MC&O Masonry, Inc. v Parex U.S.A., Inc.
2015 NY Slip Op 30835(U)
May 18, 2015
Supreme Court, New York County
Docket Number: 104975/10
Judge: Saliann Scarpulla

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

----------X

MC&O MASONRY, INC., FIRST AVENUE BUILDERS, LLC AND FSLM ASSOCIATES, LLC,

Plaintiffs,

Decision and Order

-against-

Index No. 104975/10

PAREX U.S.A., INC.

Defendants.

----------X

HON. SALIANN SCARPULLA, J.:

In this action which arises out of the construction of an apartment building known as the Kalahari located at 40 West 116th Street in Manhattan (the "Kalahari Project"), defendant Parex U.S.A., Inc. ("Parex" or "defendant") moves for summary judgment to dismiss the amended complaint filed by plaintiffs MC&O Masonry, Inc. ("MC&O"), First Avenue Builders, LLC ("FAB"), and FSLM Associates, LLC ("FSLM") (collectively "plaintiffs"). Plaintiffs cross move, pursuant to CPLR 3123, for an order granting them leave to serve late responses to defendants' requests for admissions.

Background

FSLM was the owner, and FAB was the general contractor, for the Kalahari Project. On June 9, 2006, MC&O entered into a subcontract (the "Subcontract") with FAB. Pursuant to which, MC&O's "scope of work" was to "furnish and install EIFS and compatible sealant as specified," "furnish and install reinforced EIFS and compatible

sealant as specified," and "furnish and install stucco on wire mesh," in addition to performing all masonry work.

On January 17, 2007, MC&O furnished specifications on the Parex EIFS system required for the Kalahari Project to Wall Systems Supply, and on January 23, 2007, MC&O furnished information on the Parex EIFS system for the Kalahari Project to Damian Broadwater of FAB for FAB's review. Between March 24, 2007 and September 11, 2008, MC&O purchased all of the Parex materials relating to and used in the installation of the EIFS system at the Kalahari Project from Wall Systems Supply. MC&O never purchased any Parex materials directly from Parex.

On November 18, 2007, Wall Systems Supply requested that Parex issue it a Water Master Commercial Warranty relating to the Parex Water Master Commercial System installed by MC&O at the Kalahari Project, which Parex issued on December 6, 2007 (the "Warranty"). The Warranty states that it was "issued to the General contractor, Builder or Owner on the building," that it was issued for the Kalahari and that the Installing Applicator was MC&O. The Warranty also provides that:

> Parex warrants that the **Parex Water Master Commercial System** when installed by an applicator who has attended a Parex Water Master Education Seminar, and in accordance with Parex's installation instruction, will be free from defects in material and manufacturing. . . .THIS LIMITED EXPRESS WARRANTY IS EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES OF ANY NATURE WHATSOEVER, WHETHER ORAL, WRITTEN, EXPRESS OR IMPLIED BY LAW, PARTICULARLY IN LIEU OF THE IMPLIED WARRANTIES OF MERCHANTABILITY AND OF FITNESS FOR ANY PARTICULAR PURPOSE. WITHOUT LIMITATION, IN NO EVENT SHALL PAREX

> HAVE ANY LIABILITY ARISING OUT OF THE ERRORS OR OMISSIONS OR RELATING TO THE DESIGN OF THE CONSTRUCTION ON WHICH ITS PRODUCTS ARE USED, OR BASED ON NEGLIGENCE CONCERNING THE USE OF THE PRODUCT. . . . The exclusive and sole remedy for any breach of warranty whatsoever shall be that Parex will provide conforming replacement products and cover the labor costs of repair by an applicator currently listed by Parex, if it is shown that the products manufactured and sold by Parex were defective when originally supplied. The warranty cost will not exceed 4 times the original cost of the material shown to be defective.

(Emphasis in original.)

The Warranty also provides that "PAREX IS NOT LIABLE FOR ANY INCIDENTAL OR CONSEQUENTIAL DAMAGES OF ANY KIND, WHETHER BASED ON WARRANTY, NEGLIGENCE, CONTRACT, TORT, STRICT LIABILITY, OR ANY OTHER THEORY WHATSOEVER." (Emphasis in original.) In addition, the Warranty states that it "is written and governed under the law of the state of Georgia."

On May 22, 2008, a portion of the wall and the EIFS installed by MC&O on the Kalahari Project collapsed and fell off the building, causing damage to both the EIFS system itself, portions of the Kalahari, and to a neighboring market known as Malcolm Shabazz Harlem Market, which sustained considerable damage.

In the amended complaint in this action plaintiffs assert seven causes of action for: breach of contract; guarantee; breach of warranty; breach of implied warranty of merchantability; breach of implied warranty for a particular purpose; breach of express warranty; and negligence. Plaintiffs seek to recover the damages incurred as a result of

the wall collapse and include two basic categories. The first category consists of the hard costs comprised of the actual property damage caused by the wall collapse, which includes property damage suffered in the Kalahari to items such as flooring, carpentry, paint, roofing, etc., that amounts to $870,607, and it also includes damage to the adjoining Shabazz Market. The Shabazz Market asserted a claim against plaintiffs for that damage, which was settled for $193,000. Plaintiffs also allege that they incurred additional costs in the form of attorneys' and consultant fees in connection with that claim, which they state amounted to $40,215.

Plaintiffs also seek to recover a second category of damages, comprised of the lost rental and income suffered by reason of the delays caused by the need to repair and remediate the exterior walls, which plaintiffs claim amounts to $1,740,000.

Parex moves for summary judgment dismissing the amended complaint and staying further discovery in the action pending the determination of this motion. In support of its motion, Parex first argues that none of the plaintiffs may assert a cause of action for breach of contract against Parex because none of the plaintiffs had a contract with Parex. Parex also argues in the Warranty, Parex disclaims the warranties of merchantability and fitness, and accordingly plaintiffs' claims should be dismissed pursuant to either New York or Georgia law. In addition, Parex asserts that the economic loss doctrine bars plaintiffs from recovering on any tort claims. Parex relies, in part, on

plaintiff's failure to respond to the Notices to Admit served them on or around January 23, 2013.

Plaintiffs oppose Parex's motion for summary judgment, and cross move for leave to respond to Parex's Notices to Admit. In opposition to the motion for summary judgment, plaintiffs argue that the economic loss doctrine does not bar their claims for damage to other property, or for inherently dangerous products. Plaintiffs also assert that the express Warranty does not apply to the product at issue, and that the applicability of the Warranty limitations should be determined on this motion. Plaintiffs also contend that there is an issue of fact as to whether non-party Wall Systems Supply was Parex's agent, which would establish privity between Parex and plaintiffs.

In addition, plaintiffs assert that Parex's notices to admit were palpably improper as they seek admissions on ultimate and material issues in this case, and that summary judgment cannot be premised on such non-responses. Plaintiffs also note that their failure to timely reposed to the notices to admit can be remedied, and that therefore leave should be given to serve responses to the notices to admit. Further, plaintiffs assert that neither the economic loss doctrine nor any of the warranty limitations asserted in the moving papers were plead as affirmative defenses by Parex in its answer. Finally, plaintiffs also maintain that the motion for summary judgment is premature before discovery is complete and depositions have been held.

In opposition to the motion, plaintiffs submit a report prepared by a consultant, Kenny Associates ("Kenny") dated January 2, 2009 (the "Kenny report"). The first paragraph of the Kenny report states, "[w]e have reviewed the certified letter dated July 14, 2008, from Arch Speciality Insurance Company . . . concerning the denial of coverage based upon Arch's Exterior Insulation and Finish System (EIFS) Exclusion . . . . We have also performed field inspections and laboratory testing of the site and materials." Kenny determined that Arch was in error to deny coverage "because the subject wall section collapse was caused by a failure of the masonry substrate parging material" – manufactured and supplied by Parex and called "Parex 121 Base Coat & Adhesive" – "not by the EIFS."

The Kenny report also notes that, according to Parex's website and product information for the Parex 121 product, the product was to be used as a "leveler and filler for masonry, concrete and stucco surfaces." Kenny cited Parex's own representations that the product was supposed to develop a tenacious bond to the masonry substrate so that the tensile strength of the parging should have been very high. The Kenny Report also states that when the product is applied to masonry substrate and comprises the substrate for the EIFS, it should be very difficult to remove a section of the EIFS.

The Kenney report further stated that the parging at the Kalahari had insufficient strength and was defective. Kenny performed testing which demonstrated that "the

masonry substrate parging had insufficient strength and was defective, either as a result of application error or due to a manufacturing defect."

Kenny concluded in its report that the Parex 121 product was not part of Parex's EIFS system. According to the Kenny report, Parex's legacy report, which was annexed as an exhibit to the Kenny report, expressly states that the Parex EIFS Standard System consisted of five components: (1) polystyrene insulation board; (2) woven glass mesh; (3) adhesive; (4) base coast; and (5) finish coat.

In opposition to the cross motion, Parex asserts that it was never ordered to produce a witness for a deposition, whereas plaintiffs repeatedly disregarded Parex's discovery requests. In further support of its motion, Parex notes that the Kenny report discusses the five components of the EIFS Standard System, however that was not the system installed at the Kalahari. Rather, the Water Master Commercial System, which is referred to in the Warranty, was installed.

Discussion

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.'" *Ayotte v Gervasio*, 81 NY2d 1062, 1062 (1993) (quoting *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986)); *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers"

Winegrad v New York Univ. Med. Ctr., 64 NY2d at 853. *See also Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982, 985 (1993).

The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *CitiFinancial Co. [DE] v McKinney*, 27 AD3d 224, 226 (1st Dept 2006). The court is required to examine the evidence in a "light most favorable to the party opposing the motion." *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Summary judgment may be granted only when it is clear that no triable issues of fact exist, *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986), and "should not be granted where there is any doubt as to the existence of a triable issue" of fact. *American Home Assur. Co. v Amerford Intl. Corp.*, 200 AD2d 472, 473 (1st Dept 1994).

Breach of Contract and Guarantee (First and Second Causes of Action)

In the first cause of action, plaintiffs allege that Parex breached its contract with MC&O by furnishing defective, unsatisfactory and inappropriate parging material that was unsuitable for use on the Kalahari Project. In the second cause of action, plaintiffs allege that, pursuant to its contract with MC&O, Parex guaranteed the performance of the material for the Kalahari Project, and that, within the period covered by the guarantee, the material furnished by Parex failed.

"It is axiomatic that '[w]ithout [an] agreement . . . there can be no contract [and] [w]ithout a contract there can be no breach of the agreement.'" *Schaffe v SimmsParris*,

82 AD3d 867, 868 (2d Dept 2011) (quoting *Franklin v. Carpinello Oil Co.*, 84 A.D.2d 613 (3d Dep't 1981)). The existence of a binding contract is an essential element of a cause of action for breach of contract. *Harris v Seward Park Hous. Corp.*, 79 A.D.3d 425 (1st Dep't 2010); *El-Nahal v FA Mgt., Inc.*, 2015 N.Y. App. Div. LEXIS 1768, 2015 NY Slip Op 01778 (2d Dep't Mar. 4, 2015); *Araujo v City of New York*, 84 AD3d 993, 994 (2d Dept 2011) (granting summary judgment dismissing complaint as to third-party defendant who "demonstrated that there was no contract between himself and the [third-party plaintiffs]").

Plaintiffs have produced no written contract between MC&O and Parex, or between any of the plaintiffs and Parex. Indeed, the only contract produced was the Subcontract between MC&O and FAB relating to the Kalahari Project. The documents produced clearly show that MC&O obtained the Parex products it used at the Kalahari Project from non-party Wall Systems Supply, not directly from Parex. There is thus no direct privity of contract between any of the plaintiffs and Parex.

Without a contract between MC&O and Parex, there is no viable cause of action against Parex for breach of contract or contractual guaranty, and the first and second causes of action in the amended complaint must be dismissed.

In opposition to the motion, plaintiffs contend that an authorized dealer can be an agent of a manufacturer with respect to the final buyer, and therefore there is an issue of fact as to whether Wall Systems Supply was Parex's agent, such as to establish privity of

contract. Plaintiffs' argument is unavailing. The cases relied on by plaintiffs do not discuss the issue of privity of contract between a dealer and manufacturer with respect to an action by an end user for breach of contract against the manufacturer, but rather analyze the issue of privity in the context of causes of action for negligence, strict liability, and breach of implied warranties, in which manufacturers assert a defense of lack of privity of contract, as a defense to causes of action based upon implied warranties.[1] Moreover, although I requested that the parties submit any evidence concerning this alleged "agency" relationship, none was submitted.

Accordingly, the first and second causes of action of the amended complaint are dismissed.

Warranty (Third, Fourth, Fifth and Sixth Causes of Action)

Parex issued the Warranty on December 6, 2007. The Warranty, specific to the Kalahari, provides that it was "issued to the General contractor, Builder or Owner of the building," and indicates MC&O is the installing applicator.[2] Parex contends that MC&O has no valid claim pursuant to the Warranty, as it was not issued to MC&O, and MC&O is not the general contractor, builder or owner of the Kalahari.

---

[1] *See Hodgson v. Isolatek Int'l Corp.*, 300 A.D.2d 1051 (4th Dep't 2002); *Carpinone v. Zucker*, 241 A.D.2d 596 (3d Dep't 1997); *Christensen v. Fashion-Fain Homes, Inc.*, 10 Misc. 3d 1060(A) (Sup. Ct. Yates Co. 2005).

[2] While not specified in the Warranty, the Subcontract names FAB as the Contractor, MC&O as the Subcontractor and FSLM as the Owner.

The Warranty provides that it is valid "when installed by an applicator who has attended a Parex Water Master Education Seminar, and in accordance with Parex's installation instruction," and that the produce "will be free from defects in material and manufacturing." Parex contends that plaintiffs have produced no proof that MC&O attended a Parex Water Master Education Seminar. Defendant argues, therefore, that plaintiffs cannot maintain their third and sixth causes of action for breach of express warranty.

Parex further contends that the Warranty clearly excludes both implied warranties specifically stating that is "in lieu of the implied warranties of merchantability and of fitness for any particular purpose," and accordingly, plaintiffs' fourth and fifth cause of action for breach of implied warranty must be dismissed.

In opposition to the motion, plaintiffs contend that the Warranty applies only to the EIFS system, not to the Parex product 121 which, according to their expert, caused the collapse of the wall. Thus, plaintiffs contend, the limitations on implied warranties that are set forth in the Warranty do not apply.

"The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent The best evidence of what parties to a written agreement intend is what they say in their writing. Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Greenfield v. Phillies Records*, 98 N.Y.2d 562, 569 (2002)

(internal citations and quotations omitted). "Moreover, because an express warranty is part of the 'basis of the bargain,' its interpretation is governed by the rules of contract interpretation." *Goldsmith v. Hampton Shipyards, Inc.*, 2011 N.Y. Misc. LEXIS 4179, 12-13, 2011 NY Slip Op 32289(U) (Sup. Ct. Nassau Co. 2011) (citing *Prudential Ins. Co. v. Premit Group, Inc.*, 270 A.D.2d 115 (1st Dept., 2000), *lv. denied* 95 N.Y.2d 756 (2000)).[3]

---

[3] The Warranty states that it is to be governed by the law of the State of Georgia. "It is the policy of the courts of New York to enforce choice-of-law clauses, provided that the law chosen has a reasonable relationship to the agreement and does not violate a fundamental public policy of New York." *Hugh O'Kane Elec. Co., LLC v. MasTec N. Am., Inc.*, 19 A.D.3d 126, 127 (1st Dep't 2005). Neither party addresses whether Georgia law should apply, or whether it has a reasonable relationship to the agreement, although Parex does argue its position under both New York and Georgia law. Other than a P.O. Box address on the Warranty, there is nothing to suggest a connection to Georgia. If there was a "disagreement as to which state's law should apply, [the] first step is to determine whether there is an actual conflict between the laws of the jurisdictions involved." *TBA Global, LLC v Proscenium Events, LLC*, 980 N.Y.S.2d 459, 461 (1st Dep't 2014). The Courts of Georgia follow the same rules of contract interpretation as the Courts of New York. *See, e.g., Grain Dealers Mut. Ins. Co. v. Pat's Rentals*, 269 Ga. 691, 693 (Ga. 1998) ("As is the case with all contracts, unambiguous terms . . . require no construction, and the plain meaning of such terms must be given full effect . . . ."); *NW Parkway, LLC v. Lemser*, 309 Ga. App. 172, 175-176 (Ga. Ct. App. 2011) ("The first rule that courts must apply when construing contracts is to look to the plain meaning of the words of the contract, and it is a cardinal rule of contract construction that a court should, if possible, construe a contract so as not to render any of its provisions meaningless and in a manner that gives effect to all of the contractual terms") (internal citations and quotations omitted). As the parties have ignored this issue, there is no apparent relationship to Georgia, and there is no actual conflict between the laws of the two jurisdictions, I will apply the law of New York, the forum state. *Excess Ins. Co. v. Factory Mut. Ins. Co.*, 2 A.D.3d 150, 151 (1st Dep't 2003) ("If no conflict exists, then the court should apply the law of the forum state in which the action is being heard").

The Warranty by its terms relates only to the "Parex Water Master Commercial System [which] is an Exterior Insulation & Finish System (EIFS)." In its report[4], Kenney identified the Parex product 121, a parging product used to level and fill in the masonry substrate, as the source of the collapse. Kenny further concluded that the Parex 121 product was not part of the Parex EIFS system.

Plaintiffs note that Parex's legacy report, which was annexed as an exhibit to the Kenny report, expressly states that the Parex EIFS Standard System consisted of five separate components: (1) polystyrene insulation port; (2) woven glass mesh; (3) adhesive; (4) basecoat; and (5) finish coat. The Parex 121 product is not listed. However, the legacy report also states that the Parex Water Master System, which Parex contends was installed at the Kalahari "consists of six components . . . a weather-resistive barrier, polystyrene insulation board that has drainage channels, woven glass fabric, fasteners, base coat, and finish coat." Parex does not reference the Parex 121 product in its description of its EIFS system or in the Warranty.

Accordingly, plaintiffs raises issues of fact as to whether the EIFS system, the Parex product 121, or its application caused the collapse of the wall. If found at trial that

---

[4] Both plaintiffs and defendant refer to the Kenny report as an expert report. However, plaintiffs have not authenticated this report, put in an affidavit by anyone with first hand knowledge who created the report, or even submitted a resume or other information about the author of the Kenny Report. As Parex has not challenged the validity of the report, and it is being used to oppose summary judgment, I will allow its use.

the EIFS system was not at fault, then the Warranty, and its limitations on plaintiffs' claims for breach of the implied warranties of merchantability and fitness for a particular purpose, would not apply. Consequently, Parex's motion to dismiss the fourth and fifth causes of action for breach of implied warranty is denied. The court notes that, however, if is found at trial that the EIFS System did not cause the wall collapse, plaintiffs' express warranty claims will be dismissed.

Parex's motion to dismiss the express warranty causes of action is also denied. The evidence submitted shows that Vincent O'Reilly of MC&O attended the necessary Parex seminar on March 6, 2008. Parex contends that MC&O's work on the Kalahari Project was completed by October 12, 2007. Parex argues that because O'Reilly did not attend the seminar until six months after the work was completed, plaintiffs should be barred from recovering under the Warranty for any alleged defects in material or manufacturing. None of the documents supplied by Parex state that the completion date of the project was October 12, 2007. Indeed, according to the documents attached to Parex's moving papers, MC&O was still purchasing Parex materials from Wall Systems Supply relating to and used in the installation of the EIFS at the Kalahari Project as late as September 2008. Accordingly, because no conclusive documentary evidence was submitted as to the completion date of MC&O's work on the Kalahari Project, Parex's motion for summary judgment to dismiss the third and sixth causes of action for express warranty is denied.

Negligence (Seventh Cause of Action)

Defendants contend that the economic loss doctrine precludes plaintiffs' seventh cause of action for negligence. "'The economic loss doctrine provides that tort recovery in strict products liability and negligence against a manufacturer is not available to a downstream purchaser where the claimed losses flow from damage to the property that is the subject of the contract, and personal injury is not alleged or at issue.'" *New York Methodist Hosp. v Carrier Corp.*, 68 AD3d 830, 831 (2d Dept 2009) (citation omitted. *See also Bocre Leasing Corp. v General Motors Corp. (Allison Gas Turbine Div.)*, 84 NY2d 685, 694 (1995); *Archstone v Tocci Bldg. Corp. of N.J., Inc.*, 101 AD3d 1059, 1061 (2d Dept 2012), *lv dismissed* 21 NY3d 1035 (2013).

"This rules applies to both economic losses with respect to the product itself and consequential damages resulting from the alleged defect." *New York Methodist Hosp.*, 68 AD3d at 831. *See e.g. Amin Realty v K&R Constr. Corp.*, 306 AD2d 230, 231 (2d Dept 2003), *lv denied* 100 NY2d 515 (2003) (noting that "the economic loss rule is applicable to economic losses to the product itself, as well as consequential damages resulting from the defect" and bars claims "with respect to removal, reinstallation and repair of the first floor of the subject building" as mere economic losses). When alleged damages stem from "deterioration or breakdown of the product itself, the injury is properly characterized as 'economic loss' and plaintiff is relegated to contractual remedies." *Hemming v*

Certainteed Corp., 97 AD2d 976, 976 (4th Dept 1983), *appeal dismissed* 61 NY2d 758 (1984).

"The economic loss rule is based on the principle that damages arising from the failure of the bargained-for consideration to meet the expectations of the parties are recoverable in contract, not tort, unless a legal duty independent of the contract itself has been violated." *Suffolk Laundry Servs. v Redux Corp.*, 238 AD2d 577, 578 (2d Dept 1997); *see e.g. New York Methodist Hospital*, 68 AD2d at 831 (holding that economic loss rule barred tort-based claims when plaintiff 'merely alleged economic loss" from product "and consequential damages resulting from its failure to operate properly"); *see also Hemming*, 97 AD2d at 976 (noting that "defects related to the quality of the product, e.g., product performance, go to the expectancy of the parties (loss of bargain) and are not recoverable in tort" and that economic loss claims should be relegated "to the law of contracts and warranty which governs the economic relations between suppliers and consumers of goods").

In *Weiss v Polymer Plastics Corp.*, 21 AD3d 1095 (2d Dept 2005), a case involving an EIFS system, the court held that:

> The essence of the plaintiffs' claims are that the EIFS did not perform properly to protect their home and, as a consequence, they have suffered direct loss to the stucco siding itself and consequential damages to the plywood substrate attached to their home in terms of water infiltration through the EIFS. Their tort claims were therefore properly characterized as being for 'economic loss' due to product failure, and were dismissed by the Supreme Court accordingly.

Id. at 1096. *See also Bocre Leasing Corp.*, 84 NY2d at 693 (finding that property damage to the product itself and lost profits "are classic contractual-type economic damages, and plaintiff could have protected itself from both type of losses via UCC warranties and insurance"); *Archstone*, 101 AD3d at 1061 (holding that plaintiffs' negligence claim was barred by economic loss rule and granting summary judgment in favor of defendant where "plaintiffs' [claims were for] economic losses with respect to the reconstruction of the buildings allegedly resulting from the failure of the stone cladding system to perform properly" and that the alleged losses "constituted consequential damages resulting from the alleged design defect and flowing from damage").

Here, it is clear that the damages being claimed by plaintiffs are consequential damages resulting from alleged defects in the Parex materials used at the Kalahari Project, as well as repairs made to the building after the delamination event occurred on May 22, 2008. In other words, the damages sought here arise from the failure of the products to perform as intended.

Plaintiffs contend that the economic loss doctrine does not apply here because the products at issue are inherently dangerous products. In support of this argument, plaintiffs rely on *Trustees of Columbia Univ. in City of N.Y. v Gwathmey Siegel & Assoc. Architects,* 192 AD2d 151 (1st Dept 1983), and *Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449 (1st Dept 1985). However, both of these cases are inapposite.

In *Gwathmey Siegel*, the plaintiffs were not suing the manufacturer of the facade that collapsed, but the contractor. In finding a duty independent of the contract itself, such that liability in tort may lie, the court noted that the project "involve[d] the construction of a facade for a tall building" and that members of the public "trust their very lives to the competence and expertise of those people who build them." 192 AD2d at 154. The Court, in holding that a cause of action in negligence could proceed, recognized that such a result may be appropriate where the nature of the performance called for is affected with a "significant public interest" and failure to perform the service carefully and competently "can have catastrophic consequences." *Id.* at 154-155. Here, however, Parex is the manufacturer, not the contractor, and was not performing any service. Thus, *Gwathmey Siegel* is not applicable.

Mitchell/Giurgola is likewise unpersuasive. In that case, while damages were being sought against a manufacturer, the cause of action asserted was based in strict liability, not in negligence. Under strict liability, unlike the negligence claim asserted here, a plaintiff need not prove fault. The court specifically stated "[t]hat a wall rendered defective and in imminent danger of collapse by improperly fabricated material constitutes the type of dangerous product for which the manufacturer owes a duty to the

ultimate user *under the doctrine of strict products liability* bespeaks itself." 109 AD2d at 455 (emphasis added).[5]

In sum, plaintiffs' seventh cause of action alleging negligence constitutes an impermissible claim for economic loss, and is therefore dismissed.

Cross Motion for Leave to Serve Late Responses

Plaintiffs cross move for leave to serve late responses to defendant's notices to admit. The notices to admit were served on plaintiffs on January 23, 2013, and to date, plaintiffs have failed to respond or object to such notices. Pursuant to CPLR 3123 (a), "[i]f the requested admission is not denied or otherwise explained within twenty days after service thereof or within such further time as the court may allow, then the requested admission will be admitted." *Priceless Custom Homes, Inc. v O'Neill*, 104 AD3d 664, 664 (2d Dept 2013); *see also Hernandez v The City of New York*, 95 Ad3d 793, 794 (1st Dept 2010) (recognizing that a party "is deemed to have admitted the facts contained in [another's party] notice to admit, as it did not timely respond to the notice"). However, it is within this Court's discretion to extend the time to respond. *See Alford v. Progressive Equity Funding Corp.*, 144 A.D.2d 756 (3d Dep't 1988).

---

[5] The other cases cited by plaintiffs with regard to the inherently dangerous product exception to the economic loss doctrine are also inapplicable, as, unlike here, the damages sought in those cases were not the result of the failure of the products at issue to perform their intended purposes.

Plaintiffs contend that the majority of the notices to admit are blatantly improper, and that the requests that they seeks leave to serve "were inadvertently overlooked among the remainder of blatantly improper requests in Parex's notices." It is well settled that "[a] notice to admit pursuant to CPLR 3123 (a) is to be used only for disposing of uncontroverted questions of fact or those that are easily provable, not for the purpose of compelling admission of fundamental and material issues or ultimate facts that can only be resolved after a full trial." *Meadowbrook-Richman, Inc. v. Cicchiello*, 273 A.D.2d 6 (1st Dep't 2000). As the parties are overdue for a conference,[6] I direct the parties to appear for a compliance conference, and this and any other discovery issues will be addressed at that time.

The court has considered the remaining arguments, and finds them to be without merit.

In accordance with the foregoing, it is

ORDERED that defendant Parex U.S.A. Inc.'s motion for summary judgment is granted only to the extent that the first, second and seventh causes of action of the amended complaint are dismissed, and the motion is denied in all other respects; and it is further

ORDERED that action shall be severed and continue as to the third, fourth, fifth and sixth causes of action of the amended complaint; and is further

---

[6] The parties were last before the court for a Status Conference on October 3, 2012.

ORDERED that the parties shall appear for a status conference in IAS Part 39, 60 Centre Street, Room 208, on June 24, 2015, at 2:15 p.m., which conference may not be adjourned without prior permission of the Court to be obtained only by calling chambers on conference call at (646) 386-3690; and it is further

ORDERED that the cross motion by plaintiffs MC&O Masonry, Inc., First Avenue Builders, LLC, and FSLM Associates, LLC for leave to serve late responses to defendant's notices of admission is adjourned to June 24, 2015 at 2:15 p.m.

This constitutes the decision and order of the Court

Date: New York, New York
May 18, 2015

ENTER:

Saliann Scarpulla, J.S.C.