Rosenfeld v Southgate Owners Corp.
2020 NY Slip Op 34377(U)
December 23, 2020
Supreme Court, New York County
Docket Number: 156720/2015
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

DEBRA L. ROSENFELD,

Index No. 156720/2015

Plaintiff,

- against -

SOUTHGATE OWNERS CORP. and KNS BUILDING RESTORATION INC.,

Defendants.

SOUTHGATE OWNERS CORP.,

Index No. 160958/2017
Plaintiff,
(consolidated into

156720/2015)

- against -

Motion Sequence Nos.
005,006 & 007

DEBRA L. ROSENFELD,

Defendant.

The following papers, numbered 1 to _____ were read on this motion to/for _____
Notice of Motion/Order to Show Cause — Affidavits — Exhibits … _____
Answering Affidavits — Exhibits_____
Replying Affidavits_____

CROSS-MOTION: X YES NO

The motions are decided in accordance with the accompanying decision and order.

DATED: December 23, 2020
New York, New York

ENTER:

MELISSA A. CRANE, J.S.C

Check one: FINAL DISPOSITION **X** NON-FINAL DISPOSITION
Check if appropriate: MOTION IS: ☐ GRANTED ☐DENIED ☐ GRANTED IN PART ☐ OTHER
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ FIDUCIARY APPOINTMENT

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CRANE, J.:

Motion sequence numbers 005, 006 and 007 are consolidated for disposition. Plaintiff Debra L. Rosenfeld (Rosenfeld) brings this action, under index No. 156720/2015 (Action 2), against defendants Southgate Owners Corp. (Southgate), a cooperative housing corporation, and KNS Building Restoration Inc. (KNS), a contractor Southgate hired, seeking damages in connection with a water intrusion that caused significant damage to her cooperative apartment. Southgate, in turn, brings a related action against Rosenfeld, under index No.

160958/2017 (Action 3), seeking unpaid maintenance and fees. Action 3 was consolidated into Action 2.

In her 10-count complaint in Action 2, Rosenfeld asserts claims for: (1) breach of contract; (2) declaratory judgment; (3) permanent injunction; (4) breach of fiduciary duty/bad faith; (5) breach of warranty of habitability; (6) breach of quiet enjoyment/constructive eviction; (7) violation of the New York City Housing Maintenance Code (HMC) and New York State Multiple Dwelling Law (MDL); (8) negligence; (9) negligence against KNS; and (10) attorney's fees. With the exception of the ninth cause of action, Rosenfeld asserts these claims against Southgate only.

In its amended answer, in addition to eighteen affirmative defenses, Southgate asserts the following cross claims against KNS: (1) breach of contract based on, among other things, KNS's failure to properly perform its work; (2) "judgment over and against KNS for [any and all amounts that Southgate may be required to pay to Rosenfeld], together with the costs, expenses and disbursements incurred in the defense of this action" (NYSCEF Doc No. 53, Southgate's amended answer in Action 2, ¶ 35); (3) attorneys' fees; (4) contractual indemnification; (5) breach of contract based on failure to procure additional insured coverage; (6) common law indemnification; and (7) contribution.

In its answer, KNS asserts seven affirmative defenses. It also cross-claims against Southgate for common law indemnification and contribution.

In its complaint against Rosenfeld in Action 3, Southgate seeks to recover unpaid maintenance, assessments, fees and expenses. The complaint contains the following causes of action: (1) breach of contract; (2) unjust enrichment; (3) quantum meruit; (4) account stated; and (5) attorneys' fees. In her answer, Rosenfeld asserts 17 affirmative defenses and the following

counterclaims against Southgate: (1) breach of contract; (2) nuisance; (3) negligence/gross negligence; (4) harassment under the HMC and the MDL; and (5) attorney's fees.

In motion sequence number 005, Southgate moves to amend its answer in Action 2, pursuant to CPLR 3025, to include cross claims against KNS for common law indemnification and contribution, contractual indemnification and defense and breach of contract for failure to procure insurance. Notably, Southgate appears to be unaware that it has already amended its answer as of right to include these cross claims against KNS (*see* NYSCEF Doc No. 53). It also seeks to amend its response to paragraph 165 of Rosenfeld's complaint from "Admit" to "Deny." Upon grant of the motion to amend, Southgate seeks summary judgment dismissing Rosenfeld's complaint and KNS's cross claims as against it and judgment on its cross claims against KNS. Also, as part of motion sequence number 005, Southgate seeks leave to amend its reply in Action 3, to include affirmative defenses to Rosenfeld's counterclaims. Upon grant of the motion to amend, it seeks summary judgment dismissing all of Rosenfeld's counterclaims.

In motion sequence number 006, KNS moves to dismiss Rosenfeld's negligence claim against it. In motion sequence number 007, Southgate seeks summary judgment on its complaint in Action 3 and moves to dismiss/strike Rosenfeld's affirmative defenses pursuant to CPLR 3211 (b).

In response, Rosenfeld cross-moves: in motion sequence number 005, to amend the complaint in Action 2 to reference the correct text in her proprietary lease with Southgate (Proprietary Lease) and to extend the time frame for which she seeks a rent abatement; in motion sequence number 006, to amend the complaint in Action 2 to add causes of action for breach of contract and nuisance and a claim for punitive damages against KNS; in motion sequence

number 007, to amend the answer in Action 3 to reference the correct paragraph number and text in the Proprietary Lease.

I. Background and Procedural History

Rosenfeld is the proprietary lessee of cooperative apartment 12E (Apartment), located at 433 East 51st St, New York, NY (Building), and the owner of 220 shares of stock in Southgate. The Building is part of a five-building complex owned by Southgate. The Proprietary Lease, dated May 14, 1997, between Rosenfeld and Southgate provides, in pertinent part, as follows:

> "Lessor's Repairs
>
> "2. The Lessor shall at its expense keep the Building in good repair, including all of the apartments . . .
>
> . . .
>
> "Damage to Apartment or Building
>
> "4. (a) If the Apartment . . . shall be damaged by fire or other cause covered by multiperil policies commonly carried by cooperative corporations in the New York City area . . . the Lessor shall at its own cost and expense, with reasonable dispatch after receipt of notice of said damage, repair or replace or cause to be repaired or replaced with materials of a kind and quality then customary in buildings of the type of the Building, the Building, the Apartment, and the means of access thereto, including the walls, floors, ceilings, pipes, wiring and conduits in the Apartment. . . . Anything in this paragraph or Paragraph 2 to the contrary notwithstanding, Lessor shall not be required to repair or replace, or cause to be repaired or replaced, equipment, fixtures, furniture, furnishings or decorations installed by the Lessee or any of his or her predecessors in interest nor shall the Lessor be obligated to repaint or replace wallpaper or other decorations in Apartments or to refinish floors or to repair or replace rugs, carpets or other floor covering located therein.

"Rent Abatement

(b) In case the damage resulting from fire or other cause shall be so extensive as to render the Apartment partly or wholly untenantable . . . the rent hereunder shall proportionately abate until the Apartment shall again be rendered wholly tenantable. . . .

. . .

"Payment of Rent

"12. The Lessee will pay the rent to the Lessor upon the terms and at the times herein provided, without any deduction on account of any set-off or claim which the Lessee may have against the Lessor, and if the Lessee shall fail to pay any installment of rent promptly, the Lessee shall pay interest thereon at the maximum legal rate from the date when such installment shall have become due to the date of the payment thereof (and any administrative or late fee which may be imposed by the Board of Directors) and such interest and fee shall be deemed additional rent hereunder.

. . .

"Lessor's Immunities

"29. (a) . . . No abatement of rent or other compensation or claim of eviction shall be made or allowed because of the making or failure to make or delay in making any repairs, alterations or decorations to the Building . . . unless due to Lessor's wilful [sic] acts or gross negligence.

. . .

"Notice to Lessor of Default

"45. The Lessee may not institute an action or proceeding against the Lessor or defend, or assert a counterclaim in any action by the Lessor related to the Lessee's failure to pay rent, if such action, defense or counterclaim is based upon the Lessor's failure to comply with its obligations under this lease or any law, ordinance or governmental regulation unless such failure shall

> have continued for at least thirty (30) days before such action or proceeding was commenced and the giving of written notice thereof by the Lessee to the Lessor" (NYSCEF Doc No. 185, Proprietary Lease, ¶¶ 2, 4 (a), (b), 12, 29 (a), 45).

According to Rosenfeld, the Apartment has suffered from leaks of varying severity from 1999 to present day. She states that she has "endured at least thirteen (13) floods and/or water leaks as a result of [Southgate's] failure to, among other things, keep the Building's façade and roof in good repair" (NYSCEF Doc No. 258, Rosenfeld aff in opposition to motion sequence no. 005 [Rosenfeld aff], ¶ 9). For example, she alleges that, in January 2010, "water came pouring into the master bedroom of the Apartment from the light fixture," forcing her and her daughter to "live in a hotel for three months (January, February and March 2010) while Southgate repaired the Apartment" (*id.*, ¶ 16).

Southgate retained Gary Trias (Trias) of Trias Management Services, Inc. to investigate the source of the water entering the Apartment, and a neighboring unit, and to prepare plans and specifications for the necessary repairs. Trias is not a professional engineer (*see* NYSCEF Doc No. 214, Signorella 4/09/2019 tr at 101). In addition, Southgate retained KNS to repair the Building's parapet, walls and terrace. Its contract with KNS (KNS Contract), dated February 3, 2012, describes the project as follows: "Repairs to Correct Defective Conditions Causing Leaks into Apartments 12C and 12E @ 433 East 51st Street, NYC" (NYSCEF Doc No. 175, KNS Contract at 1). As part of Trias's services, he oversaw the construction work.

In pertinent part, the KNS Contract contains the following indemnification provision:

> "§ 3.18 INDEMNIFICATION
>
> "§ 3.18.1 To the fullest extent permitted by law the Contractor shall indemnify and hold harmless the Owner . . . from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the

> Work, provided that such claim, damage, loss or expense is attributable . . . to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor . . . regardless of whether or not such claim, damage, loss on expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section 3 18" (*id.*, AIA Document A201-2007, §§ 3.18.1)

In other pertinent part, the KNS Contract contains an insurance procurement provision, requiring KNS to obtain: (1) insurance for, among other things, damage to property arising "out of or result[ing] from the Contractor's operations and completed operations under the Contract"; and (2) additional insured coverage for Southgate under KNS's commercial liability policy "for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's operations" and "completed operations" (*id.*, §§ 11.1.1, 11.1.4). In addition, the general specifications annexed to the KNS Contract provide as follows with regard to "Safety, Protection and Cleanliness":

> "The Contractor is responsible to protect the Building in general, the work area and his new work from damage due to his work and to temporarily protect the Building, the work area and his new work from damage caused by the weather until final acceptance by the Owner's Representative. The Contractor must immediately repair all areas damaged due to his failure to comply with this or any other specification requirement. The Owner reserves the right to make any repairs and replace any damaged property not immediately repaired or replaced by the Contractor and to deduct all associated costs from the amount owed to the Contractor" (*id.*, "Section 0500-General Specifications" at 14).

Dimitrios Malatos (Malatos), the Vice President and part owner of KNS, testified that KNS had insurance covering its work and that Southgate would not have permitted KNS to work otherwise

(NYSCEF Doc No. 300, Malatos tr at 322, lines 14-23). Likewise, Mary Signorella (Signorella), who, as Southgate's general manager from 2010 to 2016, oversaw the day-to day operations of the complex, testified that Southgate would not allow a contractor to begin work on the premises without first supplying proof of insurance (NYSCEF Doc No. 215, Signorella 4/25/2019 tr at 234, lines 4-8).

According to Rosenfeld, in June and July 2012, while repairing the Building's exterior, KNS damaged the Apartment on three separate occasions. She states that, on June 12, 2012, KNS caused a water intrusion into her daughter's bedroom. Then, approximately three weeks later, KNS drilled holes into her ceiling, causing dust and debris in the Apartment. Finally, on July 18, 2012, she alleges that KNS caused a major water intrusion (July 2012 Flood). (Rosenfeld aff, ¶¶ 18-20.)

During her deposition, Rosenfeld testified that there was a thunderstorm on July 18, 2012 and water came "gushing through" the top and sides of the closed window in her living room. She notified Southgate, which immediately sent "everybody from all five buildings to drop everything and come over." (NYSCEF Doc No. 172, Rosenfeld tr, at 63-64.) Rosenfeld stated that the Building's resident manager, John Robertelli (Robertelli), told her that he had found Styrofoam blocking the drains of the terrace above the Apartment. This caused an overflow. KNS had ostensibly placed the Styrofoam to prevent the drains from becoming clogged with construction debris and forgot to remove it at the end of the workday. Robertelli and a handyman at the scene allegedly told Rosenfeld that, when the Styrofoam was removed, the rush of water stopped. (*id.* at 73-76.)

Signorella also testified that the water entered directly above the living room window and said Robertelli reported that he went up to the roof and found a blocked drain where KNS had been performing its work (Signorella 4/09/2019 tr at 155-156).

During his deposition, Malatos testified that, on July 18, 2012, KNS had been repairing and waterproofing the parapet wall above the Apartment's living room window. At the end of the workday, the crew secured a plastic tarp over the exposed wall. Malatos recalled that, after KNS had left for the day, there was a sudden storm with heavy rain and strong winds. He then received a call from Robertelli, informing him that there was a leak in the Apartment. Malatos testified that, by the time he arrived, water was no longer entering the Apartment (*see* Malatos tr at 262, lines 4-18), that he noticed that the plastic had "definitely shifted" (*id.* at 732, lines 18-22), and was "compromised from the wind" (*id.* at 822, lines 19-23). When asked whether he thought this could have been the cause of the water intrusion, he stated that the "outside wall where the brick was removed" was "the only open area that could have let the water in" (*id.* 732, line 16-733, line 6) and speculated that the storm was too strong and blew the tarp off (*id.* at 721, lines 11-17). In addition, Malatos stated that he did not believe a clogged drain could have caused the flooding, because the roof was flat, with multiple drains and scuppers, and the water would have simply flowed to a different drain (*id.* at 744, lines 7-16, 418). To protect against further water intrusions, he placed a second plastic tarp over the existing one (*id.* at 708, line 25-709, line 7).

When asked whether he had "conduct[ed] any type of investigation, or learn[ed] how that water leak occurred," Malatos responded that "[he] could only attribute it to heavy rains leaking into an unfinished wall" (*id.* at 280, lines 19-23). However, he immediately clarified that he had not seen the source of the leak, that "[he] was only assuming," and that it was "possibly caused" by

heavy rain that "was just too overwhelming for the roof itself, for the terrace itself" (*id.* at 281, lines 2-16). When again asked if KNS had investigated the cause of the water intrusion, Malatos stated that it had not and that, in his view, placing a second sheet of plastic over the first with no subsequent leaks satisfied KNS' due diligence obligations (*id.* at 440, lines 14-23). He also said that it was "almost impossible on [sic] a situation like this and that kind of roof terrace to actually see where the water would come in from. . . . The water could have come in anywhere and made its way there" (*id.* at 748, lines 3-13).

When pressed about a report KNS's insurance adjuster prepared, stating that Malatos had acknowledged that KNS had caused the damage, Malatos stated that this was inaccurate. He explained that he had told the adjustor that: "this occurred while we were working, as a result of how we installed our plastic, and at the time that we were working. Not that we caused anything by our work" (*id.* at 439, line 15-440, line 5). He repeatedly denied that the leak "was caused by [his] crew" (*id.* at 444, lines 12-13), and went on to clarify that it was a "coincidence" that KNS was working on the section where the leak occurred and "[n]ot that [KNS] did anything, like, you know, just open a hole and let the water in" (*id.* at 444, line 23-445, line 4). According to Malatos, KNS completed its work on the Building and removed its equipment "sometime in late December [2012] or early January of 2013" (*id.* at 674, lines 23-25).

Rosenfeld stated that the July 2012 Flood destroyed 80% of the Apartment and rendered it completely uninhabitable (Rosenfeld aff, ¶ 21). She and her daughter relocated to an extended stay hotel near the Apartment and moved her surviving personal possessions into storage. Rosenfeld's insurer, Vigilant Insurance Company (Vigilant) assigned the July 2012 Flood claim number 40512075262. Southgate's insurer denied coverage. The denial letter explained that coverage was denied, because: (1) a "gut renovation" a few years prior, rendered the new hard

wood floors, walls and base moldings betterments that were not original to the building, excluding them from coverage; and (2) the cause of damage—a weather condition, combined with exterior maintenance issues and KNS's failure to seal off the exterior of the building properly—also fell under the policy's exclusions (NYSCEF Doc No. 259). According to Rosenfeld, Southgate knew that the Apartment had never been gut-renovated, but refused to correct its statements to its insurer (Rosenfeld aff, ¶ 23).

In December 2012, Southgate informed Rosenfeld that repairs were complete. During a walkthrough of the Apartment, Rosenfeld detected a musty odor and noticed a leak in the living room ceiling (Rosenfeld tr at 94-95).

On January 11, 2013, Trias inspected the Apartment. In a report dated February 18, 2013 (February 2013 Trias Report), he concluded that there were two leaks. The east penthouse wall that "need[ed] major reconstruction" caused one of the leaks. The other occurred because planters interfered with proper drainage on the penthouse's terrace (NYSCEF Doc No. 201, February 2013 Trias Report at 5). Trias recommended deferring the reconstruction of the penthouse wall, until Southgate began a planned building-wide project. As a temporary measure that would provide one to three years of waterproofing protection, he recommended that the wall be sealed or cut and pointed. (*id.*) In his affidavit, submitted in support of Southgate's motion for summary judgment in Action 3, Trias states that "these leaks were small and did not prevent a person from living in the Unit" (NYSCEF Doc No. 200, Trias aff, ¶ 10).

Southgate then retained Insight Environmental Inc. (Insight) to perform a fungal screening in the Apartment on March 29, 2013. In a report dated April 2, 2013 (Insight Report), Insight concluded, based on a visual inspection and samples taken at the Apartment, that the Apartment "[was] considered to be safe for occupancy" (NYSCEF Doc No. 221, Insight Report

at 1). Rosenfeld states that Southgate informed her of this finding, but refused to provide a copy of the Insight Report (Rosenfeld aff, ¶ 33).

By letter dated July 25, 2013, Southgate informed Rosenfeld that the Apartment had been ready for occupancy as of July 18, 2013 (NYSCEF Doc No. 223). Vigilant inspected the Apartment on September 6, 2013 and concluded that "the repairs were completed and [the] unit was habitable" (NYSCEF Doc No. 224). Accordingly, it declined to extend additional living expenses coverage and ceased paying Rosenfeld's hotel costs as of August 2013. Rosenfeld states that, once Vigilant stopped paying her hotel costs, she stopped paying maintenance, because the Apartment remained uninhabitable and she was paying approximately $16,000 per month to continue living at the hotel (*see* Rosenfeld tr at 345, lines 16-25; 347, lines 7-11; Rosenfeld aff, ¶ 68).

By letter dated October 18, 2013, Rosenfeld's attorney requested that Southgate provide various documentation, including a copy of the Insight Report, so that Rosenfeld could evaluate the sufficiency of the repairs done to the roof and façade and their impact on the Apartment (NYSCEF Doc No. 269). Rosenfeld states that, in November 2013, she finally received a copy of the report. It revealed that only the second bedroom and the living room had been tested for mold and that limited air testing had been performed (Rosenfeld aff, ¶ 34).

Rosenfeld retained Olmsted Environmental Services, Inc., an environmental consulting company. Edward Olmsted (Olmstead), the owner, has a certificate from the American Academy of Industrial Hygiene in industrial hygiene and is a certified safety professional (NYSCEF Doc No. 263, Olmsted aff, ¶ 1).

Olmsted inspected the Apartment on November 22, 2013. In a report dated December 13, 2013 (December 2013 Olmsted Report), he concluded that, while there was no "evidence of

active water intrusion," the Apartment "[was] not sufficiently decontaminated and there [was] still evidence of mold colonization and contamination" (NYSCEF Doc No. 264, December 2013 Olmsted Report at 4, 7). He advised that the Apartment would not be ready for occupancy until, among other things, Southgate removed water damaged plaster behind the fan coil units in the master bedroom and living room and removed all millwork and "the remaining flooring in the master bedroom and . . . along the perimeter of the living room and dinette where original flooring [had been] left in place" (*id.* at 7). Based on the findings in the December 2013 Olmsted Report, Vigilant eventually opened a separate claim, under claim no. 40514080304 (Rosenfeld aff, ¶ 37).

By letter dated January 16, 2014, Rosenfeld's attorney informed Southgate of Olmsted's findings and provided a copy of the December 2013 Olmsted Report. In addition, the letter informed Southgate that it was in breach of the warranty of habitability and the covenant of quiet enjoyment and that Rosenfeld had been, and continued to be, constructively evicted from the Apartment since July 18, 2012. The letter demanded immediate remediation of the mold condition in the Apartment. (NYSCEF Doc No. 270.)

After making the recommended repairs, Southgate retained Microecologies Inc. (Microecologies) to test the Apartment for mold. On October 22, 2014, Microecologies "performed a limited indoor environmental inspection and airborne mold sampling" (NYSCEF Doc No. 226 at 1). In a report dated October 27, 2014 (October 2014 Microecologies Report), Microecologies found that a small corner of the master bedroom ceiling registered as wet. This "suggest[ed] that moisture intrusion problems [were] ongoing and require[d] further evaluation," but that air sampling of airborne mold was within "acceptable range" (*id*. at 2, 3). It recommended that an engineer or an architect evaluate the terrace above the Apartment to

determine the pathway of the moisture intrusion and that the repair work be performed promptly (*id.* at 5). Microecologies also recommended that "building and refinishing of surfaces should not be performed until the source(s) of the underlying water damage problem [was] definitively identified and demonstrably repaired" and that, "[w]hen building, sheetrock or greenboard (paper-faced gypsum boards) should not be used," because "the refined cellulose content of paper . . . provides ideal nutrients to support toxic fungal growth in the presence of water damage" (*id.* at 4). It recommended that cement board be used instead of sheetrock and that "[s]urfaces that were originally finished with plaster should be refinished with plaster" (*id.*).

On October 23, 2014, Trias inspected the Apartment. In a report dated November 12, 2014 (November 2014 Trias Report), Trias confirmed the presence of an obvious leak in the ceiling of the dining room, detected moisture "at the exterior wall at the southeast corner of the apartment" and noted some plaster damage at the east facing window (NYSCEF Doc No. 203. November 2014 Trias Report at 1-2).

Vigilant cancelled Rosenfeld's policy, effective December 10, 2014. (Rosenfeld aff,¶ 40). On February 19, 2015, Vigilant commenced a subrogation action against KNS, entitled *Vigilant Insurance Company a/s/o Debra Rosenfeld v KNS Building Restoration Inc.*, under index No. 151694/2015 (Action 1).[1]

During subsequent renovation work on the Apartment, mold was discovered under the marble windowsills in the master bedroom. Southgate again engaged Microecologies to perform an environmental inspection of the Apartment. Microecologies performed the inspection on March 19, 2015 and issued a report dated April 1, 2015 (April 2015 Microecologies Report). It found "heavy levels of mold growth" on the windowsill in the master bedroom and that some sheetrock on the north window measured wet (NYSCEF Doc No. 227, April 2015

Microecologies Report at 1). It recommended the removal of the window sills and "any underlying sheetrock displaying water damage or mold growth" (*id.* at 2). To avoid contamination during remediation, Microecologies recommended the removal or covering of all personal property and the use of negative air and HEPA vacuums and respirators (*id.*). The report also contained the following recommendations for rebuilding: (1) identify and repair the source of the water damage; (2) do not use sheetrock; and (3) "[w]here possible, walls and ceilings that were constructed of plaster should be refinished with plaster rather than being covered with a wallboard material" (*id.* at 3).

On April 27, 2015, Microecologies returned to the Apartment to conduct a further evaluation of the remaining windowsills in the Apartment. In a report dated May 7, 2015 (May 2015 Microecologies Report), Microecologies confirmed the continued presence of mold in the master bedroom and also found mold in the second bedroom, living room and dining room (NYSCEF Doc No. 228, May 2015 Microecologies Report at 1-2). It also found that the inset in the north window in the master bedroom measured wet and "observed corrosion on the framing underneath the window casing [in the second bedroom] suggesting a history of water intrusion" (*id.*). It again recommended the removal of damaged windowsills and adjoining sheetrock. Because this work would "unavoidably result in the release of high levels of dust, which may include fungi and bacteria," it recommended, among other things, removal of personal items, sealing off work areas with plastic barriers and using negative air (*id.* at 4). The report also contained similar recommendations with respect to rebuilding as the previous reports (*id*. at 5).

In June 2015, Southgate engaged American Fire Restoration to perform the mold remediation work outlined in Microecologies' reports. On June 5, 2015, Microecologies returned to conduct a post-remediation inspection and air sampling. In a report dated June 15,

2015 (June 2015 Microecologies Report), it found that sheetrock within 12 inches of all windows had been removed and that there was no visible mold growth. However, it did note that the terracotta block around two windows, one in the living room and one in the master bedroom, registered as damp to wet, suggesting "that rainwater infiltration [was] still occurring." (NYSCEF Doc No. 229, June 2015 Microecologies Report at 1.) It found that indoor air quality was acceptable (*id.* at 2) and concluded that the mold remediation work had "been successfully completed and clearance [was] considered to have been achieved" (*id.* at 3). However, it also noted that "the damp/wet conditions detected in the terracotta block . . . suggest[ed] ongoing water intrusion problems" and recommended that, "[t]o prevent a recurrence of mold growth conditions, rebuilding and refinishing of these surfaces should not be performed until the source(s) of the underlying water damage problem [was] definitively identified and demonstrably repaired" (*id.* at 3).

On June 18, 2015, Trias took moisture readings at the Apartment. He found moisture in the masonry surrounding the windows. However, in his report, dated July 17, 2015 (July 2015 Trias Report), Trias concluded that the moisture was "not an issue," because the wall was designed thick enough to resist water infiltration. Thus, during rain, water would enter the wall and, once the rain stopped, water would leave "back in the direction it came (exterior side) and. . . . through vapor transmission" on the interior side. He explained that the "vapor would dissipate through a standard plaster system on the interior face," but that this was not happening, because the "terracotta block was encapsulated with a coating that appear[ed] to be non breathable" and, as a result, the vapor "[could not] escape and . . . and condense[d] near the inner face of the wall." (NYSCEF Doc No. 204, July 2015 Trias Report at 4-5).

According to Rosenfeld, what followed was several months of delay while Southgate decided on a contractor to restore the Apartment after the remediation (Rosenfeld aff, ¶¶ 50-62). On October 12, 2015, Southgate's resident manager came to the Apartment to take moisture readings. Rosenfeld was present and states that "certain areas in the Apartment registered almost 40% wet" (*id.*, ¶ 61). By email dated October 27, 2015, Southgate advised that the contractor it selected would start work on November 30, 2015, that the project would take 4-5 weeks and that no work could occur between December 23rd and January 4th, due to Southgate's moratorium on contractors during the holiday season. Southgate refused to waive the moratorium for Rosenfeld. (NYSCEF Doc No. 275.)

On November 24, 2015, Olmsted took additional moisture readings at the Apartment. In a report of his findings (November 2015 Olmsted Report), he explained that "[t]he moisture readings indicate[d] some areas with elevated dampness, which indicate[d] active water intrusion" that was "entering through the exterior masonry" (NYSCEF Doc No. 265, November 2015 Olmsted Report at 3). In addition, Olmsted found "corrosion of steel around the windows in the living room and master bedroom" and stated that "[t]his [was] an indication of chronic water intrusion around the windows" (*id.*). He also noted that "the newly installed sheetrock walls ha[d] no insulation or vapor barrier inside the wall cavity" and that "[t]he sheetrock itself [was] not a mold resistant material and contain[ed] cellulose, which is a substrate that will promote mold growth" (*id*). He recommended that "[t]he source of the water incursion should be further evaluated and mitigated before rebuilding the walls" and advised that "[i]nstalling sheetrock over damp masonry walls [would] result in mold growth over time" (*id.*). In his affidavit, Olmsted opines that "the walls should have been rebuilt with plaster (as originally constructed) as recommended in the Microecologies' Reports" (Olmsted aff, ¶ 15).

The repair work did not proceed on November 30, 2015. On December 2, 2015, Olmsted returned to the Apartment to take moisture readings in the presence of the Building's resident manager. As stated in a report dated December 9, 2015 (December 2015 Olmsted Report), he found that "there [were] damp areas around the master bedroom and living room windows indicating active water intrusion through the exterior masonry" (NYSCEF Doc No. 266, December 2015 Olmsted Report at 2). Olmsted states, at that point, he and the resident manager discussed the appropriateness of applying a water proofing coat to the exterior masonry, until repair work could occur, but that this discussion ended without resolution (Olmsted aff, ¶¶ 19-20).

By notice of default dated December 15, 2015 (Default Notice), Southgate informed Rosenfeld that she owed $69,296.70, consisting of maintenance and additional rent, and gave her 10 days to cure the default or it would terminate the Proprietary Lease (Rosenfeld aff ¶ 66; NYSCEF Doc No. 261, Default Notice). By letter dated December 24, 2015, her lender informed Rosenfeld that Southgate had provided it with a copy of the Default Notice and that, unless she provided written notice within 10 days stating that the matter was resolved, the lender would accelerate her note (NYSCEF Doc No. 262). According to Signorella, when a shareholder fails to pay his or her maintenance the "[p]ractice is always a courtesy . . . letter or a phone call" (Signorella 4/25/2019 tr at 165, lines 16-24). It is not clear from the record, whether Rosenfeld received this courtesy.

Rosenfeld commenced Action 2 against Southgate and KNS by filing a summons with notice on July 2, 2015. She subsequently filed an amended summons. By order to show cause filed on January 5, 2016, Rosenfeld sought a preliminary injunction: (1) prohibiting Southgate from commencing a summary proceeding or cancelling the Proprietary Lease until the resolution

of the action and (2) compelling Southgate to identify and repair the source of the water intrusion and restore the Apartment to its original condition, i.e. replace the sheetrock walls with plaster. By a so ordered stipulation dated January 6, 2016, Southgate withdrew the Default Notice and agreed not to serve a nonpayment notice until after the hearing that was scheduled for January 26, 2016.

During oral arguments on January 26, 2016, Southgate's attorney stated that the external repairs to the Building would occur in the course of the larger Local Law11 restoration under way at that time. However, because Southgate consisted of multiple buildings, it was a phased Local Law 11 restoration, and the Building was not scheduled for work until the beginning of 2017. When asked if there were other apartments with similar water intrusion issues, Southgate's attorney responded that there were not. (NYSCEF Doc No. 278, 1/26/2016 tr at 18-19, 25, lines 24-26.) At the end of the argument, Justice Kathryn Freed issued an interim order (Interim Order), directing Southgate to complete certain repairs—including repairing walls using "'green' or 'purple' board sheetrock commonly used in bathrooms or high moisture conditions"—before the parties' next scheduled appearance on March 8, 2016. A temporary restraining order (TRO) was to remain in place until then. (NYSCEF Doc No. 279, Interim Order.)

Rosenfeld filed her complaint in Action 2 on January 29, 2016. Southgate filed its answer on February 18, 2016.

On March 8, 2016, the parties appeared back before Justice Freed. At this point, Southgate represented that it had completed the repairs in accordance with the Interim Order and agreed not to commence a summary proceeding against Rosenfeld before April 8, 2016. The court, therefore, denied Rosenfeld's order to show cause in its entirety, lifted the TRO and

directed Rosenfeld to begin paying her monthly maintenance and common charges as of April 1, 2016. (NYSCEF Doc No. 194.) Rosenfeld returned to the Apartment and resumed paying maintenance as of April 1, 2016.

On March 9, 2016, Southgate filed an amended answer, asserting seven cross claims against KNS. On July 11, 2016, KNS filed its answer with cross claims against Southgate. Southgate filed its answer to KNS's cross claims on September 9, 2016.

By order dated December 8, 2017, the court consolidated Action 1 with Action 2 for the purposes of discovery only. It denied consolidation for trial purposes without prejudice.

During the pendency of Action 1 and Action 2, Rosenfeld attempted to settle her disputed claims with Vigilant. As part of these negotiations, Rosenfeld submitted a breakdown of what she considered her outstanding claims (Vigilant Breakdown). Totaling $529,444.58, these consisted of: (1) $286,700 in hotel costs; (2) $150,022.12 in content replacement costs, including $52,135 worth of items that were allegedly damaged/lost by Moving Right Along (MRA), a moving and storage company; (3) $11,327.44 in moving fees; (4) $16,251.01 for dry cleaning; (5) $7,380 in storage fees; (6) $48,264 for meals and toiletries; and (7) $9,500 in hotel tips (NYSCEF Doc No. 190, Vigilant Breakdown).

By a release and settlement agreement dated July 24, 2017 (Vigilant Settlement Agreement), Rosenfeld and Vigilant settled both the July 18, 2012 claim (claim number 040512075262) and the December 13, 2013 claim (claim number 040514080304) for a total settlement amount of $948,198.64 (NYSCEF Doc No. 189, Vigilant Settlement Agreement). Having already paid $638,198.64, Vigilant paid an additional $310,000 as part of the settlement. In pertinent part, the Vigilant Settlement contains a mutual release (Release), that states:

> "For the mutual consideration set forth in the Agreement, Rosenfeld and Vigilant hereby agree to and accept a full and

> complete mutual release and discharge of any and all claims, demands, obligations, actions, causes of action, agreements, contracts, losses, liabilities, costs incurred, expenditures, damages and causes of action for damages, and any other theory of recovery as against each other under or arising out of the Policy, of whatever kind or nature, whether in law, equity or otherwise, whether known or unknown, whether suspected or unsuspected, and arising out of, flowing from or in any way connected with the loss related to the Claims, and Rosenfeld amatively covenants not to make further claim against Vigilant for any loss or damage covered under any first party coverage provided by the Policy as a result of the water damage as noted above " (*id.* at 2, ¶ 2).

According to Rosenfeld, the Vigilant Settlement Agreement did not include certain categories of damage, because her policy with Vigilant only covered first-party losses for property damage and alternate living expenses. These additional categories of damages include: legal fees; environmental consultant fees; the cost of repairs to her kitchen; gratuities paid during her hotel stay; the cost of meals and toiletries; the cost of a personal assistant; the penalties on withdrawals from her retirement account and the interest on credit cards after Vigilant ceased paying her hotel bills; and inconvenience/nuisance expenses. Ronzel Simmons (Simmons), the Vigilant adjuster/examiner who handled Rosenfeld's claims, testified that Vigilant did not consider these items covered under its policy (*see* NYSCEF Doc No. 171, Simmons tr at 169-170, 174-175).

By filing a summon and complaint on December 11, 2017, Southgate commenced Action 3 against Rosenfeld, seeking to recover $45,994.18 in maintenance arrears and attorneys' fees. The reduced amount reflects a $25,000.00 abatement Southgate issued to Rosenfeld after litigation had ensued, covering the period between July 18, 2012 to July 18, 2013 (*see* NYSCEF Doc No. 222). Rosenfeld filed an answer with counterclaims on January 31, 2018, counterclaiming for breach of contract, nuisance, negligence/gross negligence, harassment under

the HMC and MDL, and attorney's fees. Southgate filed its reply to the counterclaims on February 20, 2018. The reply did not contain any affirmative defenses to Rosenfeld's counterclaims.

Rosenfeld moved to consolidate Action 2 and Action 3. By decision and order dated February 22, 2019, this court granted Rosenfeld's motion and consolidated Action 3 into Action 2. On April 26, 2019, Rosenfeld filed the note of issue in Action 2.

Notably, Southgate has made multiple attempts to obtain defense and indemnification from KNS and its insurer. Southgate tendered its demand for defense and indemnification on KNS on April 26, 2016 and August 22, 2016 (NYSCEF Doc Nos. 178, 179). In addition, Southgate tendered its defense and indemnification on KNS and its insurers, New York Marine and General Insurance Company (New York Marine) and ProSight Specialty Insurance (ProSight), on September 26, 2016 and March 15, 2019 (NYSCEF Doc Nos. 180, 181). By letter dated September 4, 2019, ProSight, the claims administrator for New York Marine, that issued a comprehensive general liability policy to KNS for the January 28, 2012 to January 28, 2013 policy period, informed KNS that New York Marine would pay reasonable attorneys' fees and costs for Southgate's defense in Action 2, subject to its reservation of rights and partial declination of coverage (NYSCEF Doc No. 301).

II. Analysis

A. Leave to Amend

Southgate contends that it is entitled to amend its answer in Action 2, changing its response to paragraph 165 of Rosenfeld's complaint from "Admit" to "Deny," because the Proprietary Lease does not contain the language quoted in the complaint. In addition, Southgate seeks leave to amend its answer to assert three cross claims (contribution and common law

indemnification, contractual indemnification and defense and breach of contract) against KNS. It argues that KNS cannot claim prejudice or surprise, because: (1) Southgate first tendered its defense and indemnification to KNS on April 26, 2016; and (2) the proposed cross claims mirror Southgate's counterclaims in its answer to KNS's third-party complaint in Action 1.

Southgate also seeks leave to amend its reply in Action 3, to assert 14 affirmative defenses to the counterclaims that Rosenfeld asserts in her answer. Southgate argues that it previously moved to amend its reply in Action 3, but that Justice Tanya R. Kennedy denied the motion without prejudice, pending the motion to consolidate Actions 2 and 3, reasoning that consolidation would make the motion to amend moot. It argues that, therefore, post-consolidation, the affirmative defenses asserted in Action 2 should now apply to the counterclaims asserted in Action 3, nunc pro tunc.

Rosenfeld argues that Southgate's motion to amend its reply in Action 3 should be denied as procedurally defective, because it is not supported by an affidavit of merit. In addition, Rosenfeld cross-moves for leave to amend her complaint in Action 2 and answer in Action 3, to reference the correct paragraph number and text of the Proprietary Lease. She also seeks leave to amend her complaint in Action 2 to: (1) extend the time frame for which she seeks a rent abatement under her breach of the covenant of quiet enjoyment and constructive eviction cause of action; and (2) add causes of action for breach of contract and nuisance and a claim for punitive damages against KNS.

KNS opposes Rosenfeld's cross motion to amend, arguing that the proposed claims are legally insufficient and devoid of merit. It does not oppose Southgate's motion to amend.

"Leave to amend pleadings under CPLR 3025 (b) should be freely given, and denied only if there is prejudice or surprise resulting directly from the delay, or if the proposed amendment is

palpably improper or insufficient as a matter of law" (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012] [internal quotation marks and citations omitted]). The movant "need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010] [internal citations omitted]; *see Hickey v Steven E. Kaufman, P.C.*, 156 AD3d 436, 436 [1st Dept 2017] [explaining that, "[g]iven the Legislature's 2005 amendment of CPLR 3211 (e), [the] plaintiff was not required to support his motion to amend the complaint with an affidavit of merit"], citing *Lucido v Mancuso*, 49 AD3d 220, 228-229 [2d Dept 2008]). "Cases involving CPLR 3025 (b) that place a burden on the pleader to establish the merit of the proposed amendment erroneously state the applicable standard and are no longer to be followed" (*Lucido*, 49 AD3d at 229). "A party opposing leave to amend must overcome a heavy presumption of validity in favor of [permitting amendment]" (*LDIR, LLC v DB Structured Prods., Inc.*, 172 AD3d 1, 4 [1st Dept 2019] [internal quotation marks and citation omitted]).

i. Rosenfeld's Cross Motions to Amend (motion sequence numbers 005, 006 & 007)

To the extent, Rosenfeld seeks leave to amend the complaint in Action 2 and her answer in Action 3 to reference the attorneys' fee provision of the Proprietary Lease—the basis for her tenth cause of action and fifth counterclaim for attorneys' fees—the court grants leave. The proposed amended complaint (PAC 2) and the proposed amended answer (PAA 3) correctly reference paragraph 28 of the Proprietary Lease, that provides the lessee shall pay the lessor's "reasonable attorneys' fees and disbursements," incurred "in performing acts which the Lessee is required to perform, or in instituting any action or proceeding based on any default by Lessee, or in defending, or in asserting a counterclaim in any action or proceeding brought by the Lessee" (Proprietary Lease, ¶ 28; *see* NYSCEF Doc No. 286, PAC 2, ¶¶ 165-166; NYSCEF Doc No.

343, PAA 3, ¶ 140). Pursuant to Real Property Law § 234, this provision in the Proprietary Lease creates an implied reciprocal covenant by the lessor to pay the lessee's reasonable attorneys' fees (*see Graham Ct. Owner's Corp. v Taylor*, 115 AD3d 50, 56 [1st Dept 2014], *affd* 24 NY3d 742 [2015] [stating that "[t]he overriding purpose of [Real Property Law § 234] is to provide a level playing field between landlords and tenants, by creating a mutual obligation . . ."]). Therefore, the proposed amendments correct the deficiencies of the current pleadings. Because Southgate does not argue, nor can it, that the proposed amendments cause it prejudice or surprise, to the extent that Rosenfeld cross-moves to amend the tenth cause of action in Action 2 and the fifth counterclaim in Action 3, leave to amend is granted.

However, to the extent that Rosenfeld seeks leave to make additional amendments to the complaint in Action 2—extending the period for which she seeks recovery on her sixth cause of action for breach of the covenant of quiet enjoyment and constructive eviction and adding claims for breach of contract, nuisance and punitive damages against KNS—leave is denied, because the proposed amendments are "palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp.*, 74 AD3d at 500). Rosenfeld may not amend the sixth cause of action for breach of the covenant of quiet enjoyment and constructive eviction to include a 2010 water intrusion that allegedly forced her out of the Apartment for three months. The claim "is governed by a one-year statute of limitations" (*Kent v 534 E. 11th St.*, 80 AD3d 106, 111 [1st Dept 2010] [finding that a claim for constructive eviction was time-barred]; *see Jackson v Westminster House Owners Inc.*, 24 AD3d 249, 250 [1st Dept 2005] [stating that a breach of the covenant of quiet enjoyment claim requires actual or constructive eviction]). Rosenfeld commenced Action 2 in 2015. Thus, even under the relation back doctrine (*see* CPLR 203 [f]), the proposed amendment is time-barred. Therefore, leave to amend the sixth cause of action is denied (*see*

Risk Control Assoc. Ins. Group v Maloof, Lebowitz, Connahan & Oleske, P.C., 151 AD3d 527, 528 [1st Dept 2017] [affirming denial of leave to amend, where the proposed amendment was time-barred]).

Rosenfeld's proposed claims against KNS fare no better. The proposed eleventh cause of action alleges that KNS created a nuisance by "causing three water leaks in the Apartment," the last of which "destroyed 80% of the Apartment [and] rendered it unsafe and uninhabitable for an extended period of time" (PAC 2, ¶ 169).[2] Rosenfeld correctly argues that a nuisance can be created through negligence and does not require intentional conduct (*Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 569 [1977] ["negligence is merely one type of conduct which may give rise to a nuisance"]). However, where, as here, "nuisance and negligence elements are so intertwined as to be practically inseparable, a plaintiff may recover only once for the harm suffered" (*70 Pinehurst Ave. LLC v RPN Mgt. Co., Inc.*, 123 AD3d 621, 622 [1st Dept 2014] [internal quotation marks and citations omitted] [dismissing the nuisance claim as duplicative of the negligence cause of action]). Because Rosenfeld's proposed nuisance claim is largely based on KNS's alleged negligence in causing the July 2012 Flood (*see* PAC 2 ¶¶ 169-170), it is duplicative of the ninth cause of action for negligence, that makes the same allegations (*see 70 Pinehurst Ave. LLC*, 123 AD3d at 622; *see also Caldwell v Two Columbus Ave. Condominium*, 92 AD3d 441, 441-442 [1st Dept 2012] [finding that, "[t]o the extent plaintiffs' nuisance claim [was] based solely on negligence, it [was] duplicative of the [negligence] cause of action"]).

In addition, to the extent the proposed nuisance claim is based the water intrusion in her daughter's bedroom and the holes drilled through the ceiling of her master bedroom, Rosenfeld does not explain how these discreet incidents, that appear to have been promptly addressed (*see*

Rosenfeld tr at 50, 57-60), "constitute[] an unreasonable and continuous invasion of [the plaintiff's property] rights" as to create a nuisance (*Ewen v Maccherone*, 32 Misc 3d 12, 14 [App Term, 1st Dept 2011] [internal quotation marks and citations omitted]; *see Metropolitan Life Ins. Co. v Moldoff*, 187 Misc 458, 459 [App Term, 1st Dept 1946], *affd* 272 AD 1039 [1st Dept 1947] [internal quotations marks and citation omitted] ["some degree of permanence is an essential element of the conception of nuisance"]; *Domen Holding Co. v Aranovich*, 1 NY3d 117, 124 [2003] ["[n]uisance imports a continuous invasion of rights . . ."]). For the foregoing reasons, the proposed amendment is palpably insufficient to state a nuisance cause of action and, accordingly, leave to amend the complaint to add the claim is denied.

The proposed twelfth cause of action is for breach of contract and alleges that Rosenfeld was the intended third-party beneficiary of the KNS Contract, because it specifically provides that KNS was hired to do "Repairs to Correct Defective Conditions Causing Leaks into Apartments 12C and 12E @ 433 East 51st Street, NYC" (PAC 2, ¶¶ 173-175; *see also* KNS Contract at 1). To assert a breach of contract claim, a nonparty must be "an intended, and not a mere incidental, beneficiary, and even then, . . . the parties' intent to benefit the third party must be apparent from the face of the contract" (*CWCapital Invs. LLC v CWCapital Cobalt VR Ltd.*, 182 AD3d 448, 452 [1st Dept 2020] [internal quotation marks and citation omitted]). Where a nonparty seeks to assert a claim for breach of a construction contract, "express contractual language[,] stating that the contracting parties intended to benefit a third party by permitting that third party to enforce [a promisee's] contract with another," is required (*Dormitory Auth. of the State of N.Y. v Samson Constr. Co.*, 30 NY3d 704, 710 [2018] [internal quotation marks and citation omitted]). Here, the KNS Contract merely references the Apartment to describe the purpose of the project. It does not identify Rosenfeld by name, much less, expressly state that

she is an intended third-party beneficiary. Thus, she is merely an incidental beneficiary and may not assert a claim for breach of the KNS Contract. Therefore, the proposed twelfth cause of action is palpably insufficient and leave to add the claim is denied.

Lastly, Rosenfeld seeks leave to amend the complaint to add a request for punitive damages against KNS. "[P]unitive damages are awarded only in singularly rare cases such as cases involving an improper state of mind or malice or cases involving wrongdoing to the public" (*Bothmer v Schooler, Weinstein, Minsky & Lester*, 266 AD2d 154, 154 [1st Dept 1999] [internal quotation marks and citations omitted]). Here, Rosenfeld fails to allege that KNS acted with malice or that it engaged in conduct that "was so outrageous as to evince a high degree of moral turpitude and showing such wanton dishonesty as to imply a criminal indifference to civil obligations" (*id.*). Therefore, the proposed amendment is palpably insufficient and leave to amend the complaint to add punitive damages is denied For the foregoing reasons, to the extent Rosenfeld seeks leave to amend the complaint in Action 2 to assert additional claims against KNS, the cross motion is denied.

ii. Southgate's Motion to Amend (motion sequence number 005)

To the extent that Southgate seeks leave to amend its response to paragraph 165 of the complaint in Action 2 from "Admit" to "Deny," because the quoted language is not in the Proprietary Lease, the motion is denied. Having granted Rosenfield's cross motion to correct paragraph 165, this portion of Southgate's motion is now moot.

To the extent that Southgate seeks to assert cross claims against KNS, the motion is granted. Notably, Southgate has previously amended its answer as of right, in order to assert seven cross claims against KNS, including the three proposed on this motion (*see* NYSCEF Doc No. 53, Southgate's amended answer in Action 2). KNS acknowledges that Southgate "filed an

Answer on February 18, 2016, and then an Amended Answer with Cross-Claims on March 9, 2016" (NYSCEF Doc No. 288, Auer affirmation in opposition to Southgate's motion for summary judgment, ¶ 14). It is unclear why Southgate appears to be unaware of this pleading. However, as KNS does not oppose the motion and cannot claim to be surprised or prejudiced by the proposed amendments that merely condense and crystalize the previous seven cross claims, this portion of Southgate's motion to amend its answer in Action 2 is granted (*see McGhee*, 96 AD3d at 450 ["[l]eave to amend pleadings under CPLR 3025 (b) should be freely given . . . "]).

Lastly, to the extent Southgate seeks leave to amend its reply in Action 3 to include 14 affirmative defenses (*see* NYSCEF Doc No. 193, proposed amended reply in Action 3), the motion is granted. The proposed affirmative defenses largely mirror Southgate's affirmative defenses to Rosenfeld's claims in Action 2, that, in turn, largely mirror Rosenfeld's counterclaims in Action 3. Therefore, granting leave to amend would not prejudice or surprise Rosenfeld, but would serve to "prevent the injustice which would result from divergent decisions based on the same facts," a principal purpose for consolidation (*Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 74 [1st Dept 2002] [internal quotations marks and citation omitted]). Contrary to Rosenfeld's contention, Southgate "was not required to support [its] motion to amend the complaint with an affidavit of merit" (*Hickey*, 156 AD3d at 436). As Rosenfeld does not demonstrate that the proposed amendment results in prejudice or surprise, she fails to "overcome [the] heavy presumption of validity in favor of [permitting amendment]" (*LDIR, LLC*, 172 AD3d at 4 [internal quotation marks and citation omitted]). Accordingly, to the extent Southgate seeks leave to amend its reply in Action 3, the motion is granted

B. Summary Judgment

Pursuant to CPLR 3212 (b), "[t]o obtain summary judgment, the movant 'must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 607 [1st Dept 2012], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "A [movant] cannot satisfy its burden merely by pointing out gaps in the [opponent's] case" (*Sabalza v Salgado*, 85 AD3d 436, 437-438 [1st Dept 2011]) or by relying on "[a] conclusory affidavit or an affidavit by an individual without personal knowledge of the facts" (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384 [2005]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez,* 68 NY2d at 324). Once the movant satisfies its burden, the opposing party must "produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*id.*).

"When deciding a motion for summary judgment, . . . [t]he evidence will be construed in the light most favorable to the one moved against" (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). Summary judgment "should not be granted where there is any doubt as to the existence of [material and triable issues of fact], or where the issue is arguable" (*Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968] [internal quotation marks and citation omitted]). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . on a motion for summary judgment . . ." (*Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 [1st Dept 2013] [internal quotation marks and citation omitted])

i. Southgate's Motion for Summary Judgment against KNS (motion sequence number 005)

1. Southgate's Contractual Indemnification and KNS's Common Law Indemnification Cross Claims

Southgate contends that it is entitled to summary judgment on its cross claim for contractual defense and indemnification, because the evidence demonstrates that KNS was the sole cause of the July 2012 Flood. For the same reason, it argues that the court should dismiss KNS's cross claim for common law indemnification. KNS counters that the KNS Contract does not provide for defense, only indemnification. It also argues that the motion should be denied, because Southgate fails to demonstrate, *prima facie,* that KNS's negligence proximately caused the July 2012 Flood. Moreover, KNS argues, to the extent that Rosenfeld's claims are based on her dispute with Southgate over the adequacy of repairs, they do not arise out of KNS's work. Therefore, the indemnification clause would not cover these claims. The parties also dispute whether the motion is premature or may be granted conditionally, subject to a finding of KNS's negligence.

"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] [internal quotation marks and citation omitted]). "To obtain conditional relief on a claim for contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and [may be] held liable solely by virtue of ... statutory [or vicarious] liability" (*Spielmann v 170 Broadway NYC LP*, 187 AD3d 492, 494 [1st Dept 2020] [internal quotation marks and citations omitted]). "[T]he predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, [therefore,] it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine" (*Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 453 [1st Dept 1985]).

Here, section 3.18 of the KNS Contract provides indemnity for "claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from

performance of the Work ... but only to the extent caused by the negligent acts or omissions of the Contractor." Because the KNS Contract does not state that KNS must defend Southgate, Southgate is not entitled to a defense from KNS, but may eventually be entitled to reimbursement for its attorney's fees. Likewise, Southgate is not entitled to summary judgment on its contractual indemnification cross claim. The KNS Contract provides indemnification for claims arising out of KNS's work, but only to the extent caused by KNS's negligence. Meanwhile, Southgate fails to make a prima facie showing of KNS's negligence.

None of the testimony Southgate offers is from someone with firsthand knowledge of the relevant facts. Both Rosenfeld and Signorella testified to what Robertelli told them, namely, that KNS had left Styrofoam covering drains and that this caused the July 2012 Flood (*see* Rosenfeld tr at 73-76; Signorella 4/09/2019 tr at 155-156). Malatos also testified that he had not seen the source of the water intrusion (*see* Malatos tr at 262, lines 4-18; at 748, lines 3-13) and that "[he] was only assuming" that it was caused by water entering the unfinished wall (*id.* at 281). This evidence is insufficient to meet Southgate's burden on a motion for summary judgment (s*ee Saunders v J.P.Z. Realty, LLC*, 175 AD3d 1163, 1164 [1st Dept 2019] [finding that the defendant failed to meet its burden on a motion for summary judgment, where it relied on the deposition and affidavit of one who "did not have personal knowledge of the facts as required by CPLR 3212 (b)"]; *see also Wen Ying Ji v Rockrose Dev. Corp.*, 34 AD3d 253, 254 [1st Dept 2006] [finding that the plaintiff's affidavit, detailing a conversation she had, "was, in important respects, hearsay evidence, and as such was insufficient to satisfy the movant's burden of establishing a prima facie showing of entitlement to an award of summary judgment"]).

Notably, Southgate points to the KNS Contract to demonstrate that KNS was "responsible . . . to temporarily protect the Building, the work area and [its] new work from

damage caused by the weather" (KNS Contract, "Section 0500-General Specifications" at 14). It also points to the same provision, that then requires KNS to "immediately repair all areas damaged due to [its] failure to comply with this or any other specification requirement," in response to KNS's contention that it cannot be held liable for claims arising out of Southgate's repairs to the Apartment (*id.*). While the first clause may demonstrate that Rosenfeld's claims arise out of KNS's work and the second may give Southgate a breach of contract claim against KNS, neither obviates Southgate's burden to demonstrate that KNS was negligent.

For the foregoing reasons, to the extent that Southgate seeks summary judgment for contractual indemnification and defense against KNS, the motion is denied (*see Lexington Ins. Co. v Kiska Dev. Group LLC*, 182 AD3d 462, 464 [1st Dept 2020] [denying motion for summary judgment, where, among other things, contractual indemnification applied to "claims arising out of [the contractor's] negligent acts or omissions or breaches of contract, and it ha[d] not yet been determined whether [the contractor] was negligent or breached the contract"]; *see also Trawally*, 137 AD3d at 493 [denying summary judgment on contractual indemnification under a clause requiring "negligent performance" of work, where there were issues of fact as to contractor's negligence]; *Inner City Redevelopment Corp. v Thyssenkrupp El. Corp.*, 78 AD3d 613, 613 [1st Dept 2010] [holding that, where "[t]he contract limit[ed] the indemnity to losses caused in whole or in part by defendant's negligence" and "there ha[d] been no showing that defendant was negligent, any order requiring defendant to defend or indemnify [was] premature"]).

Further, whether Southgate's conduct, in repairing and maintaining the Building and the Apartment, contributed to Rosenfeld's claims, presents an issue of fact. Therefore, "a conditional order of summary judgment for contractual indemnification must be denied as premature" (*Spielmann*, 187 AD3d at 494 [internal quotation marks and citation omitted]).

However, to the extent that Southgate seeks summary judgment dismissing KNS's cross claim for common law indemnification, the motion is granted. Rosenfeld seeks recovery against KNS based on its alleged negligence in performing work on the Building and causing the July 2012 Flood (*see* complaint in Action 2, ¶¶ 159-163).

> "Thus, liability against [KNS] would be based upon [its] own participation in the acts giving rise to the loss, that is, as an actual wrongdoer, and, alternatively, if [it] did perform its duties properly by exercising due care and skill in the performance of its work thereby fulfilling its obligations to plaintiff, [KNS] would be free from liability . . . " (*Trustees of Columbia Univ.,* 109 AD2d at 453-454)

Therefore, the court dismisses KNS' claim for common law indemnification.

2. Southgate's Cross Claim for Failure to Procure Additional Insured Coverage

Southgate argues that it is entitled to summary judgment because KNS failed to procure general liability insurance affording coverage to Southgate as an additional insured for any claims caused, in whole or in part, by KNS's negligent acts or omissions, as sections 11.1.1 and 11.1.4 of the KNS Contract required. As evidence of the breach, Southgate points to the lack of a response to its four tenders of defense and indemnification on KNS, ProSight and New York Marine. In opposition, KNS argues that Southgate's motion must be denied, because the record demonstrates that it procured the required insurance.

"A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with" (*DiBuono v Abbey, LLC*, 83 AD3d 650, 652 [2d Dept 2011] [internal quotation marks and citations omitted]; *see also Jackson v Manhattan Mall Eat LLC*, 111 AD3d 519, 520 [1st Dept 2013] [finding that,

"in the absence of evidence that third-party defendant procured the required insurance, summary judgment should have been granted on the breach of contract claim"]).

Here, the record demonstrates that KNS complied with its contractual obligations to procure additional insured coverage for Southgate. First, Signorella and Malatos both testified that Southgate would not have permitted KNS to commence work without proof of coverage (Signorella 4/25/2019 tr at 234, lines 4-8; Malatos tr at 322, lines 14-23). More to the point, by letter dated September 4, 2019, ProSight wrote as follows:

> "New York Marine recognizes the potential for additional insured coverage under the 2012-2013 Policy. However, New York Marine reserves its rights to disclaim coverage in the event that all of the requirements for additional insured coverage have not been satisfied, including whether Southgate's alleged liability is causally related to the operations performed by or on behalf of KNS" (NYSCEF Doc No. 301 at 10).

In addition, New York Marine agreed to pay reasonable attorneys' fees and costs for Southgate's defense in Action 2, subject to its reservation of rights and partial declination of coverage (*id.* at 1).

Southgate complains that New York Marine has yet to pay any of Southgate's defense costs (*see* NYSCEF Doc No. 345, Goodbody reply affirmation, ¶ 21). That may well be the case, yet this in no way bolsters Southgate's claim against KNS. The evidence demonstrates that KNS procured the required insurance under the KNS Contract. Accordingly, Southgate's motion for summary judgment on its breach of contract cross claim is denied (*see contra DiBuono*, 83 AD3d at 652 [affirming grant of summary judgment on the issue of liability on a claim for failure to procure additional insured coverage, where the third-party plaintiff submitted a copy of the lease, requiring additional insured coverage, and a letter from the third-party defendant's insurer, stating that none was issued]; *Jackson*, 111 AD3d at 520).

ii. KNS's Motion for Summary Judgment against Rosenfeld (motion sequence number 006)

KNS argues that it is entitled to summary judgment dismissing Rosenfeld's negligence claims against it, because Rosenfeld cannot show damages. It argues that: (1) Vigilant fully compensated Rosenfeld for damages proximately caused by the July 2012 Flood, namely damage to personal property and alternative living expenses; and (2) the remaining damages that Rosenfeld seeks are either not proximately caused by KNS, consist of expenses voluntarily and unnecessarily incurred or are not recoverable as a matter of law.

Rosenfeld responds that the Vigilant Settlement was a compromise and that it did not compensate her for damages that Vigilant deemed outside its coverage, including: penalties on her retirement account, additional interest on her credit cards, cost of restoring the Apartment to its original condition, attorney's fees, personal assistant fees, engineering and environmental consultant fees, damage to items not compensated by Vigilant, tips paid during her lengthy stay at the hotel and the cost of meals and toiletries. She argues that whether KNS's negligence was the proximate cause of these damages is an issue of fact. In addition, Rosenfeld argues that KNS's motion should be denied as procedurally defective, because KNS presents its evidence and legal argument in an attorney's affirmation. Lastly, Rosenfeld urges the court to search the record and, based on Malatos's testimony, grant summary judgment against KNS on the issue of liability.

"In order to prevail on a negligence claim, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom" (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016] [internal quotation marks and citation omitted]). "A defendant's negligence qualifies as a proximate cause where it is a substantial cause of the events which produced the injury" (*Turturro v City of New York*, 28

NY3d 469, 483 [2016] [internal quotation marks and citation omitted]). "[W]here the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the causal connection is not automatically severed. In such a case, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence" (*id.* at 484 [internal quotation marks and citation omitted]). Determinations with regard to proximate cause and the foreseeability of an intervening act are generally for the fact finder to resolve (*see id.*).

As a preliminary matter, the motion does not merit denial as procedurally defective. While KNS's submission of an attorney's affirmation that presents evidence and legal argument violates 22 NYCRR § 202.8(c), this defect in no way prejudices Rosenfeld. Accordingly, it "shall be disregarded" (CPLR 2001). In addition, "[t]he fact that defendant's supporting proof was placed before the court by way of an attorney's affirmation annexing deposition testimony and other proof, rather than affidavits of fact on personal knowledge, is not fatal to the motion" (*Alvarez*, 68 NY2d at 325).

Turning to the substance of the motion, KNS fails to demonstrate, *prima facie*, that Rosenfeld has sustained absolutely no damages from KNS's alleged negligence, although most categories of damage cannot be the fault of KNS as a matter of law. First, KNS attempts to demonstrate that the Vigilant Settlement fully compensated Rosenfeld for lost and damaged personal property and her alternative living expenses. In support of its motion, KNS points to: (1) the Vigilant Breakdown, which lists $150,022.10 in lost and damaged contents, including $52,135 worth of items lost or damaged by MRA (Vigilant Breakdown at 1); and (2) Simmons's testimony that he apportioned the final settlement payment of $310,000 evenly between contents coverage and alternative living expenses, $155,000 each (*see* Simmons tr at 115, lines16-25; at

116 lines 2-9). Based on this, KNS argues that Rosenfeld was overcompensated, because the final payment for contents ($155,000) covered the cost of items lost or damaged by MRA, damage that, it argues, is not attributable to the July 2012 Flood. KNS also points to Rosenfeld's testimony that Vigilant reimbursed her for her entire stay at the hotel (Rosenfeld tr at 174, lines 14-25; at 175, line 1) and that she had "a very tiny kitchen" and "like a pot, a pan" during her stay (Rosenfeld tr at 186, lines 8-13), to argue that Vigilant compensated her for her alternative living costs and that any additional expenses, such as the cost of eating out rather than cooking and gratuities paid, were a matter of personal choice, not caused by the July 2012 Flood and, therefore, not recoverable.

However, what KNS's calculations miss, is that Rosenfeld was seeking $529,444.58, with $286,7000 of that for hotel costs, and Vigilant ultimately paid $310,000. Moreover, the Vigilant Settlement Agreement does not apportion the settlement amount among Rosenfeld's various claims and Simmons testified that it was not an itemized settlement, but a lump sum paid in satisfaction of all remaining items, which he then "had to take . . . and break it down per claim," referring to the July 12, 2012 claim and the December 13, 2013 claim (Simmons tr at 131; lines 15-25; at 132, lines 2-4). As such, the evidence does not establish, as a matter of law, that Rosenfeld was fully compensated for all of her personal property damages. [3]

Nevertheless, the court, on the record, and for the reasons stated on the record, namely there being no proximate cause, grants that part of the motion dismissing Rosenfeld's claims seeking reimbursement for her personal assistant. Also, to the extent charges for toiletries or food are beyond replacement value for items the flood damaged, these also are not reimbursable because plaintiff would have had to incur these expenses regardless (See Tr. pgs 45-47).

To the extent plaintiff has items of personal property that the flood damaged that were not covered in the insurance payout, damages would be recoverable from KNS. However, to the extent the moving company damaged items, and not the flood, again there is no proximate cause. KNS also correctly argues that its alleged negligence was not the proximate cause of the fees and penalties that Rosenfeld incurred when she was forced to withdraw from her retirement account and rely on her credit cards. Rather, Vigilant's decision to stop payments in August 2013, was responsible for the fees and penalties. The same analysis applies to credit card interest.

KNS also correctly argues that Rosenfeld may not recover her attorney's fees from KNS. "Under the general rule, attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]; *see Congel v Malfitano*, 31 NY3d 272, 290 [2018] [reversing award of attorneys' fees and experts' fees, because "the prevailing litigant ordinarily cannot collect ... attorneys' fees from its unsuccessful opponents"]). Here, Rosenfeld's basis for the claim is the KNS Contract (*see* NYSCEF Doc No. 312, Rosenfeld's brief in opposition to KNS's motion at 14). However, as explained above, she may not proceed under that agreement. Therefore, her attorneys' fees and experts' fees are not recoverable against KNS.

The court also declines to grant summary judgment to Rosenfeld on the issue of liability. Having searched the record, Malatos's testimony does not establish KNS's negligence as a matter of law. By the time Malatos arrive at the scene, water was no longer gushing into the Apartment (Malatos tr at 262, lines 4-18). He testified that he did not see the source of the leak, did not try to locate it and that it was impossible to ascertain the exact source of the leak (*id.* at 280, lines 19-23; at 281, lines 2-16; at 440, lines 14-23; at 748, lines 3-13). While he speculated

that the water entered the Apartment because the wind shifted the tarp protecting the exposed wall, he also made clear that he was only assuming that this was the case (*id.* at 280-281). Lastly, while he directed his crew to secure a second layer of plastic over the exposed wall, "evidence of post-accident repairs is generally inadmissible and may never be admitted to prove an admission of negligence" (*Stolowski v 234 E. 178th St. LLC*, 89 AD3d 549, 549 [1st Dept 2011]). Therefore, Rosenfeld is not entitled to summary judgment on the issue of liability on her negligence claims against KNS.

iii. Southgate's Motions for Summary Judgment against Rosenfeld

1. Motion for Summary Judgment Dismissing the Complaint in Action 2 (motion sequence number 005)

a. Accord and Satisfaction and the Vigilant Settlement Agreement

Southgate contends that Rosenfeld's complaint in Action 2 must be dismissed in its entirety under the theory of accord and satisfaction, because, pursuant to the Vigilant Settlement Agreement, Rosenfeld accepted $948,198.64 in full and final settlement of all possible claims related to the July 2012 Flood. In addition, Southgate argues that Rosenfeld may not claim that Vigilant did not cover certain categories of damage, because the Vigilant Settlement Agreement did not reserve Rosenfeld's right to seek additional damages from other parties and failed to specify claims that were not addressed by the settlement. Rosenfeld responds that the Vigilant Settlement Agreement resolved only the claims she had against Vigilant. In addition, she argues that Simmons's testimony unequivocally demonstrates that Vigilant did not pay for any of the categories of loss she seeks in Action 2.

> "As a general rule, the acceptance of a check in full settlement of a disputed, unliquidated claim, without any reservation of rights, operates as an accord and satisfaction discharging the claim. The theory underlying this common-law rule is that the parties have entered into a new contract discharging all or part of their obligations under the original contract, but there must be a clear

> manifestation of intent by the parties that the payment was made, and accepted, in full satisfaction of the claim" (*Nationwide Registry & Sec. v B & R Consultants*, 4 AD3d 298, 299-300 [1st Dept 2004] [internal citations omitted]).

Here, Southgate focuses on a single portion of the Vigilant Settlement Agreement, stating that Rosenfeld and Vigilant release all claims "arising out of, flowing from or in any way connected with the loss related to the Claims," and ignores the portion that states "as against each other under or arising out of the Policy" (Vigilant Settlement Agreement at 2, ¶ 2). Thus, while Rosenfeld and Vigilant have chosen to "enter[] into a new contract discharging all or part of their obligations under the [Policy]" (*Nationwide Registry & Sec.*, 4 AD3d at 300), that new contract in no way contemplates the release of claims against nonparties to that agreement, such as Southgate (*see Banco Espírito Santo, S.A. v Concessionária Do Rodoanel Oeste S.A.*, 100 AD3d 100, 106 [1st Dept 2012] [stating that an unambiguous contract "must be enforced according to the plain meaning of its terms"]). Therefore, to the extent Southgate seeks summary judgment dismissing the complaint based on the doctrine accord and satisfaction, the motion is denied.

To the extent that Southgate argues that Rosenfeld is now unable to prove damages that were not covered by Vigilant as a collateral source, it misapprehends the burden of proof. "Defendant bears the burden of establishing by clear and convincing evidence that it is entitled to an offset for any collateral source payment that represents reimbursement for a category of loss that corresponds to a category of loss for which damages are awarded in this action" (*Stolowski*, 89 AD3d at 549; *see Johnson v New York City Tr. Auth.*, 88 AD3d 321, 328 [1st Dept 2011] [citation omitted] [explaining that, "[b]ecause CPLR 4545 (a) is in derogation of the common law, its provisions must be strictly construed, and the defendant has the burden of establishing

entitlement to a collateral source offset by clear and convincing evidence"]). Moreover, Simmons testified that

Vigilant did not pay Rosenfeld for any categories of loss outside of its coverage (Simmons tr. at 166, lines 24-25; at 167, lines 2-8), including certain categories of damage that Rosenfeld seeks to recover in Action 2 (*see id.* at 169-170, 173-175).

For the foregoing reasons, to the extent Southgate seeks dismissal of the complaint in Action 2 in its entirety, the motion is denied.

b. Breach of Contract (First Cause of Action)

Southgate argues that the breach of contract claim must be dismissed, because it: (1) complied with all provisions of the Proprietary Lease; (2) did not cause July 2012 Flood; and (3) attempted to remedy the situation. In addition, it argues that, even if there was a breach, there are no damages because: (1) Rosenfeld received $948,198.64 in exchange for settling all of her claims; and (2) Rosenfeld's alleged damages in Action 2 (i.e. credit card fees, penalties on withdrawal from retirement account, cost of meals, etc.) stem from Vigilant's delay in paying her claims. Rosenfeld counters that the motions should be denied, because: (1) Southgate fails to make a prima facie showing of its entitlement to summary judgment; and (2) Signorella's testimony bolsters Rosenfeld's allegations that Southgate breached the Proprietary Lease.

A cause of action for breach of contract requires a plaintiff to demonstrate "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). "The damages for which a party may recover for a breach of contract are such as ordinarily and naturally flow from the non-performance. They must be proximate and certain, or capable of

certain ascertainment, and not remote, speculative or contingent" (*Fruition, Inc. v Rhoda Lee, Inc.*, 1 AD3d 124, 125 [1st Dept 2003] [internal quotation marks and citation omitted]).

Here, Rosenfeld claims that Southgate breached paragraphs 2 and 4 (a) of the Proprietary Lease, because, it failed to: (1) promptly locate and correct the source of the continued water intrusions into the Apartment after the July 2012 Flood; and (2) repair the Apartment "with materials of a kind and quality then customary" to a pre-war building (i.e. plaster rather than sheetrock). In support of its motion for summary judgment, Southgate fails to refute these allegations. Instead, it offers, in a conclusory manner, that "evidence is clear that Southgate had no involvement with the subject water intrusion event and that Southgate, at all times, attempted to remedy the situation and acted prudently" and provides a general citation to Rosenfeld's and Signorella's lengthy deposition transcripts (NYSCEF Doc No. 197, Southgate's brief in motion sequence number 005 at 18). In addition, as explained above, the record does not permit the court to conclude, as a matter of law, that the Vigilant Settlement Agreement fully compensated Rosenfeld for all of her damages arising out of the July 2012 Flood. Southgate's "[f]ailure to make [a] prima facie showing requires a denial of the motion" and the court need not consider Rosenfeld's papers in opposition (*Alvarez,* 68 NY2d at 324; *see also Artalyan, Inc. v Kitridge Realty Co., Inc.*, 79 AD3d 546, 547 [1st Dept 2010]). Therefore, to the extent Southgate seeks summary judgment dismissing Rosenfeld's first cause of action, the motion is denied.

c. Declaratory Judgment and Permanent Injunction (Second and Third Causes of Action)

Southgate argues that Rosenfeld's causes of action for declaratory judgment and permanent injunction must be dismissed as moot, because Justice Freed addressed both during a hearing held on March 8, 2016 and her determination is the law of the case. In addition, Southgate argues the claims are moot, because they seek to compel Southgate to perform certain

repairs to render the Apartment habitable, but Rosenfeld has been living in the Apartment since April 2016 and has testified that the Apartment was habitable and free of mold. Rosenfeld responds that the March 2016 hearing dealt with her order to show cause, seeking a preliminary injunction and a temporary restraining order, and that there was no final adjudication of her claims on the merits. In addition, she states that the Apartment continued to suffer from water intrusions after she resumed occupancy.

The law of the case "doctrine is only applicable to legal determinations that were necessarily resolved *on the merits* in a prior decision" (*Matter of Michael R. v Amanda R.*, 175 AD3d 1134, 1139 [1st Dept 2019] [internal quotation marks and citation omitted]). "[A] preliminary injunction, even when issued after an evidentiary hearing, depends upon probabilities, any or all of which may be disproven when the action is tried on the merits . . ." (*J.A. Preston Corp. v Fabrication Enters.*, 68 NY2d 397, 406 [1986]). Therefore, "[t]he granting or refusal of a temporary injunction does not constitute the law of the case or an adjudication on the merits, and the issues must be tried to the same extent as though no temporary injunction had been applied for" (*Walker Mem. Baptist Church, Inc. v Saunders*, 285 NY 462, 474 [1941]; *see London Paint & Wallpaper Co., Inc. v Kesselman*, 158 AD3d 423, 423 [1st Dept 2018]).

Here, Rosenfeld seeks declaratory judgment determining whether she was constructively evicted and whether her obligation to pay maintenance was suspended until the Apartment was restored to its original condition and made habitable and free of water intrusions. In addition, she seeks a permanent injunction to compel Southgate to identify and repair the source of the water intrusions and to restore the Apartment to its original condition (i.e. with plaster walls). The court did not determine any of these issues on the merits at the March 8, 2016 hearing.

Rosenfeld had moved by order to show cause for a preliminary injunction, prohibiting Southgate from commencing a summary proceeding based on the Default Notice and compelling it to identify and repair the source of the water intrusion and to restore the Apartment to its original condition. Justice Freed issued the Interim Order, which continued the TRO already in place and directed Southgate to complete certain repairs, including using "'green' or 'purple' board sheetrock" to rebuild the walls (NYSCEF Doc No. 279). However, in issuing the Interim Order, the court did not determine whether the Proprietary Lease required that the walls be rebuilt with plaster. Instead, Justice Freed observed that "obviously [the parties] [were] going to argue that one out" (NYSCEF Doc No. 278 at 21, lines 21-26; at 22, line 2). At the March 8, 2016 hearing, Southgate represented that it had substantially complied with the Interim Order and the court denied Rosenfeld's order to show cause in its entirety, lifted the TRO and directed Rosenfeld to begin paying her monthly maintenance (NYSCEF Doc No. 194). Because the previous orders were in response to Rosenfeld's request for a preliminary injunction and a temporary restraining order, and did not address the merits, they do not constitute law of the case (*see London Paint & Wallpaper Co., Inc.*, 158 AD3d at 423).

Nor are the claims moot based on Rosenfeld's testimony that she resumed occupancy of the Apartment in April 2016 and found the Apartment to be habitable and mold-free (Rosenfeld tr. at 428 lines 14-18; at 461, lines 9-18). She also testified that she suspected that the Apartment continued to suffer from leaks (*id.* at 248, lines 11-18; at 461, lines 6-8). In addition, the parties continue to dispute the extent of Southgate's duty to repair the Apartment and Rosenfeld's obligation to pay maintenance for the period of her absence from the Apartment.

Therefore, to the extent Southgate seeks dismissal of the second and third causes of actions as moot, summary judgment is denied.

d. Breach of Fiduciary Duty/Bad Faith (Fourth Cause of Action)

Southgate argues that the breach of fiduciary duty claim must be dismissed, because there is no evidence that Southgate breached its duty to Rosenfeld. It claims that, to the contrary, the evidence demonstrates that Southgate responded appropriately to the July 2012 Flood, by: (1) immediately sending all of its employees to clean up the water; and (2) paying for all of the repairs to the Apartment. In addition, it argues that the claim must be dismissed as duplicative of the breach of contract cause of action. Rosenfeld counters that the motion must be denied, because the claim is not premised on Southgate's immediate response to the July 2012 Flood, but on its acts and omissions in the months and years that followed. She argues that Southgate, therefore, fails to make a prima facie showing of entitlement to summary judgment. In addition, she argues that the claim is not duplicative of the breach of contract claim, because it arises out of conduct wholly district from Southgate's obligation under the Proprietary Lease.

To establish a breach of fiduciary duty claim, a plaintiff must demonstrate: (1) the existence of a fiduciary relationship; (2) misconduct by the defendant; and (3) damages (*Burry v Madison Park Owner LLC*, 84 AD3d 699, 700 (1st Dept 2011). "[A] cooperative corporation has a fiduciary duty to treat its shareholders fairly and evenly, and must discharge that duty with good faith and scrupulous honesty. Any departure from uniform treatment of shareholders must be in furtherance of a justifiable and bona fide business purpose" (*Smolinsky v 46 Rampasture Owners*, 230 AD2d 620, 621-22 [1st Dept 1996] [internal citations omitted]). However, "[a] cause of action for breach of fiduciary duty which is merely duplicative of a breach of contract claim cannot stand" (*William Kaufman Org. v Graham & James*, 269 AD2d 171, 173 [1st Dept 2000]).

Here, the breach of fiduciary duty claim is premised on a multitude of distinct allegations, including that Southgate: (1) falsely reported to its insurance carrier that Rosenfeld performed a gut renovation to the Apartment; (2) failed to notify Rosenfeld that walls would be rebuilt with sheetrock, not plaster; (3) initially refused to provide Rosenfeld with a copy of the Insight Report; (4) refused to waive the moratorium on work, despite the uninhabitable condition of the Apartment; and (5) sent the Default Notice, while the Apartment remained uninhabitable. In addition, the claim is premised on the allegations of delayed and inadequate repairs and mold remediation.

To the extent that the breach of fiduciary duty claim seeks to recover for Southgate's alleged failure to make timely and adequate repairs to the Apartment, including its failure to use plaster rather than sheetrock, the claim is duplicative of the breach of contract claim. Therefore, that portion of the claim is dismissed (*see Granirer v Bakery, Inc.*, 54 AD3d 269, 272 [1st Dept 2008] [finding that "[t]he cause of action for breach of fiduciary duty should have been dismissed as against the cooperative. . . , because it [was] merely duplicative of the cause of action for breach of the proprietary lease"]).

However, Southgate makes no showing with respect to the remaining grounds for the claim. Therefore, to the extent the claim is premised on acts distinct from Southgate's failure to repair and maintain the Apartment and the Building, Southgate's motion for summary judgment dismissing the claim is denied (*see Alvarez,* 68 NY2d at 324).

e. Breach of Warranty of Habitability, Breach of Quiet Enjoyment/Constructive Eviction, Violation of the HMC and the MDL and Negligence (Fifth through Eighth Causes of Action)

Southgate argues that the fifth through eighth causes of actions should be dismissed as duplicative of the breach of contract claim, because they all stem from Southgate's alleged

failure to perform its duties under the Proprietary Lease and because they all seek the same indeterminate damages. Rosenfeld counters that these claims are premised on acts wholly district from those underlying the breach of contract claim and, unlike that claim, they also seek punitive damages.

The fifth cause of action for breach of the warranty of habitability is not duplicative of the breach of contract claim. It is not premised on Southgate's duty to repair and maintain the Building under the Proprietary Lease, but on Real Property Law § 235–b (1), which provides that every residential lease contains an implied warranty "that the premises . . . . are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety." In other words, it "sets forth a minimum standard to protect tenants against conditions that render residential premises uninhabitable or unusable" (*Solow v Wellner*, 86 NY2d 582, 588 [1995]). The statute is not "coextensive with the parties' lease agreement" and is "inten[ded] to insure the independence of the warranty of habitability from the specific terms of a lease" (*id.* at 589). Therefore, the fifth cause of action is not duplicative of the breach of contract claim.

Nor is the sixth cause of action for breach of the covenant of quiet enjoyment and constructive eviction duplicative of the breach of contract claim, as it is premised on a different provision of the Proprietary Lease, namely paragraph 10, entitled "Quiet Enjoyment," rather than paragraphs 2 and 4 (a), dealing with "Lessor's Repairs" and "Damage to Apartment or Building." Moreover, the cause of action alleges not only that Southgate failed to repair the Apartment, but that the failure "forced [Rosenfeld] to relocate" (complaint in Action 2, ¶ 144; *see* Granirer, 54 AD3d at 272 [finding that an abatement was properly granted pursuant to the

terms of the proprietary lease and that "[p]laintiffs properly pleaded a cause of action for breach of the covenant of quiet enjoyment by alleging a constructive eviction, i.e. that the conditions in their home, attributable to the cooperative's failure to make the necessary repairs, compelled them to move out"). Therefore, the sixth cause of action is not duplicative of the breach of contract claim.

However, the seventh cause of action, alleging violations of HMC § 27-2005 and MDL § 78, is duplicative of the breach of contract claim. HMC § 27-2005 and MDL § 78 imposes on a landlord of a multiple dwelling the "obligation . . . to keep residential property in good repair" (*Eyedent v Vickers Mgt*., 150 AD2d 202, 204 [1st Dept 1989]). The seventh cause of action alleges that Southgate failed to do so (complaint in Action 2, ¶¶ 148-150). This is identical to the breach of contract claim, which alleges, among other things, that Southgate breached paragraph 2 of the Proprietary Lease, requiring it to "keep the Building in good repair." Because the seventh cause of action is premised on the same facts and seeks the same indeterminate damages, "in an amount to be determined at trial" (*id.*, ¶¶ 120, 150), as the breach of contract claim, it is dismissed as duplicative (*cf Duane Reade v SL Green Operating Partnership, LP*, 30 AD3d 189, 190 [1st Dept 2006] [internal citations omitted] ["a tort cause of action that is based upon the same facts underlying a contract claim will be dismissed as a mere duplication of the contract cause of action, particularly where, as here, both seek identical damages"]).

Likewise, the eighth cause of action for negligence must be dismissed as duplicative.

> "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 quotations marks and citations omitted]).

Here, the negligence claim relies on Southgate's failure to exercise reasonable care in, among other things: hiring a competent contractor to perform façade repairs; identifying and correcting the source of the water intrusions; remediating the mold found in the Apartment; and retaining a licensed architect or engineer to prepare plans and specifications to address years of water intrusions. This is nothing but a restatement of the breach of contract claim, couched in terms of negligent performance of work. Additionally, Rosenfeld "fails to include a single allegation that contains any distinction between the damages applicable to either claim" (*id.* at 712). Rather, she seeks an unspecified $2 million in damages. While she also seeks punitive damages, "[a] demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action'" (*Miller v Allstate Indem. Co.*, 132 AD3d 1306, 1308 [4th Dept 2015], quoting *Rocanova v Equitable Life Assur. Socy. of U.S.,* 83 NY2d 603, 616 [1994]). Therefore, the eighth cause of action is dismissed as duplicative of the breach of contract claim (*see City of New York v 611 W. 152nd St.*, 273 AD2d 125, 126 [1st Dept 2000] ["claims based on negligent or grossly negligent performance of a contract are not cognizable"]).

For the forgoing reasons, to the extent that Southgate seeks summary judgment dismissing the seventh and eighth causes of action in Action 2, the motion is granted. The motion is denied as to the fifth and sixth causes of action.

f. Punitive Damages

Of the remaining causes of action, Rosenfeld seeks punitive damages in connection with her claims for breach of fiduciary duty (fourth cause of action), breach of the warranty of habitability (fifth cause of action) and breach of the covenant of quiet enjoyment and

constructive eviction (sixth cause of action). The parties dispute whether Rosenfeld may seek punitive damages.

"[P]unitive damages are awarded only in singularly rare cases such as cases involving an improper state of mind or malice or cases involving wrongdoing to the public," where the conduct "was so outrageous as to evince a high degree of moral turpitude and showing such wanton dishonesty as to imply a criminal indifference to civil obligations" (*Bothmer v Schooler, Weinstein, Minsky & Lester*, 266 AD2d 154, 154 [1st Dept 1999] [internal quotation marks and citations omitted]; *see Marinaccio v Town of Clarence*, 20 NY3d 506, 511 [2013] ["the standard for imposing punitive damages is a strict one and punitive damages will be awarded only in exceptional cases"]).

> "With respect to this State's strict housing code standards and statutes, made enforceable through civil and criminal sanctions and other statutory remedies, it is within the public interest to deter conduct which undermines those standards when that conduct rises to the level of high moral culpability or indifference to a landlord's civil obligations. Therefore, it has been recognized that punitive damages may be awarded in breach of warranty of habitability cases where the landlord's actions or inactions were intentional and malicious" (*Minjak Co. v Randolph,* 140 AD2d 245, 249-50 [1st Dept 1988]).

Here, as concerns fifth and sixth causes of action, the record does not support a dismissal of punitive damages. While Southgate points to the numerous renovations and mold remediations it undertook at its own expense, Rosenfeld points out that the Local Law 11 work on the Building was inexplicably delayed. While Local Law 11 restorations were underway at the complex in January 2016, the Building was not scheduled for work until 2017 (*see* NYSCEF Doc No. 278 at 18, lines 20-26). This, despite: (1) Rosenfeld's numerous complaints over the years about leaks in her Apartment; (2) Trias's determination, in 2013, that one of the leaks in

the Apartment was caused by a penthouse wall that "need[ed] major reconstruction" (February 2013 Trias Report at 5); and (3) a statement by Southgate's attorney's that there were no other apartments with similar water intrusion issues (NYSCEF Doc No. 278 at 19, lines 2-4). Based on the foregoing, whether Southgate's delay in making necessary repairs "rises to the level of high moral culpability or indifference to a landlord's civil obligations" (*Minjak Co.*, 140 AD2d at 249) is an issue of fact for the jury (*see Swersky v Dreyer & Traub*, 219 AD2d 321, 328 [1st Dept 1996] [finding that "claims for punitive damages were . . . improperly dismissed," because it was for the jury to decide whether the conduct at issue was "so reprehensible as to warrant punitive damage"]; *Century Apts. v Yalkowsky*, 106 Misc 2d 762, 766 [Civ Ct, NY County 1980] [awarding punitive damages where a one-year delay in the "correction of [a] leaking terrace was a deliberate decision"]).

However, as concerns the fourth cause of action for breach of the fiduciary duty, Rosenfeld does not set forth any conduct that is "so outrageous as to evince a high degree of moral turpitude" (*Bothmer*, 266 AD2d at154). Accordingly, to the extent Southgate seeks summary judgment dismissing the claim for punitive damages, the motion is granted in connection with the fourth cause of action only.

g. Attorneys' Fees (Tenth Cause of Action)

Southgate argues that the tenth cause of action must be dismissed, because the attorneys' fees language it quotes does not appear anywhere in the Proprietary Lease. As the court has granted Rosenfeld's motion to amend the complaint in Action 2 to correct this error, this portion of Southgate's motion for summary judgment is denied as moot (*see Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005] [stating that, where "the original complaint was superseded by

the amended complaints, the sufficiency of the allegations in the earlier complaints is rendered academic"]).

2. Motion for Summary Judgment Dismissing Rosenfeld's Counterclaims in Action 3 (motion sequence number 005)

Southgate contends that it is entitled to summary judgment dismissing Rosenfeld's counterclaims in Action 3, because she failed to provide written notice of her intended counterclaims 30 days before asserting them, as required by paragraph 45 of the Proprietary Lease. Rosenfeld counters that she has been in constant communication with Southgate regarding its responsibility to restore the Apartment to its original condition. In addition, she argues that she provided Southgate with written notice as early as October 18, 2013 and that Southgate received additional written notice through Action 2, which arises out of the same facts as Action 3. In any event, Rosenfeld argues, at best, paragraph 45 bars only the first and fourth counterclaims, as those are the only ones that are based on Southgate's failure to comply with its obligations under the law or the Proprietary Lease.

"A written agreement that is clear, complete and subject to only one reasonable interpretation must be enforced according to the plain meaning of the language chosen by the contracting parties" (*Brad H. v City of New York*, 17 NY3d 180, 185 [2011]).

Here, paragraph 45 provides that, where an "action, defense or counterclaim is based upon the Lessor's failure to comply with its obligations under this lease or any law, ordinance or governmental regulation," that "such failure shall have continued for at least thirty (30) days before such action or proceeding was commenced" and that Lessee give prior "written notice thereof" to Lessor. The "thereof" plainly refers to the "Lessor's failure to comply with its obligations" under the Lease or the law and does not require Rosenfeld to provide Southgate

with written notice of the actual causes of action, affirmative defenses or counterclaims she intends to assert.

Rosenfeld provided Southgate with the required notice. Her counterclaims are all related to Southgate's alleged: failure to maintain the Building, resulting in persistent leaks in the Apartment; its failure to timely and properly repair the Apartment; and service of the Default Notice. By letter dated October 18, 2013, Rosenfeld requested documentation of the recent repairs to the Building's façade and roof to assess whether the work adequately addressed the persistent water leaks that the Apartment had been experiencing since 1999 (NYSCEF Doc No. 269). Then, by letter dated January 16, 2014, Rosenfeld informed Southgate of Olmsted's findings, including the "existing mold condition in the Apartment," and provided a copy of the December 2013 Olmsted Report. The letter also informed Southgate that the July 2012 Flood had forced Rosenfeld to vacate the Apartment, that she and her daughter "continue[d] to live in a hotel as a result of the [Southgate's] failure to, among other things, properly maintain the Building." (NYSCEF Doc No. 270 at 1, 2.) The letter also informed Southgate that its "actions (or lack thereof), amount[ed] to a breach of the warranty of habitability and a breach of the covenant of quiet enjoyment, among other things" (*id.* at 2). Moreover, Rosenfeld filed her complaint in Action 2 on January 29, 2016, almost a year before Southgate commenced Action 3 on December 11, 2017. Rosenfeld's complaint details all of Southgate's alleged failures to fulfill its obligations, including allegations concerning the impropriety of the Default Notice (*see* complaint in Action 2, ¶¶ 107-115). "Southgate agrees with Rosenfeld's assertion that the counterclaims are based on the identical set of facts and circumstances as the claims in Action 2" (NYSCEF Doc No. 346, Goodbody reply affirmation, ¶ 26). In light of the foregoing, Rosenfeld provided Southgate with written notice of the facts constituting her counterclaims at least 30

days before asserting them. Therefore, to the extent that Southgate seeks summary judgment dismissing Rosenfeld's counterclaims in Action 3, the motion is denied.

3. Motion for Summary Judgment on Southgate's Causes of Action in Action 3 (motion sequence number 007)

a. Breach of Contract (First Cause of Action)

Southgate argues that it is entitled to summary judgment on its breach of contract cause of action, because Rosenfeld stopped paying maintenance in August 2013 and the Apartment was restored and habitable as early as January 2013. In addition, it argues that Rosenfeld is not entitled to an abatement beyond the one she has already received, because all of Rosenfeld's affirmative defense seeking abatement—breach of the Proprietary Lease, breach of the warranty of habitability, breach of the covenant of quiet enjoyment and constructive eviction—fail as a matter of law.

Rosenfeld counters that Southgate is not entitled to summary judgment, because it fails to submit invoices or other evidence demonstrating the amount owed. In addition, she argues that the evidence demonstrates that the Apartment was not habitable from July 2012 until April 2016. She urges the court to search the record and grant summary judgment in her favor, dismissing Southgate's complaint in Action 3 and granting judgment on the issue of liability on her counterclaims.

Here, Southgate fails to make a prima facie showing of entitlement to summary judgment. While Rosenfeld does not deny that she stopped paying rent, Southgate does not demonstrate what the maintenance was or what assessments, fees and expenses constitute the additional rent that it seeks to recover. In fact, in its submissions on this motion, Southgate does not mention the amount that it seeks to recover, much less explain how it arrived at that amount. Its evidentiary showing consists entirely of Rosenfeld's testimony that she stopped paying

maintenance in August 2013. While "[p]ossible discrepancies as to the amount owed do not present issues of fact precluding summary judgment," here, Southgate makes absolutely no showing of the amount owed. Accordingly, the motion is denied (*contra Matter of Moskowitz v Jorden*, 27 AD3d 305, 306 [1st Dept 2006] [finding that summary judgment should have been granted in owner's favor on the issue of rent arrears, where "[t]he claim for arrears owed . . . was not denied, and the owners clearly explained and documented how the monthly rent had been determined"]; *Traders Co. v AST Sportswear, Inc.*, 31 AD3d 276, 277 [1st Dept 2006] [finding that the plaintiff in an action for unpaid rent met his burden on a motion for summary judgment, where "proof in admissible form was submitted which established the unpaid base and the additional rent due of $94,827.18 . . ."].

Moreover, in her opposition, Rosenfeld raises issues of fact as to whether she is entitled to an abatement based on her sixteenth affirmative defense for breach of the Proprietary Lease, breach of the warranty of habitability and breach of the covenant of quiet enjoyment and constructive eviction.

First, Rosenfeld claims that Southgate breached the Proprietary Lease by failing to repair and/or maintain the Building and the Apartment. Southgate argues that the affirmative defense is without merit, because Rosenfeld cannot demonstrate "Lessor's wilful [sic] acts or gross negligence," as required to maintain a claim for "abatement of rent or other compensation or claim of eviction" under the Proprietary Lease (Proprietary Lease, ¶ 29 [a]). However, as discussed above, Southgate has never explained why it failed to prioritize the Building for Local Law 11 work.[4]

Its delay of the work may lead a factfinder to conclude that Southgate acted willfully or with gross negligence, warranting an abatement. In addition, Microecologies, that Southgate

hired to test for mold in the Apartment, repeatedly recommended that plaster walls and ceilings be repaired with plaster or concrete board rather than sheetrock, as the latter "provides ideal nutrient to support toxic fungal growth in the presence of water damage" (October 2014 Microecologies Report at 4; *see also* April 2015 Microecologies Report at 3; May 2015 Microecologies Report at 5). Yet, Southgate offers no explanation for why it continued to use sheetrock, despite recommendations to the contrary and the Apartment's long history of water intrusions. Because the foregoing may support a reasonable inference that Southgate acted willfully or with gross negligence, whether Rosenfeld is entitled to an abatement based on Southgate's failure to timely and adequately address the water intrusions into the Apartment raises an issue of fact.

Southgate's invocation of the business judgment rule does not require a different result. The rule provides that:

> "a court's inquiry is limited to whether the board acted within the scope of its authority under the bylaws (a necessary threshold inquiry) and whether the action was taken in good faith to further a legitimate interest of the condominium. Absent a showing of fraud, self-dealing or unconscionability, the court's inquiry is so limited and it will not inquire as to the wisdom or soundness of the business decision" (*Perlbinder v Board of Mgrs. of 411 E. 53rd St. Condominium*, 65 AD3d 985, 989 [1st Dept 2009] [internal quotation marks and citations omitted]).

However,

> "[a] board's decision is not entitled to protection under the business judgment rule, . . . when the action taken has no legitimate relationship to the welfare of the cooperative, deliberately singles out individuals for harmful treatment, is taken without notice or consideration of the relevant facts, or is beyond the scope of the board's authority" (*Nainan v 715-723 Sixth Ave. Owners Corp.*, 177 AD3d 489, 490 [1st Dept 2019] [internal quotation marks and citation omitted]).

While Southgate argues that its decisions regarding repairs are shielded from the court's review, it fails to demonstrate that its decisions to delay Local Law 11 work or to use sheetrock were made "in good faith" or in furtherance of "a legitimate interest of the condominium" (*Perlbinder*, 65 AD3d at 989). For the reasons set out above, whether Southgate "deliberately singled out [Rosenfeld] for harmful treatment" or acted "without notice or consideration of the relevant facts" present issues of fact precluding summary judgment (*Nainan*, 177 AD3d at 490 [finding that whether the coop defendants were protected by the business judgment rule presented "issues of fact that preclude summary dismissal of the breach of fiduciary duty claim on that basis"]; c*ontra Baxter St. Condominium v LPS Baxter Holding Co., LLC*, 126 AD3d 417, 418 [1st Dept 2015] [holding that the condominium board's decision "[was] protected by the business judgment rule," where "[t]he board's determinations [were] supported by," among other things, "an engineer's report identifying various defects as the cause of the water infiltration . . . and recommending remedial measures . . ."]).

Second, whether Rosenfeld is entitled to an abatement based on Southgate's breach of the warranty of habitability also presents issues of fact. In general, "a breach of the implied warranty of habitability has occurred" and the lessee may be entitled to an abatement, "[i]f, in the eyes of a reasonable person, defects in the dwelling deprive[d] the [lessee] of those essential functions which a residence is expected to provide . . ." (*Park W. Mgt. Corp. v Mitchell*, 47 NY2d 316, 328 [1979]).

> "A decision as to a breach of the warranty will turn on the extensiveness of the breach, the manner in which it impacted on the health of the tenant and even the measures taken by the landlord to alleviate the violation. . . .The question is rarely capable of resolution by papers . . . " (*Suarez v Rivercross Tenants' Corp.*, 107 Misc 2d 135, 140 [App Term, 1st Dept 1981] [internal citations omitted]).

Here, Southgate submits Trias's affidavit in support of its motion, in which he states that the Apartment was fully restored by January 2013, that there "were no conditions present that would render the Unit untenantable" and that "[a]ny residual moisture issues that did arise after this date were extremely minor" (Trias aff, ¶ 8). He also states that he identified two sources for the leaks, including a penthouse wall that was in need of major reconstruction, and that he recommended temporary measures be taken until Southgate began its planned building-wide repairs (*id.*, ¶¶ 10, 11). He states that Southgate implemented his recommendations and that the "waterproofing protection lasted until [Southgate] commenced its major reconstruction project, which occurred five (5) years later" (*id.*, ¶ 12). In addition, Southgate points to mold testing done by Insight on March 29, 2013, which found that "the Apartment [was] . . . safe for occupancy" (Insight Report at 1). Lastly, it argues that it always acted promptly to remedy any mold or moisture conditions after they were found, by engaging professionals to assess, test, and remedy the issues.

In opposition, Rosenfeld submits Olmsted's three reports, his affidavit in opposition to motion sequence number 007 (Olmsted 12/19/2019 aff), Microecologies' four reports and Signorella's deposition transcript. [5]

Olmsted's and Microecologies' reports document the presence of mold and continued presence of moisture in the Apartment at various points between December 2013 and December 2015 (*see* December 2013 Olmsted Report at 7 [finding that the Apartment "[was] not sufficiently decontaminated and there [was] still evidence of mold colonization and contamination"]; October 2014 Microecologies Report at 2 , 3 [noting evidence of ongoing water intrusion, although air sampling of airborne mold was within acceptable range]; April 2015

Microecologies Report at 1 [finding "heavy levels of mold growth" on the windowsill in the master bedroom]; May 2015 Microecologies Report at 1-2 [finding additional mold in the master bedroom, the second bedroom, the living room and the dining room, as well as additional evidence of continued water intrusion]; June 2015 Microecologies Report at 1 [finding no visible mold growth, but that certain walls registered damp to wet, which "suggest[ed] that rainwater infiltration [was] still occurring"]; November 2015 Olmsted Report at 3 [finding evidence of an "active water intrusion" that was "entering through the exterior masonry" and evidence of "chronic water intrusion around the window[s]" in the living room and master bedroom]; December 2015 Olmsted Report at 2 [confirming "active water intrusion through the exterior masonry" around the master bedroom and living room windows]). In addition, the November 2015 Olmsted Report states that the newly installed sheetrock walls "ha[d] no insulation or vapor barrier" and were "not a mold resistant material" (November 2015 Olmsted Report at 3). It warns that "[i]nstalling sheetrock over damp masonry walls will result in mold growth over time" (*id.*).

The reports also make recommendations for abatement that required Rosenfeld's continued absence from the Apartment (*see* December 2013 Olmsted Report at 7 [concluding that the Apartment was not ready for occupancy until, among other things, what remained of the original flooring was removed]; April 2015 Microecologies Report [recommending the removal of sheetrock in areas with water damage or mold and various precautions to avoid contamination, including the use of negative air, HEPA vacuums and respirators]; May 2015 Microecologies Report at 4 [making recommendation that would "unavoidably result in the release of high levels of dust, which may include fungi and bacteria"]).

In his affidavit, Olmsted further explains why the Apartment was not habitable while the moisture issues persisted. He states that, according to the Institute for Inspection Cleaning and Restoration Certification (IICR), a national consensus organization, "moisture levels as low as 17% can support mold growth" (NYSCEF Doc No. 324, Olmsted 12/19/2019 aff, ¶ 24). He points out that Trias's own moisture readings at the Apartment, taken on June 18, 2015, ranged above 20% (*id.*, ¶ 25; *see* July 2015 Trias Report at 4). Based on his professional experience and the IICRC guidelines, Olmsted states these moisture levels in sheetrock "will lead to mold growth" (Olmsted 12/19/2019 aff, ¶ 25). He also states that "[t]he mere presence of moisture and presence of mold colonization are health factors for occupants" (*id*., ¶ 28), even when found in inaccessible areas (*id.*, ¶ 30).

Lastly, during her deposition, Signorella testified that the Apartment was not habitable at various stages (Signorella 4/25/19 tr at 180, lines 18-21), specifically: on April 1, 2015, because Microecologies found evidence of mold (*id.* at 120, lines 8-25; at 121, lines 2-14); on May 7, 2015, based on the documented presence of mold (*id.* at 126); and as of October 27, 2015, because Southgate had not done the restoration work after the remediation in June (*id.* at 154, lines 5-19, at 157, lines 13-17). She also testified that, as of January 19, 2016, the Apartment had not been repaired (*id.* at 169, lines 21-24).

In light of the foregoing, whether Southgate breached the warranty of habitability, entitling Rosenfeld to an abatement, presents an issue of fact. Lastly, Rosenfeld is not barred from asserting claims for breach of the covenant of quiet enjoyment and constructive eviction. To maintain a claim for breach of the covenant of quiet enjoyment there must be eviction, actual or constructive, "and further, . . . plaintiff must have performed all covenants which are conditions precedent to his right to insist upon the covenant . . ." (*Dave Herstein Co. v Columbia*

Pictures Corp., 4 NY2d 117, 121 [1958]). Southgate argues that this cause of action is without merit, because: (1) Rosenfeld failed to meet the condition precedent of providing prior written notice, pursuant to paragraph 45 of the Proprietary Lease; and (2) the Proprietary Lease provides immunity, except in instances of willful misconduct or gross negligence. As discussed above, Rosenfeld satisfied the prior written notice requirement. Also as discussed above, Southgate's delay in commencing Local Law 11 work on the Building and its use of sheetrock to repair the Apartment raise issues of fact as to whether it acted willfully or with gross negligence. Therefore, whether Rosenfeld is entitled to an abatement for breach of the covenant of quiet enjoyment and constructive eviction also presents issues of fact.

For the foregoing reasons, to the extent Southgate seeks summary judgment on its breach of contract claim, the motion is denied. Likewise, to the extent Rosenfeld seeks summary judgment on the issue of liability on her counterclaims, the motion denied.

b. Unjust Enrichment and Quantum Meruit (Second and Third Causes of Action)

Southgate is not entitled to summary judgment on its second and third causes of action for unjust enrichment and quantum meruit, both seeking recovery of unpaid maintenance. Here, there is no dispute as to the existence of a contract governing the subject matter. As such, Southgate may not proceed in quasi contract (*see Sabre Intl. Sec., Ltd. v Vulcan Capital Mgt., Inc.*, 95 AD3d 434, 438 [1st Dept 2012] [stating that the existence of an express agreement, governing the same subject matter, "precludes recovery in quasi contract for events arising out of the same subject matter"]; *see also Corsello v. Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012] [stating that the theory of unjust enrichment is "not a catchall cause of action to be used when others fail" and "is not available where it simply duplicates, or replaces, a conventional contract or tort claim"]).

c. Account Stated (Fourth Cause of Action)

Southgate argues that it is entitled to summary judgment on its fourth cause of action for account stated. It relies on Rosenfeld's continued timely payment of her maintenance during the first year of her absence from the Apartment, between July 2012 and August 1, 2013. It argues that, because Rosenfeld paid a portion of the indebtedness, Southgate is entitled to summary judgment on the amount owed for the entire period of her absence. Rosenfeld counters that there can be no account stated, because Southgate was well aware of her position that she was not obligated to pay maintenance for an apartment that was uninhabitable.

"[W]here an account is rendered showing a balance, the party receiving it must, within a reasonable time, examine it and object, if he disputes its correctness. If he omits to do so, he will be deemed by his silence to have acquiesced, and will be bound by it as an account stated . . . ." (*Peterson v Schroder Bank & Trust Co*., 172 AD2d 165, 166 [1st Dept 1991] [internal quotation marks and citation omitted]; *see also Federal Express Corp. v Federal Jeans, Inc.*, 14 AD3d 424, 424 [1st Dept 2005]). "[E]ither retention of bills without objection or partial payment may give rise to an account stated" (*Morrison Cohen Singer & Weinstein, LLP v Waters*, 13 AD3d 51, 52 [1st Dept 2004]; *see also Parker, Chapin, Flattau & Klimpl v Daelen Corp.*, 59 AD2d 375, 378 [1st Dept 1977] [stating that "[partial] payment constituted an acknowledgment of the validity of the bill, thereby establishing it as an account stated"]).

Here, Southgate is not entitled to summary judgment on its cause of action for account stated. It fails to demonstrate, prima facie, that Rosenfeld either retained the disputed invoices without objection or made a partial payment on the debt. It is undisputed that Rosenfeld stopped paying maintenance as of August 1, 2013 (Rosenfeld tr at 347, lines7-11). However, Southgate does not claim that Rosenfeld stopped paying maintenance without notifying it of her view that

the Apartment remained uninhabitable. Rather, it argues that having paid her monthly invoices for a year while the Apartment was uninhabitable, Rosenfeld could not dispute any new invoices generated during her continued absence from the Apartment. Southgate does not present any supporting authority for this position and mistakenly relies on *Shea & Gould v Burr* (194 AD2d 369 [1st Dept 1993]). In *Shea & Gould*, the "plaintiff sent defendants a bill for $55,812.04 for legal services performed and expenses incurred" and the defendant retained the bill for five months without objection, before making a partial "payment in the amount of $5,000" (194 AD2d at 370). Here, the facts are inapposite. Southgate never presented Rosenfeld with an invoice for all unpaid maintenance that she then paid a portion of. Rather, Southgate relies on her initial timely payment of monthly invoices and argues that this demonstrates partial payment of a debt that did not exist at the time that she made the payments. Having failed to demonstrate that Rosenfeld retained the unpaid invoices without objection or that she made a partial payment thereon, Southgate's motion for summary judgment on account stated must be denied.

d. Attorneys' Fees (Fifth Cause of Action)

Having denied Southgate's motion for summary judgment in its entirety, at this time, Southgate is not entitled to an award of attorney's fees pursuant paragraph 25 of the Proprietary Lease.

C. Motion to Dismiss (motion sequence number 007)

Southgate moves, pursuant to CPLR 3211 (b), to dismiss and/or strike Rosenfeld's affirmative defenses, contending that they are devoid of factual allegations and are without merit in law.

On a CPLR 3211 (b) motion to dismiss affirmative defenses, "the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed" (*534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 542 [1st Dept 2011]). "[T]he plaintiff bears the burden of demonstrating that the defenses are without merit as a matter of law. . . . A defense should not be stricken where there are questions of fact requiring trial" (*id.* at 541, 542).

As a preliminary matter, to the extent that Southgate argues that Rosenfeld's affirmative defenses must be stricken for failure to provide prior written notice pursuant to paragraph 45 of the Proprietary Lease, the argument fails for the reasons discussed above. The court only adds that: (1) nothing in paragraph 45 requires a formal "Default Notice" and the court shall not "add or excise terms or distort the meaning of those used to make a new contract for the parties" (*Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]); and (2) as concerns Rosenfeld's affirmative defense of breach of the warranty of habitability, the defense is not waivable and "a landlord may not require prior written notice of a defective condition before a tenant may invoke the warranty" (*Matter of Moskowitz v Jorden*, 27 AD3d 305, 306 [1st Dept 2006] [stating that while notice of the specific defective condition is required, a landlord may not require prior written notice]; *see also Vanderhoff v Casler*, 91 AD2d 49, 51 [3d Dept 1983] [stating that "[c]ompelling the tenants to first supply written notice critically circumscribes their ability to assert important rights which the Legislature intended them to have"]).

Rosenfeld's first affirmative defense, that the complaint fails to state a cause of action, is not subject to dismissal. The defense it is mere "surplusage" and "may be asserted at any time" (*Riland v Todman & Co.*, 56 AD2d 350, 352 [1st Dept 1977]; *see also Mazzei v Kyriacou*, 98

AD3d 1088, 1089 [2d Dept 2012] ["[n]o motion by the plaintiff lies under CPLR 3211[b] to strike the defense [of failure to state a cause of action], as this amounts to an endeavor by the plaintiff to test the sufficiency of his or her own claim"]).

The motion is granted as to the second affirmative defense, that Southgate's claims are barred by documentary evidence. In her opposition to the instant motion, Rosenfeld specifies that her documentary evidence consists of Microecologies' reports, Olmsted's reports and the Interim Order. To sustain a defense based on documentary evidence, "the documents relied upon must definitely dispose of [the] plaintiff's claim" (*Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014] [internal quotation marks and citation omitted]). As made amply clear in the discussion above, Rosenfeld's "documentary evidence" merely raises issues of fact. Accordingly, the second affirmative defense is dismissed as without merit as a matter of law.

The fourth, fifth sixth, tenth, eleventh and fourteenth affirmative defenses—asserting breach of the implied covenant of good faith and fair dealing, bad faith and unclean hands, the doctrines of waiver, laches and estoppel, acquiescence, that the complaint "seeks multiple recoveries for the same injury alleged" and the doctrine of accord and satisfaction (answer in Action 3, ¶¶ 36-38, 42,43, 46)—are dismissed "as pleading only a bare legal conclusion without supporting facts" (*see Commissioners of State Ins. Fund v Ramos,* 63 AD3d 453, 453 [1st Dept 2009]; *see also Robbins v Growney*, 229 AD2d 356, 358 [1st Dept 1996] [finding that the affirmative defenses of latches and bad faith, "set forth [with] no factual basis," should have been dismissed). In addition, the court notes that "[t]he doctrine of unclean hands is an equitable defense that is unavailable in an action exclusively for damages" (*Manshion Joho Ctr. Co., Ltd. v Manshion Joho Ctr., Inc.*, 24 AD3d 189, 190 [1st Dept 2005]).

The motion is denied as to the third affirmative defense, that the complaint is barred "in whole or in part because [Southgate] failed to perform its obligations under the Proprietary Lease by, inter alia, failing to repair and/or maintain the Building and the Apartment" (answer in Action 3, ¶ 35), and the seventh affirmative defense, which alleges that Southgate failed to "commence[] the necessary Local Law 11 work at the Building, even though it made an in-court representation in February 2016 that such work would commence forthwith" (*id.*, ¶ 39). As discussed above, these defenses raise issues of fact as to Rosenfeld's entitlement to an abatement. Also as discussed above, whether Southgate may avoid judicial scrutiny of its decisions under the business judgment rule or whether its conduct demonstrates that it singled out Rosenfeld for harmful treatment or was acting "without notice or consideration of the relevant facts," presents issues of fact (*Nainan*,177 AD3d at 490).

For the same reasons, the motion is denied as to the fifteenth, sixteenth and seventeenth causes of action, which allege that Southgate's claims are barred because: (1) "the Apartment is still not water tight" ; (2) "Rosenfeld is entitled to a full abatement of her maintenance and other charges . . . on account of [Southgate's] breaches of the Proprietary Lease, breach of the statutory warranty of habitability, breach of the covenant of quiet enjoyment, and constructive eviction of Ms. Rosenfeld from the Apartment"; and (3) Southgate's conduct, in failing to maintain and repair the Apartment and serving the Default Notice, constitute harassment (answer in Action 3, ¶¶ 47, 48, 49). That Rosenfeld took ownership of the Apartment "as is" (Proprietary Lease, ¶ 18) does not require a different result, as this "does not necessarily warrant the conclusion that the [she] intended to waive any claims with respect. . . [Southgate's] obligation to maintain the [Building]" (*Prakhin v Fulton Towers Realty Corp.*, 122 AD3d 601, 603 [2d Dept 2014]).

For reasons set out in detail above, the motion is denied with respect to the eighth, ninth, twelfth and thirteenth affirmative defenses, which allege that the account stated cause of action is barred, because "[Southgate] failed to send invoices to . . . Rosenfeld for the specific amount claimed in the Complaint" and "because . . . . Rosenfeld objected to any amounts claimed to be due and owing to Southgate" (answer in Action 3, ¶¶ 40,41) and that "[t]he Complaint's causes of action for quantum meruit and unjust enrichment are barred because there is a valid contract between the parties governing the subject matter of the dispute" and that "causes of action for account stated, quantum meruit, and unjust enrichment are duplicative of [Southgate's] cause of action for breach of contract" (answer in Action 3, ¶¶ 44, 45).

For the foregoing reasons, Southgate's motion to dismiss/strike Rosenfeld's affirmative defenses in Action 3 is granted as to second, fourth, fifth, sixth, tenth, eleventh and fourteenth affirmative defenses. The motion is otherwise denied.

Accordingly, it is hereby

ORDERED that defendant/plaintiff Southgate Owners Corp.'s motion for leave to amend (motions sequence number 005) is granted, in part, as follows:

1. leave is granted to amend the answer in Action 2 (index No. 156720/2015) to assert cross claims against defendant KNS Building Restoration Inc. and to this extent the amended answer in the form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry;

2. leave is granted to amend the reply in Action 3 (index No. 160958/2017) to include affirmative defenses to the answer's counterclaims and to this extent the amended reply in the form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that defendant KNS Building Restoration Inc. shall answer the amended answer or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that that the motion of defendant Southgate Owners Corp. for summary judgment (motion sequence number 005) is granted to the extent of granting partial summary judgment in Action 2:

1. dismissing defendant KNS Building Restoration Inc.'s first cross claim;

2. dismissing a portion of plaintiff's fourth cause of action, to the extent it is duplicative of the cause of action for breach of contract and seeks punitive damages;

3. dismissing plaintiff's seventh and eighth causes of action; and it is further

ORDERED that the action shall continue as to the remaining causes of action; and it is further

ORDERED that the motion of defendant KNS Building Restoration Inc. for summary judgment (motion sequence number 006) is granted to the extent set forth herein, but denied as to any remaining categories of damage that insurance did not cover; and it is further

ORDERED that the motion of plaintiff Southgate Owners Corp. for summary judgment (motion sequence number 007) is denied; and it is further

ORDERED that the motion of plaintiff Southgate Owners Corp. to dismiss affirmative defenses in Action 3 (motion sequence number 007) is granted in part and the second, fourth, fifth, sixth, tenth, eleventh and fourteenth affirmative defenses of defendant Debra L. Rosenfeld are dismissed; and it is further

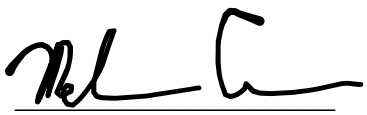
ORDERED that plaintiff/defendant Debra L. Rosenfeld's cross motions for leave to amend are granted, in part, as follows:

3. leave is granted to amend the tenth cause of action of the complaint in Action 2 (motion sequence number 005), and to this extent the amended complaint in the form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry;

4. leave is granted to amend the fifth counterclaim of the answer in Action 3 (motion sequence number 007), and to this extent the amended answer in the form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that plaintiff Debra L. Rosenfeld's cross motion for leave to amend the complaint in Action 2 (motion sequence number 006) to add claims against defendant KNS Building Restoration Inc. is denied.

Dated: December 23, 2020 ENTER:



J.S.C.

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[1] On February 18, 2018, KNS filed a third-party summons and complaint against Southgate, which served a third-party answer with counterclaims on March 27, 2018.

[2] Notably, in her affidavit Rosenfeld states that KNS caused two, not three, water intrusions into the Apartment. The first of these "did not cause too much damage to the Apartment" (NYSCEF Doc No. 303, Rosenfeld aff in opposition to KNS's motion, ¶¶ 9-11 [describing the three incidents, as a water intrusion into her daughter's bedroom, two holes punctured through her bedroom ceiling, and the July 2012 Flood]).

[3] In its reply, KNS offers yet another calculation to demonstrate that the Vigilant Settlement Agreement overcompensated Rosenfeld. It relies on an email between Vigilant and Rosenfeld's attorney, purportedly demonstrating that, prior to the settlement, the disputed amount was reduced from $529,444.58 to $389,444.58, because Rosenfeld had miscalculated her hotel costs (*see* NYSCEF Doc No. 349). KNS further reduces that amount by: (1) $52,135, for damages attributable to MRA; (2) $35,925, based on the Vigilant Breakdown estimating a lower cost for repairing, rather than replacing, some items; and (3) $48,264 in meals and toiletries, arguing that the expense is completely unreasonable. Based on these calculations, KNS concludes that the $310,000 final settlement payment was more than enough to compensate Rosenfeld. However, because the email between Vigilant and Rosenfeld's attorney is being presented for the first time on reply, it will not be considered (*see Batista v Santiago*, 25 AD3d 326 [1st Dept 2006] [finding that movant could not meet his prima facie burden on motion for summary judgment with evidence submitted for the first time in its reply]).

[4] Notably, at the time this issue was first brought to the court's attention in January 2016, Local Law 11 work was underway at the complex, but the Building was not scheduled for such work until the beginning of 2017 (*see* NYSCEF Doc No. 278 at 18, lines 20-26). It appears that the work on the Building did not commence until 2019 (*see* Signorella 4/25/19 tr at 67, lines 19-25; at 68:2-6).

[5] Notably, Southgate expresses skepticism about the findings and conclusion of the December 2013 Olmsted Report, stating that "[u]nsurprisingly, [Rosenfeld's] expert found mold," that Olmsted's results "were either based upon assumptions or outright misleading" and that the report "is not credible" (*see* NYSCEF Doc No. 199, Southgate's brief at 17, 20). However, Southgate does not offer its own expert's opinion to rebut Olmsted's methodology or findings. Issues of credibility are not to be determined on a motion for summary judgment (*Asabor*, 102 AD3d at 527).