

360 E. 72nd St. Owners Inc. v Metro Group, Inc.

2023 NY Slip Op 32405(U)

July 14, 2023

Supreme Court, New York County

Docket Number: Index No. 154453/2020

Judge: Margaret Chan

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49M

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360 EAST 72ND STREET OWNERS INC.,
Plaintiff,

- v -

THE METRO GROUP, INC.,
Defendant.

INDEX NO. 154453/2020
MOTION DATE 10/14/2022
MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

-----X
HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160

were read on this motion to/for

JUDGMENT - SUMMARY

Plaintiff 360 East 72nd Street Owners, Inc. brought suit against defendant The Metro Group, Inc., a water treatment company, alleging that defendant's chemical water treatment in the cooling tower destroyed the chilling system's copper pipes. Plaintiff asserts three causes of action for careless contractual work, negligent performance of services, and unjust enrichment. Defendant moves for summary judgment to dismiss the complaint, which plaintiff opposes.

For the reasons stated below, defendant's motion is granted.

FACTS

Plaintiff is the owner of a co-op building located at 360 East 72nd Street in New York, NY (NYSCEF # 122 – Compl., ¶ 1). Defendant provides water treatment services to plaintiff's building, which has a cooling tower and two chillers for its air conditioning system. The chiller system is connected to the cooling tower via copper tubes through which chemically treated condenser water circulates (NYSCEF # 120 – Statement of Material Facts, ¶ 2). At issue in this case is the corrosion damage to some of these copper tubes (NYSCEF # 122, ¶¶ 19, 20).

Both parties agree that the "terms of the contract between the parties were reflected in quarterly contract/invoices sent by [d]efendant Metro to the [plaintiff] Co-Op in March, June, September, and December of each year" (NYSCEF # 160 – Response to Pltf Statement of Material Facts, ¶¶ 18-19; NYSCEF # 40 – Invoices). Taken together, these invoices make up the agreement between the parties and list

the services that defendant was responsible for providing to plaintiff (NYSCEF # 160, ¶¶ 18-19). According to these invoices, plaintiff claims that defendant was contracted to provide the following services for the cooling tower:

- Annual updated [sic] to buildings [sic] cooling tower maintenance plan.
- Seasonal Water Treatment visits (April – October).
- Quarterly Legionella samples in May, July and September.
- Quarterly cooling tower inspections completed in May, July and September.
- Two (2) cooling tower cleaning completed each year.
- Annual certification to local Department of Health that all requirements of NYS Public Health Law Part 4, Title 10 have been met.

(NYSCEF # 122, ¶ 10).

Plaintiff adds that defendant was also required to provide plaintiff with cleaning instructions for the cooling tower and chiller system. But when defendant changed the chemical mix to comply with the Legionella Laws in 2016, defendant did not provide plaintiff with updated cleaning instructions and instructions on shutting down the system (*id.*, ¶¶ 12-15, 38-42).

Non-party Crystal Comfort replaced the copper tubes at issue around 2008, which replaced the previous tubes that defendant had worked on since 1993 (NYSCEF # 160, ¶¶ 17, 8). Defendant claims that it does not have “personal knowledge” of this 2008 replacement by Crystal Comfort and can only rely on plaintiff’s representations (*id.*, ¶ 8). Additionally, while the parties differ over the expected useful life of the copper tubes – plaintiff asserts it is 20-25 years, minimum, while defendant puts the number at 15-20 – the corrosion damage detected in 2019 is less than the expected useful service life provided by either party based on plaintiff’s stated installation date of 2008 (*id.*, ¶¶ 8-10).

Non-party Tri-State conducts non-destructive metallurgical testing, called ‘Eddy Current’ tests, on the copper tubes for plaintiff (*id.*, ¶ 45). These tests can detect defects on the inside or outside of the tubing (*id.*). Tri-State performed the Eddy Current tests for plaintiff in 2011, 2014, 2018, and 2019 (*id.*, ¶¶ 46, 48). The 2011 and 2014 tests indicated “minimal deterioration” of the copper tubes, in 2018 the test “did not show significant deterioration,” while the 2019 test “showed significant deterioration” (*id.*, ¶¶ 43-53; NYSCEF ## 12-13, 153-155 – Tri-State Reports).

Plaintiff blames defendant for the corrosion, asserting, among other things, that defendant used more powerful chemicals following a 2015 update to the Legionella Laws (*id.*, ¶ 31). While defendant agrees that it changed the chemical composition of water treatment solution, defendant claims that the change from one biocide to another was “regulatory in nature” in that they had “almost identical” effects (*id.*).

Plaintiff hired Crystal Comfort to replace the corroded copper tubes in 2020 (*id.*, ¶ 97). Plaintiff did not retain the corroded parts “because they serve[d] no useful purpose.” (*id.*, ¶ 99). Defendant disagrees and claims that plaintiff engaged in spoliation of “vital evidence central to this lawsuit” (NYSCEF # 119 – MOL at 15) such that the complaint should be dismissed. Defendant notes that plaintiff retained an attorney in late February 2020, replaced the pipes in early March 2020 and discarded the copper tubes three weeks after the replacement (*id.* at 14).

In support of its motion for summary judgment, defendant submits an affidavit from Rakesh Budhu, it’s Product Specialist of Cooling and Potable Waters (NYSCEF # 126). Budhu categorically denies that defendant was hired to maintain plaintiff’s chillers or instruct plaintiff on startup/shutdown of the chillers (*id.*, ¶¶ 3, 5). Nor did defendant change its water treatment procedures because of the Legionella Law since its procedures were already compliant (*id.*, ¶ 3). Its water treatment plan for plaintiff’s building did not change between 2017 and 2019 (*id.*, ¶ 4). The change in chemicals – Metro Cleaner 270 to Kathon chemicals, which was used after the Legionella Laws – “are almost identical” (*id.*, ¶ 9). Budhu attended a meeting held by plaintiff in January 2020 where he was asked, for the first time, about an appropriate shutdown procedure. He responded that “the chillers should be properly cleaned and treated and left wet (i.e. filled with condenser water)” (*id.*, ¶ 6) and followed up with an email with these instructions on January 17, 2020:

The Winter Layup of Open Recirculating Water Systems

Below is a suggested procedure for winter layup from a water treatment perspective.

1. Perform cooling water tower cleaning and disinfection while building personnel drain and flush the condenser risers.
2. Refill cleaned system with fresh water.
3. Add suitable corrosion inhibitor and biocide to tower water.
4. Circulate for 1 to 2 hours through cooling tower and entire system including standby pumps.
5. Drain system to a safe level below the roof that will not be subject to freezing.
6. Plug the discharge pipe at the bottom of the cooling tower pan with a tapered wooden or plastic plug that will keep out rain water, ice, snow, etc. The system is now sealed and protected for winter layup.
7. Perform Chiller cleaning as usual post cooling tower cleaning and system layup.

(NYSCEF # 131– email)

Defendant’s expert witness, John Farmerie, a Certified Water Technologist and an ASSE Certified Trainer for Legionella Control, inspected plaintiff’s water cooling system on November 30, 2021, and reviewed the records in this case (NYSCEF # 136 – Farmerie Aff., ¶ 2). In sum and substance, Farmerie opined that the chiller tubes should be inspected annually by either Eddy Current or Fiberoptic scope; that the solutions, including Lithium Bromide, in the system should be checked regularly; that the chillers must be properly cleaned; and that chillers with

enhanced tubes must be locally circulated weekly (*id.*, ¶¶ 4-10). Farmerie's review of plaintiff's limited available records showed little or no compliance of the required or recommended maintenance actions on the chiller system (*id.*).

Significantly, Farmerie reviewed the Eddy Current tests from 2018 and 2019, which tests would reveal an existing issue with the water treatment plan. The 2018 Eddy Current test showed no significant corrosion. Thus, contrary to plaintiff's claim, defendant's change in chemistry and water treatment plan did not cause the corrosion (*id.*, ¶ 18). Farmerie noted that the 2019 Eddy Current test, however, showed "some suspected areas of corrosion" and Tri-State had suggested "[m]etallurgical analysis" of one sample tube with a strong indication of corrosion (*id.*; NYSCEF # 13 at 4). But plaintiff did not do as recommended (NYSCEF # 136, ¶ 18). Farmerie stated that without the chiller tubes, the metallurgical tests, which could have determined the root cause of the corrosion and contributory factors, cannot be conducted, "much like conducting an autopsy without a body" (*id.*, ¶ 19).

In opposition, plaintiff submits an affidavit of Desi Ndreu, its Assistant Secretary of the Board of Director and the managing company's Chief Operating Officer. Ndreu's affidavit echoes the allegations in the complaint as to defendant's responsibility to provide plaintiff with cleaning instructions, and Ndreu avers that plaintiff had followed defendant's instructions at all times (NYSCEF # 151 – Ndreu Aff, ¶¶ 9-10). In 2019, the Eddy Current test showed "significant deterioration" in parts of the chiller system, which was caused by defendant's change in its chemical mixture for the water treatment (*id.*, ¶ 13). Because defendant failed to instruct plaintiff on how to clean the cooling tower after the change in chemical solution, Ndreu claims that plaintiff had to expend \$208,250.66 in replacing the pipes and \$6,413.00 to open and close the wall to accommodate bringing in the new pipes into the boiler room (*id.*, ¶¶ 17-19).

To supplement its assertion that defendant provided no instructions, plaintiff submits the affidavit of its resident manager, Luis Perez, who clarifies that while he averred in his November 20, 2020 affidavit, that defendant provided him with instructions on cleaning and caring of the cooling tower and chiller system, he later corrected this statement at his deposition that he obtained his instructions from a prior resident manager, not from defendant (NYSCEF 143 – Perez Aff in Opp, ¶ 4).

Plaintiff takes issue with defendant's "purported 'expert'" arguing that Farmerie's affidavit is conclusory, speculative, and contradictory, and rejects defendant's speculation as to Crystal Comfort's contributions to the damage (*id.* at 12-13). Plaintiff presents its own expert, P. Andrew Collins, a professional engineer who had been performing engineering services for plaintiff since 2017 (NYSCEF # 150 – Collins Aff, ¶¶ 1-4). Collins learned from Ndreu about the age of the chiller system and the scope of defendant's services to plaintiff (*id.*, ¶¶ 8-10). Given that the chiller system was installed in 2007, the deterioration evidenced by the Eddy Current report in 2019 for a system that should last 23 years was caused by defendant's change in its chemical solution (*id.*, ¶ 8). Thus, Collins concluded that

defendant should have instructed plaintiff on the change in cleaning methods (*id.*, ¶¶ 16-18).

Plaintiff contends that defendant has failed to meet its burden for spoliation sanctions, including where plaintiff did not act with a culpable state of mind. Further, there could be no prejudice to defendant because even if plaintiff had kept the tubes, they would have corroded when exposed to air.

In reply, defendant points to plaintiff's use of "inadmissible double hearsay" and plaintiff's inaccurate, self-serving affidavits from individuals lacking expertise in water treatment to oppose defendant's motion (NYSCEF # 158 – Reply at 2). Defendant notes that its water treatment program met and exceeded the standard of care as supported by its expert's un rebutted statement. Defendant points out that plaintiff's attacks on defendant's expert speak only to "tangential matters that do not relate to his assessment of [defendant's] work" and that there was no "attempt to contest Mr. Farmerie's findings that Metro's water treatment exceeded the standard of care" (NYSCEF # 158 at 9-10). As to spoliation, defendant argues that the complaint should still be dismissed because plaintiff did destroy the copper tubes with a culpable state of mind, including where the destruction took place "long after" it retained counsel to pursue this lawsuit (*id.* at 14).

DISCUSSION

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once a showing has been made, the burden shifts to the party or parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issue of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal citations and quotation marks omitted]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Plaintiff's first cause of action for "careless contractual work" charges defendant with generally failing to exercise reasonable skill and care in performing its work, giving rise to a cause of action for tort and breach of contract (NYSCEF # 122, ¶¶ 27-33). Plaintiff fails to explain how its first cause of action for "careless contractual work" is separate from its second cause of action for negligence, which faults defendant with its change of chemicals and failure to instruct (*id.*, ¶¶ 36-41) (*see City of New York v 611 West 152nd Street, Inc.*, 273 AD2d 125, 126 [1st Dept 2000] ["claims of negligent or grossly negligent performance of a contract are not cognizable]). "[A] simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated" (*IKB Int'l, S.A. v Wells Fargo Bank, N.A.*, 2023 WL 4002324 [Ct of Appeals, June 15, 2023] quoting

Dormitory Auth. v Samson Constr. Co., 30 NY3d 704, 711-713 [2018]; *see also Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987] [“[i]t is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated.”]).

Usually, a failure to perform services with reasonable care is only a breach of contract and not a tort (*see New York University v Continental Ins. Co.*, 87 NY2d 308, 316 [1995]; *Inspirit Development and Constr., LLC v GMF 157 LP*, 203 AD3d 430, 431 [1st Dept 2022]). But failure to perform services with reasonable care may give rise to a cause of action for breach of contract, and negligent performance may give rise to a cause of action in tort for some services (*see Milau Assoc. v North Ave Dev. Corp.*, 42 NY2d 482, 486 [1977] [recognizing that “ ‘in cases where the service is performed negligently, the cause of action accruing is for that negligence’, and ‘if it constitutes a breach of contract, the action is for that breach.’ ” quoting *Aegis Prods. v Arriflex Corp. of Amer.*, 25 AD2d 639 [1st Dept 1966]). When a claim for careless contractual work is used, it is assumed to be a negligence claim (*see Apogee Handcraft, Inc. v Verragio, Ltd.*, 155 AD3d 494, 495 [1st Dept 2017]), which is plaintiff’s second cause of action. Thus, the first cause of action for careless contractual work is dismissed.

Plaintiff’s allegations for negligence focuses generally on two items: defendant’s changes to its water treatment program and defendant’s lack of cleaning instructions to plaintiff. Each will be considered in turn in determining whether there are triable issues of fact as to defendant’s alleged negligent performance of service.

Change in Water Treatment Program

Defendant met its prima facie burden that it is entitled to summary judgment on plaintiff’s theory of negligence based on defendant’s water treatment changes. Defendant relies on, among other things, the affidavit of its expert, a certified water technologist, to argue that the change to the chemicals in their water treatment services was not completed negligently. Farmerie, the expert, has sufficiently stated his expertise in the field of water treatment and his familiarity with water treatment systems generally. Additionally, Farmerie inspected the chiller system to establish that he has specific knowledge of the system at issue.

It is undisputed that in 2016, defendant changed a chemical in its mix used to treat the condenser water by switching from the biocide “Metro Cleaner 270” to “Kathon 7 TL” and “Kathon 725 BF” (NYSCEF # 156 – Plt’s Response to Statement of Material Facts at 13, ¶ 31). Both parties agree that the reason for this change in the chemical mix was regulatory in nature following the Legionella Laws, which required that the biocides used were EPA registered (*id.*). Farmerie states that he is familiar with the Kathon chemicals, which “do not cause corrosion to yellow metals (copper and brass) in water treatment systems” (NYSCEF # 136, ¶ 16). Farmerie

explains that “the purpose, the use, and the effects of Metro 270 and Kathon are almost identical” and so do not constitute a substantial change (*id.* ¶ 15).

Plaintiff refers to Farmerie as a “purported” expert but does not argue that Farmerie is not an expert, nor does plaintiff explain why Farmerie’s listed experience is in any way inadequate (*compare* NYSCEF # 142 – MOL in Opposition at 12 *with* NYSCEF # 136 at 12-15 – Farmerie CV). Plaintiff lists Farmerie’s allegedly conclusory or contradictory assertions, but this list is not relevant or compelling to this issue¹ (NYSCEF # 142 at 12-13). Nor does plaintiff’s own expert, Andrew Collins, address the criteria on which Farmerie relied in opining that the chemical change at issue did not cause the corrosion (*see Cruz v New York City Health & Hosps. Corp*, 188 AD3d 592, 592 [1st Dept 2020]). Rather, Collins states in a conclusory fashion that “after [defendant] changed the chemical mix, the new chemical mix caused the water to become corrosive” (NYSCEF # 180, ¶ 17). Indeed, nowhere in Collins’s affidavit does Collins even identify the chemicals used or allegedly caused the corrosion. As such, plaintiff’s reliance on the line of cases rejecting the sufficiency of an expert’s report (NYSCEF # 136, ¶¶ 1-3) is of no help to plaintiff (*see Hashem v Osorio*, 200 AD3d 454, 454-455 [1st Dept 2021] [finding an expert’s conclusion without explanation was insufficient to raise issue of fact]).

Collins does not address plaintiff’s allegation that defendant increased the duration that chemicals were left in the system as a cause of the corrosion. However, putting that aside, the alleged increase in duration was required to meet the updated criteria of the Legionella Laws. Contrary to plaintiff’s assertion that defendant “nowhere disputes” such increase in duration (NYSCEF # 142 at 10), defendant points out that the support plaintiff offers for this allegation is from Crystal Comfort’s president, Chris Kraly. Defendant argues that Kraly “had no knowledge of the water treatment program for the building” (NYSCEF # 160, ¶ 34). Defendant’s point is clarified by Kraly’s testimony to the inquiry on whether he knew what chemicals defendant used in the water treatment after the Legionella Laws: “Again, there were discussions of biocides used in the disinfecting and in the treatment programs. What levels and duration [defendant] used them, we don’t know” (NYSCEF # 129 – Kraly Tr at 131:2-3). And Kraly admitted to not knowing about defendant’s program for the chiller system before the Legionella Laws (*id.* at 218:6-10 [Q. “Were you ever familiar with the program that [defendant] used for the system before the Legionella laws were updated in 2015 and 2016? A. I do not”]). Kraly’s testimony does not detract from defendant’s *prima facie* case (*see Timmins v*

¹ For instance, plaintiff notes that Farmerie acknowledges the testimony of a Crystal Comfort representative that the tubing was not “rifled” on the inside, thereafter, contending that Farmerie’s analysis of rifled tubing “is irrelevant, as this case does not involve ‘rifled tubes’ and thus fails to support” defendant (NYSCEF # 142 at 12-13). Plaintiff neglects that Farmerie did not acknowledge that this case does not involve “rifled tubes” but rather specifically noted that he could not independently verify whether rifling was involved or not because plaintiff discarded the tubing (NYSCEF # 136, ¶ 3). So to the extent that it is indeterminable whether Farmerie’s analysis of rifling tubing applies to this case, that Farmerie analyzed rifling at all is no support whatsoever that Farmerie’s affidavit is contradicted by the record.

Tishman Const. Corp., 9 AD3d 62, 70 [1st Dept 2004] [opinions “based on speculation, conjecture, and without an evidentiary basis . . . are patently inadequate to create an issue of fact”]).

The parties dispute whether defendant always performed twice yearly manual cleanings for the cooling tower and condenser water or only increased from once yearly to twice yearly following the Legionella Law mandate on that point (NYSCEF # 160, ¶ 35). Even accepting for argument’s sake that plaintiff is correct, however, plaintiff still fails to explain how defendant’s additional cleaning in 2017 present a triable issue of fact. Plaintiff acknowledges the additional cleaning came after “a high level of bacteria” was detected but fails to explain how managing bacteria with a cleaning process to prevent harm to public health could be negligent (NYSCEF # 142 at 11). Plaintiff also fails to explain how defendant’s compliance as to the change in law constitutes negligence.

Shutdown Instructions

Defendant has also met its prima facie burden that it is entitled to judgment as a matter of law with respect to plaintiff’s argument that defendant “is liable for failing to exercise reasonable care by failing to provide [plaintiff] with updated instructions after it changed its water treatment program in 2016” (NYSCEF # 142 at 6). This dispute involves winter shutdown procedures for the copper tubes. Plaintiff’s core argument on this issue is that defendant failed to update its instructions in 2016.

The allegations are that defendant had given plaintiff shutdown instructions: Plaintiff’s Resident Manager, Luis Perez, avers that “[s]ince 1993, [he had] always followed Metro’s instructions on how to clean and maintain the Chiller System and the copper tubes that are a part of that System” (NYSCEF # 36 – Perez aff ¶ 6). Significantly, the instruction at issue pertained to “shutting the Chiller System with the chemically treated water in it until the following spring when the next air conditioning season started”; Perez “faithfully followed these instructions until year end 2019” (*id.* ¶ 7). “Had [defendant] provided me with its new instructions after is changed its chemical mix in 2016, I would have followed them and prevented the chemically treated condenser water from staying in the Chiller System during the winter off-season.” (*id.* ¶14).

In early 2020 at a meeting between plaintiff and defendant, Perez and Kraly heard Rakesh Budhu say that the procedure was “wrong” and that “leaving the chemically treated water in the [c]hiller [s]ystem until the start of the next year’s air conditioning season had caused the [c]opper [t]ubes to corrode” (NYSCEF # 36 – Perez Aff., ¶ 12; *see* NYSCEF # 39 – Kraly Aff., ¶ 21). Referring to the February 2020 emailed instructions, plaintiff stated that “these instructions were the same instructions that [plaintiff] has always followed” (NYSCEF # 142 – MOL at 7 citing NYSCEF # 128 – Perez tr at 91-92). Plaintiff’s cited source is Perez’s deposition transcript, and pages 91-92 relates to the attorneys’ discussion regarding Crystal Comfort’s shut down process of plaintiff’s chiller system. In his deposition, Perez

was asked if Crystal Comfort's and plaintiff's shut down process were the same for "five, ten, twenty years, as long as Crystal Comfort has been the provider"? Perez answered, "as long as Crystal Comfort has been the provider, we have done it that way" (Perez tr at 92:16-20). Hence, plaintiff's point here is unclear.

Perez's and Kraly's affidavits assert that Budhu said in the 2020 meeting that plaintiff "should have emptied the water out of the Chiller System, blew the system dry...so that the Chiller System and Copper Tubes would be completely dry until the next air conditioning system" (NYSCEF # 39, ¶ 21; *see* NYSCEF # 36, ¶ 13). Plaintiff also points to the deposition testimony of Desi Ndreu, a senior executive of plaintiff's management company, who testified that "Rock² clearly stated that he didn't believe that we were turning off the system properly" (NYSCEF # 127 – Ndreu Tr at 29:10-12). Ndreu, however, also testified that the emailed instructions (to keep the tank with corrosion inhibitor and biocide added to fresh water) following the meeting was consistent with what Budhu stated in the meeting, which contrasts plaintiff's position that Budhu said to keep the system dry (*id.* at 32:21–33:14).

Even disregarding that inconsistency and defendant's objection that these affiants' assertions as to what they heard Budhu say constitute inadmissible hearsay (NYSCEF # 158 at 4-5), plaintiff's own submissions present contradictory points. Significantly, plaintiff asserts that the instructions given in 2020 were the same as those plaintiff had followed since 1991. And while plaintiff claims there a triable issue of fact as to whether Budhu said to keep the system dry for the layup, which Budhu denies, or to keep it wet with condenser water, defendant's point is that plaintiff should not have kept corrosive water in the chiller system during the winter layup.

On the point that defendant breached its duty to provide updated instructions upon the change in the solution due to Legionella Law, plaintiff had asserted that it had followed defendant's instructions at all times up to and including 2019. Since, according to plaintiff, that the instructions had not changed for years, plaintiff fails to show why a new set of instructions was needed since the 2020 instructions remained unchanged since 1993. Thus, plaintiff's proffer of questions do not go to the crux of the matter such that they would defeat defendant's prima facie case (*see e.g. Mayer v McBrunigan Const. Corp.*, 105 AD2d 774, 774 [2d Dept 1984] ["shadowy semblance of an issue or bald conclusory assertions. . . are not enough" to establish triable issue of fact]).

It is noted that plaintiff's references in its reply to defendant's undisputed use of the chemical Justeq07 is also insufficient to present any triable issue of fact. Plaintiff does not succeed in its attempt to contradict Farmerie's report that showed that the use of Justeq07 was approved by the State of New York for such use and

² Plaintiff indicates that "Rock" is believed to be Rakesh Budhu (NYSCEF # 142 at 6).
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"[e]very operator" employed by defendant "are certified by the State of New York to handle and properly apply these materials" (NYSCEF # 136, ¶ 13).

Unjust Enrichment; Spoliation

Plaintiff's third cause of action for unjust enrichment is moot given the court's findings above. And given the conclusions in this decision, the court need not and does not reach defendant's argument to dismiss the complaint on plaintiff's spoliation of vital evidence

CONCLUSION

In view of the above, it is

ORDERED that defendant The Metro Group, Inc.'s motion for summary judgment is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendant; and it is further

ORDERED that counsel for defendant shall serve of a copy of this Decision and Order along with notice of entry within ten days of entry on plaintiff.

07/14/2023

DATE



MARGARET CHAN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE