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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

NAUM SHEKHTER et al., Plaintiffs and Appellants, v. SENECA STRUCTURAL DESIGN, INC., et al., Defendants and Respondents.	B158174 (Los Angeles County Super. Ct. No. BC216057)

APPEAL from a judgment and orders of the Superior Court for the County of Los Angeles. Ronald M. Sohigian, Judge. Judgment of May 1, 2002 reversed and cause remanded. Order of January 25, 2002 affirmed in part and reversed in part. Writ issued.

Law Office of Steven L. Zelig, Law Office of Bruce Adelstein and Bruce Adelstein for Plaintiffs and Appellants.

Stone, Rosenblatt & Cha and Laurence F. Dunn III for Defendants and Respondents Kenneth B. Bondy, Chris R. Deetz and Seneca Structural Design, Inc.

Veatch, Carlson, Grogan & Nelson, Jill A. Thomas and Daniel Lee Jacobson for Defendant and Respondent Sunset Masonry & Concrete, Inc.

Horvitz & Levy, Barry R. Levy and Mary-Christine Sungaila; Bremer & Whyte, John O'Meara and Robert M. Case, for Defendants and Respondents W.M. Klorman Construction, Inc. and William M. Klorman.

SUMMARY

The owners of an apartment complex damaged in the Northridge earthquake sued design and construction companies and individuals allegedly responsible for faulty repairs to the complex after the earthquake. The trial court erred in sustaining demurrers to the owners' negligence claims and to some, but not all, fraud and negligent misrepresentation claims. It also erred in striking alter ego, conspiracy and other allegations from the complaint.

FACTUAL AND PROCEDURAL BACKGROUND

This is a construction defect case arising from allegedly improper repairs performed at a large apartment complex in Granada Hills after the 1994 Northridge earthquake. The owners of the complex, Naum and Margo Shekhter as trustees of the NMS Family Trust (Shekhters), sued Seneca Structural Design, Inc., Kenneth B. Bondy and Chris R. Deetz (collectively, Seneca defendants) and W.M. Klorman Construction Corporation, asserting causes of action for breach of contract, negligence, strict liability and fraud. As the lawsuit proceeded, other defendants were added, including William Klorman, the president of W.M. Klorman Construction, and Sunset Masonry & Concrete, Inc., as were other causes of action. The principal question raised in this appeal is whether the Shekhters' complaint properly stated claims for fraud, negligent misrepresentation and negligence.

A. Factual background.

The Shekhters' apartment complex consisted of three buildings and appurtenant structures. Building 1, the largest, contained an elevated post tension deck, situated above the parking area, upon which the apartments were built. This deck was divided into halves by a pour strip. In the Northridge earthquake, the entire west half of Building 1 collapsed, while the east half remained standing. In August 1994, the Shekhters entered into a contract with C.H. Construction, Inc. (general contractor) concerning the reconstruction and repair of the property. The general contractor in turn entered into an oral and implied contract with Seneca Structural Design. Bondy and

Deetz, who were officers or employees of Seneca, held themselves out as experts in the design and engineering of "post tension systems." Seneca was to provide design and engineering services for the repair and reconstruction of the Shekhter property, including recommendations and plans for an appropriate repair. Seneca agreed to provide a complete "turn key" post tension structure, and agreed the repair recommendation for the west end of Building 1 would properly integrate the east end of the building.

The Shekhters and C.H. Construction advised Seneca that it was required to obtain liability insurance. Rather than obtaining insurance, Seneca entered into an agreement with Klorman Construction under which Klorman Construction would contract with C.H. Construction to furnish the necessary labor and materials to repair the building, but would rely on the plans prepared by Seneca. In April 1995, C.H. Construction and Klorman Construction entered into a written agreement that superceded the original design contract with Seneca. The agreement obligated Klorman Construction to construct a complete "turn key" post tension structure and to provide seismic upgrade at the property in accordance with design plans and specifications. The Seneca defendants continued to provide design and engineering services on the project on behalf of Klorman Construction. The repair project was substantially completed in late 1996. Problems and defects in the construction began to manifest themselves in December 1996, "and progressed, expanded and continued thereafter." The Shekhters did not discover the relationship between the defects and the defendants' conduct until June 1998, and brought this lawsuit in August 1999.

Other litigation involving the Shekhters is relevant to an understanding of this action. The apartment complex, as the Shekhters eventually learned, contained significant defects when first built. After the earthquake, the Shekhters brought a construction defect lawsuit for damages caused by the earthquake, suing Reinforcing Post-Tensioning Systems (RPS), which had installed defective steel in the deck

supporting the apartments.[1] In that litigation, Bondy, an officer and director of Seneca who had a preexisting personal and business relationship with individuals affiliated with RPS, was retained as a consulting expert for RPS. At the same time, Bondy undertook to design and engineer the repair and reconstruction of the property for the Shekhters' general contractor. The relationship between Bondy and RPS was known to the Seneca defendants, and to Klorman Construction and William Klorman (collectively, Klorman defendants), but was not known to the Shekhters.

The essence of the Shekhters' complaint was that the Seneca and Klorman defendants fraudulently, negligently and in breach of contract recommended and used an inadequate redesign plan for the repair and reconstruction of the property. Instead of recommending the complete demolition and reconstruction of Building 1, Seneca recommended that only the collapsed west half be rebuilt, but that the east half that remained standing be fixed by using an external post tensioned cable system. The Seneca and Klorman defendants knew from the outset that this plan would be inadequate, because the east half still contained the original structural steel that was grossly underdesigned; they concealed this information from the Shekhters in order to generate larger fees. The complaint also alleged fraud in connection with the concealment of defects in the repairs after they were performed.

To avoid duplication, further factual allegations in the complaint will be described in connection with our discussion of the legal issues, *post*.

B. Procedural background.

The Shekhters amended the complaint seven times over a two year period.[2] As relevant to this appeal, the Shekhters asserted causes of action as follows:

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[1] The size of the steel in the deck had deviated from approved plans, and the method of connection between the steel pieces in the deck was inadequate and did not comply with code requirements.

[2] The Seneca and Klorman defendants stress the fact that the Shekhters have had seven opportunities to amend the complaint. As will appear, however, various of the

- Breach of contract against the Seneca defendants and Klorman Construction (first cause of action);
- Negligence against all defendants (second cause of action);
- Strict liability against Sunset Masonry (third cause of action);
- Fraud and negligent misrepresentation against the Seneca and Klorman defendants in connection with the original repair scheme (fourth and fifth causes of action);
- Fraud and negligent misrepresentation against Seneca and Bondy, for conduct in late 1996 and 1997 after problems with the repairs had manifested themselves (sixth and seventh causes of action).

Demurrers and motions to strike were filed and ruled upon with respect to various iterations of the complaint and various defendants. Of note were these:

- As to the second amended complaint, the trial court (Judge Kenneth Freeman) (1) overruled demurrers by Seneca, Bondy and Klorman Construction to the second cause of action for negligence, and (2) sustained, without leave to amend, demurrers by Seneca and Bondy to the sixth and seventh causes of action for fraud and negligent misrepresentation with respect to the work performed in 1996 and 1997.
- As to the third amended complaint, the court (Judge Freeman) overruled demurrers by the Seneca defendants and Klorman Construction to the fourth cause of action for fraud, and overruled demurrers by Bondy, Seneca and Klorman Construction to the fifth cause of action for negligent misrepresentation.[3]

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defendants' earlier demurrers were overruled by Judge Freeman and later re-asserted before Judge Sohigian.

[3] The trial court also denied the Seneca defendants' motion to strike certain allegations, including "allegations that refer to 'piercing the corporate veil'; agency/employee/partner/joint venture allegations; allegations that the Klorman contract

- William Klorman, who had not previously been named and served individually, demurred to the fifth amended complaint. The trial court (Judge Ronald Sohigian) overruled his demurrer to the second cause of action for negligence, and sustained, with leave to amend, his demurrer to the fourth and fifth causes of action for fraud and negligent misrepresentation.
- When the Shekhters filed their sixth amended complaint, the Seneca defendants again filed demurrers and motions to strike, in which William Klorman joined. Over the Shekhters' opposition – which pointed out the trial court had earlier overruled demurrers by the Seneca defendants – the trial court sustained the demurrers, with leave to amend.[4]
- Finally, the Shekhters filed the seventh amended complaint, to which the Seneca defendants demurred; the Klorman defendants joined in the demurrer. This time, the trial court (1) overruled the demurrer to various causes of action for breach of contract, (2) sustained the demurrers, without leave to amend, to the second cause of action for negligence and the fourth and fifth causes of action for fraud and negligent misrepresentation, and (3) granted a motion to strike portions of the complaint, including all references to alter ego and/or

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was made because Seneca was undercapitalized and did not have insurance; allegations that Seneca, Bondy, and Deetz were Klorman's agents, employees, etc.; [and] allegations . . . that Bondy was acting on behalf of Seneca and Klorman; . . . ."

[4] The trial court sustained the demurrer to the entire sixth amended complaint as uncertain, observing that the Shekhters continued to plead inconsistent theories of agency and conspiracy. The court sustained demurrers to the second cause of action for negligence, observing that the Shekhters did not allege ultimate facts showing the alleged defects had caused property damage other than defects in the improvements themselves. As to the fourth and fifth causes of action for fraud and negligent misrepresentation, the court observed that there was uncertainty whether there was any duty to determine and/or disclose other economically viable alternatives to repair and reconstruction of the improvements. The court also observed there were insufficient allegations of ultimate facts regarding fraudulent intent.

conspiracy allegations. In a later January 25, 2002 order, the court sustained, without leave to amend, the demurrers of Sunset Masonry – added as a Doe defendant in the fifth amended complaint – to the causes of action for breach of contract, negligence and strict liability.[5]

William Klorman then brought a motion for judgment on the pleadings, on the ground he was not a party to the contract Klorman Construction allegedly breached. That motion was granted, and judgment was entered in his favor on May 1, 2002. On June 7, 2002, the Shekhters dismissed without prejudice their remaining causes of action against Klorman Construction, the Seneca defendants and Sunset Masonry.[6] Notices of appeal were filed from the judgment in favor of Klorman, and purportedly from the other orders sustaining the demurrers of Sunset Masonry, the Seneca defendants and Klorman Construction.

DISCUSSION

I. Appealability.

The only final, appealable order or judgment is the one in favor of William Klorman. After the trial court's rulings on the seventh amended complaint, the Shekhters voluntarily dismissed without prejudice their remaining cause of action for breach of contract against the Seneca defendants and Klorman Construction, apparently according to a stipulation among the parties. A dismissal without prejudice does not operate to create an appealable order. (*Don Jose's Restaurant, Inc. v. Truck Ins. Exchange* (1997) 53 Cal.App.4th 115 [parties may not create appealability by stipulating to the dismissal of remaining causes of action].)

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[5] The complaint alleged that services and materials provided by Sunset Masonry were inadequate and/or defective.

[6] The Shekhters purported to dismiss causes of action for fraud and negligent misrepresentation against Sunset Masonry; however, those causes of action were never asserted against Sunset Masonry.

The Shekhters contend extraordinary circumstances justify the exercise of this court's discretionary power to treat the appeal as to the Seneca defendants and Klorman Construction as a writ, and the other parties do not object. (*Olson v. Cory* (1983) 35 Cal.3d 390, 401 [where records and briefs include the elements necessary to a writ proceeding, appellate court has the power to treat the purported appeal as a petition for writ of mandate, but should not exercise that power except under unusual circumstances].) The court's discretionary power has been exercised in circumstances where a dismissal constituted a final judgment as to some parties but not as to others. (*California Dental Assn. v. California Dental Hygienists' Assn.* (1990) 222 Cal.App.3d 49, 60 [to exercise the court's mandatory jurisdiction over some plaintiffs' appeals, while deferring consideration of the appeals of others, "would further the very fragmentation and multiplicity of appeals that the final judgment rule seeks to avoid"]; *Campbell v. Alger* (1999) 71 Cal.App.4th 200, 206 [all parties sought review of same issue, and it "would not serve justice" to decide an issue of first impression only as to the party as to which the judgment was final].)

While presenting no unusual issues, this case requires us to decide the issues raised in the Shekhters' appeal from the judgment for William Klorman. Because these issues are virtually identical to those in the appeals relating to the Seneca defendants and Klorman Construction, we conclude it is appropriate to treat the appeal as to those defendants as a writ, and to determine the questions presented on their merits as to all the Seneca and Klorman defendants, rather than only as to William Klorman. Considerations of judicial economy likewise suggest a determination on the merits in this five-year-old case that has not yet passed the demurrer stage.

The Shekhters' appeal as to Sunset Masonry suffers from a different problem; it is a premature appeal. The trial court disposed of all causes of action against Sunset Masonry, sustaining demurrers, without leave to amend, as to all the causes of action the Shekhters asserted against Sunset Masonry. However, no judgment was ever requested

by or entered for Sunset Masonry.[7] After this appeal was filed, the Shekhters lodged a proposed judgment in the trial court, but the record does not reflect any subsequent trial court action. While we hesitate to save an appeal for parties who fail to adhere to normal procedures to protect their interests, we will do so because the only impediment to appealability is arguably the trial court's failure to act after the Shekhters filed, albeit tardily, a proposed judgment. (See *Smith v. Hopland Band of Pomo Indians* (2002) 95 Cal.App.4th 1, 3, fn. 1 [premature appeal from order sustaining demurrer and granting motion to dismiss; "[a]lthough we fail to understand why the clearly established law on this point continues to be disregarded, in the interest of judicial economy, we shall deem the order to incorporate a judgment of dismissal"].) The only issue raised by the Shekhters as to Sunset Masonry is the negligence cause of action, the resolution of which raises the same legal principle as the negligence claims against the other defendants.[8] Accordingly, in the interest of judicial economy, we deem the order sustaining Sunset Masonry's demurrers to include an appealable judgment.

II. Fraud and negligent misrepresentation claims.

The Seneca and Klorman defendants argue, and the trial court held, that the Shekhters did not state claims for fraud and negligent misrepresentation in their fourth and fifth causes of action.[9] Except as to the negligent misrepresentation claim against the Klorman defendants, we disagree.

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[7] Sunset Masonry states the appeal is "technically premature," but it "has no objection to this Court's consideration of the appeal as against Sunset Masonry, whether from the Order or from the Judgment subsequently entered thereon." However, the record shows no subsequent judgment.

[8] The other claims against Sunset Masonry were a strict liability claim – which is not at issue as to any other defendant – and a breach of contract claim. In the opening brief, Shekhter makes no argument with respect to either of these claims.

[9] These are the causes of action as to which, in the third amended complaint, Judge Freeman overruled demurrers by Seneca defendants and Klorman Construction.

A. The fourth cause of action properly stated claims for fraud against the Seneca and Klorman defendants.

The essential allegations of a cause of action for fraud are: "(1) representation; (2) falsity; (3) knowledge of falsity; (4) intent to deceive; and (5) reliance and resulting damage (causation)." (5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 668, p. 123.) Active concealment or suppression of facts is the equivalent of a false representation. (*Id*., § 678, p. 136.) The Shekhters have alleged, "factually and specifically," each of these elements. (*Id.*, § 669, p. 125.)

To summarize,[10] the complaint alleged the Seneca defendants "concealed the fact that the repair methodology which he [Bondy] recommended was completely inappropriate particularly in light of the fact that the existing cord steel within the elevated post-tension decks which were the primary subjects of repair were grossly deficient." The Seneca defendants knew from the outset that their plan to repair rather than demolish and rebuild Building 1 would be inadequate, because the east half still contained the original structural steel that was grossly underdesigned. Bondy knew the original structural steel was underdesigned. A document written by Bondy and submitted to the City of Los Angeles about the repairs in 1995, which discussed the reasons for the building's failure during the earthquake, failed to disclose that a major cause of the damage was the underdesigned structural steel of the deck. Seneca recommended the inadequate repairs because it would earn considerably more engineering fees for the design and engineering of the post-tensioning system than if it recommended the simpler plan of demolishing all of Building 1. In addition, Seneca recommended the faulty repair plan to diminish the exposure of RPS in the original construction defect litigation. Klorman likewise knew and concealed from the Shekhters numerous facts, including that the existing structural steel in the building was grossly underdesigned, the proposed post

[10] The fourth cause of action for fraud consists of more than 14 pages, exclusive of allegations that are incorporated by reference.

tension system was not appropriate, and Bondy was consulting for RPS. Klorman benefited economically as a result of the scheme under which huge but ultimately unnecessary fees would be generated for repair of a structure that should have been demolished and rebuilt. The complaint also alleges that, in the course of the reconstruction, the Seneca and Klorman defendants concealed various defects in the repairs they designed and performed. In particular, they knew during the course of construction of the west half of the building that the elevated slab was substantially out of level with the east half of the building. They took steps to feather the junction of the two decks in order to conceal the out-of-level condition; other deficiencies also were concealed.[11]

These allegations sufficiently state the active suppression of material information about the repair of the building, knowledge that the repair plan would not work, and the intent to deceive the Shekhters. Reliance and resulting damage also are alleged. The complaint states that the Shekhters' knowledge of construction and engineering was extremely limited; they entrusted responsibility for design, engineering and construction issues to experienced and licensed individuals, including Bondy individually and on behalf of Seneca and Klorman; had they known the true facts, they would not have consented to the engagement of the Seneca defendants and Klorman Construction and would not have consented to the repair of the east end of Building 1 and would have insisted it be demolished and rebuilt. Instead, the structures have begun to manifest substantial failures and the cost of repair is estimated at 2.4 million dollars.

We briefly address specific contentions raised by each set of defendants, including a request for judicial notice by the Klorman defendants.

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[11] When the defects began to manifest themselves, the Seneca and Klorman defendants continued to take the position there was no problem with the construction, when they "knew full well that the design was inappropriate, and that construction was grossly deficient because the two as built portions of Building 1 were out of level with each other (but this condition was masked and concealed) and that steel in the new deck had been improperly placed."

1. Seneca defendants.

The Seneca defendants make several arguments. First, they contend they had no duty to disclose "the appropriate methodology of repair." We disagree. A duty of disclosure may exist when one party to a transaction has sole knowledge of material facts and is aware those facts are not known to the other party. (*LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 337; see Civ. Code, § 1572 [actual fraud includes "suppression of that which is true, by one having knowledge or belief of the fact," committed by a party to a contract with intent to deceive another party].)

Second, the Seneca defendants contend the Shekhters' complaint consists of "contentions, deductions, or conclusions of fact or law" and fails to plead facts to support those contentions. For example, Seneca says no facts support the allegation that Seneca recommended the repair methodology used for the east portion of Building 1, and this "factually-unsupported contention" is belied by certain other facts Seneca recites. Similarly, Seneca says the court may not consider allegations that Bondy "concealed the fact that the repair methodology which he recommended was completely inappropriate," because the word "concealed" is a "conclusion of law" and "the fact that the repair methodology was inappropriate" is a "conclusion of fact." We see no basis for these contentions. The question whether Seneca recommended the repair methodology used is plainly a question of fact. Although Seneca claims it did not make that recommendation, that is a question for the trier of fact or upon summary judgment. On demurrer we assume the Shekhters' version of the facts is true. The same is true for the question whether the repair methodology was appropriate. We must assume that it was not. Nor is the word "concealed" a conclusion of law. An allegation that an act is fraudulent is a conclusion of law. (4 Witkin, Cal. Procedure, *supra*, § 345, pp. 444-445.) An allegation that a person concealed or failed to disclose a particular fact is not. Seneca's other arguments that no facts are pled to establish intent, scienter and damages are equally without merit.

2. Klorman defendants.

The Klorman defendants contend that several elements are missing from the Shekhters' fraud claim as to them, including an actionable misrepresentation.[12] They observe that the fraud claims against them are based upon the purported concealment of flaws in the design and execution of the repairs, and that none of the circumstances in which nondisclosure or concealment may constitute actionable fraud are present. Those circumstances include "when the defendant had exclusive knowledge of material facts not known to the plaintiff" and "when the defendant actively conceals a material fact from the plaintiff . . . ." (*LiMandri v. Judkins, supra*, 52 Cal.App.4th at p. 336.) As to the latter, the Klorman defendants say there are no allegations of active concealment by them. As the Klorman defendants admit, however, the Shekhters alleged they "concealed the unevenness of their repairs by feathering the junction between the east and west portions of Building One." While they say this allegation is not "sufficiently detailed to support a fraud claim," we fail to see why not.

The Klorman defendants also contend the allegations do not show they had exclusive knowledge about flaws in the repair design. They contend Seneca also possessed that knowledge and, in addition, Naum Shekhter's deposition testimony shows he and the general contractor were aware that a partial rebuild of Building 1 might not be feasible, in light of reports received from other engineers. The contention that Seneca's knowledge renders Klorman's knowledge non-exclusive overlooks the fact that the complaint alleged the Klorman and Seneca defendants were agents of each other and conspired to defraud the Shekhters. (See discussion in part III.B, *post*.) Moreover, consideration of Naum Shekhter's deposition testimony would require us to take judicial

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[12] The Klorman defendants also contend the complaint lacked sufficient allegations of intent to defraud. We do not agree. "Intent, like knowledge . . . is a *fact*. Hence, the averment that the representation was made *with the intent to deceive the plaintiff*, or any other general allegation with similar purport, is sufficient." (5 Witkin, Cal. Procedure, *supra*, § 684, p. 143.)

notice of it, which we decline to do. The Klorman defendants did not request judicial notice of Shekhter's testimony by the trial court reviewing their demurrer; instead, they requested it for the first time on appeal.[13] We are not inclined to determine in the first instance whether Shekhter's deposition testimony constitutes an admission so inconsistent with the facts alleged in the complaint – that the Shekhters relied on Klorman's concealment of the design flaws in the repair plan – that we maydisregard the allegations in the complaint.[14] That matter is best resolved in the trial court on summary judgment, if appropriate.[15]

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[13] A number of cases hold that, in reviewing a demurrer, a trial court may properly take judicial notice of inconsistent statements made by a plaintiff in his or her deposition, and disregard any inconsistent allegations in the complaint. (E.g., *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604-605; contra *Garcia v. Sterling* (1985) 176 Cal.App.3d 17, 22 [taking issue with cases permitting court to consider the pleading party's deposition or other sworn testimony when determining the truth or falsity of matters asserted in the party's pleading; "[a]lthough the existence of statements contained in a deposition transcript . . . can be judicially noticed, their truth is not subject to judicial notice"].) An appellate court may take judicial notice of matters even if the trial court was not requested to do so. (*Hogen v. Valley Hospital* (1983) 147 Cal.App.3d 119, 125.)

[14] Naum Shekhter testified, for example, he hired CH Construction, his general contractor, "to do whatever necessary to rebuilt Northgate Apartments," and deferred to CH Construction to make decisions on methods of repair. He testified he received an opinion from another firm, which stated the concrete deck was not sound enough to take any more stress and recommended that it not be repaired. Shekhter said his contractor had conversations with several engineers, some of whom said the building could be saved and others of whom said it could not. He also testified that he "left it up to . . . them and the whole construction team and design team to make a decision what can and cannot be done . . . ."

[15] The Klorman defendants also contend that, "despite allegations in the complaint to the contrary, the Shekhters did not in fact rely on any alleged concealment by the Klorman defendants." This argument likewise depends solely on Shekhter's deposition testimony, which we decline to consider.

B. The fifth cause of action properly stated a claim for negligent misrepresentation against the Seneca defendants, but not against the Klorman defendants.

Both the Seneca defendants and the Klorman defendants argue that the complaint did not state a claim for negligent misrepresentation because, unlike a fraud claim, a negligent misrepresentation requires an affirmative statement, and therefore cannot be premised on an implied representation or on non-disclosure or concealment. (E.g., *Wilson v. Century 21 Great Western Realty* (1993) 15 Cal.App.4th 298, 306 [negligent misrepresentation is a species of fraud requiring a positive assertion; an implied assertion or representation is not enough]; see 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 720, p. 819 ["[w]here the defendant makes false statements, honestly believing that they are true, but without reasonable ground for such belief, he may be liable for negligent misrepresentation"] [italics omitted].)[16] While this is no doubt the general rule, the Shekhters alleged the Seneca defendants were licensed professionals who affirmatively recommended the faulty repair plan, impliedly representing it would work. The Supreme Court has pointed out that an expression of professional opinion, when it is not merely a casual expression of belief but "'a deliberate affirmation of the matters stated,'" may be regarded as a positive assertion of fact. (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 408 [accountants' statements in audit opinions], quoting *Gagne v. Bertran* (1954) 43 Cal.2d 481, 489.) We conclude the complaint stated a cause of action for negligent misrepresentation as against the Seneca defendants. On the other hand, it is not alleged the Klorman defendants made any affirmative statements of fact. The

[16] See Civil Code section 1710, subdivision 2 [defining deceit as including "[t]he assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true"]; Civil Code section 1572, subdivision 2 [defining actual fraud in a contract setting to include the "positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true"].

complaint accordingly did not state a cause of action for negligent misrepresentation against them.

C. The trial court properly sustained demurrers to the fraud and negligent misrepresentation claims in the sixth and seventh causes of action.

The Shekhters alleged a separate cause of action for fraud against Seneca and Bondy relating to events in 1996 and early 1997, when the Shekhters noticed "a manifestation of some sort of structural and/or related failure or problem" and asked Seneca and Bondy to evaluate the condition. Bondy reported there were no problems and the manifestation was normal. In January 1998, the Shekhters learned the west portion of Building 1 was substantially compromised and Bondy's representations to the contrary were false, and alleged Bondy made his misstatements to conceal his earlier fraudulent and negligent acts.

The trial court (Judge Freeman) sustained the demurrer to this cause of action, without leave to amend, concluding that the complaint alleged a misrepresentation, but did not allege "any intent to induce reliance." In addition, the complaint alleged only that the Shekhters "acted reasonably in [their] reliance thereon." Because the complaint did not allege any "alteration of a legal relationship," there could be no damages arising from the alleged misrepresentation, and therefore no cause of action. In short, the Shekhters alleged no facts showing they relied on the alleged misrepresentation to their detriment.[17]

The Shekhters contend on appeal that the trial court erred, and the second amended complaint "adequately pled" reliance and damage from the misrepresentation. We find no error in the trial court's ruling. The second amended complaint was barren of any allegations showing either that the Shekhters changed their position in 1997 in reliance on Bondy's representation that there were no problems with the repairs, or that

[17] When Seneca demurred in the trial court, and pointed out the Shekhters' "half-hearted attempt to plead justifiable reliance," the Shekhters' opposition merely stated that "[t]hese Causes of Action are more than adequately plead [*sic*]."

they were damaged as a result. (See 5 Witkin, Cal. Procedure, *supra*, § 687, p. 147 ["[w]hatever form it takes, the injury or damage must not only be distinctly alleged but its causal connection with the reliance on the representations must be shown"].) The Shekhters argue on appeal that Bondy's alleged misrepresentation caused them to delay repairing the building, and consequently to incur higher costs. However, the Shekhters do not state they could truthfully amend their complaint to allege delay and increased costs,[18] instead maintaining the causes of action were properly pled in the first place. Since they were not, we conclude the demurrers to the sixth and seventh causes of action were correctly sustained.

III. The trial court erred in striking alter ego, conspiracy and "double agency" allegations from the seventh amended complaint.

The trial court granted a motion by the Seneca defendants to strike various allegations in the seventh amended complaint, and the Shekhters contend this was error. We discuss the allegations in turn.

A. Alter ego allegations.

The complaint alleged Bondy and Deetz were suitable subjects of alter ego liability for the acts and omissions of Seneca Structural Design. The Shekhters asserted Seneca (and other corporations doing business in the same offices with the same personnel) were grossly under-capitalized; did not maintain insurance coverage for errors and omissions relating to engineering design or construction activities; did not adhere to corporate formalities; and were mere shells designed to insulate Bondy and Deetz from liability for acts done under the auspices of the corporate shells. The Shekhters further alleged the exploitation and misuse of the corporate shells was part of an ongoing

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[18] The current (seventh amended) complaint filed in November 2001 did not specifically allege that the Shekhters had actually incurred repair costs, stating only that they "will incur and/or has [*sic*] incurred repair costs," and "have been required to expend sums to . . . make temporary repairs . . . ."

business practice by Bondy and Deetz, who earlier disbanded a corporation that had been sued on many occasions.

The Seneca defendants contend the alter ego allegations were speculative and contained no supporting facts. The allegations were clear, however, and we know of, and are cited to, no principle requiring more detailed factual allegations at this stage of litigation. While the trial court has the discretion to "[s]trike out any irrelevant, false, or improper matter" (Code Civ. Proc., § 436, subd. (a)), these allegations do not fall into any of those categories.[19] Striking them was error.

B. Conspiracy allegations.

The Shekhters alleged the Seneca and Klorman defendants conspired with each other to defraud them. Conspiracy to defraud is not a separate cause of action, but if proved would render each participant in the wrongdoing responsible as a joint tortfeasor for all damages ensuing from the wrong, whether or not the participant was a direct actor and regardless of the degree of the participant's activity. (*Doctors' Co. v. Superior Court* (1989) 49 Cal.3d 39, 44.) The complaint also alleged the various defendants were "agents, employees, partners, and/or joint venturers" of each other. The trial court granted a motion to strike the conspiracy allegations, apparently concluding the Shekhters were improperly pleading inconsistent theories of agency and conspiracy.[20] In an earlier demurrer ruling, the court made a similar statement, citing *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 512 ("*Litton*"), which reaffirmed the rule

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[19] In the trial court, Seneca argued the alter ego allegations "are spelled out in some detail at paragraph 2.3 (and its subparts), but bear no semblance to the truth." If so, that is a matter for summary judgment, not a motion to strike.

[20] In sustaining an earlier demurrer, the trial court found that the Shekhters' agency allegations "indicate the impossible situation every defendant was the agent of every other defendant," and noted California law does not recognize the concept of a conspiracy between agents and their principals, so these were "mutually contradictory theories."

that duly acting agents and employees cannot be held liable for conspiring with their principals.

The trial court's ruling was erroneous. Under the "agent's immunity rule," the agents of a corporation cannot conspire with their corporate principal where they act in their official capacities on behalf of the corporation, and not as individuals for their individual advantage. (*Litton, supra*, 7 Cal.4th at p. 512, fn. 4.) For example, Klorman cannot conspire with Klorman Construction when acting on behalf of the corporation. But the Shekhters clearly allege the Seneca and Klorman defendants conspired with each other to defraud the Shekhters. The further allegation that the Seneca and Klorman defendants were acting as agents and joint venturers of each other in no way implicates the agent's immunity rule. Klorman, for example, was not (and could not have been) acting in any official corporate capacity on behalf of Seneca Structural Design, and therefore is capable of conspiring with Seneca to defraud the Shekhters. A cause of action for civil conspiracy does not arise "if the alleged conspirator, though a participant in the agreement underlying the injury, was not personally bound by the duty violated by the wrongdoing and was acting only as the agent or employee of the party who did have that duty." (*Doctors' Co. v. Superior Court, supra*, 49 Cal.3d at p. 44.) However, each of the defendants had an individual duty not to defraud the Shekhters. The agent's immunity rule "does not preclude the subjection of agents to conspiracy liability for conduct which the agents carry out 'as individuals for their individual advantage' and not solely on behalf of the principal [citation]." (*Doctors' Co. v. Superior Court, supra*, 49 Cal.3d at p. 47.) That is precisely the case here.[21]

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[21] The Seneca and Klorman defendants make various tortured arguments, including that the Shekhters somehow waived their right to appeal the order striking the conspiracy allegations. The arguments are without merit. Previous motions to strike were placed off calendar as moot and demurrers were sustained with leave to amend. The Skekhters did so, and now appeal the trial court's order striking the conspiracy allegations without leave to amend. The court did not strike the agency allegations. There was no waiver.

C. "Double agency" allegations relating to Bondy and RPS.

The Shekhters' complaint included additional causes of action for fraud and negligent misrepresentation against Bondy and Seneca (the ninth and tenth causes of action). These causes of action concerned a claim that Bondy was secretly acting as an agent for RPS – the company responsible for the defective steel in the original construction – at the same time Bondy was working for the Shekhters. The parties refer to these as "double agency" causes of action and allegations. The Shekters agreed to dismiss their "double agency" fraud claims against Bondy as a part of a settlement in the RPS construction defect litigation. However, the Shekhters continued to allege facts throughout the complaint pertaining to Bondy's personal and business relationship with RPS, as these facts explained the reason Bondy recommended the faulty repair plan and his motivation for allegedly defrauding the Shekhters. Moreover, the dismissed ninth and tenth causes of action remained in the seventh amended complaint, albeit with a heading stating that the causes of action had been dismissed with prejudice.

The trial court granted a motion to strike portions of the seventh amended complaint, including the entire ninth and tenth "double agency" causes of action, as well as all "double agency" allegations appearing elsewhere in the complaint. While it was appropriate to strike the ninth and tenth causes of action in their entirety, as all parties agree those causes of action were to be dismissed, no basis existed for striking allegations elsewhere in the complaint material to the fraud claims that remain at issue. To that extent, the order doing so was erroneous.

IV. The trial court erred in sustaining demurrers to the Shekhters' negligence claims.

The trial court sustained all demurrers to the Shekhters' second cause of action for negligence. In that cause of action, the Shekhters alleged the Seneca and Klorman defendants failed to properly design, engineer and construct the repair, restoration and rebuilding of the apartment complex, and Sunset Masonry provided inadequate and/or

defective services and materials, causing or contributing to damage to the property. The Shekhters sought damages of $3 million, "including, but not limited to, investigative costs, relocation costs, costs of repair, loss of market value, and loss of use."[22] Citing *Aas v. Superior Court* (2000) 24 Cal.4th 627 (*Aas*) and other precedent, the trial court observed that (1) negligent performance of a construction contract, without violation of an independent duty, did not justify imposition of tort damages, and (2) the Shekhters did not allege facts showing the alleged defects caused property damage "other than defects in the improvements themselves."[23] We conclude this was error.

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[22] Particularly, "defendants designed and engineered an external post-tension system at buildings one and two that were ostensibly designed to reinforce the subject structure." The complaint continued:

> "[T]he structure in question has now began [*sic*] to manifest substantial failures and deficiencies including but not limited to manifested failures on the elevated concrete deck, at supporting walls, and in various other particulars. Further, the complex . . . is subject to water intrusion, is cosmetically unsatisfactory, and is subject to various other problems and deficiencies specifically due to the inadequate design and engineering work of defendants."

Elsewhere in the complaint, the Shekhters alleged that the substantial failures and deficiencies began to manifest themselves and resulted in property damage:

> "including, but not limited to, observable failures on the elevated concrete decks at supporting walls and in other particulars; the failures include substantial and progressive cracking throughout the elevated decks; the west end elevated slab of Building 1 is substantially out of level with the east end causing and/or contributing to structural deficiencies, water intrusion drainage problems and related conditions which must be repaired and/or abated; Building 2 is also beginning to manifest property damage as a result of defects; other aspects of the construction are also subject to water, drainage and other problems as well. The cost of repair is estimated in the amount of 2.4 million dollars."

[23] These reasons are given in the trial court's November 1, 2001 order sustaining demurrers to the sixth amended complaint with leave to amend. In its ruling on the seventh amended complaint, the court cited the grounds stated in the defendants' moving papers, which relied on the court's earlier order.

In *Aas*, the Supreme Court held that, under "settled law limiting the recovery of economic losses in tort actions," a homeowner may not recover damages in negligence from a contractor or subcontractor for construction defects that have not caused property damage. (*Aas v. Superior Court, supra*, 24 Cal.4th at p. 632.) The Shekhters contend *Aas* does not apply, because the complaint clearly alleged property damage, including "substantial and progressive cracking" in the elevated decks of the apartment complex that were improperly repaired. The defendants effectively concede the complaint alleged property damage, but maintain the Shekhters do not allege "the cracking in the rebuilt and repaired concrete deck, columns or walls" has harmed any other part of the complex. They contend that under *Aas*, the property damage that permits a negligence claim must be damage to property other than the property repaired[24] and, in the absence of damage to other property, the economic loss rule bars recovery.[25]

We conclude that the defendants misconstrue *Aas*. In our view, requiring damage to property other than the repaired structure would improperly apply principles applicable to defective products to a case premised upon negligent design and engineering. Nothing in *Aas* requires that result.

To explain our conclusion, we must review the case law surrounding the proper application of the economic loss doctrine. Before we do, however, it may be helpful to bear in mind the several principles we must apply:

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[24] The complaint refers in paragraph 49 to "the elevated post-tension decks which were the primary subjects of repair . . . ."

[25] In their reply brief, the Shekhters respond that defendants' negligence did in fact cause damage to other parts of the building in addition to the parts defendants were responsible for repairing. The Shekhters point out the complaint alleged that "[t]he structures in question have now begun to manifest substantial failures and deficiencies" and that the "structures in question" include not just the concrete slabs but both parts of Building 1. Moreover, the Shekhters say, the complaint alleged that "Building 2 is also beginning to manifest property damage as a result of defects . . . ."

- The Supreme Court "first recognized a remedy in the law of negligence for construction defects causing property damage" in 1961. (*Aas, supra*, 24 Cal.4th at p. 637, citing *Stewart v. Cox* (1961) 55 Cal.2d 857 (*Stewart*) [upholding homeowner's judgment against a subcontractor who negligently applied concrete to a swimming pool, causing the release of water that damaged the pool, lot and house]; see also *Sabella v. Wisler* (1963) 59 Cal.2d 21 (*Sabella*) [upholding judgment for property damage caused by negligent residential construction, where defendant's negligent preparation of the lot on which it built a house, in combination with a subcontractor's careless plumbing work, later caused leaks, subsidence and damage to the house].)
- While negligent performance of a construction contract, without more, does not justify an award of tort damages, "conduct amounting to a breach of contract becomes tortious when it also violates a duty independent of the contract arising from principles of tort law." (*Aas, supra*, 24 Cal.4th at p. 643, citing *Erlich v. Menezes* (1999) 21 Cal.4th 543, 550-554.)
- Cases holding the builders of homes liable for construction defects causing property damage – including *Stewart* and *Sabella*, among many other negligence and strict liability cases – "may be understood as recognizing such an independent duty." (*Aas, supra*, 24 Cal.4th at p. 643.)
- The independent duty recognized in construction defects cases "is limited by the rule in *Seely* [*v. White Motor Co.* (1965) 63 Cal.2d 9, 18] . . . ." (*Aas, supra*, 24 Cal.4th at p. 643.) *Seely*, discussing strict liability in tort, established the principle that "[e]ven in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone." (*Seely v. White Motor Co., supra*, 63 Cal.2d at p. 18 [barring recovery of economic damages representing the lost benefit of a bargain].)

With these points in mind, we examine the *Aas* case in greater detail, and then explain our conclusion that *Aas* does not require damage to property "other than" the repaired structure.

A. *Aas v. Superior Court*

In *Aas v. Superior Court*, the Supreme Court addressed the question whether plaintiffs could recover in negligence a money judgment representing "the cost to repair, or the diminished value attributable to," construction defects that had not caused property damage. The defects consisted of deviations from applicable building codes or industry standards, including the failure to properly construct shear walls and connect them to other building components and the failure to properly support electrical cables. (*Aas, supra*, 24 Cal.4th at pp. 635, 633, fn. 1.) The Court examined "the nebulous and troublesome margin between tort and contract law" (*id*. at p. 635), and explained that any construction defect can diminish the value of a house. However, "the difference between price paid and value received, and deviations from standards of quality that have not resulted in property damage or personal injury, are primarily the domain of contract and warranty law or the law of fraud, rather than of negligence." (*Id.* at p. 636.) *Aas* did not address "liability for construction defects that *have* caused property damage" (*Id.* at p. 635 [original italics]), nor did *Aas* state that property damage caused by a construction defect must occur to property other than the property defectively constructed in order to support a negligence action.[26] *Aas* merely held that, where a construction defect has not

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[26] In a footnote describing the various conclusions of other jurisdictions on the application of the economic loss rule, the Supreme Court describes, but does not further discuss, a Nevada case holding that no liability existed for construction defects that caused damage only to a house and its components. (*Aas, supra*, 24 Cal.4th at p. 636, fn. 7, citing *Calloway v. City of Reno* (Nev. 2000) 993 P.2d 1259, 1263-1270.) (The Nevada Supreme Court has since held that a Nevada statute, enacted after the claims in *Calloway* arose, permits negligence claims to be alleged in construction defect cases brought under the statute. (*Olson v. Richard* (Nev. 2004) 89 P.3d 31, 32-33.)) Elsewhere in *Aas*, the Court describes its own decision holding that "persons whose homes 'suffered serious damage from cracking caused by ill-designed foundations' [citation] could sue the construction lender as the joint venturer of the developer on the theory that it owed the

actually caused any property damage, a homeowner may not recover damages in negligence from a contractor or subcontractor.

The Klorman defendants contend the Shekhters alleged damage only to "the repairs themselves." They say that, under *Aas*, property damage compensable in tort can "only" exist "when a defective component damages other parts of the same product." (*Aas, supra*, 24 Cal.4th at p. 641.) *Aas* says nothing of the sort. It states, in discussing construction defect liability based on strict products liability theory, that property damage can exist in those circumstances, not that those are the "only" circumstances under which property damage compensable in tort may exist. Indeed, *Aas* discusses and explains the "two distinct theories" (*id.* at p. 638) of tort liability in the law of construction defects which developed following the decisions in *Stewart, supra,* and *Sabella, supra*. These are:

- The strict products liability theory which was first applied to mass-produced homes in 1969. (*Kriegler v. Eichler Homes, Inc.* (1969) 269 Cal.App.2d 224.) The *Aas* court explained that, as strict products liability theory developed, it became well-established that the plaintiff cannot recover, either in strict liability or negligence, from a manufacturer for the cost of repairing a defective product or for loss of business income due to a defective product. Damages are recoverable for physical injury, but not for the benefit of a contractual bargain (such as the cost of repairing a defective product or compensation for its

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plaintiffs a duty to 'exercise reasonable care to protect them from damages caused by major structural defects' [citation]." (*Aas, supra*, 24 Cal.4th at p. 648, fn. 12, quoting *Connor v. Great Western Sav. & Loan Assn.* (1968) 69 Cal.2d 850, 856, 866.) The Court stated that to the extent *Connor* (whose holding that construction lenders could be liable in negligence for construction defects was rejected by the Legislature in Civil Code section 3434) was relevant, it was "entirely consistent with the rule we apply today." (*Aas, supra*, 24 Cal.4th at p. 648, fn. 12.)

diminished value).[27] (*Aas, supra*, 24 Cal.4th at pp. 639-640.) For example, homeowners were not allowed to recover in negligence for the cost of replacing water pipes known to be defective, but which had not yet leaked. (*Zamora v. Shell Oil Co.* (1997) 55 Cal.App.4th 204, 208-211.) Then, "[o]ver time, the concept of recoverable physical injury or property damage expanded to include damage to one part of a product caused by another, defective part." (*Aas, supra*, 24 Cal.4th at p. 641; see, e.g., *Jimenez v. Superior Court* (2002) 29 Cal.4th 473, 484 ["the manufacturer of a defective window installed in a mass-produced home may be held strictly liable in tort for damage that the window's defect causes to other parts of the home in which it is installed"]; *Stearman v. Centex Homes* (2000) 78 Cal.App.4th 611 [builder was strictly liable in tort for damages that a defective foundation caused to the interior and exterior of a home].)

- The second theory in the law of construction defects, *Aas* explains, is the theory of negligence recognized in *Biakanja v. Irving* (1958) 49 Cal.2d 647 (*Biakanja*), further developed in *J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799 (*J'Aire*), and applied in the *Stewart* and *Sabella* construction defect cases as well as in numerous other circumstances. Under *Biakanja* and *J'Aire*, liability in negligence could be imposed for negligent performance of a contractual obligation resulting in damage to the property or economic interests of a person not in privity, if the defendant was under a duty to protect those interests. (*Aas, supra,* 24 Cal.4th at pp. 643-644.) The existence of a duty is determined

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[27] This distinction rests on the nature of the responsibility a manufacturer must undertake in distributing his products. (*Seely v. White Motor Co., supra*, 63 Cal.2d at p. 18.) Thus, a consumer "should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market," but may "be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will." (*Ibid.*)

on a case by case basis, and is a matter of policy involving the balancing of six factors identified in *Biakanja*,[28] one of which is "'the degree of certainty that the plaintiff suffered injury . . . .'"[29] (*Aas, supra*, 24 Cal.4th at p. 644, quoting *Biakanja, supra*, 49 Cal.2d at p. 650.) In *J'Aire*, the court applied the *Biakanja* factors to find that a "special relationship" existed permitting the recovery of economic losses.[30] (*J'Aire, supra*, 24 Cal.3d at pp. 804-805; see *Aas, supra*, 24 Cal.4th at p. 644.) Subsequent cases have applied *J'Aire* to cases where privity of contract exists, as well as in a wide variety of cases where it does not. (*Aas, supra*, 24 Cal.4th at pp. 644-645 [citing cases].) As *Aas* informs us, *Stewart* and *Sabella* were applications of the *Biakanja* negligence theory. In *Stewart*, for example, the negligent concrete subcontractor's work "was specifically intended to affect the plaintiffs; damage to their property was foreseeable if the work were negligently done; and serious damage actually occurred." (*Aas, supra,* 24 Cal.4th at p. 638 [describing *Stewart*].)

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[28] The six factors are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached, and the policy of preventing future harm. (*Biakanja v. Irving, supra,* 49 Cal.2d at p. 650.)

[29] In *Aas*, where the construction defects had not caused property damage, the Supreme Court found an "objective obstacle" to tort recovery in the factor looking to "'the degree of certainty that the plaintiff suffered injury.'" (*Aas, supra,* 24 Cal.4th at p. 646, citing *J'Aire, supra*, 24 Cal.3d at p. 804.) The plaintiffs in *Aas* could not recover in negligence because of the absence of "appreciable, nonspeculative, present injury," which is a "fundamental prerequisite" to a tort claim. (*Aas, supra*, 24 Cal.4th at p. 646.)

[30] *J'Aire, supra,* 24 Cal.3d at pp. 802, 808, held that a contractor who undertakes construction work under a contract with the owner of premises may be held liable in tort for business losses suffered by a lessee when the contractor negligently fails to complete the project with due diligence.

B. *Aas* does not require damage to property "other than" the repaired structure.

The defendants' theory that the damage must be to property "other than" the property defectively repaired is based on cases applying products liability theory where damage caused by the defective product to persons or other property is recoverable, but damage to the product itself is not. (See *ante*, fn. 27 and accompanying text.) Defendants in effect ask us to consider the "repairs themselves" a product, which must damage some other property in order to produce recoverable tort damages. However, the Shekhters alleged the Seneca and Klorman defendants provided negligent design and engineering services, not that they manufactured a defective product or installed a defective product in a mass-produced home. (E.g., *Jimenez v. Superior Court, supra*, 29 Cal.4th at p. 484.)[31] In short, this is a construction defect case that does not arise from a defective product, but instead arises from negligent engineering and design services.[32] (See *North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 780-781 [distinguishing cases involving sale of goods or products from those relating only to the performance of services]; cf. *Cooper v. Jevne* (1976) 56 Cal.App.3d 860, 868 [liability at issue was "the malpractice liability of a professional [architect] for negligence in the rendition of his services and not that of a manufacturer for defects in his product"].) Thus, the products liability/construction defect cases that require damage to "other" property, and do not permit recovery for damage to the defective product itself, are simply not applicable.

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[31] "[T]he economic loss rule allows a plaintiff to recover in strict products liability in tort when a product defect causes damage to 'other property,' that is, property *other than the product itself*." (*Jimenez v. Superior Court, supra,* 29 Cal.4th at p. 483 [original italics].)

[32] As to Sunset Masonry, the Shekhters alleged it provided both services and materials that were inadequate and/or defective.

Accordingly, we see no basis for concluding that the design and engineering of a post-tension system to reinforce a structure is a "product" which, if it fails, must cause damage to property other than the structure itself in order to support a cause of action for negligence. On the contrary, the faulty repair plan alleged in this case is analogous to the negligence in *Sabella, supra*, 59 Cal.2d 21, where the defendants constructed a house on an improperly compacted lot, which eventually resulted in damage to the house. Negligent preparation of the lot, upon which the house was constructed, is directly analogous to the allegedly faulty plan for the execution of repairs to the structure here.[33] Neither involved a "product" and both resulted in serious damage to the property constructed or, in this case, repaired.[34]

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[33] The *Aas* court observed that today, in the wake of *Seely v. White Motor Co., supra,* 63 Cal.2d 9, the plaintiffs in *Stewart* and *Sabella* "would argue that defective components of the property . . . had damaged other components, including the houses." (*Aas, supra*, 24 Cal.4th at pp. 641-642.) Even so, in this case the result would be the same under a products liability theory. One would argue that the "product" is the design or plan for the repairs, not the "repairs themselves," and the faulty design – like the faulty preparation of the lot in *Sabella* – caused damage to the structure upon which the design was implemented. (Cf. *Stearman v. Centex Homes, supra,* 78 Cal.App.4th at p. 623 [rejecting "strained argument that for purposes of product liability law, a home is the equivalent of . . . a toaster which, when it catches fire due to faulty wiring, can be said to have injured only itself"; the analogy "just doesn't fit: When a defective foundation results in cracked walls, ceilings and countertops throughout the home, recovery of strict liability damages is not barred by the economic loss rule"].)

[34] The defendants also cite *Erlich v. Menezes, supra*, 21 Cal.4th 543, for the proposition that plaintiffs cannot obtain an award of tort damages for the negligent performance of a construction contract. In *Erlich*, a jury had found the contractor breached his contract by negligently constructing plaintiffs' home; the jury awarded the cost of repair of the extensive damages to plaintiffs' home, and also awarded emotional distress damages. The Supreme Court held that homeowners may not recover damages for emotional distress based upon breach of a contract to build a house. (*Id.* at p. 548.) The Court observed that "[t]his is a claim for negligent breach of a contract, which is not sufficient to support tortious damages for violation of an independent tort duty." (*Id.* at p. 554.) According to the concurring and dissenting opinion, the majority concluded that plaintiffs did not present an independent claim for negligence. (*Id.* at p. 562 [Werdegar, J., concurring and dissenting].)

In sum, the cases have long held that conduct amounting to a breach of contract becomes tortious when it also violates a duty independent of contract, and such an independent duty is recognized in cases assessing liability for construction defects causing property damage. (*Aas, supra*, 24 Cal.4th at p. 643.) Those cases require, inter alia, a showing of "appreciable, nonspeculative, present injury" as a "fundamental prerequisite," and "[c]onstruction defects that have not ripened into property damage, or at least into involuntary out-of-pocket losses, do not comfortably fit the definition" of appreciable harm. (*Id.* at p. 646.) In this case, the defects have "ripened into property damage," including "substantial and progressive cracking throughout the elevated decks," "observable failures . . . at supporting walls, and in various other particulars," and "water intrusion drainage problems and related conditions"; "Building 2 is also beginning to manifest property damage . . . ." The Shekhters clearly cannot recover for repairs that are merely "cosmetically unsatisfactory" or for damage that has not yet occurred. They can, however, recover damages in tort if they are able to prove, among other things, that the defective design resulted in "appreciable, nonspeculative, present" physical damage to the repaired structure. On demurrer, of course, we must assume the allegations of "substantial and progressive cracking throughout the elevated decks" and other damage in fact constitutes appreciable harm. It was therefore error to sustain the demurrers to the negligence cause of action.

DISPOSITION

The judgment in favor of William Klorman is reversed and the cause remanded to the trial court for further proceedings. The order sustaining demurrers to all causes of action against Sunset Masonry & Concrete, Inc., construed to include a judgment of dismissal, is reversed to the extent it dismisses the second cause of action for negligence, and is otherwise affirmed. Let a peremptory writ of mandate issue directing the trial court to vacate its order of January 4, 2002, to the extent the order (1) sustained the demurrers of Seneca Structural Design, Inc., Kenneth B. Bondy and Chris R. Deetz to the second, fourth and fifth causes of action for negligence, fraud and negligent

misrepresentation, (2) sustained the demurrers of W.M. Klorman Construction, Inc. and William Klorman to the second and fourth causes of action for negligence and fraud, and (3) granted the motion to strike, and directing the trial court to make a new order overruling those demurrers and denying the motion to strike to the extent described in this opinion. The Shekhters are to recover their costs on appeal.

CERTIFIED FOR PUBLICATION

BOLAND, J.

We concur:

COOPER, P.J.

RUBIN, J.