SHORT FORM ORDER

INDEX No. 601995/2017
CAL. No. 202300611CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 78 - SUFFOLK COUNTY

PRESENT:

Hon. MAUREEN T. LICCIONE
Justice of the Supreme Court

MOTION DATE 10/29/21 (015)
MOTION DATE 9/6/23 (020)
MOTION DATE 9/14/23 (021)
MOTION DATE 11/20/23 (022)
ADJ. DATE 1/31/24
Mot. Seq. # 015 MG
Mot. Seq. # 020 MG
Mot. Seq. # 021 MD
Mot. Seq. # 022 MD

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BARBARA MADDOCK, as PERSONAL REPRESENTATIVE OF THE ESTATE OF RICHARD MADDOCK, and BARBARA MADDOCK,

Plaintiff,

- against -

DENISE HAINES, as ADMINISTRATOR OF THE ESTATE OF MICHAEL HAINES, MICHAEL R. HAINES AGENCY, INC., SCDS ENTERPRISES, LLC, AKG2, INC., COOL-TEMP MECHANICAL, INC., AMERICAN PLUMBING SOLUTIONS, INC., PETER ALBINSKI, R.A., LLOYD HOWELL, P.E., JOSEPH LAUTERBORN, BUILT CONSULTING CORP., WALTER GIGLIO, DONNA STANZA, and EUGENE SANTA CATTARINA,

Defendants.

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Upon the following papers read on these motions for summary judgment and this cross motion for dismissal of the complaint: Notice of Motion/Order to Show Cause and supporting papers by defendant SCDS Enterprises, LLC, dated October 11, 2021; by defendant SCDS Enterprises, LLC, dated January 9, 2023; by defendant SCDS Enterprises, LLC, dated March 24,

2023; Answering Affidavits and supporting papers by plaintiff, dated November 12, 2021; by plaintiff, dated April 21, 2023; Replying Affidavits and supporting papers by defendant SCDS Enterprises, LLC, dated December 3, 2021; by defendant SCDS Enterprises, LLC, dated May 12, 2023; Notice of Motion/Order to Show Cause and supporting papers by defendant AKG2, Inc., dated August 7, 2023; Answering Affidavits and supporting papers by plaintiff, dated October 30, 2023; by defendant SCDS Enterprises, LLC, dated October 30, 2023; Replying Affidavits and supporting papers by defendant AKG2, Inc., dated November 20, 2023; Notice of Motion/Order to Show Cause and supporting papers by defendant Denise Haines, as administrator of the estate of Michael Haines, and Michael R. Haines Agency, Inc., dated August 7, 2023; Answering Affidavits and supporting papers by defendant SCDS Enterprises, LLC, dated October 30, 2023; Replying Affidavits and supporting papers by defendant Denise Haines, as administrator of the estate of Michael Haines, and Michael R. Haines Agency, Inc., dated November 20, 2023; Notice of Cross-Motion and supporting papers by plaintiff, dated October 26, 2023; Answering Affidavits and supporting papers by defendant Denise Haines, as administrator of the estate of Michael Haines, and Michael R. Haines Agency, Inc., dated November 20, 2023; Replying Affidavits and supporting papers by plaintiff, dated December 18, 2023; it is

ORDERED that the motion (seq. 015) by defendant SCDS Enterprises, LLC, the motion (seq. 020) by defendant AKG2, Inc., and the motion (seq. 0201) by defendants Denise Haines, as administrator of the estate of Michael Haines, and Michael R. Haines Agency, Inc. are consolidated for purposes of this determination; and it is; and it is

ORDERED that the motion by defendant SCDS Enterprises, LLC for an order pursuant to CPLR 3211 (a) (7), dismissing the amended complaint, is considered as a motion for summary judgment dismissing the breach of warranty, negligence, and fraudulent conveyance causes of action against it as set forth in the second amended complaint and, as such, is granted; and it is

ORDERED that the motion by defendant AKG2, Inc. for summary judgment dismissing the second amended complaint and cross-claims against it is granted; and it is

ORDERED that the motion by defendants Denise Haines, as administrator of the estate of Michael Haines, and Michael R. Haines Agency, Inc. for summary judgment dismissing the second-amended complaint and cross-claims against them is denied; and it is further

ORDERED that the cross-motion by plaintiff for, in part, an order pursuant to CPLR 3126, striking the amended complaint, is denied.

Plaintiff Barbara Maddock, individually and as personal representative of the estate of her late husband, Richard Maddock, brings this action allegedly arising out of a fire that occurred on January 5, 2017, at the residential property located at 62 North Captain Neck Lane, in Southampton, New York. As a way of background, the facts of this action, subject to some dispute, are briefly summarized as follows: Between 2013 and 2015, the prior owner of the property, defendant SCDS Enterprises, LLC (hereinafter SCDS), allegedly built a new home and pool cabana on the property. Defendants Donna Stanza and Eugene Santa Cattarina allegedly were members of SCDS. For the project, SCDS allegedly hired defendants AKG2, Inc. (hereinafter AKG2) and Built Consulting Corp. (hereinafter Built Consulting), as well as an architect, defendant Peter Albinski, R.A. Defendant Cool-Temp Mechanical Corp., s/h/a Cool-Temp Mechanical Inc. (hereinafter Cool-Temp Mechanical) and American Plumbing Solutions, Inc. (hereinafter American Plumbing Solutions) allegedly were subcontracted to install and inspect the boiler and related venting system in the home. Defendant Joseph Lauterborn allegedly was an officer of American Plumbing Solutions. Defendant Walter Giglio allegedly was an officer of Built Consulting.

In November 2016, plaintiff and Richard Maddock (collectively, the Maddocks) made a successful offer to purchase the property from SCDS. The Maddocks allegedly retained an engineer, defendant Llyod Howell, P.E., to conduct an inspection, which was performed on December 4, 2016. On December 12, 2016, Richard Maddock contacted an insurance brokerage firm, Michel R. Haines Agency, Inc. (hereinafter the Haines Agency), to obtain homeowners insurance for the property effective upon closing. The Maddocks allegedly had obtained various insurance policies from the Haines Agency and Michael Haines, an insurance broker therein, for over 20 years. On December 13, 2016, Jenn Woodason, also referred to as Jennifer Woodason-Svarplaitis, of the Haines Agency allegedly provided Richard Maddock with a quote for homeowners insurance for the property. On December 14, 2016, Richard Maddock allegedly spoke with Woodason and told her to "go ahead with the policy." On December 16, 2016, the Maddocks, as buyers, and SCDS, as seller, entered into a residential contract of sale for the property (hereinafter the contract of sale), which included the 2-10 Home Buyers Warranty (hereinafter the 2-10 warranty). On January 4, 2017, the Maddocks closed on the property. The next day, the subject fire occurred. Richard Maddock allegedly was not informed that the Maddocks had no homeowners insurance coverage for the property until January 6, 2017.

Given the long and complex nature of the procedural history of this action, much of which is not pertinent to the instant motions, the court limits its discussion thereof as follows: Well after the amended complaint was filed, the court (St. George, J.) issued the order dated May 7, 2020 (hereinafter the May 7, 2020 order), which granted the motion by SCDS to dismiss the complaint against it. By order dated February 22, 2021 (hereinafter the February 22, 2021 order), the court (St. George, J.), in part, vacated the May 7, 2020 order. The February 22, 2021 order set forth, among other things, that "SCDS failed to elect that its 2017 dismissal motion apply to the 2019 amended complaint; instead, SCDS joined issue when served with the amended complaint and embarked on a course indicating that it desired to litigate this action on the merits, after engaging in substantial discovery."

By order dated January 27, 2022 (hereinafter the January 27, 22 order), the court (St. George, J.), in part, converted the motion (seq. 015) by SCDS to dismiss the amended complaint, currently pending before the court, into a motion for summary judgment and granted leave for the parties to supplement their respective papers upon completion of discovery and court-ordered depositions. Thereafter, by order dated December 16, 2022 (hereinafter the December 16, 2022 order), the court (St. George, J.), among other things, granted plaintiff leave to serve the second amended complaint as proposed. By the second amended complaint, plaintiff, in part, asserts negligence claims against, inter alia, SCDS, AKG2, defendant Denise Haines, as administrator of the estate of Michael Haines, and the Haines Agency. Plaintiff also asserts claims against SCDS for, in part, breach of warranty and fraudulent conveyance pursuant to former Debtor and Creditor Law §§ 273, 274, 275, 276, and 276-a.

The Motion (Seq. 015) by SCDS

By notice of motion dated October 11, 2021, SCDS moved for an order pursuant to CPLR 3211 (a) (7), dismissing the amended complaint against it, which, has since been converted to a summary judgment motion as previously indicated. Following service of the second amended complaint, SCDS elected to apply its motion to the second amended complaint. SCDS now seeks summary judgment dismissing the negligence, breach of warranty, and fraudulent conveyance causes of action against it as set forth in the second amended complaint. SCDS contends, among other things, that the 2-10 warranty

is plaintiff's exclusive remedy against it, that it did not owe an independent duty of care to plaintiff, and that it cannot be liable for the alleged negligence of its independent contractors. In support of its motion, SCDS submits, inter alia, the contract of sale, the 2-10 warranty, and excerpts of the deposition testimony of the Maddocks, Stanza, Giglio, Daniel Gil, Giuliano, and Lauterborn. In opposition, plaintiff argues, among other things, that issue has not been joined by SCDS, its moving papers do not include all of the pleadings, and that it created the allegedly defective condition. In support of her opposition, plaintiff submits, inter alia, excerpts from the deposition testimony of Fire Marshal Dean McNamara, the Maddocks, Gil, Stanza, Giuliano, Giglio, and Lauterborn.

While a motion for summary judgment pursuant to CPLR 3212 is only permitted after issue has been joined (*see* CPLR 3212 [a]), CPLR 3211 (c) permits a court to treat a motion pursuant to CPLR 3211(a) or (b) as a motion for summary judgment, "after adequate notice to the parties," regardless of whether or not issue has been joined. The court, having given "adequate notice to the parties," as set forth in the January 27, 2022 order, hereby treats the SCDS's motion pursuant to CPLR 3211 (a) (7) as a motion for summary judgment (*see* CPLR 3211 [c]; ***Rosenblum v Great Neck Teachers Ass'n Ben. Trust Fund***, 122 AD3d 605, 995 NYS2d 607 [2d Dept 2014]). Moreover, since counsel for SCDS elected to apply its request for dismissal to the second amended complaint, which superseded the amended complaint, the court hereby considers the motion as directed against the second amended complaint (*see* ***Ofman v Tenenbaum Berger & Shivers, LLP***, 217 AD3d 960, 191 NYS3d 730 [2d Dept 2023]; ***Tueme v Lezama***, 217 AD3d 715, 190 NYS3d 463 [2d Dept 2023]; ***Estate of Feenin v Bombace Wine & Spirits, Inc.***, 188 AD3d 1001, 136 NYS3d 387 [2d Dept 2020]). As such, the court treats SCDS's motion pursuant to 3211 (a) (7), dismissing the amended complaint, as one for summary judgment dismissing the negligence, breach of warranty, and fraudulent conveyance causes of action against it as asserted in the second amended complaint.

Relatedly, by virtue of SCDS's election to apply its currently pending motion to dismiss to the second amended complaint, its time to answer the second amended complaint was extended until 10 days after service of notice of entry of the order determining its motion (*see* CPLR 3211 [f]; ***Eaton v Bluestone***, 226 AD3d 745, 209 NYS3d 93 [2d Dept 2024]; ***Rosas v Petkovich***, 218 AD3d 814, 193 NYS3d 254 [2d Dept 2023]; ***JPMorgan Chase Bank, N.A. v Degennaro***, 163 AD3d 539, 80 NYS3d 404 [2d Dept 2018]). Therefore, at this juncture, SCDS has not defaulted in appearing or answering the second amended complaint (*see* ***Eaton v Bluestone***, 226 AD3d 745, 209 NYS3d 93; ***JPMorgan Chase Bank, N.A. v Degennaro***, 163 AD3d 539, 80 NYS3d 404).

While "CPLR 3212 (b) requires that motions for summary judgment be supported by, inter alia, a copy of the pleadings, "'[a]t any stage of an action,' a court may disregard 'a mistake, omission, defect or irregularity' where 'a substantial right of a party is not prejudiced'" (***Webster v Forest Green Apt. Corp.***, 219 AD3d 867, 868, 195 NYS3d 694, 696 [2d Dept 2023], first quoting ***Newfeld v Midwood Ambulance & Oxygen Serv, Inc.***, 204 AD3d 813, 815, 164 NYS3d 497, 498 [2d Dept 2022], then quoting CPLR 2001; ***Montalvo v Episcopal Health Servs., Inc.***, 172 AD3d 1357, 1359, 102 NYS3d 74, 76 [2d Dept 2019]). Although SCDS failed to include all the pleadings for this action, it included copies of the answers to the second amended complaint on behalf of American Plumbing Solutions, Lauterborn, Denise Haines, the Haines Agency, and AKG2 with their reply papers and, in any event, the pleadings were electronically filed and readily available to the court and the parties. The court disregards SCDS's

failure to include copies of all of the pleadings with its motion papers, since the record is sufficiently complete and there is no evidence that a substantial right of plaintiff was prejudiced thereby (*see* ***Webster v Forest Green Apt. Corp.***, 219 AD3d 867, 195 NYS3d 694; ***Montalvo v Episcopal Health Servs., Inc.***, 172 AD3d 1357, 102 NYS3d 74; ***Sensible Choice Contr., LLC v Rodgers***, 164 AD3d 705, 83 NYS3d 298 [2d Dept 2018]).

The court also rejects plaintiff's contention that the motion by SCDS should be denied based on its failure to submit a statement of material facts. Well before SCDS submitted its supplemental papers, Uniform Rules for Trial Courts (22 NYCRR) § 202.8-g (a) was amended, effective July 1, 2022, to "requi[re] that statements of material facts be provided only if directed by the court and providing courts with several remedies in the event of a failure by the proponent of summary judgment to provide the statement" (***Smith v MDA Consulting Engrs., PLLC***, 210 AD3d 1448, 1449, 178 NYS3d 314, 316 [4th Dept 2022], *lv denied* 39 NY3d 910, 186 NYS3d 117 [2023]). Moreover, that SCDS's supporting proof was placed before the court by way of an attorney's affirmation referencing deposition testimony and other proof, rather than an affidavit of someone with personal knowledge of the facts, is not fatal to its motion (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Flores v Harvest Moon Farm & Orchard***, 206 AD3d 623, 169 NYSs3d 134 [2d Dept 2022]; ***JPMorgan Chase Bank, N.A. v Wright***, 174 AD3d 871, 107 NYS3d 339 [2d Dept 2019]).

Here, SCDS established its prima facie entitlement to summary judgment dismissing plaintiff's breach of warranty claim. "New home sales are covered by a housing merchant implied warranty and that warranty may, as here, be supplanted by a limited warranty that meets or exceeds the standards set forth in General Business Law § 777-b " (***Horwitz v Camelot Assoc. Corp.***, 66 AD3d 1299, 1300, 888 NYS2d 241, 242 [3d Dept 2009] [internal citations omitted]; ***20 Pine St. Homeowners Assn. v 20 Pine St. LLC***, 109 AD3d 733, 971 NYS2d 289 [1st Dept 2013]). Here, SCDS demonstrated, prima facie, that the 2-10 warranty, rather than the housing merchant implied warranty, governs and is controlling (*see* ***Fumarelli v Marsam Dev.***, 92 NY2d 298, 680 NYS2d 440 [1998]; ***20 Pine St. Homeowners Assn. v 20 Pine St. LLC***, 109 AD3d 733, 971 NYS2d 289; ***Gallup v Summerset Homes, LLC***, 82 AD3d 1658, 920 NYS2d 504 [2d Dept 2011]; ***Pesca v Barbera Homes, Inc.***, 35 Misc3d 747 [Supreme Court, Albany County 2012]).

According to paragraph 33 of the rider of the contract of sale (hereinafter the rider), "[t]he acceptance of the Deed by the Purchaser shall be deemed full performance and discharge of all terms, conditions and agreements made herein and no liability on the part of the Seller shall survive transfer of the Deed, except those terms and conditions which by the terms of this Contract expressly survive such transfer." Paragraph 40 of the rider expressly disclaims and excludes the statutory housing merchant implied warranty provided by GBL § 777-a by stating, in pertinent part that the "seller makes no housing merchant implied warranty or any other warranties express o[r] implied . . . and all such warranties are excluded except as provided in the 2-10 homebuyers warranty annexed to this contract of sale . . . . The express terms of the 2-10 [warranty] hereby incorporated in this contract of sale and there are no warranties which extend beyond the face thereof."

In addition, Section V of the 2-10 warranty itself reads, "[y]ou have accepted this express limited warranty provided in this warranty booklet. All other implied warranties, including oral or written

statements or representations made by Your Builder/Seller or any implied warranty of habitability, merchantability or fitness, are disclaimed by Your Builder/Seller and waived by You to the extent possible under the laws of Your state." Section VIII of the 2-10 warranty specifically excludes "[a]ny loss or damage that is caused or made worse by any of the following causes, whether acting alone or in sequence or concurrence with any other cause or causes whatsoever, including without limitation: . . . fire, explosion, blasting, smoke . . . " This section of the 2-10 warranty also specifically excludes coverage for damage to personal property and for consequential damages as provided for in paragraphs 10 and 12.

Section III of the 2-10 warranty provides the builder/seller with the option to repair, replace, or pay for the defect. Even if SCDS cannot properly claim that the fire exclusion applies here, plaintiff nevertheless cannot recover the damages that she seeks against SCDS according to the plain reading of the 2-10 warranty that excludes consequential damages. General damages "compensate for the value of the promised performance," whereas consequential damages are "indirect and compensate for additional losses incurred as a result of the breach" (***Achieve It Solutions, LLC v Lewis***, 186 AD3d 49, 56, 572, 128 NYS3d 242, 247 [2d Dept 2020], quoting ***Appliance Giant, Inc. v Columbia 90 Assoc., LLC***, 8 AD3d 932, 934, 779 NYS2d 611, 613 [3d Dept 2004]). Here, plaintiff seeks consequential, rather than general, damages (*see e.g.* ***Fresenius Kabi USA, LLC v Hetero USA ,Inc.***, 184 AD3d 459, 123 NYS3d 828 [1st Dept 2020]; *cf.* ***Havens v Tucker***, 136 AD2d 814, 523 NYS2d 648 [3d Dept 1988]; ***Sweazey v Merchants Mut. Ins. Co.***, 169 AD2d 43, 571 NYS2d 131 [3d Dept 1991]).

In opposition, plaintiff failed to raise a triable issue of fact. While "[t]he limited warranty cannot exclude construction which 'does not meet or exceed a relevant specific standard of the applicable building code, or in the absence of such relevant specific standard a locally accepted building practice' or construction which 'fails to ensure that the home is habitable'" (***Horwitz v Camelot Assoc. Corp.***, 66 AD3d 1299, 1300, 888 NYS2d 241, 242 [3d Dept 2009] [internal citations omitted], first quoting General Business Law § 777-b [4] [e] [i], then quoting General Business Law § 777-b [4] [e] [ii]), the 2-10 warranty did not leave plaintiff without any remedy at law (*cf.* ***Pesca v Barbera Homes, Inc.***, 35 Misc3d 747). Nor did plaintiff raise a triable issue of fact as to whether the exclusions under the 2-10 warranty were either unconscionable or void as against public policy (*see* ***Joka Indus. v Doosan Infracore Am. Corp.***, 153 AD3d 506, 59 NYS3d 470 [2d Dept 2017]; ***Suffolk Laundry Servs. v Redux Corp.***, 238 AD2d 577, 656 NYS2d 372 [2d Dept 1997]). Further, under the ejusdem generis rule, "a series of specific words describing things or concepts of a particular sort are used to explain the meaning of a general one in the same series" (***Matter of Riefberg***, 558 NY2d 134, 141, 459 NYS2d 739, 743 [1983]; ***Olivieri v Barnes & Noble, Inc.***, 211 AD3d 1525, 1528, 182 NYS3d 414, 417 [4th Dept 2022]). Plaintiff's reliance on the doctrine of ejusdem generis is unavailing (*see* ***Cohen v E. & J. Bass***, 246 NY 270, 158 NE 618 [1928]; ***Certain Underwriters at Lloyd's, London v Forty Seventh Fifth Co. LLC***, 213 AD3d 481, 183 NYS3d 89 [1st Dept 2023]). Here, "[w]ords of general description do not follow words of particular description in relation to the same subject matter" (*see* ***Cohen v E. & J. Bass***, 246 NY at 276, 158 NE at 620).

SCDS also established its prima facie entitlement to summary judgment dismissing the direct negligence claim against it. "Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party"

(***Espinal v Melville Snow Contrs., Inc.***, 98 NY2d 136, 138, 746 NYS2d 120, 122 [2002]; ***Manfredonia v Babe Ruth League, Inc.***, 227 AD3d 693, 210 NYS3d 461 [2d Dept 2024]). A defendant "may be liable in tort when it has breached a duty of reasonable care distinct from its contractual obligations, or when it has engaged in tortious conduct separate and apart from its failure to fulfill its contractual obligations" (***New York Univ v Continental Ins. Co.***, 87 NY2d 308, 316, 639 NYS2d 283, 288 [1995]; ***Borghese v Redard***, 226 AD3d 639, 640, 208 NYS3d 682, 683 [2d Dept 2024]). However, the legal duty must arise from circumstances "extraneous to, and not constituting the elements of, the contract, although it may be connected with and dependant on the contract" (***Clark-Fitzpatrick, Inc. v Long Is. R.R.***, 70 NY2d 382, 389, 521 NYS2d 653, 656-657 [1987]; ***Borghese v Redard***, 226 AD3d at 640, 208 NYS3d at 683). "The very nature of a contractual obligation, and the public interest in seeing it performed with reasonable care, may give rise to a duty of reasonable care in performance of the contract obligations, and the breach of that independent duty will give rise to a tort claim" (***New York Univ v Continental Ins. Co.***, 7 NY2d at 316, 639 NYS2d at 287; ***Santoro v Poughkeepsie Crossings, LLC***, 180 AD3d 12, 18, 115 NYS3d 368, 374 [2d Dept 2019]). "In certain circumstances, this independent duty has been imposed based on the nature of the services performed and the defendant's relationship with its customer—specifically, where the defendant 'perform[s] a service affected with a significant public interest [and where the] failure to perform the service carefully and competently can have catastrophic consequences'" (***Dormitory Auth. of the State of N.Y. v Samson Constr. Co.***, 30 NY3d 704, 711,70 NYS3d 893, 898 [2018], quoting ***Sommer v Federal Signal Corp.***, 79 NY2d 540, 553, 583 NYS2d 957, 962 [1992]). "In considering whether plaintiffs have viable tort causes of action, [the court] must also consider 'the nature of the injury, the manner in which the injury occurred and the resulting harm" (***Sestito v Vickers***, 175 AD3d 955, 956, 107 NYS3d 574, 576 [4th Dept 2019], quoting ***Gallup v Summerset Homes, LLC***, 82 AD3d at 1660, 920 NYS2d at 506 [internal quotation marks omitted]; *see* ***Michael Davis Constr., Inc. v 129 Parsonage Lane, LLC***, 194 AD3d 805, 807, 149 NYS3d 118, 121 [2d Dept 2021]; ***Board of Mgrs. of Beacon Tower Condominium v 85 Adams St., LLC***, 136 AD3d 680, 25 NYS3d 233 [2d Dept 2016]).

SCDS demonstrated, prima facie, that it did not violate a legal duty independent of the contract of sale (*see* ***517 Union St. Assoc. LLC v Town Homes of Union Sq. LLC***, 176 AD3d 1350, 111 NYS3d 715 [3d Dept 2019]; ***Board of Mgrs. of Beacon Tower Condominium v 85 Adams St., LLC***, 136 AD3d 680, 25 NYS3d 233; ***Rosner v Bankers Std. Ins. Co.***, 172 AD3d 1257, 102 NYS3d 200 [2d Dept 2019]; ***Public Serv Mut. Ins. Co. v Tri-Con Constr. Corp.***, 224 AD2d 508, 638 NYS2d 155 [2d Dept 1996]; ***Board of Mgrs. of Riverview at Coll. Point Condominium III v Schorr Bros. Dev. Corp.***, 182 AD2d 664, 582 NYS2d 258 [2d Dept 1992]). "[M]erely charging a breach of a 'duty of due care,' employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim" (***Dormitory Auth. of the State of N.Y. v Samson Constr. Co.***, 30 NY3d at 711,70 NYS3d at 898, quoting ***Clark-Fitzpatrick v Long Is. R.R. Co.***, 70 NY2d at 390, 521 NYS2d at 657; *see* ***Countrywide Home Loans v United Gen. Title Ins. Co.***, 109 AD3d 953, 972 NYS2d 296 [2d Dept 2013]).

In opposition, plaintiff failed to raise a triable issue of fact (*see* ***Rosner v Bankers Std. Ins. Co.***, 172 AD3d 1257, 102 NYS3d 200; ***Massena Towne Ctr. Assoc. v Sear-Brown Group, Inc.***, 255 AD2d 893, 680 NYS2d 349 [4th Dept 1998]). The circumstances here do not warrant the imposition of an independent duty based on the nature of the services performed and SCDS's relationship with plaintiff (*see* ***Sestito v Vickers***, 175 AD3d 955, 107 NYS3d 574 [2d Dept 2019]; *cf.* ***New York Cent. Mut. Fire***

Ins. Co. v Glider Oil Co., Inc., 90 AD3d 1638, 936 NYS2d 815 [4th Dept 2011]). Nor is the presence here of an abrupt loss, by itself, sufficient to create an independent legal duty (*see* ***Great N. Ins. Co. V ADT LLC***, 2022 WL 833320, 2022 US Dist LEXIS 50116 [ND NY, March 21, 2022, No. 1:21-cv-00685 [BKS/CFH]]; ***Hartford Fire Ins. Co. v Atl. Handling Sys., LLC***, 2011 WL 4463338, 2011 US Dist LEXIS 109030 [ED NY Sep. 26, 2011, No. 09-CV-4127 [RRM][ALC]]).

SCDS also, in effect, established a case of prima facie entitlement to summary dismissing the vicarious liability claim against it. Generally, "a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligent" (***Brothers v New York State Elec. & Gas Corp.***,11 NY3d 251, 257, 869 NYS2d 356, 359 [2008], quoting ***Kleeman v Rheingold***, 81 NY2d 270, 273, 598 NYS2d 149, 152 [1993]; ***Wendy-Geslin v Oil Doctors***, 226 AD3d 727, 208 NYS3d 684 [2d Dept 2024]). However, there are various exceptions to this general rule, falling into three broad categories: (1) where the employer was negligent in selecting, instructing, or supervising the independent contractor; (2) where the independent contractor was hired to perform work that is inherently dangerous; and (3) where a specific nondelegable duty exists, arising out of some relation toward the public or the particular plaintiff (*see* ***Brothers v New York State Elec. & Gas Corp.***,11 NY3d 251, 869 NYS2d 356; ***Bennett v State Farm Fire & Cas. Co.***,198 AD3d 857, 156 NYS3d 92 [2d Dept 2021]).

Here, SCDS demonstrated, prima facie, that the alleged negligence was committed solely by independent contractors, and that the above-described "independent contractor rule" applied (*see* ***Hussain v City of New York***, 179 AD3d 1046, 114 NYS3d 681 [2d Dept 2020]; ***Braun v Star Community Publ. Group, LLC***, 125 AD3d 913, 5 NYS3d 151 [2d Dept 2015]; ***Campbell v HEI Hospitality, LLC***, 72 AD3d 860, 898 NYS2d 864 [2d Dept 2010]). In opposition, plaintiff failed to raise a triable issue of fact as the applicability of any of the exceptions to the general rule of nonliability for the negligent acts of an independent contractor (*see* ***Shusterich v Kleinman***, 171 AD3d 1236, 98 NYS3d 638 [2d Dept 2019]; ***Mery v Eginger***, 149 AD3d 827, 49 NYS3d 905 [2d Dept 2017]; ***Braun v Star Community Publ. Group, LLC***, 125 AD3d 913, 5 NYS3d 151). "[T]he mere retention of general supervisory powers over an independent contractor cannot form a basis for the imposition of liability against the principal" (***Wendt v Bent Pyramid Prods., LLC***, 108 AD3d 1032, 1033, 970 NYS2d 138, 140 [4th Dept 2013], quoting ***Goodwin v Comcast Corp.***, 42 AD3d 322, 323, 840 NYS2d 781, 782 [1st Dept 2007]; ***Fernandez v 707, Inc.***, 85 AD3d 539, 540, 926 NYS2d 408, 411 [1st Dept 2011]).

Given that "the existence of an 'unsatisfied judgment' is an essential element of a cause of action pursuant to Debtor and Creditor Law § 273–a" (***Felshman v Yamali***, 106 AD3d 948, 949, 966 NYS2d 145, 147 [2d Dept 2013]; ***Coyle v Lefkowitz***, 89 AD3d 1054, 1056, 934 NYS2d 216, 219 [2d Dept 2011] [internal quotation marks omitted), in light of the court's determination herein, SCDS is also entitled to summary judgment dismissing the cause of action for fraudulent conveyance (*see* ***Frybergh v Weissman***, 145 AD2d 531, 536 NYS2d 465 [2d Dept 1988]).

To the extent not explicitly referenced herein, the court has reviewed plaintiff's remaining contentions in opposition to the motion and determined them to be unavailing. Accordingly, the motion by SCDS is granted.

The Motion (Seq. 020) by AKG2

AKG2 moves for summary judgment dismissing the second amended complaint and cross-claims against it. AKG2 argues, among other things, that it did not enter into a contract with plaintiff, that none of the *Espinal* exceptions apply here, and that it contracted directly with SCDS. In support of its motion, AKG2 submits, inter alia, the deposition transcripts of Barbara Maddock, Giuliano, Stanza, Giglio, and Lauterborn, and the affidavit of Giuliano.

Plaintiff and SCDS oppose AKG2's motion. In opposition, plaintiff contends, among other things, that there are triable issues of fact as to whether the *Espinal* exceptions apply here and whether it created and/or contributed to the dangerous condition at the premises. In support of her opposition, plaintiff submits, in part, the deposition transcripts of Richard Maddock and Fire Marshal McNamara. SCDS, in opposition, asserts, in part, that it has asserted cross-claims against AKG2 for indemnification and contribution, and that there has been no determination as to the cause of the fire. SCDS's submissions include, inter alia, excerpts of the deposition testimony of Giuliano and Giglio.

AKG2 established a prima facie case of entitlement to summary judgment dismissing the second amended complaint against it (*see* ***Verderosa v County of Suffolk***, 226 AD3d 845, 209 NYS3d 138 [2d Dept 2024]; ***Butnik v Luna Park Hous. Corp.***, 200 AD3d 993, 158 NYS3d 240 [2d Dept 2021]; ***Guzman v Jamaica Hosp. Med. Ctr.***, 190 AD3d 705, 135 NYS3d 886 [2d Dept 2021]; ***Miller v Infohighway Communications Corp.***, 115 AD3d 713, 981 NYS2d 797 [2d Dept 2014]). Generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a non-contracting third party (***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 746 NYS2d 120 [2002]; ***Guzman v Jamaica Hosp. Med. Ctr.***,190 AD3d 705, 135 NYS3d 886). However, "there are three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care–and thus be potentially liable in tort– to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (***Espinal v Melville Snow Contrs.***, 98 NY2d at 140, 746 NYS2d at 123 [internal quotation marks and citations omitted]; *see* ***Verderosa v County of Suffolk***, 226 AD3d 845, 209 NYS3d 138).

AKG2 established, prima facie, that plaintiff was not a party to any contract with it and that, even assuming, arguendo, plaintiff alleged exceptions to *Espinal* in her pleadings or bills of particulars, it demonstrated, prima facie, that those exceptions are not applicable under the facts of this case (*see* ***Verderosa v County of Suffolk***, 226 AD3d 845, 209 NYS3d 138; ***Butnik v Luna Park Hous. Corp.***, 200 AD3d 993; ***Miller v Infohighway Communications Corp.***, 115 AD3d 713, 981 NYS2d 797). According the Fire Marshall McNamara's fire report (hereinafter the fire report), all ignition sources were eliminated except for heat from the three-inch exhaust vent from one of the boilers. Based on the deposition testimony and affidavit submitted by AKG2, it had no involvement in installing the subject boiler or vent pipes or finishing the basement. For the same reasons, AKG2 cannot be liable in contribution or common-law indemnification (*see* ***Stone v Williams***, 64 NY2d 639, 485 NYS2d 42 [1984]; ***Calle v 16th Avenue Grocery, Inc.***, 219 AD3d 450, 194 NYS3d 116 [2d Dept 2023]; ***Sotarriba v 346 W. 17th St. LLC***, 179 AD3d 599, 118 NYS3d 90 [1st Dept 2020]).

In opposition, plaintiff and SCDS failed to raise a triable issue of fact. Plaintiff's submissions were insufficient to raise a triable issue of fact as to the applicability of one or more of the three *Espinal* exceptions (*see* ***Verderosa v County of Suffolk***, 226 AD3d 845, 209 NYS3d 138; ***Butnik v Luna Park Hous. Corp.***, 200 AD3d 993; ***Miller v Infohighway Communications Corp.***, 115 AD3d 713, 981 NYS2d 797). Evidence that AKG2 may have been the general contractor for the project, without more, is insufficient to raise a triable issue of fact (*see* ***Quezada v Structure Tone, Inc.***, 226 AD3d 716, 208 NYS3d 692 [2d Dept 2024]). "A contractual obligation to supervise a project, standing alone, generally will not give rise to tort liability in favor of a third party" (***Butnik v Luna Park Hous. Corp.***, 200 AD3d at 994, 158 NYS3d at 242; *see* ***Guzman v Jamaica Hosp. Med. Ctr.***, 190 AD3d 705, 135 NYS3d 886; ***Kenny v Turner Const. Co.***,155 AD3d 479, 65 NYS3d 17 [1st Dept 2017]).

AKG2 also established its prima facie entitlement to summary judgment dismissing the cross-claims against it for contractual indemnification, breach of contract, and breach of contract for failure to procure insurance (*see* ***Pantaleo v Bellerose Senior Hous. Dev Fund Co.***, 147 AD3d 777, 46 NYS3d 189 [2d Dept 2017]; ***Jones v Rochdale Village, Inc.***, 96 AD3d 1014, 948 NYS2d 80 [2d Dept 2012]). AKG2's submissions demonstrated, among other things, that it contracted directly with SCDS. Moreover, inasmuch as none of AKG2's co-defendants, other than SCDS, oppose the motion, those cross-claims are deemed abandoned and are dismissed (*see* ***Winkler v Halmar Intl., LLC***, 206 AD3d 508, 171 NYS3d 6 [1st Dept 2022]; ***Hernandez v NY Prepaid Wireless LLC***, 206 AD3d 409, 170 NYS3d 29 [1st Dept 2022]; ***Blackman v Metropolitan Tr. Auth.***, 206 AD3d 602, 169 NYS3d 653 [2d Dept 2022]).

The court notes that SCDS asserts no cross-claims at this juncture. "'When an amended complaint has been served, it supercedes the original complaint and becomes the only complaint in the case," and the defendant[]'[s] 'original answer has no effect and a new responsive pleading must be substituted for the original answer'" (***Seidler v Knopf***, 186 AD3d 886, 888, 130 NYS3d 40 [2d Dept 2020], quoting ***St. Lawrence Explosives Corp. v Law Bros. Contr. Corp.***, 170 AD2d 957, 957, 566 NYS2d 127, 128 [4th Dept 1991]). Here, the second amended complaint became the operative complaint and SCDS's answer to the amended complaint, as well as the cross-claims asserted therein, had no legal effect (*see* ***Rosa v Triborough Bridge & Tunnel Auth.***, 218 AD3d 810, 194 NY3d 68 [2d Dept 2023]; ***Romano v New York City Tr. Auth.***, 213 AD3d 506, 184 NYS3d 323 [1st Dept 2023]).

To the extent not explicitly referenced herein, the court has reviewed the remaining contentions of plaintiff and SCDS in opposition to AKG2's motion and determined them to be unpersuasive. Accordingly, AKG2's motion is granted.

The Motion (Seq. 021) by Defendants Denise Haines, as Administrator of the Estate of Michael Haines, and the Haines Agency

Defendants Denise Haines and the Haines Agency (collectively, the Haines defendants) move for summary judgment dismissing the second amended complaint and cross-claims against them. The Haines defendants argue, in part, that they did not breach any duty of care to the Maddocks, and that they did not proximately cause the claimed damages. In support of their motion, the Haines defendants

submit, inter alia, the deposition transcripts of Richard Maddock, Joseph Haines, Stanza, and Lauterborn, and the affidavits of Dr. Medhat Allam, Dwight Geddes, and Peter Chen.

Both plaintiff and SCDS oppose the Haines defendants' motion. Plaintiff argues, among other things, that there are triable issues of fact as to whether Richard Maddock and Woodason communicated after she sent him a quote on December 13, 2016, whether he accepted such quote, and whether coverage for the fire would not have been excluded even if a homeowners insurance policy were issued. In support of her opposition, plaintiff submits, inter alia, the affidavit of John Costigan. SCDS contends, among other things, that the cause of the fire cannot be determined, and that the fire originated in the first floor bedroom. In support of its opposition, SCDS submits, in part, the fire report, excerpts of the deposition testimony of Fire Marshall McNamara and Lauterborn, and the affidavit Brian Canova.

The Haines defendants established their prima facie entitlement to summary judgment dismissing the second amended complaint against them. "An insurance broker 'may be held liable under theories of breach of contract or negligence for failing to procure insurance upon a showing by the insured that the agent or broker failed to discharge the duties imposed by the agreement to obtain insurance either by proof that it breached the agreement or because it failed to exercise due care in the transaction'" (***Ewart v Allstate Ins. Co.***, 221 AD3d 968, 969, 199 NYS3d 688, 690 [2d Dept 2023], quoting ***Da Silva v Champ Constr. Corp.***,186 AD3d 452, 453, 128 NYS3d 582, 584 [2d Dept 2020]). Liability, however, is "limited to that which would have been borne by the insurer had the policy been in force" (***Milgrim v Royal & SunAlliance Ins. Co.***, 75 AD3d 587, 589, 906 NYS2d 572, 574 [2d Dept 2010], quoting ***Andriaccio v Borg & Borg***, 198 AD2d 253, 253, 603 NYS2d 528, 529 [2d Dept 1993]; ***Jual Const. Ltd. v A.C. Edwards, Inc.***, 74 AD3d 1150, 902 NYS2d 428 [2d Dept 2010]).

Notwithstanding the triable issues of fact as to whether the Haines defendants were negligent in obtaining homeowners insurance for the Maddocks (*see* ***Katz v Tower Ins. Co. of N.Y.***, 34 AD3d 432, 824 NYS2d 146 [2d Dept 2006]; ***Ewart v Allstate Ins. Co.***, 221 AD3d 968, 199 NYS3d 688, [2d Dept 2023]), through the submission of, inter alia, the affidavits of Chen and Geddes, the Haines defendants demonstrated, prima facie, that any failure to procure insurance did not proximately cause plaintiff's alleged damages (*see* ***Da Silva v Champ Constr. Corp.***, 186 AD3d 452, 128 NYS3d 582; ***Milgrim v Royal & SunAlliance Ins. Co.***, 75 AD3d 587, 906 NYS2d 572; ***Weissberg v Royal Ins. Co.***, 240 AD2d 733, 659 NYS2d 505 [2d Dept 1997]). In his affidavit, Chen, who is a forensic engineer, opines, with a reasonable degree of engineering certainty, that, based on his review of, inter alia, various deposition transcripts and the fire report, the fire was caused by insufficient clearances to combustibles, which was a construction and latent defect. According to the affidavit of the Haines defendants' insurance expert, Geddes, based on his review of, inter alia, various deposition transcripts and Chen's report, even if an insurance policy had been issued, the subject loss would not have been covered under a standard HO-3 policy. Geddes explains that the quote given to Richard Maddock was for a standard HO-3 policy, which specifically excludes coverage for latent defects.

In opposition, plaintiff and SCDS raised triable issues of fact (*see* ***Voss v Netherlands Ins. Co.***, 22 NY3d 728, 985 NYS2d 448 [2014]; ***Finch v Steve Cardell Agency***, 136 AD3d 1198, 25 NYS3d 441 [3d Dept 2016]). Plaintiff's opposition papers include the affidavit of her insurance expert, Costigan, who opines that the HO-3 policy referred to in Geddes' affidavit would only exclude coverage for

damage directly to the boiler exhaust vent installation itself, rather than damage to other portions of the home resulting from the defective boiler vent installation. Generally, issues of proximate cause and foreseeability should be determined by fact finder (***Voss v Netherlands Ins. Co.***, 22 NY3d at737, 985 NYS2d at 454; *see* ***Finch v Steve Cardell Agency***, 136 AD3d 1198, 25 NYS3d 441). Moreover, SCDS submits, in part, the affidavit of Brian Canova, a fire and explosion investigator, who rejects Chen's opinion that the cause of the fire was a construction and latent defect. Rather, Canova opines that the subject fire likely originated in the first floor bedroom, specifically where the upholstered furniture was located.

Finally, the Haines defendants failed to establish their prima establishment to summary judgment dismissing the cross-claims against them. The Haines defendants did not address the cross-claims against them in their motion papers, other than to generally request an award of summary judgment thereon. The court shall not award summary judgment on grounds not litigated by the parties (*see* ***Scarpelli v Naderi***, 207 AD3d 769, 173 NYS3d 264 [2d Dept 2022]; ***Romanelli v Jones***, 179 AD3d 851, 117 NYS3d 90 [2d Dept 2020]; ***Grucci v Grucci***, 174 AD3d 790, 102 NYS3d 885 [2d Dept 2019]).

Accordingly, the Haines defendants' motion is denied.

The Cross-Motion (Seq. 022) by Plaintiff

Plaintiff cross-moves for an order pursuant to CPLR 3126, striking the Haines defendants' answer, or, in the alternative, imposing an adverse inference charge against them. Plaintiff contends, among other things, that the Haines defendants willfully and contumaciously withheld evidence, and that they spoliatated certain emails, which were produced in response to a subpoena duces tecum by nonparty Allstate Insurance Company (hereinafter Allstate). In support of her motion, plaintiff submits, inter alia, the affidavit of Woodason-Svarplaitis, various emails, and certified business records from Allstate. In opposition, the Haines Defendants contend that the cross-motion is untimely, that they did not willfully or negligently withhold evidence, and that plaintiff was not prejudiced from prosecuting the action. In support of its opposition, the Haines Defendants submit, inter alia, the affidavit of John Haines.

Initially, by filing the note of issue and certifying that all discovery was complete without reserving any rights or objections, plaintiff waived her rights to seek discovery sanctions under CPLR 3126 based on the Haines defendants' failure to comply with her discovery demands (*see* ***Fugazy v Fugazy***, 210 AD3d 653, 176 NYS3d 728 [2d Dept 2022]; ***J. H. v City of New York***, 170 AD3d 816, 93 NYS3d 896 [2d Dept 2019]; ***K-F/X Rentals & Equip., LLC v FC Yonkers Assoc., LLC***, 131 AD3d 945, 15 NYS3d 891 [2d Dept 2015]).

The fact that plaintiff moves for spoliation sanctions post-note of issue, however, does not render that branch of the motion untimely here (*see* ***Parkis v City of Schenectady***, 211 AD3d 1444, 180 NYS3d 710 [3d Dept 2022]). "Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, the responsible party may be sanctioned under CPLR 3126" (***Van DeVeerdonk v North Westchester Restorative Therapy & Nursing Ctr.,*** 223 AD3d 702, 703, 204 NYS3d 132, 135 [2d Dept 2024], quoting ***Holland v W.M. Realty Mgt.***, 64 AD3d 627, 629, 883 NYS2d 555, 557 [2d Dept 2009]). The determination of spoliation sanctions, if any, lies within the broad

discretion of the court (*see* ***Van DeVeerdonk v North Westchester Restorative Therapy & Nursing Ctr.***, 223 AD3d 702, 204 NYS3d 132; ***M.M. v Macerich Prop. Mgt. Co., LLC***, 219 AD3d 471, 193 NYS3d 295 [2d Dept 2023]). The party seeking sanctions for spoliation of evidence bears the burden of proving the following:

> "[T]he party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a 'culpable state of mind,' and 'that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense'"

(***Pegasus Aviation I, Inc. v Varig Logistica S.A.***, 26 NY3d 543, 547, 26 NYS3d 218, 219 [2015], quoting ***VOOM HD Holdings LLC v EchoStar Satellite L.L.C.***, 93 AD3d 33, 45, 939 NYS2d 321, 330 [1st Dept 2012]; *see* ***McGlynn v Burns & Harris***, 223 AD3d 733, 735-736, 203 NYS3d 369, 373 [2d Dept 2024]).

The extreme sanction of striking the Haines defendants' answer based on their alleged spoliation of evidence is not warranted here. Plaintiff failed to demonstrate that the Haines defendants' failure to produce certain emails deprived her of the ability to prove her claim (*see* ***Lifrieri v Gambale***, 222 AD3d 860, 203 NYS3d 97; ***S.W. v Catskill Regional Med. Ctr.***, 211 AD3d 890, 180 NYS3d 561 [2d Dept 2022]; ***Hirschberg v Winthrop-University Hosp.***, 175 AD3d 556, 106 NYS3d 376 [2d Dept 2019]). It appears that the emails purportedly sought by plaintiff were produced by Allstate (*see* ***Peters v Peters***, 146 AD3d 503, 45 NYS3d 406 [1st Dept 2017]). However, the issue of whether an adverse inference charge is warranted should be determinated at trial (*see* ***Lifrieri v Gambale***, 222 AD3d 860, 203 NYS3d 97; ***S.W. v Catskill Regional Med. Ctr.***, 211 AD3d 890, 180 NYS3d 561; ***Angotti v Petro Home Services***, 208 AD3d 1294, 175 NYS3d 288 [2d Dept 2022]).

Accordingly, plaintiff's cross-motion is denied.

Dated: July 8, 2024

Maureen T. Liccione
J.S.C.
HON. MAUREEN T. LICCIONE, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION

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