SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 58

R&R THIRD PROPERTIES, LLC, ROSENBAUM, ROSENFELD & SONNENBLICK, LLP, and COMPUTERIZED DIAGNOSTIC SCANNING ASSOCIATES, PC,

Plaintiffs,

- against -

GREATER NEW YORK MUTUAL INSURANCE COMPANY, FEDERAL INSURANCE COMPANY, TRAVELERS INSURANCE COMPANY OF CONNECTICUT and THE HARTFORD STEAM BOILER INSPECTION AND INSURANCE COMPANY,

Defendants.

DECISION AND ORDER

Action No. 1

Index No. 651377/2013

ROSENBAUM, ROSENFELD & SONNENBLICK, LLP, R&R PROPERTIES LLC AND COMPUTERIZED DIAGNOSTIC SCANNING ASSOCIATES, PC,

Plaintiffs,

- against -

EXCALIBUR GROUP NA, LLC, A SUPERIOR SERVICE AND REPAIR CO. INC., HOME SYSTEMS ENGINEERING, INC., PHILIPS HEALTHCARE, PHILIPS MEDICAL SYSTEMS NORTH AMERICA COMPANY, PHILIPS ELECTRONICS NORTH AMERICA CORPORATION, PHILIPS MEDICAL SYSTEMS NORTH AMERICA, INC., PHILIPS HEALTHCARE INFORMATICS, INC. and ESTATE OF MERLE H. EISENSTEIN,

Defendants.

Action No. 2

Index No. 150083/2014

DAVID B. COHEN, J.:

These actions stem from two flooding events that occurred on April 18, 2011 and April 23, 2011, at 1421 Third Avenue, New York, New York, which caused extensive damage to property owned by plaintiffs R&R Third Properties LLC (R&R), Rosenbaum, Rosenfeld & Sonnenblick,

LLP (RRS), and Computerized Diagnostic Scanning Associates, PC (CDSA) (collectively, plaintiffs).

In motion sequence number 001 in Action No. 1, defendant Federal Insurance Company (Federal) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint, or, in the alternative, for summary judgment dismissing plaintiffs' demands for consequential damages and business interruption losses, which were asserted for the first time in a supplemental response to interrogatories dated February 7, 2018.

In motion sequence number 004 in Action No. 2, defendants Philips Healthcare, Philips Medical Systems North America Company, Philips Electronics North America Corporation, Philips Medical Systems North America, Inc., and Philips Healthcare Informatics, Inc. (collectively, Philips) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and the cross claim asserted against them by defendant Excalibur Group NA, LLC (Excalibur), or, in the alternative, for an order, pursuant to CPLR 602 (a), joining the action for trial with Action No. 1.

Motion sequence number 001 in Action No. 1 and motion sequence number 004 in Action No. 2 are consolidated for disposition herein as the motions involve a common nucleus of facts inasmuch as the court (Mills, J.) consolidated the two actions for "motion practice"[1] (NY St Cts Elec Filing [NYSCEF] Doc No. 82, affirmation of Federal's counsel, exhibit 59 at 2).

BACKGROUND

A. The Parties

R&R is the owner of the building where RRS, in which Drs. Alfred Rosenbaum, Stanley Rosenfeld (Rosenfeld), and Emily Sonnenblick were partners, and CDSA were tenants on the first,

[1] Because the parties rely on many of the same documents, for purposes of this decision, the court shall refer primarily to the exhibits submitted on Federal's motion, unless stated otherwise.

second and third floors of the building (the Premises) (NYSCEF Doc No. 128 in Action No. 2, affirmation of Philips' counsel, exhibit A [Rosenfeld 10/17/13 tr] at 12 and 48; NYSCEF Doc No. 79, affirmation of Federal's counsel, exhibit 56 [amended complaint in Action No. 1], ¶¶ 12-16; NYSCEF Doc No. 81, affirmation of Federal's counsel, exhibit 58 [complaint in Action No. 2], ¶¶ 14-17). RRS operates a radiology practice at the Premises (NYSCEF Doc No. 94, affirmation of Federal's counsel, exhibit 71 [Rosenfeld 5/24/16 tr] at 12). CDSA performs the computerized scans and billed for those services (*id.* at 11; NYSCEF Doc No. 95, affirmation of Federal's counsel, exhibit 72 [Rosenfeld 8/25/16 tr] at 88).

Philips manufactures, sells and services medical equipment, including MRI and PET/CT scanners. Philips was involved in renovating the Premises to accommodate its medical equipment (NYSCEF Doc No. 81, ¶¶ 20 and 40).

Philips contracted with Excalibur to renovate the Premises (NYSCEF Doc No. 81, ¶ 21). Excalibur retained defendants Estate of Merle H. Eisenstein (Eisenstein) as the architect, Home Systems Engineering, Inc. (Home Systems) as the engineer, and A Superior Service and Repair Co., Inc. (Superior) as the plumber for the renovation work (NYSCEF Doc No. 81, ¶¶ 43-55).

Defendant Greater New York Mutual Insurance Company (GNY) issued insurance policy number 113M92953 to R&R, effective May 15, 2010 to May 5, 2011 (NYSCEF Doc No. 79, ¶ 8).

Federal issued insurance policy number 0661-95-87 EUC (the Federal Policy) to RRS, in effect from January 23, 2011 through January 23, 2012 (NYSCEF Doc No. 80, affirmation of Federal's counsel, exhibit 57 [Federal's answer], ¶ 9; NYSCEF Doc No. 25, affirmation of Federal's counsel, exhibit 2 [the Federal Policy] at 29).

Defendant Travelers Insurance Company of Connecticut (Travelers) issued insurance policy number I-680-3345W05A-TCT-11 to RRS, "Rosetta Radiology" and CDSA in effect from

January 11, 2011 through January 11, 2012 (NYSCEF Doc No. 79, ¶ 10). Travelers' policy provided coverage for actual loss of business income for 12 consecutive months (NYSCEF Doc No. 87, affirmation of Federal's counsel, exhibit 64 at 1).

Defendant The Hartford Steam Boiler Inspection and Insurance Company (Hartford) issued insurance policy number FBP6200087 to RRS and CDSA in effect from December 1, 2010 to December 1, 2011 (NYSCEF Doc No. 79, ¶ 11). Hartford's policy provided a $2.5 million limit of liability for loss of business income and extra expense, a $100,000 limit for service interruption, and a $25,000 limit for loss of contingent business income (NYSCEF Doc No. 90, affirmation of Federal's counsel, exhibit 67 at 1).

B. The Lease of the Scanner

Rosenfeld testified that in 2006, RRS sought to replace the existing imaging equipment at the Premises and reached out to several equipment vendors, including Philips (Rosenfeld 10/17/13 tr at 54-55). He testified that RRS elected to proceed with Philips, in part, because "Philips was a turnkey operation, which means Philips would be involved in supervising whatever contractor was going to be doing the renovations," in addition to selling medical equipment to the practice (Rosenfeld 10/17/13 tr at 55-56), whereas other equipment vendors did not provide that service (Rosenfeld 5/24/16 tr at 13). A copy of a turnkey proposal dated December 18, 2006 (the Turnkey Proposal) reveals that Philips offered to design, construct and provide management services for the renovation of the Premises to accommodate the new MRI and PET/CT systems (NYSCEF Doc No. 132 in Action No. 2, affirmation of Philips' counsel, exhibit E at 1).

Philips furnished RRS with a price quotation for a Gemini TF 16 scanner (the Scanner) for $1,898,673, together with five-year "CUSTOMerCARE" service package[2] (NYSCEF Doc No. 92,

[2] Rosenfeld avers that RRS entered into an agreement on June 4, 2007 to lease-purchase a Gemini PET scanner for $1,898,673 (NYSCEF Doc No. 169 in Action No. 2, Rosenfeld 9/12/18 aff, ¶¶ 4-5). However,

affirmation of Federal's counsel, exhibit 69 at 2; NYSCEF Doc No. 93, affirmation of Federal's counsel, exhibit 70 at 5). Under the terms of the CUSTOMerCARE service agreement (the Service Agreement), Philips agreed to provide onsite "[e]quipment quality performance assurance service" and "[r]epair service, due to Equipment malfunction" (NYSCEF Doc No. 93 at 4). Expressly excluded from service was "e. any service necessary due to … (5) damage caused by an external source, regardless of nature" (*id.*). Paragraph 9, titled "**LIMITATIONS OF REMEDIES AND DAMAGES**" states, as follows:

> "Philips' total liability, if any, and Customer's exclusive remedy with respect to the Services and Philips' performance hereunder is limited to an amount not to exceed the price stated herein for service that is the basis for the claim. IN NO EVENT WILL PHILIPS BE LIABLE FOR ANY INDIRECT, PUNITIVE, INCIDENTAL, CONSEQUENTIAL, OR SPECIAL DAMAGES, INCLUDING WITHOUT LIMITATION, LOST REVENUES OR PROFITS, OR THE COST OF SUBSTITUTE PARTS OR SERVICES, WHETHER ARISING FROM BREACH OF THE TERMS IN THIS AGREEMENT, BREACH OF WARRANTY, NEGLIGENCE, INDEMNITY, STRICT LIABILITY OR OTHER TORT. PHILIPS WILL HAVE NO LIABILITY FOR ANY ASSISTANCE PHILIPS PROVIDES THAT IS NOT REQUIRED UNDER THIS AGREEMENT"

(*id.* at 5). A representative for RRS signed both documents on November 19, 2007 (NYSCEF Doc No. 92 at 19; NYSCEF Doc No. 93 at 5).

Rosenfeld explained that RRS ultimately executed a lease-to-purchase agreement for the Scanner and obtained a capital loan of more than $1.5 million from Philips to fund the renovation work[3] (Rosenfeld 10/17/13 tr at 57-58).

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the agreement submitted on Philips' motion describes the acquisition of a Gemini GXL 16 Slice PET/CT scanner for $2,916,060 (NYSCEF Doc No. 129 in Action No. 2, affirmation of Philips' Counsel, exhibit B at 2 and 19). A representative for RRS executed this document on January 2, 2007 (*id.* at 11).

[3] Rosenfeld testified that RRS may have "upgraded" the Scanner (Rosenfeld 10/17/13 tr at 120).

On June 28, 2007, Philips, as "owner," and Excalibur, as "contractor," entered into a turnkey construction agreement for the renovation of the Premises for $1.274 million (the Turnkey Agreement) (NYSCEF Doc No. 131 in Action No. 2, affirmation of Philips' counsel, exhibit D at 1). The relevant portion of paragraph 4.4 of the Turnkey Agreement reads:

> "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.* at 3). Incorporated into the Turnkey Agreement was Excalibur's written proposal which contained nearly identical terms as those propounded in the Turnkey Proposal, including the provisions where Philips proposed to furnish architectural and engineering drawings and to supervise the work (*id.* at 12-13). According to Superior's written proposal dated November 7, 2007, Superior agreed to remove, relocate, supply or install cast iron waste and vent stacks "as indicated on [the] plans" and "supply an[d] install all necessary pipe and fittings for rough in of the following: (3) New water closets, [and] (6) New lavatory sinks" at the Premises (NYSCEF Doc No. 134 in Action No. 2, affirmation of Philips' counsel, exhibit G at 1).

Rosenfeld testified that he did not know how often a Philips representative was at the Premises to supervise the work (Rosenfeld 10/17/13 tr at 63). It is not disputed that the renovation work was completed or that RRS began using the Scanner in 2008 (Rosenfeld tr 5/24/16 tr at 26).

C. The Two Flooding Events

On April 18, 2011, following a rainstorm, plaintiffs discovered that water emanating from a toilet on the third floor had overflowed and flooded the Premises, causing damage to the Scanner (NYSCEF Doc No. 81, ¶ 1; NYSCEF Doc No. 169 in Action No. 2, Rosenfeld 9/12/18 aff, ¶¶ 19-

21), the room in which the Scanner was situated and an adjacent control room (Rosenfeld 8/25/16 tr at 44). The same toilet overflowed a second time on or about April 23, 2011, causing additional damage (NYSCEF Doc No. 81, ¶ 1; Rosenfeld 10/17/13 tr at 85-87). Rosenfeld averred that "[t]he Scanner sat in a pool of 2-3 inches of mixed rain and sewage water" after the first flood, and that "mixed rain/sewage-water from the second flood … inundated the Scanner" (Rosenfeld 9/12/18 aff, ¶¶ 22 and 28). Plaintiffs attributed the cause of both flooding events to an improper connection between an existing storm riser leading down from the roof to a sewer line at the third floor, which diverted rainwater from the roof into the sewer line (Rosenfeld 10/17/13 tr at 89; Rosenfeld 5/24/16 tr at 40-42). Rosenfeld surmised that the improper pipe connection "only could have happened during the course of the construction" (Rosenfeld 5/24/16 tr at 41). He further testified, "I'm not saying [it was] anyone's fault. It was said that was what was done" (*id.* at 42). RRS retained Excalibur to repair the physical damage to the Premises (Rosenfeld 10/17/13 tr at 73).

D. The Federal Policy

According to the Federal Policy, Federal "will pay for direct physical loss or damage to **scientific equipment** caused by or resulting from peril not otherwise excluded, not to exceed the applicable Limit of Insurance for Scientific Equipment shown in the Declarations" (NYSCEF Doc No. 25 at 33). The loss payment options in the Federal Policy read as follows:

> "In the event of loss or damage covered by this insurance, at our option we will either:
> - pay the covered value of the lost or damaged **scientific equipment**;
> - pay the cost of repairing or replacing the lost or damaged **scientific equipment**, plus any reduction in value of the repaired item;
> - take all or any part of the **scientific equipment** at an agreed or appraised value; or
> - repair or replace the **scientific equipment** with other **scientific equipment** of comparable material and quality for the same use"

(*id.* at 40). An endorsement lists the value of the "PHILIPS GEMINI TF 16 PET CT SCANNER" at $1,898,673 (*id.* at 49). CDSA is a named additional insured (*id.* at 47).

E. The Repair of the Scanner

RRS contacted Federal after the first flood (Rosenfeld 9/12/18 aff, ¶ 23). Federal retained the services of Frank Cuoco (Cuoco), an independent electronics consultant, to assist in evaluating the Scanner (NYSCEF Doc No. 21, Luis Rodriguez [Rodriguez] aff, ¶ 9). Meanwhile, RRS separately paid Philips $5,000 to evaluate the Scanner (Rosenfeld 5/24/16 tr at 66), because the floods had resulted in a termination of the Service Agreement with Philips[4] (Rosenfeld 9/12/18 aff, ¶ 33). Technicians from Philips, Rodriguez, and Cuoco inspected the Scanner on April 25, 2011 (*id.*, ¶ 32; Rodriguez aff, ¶ 10).

Rosenfeld testified that at the inspection, Philips "said that it could be repaired" and that "they felt they could do it" (Rosenfeld 10/17/13 at 90-91). Plaintiffs, however, felt that a complete factory overhaul of the Scanner was necessary. Rosenfeld explained that RRS had contacted MLMIC, its medical malpractice insurance carrier, about the Scanner, and MLMIC had indicated that it would reject any claim if RRS "use[d] a machine that was in this condition" (Rosenfeld 10/17/13 at 168-169). Rosenfeld referred to a report dated May 5, 2011 and prepared by Edward Sokolowski (Sokolowski) of M5 Medical, an expert for Excalibur. The report stated that water had infiltrated major components of the Scanner, which could lead to immediate and prolonged system failures (Rosenfeld 5/24/16 tr at 63-64; Rosenfeld 9/12/18 aff, ¶ 34; NYSCEF Doc No. 171 in Action No. 2, Rosenfeld 9/12/18 aff, exhibit B at 2). Sokolowski recommended disassembling the Scanner and testing each component at Philips' factory (Rosenfeld 5/24/16 tr at 64). Rosenfeld

[4] Geoffrey Perini of Excalibur directed Philips to send the invoice for the service call to Excalibur (NYSCEF Doc No. 96, affirmation of Federal's counsel, exhibit 73 at 1).

testified that, according to Sokolowski's report, "the only way this machine could be used was if it was sent back to the machine [manufacturer] and refurbished as any other used machine would be given back to the vendor" (Rosenfeld 10/17/13 at 90-91). Rosenfeld added that he did not think "there were any warranties that Philips was willing to come forward with to say that that fix would stay fixed and that they would service it and/or guarantee their work" (Rosenfeld 5/24/16 tr at 69). Rosenfeld testified that given these factors, "[w]e were fairly – felt very, very strongly" (Rosenfeld 5/24/16 tr at 62) that the Scanner could not be used unless it was completely overhauled at Philips' factory because "the problem was that even it was fixed, that the machine was totally unreliable" (*id.* at 69). He expressed that he did not believe the Scanner, a sophisticated machine that had twice suffered water damage, could have been repaired such that it would be reliable (Rosenfeld 8/25/16 tr at 39). Rosenfeld also testified that "we didn't want to use it. But if we were compelled to use a machine that was fixed without a warranty, we would open ourselves to endless service calls at premium prices" (*id.* at 64).

Rosenfeld further testified that Federal would not replace the machine[5] (Rosenfeld 5/24/16 tr at 72). He explained that, despite RRS's concerns about the repair, "[w]e decided to allow Philips to try to fix the machine" (*id.* at 78). The repair work did not begin until August 2011 (*id.*). By letter dated October 5, 2011, Philips stated that "the unit has been repaired, completely meets our specifications as the original equipment manufacturer and is ready for patient use" (NYSCEF Doc No. 24, affirmation of Federal's counsel, exhibit 1 at 1). Rosenfeld, though, testified that the Scanner "couldn't be put into service [in October 2011] … [b]ecause the only proof that this was a working machine was one film of a phantom" (Rosenfeld 5/24/16 tr at 81). An extension cord

[5] Federal is a Chubb-affiliated insurer (Rodriguez aff, ¶ 1).

was also left attached to the machine (*id.*). Rosenfeld claimed that the Scanner was "still wet or unreliable" (Rosenfeld 8/25/16 tr at 112).

Alan J. Garfunkel (Garfunkel), an attorney who represented RRS on its claim to Federal, affirms that plaintiffs protested the onsite repair and demanded removal of the Scanner from the Premises (NYSCEF Doc No. 176 in Action No. 2, Garfunkel affirmation, ¶ 7). He states that Philips had agreed to meet at the Premises "to see if the Scanner was ready for patient use," but Philips inexplicably missed the January 9, 2012 appointment (*id.*, ¶¶ 9-10). Philips also failed to attend the meeting which had been rescheduled for January 27, 2012 (*id.*, ¶ 12).

Rosenfeld avers that Sokolowski inspected the Scanner a second time on March 2012 (Rosenfeld 9/12/18 aff, ¶ 48). Sokolowski observed "dried water stains or rust" on the patient couch, CT gantry, gantry separation, and the PET gantry rails and base (NYSCEF Doc No. 174 in Action No. 2, Rosenfeld 9/12/18 aff, exhibit G at 1). He states that Sokolowski noted that there was power to the system but an "Estop" could not be cleared" (*id.*). Sokolowski concluded that the system was not ready for patient use (*id.* at 2).

Rosenfeld avers that Philips and Federal were present at the Premises for a June 12, 2012 inspection (Rosenfeld 9/12/18 aff, ¶ 50), where "[t]he machine did not work" (Rosenfeld 5/24/16 tr at 85). He testified that Philips discovered an additional problem that needed repair, but Federal refused to pay because the issue did not stem from the original water damage (*id.* at 86). Rosenfeld testified that plaintiffs paid Philips $40,000 to repair the problem, but "the machine didn't turn on" (*id.* at 86). He testified that plaintiffs paid Philips another $55,000 to repair the Scanner, but "the machine doesn't work" (*id.* at 87).

Rosenfeld avers that RRS hired Jose Pons (Pons) of Image Service Solutions to attend a May 28, 2014 inspection of the Scanner. Pons concluded that "the entire system should have been

replaced due to the internal corrosion" and recommended a complete system replacement (NYSCEF Doc No. 175 in Action No. 2, Rosenfeld 9/12/18 aff, exhibit F at 3). Eventually, the practice chose to replace the Scanner so that it could stay in business (Rosenfeld 5/24/16 tr at 83). Decommissioning the Scanner cost $35,000 to $40,000, rigging and removal cost $35,000 to $40,000, and the purchase of a replacement machine cost $800,000 to $900,000 (*id.* at 71). Rosenfeld testified that the Scanner is presently in storage "[b]ecause we paid for it and it may be of value to Philips at some point" (*id.* at 71).

Rosenfeld explained that post-flood repairs were made to the Scanner room (Rosenfeld 8/25/16 tr at 36). He did not believe that the floor in the room was repaired, but the floor in the adjacent control room was replaced (*id.* at 37). He recalled hearing from RRS's office manager that a Philips technician could not test the Scanner because of the cosmetic repair work in the Scanner room (*id.* at 38).

Rodriguez, Federal's general adjuster, avers that Cuoco and Philips' technicians stated that the Scanner was repairable onsite and that it did not need to be replaced (Rodriguez aff, ¶ 10). The initial estimate for the repair was $194,928.44, which Cuoco had indicated was reasonable, and Federal agreed to pay that amount, less the policy deductible (*id.*, ¶¶ 12 and 14). Federal also agreed to consider further repair costs (*id.*, ¶ 14). Despite the objections RRS had raised about a repair as opposed to a total replacement, RRS's "public adjuster advised Federal that it had retained Philips to complete the initial repairs" (*id.*, ¶¶ 13 and 16-17). Rodriguez avers that Philips' technicians confirmed the machine could be repaired onsite and did not need to be removed (*id.*, ¶ 19; NYSCEF Doc No. 39, affirmation of Federal's counsel, exhibit 16 at 1). Federal paid RRS an additional $68,668.76 and $54,478 to complete the repairs (Rodriguez aff, ¶¶ 23 and 29).

Rodriguez states that Philips certified that the Scanner was ready for patient use, but RRS's attorney rejected the repaired Scanner (Rodriguez aff, ¶ 26). Specifically, RRS complained that Federal's authorization for Philips to perform an onsite repair of the Scanner "does not comply with the requirements of RR&S' malpractice carrier" that the inspection and repair occur at the manufacturer's factory (NYSCEF Doc No. 50, affirmation of Federal's counsel, exhibit 27 at 1). RRS demanded that Federal pay RRS the current replacement value for the Scanner and remove it from the Premises (*id.* at 2). On February 12, 2012, RRS filed a claim seeking $1,526,119.80 ($1,898,693 [the cost of the Scanner] – $372,553.20 [Federal's previous payments plus the $5,000 deductible]) (NYSCEF Doc No. 55, affirmation of Federal's counsel, exhibit 32 at 2). Federal rejected the claim because "[t]he proof is not reflective of the damage the PET scan[ner] sustained as a result of the loss that occurred on April 18, 2011" (NYSCEF Doc No. 56, affirmation of Federal's counsel, exhibit 33 at 1).

By letter dated February 23, 2012, Philips informed plaintiffs that they were in default on the Service Agreement (NYSCEF Doc No. 104, affirmation of Federal's counsel, exhibit 81 at 1). Garfunkel responded by letter on April 12, 2012, and advised Philips that it was "not authorized to perform any further repairs or maintenance on the unit" (NYSCEF Doc No. 105, affirmation of Federal's counsel, exhibit 82 at 3). In the same letter, Garfunkel invited Philips to an inspection to verify that the Scanner "is not operable and must be permanently removed from use" (*id.*). Rodriguez avers that the field test was held on June 12, 2012 (Rodriguez aff, ¶¶ 27-28 and 33-34). Rodriguez observed that the Scanner room had been renovated before the test was held, and wires and cables attached to the Scanner had been improperly disconnected (*id.*, ¶ 34). He states that the Scanner would not turn on properly during the inspection even though it had been fully calibrated in October 2011 (*id.*, ¶ 35). Another inspection on January 23, 2013 revealed damage to the patient

table motor controller and PET computer, but Philips had replaced the controller in October 2011 (*id.*, ¶39). Rodriguez avers that Philips confirmed the damage to the controller and PET computer was not caused by water damage from the April 2011 floods (*id.*, ¶ 43).

Cuoco avers that each section of the Scanner was independently evaluated in April 2011, and that a full internal examination of the CT and PET sections was performed (NYSCEF Doc No. 22, Cuoco aff, ¶ 6). At that time, Cuoco did not observe any water damage to the computers in the adjacent control room, and there was no internal water damage to the PET section of the Scanner (*id.*, ¶¶ 9 and 11). Cuoco states that he and the Philips technicians at the inspection, Steve Steckler (Steckler) and Mohamed Abbas (Abbas), concluded that the Scanner was repairable onsite (*id.*, ¶ 10). Cuoco opines that Philips' post-repair testing was conducted in accordance with New York State law and Philip's own compliance testing guidelines (*id.*, ¶ 15).

When Cuoco returned to the Premises for the June 12, 2012 inspection, he noted that the Scanner room had been renovated and that the computer system cables had been improperly disconnected or reconnected (*id.*, ¶ 17). At a July 23, 2013 inspection, Steckler informed Cuoco that the patient table motor controller and PET hard drive were operational in October 2011, leading Cuoco to conclude that these post-repair failures were not caused by the two floods (*id.*, ¶¶ 20-21). An internal x-ray generator failed at a May 28, 2014 inspection, but the generator had been replaced as part of the initial repair (*id.*, ¶ 23). Cuoco attributes these failures, in part, to RRS's failure to maintain its Service Agreement with Philips as the failure to routinely service the machine "would have significantly increased the likelihood of potential breakdowns or failures" (*id.*, ¶ 24). Cuoco further states that he has worked on other claims involving water damage to medical equipment, including a similar Philips scanner at another medical facility, and that it was

customary to perform onsite repairs of PET and CT scanners given their size and the radioactive materials they use (*id.*, ¶ 25).

Steckler testified that his duties as a zone technical specialist for Philips in 2011 involved supporting field service engineers with technical problems and repairs (NYSCEF Doc No. 98, affirmation of Federal's counsel, exhibit 75 [Steckler tr] at 14). Philips had no protocol in place for reviewing water-damaged machines (*id.* at 25). He testified that it was a "visual inspection, [and] we replace what is wet. From that point we continue troubleshooting once we power up" (*id.* at 25). PET/CT machines were repaired onsite because they are always anchored to the floor (*id.* at 48).

Steckler recalled that he visually inspected the Scanner after the floods and "went through the system and anything that had any evidence of water damage was replaced" (*id.* at 17-19). He stated that he would have had to turn the Scanner on and run diagnostics to determine if there was a problem involving parts of the machine that he could not see (*id.* at 19 and 44). After the repairs had been completed, the CT side of the Scanner was fully operational (*id.* at 81). He could not remember whether there were water marks on the PET side (*id.* at 30). Steckler testified that he conducted "some very basic testing on the PET using diagnostic tools available to us," but they were unable to perform a full quality control test of the PET side because "[t]here were no isotopes available for use to test the PET machine" (*id.* at 26 and 80).

Steckler testified that he did not run any diagnostics on the computer systems because "we didn't think there was a reason to" as there was no evidence of water damage to the computers in the control room (NYSCEF Doc No. 98 at 62 and 79). He discussed "going back and [doing] what we call buttoning-up the system," a term which meant "[m]aking sure the covers are on, everything is ready … make [sic] sure the system is put together completely," but he did not believe that

Philips ever returned to button-up the Scanner (*id.* at 51-52). Steckler concluded that the Scanner was repaired (*id.* at 25). Steckler testified that the machine stays on 24 hours a day, and that it may suffer damage if it is not powered down correctly (*id.* at 82). As to the physical condition of the Premises in June 2012, Steckler testified the rooms had changed since his last visit the prior year. Steckler noted that the consoles in the control room had been pulled away from the walls, and the walls were under repair (*id.* at 49-50 and 57). When they had left the Scanner room in October 2011, "[n]one of the cables were pulled, it wasn't pulled away from the wall" (*id.* at 58).

Abbas testified that he was one of the Philips technicians assigned to repair the Scanner after the floods, although he never received training from Philips on how to repair water-damaged machines (NYSCEF Doc No. 97, affirmation of Federal's counsel, exhibit at 74 [Abbas tr] at 37). Abbas expressed, "[t]his machine suffered water damage … and I don't see [sic] another machine that … [has had] water damage … like this one" (*id.* at 51). Abbas testified that he could diagnose the Scanner without having to remove it from the Premises (*id.* at 44). He explained that once the machine dried out, he would be able to "put the power to the system and inspect it" (*id.*).

Abbas recalled replacing every part that showed physical evidence of water damage (*id.* at 123-124 and 147), which appeared mostly on the CT side of the Scanner (*id.* at 162). He personally performed quality control, or QC, tests on the CT section, which involved testing high-speed rotation of the gantry and taking a phantom image (*id.* at 53-55). Ordinarily, performing QC would involve taking two, four or eight images; Abbas could not recall the number of phantom images that were taken on the Scanner during the repair (*id.* at 56-58). The CT side was fully calibrated (*id.* at 95). There was no evidence of water damage to the PET side (*id.* at 69 and 145). Philips performed only limited testing on the PET side "because we couldn't get the radioactive source on the site," and the isotope was necessary to fully perform calibration and quality control tests and

to determine whether there were any problems on that side (*id.* at 145, 163 and 176). It was the customer's responsibility to obtain the radioactive material, and he was told that RRS had difficulty obtaining it because RRS needed to be relicensed (*id.* at 96).

Abbas recalled telling RRS that Philips had to return to the Premises to "button up" the system, which meant putting the covers and wires back into place and getting the system ready to scan patients, once construction on the Scanner room was complete (*id.* at 52, 84-85 and 133). The machine could not be used to scan patients until it was buttoned up (*id.* at 94). Abbas testified that the Scanner was worked on such that it was "ready to go back under a service contract" (*id.* at 128). At a subsequent inspection at the Premises, Abbas noticed that the computers in the control room had been moved (*id.* at 136).

Plaintiffs' expert, Michael Pecht (Pecht), a professional engineer with a doctorate in engineering mechanics, avers that he inspected the Scanner at a storage facility in Brooklyn on September 14, 2017 (NYSCEF Doc No. 181 in Action No. 2, affirmation of plaintiffs' counsel, exhibit B [Pecht 9/13/18 aff], ¶¶ 2-3). He opines that "water would have a significantly detrimental impact on all electronics of the [S]canner" and that "intermittent operation (and failure) can occur and a short-term demonstration of operation, does not mean the system is reliable (or safe)" (*id.*, ¶ 4). He concludes that the repair should have been made at Philips' factory and the Scanner "properly re-qualified" (*id.*). Pecht also avers that the United States Food and Drug Administration (FDA) had issued multiple violations to Philips after an inspection of its Cleveland, Ohio facility revealed that Philips had attempted to repair equipment without first disassembling them (*id.*, ¶ 5).

In a second affidavit, Pecht avers that every part of the Scanner that had been subjected to water should have been replaced (NYSCEF Doc No. 132, Pecht 9/18 aff, ¶ 3). He states that the parts which Philips replaced "may have been defective parts, may have been damaged during

troubleshooting, may have been installed incorrectly, may have been damaged during installation, may have been installed with procedures that themselves caused damage and may have been damaged when the working piece of equipment was connected to an unreliable piece of equipment which had been subject to water" (*id.*, ¶ 4).

PROCEDURAL HISTORY

Plaintiffs commenced Action No. 1 against GNY, Federal, Travelers and Hartford by filing a summons and complaint on April 16, 2013. As against Federal, plaintiffs allege that Federal attempted to repair the Scanner even though RRS "was, and is of the opinion that the equipment could not be repaired for patient use" (NYSCEF Doc No. 79, ¶¶ 28-31). Plaintiffs further allege that the Scanner is not operable, and that RRS is holding $338,542.76 in escrow, with that amount representing the total sum Federal has tendered to RRS for the repair (*id.*, ¶¶ 32-33). They seek $2 million to cover the cost of a replacement machine (*id.*, ¶ 37). Plaintiffs have discontinued the action against GNY, Travelers and Hartford (NYSCEF Doc No. 13 at 1; NYSCEF Doc No. 85, affirmation of Federal's counsel, exhibit 63 at 1; NYSCEF Doc No. 88, affirmation of Federal's counsel, exhibit 65 at 1).

Plaintiffs commenced Action No. 2 against Excalibur, Superior, Home Systems, Philips and Eisenstein by filing a summons and complaint on January 6, 2014. While Excalibur and Philips have interposed answers, Home Systems and Eisenstein have not appeared. The action against Superior has been dismissed as the result of a prior appeal (*see Rosenbaum, Rosenfeld & Sonnenblick, LLP v Excalibur Group NA, LLC*, 146 AD3d 489, 491 [1st Dept 2017]).

DISCUSSION

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate

any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (*see* CPLR 3212). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*id.*, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, *regardless of the sufficiency of the opposing papers*" (*Vega*, 18 NY3d at 503 [internal quotation marks and citation omitted, emphasis in original]).

Federal's Motion for Summary Judgment in Action No. 1

Federal argues that it is entitled to summary judgment because it has discharged its obligations under the Federal Policy by tendering $318,075.20 to RRS in full satisfaction of all repairs.[6] Plaintiffs, in opposition, argue that Federal contracted with Philips to repair the Scanner onsite but the Scanner was never repaired. Plaintiffs also argue that the onsite repairs were "thrust upon RR&S jointly by Federal and Philips" even though Sokolowski had recommended disassembling the Scanner and testing it at Philips' factory (NYSCEF Doc No. 121, plaintiffs' memorandum of law at 6).

It is well settled that "[a]n insurance agreement is subject to principles of contract interpretation ... [and] 'unambiguous provisions of an insurance contract must be given their plain and ordinary meaning'" (*Universal Am. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*,

[6] In their amended complaint, plaintiffs admitted that Federal has tendered $338,542.76 to RRS (NYSCEF Doc No. 79, ¶ 33).

25 NY3d 675, 680 [2015] [internal quotation marks and citations omitted]). Also, "implicit in contracts of insurance is a covenant of good faith and fair dealing, such that 'a reasonable insured would understand that the insurer promises to investigate in good faith and pay covered claims'" (*Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.*, 10 NY3d 187, 194 [2008], *rearg denied* 10 NY3d 890 [2008] [internal quotation marks and citation omitted]). Here, the loss payment provision in the Federal Policy allowed Federal to select any of four options, including repair of the damaged equipment, in the event of a covered loss. Based on the recommendations of its expert, Federal elected to repair the Scanner onsite, as was permissible[7] (*see Wynkoop v Niagara Fire Ins. Co.*, 91 NY 478, 482 [1883] [stating that "[t]he insurers had the right to determine the manner in which they would perform their contract, and this right did not depend upon the assent of the insured"]).

As an initial matter, Federal correctly states that the reports prepared by Pons and Sokolowski are neither sworn to nor certified. The reports, though, are not the only evidence upon which plaintiffs rely (*see Santos v Condo 124, LLC*, 161 AD3d 650, 655 [1st Dept 2018]). Federal also objects to consideration of Pecht's affidavits, as he did not conduct an internal inspection of the Scanner or conduct any tests.

Nevertheless, Federal has not dispelled all triable issues of fact as to whether it discharged its obligations under the Federal Policy to ensure that the Scanner was repaired. Federal claims that the Scanner was repaired to pre-loss condition as of October 5, 2011, but multiple post-repair inspections revealed that the Scanner was not operational. It attributes these operational failures to several factors, such as RRS's willful termination of the Service Agreement and possible damage to the machine and to the adjacent control room caused by the post-flood renovation work,

[7] Plaintiff alleges that Federal contracted with Philips to repair the Scanner, but it appears that plaintiffs' public adjuster directed Philips to proceed with the repair.

as opposed to flood-related damage. Federal also maintains that Philips had previously replaced those same parts as part of the post-flood repair. But, when those same parts were replaced a second time, the Scanner still failed to work. Cuoco's statement that a sudden power interruption was "most likely the cause of the PET hard drive malfunction" is speculative (NYSCEF Doc No. 22, ¶ 24). He did not, however, opine on whether the power interruption would have affected the proper functioning of the newly-replaced x-ray generator. Similarly, Cuoco does not adequately explain why the newly-repaired Scanner would have required routine maintenance, which Cuoco states normally addresses failures that occur during normal usage (*id.*). The Scanner at issue was not in use after October 5, 2011.

Federal argues that it was denied access to the Scanner to test whether it had been repaired, but Garfunkel affirmed that he had twice invited Federal to the Premises for a January 2012 inspection. He stated that Federal failed to show, and Federal has not rebutted his statement.

Federal also contends that post-flood remediation work inside the Scanner room affected the Scanner's functionality. The Scanner, however, was anchored to the floor of the room in which it was situated. Apart from testimony that the computer consoles in the adjacent control room had been moved, Federal has not fully explained how the post-flood renovation work inside the Scanner room has affected the internal workings of a machine that was affixed to the ground.

Cuoco's initial report states that there was "minimal on non-consequential water spotting … found within this [PET] section of the machine" and that the "[PET] section will be further tested once the CT section is repaired" (NYSCEF Doc No. 72, affirmation of Federal's counsel, exhibit 49 at 4), but it does not appear that a full diagnostic examination of the PET side was performed. An email Steckler wrote dated August 15, 2011 states that "the system did pass PET QC" (NYSCEF Doc No. 74, affirmation of Federal's counsel, exhibit 51 at 1). Steckler and Abbas,

though, testified that they performed only limited testing on the PET side. Notably, Cuoco does not disclose how such limited testing on the PET side "was conducted in accordance with New York State Law and Philips' compliance testing guidelines" (NYSCEF Doc No. 22, ¶ 15).

As to plaintiffs' claim for consequential damages, "[a] plaintiff may sue for consequential damages resulting from an insurer's failure to provide coverage if such damages ('risks') were foreseen or should have been foreseen when the contract was made" (*D.K. Prop., Inc. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 168 AD3d 505, 506 [1st Dept 2019], citing *Bi-Economy Mkt., Inc.*, 10 NY3d at 192; *accord Panasia Estates, Inc. v Hudson Ins. Co.*, 68 AD3d 530, 530 [1st Dept 2009]). It is incumbent upon an insurer moving for summary judgment dismissing a claim for consequential damages to show that "the damages sought were 'a type of damage not within the contemplation of the parties when they executed the insurance policy'" (*Pandarakalam v Liberty Mut. Ins. Co.*, 137 AD3d 1234, 1236 [2d Dept 2016] [internal quotation marks and citation omitted]). In a supplemental response to interrogatory number 18, dated February 7, 2018, plaintiffs claimed damages of $1,898,673 as the replacement value of the Scanner, $7,500 and $30,750 for removing the Scanner, storage costs of $550 per month from October 2014, and $2.1 million in lost revenue from April 18, 2012 through March 2015.

Plaintiffs did not specifically plead a claim for consequential damages in the amended complaint and they never moved to amend their pleading to assert such claim. To the extent plaintiffs attempted to assert the claim in a "supplemental" response to Federal's interrogatories, service of the supplemental response was made without leave of court (*see* CPLR 3133 [c] [stating in pertinent part that "answers to interrogatories may be amended or supplemented only by order of the court upon motion"]; *see also Estate of Terilli*, NYLJ, Aug. 2, 1994 at 31, col 4, 1994 NYLJ

LEXIS 1192, *3 [Sur Ct, Bronx County 1994] [advising the respondent to make a formal application to amend the responses to interrogatories to avoid the risk of preclusion at trial]).

Furthermore, the court "must look to the 'the nature, purpose and particular circumstances of the contract known by the parties … as well as what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made'" (*Bi-Economy Mkt., Inc.*, 10 NY3d at 193, quoting *Kenford Co. v County of Erie*, 73 NY2d 312, 319 [1989] [internal quotation marks and citation omitted]). Federal has established that consequential damages were not reasonably contemplated or foreseeable. Nothing in the Federal Policy obligates Federal to pay for damages other than direct physical loss or damage to scientific equipment (NYSCEF Doc No. 25 at 33). The evidence demonstrates that plaintiffs had contracted with Travelers and Hartford for business interruption coverage, and that plaintiffs have settled their claims against those insurers.

Nor have plaintiffs alleged the requisite bad faith in Federal's handling of their insurance claim. There must be some evidence of the insurer's "gross disregard" of its policy obligations to support a claim of bad faith (*Sukup v State of New York*, 19 NY2d 519, 522 [1967]). As applied herein, Federal promptly investigated the claim and paid to repair the Scanner, and plaintiffs do not refute that those payments have been made. Plaintiffs also argue that Federal ignored its requests for a replacement, but an insurer's bad faith "require[s] more than an arguable difference of opinion between carrier and insured over coverage to impose an extra-contractual liability" (*id.*).

Plaintiffs' reliance on *Chaffee v Farmers New Century Ins. Co.* (2008 WL 4426620, 2008 US Dist LEXIS 74334 [ND NY Sept. 24, 2008, No. 5:04-CV-1493]) is misplaced. The procedural posture in that action involved a motion for judgment on the pleadings under Federal Rules of Civil Procedure rule 12 (c), whereas Federal has moved for summary judgment. The court in

Chaffee also declined to dismiss the plaintiffs' claim for consequential damages because the claim was "properly part of their breach-of-contract claim and not a separate cause of action subject to dismissal" (2008 WL 4426620, *5, 2008 US Dist LEXIS 74334, *15). Importantly, the court noted that it made "no findings as to whether Plaintiffs are entitled to such damages and only notes that Plaintiffs may seek to prove consequential damages as set out in *Bi-Economy*" (*id.*). Consequently, Federal's motion for summary judgment is granted to the extent of dismissing plaintiffs' claim for consequential damages.

Philips' Motion for Summary Judgment in Action No. 2

At the outset, plaintiffs urge the court to deny Philips' motion on the ground that their legal arguments are contained in an attorney's affirmation, in contravention of Uniform Rules for Trial Courts (22 NYCRR) § 202.8 (c), which states, in pertinent part, that "[a]ffidavits shall be for a statement of the relevant facts, and briefs shall be for a statement of the relevant law." "Affirmations, like affidavits, are reserved for a statement of the relevant facts; a statement of the relevant law and arguments belongs in a brief (i.e., a memorandum of law)" (*Tripp & Co., Inc. v. Bank of N.Y. (Del), Inc.*, 28 Misc 3d 1211[A], 2010 NY Slip Op 51274[U], *6 [Sup Ct, NY County 2010]). However, the court may waive strict adherence to this rule (*see e.g.* Uniform Rules for Trial Cts [22 NYCRR] 202.1 [b]). As there is no prejudice to plaintiffs, the court will overlook Philips' error in this instance and consider the submission (*see Serov v Kernzer Intl. Resorts, Inc.*, 52 Misc 3d 1214[A], 2016 NY Slip Op 51150[U], *2 [Sup Ct, NY County 2015]).

A. The Second Cause of Action (Negligence) against Philips

The complaint alleges that the property damage plaintiffs sustained from "the April 18, 2011 Flood and the April 23, 2011 Flood and remediation and repair were proximately caused by the negligence of Philips, its agents, servants, workmen and/or employees" (NYSCEF Doc No.

81, ¶ 91). The complaint also alleges that plaintiffs' insurers have refused to pay for a replacement machine based on Philips' representation that the Scanner was "functional and can be used in the medical practice (*id.*, ¶ 77). Plaintiffs amplified their claims in a verified bill of particulars in which they assert that Philips failed to properly install, repair, maintain and/or inspect the plumbing system at the Premises and failed to hire competent contractors and to supervise and instruct them, among other allegations (NYSCEF Doc No. 147 in Action No. 2, affirmation of Philip's counsel, exhibit T at 4-5).

"In order to prevail on a negligence claim, 'a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom'" (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016], *rearg denied* 28 NY3d 956 [2016] [internal quotation marks and citation omitted]). The court shall address the negligence claims separately.

1. Negligent Design, Installation and Supervision

Philips argues that it is entitled to summary judgment because it has already been determined that Superior's plumbing work was not negligently performed. In addition, Excalibur retained full control over all subcontractors, and thus, the negligent design, installation and supervision claim fails. In response, plaintiffs maintain that Philips had a duty to exercise reasonable care in the performance of the renovation work.

With respect to independent contractors, "[t]he general rule is that an employer who hires an independent contractor is not liable for the independent contractor's negligent acts" (*Rosenberg v Equitable Life Assur. Socy. of U.S.*, 79 NY2d 663, 668 [1992], *rearg dismissed* 82 NY2d 825 [1993]). This rule applies except in the following three instances: (1) where the employer was negligent in selecting, instructing or supervising the contractor; (2) where the employer has a non-

delegable duty to the public; and (3) where the contracted-for work is inherently dangerous (*Brothers v New York State Elec. & Gas Corp.*, 11 NY3d 251, 258 [2008] [citations omitted]). A review of plaintiffs' allegations indicates that the second and third exceptions are inapplicable.

Here, Philips has met its burden of demonstrating that it is not liable for failing to install or supervise those who installed the plumbing system at the Premises. The Appellate Division, First Department, has already determined that the improper pipe connection was not within the scope of Superior's contract and that it was outside the scope of its work area (*see Rosenbaum, Rosenfeld & Sonnenblick, LLP*, 146 AD3d at 490). As stated earlier, the Turnkey Agreement, Excalibur's proposal, and Superior's proposal incorporated the work described in the Turnkey Proposal. Therefore, Philips could not have negligently designed or installed the plumbing system because the improper connection was outside the scope of the contracted-for work. The mere presence of Philips' personnel during construction is not, by itself, sufficient to raise a triable issue of fact regarding Philips' supervision (*see Farnsworth v Brookside Constr. Co., Inc.*, 31 AD3d 1149, 1150 [4th Dept 2006], *lv denied* 7 NY3d 713 [2006] [finding that a defendant's rights to inspect, supervise or coordinate the work was insufficient to establish the requisite control over an independent contractor]; *Saini v Tonju Assoc.*, 299 AD2d 244, 245 [1st Dept 2002] [stating that the "mere presence" of the defendant's personnel at the premises was inadequate to show that the defendant supervised or controlled the independent contractor]). Thus, the second cause of action insofar as it is predicated upon a negligent design, installation and supervision theory is dismissed.

2. Negligent Misrepresentation

Philips argues that the negligent misrepresentation claim fails, because plaintiffs did not rely on Philips' statement that the Scanner had been repaired, or allege that a special relationship existed between them. Plaintiffs contend that they can recover for Philips' statement to Federal

that the Scanner was repaired, because RRS felt the effects of the misrepresentation when Federal declined to furnish a replacement. In the alternative, plaintiffs claim that Philips misrepresented that the Scanner could be repaired onsite.

A negligent misrepresentation claim requires a plaintiff to show "'(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information'" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180 [2011], quoting *J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007], *rearg denied* 8 NY3d 939 [2007] [internal quotation marks omitted]). "'In the commercial context, the duty to speak with care exists when 'the relationship of the parties, arising out of contract or otherwise, [is] such that in morals and good conscience the one has the right to rely upon the other for information'" (*Kimmell v Schaefer*, 89 NY2d 257, 263 [1996], quoting *International Prods Co. v Erie R.R. Co.*, 244 NY 331, 338 [1927], *cert denied* 275 US 527 [1927]). However, not every statement gives rise to a duty to speak with care (*Kimmel*, 89 NY2d at 263). The plaintiff must show "either actual privity of contract between the parties or a relationship so close as to approach that of privity" (*Parrott v Coopers & Lybrand*, 95 NY2d 479, 483 [2000] [collecting cases]; *accord Prudential Ins. Co. of Am. v Dewey Ballantine, Bushby, Palmer & Wood*, 80 NY2d 377, 381 [1992], *rearg denied* 81 NY2d 955 [1993]). Ordinarily, "[a]n arm's length business relationship … is not generally considered to be the sort of confidential or fiduciary relationship that would support a cause of action for negligent misrepresentation" (*Greentech Research LLC v Wissman*, 104 AD3d 540, 540 [1st Dept 2013]; *accord US Express Leasing, Inc. v Elite Tech. (NY), Inc.*, 87 AD3d 494, 497 [1st Dept 2011] [stating that "[a] special relationship does not arise out of an ordinary arm's length business transaction between two parties]).

In addition, even if a close relationship exists, the court must "consider whether the person making the representation held or appeared to hold unique or special expertise; whether a special relationship of trust or confidence existed between the parties; and whether the speaker was aware of the use to which the information would be put and supplied it for that purpose" to determine whether the injured party's reliance on the alleged misrepresentation was justified (*Kimmel*, 89 NY2d at 264). Ordinarily, this last element of reliance presents an issue of fact (*id.*), but absent the injured party's reasonable reliance on the alleged misrepresentation, a claim for negligent misrepresentation must be dismissed (*see IFD Constr. Corp. v Corddry Carpenter Dietz & Zack*, 253 AD2d 89, 93 [1st Dept 1999]). Moreover, even if a plaintiff can prove justifiable reliance, as with any negligence claim, the plaintiff must also demonstrate that a defendant's alleged misrepresentation proximately caused the plaintiff's damages (*see Gerber Trade Fin., Inc. v Skwiersky, Alpert & Bressler, LLP*, 12 AD3d 286, 286 [1st Dept 2004], *lv denied* 4 NY3d 705 [2005] [concluding that the plaintiff failed to raise a triable issue of fact on proximate cause]).

Applying these principles to the present action, Philips is correct that plaintiffs did not plead a special relationship in the complaint or bill of particulars. Philips has also demonstrated the absence of a special relationship because RRS retained its own expert to determine whether the Scanner could be, and was, repaired (*see Greentech Research LLC*, 104 AD3d at 540 [dismissing a negligent misrepresentation claim where the defendants did not possess unique or specialized financial expertise and where the plaintiff was an experienced financial analyst]).

Assuming that a special relationship exists, Philips has shown that plaintiffs did not rely on Philips' statement that the Scanner was operational or that it could be repaired onsite. First, plaintiffs cannot recover for Federal's reliance on Philips' statement (*see Williams v State of New York*, 90 AD2d 861, 862 [3d Dept 1982] [dismissing a negligent misrepresentation claim because

the "claimant did not rely upon the State's misrepresentation, the deputy sheriff did"]; *cf. Zampatori v United Parcel Serv.*, 125 Misc 2d 405, 409 [Sup Ct, Monroe County 1984] [denying dismissal of a negligent misrepresentation claim where the plaintiff felt the direct effect of his employer's reliance on the defendant's transmission of polygraph test results which led to the plaintiff's termination]). Second, plaintiffs and Federal retained their own experts to assess whether the Scanner could be repaired, as discussed above. Third, plaintiffs could not have relied on Philips' statements because they had resolved that they would refuse to use the Scanner even if it was repaired. Rosenfeld testified, "[a]s I said, Philips stated that they could fix this machine onsite. And we felt that whether or not they could, the problem was that even if it was fixed, that [the] machine was totally unreliable" (Rosenfeld 5/24/16 tr at 69). Rosenfeld added that nothing Philips could have said would have changed plaintiffs' position (*id.* at 70). Thus, whether Philips' negligently mispresented that the Scanner could be repaired onsite or that it was repaired, plaintiffs cannot show that they reasonably relied on those statements to their detriment (*see Laub v Faessel*, 297 AD2d 28, 31 [1st Dept 2002] [finding that the plaintiff had not shown that the alleged misrepresentations directly and proximately caused his losses]).

3. Negligent Repair

Plaintiffs allege that Philips never addressed the negligent repair claim, and refer to several paragraphs in the complaint alleging that Philips failed to effectuate a repair (NYSCEF Doc No. 165 in Action No. 2, plaintiffs' memorandum of law at 16-17). Plaintiffs, however, have not articulated a claim for negligent repair of the Scanner.

The complaint pleads that the "damage to the plaintiffs' property from … remediation and repair were proximately caused by the negligence of Philips" (NYSCEF Doc No. 81, ¶ 91), but this allegation cannot be construed to support a negligent repair claim. Plaintiffs have not alleged

that the post-flood repair of the Scanner caused *more* damage to the already water-damaged machine. The verified bill of particulars discusses Philips' alleged negligence pertaining to the initial renovation and plumbing work, not Philips' repair of the Scanner (NYSCEF Doc No. 147 in Action No. 2 a 4-5). Additionally, the claim sounds more akin to a claim for negligent performance of a contract, which is not a cognizable claim (*see Pacnet Network Ltd. v KDDI Corp.*, 78 AD3d 478, 479 [1st Dept 2010]). Plaintiffs also failed to plead a duty independent of the contract (*see Von Sengbusch v Les Bateaux De N.Y., Inc.*, 128 AD3d 409, 410 [1st Dept 2015] [dismissing a tort claim as duplicative of a contract claim in the absence of an allegation that there was a duty independent of the contract]). Furthermore, plaintiffs sustained only financial harm, which cannot "transform" a contract claim into a tort claim (*Verizon N.Y., Inc. v Optical Communications Group, Inc.*, 91 AD3d 176, 182 [1st Dept 2011]; *Logan v Empire Blue Cross & Blue Shield*, 275 AD2d 187, 193 [2d Dept 2000], *lv dismissed* 96 NY2d 823 [2001] [stating that the plaintiffs' injuries were "solely financial . . . [and] are not typical of those arising from tort"]). Significantly, as noted above, Rosenfeld testified that plaintiffs would have refused to use the Scanner even if it had been properly repaired because it was not reliable.

The statements in Pecht's affidavits are less than equivocal on the issue of Philips' negligence. Pecht opined that Philips' "may" have installed defective parts in the Scanner, but this contention is wholly unsupported by the record and is, therefore, speculative (*see Reif v Nagy*, — AD3d —, 2019 NY Slip Op 05504, * 11 [1st Dept 2019] [concluding that the experts' speculations, which were not supported by the record, were insufficient to defeat summary judgment]). Next, the FDA letter upon which Pecht relies does not stand for the proposition that Philips should have "baked" the Scanner before undertaking a repair or that the machine should have been repaired in Philips' factory. The FDA letter provides only that Philips continued to install circuit boards that

had been subjected to moisture ingress (NYSCEF Doc No. 137, reply affirmation of Federal's counsel, exhibit 92 at 2), not that a wholesale replacement of water-damaged parts of the Scanner could not have been performed onsite. Likewise, Rosenfeld avers that Philips installed "refurbished parts and not new parts" during the various repairs of the Scanner (NYSCEF Doc No. 128, Rosenfeld 9/17/18 aff, ¶ 6), but he does not set forth an evidentiary basis for this belief. The reports from Sokolowski and Pons, meanwhile, show only that the Scanner should have been repaired at Philips' factory or that it should have been replaced, not that Philips effectuated a negligent repair. Thus, the second cause of action sounding in negligence is dismissed.

B. The Sixth and Seventh Causes of Action (Breach of Contract) against Philips

The sixth cause of action pleads a claim for breach of contract arising out of Philips' failure to properly design, supervise and install the plumbing system at the Premises. The seventh cause of action asserts that Philips breached its duty under the Turnkey Agreement, the Service Aagreement, and "subsequent agreements" by failing to properly design, supervise and install the plumbing system and by failing to make the Scanner operational (NYSCEF Doc No. 81, ¶ 110).

Philips contends that the breach of contract claims must fail because the Turnkey Agreement did not make Philips responsible for performance of the renovation work, and refers to the limitation of liability provision therein. Philips also argues that plaintiffs failed to identify the contract provisions and the contracts that Philips purportedly breached. Plaintiffs argue that their affidavits in opposition to the motion "clearly identify the exact contract provisions at issue and the manner in which Philips breached them" (NYSCEF Doc No. 165 in Action No. 2, plaintiffs' memorandum of law at 22).

To sustain a cause of action for breach of contract, a plaintiff must prove the existence of a contract, the plaintiff's performance, the defendant's breach, and damages (*see Harris v Seward*

Park Hous. Corp., 79 AD3d 425, 426 [1st Dept 2010]). In the absence of a binding, enforceable agreement, a breach of contract claim must be dismissed (*see Luxor Capital Group, L.P. v Seaport Group LLC*, 148 AD3d 590, 590 [1st Dept 2017], *lv denied* 30 NY3d 905 [2017]). In addition, it is incumbent upon a plaintiff seeking to recover on a breach of contract claim to "identify the express provision" of the contract the defendant is alleged to have breached (*see Gordon v Curtis*, 68 AD3d 549, 550 [1st Dept 2009], *lv denied* 14 NY3d 713 [2010]).

A review of the complaint reveals that plaintiffs neither attached the agreements at issue nor identified the specific provisions upon which the contract claims are predicated. Plaintiffs were afforded an opportunity to amplify the breach of contract claims in response to Philips' supplemental demand for a verified bill of particulars, but their response largely contained general objections to Philips' demands. Indeed, when asked to "[i]dentify with particularity the contract(s) allegedly breached by Philips," plaintiffs responded with the following:

> "Plaintiffs object to this Demand to the extent that it seeks documents or information outside of the scope of knowledge or possession of Plaintiffs including, without limitation, documents or information within the knowledge or possession of any third-parties. Plaintiffs further object to this Demand to the extent it seeks documents or information that is, or should be, within the knowledge or possession of Philips. Notwithstanding the foregoing, Plaintiffs previously produced documents responsive to this Demand"

(NYSCEF Doc No. 148 at 4). Additionally, when asked to "state which specific provision(s) of the contract Philips allegedly breached," plaintiffs objected to the demand "to the extent it seeks legal conclusions rather than factual statements and refer to the documents for the content thereof" (NYSCEF Doc No. 148, 4-5). These plainly deficient statements cannot support a breach of contract claim. To the extent plaintiffs submit that Philips failed to authenticate the documents annexed to its moving papers, the court notes that the Turnkey Proposal submitted with plaintiffs'

opposition is similarly unauthenticated. Thus, plaintiffs failed to plead which contract and which contract provision Philips is alleged to have breached, irrespective of the purportedly different versions of the Turnkey Proposal that have been submitted.

Assuming plaintiffs had pleaded viable contract claims, Philips has demonstrated that it did not breach the terms of the Turnkey Proposal, as the improper connection between the storm stack and sanitary line fell outside the scope of the contracted-for work (*see Rosenbaum, Rosenfeld & Sonnenblick, LLP*, 146 AD3d at 490). Additionally, Philips could not have breached the Service Agreement because the agreement excluded service for damage caused by an external source. Hence, the Service Agreement cannot form the basis of the contract claims.

As for the unspecified subsequent agreements referenced in the complaint, plaintiffs refer to two Philips invoices dated May 19, 2011 and August 24, 2011, both of which read, in part, that "[d]ue to the extensive water damage, more parts may be required as this system has not been powered up as not to cause any further damage. Unit will be dried out prior to any repairs" (NYSCEF Doc No. 172, Rosenfeld 9/12/18 aff, exhibit C at 1; NYSCEF Doc No. 173, Rosenfeld 9/12/18 aff, exhibit D at 1). These statements fail to show that Philips committed a breach of contract as plaintiffs have not disputed that Philips replaced the parts listed on those invoices. Moreover, Abbas testified that the Scanner was "ready to go back under a service contract" (Abbas tr at 128). RRS, though, defaulted on its payment obligations under the Service Agreement, and Garfunkel informed Philips in April 2012 that it was no longer authorized to work on the Scanner (NYSCEF Doc No. 105 at 3).

Nor may plaintiffs defeat summary judgment by claiming that Philips tortiously interfered with plaintiffs' contract with Federal. Plaintiffs never pleaded a cause of action for tortious interference with contract, and "[i]t is axiomatic that a plaintiff cannot defeat a summary judgment

motion that made out a prima facie case by merely asserting, without more, a new theory of liability for the first time in the opposition papers" [*Biondi v Behrman*, 149 AD3d 562, 563-564 [1st Dept 2017], *lv denied* 30 NY3d 1012 [2017] [citation omitted]).

Also, contrary to plaintiffs' assertions, the factual allegations in the complaint are insufficient to infer that a tortious inference claim had been made. A cause of action for tortious inference with contract requires a plaintiff to plead the existence of a valid contract between the plaintiff and a third party, the defendant's knowledge of that contract, and the defendant's improper procurement of a breach of that contract resulting in damages to the plaintiff (*see White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]). The complaint herein refers to unnamed insurance companies, and alleges that these unnamed insurers have refused to pay for a replacement Scanner and business interruption losses or allow plaintiffs to remove and replace the Scanner (NYSCEF Doc No. 133, ¶¶ 76-77 and 84). These allegations are too general to support a tortious interference claim (*see Williams v Citigroup, Inc.*, 104 AD3d 521, 522 [1st Dept 2013] [dismissing a tortious interference with contract claim where the complaint failed to identify the provision of the contract that was allegedly breached]). In any event, plaintiffs did not plead that the alleged breach of the Federal Policy was procured "by the use of wrongful means or motivated solely by malice" (*IME Watchdog, Inc. v Baker, McEvoy, Morrissey & Moskovits, P.C.*, 145 AD3d 464, 465 [1st Dept 2016]; *Lakeville Pace Mech, Inc. v Elmare Realty Corp.*, 276 AD2d 673, 676 [2d Dept 2000] [dismissing the plaintiff's claim for tortious interference with contract where the record failed to demonstrate that the alleged breach was induced by "illegal or improper means or with malice toward" the plaintiff]). Lastly, neither R&R nor CDSA are signatories any of RRS's agreements with Philips such that they are proper parties to a breach of contract action, nor are

plaintiffs parties to the Turnkey Agreement between Philips and Excalibur. Therefore, the sixth and seven causes of action against Philips are dismissed.

C. Excalibur's Cross Claim against Philips

In view of the foregoing, Excalibur's cross claim against Philips for contribution and indemnification is dismissed.

D. Philips' Alternative Request for a Joint Trial

Philips' request for a joint trial with Action No. 1 is denied as moot for the reasons set forth above.

Accordingly, it is

ORDERED that the motion of defendant Federal Insurance Company for summary judgment in Action No. 001 is granted to the extent of dismissing plaintiffs' claim for consequential damages, and the motion is otherwise denied; and it is further

ORDERED that the part of the motion of defendants Philips Healthcare, Philips Medical Systems North America Company, Philips Electronics North America Corporation, Philips Medical Systems North America, Inc., and Philips Healthcare Informatics, Inc. for summary judgment in Action No. 2 is granted and the complaint is dismissed against them, and the part of the motion seeking a joint trial of Action No. 1 and Action No. 2 is denied as moot; and it is further

ORDERED that the cross claim against said defendants by defendant Excalibur Group NA, LLC in Action No. 2 is dismissed; and it is further

ORDERED that the said claims and cross claim against defendant Excalibur Group NA, LLC in Action No. 2 are severed and the balance of the action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendants Philips Healthcare, Philips Medical Systems North America Company, Philips Electronics North America

Corporation, Philips Medical Systems North America, Inc., and Philips Healthcare Informatics, Inc. dismissing the claims and cross claim made against them in Action No. 002, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

Dated: 9-9-2019

ENTER:

J.S.C.

HON. DAVID B. COHEN
J.S.C.