

Medical Liab. Mut. Ins. Co. v United Airconditioning Corp.

2021 NY Slip Op 30717(U)

March 4, 2021

Supreme Court, New York County

Docket Number: 100115/2011

Judge: Francis A. Kahn III

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

INDEX NO. 100115/2011

MEDICAL LIABILITY MUTUAL INSURANCE COMPANY,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 013 015 016

- v -

UNITED AIRCONDITIONING CORP., UNITED AIRCONDITIONING CORP. II, et al.

DECISION + ORDER ON MOTION

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 013) 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 154, 214, 215, 216, 217, 218, 219, 220, 221, 222

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 015) 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200

were read on this motion to/for SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 016) 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 223, 224, 225

were read on this motion to/for JUDGMENT - SUMMARY

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

In this action for property damage as a result of flooding, the following motions are consolidated for determination herein.

Defendant Skylift Contractor Corp. (Skylift)1 moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all crossclaims as against it (mot seq 013). Defendant MG Engineering P.C. (MG) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all crossclaims against it (mot seq 015). Defendant Hallen Welding Service Inc. (Hallen) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all crossclaims against it (mot seq 016).

BACKGROUND

1 The motion is on behalf of Skylift Contracting Corp. only. During his deposition, Skylift owner Frank Allecia testified that defendant Skylift Master Riggers is "a company that we -- our 23 drivers, all our drivers that work under, our 24 union drivers. Strictly trucking" (Spitz affirmation, exhibit E at 14). Skylift Master's motion for summary judgment was denied by an April 10, 2012 decision of the court.

This case involves flooding that occurred between January 11, 2008 and October 28, 2008 at the offices of plaintiff Medical Liability Mutual Insurance Company (MLMIC), a tenant at 2 Park Avenue, New York, New York (the Building), as a result of demolition and construction operations on the roof immediately above it. MLMIC alleges approximately \$1,000,000 in property damages as a result of this water intrusion and flooding.

MLMIC leased offices on the 26th floor of the Building, immediately below the 27th floor roof where the operations took place, as well as space on the 25th and 24th floors. From January 2008 through October 2008, an entity called United Airconditioning Corp. ("UAC") contracted with the Building's managing agent, L&L Holding Company ("Managing Agent"), to conduct renovations, construction and repair work on the roof at the Premises.

The relevant demolition and construction operations involved two construction projects on the roof of the Building, which took place in two major stages. In the first stage,² the building's cooling towers were removed and replaced (the cooling tower restoration project). The cooling towers are located on top of what is described as a "Mechanical Room," which is also located on the roof of the building. During the course of the cooling tower restoration project, precipitation (rain water, sleet, snow, hail) repeatedly resulted in flooding in MLMIC's offices directly beneath (the Premises). New cooling towers were needed because the building required more electricity to operate the central air conditioning in the building. The cooling towers cooled the hot water generated by the air conditioning.

The second major stage was replacement of the roofs on all the setbacks of the entire building, including the 27th floor roof (the roof replacement project). During the course of the roof replacement project, precipitation (rain, snow, etc.) continued to result in water destructively infiltrating MLMIC's offices. Defendant East Coast Restoration & Consulting Corp. (and/or East Coast Restoration & Consulting of NY, Corp. and East Coast Restoration Corp.) (collectively ECR) was the General Contractor for the Roof Replacement Project.

During his deposition, Richard Veltri (Veltri), the Vice President of UAC, testified as to what generally occurred during the cooling tower restoration project:

Q: When the new towers were placed, were they placed on top of the mechanical room, or were they placed in a new area?

A: No. They were placed in the exact same location as the old ones were. There was some modifications to the existing steel that I think was performed by Hallen Steel, if I remember correctly, we contracted Hallen Steel to do that work. So what happened -- the process of that is, just to explain that process, the old towers would be demolished by hand, They weren't rigged off the roof, they were demolished in pieces by hand. The new steel was -- the existing steel was then modified with some new steel, which is, again, above the mechanical room, right?

Q: Okay.

A: Then the new towers show up and get rigged over that weekend onto that new -- slash -- you, know, modified steel. That's it.

Q: Okay.

A: That's the tower replacement. The physical tower replacement"

(Nwokoro affirmation, exhibit G at 51-52).

² During the first phase of the project, there were six leaks into plaintiff's premises: January 11, 2008, January 14, 2008, February 13, 2008, May 11, 2008, May 18, 2008, May 21, 2008 (Sellers affirmation, exhibit E at 5).

Facts pertaining to Skylift

The fourteenth cause of action in the verified complaint sets forth a claim in negligence against Skylift. As stated above, UAC was the General Contractor for the cooling tower restoration project. To complete this work, UAC had multiple sub-contractors who performed aspects of the work such as demolition, welding, lifting, electrical, etc. One of those subcontractors was movant Skylift, which was responsible for delivering, rigging, hoisting and setting the components of the new cooling towers onto the structural steel above the roof, known as the “mechanical room,” on the 27th floor roof of the building.

Skylift did its work on the weekend of February 8th and 9th of 2008. On the Saturday that delivery was made, Skylift assembled a crane and then rigged and hoisted the components of the new water cooling tower, consisting of 6 or 8 sections, each of which weighed approximately 10,000 pounds, from the street onto structural steel supports built over the Mechanical Room sitting on the roof of the 27th floor, after which other companies would install the new cooling towers. Frank Allecia, the owner of Skylift, testified to this:

“Q. Do you recall a Skylift Contracting job at 2 Park Avenue in 2008?

A. Yes.

Q. What do you recall about that?

A. We were contracted by United Air Conditioning to receive, deliver, and rig to the roof of the existing steel that was on the roof, the new cooling towers”

(Spitz affirmation, exhibit E at 18).

During his deposition, Frank Allecia further testified:

“Q. What, if any, precautions did Skylift Contracting take to assure that the operation caused no damage to the building?

A. Again, we had a city inspector there. He stayed until the picks were made. The crane that was picked was more than adequate to do the job. The crane at no time came close to hitting the building or near the building.

Q. What, if any, precautions did Skylift Contracting take to assure that the roof of the building was not damaged during the hoisting and setting of the towers?

A. Our contract was to put cooling towers on the actual steel. Any protection would have to be done by others than us. We do not do protection.

Q. Who was responsible for protection?

A. United or one of their subcontractors”

(Spitz affirmation, exhibit E at 42).

He additionally testified:

“[Skylift does] no roof protection. Our job was to land the equipment up on the upper steel. What we did was stand on the steel and land it. We never touched the roof. There was no reason to”

(Spitz affirmation, exhibit E at 54).

UAC witness Badresh Shah (Shah), the Project Manager for the cooling tower restoration project, testified to Skylift’s work on the project and Skylift’s lack of responsibility for the flooding:

“Q. Did United hire Skylift Contractor Corp.?

A. Yes.

Q. Can you tell me what Skylift was hired to do for the project?

A. To hoist the tower from street level up to the roof.

Q. And did you observe the work that Skylift did?

A. Yes.

Q. How long did the work take?

A. Two days.

Q. And in the two days that Skylift was on the project site, did they perform any type of construction work to the roof?

A. No.

Q. Did they perform any renovations to the roof?

A. No.

Q. Did they perform any repair work to the roof?

A. No.

Q. Did they do any type of demolition work to the roof?

A. No.

Q. Did they do any dismantling of any type?

A. No.

Q. Did Skylift have any part of dismantling the cooling towers that you had indicated earlier were removed from the roof?

A. No.

Q. Were the cooling towers already removed by the time that Skylift came to the job site?

A. Yes.

Q. Did you or somebody else from United Airconditioning direct Skylift on where to place the towers?

A. Yes.

Q. Did you see Skylift cause any damage to the roof or any other part of the structure of the building during the two days that it was on the job site?

A. No.

Q. Did you receive any complaints from any contractor or yourself about the work that Skylift did on those two days at the project?

A. No.

Q. Did Skylift have any responsibility to connect the cooling towers to the HVAC system?

A. No.

Q. In your opinion, sir, was there any way that Skylift caused any damage to the roof to cause it to leak?

A. No”

(Spitz affirmation, exhibit I at 450-452).

UAC witness Richard Veltri (Veltri) was asked the following questions and gave the following answers:

“Q. Did Skylift make any openings to the roof for any of their job responsibilities at this project?

A. No. There would be no reason for them to do that.

Q. Would Skylift make any openings in the machine room floor for this project?

A. No”

(Spitz affirmation, exhibit J at 157).

Pursuant to paragraph 2 of the Terms and Conditions of the Purchase Order agreement between Skylift and UAC, Skylift assumed all of UAC’s obligations and responsibilities:

“Subcontractor is bound to United Airconditioning Corp II for the performance of the Work in the same manner as United Airconditioning Corp II is bound to the General Contractor/Construction Manager and/or Owner under contract with the General Contractor/Construction Manager and/or Owner. The pertinent parts of such contract will be made available upon Subcontractor’s request. In the event of any conflict between these Terms and Conditions and a contract between United Airconditioning Corp II and General Contractor/Construction Manager and/or Owner, the more strict provision in favor of United Airconditioning Corp II shall govern”

(Spitz affirmation, exhibit F at 2, cited in MLMIC memo in opp at 5-6 (the exhibit itself is illegible)).

As the general contractor, UAC had a contract with the owner and L&L. Under that contract, UAC had the responsibility to protect the Premises against the elements during construction:

“15.1 Safety Precautions and Programs “The Contractor [UAC] shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract. The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to:
* * * .3 other property at the site or adjacent thereto.

The Contractor shall give notices and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on safety of persons and property and their protection from damages injury or loss. The Contractor shall promptly remedy damage and loss to property caused in whole or in part by the Contractor, a Subcontractor, a sub-subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Contractor is responsible under Subparagraphs 15.12 and 15.13, except for damage or loss attributable to acts or omissions of the Owner or Architect or by anyone for whose acts either of them may be liable, and not attributable to the fault or negligence of the Contractor. The foregoing obligations of the Contractor are in addition to the Contractor’s obligations under Paragraph 8.13”

(Ellenberg, exhibit 3, § 15.1).

According to MLMIC, under this provision, Skylift assumed all of UAC’s obligations and responsibilities. MLMIC also offers the fact that “most pertinent to Skylift’s motion is that MLMIC suffered flooding and water damage on February 13, 2008, within 4 or 5 days of moving defendant Skylift’s work on the roof” (MLMIC memo in opp at 4).

In a February 22, 2008 letter, the Managing Agent made the following statement regarding the flooding of January 11th and February 13th, 2008:

“As we discussed, efforts have been made to minimize the exposure of the Building to water infiltration during the time that portions of the roof have necessarily been opened

or made vulnerable to wind and rain. Landlord has incurred considerable expense engaging its engineering staff and various contractors to install, adjust and monitor a temporary enclosure system for portions of the roof following the removal of the old tower. The water infiltration on January 11th was strictly related to the removal of the old tower while that of February 13th was related to setting the components of the new tower into place over the mechanical room. Unfortunately, both of those critical stages of work were accompanied by unseasonably high and unforeseeable levels of wind and rain. We continue to make daily inspections and adjustments to the temporary enclosure system we've installed on the roof (and around the cooling tower components as that work progresses) to safeguard against water infiltration. As soon as the major construction is complete on the cooling tower, our roofing contractor will begin preliminary work toward the roof replacement on this portion of the Building. Again, we will take all necessary precautions during the roof replacement to protect the Building against water infiltration”

(Ellenberg affirmation, exhibit 2).

Plaintiff's expert in its report concludes as follows:

“Our findings are that if United Air Conditioning Corp. and East Coast restoration, and its agents and sub-contractors had conducted proper waterproofing and protection during both their respective demolition and construction operations; that these multiple leak events would not have occurred”

(Spitz affirmation, exhibit N at 4).

Consequently, according to MLMIC, although plaintiff's expert did not identify particular UAC subcontractors in its expert report, it did not exonerate defendant and subcontractor Skylift. MLMIC argues that Skylift's motion should be denied because some of the parties have not yet served expert reports, and, therefore, discovery is not yet complete.

Facts pertaining to MG

The seventh cause of action of the verified complaint sets forth the claim against MG. In that cause of action, MLMIC claims that from January 2008 through October 2008, MG entered into an agreement with UAC, under which MG undertook and performed construction related to the work on the roof of the Premises. MLMIC also alleges that MG “negligently” performed various renovation and construction work on the Project resulting in water leaks into MLMIC's office space between January 2008 and October 2008 (Spitz affirmation, exhibit A at ¶52). On its motion, MG argues that MLMIC's allegations have no basis in truth and are thoroughly controverted by the contracts between MG and the Managing Agent, as well as by deposition testimony in this action.

MG was a consulting mechanical, electrical and plumbing ("MEP") engineer for the cooling tower restoration project. Through a series of proposals and contracts with the Managing Agent, and not UAC, MG was responsible for:

“(a) preparation of specifications for testing the water systems of the existing cooling tower and prepare a schematic for which areas were to be tested; (b) design a mechanical room for the new HVAC equipment; (c) preparation of mechanical, electrical, fire alarm and plumbing (MEP) engineering documents; and (d) during the construction phase of

the Cooling Tower Project, review shop drawings and attend periodic field observations as necessary”

(MG reply affirmation, citing Gerazounis aff, exhibits 1-4).

According to the affidavit of Michael Gerazounis (Gerazounis), a principal of MG, MG was hired to provide the design of the cooling towers (Sellers affirmation, exhibit D at 47), but not to provide any services related to renovation, construction, or repair to the roof of the Project and had no responsibility to investigate the conditions of the roof or to supervise the work of any of the other subcontractors for either the cooling tower restoration project (Gerzounis aff, ¶ 11).

In 2004, MG Engineering prepared an analysis of the cooling towers and associated machinery, pumps, pipes, systems and equipment, and of the alternative projects for addressing the cooling systems' deficiencies.

Gerazounis testified that MG, as the engineer on the cooling tower restoration project, had no responsibility for the roof:

“A. I'm not an architect. I'm not a roofing expert, but basically as a generalization it's if there was some damage to the roof it would be patched as if you would patch a hole in a tire or patch a hole in a suit or -- so same thing.

Q. Was that included in the engineering?

A. That would not be part of my scope. The purpose for this was to get an understanding of the whole entire scope of the project, so...

Q. Okay. Whose responsibility would that be?

A. An architect.

Q. To draw the plans?

A. To deal with the roof”

(Sellers affirmation, exhibit D at 33-34).

Gerazounis further testified that MG was the mechanical engineer for the cooling tower restoration project, was not on site daily and had no involvement in the means and methods of the work (see Sellers Aff., Exhibit D, at ¶¶ 25: 22-25, ¶¶ 29: 5-14, ¶¶ 69:10 – 70:13, ¶¶ 29:5-14, ¶¶ 92:18 – 93:12, ¶¶ 125:7- 25, ¶¶ 33:21 – 34:13; 34:20 – 35:2, ¶¶ 78:6-20 ¶¶ 71:4–23, at ¶¶ 72:19 – 73:4). With respect to MG's visits to the site, Gerazounis testified: “[t]o visit the site or be onsite on a day-to-day basis, we would go broke if that's what we did. We do periodic observations when appropriate” (*id.* at 125). As per MG's visits, he additionally testified:

“Q. Who for MG Engineering visited the site once a week?

A. I don't recall.

Q. Was that the project manager or project engineer?

A. Could have been an engineer involved with the project.

Q. Were field reports prepared following those visits?

A. I don't recall. I don't recall”

(*id.* at 90-91).

MG states that its contract with the Managing Agent expressly provided that MG was not responsible for supervising the construction work:

“Our responsibility during the construction phase shall not be construed as supervision. Quality of workmanship, the means and methods of construction as well as any effects from the deviation from the contract documents or of approved shop drawings shall be the responsibility of the construction manager or any other persons performing the work”

(Gerazounis affirmation, Exhibit 4, at 2.3).

Gerazounis testified that MG was not responsible to protect the roof and, during the project, and had no knowledge of the leaking:

“Q. Do any of these drawings reflect any steps to be taken to protect the integrity of the roof during the course of the work?

A. The drawings strictly reflect the mechanical, electrical, plumbing requirements for the project.

Q. And those requirements, do those requirements include anything to protect the integrity of the existing structure?

A. That's part of the means and methods of working on the project.

Q. That's not MG Engineering?

A. Not ours.

Q. You don't design or provide engineering drawings for that purpose?

A. That's correct

Q. Did you become aware at any time during the course of the cooling tower project of any issues regarding the integrity of the roof?

A. Absolutely none”

(Sellers affirmation, exhibit D at 70-71, 72).

During his deposition, Shah testified that MG did not work on the roof and did not provide protection for the roof with respect to the cooling tower restoration project:

Q. Did MG actually do any renovation work on the project?

A. No.

Q. Did they actually do any construction work at the project?

A. No.

Q. Would MG ever have had any reason to perform any renovation or construction work on the project?

A. Not that I know of.

Q. To your knowledge, was MG responsible in any way to provide any protection for the roof of the project?

A. No”

(Exhibit F, at 455–456).

Veltri of UAC testified as to the Owner's responsibility for the roof protection:

“Q: Do you recall any conversations you had with Nino Pietro regarding receiving a credit for the \$20,000 roofing allowance?

A: Just that -- I don't recall the conversation, but I know he asked me to take it out of the contract, because they were going to perform the roofing and protection themselves”

(*id.* at 30-31).

Further, MG notes in its motion that MLMIC's retained expert, Thornton Thomasetti (TT), attributes no liability to MG in its expert report regarding the source and causes of the alleged water intrusion. MG cites the TT Report for its opinion that MG's designs for the cooling tower restoration project were proper and no water leaks into MLMIC's property would have occurred had UAC followed MG's designs. Specifically, the TT Report provides as follows:

"Had UAC exercised the level of care required by industry standards, their contractual obligations to L&L Holdings, the drawings and specifications prepared by MG Engineering as well as the AIA language noted below in Paragraph 6(c) as excerpted from AIA Document No. A201 "General Conditions of the Contract for Construction" ; the leaks would not have occurred. Specifically noted are the \$50,000 that UAC included in the Applications for payment for line items 4 and 6 for Carpentry / Protection and Roofing work, respectively"

(Sellers affirmation, exhibit E at 6, ¶ 5 (e)).

According to TT's report, the fault for the leaks and flooding lies only with UAC and ECR. In the report, TT found UAC 75% responsible and ECR 25% responsible, respectively.

In its opposition to MG's motion, UAC states that MG was responsible for more than MG claims in its motion papers. Specifically, UAC highlights Gerazounis' testimony that typically, after a contract is signed, MG would visit the site, take survey notes, and evaluate existing field conditions. (Sellers affirmation, exhibit D at 48-49, 53). After the site visit, engineering drawings would be prepared. (*id.* at 53). The drawings would include the demolition of the existing structure and the replacement of the cooling towers (*id.* at 63-64).

According to UAC, MG's 2007 contract with the Managing Agent required MG to prepare drawings, prepare the bid package for potential contractors, review bids for the job, provide information to the owner regarding the bids, review drawings prepared by subcontractors, conduct a weekly inspection, meet with the owner and construction team on a regular basis, and prepare a final punch list for completion of the project. The key facts that UAC focuses on are MG's responsibilities to conduct weekly inspections and meet with the owner and construction team on a regular basis.

During his deposition, Gerazounis testified:

"Q. Turning to the next page, item 3 2.1.13 reads, "It is anticipated that the construction shall take no more than eight weeks to complete. Consultant shall visit site at least once a week to observe progress and prepare a field report on the progress and status of installation as well as prepare a final punch list as implementation by the final contractor"?

A. Yes"

(Sellers affirmation, exhibit D at 89).

Thus, UAC takes the position that the contractual provision stating that MG was not responsible for supervising the construction work is contrary to these other provisions in the contract.

The agreement between MG and the Managing Agent contains the following provisions:

- “2.1.1 Consultant shall either attend or participate via teleconference at a reasonable number of meetings with the client/architect, construction manager, and other consultants, when necessary, in order to ascertain the requirements of the project during the design document preparation period.
- 2.1.2 Field survey of premises will be conducted as required to verify existing drawings and other information supplied by Client. . . .
- 2.1.4 Complete design calculations and working drawings on AutoCad.
- 2.1.5 Complete specifications, including adequate performance clauses and provision for testing all equipment before acceptance.
- 2.1.6 Checking and coordination of all drawings and specifications prepared by the Consultant under supervision of a licensed professional engineer.
- 2.1.8 Preparation of contract documents. . . .
- 2.1.10 Consultant's documents shall be used for the bidding, filing and subsequent construction of the installation.
- 2.1.11 Consultant together with the client shall provide documents to select contractors and shall level all bids and aid in the selection and award.
- 2.1.12 Consultant together with the client shall provide input to successful contractor for the preparation of a construction schedule.
- 2.1.13 It is anticipated that the construction shall take no more than eight (8) weeks to complete. Consultant shall visit site at least once a week to observe the progress and prepare a field report on the progress and status of the installation as well as prepare a final punchlist for implementation by the contractor”

(Sellers affirmation, exhibit 4 at 2-3).

The cooling tower restoration project Engineer's Contract also specified the following requirements for [MG's] involvement with the actual cooling tower replacement work (at page 3): 2.2.1 “The review and processing of construction shop drawings.” 2.2.2 “Periodic field observation visits and attendance at site meetings when requested with a maximum of 8-meetings/24- man hours will be performed during the construction period. Time spent in excess of this allotment will constitute additional services”

(*id.* at 3).

Furthermore, UAC retained an expert, MC Consultants, Inc.(MC), who concluded the following:

“MC disagrees with the above Plaintiffs expert conclusion. While it is true that the means and methods of any project falls squarely on the contractor as is industry standard, TT assigns the standard of care to study the existing condition of the roof and its components to the contractor. First and foremost, that is the responsibility of the Designer of Record and the decision of the Owner to undertake such studies. In this case that would be the responsibility of Wiss, Janney, Elstner Associates, Inc. (WJE)”

“It is MC's opinion that, although the scope of work to replace the cooling tower was mission critical, the Property Manager and Owner's Representative grossly underestimated the existing roofing conditions that required repair not only to the roof membrane but the concrete substrate. In addition, the underlying roof deficiencies that required brick repointing, flashing repair, removal of abandoned roof penetrations and the repair of the existing drains contributed to the water intrusion events. The design team

presented themselves and are indeed experts in their field regarding remediation of historic properties. However, as condition assessment (only examination for asbestos) did not occur until just prior to the commencement of work, the design team failed to meet their standard of care by giving the Owner a basis to make an informed decision as to the procedure to their capital improvement program”

(Delaney aff, exhibit 2 at 4 and 14).

Facts pertaining to Hallen

The eleventh cause of action in the verified complaint sets forth a cause of action in negligence against Hallen. Hallen was involved in the cooling tower restoration project pursuant to a sub-contract between itself and UAC. Furthermore, Hallen’s site work on the cooling tower restoration project commenced in or about October of 2007, was substantially completed by February 20, 2008 (Exhibit F to Nwokoro aff., Sandie EBT, page 22), and concluded on or about October 9, 2008. Specifically, Hallen was hired to construct, install and provide structural supports, general welding and further construction for the cooling tower restoration project. According to Hallen’s initial motion papers, Hallen argues that the evidence shows that Hallen only welded steel onto existing steel, did not make any openings in the roof, was not responsible for making any openings in the roof, and was not responsible for providing protection for any openings made in the roof. Yet, in its reply, Hallen states that the relevant purchase order required Hallen to “drill holes in the roof to install anchors for the new portions of the cooling tower” (Hallen reply affirmation at 3).

In the portions of Vice President of Hallen, William Sandie’s (Sandie), deposition transcript that were submitted to the court, Sandie testifies that it was not Hallen that was responsible to protect the roof, but it was UAC’s responsibility to protect the roof:

“Q. Oh, yes, okay. At the time of this project, did Hallen have any protocol for protecting the existing roof from being damaged as a result of the work that Hallen was going to do?

A. We did not because that is not our responsibility”
(Nwokoro affirmation, exhibit N at 39-40).

Further, Sandie testified with respect to the holes in the roof that were necessary for Hallen to do its work on the cooling towers:

“Q. Do you know if Hallen Steel had to make holes in the roof to put the steel posts in to support the mezzanine?

A. That would usually be done by the demo contractor.

Q. Do you know who the demo contractor was?

A. I don't know.

Q. Would Hallen Steel have to coordinate with the demo contractor as to the day and time that work was to be done?

A. Yes,

Q. And how would that coordination take place?

A. Let me go back. We would coordinate with them the location of the penetration, not so much the date and time”

(Nwokoro affirmation, exhibit F at 129-130).

According to the UAC's opposition to Hallen's motion, Sandie testified that Hallen drilled holes in the roof, however, the cited pages have not been submitted to the court:

"Mr. Sandie testified that HALLEN drilled the holes and installed the anchors in the roof. Exhibit "F" at 134. HALLEN would install the posts, and would then drill the anchors. Exhibit "F" at 137. HALLEN employees would drill through the concrete roof slab to install the anchors. Exhibit "F" at 138. The anchors went into the slab four to six inches deep. Exhibit "F" at 139"

(UAC memo in opposition to Hallen's motion at 2-3).

UAC included in detail Sandie's testimony with respect to Hallen's penetration of the roof:

"Q: And on the bottom left corner are those two black lines in the middle, that's the anchors?

A: That's correct. +++++++

Q: And who did those that roof penetration?

A: We [Hallen] drilled those holes and installed those anchors. (134-135) + + + + +

Q:Hallen Steel, did you do more than these two posts?

A: I believe we did.

Q: How many more?

A: I don't know..... (135) +++++++

Q: ...The holes you said were dug for these posts, what was the process used to dig those holes? (137)

A: Well, we would lay out where we wanted that roof penetration, where we wanted the roof material to be removed, and someone else would remove the roof material. Then we would come in and install the post, drill for the two or four anchors. It's probably four anchors, by the way, not just two.

Q: Okay, four anchors per post?

A: That's right. Yes, it says four actually there, so it's four. We would drill the four holes, install the anchor, tighten it up, and then our responsibility finishes. (137). + + + + +

Q: When you said someone would remove the roof materials, what type of roof materials are you talking about were removed? (138)

A: I can't tell from this drawing. I don't know what the roof composition is of 2 Park Avenue. But many roofs are comprised of rubber membranes, steel decking, concrete, there could be pavers, gravel, all those things would be removed by others. (138).

Q: And what would be left?

A: In this case, you would see the top surface of the structural concrete slab.

Q: And then would Hallen Steel employees drill through the concrete slab?

A: That's right. (138)

(UAC affirmation in opp at 13-14).

Additionally, UAC offers Sandie's testimony with respect to the repairing of the roof:

Q: And then would someone from Hallen Steel notify someone that the posts were in and the roofing contractor could come in next? (141)

A: Possibly.

Q: Is that what would have been the next thing to be done?

A: Or there was a super on that site who knew that the roof penetrations – that the roofing needed to be repaired in those locations. (141)

(*id.* at 14-15).

UAC also offers Shah’s contrasting testimony that no holes were made in the roof during the cooling tower restoration project, which contradicts Sandie’s testimony. On this point, UAC relies on the Hallen attorney Nwokoro’s affirmation in support:

“16. Mr. Shah also testified that the roof of the building was not cut, ripped or torn up during the water tower replacement project. (Exhibit H, Page 419); No holes were made in the roof during the project and no roof damages was caused by the project. (Exhibit H, Page 420)”

(Nwokoro affirmation in support of Hallen’s motion at 7).

The terms of the Hallen/UAC subcontract are set forth in a May 19, 2008 letter from Hallen to UAC. Those terms are, in part:

“We propose to furnish and install the structural steel at the above-referred job per WJE Architects drawings 1 & 2, dated 5/05/08, for the sum of Nineteen Thousand Five Hundred Dollars (\$19,500.00), tax status ‘capital improvement.’ This price includes the following scope of work, which is the full extent of labor and material we will provide for the above-referred job. Scope; 1. Furnish and install upper double channel framing. 2. Furnish and install lower double perimeter framing. 3. Furnish and install (4) of the (6) 1" hanger rods. 4. Furnish and install (4) angle stub posts, bolted to existing roof slab. 5. Furnish only (2) -1" hanger rods, drilled thru Filtration Base & installed by others. 6. Furnish shop details for approval. 7. Furnish one shop coat of prime paint all material. 8. Furnish straight time delivery and installation”

(Nwokoro affirmation, exhibit E at 1).

The proposal further stated:

“Exclusions: a. Overtime (unless noted). b. P.E. stamp or calculation. c. Field painting or touchups. d. Shore or shoring, needling. e. Chopping (including exposing steel for welding machine ground), patching, demo or removals, fireproofing, grouting or dry packing, flashing/pitch pockets. f. Fire watch or protection, safety cabling/protection of open shaft ways or platforms. g. Inspection reports or controlled inspection (unless noted). h. Permits, fees for bid or performance bonds. i. Protection of flashed or unfinished surfaces, safety barricades”

(*id.* at 2).

Although Sandie testifies that the list of exclusions includes “roof protection,” (Nwokoro affirmation, exhibit F at 53), the document does not corroborate that testimony.

With respect to protection of property during the project, UAC witness Shah testified that it was the building manager, and not UAC, that had this responsibility:

“Q. And looking at the third point, was United responsible for other property at the site or adjacent thereto, specifically, responsible for taking reasonable precautions for the safety of and providing protection to prevent damage, injury or loss?

A. In the providing the protection, but other things, yes.

Q. Who is responsible for providing the protection?

A. I believe it's building's responsibility. Building. Building management”

(Nwokoro affirmation, exhibit H at 105-106).

UAC witness, Veltri, likewise testified that it was the building manager who was responsible for the protection of the roof:

“Q Let me re-ask the question. Do you recall any conversations you had with Nino Pietro regarding receiving a credit for the \$20,000 roofing allowance?

A Just that -- I don't recall the conversation, but I know he asked me to take it out of the contract, because they [L&L] were going to perform the roofing and protection themselves”

(exhibit G at 30-31).

L&L's witness Nino Pjetri (Pjetri) testified that waterproofing the roof was the responsibility of UAC:

“Q To your knowledge, do you know who was responsible for waterproofing the site of the tower replacement project?

A When you say, "waterproofing" -- the waterproofing is an actual installation which the roofer does as part of his roof replacement project. If waterproofing means protecting a certain area while it's under construction, then that would then would have been the responsibility of the primary contractor on the job which was United”

(Ellenberg affirmation, exhibit 4 at 71).

Plaintiff's retained expert, TT, attributes no liability to Hallen in its report regarding the source and causes of the alleged water intrusion. According to Hallen, there is no indemnification clause in the documents requiring Hallen to do the work on the cooling tower restoration project:

“The sub-contracting agreement between UAC and Hallen under which Hallen performed work on the water tower replacement project did not contain an indemnification clause.

As the un-contradicted evidence shows, the agreement was memorialized by Purchase orders and Change orders. UAC invited bids for the work. Hallen made written proposals to UAC and UAC signed off on the proposal. UAC then issued a Purchase Order to Hallen signed by UAC. This purchase order, does not contain an indemnification clause”

(Nwokoro affirmation in support of Hallen's motion at 12-13).

In its opposition to Hallen's motion, MLMIC reiterates the finding in the TT report that: “if United Air Conditioning Corp. and East Coast Restoration, and its agents and sub-contractors had conducted proper waterproofing and protection during both their respective demolition and construction operations . . . these multiple leak events would not have occurred” (MLMIC affirmation in opp to Hallen motion, ¶ 11). MLMIC points out that Hallen admits that it was a subcontractor of UAC for the cooling tower restoration project.

MLMIC states that Hallen, in its motion papers, is relying not on the principal agreement or contract between Hallen and UAC, but on a supplemental agreement or contract between UAC and Hallen that expanded the scope of Hallen's work (*id.*, ¶ 14). According to the TT report, the water cooling project began in October 2007 and ended in October 2008. MLMIC describes that May 2018 letter between Hallen and UAC as a change order.

MLMIC relies on the February 22, 2008 letter of the Managing Agent to argue that Hallen is liable for the flooding. Specifically, MLMIC cites the portion of the letter that states:

"The water infiltration on January 11th was strictly related to the removal of the old tower while that of February 13th was related to setting the components of the new tower into place over the mechanical room. Unfortunately, both of those critical stages of work were accompanied by unseasonably high and unforeseeable levels of wind and rain"

(Ellenberg affirmation, exhibit 1 at 1).

This letter contains the following language concerning the Managing Agent's work on protecting the roof:

"As we discussed, efforts have been made to minimize the exposure of the Building to water infiltration during the time that portions of the roof have necessarily been opened or made vulnerable to wind and rain. Landlord has incurred considerable expense engaging its engineering staff and various contractors to install, adjust and monitor a temporary enclosure system for portions of the roof following the removal of the old tower. The water infiltration on January 11 was strictly related to the removal of the old tower while that of February 13 was related to setting the components of the new tower into place over the mechanical room. Unfortunately, both of those critical stages of work were accompanied by unseasonably high and unforeseeable levels of wind and rain. We continue to make daily inspections and adjustments to the temporary enclosure system we've installed on the roof (and around the cooling tower components as that work progresses) to safeguard against water infiltration. As soon as the major construction is complete on the cooling tower, our roofing contractor will begin preliminary work toward the roof replacement on this portion of the Building. Again, we will take all necessary precautions during the roof replacement to protect the Building against water infiltration"

(*id.* at 1-2).

With respect to working on this date, Sandie testified as follows:

"Q. Did Hallen have responsibilities relating to setting the components of the new tower into place over the mechanical room?

A. Perhaps. Hallen had workers on the roof on January 11, 2008, January 29 and January 30, 2008, among other dates"

(MLMIC affirmation in opposition to Hallen's motion at 13).

Thornton Tomasetti Report

In the introduction to the report, the TT offers this opinion:

“The mechanism of the leaks and the responsible parties are discussed in detail elsewhere in this report. Our findings are that if [UAC] and [ECR], and its agents and sub-contractors had conducted proper waterproofing and protection during both their respective demolition and construction operations; that these multiple leak events would not have occurred. Furthermore, we opine that the shared responsibility for the leaks can be prorated with [UAC]- being 75% responsible and [ECR] being 25% responsible.

The proper way to have maintained the water tightness of the roof would have been by removing only the amount of roof membrane area that could be replaced in one (1) day of work, and to meticulously install temporary roof measures at all joints between old and new roofing, penetrations and changes in plane. This would have avoided creating the conditions that led to the multiple leaks into the offices below in the event of rain or snow precipitation events that occurred. In removing too many sections or too large an area of the roof and leaving it exposed to the elements overnight or for multiple days, [UAC] and [ECR] caused the failure of the building envelope and the subsequent leakage that followed. This is why in the construction industry, the means and methods of executing the work falls squarely on the contractor and no-one else. As such, and after evaluation of the documents provided to us, TT opines that the cause of the multiple leaks onto the office spaces below were the actions and/or inactions of [UAC] and [ECR]”

(Spitz affirmation, exhibit N at 4).

“If both of the contractors involved in the roof-top projects had conducted proper preconstruction planning, assigned competent persons to study the roof, parapet walls and cooling tower assemblies thoroughly, then executed their respective contracts professionally and with the level of care demanded of such work; they would have met their contractual and industry standard obligations to deliver a project free of defects and damage to adjacent spaces and/or property. This is why in the construction industry, the means and methods of executing the work always falls squarely on the contractor and no one else”

(*id.* at 14).

DISCUSSION

1. Skylift’s Motion

“[T]he proponent of a summary judgment motion 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” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986][internal citations omitted]). “Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*id.*). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’ for this purpose” (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988][citation omitted]). “[A]verments merely stating conclusions, of fact or of law, are insufficient’ to ‘defeat summary judgment’” (*Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 383 [2004][citations omitted]).

Skylift moves to dismiss the complaint and any crossclaims against it. The court finds that Skylift meets its initial burden to establish its entitlement to summary judgment. In support of its motion, Skylift presents the court with the deposition testimony of Frank Allecia. Frank Allecia testified

that Skylift contracted with UAC to deliver, and rig to the existing steel that was on the roof, the new cooling towers. He testified that Skylift did just that when they assembled a crane, on February 8th and 9th 2008, and then rigged and hoisted the components of the new water cooling tower, consisting of 6 or 8 sections, each of which weighed approximately 10,000 pounds, from the street onto structural steel supports built over the Mechanical Room sitting on the roof of the 27th floor, after which other companies would install the new cooling towers. He testified that Skylift had no reason to “touch the roof” and did not “touch the roof,” and was, therefore, not responsible for the protection of the roof, and did nothing to protect the roof.

Skylift additionally relied on the testimony of UAC witnesses Shah and Veltri. Shah testified that Skylift did not do any repair work, dismantling, renovations or demolition work on the roof. He testified that Skylift did not damage the roof or cause any leaks. Likewise, Veltri testified that Skylift did not make any openings to the roof for any of their job responsibilities at the Project. Skylift offered the deposition testimony of other witnesses to establish that not one witness came forward with facts supporting a claim of negligence against Skylift. Finally, Skylift refers to the expert report of TT to establish that this report does not name Skylift specifically, nor does the report lay blame on Skylift for the leaks. The report, although speaking to UAC’s management and coordination of the Project, and the coordination of the subcontractors, does not offer any facts that would support a negligence claim against Skylift.

The court further finds that MLMIC does not satisfy its burden to establish the existence of material issues of fact which require a trial on this matter.

MLMIC argues that the language in TT’s report creates liability for Skylift and cites to this paragraph in the report:

“if United Air Conditioning Corp. and East Coast Restoration, and its agents and sub-contractors had conducted proper waterproofing and protection during both their respective demolition and construction operations . . . these multiple leak events would not have occurred”

(Spitz affirmation, exhibit N at 4).

According to MLMIC, Skylift was one of the subcontractors to which TT referred in its analysis of the actions of the subcontractors of General Contractor, United Air Conditioning Corp.

MLMIC further argues that according to the language in paragraph 2 of the Terms and Conditions of the Purchase Order agreement between Skylift and UAC, Skylift assumed all of UAC’s obligations and responsibilities:

“Subcontractor is bound to United Airconditioning Corp II for the performance of the Work in the same manner as United Airconditioning Corp II is bound to the General Contractor/Construction Manager and/or Owner under contract with the General Contractor/Construction Manager and/or Owner. The pertinent parts of such contract will be made available upon Subcontractor’s request. In the event of any conflict between these Terms and Conditions and a contract between United Airconditioning Corp II and General Contractor/Construction Manager and/or Owner, the more strict provision in favor of United Airconditioning Corp II shall govern”

(Spitz affirmation, exhibit F at 2, cited in MLMIC memo in opp at 5-6 (the exhibit itself is illegible)).

Essentially, MLMIC argues that several of the floods occurred close in time to Skylift's work on the site and, therefore, there exist questions of fact concerning Skylift's role in the flooding. On this point, MLMIC argues that nowhere in Skylift's motion papers does it advise this Court of the date(s) that it was actually on the job site. In its opposition, MLMIC notes that Frank Allecia could not identify any exact alternative date(s) that Skylift was on the job site. MLMIC includes these references to ultimately argue that Skylift is carefully avoiding to inform this Court that February 8th and 9th, 2008 was the weekend immediately before a significant water intrusion event into MLMIC's leased Premises on February 13, 2008.

Finally, MLMIC argues that the February 22, 2008 letter of L&L, the owner's representative and manager of the property, reached the following conclusions about Skylift's responsibility for the leaks:

"As we discussed, efforts have been made to minimize the exposure of the Building to water infiltration during the time that portions of the roof have necessarily been opened or made vulnerable to wind and rain. Landlord has incurred considerable expense engaging its engineering staff and various contractors to install, adjust and monitor a temporary enclosure system for portions of the roof following removal of the old tower. The water infiltration on January 11th was strictly related to the removal of the old tower while that of February 13th was related to setting the components of the new tower into place over the mechanical room. Unfortunately, both of those critical stages of work were accompanied by unseasonably high and unforeseeable levels of wind and rain"

(Ellenberg affirmation, exhibit 2 at 1-2).

As the foregoing report makes clear, the owner's representative, L&L, attributed the water intrusion event of February 13, 2008 "to setting the components of the new tower into place over the mechanical room" on a day it apparently rained. (Exhibit 2.). Skylift acknowledges that it delivered the new cooling tower components to the steel support structure above the roof of the mechanical room. According to MLMIC, this is the basis for Skylift's liability.

In its reply, Skylift argues that water was leaking into plaintiff's office space for a whole month before Skylift delivered the towers, and thereafter continued for over 9 months. For plaintiff's attorney to say that Skylift may have caused the leaks because they delivered the equipment a few days before one of the 11-12 leaks is without foundation. Most importantly, plaintiff's own expert does not implicate Skylift's work as a cause of the leaks. Further, Skylift argues that it was not one of the subcontractors that should have conducted waterproofing and protection during their work. Skylift offers Frank Allecia's deposition testimony in support:

"Q: What, if any, precautions did Skylift Contracting take to assure that the roof of the building was not damaged during the hoisting and setting of the towers?

A: Our contract was to put cooling towers on the actual steel. Any protection would have to be done by others than us. We do not do protection.

Q. Who was responsible for protection?

A. United or one of their subcontractors"

(Spitz affirmation, exhibit E at 42).

The Court finds that MLMIC's arguments are conclusory and speculative on the issue of Skylift's liability. MLMIC offers no facts linking Skylift to the opening of the roof or the repair or

demolition or renovation of the roof or anything on, or near, the roof. MLMIC does not present any facts that the work of Skylift assisted in the opening of the roof or the renovation or repair or demolition of the roof, nor does MLMIC offer any grounds for the court, or any potential fact finder, to find that Skylift's work was done in a negligent way. The language in the TT report, to which MLMIC refers, is too general and conclusory to create a factual issue with respect to Skylift's liability. The report does not identify Skylift by name or describe Skylift as negligent, or attribute any negligence to Skylift.

Furthermore, the February 22, 2008 letter from the Managing Agent likewise does not support any finding of liability against Skylift. Although the letter generally links the flooding on February 13th to the setting of the components of the new tower into place over the mechanical room, which was work performed by Skylift, the letter does not ascribe any negligence to Skylift. Significantly, and to the contrary, the letter goes on to describe the Managing Agent's responsibilities respecting the protection of the roof.

Finally, there are no grounds for this court to find that Skylift was contractually bound to assume all of the UAC's obligations and responsibilities. As the general contractor for the cooling tower restoration project, UAC was physically present at the premises and, as described in the TT report, had knowledge and responsibility for the different phases of the project. In the report, TT stated that the proper way to have maintained the water tightness of the roof "would have been by removing only the amount of roof membrane area that could be replaced in one (1) day of work, and to meticulously install temporary roof measures at all joints between old and new roofing, penetrations and changes in plane" (Nwokoro affirmation, exhibit D at 4). According to TT, this was the responsibility of the contractors, who were involved in the planning, the hiring of workers, and the assembly of the projects. Skylift was solely responsible for placing the components of the tower. Skylift was present at the site for one weekend out of the whole project, lacking the presence and oversight necessary to assume those responsibilities.

The court likewise finds that the doctrine of *res ipsa loquitur* is not applicable to these facts. In order for the doctrine of *res ipsa loquitur* to apply, the plaintiff must establish three elements: (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff (*States v Lourdes Hospital*, 100 NY2d 208, 211-212 [2003]). Here, there are no facts with respect to Skylift's work on the cooling tower restoration project that would satisfy the second element.

As a result, the court finds that Skylift has met its burden to establish that there are no questions of fact respecting its liability, and MLMIC has not created a question of fact that would require a factfinder. The court, therefore, grants Skylift's motion for summary judgment and dismisses the complaint against it.

2. Skylift's motion for sanctions

Skylift moves for sanctions as against MLMIC. On this point, Skylift argues that it made "numerous requests in person, by telephone and by letter, to plaintiff's counsel for the voluntary discontinuance of this action" (Skylift affirmation in support at 12), but that plaintiff's counsel ignored Skylift's letters and verbal requests. According to Skylift, therefore, plaintiff's attorney should be sanctioned for commencing a frivolous action against Skylift and for failing to voluntarily discontinue the action "when ample proof was repeatedly submitted to the plaintiff's attorney that Skylift was not responsible" (*id.*).

Under 22 NYCRR 130-1.1(c)(1), conduct is frivolous if “it is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; [or] it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or it asserts material factual statements that are false.”

The Court denies Skylift’s motion imposing sanctions upon plaintiff’s law firm, since the record before this court does not support the conclusion that the “plaintiff’s commencement of this action was ‘frivolous’ or in ‘bad faith’, [which are] the stated grounds for the award” (*see Rittenhouse v St. Regis Hotel Joint Venture*, 180 AD2d 523, 525 [1st Dept 1992]).

3. MG’s Motion

The court finds that MG meets its initial burden on its motion for summary judgment. MG offers facts that establish it had no involvement in the roof replacement project and had no responsibility to inspect and protect the roof. MG establishes that it was only responsible for the cooling tower restoration project. Furthermore, based upon the testimony of Gerazounis and Shah there are no facts supporting a finding that MG was negligent and that that negligence led to the leaking and flooding of MLMIC’s offices. Additionally, the expert reports of TT and Martinez do not establish any liability on the part of MG.

As outlined above, TT’s report focuses on the actions of UAC and ECR with respect to their responsibility for the leaks and the flooding. Nowhere in the report does TT link MG to any responsibility for the damages to MLMIC’s offices, nor does TT describe MG’s work as negligent or as failing to meet industry standards. Likewise, the Martinez report does not identify MG as responsible for the leaks, the flooding or the damages. Martinez expressly links the design responsibilities of WJE, the engineer responsible for the roof restoration, to the flooding. In the report, Martinez does not describe MG’s work as negligent or as failing to meet the industry standards.

Thus, MG meets its burden to establish there is no question of fact with respect to its liability in this action.

In opposition to MG’s motion, UAC argues that because MG was responsible for visiting the site either weekly or periodically and reporting on these visits, MG is liable for the flooding. UAC argues that based on the contractual requirement for these visits, the contract clause that states that MG is not responsible for supervision of the site is contradictory and ineffective. The court finds that this argument does not create a material issue of fact. There is no testimony or documentation supporting the assertion that MG’s site visits involved supervising the work at the site. Gerazounis’ uncontroverted testimony is that MG was not responsible for the roof and was unaware of the leaks at the site during the entire course of the Project. There is no testimony or documentation that MG’s designs, site visits or any other activities with respect to the Project were negligent or failed to meet industry standards.

In its opposition to MG’s motion, MLMIC catalogues all of MG’s responsibilities on the cooling tower restoration project and then offers the affidavit of Christopher Delaney (Delaney), a licensed professional engineer, a vice president at TT, to create a question of fact concerning MG’s liability. MLMIC describes at length MG’s responsibilities on the water cooling replacement project:

“As the design engineer for the Cooling Tower Project, the Cooling Tower Project Engineer’s Contract (Exhibit 4 to the Gerazounis Aff, at pages 2-3) specified that MG Engineering would be responsible to provide professional engineering services during the construction documentation phase . . . The Cooling Tower Project Engineer’s Contract (Exhibit 4 to the Gerazounis Aff, at page 3) also specified that MG Engineering would

continue act as the design engineer during the actual work to demolish and replace the cooling towers . . . MG Engineering agreed adhere to a professional standard of care in providing design engineering services and fulfilling its responsibilities under the Cooling Tower Project Engineer's Contract . . . MG Engineering then set to work during the period from April to October 2007 to design the Cooling Tower Project . . . MG Engineering's responsibilities continued right into and through the demolition and construction of the cooling towers”

(Dettmer affirmation in opposition to MG’s motion at 5 – 9).

MLMIC further cites MG’s role as building engineer:

“Q. You mentioned at one point quite a while ago this morning that during the time MG Engineering was involved and during the active phase of the cooling tower project, that MG was also involved on other projects at 2 Park Avenue; is that accurate?

A. We generally had multiple projects going at this particular time, I can't recall what we had going on. But as our role is building engineer, we would work on multiple projects”

(Sellers affirmation, exhibit D at 126).

MLMIC argues that as a result of all of these responsibilities, and because flooding took place during the water-cooling replacement project, MG must be negligently responsible for the flooding and resulting damages. However, in support of this position, MLMIC does not offer any facts, any testimony or documentation, that reveal any negligent acts on the part of MG. MLMIC does not, for example, offer testimony that MG failed to visit the worksite, or that MG’s designs led to the flooding. Instead, MLMIC relies on Delaney’s affidavit to argue that the Martinez report intended to ascribe negligence to MG, but did not, and to argue that MG’s failure to submit an expert report contravening Delaney’s conclusions likewise creates a question of fact, requiring the denial of MG’s motion.

In his affidavit, Delaney takes the position that the Martinez report needs additional explaining and this is what he offers in his affidavit. Delaney concludes that “the Martinez Report makes it clear that movant defendant MG Engineering bears at least some percentage of liability for the extensive property damage suffered by MLMIC” (Delaney affidavit, ¶ 10). “These allocations of responsibilities are critical to understanding the conclusions asserted in the remainder of the Martinez Report”

(*id.*, ¶ 11).

The crux of Delaney’s affirmation, and of MLMIC’s opposition, is that the Martinez report wrongly did not conclude that MG was responsible for the flooding. To this point, Delaney states that although the TT report assigned the “standard of care to study the existing conditions of the roof and its components to the contractor [UAC],” the Martinez Report finds that it was the responsibility of the “Designer of Record and the decision of the Owner to undertake such studies” Thus, the Martinez Report concludes that “[i]n this case that [the study of the existing roof conditions] would be the responsibility of Wiss, Janney, Elstner Associates, Inc. (WJE)” But this conclusion is not the correct interpretation of the conclusion of the Martinez report, according to Delaney. Delaney states that because MG was the designer of record for the cooling tower restoration project, MG was responsible for studying the pre-construction conditions of the roof and its components:

“The Martinez Report however had already identified the designers of the Cooling Tower Project as Sterling Interiors (“Roof design documents”) and [MG] (“Cooling tower design documents”). In other words, according to the Martinez Report, if the

responsibility for studying the pre-construction conditions of the roof and its components resided with the "Designer of Record", then the responsibility and the fault for failing to recommend and pursue such studies lay with Sterling Interiors and MG Engineering, not with WJE, which was not responsible for the design documents for the Cooling Tower Project"

In its argument in opposition, MLMIC thus concludes:

Again, however, the Martinez Report identifies the responsible professionals as Sterling Interiors ("Roof design documents") and MG Engineering ("Cooling tower design documents"), yet somehow ignores these facts from its own report and decides, instead, to blame WJE for the water intrusion events. So if there was any professional failure here, as alleged by the Martinez Report, it was by Sterling Interiors and MG Engineering rather than WJE"

(Dettmer affirmation in support of MLMIC's opposition to MG's motion at 12-13, citing Delaney aff at ¶ 15).

Delaney further highlights the portion of the Martinez report that addresses the priority of the projects and surmises that the roof replacement should have been done before the cooling tower replacement. This is so, according to Martinez, because asbestos was found in the roof tiles and the cooling tower restoration project would require cutting these tiles:

"The Martinez Report states that the presence of concealed asbestos under the roof necessitated undertaking the Roof Replacement Project before the Cooling Tower Project. (See, for example, Martinez Report at 8-9: "While the condition of the existing cooling tower may have been mission critical, abatement of the asbestos roof membrane would take priority as reinforcement of the dunnage, new pipe supports, and replacement of the ladder would require cutting and patching of the aforementioned membrane and possibly releasing friable asbestos material endangering the demolition and construction contractors.")

Yet, according to Delaney, MG had knowledge of the presence of asbestos and, therefore, according to Delaney, Martinez actually intended to place the responsibility for the flooding on MG:

"The Martinez Report also fails to acknowledge and address the fact that MG Engineering was aware of possible asbestos issues long before it prepared the mechanical engineering and bid documents for the Cooling Tower Project"

(Delaney aff, ¶ 16).

Martinez, in the report, does not place the responsibility for the flooding on MG. Thus, Delaney concludes: "The Martinez Report's disregard of the role of MG Engineering is surprising in light of MG Engineering's 2007 contract with L&L Holding Company, LLC for the cooling tower project" (Delaney aff, ¶ 19).

It is incumbent upon the plaintiff to present expert testimony to support allegations of malpractice. (*McDermott v Manhattan Eye, Ear & Throat Hosp.*, 15 NY2d 20, 24 [1964]; 7 Wigmore, Evidence [3d ed], § 2090)), except where the alleged act of malpractice falls within the competence of a lay jury to evaluate (*Hammer v Rosen*, 7 NY2d 376 [1960]); *530 E 89 Corp v Unger*, 43 NY2d 776 [1977]). Here, MLMIC fails to meet its burden to adduce credible expert testimony that MG's work on

the cooling tower restorations project deviated from locally prevailing standards of architectural practice (see *530 E 89 Corp.*, 43 NY2d at 777).

Here, Delaney's report does not identify any negligence on the part of MG, nor does Delaney describe MG's actions or decisions as a deviation from industry standards. Delaney's report offers no independent analysis of MG's actions. The report surmises that Martinez intended to place responsibility for the damage on MG, however, Martinez did not, creating nothing more than speculation as to why this is so.

If an "expert states his conclusion unencumbered by any trace of facts or data, his testimony should be given no probative force whatsoever" (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 533-534 n 2 [1991][internal quotation marks omitted]).

Further, an expert's report does not:

"create a triable issue with respect to the existence of an accepted industry practice or standard, [where] no support was offered for this assertion, either in the form of a published industry or professional standard or in the form of evidence that such a practice had been generally accepted in the relevant industry"

(*Jones v City of New York*, 32 AD3d 706, 707 [1st Dept 2006]).

"In other contexts, this Court has recognized that '[o]rdinarily, the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants[.]' Where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, however, the opinion should be given no probative force and is insufficient to withstand summary judgment"

(*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544-545 [2002] [expert "did not create a triable issue with respect to the existence of an accepted industry practice or standard," where the professional guidelines the expert referenced were merely recommendations, and the expert "failed to provide any factual basis for her conclusion that the guidelines establish or are reflective of a generally-accepted standard or practice" in the relevant industry]).

Where the jury does not need specialized knowledge to make a determination on the facts of the case, lack of expert testimony will not undermine a plaintiff's proof:

"We reject defendants' contention that plaintiffs failed to prove a prima facie case because of the absence of expert testimony to establish the professional standard of care an engineer must employ in conducting a structural inspection. Having undertaken to report on the condition of the roof as part of their inspection service, defendants clearly owed the duty of reasonable care in doing so. In the exercise of reasonable care, it is not unreasonable to expect that defendants, as professional engineers, would observe that which was readily observable to a roofer and/or a contractor. This is not a case of a latent defect, discoverable only by professional analysis and/or testing. Plaintiffs presented evidence that the leak was a patent defect, discoverable by observing that which was readily observable. The jury did not need either specialized knowledge or an expert opinion to determine whether defendants breached their duty to exercise reasonable care when they reported the roof in excellent condition despite the existence of readily observable indications of a substantial leak"

(*Kohl v Green*, 235 AD2d 671, 672 [3d Dept 1997]).

Here, however, neither party has taken the position that expert testimony is not necessary, and the parties have submitted several reports from experts opining on who was responsible for the flooding. Instead, all parties on this motion use the available expert materials, which opine on who was responsible for the flooding, to support their arguments. MG relies on the conclusions set forth in the reports of TT and Martinez, which both conclude that other parties, not MG, are responsible for the flooding and consequent damages. TT's statement in its report: "our findings are that if [UAC] and [ECR], and its agents and sub-contractors had conducted proper waterproofing and protection" is too vague to support a liability finding against MG. Additionally, Delaney's report does not disturb the conclusions set forth in the TT report that UAC and ECR are named as jointly responsible for the flooding and MG is not named. Delaney's report does not identify any industry practice or standard that MG failed to recognize. Nor does Delaney offer any facts supporting MG's deviation from such a standard, other than to suggest that MG's knowledge of the presence of asbestos or MG's role as a designer on the project should have produced different findings by Martinez.

Neither Delaney's report nor any of the other materials submitted by MLMIC on its opposition offer any facts supporting MG's negligence. There are no facts that MG was responsible for the protection of the roof or that MG's design work breached the roof, negligently causing the leaks. Thus, despite MG's alleged extensive design work on the project, and MG's other work with respect to both the building and the cooling tower replacement project, there is no question of fact with respect to MG's negligence in connection with the flooding and consequent damages. The court, therefore, grants MG's motion for summary judgment dismissing the complaint as against MG.

4. Hallen's Motion

Hallen moves to dismiss the complaint, as well as all crossclaims against it. The court finds that Hallen has met its initial burden on its motion. Hallen establishes that it worked on the cooling tower replacement project only, and not on the roof restoration project. Further, Hallen establishes that it was hired to construct, install and provide structural supports, general welding and further construction for the cooling tower replacement project. In its motion papers, Hallen initially argues that it was not responsible for making any holes in the roof. Subsequently, Hallen argues that it was responsible for directing the penetrations in the roof. Further, Sandie, during his deposition, first asserts that Hallen had another contractor make the penetrations, but then testified that Hallen itself made the penetrations, but was not responsible for protection of the roof or for filling in the holes. Despite this inconsistency in Hallen's position with respect to making penetrations in the roof, there is consistent evidence throughout Hallen's motion that Hallen was not responsible for protecting the roof and that there is no support for a finding that Hallen was negligent. Sandie testifies to this point. Shah and Veltri testify to this point. The experts, in both the TT report and the Martinez report, do not attribute any responsibility on the part of Hallen for either negligent conduct or for protecting the roof. Not one expert attributes the damages to Hallen. There is no testimony or documentation that supports a finding that Hallen was negligent.

Likewise, although the opposition papers highlight the inconsistencies in the testimony, they do not offer any additional facts that might support a finding that Hallen was responsible for the roof protection, that Hallen acted negligently in either opening the roof or in not filling in the holes. In its opposition to Hallen's motion, MLMIC demonstrates for the court the contradiction between Shah's testimony and Sandie's testimony. On the one hand, Shah testifies that the roof was not at all opened up during the cooling tower replacement project, while, on the other, Sandie testifies that Hallen opened the roof during the cooling tower replacement project. This contradiction does not, however, create a material factual conflict that would support the denial of summary judgment for Hallen. The existence

of this contradiction does not undermine the unanimous testimony, across the board, that Hallen was not responsible for protecting the roof. There is testimony that UAC was responsible for protecting the roof, there is testimony that ECR was responsible for protecting the roof, and there is testimony that L&L, the Managing Agent, was responsible for protecting the roof. But there is no testimony that Hallen had this responsibility.

Further, in opposition, UAC argues that there are questions of fact as to whether Hallen's roof penetrations caused the alleged leaks, and as to whether UAC is entitled to contractual indemnification from Hallen, as referred to in the purchase orders. As a result, according to UAC, MLMIC's complaint and its own crossclaims should not be dismissed. With respect to Hallen's roof penetrations, UAC argues: "As such, this roof penetration work could have created the alleged water leaks and therefore questions of fact exist as to whether HALLEN's work created or exacerbated the alleged defective conditions" (UAC affirmation in opposition at 8).

With respect to UAC's crossclaim against Hallen, to make its argument concerning Hallen's contractual indemnification of UAC, UAC relies on Veltri's deposition testimony that purchase orders were used as contracts. Mr. Veltri of UAC testified:

Q: Did United enter into separate contracts with the subcontractors that United ultimately used on this project?

A: Yes.

Q: And so would United maintain a copy of those contracts somewhere?

A: Yeah. They're here.

Q: Where are they?

A: These are those contracts, these purchase orders. We call them purchase orders.

Q: The purchase order is the contract that you -

A: Is between us, United Air-conditioning, and a vendor.

(UAC affirmation in opposition at 3, citing Nwokoro affirmation, exhibit G at 57-58).

Sandie's testimony on this point is:

"Q: Was there a separate and distinct contract between United and Hallen Steel or was it related solely to these purchase orders that we've looked at?

A: I don't know.

Q: Was it custom and practice back in 2007 for Hallen Steel to have a contract with its general contractor?

A: I don't know the answer to that, but I can say that it's common and customary practice for a purchase order to be generated for us to do the work.

Q: And that is all you need, you wouldn't have a contract?

A: That's all I need.

Q: Before this job, had Hallen Steel done work with United?

A: Yes"

(*id.* at 4, citing Nwokoro affirmation, exhibit F at 100-101).

Sandie further testified:

Q: Was there a separate and distinct contract between United and Hallen Steel or was it related solely to these purchase orders that we've looked at?

A: I don't know.

Q: Was it custom and practice back in 2007 for Hallen Steel to have a contract with its general contractor?

A: I don't know the answer to that, but I can say that it's common and customary practice for a purchase order to be generated for us to do the work.

Q: And that is all you need, you wouldn't have a contract?

A: That's all I need.

Q: Before this job, had Hallen Steel done work with United?

A: Yes.

(*id.* at 4 citing , Exhibit "F" at 100-101).

With respect to this question of contractual indemnification, UAC argues that "Hallen is required to defend and indemnify UAC for all claims arising out of or resulting from its performance at the jobsite" (UAC affirmation in opposition at 9). UAC includes the indemnification language from its purchase order with Hallen:

"11.2: To the fullest extent permitted by Law, Subcontractor will indemnify and hold harmless United Air-conditioning Corp. II, General Contractor, Construction Manager and Owner, their officers, directors, agents and employees from and against any and all claims, suits, liens, Judgments, damages, losses and expenses including reasonable legal fees and costs, arising in whole or in part and in any manner from the acts, omissions, breach or default of Subcontractor, its officers, directors, agents, employees and sub-contractors, in connection with the performance of any work by subcontractor pursuant to this Purchase Order and/or a related Proceed Order. Subcontractor will defend and bear all costs of defending any actions or proceedings brought against United Airconditioning Corp. II and/or General Contractor/Construction Manager and/or Owner, their officers, directors, agents and employees, arising in whole or in part out of any such acts, omission, breach or default"

(Thompson affirmation, exhibit A at 1).

Additionally, UAC argues that the purchase orders between Hallen and itself incorporate, by reference, the AIA A107-1997 Contract between the Owner and United and provides in relevant part:

"16.1.1 Contractor shall deliver to Owner, prior to commencement of any work, evidence of the insurance required hereunder. The Contractor shall not permit or allow any subcontractor to commence any work until the subcontractor delivers similar evidence of insurance in the amounts and on the terms provided hereinafter. It is required that all insurance requirements set forth herein be forwarded to the Contractor's insurance carrier to ensure that the required coverage is provided."

"16.1.3. The policy shall be a Commercial General Liability bodily Injury, Property Damage, Personal Injury, Contractual Liability, Products/Completed Operations with minimum limits as set forth herein. The policy shall be so written as to include coverage protecting the Contractor and all additional insureds required to be named herein against all claims arising from the operations of the Contractor or of a subcontractor or anyone directly or indirectly employed by any of them. All policies shall not contain any deductibles or self-insured retention without prior consent of the Owner."

"16.2.3. All policies of insurance shall contain a statement that said policy is primary coverage to the Owner and its designees with respect to the Project."

Furthermore, according to UAC, the AIA Contract also provides an additional indemnification requirement which states in relevant part:

“16.2.12. The Contractor hereby agrees to indemnify and hold harmless, Owner, its agent, the Architect and any of Owner's subsidiaries and designees from and against all liability, claims, suits, causes of actions, demands, and judgments in connection with or arising from any injury to persons, including but not limited to, death resulting therefrom and damages to property arising out of the performance of this Contract by the Contractor, its employees, agents and subcontractors and the Contractor's property and equipment, except against the negligence of the Owner, the Consultant and any of Owner's subsidiaries and designees. The Contractor shall at Contractor's sole cost and expense, defend any and all actions at law or in equity brought against the Owner, the Consultant, the Owner's subsidiaries and its designees and shall pay for all attorney fees and all other expenses in connection therewith and promptly discharge any judgments arising therefrom.”

“16.2.15. All of the conditions contained in the Article shall also apply to any subcontracted operations”

(UAC affirmation in opposition to Hallen motion at 9-11).

The court notes that there are several purchase orders annexed to UAC's opposition as exhibit “A.” The exhibit includes both the back and front of the documents. The indemnification language as cited by UAC is legible in the exhibits. Several of the documents have legible dates, including February 2008 and January 2009. Other dates on the documents are not legible.

“The indemnification clause in the contract between Fuller and A & M is written in broad terms. In it, A & M agreed to assume liability incurred by Fuller for personal injuries “or any other claim arising out of, in connection with or as a consequence of the performance of the Work *and/or* any acts or omission of the Subcontractor or any of its * * * subcontractors” (emphasis added). Thus, A & M was to indemnify Fuller in either of two situations: (1) where a claim arose out of, in connection with or as a consequence of the performance of A & M's work (*see, O'Connor v Serge Elevator Co.*, 58 NY2d 655, 657) or (2) where a claim arose out of the “acts or omission[s]” of A & M. Manifestly, the purpose of the clause was to broaden A & M's liability under common-law rules of implied indemnity (*cf., Mas v Two Bridges Assocs.*, 75 NY2d 680; *Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 567-568). It provides for indemnification when the claim arises out of the subcontractor's work even though the subcontractor has not been negligent. By its terms the clause applies in this case in which plaintiff, an employee of the subcontractor hired by A & M, was injured while performing work called for in A & M's contract with Fuller. Therefore, although there is no evidence of negligence on A & M's part, the indemnification agreement requires A & M to indemnify Fuller (*see, Walsh v Morse Diesel*, 143 AD2d 653, 654-655)”

(*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 178 [1990]).

Here, the same language, “arising in whole or in part and in any manner from the acts, omissions, breach or default of Subcontractor,” appears in the purchase orders relied upon by UAC in its opposition. Thus, despite this court's finding that there is no question of fact concerning Hallen's negligence, and the consequential dismissal of the complaint as against Hallen, based upon this language, and the ruling in *Brown*, this court may not dismiss UAC's crossclaim for contractual

indemnification. On this point, the court notes the factual disputes between the parties, including the dates of the purchase orders, the legibility of the purchase orders and the enforceability of the purchase orders.

Accordingly, the court grants Hallen’s motion for summary judgment to the extent of dismissing the complaint as against Hallen, but does not dismiss UAC’s crossclaim for indemnification.

In accordance with the foregoing, it is

ORDERED that defendant Skylift Contractor Corp.’s motion for summary judgment (motion sequence 013) is granted and the complaint and all crossclaims, if any are still pending, are dismissed as against Skylift; and it is further

ORDERED that defendant MG Engineering PC’s motion for summary judgment (motion sequence 015) is granted and the complaint and crossclaims are dismissed as against MG; and it is further

ORDERED that defendant Hallen Welding Service Inc.’s motion for summary judgment (motion sequence 016) is granted to the extent of dismissing the complaint against Hallen, but UAC’s crossclaim for contractual indemnification remains in the action.

3/4/2021

DATE

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

APPLICATION:

CHECK IF APPROPRIATE:

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

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