SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 43

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VERIZON NEW YORK, INC.,

Plaintiff, Index No. 652212/13

- against -

50 VARICK LLC, FOUNDATIONS GROUP I, INC.,
ROCK SCAFFOLDING CORP.,
ADJMI & ANDREOLI, INC., and "JOHN DOE",

Defendants.

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REED, J.:

Motion sequence numbers 004 and 005 are consolidated for disposition.

Plaintiff Verizon New York, Inc. (Verizon) moves for partial summary judgment on its first and fifth causes of action against defendant 50 Varick LLC (Varick) (motion sequence number 004). Varick cross-moves for summary judgment dismissing the first, second, third, fourth, and fifth causes of action in the complaint and the cross claims against it, on its cross claim for contractual indemnification against co-defendants Foundations Group I, Inc. (Foundations) and Rock Scaffolding Corp. (Rock), and on its cross claim to recover the sums incurred defending this action. Rock moves for partial summary judgment dismissing plaintiff's eleventh and twelfth causes of action and Foundations' fourth cross claim (motion sequence number 005).

Verizon, a public utility providing internet and phone services, used to own all the units of a condominium building in New York City. On the second, third, and fourth floors of the building, Verizon operates "critical and sensitive" telecommunications switching and

transmission equipment. In March 2010, Verizon sold the fifth, sixth, and seventh floors of its condominium to Varick. The Condominium Declaration (Declaration) governs the use and maintenance of the condominium property. Allegedly, Varick participated in drafting the Declaration and signed it before the sale closed.

Early in 2012, Varick began a construction project to convert its units into a rooftop event space, a theater, and studios for its tenant. The project entailed demolishing the interior of Varick's units, removing parts of the sixth and seventh floor slabs and part of the exterior wall on the Varick Street side of the building, replacing the exterior wall with a glass window, which the parties call a glass curtain wall, and replacing the roof. Foundations was the general contractor on the project and Rock the subcontractor responsible for erecting scaffolding. Varick made a contract with Foundations (the Foundations contract) and Foundations made a subcontract with Rock (the Rock contract).

Pursuant to the Declaration, Verizon had to approve the construction plans for the project. This was done and the work began. The plan called for the building of a watertight temporary roof which could not be removed until after the permanent roof and the new glass curtain wall were installed. The temporary roof was built, was tested, and was found to be waterproof. Subsequently, the temporary roof was demolished, either totally or partially, before the glass curtain wall was put up and before the permanent roof was completely installed. Rock's contract called for it to install a tarp at the fifth, sixth, and seventh floors, but this was not done. On September 18, 2012, a severe rainstorm hit New York City and water flooded into the building, "through the incomplete permanent roof and the exposed facade," damaging Verizon's equipment and the ceilings and walls in its units, according to William Sieling, an engineer who

acted as Verizon's representative for the project (Sieling aff, ¶ 12). Sieling states that the rain caused equipment to smoke and short out, and approximately 2,200 customers lost service.

Verizon seeks $478,675, the cost of repairing its equipment, and attorney's fees and costs. Varick, Foundations, and Rock cross-claimed against each other. No counterclaims were asserted against Verizon. The architect, Adjmi & Andreoli, Inc., is no longer in this case, as the parties dropped their claims against it.

Verizon sues for breach of contract and negligence, and now moves for summary judgment dismissing Varick's affirmative defenses and on its contract causes of action against Varick. The first cause of action alleges that 1) Varick breached the Declaration by modifying the sequence of construction without Verizon's approval, and that this breach damaged Verizon's equipment, and 2) under Article 6 of the Declaration, Varick must pay for Verizon's repairs. The fifth cause of action is based on Varick's breach of a stipulation dated July 3, 2013 in which Varick agreed to pay attorneys' fees and costs if Verizon prevailed in this lawsuit.

Varick argues that it is not liable for breach of contract because Verizon's representative, Sieling, agreed to change the plan. Sieling allegedly consented to removing the temporary roof before the permanent roof and curtain wall were built. In his affidavit, Sieling states that defendants never proposed, nor did Verizon ever approve, changing the plan such that the temporary roof could be removed before the permanent roof and curtain wall were installed.

Varick does not dispute that, according to the plan, the temporary roof had to stay up until the permanent roof was completely installed. However, Varick alleges that the plan did not require that the temporary roof had to stay up until the curtain wall was fully installed. In its reply, Verizon does not dispute this allegation and instead emphasizes that the permanent roof

had to be installed and only then could the temporary roof be demolished.

I. Relevant deposition testimony

Anthony Colon was Foundations' onsite supervisor. During his deposition, he testified that the temporary roof was fully or partly demolished, that the permanent roof was not installed or not fully installed, that tarps were placed over the areas that were open to the elements and that, until September 18, the day of the storm, the tarps succeeded in keeping out the rain. There had been heavy rain storms before but water did not leak into the building. On September 18, however, the tarp system failed because the rain was very heavy and the electricity went off, causing the pumps to fail. The pumps did not remove the water and rain flooded the building.

Colon was the second supervisor on the project. He testified that he came up with an alternative sequence of work, which he discussed with Sieling. Colon said that the plan created by his predecessor would not work, because steel connection points had to be put in to hold the glass curtain wall and that could not be done if the temporary roof was in place. Colon said that he discussed removing the temporary roof before the permanent roof was completed with Sieling. Greg Altshuler, Varick's representative, knew about the change that entailed removing the temporary roof before the permanent roof was completed; he was at meetings where "we discussed the need to be able to remove the waterproofing in order to progress the job . . ." (Colon tr at 159). Altshuler saw the demolition of the temporary roof and never objected to it or voiced concerns.

Colon testified that he was aware of the importance of protecting Verizon's equipment and keeping it dry. Colon testified that Rock provided the sidewalk bridge and all the scaffolding on the outside of the building, and that Rock was supposed to provide the tarp system that would

have been weatherproofing for the facade of the building. Colon called it a "waterproofing membrane" (Colon tr at 67). Colon stated that this had been planned to be in place by September 18, and that Rock did not install it, although the materials were on site, the official approvals had been obtained, and the engineering portion of that project was finished, because Rock was busy with other jobs. Colon tried to get Rock to do the work on September 17, but Rock said it could not because it was waiting for engineering drawings to be approved.

Colon testified that his workers cut out parts of the temporary roof and put tarps over the opening and he showed this to Sieling. By September 18, the roof and the facade on the Varick Street side had been demolished and the opening in the facade was 180 linear feet wide and 50 feet in height. It was standard practice to check the weather and Colon knew that a storm was coming. Colon's workers set about supplementing a tarp covering that was already up or putting it up again after it had been taken down. The job report for September 19, the day after the storm, states that Colon's workers were cleaning up the leaks and putting up "full height plastic protection at curtain wall location on Varick street elevation" (Colon tr at 126). Colon explained that "we were basically trying to mimic the tarp system that Rock was supposed to do, but just - - it wouldn't work" (*id.* at 126). "It needs to be on the outside of the scaffold, but we're not allowed to do that because it's on the outside of the building. It has to be an actual scaffold company" (*ibid.*).

Prabhjit Singh testified for Rock. Colon emailed him to schedule installation of the tarp system for September 17, and called him and told him that the tarp needed to go up. Singh said that he told them that he could not do it until the engineering drawings were approved. He left the materials at the job site to show that he was ready, but he had to wait for the approval.

Altshuler, Varick's representative, testified that he did not know of any changes to the plan. He knew the importance of protecting Verizon's floors against water. It was agreed that once the permanent roof and facade were in place, the temporary roof would be removed. He believed that Verizon had to approve any change to this sequence. He visited the site once a week to attend project meetings; while there, he would tour the site. He did not know of any change in the construction plan or that the temporary roof had been removed or partly demolished.

II. Relevant parts of the Declaration

Exhibit F to the Declaration is entitled "Verizon Special Rights." It states that the building may not be altered without Verizon's prior approval (Declaration at F-2, ¶ 2 [A]). The unit owner shall submit "plans and specifications (including any subsequent material modification of same) and a description of construction methods sufficient to allow [Verizon] to ensure such Alteration does not have an Adverse Effect . . ." and Verizon shall approve or reject said submission within 45 days of receipt (*id.*, ¶ 2 [B]).

Article 6 of the first part of the Declaration is entitled "Alteration: no subdivision or combination of units without unanimous consent." A unit owner making alterations to its "Unit or the Limited Common Elements appurtenant thereto shall:

> "(iii) be responsible for all costs related thereto, including, but not limited to any fees incurred by the Board or other Unit Owners for reasonable architectural, engineering and legal fees;
> (iv) repair any damage to other Units or any Common Elements caused by or attributable to such work and the Board and other Unit Owners shall have no liability therefore; and
> (v) maintain additional insurance . . . throughout the construction period, as may be reasonably required by the Board"

(Declaration, ¶ 6.1 [A]).

Article 7 of the Declaration is entitled "Insurance." Section 7.3 (D) is entitled "Insurance to be Maintained by Unit Owners."

> "Each Unit Owner shall be solely responsible for insuring those contents of such Unit Owner's Unit and Limited Common Elements that are not as a matter of law part of the real property comprising such Unit, for the full replacement value, covering the Unit . . . . Each unit owner shall procure . . . commercial general liability insurance against claims for bodily injury, death or property damage occurring or, in or about their Units including the Limited Common Elements with a combined single limit for each occurrence . . . at least in the amount of $1,000,000 per occurrence with a $2,000,000 general aggregate for bodily and personal injury . . . and property damage . . . . All property insurance policies shall contain standard waivers of subrogation providing that the insurance shall not be invalidated should the insured waive, prior to loss, any right of recovery against the Board and other Unit Owners . . . . Notwithstanding any of the foregoing, the Verizon Units Owner may provide any of the coverages required to be maintained by it hereunder through self-insurance, provided that the Verizon Units owner providing such self-insurance . . . has assets of at least One Billion Dollars . . ."

(Declaration, ¶ 7.3 [D]).

"Common Elements" are defined as the "Limited Common Elements" and the "General Common Elements" (Declaration at 3). "General Common Elements" are all the elements and features of the condominium, except the Units and the Limited Common Elements, and include the facilities and services for the common use of all unit owners, such as exterior and interior walls, foundations, and the portions of the floors, walls and ceilings that are not within the boundaries of the Units or the Limited Common Elements "appurtenant thereto" (*id.*, ¶ 3.3 [A]).

The "Limited Common Elements" are the "Unit A Limited Common Elements" and "Verizon Units Limited Common Elements" (*id.* at 5). The Verizon Units Limited Common Elements are those areas and systems which

> "exclusively serve any of the Verizon Units and which are located outside of the

> Verizon units. The Verizon Units Limited Common Elements specifically include
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> . . .
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> (vi) the air-handling units located in the Verizon Units; . . . (ix) the computer room located on the seventh (7th) floor . . .; and (x) those areas of any floor or the roofs of the Building where equipment dedicated to one or more of the Verizon Units is located (e.g. cooling systems, telecommunications equipment, generators and day tanks, GPS antennae, etc.) or which is otherwise designated on the Plans as a Verizon Units Limited Common Element"

(*id.*, ¶ 3.5 [B]).

A "Unit" includes the non-structural walls within the unit, the upper surface of floors, the lower surface of ceilings, interior building walls, and windows (*id.* at 9).

A provision entitled "Waiver" provides that no provision "shall be deemed to have been abrogated or waived by reason of any failure to enforce such provision, irrespective of the number of violations or breaches which may occur" (*id.*, ¶ 15.8).

III. Verizon's motion for summary judgment

As the moving party, Verizon must show that it is entitled to judgment as a matter of law because there are no material issues of fact in dispute (*Dallas-Stephenson v Waisman,* 39 AD3d 303, 306 [1st Dept 2007]). If the proponent of the motion makes this showing, the opposing party must produce evidence that there are genuinely disputed issues of fact which should be determined at trial (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]). On a motion for summary judgment, the court determines whether any triable issues of fact exist and does not decide the merits of any claims (*Sheehan v Gong,* 2 AD3d 166, 168 [1st Dept 2003]).

Verizon's claim that Varick breached the Declaration - Verizon shows that Varick changed the plans without adhering to the provision in the Declaration that proposed changes had

to be submitted to Verizon for approval. Varick's argument that said provision does not require approval of modifications has no merit. However, Varick raises an issue of fact regarding whether Verizon, through Sieling, approved the change.

"A provision in a construction contract which requires a written order for any alteration or extra work is generally valid and binding upon the parties, in the absence of a waiver, modification, or abrogation thereof" (*DHE Homes, Ltd. v Jamnik*, 121 AD3d 744, 745 [2d Dept 2014]). Oral directions or the general course of conduct between the parties may modify or eliminate contract provisions requiring written authorization (*Kiam v Park & 66th Corp.*, 66 AD3d 415, 416 [1st Dept 2009]; *Barsotti's, Inc. v Consolidated Edison Co. of N.Y.*, 254 AD2d 211, 212 [1st Dept 1998]). Colon's testimony raises the possibility that Sieling approved the modifications, in which case Varick did not breach the Declaration. Colon testified that he told Sieling about the change in sequence, that Sieling saw that the temporary roof had been demolished although the permanent roof was not up, and that Sieling did not object.

Verizon claims that the no waiver clause in the Declaration precludes any waiver of the requirement that proposed modifications must be submitted to it. However, parties can waive a no waiver clause (*see BDCM Opportunity Fund II, LP v Yucaipa Am. Alliance Fund I, LP*, 112 AD3d 509, 511 [1st Dept 2013]; *Kenyon & Kenyon v Logany, LLC*, 33 AD3d 538, 539 [1st Dept 2006]). There is enough evidence to raise an issue of fact as to whether Verizon waived the no waiver clause.

Varick's obligations under Article 6 of the Declaration - Verizon argues that, whether or not it approved of Varick's changes to the plan, Article 6 obligates Varick to pay for the repairs, and that the waiver of subrogation in Article 7 does not preclude Varick's obligation.

The basic rule of contract interpretation is that contracts are construed in accord with the parties' intent, as indicated by the language that they chose to use (*Slamow v Del Col,* 79 NY2d 1016, 1018 [1992]; *Slatt v Slatt,* 64 NY2d 966, 967 [1985]). An agreement that is clear and complete will be enforced according to the plain meaning of the terms (*Kolmar Ams., Inc. v Bioversel Inc.,* 89 AD3d 493, 494 [1st Dept 2011]; *150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 6 [1st Dept 2004]). Reading Article 6, the court concludes that the parties clearly intended that the party doing alterations on its unit should be responsible for resultant harm to other units, and repair the parts of the units and Common Elements that are damaged. Verizon's equipment is part of the Common Elements, and its walls and ceilings are part of its unit.

Article 6 does not provide that the unit owner's duty depends upon its fault. Therefore, provided that Varick's alterations caused the damage, Varick has a duty to pay for repairs, even if Varick was not negligent or in any way at fault (*see Brown v Two Exch. Plaza Partners,* 76 NY2d 172, 178 [1990]; *Correia v Professional Data Mgt.,* 259 AD2d 60, 64 [1st Dept 1999]; *Spector v Cushman & Wakefield, Inc.,* 34 Misc 3d 1204[A], *5, 2011 NY Slip Op 52426[U], *5 [Sup Ct, NY County 2011], *affd* 100 AD3d 575 [1st Dept 2012]).

Waiver of subrogation and insurance - Article 7 provides that each unit owner must buy property insurance with a waiver of subrogation. According to Varick, the waiver means that Verizon must look to its own insurer for compensation and cannot recover from Varick. Verizon disputes this, and also states that it cannot receive compensation from its insurer, as the deductible is $10 million, and Verizon's damages are less than that.

Subrogation "allows an insurer to stand in the shoes of its insured and seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is

bound to reimburse" its insured (*Kaf-Kaf, Inc. v Rodless Decorations,* 90 NY2d 654, 660 [1997]). Where a party has suffered an injury and has been compensated by its insurer, the insurer cannot recover the amount of the compensation from the wrongdoer which caused the injury, if the injured party waived its insurer's right to subrogation (*State Farm Ins. Co. v J.P. Spano Constr., Inc.*, 55 AD3d 824, 825 [2d Dept 2008]). In addition to barring the insurer's claim, a waiver of subrogation bars the insured's claim against the other party to the contract (*Travelers Indem. Co. v Losco Group, Inc.*, 136 F Supp 2d 253, 256-257 [SD NY 2001]; *Lim v Atlas-Gem Erectors Co.*, 225 AD2d 304, 306 [1st Dept 1996]).

A waiver of subrogation clause is an allocation of risk provision, which places the ultimate risk of loss on the insurer of the injured party (*see Insurance Co. of N. Am. v Borsdorff Servs.*, 225 AD2d 494, 494 [1st Dept 1996]; *Viacom Intl. v Midtown Realty Co.*, 193 AD2d 45, 53 [1st Dept 1993]). Waiver of subrogation "is necessarily premised on the procurement of insurance by the parties" (*Duane Reade v Reva Holding Corp.*, 30 AD3d 229, 232 [1st Dept 2006] [internal quotation marks and citation omitted]). In this case, the waiver of subrogation in Article 7 does not apply to the kind of insurance which Varick must turn to in order to pay for Verizon's repairs. Varick's payment to repair Verizon's equipment must come out of Varick's liability insurance policy, which is not required to contain a waiver of subrogation.

Article 7 requires unit owners to procure liability and property insurance and only the latter kind is required to include a waiver of subrogation. "New York law recognizes the distinction between property and liability insurance in circumstances" where the contract requires two kinds of insurance and the waiver of subrogation applies to one kind (*Tokio Marine & Fire Ins. Co. v Employers Ins. of Wausau,* 786 F2d 101, 104 [2d Cir 1986]; *Trump-Equitable Fifth*

Ave. Co. v H.R.H. Constr. Corp., 106 AD2d 242, 244 [1st Dept 1985], *affd* 66 NY2d 779 [1985]). Liability insurance protects the insured from liability to third parties arising out of the insured's conduct (*In re September 11 Prop. Damages Litig.*, 650 F3d 145, 155 [2d Cir 2011]; *St. Paul Fire & Marine Ins. Co. v Universal Builders Supply*, 409 F3d 73, 84-85 [2d Cir 2005]). Liability insurance is third-party insurance. Property insurance is first-party insurance which compensates the insured for damage to its own property (*Parks Real Estate Purch. Group v St. Paul Fire & Marine Ins. Co.*, 472 F3d 33, 41 [2d Cir 2006]; *St. Paul Fire*, 409 F3d at 85).

At first glance, Articles 6 and 7 may seem inconsistent. Article 6 requires the unit owner to pay for damage to other units, which means that the unit owner will have recourse to liability insurance. Article 7 requires each unit owner to insure its own property, which means that each unit owner pays for its own damages.

Courts must construe a contract in a manner that avoids inconsistencies and reasonably harmonizes its terms (*Gessin Elec. Contrs., Inc. v 95 Wall Assoc., LLC*, 74 AD3d 516, 518 [1st Dept 2010]). The court must read an indemnification provision in conjunction with the other provisions in the agreement to avoid inconsistencies or an interpretation which would render any provision superfluous or without effect (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 492-493 [1989]). "[P]ursuant to a countervailing rule of contract construction, if there is an inconsistency between a general provision and a specific provision of a contract, the specific provision controls" (*Bank of Tokyo-Mitsubishi, Ltd., N.Y. Branch v Kvaerner a.s.*, 243 AD2d 1, 8 [1st Dept 1998]; *see also Matter of TBA Global, LLC v Fidus Partners, LLC*, 132 AD3d 195, 204 [1st Dept 2015]). In addition, "a waiver of subrogation clause cannot be enforced beyond the scope of the specific context in which it appears" (*Kaf-Kaf*, 90 NY2d at 660).

There is no actual inconsistency. Article 6 specifically addresses damage by unit owners making alterations. Thus, it applies to this case, while the property insurance required by Article 7 is for the occasion when the harm is not caused by a unit owner's alterations. Article 7 also requires liability insurance, which a unit owner liable under Article 6 must turn to in order to compensate another unit owner.

Article 6 requires the unit owner to obtain "additional insurance" if required by the Board. Varick claims that this means that it need not compensate Verizon, because the Board did not require that Varick buy "additional insurance" and thus, Varick did not have to purchase insurance for the alterations. This is incorrect. The "additional insurance" is in addition to the liability insurance that all unit owners must obtain pursuant to Article 7.

Evidence of Verizon's repairs - When the measure of damages to property is the cost of repairs, the recovering party must have proof that the repairs were necessary and were reasonably worth the sum paid (*Parilli v Brooklyn City R.R.*, 236 App Div 577, 578 [2d Dept 1932]). There must be evidence of the extent of the damage and of the specific sums expended to replace each item, and a showing "that the work done was reasonably necessary to repair the premises . . . " (*Halkedis v Two E. End Ave. Apt. Corp.*, 161 AD2d 281, 282-283 [1st Dept 1990]). The party seeking payment for repairs need not produce an expert witness and "may prove its damages . . . through credible testimony of a person with knowledge about the costs involved" (*New York City Tr. Auth. v Horner*, 21 Misc 3d 1129[A], 2008 NY Slip Op 52277[U], *2 [Civ Ct, Kings County 2008])

In his affidavit, Osborne Martin says that, as part of his duties as Verizon's condominium asset manager, he compiled the damages incurred by Verizon. The damages consist of the cost

of replacement telecommunications equipment for the equipment damaged by the flood, labor and overtime costs of Verizon personnel who replaced the equipment and cleaned up the water damage, and the cost of the contractor who repaired the damage to the walls, ceilings, and floors of Verizon's units.

Martin says that the flood caused damage to the network and switching components. Pursuant to Verizon's standard procedures, the bar code identifier of each piece of damaged equipment that was replaced was scanned into Verizon's parts inventory control system. This system identifies the part and the replacement cost. Martin says that Verizon did not get the replacement parts from a supplier, as that would have substantially lengthened the time needed to make the repairs and to restore service. The parts were obtained from inventories maintained by Verizon for emergencies and the replacement costs are the average cost to Verizon for each piece of equipment. He further states that, because thousands of customers were disrupted by the service interruption, the employees worked on an emergency basis and Verizon incurred overtime costs.

Martin compiled the costs with the help of personnel from the switching and network teams. He attaches one spreadsheet of costs for the switching components and one for the network components. He says that they were compiled from the records kept by Verizon in the ordinary course of business. He submits invoices from the contractor that repaired the ceilings, the floor tiles, the walls, and the lighting.

Varick objects that Martin does not have personal knowledge regarding the data used to create the spreadsheets, which are hearsay and not probative. In reply, Verizon submits an affidavit by Glenn Koehler who says that he was the switch foreman for Verizon, that he oversaw

the replacement of damaged switching parts by Verizon employees and, that under Martin's supervision, he compiled information regarding the repair and labor costs. Koehler says that he provided the spreadsheet about switching equipment to Martin and that it was prepared in the regular course of his duties as switch foreman. The spreadsheet lists each damaged part's barcode and cost. Each part was scanned by technicians on his team on or about the day of the storm. Koehler also says that he prepared the labor and overtime spreadsheet in the regular course of his business in regard to labor and provided it to Martin. Randher Feliz submits an affidavit stating exactly the same thing in regard to network equipment. Feliz was the first level manager responsible for the network equipment.

A document may be admitted as a business record upon proof that it is made and kept in the regular course of business (*see* CPLR 4518 [a]; *People v Kennedy*, 68 NY2d 569, 579-580 [1986]). A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures (*Matter of Brooke Louise H.*, 158 AD2d 425, 426 [1st Dept 1990]; *Sabatino v Turf House,* 76 AD2d 945, 946 [3d Dept 1980]). Computer-generated or electronic records are admissible as business records where the plaintiff establishes that the information contained therein was entered into the computer in the regular course of business and is an accurate representation of the electronic record (*see Palisades Collection, LLC v Kedik*, 67 AD3d 1329, 1331 [4th Dept 2009]; *Federal Express Corp. v Federal Jeans, Inc.*, 14 AD3d 424, 424-425 [1st Dept 2005]). Verizon's computer-generated evidence of repair costs is proper, except that Verizon fails to state how the data was entered into the computer in the first place (*see People v DiSalvo*, 284 AD2d 547, 548 [2d Dept 2001] (employees entered all relevant information into its computer, which in turn

generated the print-out]). Because of this deficiency, the evidence is not admitted.

Also, Verizon does not provide any foundation for the attached invoices, which show that the cost of repairing the ceiling, floor, and walls totals $55,352.03, of which approximately $33,000 is the estimated cost of work not done at the time that the motion was made. A foundation must be provided for business invoices (*West Val. Fire Dist. No. 1 v Village of Springville*, 294 AD2d 949, 950 [4th Dept 2002]).

Verizon's motion for summary judgment on its first cause of action is granted on liability, as Varick is obligated to pay for the repairs pursuant to Article 6 of the Declaration. Summary judgment on the amount of the repairs is denied. Verizon is granted summary judgment on its fifth cause of action for fees and costs, pursuant to the July 3, 2013 stipulation with Varick.

Verizon's motion to dismiss Varick's affirmative defenses - Varick presents 12 affirmative defenses. The second affirmative defense is failure to state a cause of action, which has no merit. The fourth is for improper service; however, Verizon shows by an affidavit of service that service was proper and, in the stipulation, Varick acknowledged proper service. The fifth is based on the statute of limitations, which is three years for property damage (CPLR 214 [4]) and six years for breach of contract (CPLR 213 [2]). The complaint is timely. The ninth is that plaintiff failed to mitigate damages. There is no evidence to support this "unsubstantiated and speculative" claim (*see Bank of Am., N.A. v J.P.T. Auto., Inc.*, 52 AD3d 553, 555 [2d Dept 2008]). Bare legal conclusions do not constitute an affirmative defense (*Robbins v Growney*, 229 AD2d 356, 358 [1st Dept 1996]). The second, fourth, fifth, and ninth affirmative defenses are dismissed.

The first affirmative defense is assumption of risk, a tort concept, not applicable to

Verizon's contract claims (*Georgiades v Nassau Equestrian Ctr. at Old Mill, Inc.*, 134 AD3d 887, 888 [2d Dept 2015]). The third affirmative defense is that third persons over whom Varick had no control caused the damages. The sixth affirmative defense is based on Article 16 of the CPLR, which applies to tort actions (*Roseboro v New York City Tr. Auth.*, 286 AD2d 222, 223 [1st Dept 2001]; *Concepcion v New York City Health & Hosps. Corp.*, 284 AD2d 37, 39 [1st Dept 2001]). The seventh affirmative defense alleges that Verizon has been indemnified by a collateral source, by reason of which Varick's liability, if any, should be reduced by said indemnification amount. The eighth affirmative defense states that, under CPLR 4545, Verizon's costs will be replaced or indemnified in whole or in part from a collateral source. CPLR 4545 and the collateral source rule do not apply to a contract claim (*Ocean Ships, Inc. v Stiles*, 315 F3d 111, 116 [2d Cir 2002]; *Inchaustegui v 666 5th Ave. Ltd. Partnership*, 96 NY2d 111, 116 [2001]). The tenth affirmative defense is that intervening acts of other parties caused the damages. The eleventh is that Varick was not negligent. The twelfth is that defendant acted without malice. These defenses apply to tort claims and do not invalidate the contractual provision placing responsibility on Varick. They are not dismissed because Verizon maintains a negligence claim against Varick.

IV. Varick's cross motion for summary judgment

Varick cross-moves to dismiss the first, second, third, fourth and fifth causes of action in the complaint and all cross claims against it and on its claims for contractual indemnification against Foundations and Rock. That Verizon is entitled to summary judgment on its first and fifth causes of action has been decided. Varick claims that it is not liable for the actions of Foundations or Rock, that Verizon's claim of gross negligence has no merit, and that Verizon

spoliated evidence.

Varick's claim that Verizon spoliated evidence - Varick seeks dismissal on the basis that Verizon spoliated evidence and willfully prevented Varick from inspecting the damaged telecommunications equipment.

Varick refers to the deposition of Martin, who testified that he came to the building about one week after the flood and saw the damaged equipment. He did not know where the equipment was at the time of his deposition, although he had directed Verizon employees to preserve it. Varick emphasizes that the equipment was destroyed shortly after the day of the storm. Verizon, in turn, refers to testimony by Altshuler, Varick's representative, who saw the damaged equipment one day after the storm, but did not ask Verizon to preserve it. Verizon alleges that none of the defendants asked to inspect the equipment or requested that it be preserved until Rock served its demand for inspection of property in 2014.

Spoliation occurs when a party intentionally or negligently loses or destroys evidence before the other side has an opportunity to inspect it (*Standard Fire Ins. Co. v Federal Pac. Elec. Co.*, 14 AD3d 213, 219 [1st Dept 2004]; *Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 173 [1st Dept 1997]). Where the evidence destroyed is crucial, that is, where it causes the other party to be deprived of the ability to defend against or establish a claim, drastic sanctions such as dismissal are appropriate (*ibid.*). Where the other side is not so deprived and the conduct is not wilful or intentional, a monetary sanction may be appropriate (*see Dedushaj v 3175-77 Villa Ave. Hous. Dev. Fund Corp.*, 135 AD3d 421 [1st Dept 2016]; *Young v City of New York*, 104 AD3d 452, 454 [1st Dept 2013]).

As the party seeking sanctions, Varick had the burden to show prejudice on account of the

destroyed evidence (*Baldwin v Gerard Ave., LLC*, 58 AD3d 484, 485 [1st Dept 2009]). Varick does not show prejudice. Conclusory statements that Varick has been deprived of assessing damages are made in its memorandum of law by its attorney. Varick does not produce an affidavit by someone with knowledge or by an expert that it would not be able to defend itself without the equipment (*see Cameron v Nissan 112 Sales Corp.*, 10 AD3d 591, 592 [2d Dept 2004] [defendant did not produce expert proof or any proof beyond its attorney's bare assertions that it was not able to prove its case without inspecting the destroyed evidence]; *see also American Intl. Ins. Co. v A. Steinman Plumbing & Heating Corp.*, 93 AD3d 559, 560 [1st Dept 2012] [plaintiff makes no showing as to how the discarded evidence would have allowed it to prove its case]). In addition, there is no evidence of wilfulness or bad faith.

On the other hand, given that Verizon is suing for the destruction of that property, it had a duty to preserve it. That Varick did not ask to see the equipment is not a justification for disposing of it.

The decision whether to impose sanctions, as well as the nature and severity of any to be imposed, are matters within the discretion of the trial court (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 551 [2015]). Any sanction levied by a court must be proportionate to the offending conduct (*Young*, 104 AD3d at 454). In this case, a sanctions is appropriate given the unexplained disappearance of the equipment. Verizon shall pay Varick the attorneys' fees and costs associated with making the cross motion and defending against Verizon's motion.

Negligence claims against Varick - Verizon's second cause of action is for negligence and the third is for gross negligence. As explained below, Varick is not entitled to the dismissal of the negligence claim. As for gross negligence, Varick is correct that the cause of action should

be dismissed. A party is liable for gross negligence when its conduct indicates a reckless disregard for others' rights or intentional wrongdoing (*Ambac Assur. UK Ltd. v J.P. Morgan Inv. Mgt., Inc.*, 88 AD3d 1, 9 [1st Dept 2011]). The facts do not indicate such a level of negligence. The third cause of action in Verizon's complaint is dismissed as against Varick.

Vicarious liability claim against Varick - Verizon's fourth cause of action sounds in vicarious liability. Varick argues that Foundations is an independent contractor, which no party disputes, and that Varick is not liable for Foundations' conduct. In general, an owner who retains an independent contractor is not liable for the latter's negligent acts (*Rosenberg v Equitable Life Assur. Socy. of U.S.*, 79 NY2d 663, 668 [1992]). However, the general rule is excepted when a nondelegable duty is placed on the owner (*ibid.*). Since a party cannot pass on a nondelegable duty, it cannot insulate itself from liability caused by another's breach of that duty (*ibid.*). In this manner, a blameless owner may be held vicariously liable for the negligence of the independent contractor (*ibid.*).

Varick incorrectly contends that it was not under a nondelegable duty. A property owner who hires an independent contractor to perform construction on a condominium unit has a nondelegable duty to protect its neighbors from damage associated with the construction (*905 5th Assoc., Inc. v Weintraub,* 85 AD3d 667, 667 [1st Dept 2011]; *Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 367 [1st Dept 2006]). By virtue of its nondelegable duty, Varick may be vicariously liable for damage caused by the contractors (*see Brothers v New York State Elec. & Gas Corp.*, 11 NY3d 251, 257 [2008]; *Pesante v Vertical Indus. Dev. Corp.*, 142 AD3d 656, 657 [2d Dept 2016]). Varick's motion to dismiss the fourth cause of action is denied.

Claim that Varick was at fault - The contract between Varick and Foundations

provides that Foundations has sole responsibility for the construction methods, techniques, sequences, and procedures and is responsible to Varick for the acts and omissions of its employees and subcontractors. "In no event shall Owner have control over, charge of, or any responsibility for" any of the above . . ." (Foundations Contract, ¶ 2.5.2). Varick argues that it was not negligent and that it did not have authority over the work. Varick cites to Foundations' contract to show that it was barred from assuming any control over the work. An owner may be liable for negligence for a dangerous condition arising from either the condition of the premises or the means and methods of the work (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]; *Urbano v Rockefeller Ctr. N., Inc.*, 91 AD3d 549, 550 [1st Dept 2012]). An owner's liability for injury arising from the means and methods of the work attaches only if the owner exercised supervisory control over the work (*Cappabianca* 99 AD3d at 144; *see also Whitaker v Norman,* 75 NY2d 779, 782 [1989]). Here, the record is devoid of evidence of control or supervision over the work site or the manner of work. "[T]he mere retention of general supervisory powers over an independent contractor cannot form a basis for the imposition of liability against the principal" (*Goodwin v Comcast Corp.*, 42 AD3d 322, 323 [1st Dept 2007]; *Wright v Esplanade Gardens,* 150 AD2d 197, 198 [1st Dept 1989]). The fact that Varick had a supervisor on site who attended meetings is not by itself a basis for liability, as "the fact that [the owner] may have dispatched persons to observe the progress and method of the work does not render it actively negligent . . ." (*Aragon v 233 W. 21st St.*, 201 AD2d 353, 354 [1st Dept 1994]; *see Uribe v Fairfax, L.L.C.*, 48 AD3d 336, 337 [1st Dept 2008] [owner's conversations with contractor about the sequence of tasks were insufficient to establish control over the work]). Varick's alleged participation in the decision to change the work sequence does

not confer direct liability upon it based on control.

An owner may also be directly liable for damage when it has prior notice of a dangerous condition of the premises (*see Maggio v 24 W. 57 APF, LLC*, 134 AD3d 621, 626 [1st Dept 2015]; *Makarius v Port Auth. of N.Y. & N.J.*, 76 AD3d 805, 808 [1st Dept 2010]; *Gerinshteyn v Lower Manhattan Dev. Corp.*, 19 Misc 3d 1109[A], *2, 2008 NY Slip Op 50608[U] [Civ Ct, NY County 2008], citing *Schwartz v Merola Bros. Constr. Corp.*, 290 NY 145, 152 [1943]). Evidence shows that Altshuler, Varick's representative may have had notice that the side of the building was open or insufficiently protected. Varick fails to show that such notice did not exist. Therefore, an issue of fact exists whether Varick was negligent based on notice of a dangerous condition. The second cause of action for negligence is not dismissed.

Regardless of fault, Varick must compensate Verizon under Article 6 of the Declaration, and it may be held vicariously liable for the damage. Also, there is a question of fact as to whether it bears any direct liability.

Foundations' and Rock's agreement to indemnify Varick - Varick seeks summary judgment on its contractual indemnification cross claims against the contractors. Foundations agreed to indemnify Varick "to the fullest extent permitted by law" against claims "arising out of, related to or resulting from a breach of the Agreement and/or performance of the Work regardless of whether or not such claim . . . is caused in part by a party indemnified hereunder, provided that where such claim" is based on destruction of property, Foundations' obligation is limited "only to the extent not caused by the negligent acts or omissions of" any party indemnified here (Foundations contract, ¶ 3.18.1).

As Varick argues, this provision does not violate General Obligations Law (GOL) §

5-322.1, as it does not contemplate indemnifying Varick for its active negligence (*see Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795 [1997]; *Castro v New York City Tr. Auth.*, 52 AD3d 213, 214 [1st Dept 2008]). Foundations' contract states that Foundations will not indemnify a party against liability caused by the party's fault, but will indemnify the party to the extent that it is not at fault. The phrase in the provision, "to the fullest extent permitted by law," similarly authorizes partial indemnification (*see Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008]). If Varick is found liable and the liability is partly based on Varick's fault and partly due to Varick's vicarious liability, Foundations must indemnify it for the part of Varick's liability that is vicarious, and not for the part of Varick's liability that is due to Varick's fault. If Varick's liability is wholly vicarious, Foundations must indemnify it for all of the liability. Foundations bears this obligation toward Varick regardless of Foundations' liability (*see Correia*, 259 AD2d at 64).

The contract between Rock and Foundations provides that "to the fullest extent permitted by law," Rock will indemnify the owner against claims arising out of Rock's work, to the extent that the damage is caused by Rock's negligent acts, "regardless of whether or not such claim . . . is caused in part by a party indemnified hereunder" (Foundations and Rock contract, ¶ 4.6.1). Like, Foundations' contract, this provision provides for partial indemnification. The difference between the contracts is that Rock will indemnify only where it is at fault. If any part of Varick's vicarious liability is due to Rock's fault, Rock must indemnify Varick to the extent of Rock's fault.

If Varick was found to be partially responsible for the accident, it would be entitled to indemnification for the percentage of any award arising not from its negligence but from the

negligence of others. Varick is entitled to conditional summary judgment on its contractual indemnification cause of action, since it is not yet determined whether defendants were negligent and to what extent (*see Maggio*, 134 AD3d at 627-628; *DeSimone v City of New York*, 121 AD3d 420, 422-423 [1st Dept 2014]).

Foundations' and Rock's cross claims - Foundations cross-claimed against the other defendants for contribution, contractual indemnification, common law indemnification, and breach of contract for failure to procure adequate insurance (fourth cross claim). Rock cross-claimed against the other defendants for contribution and indemnification. Varick moves on the basis that it is not at fault. In order to recover on a claim for common-law indemnification, the one seeking indemnity must prove that its liability is wholly vicarious and that the proposed indemnitor was negligent to some degree (*Structure Tone, Inc. v Universal Servs. Group, Ltd.*, 87 AD3d 909, 911-912 [1st Dept 2011]; *Edge*, 25 AD3d at 367). Contribution is available where more than one person is subject to liability for a tort (*American Home Assur. Co. v Nausch, Hogan & Murray, Inc.*, 71 AD3d 550, 552 [1st Dept 2010]). As stated, the issue of defendants' liability is one of fact. Foundations' claims that Varick did not procure insurance and that Varick must provide it with contractual indemnification are not dismissed, because Varick does not assert that it did not promise to obtain such insurance or provide indemnification, although no party states that Varick did make such an agreement. Varick's motion to dismiss the cross claims is denied.

V. Rock's motion to dismiss Verizon's claims and punitive damages demand and Foundations' fourth cross claim

As stated, Foundations' fourth cross claim alleges that its co-defendants breached a

promise to procure insurance covering Foundations. Rock states that it obtained insurance covering Foundations and Varick. Rock submits an affidavit from a manager at Burlington Insurance Company (Burlington), Rock's insurer, who states that Burlington disclaimed coverage for Foundations and Varick, because, among other reasons, the Burlington policy excludes coverage for work done by Rock that exceeds three stories.

A party who, as promised, procures insurance may still be liable for failing to do so, if the insurance procured does not match the coverage promised (*see Nrecaj v Fisher Liberty Co.*, 282 AD2d 213, 214 [1st Dept 2001]). While it appears that Foundations is included as an additional insured in Rock's insurance policy, it is not clear that Rock's insurance covers the activity in which defendants were engaged. Rock's contract stated that it was to install a tarp at fifth, sixth and seventh floors. Foundations' claim for breach of contract against Rock cannot be dismissed, since Rock does not show that it obtained the kind of insurance engaged for in the contract between Rock and Foundations.

There are other reasons not to dismiss Foundations' cross claim. In a separate action in this court, Foundations' insurance carrier is suing Rock's insurance carrier and Rock, because Rock's insurer refused to cover Foundations (*State Natl. Ins. Co. v Burlington Ins. Co. & Rock Scaffolding Corp.*, Index No. 160191/13). Foundations' insurer moved for summary judgment and the court, in a decision dated February 5, 2015, stated that the "purported contract" between Foundations and Rock had not been authenticated, and that there were material issues of fact as to insurance coverage for Foundations and Varick.

Regarding Verizon's causes of action for negligence and gross negligence, the eleventh and twelfth causes of action, respectively, Rock states that Verizon can have no negligence

claims against it, as Verizon did not hire Rock and no privity exists between them. Rock argues that the negligence claim is actually a breach of contract claim, which must be dismissed, since there is no contract between Rock and Verizon.

The eleventh cause of action alleges that Rock had a duty to Verizon and that it negligently breached the duty by failing to install barriers on the building exterior. This adequately states a negligence cause of action. The twelfth cause of action sounds in gross negligence and is dismissed, as there are no facts tending to show that level of negligence. The demand for punitive damages is also dismissed. Such damages are granted against a party whose actions showed very bad conduct, amounting to depravity (*see Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 489 [2007]). That is not alleged.

VI. To conclude, it is hereby

ORDERED that the motion by plaintiff (motion sequence number 004) for partial summary judgment against defendant 50 Varick LLC

- on plaintiff's first cause of action is granted as to liability only,

- on plaintiff's fifth cause of action is granted and an assessment of attorneys' fees and costs against defendant at the conclusion of this action is directed,

- to dismiss defendant's affirmative defenses is granted as the second, fourth, fifth, and ninth affirmative defenses, which are dismissed, and is otherwise denied; and it is further

ORDERED that the motion by defendant Rock Scaffolding Corp. (motion sequence number 005) for partial summary judgment

- to dismiss plaintiff's eleventh and twelfth causes of action and plaintiff's

demand for punitive damages is granted to the extent that the twelfth cause of action and the demand for punitive damages are dismissed as against defendant Rock Scaffolding Corp., and is otherwise denied, and

- to dismiss the fourth cross claim of Foundations Group I, Inc. is denied; and it is further

ORDERED that the cross motion by defendant 50 Varick LLC for summary judgment

- to dismiss plaintiff's complaint is granted to the extent that the third cause of action is dismissed as against defendant 50 Varick LLC, and is otherwise denied,

- to dismiss the cross claims of defendants Foundations Group I, Inc. and Rock Scaffolding Corp. is denied,

- on its cross claim for contractual indemnification as against defendants Foundations Group I, Inc. and Rock Scaffolding is granted on a conditional basis, pending a final determination as to liability,

- on its request for sanctions against plaintiff for spoliation of evidence is granted to the extent that plaintiff shall pay 50 Varick LLC's attorneys' fees, costs, and disbursements incurred making the cross motion and defending against plaintiff's motion.

Dated: 2/3/17

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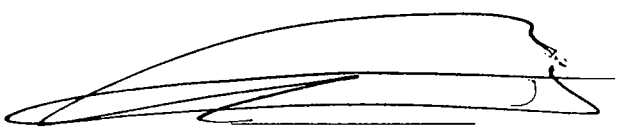

J.S.C.