IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

SAMANTHA A. DUNFEE, and CHRISTINA M. DUNFEE, Administrators of the Estate of CARL T. DUNFEE, *et al.*	)	
Plaintiffs,	)	
v.	)	C.A. No. N16C-04-108 RRC CONSOLIDATED CASES
KGL HOLDINGS RIVERFRONT, LLC d/b/a EVERGREEN APARTMENTS AT RIVERFRONT HEIGHTS, a Delaware limited liability company, EVERGREEN PROPERTIES MANAGEMENT, INC., a Delaware corporation, EVERGREEN APARTMENT GROUP, INC., a Delaware corporation, ANTHONY FRAGLE, CONTINENTAL CASUALTY COMPANY, a foreign corporation, VILLAGE OF WINDHOVER, L.L.C., a Delaware limited liability company, GLOBAL REALTY SERVICES GROUP, LLC a/k/a GRS GROUP/CORTEQ, a foreign corporation, SAV ENGINEERS, INC., a foreign corporation, STEPHEN VARITIKIAS, KEYCORP, individually and d/b/a KEYBANK NATIONAL ASSOCIATION, and KEYBANK NATIONAL ASSOCIATION, A-1 AIR CONDITIONING, HEATING & REFRIGERATION SERVICE, INC., and WILLIAM HENSEL, individually and d/b/a A-1 AIR CONDITIONING, HEATING & REFRIGERATION SERVICE, INC.,	)	
Defendants.	)	

Submitted: February 13, 2019
Decided: April 30, 2019

On Defendants SAV Engineers, Inc.'s and Stephen Varitikias'
Motion to Dismiss Plaintiffs' Complaint and Defendants' Cross Claims. **DENIED**.

On Defendant Global Realty Services, Inc.'s
Motion to Dismiss Plaintiffs' Complaint and Defendants' Cross Claims. **DENIED.**

On Defendants Keycorp's and Keybank National Association's
Motion to Dismiss Plaintiffs' Complaint. **GRANTED.**

MEMORANDUM OPINION

Gary S. Nitsche, Esquire, William R. Stewart, III, Esquire, and Rachel D. Allen, Esquire, Weik Nitsche & Dougherty, LLC, Wilmington, Delaware, Attorney for Plaintiffs Samantha Dunfee and Christina Dunfee.

Joseph J. Rhoades, Esquire, Rhoades & Morrow, LLC, Wilmington, Delaware, Attorney for Plaintiff Jodi Colatriano.

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Elizabeth C. Grabey, Esquire, McGivney, Kluger & Cook, P.C., Wilmington, Delaware, Attorney for Defendant Village of Windhover, LLC.

Christina M. Belitz, Esquire, Polsinelli PC, Wilmington, Delaware, Attorney for Defendants Keycorp and Keybank National Association.

Michael J. Logullo, Esquire, Rawle & Henderson, LLP, Wilmington, Delaware, Attorney for Defendant Global Realty Services, Inc.

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COOCH, R.J.

I. INTRODUCTION

Before this Court are the Motions to Dismiss Plaintiffs' Complaint of Defendants Keycorp and Keybank National Association (collectively "Keybank"), Global Realty Services, Inc. ("GRS"), and SAV Engineers, Inc. ("SAV") with Stephen Varitikias ("Varitikias"); collectively the "moving defendants."[1] This case arises from the injuries and deaths of four decedents as a result of carbon monoxide exposure at Evergreen Apartments at Riverfront Heights ("Evergreen Apartments") on March 25, 2016.[2]

Plaintiffs assert negligence on the part of the current and previous apartment owners, the property managers, the purchaser's lender, the insurance company, certain contractors, and various individuals. Of import to the moving defendants' instant motions is Plaintiffs' allegation that the moving defendants negligently performed a property valuation assessment ("assessment"), upon which Defendant KGL Riverfront Holdings, LLC ("KGL")—the owner of Evergreen Apartments at the time of the carbon monoxide exposure—relied and that reliance caused Plaintiffs' harm.

Defendants Keybank, GRS, SAV, and Varitikias, seek dismissal pursuant to Superior Court Rule 12(b)(6). Keybank alone also seeks dismissal pursuant to Rule

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[1] Defendants GRS, SAV, and Varitikias also move to dismiss any cross claims filed by Co-Defendants, based on a lack of liability towards Plaintiffs. The fate of the cross claims will be the same as the Court's determination on the motions to dismiss Plaintiffs' complaint.

[2] All the personal injury, non-wrongful death cases have recently settled, leaving only the four wrongful death cases as yet unresolved. *See* Letter from Ms. Sherlock to the Court, D.I. 470 (Mar. 5, 2019). Those four wrongful death cases form the consolidated case "*Samantha A. Dunfee, et al. v. KGL Holdings Riverfront, LLC, et al.*, C.A. No. N16C-04-108 RRC."

12(b)(2). Keybank alleges this Court lacks personal jurisdiction to subject Keybank to litigation in Delaware. For Rule 12(b)(6), the moving defendants argue that Plaintiffs have failed to allege a proper basis for negligence to subject defendants to liability. The moving defendants contend that they cannot be held liable because the assessment was prepared for the sole and exclusive benefit of Keybank and the assessment was intended only for lending purposes.

Plaintiffs counter that the moving defendants are liable for the alleged negligently conducted assessment under Restatement (Second) of Torts § 324A(c). Section 324A(c) imposes liability to defendants for injuries to third parties if a party, either the third-party or "another," relies on an undertaking by the defendant which the defendant should have known was for the protection of third-parties.[3] Plaintiffs argue that Keybank hired GRS to conduct the assessment, that Varitikias conducted the assessment on behalf of GRS "and/or"[4] SAV, that KGL relied on the assessment, and, lastly, KGL's reliance caused injury to Plaintiffs.

The Court finds that—when construing all reasonable inferences in favor of the non-moving party when necessary—Plaintiffs have properly alleged that GRS and SAV, through Varitikias, undertook to perform services for another, which they should have known was for the protection of third-parties, and KGL's reliance on that undertaking led to harm to Plaintiffs. However, Plaintiffs have not satisfactorily alleged that Keybank undertook to render services for another, nor have Plaintiffs advanced a separate theory of negligence which may impose liability on Keybank.

II. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

From 2014 to 2015, KGL was in the process of purchasing Evergreen Apartments. Prior to KGL's acquisition of the property, GRS—a company that is both incorporated and maintains its principal place of business in California—apparently engaged SAV to conduct a property valuation assessment on behalf of KGL's lender and mortgagee, Keybank.[5] On March 12, 2015, Varitikias went to the apartment complex and performed the assessment, allegedly stating to apartment personnel that he was there "on behalf of [] SAV 'and/or' GRS."[6] The assessment included an inspection of the boiler system.[7] The assessment yielded no sign of a

[3] *See* Restatement (Second) of Torts § 324A(c).
[4] Pls.' Joint Resp. in Opp. to SAV's Mot. to Dismiss at 6, D.I. 407 (Oct. 19, 2018).
[5] Def.'s (KGL) Answ. to the Compl. and Third Party Compl. at 12–13, D.I. 16 (July 22, 2016).
[6] Pls.' Joint Resp. in Opp. to SAV's Mot. to Dismiss at 6.
[7] Def.'s (KGL) Answ. to the Compl. at 12.

defective boiler system and KGL received no recommendation to replace the boiler or to install carbon monoxide detectors.[8] KGL allegedly received a copy of the assessment report and recommendations.[9] Relying on the apparent soundness of the report, KGL allegedly did not conduct any further inspections or repairs on the gas boiler or conduct their own separate property assessment.

On March 25, 2016, management at Evergreen Apartments called police after receiving reports that a resident had been unreachable for the past two days. New Castle County paramedics and police responded to the apartment complex, and located four unresponsive persons in Building G. Emergency responders pronounced all four individuals dead. The emergency responders also discovered several more persons located in Building G and Building F who, while alive, were suffering from apparent injuries. The injured were transported to the hospital for treatment. Doctors determined that those sent to the hospital had been exposed to toxic levels of carbon monoxide gas. The four individuals pronounced dead in Building G had been killed by exposure to lethal levels of carbon monoxide. Several days later, Delaware Department of Natural Resources and Environmental Control officials confirmed that high levels of carbon monoxide had been present, and determined that the gas had emanated from the exhaust pipes of the apartment complex boiler room.

Plaintiffs were among those who were injured and killed by the carbon monoxide leak. From 2016 to 2018, Plaintiffs filed individual suits against the various defendants. Plaintiffs filed suit against the KGL entities, alleging that KGL permitted the exhaust pipes to fall into "a horrible state of disrepair and decay, rusting and collapsing, rendering them unable to [properly] vent the carbon monoxide[.]"[10] Plaintiffs brought suit against Anthony Fragale, who conducted an inspection of the property on behalf of Continental Casualty Company, and against Continental Casualty Company, on the theory of *respondeat superior*.[11] Plaintiffs sued Village of Windhover, L.L.C., the previous owner of Evergreen Apartments, for failure to have properly inspected the boiler system, failure to warn, failure to arrange for re-inspection, and various other negligence claims.[12] Plaintiffs brought suit against GRS claiming that GRS failed to recommend that KGL install carbon monoxide detectors in the apartment complex, failed to properly inspect the boiler system, failed to warn of any defects in the boiler system, and failed to recommend

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[8] *Id.* at 12-13.
[9] *Id.* at 13.
[10] Pls.' Joint Answ. Br. in Opp'n to Keybank's Mot. to Dismiss at 6, D.I. 389 (Oct. 5, 2018).
[11] *Id.* at 6-7.
[12] *Id.* at 7.

that the boiler system be repaired or replaced.[13] Plaintiffs brought suit against Stephen Varitikias and SAV Engineers, Inc., claiming that Varitikias acted as an agent of SAV "and/or" GRS and was negligent in that he failed to properly inspect the boiler system, and failed to recommend that the boiler system be repaired or replaced.[14] Lastly, Plaintiffs brought suit against Keybank, alleging that Keybank was "involved in the financing and/or hired the contractors and/or [was] involved in the inspections of the premises including the boiler and boiler systems."[15] Plaintiffs argue that Keybank is vicariously liable for the actions of GRS and SAV under the doctrine of *respondeat superior*.[16]

To aid in the orderly dispensation of the issues, all cases arising from the carbon monoxide leak were consolidated by Court order on December 11, 2018.[17] GRS, SAV, Varitikias, and Keybank filed motions to dismiss pursuant to Rule 12(b)(6).[18] Keybank also argues for dismissal for lack of personal jurisdiction pursuant to Rule 12(b)(2).

III. THE PARTIES' CONTENTIONS

A. SAV's and Varitikias' Contentions

SAV and Varitikias argue that Plaintiffs have failed to allege that the moving defendants owed a legal duty to Plaintiffs, breached any such duty, or that any such breach was the proximate cause of Plaintiff's injury. SAV and Varitikias contend that Plaintiffs merely allege that SAV and Varitikias "fail[ed] to do something [Plaintiffs] allege[] should have been done[,]" a "classic" nonfeasance scenario.[19]

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[13] *Id.* at 8.

[14] Pls.' Second Am. Compl. adding SAV Engineers, Inc. and Stephen Varitikias at 8, D.I. 210 (Jan. 22, 2018).

[15] Pls.' (Colatriano) Compl. at 19 ¶ 74, *Jodi Colatriano, et. al. v. KGL Holdings Riverfront, LLC, et. al.*, N18C-03-217 RRC, D.I. 1 (Mar. 23, 2018).

[16] Pls.' Answ. Br. in Opp'n to Keybank at 9; *see* Pls.' (Colatriano) Compl. at 17 ¶ 68.

[17] *See* Order of Consolidation, *Samantha A. Dunfee, et al. v. KGL Holdings Riverfront, LLC, et al.*, N16C-04-108 RRC, D.I. 432 (Dec. 12, 2018).

[18] These motions were filed prior to consolidation in several different cases, all of which arose from the carbon monoxide leak. Upon consolidation of the cases, all motions previously filed under separate captions were argued under the consolidated caption. The parties agreed that the motions raised much of the same issues and applied to all Plaintiffs' claims. *See* Tr. of Oral Argument at 1 lns.12–19 (Feb. 13, 2019); *see also* Letter from Mr. Logullo to the Court, D.I. 449 (Jan. 28, 2019).

[19] Defs.' (SAV & Varitikias) Mot. to Dismiss at 3, *Jodi Colatriano, et. al. v. KGL Holdings Riverfront, LLC, et. al.*, N18C-03-028 RRC, D.I. 34 (Sept. 26, 2018).

SAV and Varitikias argue that a party who merely omits to act owes no general duty to others absent a "special relation between the actor and the other which gives rise to the duty."[20] SAV and Varitikias argue that there has been no allegation of a special relationship between the parties which would give rise to a duty, and as such Plaintiffs' claims should be dismissed.

SAV and Varitikias also argue that Plaintiffs have failed to allege facts which would establish that the moving defendants owed a duty to third persons under Restatements (Second) of Torts § 324A. SAV and Varitikias contend that Plaintiffs have failed to allege there was an undertaking to render services for another, failed to allege that SAV and Varitikias increased any risk of harm, and failed to allege that another party properly relied on SAV and Varitikias' alleged undertaking.[21] Even if a party relied on any undertaking, SAV and Varitikias argue that such reliance was improper because a contract between Keybank and GRS ("Keybank/GRS contract") for the performance of the assessment stated that no one other than Keybank may rely on the report produced from the survey.

B. GRS' Contentions

GRS contends that Plaintiffs have only alleged nonfeasance, which would require Plaintiffs to establish that "there is a special relationship between [GRS] and [Plaintiffs]" to sustain a claim of negligent nonfeasance against GRS.[22] GRS argues that Plaintiffs' complaint fails to provide any factual allegations to show that such a special relationship existed between GRS and Plaintiffs which could impose a duty to act. Further, GRS contends that Plaintiffs' claim under Restatement Second of Torts § 324A is ostensibly nullified because Plaintiffs have not alleged that GRS undertook to render services for Plaintiffs' protection. Nor have Plaintiffs, GRS argues, alleged that the assessment increased the risk of harm by causing "a physical change to the environment or material alteration of the circumstances."[23] Lastly, GRS contends that Plaintiffs have not established reasonable reliance by Plaintiffs on any alleged undertaking.

C. Keybank's Contentions.

Keybank argues that the complaint lacks any factual allegations about how Keybank was involved in the inspection of the apartment complex or the hiring of

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[20] *Id.* (quoting *Price v. E.I. DuPont De Nemours & Co.*, 26 A.3d 162, 167 (Del. Super. Ct. 2012)).
[21] *Id.* at 3–4.
[22] *Price v. E.I. DuPont De Nemours & Co.*, 26 A.3d 162, 169 (Del. 2011).
[23] *Patton v. Simone*, 626 A.2d 844, 851 (Del. Super. Ct. 1992).

contractors.[24] Further, Keybank argues that Plaintiffs have not alleged any facts purporting to establish the existence of any duty owed by Keybank to the Plaintiffs. Nor have Plaintiffs, Keybank argues, alleged any facts to establish any kind of relationship existed between Keybank and Plaintiffs. Keybank contends that Plaintiffs have only offered legal conclusions that other defendants were acting as agents of Keybank, but have provided no factual allegations to substantiate those legal claims. Keybank argues that without such factual allegations there can be no vicarious liability under the doctrine of *respondeat superior*. Without this doctrine as support for the allegations in the complaint, Keybank argues that Plaintiffs have failed to state a claim upon which relief can be granted.

D. Plaintiffs' Contentions

Plaintiffs contend that SAV and Varitikias undertook to perform the assessment for the benefit of GRS, KGL, and Plaintiffs. Plaintiffs—and KGL—argue that regardless of the Keybank/GRS contract language, the assessment report was in fact given to KGL, and the report had repair recommendations for KGL to follow. Plaintiffs contend that KGL relied on the apparent soundness of the report, and did not undertake any additional repairs to the Building G gas boiler because the report certified the boiler's life expectancy was for several more years. Further, Plaintiffs argue that the apartment residents, Plaintiffs among them, relied on the report to correctly detail the condition and safety of the apartment complex. Plaintiffs assert that this scenario satisfies Restatement (Second) of Torts § 324A, and overcomes SAV's and Varitikias' Motion to Dismiss.

As for GRS, Plaintiffs reiterate the same arguments raised against SAV and Varitikias. Plaintiffs allege that GRS affirmatively acted but did so in a negligent manner which led to Plaintiffs injuries. Plaintiffs contend that SAV and Varitikias were agents of GRS whose conduct should be imputed to GRS. Further, Plaintiffs argue that there is a factual question of what entity—GRS, SAV, or both—Varitikias represented himself to be representing when he was at the apartment complex conducting the assessment.

Lastly, Plaintiffs contend that the complaint lists specific allegations of negligent conduct by Keybank. Plaintiffs allege that Keybank failed to properly inspect the boiler system, that Keybank failed to warn of the necessity of repairs to the boiler system, and that Keybank failed to recommend to KGL to install carbon

[24] *See* Keybank's Opening Br. in Support of Mot. to Dismiss at 3, *Samantha A. Dunfee, et al. v. Evergreen Property Management, LLC, et al.*, N18C-03-220 RRC, D.I. 13 (July 11, 2018).

monoxide detectors.[25] To establish Keybank owed a duty to Plaintiffs, Plaintiffs again rely on § 324A, and allege that Keybank undertook to perform services for KGL. Plaintiffs contend that Keybank, by and through "[its] agent, Defendant GRS" performed the assessment in a negligent manner, and the assessment was relied upon by KGL.[26]

IV. STANDARD OF REVIEW

Upon a motion to dismiss a complaint under Rule 12(b)(6), the Court "(i) accepts all well-pleaded factual allegations as true, (ii) accepts even vague allegations as well-pleaded if they give the opposing party notice of the claim, (iii) draws all reasonable inferences in favor of the non-moving party, and (iv) only dismisses a case where the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances."[27]

When the complaint includes claims of negligence, the Court must also take into account Rule 9(b), which requires the plaintiff to plead allegations of negligence with particularity.[28] The underlying purpose of Rule 9(b) is to ensure that the defendant is notified of the "acts or omissions by which it is alleged that a duty has been violated in order to enable the preparation of a defense."[29] Under Rule 9(b) "it is usually necessary allege only sufficient facts out of which a duty is implied and a general averment of failure to discharge that duty."[30] The Court will "ignore conclusory allegations that lack specific supporting factual allegations."[31]

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[25] *See* Pls.' Joint Answ. Br. in Opp'n to Keybank at 9.
[26] *Id.* at 19.
[27] *Turf Nation, Inc. v. UBU Sports, Inc.*, 2017 WL 4535970, at *5 (Del. Super. Ct. Oct. 11, 2017) (citing *Central Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 227 A.3d 531, 536 (Del. 2011)).
[28] Super. Ct. Civ. R. 9(b); *see, e.g.*, *Browne v. Robb*, 583 A.2d 949, 953 (Del.1990) ("It is insufficient to merely make a general statement of the facts which admits of almost any proof to sustain it.") (internal quotation omitted).
[29] *State Farm Fire & Cas., Co. v. Gen. Elec. Co.*, 2009 WL 5177156, at *5 (Del. Super. Ct. Dec. 1, 2009).
[30] *Id.*
[31] *Id.* (quoting *Ramunno v. Crawley*, 705 A.2d 1029, 1034 (Del. 1998)).

V. DISCUSSION

A. Liability under Restatement Second of Torts § 324A.

The "threshold requirement for the application of [§] 324A" is whether the defendant "undertook … to render services to another[.]"[32] A motion to dismiss must be denied not only when a plaintiff alleges that a defendant "affirmatively committed to undertake"[33] to render services to another, but also the undertaking must be one which the defendant "should have recognized as necessary for the protection of third persons[.]"[34] These allegations, "if proven, would be sufficient to trigger a duty on the part of the [defendants] who undertook to protect [third persons] from harm to discharge that duty with reasonable care."[35] Failure to exercise reasonable care may lead to liability under § 324A.

Once there is a sufficient allegation that a defendant performed an undertaking, the plaintiff must allege facts which would place defendant's conduct within one of three separate scenarios enumerated by § 324A. To be liable under § 324A(a), the defendant's failure to exercise reasonable care while performing the undertaking must "increase[] the risk of [] harm[.]"[36] To establish an increased risk, there must be a showing of "a physical change to the environment or material alteration of the circumstances."[37] Further, if the defendant's negligent performance results in an increase of the risk of harm to a third person, "the fact that [the defendant] is acting under a contract … with another will not prevent his liability to the third person."[38] Section 324A(b) imposes liability when a defendant undertakes to perform "a duty owed by the other to the third person[.]"[39] There must be sufficient facts in the record to "create a genuine issue of material fact" that the defendant assumed a duty "the other" owed to Plaintiffs.[40]

Lastly, § 324A(c) may impose liability when there is reliance on the defendant's undertaking by the other or the third party. It is not necessary that a new risk be created or that an existing risk be increased, but a risk must be present nonetheless. If the reliance induced the other "to forgo other remedies or precautions

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[32] *Patton*, 626 A.2d at 849.
[33] *Doe 30*, 58 A.3d at 437.
[34] Restatement (Second) of Torts § 324A.
[35] *Doe 30*, 58 A.3d at 437.
[36] Restatement (Second) of Torts § 324A(a).
[37] *Patton*, 626 A.2d at 851.
[38] Restatement (Second) of Torts § 324A, cmt.c.
[39] *Id.* at § 324A(b).
[40] *Patton*, 626 A.2d at 851.

against such a risk, [then] the harm results from the negligence as fully as if the [defendant] had created the risk."[41] If, when committing the above referenced undertaking, the defendant fails to exercise reasonable care and "the [future] harm is suffered because of reliance of the other or the third person upon the undertaking" then the defendant may be liable for negligence under § 324A(c).[42]

B. The Undertaking.

As with any § 324A analysis, the threshold question in this case is whether Plaintiffs have established that the moving defendants have "undertaken to render services to another" and that the undertaking was initiated for the protection of a third party. [43] Plaintiffs allege that on March 12, 2015, Varitikias, "who was [allegedly] acting as an agent and/or employee of [GRS] "and/or" [SAV]," performed an assessment of Evergreen Apartments.[44] The assessment allegedly contained a description of various aspects of the apartment complex, including the boiler system, and recommended repairs based on Varitikias' observations. Plaintiffs allege that such an assessment was an undertaking to render services to KGL specifically, for KGL would be the entity to follow the repair recommendations. Further, because of the nature of the assessment—safety of and lifespan of certain parts of the property—GRS, SAV, and Varitikias should have known the assessment was conducted for the protection of third persons, i.e., Plaintiffs.[45]

The moving defendants' have advanced the arguments that (1) Varitikias was not an agent or employee of GRS or SAV, (2) that the assessment was prepared for the sole and exclusive use and benefit of Keybank, and (3) that the moving defendants should not have known the alleged undertaking was for the protection of third parties. While these arguments "may … prove fatal to plaintiffs' § 324A claim on a summary judgment record[,]" they are premature on a motion to dismiss.[46] Plaintiffs have adequately pled that GRS, SAV, and Varitikias initiated an undertaking—both through their individual conduct and through Varitikias' conduct as an ostensibly agent—which was directed towards KGL and Plaintiffs, and GRS, SAV, and Varitikias should have known was for the protection of third parties such as Plaintiffs. The Court's determination is that the allegation that an undertaking was

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[41] Restatement (Second) of Torts § 324A, cmt.e.
[42] *Id.* at § 324A(a)–(c).
[43] *Doe 30*, 58 A.3d at 457.
[44] Pls.' (Uniacke) Second Am. Compl. Against KGL Holdings Riverfront, LLC, et al., D.I. 430, at 14 ¶ 41 (Dec. 11, 2018); *see also* Pls.' Second Am. Compl., D.I. 210, at 8 ¶ 31(a).
[45] Pls.' Joint Resp. in Opp'n to SAV at 12.
[46] *Doe 30*, 58 A.3d at 458.

performed is sufficient for a motion to dismiss. Whether the undisputed facts will support Plaintiffs' allegations after the close of discovery on a summary judgment record, or after a trial, should there be genuine issues of material fact, remains to be seen.[47]

C. Increased Risk of Harm and Assumption of Duty to Third Parties.

Under § 324A(a), a defendant may be liable if the undertaking increased the risk of harm. A finding of an increased risk of harm requires "a physical change to the environment or material alteration of the circumstances."[48] In the instant case, the undertaking was the assessment. This assessment was allegedly performed negligently when Varitikias failed to note any problems with the boilers. Plaintiffs do not provide factual allegations to establish that Varitikias caused a physical change or material alteration. At worst, Plaintiffs' allegation is that Varitikias merely failed to notice a risk. Even when construing all reasonable inferences in favor of the Plaintiffs, the Court finds it difficult to conceive of any circumstance in which failing to notice a defect with the boiler somehow causes a physical change or material alteration to the boiler. Plaintiffs arguments under § 324A(a) are questionable.

As for § 324A(b), Plaintiffs must allege that the moving defendants undertook to perform a duty that KGL owed to Plaintiffs. Plaintiffs allege that KGL owed a duty to Plaintiffs to inspect the property and maintain safety. Plaintiffs claim that the moving defendants undertook a duty owed to Plaintiffs to inspect and ensure that the property was safe. However, the facts alleged establish that KGL did not have possession or ownership of Evergreen Apartments at the time of the assessment. Thus, Plaintiffs essentially contend that KGL owed a duty to their future tenants. Without allegations of a special relationship at the time of the assessment, Plaintiffs arguments under § 324A(b) are tenuous.

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[47] *See Furek v. Univ. of Del.*, 594 A.2d 506, 520 (Del. 1991) (holding that trial court properly granted summary judgment on plaintiff's § 324A claim upon concluding that defendant did not initiate an undertaking for the protection of the plaintiff); *Patton*, 626 A.2d at 423 (finding the insurance company defendant was not liable under § 324A after the Court reviewed a complete record on a motion for summary judgment); *Mergenthaler v. Asbestos Corp. of Am., Inc.*, 1989 WL 48601, at *2–3 (Del. Super. Ct. April 28, 2989) (denying motion to dismiss upon concluding that plaintiff adequately plead that defendant initiated an undertaking for the protection of the plaintiff).

[48] *Patton*, 626 A.2d at 851.

D. Reliance on the Undertaking.

Plaintiffs' arguments under § 324A(c) are more compelling than the above arguments. Section 324A(c) may impose liability for a defendant's negligent undertaking when "either the person to whom the defendant's undertaking was made, or the third person whose protection is the subject of the undertaking, suffers harm as a result of 'reliance ... upon the undertaking.'"[49] The reliance need not be that of Plaintiffs, but may be the reliance of KGL, "the other."[50] In the instant case, there is no suggestion that Plaintiffs knew of GRS', SAV's, and Varitikias' undertaking prior to this litigation. Plaintiffs instead allege that KGL relied on the undertaking, and KGL's reliance caused harm to Plaintiffs. Although Plaintiffs do not say the talismanic words "reliance on the undertaking led to harm" in their complaint, the Court may draw all reasonable inferences from the well-pled factual allegations. Plaintiffs have sufficiently alleged that the undertaking—the assessment—was not conducted with reasonable care,[51] specifically that GRS, SAV, and Varitikias failed *inter alia* to properly inspect the boiler system.[52] GRS', SAV's and Varitikias' negligent conduct would be relevant in this case if KGL received the assessment report and relied up its recommendations. The Court will draw the reasonable inference the KGL did receive the assessment and relied on the report's findings.[53]

This reliance would allegedly determine what actions KGL took regarding repair and inspection of the apartment complex. It stands to reason that KGL's reliance on defendants' conduct caused KGL to forgo further repairs or inspections of the gas boiler. If the alleged reliance prevented further repairs to the boiler system it is again reasonable to infer that, a year after the assessment, the boiler malfunctioned because no further repairs or inspections had been conducted. Such reliance, if proven, would have been a cause of Plaintiffs' harm. If these allegations are proven there may well be liability imposed pursuant to § 324A(c), although Plaintiffs may still need to address other issues such as proximate cause, superseding

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[49] *Doe 30*, 58 A.3d at 460 (quoting Restatement (Second) of Torts § 324A(c)).

[50] Restatement (Second) of Torts § 324A(c) cmt.e ("Where the reliance of the other, or of the third person, has induced him to forgo other remedies or precautions against such a risk, the harm results from the negligence as fully as if the actor had created the risk."); *Mergenthaler v. Asbestos Corp. of Am., Inc.*, 1989 WL 48601, at *3 (Del. Super. Ct. April 28, 1989) (quoting § 324A(c) cmt.e).

[51] *See* Pls.' Second Am. Compl., D.I. 210, at 8 ¶ 31(a)–(d).

[52] *Id.* at ¶ 31(a).

[53] *See* Tr. of Oral Argument at 25 lns.16–23 ("[E]ven though the [report] went to ... Keybank, we know that both Village of Windhover and [KGL] relied upon it because there was a requirement that $204,000 and so forth be escrowed to fix all kinds of things.").

cause, and so on. Thus, Plaintiffs sufficiently allege a claim of negligence against GRS, SAV, and Varitikias to overcome their motions to dismiss.

The Court will note that within the motion papers and at oral argument, Defendants and Plaintiffs have drawn the Court's attention to several allegedly significant facts in the record that are outside the pleadings typically considered on a motion to dismiss. The import and interpretation of these facts is disputed between the parties. At this stage in the proceedings there are also other unknown factors within the record that the parties have not addressed.[54] If this Court considered those facts which are "outside the pleadings[,]" the motions to dismiss would then be treated as motions for summary judgment pursuant to Rule 56.[55] Such consideration would bring with it the summary judgment standard that the Court may only grant judgment as a matter of law when there are no genuine issues of material fact.[56] At a minimum, the exact nature of Varitikias' relationship with SAV and GRS is disputed.[57] His agency relationship with those defendants, or lack thereof, directly impacts both GRS' and SAV's liability. Further, the acknowledgment by KGL during oral argument that KGL did in fact receive the assessment report, and relied upon it,[58] is a material fact of which GRS, SAV, and Varitikias dispute the significance.[59] Thus, even if the Court did consider the facts outside of the pleadings, the defendants' motions would be denied as there are disputes of material facts.[60]

E. Keycorp and Keybank National Association

For the purposes of these motions to dismiss, Plaintiffs sufficiently alleged an undertaking by GRS, SAV, and Varitikias, and that KGL relied on that undertaking. However, Plaintiffs claims against Keycorp and Keybank National Association

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[54] *See* Tr. of Oral Argument at 24–32; *id.* at 25 lns.1–6 (The motion to dismiss "is premature is because we don't know what [Varitikias] is going to say. We don't know what Mr. Wolfgang is going to say. We don't know what the inspector from Village of Windhover who walked around the property with SAV Engineers is going to say.").

[55] Super. Ct. Civ. R. 12(b).

[56] *See* Super. Ct. Civ. R. 56.

[57] *See supra* note 58.

[58] *See* Tr. of Oral Argument at 33 lns.11–19 ("And the work was for [Keybank's], quote, sole use and benefit. And the benefit in this case happened to be Keybank provided, if everyone wants to know, provided this assessment to my clients [KGL]. And my clients were basically told to rely upon the assessment and follow through with same.").

[59] *See* Tr. of Oral Argument at 14 lns.2–22, 40 lns.19–23.

[60] The Court's consideration of the language in the Keybank/GRS contract would not change the outcome at this stage in the proceedings, for Plaintiffs, KGL, and Village of Windhover dispute the facts surrounding the contract and the acts committed ostensibly pursuant to that contract.

(collectively "Keybank"), merely KGL's lender and mortgagee, are more tenuous. Under § 324A the Plaintiffs must plead that Keybank undertook to perform services for another. Plaintiffs' complaint only states that "[p]rior to [KGL's] acquisition of Riverfront Heights, KGL's lender and mortgagee, KeyBank, contracted with Global Realty Services Group, LLC to have a property condition assessment performed on the property as part of the loan process."[61] The allegation does not establish that Keybank itself performed an undertaking. Thus, it appears to the Court that Plaintiffs may only properly assert a claim against Keybank by establishing that Keybank is vicariously liable for the actions of GRS, SAV, and Varitikias.

Plaintiffs have not provided factual allegations to support allegations of vicarious liability. Unlike the allegations against GRS, SAV, and Varitikias, which have factual allegations to support an agency or employee relationship,[62] Plaintiff merely offered the legal conclusion that GRS and SAV were agents of Keybank without factual allegations which may demonstrate what control Keybank had over the manner in which GRS or SAV operated. As Keybank is not alleged to have performed an undertaking itself, and the conclusory legal statements that GRS, SAV, and Varitikias were Keybank's agents need not be accepted, Plaintiffs have failed to properly allege negligence under § 324A.

CONCLUSION

The Court's determination is limited to whether Plaintiffs' allegations do or do not sufficiently state a claim upon which relief may be granted. This finding does not purport to determine whether Plaintiffs allegations are in fact true. Whether the undisputed facts will support Plaintiffs' claims after the close of discovery, on a summary judgment record or at trial, is potentially an issue for another day.

Plaintiffs have alleged that GRS and SAV, through Varitikias, affirmatively committed to undertake to render a service that they should have understood was for the protection of Plaintiffs. Further, Plaintiffs sufficiently allege that the undertaking was relied upon by KGL, which allegedly led to Plaintiffs' harm. These allegations, if proven, would be sufficient to trigger a duty on the part of the defendants who undertook to inspect the apartment complex to do so with reasonable care. As such, adjudication of these claims on a motion to dismiss is inappropriate. Global Realty Services, Inc.'s, SAV Engineers, Inc.'s and Stephen Varitikias' Motions to Dismiss

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[61] Pls.' (Uniacke) Compl. Against Keybank at 2 ¶ 11, *Gerald Uniacke, et al. v. KeyCorp, et al.*, N18C-03-221 RRC, D.I. 1 (Mar. 23, 2018).

[62] *See* Pls.' Amended Compl., D.I. 210, at 3 ¶ 11–13.

Plaintiffs' complaint and Defendants' Cross Claims pursuant to Rule 12(b)(6) are **DENIED**.

Plaintiffs have failed to sufficiently allege that Keycorp and Keybank National Association, Inc. owed a duty to Plaintiffs or performed an undertaking which should have been understood as for the protection of third parties. Further, Plaintiffs failed to allege sufficient facts to establish a potential agency relationship between the Key defendants and the remaining moving defendants. Thus, Keycorp and Keybank National Association, Inc.'s Motion to Dismiss Plaintiffs' Complaint pursuant to Rule 12(b)(6) is **GRANTED**.[63]

IT IS SO ORDERED.

Richard R. Cooch, R.J.

cc: Prothonotary

[63] As the Court grants the Key Defendants' Motion to Dismiss under Rule 12(b)(6), the Court does not consider the Key Defendants' Rule 12(b)(2) arguments.