SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DEBRA A. JAMES** **PART 59**

Justice

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AARON RICHARD GOLUB,

Plaintiff,

- v -

MODERN YACHTS, LLC,MODERN YACHTS II, INC.,BRIAN FREZZA, MARINE SPECIALISTS INC., and MICHAEL J. BUDNEY,

Defendants.

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INDEX NO. 655531/2016

MOTION DATE 11/11/2022

MOTION SEQ. NO. 006 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/FROM TRIAL CALENDAR.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 271, 272, 273, 274, 275, 276, 277, 278, 281, 284

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

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of defendants to vacate the Note of Issue pursuant to 22 NYCRR § 202.21(e) (motion sequence number 006) is granted and the note of issue is vacated, and the case is stricken from the trial calendar; and it is further

ORDERED that all further discovery in this matter shall be completed within sixty (60) days from service of a copy of this order with notice of entry; and it is further

ORDERED that counsel shall post on NYSCEF a proposed discovery status conference order or competing proposed discovery status conference order(s) at least two days before April 2, 2024, on which date counsel shall appear via Microsoft Teams, unless such appearance be waived by the court; and it is further

ORDERED that counsel shall refrain from posting on NYSCEF any notices/demands for discovery or records exchanged in discovery, unless such documents are submitted as exhibits to any meritorious application, made by show cause order or notice of motion; and it is further

ORDERED that, within fifteen (15) days from the entry of this order, defendants shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the General Clerk's Office, who is hereby directed to strike the case from the trial calendar and make all required notations thereof in the records of the court; and it is further

ORDERED that, within fifteen (15) days from completion of discovery as hereinabove directed, the plaintiff shall cause the action to be placed upon the trial calendar by the filing of a new note of issue and certificate of readiness (for which no fee shall be imposed), to which shall be attached a copy of this order; and it is further

ORDERED that such filing upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth

in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website); and it is further

ORDERED that to the extent of dismissal of the second, fourth, fifth, sixth, seventh and ninth causes of action as against Modern Yachts, LLC and the complaint in its entirety against Brian Frezza, the motion of defendants Modern Yachts, LLC and Brian Frezza for summary judgment (motion sequence number 007) is granted, and such motion is otherwise denied; and it is further

ORDERED that, by operation of law, the cross-claims against defendant Brian Frezza interposed by defendants Marine Specialists Inc. and Michael J. Budney, and the cross-claims against defendants Marine Specialists Inc. and Michael J. Budney interposed by defendant Frezza are dismissed; and it is further

ORDERED that the remaining claims against the remaining defendants are severed, and the balance of the action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment dismissing the cross claims made by defendant Brian Frezza against co-defendants Marine Specialists Inc. and Michael J. Budney and, in favor of defendant Frezza, dismissing the claims and cross-claims made against him in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

DECISION

In this action for breach of contract, among other claims, defendants move to vacate the note of issue and strike this action from the trial calendar pursuant to 22 NYCRR § 202.21(e). This court agrees with defendants that the certificate of readiness, filed by plaintiff on May 12, 2021, was inaccurate because, inter alia, after the discovery compliance conference order, dated October 3, 2019, and during the court COVID-19 shutdown, defendants, on March 19, 2020, propounded a demand for document production, to which, on October 21, 2021, plaintiff's counsel responded by e-mail message stating "I will circulate a proposed SC Order as you suggested. What discovery is outstanding besides expert discovery?" As, by plaintiff's own admission, there was outstanding discovery as of May 12, 2021, a material fact in the certificate of readiness is incorrect, and the note of issue must be vacated. See Savino v Lewittes, 160 AD2d 176, 177 (1st Dept 1990).

Defendants Modern Yachts, LLC (MY) and Brian Frezza (Frezza) (together, MY/Frezza) also move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Aaron Richard Golub's complaint and for summary judgment on their cross-claims against defendants Marine Specialists Inc. (MSI) and Michael J. Budney (Budney) (together, MSI/Budney).

Factual Background

MY, a New York limited liability company, operates three marinas on Long Island (NY St Cts Elec Filing [NYSCEF] Doc No. 274, Kenneth B. Danielsen [Danielsen] reply affirmation, exhibit 2, MY/Frezza amended answer ¶ 2). MY employs Frezza as its service manager at its marina in Hampton Bays, New York (NYSCEF Doc No. 225, Danielsen affirmation, exhibit F, Frezza tr at 14). Budney owns MSI, which is a New York corporation (NYSCEF Doc No. 9, MSI/Budney answer ¶ 2).

Plaintiff is the former owner of a 43-foot-long boat named the "Darrow II" (the Boat)[1] (NYSCEF Doc No. 220, Danielsen affirmation, exhibit A, complaint ¶ 8; NYSCEF Doc No. 268, plaintiff's response to statement of material facts, ¶ 1; NYSCEF Doc No. 221 at 53). Prior to plaintiff purchasing the pre-owned vessel (NYSCEF Doc No. 221 at 18), plaintiff commissioned a survey of the Boat's condition and value from Thomas J. Ferguson (Ferguson), a marine surveyor (id. at 31). In a report dated April 20, 2015, Ferguson made the following observations about the Boat's air conditioning, or HVAC, system: (1) "The forward stateroom air conditioning compressor raw water circulating pump reported not working. Recommend service and repair per discoveries to make good working" (NYSCEF Doc No. 222, Danielsen affirmation, exhibit C, at

[1] Plaintiff donated the Boat to the Sea Turtle Foundation in 2018 (NYSCEF Doc No. 221, Danielsen affirmation, exhibit B, plaintiff tr at 53).

4); (2) "Cabin air conditioning is malfunctioning" (id. at 7); (3) "Butterfly drain on starboard air conditioning raw water circulating pump is weeping. Recommend service and repair per discoveries to make good working" (id.). Though the "report does not address condition of the … generator" (id., at 2), Ferguson noted that: (1) "The primary breaker generator housing control box is in poor condition. Generator reported inoperative. Recommend service and repair per discoveries to make good working. Sound shield covering for generator starboard side not sighted" (id. at 4); (2) "At time of inspection generator is not operating. Recommend service and repair per discoveries to make good working" (id. at 6); and (3) "Generator panel is deteriorated – corroded. Reported not working. Recommend service and repair per discoveries to make good working" (id. at 8). Plaintiff completed the purchase of the Boat on May 15, 2015 (NYSCEF Doc No. 221 at 26) and took possession of it that same month or the next month (*id.* at 35).

On or about July 20, 2015, plaintiff rented a slip at MY's Hampton Bays marina pursuant to a "Marina Reservation" contract (NYSCEF Doc No. 268, ¶ 2). On or about November 23, 2015, plaintiff entered into a second "Marina Reservation" contract with MY to rent a slip at the same marina for 2016 (id., ¶ 3). The terms of the two contracts (together, the Dockage Contracts) are largely identical and contain the following provisions pertinent to this action:

> "1. All reasonable precautions will be taken by MODERN YACHTS, (hereinafter referred to as 'MARINA') to secure Boat Owner's property and safety. However, the Marina assumes no responsibility for loss or damage due to storm, fire, theft, vandalism or any other cause, and the boat owner agrees to hold MODERN YACHTS free and harmless in the event of such occurrences. Facilities are leased with the understanding that the Marina is not liable for property damage or bodily injury. Boat owners must have customary boat insurance and marine liability insurance and supply the marina with the company and policy number.
>
> …
>
> 4. Boat owners will not engage outside contractors or service men to work on their boats while at the Marina without prior written permission of the yard manager. MODERN YACHTS reserves the exclusive right to perform all services on boats docked or stored in the Marina other than work performed by the boat owner personally"

(NYSCEF Doc Nos. 223-224, Danielsen affirmation, exhibits D-E).

Plaintiff testified that he experienced several problems with the Boat beginning in August 2015, including issues with the generator, the air conditioning system, the electrical system, the stereo sound system, and the power steering system (NYSCEF Doc No. 221 at 47-49). Plaintiff subsequently retained MY to performance maintenance and repair work on the Boat (id. at 49; NYSCEF Doc No. 268, ¶ 5).

Regarding the HVAC system, plaintiff testified that it "functioned partially and then it didn't function and it was inconsistent" (NYSCEF Doc No. 221 at 60) and would blow hot air

instead of cold (id. at 93). Plaintiff hired MY in 2015 to "fix it a few times" but he could not recall whether MY was able to repair the system (id. at 60). Plaintiff discussed the air conditioning system with Frezza, who "kept telling me that I should replace the entire system … because it really wasn't working very well" (id. at 61). On February 24, 2016, MY furnished plaintiff with a two-page written estimate (the HVAC Estimate) to replace the air conditioning system for $17,010.13, inclusive of sales tax (NYSCEF Doc No. 250, Nehemiah S. Glanc [Glanc] affirmation, exhibit 2 at 2-3). When plaintiff inquired about the warranty term, Bruce Madsen (Madsen), a service coordinator at MY, responded that "[t]he warranty for the first year is parts and labor. The warranty for the second year is parts only" (id. at 1). Plaintiff made the decision to allow MY to install a new air conditioning system and directed MY to replace the existing system right away (NYSCEF Doc No. 221 at 62-63). Plaintiff and MY never executed a formal written contract for this work. MY subcontracted the HVAC work to MSI (NYSCEF Doc No. 268, ¶ 9). MSI billed MY $11,568.64 for the HVAC work (NYSCEF Doc No. 228, Danielsen affirmation, exhibit I).

Plaintiff alleges that after the new HVAC system was installed, it failed to function properly and cool the Boat's interior to the temperature set on the thermostat (NYSCEF Doc No. 221 at 74). Beginning July 24 and continuing through August 2016, plaintiff made numerous complaints to Frezza about the temperature

inside the Boat while cruising and about unopened vents (NYSCEF Doc No. 230, Danielsen affirmation, exhibit K; NYSCEF Doc No. 234, Danielsen affirmation, exhibit O; NYSCEF Doc No. 237, Danielsen affirmation, exhibit R; NYSCEF Doc No. 239, Danielsen affirmation, exhibit T; NYSCEF Doc No. 255, Glanc affirmation, exhibit 7).

Plaintiff later learned that operating the HVAC system simultaneously with the Boat's other appliances, such as the refrigerator, drew more electricity than the Boat's generator could produce (NYSCEF Doc No. 221 at 74). Plaintiff testified the HVAC system could not run simultaneously with these other appliances as doing so would create too much demand on the generator and cause the generator to shut down (id.). Plaintiff explained the generator was equipped with a 30-amp breaker panel (id. at 94), but the HVAC system and other appliances operating simultaneously drew close to 50 amps or more (id. at 74). Plaintiff recounted one instance where the wiring to the generator panel overheated, and the Boat's captain for the day "saw the smoke and the wiring burning" (id. at 100).

In response to plaintiff's first complaint on July 24, 2016, Frezza confirmed that "there is a warranty" (NYSCEF Doc No. 231, Danielsen affirmation, exhibit L at 1). Four days later, Frezza emailed plaintiff that "[t]here is no way possible that all three of the air conditioning and hot water heater and freezer and ice maker and refrigerator will all work at the same time. It is too

much draw of amperage" (NYSCEF Doc No. 232, Danielsen affirmation, exhibit M at 1). On August 6, 2016, Frezza wrote the following to plaintiff:

> "I confirmed that the breaker located on the generator itself is a 40-amp breaker so the biggest we could put into the breaker panel in the cabin is a 40 amp. If you then overload the system there is a chance that not only the breaker in the cabin will trip but the breaker located on the generator itself will trip and you may also damage wiring. I will say again, there is nothing wrong with the A/C units and they work with the amperage provided by the boats [sic] equipment. All three will work on shore power and all three will work on generator as long as you do not add additional load to the system"

(NYSCEF Doc No. 234, Danielsen affirmation, exhibit O at 1). Plaintiff testified that Frezza had emailed him that upgrading the breaker panel to a 40-amp panel would solve the issue, and that plaintiff had instructed Frezza to change the panel but Frezza "was never able to do it" (NYSCEF Doc No. 221 at 94). Plaintiff also testified that "Budney didn't do what he was supposed to do as an air conditioning person and that was to check the amperage on the boat, which he never did … [b]ecause when you install an air conditioning system, if it's not going to comport with the type of amperage there is on the boat, you better not install it" (id. at 91). When asked whether the prior air conditioning system was capable of running on the Boat's generator, plaintiff responded, "I have no idea. I know that the air conditioning

system that was on the boat before I wanted to replace" (id. at 92). Plaintiff later moved the Boat to a different marina operated by Sea Coast Enterprises where he had the breaker panel replaced (id. at 76). Plaintiff was "not sure" replacing the panel fixed the air conditioning system and admitted that the system worked only intermittently thereafter (id.) and still would not work with the other appliances (id. at 98).

Plaintiff also experienced issues with the Boat's power steering pump. Plaintiff testified that he had paid MY $5,000 to "rebuild the pump" in 2015 (id. at 14; NYSCEF Doc No. 220, ¶ 46). When the pump portion of the system failed in May 2016, MY repaired it (NYSCEF Doc No. 220, ¶¶ 49-50). However, on July 2, 2016, the power steering system failed a second time (id., ¶ 51). Plaintiff testified that MY had failed to secure the cap to the reservoir that held the power steering fluid, causing fluid to leak all over the engine room (NYSCEF Doc No. 221 at 158-160).

In addition, plaintiff claimed that the Boat's railings were damaged on two or three occasions when the Boat "was hung up on the piling" (id. at 144). Plaintiff testified that Frezza attributed the damage to changes in the tides (id. at 145). Plaintiff testified that the Boat would not have sustained any damage had MY installed "pointed caps" and tied up the Boat (id. at 146).

Plaintiff also complained that MY/Frezza denied his requests for outside contractors to work on the Boat because of insurance reasons (id. at 120-121). Specifically, Frezza denied plaintiff's requests for Shinnecock Electronics and Hampton Navigation to work on the radar system and for a woodworker to refinish the wood on the Boat (id. at 122-123). Plaintiff added that Frezza insisted MY fix the Boat's railings, repaint the hull, repair the sound system, and replace the air conditioning system, among other repairs (id. at 124).

At his deposition, Frezza testified that his actions were all undertaken on behalf of MY, where he was employed as a service manager (NYSCEF Doc No. 225 at 42). Frezza testified that there is no written procedure on how MY determined whether a boat owner is permitted to engage an outside contractor (id. at 61). However, Frezza stated that "[i]f a customer asks, we let them" (id.). Frezza could not recall plaintiff ever asking for permission to engage an outside contractor to service the Boat (id. at 64). MY employees performed repairs if requested and if they possessed the requisite technical expertise, otherwise MY would retain outside subcontractors (id. at 65-68). When a subcontractor sends its bill to MY, either Frezza or Madsen will add a markup which is then passed on to the boat owner (id. at 76).

Frezza admitted that he had no specialized training or background in HVAC systems for marine craft (id. at 34), and that

either he or Madsen determined that MSI would perform the HVAC work on the Boat (id. at 99). Regarding the "warranty" Madsen had described to plaintiff, Frezza testified that the warranty meant "[t]hat if something breaks, a part breaks, it's covered under the warranty" (id. at 113).

Frezza recalled little about his interactions with plaintiff and the work MY performed on the Boat. For instance, Frezza never discussed plaintiff's HVAC system with Matthew Levy (Levy), a sales manager at MY (id. at 131); was not aware that Levy had told plaintiff the HVAC system was under warranty (id. at 118 and 120); did not know what actions MSI took to test the new HVAC system (id. at 117); did not know of any fire risks while cruising if use of the air conditioning system exceeded the generator's amperage (id. at 131); could not recall plaintiff's complaints about the air conditioning system, a burning smell on the Boat, or unopened vents (id. at 166 and 213); could not recall the amperage of the breaker on the generator panel (id. at 168); did not know if MY determined the amperage load capacity before installing the new HVAC system (id.); did not know if MY investigated whether the HVAC system could run simultaneously with other appliances (id.); did not recall telling plaintiff that a 30-amp and 40-amp breaker panel could not support the HVAC system and the other appliances (id. at 169); could not recall telling plaintiff what appliances could run simultaneously with the HVAC system (id. at 191); did

not recall telling plaintiff that he would have to either open or repair certain vents because the airflow was insufficient (id. at 196); did not know if MY inspected the gauge of wiring on the Boat before installing the HVAC system (id. at 170); did not know why he warned plaintiff that overloading the HVAC system could damage the Boat's wiring (id. at 201-202); could not recall any repairs to the power steering system pump or whether he ever spoke to plaintiff about a power steering issue in July 2016 (id. at 139 and 154); did not recall any complaints from plaintiff about spilled power steering fluid in the engine room (id. at 155); and could not recall what measures MY took in July 2016 to ensure the safety of the Boat (id. at 154).

Budney testified that MSI did not install an HVAC system on the Boat because "[a]n installation would be a boat that never had air conditioning in it" (NYSCEF Doc No. 227, Danielsen affirmation, exhibit H, Budney tr at 40). Rather, MSI "changed out what was existing on the boat" (id.). The work involved installing three self-contained 16,000 btu units manufactured by Marine Air (id. at 41 and 89). Budney testified that he understood there was a one-year warranty on the HVAC system for parts and labor (id. at 89). He recalled "turning on the three units and made sure they ran in heating and cooling" while the Boat was in the water, and the units worked (id.). He also tested the vents and air was flowing through them (id. at 101-102). The units were tested only using shore

power (id. at 92). MSI never tested the units at sea (id. at 91-92) "[b]ecause if it worked at the dock it should work away from the dock" (id. at 136-137). Budney explained that he "replaced what was there, and I assumed that all these years it's been working and that I wasn't going to reengineer what had been done before and was already working" (id. at 97).

Budney testified that he never looked at the amperage of the breaker on the Boat's generator panel (id. at 112), and no one at MY asked MSI to determine the generator's amperage load capacity before undertaking the HVAC work (id. at 116-117). He denied that tripping the Boat's generator could pose a fire risk (id. at 98) or that doing so could damage the wiring (id. 148). He had no idea whether using the HVAC system and the Boat's other appliances could draw too much amperage because he "didn't look at the boat for that" (id. at 135). MSI did not inspect the wiring on the Boat nor did MY ask it to conduct an inspection (*id.* at 117). Budney recalled vising the marina to test the HVAC units after plaintiff's initial complaint and found that the units worked "flawlessly" (id. at 123). He concluded that plaintiff's complaint was "a boat issue. It had nothing to do with the air conditioners that I put in the boat" (id. at 124). Budney repeated that MSI was "contracted to replace the air conditioners, which is what we did. We were not contracted make sure the boat was in the proper

shape that everything would run on the generator, inspected properly and the breakers were inspected properly" (id. at 138).

Procedural History

Plaintiff commenced this action on October 19, 2016 by filing a summons and complaint asserting the following nine causes of action: (1) breach of contract against all defendants; (2); breach of warranty against all defendants; (3) breach of contract against MY/Frezza; (4) negligence against all defendants; (5) negligence against MY/Frezza; (6) gross negligence against all defendants; (7) gross negligence against MY/Frezza; (8) breach of the covenant of good faith and fair dealing against MY/Frezza; and (9) a violation of General Business Law § 349.

MY/Frezza served an answer on November 11, 2016 (NYSCEF Doc No. 10) and a first amended answer on November 6, 2018 (NYSCEF Doc No. 149). MY/Frezza's first amended answer pleads a counterclaim against plaintiff for non-payment for services rendered and three cross-claims against MSI/Budney for breach of implied contract, common-law indemnification, and contribution. MSI/Budney's answer pleads a counterclaim against plaintiff for libel and a cross-claim against MY/Frezza for indemnification or contribution (NYSCEF Doc No. 9).

MY/Frezza now move for summary judgment dismissing the complaint. Plaintiff opposes.

Discussion

A party moving for summary judgment under CPLR 3212 "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]). The "facts must be viewed in the light most favorable to the non-moving party" (Vega v Restani Constr. Corp., 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). If the moving party meets its prima facie burden, the non-moving party must furnish evidence in admissible form sufficient to raise a material issue of fact (Alvarez, 68 NY2d at 324).

At the outset, the court declines to deny MY/Frezza's motion as procedurally defective for their failure to submit a copy of the pleadings as required by CPLR 3212 (b), as the pleadings have been filed electronically (see Washington Realty Owners, LLC v 260 Wash. St., LLC, 105 AD3d 675, 675 [1st Dept 2013]). The court also excuses MY/Frezza's failure to comply with Uniform Rules for Trial Courts (22 NYCRR) § 202.8-b (c), which requires the submission of word count certifications for briefs, memoranda, affirmations, and affidavits, in this instance since the court may "overlook[ ] such a technical defect" (Anuchina v Marine Transp. Logistics, Inc., 216 AD3d 1126, 1127 [2d Dept 2023]). The court will also consider MY/Frezza's reply memorandum even though it exceeds the word count limit (Uniform Rules for Tr Cts [22 NYCRR]

§ 202.8-b [a] [ii]). MY/Frezza has tendered a shorter version of their reply memorandum (NYSCEF Doc No. 280, January 14, 2022 letter from MY/Frezza's counsel), and plaintiff has not objected to this submission (NYSCEF Doc No. 281, January 18, 2022 letter from plaintiff's counsel).

A. The Claims Against Frezza

MY/Frezza argue that Frezza cannot be held liable because he is merely an employee, and not an owner, of MY, and because he did not execute the contracts at issue in his individual capacity. Plaintiff, in response, concedes that Frezza is merely MY's employee. However, plaintiff submits that Frezza's lies and misrepresentations fall outside the scope of his employment. Alternatively, plaintiff contends that Frezza is personally liable for his tortious acts even though his conduct fell within the scope of his employment.

"It is a general principle that only the parties to a contract are bound by its terms" (Highland Crusader Offshore Partners, L.P. v Targeted Delivery Tech. Holdings, Ltd., 184 AD3d 116, 121 [1st Dept 2020]). MY/Frezza have demonstrated that Frezza is not a party or a signatory to any of the subject agreements. Thus, the first and third causes of action for breach of contract, the second cause of action for breach of warranty, and the eighth cause of action for breach of the covenant of good faith and fair dealing are dismissed as against Frezza.

The fourth and fifth causes of action for negligence and the sixth and seventh causes of action for gross negligence are also dismissed. It is well settled that "[a]n individual acting solely in his capacity as agent of his corporate principal, without any showing of exclusively independent control of operations, cannot be held individually liable for alleged corporate wrongdoing" (Mendez v City of New York, 259 AD2d 441, 442 [1st Dept 1999]). As applied here, MY/Frezza have demonstrated that Frezza was acting solely in his capacity as an agent for MY, and that he did not have exclusive, independent control over MY's operations.

Plaintiff fails to raise a triable issue of fact in opposition. While an agent may be held personally liable to a third party when the agent breaches a duty owed to that third person (Connell v Hayden, 83 AD2d 30, 49 [2d Dept 1981]), plaintiff has not identified a duty that Frezza, individually, owed to him. Furthermore, the alleged lies and misrepresentations plaintiff has accused Frezza of telling relate to MY's work on the Boat. Accordingly, that part of MY/Frezza's motion for summary judgment dismissing the complaint against Frezza is granted.

B. The First and Third Causes of Action for Breach of Contract

In the first cause of action, plaintiff alleges that MY failed to perform their duties and obligations under and adhere to the terms and conditions of the Dockage Contracts and Repair Order

Invoices related to the HVAC system[2] (NYSCEF Doc No. 220, ¶¶ 63-65). In the third cause of action, plaintiff alleges that MY breached the Dockage Contracts and Repair Order Invoices related to the Boat's railings and power steering systems (id., ¶¶ 78-79).

MY argues that plaintiff cannot prevail on these claims because there is no evidence that it failed to perform, and that MSI performed the HVAC work on the Boat. Plaintiff, in opposition, argues that he contracted solely with MY for the HVAC work, and that his complaint sets forth MY's involvement. Plaintiff additionally argues that the third cause of action is pled solely against MY, not MSI/Budney.

A cause of action for breach of contract requires the plaintiff to prove the existence of a contract, the plaintiff's performance, the defendant's breach, and resulting damages (Fawer v Shipkevich PLLC, 213 AD3d 408, 408 [1st Dept 2023]). The plaintiff on a breach of contract claim must also "allege, in nonconclusory language, as required, the essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated" (Matter of Sud v Sud, 211 AD2d 423, 424 [1st Dept 1995]).

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[2] The complaint identifies a single "Repair Order Invoice," specifically no. 305937 dated April 7, 2016 for to the power steering system (NYSCEF Doc No. 220, ¶ 60 (i). The court presumes that the Repair Order Invoice referenced in the first cause of action is the HVAC Estimate.

MY has shown that plaintiff cannot identify an express provision in the Dockage Contracts that MY allegedly breached with respect to the air conditioning and power steering systems. The purpose of the Dockage Contracts pertains to plaintiff's rental of a slip at MY, not repairs to the air conditioning and power steering systems. The HVAC Estimate and Repair Order Invoice no. 305937 also do not state that MY agreed that its performance would achieve a specific result (see Mutual Redevelopment Houses, Inc. v Skyline Eng'g, L.L.C., 178 AD3d 575, 576 [1st Dept 2019]; see also Milau Assoc. v North Ave. Dev. Corp., 42 NY2d 482, 487 [1977] ["where the party rendering services can be shown to have expressly bound itself to the accomplishment of a particular result, the courts will enforce that promise"]).

However, a plaintiff may establish a breach of contract by showing a breach of the contract's implied covenant of good faith and dealing (Parlux Fragrances, LLC v S. Carter Enters., LLC, 204 AD3d 72, 91-92 [1st Dept 2022] ["a breach of the covenant of good faith and fair dealing is a breach of the contract itself"]). "Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance" (Dalton v Educational Testing Serv., 87 NY2d 384, 389 [1995]). "This covenant embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract'" (511 W.

232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 153 [2002] [citations omitted]; see also 23 Williston on Contracts § 63:22 [4th ed 2021] ["a party who evades the spirit of the contract, willfully renders imperfect performance, or interferes with performance by the other party, may be liable for breach of the implied covenant of good faith and fair dealing"]). Here, triable issues of fact preclude granting MY summary judgment on the first and third causes of action. The record demonstrates that, although the air conditioning system worked on shore power, the system did not work at sea with the Boat's other appliances. This result could not have been contemplated at the time plaintiff and MY agreed for MY to perform the HVAC work. Likewise, a triable issue of fact exists whether MY failed to replace the cap on the reservoir containing the power steering fluid when it completed its repair so as to defeat the purpose of the parties' contract with respect to a repair of the power steering system.

As to the alleged breach of paragraph 4 of the Dockage Contracts concerning the Boat's railings, MY failed to advance any arguments addressing these allegations (NYSCEF Doc No. 220, ¶¶ 44-45). Therefore, it has failed to meet its prima facie burden on this part of the third cause of action. Accordingly, MY's motion for summary judgment dismissing the first and third causes of action is denied.

C. The Second Cause of Action for Breach of Warranty

MY argues the breach of warranty claim must be dismissed because the transaction was predominantly a service-oriented one such that a warranty claim does not lie. Plaintiff contends that MY furnished either a common-law or UCC Article 2 express or implied warranty.

Article 2 of the Uniform Commercial Code applies to "transactions in goods"[3] (UCC § 2-102), and where a transaction concerns the sale of goods, warranties can be express or implied. UCC § 2-313 governs express warranties and states, in part that, "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise" (UCC 2-313 [1] [a]). UCC 2-314 creates an implied warranty if merchantability, and UCC 2-315 creates an implied warranty of fitness for a particular purpose. That said, "[t]here is no cause of action for breach of warranty where the defendant has only provided a service" (Gutarts v Fox, 104 AD3d 457, 459 [1st Dept 2013], citing Aegis Prods. v Arriflex Corp. of Am., 25 AD2d 639, 639 [1st Dept 1966]). This rule also applies where there is a hybrid transaction involving the sale of goods and services, provided the transaction primarily

[3]UCC 2-104 (1) provides, in part, that "'[g]oods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid."

concerns the provision of services and the transfer of goods is merely incidental (see Hagman v Swenson, 149 AD3d 1, 3 [1st Dept 2017]). Stated another way, "'[w]hen service predominates, and transfer of personal property is but an incidental feature of the transaction', the exacting warranty standards for imposing liability without proof of fault will not be imported from the law of sales'" (Milau Assoc., 42 NY2d at 486, quoting Perlmutter v Beth David Hosp., 308 NY 100, 104 [1954], rearg denied 308 NY 812 [1955]). To determine whether the service or sales aspect of a contract predominates, "courts must look at the main objective sought to be accomplished by the contracting parties to determine the nature of the contract" (Super PC Sys., Inc. v Kaitryanna Pizza Inc., 2022 NY Slip Op 30218[U], *20 [Sup Ct, NY County 2022], citing Triangle Underwriters, Inc. v Honeywell, Inc., 604 F2d 737, 742-743 [2d Cir 1979]; see also Stafford v International Harvester Co., 668 F2d 142, 147 [2d Cir 1981] ["the underlying nature of a hybrid transaction is determined by reference to the purpose with which the customer contracted with the defendant"]).

Here, MY has demonstrated that the labor and service aspect of the parties' contract predominates over the sale of HVAC equipment. As noted above, plaintiff and MY did not execute a formal written contract. The only document that governs the transaction is the HVAC Estimate. The HVAC Estimate describes the work as "estimate air conditioning repairs/replacement" (NYSCEF

Doc No. 250 at 2) (block capitals removed). Under the heading "**Sublet Labor,**" a description of the work reads "a/c repairs/replacement" and the contractor is identified as MY, with a "**Sublet Labor Subtotal**" of $15,659.50 (id.) (block capitals removed). The estimate describes the proposed work as "remove all 3 a/c – install new vector turbo marine air ac's – remove a c water pumps and install new correct size pumps - reroute water lines for pumps so pumps don't get airbound – reduct fwd ac and install wedge grill on starboarde side of fwd cabin – install all new controls," among other items (id.). MY furnished a warranty of parts and labor for the first year, and parts, only, for the second year.

When viewed in its entirety, the predominant purpose of the transaction is the furnishing of a service, namely the removal and replacement of an existing HVAC system on the Boat, and the sale of goods used to accomplish this task was incidental to the transaction (see New York Helicopter Charter, Inc. v Borneman, 168 AD3d 509, 509-510 [1st Dept 2019] [dismissing warranty claim because repairs were a service, and not a sale, of a refurbished turbine]; Fallati v Concord Pools, Ltd., 151 AD3d 1446, 1448 [3d Dept 2017] [construction of swimming pool a transaction predominantly for services]; Golisano v Vitoch Interiors Ltd., 150 AD3d 1629, 1630-1631 [4th Dept 2017] [contract to refurbish a luxury motor yacht a service-oriented transaction]; Geelan Mechanical Corp. v Dember Constr. Corp., 97 AD2d 810, 811 [2nd

Dept. 1983] [contract to perform plumbing work not a contract for the sale of goods]; Schenectady Steel Co. v Bruno Trimpoli Gen. Constr. Co., 43 AD2d 234, 236-237 [3d Dept 1974], affd 34 NY2d 939 [1974] [contract to furnish labor, equipment and materials to install and erect structural steel considered a service contract because the its primary purpose was to secure the erection of structural steel]; cf. Franklin Nursing Home v Power Cooling, 227 AD2d 374, 375 [2d Dept 1996] [contract predominantly one for the sale of an air conditioning unit, and its installation was merely incidental or collateral to the transaction]). The main objective of the subject transaction was the removal and replacement of an air conditioning system, which is predominantly a labor-intensive endeavor (see Milau, 42 NY2d at 488).

Plaintiff fails to raise a triable issue of fact in opposition by showing that the predominant purpose of the transaction was the sale of goods. Plaintiff alleges that defendants represented and warranted that they provided a specialized service with respect to the installation, repair and maintenance of HVAC systems on watercraft (NYSCEF Doc No. 269, plaintiff's mem of law at 3). This assertion coupled with plaintiff's testimony that "[Frezza] told me they were going to take care of it" (NYSCEF Doc No. 221 at 136) implies that plaintiff purchased a service, not a good. Moreover, the record demonstrates that the HVAC equipment is not faulty, just that the Boat's generator could not support the operation of

that equipment simultaneously with the Boat's other appliances. Thus, plaintiff's complaints about how the equipment was installed does not give rise to a warranty claim (see e.g. Town of Poughkeepsie v Espie, 41 AD3d 701, 706 [2d Dept 2007], lv dismissed 9 NY3d 1003 [2007], lv denied 15 NY3d 715 [2010] [no warranty claim stated based on a guarantee that the work "would be performed in a certain manner"]). Nor has plaintiff demonstrated that MY is a "merchant" for purposes of the implied warranty of merchantability (UCC 2-314, Comment 3 ["[a] person making an isolated sale of goods is not a 'merchant' within the meaning of the full scope of this section and, thus, no warranty of merchantability would apply"]), or that the HVAC units were fit for a particular purpose, as opposed to an ordinary purpose (UCC 2-315, Comment 2 [a particular purpose "envisages a specific use by the buyer which is peculiar to the nature of his business"]).

Plaintiff refers to an email dated April 2, 2016 in which Frezza writes in part, "[w]ith us supplying and installing all the equipment you have none of that responsibility, all is covered by us. All labor and parts are covered by us. Any parts that are needed are taken care of by us. And as I stated a full orientation of the equipment is included" (NYSCEF Doc No. 249, Glanc affirmation, exhibit 1). That email, however, concerns the sound and television systems on the Boat, not the air conditioning system. Furthermore, "New York does not recognize a cause of

action based upon breach of an implied warranty where only economic loss is claimed and where the warranty arises from a contract for services" (Gordon v Holt, 65 AD2d 344, 349 [4th Dept 1979], lv denied 47 NY2d 710 [1979]). Accordingly, the second cause of action is dismissed.

D. The Fourth through Seventh Causes of Action for Negligence or Gross Negligence

MY posits that the negligence and gross negligence claims should be dismissed on two grounds. First, the economic loss rule bars the negligence claims. Second, plaintiff cannot demonstrate that MY owed him a legal duty independent of the parties' contract.

Plaintiff counters that the economic loss rule is inapplicable and that MY breached a duty to exercise reasonable care distinct from its contractual obligations.

A cause of action for negligence requires the plaintiff to prove the existence of a duty owed to the plaintiff from the defendant, and the defendant's breach, which proximately caused the plaintiff's injury (Moore Charitable Found. v PJT Partners, Inc., 40 NY3d 150, 157 [2023]). In contrast to ordinary negligence, gross negligence is "conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing" (Colnaghi, U.S.A. v Jewelers Protection Servs., 81 NY2d 821, 823-824 [1993], quoting Sommer v Federal Signal Corp., 79 NY2d 540, 554 [1992]; see also Food Pageant v Consolidated

Edison Co., 54 NY2d 167, 172 [1981] ["gross negligence has been termed as the failure to exercise even slight care"]).

It is an 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'" (Dormitory Auth. of the State of N.Y. v Samson Constr. Co., 30 NY3d 704, 711 [2018] [citation omitted]). In determining whether a defendant owes a duty of care distinct from the parties' contract, the court must look to the "nature of the services performed and the defendant's relationship with its customer" (id.), as well as "the nature of the injury, the manner in which the injury occurred and the resulting harm" (Sommer, 79 NY2d at 552).

MY has demonstrated that it did not owe plaintiff a legal duty independent of their contract (see Santini v Gillian Abrams Design LLC, 187 AD3d 453, 454 [1st Dept 2020]). In the fourth and fifth causes of action, plaintiff alleges that MY "owed Plaintiff a duty to exercise normal, reasonable care while servicing or repairing the Boat to ensure that they did not risk placing Plaintiff and/or his guests in danger or cause damage to the Boat" (NYSCEF Doc No. 220, ¶¶ 84 and 89). The sixth and seventh causes of action plead similar allegations (id., ¶¶ 94 and 102). This alleged duty relates to MY's contracted-for performance, and thus "does not fall outside of the obligations agreed to under the contract" (320 W. 115 Realty LLC v All Bldg. Constr. Corp., 194

AD3d 511, 512 [1st Dept 2021]; see also City of New York v 611 W. 152nd St., 273 AD2d 125, 126 [1st Dept 2000] ["claims based on negligent or grossly negligent performance of a contract are not cognizable"]). Since plaintiff is seeking to enforce his bargain with MY, he may recover only under a contract theory (Dormitory Auth. of the State of N.Y., 30 NY3d at 711-712).

In addition, the installation or repair of the HVAC and power steering systems did not cause plaintiff to suffer personal or property damage, and the alleged injuries did not arise from an abrupt, cataclysmic occurrence (compare Inspirit Dev. & Constr., LLC v GMF 157 LP, 203 AD3d 430, 431 [1st Dept 2022] [dismissing negligence claim where the plaintiff sought to enforce a contractual bargain] and Sestito v David L. Vickers & Sons, 175 AD3d 955, 956 [4th Dept 2019] [dismissing negligence claims for allegedly defective construction, in part, because the plaintiffs' injuries did not arise out of an abrupt, cataclysmic occurrence] with New York Univ. v Turner Constr. Co., 206 AD3d 536, 537 [1st Dept 2022] [denying dismissal of the negligence and gross negligence claims where "the nature of the work, which was to protect against an 'abrupt, cataclysmic occurrence,' gave rise to a duty of reasonable care independent of the contractual obligations"]). Rather, "the manner in which the injury occurred sounds in contract," not tort (see Gallup v Summerset Homes, LLC,

82 AD3d 1658, 1660 [4th Dept 2011] [mold caused by allegedly defective workmanship not an abrupt, cataclysmic event]).

Furthermore, MY has established that the economic loss rule bars the negligence and gross negligence claims pled against it. "The economic loss rule reflects the principle that damages arising from the failure of the bargained-for consideration to meet the expectations of the parties are recoverable in contract, not tort" (Bristol-Myers Squibb, Indus. Div. v Delta Star, 206 AD2d 177, 181 [4th Dept 1994] [collecting cases]; see generally Bocre Leasing Corp. v General Motors Corp. (Allison Gas Turbine Div.), 84 NY2d 685, 687 [1995] [explaining that a plaintiff cannot recover in tort for "contractually based economic losses, including to the product itself, occasioned by the failure of the product"]), and "applies both to economic losses with respect to the product itself and consequential damages resulting from the alleged defect" (New York Methodist Hosp. v Carrier Corp., 68 AD3d 830, 831 [2d Dept 2009]). "Whether a product fails to perform as promised due to negligence in the manufacturing process or in the installation process, recovery in negligence is unavailable for purely economic loss" (Bristol-Myers Squibb, Indus. Div., 206 AD2d at 181). In that instance, the "contracting party seeking only a benefit of the bargain recovery, viz., economic loss under the contract, may not sue in tort notwithstanding the use of familiar tort language in its pleadings" (17 Vista Fee Assoc. v Teachers Ins. & Annuity

Assn. of Am., 259 AD2d 75, 83 [1st Dept 1999]). As explained above, plaintiff claims that the HVAC and power steering systems failed to perform as intended, but these are contract, not negligence, claims (see Bristol-Myers Squibb, Indus. Dev., 206 AD2d at 180 [granting summary judgment dismissing tort claim where an electrical transformer installed by the defendant at the plaintiff's facility failed to perform as anticipated]).

In response to MY's prima facie showing, plaintiff fails to raise a triable issue of fact. Plaintiff largely repeats the allegation that MY failed to exercise due care in servicing or repairing the Boat, but the failure to exercise due care in performing a contract does not give rise to a negligence claim (see Gallup, LLC, 82 AD3d at 1660). Plaintiff's allegations that defendants failed to exercise due care when they failed to conduct an amperage load capacity calculation, inspect the Boat's wiring gauge, or ocean-test the Boat merely restate the "'implied' contractual obligations asserted in the cause of action for breach of contract" (Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 390 [1987]).

Plaintiff's contention that, because of the potentially catastrophic consequences from MY's failure to perform, MY owed him a duty of reasonable care independent of the parties' contract is unpersuasive. In Sommer, the Court of Appeals determined that the defendant fire alarm company owed the plaintiff building owner

a duty of care distinct and in addition to its contractual obligations based on the nature of the defendant's services. The Court determined that the defendant "perform[s] a service affected with a significant public interest" that requires compliance with New York City's comprehensive fire-safety regulations, and the "failure to perform the service carefully and competently can have catastrophic consequences" (79 NY2d at 552-553). The Court noted that "it is policy, not the parties' contract, that gives rise to a duty of care" (id. at 552). In this case, plaintiff has not shown that the nature of the service offered by MY is akin to the service furnished in Sommer, specifically a service of the type that clearly affects a significant public interest (see Trustees of Columbia Univ. in City of N.Y. v Gwathmey Siegel & Assoc. Architects, 192 AD2d 151, 154 [1st Dept 1993]). Nor does plaintiff's negligence claim relate to any obligations imposed upon MY by statute (see Duane Reade v SL Green Operating Partnership, LP, 30 AD3d 189, 190 [1st Dept 2006]). Despite plaintiff's assertion that MY's failure to perform could have had catastrophic consequences, his damages also are "not typical of those arising from tort" (Logan v Empire Blue Cross & Blue Shield, 275 AD2d 187, 193 [2d Dept 2000], lv dismissed 96 NY2d 823 [2001] [solely financial harm does not typically arise from tort]), and "the Court of Appeals has declined to extend *Sommer* to cases involving only economic harm" (Verizon N.Y., Inc. v Optical

Communications Group, Inc., 91 AD3d 176, 181 [1st Dept 2011]. Again, plaintiff has not shown that his damages arose from an abrupt, cataclysmic occurrence (see Gallup, 82 AD3d at 1660).

Plaintiff's assertion that the economic loss rule is inapplicable because he and MY enjoyed a relationship of reliance is equally unpersuasive, as the cases he cited in support of this contention are distinguishable. Critically, the plaintiffs in those actions sustained damage to property other than the items the defendants serviced, repaired or installed. For instance, in Anunziatta v Orkin Exterminating Co., Inc. (180 F Supp 2d 353, 357-358 [ND NY 2001]), the plaintiffs relied on the defendant's advice and expertise with respect to treating their home for termites, and they sustained significant structural damage to their home which the defendant had treated repeatedly for a termite infestation. The plaintiff's insured in State Farm Fire and Cas. Co. v Advanced Chimney, Inc. (2014 WL 4438899, *1, 2014 US Dist LEXIS 125357, *2-3 [ED NY, Aug. 11, 2014, No. 13-CV-4608 (ADS)(AKT)]) had contracted with the defendant to perform work on the chimney in the house and suffered personal and property damage from a fire that originated in the vicinity of the fireplace after the defendant had completed its work. The economic loss rule did not bar the plaintiff in 126 Newton St. LLC v Allbrand Commercial Windows & Doors, Inc. (121 AD3d 651, 653 [2d Dept 2014]) from pursuing a claim to recover damage to a building's structural

elements caused by the allegedly defective fabrication or installation of windows and doors. By contrast, plaintiff in this action has not claimed to have sustained a personal injury (see Catalano v Heraeus Kulzer, Inc., 305 AD2d 356, 357 [2d Dept 2003]), nor has he identified any property damage to other parts of the Boat caused by MY's alleged negligence.

Plaintiff's claimed damages primarily center on the loss of his use of the Boat, but such "loss … is a consequential damage caused by the [HVAC and power steering systems'] failure to 'perform as anticipated under normal business conditions – a traditional breach of contract situation' that is precluded by the economic loss doctrine" (Cincinnati Ins. Co. v Emerson Climate Tech., Inc., 215 AD3d 1098, 1101 [3d Dept 2023], quoting *Bristol-Myers Squibb, Indus. Dev.*, 206 AD2d at 180 [loss of 6,000 gallons of wine considered consequential damage caused by the compressor/chiller's failure to perform]; accord Archstone v Tocci Bldg. Corp. of N.J., Inc., 101 AD3d 1059, 1061 [2d Dept 2022], lv dismissed 21 NY3d 1035 [2013] [building damage caused by stone cladding system's failure to perform constituted consequential damages]; New York Methodist Hosp., 68 AD3d at 831 [consequential damages from chiller's failure to operate properly not recoverable]). Consequential damages also typically refer to the "loss of expected profits or economic opportunity" (126 Newton St., LLC, 121 AD3d at 653). Although the complaint alleges it

costs $5,000 per day to rent a comparable boat (NYSCEF Doc No. 220, ¶¶ 39, 66 and 79), plaintiff never chartered a substitute boat and never sought to make the Boat available to others for private charter (NYSCEF Doc No. 221 at 105). Incidentally, plaintiff alleges the same conduct and seeks the same damages on his negligence claims as on his contract claims (see Board of Mgrs. of the Soundings Condominium v Foerster, 138 AD3d 160, 164 [1st Dept 2016]).

To the extent plaintiff alleges that MY negligently performed services (see Aegis, 25 AD2d at 639 [stating that where a "service is performed negligently, the cause of action accruing is for that negligence"]), the economic loss rule still bars recovery because plaintiff has suffered only economic harm (see *Von Sengbusch v Les Bateaux De N.Y., Inc.*, 128 AD3d 409, 410 [1st Dept 2015]; Bristol-Myers Squibb, Indus. Dev., 206 AD2d at 181 [economic loss rule barred claim for negligent performance of services]).

Last, plaintiff has failed to raise an issue of fact that MY's conduct is "the type of conduct that smacks of intentional wrongdoing and evinces a reckless indifference to the rights of others" (Abacus Fed. Sav. Bank v ADT Sec. Servs., Inc., 18 NY3d 675, 683 [2012] [allegations that the defendants had known for weeks or months that the security equipment they had installed had been malfunctioning and failed to notify anyone at plaintiff of a potential security breach sufficient to establish gross

negligence]). Accordingly, the fourth, fifth, sixth, and seventh causes of action are dismissed as against MY.

E. The Eighth Cause of Action for the Breach of the Covenant of Good Faith and Fair Dealing

According to the complaint, plaintiff alleges that MY breached the covenant of good faith and fair dealing implicit in the Dockage Contracts and the Repair Order Invoices by refusing to allow plaintiff to engage outside contractors to work on the Boat in order to charge plaintiff inflated fees for MY's services (NYSCEF Doc No. 220, ¶ 111).

As stated earlier, "[i]mplicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance" (Dalton, 87 NY2d at 389). The covenant of good faith is breached when one party "exercises a contractual right as part of a scheme to deprive the other party of the benefit of its bargain" (Barnett v Berkowitz, 217 AD3d 523, 524 [1st Dept 2023]). The "implied covenant of good faith and fair dealing will be enforced only to the extent it is consistent with the provisions of the contract" (Phoenix Capital Invs. LLC v Ellington Mgt. Group, L.L.C., 51 AD3d 549, 550 [1st Dept 2008]). A cause of action for breach of the covenant of good faith and fair dealing will be dismissed as duplicative of a breach of contract claim when the two causes of actions allege a breach of the same obligations, are based on the same facts, and seek identical damages (Astor Ben

Sasha LLC, v HFZ 235 W. 75th St. Owner LLC, 215 AD3d 515, 516 [1st Dept 2023]).

Contrary to MY's contention, the good faith and fair dealing cause of action arises from different operative facts than those alleged on the contract claims (see Tirschwell v TCW Group, 194 AD3d 665, 667 [1st Dept 2021]). "Where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion" (Dalton, 87 NY2d at 389). Paragraph 4 of the Dockage Contracts states that boat owners, like plaintiff, may not retain outside contractors without MY's prior permission (NYSCEF Doc Nos. 223-224). Plaintiff testified that MY repeatedly refused to allow outside contractors to perform work on the Boat, then charged him more to perform that same work than outside contractors would charge. As one example, MSI billed MY $11,568.64 for the HVAC work, but MY billed plaintiff $17,010.13, a difference of $5,441.49. Frezza, meanwhile, testified that there was no written procedure governing when MY would permit boat owners to engage outside contractors. In contrast to plaintiff's testimony, Frezza testified that if a boat owner wished to retain an outside contractor, MY would always allow it. Thus, a triable issue of fact exists whether MY's exercise of discretion under paragraph 4 in the Dockage Contracts was exercised in bad faith (see Maddaloni Jewelers, Inc. v Rolex Watch U.S.A., Inc., 41 AD3d 269, 270 [1st

Dept 2007]). MY's motion for summary judgment dismissing the eighth cause of action is denied.

E. The Ninth Cause of Action under General Business Law § 349

General Business Law § 349 (a) prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." The statute provides a private right of action to "any person who has been injured by reason of any violation of this section may bring an action in his [or her] own name to enjoin such unlawful act or practice, an action to recover his [or her] actual damages" (General Business Law § 349 [h]). To state a cause of action under General Business Law § 349, "a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice" (City of New York v Smokes-Spirits.Com, Inc., 12 NY3d 616, 621 [2009]; accord Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, 85 NY2d 20, 26 [1995]). The statute does not apply to private disputes (see New York Univ. v Continental Ins. Co., 87 NY2d 308, 321 [1995]). Key to any claim brought under General Business Law § 349 is whether the conduct complained of has "a broader impact on consumers at large" (Oswego, 85 NY2d at 25).

Applying these precepts, MY has demonstrated that plaintiff's complaints concern a private dispute unique to him (see Loeb v

Architecture Work, P.C., 154 AD3d 616, 616 [1st Dept 2017] [dismissing General Business Law § 349 claim where the injury arose out of the defendant's specific acts and omissions as opposed to conduct that impacted the public at large]; accord Camacho v IO Practiceware, Inc., 136 AD3d 415, 416 [1st Dept 2016] [dismissing General Business Law § 349 claim where the complaint related to "the specific facts at hand"]). Plaintiff, in opposition, fails to raise a triable issue of fact that MY's conduct impacts consumers at large (Plaza PH2001 LLC v Plaza Residential Owner LP, 98 AD3d 89, 104 [1st Dept 2012]). The ninth cause of action is dismissed as against MY.

F. MSI/Budney's Cross-Claims against MY

In view of the foregoing, that part of MY's motion for summary judgment dismissing the cross-claims brought by MSI/Budney against it is denied.

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3/11/2024
DATE

DEBRA A. JAMES, J.S.C.

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