Brail v Ogawa Depardon Architects
2020 NY Slip Op 33584(U)
June 25, 2020
Supreme Court, New York County
Docket Number: 155992/2014
Judge: Melissa A. Crane

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 15

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DAVID J. BRAIL and JULIE M. BRAIL, Index No. 155992/2014

Plaintiffs, Mot Seq 005

- against -

OGAWA DEPARDON ARCHITECTS, GILLES DEPARDON, R.A., CHARLES G. MICHEL ENGINEERING, P.C., CHARLES G. MICHEL, P.E., GILSANZ MURRAY STEFICEK, LLP, CODE, LLC., BRIAN T. GILLEN, ROSS LEE RENOVATIONS, INC., ROSS LEE RENOVATIONS, and PETER MURPHY,

Defendants.

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ROSS-LEE RENOVATIONS, INC. and PETER MURPHY,

Third-Party Plaintiff, Third-Party Index No. 595288/2015

- against -

R. FROST DESIGN BUILD, INC.,

Third-Party Defendant.

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The following papers, numbered _ to _ were read on this motion to/for_____.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause — Affidavits — Exhibits …	_____
Answering Affidavits — Exhibits_____	
Replying Affidavits_____	

CROSS-MOTION: YES NO

Upon the foregoing papers, it is ordered that this motion is

The motion is decided in accordance with the accompanying decision and order.

DATED: 6/25/2020, 2020 _____

MELISSA A. CRANE, J.S.C

Check one: ☐ FINAL DISPOSITION ☐NON-FINAL DISPOSITION
Check if appropriate: MOTION IS: ☐ GRANTED ☐DENIED ☐ GRANTED IN PART ☐ OTHER
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ FIDUCIARY APPOINTMENT
SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK: I.A.S. PART 15

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DAVID J. BRAIL and JULIE M. BRAIL, DECISION AND ORDER

Plaintiffs, Index No. 155992/2014

- against -

OGAWA DEPARDON ARCHITECTS, GILLES DEPARDON, R.A., CHARLES G. MICHEL ENGINEERING, P.C., CHARLES G. MICHEL, P.E., GILSANZ MURRAY STEFICEK, LLP, CODE, LLC., BRIAN T. GILLEN, ROSS LEE RENOVATIONS, INC., ROSS LEE RENOVATIONS, and PETER MURPHY,

Defendants.

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ROSS-LEE RENOVATIONS, INC. and PETER MURPHY,

Third-Party Plaintiff, Third-Party Index No. 595288/2015

- against -

R. FROST DESIGN BUILD, INC.,

Third-Party Defendant.

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MELISSA A. CRANE, J.:

This action arises out of design, construction, and renovation work (the Project) on a townhouse located at 320 West 102nd Street, New York, New York (the Building). In motion sequence no. 005, defendants Ogawa Depardon Architects (ODA) and Gilles Depardon, R.A. (Depardon) (together, ODA) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and the cross claims asserted against them.

BACKGROUND

Plaintiffs David J. Brail (David) and Julie M. Brail (Julie) purchased the Building in February 2006 as their new home (NY St Cts Elec Filing [NYSCEF] Doc No. 168, affirmation of Elaine C. Gangel [Gangel], exhibit D, ¶¶ 1 and 16). Plaintiffs allege that shortly thereafter, they

embarked on the Project, that entailed an "alteration 'type 1' renovation and conversion of a multiple dwelling to a single family residence. This was a 'home improvement' project within the meaning of the laws of the City and State of New York" (*id.*, ¶ 17). The Project also involved "alteration type II" structural work at the Building (NYSCEF Doc No. 231, John B. Simoni [Simoni] affirmation, exhibit H at 1).

On March 14, 2006, plaintiffs, as "Owner," and ODA, as "Architect" entered into a written agreement where ODA agreed to perform architectural services for the Project (the ODA Contract) (NYSCEF Doc No. 168, ¶ 29; NYSCEF Doc No. 188, Depardon aff, exhibit 1 at 1). Depardon is a licensed architect and one of ODA's principals (NYSCEF Doc No. 168, ¶ 3).

The ODA Contract is based on The American Institute of Architects (AIA) form B151-1997, titled "Abbreviated Standard Form of Agreement Between Owner and Architect" (NYSCEF Doc No. 188 at 1). According to article 2 of the ODA Contract, the scope of ODA's "basic services" encompassed five distinct phases: (1) a schematic design phase; (2) a design development phase; (3) a construction documents phase; (4) a bidding or negotiating phase; and (5) a construction phase (*id.* at 2-3 [sections 2.2-2.6]). ODA's services during the construction phase included administering the construction contract, serving as the owner's representative on the Project, and reviewing and certifying payments to the contractor (*id.* at 3-4). Section 11.2.1 set ODA's compensation for performing these basic services at $270,000, or 15% of the estimated $1.8 million in construction costs, although this amount was subject to change (*id.* at 12). ODA also agreed to perform "optional additional services" described in article 3. These optional services included "[p]roviding services after issuance to the Owner of the final Certificate for Payment, or in the absence of a final Certificate for Payment, more than 60 days after the date of Substantial Completion of the Work" (*id.* at 6 [section 3.4.18]). ODA billed

hourly for these additional services (*id.* at 12 [section 11.3]). Plaintiffs and ODA also executed a rider to the ODA Contract modifying or supplementing certain provisions in their agreement (*id.* at 15-17).

Plaintiffs allege that ODA engaged defendant Code, LLC. (Code) and its principal, Brian T. Gillen (Gillen), to provide expediting services for the Project (NYSCEF Doc No. 168, ¶ 35). According to a proposal dated April 27, 2006, the scope of Code's work for the "Alteration Type I" Project included "[f]ollowing up with [the] application for and procurement of a new Certificate of Occupancy" with the New York City Department of Buildings (DOB) (NYSCEF Doc No. 230, Simoni affirmation, exhibit G at 1). In particular, the proposal stated that Code's "basic services" were to "[a]ct on behalf of the client as agent, [and] to obtain approval of plans by the New York City Department of Buildings for a new or amended certificate of occupancy" (*id.*). Under the heading titled "Additional Services," Code agreed to file the application for a new certificate of occupancy with DOB and, upon obtaining the required sign-offs for the plumbing, electrical and construction work, to request the preparation of a new certificate of occupancy (*id.* at 2). Code addressed its April 27, 2006 proposal to Depardon at ODA (*id.* at 1). The signature line indicating that the proposal was accepted and agreed is blank (*id.* at 4).

Code also forwarded to ODA a separate proposal dated May 3, 2006 related to the "Alteration Type II Application" for the Project (NYSCEF Doc No. 231 at 1). Code's "basic services" on this proposal included filing an application with DOB for the Alteration Type II portion of the Project, and filing the drawings and paperwork required for approval from the Landmarks Preservation Commission (*id.*). As with Code's earlier proposal dated April 27, 2006, the signature line indicating that the May 3, 2006 proposal had been accepted and agreed is blank (*id.* at 3).

In January 2007, plaintiffs retained defendants Ross Lee Renovations and Ross Lee Renovations, Inc. (together, Ross) as their general contractor for the Project (NYSCEF Doc No. 168, ¶ 19). Defendant Peter Murphy (Murphy) is Ross's sole owner (NYSCEF Doc No. 185, Gangel affirmation, exhibit O1 [Murphy tr] at 16]). Plaintiffs' written agreement with Ross is based on AIA form A101-1997, entitled "Standard Form Agreement Between Owner and Contractor." This document identifies plaintiffs as the "Owner," "Ross Lee Renovations" as the "Contractor," and ODA as the "Architect" (the Ross Contract) (NYSCEF Doc No. 227, Simoni affirmation, exhibit D at 1). The Ross Contract states that work on the Project shall commence in February 2007, and achieve substantial completion by March 2008 (*id.* at 2 [sections 3.1 and 3.2]). The agreement set a contract price of $2,315,700 to be paid in installments as the work progressed. ODA was to certify all progress payments certified before plaintiffs paid Ross (*id.* at 2-3 [sections 4.1 and 5.1.1]). In addition, section 5.1.3 provides that "[a] 10% retainage will be held by the owner to substantial completion when 5% will be released and the remaining 5% on completion of punch list" (*id.* at 3).

In or about September 27, 2007, Ross retained third-party defendant R. Frost Design Build, Inc. (Frost) for the Project. Ross hired Frost to build and install custom windows and doors and to supply and install the motors and switch transformers necessary to operate them (NYSCEF Doc No. 174, Gangel affirmation, exhibit J [third-party summons and complaint] ¶¶ 9-10).

Plaintiffs executed separate contracts with defendants Charles G. Michel and Charles G. Michel Engineering, P.C. (together, Michel Engineering) to serve as the mechanical engineer, and Gilsanz Murray Steficek, LLP (Gilsanz) to serve as the structural engineer on the Project (NYSCEF Doc No. 168, ¶¶ 32-33).

At her deposition, Julie testified that the demolition and construction work on the Building began in 2007 (NYSCEF Doc No. 176, Gangel affirmation, exhibit L1 [Julie tr] at 53). She and her family moved into the Building on October 31, 2008 (*id.* at 99), although she did not conduct a walk-through of the Building before moving in (*id.* at 104). At that time, work on the bathrooms and bedrooms were complete (*id.* at 126). Julie stated that "[t]here were still items that needed to be complete[d], but it was livable" (*id.* at 100). She explained that the Building lacked heat and gas; the basement was not usable; an inlaid hardwood floor had not been installed; hardware and light fixtures in some areas were missing; the sliding doors in the living room were problematic; there were exposed wires in the den; and the roof deck had not been built, among other issues (*id.* at 100, 102-106, 110, 116 and 127).

Shortly after moving in, Julie noticed significant water leaks from the rear, south-facing windows, that caused the wood window frames to warp and damaged the window sills (NYSCEF Doc No. 177, Gangel affirmation, exhibit L2 [Julie tr] at 457-463, 473 and 477). Julie also described water leaks from a skylight over the basement. This resulted in the growth of black mold. (NYSCEF Doc No. 176 at 180-181; NYSCEF Doc No. 177 at 353). The varnish on the windows on the south façade needed refinishing (NYSCEF Doc No. 176 at 187). A tree also appeared to be growing out of a chimney attached to the Building (NYSCEF Doc No. 177 at 405).

Julie testified that ODA completed the first four phases – design development, construction document, bidding and negotiation – of the basic services outlined in the ODA Contract, but it did not fulfill its duties on the construction administration phase (NYSCEF Doc No. 176 at 153). She described an ongoing process beginning in October 2008, lasting through at least 2011, where she prepared and revised a series of punch lists (NYSCEF Doc No. 176 at

104, 130, 141, 168, 180-181 and 203). Julie explained that she spoke to Murphy several times about Ross completing the punch list work, but Murphy replied that ODA had to create the punch list (*id.* at 148-149). She further testified that ODA did not create a punch list for the remaining work even though "Gilles [Depardon] knew that he was supposed to create it. He never did it" (*id.* at 148). She forwarded her punch lists to ODA, but ODA "let the ball drop for quite some time" (*id.* at 212). Julie also testified that Ross refused to complete the work without receiving additional funds, that she believed David had paid (*id.* at 138-140).

Julie admitted that they did "not [pay] every single penny [to ODA] because he owed us the completion of the C[ertificate] of O[ccupancy], which he never dealt with" (*id.* at 135). She described encountering numerous obstacles with regard to obtaining the certificate, including securing a sign-off from the plumber (*id.* at 283). Julie testified that ODA pushed plaintiffs to hire Code as the expediter, and that it was Code's responsibility to obtain the final or temporary certificate of occupancy (*id.* at 157-158). Julie later testified that plaintiffs had not retained Code's services, and that she believed CODE had an agreement with OGA to "get the C of O and all the approvals" (*id.* at 269). In the end, Julie directed Code to cease working, and she secured the certificate of occupancy from DOB herself (*id.* at 218 and 220-221).

David testified that construction continued for "months" after he and his family moved into the Building in 2008 (NYSCEF Doc No. 178, Gangel affirmation, exhibit M [David tr] at 75). He described the Building when they moved in as "[r]aw and unfinished" with "drop cloths everywhere" and "[r]ooms … sealed off as they finished the work" (*id.* at 90). At that time, the exterior façade, bedrooms and kitchen had been completed, the bathrooms were functional, and the rear windows were operable (*id.* at 92-93). David testified that Julie became more involved in the Project in October 2008, and that she, not ODA, created the punch lists (*id.* at 99-100, 225

and 232). David stated that Ross never completed the punch list work even though he had paid Ross the balance due on the Ross Contract (*id.* at 106). David explained that plaintiffs had taken out a construction loan to fund the Project (*id.* at 233). He testified, "I think there was an issue getting the C of O. I think the issue with C of O was needed to pay off construction loan and convert to mortgage. We had to deliver the C of O and that is what created the issue with Code" (*id.*). He added that with regard to securing the certificate of occupancy, Julie "did it all" (*id.* at 206).

At his deposition, Depardon acknowledged that ODA's contractual obligations included providing construction administration services. This involved ODA staff observing the construction work as it progressed[1] (NYSCEF Doc No. 235, Simoni affirmation, exhibit L [Depardon tr] at 136 and 140). Depardon admitted that he could not recall when the Project reached substantial completion (*id.* at 205), although he believed it was on or near December 2008, when the first punch list was issued (*id.* at 358). Depardon described a punch list as "a list of items which are to be fixed by the contractors in order to get to a final completion" (*id.* at 380). He stated that Julie kept adding items to the punch list, and that some of the items were outside the original scope of the Project (*id.* at 361-364).

Regarding Ross, Depardon confirmed that ODA reviewed Ross's payment applications (*id.* at 142 and 207). He stated that after reviewing the applications and inspecting the worksite, ODA would certify whether the work conformed to what Ross had represented in its payment applications (*id.* at 209). Depardon testified that Ross's payment application no. 18 dated November 10, 2008 was not certified, although he signed the document (*id.* at 219, 225-226 and 230-231). According to the application, Depardon approved the release of 50% of plaintiffs'

[1] For ease, the court refers to the copy of Depardon's deposition transcript submitted with plaintiffs' opposition, since the entire transcript is contained in a single exhibit, as opposed to six separate exhibits (NYSCEF Doc Nos. 179-184, Gangel affirmation, exhibits N1-N6).

retainage (*id.* at 223). He added, "this is not an approval 100 percent by any means. This is an approval of 25, 50 percent of the retainage. In fact, I'm holding $124,000 of the retainage and $27,000 of the actual work, so it is by no means 100 percent approval of anything, okay" (*id.*). He stated, "[w]hat's certified in terms of what Ross-Lee requested for that payment was not certified at all. The only thing requested, the only thing agreed to, was 50 percent retainage" (*id.* at 230). Depardon could not recall certifying any subsequent payment applications (*id.* at 213 and 225-226). Ross was not paid in full (*id.* at 359), and Ross's final pay application "was never fully approved because things were not finished" (*id.* at 361-362 and 472). Depardon testified that, when it became apparent Ross would not be paid, Ross ceased working on the punch list (*id.* at 366).

Depardon testified that ODA's responsibilities did not involve dealing with the filings made with DOB (*id.* at 100). He believed that plaintiffs hired Code to take care of the DOB filings (*id.* at 100), and to ensure that certain sign-offs for the work were submitted to that agency (*id.* at 217). Although Code addressed its proposals for the "Alteration I" and "Alteration II" portions of the Project to ODA (*id.* at 107-108), Depardon expressed that project owners, not the architect, typically signed the proposals from the expediter (*id.* at 109). He could not recall whether ODA contracted with Code for this Project (*id.* at 78), or whether ODA executed either of the two Code proposals for the work (*id.* at 109-111). He recalled that Code's invoices, though, passed through ODA (*id.* at 109), and that ODA paid some of Code's bills (*id.* at 476). However, Depardon also testified that ODA had asked Code to send its invoices to plaintiffs directly (*id.* at 478).

Depardon acknowledged that the Project required a new certificate of occupancy (*id.* at 102), and he maintained that "[o]ur role is to assist in filing and assist in getting the C of O.

That's our role" (*id.* at 103). He testified that he did not know when Ross and the other subcontractors submitted the sign-offs of their work to DOB, but claimed "[t]he final amendment which I organized to get this approval for Julie was March, 2010" (*id.* at 226).

Murphy testified that Ross substantially completed the job by March 2008 (NYSCEF Doc No. 185, Gangel affirmation, exhibit O1 [Murphy tr] at 65). The scope of Ross's work under the Ross Contract did not include providing sign-offs from DOB for the certificate of occupancy (*id.* at 77). Murphy explained that the architect and the expediter on the Project were responsible for securing the letters of completion and the certificate of occupancy (*id.* at 78 and 81). Murphy testified that it was ODA's responsibility to create a punch list (*id.* at 91), and that Julie submitted a "huge" list (*id.* at 94). The punch list included items for which Ross was not responsible (*id.* at 141). Murphy stated that Ross was not paid in full on the Ross Contract and that Ross did not finish all items on the punch list (*id.* at 101).

Ross's payment application no. 18 states a total contract price of $2,586,715, inclusive of all change orders (NYSCEF Doc No. 189, Depardon aff, exhibit 2 at 1). It appears that Depardon approved the application and the release of $124,796 in retainage to Ross (*id.* at 1; NYSCEF Doc No. 190, Depardon aff, exhibit 3 at 1). No one from Ross executed the section of the application certifying that the work described in the application was complete (*id.* at 1).

DOB issued a final certificate of occupancy for the Building on June 11, 2012 (NYSCEF Doc No. 232, Simoni affirmation, exhibit I at 1).

PROCEDURAL HISTORY

Plaintiffs commenced this action on June 19, 2014 by filing a summons with notice (NYSCEF Doc No. 165, Gangel affirmation, exhibit A at 1). According to the first amended complaint, plaintiffs allege they moved into the Building in or about October 30, 2008, but they

have been "unable to achieve final completion" (NYSCEF Doc No. 168, ¶ 36). Plaintiffs further allege they discovered significant design or construction defects in the Building, including: damaged wood floors and windows, recurring water damage, and façade problems (*id.*, ¶¶ 36, 41-43, and 68).

Plaintiffs asserted six causes of action: (1) breach of contract against ODA, Michel Engineering, and Gilsanz; (2) breach of contract as a third-party beneficiary against Code, and Gillen; (3) professional malpractice against ODA, Michel Engineering, Gilsanz, Code, and Gillen; (4) negligence against ODA, Michel Engineering, Gilsanz, Code, and Gillen; (5) breach of contract against Ross and Murphy; and (6) negligence against Ross and Murphy. The complaint and cross claims against Michel Engineering, Gilsanz and Gillen have been dismissed (NYSCEF Doc Nos. 78, 79, 126 and 323). The action against Murphy or his estate has been severed (NYSCEF Doc No. 159). ODA now moves for summary judgment dismissing the complaint and the cross claims asserted against it.

DISCUSSION

A party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Evidence in admissible form must support the motion (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as pleadings, and other proof such as affidavits, depositions and written admissions (*see* CPLR 3212 [b]). The movant's "failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013], citing *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

A. The Statute of Limitations

ODA asserts that plaintiffs' claims against them are time-barred. ODA relies on CPLR 214 (6), that sets a three-year statute of limitations for negligence and malpractice actions against non-medical professionals, and section 9.3 of the ODA Contract, that describes when a cause of action accrues against ODA.

An affidavit from Depardon, avers that, with the exception of the installation of the plumbing and electrical fixtures, tiling and countertops, "100% of construction in accordance with ODA's Construction Documents had been completed by Ross-Lee Renovations" by November 2008 (NYSCEF Doc No. 187, Depardon aff, ¶ 9). In addition, on December 4, 2008, ODA issued invoice no. 0605.00-0000028 to plaintiffs, where ODA represented that it had completed all phases of work the ODA Contract describes (NYSCEF Doc No. 191, Depardon aff, exhibit 4 at 1). Depardon maintains that "[i]t is the custom and practice in the construction industry that substantial completion of construction is achieved when the work is sufficiently completed such that the owner can occupy or utilize the constructed space for its intended use" (NYSCEF Doc No. 187, ¶ 15). Depardon also states that "it is … customary practice in the construction industry that the creation of a Punch List signifies that substantial completion of construction has been achieved" (*id.*, ¶ 17). He submits that ODA did not render any substantive services to plaintiffs after December 4, 2008 (*id.*, ¶ 18).

Plaintiffs counter with four arguments. First, plaintiffs argue that the accrual date for their claims runs from the date the certificate of occupancy was issued, or June 11, 2012. Thus, plaintiffs claim they timely commenced this action on June 19, 2014, less than three years after DOB issued the certificate of occupancy. Julie avers that ODA "had not even finished designing the Home before the contended trigger date of June 19, 2011," because ODA was responsible for

obtaining the certificate of occupancy (NYSCEF Doc No. 240, Julie aff, ¶ 5). She attests that Ross never furnished ODA with a comprehensive list of items to complete. Nor did ODA inspect Ross's work to determine whether plaintiffs could occupy the Building, as section 9.8.3 of the "General Conditions of the Contract for Construction" found in AIA form A201-1997 (the General Conditions) required. Importantly, Julie notes that the "Specification for Construction" book dated December 5, 2006, that ODA prepared, supplements paragraph 9.8.2 of the General Conditions as follows:

> "The Contractor shall notify the Architect in writing at least seven (7) days before scheduled completion that he is ready for Final Punch List. After Final Punch List, the Architect will certify the date of Substantial Completion on AIA Document G704" (NYSCEF Doc No. 240, ¶ 24; NYSCEF Doc No. 234, Simoni affirmation, exhibit K at 7).

Julie adds that ODA never issued a "final punch list" under article 9.8.2 (NYSCEF Doc No. 240, ¶ 25).

Plaintiffs also rely on an affidavit from licensed architect Douglas Korves, RA (Korves). Korves avers that he "fundamentally disagree[s]" with ODA's contention that it completed the architectural services in 2008, in part, because the contract conditions for substantial completion and for the issuance of a final certificate of payment never occurred (NYSCEF Doc No. 255, Korves aff, ¶¶ 4-5). Korves states that ODA never issued a certificate of substantial completion for the Project (*id.*, ¶ 15). Nor did it issue a final certificate of payment to Ross (*id.*, ¶ 29). After examining ODA's approval of Ross's payment application no. 18, he concludes that the approval "is just another example in a long line of interim payment applications" and that the approval does not qualify as a final payment certificate (*id.*, ¶¶ 28-29).

Second, plaintiffs contend that ODA was obliged to secure the certificate of occupancy, and the statute of limitations runs from the date the certificate was issued. Korves opines that

ODA did not fulfill its express contractual obligation to see through the municipal approvals for the Project (NYSCEF Doc No. 255, ¶¶ 5 and 42-44). Section 2.4.4 of the ODA Contract specifically provides that "[t]he Architect shall assist the Owner in connection with the Owner's responsibility for filing documents required for the approval of governmental authorities having jurisdiction over the Project" (NYSCEF Doc No. 188 at 3). ODA retained Code for this express purpose, as evidenced in Code's two work proposals addressed to ODA (NYSCEF Doc No. 255, ¶¶ 51-52). Korves submits that ODA did complete this express contractual obligation, that he deems was "significant and material," until June 11, 2012, when DOB issued the certificate of occupancy (*id.*, ¶¶ 5-6). Further, Korves rejects ODA's assertion that substantial completion occurred in 2008, when plaintiffs moved into the Building, because "no occupancy was lawfully permitted before the DOB conducted its final inspections and the C of O was issued" (*id.*, ¶ 20). The plumbing and elevator sign-offs occurred well after June 19, 2011 (*id.*, ¶ 58). Additionally, ODA continued to coordinate with Code to obtain the certificate of occupancy through at least June 1, 2012 (*id.*, ¶ 73; NYSCEF Doc No. 264, Korves aff, exhibit I at 1).

Next, plaintiffs argue that ODA is equitably estopped from asserting the action is time-barred under section 9.3 of the ODA Contract. ODA has not produced the requisite certificates of final payment and of substantial completion. ODA's argument that the claims began to accrue from the date the first punch list was issued contradicts what the ODA Contract stipulates shall constitute the triggering event from which to measure the accrual date.

Finally, plaintiffs contend that the continuous representation doctrine acts to toll the statute of limitations. Plaintiffs allege that their correspondence with ODA demonstrates that ODA continued to work on the Project well after 2008.

In reply, ODA urges the court to reject Korves's affidavit, asserting that it is replete with inconsistencies and impermissibly contains opinions on several legal issues. ODA claims that plaintiffs' reference to clauses found in the General Conditions is unavailing. The obligations in the General Conditions pertain to the agreement between plaintiffs and Ross, not ODA. The ODA contract governs plaintiffs' relationship with ODA. In any event, section 1.1.2 of the General Conditions states, in pertinent part, that "[t]he Contract Documents form the Contract for Construction … [and] shall not be construed to create a contractual relationship of any kind … (3) between the Owner and Architect" (NYSCEF Doc No. 228, Simoni affirmation, exhibit E at 10). ODA also refutes plaintiffs' contention that it was responsible for obtaining a final certificate of occupancy, because Julie admitted at her deposition that DOB issued a temporary certificate of occupancy that remained in effect until they received the permanent certificate (NYSCEF Doc No. 176 at 215).

CPLR 214 (6) imposes a three-year statute of limitations for claims arising out of non-medical professional malpractice, whether or not the underlying theory is based in contract or tort (*see Matter of R.M. Kliment & Frances Halsband, Architects (McKinsey & Co., Inc.)*, 3 NY3d 538, 541-542 [2004]). "In cases against architects or contractors, the accrual date for Statute of Limitations purposes is the completion of performance … since all liability has its genesis in the contractual relationship of the parties" (*City School Dist. of City of Newburgh v Hugh Stubbins & Assoc.*, 85 NY2d 535, 538 [1995] [internal citations omitted]). Generally, a cause of action against an architect for defective design and construction "accrues upon the completion of the construction, meaning completion of the actual physical work" (*State of New York v Lundin*, 60 NY2d 987, 989 [1983]). Even if an architect continues to perform services after the physical work is complete, the accrual date does not change, provided that the

additional work is incidental to the original work (*see Cabrini Med. Ctr. v Desina*, 64 NY2d 1059, 1061 [1985]; *Sendar Dev. Co., LLC v CMA Design Studio P.C.*, 68 AD3d 500, 503 [1st Dept 2009] [stating that "[a]fter the completion of work, a relationship between the owner and design professional on an incidental matter that does not relate to the contractual duties between the parties will not extend the completion date"]). Thus, "[a]n owner's claim against a design professional accrues upon the termination of the professional relationship between the parties, when the designer completes its performance of significant (i.e., non-ministerial) duties under the parties' contract" (*Parsons Brinckerhoff Quade & Douglas v EnergyPro Constr. Partner*s, 271 AD2d 233, 234 [1st Dept 2000]).

The court must look to the particular circumstances of the case to determine when the architect's work is complete, as the accrual date may turn on the terms of the parties' contract (*see Mary Imogene Bassett Hosp. v Cannon Design, Inc*., 84 AD3d 1524, 1525 [3d Dept 2011]; *Richards v Passarelli*, 69 AD3d 601, 602 [2d Dept 2010]; *Town of Wawarsing v Camp, Dresser & McKee, Inc*., 49 AD3d 1100, 1101-1102 [3d Dept 2008]). For instance, where an architect is obligated to help procure a certificate of occupancy, the date from which a cause of action against that architect begins to accrue runs from the issuance of the certificate (*see Frank v Mazs Group, LLC*, 30 AD3d 369, 370 [2d Dept 2006] [stating that because of the architect's contractual obligation to obtain a certificate of occupancy, the plaintiff's claim began to accrue when the certificate of occupancy was issued]; *Board of Mgrs. of Yardarm Beach Condominium v Vector Yardarm Corp*., 109 AD2d 684, 686 [1st Dept 1985], *appeal dismissed* 65 NY2d 998 [1985] [concluding that a cause of action for negligence did not lie against an architect, in part, because the architect was not responsible for obtaining the certificate of occupancy]). Likewise, if an architect is contractually obligated to furnish a final payment certificate, claims for breach

of contract and negligence accrue "upon the architect's fulfillment of its contractual obligations and not upon the physical completion of the buildings" (*Matter of Kohn Pederson Fox Assoc. (FDIC)*, 189 AD2d 557, 558 [1st Dept 1993]).

The defendant bears the burden of proving that a claim is time-barred under the applicable statute of limitations (*see Trustee of Columbia Univ. in City of N.Y. v Gwathmey Siegel & Assoc. Architects*, 167 AD2d 6, 11 [1st Dept 1991]). A contract may designate "when the period of limitations will commence, and such a provision will govern in the absence of duress, fraud or misrepresentation" (*Matter of Oriskany Cent. School Dist. (Booth Architects)*, 206 AD2d 896, 897 [4th Dept 1994], *affd* 85 NY2d 995 [1995], citing CPLR 201).

As relevant here, section 9.3 of the ODA Contract reads as follows:

> "Causes of action between the parties to this Agreement pertaining to acts or failures to act shall be deemed to have accrued and the applicable statutes of limitations shall commence to run not later than either the date of Substantial Completion for acts or failures to act occurring prior to Substantial Completion or the date of issuance of the final Certificate for Payment for acts or failures to act occurring after Substantial Completion. In no event shall such statutes of limitations commence to run any later than the date when the Architect's services are substantially completed"

(NYSCEF Doc No. 188 at 10).

Section 2.6.1 of the ODA Contract states that ODA's "responsibility to provide Basic Services for the Construction Phase under this Agreement … terminates at the earlier of the issuance to the Owner of the final Certificate of Payment or 60 days after the date of Substantial Completion of the Work" (NYSCEF Doc No. 188 at 3). "The Architect's certification for payment shall constitute a representation to the Owner, based on the Architect's evaluation of the Work … that the Work has progressed to the point indicated, and that, to the best of the Architect's knowledge, information and belief, the quality of the Work is in accordance with the

Contract Documents" (NYSCEF Doc No. 188 at 4 [section 2.6.9.2]). As noted above, ODA had agreed to "review and certify the amounts due to the Contractor and shall issue certificates in such amounts" (*id.* [section 2.6.9.1]).

Section 2.6.14 states that ODA shall "conduct inspections to determine the date or dates of Substantial Completion and the date of final completion …" (NYSCEF Doc No. 188 at 4). Although the ODA contract does not describe the phrase "substantial completion," article 9 in the General Conditions discusses what constitutes substantial completion. Importantly, section 2.6.2 of the ODA Contract expressly incorporates the General Conditions (*id.* at 3).

Section 9.8.1 of the General Conditions defines "substantial completion" as "the state in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use" (NYSCEF Doc No. 192, Depardon aff, exhibit 5 at 1). Article 9 further describes the process for determining substantial completion. First, where a contractor believes that its work is substantially complete, it shall submit a list of items to be completed or corrected before final payment to the architect (NYSCEF Doc No. 228, Simoni affirmation, exhibit E at 32 [section 9.8.2]). The architect shall then "make an inspection to determine whether the Work … is substantially complete" (*id.* [section 9.8.3]). Significantly, section 9.8.4 states:

> "[w]hen the Work or designated portion thereof is substantially complete, the Architect will prepare a Certificate of Substantial Completion which shall establish the date of Substantial Completion, shall establish responsibilities of the Owner and Contractor for security, maintenance, heat, utilities, damage to the Work and insurance, and shall fix the time within which the Contractor shall finish all items on the list accompanying the Certificate" (*id.*).

In addition, section 9.8.5 partially provides that "[t]he Certificate of Substantial Completion shall be submitted to the Owner and Contractor for their written acceptance of responsibilities assigned to them in such Certificate" (*id.*).

"Where, as here, a construction contract required the architect to conduct inspections to determine the dates of substantial and final completion and to issue a final certificate of payment, a cause of action against him does not accrue until the final certificate of payment is issued" (*Board of Educ. of Tri-Val. Cent. School Dist. at Grahamsville v Celotex Corp*., 88 AD2d 713, 714 [3d Dept 1982], *affd* 58 NY2d 684 [1982], *rearg denied* 58 NY2d 824 [1983]). "'In such a case, the architect's duties do not end until the issuance of a certificate of completion'" (*Matter of Oriskany Cent. School Dist. (Booth Architects)*, 206 AD2d at 897, quoting *Williamsville Cent. School Dist. v Cannon Partnership*, 187 AD2d 1011, 1012 [4th Dept 1992]). Thus, an architect's relationship with an owner ends, not upon the physical completion of the buildings, but upon the issuance of the final certificate of payment (*see Matter of Kohn Pederson Fox Assoc. (FDIC)*, 189 AD2d at 588).

ODA has not met its burden of demonstrating the three-year statute of limitations from CPLR 214 (6) bars plaintiff's claims. Under section 9.3, the two events from which plaintiffs' claims accrue are substantial completion or the issuance of a final certificate of payment. When read in conjunction with article 9 of the General Conditions, substantial completion does not equate with the issuance of the first punch list or plaintiffs' actual occupancy of the Building, as ODA contends. Rather, substantial completion hinges on ODA's issuance of a certificate of substantial completion after it has inspected the work. If ODA concluded substantial completion had occurred, it was obligated to issue the certificate of substantial completion to both plaintiffs and Ross. Then, the responsibilities of each party would have been fixed. Here, ODA has not produced the certificate of substantial completion for this Project. Nor has ODA produced the final certificate of payment to Ross. In fact, Depardon admitted at his deposition that Ross had

not been paid in full, and that he could not recall certifying any payment application from Ross after ODA received payment application no. 18.

The issuance of a final certificate of payment, or a certificate of substantial completion, are not merely ministerial or incidental tasks (see *Board of Educ. of Tri-Val. Cent. School Dist. at Grahamsville*, 88 AD2d at 714 ["the final certificate was not merely a ministerial act but represented a substantial contractual right of plaintiff owner and a concommitant contractual responsibility of defendant architect in completing the project"]). Moreover, "[t]he architect's issuance of the [final] certificate marks the completion of its performance and the point when the Statute of Limitations starts to run for a breach of its contractual undertaking" (*State of New York*, 60 NY2d at 989). Thus, ODA has not demonstrated that plaintiffs' claims are time-barred under section 9.3 of the ODA Contract and CPLR 214 (6).

ODA's assertion that plaintiffs cannot rely on the clauses discussing substantial completion in the General Conditions is unpersuasive. ODA correctly states that the General Conditions largely pertain to Ross's contractual obligations. Additionally, ODA correctly states that article 1 of the General Conditions reads that the Ross Contract does not create a contractual relationship between plaintiffs and ODA. However, ODA ignores the balance of the language in section 1.1.2 stating that "[t]he Architect shall, however, be entitled to performance and enforcement of obligations under the Contract intended to facilitate performance of the Architect's Duties" (NYSCEF Doc No. 228 at 9). Significantly, ODA concedes that the ODA Contract expressly incorporated the General Conditions of Ross's Contract into its own agreement with plaintiffs (NYSCEF Doc No. 187, ¶ 16).

The facts in *Matter of Oriskany Cent. School Dist. (Booth Architects)*, that ODA cites, are distinguishable. In that action, the contract between the plaintiff school district and the

defendant architect specifically incorporated the "General Conditions of the Contract for Construction" between plaintiff and the general contractor (206 AD2d at 897 [internal quotation marks omitted]). The "General Conditions define[d] the date of substantial completion of the work as 'the Date certified by the Architect when construction is sufficiently complete … so the Owner can occupy or utilize the Work or designated portion thereof for the use for which it is intended'" (*id.* at 897-898). Incidentally, this clause is nearly identical to section 9.8.1 of the General Conditions in this action (NYSCEF Doc No. 192 at 1). In *Matter of Oriskany Cent. School Dist. (Booth Architects)*, the architect certified the project was complete and the buildings suitable for occupancy in 1985 (206 AD2d at 898). The Court determined that substantial completion for purposes of the architect's contract occurred when the plaintiff could occupy or utilize the buildings, and that this condition occurred when the plaintiff accepted the buildings for occupancy (*id.*). The Court also concluded that the provisions relating to the issuance of a certificate of substantial completion, found in the contract between plaintiff and the general contractor, "were solely intended to govern when the Contractor became entitled to final payment" (*id.*). Thus, the Court found that the plaintiff's claim was untimely (*id.*).

On appeal, the Court of Appeals indicated that the architect never issued a certificate of substantial completion, as the general conditions of the contract between the plaintiff and the general contractor required (85 NY2d at 997). The Court also stated the general conditions were incorporated into the contract between plaintiff and the architect (*id.*). Nevertheless, the Court reasoned that a "Certificate of Suitability and Acceptance of Building for Pupil Occupancy [signed by the plaintiff] was an appropriate substitute" for the certificate of substantial completion (*id.*). In addition, the architect signed the application and certificate for payment for final payment. In contrast to this action, ODA has not issued a final certificate of payment, nor

has it issued the functional equivalent of a certificate of substantial completion (*see Precision Window Sys., Inc. v EMB Contr. Corp.*, 149 AD3d 883, 884 [2d Dept 2017], *appeal dismissed* 2017 NY Slip Op 79070[U] [2d Dept 2017] [reasoning that a notice of transfer "served the same essential function and is entitled to the same legal effect" as the owner's certificate of completion and its acceptance of the work]). Consequently, the court denies that part of ODA's motion for summary judgment to dismiss plaintiffs' claims as time-barred.

B. The Economic Loss Rule and Plaintiffs' Tort Claims

ODA alleges that the third cause of action for professional malpractice and the fourth cause of action for negligence are not legally cognizable. ODA maintains that these tort claims arise from ODA's contractual obligations, and that plaintiffs have sustained only economic loss. Plaintiffs argue that they have adequately pled causes of action sounding in tort, which may co-exist with the breach of contract cause of action.

"The economic loss rule is based on the principle that damages arising from the failure of the bargained-for consideration to meet the expectations of the parties are recoverable in contract, not tort, unless a legal duty independent of the contract itself has been violated" (*Suffolk Laundry Servs. v Redux Corp.*, 238 AD2d 577, 578 [2d Dept 1997]). That said, "[i]t is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated'" (*Dormitory Auth. of the State of N.Y. v Samson Constr. Co.*, 30 NY3d 704, 711 [2018], quoting *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]). Using common tort language does not, without more, transform a breach of contract claim into a tort claim (*Clark-Fitzpatrick, Inc.*, 70 NY2d at 390). However, a legal duty independent of the parties' contractual obligations may render a professional "subject to tort liability for failure to exercise reasonable care, irrespective of their contractual

duties" (*Assured Guar. (UK) Ltd. v J.P. Morgan Inv. Mgt. Inc.*, 80 AD3d 293, 306 [1st Dept 2010], *affd* 18 NY3d 341 [2011] [internal quotation marks and citation omitted]). The court must consider "the nature of the injury, how the injury occurred and the harm it caused" (*Dormitory Auth. of the State of N.Y.*, 30 NY3d at 711).

According to the complaint, plaintiffs allege that ODA breached "the required standard of care, competence and skill in the completion of their duties as professionals in connection with the Project" (NYSCEF Doc No. 168, ¶ 54), and that ODA negligently performed its duties and services on the Project (*id.*, ¶ 61). Plaintiffs allege they have sustained losses and damage including but not limited to repair and replacement costs; corrective work costs; property damage; alternative living and future alternative living costs; and duplicate construction and energy costs (*id.*, ¶ 36). These allegations, although framed in language ordinarily associated with tort, does not plead the breach of a legal duty separate and apart from the breach of contract claim. Rather, the professional malpractice and negligence causes of action merely restate the breach of contract cause of action, that details 22 specific instances where ODA failed to perform (*id.*, ¶ 41). Thus, plaintiffs are "essentially seeking enforcement of the bargain, [and therefore] the action should proceed under a contract theory" (see *Structure Tone, Inc. v. Universal Servs. Grp., Ltd.*, 87 A.D.3d 909, 911 [1st Dep't 2011]["[t]he motion court properly granted third-party defendants summary judgment as to USG's claims for contribution because despite USG's attempts at casting its claims in tort, the claims are based on alleged breaches of an express contract"] see also, *Sommer v Federal Signal Corp.*, 79 NY2d 540, 552 [1992]). Korves's opinion that ODA allegedly breached a professional standard of care governing the conduct of architects (NYSCEF Doc No. 255, ¶ 80) does salvage plaintiffs' tort claims. Korves largely predicates his opinion on ODA's purported failure to fulfill the terms of the contract with regard

to the final punch list and the certificate of substantial completion (*id.*, ¶ 19). His assertions are plainly insufficient to raise a triable issue whether ODA breached a legal duty separate and apart from its contractual obligations. Therefore, the economic loss doctrine bars the third cause of action for professional malpractice and the fourth cause of action for negligence (*see Dormitory Auth. of the State of N.Y.*, 30 NY3d at 711-712; *Blackrock Balanced Capital Portfolio (FI) v U.S. Bank N.A.*, 165 AD3d 526, 528 [1st Dept 2018]).

Even assuming the economic loss doctrine is inapplicable, the professional malpractice and negligence causes of action are dismissed for the additional reason that both are duplicative of the breach of contract cause of action (*see Dormitory Auth. of the State of N.Y.*, 30 NY3d at 713). Plaintiffs' tort claims are grounded on the same factual allegations as the breach of contract claim, and seek the same damages (*see City of New York v Eastern Shipbuilding Group, Inc.*, 162 AD3d 469, 470 [1st Dept 2018] [dismissing a professional malpractice claim as duplicative of a breach of contract claim]). Accordingly, that part of ODA's motion for summary judgment dismissing the third cause of action for professional malpractice and the fourth cause of action for negligence is granted, and the third and fourth causes of action are dismissed.

C. The Cross Claims against ODA

Ross and Code have pled a cross claim for contribution and indemnification against ODA (NYSCEF Doc No. 171, Gangel affirmation, exhibit G at 7 and 17-18). ODA submits that contractual indemnification does not lie in the absence of a contract between ODA and Ross or ODA and Code. ODA also contends that there is no basis to support a claim for common-law indemnification, because Ross and Code would not be vicariously or passively for ODA's

alleged liability. Likewise, ODA argues that contribution is unavailable because plaintiffs seek purely economic damages arising out of the allegedly defective work.

Ross and Frost oppose this branch of the motion on the ground that plaintiffs' damages are not limited to the recovery of the benefit of their bargain.

CPLR 1401 provides, in part, that "two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought." Generally, "purely economic loss resulting from a breach of contract does not constitute 'injury to property' within the meaning of New York's contribution statute" (*Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 26 [1987]). The court must look to the measure of damages pled in the complaint to determine whether contribution is available (*see Children's Corner Learning Ctr. v A. Miranda Contr. Corp.*, 64 AD3d 318, 324 [1st Dept 2009]).

An examination of the allegations in the complaint in this action reveals that plaintiffs seek the same damages in their breach of contract cause of action as in their professional malpractice and negligence causes of action (*see Children's Corner Learning Ctr.*, 64 AD3d at 324). Significantly, plaintiffs seek to recover for purely economic loss, that cannot support a claim for contribution (*see Chatham Towers, Inc. v Castle Restoration & Constr., Inc.*, 151 AD3d 419, 420 [1st Dept 2017]; *Sendar Dev. Co., LLC*, 68 AD3d at 504). Moreover, in view of the dismissal of the professional malpractice and negligence claims against ODA, there is no predicate tort for which contribution is available (*see Trump Vill. Section 3 v New York State Hous. Fin. Agency*, 307 AD2d 891, 897 [1st Dept 2003], *lv denied* 1 NY3d 504 [2003]). Thus,

summary judgment is granted to ODA dismissing so much of the cross claims for contribution asserted against it. Further, in the absence of a valid contract containing an indemnification provision, as is the case here, contractual indemnification is unavailable to Ross and Code from ODA.

As to the issue of common-law indemnity, "[a] party cannot obtain common law indemnification unless it has been held to be vicariously liable without proof of any negligence or actual supervision on their own part" (*McCarthy v Turner Constr., Inc*., 17 NY3d 369, 377-378 [2011]). In this action, plaintiffs seek to hold ODA liable for its own wrongdoing, not for the wrongdoing of others. Therefore, common-law indemnification is unavailable from ODA (*see Chatham Towers, Inc.*, 151 AD3d at 420). Thus, the court grants that part of ODA's motion seeking to dismiss the cross claims asserted against it, and the court dismisses the cross claims for contribution and contractual and common-law indemnity asserted against ODA.

Accordingly, it is

ORDERED that the motion of defendants Ogawa Depardon Architects and Gilles Depardon, R.A. for summary judgment is granted to the extent of dismissing the third cause of action for professional malpractice and fourth cause of action for negligence and dismissing the cross claims for contribution and contractual and common-law indemnification asserted against said defendants, and the third cause of action for professional malpractice and fourth cause of action in the complaint and the cross claims for contribution and contractual and common-law indemnification asserted against defendants Ogawa Depardon Architects and Gilles Depardon, R.A. are dismissed, and the motion is otherwise denied.

Dated: June 25, 2020

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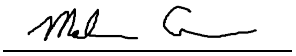

J.S.C.