SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice PART 35

Index Number : 103682/2010
AMERICAN INTERNATIONAL
vs
T&R CONSTRUCTION
Sequence Number : 001
SUMMARY JUDGEMENT

INDEX NO. _____
MOTION DATE 5-16-13
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____
Answering Affidavits — Exhibits _____ No(s). _____
Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Motion sequences 001 and 002 and the accompanying cross motions, are decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the motion (seq. 001) by defendant Horizon Engineering Associates, LLP ("Horizon") for summary judgment dismissing the complaint and all cross-claims asserted against it is denied, without prejudice; and it is further

ORDERED that the motion by defendant Active Fire Sprinkler Corp. (seq. 002) to strike the Amended Answer of defendant T&R Construction Corp. for failure to amend within 20 days after the initial pleading pursuant to CPLR 3025(b) is denied; and it is further

ORDERED that the cross-motion by T&R for leave to amend its Amended Answer to assert a cross-claim for contractual indemnification against Horizon (cross-motion to 001), and to amend its Answer, *nunc pro tunc*, to assert a cross-claim for contractual indemnification against Active (cross-motion to 002) is granted, and the Amended Answer attached to T&R's cross-motion is deemed served; and it is further

ORDERED that the parties shall appear for a preliminary conference on August 20, 2013, 2:15 p.m.; and it is further

ORDERED that T&R shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

Dated: 6-18-2013

A. L. Edmead, J.S.C.
HON. CAROL EDMEAD

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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AMERICAN INTERNATIONAL INSURANCE COMPANY as subrogee of DAVID DULL and SUSAN SHIELDKRET,

Index No. 103682/2010

Plaintiffs,

-against-

DECISION/ORDER

T&R CONSTRUCTION CORP., ACTIVE FIRE SPRINKLER CORP., CETRA/RUDDY INCORPORATED, ATHWAL AND ASSOCIATES, INC., ATHWAL ENGINEERING, P.C., HORIZON ENGINEERING ASSOCIATES, LLP, and INTEL 18TH STREET, LLC,

Defendants.

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T&R CONSTRUCTION CORP.,

Third-Party Plaintiff,

-against-

CETRA/RUDDY INCORPORATED, ATHWAL AND ASSOCIATES, INC., ATHWAL ENGINEERING, P.C., and HORIZON ENGINEERING ASSOCIATES, LLP

Third-Party Defendants.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this insurance subrogee action to recover monies plaintiff paid to its insureds for property damages sustained by the insureds, defendant Horizon Engineering Associates, LLP ("Horizon") moves for summary judgment dismissing the complaint and all cross-claims asserted against it (seq. 001).

Defendant Active Fire Sprinkler Corp. ("Active") moves (seq. 002) to strike the

Amended Answer of defendant T&R Construction Corp. ("T&R") for failure to amend within 20 days after the initial pleading pursuant to CPLR 3025(b).

In response, T&R cross moves for leave to amend its Amended Answer to assert a cross-claim for contractual indemnification against Horizon (cross-motion to 001), and to amend its Answer, *nunc pro tunc*, to assert a cross-claim for contractual indemnification against Active (cross-motion to 002).[1]

Factual Background

This action by plaintiff American International Insurance Company ("plaintiff") arises from an incident that occurred on January 18, 2009 wherein a fire sprinkler pipe in its insureds' Apartment 6B of 32 West 18th Street, New York, New York (the "premises") allegedly froze and burst. Plaintiff claims that the fire sprinkler pipe was not insulated and was too close to the building's exterior wall, and that T&R, the general contractor for the renovation of the building, and its sub-contractor Active, which installed the sprinkler system in the building, are jointly and severally liable for plaintiff's losses (see the Amended Complaint, ¶¶Sixth through Eleventh).[2]

In turn, T&R alleges (in its third-party complaint for common law indemnification and contribution) that plaintiff's damages were caused by the third-party defendants. Third-party defendant Horizon was the owner's representative which oversaw and supervised the construction progress and construction activities at the project. Third-party defendant Cetra/Ruddy Incorporated, the architect for the Project, prepared the plans and specifications for

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[1] Motion sequence 001 and 002 are consolidated for joint disposition and decided herein.

[2] It is alleged that "Intell 18th Street LLC" was the owner of the building prior to its conversion to condominiums (third-party complaint, ¶¶6-7) that entered into a written construction contract with T&R to renovate the building. (see also, EBT of Louis Arzano, 47 reference to contract regarding "Intel Management Company").

the project. Third-party defendants Athwal and Associates, Inc. and Athwal Engineering, P.C. (collectively, "Athwal") was the mechanical engineer that designed the sprinkler system and heating ventilation and air conditioning ("HVAC") system for the project. (Third-party complaint, ¶¶ 8-17)

Motion 001

In support of dismissal, Horizon argues that Horizon's duty under its contract with Extell respecting the building did not extend to the insureds or co-defendants. A breach of a contractual obligation does not give rise to tort liability, and the three exceptions to this rule do not apply as Horizon did not exacerbate any dangerous condition, no party relied upon Horizon's performance under the contract, and Horizon did not displace the duty of the building owner to maintain the building in a safe condition. Based on the deposition testimony of non-party witness Louis Arzano, the Director of Mechanical and Electrical Engineering of Extell Development Company (the developer of the premises) and the affidavit of Horizon's principal Michael English (the "English affidavit"), Horizon had no involvement with or obligation related to the building's sprinkler system or the building's windows or insulation. No act or omission on Horizon's part contributed to the alleged freezing and bursting of the sprinkler pipe. Horizon's scope of work occurred well after the completion of the design documents, of which Horizon had no part. And, Extell was unaware of any deviations between the building's Mechanical, Electrical and Plumbing drawing and the final work. Horizon's reports were included with its Project File, including the Deficiency Log and Commissioning Log. While the Commissioning Services Proposal to Extell included the sprinkler system items as "general equipment list," the fee breakdown in the agreement did not include the sprinkler system because it was not included in

Horizon's scope of work. And, any claim that the building's HVAC system may have contributed to the freezing to the pipe is of no moment to Horizon since Horizon was not involved in the design of the HVAC system, but was only responsible to ensure that it conformed to the plans made by Athwal, which it did (Affirmation in Support, ¶4). Consequently, neither can Horizon be held liable for common law indemnification or contribution. Moreover, since T&R cannot establish its freedom from negligence, and liability found against any other defendant would not be vicarious, Horizon cannot be held liable to any other defendant.

Plaintiff, T&R, and Active oppose Horizon's motion, arguing that it is premature as the depositions of the parties, including Horizon, have not been completed, and that issues of fact exist as to the cause and location of the property damage, and the parties' responsibility for the incident.

T&R adds that Horizon's motion is procedurally defective for failing to include the Answers of T&R and of any other co-defendant, and is insufficiently supported as the English affidavit is conclusory and refers to Horizon's contract which is not attached thereto.[3] T&R contends that the three bases of holding Horizon liable in tort to plaintiff's subrogors based on Horizon's breach its contractual obligation to Extell applies. Horizon has not provided all of the documents regarding its role in the project regarding deficiencies and the commissioning report. Further, according to T&R's professional engineer, Yevsey Lenchner, it would be unlikely that a project of this scope would experience no problems when the HVAC was first commissioned.

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[3] Horizon points out that T&R cured any defect in Horizon's moving papers by submitting the missing pleadings, and failed to state any relevant facts discovery would yield. And, while T&R complains that discovery is outstanding, T&R requested an adjournment of depositions while the motion for summary judgment is pending. Horizon also notes that T&R submitted an unsigned and unsworn affidavit; however, in sur-reply, Horizon explained such inadvertence, and submitted a signed, notarized version of the affidavit.

Without the deposition of Horizon or the HVAC designer Athwal, there is no showing that the HVAC system was installed pursuant to the plans, or that Horizon's commissioning work was not negligent. And, the relief sought is unclear, since Horizon fails to mention any request against T&R's third-party action.

In reply, Horizon argues that it provided a CD containing the Project File of all the documents pertaining to its commissioning services at the building, and no party, including the experts of the movants, referenced a single document to refute the deposition testimony of Extell's witness and the English affidavit. The opinion of T&R's expert Lenchner as to the probable cause of the incident is speculative, and Horizon's commissioning services had no involvement with the sprinkler system or window system. T&R, as the general contractor, is in the best position to offer evidence as to defects with the HVAC system. T&R, Active, and plaintiff's conclusory expressions of hope are insufficient to defeat summary judgment.

Discussion (Motion 001)

Where a defendant moves for summary judgment, said defendant must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Ivanov v City of New York*, 21 Misc 3d 1148, 875 NYS2d 820 [Sup Ct, New York County 2008]). Defendant must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Melendez v Parkchester Med. Servs., P.C.*, 76 AD3d 927, 908 NYS2d 33 [1st Dept 2010]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1st

Dept 2002]). It is noted that "CPLR 3212(b) requires that a motion for summary judgment be supported by copies of the pleadings, [and] the court has discretion to overlook the procedural defect of missing pleadings when the record is "sufficiently complete" (*Washington Realty Owners, LLC v 260 Washington Street*, 105 AD3d 675, 675, 964 NYS2d 137[1st Dept 2013]). "The record is sufficiently complete when, although the movant has not attached all of the pleadings to the motion, a complete set of the papers is available from the materials submitted (*Washington Realty Owners, LLC v 260 Washington Street*, 105 AD3d at 675 *citing Studio A Showroom, LLC v Yoon*, 99 AD3d 632, 952 N.Y.S.2d 879 [1st Dept. 2012] [the pleadings were filed electronically and were available for the court's consideration], and *Pandian v New York Health and Hospitals Corp.*, 54 AD3d 590, 591, 863 NYS2d 668 [1st Dept 2008] [the pleadings were attached to the reply papers]). Here, a complete set of the papers is available from the exhibits submitted by the parties, and from the records available in the e-filing system. Therefore, it cannot be said the motions are procedurally deficient.

"The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

It is undisputed that Horizon was responsible for overseeing and supervising the project pursuant to its contract dated March 26, 2007 with the "Owner," Extell.

While "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*All American Moving and Storage, Inc. v Andrews*, 96 AD3d 674, 949 NYS2d 17 [1st Dept 2012], *citing Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138,

746 NYS2d 120, 773 NE2d 485 [2002]), "there are three exceptions to this general rule pursuant to which a party may be said to have assumed a duty of care to third parties" (*All American Moving and Storage, Inc., supra, citing Espinal*, 98 NY2d at 140). "One of those exceptions is where the third party has detrimentally relied on the continued performance of the contracting party's duties" (*All American Moving and Storage, Inc., supra*).

Extell's Director of Mechanical and Electrical Engineering Aranzo testified that Active installed the sprinkler system (EBT, 13), that the sprinkler system "is my scope and responsibility," (id., 53), and that and Horizon was not involved with the building's fire protection or sprinkler system, with the installation of the sprinkler system, or with the supervision or approval of the installation of the sprinkler system (id., 10-11). Instead, Horizon's role was to "verify" that the mechanical, electrical, and plumbing systems were "installed as per the engineer's design" (id., 7); to verify any deviations from the plans, or of any deficiencies as to the "way systems are installed based on design" (id., 42).

Arzano also testified that the "Equipment List" of the equipment in the building included "the quantity they [Horizon] commissioned" (id., 19), and this "general" list included fire protection and sprinkler related equipment. However, because he "didn't contract with them to commission the sprinkler system" (id., 12), the fire protection and sprinkler equipment was not part of Horizon's scope of work (id., 20). Horizon had "no responsibilities with the sprinkler system" (id., 45).

However, when asked what was "the point of having them [the fire protection and sprinkler equipment] listed in the equipment list in the signed agreement if they are not listed in the scope? [of Horizon's commissioning services]", Arzano replied, "I didn't make the list. I

don't know." (id., 24) When asked if he knew "why that would be signed on Extell's behalf if it was not part of the scope they were contracting for?", Arzano replied, "I can't answer that question, I didn't make the list." (id.). When asked if he was made aware of "the fact that Active had installed sprinkler heads at improper locations according to the drawings," Arzano replied, "Not that I recall." (id., 30). Extell was not responsible for supervision of T&R's general contracting work on a day-to-day basis, but only "sporadically checks in to see [that the general contractor is delivering the project as per plans and specifications] (id., 34). Arzano was also unaware of the party responsible for the installation of the interior and exterior walls and windows (id., 37).

Here, it cannot be said, as a matter of law, that the contract between Extell and Horizon was not intended to benefit plaintiff's subrogees with Horizon's commissioning services regarding the project, and that such services did not include the sprinklers and HVAC system (*see All American Moving and Storage, Inc. v Andrews*, 96 AD3d 674, 949 NYS2d 17 [1st Dept 2012] (finding that tenant which hired sprinkler inspector pursuant to its lease with the building owner intended to benefit the building owner), *citing MK W. St. Co. v Meridien Hotels*, 184 AD2d 312, 313, 584 NYS2d 310 [1992]) ["the intention which controls in determining whether a stranger to a contract qualifies as an intended third-party beneficiary is that of the promisee"], and the benefit to plaintiffs was "sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [the non-contracting parties] if the benefit is lost" (*All American Moving and Storage, Inc., supra, citing Burns Jackson Miller*

Summit & Spitzer v Lindner, 59 NY2d 314, 336, 464 NYS2d 712, 451 NE2d 459 [1983]).[4]

Regarding the matter of Horizon's alleged negligence, it cannot be said at this juncture, in the absence of deposition testimony (of Horizon, Athwal, and Active) that Horizon did not undertake a duty to inspect the sprinkler and/or HVAC systems and whether any such breach, including any alleged failure to report any issue with the sprinkler or HVAC system was a proximate cause of the damage. The claim by Horizon that the HVAC system conformed to the engineer's plans, should be subject to further investigation at the depositions of all parties (*Ocasio ex rel. Rosado v Town of Greenburgh*, 79 AD3d 426, 910 NYS2d 908 [1st Dept 2010] (affirming denial of summary judgment as "premature before completion of discovery" where movant's affidavit offered "only self-serving conclusions . . . ."). The affidavit of Horizon's principal and correspondence exchanged subsequent to the incident, indicating that Horizon had no involvement with the design or approval of the HVAC system, and that the fire sprinkler's items on the Equipment List were not included within Horizon's scope of work, should also be subject to further exploration at a deposition. That Horizon was not involved in the design of the HVAC system or fire sprinkler system is not dispositive. And, it is noted that the record does not establish the cause and/or location of the subject property damage.

Consequently, Horizon is not entitled to summary judgment dismissing the complaint or cross claims (for indemnification and contribution) asserted against it, at this juncture, and its

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[4] However, the Court finds that the other two *Espinal* exceptions do not apply. Any failure by Horizon to inspect the sprinklers did not launch a force or instrument of harm (*see All American Moving and Storage, Inc. v Andrews, supra, citing Church v Callanan Indust.*, 99 NY2d 104, 112, 752 NYS2d 254, 782 NE2d 50 [2002] [incomplete performance of contractual duty to install guide rail did nothing more than neglect to make highway safer, as opposed to making it less safe)). Nor was Horizon's agreement with Extell to oversee and supervise the project the type of comprehensive and exclusive service agreement (*see All American Moving and Storage, Inc. v Andrews, supra*)).

motion is denied.

Motion 002

In support of Active's motion to strike T&R's Amended Answer, "dated February 17, 2012," Active argues that T&R failed to seek leave to amend its "May 4," 2010 Answer, as the Amended Answer was not served within 20 days of the Answer pursuant to CPLR 3025(b).[5]

T&R opposes Active's motion, as T&R amended its Answer as of right, Active failed to timely object to said Amended Answer, and Active was not prejudiced by the Amended Answer.

Discussion (Motion 002)

At the outset, it is noted that the "Amended Answer dated February 17, 2012" that Active submits as Exhibit G and argues "must be stricken" (Affirmation, ¶9) is not an Amended Answer, but is T&R's "Answer to Supplemental and Amended Complaint." T&R's "Amended Answer to Supplemental and Amended Complaint" is dated May 4, 2012.

CPLR 3025(a) permits a party to "amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it." Pursuant to CPLR 3025(b), a "party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties."

The submissions establish that after T&R served its Answer, dated August 16, 2010, and later impleaded Cetra/Ruddy, Athwal, and Horizon, plaintiff then served a Supplemental Summons and Amended Complaint on January 11, 2012 naming the impleaded parties as direct defendants. On February 7, 2012, Active served its Answer to plaintiff's Amended Complaint,

[5] T&R's Answer is dated August 16, 2010.

and on February 17, 2012, T&R served its Answer to plaintiff's Amended Complaint, asserting in its first (and only) cross claim, contribution and common law and contractual indemnification claims against all co-defendants (*i.e.*, Active) (¶11). On May 4, 2012, T&R served its Amended Answer, delineating as a second cross-claim a contractual indemnification claim against Active based on Article 8 of the contract between T&R and Active. T&R's May 4, 2012 Amended Answer, served approximately 78 days after its February 17, 2012 Answer, was untimely. However, Active waived its right to object to the Amended Answer filed by T&R, even though such Amended Answer was served beyond the period within which an amended pleading could be served as of right, since it was retained by Active without objection for approximately seven months until the instant motion practice was initiated in December 2012 (*see Wittlin v Schapiro's Wine Co.*, 178 AD2d 160, 576 NYS2d 580 [1st Dept 1991] ("The retention of an answer without objection will be deemed a waiver of objection as to untimeliness."); *Jordan v Altagracia Aviles*, 289 AD2d 532, 735 NYS2d 623 [2d Dept 2001] (holding, that defendant, having accepted amended complaint and answered it, waived any objection it may have had based on plaintiff's failure to obtain leave to file it)).

Therefore, the Court denies Active's motion to strike to T&R's Amended Answer.

Cross-Motions by T&R (to 001 and 002)

T&R cross moves to amend its Answer to plaintiff's January 11, 2012 Amended Complaint to assert a cross claim against Horizon and against Active for contractual indemnification.

As against Horizon (001), T&R claims it recently became aware of Horizon's contract with Extell and its obligations thereunder. Horizon opposes the cross-motion, arguing that the

proposed amendment is insufficient to state a cause of action and lacks merit, and is prejudicial and an unfair surprise. For Horizon to be responsible to indemnify T&R, the loss must arise out of or result from "the Consultant's activities under the Agreement, provided that such Exposure was caused, in whole or in part, by the Consultant." The frozen/burst sprinkler head could not have originated from Horizon's commissioning work, or any of its acts or omissions, as there is no evidence that Horizon failed to perform its duties under its contract with Extell. And, T&R never notified any counsel of its intent to make its cross-motion.

As against Active (002), T&R seeks to include a contractual indemnification claim pursuant to T&R's contract with Active. Active opposes the cross-motion to amend its Answer, arguing that such request is untimely and unsupported by any reason for the delay, and prejudicial to Active. In reply, T&R contends that there is no prejudice since the indemnification clause appears in Active's own contract, and a claim for indemnity has yet to accrue, since payment on the judgment has not yet been made by the T&R.

Discussion (Cross-Motion to 001 and 002)

"Leave to amend pleadings under CPLR 3025(b) should be freely given, and denied only if there is "prejudice or surprise resulting directly from the delay . . . or if the proposed amendment 'is palpably improper or insufficient as a matter of law'" (*McGhee v Odell*, 96 AD3d 449, 946 NYS2d 134 [1st Dept 2012] *citing McCaskey, Davies & Assoc. v New York Health & Hosps. Corp.*, 59 NY2d 755, 757, 463 NYS2d 434, 450 NE2d 240 [1983] and *Shepherd v New York City Tr. Auth.*, 129 AD2d 574, 574, 514 NYS2d 72 [1987]). "A party opposing leave to amend 'must overcome a heavy presumption of validity in favor of [permitting amendment]" (*McGhee v Odell, supra citing Otis El. Co. v 1166 Ave. of Ams. Condominium*, 166 AD2d 307,

307, 564 NYS2d 119 [1990]). "Prejudice to warrant denial of leave to amend requires 'some indication that the defendant has been hindered in the preparation of [their] case or has been prevented from taking some measure in support of [their] position'" (*McGhee v Odell, supra, citing Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504, 925 NYS2d 51 [2011] [citation omitted]).

Here, T&R's allegations within the proposed Amended Complaint, dated March 4, 2013 and the submissions before the Court demonstrate that the contractual indemnification claims have merit, and there has been no showing of prejudice.

T&R's contractual indemnification claim against Horizon is premised upon the indemnification clause found in Horizon's contract with Extell (Article R.5), wherein Horizon agreed to "defend, indemnify, and hold the Owner, Construction Manager [T&R] . . . harmless from and against all claims, actions, damages, losses and expenses . . . arising out or resulting from the Consultant's activities under the Agreement. . . ." Extell's witness was deposed on November 13, 2012 and T&R did not have possession of Extell's contract with Horizon at the time T&R served its initial Answer. The allegations that the damages were caused by Horizon's failure to properly commission the project, if true, may trigger Horizon's indemnification obligation. Horizon's contention that the frozen/burst sprinkler head could not have originated from its commissioning work, or any of its acts or omissions, is not established, at this juncture. It is noted that T&R's February 17, 2012 Answer to the Supplemental and Amended Complaint asserted its cross claims against "All co-defendants" for "common law *indemnity/contractual indemnity* . . . ." (¶11) (emphasis added). And, the fact that T&R never notified any counsel of its intent to make its cross-motion is of no moment.

T&R's contractual indemnification claim against Active is premised upon Article 8 of T&R's contract with Active, in which Active agreed, with certain exceptions, to "indemnify and hold harmless the Owner, Architect, Architect's consultants and agents and employees of any of them from and against claims, damages, losses and expenses . . .arising out of or resulting from performance of the Work . . . ." As noted above, Active did not object to the service of T&R's May 4, 2012 Amended Answer (*infra*, at 10-11), which contained a reference to Article 8 as well. Therefore, there can be no claim of unfair surprise.

Thus, T&R's cross-motions for leave to amend its Answer in the manner set forth in the proposed Amended Complaint, dated March 4, 2013, is granted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion (seq. 001) by defendant Horizon Engineering Associates, LLP ("Horizon") for summary judgment dismissing the complaint and all cross-claims asserted against it is denied, without prejudice; and it is further

ORDERED that the motion by defendant Active Fire Sprinkler Corp. (seq. 002) to strike the Amended Answer of defendant T&R Construction Corp. for failure to amend within 20 days after the initial pleading pursuant to CPLR 3025(b) is denied; and it is further

ORDERED that the cross-motion by T&R for leave to amend its Amended Answer to assert a cross-claim for contractual indemnification against Horizon (cross-motion to 001), and to amend its Answer, *nunc pro tunc*, to assert a cross-claim for contractual indemnification against Active (cross-motion to 002) is granted, and the Amended Answer attached to T&R's cross-motion is deemed served; and it is further

ORDERED that the parties shall appear for a preliminary conference on August 20, 2013, 2:15 p.m.; and it is further

ORDERED that T&R shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: June 18, 2013

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD