

McMahon v Cobblestone Lofts Condominium

2020 NY Slip Op 30975(U)

April 17, 2020

Supreme Court, New York County

Docket Number: 151136/2014

Judge: Paul A. Goetz

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ PART IAS MOTION 47EFM

Justice

-----X

SHANE MCMAHON, MARISSA MCMAHON,
Plaintiffs,

- v -

THE COBBLESTONE LOFTS CONDOMINIUM, THE
ANDREWS ORGANIZATION, JOHN DOES 1-5, NOVA
RESTORATION OF NY INC., NOVA RESTORATION LLC,
WALTER B. MELVIN, ARCHITECTS, LLC, 7 VESTRY LLC,
PACT REALTY, LLC, PAUL JACOBSON, AVRA JAIN,
CHRISTOPHER SMITH, CMS ARCHITECTURE AND
DESIGN, ROBERT SHAPIRO, OSTREICHER LAIGHT
PARTNERS LLC, OSTREICHER CONSTRUCTION
CORPORATION,

Defendants.

-----X

THE COBBLESTONE LOFTS CONDOMINIUM, THE
ANDREWS ORGANIZATION,

Third-Party Plaintiffs,

-against-

NOVA RESTORATION OF NY INC., NOVA RESTORATION
LLC, WALTER B. MELVIN, ARCHITECTS, LLC,

Third-Party Defendants.

-----X

THE COBBLESTONE LOFTS CONDOMINIUM, THE
ANDREWS ORGANIZATION,

Second Third-Party Plaintiffs,

-against-

OLMSTEAD ENVIRONMENTAL SERVICES INC., TOTAL
ENVIRONMENTAL RESTORATION SOLUTIONS,

Second Third-Party Defendants.

-----X

Table with 2 columns: INDEX NO., MOTION DATE, MOTION SEQ. NO. and a large text block: DECISION + ORDER ON MOTION

Third-Party
Index No. 595341/2014

Second Third-Party
Index No. 595327/2016

The following e-filed documents, listed by NYSCEF document number (Motion 028) 1055, 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1064, 1065, 1066, 1067, 1068, 1069, 1070, 1071, 1072, 1073,

1074, 1075, 1076, 1077, 1078, 1079, 1080, 1081, 1082, 1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096, 1097, 1098, 1099, 1102, 1103, 1106, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1116, 1117, 1135, 1136, 1137, 1138, 1139, 1140, 1141, 1146, 1147, 1148, 1149

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

The following e-filed documents, listed by NYSCEF document number (Motion 029) 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1107, 1123, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1133, 1134, 1150, 1151, 1152

were read on this motion to/for LEAVE TO FILE

The following e-filed documents, listed by NYSCEF document number (Motion 030) 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000, 1001, 1002, 1104, 1118, 1119, 1120, 1121, 1122, 1142, 1153, 1154, 1155, 1157

were read on this motion to/for JUDGMENT – SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 031) 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1105, 1143, 1156

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

Plaintiffs Shane McMahon and Marissa McMahon, individually and on behalf of their children AM, BM, and CM, bring this action for, inter alia, money damages and injunctive relief resulting from water infiltration into their penthouse unit, Penthouse A, at the Cobblestone Lofts Condominium located at 28 Laight Street in Manhattan. Plaintiffs allege that toxic mold grew in their apartment, which caused them to suffer, among other things, asthma or aggravated their asthma.

Defendants/third-party defendants Nova Restoration of NY, Inc. and Nova Restoration LLC (together, Nova) move for an order: (1) pursuant to CPLR 3211 and/or 3212, dismissing plaintiffs’ claims on statute of limitations grounds; (2) pursuant to CPLR 3212, granting Nova summary judgment dismissing plaintiffs’ complaint and all claims against it with prejudice; and (3) pursuant to CPLR 3212, granting Nova summary judgment dismissing all cross claims and third-party claims against it (motion sequence number 028).

Defendant/third-party plaintiff/second-third-party plaintiff The Cobblestone Lofts Condominium (Cobblestone) moves, pursuant to CPLR 3025, for leave to amend its answer to assert additional affirmative defenses, including (1) failure of consideration, (2) frustration of purpose, (3) impossibility, (4) plaintiffs’ prior breach, and (5) election of remedies. Cobblestone also moves, pursuant to CPLR 3212, for an order: (1) granting summary judgment dismissing plaintiffs’ remaining breach of contract cause of action based on the doctrine of failure of consideration; and (2) granting Cobblestone summary judgment on its contractual indemnification claim over and against Nova (motion sequence number 029).

Second third-party defendant Olmsted Environmental Services, Inc. (Olmsted) moves, pursuant to CPLR 3212, for summary judgment dismissing the second third-party complaint and all claims, cross claims, and causes of action asserted against it (motion sequence number 030).

Second third-party defendant Total Environmental Restoration Solutions (TERS) moves, pursuant to CPLR 3212, for summary judgment dismissing the second third-party claims for indemnification and all other claims against it (motion sequence number 031).

Motion sequence numbers 028, 029, 030, and 031 are consolidated for disposition.

BACKGROUND

Defendant the Andrews Organization f/k/a Andrews Building Corporation (Andrews) is the Cobblestone residential condominium’s managing agent. Nova was hired to replace the roof deck and the roof of the condominium. Andrews hired Olmsted, an industrial hygienist, to conduct a mold survey. TERS performed mold remediation work as outlined by Olmsted. Defendant/third-party defendant Walter B. Melvin Architects, LLC (WBMA) was the architect retained for the roof and deck replacement.

Shane McMahon testified at his deposition that he did not know about mold in the building until “towards the end of 2011” (NY St Cts Elec Filing [NYSCEF] Doc No. 1068, Shane McMahon tr at 333). He also testified that he did not know that there was mold in the mechanical rooms (*id.*). Mr. McMahon stated that he became concerned for his and his family’s health in 2012; “Once we learned of the mold, which was right after we moved out, so 2012 beginning of 2012” (*id.* at 108). Mr. McMahon testified that they moved out in the spring of 2012 when their family doctor told them that “[y]ou cannot have children, especially with the conditions that they have, in a mold infested environment” (*id.* at 140). According to Mr. McMahon, “there were definitely workmen on the deck on the three decking projects, one of which I know definitely was Nova for 2012” (*id.* at 204, 207).

Marissa McMahon testified at her deposition that the earliest that she remembered sending emails to Kosha Diaz (a property manager with Andrews) was in the fall of 2011 (NYSCEF Doc No. 1069, Marissa McMahon tr at 281). Mrs. McMahon testified that, “I think I had spoken to the kids’ pediatrician and . . . he just sort of told me that I shouldn’t wait, that we should move out of the apartment; so I think that it must have been after speaking with him or hearing his opinion about that” either in the winter of 2011 or the spring of 2012 (*id.* at 353).

Plaintiffs’ engineer, Thornton Tomasetti, issued a report dated March 12, 2013, which states that:

“Improper [exterior insulation finishing system] EIFS termination was observed throughout the façade. It appears that when the new deck was put in place, significant damage was done to the EIFS. The proper method of installing the decking against EIFS would be to butt the ends of the deck boards to within ¼ inch of the EIFS finish. This method allows for expansion and contraction of the deck board without impacting the EIFS finish. Instead the installers of the deck cut through the EIFS and set the deck boards under the now unfinished EIFS underside exposing the polystyrene (Photos 27 & 28). The polystyrene will wick water off of the deck boards and will remain damp for long periods of time”

(NYSCEF Doc No. 203 at 3 of 23).

Ireneusz Janczyk (Janczyk), Nova Restoration, LLC's president, testified that, in August 2010, the Board hired Nova for a roof and deck replacement project at the premises (NYSCEF Doc No. 1072, Janczyk tr at 17-19). Janczyk was the project manager (*id.* at 20, 90). According to Janczyk, there are at least four or five roofs on the building, with smaller roofs over other structures or parts of the structure (*id.* at 27). He explained that there is a roof over the penthouse, and that there is a roof over the six-story building beneath the penthouse (*id.*). The work involved the replacement of the deck above the sixth floor and the replacement of the roof (*id.* at 28). The deck that was replaced was the deck outside the penthouse (*id.*). He stated that "[o]ne section was done by someone else prior to [Nova] working at the building" (*id.* at 52). Janczyk testified that once the decking was back in place, the architect inspected the decking (*id.* at 54-55). The roof "was poorly done, you know, prior to [when] we got there, so it was just really poor, poor roof" (*id.* at 60). There were no other contractors working on the lower roof, the roof overlying the six-story structure (*id.* at 62). He did not observe anyone cut into the EIFS (*id.* at 65). When shown a photograph from plaintiffs' engineer's report regarding the improperly installed decking, Janczyk stated that he did not recall ever seeing the condition on the site (*id.* at 66). He testified that "[i]t's not even clear with the pictures what this is, to be honest" (*id.*). Cobblestone never issued an event of default, nor did it issue a stop work order (*id.* at 113). Nova was also hired in 2013 for an exterior restoration project (*id.* at 30-32). The exterior repairs did not involve the roof over the penthouse but did involve its exterior walls (*id.* at 32). In October 2013, Nova was again retained to replace the roof membrane above the penthouse unit (*id.* at 39-40).

Anne Hinsman (Hinsman), WBMA's witness, testified that she inspected the roof prior to Nova's work, and observed that the roof was not in good condition and that it "was not serving its purpose as a good roofing system anymore" (NYSCEF Doc No. 1073, Hinsman tr at 155). Hinsman testified that "one of the contributing factors was that the existing deck system penetrated the roof system, many, many, many, many, many times over the [main] roof" (*id.*). She observed leaks in more than one unit under the main roof before Nova started its work (*id.* at 156). WBMA had to certify that Nova's work had been done correctly (*id.* at 48). Final payment would not be issued until WBMA performed a final inspection and certified that the work was complete (*id.*). She did not observe anyone cutting into the EIFS outside Penthouse A (*id.* at 134).

Kosha Diaz (Diaz), a property manager employed by Andrews, testified that she thought that she may have inspected Nova's work after the roof was installed (NYSCEF Doc No. 1070 at 30, 31, 539). She did not recall any issues with the work (*id.* at 540). She stated that her construction experience was limited to coordinating vendors (*id.* at 485). She did not request that Olmsted perform an inspection of the exterior envelope of the building (*id.* at 502).

Luigi Rukaj (Rukaj), the building superintendent, testified, with respect to the construction of the deck near the exterior façade of the penthouse, that "you probably had maybe quarter of an inch before it touched the flashing of the roof which is the extra water proofing so water don't get in. Then you had about a three-foot drop or four-foot drop under the deck like a little crawl space in there" (NYSCEF Doc No. 1071, Rukaj tr at 131). There was flashing right at the rim where the deck met the façade (*id.* at 132). He did not know whether there was EIFS on the exterior of plaintiffs' apartment (*id.* at 133). Rukaj testified that the exterior façade did

not have to be cut in order to accommodate the decking (*id.*). However, the developer had cut a certain portion where the decking went into the façade (*id.*).

Edward Olmsted (Mr. Olmsted) testified that he is a certified industrial hygienist, and that he is the owner of Olmsted (NYSCEF Doc No. 982, Olmsted tr at 15, 17). Mr. Olmsted inspected plaintiffs' apartment unit on four separate occasions (*id.* at 25). He testified that he "was asked to [do] an assessment for mold [and to] come [up] with [a] recommendation as to where the mold is and what should be removed and what should be cleaned" (*id.* at 125). He testified that he did not have a formal agreement with Andrews (*id.* at 32). However, he believed that he submitted a proposal to perform mold testing inside the penthouse apartment to Andrews; "I'm not certain I sent a proposal, but I will have to – usually that's what I do, but I could not find a proposal in this case" (*id.* at 33). Mr. Olmsted inspected the kitchen, children's play room, and the HVAC system (*id.* at 125-126). Mr. Olmsted took an air sample with a vacuum pump to pull air into a sterile filter (*id.* at 129-130). According to Mr. Olmsted, bulk sampling involves cutting a sample of material and sending it for analysis (*id.* at 71-72). He testified that dust samples are "good indicators of a mold"; however, they are not as conclusive as a sample of the underside of the wood (*id.* at 130-131). He could not find evidence of mold growth (*id.* at 130). Mr. Olmsted prepared a remediation plan (*id.* at 185). After TERS was retained to conduct the remediation, additional mold was found (*id.*). Seven holes were drilled into the floor, but Olmsted could not find any evidence of mold (*id.* at 195-196). He believed that the problems with plaintiffs' unit were related to an episodic flood during a hurricane and bad storm (NYSCEF Doc No. 983, Olmsted continued tr at 365). Mr. Olmsted stated that he did not have any reason to believe that there was a chronic moisture issue (*id.* at 365-366). However, he admitted that the pattern of growth was inconsistent with a roof leak and "there was something

else going on” (*id.* at 366-367). When asked why he did not hire someone to figure out what was causing the mold intrusion, he stated “I don’t know. I should have probably” (*id.* at 367).

Gary Shaked (Shaked) testified that he is the president and owner of TERS (NYSCEF Doc No. 1036, Shaked tr at 27). TERS performs “[e]nvironmental work, emergency response, water damage mitigation, fire damage mitigation, documents cleanup” (*id.* at 31). Andrews hired TERS on projects from around 2008 through 2011 (*id.* at 35). He testified that “he visit[ed] only one section, one part of the house, only the part of the house he guide us, the kitchen area” (*id.* at 48). TERS’s proposal to Andrews was based upon Olmsted’s recommendations (*id.* at 49). During his site visit, he looked at the kitchen area, part of the entrance area, and the utility room where the HVAC equipment was located (*id.* at 50). Shaked drafted Olmsted’s proposal dated December 3, 2011 (*id.* at 82-83). TERS removed all affected material from the kitchen area (*id.* at 138). Mr. McMahon was present at a post-remediation site visit on May 24, 2012 (*id.* at 150). Mr. McMahon was “very upset” and explained to him that the leak in the kitchen was not the only one and all the floor from the areas should have been removed (*id.*). He explained to Mr. McMahon that it was outside the scope of TERS’s work, and that he would contact Andrews (*id.* at 151).

PROCEDURAL HISTORY

Plaintiffs commenced the instant action with a summons with notice on February 7, 2014 (NYSCEF Doc No. 1). Plaintiffs thereafter filed their complaint on April 9, 2014 against Cobblestone, Andrews, and John Does 1-5, asserting the following claims: (1) negligence against Cobblestone and Andrews; (2) negligence causing physical injuries against all defendants; (3) breach of contract against Cobblestone; (4) breach of contract against Andrews; (5) breach of contract against John Does 1-2; (6) breach of contract against John Does 3-5; (7) negligent

infliction of emotional distress against all defendants; and (8) injunctive relief against Cobblestone and Andrews (NYSCEF Doc. No. 21).

Cobblestone and Andrews filed a verified third-party complaint against Nova and WBMA, seeking: (1) contractual indemnification; (2) common-law indemnification; (3) contribution; and (4) failure to procure insurance (NYSCEF Doc No. 117).

Plaintiffs thereafter filed an amended complaint naming Nova and WBMA as direct defendants (NYSCEF Doc. No. 182).

Thereafter, plaintiffs filed a second amended complaint, the operative complaint, asserting the following nine causes of action:

- (1) negligence based on violations of Multiple Dwelling Law § 78 and Administrative Code of the City of New York § 27-345 against Cobblestone and Andrews;
- (2) negligence causing physical injuries against all defendants;
- (3) breach of contract against Cobblestone;
- (4) breach of contract against Andrews;
- (5) breach of contract against WBMA and John Doe 1;
- (6) breach of contract against Nova and John Doe 2;
- (7) negligent infliction of emotional distress against all defendants;
- (8) injunctive relief against Cobblestone and Andrews; and
- (9) a declaratory judgment for an abatement of common charges, assessments, and other sums owed to Cobblestone.

(NYSCEF Doc No. 182). Plaintiffs seek no less than \$50 million in compensatory damages, in addition to reasonable attorneys' fees and costs and expenses (*id.*).

Cobblestone and Andrews filed a second third-party complaint against Olmsted and TERS, asserting two causes of action for indemnification, contribution, breach of warranty, and breach of contract (NYSCEF Doc No. 329).

Previously, Cobblestone and Andrews moved, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the first, second, fourth, seventh, eighth, and ninth causes of action in the second

amended complaint (NYSCEF Doc No. 374). By decision and order dated July 27, 2016, the court (Wright, J.): (1) granted dismissal of the first cause of action as against Andrews, but not as to Cobblestone; (2) dismissed the second cause of action; (3) dismissed the cause of action for negligent infliction of emotional distress; (4) denied dismissal of the breach of contract claim against Andrews; (5) denied dismissal of the injunctive relief claim; and (6) denied dismissal of the claim for a declaratory judgment seeking an abatement of common charges and assessments (NYSCEF Doc No. 1041).

Thereafter, Cobblestone moved to resettle and/or reargue the court's July 27, 2016 decision and order (NYSCEF Doc No. 503). On April 25, 2017, the court: (1) granted dismissal of all claims against Andrews; and (2) granted dismissal of the claim for a declaratory judgment (NYSCEF Doc No. 1044).

Plaintiffs also moved for a preliminary injunction ordering Cobblestone to make repairs to the penthouse unit to prevent entering their unit (NYSCEF Doc No. 641). The court (Edwards, J.) granted the motion in a decision and order dated October 10, 2018 (NYSCEF Doc No. 1047).

On appeal, as relevant here, the First Department held that:

“[t]he court properly declined to dismiss the causes of action relating to Cobblestone’s contractual and statutory duties to repair and maintain the roof over the plaintiffs’ penthouse, and properly dismissed the negligence cause of action against it. The allegations concerning Cobblestone’s defective work sound in breach of contract, not negligence. The complaint also fails to allege conduct that approaches the level of outrageousness or extremity necessary to support a claim of intentional infliction of emotional distress. Plaintiffs’ cause of action seeking an abatement fails since their unit did not suffer a ‘casualty loss’ as required under the bylaws.

The court properly denied dismissal of the injunctive relief claim and properly granted plaintiffs’ subsequent motion for a preliminary injunction requiring Cobblestone to make all necessary repairs to prevent further infiltration of water in plaintiffs’ unit. Plaintiff demonstrated a likelihood of success on the merits, the

prospect of irreparable harm absent an injunction and a balance of equities in their favor”

(*McMahon v Cobblestone Lofts Condominium*, 161 AD3d 536, 537 [1st Dept 2018] [citations omitted]).

Therefore, the remaining causes of action are: (1) plaintiffs’ first cause of action asserting breaches of Cobblestone’s statutory duties to maintain and repair the roof over plaintiffs’ penthouse; (2) plaintiffs’ third cause of action asserting breaches of Cobblestone’s contractual duties under the declaration and bylaws; and (3) plaintiffs’ eighth cause of action seeking injunctive relief (NYSCEF Doc. No. 182).

Plaintiffs filed the note of issue and certificate of readiness on April 30, 2019 (NYSCEF Doc No. 939).

DISCUSSION

It is well established that “[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court’s directing judgment in its favor as a matter of law” (*Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551, 553 [1st Dept 2012] [internal quotation marks and citation omitted]). “Thus, the movant bears the burden to dispel any question of fact that would preclude summary judgment” (*id.*). “Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution” (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). “On a motion for summary judgment, 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]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v*

Amalgamated Hous. Corp., 298 AD2d 224, 226 [1st Dept 2002]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (*O'Brien v Port Auth. Of N.Y. & N.J.*, 29 NY3d 27, 37 [2017]).

I. Nova's Request for Summary Judgment Dismissing the Second Amended Complaint

A. Whether Plaintiffs' Personal Injury Claims Are Time-Barred

Nova argues that plaintiffs' personal injury claims should be dismissed as time-barred. According to Nova, plaintiffs' claims are governed by the three-year statute of limitations for personal injuries resulting from an alleged exposure to a toxic substance. Nova contends that plaintiffs were experiencing respiratory ailments as early as 2010, submitting selected medical records for AM, BM, CM, and Mrs. McMahon (NYSCEF Doc No. 1094). Nova argues that plaintiffs are barred from bringing their personal injury claims related to mold exposure because they commenced this action in April 2014. Finally, Nova maintains that plaintiffs were aware of prior mold in the building and numerous water intrusions into their unit as early as 2009.

In response, plaintiffs contend that Nova has failed to establish that plaintiffs' personal injury claims are untimely. Specifically, plaintiffs contend that their preexisting medical conditions and the existence of mold and water in the building do not prove that they knew prior to 2012 that their unit would become infested with toxic mold. Furthermore, plaintiffs testified that they were not aware of, and had no reason to be aware of, mold in their unit before the end of 2011.

"Generally, an action to recover damages for personal injury or injury to property must be commenced within three years of the injury" (*Panzo v Keyspan Corp.*, 176 AD3d 961, 962 [2d Dept 2019] [internal quotation marks and citation omitted]; *see also* CPLR 214 [4], [5]).

“[T]he three year period within which an action to recover damages for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances . . . shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier”

(CPLR 214-c [2]).

In *Matter of New York County Litig. DES Litig.* (89 NY2d 506, 515 [1997]), the Court of Appeals held that the running of the statute of limitations does not “depend on claimants’ subjective understanding of the etiology of their conditions,” because doing so would make accrual dependent upon “fortuitous circumstances as the medical sophistication of the individual plaintiff and the diagnostic acuity of his or her chosen physician.”

“[D]iscovery occurs when, based upon an objective level of awareness of the dangers and consequence of the particular substance, ‘the injured party discovers the primary condition on which the claim is based’” (*MRI Broadway Rental v United States Min. Prods. Co.*, 92 NY2d 421, 429 [1998], quoting *Matter of New York County DES Litig.*, 89 NY2d at 509). “[T]he drafters of CPLR 214-c intended the term ‘injury’ to refer to an actual illness, physical condition or other similarly discoverable objective manifestation of the damage caused by previous exposure to an injurious substance” (*Sweeney v General Print.*, 210 AD2d 865, 865-866 [3d Dept 1994], *lv denied* 85 NY2d 808 [1995]). Therefore, “a plaintiff must be considered to have discovered such an injury when he or she is actually diagnosed as suffering from a particular disease, even though unaware of its cause” (*id.* at 866; *see also Matter of New York County DES Litig.*, 89 NY2d at 520 n 4; *see e.g. Harley v 135 E. 83rd Owners Corp.*, 238 AD2d 136, 137-138 [1st Dept 1997] [statute of limitations on plaintiff’s negligence claim began to run when she discovered her injuries, despite the fact that her chronic condition was attributed to mold flourishing in her damp apartment two years later]). In addition, “separate and distinct disease[s]

... may constitute different injuries, each with its own time of discovery” (*Sweeney*, 210 AD2d at 866).

Here, Nova has failed to establish prima facie that plaintiffs’ claims are time-barred. Specifically, Nova has not shown that plaintiffs discovered or reasonably should have discovered their symptoms three years before they commenced this action. Plaintiffs’ verified bill of particulars alleges that they “suffered respiratory injuries as a result of exposure to conditions in the Unit” (NYSCEF Doc No. 1065 at 16). Plaintiffs allege that they suffered from:

[A]sthma and exacerbation of asthma (in the case of plaintiffs AM, BM, and CM and plaintiff Shane McMahon), sinusitis, upper and lower respiratory infection, allergic reaction resulting from the combination of pre-existing allergy to mold and exposure to mold infestation caused by Defendants’ negligence, hypersensitivity pneumonitis, shortness of breath, weakened immunity, fatigue and diminished capacity to participate actively in regular activities

(*id.*). Although Nova submits one medical record for AM dated January 27, 2010 indicating that AM suffered from asthma (NYSCEF Doc No. 1094 at 3-4), Nova has not demonstrated when AM’s asthma symptoms worsened (*see Vincent v New York City Hous. Auth.*, 129 AD3d 466, 467 [1st Dept 2015] [tenant’s claim accrued when tenant’s asthma symptoms worsened, resulting in more frequent attacks and hospital visits, and prescription of additional medications]). Nova also relies upon medical records for BM, CM, and Mrs. McMahon from 2009 and 2010, indicating that they suffered from rhinitis and hay fever (NYSCEF Doc No. 1094). Nevertheless, Nova has also not excluded the possibility that plaintiffs later suffered from separate and distinct diseases (*see Wells v 3M Co.*, 137 AD3d 1556, 1557 [3d Dept 2016]). Furthermore, Nova has not submitted any evidence demonstrating when plaintiffs were aware that their apartment was contaminated with mold (*cf. Byrd v Pinecrest Manor*, 82 AD3d 813, 815 [2d Dept 2011]; *Searle v City of New Rochelle*, 293 AD2d 735, 736-737 [2d Dept 2002]).

Accordingly, the branch of Nova's motion seeking dismissal of plaintiff's personal injury claims as time-barred must be denied.

B. Plaintiffs' Negligence Claim

Nova next argues that plaintiffs' negligence cause of action must be dismissed because it did not owe plaintiffs a duty of care. Nova contends that it did not create or exacerbate any condition that forced plaintiffs to leave their apartment. Nova asserts that it was called in to fix the main roof in 2010, following 10 years of water intrusions into the building.

To support its position, Nova submits an affidavit from Don Erwin, an architect who performed a site inspection of plaintiffs' unit and the roof on August 22, 2017 (NYSCEF Doc No. 1081, Erwin aff, ¶ 3). Erwin states that the portion of the main roof that Nova installed in 2010 is located several feet below the floor plane of Penthouse A (*id.*, ¶ 19). Therefore, any water infiltration would not be able to travel up into Penthouse A (*id.*). The main roof under the interior of Penthouse A was only partially visible during his inspection because sheetrock had been removed, exposing the area below (*id.*, ¶ 20). He observed a dry space with no evidence of moisture (*id.*). Nova's work on the main roof did not impact any portion of the concealed space under the interior of Penthouse A (*id.*). Although he observed water stains on the drywall on the interior of Penthouse A around the windows and doors, Nova's work did not touch these areas (*id.*, ¶ 21). There was no sign of active leaks in the terrace door (*id.*, ¶ 22). According to Erwin, there was no water damage to the floors in that area (*id.*).

Erwin observed that all work performed by Nova, i.e., the main roof, the Penthouse A terrace, the upper roof and the sill work, were all consistent with industry standards and were performed in a workman-like manner (*id.*, ¶ 23). Penthouse A had been experiencing water infiltration since the initial construction in 2001, a fact that was only revealed as a result of the

detailed investigations after the severe weather in the summer of 2011 (*id.*, ¶ 24). Erwin states that “[i]t is not clear if plaintiffs were aware of the extent or significance of the water damage to Penthouse A at that time” (*id.*). From 2010 through 2012, Nova’s work only incidentally touched Penthouse A in two locations: (1) where the main roof was flashed to the wall below Penthouse A’s floor level; and (2) where the defective membrane was replaced at the stone threshold (*id.*, ¶ 25). Nova was not responsible for the initial lack or detreating membrane underneath the stone sill (*id.*, ¶ 26). Erwin was not aware of any complaints of water intrusions in that area since Nova completed the repair work (*id.*). Erwin concludes that:

“Based on the timeline of events as detailed above, plaintiffs’ complaints of water intrusion which allegedly result[ed] in mold growth could not have involved any work performed by Nova. All of the investigations of Penthouse A’s walls and roof and all of the mold testing that forms the basis of plaintiffs’ claims were done *prior* to Nova performing any work at the Penthouse A. Nova’s work that occurred prior to the investigations cannot be implicated, since it did not impact Penthouse A. Moreover, its subsequent work cannot be implicated since it was undertaken to address the defects in the original construction”

(*id.*, ¶ 27). Further, Nova contends that there is no evidence that it cut into the EIFS.

Moreover, Nova argues that plaintiffs did not rely on Nova’s continued performance under its contract with Cobblestone. Nova further contends that it did not displace Cobblestone’s duty to maintain the building safely. Finally, Nova argues that it did not breach its duty, and did not cause plaintiffs’ injuries.

In opposition, plaintiffs contend that: (1) there is an issue of fact as to whether Nova owed them a duty of care; (2) Nova’s acts and omissions create issues of fact as to its liability; and (3) Nova has not shown that it did not proximately cause plaintiffs’ harm.

Generally, “a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party” (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]). However, there are three exceptions to the general rule: (1) “where the contracting party, in

failing to exercise reasonable care in the performance of his duties, launch[es] a force or instrument of harm” (*id.* at 140); (2) “where the plaintiff detrimentally relies on the continued performance of the contracting party’s duties” (*id.*); and (3) “where the contracting party has entirely displaced the other party’s duty to maintain the premises safely” (*id.*).

With respect to the first exception, “a defendant who undertakes to render services and then negligently creates or exacerbates a dangerous condition may be liable for any resulting injury” (*id.* at 141-142).

In this case, Nova has failed to establish that it did not create or exacerbate a dangerous condition, or that it did not cause plaintiffs’ injury or property damage (*see Daitch v Naman*, 25 AD3d 458, 459 [1st Dept 2006] [issues of fact as to “whether such mold was caused by water and particulate matter that entered plaintiff’s apartment because of the contractor’s failure to exercise due care, and whether such mold caused plaintiff’s alleged injuries”]). Although Nova argues that there is no evidence that it cut into the EIFS, Hinsman, the WBMA architect, testified that she did not know whether Nova cut into the EIFS, since she was not on the site at all times (NYSCEF Doc No. 1073, Hinsman tr at 134). Moreover, Diaz, the Andrews property manager, testified that she did not recall whether there were any complaints about Nova’s work (NYSCEF Doc No. 1070, Diaz tr at 540). Janczyk, Nova’s project manager, testified when shown photographs allegedly depicting damage to the EIFS, that he did not recall seeing the condition on the site and that “it’s not even clear with the pictures what this is to be honest” (NYSCEF Doc No. 1072, Janczyk tr at 66). Rukaj, the condominium’s superintendent, testified that he did not know whether Nova had to cut into the EIFS to accommodate the decking (NYSCEF Doc No. 1071, Rukaj tr at 133). Thornton Tomasetti’s (plaintiffs’ engineer) report states that “[i]t appears that when the new deck was put in place, significant damage was done to the EIFS” (NYSCEF

Doc No. 203 at 3 of 23). While Nova argues that Thornton Tomasetti's report is inadmissible hearsay, the court may consider this evidence because it is not the only evidence submitted in opposition (*see O'Halloran v City of New York*, 78 AD3d 536, 537 [1st Dept 2010]). Indeed, Janczyk testified that Nova was the only company performing work on the roof and deck replacement project in 2010, and that there were no subcontractors (NYSCEF Doc No. 1072, Janczyk tr at 61-62). Moreover, Cobblestone offers an affidavit indicating that it hired an architectural firm to conduct an inspection of the penthouse, and found an apparent flaw in the construction of the deck (NYSCEF Doc No. 1139, Breyman aff, ¶ 7). Given the issues of fact as to whether Nova failed to exercise due care in the performance of its work, Nova's contention that its contracts did not impose a duty of care to plaintiffs is unavailing (*see Montefiore v Ansonia Assoc., Inc.*, 11 Misc3d 145[Λ], *2 [App Term, 1st Dept 2006]).

Nova next argues that plaintiffs' mold-related claims should be dismissed because plaintiffs cannot prove that mold can cause any of the injuries alleged by plaintiffs. Nova maintains that plaintiffs fail to establish specific causation regarding their mold exposure.

Plaintiffs contend, in opposition, that Nova has failed to establish prima facie entitlement to summary judgment. According to plaintiffs, Nova has not submitted any evidence that demonstrates that causation is lacking.

In toxic tort cases, an expert opinion on causation must set forth (1) a plaintiff's exposure to a toxin, (2) that the toxin is capable of causing the particular injuries plaintiff suffered (general causation) and (3) that the plaintiff was exposed to sufficient levels of the toxin to cause such injuries (specific causation)

(*Sean R. v BMW of N. Am., LLC*, 26 NY3d 801, 808 [2016]; *see also Parker v Mobil Oil Corp.*, 7 NY3d 434, 446 n 2 [2006]).

In this case, Nova asserts that plaintiffs cannot demonstrate general causation or specific causation. With respect to general causation, Nova maintains that "[p]laintiffs have not

submitted any evidence, via expert proof, that it is generally accepted by the scientific community that inhalation exposure to mold spores causes permanent symptoms or conditions” (NYSCEF Doc No. 1056, Collazzi affirmation in support, ¶ 105). Thus, Nova has “merely pointed to perceived gaps in plaintiffs’ proof, rather than submitting evidence showing why [plaintiffs’] claims fail” (*O’Connor v AERCO Intl., Inc.*, 152 AD3d 841, 844 [3d Dept 2017] [internal quotation marks and citation omitted]; cf. *Cornell v 360 W. 51st St. Realty, LLC*, 22 NY3d 762, 782 [2014], *rearg denied* 23 NY3d 996 [2014] [landlord made prima facie showing, through expert opinion, that tenant could not prove general causation]). Nova has also failed to demonstrate a lack of specific causation, i.e., that plaintiffs were exposed to insufficient levels of mold to cause their asthma or aggravation of asthma or other injuries (*see Cabral v 570 W. Realty, LLC*, 73 AD3d 674, 675 [2d Dept 2010]). Therefore, Nova is not entitled to dismissal of plaintiffs’ mold claims on the ground that plaintiffs cannot prove general causation or specific causation.

C. Plaintiffs’ Breach of Contract Claim

Nova argues that plaintiffs’ breach of contract claim must be dismissed because they were not named third-party beneficiaries of the contract. Furthermore, Nova argues that its work was not negligent. Plaintiffs point out, in opposition, that Nova’s president admitted that plaintiffs were intended third-party beneficiaries of Nova’s contracts -- Janczyk testified that he knew that the contract was being done for the benefit of the residents (NYSCEF Doc No. 1072, Janczyk tr at 111-112).

“A party asserting rights as a third-party beneficiary must establish ‘(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [her] benefit and (3) that the benefit to [her] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [her] if the benefit is lost’”

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

The Court of Appeals has allowed a third-party beneficiary to enforce a contract in two situations: “[1] when the third party is the only one who could recover for the breach of contract or [2] when it is otherwise clear from the language of the contract that there was ‘an intent to permit enforcement by the third party’” (*Dormitory Auth. of the State of N.Y. v Samson Constr. Co.*, 30 NY3d 704, 710 [2018], quoting *Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 66 NY2d 38, 45 [1985]). “[T]he ordinary construction contract—i.e., one which does not expressly state that the intention of the contracting parties is to benefit a third party—does not give third parties who contract with the promisee the right to enforce the latter's contract with another. Such third parties are generally considered mere incidental beneficiaries” (*Port Chester Elec. Constr. Co. v Atlas*, 40 NY2d 652, 656 [1976]).

Nova has demonstrated that plaintiffs were not named third-party beneficiaries of any of its contracts. Plaintiffs have failed to point to any language in Nova's contracts evidencing an intent to permit enforcement by them. Moreover, plaintiffs are not the only parties who could recover for breach of contract. Indeed, Cobblestone has asserted its own breach of contract claim against Nova. Accordingly, plaintiffs' breach of contract claim must be dismissed as against Nova (*see Leonard v Gateway II, LLC*, 68 AD3d 408, 408–409 [1st Dept 2009] [condominium unit buyer was not third-party beneficiary of alleged contracts with member of condominium sponsor and seller]; *Board of Mgrs. of Riverview at Coll. Point Condominium III v Schorr Bros. Dev. Corp.*, 182 AD2d 664, 665 [2d Dept 1992] [purchasers of units in condominium were not third-party beneficiaries to contract between developer of condominium and contractors so as to be entitled to sue to enforce contract]).

D. Plaintiffs' Negligent Infliction of Emotional Distress Claim

Nova contends that plaintiffs' negligent infliction of emotional distress claim fails because it did not unreasonably endanger plaintiffs' safety. Nova asserts that it was retained to fix the ongoing water intrusion into the building and only performed work after plaintiffs vacated their unit (NYSCEF Doc No. 1081, Erwin aff, ¶¶ 16-18, 24-42). In addition, Nova maintains that its work was performed in accordance with industry standards and in a workmanlike manner (*id.*, ¶ 23).

In opposition, plaintiffs argue that there are factual issues that cannot be resolved on summary judgment, especially given that Nova has not submitted any evidence to support its position.

“A cause of action to recover damages for negligent infliction of emotional distress does not require a showing of physical injury but must generally be premised upon a breach of a duty owed directly to the plaintiff which either unreasonably endangers a plaintiff's physical safety or causes the plaintiff to fear for his or her own safety” (*Daluise v Sottile*, 40 AD3d 801, 803 [2d Dept 2007] [internal quotation marks and citation omitted]). Extreme and outrageous conduct is also an element of negligent infliction of emotional distress (*see Lau v S&M Enters.*, 72 AD3d 497, 498 [1st Dept 2010], *lv dismissed in part, denied in part* 16 NY3d 767 [2011]; *see also Sheila C. v Povich*, 11 AD3d 120, 130-131 [1st Dept 2004] [“a cause of action for . . . negligent infliction of emotional distress must be supported by allegations of conduct by the defendants ‘so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community’”] [internal quotation marks and citations omitted]). Nova's alleged actions do not rise to the level of extreme and outrageous conduct. Accordingly, plaintiffs' negligent infliction of emotional distress claim must be dismissed.

II. Cobblestone's Request for Leave to Amend its Answer and for Summary Judgment Dismissing the Complaint Based on the Doctrine of Failure of Consideration

A. Leave to Amend

Cobblestone moves for leave to amend its answer to assert additional affirmative defenses, including (1) failure of consideration; (2) frustration of purpose; (3) impossibility; (4) plaintiffs' prior breach; and (5) election of remedies. As support, Cobblestone submits an affidavit from Greg Breyman (Breyman), a current member and past president of the board, who avers, based upon ledger sheets maintained by Andrews, that, as of June 27, 2019, plaintiffs owed \$939,286.71 in common charges and assessments, after failing to make payments since June 2012 (NYSCEF Doc No. 1049, Breyman aff, ¶¶ 3-6).

Plaintiffs argue, in opposition, that Cobblestone's motion should be denied because: (1) Cobblestone does not offer any excuse for failing to move to amend its answer for the past five years; (2) plaintiffs would be prejudiced by permitting amendment because they did not have an opportunity to take discovery on these affirmative defenses; (3) Cobblestone is judicially estopped from relitigating whether plaintiffs owe common charges, in light of the dismissal of a foreclosure action that Cobblestone commenced to foreclose on plaintiffs' unit for failure to pay their common charges; and (4) Cobblestone would not be prejudiced because it has been on notice of the facts supporting these proposed affirmative defenses for six years.

"[L]eave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit . . . , and the decision whether to grant leave to amend [pleadings] is committed to the sound discretion of the court"²³ (*Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015]; see also CPLR 3025 [b]).

“On a motion for leave to amend a pleading, movant need not establish the merit of the proposed new allegations, but must simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit” (*Cruz v Brown*, 129 AD3d 455, 456 [1st Dept 2015] [internal quotation marks and citation omitted]; accord *Weinstein v W.W.W. Assoc., LLC*, 178 AD3d 486, 487 [1st Dept 2019]). Prejudice “requires some indication that the [opposing party] has been hindered in the preparation of [its] case or has been prevented from taking some measure in support of [its] position” (*Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011] [internal quotation marks and citation omitted]). “[W]here the application for leave to amend is made long after the action has been certified for trial, judicial discretion in allowing such amendments should be discrete, circumspect, prudent, and cautious” (*Morales v 1415, LLC*, 171 AD3d 913, 915-916 [2d Dept 2019] [internal quotation marks and citation omitted]).

Plaintiffs’ reliance on the judicial estoppel doctrine to be misplaced. “[T]he doctrine of judicial estoppel precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed” (*Gale P. Elston, P.C. v Dubois*, 18 AD3d 301, 303 [1st Dept 2005] [internal quotation marks and citation omitted]). Cobblestone did not secure a judgment in its favor in the foreclosure action. Rather, the court dismissed the foreclosure action, without prejudice, because Cobblestone failed to timely serve plaintiffs with notices of pendency (NYSCEF Doc No. 1151).

The proposed thirty-fourth through thirty-seventh affirmative defenses allege that plaintiffs’ breach of contract cause of action is barred by the failure of consideration, frustration of purpose, and impossibility doctrines, and plaintiffs’ prior breach (NYSCEF Doc No. 1050). These proposed affirmative defenses are not clearly devoid of merit, in light of Breyman’s

affidavit indicating that plaintiffs have not paid common charges for the past seven years (NYSCEF Doc No. 1049, Breyman aff, ¶¶ 3-6). “Failure of consideration exists wherever one who has promised to give some performance fails to receive in some material respect the agreed quid pro quo for the performance. Failure of consideration gives the disappointed party the right to rescind the contract” (*Fugelsang v Fugelsang*, 131 AD2d 810, 812 [2d Dept 1987]). “The doctrine of frustration of purpose discharges a party's duties to perform under a contract where a wholly unforeseeable event renders the contract valueless to one party” (*Axginc Corp. v Plaza Automall, Ltd.*, 759 Fed Appx 26, 29 [2d Cir 2018]). “[I]mpossibility (which is treated synonymously with impracticability) is a defense to a breach of contract action ‘only when ... performance [is rendered] objectively impossible . . . by an unanticipated event that could not have been foreseen or guarded against in the contract’” (*id.*, quoting *Kel Kim Corp. v Cent. Mkts., Inc.*, 70 NY2d 900, 902 [1987]).

The proposed thirty-eighth affirmative defense, which alleges that plaintiffs have pursued inconsistent remedies (i.e., injunctive relief and money damages), is likewise not palpably insufficient. “The doctrine of election of remedies is only applicable when the choice which has been exercised proceeds upon a claim that is irreconcilable with another right” (*Matter of Petersen v Bane*, 194 AD2d 1001, 1002 [3d Dept 1993]). “It is axiomatic that where more than one procedural remedy is available to redress a single alleged wrong, the election of and full participation in one of these avenues of relief constitutes a waiver of the right to seek relief pursuant to those procedures which remain” (*Matter of City of Newburgh v Local 589, Intl. Assn. of Firefighters, AFL-CIO*, 140 AD2d 339, 340 [2d Dept 1988], *appeal denied* 72 NY2d 808 [1988]).

The court turns next to whether plaintiffs have been prejudiced by the delay in Cobblestone moving to assert these defenses.

Although Cobblestone has not offered an excuse for the delay in moving to amend, “the failure to offer an excuse for the delay does not, alone, bar amendment absent a showing of prejudice resulting from the delay” (*Northbay Constr. Co. v Bauco Constr. Co.*, 275 AD2d 310, 312 [2d Dept 2000]). Moreover, “[m]ere lateness is not a barrier to . . . amendment. It must be lateness coupled with significant prejudice to the other side” (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983] [internal quotation marks omitted]).

A proper showing of prejudice must be “traceable not simply to the new matter sought to be added, but also to the fact that it is only now being added. There must be some special right lost in the interim, some change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one wants to add”

(*Williams v Tompkins*, 132 AD3d 532, 533 [1st Dept 2015], quoting *A.J. Pegno Constr. Corp. v. City of New York*, 95 AD2d 655, 656 [1st Dept 1983]).

Plaintiffs argue that they have not had an opportunity to conduct discovery on Cobblestone’s proposed affirmative defenses. Nevertheless, “the need for additional discovery does not constitute prejudice sufficient to justify denial of an amendment” (*Jacobson v Croman*, 107 AD3d 644, 644 [1st Dept 2013] [internal quotation marks omitted]). Additionally, if plaintiffs need discovery, plaintiffs may obtain it (*see id.*). Plaintiffs cannot claim to be surprised, since Cobblestone’s proposed affirmative defenses are based on facts within their knowledge – that they have failed to pay their common charges and assessments for seven years. Accordingly, Cobblestone’s request for leave to amend its answer must be granted.

B. Cobblestone's Summary Judgment Request

Cobblestone contends in support of its failure of consideration argument that plaintiffs have willfully failed to pay their common charges since June 2012. Thus, Cobblestone argues that, based upon plaintiffs' inexcusable breach of their contractual duty to pay common charges and assessments, Cobblestone is entitled to rescind the contract. Moreover, Cobblestone maintains that, pursuant to the doctrine of failure of consideration, plaintiffs are barred from seeking damages based upon any alleged breach of contract. According to Cobblestone, plaintiffs' breach of contract cause of action may be dismissed even if the alleged breach predated the failure of consideration.

Plaintiffs argue, in response, that there are issues of fact as to Cobblestone's ability to function as a condominium. They further contend that although Cobblestone may be entitled to an offset, Cobblestone has failed to establish entitlement to judgment as a matter of law. Additionally, plaintiffs contend that summary judgment is premature, since they have not had an opportunity to take discovery on Cobblestone's failure of consideration defense.

Real Property Law § 339-j provides that "[e]ach unit owner shall comply strictly with the by-laws and with rules, regulations, resolutions and decisions adopted pursuant thereto." Real Property Law § 339-x states that "[n]o unit owner may exempt himself from liability for his common charges by waiver of the use or enjoyment of any of the common elements or by abandonment of his unit."

As the First Department has held, "[a]n individual unit owner, such as the plaintiff, cannot withhold payment of common charges and assessments in derogation of the by-laws of the condominium based on defective conditions in his unit or in the common areas, or based on his disagreement with actions lawfully taken by the Board of Managers" (*Frisch v Bellmarc*

Mgt., 190 AD2d 383, 389 [1st Dept 1993] [internal citation omitted]). In the present case, the First Department has already determined that plaintiffs are not entitled to an abatement of common charges (*see McMahon*, 161 AD3d at 537).

“Generally, “rescission of a contract is permitted where there is a breach of contract that is material and willful, or, i[f] not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract” (*Lenel Sys. Intl. Inc. v Smith*, 106 AD3d 1536, 1538 [4th Dept 2013] [internal quotation marks and citation omitted]). Rescission, “lying in equity, is a matter of discretion” (*Rudman v Cowles Communications*, 30 NY2d 1, 13 [1972]). “The equitable remedy is to be invoked only when there is lacking complete and adequate remedy at law and where the status quo may be substantially restored” (*id.*).

Cobblestone has failed to show that it lacks an adequate remedy at law. Even though Cobblestone submits evidence that plaintiffs have not paid common charges for the past seven years, this alone does not provide a basis for Cobblestone to avoid its contractual obligations in their entirety (*see Niagara Frontier Transp. Auth. v Patterson-Stevens, Inc.*, 237 AD2d 965, 966 [4th Dept 1997]) [partial failure of consideration was not ground to completely avoid contractual obligations]).

Accordingly, Cobblestone’s motion for summary judgment must be denied.

III. Nova’s Request for Summary Judgment Dismissing the Third-Party Claims and Cross Claims Against It/Cobblestone’s Request for Contractual Indemnification Against Nova

A. Contribution Claims Against Nova

Nova argues that the contribution claims against it must be dismissed because it was not responsible for the mold condition in plaintiff’s unit. Moreover, Nova contends that it did not owe any duty to plaintiffs, nor did it breach any duty.

Cobblestone contends that Nova has failed to make a prima facie showing of entitlement to summary judgment. According to Cobblestone, there are questions of fact as to whether Nova's work resulted in the growth of mold in plaintiffs' apartment.

Pursuant to CPLR 1401, "two or more persons who are subject to liability for damages for the same personal injury, injury to property . . . may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought." An action for contribution is predicated upon a third-party's breach of a duty owed to either the plaintiff or the defendant (*see Sommer v Federal Signal Corp.*, 79 NY2d 540, 559 [1992]). "The critical requirement for apportionment . . . CPLR article 14 is that the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought" (*Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 603 [1988]). As set forth in section (I) (B) above, Nova has failed to establish that it did not owe a duty to plaintiffs or Cobblestone and there are questions of fact as to whether Nova had a part in causing or augmenting plaintiffs' injuries. Accordingly, Nova's request for dismissal of the contribution claims must be denied.

B. Common-Law Indemnification Claims Against Nova

Nova also seeks summary judgment dismissing the common-law indemnification claims against it. Nova argues that it did not cause any mold growth in plaintiffs' apartment. Cobblestone again asserts that there are issues of fact as to whether Nova's work caused the mold to grow in plaintiffs' apartment.

"Indemnity involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another party who should more properly bear responsibility for that loss because it was the actual wrongdoer" (*Trustees of Columbia Univ. v*

Mitchell/Giurgola Assoc., 109 AD2d 449, 451 [1st Dept 1985]). In addition, “[s]ince the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine” (*Trump Vil. Section 3 v New York State Hous. Fin. Agency*, 307 AD2d 891, 895 [1st Dept 2003], *lv denied* 1 NY3d 504 [2003] [internal quotation marks and citation omitted]). Cobblestone is barred from obtaining common-law indemnification because its liability would not be vicarious. Cobblestone had a contractual and statutory duty to maintain the common elements in good repair. Accordingly, the common-law indemnification claims against Nova must be dismissed (*see Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 367 [1st Dept 2006], *lv denied* 7 NY3d 864 [2006]).

C. Cobblestone’s Contractual Indemnification Claim Against Nova

Nova moves for summary judgment dismissing Cobblestone’s contractual indemnification claim asserted against it. Nova argues that the allegations pertaining to this claim only implicate its work performed for the 2010 main roof contract, which contains the following regarding indemnification:

“§ 9.15 INDEMNIFICATION

9.15.1 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect’s consultants and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys’ fees, arising out of or resulting from performance of the Work, provided that such, claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section 9.15.1”

(NYSCEF Doc No. 1085, § 9.15.1).

Nova argues that: (1) it has demonstrated its freedom from negligence; and (2) even if there is question of fact as to its negligence, the indemnification provision contains an exclusion for the “Work itself,” and all of plaintiffs’ and Cobblestone’s claims challenge the work itself.

Cobblestone also moves for summary judgment on its contractual indemnification claim against Nova. Cobblestone argues that Nova’s contractual indemnification obligations are fully enforceable because they are coupled with a duty to purchase insurance naming Cobblestone as an additional insured. In this regard, Cobblestone relies upon the following provision:

“The Contractor shall purchase from, and maintain in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, insurance for protection from . . . claims for damages, other than to the Work itself, to property which may arise out of result from the Contractor’s operations and completed operations under the Contract, whether such operations be by the Contractor or by a Subcontractor or anyone or directly or indirectly employed by them . . . The Contractor shall cause the commercial liability coverage required by the Contract Documents to include: (1) the Owner, Architect and the Architect’s Consultants as additional insureds for claims caused in whole or in part by the Contractor’s negligent acts or omissions during the Contractor’s operations; and (2) the Owner as an additional insured for claims caused in whole or in part by the Contractor’s negligent acts or omissions during the Contractor’s completed operations”

(NYSCEF Doc No. 1052, § 17.1).

“A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances” (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987] [internal quotation marks and citation omitted]). “When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed” (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]).

Pursuant to General Obligations Law § 5-322.1, a clause in a construction contract which purports to indemnify a party for its own negligence is void and unenforceable as against public policy (*Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795 [1997]). However, an indemnification agreement that authorizes partial indemnification “to the fullest extent permitted by law” is enforceable (*Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008]; *Guzman v 170 W. End Ave. Assoc.*, 115 AD3d 462, 464 [1st Dept 2014]; *Dutton v Pankow Bldrs.*, 296 AD2d 321, 322 [1st Dept 2002], *lv denied* 99 NY2d 511 [2003]). Even if the indemnification provision does not contain this savings language, it may nevertheless be enforced where the party to be indemnified is found to be free of any negligence (*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990]).

Although Nova argues that the indemnification provision does not apply because Cobblestone is challenging the Work itself, the indemnification provision requires Nova to indemnify Cobblestone for personal injuries and property damage arising from Nova’s negligent acts or omissions (*cf. Board of Mgrs. of Baxter St. Condominium v Street Development Co., LLC*, 2013 WL 486506 [Sup Ct, NY County 2013]). However, there are questions of fact as to whether Cobblestone violated Multiple Dwelling Law § 78 (requiring that every multiple dwelling be kept in good repair), and whether Nova’s negligent acts and omissions caused plaintiffs’ property damage and personal injuries. Accordingly, Cobblestone shall be conditionally granted contractual indemnification against Nova.

D. Cobblestone’s Breach of Contract Claim Against Nova

Nova moves for summary judgment dismissing Cobblestone’s breach of contract claim. Nova argues that it purchased a commercial general liability policy with a blanket additional insured endorsement as required by its contract and submits the declarations page and blanket

additional insured endorsement pages of its policy (NYSCEF Doc No. 1096). Cobblestone's contention that Nova breached its obligation to purchase insurance, since Nova's insurer issued reservations of rights and brought claims seeking to disclaim defense and indemnification obligations (NYSCEF Doc Nos. 1140, 1141), is without merit (*see Sicilia v City of New York*, 127 AD3d 628, 629 [1st Dept 2015]; *Perez v Morse Diesel Intl., Inc.*, 10 AD3d 497, 498 [1st Dept 2004]). Accordingly, Cobblestone's breach of contract claim is dismissed.

IV. Olmsted's Motion for Summary Judgment Dismissing the Second Third-Party Complaint and All Claims, Cross Claims, and Causes of Action Asserted Against it

A. Contractual Indemnification and Failure to Procure Insurance Claims Against Olmsted

Olmsted argues that the contractual indemnification claims and failure to procure insurance claims against it should be dismissed because it did not agree to indemnify or purchase insurance for the benefit of any party in any written agreement. In support of its argument, Olmsted submits an affidavit from Mr. Olmsted, indicating that no written agreement or proposal exists between Olmsted and Cobblestone, Andrews or TERS (NYSCEF Doc No. 994, Olmsted aff, ¶¶ 6-8). Cobblestone points out, that Olmsted failed to produce the contract in its moving papers.

Contrary to Cobblestone's contention, Olmsted has met its prima facie burden that these claims should be dismissed (*see Ryan*, 96 AD3d at 553). Mr. Olmsted testified that "I sent them a proposal to do testing," but then stated that he was "not certain I sent them a proposal" (NYSCEF Doc No. 982, Olmsted tr at 32-34). Mr. Olmsted's avers that he subsequently performed a search for written agreements and proposals, and that no such agreements or proposals exist (NYSCEF Doc No. 994, Olmsted aff, ¶¶ 6-8). The court may consider Mr. Olmsted's affidavit because it does not directly contradict his prior deposition testimony (*see Capuano v Tishman Constr. Corp.*, 98 AD3d 848, 851[1st Dept 2012]). In opposition,

Cobblestone has failed to raise an issue of fact. Therefore, Olmsted is entitled to dismissal of claims for contractual indemnification and failure to procure insurance.

B. Common-Law Indemnification Claims Against Olmsted

Olmsted next argues that the common-law indemnification claims against it should be dismissed because the claims asserted against Cobblestone and TERS do not seek to hold them vicariously liable for the acts or omissions of Olmsted. Cobblestone argues that it is free from any wrongdoing, and that if plaintiffs were injured in the manner alleged in the second amended complaint, it was because of the acts of the third-party vendors.

Since the liability of Cobblestone and TERS is not vicarious or derivative, Cobblestone's and TERS's claims for common-law indemnification against Olmsted fail and must be dismissed (*compare 17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 81 [1st Dept 1999] ["since 17 Vista's liability relating to the smoke purge system was, in essence, derivative, 17 Vista's indemnity claim is viable"]).

C. Contribution Claims Against Olmsted

In moving for summary judgment dismissing the contribution claims asserted against it, Olmsted argues that it was not retained to repair or determine the cause of the water infiltration, and that there are no allegations that Olmsted contributed to the water infiltration in plaintiffs' unit.

Cobblestone argues that Olmsted failed to use appropriate testing methods, failed to recognize that the pattern of mold growth was not limited to the August 29, 2011 flooding, and failed to locate mold beneath the floors and behind the walls of plaintiffs' apartment.

There are questions of fact as to whether Olmsted had a part in causing or contributing to plaintiffs' injury and property damage (*see Raquet v Braun*, 90 NY2d 177, 183 [1983]). Mr. Olmsted testified that he inspected the kitchen, the children's play room, and the HVAC system

(NYSCEF Doc No. 982, Olmsted tr at 125-126). He looked at the wood flooring in the living room/dining room area (*id.* at 129). He relied on air sampling that utilized a vacuum to pull air into a sterile filter (*id.* at 129-130). He testified that this method was not as accurate as bulk sampling (*id.* at 129-130). Bulk sampling involves cutting a sample of material and sending it for analysis (*id.* at 71-72). According to Mr. Olmsted, the vacuum method of testing for mold under the floor was “inconclusive” (*id.* at 131).

Although Olmsted argues in reply that the underlying claims are based in contract, plaintiffs also assert a cause of action against Cobblestone for failure to repair and maintain the roof pursuant to Multiple Dwelling Law § 78. The First Department held that the court properly declined to dismiss this cause of action (*see McMahon*, 161 AD3d at 537). Thus, “the necessary predicate tort liability for a contribution action remains in the case” (*Sound Refrig. & A.C., Inc. v All City Testing & Balancing Corp.*, 84 AD3d 1349, 1350 [2d Dept 2011] [internal quotation marks and citation omitted]).

Accordingly, Olmsted is not entitled to dismissal of the contribution claims asserted against it.

V. TERS’s Motion for Summary Judgment Dismissing the Second Third-Party Complaint and Cross Claims Asserted Against it

A. Contractual Indemnification Claims Against TERS

TERS argues that the contractual indemnification claims against it should be dismissed because it did not agree to indemnify any party.

However, as pointed out by Cobblestone, TERS’s scope of work proposal includes an indemnification provision that provides that “[e]ach party agrees to indemnify, defend and hold the other harmless for any and all damages suffered as a result of the intentional acts, negligent acts or omissions to act of the other party” (NYSCEF Doc No. 1015). Although TERS argues,

for the first time in reply, that it did not commit any intentional acts and was not negligent, the court does not consider this argument because “[t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion” (*Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]). Accordingly, TERS’s request for dismissal of the contractual indemnification claims is denied.

B. Common-Law Indemnification Claims Against TERS

TERS next argues that the common-law indemnification claims should be dismissed because Cobblestone is not free from negligence. In addition, TERS contends that it was not negligent because it completely fulfilled its remediation contract with Andrews. Moreover, TERS asserts that it had no authority to direct or control the work that gave rise to the mold condition. For its part, Cobblestone asserts that it is entitled to common-law indemnification from TERS, as Cobblestone is free from any active wrongdoing.

In this case, Cobblestone’s liability would be based upon its own affirmative wrongdoing and not derivative or based upon vicarious liability (*see 17 Vista Fee Assoc.*, 259 AD2d at 80). Accordingly, the common-law indemnification claims against TERS must be dismissed.

C. Contribution Claims Against TERS

Finally, TERS argues that it did not contribute to plaintiffs’ harm. According to TERS, it was not permitted to perform the scope of work it found necessary to properly remediate the mold condition. Upon completing its work, and sending an additional proposal, TERS was removed from the job.

In opposition, Cobblestone argues that: (1) there are questions of fact as to TERS's scope of work inside the unit; and (2) TERS did not address the wooden, dining floors that Mr. Olmsted testified had to be addressed.

Here, there are questions of fact as to the scope of TERS's work and whether any acts or omissions of TERS had a part in causing or augmenting plaintiffs' injury. TERS's proposal dated December 3, 2011 indicates that it would remove affected materials, including "Dining room water damage wood, sheetrock and ceiling affected by the water" (NYSCEF Doc No. 1015). Mr. Olmsted testified that TERS did not remove the wood flooring, and believed that it did not remove all the water-damaged sheetrock in the playroom (NYSCEF Doc No. 1025, Olmsted tr at 153). Therefore, TERS is not entitled to dismissal of the contribution claims against it.

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 028) of defendants/third-party plaintiffs Nova Restoration of NY, Inc. and Nova Restoration LLC is granted to the extent of dismissing plaintiffs' breach of contract and negligent infliction of emotional distress claims, and the third-party claims and cross claims for common-law indemnification, and breach of contract, and is otherwise denied; and it is further

ORDERED that the motion (sequence number 029) of defendant/third-party plaintiff/second third-party plaintiff Cobblestone Lofts Condominium is granted to the extent of (1) granting leave to amend its answer to assert affirmative defenses, and the amended answer in the proposed form annexed to the moving papers is deemed served upon service of a copy of this order with notice of entry thereof, and (2) conditionally granting defendant/third-party

plaintiff/second third-party plaintiff Cobblestone Lofts Condominium contractual indemnification against Nova Restoration of NY, Inc. and Nova Restoration LLC, and is otherwise denied; and it is further

ORDERED that the motion (sequence number 030) of second third-party defendant Olmsted Environmental Services, Inc. is granted to the extent of dismissing the contractual indemnification, failure to procure insurance, and common-law indemnification claims against it, and is otherwise denied; and it is further

ORDERED that the motion (sequence number 031) of second third-party defendant Total Environmental Restoration Solutions for summary judgment is granted to the extent of dismissing the common-law indemnification claims against it and is otherwise denied.

4/17/20
DATE


PAUL A. GOETZ, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	DENIED
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE