SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

HENICK-LANE, INC.,

Plaintiff,

-against-

HUDSON MERIDIAN CONSTRUCTION GROUP, LLC, RED APPLE 86 FLEET PLACE DEVELOPMENT LLC, and HARTFORD FIRE INSURANCE COMPANY,

Defendants.

VIVID MECHANICAL LLC,

Additional Defendant on Counterclaims.

Index No. 511022/2019

DECISION
Hon. Larry D. Martin

This action arises out of certain HVAC work performed by Henick-Lane, Inc. ("Henick") at the construction project located at 86 Fleet Place, Brooklyn, New York 11201, a new 32-story, mixed-use development. Henick commenced this action against Red Apple 86 Fleet Place Development LLC ("Red Apple"), Hudson Meridian Construction Group, LLC ("Hudson"), and Hartford Fire Insurance Company ("Hartford") alleging, among other things, breach of contract regarding non-payment for HVAC work, materials, and services.

Red Apple's instant motion (Mot Seq 2, NYSCEF Doc 37) seeks partial summary judgment on its counterclaims for indemnification against Henick and its cross claim defendant Vivid Mechanical LLC ("Vivid"). Said motion was filed prior to the parties' subsequent commencement of discovery. Red Apple asserts, however, that discovery is stayed under CPLR 3214(b) due to the pending Motion. Meanwhile, Henick moves to compel Red Apple to respond to Plaintiff's April 22, 2020 discovery demands (Mot Seq 4, NYSCEF Doc 103).

Standard of Review

To prevail on a summary judgment motion, the moving party must produce admissible evidentiary proof sufficient to warrant the direction of summary judgment in his or her favor (*GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965, 967 [1985]). Once this burden is met, the burden shifts to the opposant to submit admissible proof sufficient to create a question of fact requiring a trial (*Kosson v Algaze*, 84 NY2d 1019 [1995]). In deciding the motion, the evidence will be construed in the light most favorable to the one moved against (*Young v New York City Health & Hosps. Corp.*, 91 NY2d 291, 296 [1998]). With these principles in mind, summary judgment is appropriate only in those instances where only one conclusion may be drawn from the established facts (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308 [1980]).

Movants' Proposed Statement of Undisputed Facts

Co-defendants Red Apple and Hartford submit the following undisputed facts in support of their motion for partial summary judgment against plaintiff Henick and cross-claimant, Vivid.

On or about December 1, 2014, Red Apple entered into a construction management agreement (the "CMA") with its agent, co-defendant Hudson, to provide construction management services in connection with a new 32-story, mixed-use building (the "Building"), located at 86 Fleet Place, Brooklyn, NY (the "Project"). The Project was managed by Hudson and constructed by contractors hired directly by either Red Apple or Hudson.

On or about August 21, 2015, Hudson, acting as Red Apple's agent, contracted with subcontractor Henick (the "Trade Contract"), to perform heating and ventilation work (collectively, the "Work"). Henick then subcontracted with Vivid (the "Subcontract") for Vivid to install certain components of the Work. Henick was responsible for overseeing Vivid's work.

Pursuant to the Trade Contract and Subcontract's General Indemnity clauses, Henick and

Vivid agreed to defend, indemnify and hold Red Apple harmless as well.[1]

On or about December 29, 2017, a temporary certificate of occupancy was issued for the Building, and it commenced operations and tenancy. Less than thirty days later, the Building suffered numerous minor and major water leaks from the pipe fittings which were improperly installed. That is, in a manner inconsistent with industry standards or in compliance with the Trade Contract. While Henick admittedly cured the defective work, Red Apple incurred significant economic damages as a result of Henick's and/or Vivid's thereof, some but arguably not all of which was covered by insurance.

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[1] Henick, among other things, agreed:

> [t]o the extent not proven to be caused in whole or in part by an Indemnitee's (as hereinafter defined) own negligence, [Henick] shall indemnify, defend, save and hold harmless the Construction Manager, [Red Apple], [Red Apple]'s Project lender(s) and such other parties as required to be named as additional insureds pursuant to this Trade Contract ... from and against all liability, damage, loss, claims, demands and actions of any nature whatsoever which arise out of or are connected with or are claimed to arise out of or to be connected with personal injury, wrongful death or property damage in the performance of the Work by [Henick] or from any act or omission of [Henick].

Under Article 20.1, Henick also agreed that:

> [i]n the event of any such claims or demands for damages is made (or threatened to be made) against the Indemnitees, [Red Apple] or Construction Manager may withhold from any payment due or thereafter to become due to [Henick] under the terms of this Trade Contract, an amount sufficient in its judgment to defend, protect and indemnify Indemnitees for any and all such indemnified claims to the extent such claim is not covered by insurance. As used herein, the term "Trade Contractor" shall include is sub-subcontractors of any tier. Without limiting the generality of the foregoing, such defense and indemnity include all liability, damages, loss, claims, demands and actions on account of personal injury, death, or property damage against any Indemnitee ... whether based upon, or claimed to be based upon, statutory (including, without limiting the generality of the foregoing, workers' compensation), contractual, tort or other liability of any Indemnitee.

The Subcontract provides that Vivid would:

> to the maximum extent permitted by law, defend, indemnify and fold harmless... [Red Apple] from all liabilities, damages, expenses, actions, claims and judgments, including reasonable attorney's fees regardless of whether a lawsuit is actually commenced: (i) arising from injury to any person or persons or property which may occur in, on or about any project worked on by [Vivid] as a result of or relating to [Vivid's] Work, or from any matter or thing which is connected or related to [Vivid's] Work, or (ii) arising from [Vivid's] failure to perform any of its obligations hereunder.

Red Apple's damages, losses, additional expenses and costs are alleged to be not less than $2,917,197, above payments recovered from Red Apple's insurance carrier. To date, Henick is alleged to have been paid $7,970,048.54 of the adjusted contract total of $8,922,525.08, leaving a balance owed to Henick of $952,476.54. On or about July 31, 2018, Henick filed a mechanic's lien against the Property for said sum (the "Lien") and, on or about October 5, 2018, Hartford issued a mechanic's lien discharge bond, naming Red Apple as principal, in the amount of $1,047,724.19 purporting to discharge the Lien (the "Discharge Bond").

It appears to be undisputed that the Trade Contract does not include "economic loss" indemnification coverage, however while defendants allege that such coverage was "expressly excluded," no such exclusion clause has been referenced, thus leaving the issue of such coverage one of many factual issues in dispute. Moreover, while defendants maintain that Red Apple has not provided any documentary support for its alleged "extensive property damage and unsafe conditions," none of the parties have focused their briefs on which damages were expressly or implicitly covered or excluded by language in the settlements.

Based upon the moving papers, the record, and reasons set forth above, defendant Red Apple's motion for partial summary judgment (Mot Seq 2, NYSCEF Doc 37) is **denied**. Henick's motion (Mot Seq 4, NYSCEF Doc 103) to compel Red Apple to respond to Plaintiff's April 22, 2020 discovery demands is granted solely to the extent of directing the parties to submit to binding discovery arbitration before one of this Court's Special Masters.

Dated: March 22, 2022

HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT

Hon. Larry D. Martin
Supreme Court of the State of New York