SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART** IAS MOTION 53EFM

Justice

----------X

BROOKLYN NAVY YARD DEVELOPMENT CORPORATION,

Plaintiff,

- v -

TDX CONSTRUCTION CORPORATION, LIRO PROGRAM AND CONSTRUCTION MANAGEMENT, PE, P.C.,CALCEDO CONSTRUCTION CORPORATION (3RD PARTY DEFT.), TLH CONSTRUCTION CORPORATION (3RD PARTY DEFT.), GLASSSOLUTIONS UNLIMITED CORP.,

Defendant.

----------X

INDEX NO. 110475/2011

MOTION DATE 04/29/2019, 04/29/2019, 04/30/2019, 04/30/2019, 04/30/2019

MOTION SEQ. NO. 001 002 003 004 005

DECISION + ORDER ON MOTION

GLASSSOLUTIONS UNLIMITED CORP.

Plaintiff,

-against-

STARBRITE WATERPROOFING CO. INC.

Defendant.

----------X

Third-Party
Index No. 595509/2016

CALCEDO CONSTRUCTION CORPORATION (3RD PARTY DEFT.)

Plaintiff,

-against-

NEW YORK CITY ACOUSTICS, INC.,

Defendant.

----------X

Second Third-Party
Index No. 595200/2019

The following e-filed documents, listed by NYSCEF document number (Motion 001) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 191, 192, 203, 204, 205, 206, 207, 208, 209, 210, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 346

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 193, 211, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 342, 343, 344, 345

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 194, 212, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 349

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 195, 197, 198, 199, 200, 201, 202, 213, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 340, 341

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 196, 214, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 347, 348

were read on this motion to/for JUDGMENT - SUMMARY.

In motion seq. no. 001, TDX Construction Corporation (**TDX)** moves for summary judgment dismissal of (i) the complaint against it, (ii) all crossclaims and counterclaims against it; and (iii) for summary judgment on its common law indemnification claims against Calcedo Construction Corporation (**Calcedo**). Calcedo cross-moves to dismiss the indemnification claim.

In motion seq. no. 002, Calcedo and New York City Acoustics Inc. (**NYC Acoustics**) jointly move to (i) dismiss TDX's third-party complaint and (ii) dismiss the first and second causes of action in Brooklyn Navy Yard Development Corporation's (**Navy Yard**) complaint.

In motion seq. no. 003, Liro Program and Construction Management, PE, P.C. (**LiRo**) moves for summary judgment dismissing the complaint against it.

In motion seq. no. 004, Starbrite Waterproofing Co., Inc. (**Starbrite**) moves for summary judgment dismissing Glassolutions Unlimited Corp.'s **(GlasSolutions)** fifth party complaint.

In motion seq. no. 005, GlassSolutions moves for summary judgment dismissing (i) Navy Yard's complaint against it, (ii) Calcedo's fourth party complaint against it, and (iii) any other claims, crossclaims and counterclaims against it.

For the reasons set forth below and on the record (10/25/19), that branch of TDX's motion (seq. no. 001) for summary judgment dismissal of the complaint is granted, LiRo's motion (seq. 003) to dismiss the complaint against it is granted, and the remainder of the motions are granted to the extent that all the indemnity claims are now moot and the third, fourth and fifth party complaints should, therefore, be dismissed.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

This action arises out of the construction of a three-story industrial building on Perry Avenue in Brooklyn, New York (the **Perry Building**) consisting of a warehouse with two bathrooms, an elevator and a lot of open space (Tomei EBT, p. 18, NYSCEF Doc. No. 56; Coburn EBT., p. 23, NYSCEF Doc. No. 51). Pursuant to a Construction Management Contract Number 835256 (the **Construction Management Contract**), dated September 18, 2006, by and between TDX and Navy Yard, Navy Yard hired TDX to, *inter alia*, supervise the Perry Building construction (Shah Aff., Ex. 1, NYSCEF Doc. No. 65). Per the terms of the Construction Management Contract, TDX provided a guarantee with respect to all the materials, equipment and work performed, against all defects, including latent ones, for a period of one year (the **Warranty Period**) from

the date of final completion (*i.e.*, here, March 3, 2009), and agreed to repair, replace or rebuild all defects so long as Navy Yard gave it notice of the defect within this one year period, which notice would be timely so long as it was received within ten days of the expiration of the one year period (*id.*, §§ 12.2, 12.3, 25.1, 25.4) . If TDX did not fix the defective work after notice was given, it agreed that it would compensate Navy Yard for the cost of having a third party fix it (*id.*, § 25.5).

Specifically, Section 12.2 of the Construction Management Contract provides:

> Guarantee of Work Unless otherwise specifically set forth in the Construction Documents or elsewhere in this Contract, CM fully warrants and guarantees the materials, equipment, and Work against any and ***all defects whether latent or patent for a period of one year from the date of Final Completion*** (hereinafter referred to as the "Warranty Period"). During the warranty period CM shall promptly repair, replace, rebuild or restore (as BNYDC may direct) all defective Work and materials and shall pay all costs for labor and materials necessary to correct such defective Work. Should CM fail to promptly repair, replace, rebuild or restore such defective Work, BNYDC shall repair, replace, rebuild or restore such defective Work and CM shall promptly pay to BNYDC all costs incurred by BNYDC in connection therewith. BNYDC's invoice setting forth the costs incurred in repairing, replacing, rebuilding or restoring any damaged or defective Work shall be binding and conclusive as to the amount thereof upon the CM

(NYSCEF Doc. No. 65, § 12.2 [emphasis added]).

Section 12.3 of the Construction Management Contract provides:

> Security for Materials and Guarantees As security for the CM's faithful performance of its obligations under this Article 12, BNYDC will deduct from the Final Completion payment for each Subcontract an amount equal to one percent (1%) of the Contract Price or such greater amount fixed in the RFB (hereinafter referred to as "Retainage"). In BNYDC's sole discretion, BNYDC may require CM to cause his Subcontractor(s) to post in addition to the Retainage security in such amount, as BNYDC deems necessary to guarantee CM's performance under this Article 12. If CM faithfully performs all its obligations hereunder, BNYDC will as soon as practicable after the expiration of the Warranty Period return to Contractor the Retainage and additional security, if any, without interest. ***Notice by BNYDC to repair, replace, rebuild and/or restore any defective or damaged***

> ***Work shall be timely if given up to 10 days after the expiration of the Warranty Period***

(*id.* [emphasis added]).

In addition, Section 25.1 of Article 25, "Maintenance and Guaranty," provides:

> [TDX] must promptly repair, replace, restore or rebuild, as the President [of Navy Yard] may determine, any finished Work in which defects of materials or workmanship may appear or to which damage may occur because of such defects during the one-year period subsequent to the date of Substantial Completion of the Work required herein except where other period of maintenance and guarantee are provided for

(*id.*).

Section 25.4 further provides:

> Notice by the President to the CM to repair, replace, rebuild or restore such defective or damaged Work shall be timely if given no later than ten (10) days subsequent to the expiration of the one-year period or other periods provided herein

(*id.*).

Finally, Section 25.5 provides:

> ***If*** [TDX] shall fail to repair, rebuild or restore such defective or damaged Work promptly after receiving such notice, the President shall have the right to have the Work done by others … CM shall be liable to pay [any] deficiency [not covered by money on deposit as security during the 1 year period (*see* § 25.2)] on demand by the President

(*id.* [emphasis added]).

As relevant to the third, fourth, and fifth party actions, TDX engaged Calcedo as the general contractor to furnish certain labor and materials pursuant to a Standard Form of Agreement (the **Calcedo Subcontract**), dated September 12, 2007, by and between TDX and Calcedo (Shah Aff., Ex. 2, NYSCEF Doc. No. 66). As the general contractor, Calcedo was responsible for the concrete slab work, masonry work, curtain walls construction, installation of the windows and

interior/exterior sheetrock (Nelson Affirm., Ex. S, pp. 8-10; Ex. R, p. 31). Calcedo, in turn, retained GlasSolutions pursuant to a Standard Form of Agreement Contract (the **GlasSolutions Subcontract**), dated December 19, 2007, by and between Calcedo and GlasSolutions to perform all of the window work in the Perry Building (Tomei Aff., Ex. 2, NYSCEF Doc. No. 207). The GlasSolutions Subcontract provided that GlasSolutions was responsible for any field testing of the windows (*id.*, Ex. 1, GLAS 00171). Calcedo also hired NYC Acoustics pursuant to a Standard Form of Agreement Contract (the **NYC Acoustics Subcontract**), dated November 30, 2007, by and between Calcedo and NYC Acoustics, to perform certain carpentry work in the Perry Building, including the installation of sheetrock and insulation *(id.*, Ex. 2, NYSCEF Doc. No. 208). NYC Acoustics was to perform work on the east wall of the Perry Building, including stud framing, interior sheetrock, batt insulation, exterior sheathing, and doors and frames. The east wall was designed to be the fire rated wall. The materials used in construction of the Perry Building were pre-approved by Navy Yard's architect (Shah EBT, p.20, 122; NYSCEF Doc. No. 55). Navy Yard also entered into a Program Management Contract (the **Program Management Contract**), dated as of April 18, 2006, by and between Navy Yard and LiRo, for LiRo to provide certain "Program Management Services," including "monitor[ing] and review[ing] the work of the Architects, Engineers, Planners and construction managers engaged in the Projects for conformance to the Construction Contracts" (NYSCEF Doc. No. 134, Appendix B, II [A][1]). However, per the Program Management Contract, LiRo would "not be responsible for means, methods, techniques, sequences and procedures of construction employed by the Architects, Engineers, Planners, construction managers and contractors engaged in the Projects in the performance of their work," and would only be required to "monitor, review, and report to BNYDC deviations from the Construction Contract" (*id.*, Appendix B, II[B]).

Construction on the Perry Building commenced in 2007 and was completed on or about March 3, 2009 (Certificate of Completion, Singh Affirm., Ex. E, NYSCEF Doc. No. 77; P. Risolo EBT, pp. 16:24-17:4, NYSCEF Doc. No. 52). There is no dispute that to the extent that TDX was notified of any defects in construction or needed repairs, TDX and/or its contractors returned to complete any necessary repairs at no cost to Navy Yard.

Pursuant to a Lease agreement (the **Lease**) dated December 2, 2008 between the Navy Yard as landlord and SurroundArt Management LLC (**SurroundArt)** as tenant, the Navy Yard leased the entire Perry Building to SurroundArt for a five-year term, with three separate "renewal terms," with a commencement date of February 1, 2009, but with no rent due for the first six months until September 2009, and with a base rent of $148,333.33/month thereafter for the first five years (Nelson Aff., Ex. U, NYSCEF Doc. No. 58). The Lease contained a Lease Declaration, attached to and incorporated into the Lease, that provided the following with respect to "construction:"

> (a) Landlord shall provide Tenant with at least seven (7) days notice before the anticipated Start Date, during which time Tenant and its architects, engineers and any qualified inspectors may inspect all work performed by Landlord's contractors and the condition of the Premises. Within such seven (7) day period, Tenant shall prepare a written punch list including any defects, problems or omissions with the construction of the Building and any items requiring repair or completion, including any items in Exhibit C that have not been incorporated into the Building. Landlord or its contractor may be present at any inspection. Landlord shall complete any work or install any equipment on Tenant's list, provided that such was required by either Exhibit C specifications or code requirements, within a period of thirty days (30), unless otherwise agreed.
>
> ***If Landlord's work precludes Tenant from starting its interior improvements to the Building, then the Start Date (and all corresponding dates tied to the Start Date) shall be deferred by the number of days that Tenant is delayed.*** Both parties shall use their best efforts to work together (and have contractors work - simultaneously) to the extent possible.

* * *

> (d) ***One year after the Start Date, Tenant may conduct another inspection of the Building with its architect and/or engineer, in order to locate any defects or problems in the original construction that were not evident prior to the start date (for example, an unusual deterioration in some materials or systems), and Landlord may have a representative present at such inspection.*** Landlord shall request from its contractors any repairs, replacements or corrections identified in this "one year inspection" and pursue such work, as set forth in the Warranty Agreement.

(Lease Declaration, ¶¶ 8[a], 8[d] [emphasis added]).

In other words, per Paragraph 8(a), if Navy Yard's work prevented SurroundArt from starting its interior improvements, the Start Date (as such term is defined in the Lease) and its corresponding rent payment obligations under the Lease would be delayed by as many days as SurroundArt was delayed from starting its interior improvements. And, if following the Start Date, SurroundArt conducted another inspection of the Perry Building and located any defects in materials (*e.g.*, insulation or windows), Navy Yard shall request from its contractors any necessary replacements or repairs identified at the one year inspection and pursue such work as set forth in the Warranty Agreement, which Warranty Agreement was attached as exhibit to the Lease. For the avoidance of doubt, the Warranty Agreement did not otherwise provide for any rent offset for SurroundArt, and only provides, like the Lease, that Navy Yard will demand performance under the warranties, including, if necessary, initiating any requisite legal proceedings.

Pursuant to Section 11.02 of the Lease, SurroundArt expressly acknowledged that it accepts the Perry Building "AS IS:"

> Section 11.02 Subject to the terms set forth in the Lease Declaration, the Demised Premises are leased "AS IS". Tenant acknowledges that it has thoroughly inspected the Demised Premises at the commencement of its term and

> accepts the Demised Premises "AS IS" including without limitation accepting the condition of the structure, walls, the concrete decks, the ceiling, and the facilities, if any. Landlord does not represent, guarantee or warrant the condition of the Demised Premises, nor does Landlord except as agreed to in the separate Agreement attached hereto represent, guarantee or warrant the suitability of the Demises Premises for any use that may be made of the Demised Premises.

(*id.*, § 11.02; see also, Art. 7[A]).

In addition, and most significantly, Section 2.01 of the Lease provides:

> Section 2.01 Tenant covenants and agrees to pay to Landlord, Rent as stated in the Lease Declaration. ***Rent is absolutely net to Landlord and shall be paid to Landlord without notice, demand, abatement deduction or set-off.*** Rent shall be in addition to, and over and above, all other payments to be made by Tenant as provided herein. Rent shall be paid in equal monthly installments in advance on the first day of each and every calendar month during the term of this Lease, except that Tenant shall pay the Rent for the Rent for the first full calendar month of the term of this Lease on the execution hereof.

(*id.*, § 2.01 [emphasis added]).

Navy Yard claims that several issues arose with Perry Building that caused it to issue over $1.4 million in rent abatements to SurroundArt. Specifically, from December 2009 to April 2010, it was discovered that certain windows had leaks, and in February 2011 Navy Yard discovered that insulation was allegedly incorrectly installed on the east wall of the Perry Building (Kao Affirm., ¶¶ 14, 19-20). TDX was timely notified of and corrected the issues with the window leaks free of charge to Navy Yard, as it was required to do under the terms Construction Management Contract (*see* NYSCEF Doc. No. 65, §§ 12.2, 25.1). However, Navy Yard never notified TDX of any issues with insulation and, instead, hired a new contractor, Plaza Construction Corp. to "remedy the insulation defects" (Kao Affirm., ¶ 24). TDX did not get notice of the insulation issue until Navy Yard filed the instant complaint.

Navy Yard commenced this action against TDX for (1) remediation costs incidental to TDX's allegedly deficient work and (2) lost rents allegedly caused by TDX's failure to perform its work in good and workmanlike manner, and against LiRo for (3) the same damages arising from LiRo's alleged failure to properly monitor, review and report developments at the job site to Navy Yard (Primary Complaint, NYSCEF Doc. No. 38). TDX impleaded the general contractor, Calcedo, and another contractor, TLH Construction Corp., asserting claims for indemnification and contribution (Third Party Complaint, NYSCEF Doc. No. 41). Calcedo impleaded GlasSolutions, the entity responsible for supplying, installing and caulking the windows, and NYC Acoustics, the drywall and insulation subcontractor, seeking contribution and indemnity (Fourth Party Complaint, NYSCEF Doc. Nos. 44, 46). GlasSolutions, in turn, impleaded Starbright, which was one of several companies that GlasSolutions hired to perform the exterior caulking work at the premises (Fifth Party Complaint, NYSCEF Doc. No. 48).

DISCUSSION

I. Motion to Dismiss Complaint Against TDX is Granted

As noted, *supra*, the damages sought by Navy Yard in this action consist of (i) rent credits that Navy Yard provided to SurroundArt as a result of the leaks and incorrect insulation, and (ii) the corrective work undertaken to cure said defects. TDX raises two primary arguments with respect to the complaint against it, both having to do with said damages. First, it argues that to the extent Navy Yard seeks to recover for any rent abatement payments issued to SurroundArt, those abatements were given as an accommodation for a tenant otherwise behind on its rent and without obligation and are therefore barred by the voluntary payment doctrine. Second, it argues that Navy Yard is not entitled to recover for any corrective work undertaken in the Perry

Building as that work occurred outside of the one-year Warranty Period applicable to such claims and without any notice or opportunity for TDX to cure.

The voluntary payment doctrine "bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law" (*Dillon v U-A Columbia Cablevision of Westchester, Inc.*, 100 NY2d 525, 526 [2003]; *Millennium Holdings LLC v Glidden Co.*, 146 AD3d 539 [1st Dept 2017]). TDX argues that because Navy Yard voluntarily undertook to provide SurroundArt with rent abatements (*i.e.*, SurroundArt did not commence a legal action or even threaten to do so), it is not entitled to recover for the rent abatements from TDX. Navy Yard, in turn, claims that this common law doctrine is inapplicable to this action because it only applies "where plaintiff voluntarily pays an amount directly to defendant which was not legally due, and subsequently seeks to recover said payment from said defendant" (Ptf. Opp. Memo., NYSCEF Doc. No. 239, p. 4).

Here, looking at the terms of the Lease, and as described above, nothing required Navy Yard to provide SurroundArt with a rent credit and indeed, the Lease, expressly provided that rent was due without offset. To wit, the Lease provides for two remedies in connection with any issues with the Navy Yard's work. The first remedy addresses issues which prevent SurroundArt's installation work. In this regard, as described above, the Lease (*see* § 8[a] of the Lease Declaration) provides for a delay in the Start Date (*i.e.,* pushing out the first day when rent would otherwise be due). The second addresses issues which did not prevent SurroundArt's installation work. In this regard, the Lease provides that for items identified during an inspection during the one year period following the Start Date (*see* § 8[d] of the Lease Declaration), Navy Yard shall

make demand on the contractors to repair and replace in accordance with the Warranty Agreement. Here, looking at the timeline, attached as exhibit X to the Singh Affirm., it is undisputed that the issues did not impede SurroundArt's interior improvements. Therefore, Section 8(a) of the Lease Declaration does not apply, and the Start Date was not adjusted. A defect identified pursuant to Section 8(d) of the Lease Declaration did not entitle SurroundArt to a rent credit. And, in fact, as discussed above, Section 2.01 of the Lease confirms that SurroundArt is not entitled to a rent credit or an abatement under the Lease. Put another way, any rent abatement extended by Navy Yard was done voluntarily and without obligation under the Lease. The fact that Navy Yard voluntarily extended rent credits to SurroundArt, well after the "Start Date," as an accommodation and without any obligation to do so does not make TDX, the Navy Yard's construction manager, liable for those rent credits. Nor may it be said that such rent credits were the foreseeable and consequential damages of any breach of the Construction Management Contract. "It is well settled law in this State that consequential damages are not recoverable in an action to recover damages for breach of contract in the absence of the plaintiff's showing that such damages were foreseeable and within the contemplation of the parties at the time the contract was made" (*Martin v Metropolitan Prop. & Cas. Ins. Co.*, 238 AD2d 389, 390 [2d Dept 1997] [internal quotation omitted]). Rather, damages for breach of contract are generally limited to "general damages which are the natural and probable consequence of the breach" (*Kenford Co. v County of Erie*, 73 NY2d 312, 318 [1989]). Here, it was neither foreseeable nor within the contemplation of the parties at the time of the contract that TDX could be liable for voluntary rent credits after the Lease start date for the Perry Building went into effect. And, finally, Navy Yard is not claiming that it extended the rent credits based on a mistake of material fact or law or upon any fraud. Nor does Navy Yard cite any facts to

suggest that it was "under economic duress" and "lacked a meaningful choice" as alluded to in its brief (Ptf. Opp. Memo., NYSCEF Doc. No. 239, p. 5, *citing DRMAK Realty LLC v Progressive Credit Union*, 113 AD3d 401, 403-04 [1st Dept 2015]). Simply put, Navy Yard did not have to incur these damages and could have pursued its rights under the Lease against SurroundArt in court. Having chosen to do otherwise, it cannot now recover its losses against TDX.

With respect to the corrective work that had to be undertaken, Navy Yard alleges that it sustained damages as a result of (1) certain condensation issues relating to the windows installed, and through (2) faulty insulation. As Navy Yard does not dispute in its opposition papers that the condensation issues did not arise as a result of any action by TDX or any of TDX's subcontractors, all claims that are premised on the condensation issue are dismissed.

Navy Yard's claim that it is entitled to recover what it paid to Plaza Construction to replace the insulation in the east wall of the Perry Building is also dismissed. The outside limit for notice of any "defective or damaged Work" was the "one-year period subsequent to the date of Substantial Completion of the Work" (*id.*, §§ 25.1, 25.4). The "Work" was completed on or about March 3, 2009 (Singh Affirm., ¶ 39, Ex. E). Evidence in the record shows that Navy Yard notified TDX, in accordance with the Construction Management Contract, on numerous occasions of work that needed to be repaired or replaced; and all the problems brought to TDX's attention were promptly resolved (Singh Affirm., ¶¶ 17-23). By April 2010, all "defective or damaged Work" of which TDX had notice was remedied at no cost to Navy Yard (Singh Affirm., ¶ 20). However, Navy Yard never notified TDX of any issues with insulation nor gave it any

opportunity to repair the alleged defects. Rather, as noted, the first time that Navy Yard gave notice of insulation issues was when it filed the instant suit alleging that TDX installed improper insulation on the east wall of the Perry Building, and sought to recover $327,950 for the cost of replacing the insulation.

Navy Yard argues that the one year deadline imposed by the Construction Management Contract's Warranty Period and in Article 25 is simply a deadline to give notice, and that, after such period is over, it may hire a third party to correct the work without giving TDX any notice or opportunity to correct. Navy Yard is incorrect. The one year Warranty Period is the time during which TDX is obligated to repair any defective work, including if notice is given "up to ten days after the expiration of the Warranty Period" (NYSCEF Doc. No. 65, § 12.3). Here, it is not disputed that Navy Yard did not give notice to TDX of any issues with respect to insulation within the one-year Warranty Period (or ten days after the expiration thereof). Accordingly, TDX was under no obligation to repair the allegedly defective insulation. Without any obligation to repair any allegedly defective installation, there is simply no basis to require payment for Navy Yard's costs in connection with any such work. Navy Yard cannot escape this clear limitation on TDX's liability by simply re-casting its claim as a general breach of contract cause of action and arguing that the six-year statute of limitations applies since the Construction Management Contract clearly contemplates a shorter window during which the owner may take issue with respect to any "latent or patent defects" (NYSCEF Doc. No. 65, § 12.2). For the avoidance of doubt, contrary to what Navy Yard argued at oral argument, this conclusion does not circumvent the six-year statute of limitations period generally applicable to breach of contract claims in New York. The Construction Management Contract is replete with

obligations that TDX could be sued upon for the entire six-year statute of limitations period (*e.g.*, any of the of construction management services set forth in Article 11). However, to the extent that TDX "fully warrant[ed] and guarantee[d]" ***its subcontractors'*** "materials, equipment, and Work against any and all defects whether ***latent or patent*** (emphasis added)," that specific warranty was for one year and any claims thereon needed to be timely brought within such period.

In addition, to the extent that Navy Yard destroyed the insulation without first giving TDX or any of its subcontractors a chance to examine it, it is also precluded from claiming that improper insulation was installed on the east wall of the Perry Building and is, therefore, not entitled to recover $327,950 for the cost of replacing said insulation (*Standard Fire Ins. Co. v Federal Pac. Elec. Co.*, 14 AD3d 213, 217-218 [1st Dept 2004] [dismissal of claim appropriate where plaintiff should "have foreseen that preservation of the panel and circuit breakers was absolutely essential to the assertion of any claim based upon a defect in the electrical equipment"]). Destruction of evidence need not be intentional for a claim to be dismissed on that basis (*id.*, *Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 172[1st Dept 1997] ["law concerning spoliation has been extended to nonintentional destruction of evidence"]). Here, as a result of Navy Yard's conduct, there is simply no way for the defendants to present a defense *vis a vis* whether the insulation that was installed conformed to the terms of the Construction Management Contract since the Navy Yard replaced the allegedly defective insulation without ever providing TDX or any other defendant a chance in to inspect it. As "such physical evidence is often the most eloquent impartial 'witness' to what really occurred," it would be inherently unfair to allow a "party to destroy evidence and then to benefit from that conduct or omission" (*Kirkland*, 236 AD2d at

172). Accordingly, the claims with respect to the allegedly defective insulation must be dismissed.

As the complaint against TDX is dismissed, there is no basis for TDX's indemnification claim against Calcedo and TDX's complaint Calcedo must necessarily be dismissed as well.

II. Motion to Dismiss Complaint Against LiRo is Granted

As noted above, LiRo only provided program management services, which were largely administrative, to Navy Yard in connection with its construction of the Perry Building. Contrary to Navy Yard's assertion, LiRo was not required by the Program Services Contract to inspect any contractor's work, only to "monitor" the work and report any observed deviations. Notably, LiRo is not an architect, engineer or other specialist and there is no evidence in the record to suggest a basis for LiRo to even be able to observe that any non-compliant insulation may have been used. Moreover, as indicated, Navy Yard did not provide any of the defendants, including LiRo, with an opportunity to inspect the allegedly improper insulation and, as such, it is impossible to know if LiRo would have even been capable of observing the difference in the allegedly defective insulation as opposed to the insulation that Navy Yard claims should have been used. The complaint against LiRo is dismissed.

III. Motions to Dismiss the Third, Fourth, and Fifth Party Complaints are Granted

The motions by Calcedo and NYC Acoustics (seq. 002), Starbrite (seq. 004), and GlasSolutions are all moot as the claims for indemnification against these defendants must be dismissed in light of the foregoing dismissal of the primary complaint against TDX and LiRo.

Accordingly, it is

ORDERED that motions seq. no. 001 and 003 for summary judgment are granted as indicated above and the complaint is dismissed; and it is further

ORDERED that motions seq. no. 002, 004, and 005 are granted to the extent that the third party complaint, the fourth party complaint, and the fifth party complaint are all dismissed, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

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10/30/2019
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE