Seymour v Hovnanian
2020 NY Slip Op 33719(U)
November 9, 2020
Supreme Court, New York County
Docket Number: 154579/2016
Judge: Melissa A. Crane

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA ANNE CRANE** **PART** **IAS MOTION 15EFM**

Justice

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INDEX NO. 154579/2016

GABRIEL NORTH SEYMOUR

Plaintiff,

- v -

HOVNANIAN, ARA

Defendant.

MOTION DATE 06/08/2020, 06/08/2020, 06/08/2020, 06/08/2020, 06/08/2020, 06/08/2020, 06/08/2020, 06/08/2020

MOTION SEQ. NO. 006 007 008 009 010 011 012 013

DECISION + ORDER ON MOTION

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ARA HOVNANIAN, RACHEL LEE HOVNANIAN

Plaintiff,

-against-

AUTUN CONTRACTORS, WILLIAM F. O'NEILL ARCHITECTS, GILSANZ MURRY STEFICEK LLP, PILLORI ASSOCIATES, PA, SIGNATURE INTERIOR DEMOLITION, INC., JG CONSTRUCTION OF QUEENS, INC., SUPER JC CONSTRUCTION CORPORATION, MITCHELL IRON WORKS, INC.

Defendant.

Third-Party
Index No. 595896/2016

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 748, 793, 794, 795, 796, 797, 821

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

The following e-filed documents, listed by NYSCEF document number (Motion 007) 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, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 745, 751, 813, 814, 815, 816

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

The following e-filed documents, listed by NYSCEF document number (Motion 008) 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 744, 758, 759, 786, 787, 788, 789, 801, 802, 847

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

The following e-filed documents, listed by NYSCEF document number (Motion 009) 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 753, 780, 781, 782, 790, 791, 792, 819, 851, 852, 857

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

The following e-filed documents, listed by NYSCEF document number (Motion 010) 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 703, 704, 705, 706, 707, 708, 709, 710, 742, 743, 746, 754, 817, 818

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

The following e-filed documents, listed by NYSCEF document number (Motion 011) 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 747, 756, 783, 784, 785, 812

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

The following e-filed documents, listed by NYSCEF document number (Motion 012) 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 757, 803, 804, 806, 807, 808, 809, 820

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

The following e-filed documents, listed by NYSCEF document number (Motion 013) 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 750, 752, 755, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 805, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 850, 853, 870, 871, 872, 874, 875, 876, 877, 878

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

Upon the foregoing documents,

HON. MELISSA A. CRANE:

The court consolidates motion sequence numbers 006 through 013, along with the cross-motions, for disposition.

This is an action, *inter alia*, to recover damages for breach of a license agreement and a third-party action seeking, *inter alia*, indemnification and contribution. In motion sequence number 006, third-party defendant Signature Interior Demolition, Inc. (Signature) moves for summary judgment dismissing the third-party complaint and all cross claims asserted against it. In motion sequence number 007, third-party defendant William F. O'Neill Architects (O'Neill) moves for summary judgment dismissing the third-party complaint and all cross claims asserted against it. In motion sequence number 008, third-party defendant Mitchell Iron Works, Inc. (Mitchell) moves for summary judgment dismissing the third-party complaint and all cross claims asserted against it. JG Construction of Queens, Inc. (JG) cross-moves for summary judgment dismissing the third-party complaint and all cross claims asserted against it. In motion sequence number 009, defendants/third party plaintiffs Ara Hovnanian and Rachel Lee Hovnanian (together the Hovnanians) move for partial summary judgment: (1) dismissing the complaint insofar as it seeks to recover attorney's fees, liquidated damages, and damages for reckless infliction of emotional distress and private nuisance and (2) on their third-party complaint insofar as it seeks contribution and common-law indemnification from the third-party defendants. In motion sequence number 010, third-party defendant Pillori Associates, P.A. (Pillori) moves for summary judgment dismissing the third-party complaint and all cross claims asserted against it. In motion sequence number 011, third-party defendant Gilsanz Murry Steficek LLP, (GMS) moves for summary judgment dismissing the third-party complaint and all cross claims asserted against it. In motion sequence number 012, third-party defendant Autun Contractors (Autun) moves for summary judgment on its cross claim for contractual indemnification insofar as asserted against Signature, JG, and Mitchell. In motion sequence number 013, plaintiffs Gabriel North Seymour and Tryntje Van Ness Seymour, as co-executors of the estates of Whitney Seymour Jr. and Catryna Ten Eyck Seymour, move for partial summary judgment on their causes of action seeking to recover damages for breach of contract, specific performance, tortious trespass, private nuisance, strict liability, and negligence *per se* for violating various statutory and regulatory mandates.

I. BACKGROUND

This action arises out of an extensive renovation project the Hovnanians initiated at a townhome they purchased in June 2012. The townhome is located at 292 West 4th Street, in the Greenwich Village Historic District of Manhattan (the Hovnanian Property). The Hovnanian Property is adjacent to a townhome located at 290 West 4th Street, that Whitney Seymour, Jr. (Mr. Seymour) purchased in 1956 (the Seymour Property). The Hovnanian and Seymour Properties share a common party wall. Both townhomes consist of three stories, plus a basement and cellar floor. Built in 1860, they are designated landmarks and subject to New York City's Landmarks Preservation Law.

Mr. Seymour and his wife, Catryna Ten Eyck Seymour (Mrs. Seymour) (together the Seymours) raised their two children, Gabriel North Seymour and Tryntje Van Ness Seymour, at the Seymour Property. The Seymours were both in their 80s and still living at the Seymour Property at the time the Hovnanians purchased the townhome next door. At that time, the Seymour Property was being utilized as a two-family home, with the Seymours occupying the first floor, basement, and cellar, and a family of tenants occupying the second and third floors in a separate apartment.

GMS performed a pre-construction survey of the Seymour Property on September 6, 2012 in order to document the existing conditions prior to any construction taking place (Pre-Construction Survey Report, NYSCEF Doc. No. 507). Shortly thereafter, the Hovnanians commenced work on their property. The project entailed a gut renovation, among other things, removing all interior finishes, partitions, structural framing, modifying the roof structure, modifying the rear elevation, and lowering the basement floor by approximately 4 feet.

On May 2, 2013, the Hovnanians entered into a license agreement with the Seymours, by which the Seymours granted the Hovnanians temporary access to the Seymour Property to perform certain work (License Agreement, NYSCEF Doc. No. 8). The agreement obligates the Hovnanians to comply with specified inspection, notice, monitoring and reporting requirements, and to take measures to protect the Seymour Property and its occupants. In addition, the Hovnanians agreed to pay for the Seymours' "reasonable legal fees and expenses in connection with the negotiation and implementation" of the license agreement (*id.* at ¶ 9.I). Further, to the extent the work performed at the Seymour Property was not in full compliance with the requirements set forth in the license agreement or applicable rules or regulations, the Hovnanians agreed to make changes to bring the work into full compliance (*id.* at ¶ 9.J). In addition, in the event of damage to the Seymour Property "resulting from any aspect of the project," the Hovnanians agreed to restore the Seymour Property "fully to its preexisting condition or pay for any resulting costs or reduction in property value" (*id.* at ¶ 9.K).

II. THIS ACTION

The Seymours initiated this action in May 2016, alleging that the Hovnanians breached the license agreement and that their project caused significant damage to the Seymour Property, rendered it uninhabitable, and interfered with the Seymour's quality of life (Complaint, NYSCEF Doc. No. 7). The complaint alleges causes of action for breach of contract and specific performance of the license agreement, reckless infliction of emotional distress, tortious trespass, negligence, strict liability for violation of section 3309 of the New York City Building Code (*see* New York City Building Code [Administrative Code of City of NY, tit 28, ch 7] § BC 3309 et seq. [hereinafter section BC 3309]), and private nuisance.

According to the complaint, the Hovnanians failed to monitor the Seymour Property throughout the construction process, and consistently engaged in construction activities that exceeded the maximum permissible vibration threshold. The complaint alleges that the resulting damage to the Seymour Property includes: (1) vibrational damage, (2) settlement damage, (3) water damage, and (4) exposure to toxic dust that rose to such a dangerous level that the Seymours were forced to move out of their home during the Hovnanians' project. The Seymours never resumed living in the Seymour Property. They died during the pendency of this action.[1] Their two children were substituted as plaintiffs in their capacity as co-executors of their estates (hereinafter plaintiffs).

In December 2016, the Hovnanians commenced a third-party action against Autun, O'Neill, GMS, Pillori, Signature, JG, Super JC Construction Corporation (Super JC), and Mitchell, seeking, among other things, contribution and indemnification in the event that plaintiffs recovered against them in the main action (NYSCEF Doc. No. 11). According to the

[1] Mrs. Seymour died on December 2, 2017. Mr. Seymour died on June 29, 2019.

third-party complaint, the Hovnanians retained Autun as the general contractor for the project and O'Neill as the architect. The Hovnanians also hired GMS to provide engineering services and Pillori as a geotechnical engineer responsible for inspecting the underpinning work and ensuring that it was completed as per the project plans. According to the third-party complaint, Autun, in turn, subcontracted with Signature, JG, and Super JC to provide demolition work, and with Mitchell to perform iron work for the project.

The third-party complaint alleges causes of action against all third-party defendants for common-law indemnification, contribution, contractual indemnification, breach of contract, breach of contract for failure to procure insurance, negligence, and breach of express and implied warranties. All third-party defendants, except Super JC,[2] asserted cross claims against each other for, among other things, indemnification and contribution (NYSCEF Doc. Nos. 14, 19, 23, 33, 36, 43, 55). Pillori, O'Neill, Autun, JG, and Mitchell counterclaimed for, inter alia, indemnification and contribution against the Hovnanians.

Now before the court are motions by (1) plaintiffs for partial summary judgment on various claims in the main action (Mot Seq No 13), (2) the Hovnanians for partial summary judgment dismissing various claims against them in the main action and on their claims for common-law indemnification and contribution against all third-party defendants in the third-party action (Mot Seq No 009), (3) Signature, O'Neill, Mitchell, JG, Pillori, and GMS for summary judgment dismissing the third-party complaint and all cross claims insofar as asserted against them in the third-party action (Mot Seq Nos 006, 007, 008, 010, 011), and (4) Autun for summary judgment on its cross claim for contractual indemnification insofar as asserted against Signature, JG, and Mitchell.

III. DISCUSSION

As a preliminary matter, in an order dated July 9, 2020, this court granted certain branches of plaintiffs' motion for partial summary judgment and denied certain branches of the Hovnanians' motion for partial summary judgment (NYSCEF Doc. No. 853). Specifically, the court ordered the following:

> "1. Defendants Ara Hovnanian and Rachel Lee Hovnanian are liable to the Plaintiffs for breaching Paragraph 12 of the License Agreement for failing to pay liquidated damages of $318,000 that accrued at the rate of $1,000 per day from November 2, 2014 to September 15, 2015, and it is further ordered that, pursuant to CPLR § 5001, Plaintiffs are awarded prejudgment interest to be computed cumulatively from the date each item of $1,000 in damages was incurred from November 2, 2014 to September 15, 2015, at the statutory rate of 9 % per annum (*see* Court Proceeding Transcript of May 28, 2020 at pp. 23-25);
>
> 2. Defendants Ara Hovnanian and Rachel Lee Hovnanian are liable to the Plaintiffs for

[2] Super JC has not answered or otherwise appeared in this action.

breaching Paragraph 9.I. of the License Agreement for failing to pay Plaintiffs' outstanding consultants' and attorneys' fees as provided in the agreement, and the issue of the amount of a judgment, including prejudgment interest, remains to be determined in a later proceeding. The Court's decision on whether the License Agreement requires the Defendants to pay Plaintiffs' attorneys' fees and expenses for this litigation remains pending (*see* Court Proceeding Transcript of May 28, 2020 at pp. 24-25);

3. By August 12, 2020 or such other date agreed to by the parties, Defendants Ara Hovnanian and Rachel Lee Hovnanian are further ordered to obtain at their own expense and in accordance with the parties' License Agreement:

a. the removal of all temporary protections installed to control dust and debris from entering the Plaintiffs' property, along with the removal of the toxic lead dust and debris from the Plaintiffs' property using-EPA compliant remediation procedures for lead dust abatement as set forth in NYSECF Doc. No. 825, using contractors and a project supervisor designated by the Plaintiffs;

b. once lead dust abatement to the chimneys on Plaintiffs' property has been completed, an inspection for damage to the chimneys on Plaintiffs' property, along with conducting chimney smoke tests and preparing related reports, using contractors and a project supervisor designated by the Plaintiffs;

c. the removal of the Verizon splicebox from Plaintiffs' property and, using contractors and a project supervisor designated by the Plaintiffs, the repair and restoration of the rear façade to its condition prior to the damage caused by the drilling and mounting of the Verizon splicebox to the rear façade of Plaintiffs' property; and,

d. the installation and maintenance of effective flashing on the roof of the Plaintiffs' property and the repair of the underlying water infiltration damage to Plaintiffs' property, using contractors and a project supervisor designated by the

Plaintiffs. (*See* Court Proceeding Transcript of May 28, 2020 at pp. 62-64)"

(NYSCEF Doc. No. 853). In addition, the court denied the Hovnanians' motion for partial summary judgment to the extent that it seeks dismissal of the causes of action for which the court granted plaintiffs' motion (*id.*). The court now addresses only those issues it did not decide on July 9, 2020.

A. **Plaintiffs' Motion (Mot Seq No 013)**

1. Breach of Contract and Specific Performance of License Agreement

a. Failure to Make Repairs to Damage Caused by the Project

Plaintiffs move for partial summary judgment on certain branches of their causes of action seeking damages for breach of contract and specific performance of the license agreement. First, plaintiffs point out that paragraphs 9.F and 9.K of the license agreement impose an obligation on the Hovnanians to "promptly repair any damage caused to" their property "by the construction activities" and to "restore" their "property fully to its pre-existing condition or pay for any resulting costs or reduction in property value" (NYSCEF Doc. No. 8). Plaintiffs contend that the Hovnanians breached this obligation, because their construction project damaged the Seymour Property and the Hovnanians have failed to make the necessary repairs or pay for the damages. Therefore, plaintiffs assert, they are entitled to a judgment against the Hovnanians finding them liable under the license agreement for the cost of these repairs, with the specific amount of damages to be determined at trial.

In support of their motion, plaintiffs rely on, among other things, the pre-construction survey (NYSCEF Doc. No. 507), and affirmations from two professional engineers, an architect, and two experts in the field of historic preservation, whose investigations collectively conclude that the Hovnanians' project damaged the following: (1) the original 1860 plaster inside the Seymour Property and the brick masonry and stucco on the exterior of the building; (2) the common party wall; (3) the rear yard; (4) the oculus stained-glass laylight, skylight and roof; and (5) the boiler (*see* Mem of Law in Support, at pages 25-29, NYSCEF Doc. No. 452; Affidavit of Donald Friedman, NYSCEF Doc. No. 498; Affidavit of Mary Jablonski, NYSCEF Doc. No. 460; Affidavit of Jennifer Schork, NYSCEF Doc. No. 457; Affidavit of Don Erwin, NYSCEF Doc. No. 465; Affidavit of James Cohen, NYSCEF Doc. No. 454). Plaintiffs also present evidence that the Hovnanians failed to repair or pay for these damages (Affidavit of Tryntje Seymour, NYSCEF Doc. No. 521; Affidavit of Gabriel Seymour, NYSCEF Doc. No. 540).

In opposition to plaintiffs' prima facie showing, the Hovnanians fail to raise an issue of fact. Their expert's opinion as to the respective fault attributable to the third-party defendants/contractors is irrelevant to whether the Hovnanians are liable to plaintiffs for breaching their obligation under the license agreement to repair or pay for the damage their construction project causes. Thus, the court grans that branch of plaintiffs' motion for partial summary judgment on their cause of action seeking damages for breach of contract based on the Hovnanians' failure to repair, or pay the costs of repairing, the damage to plaintiffs' property caused by their construction project is granted. The issue of the amount of a judgment remains to be determined at trial.

b. Obligation to Indemnify for Legal Fees and Expenses incurred in Connection with this Litigation

Next, plaintiffs contend that the Hovnanians are obligated under the license agreement to pay for their legal fees and expenses incurred in connection with this litigation. They seek an order directing specific performance of this obligation.

In New York, the "American rule precludes the prevailing party from recouping legal fees from the losing party except where authorized by statute, agreement or court rule" (*Gotham Partners, L.P. v High Riv. Ltd. Partnership*, 76 AD3d 203, 204 [1st Dept 2010][internal quotation marks and citation omitted]). As the Court of Appeals explained in *Hooper Assoc. v AGS Computers* (74 NY2d 487, 491-492 [1989]):

> "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. *The promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances*. Inasmuch as a promise by one party to a contract to indemnify the other for attorney's fees incurred in litigation between them is contrary to the well-understood rule that parties are responsible for their own attorney's fees, *the court should not infer a party's intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise*"

(internal citations omitted [emphasis added]).

Here, paragraph 11 of license agreement contains the following indemnification clause:

> "To the fullest extent permitted by law, *Project Owner shall indemnify, defend and hold harmless Adjacent Owner and its successors, assigns and estates and Adjacent Owner's Representative and his assistant (collectively the 'Indemnitees') from and against any and all causes of action, damages, judgments, liens, litigation, liability, penalties, fines, orders, losses, costs or expenses, including reasonable attorney's fees, which may at any time be asserted against or incurred by the Indemnitees* or any one or more of them *resulting from (i) any act or omission of Project Owner or the Construction Team in connection with the performance of any work by Project Owner or any of its agents in connection with the Project Premises or (ii) any claim brought as a result of the actions of Project Owner or its agents as set forth in this Agreement or any work performed upon the Adjacent Premises or (iii) as a result of the execution and/or existence and/or the effectuation of this Agreement, including claims for personal injury or property damage sustained by any contractor, worker, or any other third or non-party* or (iv) otherwise caused by the negligence, errors, omissions or other acts of Project Owner or construction Team in connection with the installation, maintenance, inspection and, to the extent applicable, removal of the crack gauges, monitoring equipment, temporary protections, flashing, adjacent chimneys and underpinning, without limiting the generality of the foregoing, Project Owner agrees to reimburse Adjacent Owner for any costs, claims, lost rent, litigation or liability Adjacent Owner has incurred (except to the extent covered by insurance) or incur in the future as a result of dust containing lead or other material being

> discharged into Adjacent Owner's Property (including the space occupied by Adjacent Owner's tenant) or loss of habitability, as a result of work carried out previously or in the future by or on behalf of Project Owner"

(NYSCEF Doc. No. 8, ¶ 11 [emphasis added]).

This indemnification provision, to which the Hovnanians agreed, requires them to pay plaintiffs' counsel fees and expenses in connection with this litigation. This promise is evident from the plain language of the agreement. The language of the indemnification provision is broad and highly inclusive, applying to "*any and all* . . . litigation, liability,. . . costs or expenses, including reasonable attorney's fees, which may at any time be asserted against or incurred by the Indemnitees" resulting from any act or omissions of the Hovnanians or their construction team in connection with the Hovnanian Property, any claim brought as a result of their actions as set forth in the agreement or in connection with work performed at the Seymour Property, and as a result of the existence or the effectuation of the agreement (*see Crossroads ABL LLC v Canaras Capital Mgt., LLC*, 105 AD3d 645, 645-646 [1st Dept 2013]; *Matter of 2-4 Kieffer Lane LLC v County of Ulster*, 172 AD3d 1597, 1601 [3d Dept 2019]).

Interpreting the indemnification provision to apply only to third-party claims, as the Hovnanians suggest, would render the language "*including* claims for personal injury or property damage sustained by any contractor, worker, or any other third or non-party" without force and effect. "It is a well settled principle of contract law that a court should not adopt a construction of a contract which will operate to leave a provision of a contract . . . without force and effect. An interpretation that gives effect to all the terms of an agreement is preferable to one that ignores terms or accords them an unreasonable interpretation" (*Nautilus Ins. Co. v Matthew David Events, Ltd.*, 69 AD3d 457, 460 [1st Dept 2010] [internal quotation marks and citations omitted]; *see Sagittarius Broadcasting Corp. v Evergreen Media Corp.*, 243 AD2d 325, 326 [1st Dept 1997]["the first sentence of the subject clause cannot reasonably be interpreted as limited to third-party claims, particularly in view of the second portion of that clause, which clearly pertains to third-party actions, thereby rendering the first part mere surplusage were it only applicable, as defendant maintains, to third-party actions"]).

In opposition to this branch of plaintiffs' motion, the Hovnanians argue, among other things, that, because they did not have the opportunity to depose Mr. Seymour, they were unable to question him about the intended meaning of the indemnification provision. However, "where the intention of the parties is clearly and unambiguously set forth in the agreement itself, effect must be given to the intent as indicated by the language used without regard to extrinsic evidence" (*Schmidt v Magnetic Head Corp.*, 97 AD2d 151, 157 [2d Dept1983][citations omitted]; *see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). "Ambiguity in a contract arises when the contract, read as a whole, fails to disclose its purpose and the parties' intent, or where its terms are subject to more than one reasonable interpretation" (*Universal Am. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA.*, 25 NY3d 675, 680 [2015] [internal quotation marks and citations omitted]). "Whether an agreement is ambiguous is a question of law for the courts . . . Ambiguity is determined by looking within the four corners of the document, not to outside sources. The entire contract must be reviewed and [p]articular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby" (*Riverside S. Planning Corp. v*

CRP/Extell Riverside, L.P., 13 NY3d 398, 404 [2009][internal quotation marks and citation omitted]).

Here, the purpose of the license agreement as a whole was to grant the Hovnanians temporary access to the Seymour Property so they could complete their project and to protect the Seymours and their home from harm by the project's activities - a project from which the Seymours derived no benefit. Interpreting the indemnification provision as covering "costs or expenses, including reasonable legal fees . . . incurred" by the Seymours in needing to enforce the terms of the license agreement or arising out of the Hovnanians' failure to perform or comply with their obligations under the agreement is consistent with the "obligation as a whole and the intention of the parties as manifested thereby" (*Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.,* 13 NY3d at 404). The indemnification clause unambiguously encompasses these expenses. Indeed, "provisions are not ambiguous merely because the parties interpret them differently" (*Universal Am. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA.,* 25 NY3d at 680 [quotation marks and citations omitted]). Therefore, the court will not consider extrinsic evidence, such as deposition testimony.

Thus, that branch of plaintiffs' motion for partial summary judgment on their cause of action seeking specific performance of the Hovnanians' obligation to pay their reasonable legal fees and expenses incurred in connection with this litigation is granted. These fees will be determined at an inquest.

c. Obligation to Indemnify for Loss of Habitability

Plaintiffs also assert that the Hovnanians are obligated under paragraph 11 of the License Agreement to reimburse them for the loss of habitability they experienced because of the toxic dust that infiltrated their home as a result of the Hovnanians' project. In this regard, they rely on the following language in paragraph 11 of the indemnification clause:

> "Project Owner agrees to reimburse Adjacent Owner for any costs, claims, lost rent, litigation or liability Adjacent Owner has incurred (except to the extent covered by insurance) or will incur in the future as a result of dust containing lead or other material being discharged into Adjacent Owner's Property (including the space occupied by Adjacent Owner's tenant) *or loss of habitability*, as a result of work carried out previously or in the future by or on behalf of Project Owner"

(NYSCEF Doc. No. 8, at ¶ 11 [emphasis added]).

Plaintiffs contend that toxic dust initially infiltrated the Seymour Property through the fireplaces in the Fall of 2012 as a result of work the Hovnanians were performing on the chimney along the party wall. In support, plaintiffs submit the affidavit of Donald Friedman, a certified professional engineer Mr. Seymour retained in September 2012 to assist him in the implementation of the then-proposed license agreement (Affidavit of Donald Friedman, NYSCEF Doc. No. 498). Friedman states that, on behalf of Mr. Seymour, he contacted the Hovnanians' agent to remediate the problem and to request lab testing in order to determine the nature of the dust (*id.* at ¶ 9). He avers that a December 2012 lab test showed that the dust in the Seymour Property contained toxic levels of lead based on United States Environmental Protection Agency (EPA) standards and elevated levels of trichloroethylene (TCE), an industrial

solvent (*id.* at ¶ 12). Friedman attaches a copy of the December 2012 test results to his affidavit (Test Results, NYSCEF Doc. No. 503).

Friedman also states that a second sampling of dust, from January 2013, shows lead levels in excess of EPA limits considered safe for human exposure (Affidavit of Donald Friedman, ¶¶ 13-17, NYSCEF Doc. No. 498). A copy of the January 2013 report is also attached to Friedman's affidavit (Test Results, NYSCEF Doc. No. 506). According to Friedman, the toxic dust levels forced the Seymours to evacuate their home and required special remediation techniques to remove the dust from the living spaces (Affidavit of Donald Friedman at ¶ 17, NYSCEF Doc. No. 498).

The Seymour Property underwent remediation in March 2013, but toxic dust continued to infiltrate the property. As evidence of this problem, plaintiffs submit a Laboratory Sample Report, dated September 18, 2013 (Lab Sample Report, NYSCEF Doc. No. 563). The report states that an "on-site sampling for the detection of lead and/or lead based hazards" was conducted at the Seymour Property and that "[f]our of five lead in dust wipe samples [were] considered unacceptable above the lowest regulatory limit" (*id.*). Plaintiffs also submit a June 3, 2019 inspection and laboratory report showing lead levels in 7 out of 13 samples that were higher than EPA and Department of Housing and Urban Development standards (Lab Report, NYSCEF Doc. No. 575). The report also states that the "unacceptable samples were taken from multiple areas throughout the cellar, ground floors, and first floor"(where the Seymours resided) and that "[a]ll samples taken on the second and third floor" (where their tenants resided) were "acceptable" (*id.*). In light of the foregoing, plaintiffs established, *prima facie*, that toxic dust from the Hovnanians' project adversely affected the habitability of the Seymour's home.

In opposition, the Hovnanians do not dispute that they are obligated under the license agreement to reimburse plaintiffs for loss of habitability. Most important, they do not dispute the lead level measurements cited in the lab reports. They assert that the Seymours moved out of their home, not because of the toxic dust, but because of their advanced age and health conditions. The Hovnanians question plaintiffs' assertion that the Seymours were forced to move-out of their home due to toxic dust, given that the tenants occupying the apartment on the second and third floors of the Seymour Property continued to occupy their apartment throughout the construction. They point out that plaintiffs acknowledged work on the apartment upstairs to make it habitable, but did not take any action to improve the habitability of the other floors. Therefore, the Hovnanians argue, plaintiffs failed to mitigate their alleged damages and are not entitled to recover for loss of use.

The Hovnanians' opposition is not sufficient to raise an issue of fact as to whether the toxic dust infiltration adversely affected the habitability of the Seymour Property. Whether plaintiffs attempted to mitigate their damages in this regard is not relevant to the issue of liability. In any event, the Hovnanians did not establish that the Seymours failed to make diligent efforts to mitigate their damages or the extent to which such efforts would have diminished their damages (see *LaSalle Bank N.A. v Nomura Asset Capital Corp.*, 47 AD3d 103, 107-108 [1st Dept 2007]). Nor did they establish that, under the circumstances, the Seymours would not have been subject to "unreasonable risk or expense" had they continued with the remedial efforts (*Eskenazi v Mackoul*, 72 AD3d 1012, 1014 [2d Dept 2010], quoting *Janowitz Bros. Venture v 25-30 120th St. Queens Corp.*, 75 AD2d 203, 213 [2d Dept 1980]).

Thus, the court grants that branch of plaintiffs' motion seeking partial summary judgment on their cause of action seeking specific performance of the Hovnanians' obligation to reimburse them for loss of habitability.

Obligation to Provide Plaintiffs with Reports

The plaintiffs assert that the Hovnanians are obligated under the license agreement to provide them with certain reports and that the Hovnanians have failed to supply these reports despite repeated demands. Plaintiffs contend that these reports are necessary to determine the full extent of their damages.

Paragraph 9.B of the license agreement obligates the Hovnanians to have a special inspection engineer for the underpinning work "submit a final inspection report and completion or sign-off report," "including a statement that the work complies with" the plans annexed to the agreement and with "all applicable laws and regulations" (NYSCEF Doc. No. 8, ¶¶ 9.B.i-9.B.ii). Paragraph 9.B further requires them to retain the services of a "support excavation engineer" to perform special inspections of the excavation work and upon completion of such work, to submit a "final structural stability report, field report and completion or sign-off report, including a statement that the Support Excavation Work complies with" the plans and specifications annexed to the agreement and "applicable laws and regulations" (*id.* at ¶¶ 9.B.iii - 9. B.iv). Plaintiffs presented evidence establishing that they never received these reports from the Hovnanians (*see* Affidavit of Donald Friedman, NYSCEF Doc. No. 498; Affidavit of Gabriel Seymour, NYSCEF Doc. No. 540).

In opposition, the Hovnanians do not contest that they must supply plaintiffs with these reports. Nor do they argue that they have already done so. Therefore, the Hovnanians are ordered, at their own expense and in accordance with the license agreement, to obtain and provide plaintiffs with copies of the aforementioned reports.

2. Strict Liability for Violating NYC Building Code

Plaintiffs move for summary judgment on the issue of liability against the Hovnanians on their cause of action alleging a violation of section BC 3309. "[S]ection BC 3309 protects adjoining property from damage during construction or demolition work and imposes strict or absolute liability in the context of excavation work that causes damage to adjoining property. It details a procedure to be followed to protect adjoining property that may include notification, physical examination, and monitoring" *(211-12 N. Blvd. Corp. v LIC Contr., Inc.*, 186 AD3d 69, 81 [2d Dept 2020]). Section BC 3309.4 provides:

> "Whenever soil or foundation work occurs, regardless of the depth of such, the person who causes such to be made shall, at all times during the course of such work and at his or her own expense, preserve and protect from damage any adjoining structures, including but not limited to footings and foundations, provided such person is afforded a license in accordance with the requirements of Section 3309.2 to enter and inspect the adjoining buildings and property, and to perform such work thereon as may be necessary for such purpose."

"[T]he person who made the decision to excavate [or] the contractor who carried out the physical excavation work" is strictly liable for damage to any adjoining structures caused by the excavation (*American Sec. Ins. Co. v Church of God of St. Alban*s, 131 AD3d 903, 905 [2d Dept 2015]; *see Moskowitz v Tory Burch LLC*, 161 AD3d 525, 527 [1st Dept 2018]; *87 Chambers, LLC v 77 Reade, LLC*, 122 AD3d 540, 541-542 [1st Dept 2014]).

Here, plaintiffs satisfied their *prima facie* burden. Plaintiffs' evidence includes, among other things, the pre-construction survey (NYSCEF Doc. No. 507), and an affidavit from James Cohen, a professional engineer, whose investigation concludes that "construction related forces occurring on the [Hovnanians'] premises, including differentials from settlement from excavation and vibrations. . . , caused damage to the [the Seymour] Property" (NYSCEF Doc. No. 454).

In opposition, the Hovnanians failed to raise a triable issue of fact. Any precautions the Hovnanians took to avoid damage to the Seymour Property are irrelevant given that the statute imposes liability regardless of the degree of care exercised (s*ee Yenem Corp. v 281 Broadway Holdings*, 18 NY3d 481, 490 [2012]). In addition, any allegedly preexisting conditions of plaintiffs' building do not factor into a proximate cause analysis under section BC 3309.4, but merely raise an issue of fact as to damages (*see 211-12 N. Blvd. Corp. v LIC Contr., Inc.*, 186 AD3d 69 [2d Dept 2020]; *Yenem Corp. v 281 Broadway Holdings*, 18 NY3d at 491).

Thus, that branch of the plaintiffs' motion which is for summary judgment on the issue of the Hovnanians' liability on the cause of action alleging a violation of BC 3309 is granted (*see Shah v 20 E. 64th St., LLC*, 2017 NY Slip Op 32028[U] [Sup Ct, NY County 2017]).

3. Negligence Per Se

On this motion, plaintiffs assert that to the extent the Hovnanians are not strictly liable under BC 3309, they are entitled to partial summary judgment on the issue of the Hovnanians' liability under the theory of negligence per se for violations of BC 3309. This branch of plaintiffs' motion is now academic because of the court's decision in the immediately prior section of this order, that the Hovnanians' are strictly liable for damage to the Seymour Property that the excavation caused.

4. Tortious Trespass - Punitive Damages

Plaintiffs assert that the Hovnanians' tortiously trespassed onto the Seymour Property to affix a Verizon splice box on the Seymour's historic rear facade without permission. Therefore, they assert they are entitled to an award of compensatory damages for the removal and costs of repairing the holes drilled in the Seymour Property's facade. In the order dated July 9, 2020, this court ordered the Hovnanians to make such repairs at their own expense (NYSCEF Doc. No. 853). However, plaintiffs also assert in connection with this branch of their motion, that they are entitled to punitive damages in an amount to be determined at trial.

> "Punitive damages are not to compensate the injured party but rather to punish the tortfeasor and to deter this wrongdoer and others similarly situated from indulging in the same conduct in the future . . .. Punitive damages are permitted when the defendant's wrongdoing is not simply intentional but evince[s] a high degree of moral turpitude and

> demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations"

(*Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 489 [2007][internal quotation marks and citations omitted]; *see Marinaccio v Town of Clarence*, 20 NY3d 506, 512 [2013]["Something more than the mere commission of a tort is always required for punitive damages. . . . Punitive damages are awarded to punish and deter behavior involving moral turpitude"][internal quotation marks and citation omitted]). Moreover, plaintiff has failed to demonstrate activities directed towards the public (see *Linkable Networks, Inc. v. Mastercard Inc.,* 184 A.D.3d 418, 419 (1st Dep't 2020) Thus, the Hovnanians' behavior does not rise to the level necessary to sustain a claim for punitive damages.

5. Private Nuisance

Lastly, plaintiffs argue that they are entitled to a judgment holding the Hovnanians' liable for compensatory damages for creating a private nuisance on the Seymour Property, as well as punitive damages for their willful and wanton conduct in disregard of the Seymours' property rights. They assert in this regard that sometime in early 2015, the Hovnanians installed, directly along the lot line of the Seymour Property's rear yard, a structure containing five flues and ducts venting a clothes dryer, two gas fired boilers, and two bathroom exhausts for the Hovnanian Property. They contend that the exhausts of the five flues and ducts are positioned immediately adjacent to and upwind of the Seymour Property and vent hot steam, gases, and odors into their rear yard and through a kitchen window that provides ventilation into the Seymour Property. They contend that the Hovnanians exacerbated the problem by lowering their rear yard 5' below the Seymour's yard and later adding a high fence. Plaintiffs claim this ensured that none of the gases or odors would drift in the direction of the Hovnanian Property but would be deflected by the high fence and flow directly into the Seymour's yard and kitchen window. They assert that this ongoing pollution interferes with their use and enjoyment of the property.

> "The elements of a common-law claim for a private nuisance are: (1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act. Nuisance is characterized by a pattern of continuity or recurrence of objectionable conduct"

(*Berenger v 261 W. LLC*, 93 AD3d 175, 182 [1st Dept 2012] [internal quotation marks and citations omitted]). "An interference is intentional when the actor (a) acts for the purpose of causing it; or (b) knows that it is resulting or is substantially certain to result from his conduct" (*id.* at 183 [internal quotation marks and citations omitted]).

> "However, not every intrusion will constitute a nuisance. Persons living in organized communities must suffer some damage, annoyance and inconvenience from each other … If one lives in the city he [or she] must expect to suffer the dirt, smoke, noisome odors and confusion incident to city life. The relevant question is whether a defendant's use of his or her property constitutes an unreasonable and continuous invasion of [the plaintiff's property] rights"

(*Ewen v Maccherone*, 32 Misc 3d 12, 14 [App Term, 1st Dept 2011] [internal quotation marks and citations omitted]).

Here, plaintiffs submit their own affidavits, wherein they each attest, based on personal knowledge, that that the Hovnanian's flue and duct structure vented towards the Seymour Property, discharged steam, gas and odors into the Seymour's yard (NYSCEF Doc. Nos. 521 & 540). They also state that the steam, gas and odor from the flue and duct system prevents them from enjoying their yard and decreases the value of the Seymour Property. In addition, Tryntje states that she informed Rachel Hovnanian of their distress upon discovering the vents exhausting into their yard and that Rachel Hovnanian

> "acknowledged that they should be venting into [the Hovnanians'] yard, not [the Seymour's yard]. But the exhaust flow was not addressed and the hoisting of the nearly 10-foot high fence some 15 feet above the floor of [the Hovnanians'] own garden ensured they would never even sense that their exhausts were there, pouring effluents in a constant stream into [the Seymour's] garden and main ventilation window"

(NYSCEF Doc. No. 521 at ¶ 23). In support they attach photos of the flues and ducts, some of which depict the emanating steam (NYSCEF Doc. Nos. 518, 533-534; 582). Donald Friedman also states the following in his affidavit:

> "In late March 2015, the Seymours contacted me because of their surprise discovery of equipment installed along the lot line of their rear yard with the Hovnanians. They had no prior notice of this equipment. . . . . I sent an inquiry to the Hovnanian's architect William F. O'Neill asking him what this bizarre new construction was. This had appeared nowhere on the drawings for the project that I had reviewed before the License Agreement was executed, and nowhere in the drawings incorporated into the License Agreement - Mr. O'Neill . . . responded . . . that the structure included . . . a total of 5 ducts, including two toilet exhausts in addition to the two boilers and dryer exhaust.
>
> .... When I first observed these outlets right at the Seymours' garden, I thought them odd. The outlets of so many effluents adjacent to the garden and kitchen adds undesirable odors, heat, steam and gases in proximity to where this family lived, ate and visited in what was once a pleasant setting"

(NYSCEF Doc. No. 498, at ¶¶ 56 and 58). The foregoing is sufficient to satisfy the elements of a private nuisance claim.

In opposition, the Hovnanians fail to raise an issue of fact. Contrary to their contention, under the circumstances of this case, the venting of odors, steam and gasses into the Seymour's yard is not a mere incident to city life but constitutes an "unreasonable and continuous invasion" of plaintiffs' property rights (*Ewen v Maccherone*, 32 Misc 3d at 14). Moreover, while the Hovnanians aver that they did not intend to cause the gases and steam to vent onto the Seymour Property, it is not necessary that they acted for the purpose of causing the invasion. The record evinces that Ara Hovnanian was aware that the exhausts were venting directly onto the Seymour's Property (NYSCEF Doc. No. 682). As a matter of law, he should have been "substantially certain" that the arrangement of a dryer, two toilet, and a boiler exhaust venting

into someone's back year would result in undesirable odors that would affect the occupants' use and enjoyment of their property (*Berenger v 261 W. LLC*, 93 AD3d at 183).

Thus, that branch of the plaintiffs' motion which is for summary judgment on the issue of the Hovnanians' liability on the cause of action alleging private nuisance is granted. However, plaintiffs' request for punitive damages in this regard is denied inasmuch as the Hovnanians' behavior does not rise to the level necessary to sustain a claim for punitive damages. The Hovnanians' remaining contentions in opposition to plaintiffs' motion for partial summary judgment are without merit.

B. <u>The Hovnanians' Motion (Mot Seq No 009)</u>

1. The Complaint in the Main Action – Infliction of Emotional Distress

In arguing that they are entitled to dismissal of this cause of action, the Hovnanian's assert that, even accepting as true plaintiffs' allegations regarding the Hovnanians' conduct, it was not so extreme or outrageous as to constitute intentional or negligent infliction of emotional distress. While plaintiffs denominate this cause of action as one for "reckless" infliction of emotional distress, "reckless conduct is encompassed within the tort of intentional infliction of emotional distress and does not constitute a separate and distinct cause of action" (*James v Flynn*, 132 AD3d 1214, 1216 [3d Dept 2015]; *see Howell v New York Post Co.,* 81 NY2d 115, 121 [1993]; Restatement [Second] of Torts § 46 [1]).

> "[A] cause of action *for either intentional or 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"

(*Sheila C. v Povich*, 11 AD3d 120, 130-131 [1st Dept 2004] [internal quotation marks and citations omitted] [emphasis added]; *see also Norris v Innovative Health Sys., Inc.*, 184 AD3d 471, 473 [1st Dept 2020]). "Whether the alleged conduct is outrageous is, in the first instance, a matter for the court to decide" (*Wolkstein v Morgenstern*, 275 AD2d 635, 637 [1st Dept 2000] [quotation marks and citation omitted]). "The standard of outrageous conduct is strict, rigorous and difficult to satisfy" (*Scollar v City of New York*, 160 AD3d 140, 146 [1st Dept 2018] [internal quotation marks and citation omitted]).

Here, plaintiffs allege the Hovnanians' conduct in

> "failing to abide by the terms of [the license] agreement, in proceeding in violation of applicable laws, and leaving damage and ruin from the cellar to the garden, through the living spaces of the [Seymour] Premises, to the leaks on the fourth floor, to destruction of the unique hand-painted 19th century skylight, to the damage to the roof, and spewing gases and odors into a garden that was once a treasured quiet green refuge, have all caused, and all were foreseeable to cause, severe emotional distress to an older couple"

(Complaint at ¶ 267, NYSCEF Doc. No. 7).

According plaintiffs the benefit of every possible favorable inference, while most people would likely consider the alleged conduct to be deplorable, it is not 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.

In opposition to the Hovnanians' motion, plaintiffs argue, *inter alia*, that the Hovnanians engaged in conduct that, at the very least, constitutes negligent infliction of emotional distress and that the pleadings could be conformed to the proof in this regard. Plaintiffs draw this court's attention to *Taggart v Costabile,* an Appellate Division, Second Department case holding that extreme and outrageous conduct is no longer an essential element of a cause of action to recover damages for negligent infliction of emotional distress (*Taggart v Costabile*, 131 AD3d 243, 251 [2d Dept 2015]). However, that is not the law in this Department. Recently, the Appellate Division, First Department, acknowledging the holding in *Taggart v Costabile*, explicitly held that "[e]xtreme and outrageous conduct continues to be an essential element of a cause of action alleging negligent infliction of emotional distress" (*Xenias v Roosevelt Hosp.*, 180 AD3d 588, 589 [1st Dept 2020]).

Thus, that branch of the Hovnanians' motion which is for summary judgment dismissing the cause of action for infliction of emotional distress is granted.

2. The Third-Party Complaint – Indemnification and Contribution

The Hovnanians move for partial summary judgment on their cause of action seeking common-law indemnification and contribution from the third-party defendants. While the third-party complaint also includes claims for contractual indemnification, the Hovnanians do not address these claims in their moving papers.

a. Common-Law Indemnity

The basic principles of common-law, or implied, indemnification permit "one who is held vicariously liable solely on account of the negligence of another to shift the entire burden of the loss to the actual wrongdoer" (*Trustees of Columbia University v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 453 [1st Dept 1985]).

> "The party seeking indemnification must have delegated *exclusive* responsibility for the duties giving rise to the loss to the party from whom indemnification is sought, and *must not have committed actual wrongdoing itself*. Common-law indemnification is warranted where a defendant's role in causing the plaintiff's injury is *solely passive*, and thus its liability is purely vicarious. Since 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*"

(*Board of Mgrs. of Olive Park Condominium v Maspeth Props., LLC*, 170 AD3d 645, 647 [2d Dept 2019] [internal quotation marks and citations omitted][emphasis added]; *see Rosado v Proctor & Schwartz, Inc.*, 66 NY2d 21, 25 [1985][party seeking indemnification "must show that it may not be held responsible in any degree"]; *Aiello v Burns Intl. Sec. Servs. Corp.*, 110 AD3d 234, 247 [1st Dept 2013]).

The Hovnanians assert that, to the extent they are liable in the main action, it is solely on account of the negligence of the third-party defendants. They contend that they did not participate in the wrongdoing that caused the damage inasmuch as they engaged design professionals and a general contractor to perform the actual work. They did not supervise, direct or control the construction activities and did not dictate the means and methods of construction.

They relied on O'Neill and Autun to complete the project and should not be held responsible for any errors the construction professionals committed.

In support of their position, the Hovnanians submit the affirmation of professional engineer, John Cocca, wherein he opines that:

> "The [Hovnanians] were not present at the site to review the work nor would they be considered to do such. Therefore, they solely relied on William O'Neill Architect and Autun Contractors to successfully complete the project and should not be held responsible for any errors committed by the construction professionals"

(Cocca Affirmation, at ¶ 13, NYSCEF Doc. No. 379). However, Cocca's opinion in this regard is entirely conclusory and therefore insufficient to establish the Hovnanians' prima facie entitlement to judgment as a matter of law (*see Yaegel v Ciuffo*, 95 AD3d 1110, 1112 [2d Dept 2012]).

To establish that they did not retain any control over the work and that no act or omission on their part caused damage to the Seymour Property, the Hovnanians also proffer the affidavit of Ara Hovnanian, wherein he states:

> "We did not direct, supervise or control any of the contractors/subcontractors that performed the actual work. At no time were we responsible for the means and methods of construction. As owners of the property, we relied on our design team, general contractor and sub-contractors to compete their work professionally, timely and in a workmanlike manner . . . . Autun, as general contractor, was responsible for all aspects of construction, including supervision of all trades"

(NYSCEF Doc. No. 378, at ¶¶ 5-6). However, Ara Hovnanian's self-serving affidavit, without more, is insufficient to demonstrate the Hovnanians' entitlement to judgment as a matter of law (*see Deephaven Distressed Opportunities Tradings, Ltd. v 3V Capital Master Fund Ltd.*, 100 AD3d 505, 506 [1st Dept 2012]). As such, the Hovnanians failed to demonstrate the absence of any material issues of fact as to whether they can avail themselves of the doctrine of common-law indemnification.

Thus, that branch of the Hovnanians' motion which is for summary judgment on their claim for common-law indemnity is denied.

b. Contribution

"A claim for contribution exists only when two or more tort-feasors share in responsibility for an injury, in violation of duties they respectively owed to the injured person" *(Smith v Sapienza*, 52 NY2d 82, 87 [1981]).

> "A contribution claim can be made even when the contributor has no duty to the injured plaintiff. In such situations, a claim of contribution may be asserted if there has been a breach of a duty that runs from the contributor to the defendant who has been held liable. The critical requirement for apportionment by contribution under 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"

(*Trump Vil. Section 3 v NewYork State Hous. Fin. Agency*, 307 AD2d 891, 896 [1st Dept 2003] [internal quotation marks and citations omitted]). "This is so regardless of whether the parties are joint tort-feasors, or whether they are liable under different theories, so long as their wrongdoing contributes to the damage or injury involved" (*Trustees of Columbia University v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 454 [1st Dept 1985]).

"Claims for contribution are governed by CPLR 1401 and apply to damages for personal injury, injury to property or wrongful death" (*Structure Tone, Inc. v Universal Servs. Group, Ltd.*, 87 AD3d 909, 911 [1st Dept 2011]). Thus, "under the so-called 'economic loss doctrine,' 'contribution under CPLR 1401 is not available where the damages sought . . . are exclusively for breach of contract'" (*Sound Refrig. & A.C., Inc. v All City Testing & Balancing Corp.*, 84 AD3d 1349, 1350 [2d Dept 2011], quoting *Tower Bldg. Restoration v 20 E. 9th St. Apt. Corp.*, 295 AD2d 229, 229 [1st Dept 2002]). "Where a plaintiff's direct claims against a codefendant seek only a contractual benefit of the bargain recovery, their tort language notwithstanding, contribution is unavailable" (*Trump Vil. Section 3 v NewYork State Hous. Fin. Agency*, 307 AD2d at 897). "[T]he touchstone for purposes of whether one can seek contribution is not the nature of the claim in the underlying complaint but the measure of damages sought therein" (*Children's Corner Learning Ctr. v A. Miranda Contr. Corp.*, 64 AD3d 318, 324 [1st Dept 2009]). Where the plaintiff is, in essence, seeking the benefit of his or her contractual bargain, no claim for contribution lies (*see Board of Mgrs. of 195 Hudson St. Condominium v 195 Hudson St. Assoc., LLC*, 37 AD3d 312, 312 [1st Dept 2007]; *Rothberg v Reichelt*, 270 AD2d 760, 762 [3d Dept 2000]; *Wecker v Quaderer*, 237 AD2d 512, 513 [2d Dept 1997]).

Here, the economic loss doctrine bars the Hovnanians' third-party claim for contribution. Plaintiffs' claim for infliction of emotional distress is not viable. There are no damages for personal injury, and plaintiffs are seeking purely economic loss resulting from a breach of contract. This does not constitute an "injury to property" within the meaning of CPLR 1401 (*see Structure Tone, Inc. v Universal Servs. Group, Ltd.*, 87 AD3d at 911). Although the complaint includes causes of action denominated as torts, plaintiffs are nevertheless, in essence, seeking to recover the benefit of their contractual bargain (i.e., indemnification and liquidated damages under the license agreement, damages for diminution in value, and the cost of repairs for the damage the Hovnanians' project caused).

Thus, that branch of the Hovnanians' motion which is for summary judgment on their third-party claim for contribution is denied.

C. Signature's Motion (Mot Seq No 006)

Signature moves for summary judgment dismissing all third-party claims and cross claims against it. Only the Hovnanians and Autun submitted opposition to Signature's motion. Therefore, Signature's motion for summary judgment is granted with respect to the remaining third-party defendants.

1. The Third-Party Complaint Against Signature

The Hovnanians only oppose Signature's motion to the extent that it seeks dismissal of its third-party claims for contractual indemnification and contribution. Therefore, the Hovnanians' third-party claims for common-law indemnification, breach of contract, breach of contract for failure to procure insurance, negligence, and breach of express and implied warranty are

dismissed insofar as asserted against Signature. Additionally, for the reasons already discussed, the economic loss doctrine bars the Hovnanians' third-party contribution claim. Thus, the court dismisses that claim as well insofar as asserted against Signature.

As to the Hovnanians' claim for contractual indemnification, Signature's argument is limited to the assertion that it is not in privity with the Hovnanians inasmuch as it subcontracted with Autun, not the Hovnanians, to perform the interior demolition for the project (Signature Subcontract, NYSCEF Doc. 794). However, contrary to Signature's contention, that there is no contract between the Hovnanians and Signature does not preclude the Hovnanians' claim for contractual indemnification against Signature (*see e.g. Higgins v TST 375 Hudson, L.L.C.*, 179 AD3d 508, 511 [1st Dept 2020]). There is an indemnification provision in Signature's subcontract with Autun, that requires Signature to "the fullest extent permitted by law," to indemnify the Hovnanians for claims or damages "arising out of or in any way incidental to or resulting from" the performance of Signature's work (Signature Subcontract, NYSCEF Doc. No. 794). Therefore, dismissal of the Hovnanians' contractual indemnification claim is not warranted.

2. Autun's Cross Claim for Contractual Indemnification against Signature

Signature argues that Autun's cross claim against it for contractual indemnification should be dismissed because Autun has not proven itself free of negligence.

As an initial matter, the indemnification provision in Signature's subcontract with Autun expressly limits its own scope "[t]o the fullest extent permitted by law." Therefore, the contract contemplates indemnification only to the extent Autun is not negligent. Therefore, the provision is not void under General Obligations Law § 5-322.1 (see *Sanchez v Triton Constr. Co., LLC*, 184 AD3d 501, 502-503 [1st Dept 2020]). Signature asserts that, because Autun has not proven itself free from negligence, its cross claim for contractual indemnification must be dismissed. However, Signature's conclusory assertion is insufficient to meet its prima facie burden for summary judgment. Signature cannot meet its burden of demonstrating affirmatively the merits of its defense by pointing out gaps in Autun's proof (*see Sterling Park Devs. , LLC v China Perfect Constr. Corp.,* 185 AD3d 1082, 1084 [2d Dept 2020]; *Kolakowski v 10839 Assoc.*, 185 AD3d 427, 428 [1st Dept 2020]).

Thus, this branch of Signature's motion is denied.

3. Autun's Cross Claims for Common-Law Indemnification against Signature

Signature argues that Autun's cross claims against it for common-law indemnification should be dismissed because it performed in accordance with the subcontract, was paid in full, and the record is "devoid of negligence by Signature." Signature's assertion that the record is devoid of proof that it was negligent is insufficient to meet its prima facie burden for summary judgment.

Thus, this branch of its motion is also denied.

4. Autun's Cross Claims for Breach of Contract for Failure to Procure Insurance

Finally, Signature moves to dismiss any cross claims against it for breach of contract for failure to procure insurance. Signature's subcontract with Autun creates an obligation for Signature to procure commercial general liability coverage naming Autun as an additional insured (Signature Subcontract, NYSCEF Doc. No. 794). Signature submits a certificate of

liability insurance demonstrating that it satisfied this obligation (Certificate of Liability Insurance, NYSCEF Doc. No. 332). Thus, this branch of Signature's motion is granted.

D. O'Neill's Motion (Mot Seq No 007)

O'Neill moves for summary judgment dismissing all claims and cross claims against it in the third-party action. Only the Hovnanians and Signature oppose O'Neill's motion. Therefore, O'Neill's motion for summary judgment is granted with respect to the remaining third-party defendants.

1. The Third-Party Complaint Against O'Neill

The Hovnanians oppose O'Neill's motion only to the extent that it seeks dismissal of their third-party claims for common-law indemnification, contribution, negligence, and breach of contract (NYSCEF Doc. No. 703). Thus, the third-party claims for contractual indemnification, breach of contract for failure to procure insurance, and breach of express and implied warranty are dismissed insofar as asserted against O'Neill. The third-party claim for contribution against O'Neill is also dismissed for the reasons already discussed.

O'Neill asserts that the Hovnanians' third-party claim for common-law indemnification must be dismissed because a party who has participated to some degree in the wrongdoing cannot receive the benefit of the doctrine of common-law or implied indemnity. It contends that, because liability against the Hovnanians would be based upon their own participation in the acts giving rise to the loss, that is, as an actual wrongdoer, it is not entitled to common-law indemnification. However, whether the Hovnanians actually participated to some degree in the wrongdoing remains to be seen. Therefore, this branch of O'Neill's motion is denied.

With respect to the Hovnanians' third-party claim for negligence, O'Neill argues that it should be dismissed as duplicative of the third-party breach of contract claim against it.

> "It 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. Put another way, where the damages alleged were clearly within the contemplation of the written agreement . . . [m]erely charging a breach of a 'duty of due care,' employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim"

(Dormitory Auth. of the State of N.Y. v Samson Constr. Co., 30 NY3d 704, 711 [2018] [internal quotation marks and citations omitted]; *see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]; M*illet v Kamen*, 60 Misc 3d 584, 593-594 [Sup Ct, Nassau County 2018]).

Here, the gravamen of the Hovnanians' allegations are that O'Neil failed to perform its contractual duties. The Hovnanians' negligence claim against O'Neill stems from circumstances exactly the same as the elements of their breach of contract claim against O'Neill. Thus, this branch of O'Neill's motion is granted.

As to the third-party breach of contract claim, O'Neill asserts that it should be dismissed because "the Hovnanians have no evidence that O'Neill breached its contract to perform architectural services at the Project." This branch of O'Neill's motion is denied on the ground that O'Neill cannot meet its burden by pointing to gaps in the non-moving party's proof.

2. Signature's Cross Claims Against O'Neill

While O'Neill moves for summary judgment dismissing all cross claims against it, it fails to address the cross claims in its papers. As such, it has failed to satisfy its *prima facie* burden on this branch of its motion.

E. Mitchell's Motion (Mot Seq No 008)

Mitchell moves for summary judgment dismissing all third-party claims and cross claims asserted against it. Only the Hovnanians, Autun, and Signature oppose Mitchell's motion. Therefore, Mitchell's motion for summary judgment is granted as unopposed with respect to the remaining third-party defendants.

1. The Third-Party Complaint Insofar as Asserted Against Mitchell

The Hovnanians oppose Mitchell's motion only to the extent that it seeks dismissal of their third-party claims for contractual indemnification and contribution. Thus, the third-party claims for common-law indemnification, breach of contract, breach of contract for failure to procure insurance, negligence, and breach of express and implied warranty are dismissed insofar as asserted against Mitchell. The third-party claim for contribution insofar as asserted against Mitchell is also dismissed for the reasons already discussed.

Mitchell entered into an agreement with Ara Hovnanian to install structural steel, a metal roof deck, and a riser spiral staircase with balcony rails (Contract, NYSCEF Doc. No. 619; Rider to Contract, NYSCEF Doc. No. 620). The agreement includes an indemnification provision, that requires Mitchell "[t]o the fullest extent permitted by law," to indemnify the Hovnanians from and against all claims or damages "to the extent arising or alleged to arise from" the work performed under the agreement, Mitchell's breach of the agreement, or other wrongful conduct by Mitchell (Rider to Contract, NYSCEF Doc. No. 620).

In arguing that the Hovnanians' claims for contractual indemnification should be dismissed, Mitchell maintains that the indemnification provision in its agreement with the Hovnanians is void as against public policy, and under the General Obligation Law's proscription against exempting owners and contractors from liability for their own negligence. However, the indemnification provision expressly limits its own scope "[t]o the fullest extent permitted by law." Thus, this qualifying language expressly contemplates indemnification only if the party seeking indemnification is not negligent. Therefore, the provision is not void under General Obligations Law § 5-322.1 (*see Sanchez v Triton Constr. Co., LLC*, 184 AD3d at 502-503).

Mitchell also argues that the claim for contractual indemnification should be dismissed, because Mitchell's work did not cause any of the damages plaintiffs allege in the main action. However, Mitchell fails to establish this as a matter of law. Thus, this branch of its motion is denied.

2. Autun's and Signature's Cross Claims against Mitchell

While Mitchell moves for summary judgment dismissing all cross claims against it, it fails to adequately address the cross claims in its papers. As such, it has failed to satisfy its prima facie burden on these branches of its motion.

F. **JG's Cross Motion (Mot Seq No 008)**

JG cross-moves for summary judgment dismissing all claims and cross claims asserted against it in the third-party action. Only the Hovnanians, Autun, and Signature oppose JG's motion. Therefore, JG's cross motion for summary judgment is granted with respect to the remaining third-party defendants.

1. The Third-Party Complaint Insofar as Asserted Against JG

The Hovnanians oppose JG's cross motion only to the extent that it seeks dismissal of their third-party claims for contractual indemnification and contribution (NYSCEF Doc. No. 798). Thus, the third-party claims for common-law indemnification, breach of contract, breach of contract for failure to procure insurance, negligence, and breach of express and implied warranty are dismissed insofar as asserted against JG. The third-party claim for contribution insofar as asserted against JG is also dismissed for the reasons already discussed.

JG entered into an agreement with Ara Hovnanian to perform underpinning work for the project (Contract, NYSCEF Doc. No. 627). JG's agreement with the Hovnanians includes an indemnification provision, that requires JG "[t]o the fullest extent permitted by law" to indemnify the Hovnanians from and against all claims or damages "to the extent arising or alleged to arise from" the work performed under the agreement, JG's breach of the agreement, or other wrongful conduct by JG (*id.*).

JG argues that the claim for contractual indemnification should be dismissed insofar as asserted against it. However, it fails to establish as a matter of law that none of the claimed damages arose from or were alleged to have arisen from the work it performed under its contract with the Hovnanians. Therefore, this branch of JG's cross motion is denied.

2. Autun's and Signature's Cross Claims against JG

While JG cross-moves for summary judgment dismissing all cross claims against it, it fails to adequately address the cross claims in its moving papers. As such, it has failed to satisfy its prima facie burden on this branch of its cross motion.

G. Pillori's Motion (Mot Seq No 010)

Pillori moves for summary judgment dismissing all third-party claims and cross claims asserted against it. Only the Hovnanians and Signature oppose the motion. Therefore, Pillori's motion for summary judgment is granted with respect to the remaining third-party defendants.

1. The Third-Party Complaint Insofar as Asserted Against Pillori

The Hovnanians oppose Pillori's motion only to the extent that it seeks to dismiss their third-party claims for negligence, common-law indemnification and contribution. Therefore, the

third-party claims for contractual indemnification, breach of contract, breach of contract for failure to procure insurance, and breach of express and implied warranty are dismissed insofar as asserted against Pillori. The third-party claim for contribution insofar as asserted against Pillori is also dismissed for the reasons already discussed.

O'Neill hired Pillori, a geotechnical engineering firm, to, among other things, design the underpinning to allow the existing cellar of the Hovnanian Property to be lowered 3 to 6 feet and to design the support of excavation system for the extension of the cellar (O'Neill Contract, NYSCEF Doc. No. 370). Pillori asserts that any claims or cross claims against it sounding in negligence must be dismissed, because it was neither the person who made the decision to excavate nor the contractor who carried out the excavation work. Further, all of its design and related engineering services on the project accorded with good and accepted engineering practices.

In support, Pillori submits the affirmation of its expert, a licensed professional engineer, who reviewed Pillori's geotechnical report and support of excavation drawings, the available building optical survey monitoring data, vibration monitoring data, and daily field reports Pillori prepared during the below grade work at the Hovnanian Property (Papp Affidavit, NYSCEF Doc. No. 392). Pillori's expert opines that Pillori's support of excavation design and special inspections were "consistent with level of care and skill ordinarily exercised by members of the engineering profession practicing contemporaneously under similar conditions in New York" and that the alleged damage to the Seymour Property "was not a result of the design prepared by Pillori" (*id.*).

In opposition, the Hovnanians submit the affidavit of their expert, licensed professional engineer John Cocca, who reviewed the Support of Excavation Drawings issued by Pillori and "concluded within a reasonable degree of engineering certainty that the drawings prepared by Pillori . . . were deficient in that they failed to ensure that the design conforms to all state and local building policies and procedures" and that "during his contractually mandated controlled inspections, Pillori . . . should have observed that the contractor's construction activities were damaging the adjoining property" (NYSCEF Doc. No. 746). Cocca "concluded to a degree of engineering certainty that the omissions" "caused or contributed to damages" at the Seymour Property (*id.*).

The conflicting expert affidavits create triable issues of fact that preclude summary judgment (*see Bradley v Soundview Healthcenter*, 4 AD3d 194, 194 [1st Dept 2004] [conflicting expert opinions "raise issues of fact and credibility that cannot be resolved on a motion for summary judgment"]; *Sucre v Consolidated Edison Co. of N.Y., Inc.,* 184 AD3d 712, 714 [2d Dept 2020]). Thus, those branches of Pillori's motion that seek dismissal of the Hovnanians' third-party claim and any cross claims for negligence insofar as asserted against it are denied.

As to the third-party claim for common-law indemnification, Pillori asserts that because the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that parties who actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine. It contends that, because the Hovnanians and the third-party defendants would only have a valid claim for common-law indemnification if they were being cast in liability solely due to Pillori's actions, any claim or crossclaim against it for common-law indemnity must be dismissed. However, whether and to what degree any of the parties were actively at fault in bringing about the damages remains to be seen (*see Aragundi v*

Tishman Realty & Constr. Co., Inc., 68 AD3d 1027, 1029-1030 [2d Dept 2009] ["the Supreme Court improperly granted that branch of ABM's cross motion which was for summary judgment dismissing the causes of action for common-law indemnification insofar as asserted against it, since an award of summary judgment on a claim for common-law indemnification is appropriate only where there are no triable issues of fact concerning the degree of fault attributable to the parties"]). In addition, there is no per se rule against applying common-law indemnification in the context of claims sounding in breach of contract (*see 17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 80-81 [1st Dept 1999]). Thus, those branches of Pillori's motion that seek dismissal of the Hovnanians' third-party claim and any cross claims for common-law indemnification insofar as asserted against it are denied.

2. Signatures' Cross Claims against Pillori

While Pillori moves for summary judgment dismissing all cross claims against it, Pillori only adequately addresses the cross claims for negligence and common-law indemnification. Therefore, the remainder of its motion with respect to Signature's cross claims is also denied.

I. GMS's Motion (Mot Seq No 011)

GMS moves for summary judgment dismissing all third-party claims and cross claims asserted against it. Only the Hovnanians and Signature oppose the motion. Therefore, GMS's motion for summary judgment is granted with respect to the remaining third-party defendants.

1. The Third-Party Complaint Insofar as Asserted Against GMS

The Hovnanians oppose GMS's motion only to the extent that it seeks dismissal of their third-party claims for negligence, common-law indemnification, and contribution. Therefore, the third-party claims for contractual indemnification, breach of contract, breach of contract for failure to procure insurance, and breach of express and implied warranty are dismissed insofar as asserted against GMS. The third-party claim for contribution insofar as asserted against GMS is also dismissed for the reasons already discussed.

GMS contends that the Hovnanians' third-party claim for common-law indemnification must be dismissed on the ground that plaintiffs in the main action allege that the Hovnanians committed affirmative acts of negligence and base their claims on the Hovnanians' own active failure to perform their contractual obligations. However, whether the Hovnanians actually participated to some degree in the wrongdoing has yet to be determined and, as noted above, there is no per se rule against applying common-law indemnification in the context of claims sounding in breach of contract (*see 17 Vista Fee Assocs. v Teachers Ins. & Annuity Ass'n of Am.*, 259 AD2d at 80-81).

As to the Hovnanians' third-party claim for negligence, GMS asserts that it did not owe a duty of care to the Hovnanians because the Hovnanians did not have a contractual relationship with GMS. This argument lacks merit. Duty in negligence cases is not defined by privity of contract (see *Strauss v Belle Realty Co.*, 65 NY2d 399, 402 [1985]). "[A]n obligation rooted in contract may engender a duty owed to those not in privity" (*id.* [internal quotation marks and citation omitted]). Thus, that the Hovnanians were not in privity of contract with GMS does not, as a matter of law, operate to preclude the Hovnanians' negligence claim against GMS.

GMS asserts that even assuming it owed the Hovnanians a duty, its duty arose exclusively out of GMS' agreement with O'Neill, which it properly fulfilled. GMS contracted with O'Neill to perform a pre-construction survey and to install "construction vibration monitoring (seismographic) systems in predetermined locations in close proximity to demolition and construction operations taking place at" the Hovnanian Property (GMS Agreement, at ¶ II.A., NYSCEF Doc. No. 429). GMS also agreed to "measure, record, analyze and report on vibration above a threshold level of 0.20 in/sec due to demolition or construction activities" and to "require structures suitable to secure and protect the seismographs from tampering, theft, impact, and weather; and 110v power supplies, provided by others" (*id.*). It further agreed that once the seismographs were installed "automated notification of vibration levels exceeding the agreed upon trigger level [would] be transmitted via cellular/email communication to designated parties chosen by" O'Neill and that following each day of monitoring, to send a transmittal reporting the highest level of vibration recorded during the prior 24 hour period to the parties designated by O'Neill (*id.* at ¶ II.B.). Further, it agreed to "visit the site on a routine schedule of once per week for the duration of the project to verify proper continued function of the vibration monitors, download collected data, and observe and photograph overall site conditions on and near the property during construction (*id.*). GMS also agreed, that based upon the findings resulting from the pre-construction survey, they would install crack monitors in specified locations in order to quantify any crack growth, movement, or changes during the period of sub-grade construction and routinely visit the site once per week to inspect the crack monitors and any changes attributable to movement (*id.*).

GMS avers that it fulfilled the foregoing contractual obligations and that it had no obligation to reduce vibration levels or otherwise direct, instruct, or recommend to the Hovnanians or their contractors to reduce vibration levels after receiving notification that vibration levels exceed the maximum threshold. Instead, when vibration levels exceeded the maximum vibration threshold, the monitor automatically generated a notification that was directly sent from the monitor to Autun and others on-site at the project. GMS acknowledges that it did not install crack monitors. It asserts that it never did so because it only observed minor cracks in the plaster that did not warrant monitoring. GMS argues, therefore, that it played no role in the conduct that allegedly caused plaintiffs' damages. In support of its position, GMS relies on, among other things, vibration monitoring reports for the project (NYSCEF Doc. No. 435), the deposition testimony of partner, Jonathan Hernandez (NYSCEF Doc. No. 428, at page 99), that of Autun's Superintendent, John Doyle (NYSCEF Doc. No. 433), and that of William O'Neill (NYSCEF Doc. No. 430, at pages 196-187).

In opposition, the Hovnanians contend that GMS negligently performed its work under the contract. In support, they submit the affidavit their expert, John Cocca, who reviewed the vibration monitoring data and averred that "the monitors appear to have been down for multiple days and in some instances weeks during the construction" (NYSCEF Doc. No. 784, at ¶ 14). He further opines that "since the monitoring equipment was located in the basement, it is likely that localized vibrations at the party walls were higher than those recorded since the vibration level would dissipate down the wall" (*id.* at ¶ 12). In addition, while the preconstruction report noted various cracking at interior finishes, no crack gauges were installed as proposed in the agreement (*id.* at ¶ 14). Based on the above omissions, Cocca concluded "to a degree of engineering certainty" that GMS did not meet the industry standard for "the vibration monitoring they were charged to perform" (*id.* at ¶ 15).

In light of the forgoing, issues of fact exist precluding summary judgment dismissing the Hovnanians' third-party claim for negligence insofar as asserted against GMS.[3]

2. Signatures' Cross Claims against GMS

While GMS also moves for summary judgment dismissing all cross claims against it, it fails to adequately address the cross claims in its papers. As such, it fails to satisfy its prima facie burden on this branch of its motion.

J. Autun's Motion (Mot Seq No 012)

Autun moves for summary judgment on its cross claim for contractual indemnification insofar as asserted against Signature, JG and Mitchell, all of whom oppose the motion. For the following reasons, Autun's motion is denied.

"The right to contractual indemnification depends upon the specific language of the contract" (*Trawally v City of New York*, 137 AD3d 492, 492-493 [1st Dept 2016] [quotation marks and citation omitted]). Here, the indemnification provision in Signature's subcontract with Autun requires Signature to "the fullest extent permitted by law," to indemnify Autun for claims or damages "arising out of or in any way incidental to or resulting from" the performance of Signature's work (Signature Subcontract, NYSCEF Doc. No. 794). JG's agreement with the Hovnanians includes an indemnification provision, that requires JG "[t]o the fullest extent permitted by law" to indemnify Autun, as the construction manager, from and against all claims or damages "to the extent arising or alleged to arise from" the work performed under the agreement, JGs' breach of the agreement, or other wrongful conduct by JG (Contract, NYSCEF Doc. No. 627). The indemnification provision in Mitchell's contract with the Hovnanians, requires Mitchell "[t]o the fullest extent permitted by law," to indemnify Autun, as the construction manager, from and against all claims or damages "to the extent arising or alleged to arise from" the work performed under the agreement, Mitchell's breach of the agreement, or other wrongful conduct by Mitchell (Rider to Contract, NYSCEF Doc. No. 620).

To demonstrate *prima facie* entitlement to judgment as a matter of law on a contractual indemnification claim, the party seeking contractual indemnity must submit "evidence establishing that [it] was free from any negligence and that it can only be held liable based on statutory or vicarious liability" (*Graziano v Source Bldrs. & Consultants, LLC*, 175 AD3d 1253, 1260 [2d Dept 2019]; *see Correia v Professional Data Mgt.,* 259 AD2d 60, 65 [1st Dept 1999]). Autun failed to establish, *prima facie*, that it was free from negligence with regard to the damages claimed by plaintiffs in the main action. Thus, its motion is denied.

IV. CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that motion sequence number 006 by Signature Interior Demolition, Inc. is granted to the following extent:

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[3] To the extent the economic loss rule is involved, it would not apply to an engineering professional such as Pillori or GMS. (*Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mgmt. Inc.*, 80 A.D.3d 293, 306, (1st Dep't 2010), *aff'd,* 18 N.Y.3d 341 (2011)

(1) Signature Interior Demolition, Inc. is granted summary judgment dismissing Ara and Rachel Lee Hovnanian's third-party claims for common-law indemnification, contribution, breach of contract, breach of contract for failure to procure insurance, negligence, and breach of express and implied warranty insofar as asserted against it.

(2) Signature Interior Demolition, Inc. is granted summary judgment dismissing Autun Contractors' third-party cross claim for breach of contract for failure to procure insurance insofar as asserted against it.

(3) Signature Interior Demolition, Inc. is granted summary judgment dismissing the third-party cross claims of all third-party defendants, except for Autun Contractors, insofar as asserted against it; and it is further

ORDERED that motion sequence number 006 is otherwise denied; and it is further

ORDERED that motion sequence number 007 by William F. O'Neill Architects is granted to the following extent:

(1) William F. O'Neill Architects is granted summary judgment dismissing Ara and Rachel Lee Hovnanian's third-party claims for contribution, contractual indemnification, breach of contract for failure to procure insurance, negligence, and breach of express and implied warranty insofar as asserted against it.

(2) William F. O'Neill Architects is granted summary judgment dismissing the third-party cross claims of all third-party defendants, except for Signature Interior Demolition, Inc., insofar as asserted against it; and it is further

ORDERED that motion sequence number 007 is otherwise denied; and it is further

ORDERED that motion sequence number 008 consisting of Mitchell Iron Works, Inc.'s motion and JG Construction of Queens, Inc.'s cross motion, is granted to the following extent:

(1) Mitchell Iron Works, Inc. is granted summary judgment dismissing Ara and Rachel Lee Hovnanian's third-party claims for common-law indemnification, contribution, breach of contract, breach of contract for failure to procure insurance, negligence, and breach of express and implied warranty insofar as asserted against it.

(2) Mitchell Iron Works, Inc. is granted summary judgment dismissing the third-party cross claims of all third-party defendants, except for Signature Interior Demolition, Inc. and Autun Contractors, insofar as asserted against it.

(3) JG Construction of Queens, Inc. is granted summary judgment dismissing Ara and Rachel Lee Hovnanian's third-party claims for common-law indemnification, contribution, breach of contract, breach of contract for failure to procure insurance, negligence, and breach of express and implied warranty insofar as asserted against it.

(2) JG Construction of Queens, Inc. is granted summary judgment dismissing the third-party cross claims of all third-party defendants except for Signature Interior Demolition, Inc. and Autun Contractors, insofar as asserted against it; and it is further

ORDERED that motion sequence number 008 is otherwise denied; and it is further

ORDERED that motion sequence number 009 by Ara and Rachel Lee Hovnanian is granted to the following extent:

(1) Ara and Rachel Lee Hovnanian are granted summary judgment dismissing plaintiffs' third cause of action for reckless infliction of emotional distress; and it is further

ORDERED that motion sequence number 009 is otherwise denied; and it is further

ORDERED that motion sequence number 010 by Pillori Associates, P.A. is granted to the following extent:

(1) Pillori Associates, P.A. is granted summary judgment dismissing Ara and Rachel Lee Hovnanian's third-party claims for contribution, contractual indemnification, breach of contract, breach of contract for failure to procure insurance, and breach of express and implied warranty insofar as asserted against it.

(2) Pillori Associates, P.A. is granted summary judgment dismissing the third-party cross claims of all third-party defendants, except for Signature Interior Demolition, Inc., insofar as asserted against it; and it is further

ORDERED that motion sequence number 010 is otherwise denied; and it is further

ORDERED that motion sequence number 011 by Gilsanz Murry Steficek LLP is granted to the following extent:

(1) Gilsanz Murry Steficek LLP is granted summary judgment dismissing Ara and Rachel Lee Hovnanian's third-party claims for contribution, contractual indemnification, breach of contract, breach of contract for failure to procure insurance, and breach of express and implied warranty insofar as asserted against it.

(2) Gilsanz Murry Steficek LLP is granted summary judgment dismissing the third-party cross claims of all third-party defendants except for Signature Interior Demolition, Inc. insofar as asserted against it; and it is further

ORDERED that motion sequence number 011 is otherwise denied; and it is further

ORDERED that motion sequence number 012 by Autun Contractors is denied; and it is further

ORDERED that motion sequence number 013 by plaintiffs is granted to the following extent:

(1) Plaintiffs are granted partial summary judgment on their cause of action seeking damages for breach of contract based on Ara and Rachel Lee Hovnanian's failure to repair, or pay the cost of repairing, the damage to plaintiffs' property caused by their construction project in accordance with the license agreement and the issue of the amount of a judgment in this regard remains to be determined at a later proceeding.

(2) Plaintiffs are granted partial summary judgment on their cause of action seeking specific performance of Ara and Rachel Lee Hovnanian's obligation under the license agreement to pay plaintiffs' reasonable legal fees and expenses incurred in connection with this litigation and the issue of the amount of those fees and expenses remains to be determined at a later proceeding.

(3) Plaintiffs are granted partial summary judgment on their cause of cause of action seeking specific performance of Ara and Rachel Lee Hovnanian's obligation under the license

agreement to reimburse plaintiffs' for loss of habitability and the issue of the amount of a judgment in this regard remains to be determined at a later proceeding.

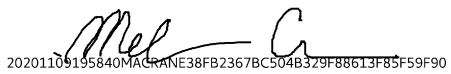
(4) Plaintiffs are granted partial summary judgment on their cause of action seeking specific performance of Ara and Rachel Lee Hovnanian's obligation to provide them with certain reports as set forth in this decision and Ara and Rachel Lee Hovnanian are ordered, at their own expense and in accordance with the license agreement, to obtain and provide plaintiffs with copies of such reports within 20 days of the efiled date of this decision and order.

(5) Plaintiffs are granted partial summary judgment on the issues of liability against Ara and Rachel Lee Hovnanian on their cause of action alleging violation of section 3309 of the New York City Building Code (*see* New York City Building Code [Administrative Code of City of NY, tit 28, ch 7] § BC 3309 et seq).

(5) Plaintiffs are granted partial summary judgment on the issues of liability against Ara and Rachel Lee Hovnanian on their cause of action for private nuisance; and it is further

ORDERED that except to the extent stated in the prior order of this court, dated July 9, 2020 (NYSCEF Doc. No. 853), motion sequence number 013 is otherwise denied.

The remaining claims are severed and shall continue.



11/9/2020								
DATE					MELISSA ANNE CRANE, J.S.C.			
CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION		
		GRANTED		DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE