At an IAS Commercial Part 12 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York on the 17th day of November 2025.

P R E S E N T:
Honorable Reginald A. Boddie
Justice, Supreme Court

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2649 E. 23 LLC

Plaintiff,

-against-

NEW YORK CITY DEPARTMENT OF BUILDINGS, SCHNEIDER ASSOCIATES, CORY A. SCHNEIDER AND MARC L. SCHNEIDER AS CO EXECUTORS OF THE ESTATE OF STEVEN SCHNEIDER, RENZO BOLARTE, SEBASTIAN GIULIANO, and DESIGN STUDIO ASSOCIATES,

Defendants.

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Index No. 521977/2016

Cal. Nos. 1-2 MS 7-8

Decision and Order

The following e-filed papers read herein:	NYSCEF Doc Nos.
MS 7	181-185, 202-215, 227
MS 8	186-201, 216-226, 228-231

Defendants Renzo Bolarte, Sebastian Giuliano and Design Studio Associates (collectively, the "DSA Defendants") have interposed a motion (motion sequence 7) pursuant to CPLR 3212 for an order granting summary judgment in their favor dismissing the cross-claims asserted by defendants Schneider Associates, Cory A. Schneider and Marc L. Schneider, as co-executors of the Estate of Steven Schneider (collectively, the "Schneider Defendants") (*see* NYSCEF Doc No. 181, notice of motion, ¶ 1). Plaintiff 2649 E. 23 LLC ("Plaintiff") has interposed a motion (motion sequence 8) pursuant to CPLR 3212 for an order granting it partial summary judgment as to

liability with respect to Plaintiff's claims of negligence and professional malpractice against the Schneider Defendants (*see* NYSCEF Doc No. 186, notice of motion, ¶ [i]).

Plaintiff is the owner of real property located at 2649 East 23rd Street, Brooklyn, New York (the "Property") (*see* NYSCEF Doc No. 197, complaint, ¶ 7). Plaintiff, through its predecessor-in-title and member Lawrence Rafalovich, retained the DSA Defendants, pursuant to a written contract, to perform architectural services, including conducting a zoning analysis and preparing plans for the construction of a building on the Property in adherence with the laws, rules and regulations of the City of New York (*id.* ¶ 8). Plaintiff alleges that the DSA Defendants conducted a zoning analysis to determine the size of the building that could be constructed on the Property, including the number of floors, in conformity with New York City law (*id.* ¶ 9). Plaintiff contends that, in conjunction with the zoning analysis, the DSA Defendants determined that the laws, rules and regulations of the City of New York permitted the construction of a four-story, eleven family building on the Property (*id.* ¶ 10). Plaintiff avers that the DSA Defendants prepared plans in accordance with their zoning analysis for Plaintiff to construct a four-story, eleven family building on the Property (*id.* ¶ 11).

Defendant Schneider Associates was the engineer of record for the construction of a four-story, eleven family building on the Property (*id.* ¶ 12). Plaintiff asserts that the Schneider Defendants reviewed and approved the zoning analysis, as well as the plans, for the construction of a four-story, eleven family building on the Property (*id.* ¶¶ 13-14). Plaintiff alleges that defendants Renzo Bolarte, Sebastian Giuliano, Schneider Associates and Steven Schneider drafted and approved, and thereafter submitted, the plans for a four-story, eleven family building on the Property to the New York City Department of Buildings for approval (the "DOB") (*id.* ¶¶ 15-16).

Thereafter, on August 7, 2015, the DOB approved the application with the plan for the construction of a four-story, eleven unit building on the Property and issued permits to commence construction of such building (*id.* ¶¶ 17-18). Plaintiff then began construction of the building in question (*id.* ¶ 19). Ultimately, on March 23, 2016, the DOB sent a letter indicating that it intended to revoke the approval and permits issued in connection with the construction of a four-story, eleven family building on the Property (*id.* ¶ 20). Plaintiff avers that on May 26, 2016, defendant Sebastian Giuliano notified Plaintiff that the fourth story of the building, which at that juncture was already partially constructed, would have to be removed (*id.* ¶ 21).

Plaintiff opines that the reason that the fourth story of the building had to be removed is that the laws, rules and regulations of the City of New York, including the New York City Zoning Resolution, do not permit a four-story building to be constructed on the Property (*id.* ¶¶ 2). Plaintiff alleges that, due to having been constrained to remove the fourth story of the building, the completion of the building had to be delayed, and Plaintiff sustained monetary damages (*id.* ¶ 23).

As a result of having allegedly been led to proceed with erecting a four-story building on the Property due to Defendants' misapprehension that Plaintiff could duly undertake the construction of a four-story building, only to be belatedly informed that it would need to remove the fourth story of the building owing to zoning restrictions, Plaintiff interposed negligence, professional malpractice and breach of contract causes of action against the Schneider Defendants and the DSA Defendants (*id.* ¶¶ 24-32, 46-50, 52-62).

The DSA Defendants have moved (motion sequence 7) pursuant to CPLR 3212 for an order granting summary judgment in their favor dismissing the cross-claims interposed by the Schneider Defendants (*see* NYSCEF Doc No. 181, notice of motion, ¶ 1). In their second cross-claim against

the DSA Defendants, the Schneider Defendants seek contribution from the DSA Defendants. CPLR 1401, which governs claims for contribution, provides as follows:

> Except as provided in sections 15-108 and 18-201 of the general obligations law, sections eleven and twenty-nine of the workers' compensation law, or the workers' compensation law of any other state or the federal government, two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought.

Based on CPLR 1401, contribution is only available (except as set forth in the statutes listed in the above-quoted paragraph, which statutes are not applicable to the instant matter) between "two or more persons who are subject to liability for damages for . . . personal injury, injury to property or wrongful death" (*id.*)

The allegations in Plaintiff's verified complaint (*see* NYSCEF Doc No. 1), and as amplified in Plaintiff's Response to the Demand for a Bill of Particulars served by the Schneider Defendants, assert only economic loss. Specifically, Plaintiff alleges as follows in its Response to the Demand for a Bill of Particulars:

> 13. Set forth, separately, the manner in which plaintiff computes its damages, as alleged in the Verified Complaint.
>
> Response:
>
> The damages consist of the following:
>
> - Materials associated with the erection of the fourth story and then it's [sic] removal and refinishing. $1,067,728; See Invoices submitted with Plaintiff's response to discovery demands.
> - Loss of sale of two 4th floor apartments, $1,700,000
> - Labor to erect and then remove 4th floor and finish, $500,000 (e) [sic]

- Five months additional construction loan financing, $85,000
- Total $3,352,728

(NYSCEF Doc No. 185, bill of particulars, ¶ 13).

In short, the purported damages sustained by Plaintiff consist solely of economic damages, and, as such, cannot support a claim for contribution between co-defendants based on applicable Second Department precedent. As the Second Department has held:

> [P]urely economic loss resulting from a breach of contract does not constitute 'injury to property' within the meaning of New York's contribution statute [CPLR 1401]" (*Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 26 [1987], quoting CPLR 1401). Accordingly, under the so-called 'economic loss doctrine, contribution under CPLR 1401 is not available where the damages sought . . . are exclusively for breach of contract (*Sound Refrig. & A.C., Inc. v All City Testing & Balancing Corp.*, 84 AD3d 1349, 1350 [2011], quoting *Tower Bldg. Restoration v 20 E. 9th St. Apt. Corp.*, 295 AD2d 229, 229 [2002]). [T]he existence of some form of tort liability is a prerequisite to application of' CPLR 1401 (*Sound Refrig. & A.C., Inc. v All City Testing & Balancing Corp.*, 84 AD3d at 1350, quoting *Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d at 28).

(*Eisman v Village of E. Hills*, 149 AD3d 806, 809 [2d Dept 2017] [internal quotations marks omitted]; *accord Children's Corner Learning Ctr. v A. Miranda Contr. Corp.*, 64 AD3d 318, 323 [1st Dept 2009] ["[I]t is well established that purely economic loss resulting from a breach of contract does not constitute injury to property . . . In *Sargent*, a case similar to this, the plaintiff, a school district, commenced a breach of contract action against the architectural firm that designed a school construction project and the general contractor that built the school. The school's roof began to leak shortly after construction was completed. The school district claimed that the architects breached their contract with the district by not obtaining proper approval of the roofing subcontractor and by failing to secure a guarantee from the roof manufacturer. The architects

sought contribution from the general contractor. In that case, the Court of Appeals, after reviewing *Dole v Dow Chem. Co.* and the legislative history of CPLR 1401, did not allow contribution"]).

In short, insofar as Plaintiff seeks purely economic damages, as distinguished from damages for personal injury, injury to property or wrongful death, as reflected in its verified bill of particulars, the Schneider Defendants' cross-claim for contribution against the DSA Defendants (namely, the second cross-claim asserted by the Schneider Defendants) is unavailing and must be dismissed on summary judgment (motion sequence 7).

Turning to the first cross-claim interposed by the Schneider Defendants against the DSA Defendants, such cross-claim seeks common law and contractual indemnification from the DSA Defendants (*see* NYSCEF Doc No. 7, ¶ 32-33). The contractual indemnification cross-claim interposed by the Schneider Defendants against the DSA Defendants must be dismissed on summary judgment in that no contract exists between the Schneider Defendants and the DSA Defendants providing for indemnification of the Schneider Defendants. As held by the Second Department:

> A party's right to contractual indemnification depends upon the specific language of the relevant contract (*see Sawicki v GameStop Corp.*, 106 AD3d 979, 981 [2013]; *Alfaro v 65 W. 13th Acquisition, LLC*, 74 AD3d 1255 [2010]; *Sherry v Wal-Mart Stores E., L.P.*, 67 AD3d 992, 994 [2009]). The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances (*see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989]).

(*Konsky v Escada Hair Salon, Inc.*, 113 AD3d 656, 658, 659 [2d Dept 2014]).

As to the common law indemnification cross-claim asserted by the Schneider Defendants against the DSA Defendants, the DSA Defendants have submitted evidence in conjunction with

their motion for summary judgment that the Schneider Defendants, the engineer on the building project, submitted the plans for a four-story building on the Property to the DOB for approval, which approval was initially granted, and thereafter denied, by the DOB on the basis that New York City laws do not permit a four-story building to be constructed on the Property, constraining Plaintiff to remove the fourth story of the building. In short, the DSA Defendants have submitted prima facie evidence in support of their motion for summary judgment buttressing the notion that the Schneider Defendants bear some fault by virtue of having erroneously sought approval of a four-story building on the Property, which prima facie showing has not been refuted with admissible evidence by the Schneider Defendants in their opposition papers (*see* NYSCEF Doc No. 206, Will affirm., ¶¶ 32-38) (*Amato v Lord & Taylor, Inc.*, 10 AD3d 374, 375 [2d Dept 2004] [Second Department declined to rely in the context of a summary judgment motion on "the bare affirmation of his attorney who demonstrated no personal knowledge of the manner in which the accident occurred"] [internal quotations omitted]).

In these circumstances, insofar as the DSA Defendants have established unrefuted prima facie evidence in support of the proposition that the Schneider Defendants bear some fault for the fourth-floor imbroglio, the common law indemnification cross-claim asserted by the Schneider Defendants against the DSA Defendants must be dismissed on summary judgment (motion sequence 7). As held by the Second Department:

> Since the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine (*Henderson v Waldbaums*, 149 AD2d 461, 462 [1989], quoting *Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 453 [1985]).

(*Konsky v Escada Hair Salon, Inc.*, 113 AD3d 656, 658 [2d Dept 2014] [internal quotation marks omitted]).

Plaintiff has interposed a motion pursuant to CPLR 3212 for an order granting it partial summary judgment as to liability with respect to Plaintiff's claims of negligence and professional malpractice against the Schneider Defendants (motion sequence 8). In support of its motion, Plaintiff has adduced prima facie evidence concerning defendant Steven Schneider's (owner of defendant Schneider Associates) direct involvement in the planning and approval of the construction of the building and that such building was not constructed in accordance with the laws of the City of New York, resulting in the removal of the fourth floor of the building.

Specifically, Plaintiff established that the Schneider Defendants were hired as the engineer of record for the construction of the building on the Property. Further, Plaintiff established that the Schneider Defendants generated, reviewed and approved the zoning analysis for the construction of the building. Moreover, Plaintiff adduced evidence that the Schneider Defendants verified compliance of the building with all applicable zoning laws and other regulations. In addition, Plaintiff showed that the Schneider Defendants verified several applications and plans, which were submitted to the DOB outlining the plan for the construction of the building. Further, Plaintiff established that the Schneider Defendants erred in their analysis and that, as such, Plaintiff was not permitted to build a four-story building on the Property. Moreover, Plaintiff showed that the Schneider Defendants failed to ascertain that their zoning analysis and plans violated the laws, rules and regulations of the City of New York. Last, Plaintiff established that due to the Schneider Defendants' failures, Plaintiff was constrained to remove the fourth floor of the building, causing Plaintiff to sustain monetary damages.

In sum, Plaintiff has submitted prima facie evidence in support of its motion for summary judgment for an order granting Plaintiff partial summary judgment as to liability against the Schneider Defendants as to Plaintiff's professional malpractice claim, which prima facie evidence was not refuted by the Schneider Defendants in their opposition papers, warranting the grant of Plaintiff's partial summary judgment motion on liability against the Schneider Defendants as to Plaintiff's professional malpractice claim (*Alvarez v Gerberg*, 83 AD3d 974, 975 [2d Dept 2011] [when the movant has established a prima facie entitlement to summary judgment, to defeat summary judgment, the non-movant must "submit evidentiary facts or materials to rebut the . . . [movant's] prima facie showing, so as to demonstrate the existence of a triable issue of fact"]).

Based on the foregoing, the DSA Defendants' motion pursuant to CPLR 3212 for an order granting summary judgment in their favor dismissing the cross-claims asserted by the Schneider Defendants is hereby granted (motion sequence 7). Plaintiff's motion pursuant to CPLR 3212 for an order granting it partial summary judgment as to liability with respect to Plaintiff's professional malpractice claim against the Schneider Defendants is hereby granted (motion sequence 8). Any relief not expressly addressed herein has been considered and is denied.

ENTER:

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Honorable Reginald A. Boddie
Justice, Supreme Court

HON. REGINALD A. BODDIE
J.S.C.