SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III **PART** IAS MOTION 32

Justice

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INDEX NO. 654232/2016

MOTION DATE _____

MOTION SEQ. NO. 005 006 007

MASSACHUSETTS BAY INSURANCE COMPANY A/S/O KALUMET, LLC D/B/A MANHATTAN DERMATOLOGY & COSMETIC SURGERY, KALUMET, LLC D/B/A MANHATTAN DERMATOLOGY & COSMETIC SURGERY, HOUSTON CASUALTY COMPANY LONDON SUBSCRIBING TO POLICY NO. B123OAP00711A15 A/S/O OF PRIME ALLIANCE LTD., CERTAIN UNDERWRITERS AT LLOYDS OF LONDON SUBSCRIBING TO POLICY NO. B123OAP00711B15 A/S/O OF PRIME ALLIANCE LTD., ACE AMERICAN INSURANCE COMPANY A/S/O OF PRIME ALLIANCE LTD., ALLIED WORLD INSURANCE COMPANY A/S/O OF PRIME ALLIANCE LTD., INTERSTATE FIRE & CASUALTY A/S/O OF PRIME ALLIANCE LTD.,

Plaintiffs,

- v -

PRODIGY CONSTRUCTION, INC., RODGER FAIREY & ASSOCIATES, RICK KORNBLAU ARCHITECT P.C.,

Defendants.

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DECISION + ORDER ON MOTION

PRODIGY CONSTRUCTION, INC.

Third-Party Plaintiff,

-against-

KALUMET, LLC,

Third-Party Defendant.

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PRODIGY CONSTRUCTION, INC.

Second Third-Party Plaintiff,

-against-

SECOND 820 OWNER LLC A/K/A THE DIPLOMAT CENTRE CONDOMINIUM, PHILIPS INTERNATIONAL HOLDING CORP., CHUNGSIN WENHUA ENTERPRISES, INC.

Second Third-Party Defendants.

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SECOND 820 OWNER LLC and PHILIPS INTERNATIONAL HOLDING CORP.

Third Third-Party Plaintiff,

-against-

THE BOARD OF MANAGERS OF THE DIPLOMAT CENTRE CONDOMIN1UM and KALUMET LLC,

Third Third-Party Defendants.
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The following e-filed documents, listed by NYSCEF document number (Motion 005) 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 231, 233, 235, 238, 241, 242, 243, 244, 251, 252, 253, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 371, 372, 373

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

The following e-filed documents, listed by NYSCEF document number (Motion 006) 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 232, 234, 236, 237, 245, 246, 247, 248, 249, 250, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 368, 369, 370

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

The following e-filed documents, listed by NYSCEF document number (Motion 007) 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398

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

Upon the foregoing documents, the motions are determined as follows:

Motion sequence numbers 005 through 007 are consolidated herein for disposition and are disposed of in accordance with the following decision and order.

In motion sequence number 005, defendant Rick Kornblau Architect P.C. (Kornblau) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all counterclaims and cross claims insofar as asserted against it.

In motion sequence number 006, defendant/third-party plaintiff/second third-party plaintiff Prodigy Construction Inc. (Prodigy) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all counterclaims and cross claims insofar as asserted against it, and second third-party defendant Chungsin Wenhua Enterprises, Inc. (Chungsin) cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the second third-party complaint and all counterclaims and cross claims insofar as asserted against it.

In motion sequence number 007, plaintiff/third-party defendant//third third-party defendant Kalumet, LLC (Kalumet) moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint insofar as asserted against it.[1]

Kalumet owns a third-floor medical suite at 820 Second Avenue in Manhattan (the medical suite). After purchasing the suite, Kalumet apparently contacted Rodger Fairey & Associates (RF&A) to provide architectural designs for the build-out of the space for the purpose of operating a dermatology practice. RF&A contacted Kornblau to prepare a complete set of architectural documents incorporating the layout generated by RF&A, including mechanical, electrical, and plumbing plans, that would be suitable for submitting to the New York City Department of Buildings (DOB) and stamped by Kornblau as the architect of record. On January 25, 2013, Kronblau submitted a proposal to Kalumet for the creation of such documents (Kornblau Proposal, NYSCEF Doc. No. 203). Kalumet signed-off on Kornblau's proposal on February 6, 2013 (*id.*).

On April 22, 2013, Kalumet retained Prodigy pursuant to an AIA Standard Form Agreement (the Agreement) to act as the contractor for the build-out (Kalumet/Prodigy Agreement, NYSCEF Doc. No. 207). The Agreement identifies Prodigy as the "Contractor" and RF&A as the "Architect" (*id.* at 1).

Prodigy began construction on the build-out in or about June 2013. The project was completed in or about January 2014. On February 15, 2016, a sprinkler head in the waiting room of the medical suite froze, causing it to rupture and discharge water throughout the suite and in other areas of the building.

In this consolidated action, brought by Kalumet and plaintiff insurance companies as subrogees of Kalumet and Prime Alliance Ltd. (Prime)[2], plaintiffs allege that during the build-out of the medical suite, a supplemental air handling unit (AHU) was installed too close to the sprinkler head involved in the incident. Plaintiffs allege that this allowed cold air to blow directly onto the sprinkler head, causing it to freeze and rupture (Complaints, NYSCEF Doc. Nos. 28 & 29; Consolidation Order, NYSCEF Doc. No. 31; *see also* NYSCEF Doc. Nos. 51 & 116; 219 & 220). Plaintiffs set forth causes of action against Prodigy, RF&A[3], and Kornblau for common-law negligence, breach of contract, and breach of warranty.

Prodigy commenced a third-party action against Kalumet and a second third-party action against, *inter alia*, Chungsin, the owner of the neighboring third-floor unit in the building, asserting claims for common-law indemnification and contribution (Third-Party Complaint, NYSCEF Doc. No. 48; Second Third-Party Complaint, NYSCEF Doc. No. 43). Prodigy claims, among other things, that Kalumet and Chungsin failed to ensure that the sprinkler system involved in the incident was hooked up to, or monitored by, an alarm so as to provide a warning and/or notification of the discharge of water, thereby delaying the response and causing unnecessary and additional damage.

Two of the second third-party defendants commenced a third third-party action against, *inter alia*, Kalumet (Third Third-Party Complaint, NYSCEF Doc. No. 141). Parties to the main action and third-party actions interposed counterclaims and/or cross claims for indemnification and contribution against each other. Now before the court are the instant motions for summary judgment.

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[1] Kalumet's notice of motion and moving papers do not seek dismissal of the third third-party complaint insofar as asserted against Kalumet (NYSCEF Doc. Nos. 337 & 338).
[2] Prime has a corporate office at 820 Second Avenue and apparently acted as a sponsor for the condominiums at that location.
[3] RF&A has not answered or appeared in this action.

DISCUSSION

On a motion for summary judgment, the moving party "bears the heavy burden of establishing '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'" (*Deleon v New York City Sanitation Dept.*, 25 NY3d 1102, 1106 [2015], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Once this showing has been made . . . , the burden shifts to the party opposing the motion . . . to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d at 324; *see Zuckerman v City of New York*, 49 NY2d at 562). "On a motion for summary judgment, facts must be viewed 'in the light most favorable to the non-moving party'" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], quoting *Ortiz v Varsity Holdings*, LLC, 18 NY3d 335, 339 [2011]).

Motion Sequence No. 005 - Kornblau's Motion

Kornblau moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all counterclaims and cross claims insofar as asserted against it. Kornblau argues that its work on the build-out was not a proximate cause of any of the property damage alleged to have been sustained by plaintiffs in the main action because Kornblau had no responsibility for the design or installation of the sprinkler system involved in the incident. If a sprinkler head was installed in a potentially improper location, it had nothing to do with Kornblau's designs. Kornblau contends that while it contracted with Kalumet to prepare the necessary architectural and mechanical drawings related to the supplemental AHU and fresh air duct, no documentary evidence or deposition testimony has been provided demonstrating that Kornblau performed its services in a negligent manner.

To support these contentions, Kornblau relies on the affidavit and deposition testimony of its principal, Rick Kornblau, R.A. In his affidavit, Rick Kornblau states that pursuant to the proposal he submitted to Kalumet, he prepared the necessary architectural and mechanical drawings related to, among other things, the AHU and fresh air duct for submission to the DOB (Kornblau Affidavit at ¶ 6, NYSCEF Doc. No. 186). His mechanical drawings included a heater positioned in the fresh air duct which "was requested to be installed as a human comfort so that no area seem[ed] colder than the rest of the space. A sensor would activate the heater in order to regulate the temperature when the air outside was very cold" (id. at ¶ 8).

Rick Kornblau avers that "[a]t the start of the Project, there was no sprinkler system installed at the building. However, a newly adopted New York City law required that by 2019, all buildings over 100 feet in height must have sprinklers. As such, a sprinkler system was not required for the design [he] prepared in 2013, and [he] did not prepare drawings that included sprinklers" (*id.* at ¶ 7). He asserts that the he "had no responsibility for the sprinkler work that was performed at the Premises" (*id.* at ¶ 8). No sprinklers were in place at the time he "performed the mechanical engineering inspection" and at no time "during the project" did he "see sprinkler drawings related to the premises nor did [he] sign off on the sprinkler component of the project" (*id.* at ¶ 10). He states: "My services were completed prior to the installation of the sprinklers which allegedly caused damage to the plaintiffs" (*id.*).

During his deposition, Rick Kornblau similarly testified that he did not create the drawings for the sprinkler system and that he did not see the sprinkler drawings (Kornblau EBT at 38, NYSCEF Doc. No. 170). At some point during the project, the sprinkler system was added, but he "was not brought in

at that point to do the work" (*id.* at 41). The sprinklers were added after he completed his mechanical inspection and sign-off (*id.* at 42, 44). Although the sprinklers were installed by the time he performed his final architectural sign-off, he was not signing-off in any way on the sprinkler component of the project (*id.* at 42-43).

Rick Kornblau's affidavit and deposition testimony are sufficient to meet Kornblau's initial burden of establishing a *prima facie* showing of entitlement to judgment as a matter of law. They disprove plaintiffs' chief allegation that Kornblau's design failed to take the location of the sprinkler head into account when it positioned the supplemental AHU in such close proximity. Rather, the affidavit and deposition testimony establish that the sprinkler system was designed and installed by another party *after* Kornblau completed his designs and mechanical inspection of the supplemental AHU, fresh-air duct, and heater to confirm that they were installed pursuant to the specifications in his drawings. They further establish that Kornblau never conducted an inspection of the sprinkler system and was not responsible for doing so. In other words, his affidavit and testimony refute plaintiffs' theory that Kornblau arranged for the installation of the supplemental AHU in an improper location (i.e., too close to the sprinkler head), by establishing that the sprinkler head was not present when he prepared his designs or when he conducted his inspection of the mechanical systems. Therefore, Kornblau's designs and/or his inspection of the mechanical component of the project cannot be the proximate cause of the sprinkler head's rupture.

In opposition, plaintiffs do not dispute that Kornblau bore no responsibility for designing, installing, or inspecting the sprinkler system or that the AHU was installed prior to the sprinkler system. They now argue that the heater in the fresh-air duct that appeared in Kornblau's mechanical drawing (Mechanical Drawing [M101 00], at NYSCEF Doc. No. 243), was either not present or not operational. They assert that during his mechanical inspection, Kornblau failed to verify that the heater was, in fact, installed and operational in accordance with his specifications. Had it been operational, the heater would have warmed the air in the duct, preventing the sprinkler head from freezing and discharging water. As such, Kornblau's failure to verify that the heater was present and working was a proximate cause of the flood.

In support, plaintiffs rely on the affidavit of Alan E. Fidellow of Levine Fidellow Engineering Consultants (Fidellow Affidavit, NYSCEF Doc. No. 252). Fidellow, a professional engineer, states that he visited the premises on February 29, 2016, and met with Thomas Schneider, the building superintendent (*id.* at ¶ 4). Fidellow determined during his investigation that the leak originated from a sprinkler head that discharged, releasing water into the medical suite (*id.* at ¶ 5). The sprinkler head "was located [in a soffit] adjacent to a supplemental [AHU], which was not original to the building" and "there was a louver installed in the exterior wall which had been ducted to a grill that dumped cold, outside air into the soffit. As the cold air from the louver entered into the space, it froze the water in the sprinkler line and caused the sprinkler head to discharge" (*id.* at ¶¶ 6-7). Fidellow observed no defects in the sprinkler head itself and "did not observe any other possible causes of the freeze up . . . other than the cold air being dumped into the space from the louver" (*id.* at ¶ 8). Fidellow also states the following:

> "9. During my inspection, I did not observe any indications that the building was not properly heated. It is my professional opinion that if there had been no heat to the building during or immediately preceding the time of the loss, there would have been additional freeze ups and leaks throughout the building.

10. I further did not observe any other issues or deficiencies within the sprinkler system in the third floor space. . . .

11. At the time of my inspection, I noted that Mr. Schneider had felt the cold air coming into the soffit from the louver and as a result, I saw that he had placed cardboard and duct tape over the louver to prevent additional cold air from entering the space. From my experience freezing conditions do not always manifest themselves immediately.. . . [A]t the time of incident there was a polar vortex and the penetration of the cold air is often dependent on the wind direction pushing the cold air into the building.

12. The duct from the louver conveying the cold air is insulated and the first location that would see the freezing temperatures is the subject sprinkler head located in the soffit.

13. As part of my investigation, I have reviewed the mechanical drawings that were provided by the Defendants during the course of discovery. There is no drawing showing the soffit where the supplemental unit is located and the sprinkler head that discharged in the soffit is also not shown on any drawing.

14. The drawings provided of the bathroom space where the duct for the outside air was located are not in accordance with the actual physical layout of the bathrooms. The actual installation combined the regular and handicapped bathrooms into one men's and one women's bathroom. [The] revision to the plumbing layout [is] dated 8/5/13 . . .

15. In the drawing dated 4/27/13, there is also a reference to an electric heater supposedly located in the duct work not far from where the louver is located. . . .

16. As such, there is no corresponding HVAC drawing to match the 8/5/13 revision to the bathroom area where the outside air duct is located and that shows the electric heater. It is therefore not clear that the electric heater was ever installed.

17. *My causal theory regarding why the sprinkler head froze relies on a finding that there was in fact no functioning electric heater tempering the cold air coming in from outside through the louver to maintain at least 40F in the duct.*

18. Further, our investigation was not able to physically locate and confirm the presence of an electric duct heater if it was in fact installed.

19. As part of my investigation, I researched the Department of Building permits for the build-out of the third floor condominium space and learned that the supplemental [AHU] and louver had been installed by Prodigy Construction and designed by Rick Kornblau, the architect assigned to the project.

20. In my professional opinion, I can state to a reasonable degree of professional and engineering certainty, this loss occurred because the supplemental [AHU] installed by Defendant, Prodigy Construction and designed by Defendant, Rick Kornblau was negligently permitted to introduce cold exterior air into the soffit space, which then froze the water in the sprinkler line causing the sprinkler head to discharge. If the supplemental [AHU] had been properly installed and designed

> with a functioning automatic electric duct heater to warm the freezing exterior air as it entered the building, the sprinkler head would not have frozen and discharged.
>
> 21. Accordingly, it is my professional opinion that incident would not have occurred. *Defendants are responsible for the incident and ensuing property damages because they failed to ensure either that the outside air duct was installed with an electric duct heater or that an electric duct heater, if installed, was in fact also functioning then as well. If either scenario was confirmed, then my professional expert opinion is that the incident would not have occurred*"

(*id.* [some emphasis added]).

In addition to relying on Fidellow's affidavit, plaintiffs highlight that during his deposition, Rick Kornblau testified that he bore the responsibility of testing the heater after installation to make sure it was operational (Kornblau EBT at 23, 25-26, NYSCEF Doc. No. 170), and while he remembered signing-off on the mechanical portion of the project, it was "difficult [for him] to recall" testing the heater (*id.* at 28). Plaintiffs assert that his inability to recall doing so, in combination with Fidellow's affidavit, raises a triable issue of fact precluding summary judgment in Kornblau's favor.

Contrary to plaintiffs' contentions, Fidellow's affidavit is not sufficient to raise an issue of fact. Fidellow's causal theory regarding why the sprinkler head froze hinges on his conclusory and unsubstantiated opinion that Kornblau failed to ensure either that the heater was installed, or if installed, that it was in fact functioning. Fidellow does not explain how he reached his opinion other than noticing that a plumbing drawing labeled "REVISED BATHROOM" does not depict the heater that appears in Kornblau's earlier mechanical drawing (Plumbing Drawing [P101 01] and Mechanical Drawing [M101 00], at NYSCEF Doc. No. 243). Fidellow does not provide a description of what steps he took, if any, to locate the heater inside the duct work, whether or not he felt warm air emanating from that location, and if not, whether the temperature was cold enough on the date of his inspection so as to activate the heater (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]["Where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, . . . the opinion should be given no probative force and is insufficient to withstand summary judgment"]; *Romano v Stanley*, 90 NY2d 444, 451-452 [1997] ["an expert's affidavit proffered as the sole evidence to defeat summary judgment must contain sufficient allegations to demonstrate that the conclusions it contains are more than mere speculation and would, if offered alone at trial, support a verdict in the proponent's favor"]). Fidellow's affidavit also does not explain why, or how, no similar incidents occurred in the more than two years preceding the one at bar, during which time, the heater was purportedly not present or not operational. Although he seemingly attributes the lack of prior problems to the fact that at the time of the incident, there was a "polar vortex," there is no indication that this was the first "polar vortex" in Manhattan from the time Kornblau signed-off on the heater in 2013, until the date of the incident in 2016.

Plaintiffs contend that Fidellow's opinion is buttressed by Kornblau's deposition testimony, taken in 2018, during which Kornblau was unable to remember testing the heater back in 2013. However, Kornblau's testimony does not demonstrate that he failed to test the heater or that the heater was not present at the time he signed-off on the mechanical aspects of the project. Indeed, Kornblau testified that he signed-off on the mechanical aspect of the work in 2013, which involved confirming that the heater was operational (Kornblau EBT at 23-24, 26-27, NYSCEF Doc. No. 170). Even assuming the heater malfunctioned more than two years later, Kornblau, as the architect of record for the project, would not be responsible. In view of the foregoing, plaintiffs failed to raise an issue of fact.

Finally, contrary to plaintiffs' contention, Kornblau's motion is not premature. "Under CPLR 3212 (f), where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied. This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion" (*Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 103 [1st Dept 2006]). That said, "a grant of summary judgment is not premature merely because discovery has not been completed" (*U.S. Bank N.A. v Wiener*, 171 AD3d 1241, 1242 [2d Dept 2019][quotation marks and citation omitted]). "[M]ere hope that somehow the plaintiffs will uncover evidence that will prove their case, provides no basis . . . for postponing a decision on a summary judgment motion" (*Fulton v Allstate Ins. Co.*, 14 AD3d 380, 381 [1st Dept 2005][internal quotation marks and citations omitted]).

Here, plaintiffs fail offer an evidentiary basis to suggest that additional discovery may lead to relevant evidence, or that facts essential to opposing the motion are exclusively within Kornblau's knowledge and control (*see Board of Mgrs. of the 23-23 Condominium v 210th Place Realty*, LLC, 185 AD3d 890, 891 [2d Dept 2020]; *Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 103 [1st Dept 2006]["The party invoking (CPLR 3212 [f]) must provide a proper evidentiary basis supporting its request for further discovery"]). Indeed, Kalumet and its subrogee argue that the motion is premature because Kalumet's own representatives, Dr. Snehal Amin and Dr. Noah Gratch, have not been deposed. They contend that it has not been possible to obtain their deposition in a safe manner given the COVID-19 pandemic. However, any information that might be derived from their testimony is already available to Kalumet as it is within its own knowledge and control and could have been proffered in an affidavit in opposition to the motions.

Thus, Kornblau's motion for summary judgment dismissing the complaint and all counterclaims and cross claims insofar as asserted against it is granted.

Motion Sequence No. 006 - Prodigy's Motion

Prodigy moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all counterclaims and cross claims insofar as asserted against it. Prodigy asserts that it cannot be liable for any improper design or location of the supplemental AHU because it had no duty and was not engaged to design, create, or draw the mechanical plans for the build-out. It contends that the design and plans for the build-out were created by Kornblau prior to Prodigy's involvement in the project and were also reviewed by the building's engineer. Prodigy asserts that it is not responsible for any negligent acts or omissions by Kornblau.

With regard to any alleged improper and/or negligent installation of the supplemental AHU, Prodigy contends that it is undisputed that its relationship to the renovation project was pursuant to the Agreement and therefore, the provisions of the Agreement establish the respective rights and duties of the parties and prevail over the conclusory allegations of the complaint. Prodigy asserts that its duty pursuant to the contract was to build as per the plans and drawings that were already created. Had it failed to build as per the plan, it would have been in breach of the Agreement.

Prodigy asserts that it installed the supplemental AHU and heater in accordance with the Agreement and specifications in Kornblau's mechanical drawings. To hold Prodigy liable for their purported improper installation would be to hold Prodigy liable for fulfilling its contractual duty. Since Prodigy's duty was to build in accord with the plans, it did not breach the Agreement, did not breach any warranty, and cannot be negligent.

In support of its motion, Prodigy submits, among other things, the deposition testimony of its owner and Chief Operating Officer, Roxanne Napolino (Napolino EBT, NYSCEF Doc. No. 221). Napolino testified that she witnessed the heater being installed inside the ductwork as specified in Kornblau's drawings (*id.* at 53-54). Prodigy also submits Kornblau's deposition testimony, during which Kornblau testified that he signed-off on the mechanical aspect of the work in 2013, which involved confirming that the heater was present and operational (Kornblau EBT at 23-24, 26-27, NYSCEF Doc. No. 170).

In light of the foregoing, Prodigy established that it installed the supplemental AHU and heater in accordance with Kornblau's specifications, as required by the Agreement. In opposition, plaintiffs contend in this regard that Prodigy's affirmative negligence in failing to properly install a functioning heater in connection with the supplemental AHU was the direct cause of the flooding and damages. They assert that Prodigy did not install the supplemental AHU properly, because it allowed a cold air condition to exist by not ensuring that a functioning electric heater was installed in the relevant air duct and therefore, its motion for summary judgment must be denied.

In support of this contention, plaintiffs again rely on Fidellow's affidavit. For reasons already discussed, Fidellow's affidavit is not sufficient to raise an issue of fact in this regard. Fidellow opines that the incident occurred because Prodigy and Kornblau "failed to ensure either that the outside air duct was installed with an electric duct heater or that an electric duct heater, if installed, was in fact also functioning then as well." However, his opinion that the heater was either never installed or not operational when installed is conclusory and unsubstantiated.

The court also rejects plaintiffs' contention that Prodigy's motion is premature. As with Kornblau's motion, plaintiffs have failed to offer an evidentiary basis to suggest that additional discovery may lead to relevant evidence, or that facts essential to opposing the motion are exclusively within Prodigy's knowledge and control.

Thus, Prodigy's motion for summary judgment dismissing the complaint and all counterclaims and cross claims insofar as asserted against it is granted.[4]

Chungsin's Cross Motion

Chungsin cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the second third-party complaint and all counterclaims and cross claims insofar as asserted against it. In view of the dismissal of the main action against Prodigy, Prodigy's third-party and second third-party complaints, except for the claims by Prodigy to recover the costs, disbursements, and attorney's fees incurred by it in defending the action, are now academic. As for the claim for attorney's fees, a prevailing party is precluded from recouping legal fees except where authorized by statute, agreement, or court rule (*see Hooper Assoc., v AGS Computers*, 74 NY2d 487, 491 [1989]), which is not the case here. The foregoing also renders the claims for contribution and indemnification in the third third-party complaint academic.

[4] In light this disposition, it is unnecessary to reach the remaining arguments set forth by Prodigy in support of its motion -- (1) that the sprinkler head froze due to longstanding heating issues in the building and (2) that a flow switch alarm, which was not present on the date of the incident, would have sounded upon the system's activation and resulted in the immediate cessation of the water flow.

Thus, Chungsin's cross motion is granted.

Motion Sequence No. 007 - Kalumet's Motion

In light of the above, Kalumet's motion, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint insofar as asserted against it is also granted.

CONCLUSION

Based upon the foregoing, it is hereby

ORDERED that Rick Kornblau Architect P.C.'s motion for summary judgment dismissing the complaint and all counterclaims and cross claims insofar as asserted against it is granted (motion sequence number 005); and it is further

ORDERED that Prodigy Construction Inc.'s motion for summary judgment dismissing the complaint and all counterclaims and cross claims insofar as asserted against it is granted (motion sequence number 006); and it is further

ORDERED that Chungsin Wenhua Enterprises, Inc.'s cross motion for summary judgment dismissing the second third-party complaint and all counterclaims and cross claims insofar as asserted against it is granted (motion sequence number 006); and it is further

ORDERED that Kalumet, LLC's motion for summary judgment dismissing the third-party complaint insofar as asserted against it is granted (motion sequence number 007); and it is further

2/11/2021
DATE

FRANCIS A. KAHN, III, A.J.S.C.

HON. FRANCIS A. KAHN III J.S.C.

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