Board of Mgrs. of the 432 Park Condominium v 56th & Park (NY) Owner, LLC
2023 NY Slip Op 31873(U)
June 1, 2023
Supreme Court, New York County
Docket Number: Index No. 655617/2021
Judge: Melissa A. Crane

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 60

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BOARD OF MANAGERS OF THE 432 PARK CONDOMINIUM, on behalf of the individual unit owners and the commercial unit owners, BOARD OF MANAGERS OF THE COMMERCIAL SECTION OF THE 432 PARK CONDOMINIUM, and BOARD OF MANAGERS OF THE RESIDENTIAL SECTION OF THE 432 PARK CONDOMINIUM, on behalf of the individual unit owners,

Plaintiffs,

- against –

56TH AND PARK (NY) OWNER, LLC, CHARLES GARNER, RYAN HARTER, DEVON MCCORKLE, JEFF MACK, HAROLD MACKLOWE, JERRY THOMAS, and TERRY WACHSNER,

Defendants.

56TH AND PARK (NY) OWNER, LLC,

Defendant/Third-Party Plaintiff,

- against –

LEND LEASE (US) CONSTRUCTION LMB INC., SLCE ARCHITECTS, LLP, WSP USA BUILDINGS, INC. f/k/a WSP FLACK + KURTZ, INC., WSP USA BUILDINGS, INC. f/k/a WSP CANTOR SEINUK STRUCTURAL ENGINEERS, and CGI NORTHEAST INC.,

Third-Party Defendants.

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Index No.: 655617/2021
Motion Seq. No. 006

Crane, Melissa A., J.:

In this action to recover damages for the alleged defective design and construction of a condominium building, third-party defendants WSP USA Buildings, Inc. f/k/a Flack + Kurtz, Inc. ("WSP F+K") and WSP USA Buildings, Inc. f/k/a WSP Cantor Seinuk Structural Engineers

("WSP Cantor") (collectively WSP Third-Party Defendants) move pursuant to CPLR 3211 (a) (1), (5) and (7) for an order dismissing counts IX (breach of contract as against WSP F+K), XI (common-law indemnification as against WSP F+K), XIII (breach of contract as against WSP Cantor), XV (common-law indemnification as against WSP Cantor) and XVI (professional malpractice against WSP Cantor) of the third-party complaint.[1]

For the reasons set forth below, the motion is granted in part and denied in part.

Background

The underlying action arises out of claims of certain alleged design and construction defects located at 432 Park Avenue, a luxury, 85-story condominium (the "Building") against Sponsor.

Construction of the Building began in 2011, after the New York City Department of Buildings approved preliminary plans (third-party complaint, ¶ 5).

To complete the design and construction of the Building, Sponsor engaged several world-renowned industry professionals, including WSP Third-Party Defendants and the other Third-Party Defendants (*id.*, ¶ 3). WSP Cantor was engaged as lead structural engineer; WSP F + K was engaged as lead mechanical engineer (*id.*, ¶ 4). By the end of 2020, purchasers had closed title to more than 90% of all units and control of the Building turned over to the unit owners through the Condominium Board (*id.*, ¶ 6). As part of the ordinary process of ending Sponsor's control period and turning over control to unit owners, a building study committee was formed to assess the state

[1] The notice of motion and opening memorandum of law seek dismissal of the breach of contract claims under Counts IX and XIII as duplicative of the professional malpractice causes of action under Counts XII and XVI (Notice of Motion, NYSCEF Doc. No. 92; Opening Memorandum, NYSCEF Doc. No. 105, p. 13). However, the reply memorandum of law appears to seek the dismissal of the professional malpractice causes of action (Reply, NYSCEF Doc. No. 130, p. 12 ["Consistent with the ruling in Dormitory Auth., a duplicative professional malpractice claim (identical in nearly every respect to the Sponsor's contract claim) should not be permitted to proceed.]). While this creates some question as to what exactly plaintiff is seeking, the court will not put form over substance, and dismisses the professional malpractice causes of action for the reasons set forth herein.

of the Building (*id.*, ¶ 7). The building study committee retained SBI Consultants, Inc. ("SBI") to assess the Building and alleged more than 1,200 design and construction defects (*id.*, ¶ 7).

WSP Third-Party Defendants are engineering firms, with WSP F+K specializing in systems engineering, commonly known as mechanical, electrical and plumbing (MEP), and WSP Cantor specializing in structural engineering. WSP Third-Party Defendants each provided professional engineering services to the Sponsor for the design and construction of certain elements of the Project pursuant to written service agreements - a structural engineering services contract ("SES Contract") dated November 29, 2011, between WSP Cantor and the Sponsor (by its predecessor in interest) and an MEP engineering services contract ("MEP Contract"), dated January 4, 2012, between WSP F+K and the Sponsor (by its predecessor in interest).

On October 13, 2010, WSP Cantor provided the Sponsor with its proposal for structural engineering services for the Project. Contract scope of services is limited to the provision of structural engineering services. The SES Contract did not require WSP Cantor to coordinate or manage significant project close-out activities, such as issuing final certificates of payment to contractors, furnishing of as-built drawings or obtaining temporary or final certificates of occupancy on behalf of the Sponsor (S. Marcus Aff. ¶ 7-8; SES Contract §2.2- 2.7; Engineer's Proposal).

WSP Cantor began its work in early 2011 (prior to construction) and completed 80% of its work under the SES Contract before the end of 2012 (S. Marcus Aff. ¶ 10-11; SES Contract §4.1 [providing, pursuant to a milestone fee schedule, that 80% of WSP Cantor's fee would be payable upon completion of structural construction documents, prior to bidding and construction work for the Project]). Construction of the Project by others began in 2012 and was substantially completed by November 10, 2015, when the New York City Department of Buildings (Department of

Buildings) issued a temporary certificate of occupancy ("TCO") for the Building (S. Marcus Aff. ¶ 15). Construction of the structural work at the Project finished in or around April 2015, prior to substantial completion (S. Marcus Aff. ¶ 12). WSP Cantor claims it completed its significant duties under the SES contract in or around April 2015, when construction for the structural elements of the Project were complete. WSP Cantor issued its invoice for the final installment of its base fee for structural engineering services under the SES contract on or about April 30, 2015.

WSP Cantor and the Sponsor entered into a tolling agreement on September 18, 2020, with respect to claims arising under the SES Contract (the "Tolling Agreement") (NYSCEF Doc. No. 125). The Tolling Agreement was later amended extending the expiration term to no later than December 31, 2021 (First Amendment to Tolling Agreement, NYSCEF Doc. No. 126). The parties again amended the First Amendment to the Tolling Agreement that extended the expiration term to March 31, 2022 (Second Amendment to Tolling Agreement, NYSCEF Doc. No. 127). WSP Cantor completed its services under the SES Contract more than five (5) years prior and the Tolling Agreement did not revive Claims.

In addition to providing structural engineering design services under the SES Contract, WSP Cantor provided engineering observation services for structural construction work in accordance with the requirements of the New York City Building Code, pursuant to a written agreement between WSP Cantor and the Sponsor, dated August 3, 2011 (the "Observations Contract") (S. Marcus Aff. ¶ 16). These services were completed not later than February 24, 2017 (S. Marcus Aff. ¶¶ 19, 21). The Observations Contract was not subject to the Tolling Agreement (R. John Aff. ¶ 13).

WSP F+K and the Sponsor also entered into the MEP Contract on January 4, 2012 (MEP Contract at 1). The scope of the MEP Contract includes mechanical, electrical, plumbing, fire

protection, telecommunications and electronic security systems engineering services (MEP Contract Art. 2, Ex. A.) The MEP Contract was not subject to the Tolling Agreement. (R. John Aff. ¶ 13).

Relevant Provisions of the Contracts

Sponsor's predecessor engaged WSP F+K in January 2012 as the primary mechanical engineer for the Building's construction (third-party complaint, ¶ 68). Pursuant to the Engineering Services Agreement (the "Flack + Kurtz ESA" or MEP Contract), Flack + Kurtz was to provide services including mechanical engineering, electrical, plumbing, fire protection, telecommunications, and electronic security system services for the Building during various stages of construction (*id.*, ¶¶ 68, 69). Under Section 1.2 of the Flack + Kurtz ESA, Flack + Kurtz was to use the skills and resources reasonably available in accordance with the usual and customary quality engineering standards of the profession (*id.*, ¶ 71). Section 10.1 of the Flack + Kurtz ESA contains an indemnification provision that runs in favor of Sponsor, and provides:

> "To the fullest extent permitted by law, Engineer, its consultants and agents, shall indemnify and hold harmless the Owner, Lender, all entities identified on Exhibit G and their respective agents, affiliates, officers, directors, officials, members and employees from and against any and all claims, damages, losses, interest, judgments, liens and expenses, including but not limited to reasonable attorneys' fees, (1) provided that any such claims, damages, losses, interest, judgments, liens and expenses are attributable to bodily injury, sickness, disease, or death of any person or persons, or to injury to or damage to or destruction of tangible property, including loss of use resulting therefrom, and (2) to the extent such claims, damages, losses, interest, judgments, liens and expenses are caused in whole or in part by any negligent act or omission of Engineer, its consultants and agents, or anyone employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person described in this Agreement."

Sponsor separately engaged WSP Cantor in 2011 to serve as the lead structural engineer for the Building (*id.*, ¶ 76). Pursuant to the Engineering Services Agreement (the "Cantor ESA" or SES Contract), Cantor was to provide services including preparing plans, drawings, and specifications for all structural work and coordinating such work with Sponsor and other consultants (*id.*, ¶ 77). Under Section 1.2 of the Cantor ESA, Cantor was to perform its services with the skill and resources reasonably available in accordance with the usual and customary quality engineering standards of the profession (*id.*, ¶ 80). Section 10.1 of the Cantor ESA contains an indemnification provision that runs in favor of Sponsor, and provides:

> "To the fullest extent permitted by law, Engineer, its consultants and agents, shall indemnify and hold harmless the Owner, Lender, all entities identified on Exhibit G and their respective agents, affiliates, officers, directors, officials, members and employees from and against any and all claims, damages, losses, interest, judgments, liens and expenses, including but not limited to reasonable attorneys' fees, (1) provided that any such claims, damages, losses, interest, judgments, liens and expenses are attributable to bodily injury, sickness, disease, or death of any person or persons, or to injury to or damage to or destruction of tangible property, including loss of use resulting therefrom, and (2) to the extent that such claims, damages, losses, interest, judgments, liens and expenses are caused in whole or in part by any negligent act or omission of Engineer, its consultants and agents, or anyone employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person described in this Agreement."

Upon completion of the above-referenced assessment (infra at Section I), SBI issued a report on July 8, 2020, that it delivered to Sponsor and subsequently to the WSP Third-Party Defendants and the other Third-Party Defendants (the "Original SBI Report") (*id.*, ¶¶ 104–05). The Original SBI Report identified 132 alleged issues in the Building, including issues with the

mechanical, electrical, and plumbing systems, cracks that resulted in water leakage, and malfunctions with self-closing doors, that relate to the services and work the WSP Defendants performed (*id.*, ¶¶ 107, 109). Since receiving the Original SBI Report, Sponsor claims it has performed significant remediation work to address the alleged issues, for which Sponsor is entitled to damages from the WSP Third-Party Defendants and the other Third-Party Defendants (*id.*, ¶¶ 113–14).

Six months later, on December 18, 2020, SBI issued a new report (the "Subsequent SBI Report," together with the Original SBI Report, the "SBI Reports"). SBI delivered The Subsequent SBI Report to Sponsor and subsequently to the WSP Third-Party Defendants and the other Third-Party Defendants (*id.*, ¶¶ 116–17). The Subsequent SBI Report identified more than 1,200 alleged issues (*id.*, ¶ 118). Like the Original SBI Report, the alleged defects relate to services and work WSP Third-Party Defendants and other non-moving Third-Party Defendants performed (*id.*, ¶ 120). Again, Sponsor incurred significant costs performing related remediation work (*id.*, ¶ 121).

Underlying Action

According to the amended complaint, plaintiffs allege that Sponsor engaged in poor oversight of its contractors and professionals that resulted in a number of structural issues with the Building (amended complaint, ¶ 8, NYSCEF Doc. No. 94). Despite plaintiff's repeated requests, Sponsor never submitted engineering reports (*id.* at ¶ 10). Sponsor claimed to have repaired most of the defects. However, after plaintiff secured its own engineering consultant, plaintiff learned that there was only an attempt to repair nine of the more than 100 defects (*id.*, ¶ 12). Plaintiffs allege that Sponsor's failure to remedy the defects "of its own construction and design of the Building are a flagrant and intentional breach of the Offering Plan" (*id.*, ¶ 16).

Architect, Rafael Vinocy, was hired to design the Building to be "one of the tallest residential buildings in the word." (*id.*, ¶ 39). The design is a slender square shaped tower over 1,396 feet high (*id.*, ¶ 40). There are 147 residential units, 59 storage closets, 18 wine cellars, 12 office units, a club unit, 3 retail stores and a garage in this luxury building (*id.*, ¶ 42). In order to be structurally sound, planning for building sway, and flow and release of air had to occur to avoid problems with elevator doors, hallway, stairway, resident unit doors, cables and electronic and plumbing equipment to avoid rattling in the Building (*id.*, ¶ 41).

Under section 17 of the Offering Plan, Sponsor is obligated to complete construction of the Building substantially in accordance with "this Plan, all applicable legal requirements and descriptions of the Property and Specifications" (*id.*, ¶ 51). Plaintiffs allege that Sponsor certified that the Offering Plan did not knowingly contain any false statement of fact or omit any material fact and that all statements and representations within this document were true (*id.*, ¶¶ 52-53). Further, they allege that Sponsor also certified that it had "primary responsibility for compliance with article 23-A of the General Business Law" as well as other applicable rules and regulations (*id.*, ¶ 54).

On June 26, 2013, Sponsor entered into a contract with Lend Lease (US) Construction LMB Inc. to manage the construction of the Building (*id.*, ¶ 66). Construction of the Building was completed on December 23, 2015 (*id.*, ¶ 70). The first closing on the sale of a residential unit took place on December 22, 2015 (*id.*, ¶ 75). A temporary certificate of occupancy was issued for the Building on December 29, 2016 for all residential units in the Building (*id.*, ¶ 69).

Thereafter, a host of structural issues and substantial defects emerged allegedly due to inadequate and negligent workmanship and material deviations from the Offering Plan, codes and laws, plans and specification of the Offering Plan and industry standards (*id.*, ¶ 79). For example,

there has been persistent flooding and water infiltration within the Building, including two leaks on the 60th and 74th floor in the elevator shaft, as well as 35 units that have had water damage due to allegedly poor plumbing installation (*id.*, ¶ 82). In addition, there has been water infiltration in the sub-basement and attempts to fix it made the issue worse (*id.*, ¶ 84).

Plaintiffs allege that it is Sponsor's failure to supervise construction properly that resulted in these defects (*id.*, ¶ 83). Sponsor engaged McGraw Hudson to address the water infiltration issue, but the contractor who drilled the foundation did not have drawings to identify where it was safe to drill (*id.*, ¶ 95). Because the contractor did not know where the electrical cables were due to the lack of drawings, and because the contractor did not stop the leak before drilling, while drilling the floor, the contractor cut into an electrical cable that resulted in an "arc flash explosion" that caused an immediate power outage (*id.*, ¶ 96).

Plaintiffs also allege that there are severe noise and vibration issues due to the sway of the Building. The sway results in creaking, banking and clicking, so pervasive that unit owners have had to move out and have complained that during inclement weather it is impossible to sleep as a result of the noise and vibration (*id.*, ¶¶ 86-88). According to plaintiffs, Sponsor refuses to remedy the problems and continues to sell units without advising prospective purchasers of the need for noise remediation after purchase (*id.*, ¶¶ 90-91).

Other defects include, but are not limited to, drywall cracks in the ceilings, above the doorways, and where the wall meets the ceiling, air and water leaks at windows, baseboard peeling, misaligned joints, malfunctioning sliding doors, grout joint openings, cracks in ceramic/stone tiles, excessive fog and condensation in windows, gaps and misalignment between wall and ceiling fixtures and repeated circuit breaker tripping (*id.*, ¶ 102). The Building currently has an energy efficient rate of "D", the lowest rating (*id.*, ¶ 13).

Procedural History

On or about September 23, 2021, plaintiffs, the Board of Managers of the 432 Park Condominium, on behalf of the individual unit owners and the commercial unit owners, the Board of Managers of the Commercial Section of the 432 Park Condominium, and the Board of Managers of the Residential Section of the 432 Park Condominium, on behalf of the individual unit owners, (collectively Plaintiffs) filed their initial complaint against the Sponsor (NYSCEF Doc. No. 2), which developed the Building, and that sponsored the 432 Park Avenue Condominium Association. Plaintiffs filed an amended complaint (the amended complaint) on or about February 4, 2022 (NYSCEF Doc. Nos. 32, 94), alleging various causes of action for breach of contract and breach of fiduciary duty against the Sponsor and other defendants and seeking damages of not less than $125,000,000.

Sponsor filed its third-party complaint against the WSP Third-Party Defendants and other third-party defendants on March 14, 2022, alleging as against the WSP Defendants: WSP F+K: a. Count IX for breach of contract; b. Count X for contractual indemnification; c. Count XI for common law indemnification; d. Count XII for professional malpractice; WSP Cantor: e. Count XIII for breach of contract; f. Count XIV for contractual indemnification; g. Count XV for common law indemnification; and h. Count XVI for professional malpractice.

Discussion

Under CPLR 3211 (a) (1), "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . defense is grounded upon documentary evidence." The court may grant dismissal when the "'documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law'" (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 571 [2005] [citation omitted]). Affidavits are not

documentary evidence under CPLR 3211 (a) (1) (*Fontanetta v John Doe 1*, 73 AD3d 78, 86 [2d Dept 2010] [affirming denial of motion to dismiss and holding affidavit is not "documentary evidence"]; *Frenchman v Queller, Fisher, Dienst, Serrins, Washor & Kool, LLP*, 24 Misc 3d 486, 495 n2 [Sup Ct, NY County 2009] ["affidavits and letters, do not constitute documentary evidence for purposes of CPLR 3211 (a) (1) dismissal"]).

Pursuant to CPLR 3211 (a) (5), a party may move for judgment dismissing one or more causes of action asserted against it on the ground that the cause of action may not be maintained because of the applicable statute of limitations. "On a motion to dismiss a cause of action pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired" (*Benn v Benn*, 82 AD3d 548, 548 [1st Dept 2011], quoting *Island ADC, Inc. v Baldassano Architectural Grp., P.C.*, 49 AD3d 815, 816 [2d Dept 2008] [internal citations omitted]). To avoid dismissal, once the defendant has met its initial burden, the plaintiff must raise a material question of fact (*see Phillips Const. Co. v City of New York*, 61 NY2d 949, 951 [1984] [granting dismissal of complaint where the defendant city's submissions showed, prima facie, that the applicable statute of limitations had run and, in response, the plaintiff's submissions were insufficient to raise a material question of fact on the issue of when significant duties were completed]). In considering a motion to dismiss, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff (*Benn v Benn*, 82 AD3d at 548).

Likewise, in considering a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), "we 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However,

"factual allegations... that consist of bare legal conclusions...are not entitled to such consideration" (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006]). "The ultimate question is whether, accepting the allegations and affording these inferences, 'plaintiff can succeed upon any reasonable view of the facts stated'" (*Doe v Bloomberg, L.P.*, 36 NY3d 450, 454 [2021] quoting *Aristy–Farer v State of New York*, 29 NY3d 501, 509 [2017]).

"[O]n such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff" (*Alden Global Value Recovery Master Fund, L.P. v KeyBank N.A.*, 159 AD3d 618, 622 [1st Dept 2018], citing *Leon*, 84 NY2d at 88). "[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" and the court "determine[s] only whether the facts as alleged fit within any cognizable legal theory" (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013], quoting *Leon*, 84 NY2d at 87-88).

Whether counts XIII and XVI as against WSP Cantor are time-barred.

WSP defendants argue that the causes of action for breach of contract (count XIII) and professional malpractice (count XVI) as against WSP Cantor are barred by the three-year statute of limitations pursuant to CPLR 214 (6), as the claims arise out of professional engineering services. Defendant/third-party plaintiff 56th and Park (NY) Owner, LLC (Sponsor) counters that these claims are timely, as WSP Cantor continued to perform non-ministerial work on the Building at least through August 10, 2021, and did not cease performing work in 2015 as asserted in WSP defendants' self-serving affidavit.

CPLR 214 (6) provides that "an action to recover damages for malpractice, other than medical, dental or podiatric malpractice" must be commenced within three (3) years of its accrual, "regardless of whether the underlying theory is based in contract or tort." There is no dispute that

CPLR 214 (6) covers claims against engineers arising out of their professional services. "A cause of action to recover damages for professional malpractice . . . for defective design or construction accrues upon the actual completion of the work to be performed and the consequent termination of the professional relationship" (*Frank v Mazs Group, LLC*, 30 AD3d 369, 369-370 [2d Dept 2006]). "However, a professional malpractice cause of action asserted against an architect or engineer may be tolled under the 'continuous representation' doctrine if the plaintiff shows its reliance upon a continued course of services related to the original professional services provided" (*Regency Club at Wallkill, LLC v Appel Design Group, P.A.*, 112 AD3d 603, 606 [2d Dept 2013]). "The doctrine applies when a plaintiff shows that he or she relied upon a continuous course of services related to the particular professional duty allegedly breached" (*id.*). "The mere recurrence of professional services does not constitute continuous representation where the later services performed were not related to the original services" (*Hall & Co. v Steiner & Mondore*, 147 AD2d 225, 228-229 [3d Dept 1989]).

"Where dismissal of a malpractice claim is sought pursuant to CPLR 3211 (a) on the ground that it is time-barred, the defendant bears the initial burden of establishing, prima facie, that the time within which to sue has expired, whereupon the burden shifts to the plaintiff to raise a question of fact as to whether the limitations period has been tolled or should not apply" (*Bronstein v Omega Const. Group, Inc.*, 138 AD3d 906, 908 [2d Dept 2016]).

While WSP Cantor argues that the time for Sponsor to file claims against Cantor for breach of contract or professional malpractice lapsed in March 2020, Sponsor argues that WSP Cantor continued to perform services at the Building after March of 2017, including, but not limited to: in February 2018, WSP Cantor ran an analysis and provided sketches in connection with a staircase slab and wall openings for units 92 and 93 (Hayner Affidavit dated July 13, 2022, Exhibit A); in

December 2018, WSP Cantor met with the Building's Board in connection with leaks concerning the common elements of the building (Hayner Aff., Exhibit B); and in August 2021, WSP Cantor reviewed and provided extensive comments on plans and drawings related to the repairs of certain areas of concrete spalling on multiple floors of the building (Hayner Aff., Exhibits C & D). Based on these submissions, it argues that WSP Cantor continued to play an intimate role in the Building after 2017, thereby tolling the time within which the Sponsor was entitled to file this action against WSP Cantor (citing *Creative Rest., Inc. v Dyckman Plumbing & Heating, Inc.*, 184 AD3d 803, 805 [2d Dept 2020] ["the fact that two years had elapsed between the completion of its professional services and its subsequent efforts to remedy the problem does not render the continuous representation doctrine inapplicable as a matter of law"]).

Sponsor's evidence showing WSP Third-Party Defendants provided inspection and recommendations on repairs up to and including August 2021 is sufficient to raise a question of fact as to whether WSP Third-Party Defendants "rendered these services to correct engineering and construction defects that it failed to identify" under its initial contract (*see Mutual Redevelopment Houses, Inc. v Skyline Eng'g., L.L.C.*, 178 AD3d 575, 576 [1st Dept 2019]). Therefore, this branch of the motion is denied.

Whether the breach of contract claims and professional malpractice claims are duplicative.

Next, WSP Third-Party Defendants argue that the breach of contract claims as against them, Counts IX and XIII, are entirely duplicative of the professional malpractice claims, Counts XII and XVI. Generally, when the claims of an owner against a design professional arise out of their contractual relationship, the owner cannot maintain duplicative actions in tort for professional malpractice and in contract under a breach of contract theory (*Dormitory Auth. of the State of N.Y. v Samson Constr. Co.*, 30 NY3d 704, 712 [2018] [an owner suing a design professional for claims

arising under a professional services contract may sue in contract or tort, but not both]). While a plaintiff may sue a contractor in contract or tort, where the plaintiff is "essentially seeking enforcement of the bargain," the action should proceed in contract (*see id.* at 713; *see also 320 West 115 Realty LLC v All Building Construction Corp.*, 194 AD3d 511, 511 [1st Dept 2021] [affirming dismissal of negligence claim based on construction work where the complaint alleged "faulty performance of the construction work" which did "not fall outside of the obligations agreed to under the contract"]). A professional malpractice cause of action cannot proceed where it is merely a "restatement of the contractual obligations asserted and seek[s] the identical economic damages as [the breach of contract cause of action]" (*Board of Managers of 100 Congress Condominium v SDS Congress, LLC*, 152 AD3d 478, 481 [2d Dept 2017]).

Here, the causes of action for professional malpractice should be dismissed as duplicative because the third-party complaint fails to allege any duty independent of the contract itself. The third-party complaint alleges in support of the breach of contract claims that under Section 1.2 of the ESA, the third-party defendants were "contractually obligated to employ the skill and resources reasonably available to [them] in accordance with the usual and customary quality engineering standards in the construction industry and the engineering profession (third-party complaint, ¶¶ 196, 226). Similarly, the third-party complaint alleges in support of the professional malpractice causes of action that the third-party defendants had a "duty to Sponsor to ensure that [their] engineering services were performed in a professional manner pursuant to all applicable laws, rules, regulations, and professional standards and consistent with the level of learning, skill and experience ordinarily exercised by similar engineers, and to use reasonable and ordinary care and diligence to perform such services" (third-party complaint, ¶¶ 216, 246). The professional

malpractice claims essentially allege that the third-party defendants breached a duty that they already had under the ESA—to act pursuant to reasonable engineering standards.

Additionally, there does not appear to be a distinction between the damages that the third-party complaint seeks for the breach of contract and professional negligence claims. Rather, all causes of action seek damages related to remediation work (third-party complaint, ¶¶ 199, 218, 229, 248).

Accordingly, this branch of the motion is granted and counts XII and XVI for professional malpractice as against WSP Third-Party Defendants are dismissed.

Whether claims Against WSP Cantor and WSP F+K for Common-Law Indemnity (Counts XI and XV of the Third-Party Complaint) Should be Dismissed.

Next, WSP Third-Party Defendants argue that the common-law indemnity causes of action as against them should be dismissed for failure to state a cause of action.

"[I]n general, common-law indemnification is not available when the primary claim alleges breach of contract resulting from the breaching party's own conduct" (*Board of Mgrs. of Porter House Condominium v Delshah 60 Ninth LLC*, 192 AD3d 415, 415 [1st Dept 2021], citing *Chatham Towers, Inc. v Castle Restoration & Constr., Inc.*, 151 AD3d 419 [1st Dept 2017]). "However, in the construction context, a party may seek common-law indemnification from a construction professional where 'the [party] itself was compelled to discharge a duty that it had delegated fully to, and that should have been discharged by, the [professional], whose negligence was the actual cause of the loss'" (*Board of Mgrs. of Porter House Condominium v Delshah 60 Ninth LLC*, 192 AD3d at 415, quoting *17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 78 [1st Dept 1999]).

"The key element of a cause of action for common-law indemnification is not a duty running from the indemnitor to the injured party, but rather, is a separate duty owed the indemnitee

by the indemnitor" (*Atanasoki v Braha Indus., Inc.*, 124 AD3d 705, 706 [2d Dept 2015]). "'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'" (*Dreyfus v MPCC Corp.*, 124 AD3d 830, 830 [2d Dept 2015] [citation omitted]).

Here, Sponsor cannot assert a common-law indemnification claim against these third-party defendants because the Board has not alleged in the underlying action that Sponsor should be held vicariously liable for other parties, but rather has asserted active wrongdoing against the Sponsor (*see Board of Mgrs. of Olive Park Condominium v Maspeth Props. LLC*, 170 AD3d 645, 647 [2d Dept 2019]; *Richards Plumbing & Heating Co., Inc. v Washington Group Intl., Inc.*, 59 AD3d 311, 312 [1st Dept 2009] [affirming dismissal of common-law indemnification claim because first party claim and cross claim did not allege vicarious liability attributed solely to the fault of proposed third-party defendant]). Further, the third-party complaint is devoid of any allegations that Sponsor delegated *exclusive* responsibility to WSP Third-Party Defendants, giving rise to the loss suffered by Sponsor as a result of their alleged breach of the offering plan due to the defective construction and design of the Building (*see Tiffany at Westbury Condominium v Marelli Dev. Corp.*, 40 AD3d 1073, 1077 [2d Dept 2007], quoting *17 Vista Fee Assn.*, 259 AD2d at 80 ["(t)he party seeking indemnification 'must have delegated *exclusive* responsibility for the duties giving rise to the loss to the party from whom indemnification is sought,' and must not have committed actual wrongdoing itself"] [*emphasis added*]).

Therefore, the court dismisses counts XI and XV.

Conclusion

Accordingly, it is

ORDERED that the motion by third-party defendants WSP USA Buildings, Inc. f/k/a Flack + Kurtz, Inc. and WSP USA Buildings, Inc. f/k/a WSP Cantor Seinuk Structural Engineers is granted to the extent that counts XI, XII, XV and XVI in the third-party action are hereby severed and dismissed as against them, and the motion is otherwise denied; and it is further

ORDERED that the remaining claims against defendants WSP USA Buildings, Inc. f/k/a Flack + Kurtz, Inc. and WSP USA Buildings, Inc. f/k/a WSP Cantor Seinuk Structural Engineers are severed and shall continue.

Dated: June 1, 2023

ENTER:

J.S.C.

HON. MELISSA A. CRANE
J.S.C.