification

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[10]With respect to allegations that SLCE failed to inspect the roof, the court notes that in its decision and order dated January 24, 2012, the court rejected SLCE's arguments that the SLCE Letter, which states that SLCE's services would not include "observation or inspection" of the Project work meant that SLCE was not responsible for inspecting the work.

related to the alleged roof defects is denied.

Firestopping

The Sponsor alleges "inadequate firestopping, especially at the plumbing and duct penetrations through concrete" as well as defective constructions at two risers, including for a refuse chute, and "failing to have the requisite 2 hour rate enclosure." (Doc 108-3 ¶'s 45(g)(h)(i) and (j)).

With respect to the firestopping,[11] SLCE argues that the evidence shows that its drawings and specifications for firestopping materials to seal penetration and enclose risers were fully code compliant, and that it was the responsibility of the trade contractors to install the firestopping to code, and of ABCO Peerless Sprinkler Corporation ("ABCO") to ensure that the firestopping work was code compliant (See Russo EBT, at 135-136; Timothy Bowe, of ABCO, EBT at 37, 57-58).

As to the second category of firestopping, drywalls and partitions, SLCE points to evidence that the installation of this type firestopping was the responsibility of defendant Interstate, the carpentry contractor, including the deposition testimony of Darrell Vernaci ("Vernaci") of Interstate that his company failed to put a third layer of drywall on the trash chute as required by the drawings which was later remedied by it (Vernaci EBT at 175-

[11]According to Russo's deposition testimony firestopping refers to the putty or mortar around slab penetrations, and the fire rating of gypsum board (Russo EBT at 135-139).

176). SLCE also points to evidence that the inspection of the firestopping was the responsibility of the Sponsor's controlled inspector, defendant Delta Testing Laboratory (Russo EBT at 137-138; Vernaci at 228).

In opposition, the Sponsor submits the affidavit of Todd Poisson ("Poisson"), a partner at BKSK Architects, LLP and an AIA certified architect registered in the State of New York. Poisson acknowledges that SLCE was not responsible "for the failure to seal with fire-rated material any penetration in a fire-rated shaft wall [which] is the responsibility of a contractor in the field" (Poisson Aff ¶ 26). Poisson states, however, that as the architect, SLCE was obligated to "correctly design shaft walls for risers and the trash chutes" (Id ¶ 26). In this connection, he opines that:

> The enclosures surrounding the Building's trash chute and some of the risers were not designed in accordance with the New York City Department of Buildings ("DOB") Code provisions that governed the Building. For one, the building's trash chute was required to be a masonry chute but was instead constructed of gypsum board. For another, SLCE failed to designate the partition type-and therefore the fire rating-for several shafts on the architectural drawings for the majority of the floors of the building.

(Id ¶ 25).

With respect to the use of gypsum board for trash chutes, Poisson states that under New York City's 1968 Building Code (hereinafter "the '68 Code"),which governed the Building's construction, refuse chutes are to be "constructed with an

enclosure of brick masonry at least 8 inches in thickness or of reinforced concrete at east six inches in thickness, except otherwise approved by the board" (Id ¶ 27) He further states that masonry of this thickness has "a two-hour rating, meaning they must be able to withstand a fire for two hours before giving way" (Id). He further states that "the '68 Code does not refer to gypsum wallboard partitions-walls made of board" (Id). He points to SLCE's original design which he asserts "shows a two-hour shaft wall utilizing gypsum wallboard, which is how the refuse chute enclosures were actually constructed[12]" (Id ¶ 28).

Next, Poisson opines as to a separate, but related, failure by SLCE, in that "certain drawings did not identify the level of fire-rating required by the '68 Code at certain risers" (Id ¶ 31). He states that "without these wall tags, the [J-Con] and the drywall subcontractor would not have had sufficient information to determine the type of partition these walls called for or what ratings the enclosures needed [and that] SLCE should have included these wall tags to ensure the risers complied with the code" (Id). As for a 2009 letter issued by SLCE stating that "it is our opinion that all rated shaft walls have been built

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[12]Poisson also states that "the original design was later designed to reflect a three-hour gypsum wallboard design, which is particularly confusing [since] the gypsum wallboard is not an acceptable material under the '68 Code [and] on the drawings the refuse chute still has a notation of '2h' [and] the revision was done in March 2007, after the construction documents were 100% complete" (Id ¶ 29).

according to our approved plans and satisfy all required fire ratings established by the New York City building code," Poisson states that "the 'opinion' given in this letter is plainly erroneous and in my view, an architect should not issue such a letter without ensuring its accuracy at a site inspection" (Id ¶32).

With respect to the firestopping, SLCE is entitled to summary judgment regarding the alleged defects at the plumbing and duct penetrations, which the Sponsor acknowledges are the responsibility of the subcontractors and not SLCE. In contrast, Sponsor has raised issues of fact as to the whether SLCE may be held liable for its failure to design the trash chutes with materials allegedly required by the applicable code, and identify the fire ratings of certain risers in drawings and by wall tags

As for SLCE's argument that is not responsible for any defects in the risers as drywall contractor, Interstate, has conceded liability for these defects, such argument is unavailing in light of evidence that the defects were related to SLCE's failure to provide the subcontractors, including Interstate, sufficient information to identify the fire ratings of certain risers.

Accordingly, with respect to the alleged firestopping defects, SLCE is granted summary judgment only as to the alleged plumbing and duct penetration defects.

Sidewalk

The Sponsor alleges that SLCE improperly designed the Building's sidewalk, which under Department of Transportation ("DOT") regulation must match the height of the adjacent sidewalk. Specifically, it is alleged that rather than meeting the adjacent sidewalk at grade, there is a six-inch drop between the Building's sidewalk and the adjacent sidewalk.

SLCE moves for summary judgment dismissing the claims based on this alleged defect, arguing that the improper sidewalk measurements were the result of a survey commissioned by the Sponsor. Moreover, SLCE argues that pursuant to the SLCE Contract, and in particular Section 1.2.3.9,[13] SLCE was entitled to rely on the accuracy of the information furnished by the Sponsor and was not required to guarantee the grades and elevations. In addition, SLCE points to the SLCE Letter which excludes from SLCE's services "supervision, observation, or inspection of the work or visits to the site, except for such visits as may be requested by the Owner for interpretations of plans and specifications." SLCE further argues that under J-Con's contract with the Sponsor, J-Con was obligated to verify

[13]Section 1.2.3.9 of the SLCE Contract states that: "The Architect shall be entitled to rely on the accuracy and completeness of services and information furnished by the [Sponsor] absent actual knowledge or prior experience to the contrary."

the measurements[14] but failed to do so, or to request that SLCE redesign the sidewalk to match the elevation of the adjacent property.

In support of the motion with respect to the sidewalk defects, SLCE submits Russo's affidavit. Russo states that he is a registered architect, and has worked at SLCE since 1992, becoming a partner in 2001, and worked on the Project and thus has personal knowledge of the relevant facts.

Russo states:

> SLCE's obligation was to design the sidewalk with elevations to match the Architectural Survey by Montrose Surveying Co, LLP ("Montrose") dated February 7, 2005. During my deposition, I pointed out that the sidewalk elevations on SLCE drawing A-102 match the Montrose survey....After construction of the sidewalk, it was discovered that the Montrose survey contained errors. As SLCE's contract expressly excludes site inspections, SLCE was not responsible for verifying measurements in the Montrose survey. Rather it was [J Con's] contractual responsibility to take field measurements, verify field conditions and compare them with the

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[14]In this connection, SLCE points to the Section 2.5.7.3 of the J Con Contract which provides that "[J Con] shall take field measurements and verify field conditions and shall carefully compare such field measurements and conditions and other information known to [J Con] with the Contract Documents before commencing activities." Section 2.5.7.3.1 states, "[t]he exactness of grades, elevations, dimensions or locations given on any Plans issued by [SLCE], or the work installed by other contractors, is not guaranteed by [SLCE] or Sponsor." Section 2.5.7.3.2 further states that "[J Con] shall, therefore, satisfy itself as to the accuracy of all grades, elevations, dimensions and locations. In all cases of interconnection of its Work with existing or other work, it shall verify at the site all dimensions relating to such existing or other work."

> Contract Documents before commencing work. Therefore, J Con was responsible for identifying the error in the Montrose survey.

(Russo Aff ¶'s 5-7).

As for his deposition testimony that the sidewalk in front of the property must align with the elevation of the adjacent property, Russo states that "SLCE's design responsibility ends at the property line [and that] [i]f J Con became aware that the adjacent property was under construction and there was a discrepancy in the sidewalk elevations, it was J-Con's obligation to issue a request for information ("RFI") regarding such elevations. No such RFI was ever received by SLCE" (Id ¶ 8).

In opposition, the Sponsor argues that issues of fact exist as to SLCE's liability for the improperly constructed sidewalk based on Poisson's opinion that, *inter alia*, it is industry standard and incumbent on the architect to visit the site and view adjacent conditions for various reasons, including to determine how to match sidewalk elevations at property line (Poisson Aff ¶ 11). Poisson opines that SLCE had "at least three opportunities to determine that an error existed in the sidewalk elevations, and ... that a competent architect exercising the standard of care within the industry would have therefore caught this error before the installation of a defective sidewalk" (Id ¶ 8).

According to Poisson, the first opportunity to identify the

error was in 2005, when, if SLCE had made a site visit, it would have observed that the survey did not reflect that the adjacent building had a ramp at the property line shared with the Building to accommodate the entrance to a parking garage. Instead, he states that survey "ambiguously notes a discrepancy of nearly a foot in elevation between the Building and the adjacent lot" (Id ¶ 10). He states that had SLCE visited the site "the error would have been immediately obvious... [since] an elevation discrepancy of this magnitude (of nearly a foot) would be highly unusual and should have prompted SLCE to seek further clarification from the surveyor" (Id ¶'s 10, 11). Poisson states that the record shows that SLCE did not seek the clarification but, "[i]nstead it appears that SLCE simply designed the Building's sidewalk to align with the top of the adjacent lot's garage entrance sidewalk ramp, which was the higher of two adjacent elevations reflected on the survey. This created a relatively steep cross slope which would not have been ideal even if the parking garage remained intact" (Id ¶ 12).

The second opportunity for SLCE to recognize the survey error and to correct the sidewalk, according to Poisson, occurred when SLCE learned that the adjacent building was being demolished before the sidewalk was constructed. Poisson opines that "an architect exercising due care would include the meeting of the sidewalks in his or her considerations of potential design impact

when contemplating demolition of an adjacent building" (Id ¶ 14).

The third opportunity came when in December 2007 and February 2008, "SLCE undertook an invasive restructuring of the Building's ground floor to address flood plain issues raised by DOB [and] conducted a facade stone base shop drawing review" (Id ¶15). According to Poisson, "each of these exercises would have provided SLCE with an ideal opportunity to consider whether the sidewalk as designed would properly align with the possibly altered sidewalk at the neighboring building" (Id). However, "SLCE does not appear to have requested or obtained the neighboring building's plans for replacing the garage ramp that existed at the time of the Building's original design" (Id ¶ 16). As a result, "SLCE's lower elevation design for the sidewalk ...still created an abrupt step in the sidewalk...[and] the sidewalk had to be partially removed, redesigned and relaid to comply with DOT regulations and match the height of the adjacent sidewalk" (Id ¶'s 17, 18).

Assuming *arguendo* that SLCE made a prima facie showing entitling it to summary judgment on the issue of its liability for the alleged sidewalk defect, Poisson affidavit is sufficient to controvert this showing. including his opinion that under the circumstances, a competent architect exercising the standard of care within the industry would have been alerted of the error and, as discussed below, visited the site, before the

installation of a defective sidewalk.

As for SLCE's reliance on a provision of the SLCE Letter that SLCE's services do not include "[s]upervision, observation or inspection of the work or visits to the site, except such visits as may be requested by the Owner for the purposes of interpretation of plans and specification," significantly, the SLCE Letter also provides that during the construction phase, SLCE was to "visit the site as required to clarify drawing content, and inspect field conditions and mock-ups.[15]" At a minimum, an issue of fact exists as to whether the requirement that SLCE visit the site to inspect field conditions and mock-ups, included an obligation to ensure that the sidewalk was at grade with the adjacent property. In particular, once the property adjacent to the Building was demolished, at the very least, issues exist as to whether SLCE's reliance on the survey done prior to such demolition was justified.

Next, contrary to SLCE's position, the section of the SLCE Contract providing, *inter alia*, that SLCE was entitled to rely on the accuracy of information furnished by the Sponsor absent

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[15]In addition, although Section 2.6.2.1 of the SLCE Contract states that SLCE "would not be required to make exhaustive on-site inspections to verify the quality of the Work ...[nor] be responsible for the construction, means, methods... in connection with the Work," the section also provides that SLCE is required "to visit the site at intervals appropriate to the stage of the Contractor's operations... keep the Sponsor informed of the progress and quality of the Work,...[and] guard the Sponsor against defects and deficiencies in the Work."

actual knowledge or prior experience to the contrary, does not resolve the issue as to SLCE's responsibility for any sidewalk defect based on its reliance on the survey provided by the Sponsor. As discussed above, the record and Poisson's affidavit raise factual questions as to whether SLCE knew or should have known that the survey was inaccurate under the circumstances, including the existence of a ramp to a parking garage adjacent to the sidewalk at the time of the survey, and the subsequent demolition of the building adjacent to the sidewalk prior to the sidewalk's construction.

Accordingly, SLCE's summary judgment motion is denied with respect to alleged defects in the sidewalk.

HVAC Access Panels

SLCE argues that with respect to any defects related to the HVAC Access panels, it is not at fault as its plans provided the exact location and dimensions of access panels for HVAC units in the apartments to be verified in the field, that the record shows that this practice is acceptable and standard in the industry and that the defective installation of the panels was solely the fault of J- Con. In support of its position that SLCE followed standard procedure in allowing the contractor to determine the location of the HVAC panels, SLCE relies on the deposition testimony of three witnesses. First, it cites Russo's deposition testimony that the exact location of HVAC access panels have to

be verified with the contractor as "[u]sually in coordination, equipment is moved around and, therefore, the access panel moved with them" (Russo EBT at 162-163). SLCE also cites Russo's testimony that inclusion of a note on the drawings, as was done in this case, for the contractor to verify locations of the access panels is warranted as access panels usually need some modification (Id at 159-160).

SLCE also refers to the deposition testimony of Mr. Robbins of IMR and Mr. Vernanci of Interstate that the architect does not always design the location of the access panels and that sometimes the determination is made by the contractor.[16]

In opposition, the Sponsor relies on the Poisson's affidavit in which he opines that "[t]he Building's HVAC panels as designed are in the wrong location, and are too small to allow service people access to the HVAC units. While not strictly required by the '68 Code, the best practice would be for the architect's design documents to show access location for HVAC panels to avoid confusion" (Poisson Aff. ¶ 33).

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[16] Specifically, Mr. Robbins testified that "[i]t's done both ways. In other words, if you have the location of the units like you do on [floors] three to eight, then you can show the access panels; but if the locations aren't set ... then sometimes the contractor has to locate them" (Robbins EBT at 124). Mr. Varnanci testified that "[s]ometimes we get a drawing with access door locations, which we prefer, but if there's no drawing that's generated, then we look for the access tags that are hanging, and it's coordinated through the general contractor" (Vernanci EBT at 162-163).

Poisson also states that "SLCE failed to make any HVAC access panels on their design documents for the Building; rather, when [J-Con] later raised certain questions regarding proper access placement, SLCE responded directly onto the duct shop drawings ...[which] ..were rather limited in utility ...because the primary access sought by an HVAC service persons is to the filters, and the filter would often be on the wrong side of the HVAC units for SLCE's notations to be of any use" (Id ¶ 34). He opines that "SLCE inadequately responded to [J-Con's] request for access detail, because SLCE had been provided with the HVAC units' submittal... which clearly noted the units' access panels and access requirements [and that]...[i]n such a case, it is the architect's responsibility to work with [J-Con] to resolve the HVAC access issue" (¶ 35).

In reply, SLCE argues that it is entitled to summary judgment as the deposition testimony establishes showing the access panels on the drawings is not the standard of care, nor is it required to comply with the '68 Code. In addition, SLCE argues that Poisson's affidavit is insufficient to raise a triable issue of fact for the purposes of summary judgment as his "opinion as to what constitutes the best practice, as oppose to what constitutes the accepted standard is irrelevant."

As argued by SLCE, the Sponsor has failed to raise an issue of fact as to SLCE's position that accepted standards of

architectural practice do not require that the drawings include HVAC access panels. However, as discussed above, the inquiry here is whether SLCE, as an architect, failed to exercise due care in performance of its contractual duties.[17] See Brushton-Moira Cent. Sch. Dist. v. Fred H. Thomas Assocs., P.C., 91 NY2d at 261. Here, the record raises issues of fact as to whether SLCE exercised due care in coordinating with J- Con to resolve the HVAC access issue. Accordingly, SLCE's motion for summary judgment is denied with respect to alleged defects related to the HVAC access panels.

Electrical Wiring

With respect to electrical wiring, the Sponsor alleges, that it was defective with respect to the oven wiring in the penthouse units which required a higher amperage, and the armored conduit for electrical cables in apartment floors which were three-eights of an inch instead of half an inch as required by IMR specifications.

SLCE argues that it is entitled to summary judgment as it had no role in the electrical wiring, which was designed by mechanical engineer, IMR, and installed by the electrical contractor, Absolute Electrical. In support of its position,

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[17]In this regard SLCE's reliance on Talon Air Services LLC v. CMA Design Studio, P.C., 86 AD3d 511, 515 (1st Dept 2011) is misplaced as that case involved a professional malpractice against architectural firm, as opposed to breach of contract claim, which is at issue here.

SLCE points to Russo's testimony that SLCE never received oven cut sheets (Russo EBT 102-103), and had no role in determining amperage, and that this determination was IMR's responsibility (Id at 140). In addition, SLCE points out the SLCE Letter specifically excludes electrical engineering from its scope of its services.

With respect to the oven wiring, SLCE relies on the testimony of Absolute Electric's representative Carmine Ricciardi that Absolute Electric's foreman looked at the appliances to determine the wiring, and that when the larger ovens were installed in the penthouse the electrician "wired them without paying attention" (Ricciardi EBT at 55).

As for the size of the conduit, SLCE points to the testimony of Robbins and David Troche that Absolute Electric, the electrical contractor, was responsible for using a three-eight inch conduit, as opposed to a one-half inch conduit required by IMR's specifications (Robbins EBT at 77; Troche EBT at 111-112), and to Russo's testimony that SLCE had no role in selecting the type or size of conduit (Russo EBT at 133-135).

In opposition, the Sponsor argues that SLCE failed to coordinate with the mechanical engineering as required under the contract documents, which resulted in the faulty oven wiring. In particular, the Sponsor refers to the provision of the SLCE Contract under which SLCE agreed to "fully and timely cooperate

and coordinate its services with all other Separate Design Professionals (section 1.2.3.10), and the provision of the SLCE Letter under which SLCE agreed provide "[c]oordination of structural, electrical and mechanical engineering."

In support of its position, Sponsor relies on Poisson's affidavit in which Poisson states that in the penthouse units the original ovens were switched with larger ovens which required a change from 17-amp wiring to 33-amp wiring. Poisson points to a "Finalized Appliance Schedule," which was sent to IMR and copied to two representatives of SLCE, and reflects that the ovens on the higher floor required the higher, 33-amp, wiring. He also points to minutes of a design team meeting from 2006 requiring SLCE to follow up with respect to the overall amperage formulas in the units.

Poisson opines that although the record shows that representatives from IMR and SLCE received the Finalize Appliance Schedule, "SLCE, as architect, was responsible for coordinating the input from the various designers [and that]...it was squarely SLCE's job to ask whether any electric changes were needed as a result of a new appliance schedule. Instead, the Building was constructed with lower amperage wiring, which created a hazardous condition when the ovens were installed in each of the units" (Poisson Aff. ¶ 24).

The Sponsor also points to deposition testimony of Alan Brot

of J-Con and Mr. Troche of IMR that it was SLCE's job to coordinate the design professionals (Brot EBT at 24-25), (Troche EBT at 61).

In reply, SLCE argues that since it is not responsible under the SLCE Letter for electrical engineering, it cannot be held liable for the oven wiring issue. SLCE also argues that the Sponsor does not raise an issue of fact in this regard as the record, including Russo's testimony, establishes that SLCE had no input in the amperage that was specified by the apartments, and was not required to review the change in model oven to determine if amperage changed.

Based on the record, SLCE is entitled to summary judgment on the issue of the size of the armored conduit for electrical wires, since the Sponsor does not submit any evidence to controvert SLCE's prima facie entitlement with respect to this issue. In contrast, with respect to the electrical wiring for the ovens, the record is sufficient to raise an issue of fact as to whether SLCE breached its contractual obligations by failing to coordinate the electrical engineering work, and whether this failure caused or contributed to the defective oven wiring.

Conclusion

In view of the above, it is

ORDERED that SLCE's motion for summary judgment is granted to the extent of (i)dismissing all claims/cross claims asserted

against SLCE by the second-third party defendants, including KNS, and/or by third-party defendant IMR; (ii) dismissing those parts of the Sponsor's cross claims against SLCE based on allegations of (a) inadequate firestopping insofar as such allegations relate to alleged defects at the plumbing and duct penetrations, (b) improper placement of HVAC panels insofar as such allegations arise out of SLCE's purported failure to include location of HVAC panels on drawings, and (c) defective electrical wiring insofar as such allegations relate to the size of the armored conduit; and it is further

ORDERED that SLCE's motion is otherwise denied.

As Justice Margaret Chan is now assigned to this action, the remaining parties shall contact her chambers to schedule a pre-trial conference.

DATED: July 3 ,2018

J.S.C.

HON. JOAN A. MADDEN
J.S.C.