SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD **PART** IAS MOTION 35EFM

Justice

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11-15 50TH AVENUE LLC,

Plaintiff,

- v -

THE J CONSTRUCTION COMPANY, LLC,KNS BUILDING RESTORATION INC.,ROSS WINDOW CORP., JOHNS MANVILLE, JOHN A. CETRA ARCHITECTURE, P.C.,LEAVITT ASSOCIATES, INC.,

Defendant.

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INDEX NO. 653674/2013

MOTION DATE 9/24/2020

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379

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

Upon the foregoing documents, it is

ORDERED that the motion by plaintiff 11-15 50th Avenue LLC for summary judgment is denied; and it is further

ORDERED that the cross motion of defendant Johns Manville for summary judgment is granted and the complaint is dismissed as against said defendant; and it is further

ORDERED that said claims against defendant Johns Manville are severed and the balance of the action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendant Johns Manville dismissing the claims against it in this action, together with costs and disbursements to be taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that counsel for defendant Johns Manville shall serve a copy of this order, along with notice of entry, on all parties within twenty (20) days.

MEMORANDUM DECISION

Plaintiff 11-15 50th Avenue LLC (plaintiff or Sponsor) moves, pursuant to CPLR 3212 (a), for summary judgment on its complaint against defendant Johns Manville (JM) (motion seq. 007). JM cross-moves for summary judgment dismissing the complaint.

BACKGROUND FACTS

Sponsor was the developer of the 12-story residential building located at 11-02 49th Avenue, also known as 11-15 50th Avenue, in Long Island City, New York (the Project). JM was the contractor who provided the roofing materials for the Project and guaranteed the integrity of the roof. In time, the roof leaked.

Sponsor makes the following three arguments for fastening liability for the leaks onto JM: (1) it is undisputed that, approximately four years before any leak was discovered, the insulation that was installed became wet, and there is no evidence that JM either replaced it, or dried it; (2) certain sheet membrane flashing, which was defectively installed by a different contractor, which allowed water to infiltrate the roof, is covered by JM's guaranty; and (3) although the proper method to affix the perlite coverboard of the roof to the base sheet is by the use of a blowtorch; here, the coverboard was installed by defendant KNS Building Restoration Inc. (KNS) by the application of hot asphalt. Sponsor contends that each of these departures from proper practice compromised the integrity of the roof. It is undisputed that JM's guaranty covers the installation of the roof by KNS, as well as the roofing materials used.

DISCUSSION

"'[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the

absence of any material issues of fact'" (*Ayotte v Gervasio*, 81 NY2d 1062, 1062 [1993] [citation omitted]; *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 [1985]). The burden is a heavy one: the facts must be viewed in the light most favorable to the non-moving party and every available inference must be drawn in the non-moving party's favor (*Sherman v New York State Thruway Auth.*, 27 NY3d 1019, 1021 [2016]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad,* 64 NY2d at 853; see also *Lesocovich v 180 Madison Ave. Corp*., 81 NY2d 982, 985 [1993]).

The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. [DE] v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]). The court is required to examine the evidence in a light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). Summary judgment is a drastic remedy that may be granted only when it is clear that no triable issues of fact exist (*Matter of New York City Asbestos Litig*., 33 NY3d 20, 25 [2019]; *Alvarez v Prospect Hosp.,* 68 NY2d 320, 324 [1986]), and "should not be granted where there is any doubt as to the existence of a triable issue" of fact (*American Home Assur. Co. v Amerford Intl. Corp*., 200 AD2d 472, 473 [1st Dept 1994]; accord *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314 [2004]).

Plaintiff's first argument is based solely upon a report written by Arthur Leavitt, who prepared a report on the roof seven months before the roof was finished, and more than five years before the first leak was reported. Indeed, Mr. Leavitt expressly noted the unfinished state of the roof, stating:

> ". . . someone had gone and cut a bunch of holes in [the roof] and there [were] some nails driven in it. So it was clearly not finished, and there was some patching work left to do."

NYSCEF Doc No. 309, 356. For the rest, plaintiff relies on its assumption that because there is no record of the insulation having been repaired or replaced, neither was done. *See* affidavit of Zachary Nord, P.E. in opposition to plaintiff's cross motion, ¶10; *see also* Nord affidavit in support of plaintiff's motion, ¶ 29. Nord does not state that such documentation would normally have been made.

JM's expert witness, James B. Talley, III, avers, however, that:

> "Based on a reasonable degree of professional certainty, had water remained in the Roofing System for those six months [between Mr. Leavitt's report and JM's final inspection], the overall dimensional stability of the Roofing System would have been affected, and while walking the roof, it would have a 'mushy' feel to it. There is no evidence that the roof felt 'mushy.' . . . Based upon my forty-three years of experience, no roofing manufacturer would issue a Guarantee when a walkthrough of the roof presented with a 'mushy' feel, and such a condition would undoubtedly have been noted by JM at the inspection, and a repair would have been required prior to the issuance of the Guarantee. . . . [T]he fact that the Guarantee was issued, warrants the conclusion that the insulation was not wet."

Talley reply affidavit, ¶ 7.

As to the metal flashings, JM's Rule 19-a Statement of Undisputed Facts (Statement), paragraphs 11 and 12, states:

> "The Guarantee specified the covered components of the Roofing System to include only the membrane and insulation.
>
> No other materials installed at the roofs, including but not limited to the pitch pockets and sealant, were covered by the Guarantee."

Inasmuch as plaintiff did not respond to the Statement, the facts stated therein are deemed to have been admitted. *See* 22 NYCRR 202.70 Commercial Division Rule 19-a (c); *see also* Sapir

aff., exhibit 1. Accordingly, JM cannot be held liable for the asserted faulty installation of the metal flashings.

In his affidavit in opposition to JM's cross motion, Mr. Nord states that the flashings are "of the same type as defined in the system description under the Roof Guarantee, and, therefore, are covered by the same." NYSCEF Doc. No. 368, ¶ 12. That conclusory statement, lacking any factual detail, would not have sufficed, even had it been made in response to the Statement.

With regard to the third asserted causal factor, plaintiff offers no direct evidence that the perlite coverboard was not affixed to the base sheet of the roof by the use of a blowtorch. Rather, Mr. Nord infers that hot asphalt was used, because a residue of such appeared on the underside of the base sheet. *See* Nord, affidavit in support of plaintiff's motion, NYSCEF Doc. No. 327, ¶ 15 (g). Mr. Talley avers, however, that on top of the concrete roof deck of the building, two layers of polyisocyanurate insulation and a Duraboard perlite coverboard were attached, in accordance with JM's specifications, by the application of hot asphalt. Above those layers, a "DynaWeld Base Sheet" and, atop of that, a "DynaWeld Cap" sheet were attached, each, in accordance with JM's specifications, torch applied. Mr. Talley further avers that Mr. Nord's observation of asphalt residue on the back side of the base sheet is not evidence that that layer of the roof was not torch applied, but is normal, because the hot asphalt that was applied to the lower layers oozes upward, so that one would expect to find such residue on the back of a torch-applied layer. *See* NYSCEF Doc No. 379, ¶¶ 15-22.

Disagreements between experts are, generally, to be left for a jury to decide. *Padilla v Montefiore Med. Ctr.,* 119 AD3d 493, 494 (1st Dept 2014). Here, however, while JM has made a prima facie case in support of its cross motion, Mr. Nord's conclusions are speculative,

inasmuch as they are based upon an unwarranted inference. Accordingly, they suffice neither to make a prima facie case for plaintiff, nor to defeat JM's cross motion for summary judgment. *DeCongelio v Metro Fund, LLC,* 183 AD3d 449, 450 (1st Dept 2020); *Singh v New York City Hous. Auth.,* 177 AD3d 475, 476 (1st Dept 2019).

In addition to alleging the three defects, discussed above, in the construction of the roof, plaintiff alleges, for the first time, that JM breached the Guarantee, by failing to reinstate it, after plaintiff completed certain repair work to the pitch pockets, to correct a defect that had caused JM to suspend its guarantee. This theory of liability does not appear in the complaint. It may not be raised initially in opposition to a motion for summary judgment. *Perez v City of New York,* 182 AD3d 425, 425 (1st Dept 2020), citing *Rollins v New York City Bd. of Educ.,* 68 AD3d 540, 541 (1st Dept 2009) (among others).

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion by plaintiff 11-15 50th Avenue LLC for summary judgment is denied; and it is further

ORDERED that the cross motion of defendant Johns Manville for summary judgment is granted and the complaint is dismissed as against said defendant; and it is further

ORDERED that said claims against defendant Johns Manville are severed and the balance of the action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendant Johns Manville dismissing the claims against it in this action, together with costs and disbursements to be taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that counsel for defendant Johns Manville shall serve a copy of this order, along with notice of entry, on all parties within twenty (20) days.

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10/14/2020
DATE

CAROL R. EDMEAD, J.S.C.

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