SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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STARR INDEMNITY AND LIABILITY COMPANY AS SUBROGEE OF ALEXANDER CONDOMINIUM,

Plaintiff,

- v -

THE CORCORAN GROUP, INC.,BOND NEW YORK, PETER GUIRGUESS,

Defendant.

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INDEX NO. 153530/2016

MOTION DATE 05/28/2020, 05/29/2020

MOTION SEQ. NO. 008 009

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 195, 197, 199, 200, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 223, 224, 226, 227

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

The following e-filed documents, listed by NYSCEF document number (Motion 009) 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 196, 198, 201, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 225, 228, 229, 230

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

Upon the foregoing documents, it is

ORDERED that the motion of Defendant N.R.T. New York LLC d/b/a The Corcoran Group s/h/a The Corcoran Group, Inc. ("Corcoran") seeking summary judgment pursuant to CPLR 3212 dismissing all claims against it (Motion Seq. 008) in *Starr Indemnity and Liability Company A/S/O/ Alexander Condominium v The Corcoran Group, Inc., Bond New York, and Peter Guirguess, individually*, Index No. 153530/2016 ("Action One") is granted; and it is further

ORDERED that the motion of Corcoran seeking summary judgment pursuant to CPLR 3212 dismissing all claims against it (Motion Seq. 003) in *Privilege Underwriters Reciprocal Exchange A/S/O Alexander Condominium v N.R.T. New York, LLC d/b/a The Corcoran Group,*

Bond New York Real Estate Corp., Peter Guirguess, Index No. 652363/2017, ("Action Two") is granted; and it is further

ORDERED that the motion of Defendants Bond New York and Peter Guirguess (collectively, the "Bond Defendants") seeking summary judgment pursuant to CPLR 3212 dismissing all claims against them (Motion Seq. 009) in Action One is denied; and it is further

ORDERED that the motion of the Bond Defendants seeking summary judgment pursuant to CPLR 3212 dismissing all claims against them (Motion Seq. 002) in Action Two is denied; and it is further

ORDERED that Actions One and Two are severed and continue against the Bond Defendants; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for Corcoran shall serve a copy of this Order, along with Notice of Entry, on all parties within twenty (20) days.

MEMORANDUM DECISION

In *Starr Indemnity and Liability Company A/S/O/ Alexander Condominium v The Corcoran Group, Inc., Bond New York, and Peter Guirguess, individually*, Index No. 153530/2016 ("Action One"), Defendant N.R.T. New York LLC d/b/a The Corcoran Group s/h/a The Corcoran Group, Inc. ("Corcoran") moves for summary judgment pursuant to CPLR 3212 dismissing all claims asserted against it (Motion Seq. 008). Likewise, Defendant Bond New York ("Bond") and its employee Peter Guirguess (collectively, the "Bond Defendants") move for summary judgment pursuant to CPLR 3212 dismissing all claims asserted against them (Motion Seq. 009). Plaintiff Starr Indemnity and Liability Company ("Starr") opposes both motions.

In the related action *Privilege Underwriters Reciprocal Exchange A/S/O Alexander Condominium v N.R.T. New York, LLC d/b/a The Corcoran Group, Bond New York Real Estate Corp., Peter Guirguess,* Index No. 652363/2017, ("Action Two"), the Bond Defendants move for summary judgment pursuant to CPLR 3212 dismissing all claims asserted against them (Motion Seq. 002). Likewise, Corcoran moves for summary judgment pursuant to CPLR 3212 dismissing all claims asserted against it (Motion Seq. 003). Plaintiff Privilege Underwriters Reciprocal Exchange a/s/o AMMJ ("PURE") opposes both motions.

The two motions in each related action are consolidated for joint decision.

BACKGROUND

These motions arise out of property damage actions wherein Plaintiffs seek damages arising from a water leak which is alleged to have occurred on February 17, 2015 in the Alexander Condominium building located in Manhattan at 250 E. 49th Street, New York, New York ("the Condominium"). Plaintiffs allege that real estate brokers working on behalf of

Defendants Bond and Corcoran caused or contributed to the water damage when they acted negligently during showings of Unit 19D in the Condominium.

Procedural History

On February 25, 2016, *Viru & Tati NYC Corp v Board of Managers of the Alexander Condominium and "XYZ Insurance Company,"* Index No. 650962/2016, was commenced by the owner of Condominium Unit 17D against the Board of Managers of the Condominium, asserting claims against the Board for damages to the individual unit. This Court consolidated *Viru* with Action One on April 17, 2017, but later dismissed *Viru* based on Plaintiff's failure to comply with various outstanding discovery orders by Decision and Order dated October 26, 2019[1] (NYSCEF doc No. 74, ¶¶ 11-13).[2]

On April 26, 2016, Action One was commenced by Starr, the Condominium's insurance carrier, against Corcoran, and was amended by Starr to add the Bond Defendants on December 21, 2016 (NYSCEF doc No. 75).

On May 5, 2016, the Condominium filed a lawsuit against the building's sponsors and building superintendent Eugene Tsirkin personally alleging, *inter alia*, construction defect claims causing bursting pipes and water leaks, which is proceeding separately from the actions detailed here in this Court's Commercial Division (*Alexander Condominium, by its Board of Managers v East 49th Street Development II, LLC*, Index No. 153813/2016).

On May 2, 2017, Action Two was commenced by PURE, the insurance subrogee for the owner of Condominium Unit 11CD, a unit damaged by the leak, against the Bond Defendants and Corcoran. (*id.* at ¶ 14).

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[1] As the *Viru* action was disposed, Starr's action against Bond and Corcoran is referred to as "Action One."
[2] References to the NYSCEF record in this section and Background Facts are under Index No. 652363/2017.

On January 31, 2018, Starr commenced Action Three against the owner of Condominium Unit 19D, *Starr Indemnity and Liability Company A/S/O Alexander Condominium v Terry Wang* (Index No. 150963/2018), which does not involve the Bond Defendants or Corcoran (*id.* at ¶ 15). This Court consolidated Actions One, Two and Three on March 26, 2018 (NYSCEF doc No. 45).[3]

On March 4, 2020, Starr filed the Note of Issue in Action One (NYSCEF doc No. 76). Starr then filed the Note of Issue in Action Three on March 5 (Index No. 150963/2018, NYSCEF doc No. 55). PURE has not yet filed the Note of Issue in Action Two.

On May 29, 2020, The Bond Defendants and Corcoran commenced the instant motions before this Court in Actions One and Two.

Background Facts

The following facts pertain to both Action One and Two.

The Condominium is a residential building located in Manhattan. In 2015, non-party Ziang Dan Tan, the owner of Units 19D and 19C in the Condominium, decided to rent out his units. Through his United States representative, non-party Terry Wang, Mr. Tan retained Corcoran as the exclusive listing agent (NYSCEF doc No. 74, ¶ 30). On January 5, 2015, Terry Wang met with Corcoran agents, non-parties Sarah Fearon and Janet Wang (no relation to Terry Wang), who coordinated the showing of the units with other agents (*id.* at ¶ 32-34). Mr. Tan was not living in the Condominium at this time, and the building's superintendent, doorman, and Mr. Wang all had access to the units (*id.* at ¶ 40). Ms. Wang did not return to the building after January 5; Ms. Fearon met with Mr. Wang at the apartment once more on January 7 and did not return again (NYSCEF doc No. 36, ¶ 8). Mr. Wang testified he believed the balcony door was

[3] This Court filed an additional order consolidating Actions One, Two and Three and amending the caption on February 24, 2021, as the 2018 consolidation order is not reflected in the Court's NYSCEF system.

closed when he and Ms. Fearon left on January 7 (NYSCEF doc No. 109 at 12). Corcoran avers that none of its brokers showed the apartment after retaining the listing; rather, prospective tenants were shown the unit by agents affiliated with other real estate brokers arranged through Corcoran (*id.*).

On February 6, 2015, Defendant Peter Guirguess, a real estate agent employed by Defendant Bond, showed 19D to a client, Sarah Gallo (*id.* at ¶ 45). Mr. Guirguess made arrangements with Corcoran and acquired the unit key from the Condominium's doorman (*id.*) Mr. Guirguess testified that he and his client spent less than a minute in the unit as the client immediately surmised that it was too small for her (*id.* at ¶ 50). Mr. Guirguess stated that he and his client did not enter the various rooms in the unit, nor did they go out on to the balcony (*id.*). Mr. Guirguess returned the key to the doorman and did not revisit the unit with another client (*id.* at ¶ 54).

On February 17, 2015, water was discovered to be leaking throughout the Condominium. It is unknown when the leak commenced (*id.* at ¶ 57). The Condominium's superintendent, Eugene Tsirkin, found water leaking in the kitchen of 19D and prepared an incident report reflecting that the unit was in freezing condition with the heat turned off, the balcony door open, and the freezing condition caused the leaking pipes (*id.* at ¶ 59). Mr. Tsirkin could not ascertain how long the balcony door, which was in a separate room from the kitchen, had been open or whether it was opened by a person or the wind (*id.* at ¶ 67). Mr. Tskirin observed snow on the floor of the unit that came in from the balcony and noted that the pipes were covered with visible ice (*id.*).

On February 24, 2015, Todd Ballot, an insurance adjuster for Starr, visited the Condominium to conduct his own investigation and take pictures of the damage to the premises

(NYSCEF doc No. 57). As part of his investigation, he reviewed the Condominium bylaws, which hold, in relevant part:

> "All Maintenance and repairs to any unit, ordinary or extraordinary ... and to the doors ... windows ... plumbing ... and heating ... together with all related ... piping ... shall be at the individual unit owner's sole cost and expense ... (e) Each unit ... shall be kept in first class condition, order, and repair (and free of snow, ice ... with respect to any balcony, terrace) by the unit owner or Board of Managers whichever is responsible for the maintenance."
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> (NYSCEF doc No. 89, Article IV, Section 10).

During discovery, Starr also retained a meteorologist, Joseph P. Sobel, PHD, who analyzed the weather conditions in the area prior to the discovery of the frozen pipes on February 17. Mr. Sobel opined that the snow inside the apartment most likely came from a storm that took place between February 6 and February 17, most likely the morning of the 17th:

> "Specifically, at 250 East 49th St., New York, NY, on February 17, 2015, the sky was cloudy throughout the morning hours and snow fell from around 2:00 a.m. until about 11:00 a.m. . . The photograph . . . is consistent with these weather conditions showing that some fresh snow from the morning snowfall was able to come into the apartment through the open balcony door. If the snow in the apartment on February 17, 2015 had been left by the storm on February 2, it would have looked much crustier and icy because of the sleet and freezing rain involved in that storm. Any snowfall after that storm and before February 6 would have been too light to accumulate to the extent shown in the photograph . . .Therefore, in our opinion, to a reasonable degree of scientific certainty, the snow in the apartment . . . was not the result of the storm that occurred on February 2 nor the result of any other weather event before February 6, but was the result of a snowfall that occurred after February 6 and most likely occurred during the morning of February 17."
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> (NYSCEF doc No. 221).

Action One Arguments[4]

Corcoran argues it is entitled to dismissal from Action One as it at no point assumed a

[4] References to the NYSCEF record in this section are under Index No. 153530/2016.

duty to maintain the condition of 19D and therefore is not responsible for the damage caused to the Condominium, nor did any affirmative act of a Corcoran agent cause the pipes to freeze and burst (NYSCEF doc No. 140 at 26). Corcoran maintains that its duties were limited to the marketing and listing of 19D and its sister unit, 19C. Corcoran further argues that Ms. Wang and Ms. Fearon are independent contractors, and therefore it cannot be liable for their actions.

In opposition, Starr argues that Corcoran has failed to meet its *prima facie* burden demonstrating entitlement to dismissal as there is substantial evidence that Corcoran created the freezing conditions that caused the leak through the Condominium (NYSCEF doc No. 202 at 11). Starr contends that Corcoran's arguments are entirely based on incredible testimony and questions of fact remain regarding whether any of its agents opened the balcony door. Starr also argues that Corcoran acted negligently in failing to send any of its agents to check on the property in between the day it signed the exclusive listing agreement in January 2015 and the day the water leak was discovered, February 17 (*id.* at 4). Starr further argues that Corcoran's "independent contractor" defense fails as a matter of law as it was not plead in its Answer, and it is at odds with how Corcoran describes its employment agreement with its agents (*id.* at 24).

The Bond Defendants argue they are entitled to dismissal from Action One as the record is devoid of any evidence that Mr. Guirguess opened the balcony door when he showed 19D to his client (NYSCEF doc No. 175 at 13). The Bond Defendants further contend they had no duty to maintain the premises of the Unit.

In opposition, Starr argues that the Bond Defendants have failed to meet their *prima facie* burden demonstrating entitlement to dismissal, given that their defense is entirely founded upon Mr. Guirguess' "self-serving" testimony that he did not open the balcony door or otherwise alter the conditions in the apartment when he showed it to his client (NYSCEF doc No. 213 at 13).

Starr concludes that the Bond Defendants cannot be dismissed from this proceeding as the record reflects that Mr. Guirguess was the last known person to visit 19D, and there is thus at least a question of fact regarding whether he contributed to the freezing conditions.

Action Two Arguments[5]

In seeking dismissal from the action commenced by PURE, the insurance carrier for the owner of Unit 11CD, another apartment in the building that suffered water damage due to the leak, Corcoran echoes the arguments made in Action One, mainly that it at no point assumed a duty to maintain the condition of 19D and therefore is not responsible for the damage caused to 11CD (NYSCEF doc No. 140 at 26). Corcoran also again maintains that its duties were limited to the marketing and listing of 19D and its sister unit, 19C, and argues that its agents are independent contractors for which it has no liability.

Although PURE is the insurer for only Unit 11CD and not the entire Condominium, PURE makes similar arguments in opposition to those advanced by Starr and does not make discrete arguments that pertain to the specific damage in Unit 11CD. PURE argues that Corcoran has failed to meet its *prima facie* burden demonstrating entitlement to dismissal as there is substantial evidence that it "launched the instrument of harm" of the freezing conditions in 19D that caused the leak to spread to 11CD (NYSCEF doc No. 104 at 8). Like Starr, PURE argues that Corcoran's defense is based on unsubstantiated testimony, and its "independent contractor" defense fails as a matter of law.

Like Corcoran, the Bond Defendants also echo the arguments they made in Action One. The Bond Defendants contend that the record is devoid of any evidence that Mr. Guirguess

[5] References to the NYSCEF record in this section are under Index No. 652363/2017.

created the condition at issue, and they had no duty to maintain the premises of 19D (NYSCEF doc No. 74 at 13).

As with its opposition to Corcoran, PURE echoes the arguments made by Starr in its opposition to the Bond Defendants. PURE contends that the Bond Defendants have failed to meet their *prima facie* burden demonstrating entitlement to dismissal as their defense is entirely based on unfounded testimony and inadmissible hearsay, and there are multiple issues of fact that must be resolved (NYSCEF doc No. 213 at 13).

The summary judgment motions in Actions One and Two are consolidated for joint decision here as the actions arise from the same occurrence, and Defendants cannot demonstrate entitlement to dismissal of one action and not the other given the overlapping arguments asserted against them by both plaintiffs. Starr and PURE are referred to collectively as "Plaintiffs" in the following sections of this decision unless otherwise specified.

DISCUSSION

Summary judgment is granted when "the proponent makes '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,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the proponent has made a prima facie showing, the burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also, DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46

NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

The function of a court in reviewing a motion for summary judgment "is issue finding, not issue determination, and if any genuine issue of material fact is found to exist, summary judgment must be denied" (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, [1st Dept 2012]). Where "credibility determinations are required, summary judgment must be denied" (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, [1st Dept 2012]). Thus, on a motion for summary judgment, the court is not to determine which party presents the more credible argument, but whether there exists a factual issue, or if arguably there is a genuine issue of fact (*DeSario v SL Green Management LLC*, 105 AD3d 421 [1st Dept 2013] (holding given the conflicting deposition testimony as to what was said and to whom, issues of credibility should be resolved at trial)).

Defendants' Alleged Negligence and Liability for the Freezing Conditions

Both Corcoran and the Bond Defendants initially argue they are entitled to dismissal as they did not create the freezing conditions in 19D that led to the damage in the Condominium. The Court thus must evaluate whether the defendant real estate agents in this action are potentially liable for negligence that caused damage to the Condominium and individual unit owners.

To establish negligence, a plaintiff is required to prove: "the existence of a duty, that is, a standard of reasonable conduct in relation to the risk of reasonably foreseeable harm; a breach of that duty and that such breach was a substantial cause of the resulting injury" (*Baptiste v New York City Tr. Auth.*, 28 AD3d 385, 386 [1st Dept 2006] citing, inter alia, *Palsgraf v Long Is. R.R. Co.*, 248 NY 339 [1928] [other citation omitted]). A contractor usually does not owe a duty to

third parties (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 138 [2002]). The Court in *Espinal* articulated three exceptions to the rule:

> "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launche[s] a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely."
>
> (98 NY2d at 138).

Here, Plaintiffs argue that Corcoran and the Bond Defendants are all potentially liable under the first prong of *Espinal* as they potentially "launched a force of harm" by failing to close the balcony door and ensure that the heat was on in 19D, and also contend Corcoran is responsible under the third prong as it failed to maintain 19D in a safe condition.

Corcoran[6]

Complete and Exclusive Control of the Premises

As a preliminary matter, the Court notes that Corcoran at no point assumed a duty to maintain Unit 19D in a safe condition, and therefore can only be found liable to Plaintiffs if the record demonstrates that one its agents took an affirmative action that created the freezing conditions in the Unit.

Generally, "individual liability cannot be based upon an allegation that amounts to mere nonfeasance unless plaintiff establishes, as a matter of law, that the managing agent was in complete and exclusive control of the premises" (*Hakim v 65 Eighth Ave.*, LLC, 42 AD3d 374,

[6] References to the NYSCEF record in this section are under Index No. 153530/2016 unless otherwise noted.

375 [2007]). Here, the record reflects that Corcoran was never in complete or exclusive control of the premises. Corcoran entered into a listing agreement to rent out Units 19C and 19D. The agreements for both units are expressly limited in scope to Corcoran's marketing efforts in renting out the units and contain no language designating Corcoran as the units' property manager (NYSCEF doc No. 154). Courts have made it clear that listing agreements such as the ones here do not convey a duty on the broker to manage or maintain the real property, nor do they constitute a "comprehensive and exclusive management and maintenance contract" which displaces the non-delegable duties of owners to maintain their property in a safe condition (*Salinas v Wells Fargo Bank, N.A.*, 7 NYS.3d 245 [N.Y. Sup. Ct. 2014], citing *Espinal*, *supra*, *Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579 [1994).[7]

Furthermore, as mentioned *supra*, the Condominium's bylaws maintain that individual unit owners are responsible for maintenance and repair of plumbing, doors, and heating ((NYSCEF doc No. 89, Article IV, Section 10). Accordingly, it was the responsibility of 19D and 19C owner Ziang Dan Tan and his representative Terry Wang to ensure that the appropriate conditions in the apartment were maintained, even during the window in time that Corcoran was showing the units. Terry Wang, who was not living in the unit at this time, also stated in an affidavit that the Condominium did not employ a "strict security" policy regarding visitors, and that "employees of Corcoran, real estate brokers, prospective tenants, and the Alexander Condominium's superintendent, porters, and doorman, all potentially had access to Unit 19D and

[7] In opposition to this point, Plaintiffs have submitted an affidavit from George Wonica, a real estate broker based in Staten Island, who contends that Corcoran deviated from the accepted standard of care by failing to discover the alleged heat issue and safely maintain the premises (NYSCEF doc No. 207). Mr. Wonica, however, cites to no legal authority for these propositions and instead appears to rely on Real Estate Board of New YORK (REBNY) course materials regarding general best practices. Mr. Wonica also confirms that the realtor has no duty to uncover latent defects, but only to perform a visual inspection, and it is not disputed that Corcoran's brokers performed a visual inspection when they went to the Units on January 7, 2015 (NYSCEF doc No. 226 at 8).

the opportunity to alter the position of the balcony door in Unit 19D" (NYSCEF doc No. 199 para 15, 2016). It is thus beyond dispute that Corcoran at no point had complete or exclusive control over the premises, nor did it assume any duty to maintain the premises, and accordingly, any nonfeasance on the part of Corcoran, such as failing to check on the premises after showings, including the showing by Bond's broker at issue in this proceeding, cannot preclude Corcoran's dismissal. Therefore, liability can only potentially attach if one of its brokers engaged in an affirmative act such as opening the balcony door or interfering with 19D's thermostat.

A Force or Instrument of Harm

Plaintiffs contend that Corcoran has failed to eliminate questions of fact regarding potential affirmative acts by its agents that launched a force of harm, given that neither Ms. Fearon or Ms. Wang testified that they definitively did not touch the thermostat or the balcony door (NYSCEF doc No. 202 at 13). However, while a review of the deposition testimony confirms that neither Ms. Fearon or Ms. Wang affirmatively stated they did not "touch" the thermostat, both agents testified they did not "notice" any conditions related to the temperature of 19D, nor did they "check" the temperature (NYSCEF doc No. 226 at 14). Therefore, while Plaintiffs are technically correct in asserting that Corcoran's agents failed to state they did not "touch" the thermostat, it can be inferred from their testimony that they did not adjust the temperature in the Unit. Ms. Fearon also stated she never received any alerts from other brokers showing the unit that it was cold in the weeks after her visit and noted that temperature issues were the responsibility of the property manager (NYSCEF doc No. 166 at 88). The Condominium also had no temperature requirements for units at that time (NYSCEF doc No. 109 at 14).

Plaintiffs also point to an email from Ms. Fearon to the representative of 19D's owner, Terry Wang sent shortly after a walk-through, in which she alerted him to an "HVAC" issue; Ms. Fearon was unable to recall the specifics of the HVAC issue when she later appeared for deposition (*id.* at 13-14). Plaintiffs contend that Ms. Fearon must have touched or otherwise interacted with the unit's thermostat if she was aware of an HVAC issue. However, the email reflects that the HVAC issue was in Unit 19C, the other unit Corcoran was retained to list, and not 19D where the leak occurred. Plaintiffs do not articulate why an "air conditioning" issue would be responsible for freezing conditions in a neighboring unit. Accordingly, Ms. Fearon's email is insufficient to raise a question of fact that would preclude summary judgment for Corcoran.

Critically, as mentioned above, Starr has submitted a weather report from an expert who tracked the meteorology history in the weeks leading up to the discovery of the frozen pipes and concluded that 19D's balcony door could not have been open between February 2, 2015 and February 6, 2015, as no "crusty snow" was on the balcony, meaning that the snow discovered February 17 was from a recent storm (NYSCEF doc No. 221). Given that it is uncontested that Ms. Fearon and Ms. Wang were last in 19D on January 7, 2015, there is no support for a conclusion that one of them opened the balcony door.

As the record does not support a finding that Corcoran's brokers took an affirmative action to "launch an instrument of harm" in Unit 19D, the caselaw advanced by Plaintiffs in support of a finding of liability under *Espinal* is misplaced.

For instance, Plaintiffs both rely on the case of *Stimmel v Osherow*, 133 AD3d 483 [1st Dept 2015], wherein plaintiff tripped and injured herself on a drapery cord while attending a

showing of an apartment. The real estate broker defendants moved for summary judgment, arguing, similar to Defendants here, that they had no duty to keep the premises safe and did not "launch the instrument of harm" that caused the accident. The lower court granted summary judgment in the brokers' favor, but the First Department reversed, finding that the broker who was showing the apartment on the day of the accident could not eliminate all issues of fact as "she was not able to state with a reasonable degree of certainty" that she did not inadvertently allow the cord to fall on the floor when she opened the drapes (*id.* at 486). The First Department concluded that as the broker did not have a specific recollection regarding the opening of the drapes on the day of the accident, she was unable to eliminate the possibility she was responsible for the hazardous placement of the cord and thus not entitled to dismissal (*id.*).

Here, of course, the discovery of the frozen pipes in 19D occurred at least a month after Corcoran's brokers were last in the apartment, not on the same day that one of them was showing the unit. Ms. Fearon and Ms. Wang have also both unequivocally stated that they did not interact with the thermostat when they visited, whereas the broker in *Stimmel* could not say with certainty whether she accidently caused the window drape cord to fall on the floor. The circumstances here are thus distinguishable from *Stimmel,* and the other cases additionally cited by Starr where accidents occurred in the immediate or near aftermath of work performed by third party contractors (*See e.g. Farrugia v. 1440 Broadway Associates*, 163 AD 3rd 452, 456 (1st Dept 2018) [whether contractor's removal of tank "created or caused an unsafe condition, or made a previously obscured opening in the metal plate "less safe" raised an issue of fact; *Karydas v Ferrara - Ruurds*, 142 AD3rd 771, 772 [1st Dept 2016] ["issues of fact exist whether, in its attempts to repair a minor leak, (defendant property manager) negligently exacerbated the problem and 'launched a force or instrument of harm"]*; Cornell v 360 West 51St Street Realty,*

LLC, 51 AD3rd 469, [1st Dept 2008] [issues of fact regarding contractor's negligent removal of debris required denial of summary judgment]; *Grant v Caprice Management Corp.*, 43 AD3rd 708, [1st Dept 2007] [issues of fact concerning replacement of parts and repair of window necessitated denial of summary judgment).

Unlike in the above cases, here Plaintiffs have not advanced an argument supporting a conclusion that Corcoran's brokers launched an instrument of harm while they were in the subject premises. Their arguments instead rest on unfounded speculation that the brokers *may have* touched the thermostat or opened the balcony door during their inspection, despite the brokers' statements to the contrary and the fact that numerus other individuals entered the apartment after their visit and reported no alarming conditions, as well as the fact that relevant caselaw and the Condominium's own bylaws demonstrate that the Unit Owner was responsible for the conditions at all times.

Accordingly, the Court finds that Corcoran is entitled to dismissal from both Action One and Action Two.

The Bond Defendants[8]

Plaintiffs make similar arguments against the Bond Defendants regarding the matter of whether Mr. Guirguess launched an instrument of harm while showing 19D to his client on February 6, 2015. Plaintiffs do not contend that Bond was ever in control of the premises as unlike Corcoran, Bond was not the real estate agency responsible for the listing. Instead, Plaintiffs argue Bond is liable for the potential negligent actions of its employee, Mr. Guirguess,

[8] References to the NYSCEF record in this section are under Index No. 153530/2016 unless otherwise noted.

who Plaintiffs contend is the last known person to visit 19D prior to the discovery of the leak on February 17.

The Bond Defendants argue that they are entitled to dismissal as Mr. Guirguess testified in deposition that he and his client spent "less than a minute" in 19D as his client deemed it too small in size, and that neither of them touched anything in the Unit or went on to the balcony (NYSCEF doc No. 228 at 2). Plaintiffs challenge the credibility of Mr. Guirguess' testimony as his client did not appear for deposition during discovery despite being subpoenaed, and therefore argue his testimony regarding his client's reaction to the unit constitutes "inadmissible hearsay" (NYSCEF doc No. 213 at 16). It is of course true that out-of-court statements offered for the truth of the matters they assert are hearsay, and there is no exception to the hearsay rule premised solely on witness availability (*Nucci ex rel. Nucci v. Proper*, 95 NY2d 597, 602 [2001]). Nevertheless, the Court notes that the matter of whether the apartment was "too small" is not at issue in this proceeding, and Mr. Guriguess' recollection of his client's reaction is being offered not for the truth of the matter asserted, but rather as part of his recollection of the time he spent in 19D.

Notwithstanding the fact that the Court finds Mr. Gurigeuss' testimony to be admissible, however, the fact remains that his uncorroborated testimony is all that the Bond Defendants have offered in support of their motions for dismissal from both actions, and Plaintiffs have introduced similarly admissible pieces of evidence indicating that there is a possibility, however remote, that Mr. Guirguess may have inadvertently touched the thermostat or left the balcony door open when he visited the Unit with his client on February 6. The Court must view the facts in the evidence in the light most favorable to Plaintiffs, as the non-moving party in both actions

here (*Sherman v New York State Thruway Auth.*, 27 NY3d 1019, 1021 [2016]). While the Bond Defendants speculate that others visited the unit after February 6, the fact remains that Mr. Guirguess is the last person recorded to have entered 19D prior to the discovery of the leak.[9] As discussed above, Starr's meteorologist expert has opined that the snow entered the Unit sometime between February 6 and February 17, a statement that has not been affirmatively disputed by Defendants. In contrast with Corcoran's brokers, there is a much closer nexus in time between Mr. Guirguess' visit and the day that snow most likely entered the Unit. Therefore, viewing the facts here in the light most favorable to Plaintiffs, the Court finds that the Bond Defendants have not eliminated the possibility that Mr. Guirguess may have launched a "force of harm" when he entered 19D on February 6.

In addition to insisting that that Mr. Guirguess' testimony is sufficient to establish they are free of negligence, the Bond Defendants further contend that Plaintiffs cannot "prove" Mr. Guirguess altered the conditions of 19D and cannot rule out other "potential or possible causes to the occurrence" (NYSCEF doc No. 228 at 3). These contentions, of course, misstate Plaintiffs' burden of proof in these actions. Plaintiffs are not the parties moving for summary judgement here and they are not required to "prove" that Mr. Guirguess caused the conditions of 19D, nor are they required to prove that an alternative or superseding cause must have created the conditions instead; the latter, of course, is the burden of the Bond Defendants, and as they have

[9] The Bond Defendants, in opposition to this point, argue that as the Condominium did not keep a strict record of visitors, it is possible that others entered the unit in between February 6 and 17 (NYSCEF doc No. 175 at 7). The Bond Defendants, however, cannot rely on this speculative statement to escape liability. Corcoran's log of external brokers that visited the Condominium to show 19D includes an entry for February 14, but the February 14 entry is marked "Did not see/Cancelled" (NYSCEF doc No. 187). Accordingly, while others may have entered after, Mr. Guirguess is the last person confirmed to have been in 19D prior to February 17 by the evidentiary record.

not met that burden, their motions must be denied irrespective of the sufficiency of Plaintiffs' opposition papers (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

As the Bond Defendants have failed to demonstrate a *prima facie* entitlement to dismissal, the Court finds that the Bond Defendants' motions seeking dismissal from both actions must be denied at this juncture.

Corcoran's "Independent Contractor" Affirmative Defense[10]

While the Court has granted Corcoran's motions for dismissal and therefore need not reach Corcoran's affirmative defense that it cannot be liable for its brokers' actions as they are independent contractors and not full-time employees, the Court writes separately to note that had it determined Corcoran could not yet be dismissed from this proceeding, this argument would not have proved persuasive.

As a preliminary matter, Plaintiffs claim that Corcoran failed to raise this affirmative defense in its Answer in either Action One or Action Two. CPLR 3018(b) provides:

> "Affirmative defenses. A party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading such as arbitration and award, collateral estoppel, culpable conduct claimed in diminution of damages as set forth in article fourteen-A, discharge in bankruptcy, facts showing illegality either by statute or common law, fraud, infancy or other disability of the party defending, payment, release, res judicata, statute of frauds, or statute of limitation. The application of this subdivision shall not be confined to the instances enumerated."

Corcoran, however, did technically raise the affirmative defense, as it stated in its Answer to both actions that "the alleged occurrence, if not the result of the negligence of plaintiff's

[10] References to the NYSCEF record in this section are under Index No. 153530/2016.

subrogor, was caused by negligence and/or actions of third parties not under the defendant's control" (NYSCEF doc No. 147 at 5). This statement afforded Plaintiffs notice that Corcoran would argue that the conditions were caused by entities not within its control, and accordingly, Plaintiffs cannot argue that the independent contractor defense took them by "surprise" as conveyed by CPLR 3018(b). This question was also raised during the depositions of Ms. Fearon, Ms. Wang, and Mr. Guirguess (NYSCEF doc No. 226 at 3). Furthermore, it has been held that "even an unpleaded defense may be raised on a summary judgment motion, as long as it would not be likely to surprise the adverse party or raise issues of fact not previously apparent" (*Brodeur v Hayes,* 305 AD2d 754, 755 [2003]). The caselaw relied upon by Plaintiffs in support of their contention that the affirmative defense was not raised is also inapplicable, as the cases cited all involved affirmative defenses that were entirely left out of the pleadings (See *Love v Rockwell's Intl. Enters., LLC*, 83 A.D.3d 914, [2nd Dept 2011] [defense raised the independent contractor issue for the first time in a post-verdict motion]; *Surlak v Surlak*, 95 AD2d 371, 383 [1983] [defendant did not request leave to amend his answer to assert affirmative defense at any point during or after trial]).

Accordingly, the Court finds that the affirmative defense was sufficiently raised in Corcoran's Answer such that the standards of CPLR 3018(b) are satisfied and turns to the legal merits of the argument.

It is well settled that one who hires an independent contractor is generally not liable for the independent contractor's negligent acts, on the grounds that the employer "cannot control the manner in which the intendent contractors' work is performed," unlike with a full-time employee (*Chainini v Board of Education,* 87 NY2d 370 [1995], *see also Rosenberg v Equitable*, 79 NY2d 664 [1992]).

Plaintiffs and Corcoran disagree on the matter of whether Corcoran's brokers are "independent contractors" or "employees" within Corcoran's full control. Plaintiffs cite to the fact that Ms. Fearon attested in deposition that she was appearing on behalf of her employer, Corcoran, and that she has been an employee of Corcoran for 11 years (NYSCEF doc No. 202 at 28). Additionally, the New York State Disclosure Form included as an attachment to Corcoran's listing agreement identifies both Fearon and Wang as agents "of Corcoran" (NYSCEF doc No. 154).

Corcoran avers that its brokers are not employees, noting that its website refers to Ms. Fearon and Ms. Wang as "Licensed Real Estate Broker" and "Licensed Real Estate Salesperson," respectively (NYSCEF doc No. 226 at 4). Corcoran also points to the fact that Ms. Fearon testified in deposition that she makes her own hours and does not receive benefits (NYSCEF doc No. 140 at 29).

The Court finds that, regardless of how Corcoran chooses to internally classify its agents for its own purposes, Corcoran may be vicariously liable for its brokers' negligent acts as its brokers are publicly associated with Corcoran and hold themselves out to be agents of Corcoran. It is hornbook law that a principal can convey to the public that an individual is their agent, cloaking that person with "apparent authority" to act on their behalf (*Federal Insurance Co. v Diamond Kamvakis & Co*, Inc., 144 AD2d 42 [1st Dept 1999]). When a principal takes action to cloak an agent with apparent authority, liability for the agent's tortious conduct can become "traceable" to the principal (*Ford v Unity Hospital*, 32 NY2d 464 [1973]). Apparent authority "may exist in the absence of authority in fact, and, if established, may bind one to a third party with whom the purported agent had contracted. . . [a]s with implied actual authority, apparent authority is dependent on verbal or other acts by a principal which reasonably give an

appearance of authority to conduct the transaction" (*Id.* at 45, citing *Greene v Hellman,* 51 NY2d 197 [1980]). By identifying Ms. Wang and Ms. Fearon as being "of Corcoran" on the listing agreement and labeling them agents with their own personal profiles on the company's website, Corcoran conveyed to the public that they are agents working on behalf of the brokerage and cloaked both with apparent authority. Therefore, Corcoran is precluded from evading liability for their actions while working as agents of Corcoran regardless of whether it considers its agents to be "independent contractors."

Accordingly, had this Court determined that Ms. Fearon and Ms. Wang may have acted negligently and launched an instrument of harm in the course of their duties, Corcoran's argument that its agents are "independent contractors" would not have proved availing and Corcoran would have remained a defendant in both actions.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of Defendant N.R.T. New York LLC d/b/a The Corcoran Group s/h/a The Corcoran Group, Inc. ("Corcoran") seeking summary judgment pursuant to CPLR 3212 dismissing all claims against it (Motion Seq. 008) in *Starr Indemnity and Liability Company A/S/O/ Alexander Condominium v The Corcoran Group, Inc., Bond New York, and Peter Guirguess, individually*, Index No. 153530/2016 ("Action One") is granted; and it is further

ORDERED that the motion of Corcoran seeking summary judgment pursuant to CPLR 3212 dismissing all claims against it (Motion Seq. 003) in *Privilege Underwriters Reciprocal Exchange A/S/O Alexander Condominium v N.R.T. New York, LLC d/b/a The Corcoran Group,*

Bond New York Real Estate Corp., Peter Guirguess, Index No. 652363/2017, ("Action Two") is granted; and it is further

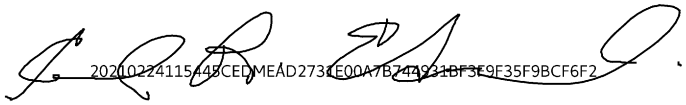
ORDERED that the motion of Defendants Bond New York and Peter Guirguess (collectively, the "Bond Defendants") seeking summary judgment pursuant to CPLR 3212 dismissing all claims against them (Motion Seq. 009) in Action One is denied; and it is further

ORDERED that the motion of the Bond Defendants seeking summary judgment pursuant to CPLR 3212 dismissing all claims against them (Motion Seq. 002) in Action Two is denied; and it is further

ORDERED that Actions One and Two are severed and continue against the Bond Defendants; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for Corcoran shall serve a copy of this Order, along with Notice of Entry, on all parties within twenty (20) days.



2/24/2021
DATE

CAROL R. EDMEAD, J.S.C.

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