[* 1]

EA 10/24/14

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA **PART** 39

Justice

Index Number : 602262/2007
MG HOTEL, LLC
vs.
BOVIS LEND LEASE LMB
SEQUENCE NUMBER : 009
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

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

decided per the memorandum decision dated 10/21/14
which disposes of motion sequence(s) no.

FILED
OCT 24 2014
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
OCT 24 2014
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

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

Dated: 10/21/14

49 _____, **J.S.C.**

HON. SALIANN SCARPULLA

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 39

----------X

MG HOTEL, LLC,

Plaintiff,

Index No. 602262/07
Submission Date 6/5/2014

-against-

BOVIS LEND LEASE LMB, INC.; BOVIS LEND LEASE, INC.; AMERICAN STANDARD INC. d/b/a THE TRANE COMPANY; AMERICAN STANDARD COMPANIES INC. d/b/a THE TRANE COMPANY; THE TRANE COMPANY, AN OPERATING DIVISION OF AMERICAN STANDARD INC.; CENTRIFUGAL/ MECHANICAL ASSOCIATES, INC.; and VIGILANT INSURANCE COMPANY,

DECISION AND ORDER

Defendants.

----------X

SALIANN SCARPULLA, J.:

In this action, plaintiff MG Hotel LLC brings breach of warranty claims against defendants Bovis Lend Lease LMB, Inc. (Bovis), Trane U.S. Inc. (s/h/a American Standard Inc., d/b/a The Trane Company, American Standard Companies Inc., d/b/a The Trane Company, and the Trane Company) (collectively, Trane), Centrifugal/Mechanical Associates, Inc. (Centrifugal) and Vigilant Insurance Company (Vigilant), as Centrifugal's surety under a performance bond, arising out of alleged heating, ventilating and air condition (HVAC) defects in heat pump air conditioning units installed at its Residence Inn by Marriott hotel located at West 39th Street and Sixth Avenue, New York, New York (the Hotel). Trane is the manufacturer of the HVAC units at issue. Plaintiff asserts that, in March 2006, several months after the Hotel opened, the hotel staff was

besieged by guest complaints of rooms that were too hot, despite a thermostat setting that called for air conditioning. Plaintiff contends that the HVAC units manufactured by Trane are inherently defective. Plaintiff also contends that the failure of Centrifugal to properly seal the backs of the heat pump unit cabinets, where water pipes penetrate the cabinets to supply water to the heat pump units, created a condition that allowed air to bypass the inside coil of the units, causing a "freeze-up" of the units. Plaintiff seeks to hold Vigilant secondarily or derivatively liable under the performance bond issued for Centrifugal, its principal and the subcontractor/installer of the Trane HVAC units in the guestrooms of the Hotel.

Motion sequence nos. 009 and 010 are consolidated for disposition. In motion sequence no. 009, Trane moves, pursuant to CPLR 3212, for an order granting it partial summary judgment dismissing plaintiff's breach of implied warranty claims, barring plaintiff's recovery of consequential and inconsequential damages, and limiting plaintiff's damages (if any) to the original price of any HVAC units that are shown to be defective.

In motion sequence no. 010, Vigilant moves, pursuant to CPLR 3212, for an order granting it summary judgment dismissing the complaint as against it, dismissing all cross-claims asserted by Bovis and/or Trane, and awarding Vigilant, as surety, the undisputed contract balance in the amount of $429,194, which is being held by plaintiff in escrow.

During oral argument on May 28, 2014, I granted Trane's motion for partial summary judgment dismissing plaintiff's fifth cause of action for breach of implied

warranty of merchantability and sixth cause of action for breach of implied warranty of fitness for a particular purpose.[1] In addition, I granted Vigilant's motion for partial summary judgment dismissing Bovis and Trane's cross-claims for indemnification and contribution, without opposition.[2]

Background

In April 2004, plaintiff and Bovis entered into a construction contract, pursuant to which Bovis was retained as the general contractor/construction manager for the hotel project (the Contract). According to the complaint, Bovis "agreed to provide labor, material, and services for all phases of the construction, including but not limited to the purchasing and installation of an HVAC system." Plaintiff did not purchase the HVAC units directly from Trane. Rather, pursuant to the Contract, plaintiff purchased the HVAC units from Bovis for installation in the Hotel. Thereafter, Bovis entered into a subcontract on behalf of plaintiff with Centrifugal, pursuant to which Centrifugal was to install the HVAC units in the Hotel in exchange for the amount of $5,760,000 (the Subcontract). Trane sold the HVAC units for the Hotel pursuant to a purchase order

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[1] Plaintiff's counsel stated at oral argument that plaintiff discontinued its claims against Bovis, and that Bovis assigned all of its rights and claims in this action to plaintiff.

[2] Both Trane and Bovis asserted cross-claims against Vigilant for indemnification and contribution. In addition, Bovis asserted a cross-claim against Vigilant for breach of the performance bond and a cross-claim for breach of warranty, based on the allegations that Vigilant failed to remedy Centrifugal's default as provided for under the performance bond and that Vigilant breached its warranty obligations under the Subcontract.

issued by Centrifugal. Pursuant to the Subcontract, Centrifugal installed 357 Trane heat pump units in the Hotel.

Centrifugal, as principal, and Vigilant, as surety, issued a performance bond (the Performance Bond) numbered 8192-55-31 in favor of Bovis and MG Hotel, as dual obligees, in the penal sum of $5,760,000 with respect to the Subcontract for the hotel project. The Performance Bond provided:

> "NOW, THEREFORE, THE CONDITION OF THIS BOND IS SUCH, that...
>
> * * *
>
> Whenever Principal [Centrifugal] shall be, and declared by Obligees [MG Hotel or Bovis] . . . to be in default, in breach and/or to have failed to perform in any manner under the [Sub]contract, the Obligees having performed their respective obligations thereunder, the Surety shall promptly remedy the default by one of the following:
>
> 1. Complete the [Sub]contract in accordance with its terms and conditions.
>
> 2. Obtain a bid for completing the [Sub]contract in accordance with its terms and conditions. . . .
>
> * * *
>
> Principal and Surety will not be liable to the Obligees unless the Obligees or any of them, have performed their respective obligations to the Principal in accordance with the terms of said [Sub]contract."

During the pre-construction phase, in order to save money, plaintiff and its consultants made a design change to the HVAC system, from a centralized fan coil unit (FCU), to the Trane water-source-heat-pump-units (HU) system in each room. As a result, plaintiff's consultants advised it that this HVAC design-change was to increase costs of $45,000 to $90,000 for additional maintenance. Plaintiff's president, Henry

Gross, attended pre-construction meetings with its consultants Consentini, Bovis and the architect on the Project. Plaintiff acknowledged that, during these meetings, its consultants discussed the "cost" of "maintenance" for its HVAC system, and its meeting minutes advised plaintiff that, by using the "vertical heat pumps instead of FCU," its "maintenance costs" would "[i]ncrease $45k to $90K" per year. Henry Gross testified that plaintiff never had any "discussions" or "meetings" with Centrifugal about what HVAC system to use. Indeed, Gross wrote to Bovis, in an email dated 4/12/06, that "Bovis" was the "proponent/instigator/value engineer that recommended this new Trane unit."

In both the Contract and the Subcontract, the parties identified plaintiff's specifications for the Centrifugal's HVAC work at the hotel. Pursuant to "Exhibit B" of the Contract, plaintiff specified that the HVAC equipment was to be provided by Trane. In its own contract specifications, plaintiff also expressly provided that the Trane HVAC units in the hotel guestrooms were to be installed "according to approved submittal data" or "as directed by the . . . manufacturer," i.e., Trane's installation instructions approved by plaintiff and its consultants on the Project.

In order for Centrifugal to perform its HVAC work under the Subcontract, plaintiff had approved Centrifugal and Trane's submittals and Trane's "Installation Owner Diagnostics" manual for Trane's "Vertical Stack Water-Source Heat Pump" that set forth the instructions and specifications for how Centrifugal was to install the Trane HVAC

units at issue. Pursuant to plaintiff's contract specifications, Centrifugal entered into a contract with Trane whereby Trane was to furnish the water source heat pumps at issue to the Project "in accordance with [Plaintiff's] plans and specifications."

Vigilant contends that plaintiff cannot establish that Centrifugal "defaulted" on or deviated from any of plaintiff's specific contract specifications. There is evidence in the record that supports this contention. Ronald Gross, plaintiff's vice president, testified that the substantial completion date of the Project and the date that the Hotel opened was in December 2005, and that since then, plaintiff has continually operated the Hotel, maintaining a "very good" occupancy rate of between 90 to 94%. Moreover, plaintiff certified in its requisitions to its lenders that "no default has occurred" under the terms of any of the construction contracts or other contracts "for which payment is requested" (including the Subcontract, and the Trane/Centrifugal contract), and that all of the work "has been performed substantially in accordance with" the approved plans, including Centrifugal's work."

Importantly, pursuant to its own requisitions, plaintiff, its architect and Bovis approved and accepted Centrifugal's work as 100% completed and installed "in accordance with [plaintiff's] Contract Documents" or specifications.

In addition, all of the witnesses have testified that they have no knowledge of any specific "installation" issue causing plaintiff's alleged HVAC problems. For instance, during their depositions, Patrick Naughton, plaintiff's director of engineering at the hotel,

and Thomas Utsey and Chris Wellington, plaintiff's maintenance staff, all admitted that they did not know of any specific installation issue causing any problem with the Trane HVAC units or system at the hotel. Henry Gross, plaintiff's president, also admitted that, in terms of what he considered to be the cause of the problems at the Hotel, he had no discussions about "air leakage or bypass." Patrick Naughton also testified that "all rooms were available" to be used.

Likewise, Bryan O'Connor and Mauro Palladino of A.D. Winston, plaintiff's outside service contractor who was retained to service the Trane HVAC units at issue, testified that: "There ha[ve] been *no* issues with the installation" to their knowledge causing any of plaintiff's alleged HVAC problems.

After physical examination of the HVAC units, Trane – the manufacturer of the units – specifically found that Centrifugal's installation of the units was "typical" in accordance with Trane's instructions. At his deposition, Trane's product manager Timothy Hughes explained that there is always some air leakage around Trane's water-source heat pumps, and that air leakage or "air bypass" at the Hotel was "typical," and was "not to the extent that it would cause freeze-ups of low pressure trip problems." Hughes further explained that setting the thermostat below 65 degrees will cause the HVAC units to "trip out" or stop operating from "low pressure" safety lockout. Hughes then explained that the "primary" cause of plaintiff's HVAC freeze-up problem was that the thermostat used and specified by plaintiff did not have "set points," and permitted the

units to be set by guests below 65 degrees, causing "freeze-ups" of the coils on the heat pump units. Indeed, the Hotel's maintenance staff instructs guests not to set the units below "60 degrees because it . . . puts the units into a freeze mode and we have to defrost the units."

Evidence in the record also reveals that plaintiff's HVAC problems may have been caused by plaintiff's failure to maintain or operate the units. For instance, Abraham Pitsirilos, Bovis' head HVAC manager, testified that the contemporaneous project records to plaintiff show that plaintiff's HVAC problems were attributable to the failure of plaintiff's maintenance staff to maintain or operate the HVAC units. Moreover, in its June 14 and 16, 2006 emails and September 25, 2006 letter to plaintiff, Bovis stated that the issues are "maintenance and design" and that this is a "maintenance issue and training is in order." In addition, in its answers to interrogatories, Bovis asserts that plaintiff failed to maintain its HVAC units at the Hotel, by plaintiff's "[l]ack of regular maintenance; . . . failure to employ properly qualified and train[ed] maintenance staff; . . . improper and [in]adequate cleaning; lack of regular cleaning; lack of regular cleaning; [and] lint build-up."

Deposition testimony has also revealed that plaintiff's maintenance staff excessively or improperly took out and put back the units, which damaged the insulation or gasketing material, and caused the units to not be properly seated, which affected the air flow. It was a regular problem with plaintiff's staff pulling out units with no

problems. Indeed, even plaintiff admitted that it had a problem with its own staff improperly taking out units and damaging the gasketing material and seal, causing alleged air bypass.

As to the alleged "freeze-ups" of the HVAC units, it is significant that Pitsirilos personally observed that some of plaintiff's units had filters with "excessive dirt on them," which had caused a "freeze-up" of the coils.

Both plaintiff and Vigilant submit expert testimony as to the cause of the HVAC problems. Plaintiff submits an affidavit from its expert Ian Shapiro, a licensed professional engineer and the president of Taitem Engineering, P.C. ("Taitem"), an engineering consulting firm, and an expert report prepared by Taitem. Shapiro contends that Centrifugal failed to comply with proper installation standards, as Centrifugal left gaps large enough to allow air to bypass the inside of the heat pump coil. Shapiro also identified a serious defect in the Trane heat pump units that Centrifugal furnished, which causes the reversing valve to get stuck in the heating mode, and prevents the units from cooling the hotel rooms.

Vigilant submits the expert affidavit of Richard L. Rosner, P.E., the director of engineering for Cashin Spinelli & Ferretti LLC. After his personal inspection, testing and study of the HVAC units, guestrooms, and HVAC system at the Hotel, Rosner concluded that "Centrifugal's installation of Plaintiff's Trane HVAC units in the Hotel – 100% approved and accepted by Plaintiff – was performed properly and in accordance with

Plaintiff's plans and specifications and industry standards for HVAC work." Rosner further concluded that:

> "11. Plaintiff MG Hotel and its expert have offered no specific contract specification, nor industry standard for HVAC work as to which Vigilant's principal Centrifugal allegedly deviated.
>
> 12. There is simply no evidence that Vigilant's principal Centrifugal deviated from any contract specification or industry standard for HVAC work.
>
> 13. There is no engineering, technical nor scientific basis for Plaintiff MG Hotel's allegations that Centrifugal's installation of the Trane HVAC units (as specified by plaintiff and its own design consultants) caused, contributed or is attributable to any alleged or perceived problems with Plaintiff's HVAC system or Trane HVAC AC units that Plaintiff purports to occur in its Hotel guestrooms."

Rosner ultimately concluded that plaintiff's alleged HVAC freeze-up issues resulted from plaintiff's own failures to maintain its HVAC units and to address "plugged coils, dirty filters, room layouts, fouled fan wheels and[/or] thermostats [with no limits] being [able to be] set too low.

Due to the problems with the HVAC units, plaintiff withheld the final payment to Bovis for the Centrifugal HVAC work, and is holding the $429,194 amount due in escrow; Bovis/Centrifugal final release in exchange for final payment of $429,194.

Under the Payment Bond, Vigilant as surety was compelled to and did pay Centrifugal's subcontractor, Striker Sheet Metal, Inc. (Striker), for the sheet metal work performed by Striker in the amount of $302,894. Vigilant asserts that, in furtherance of the project, in making payment to Striker, and in discharging the obligations of

Centrifugal and or plaintiff on the project, it incurred substantial costs and expenses, in addition to the amount paid to Striker for such work, and in an amount far exceeding the sum of $429,194.

In the amended complaint, plaintiff asserts claims against Trane for breach of implied warranty of merchantability (fifth cause of action), breach of warranty of fitness for a particular purpose (sixth cause of action), and breach of express warranty (seventh cause of action). Plaintiff further asserts one cause of action against Vigilant for breach of the performance bond (ninth cause of action).

Discussion

I. Trane's Motion for Partial Summary Judgment (Motion Sequence No. 009)

Trane provided an express warranty for the HVAC units (the Warranty), which Bovis gave to plaintiff. The Warranty states that:

> "***These warranties are given in lieu of all other warranties, express or implied, including the implied warranty of merchantability, any implied warranty of fitness for a particular purpose and any implied warranties otherwise arising from the course of dealing or trade***"

This disclaimer is written in bold type and set off from the other text in the Warranty. The Warranty further states that:

> "***In no event shall Trane be liable for any incidental or consequential damages.*** This exclusion applies whether such damages are sought based on breach of warranty, breach of contract, negligence, strict liability in tort, or any other legal theory. Should Trane nevertheless be found liable for any damages, they shall be limited to the purchase price of the equipment"

The Warranty further emphasizes that:

> "*The above warranties are given in lieu of all other warranties, express or implied, including THE IMPLIED WARRANTY OF MERCHANTABILITY, and the implied warranty of fitness for a particular purpose and any implied warranties otherwise arising from course of dealing or trade*"

Trane argues that, with respect to plaintiff's claims for breach of the express warranty, plaintiff cannot recover any incidental or consequential damages, and that plaintiff's recoverable damages are limited to the original purchase price of the HVAC units.

Under New York law, a consequential damages disclaimer is valid unless it is unconscionable (NY UCC § 2-719 [3]; *see also Reservoir Cr. Dev., LLC v Pumptronics Inc.*, 6 AD3d 1063, 1064 [4th Dept 2004] ["the Uniform Commercial Code authorizes the parties . . . to limit the remedies available upon breach by excluding claims for consequential damages"]; *Mom's Bagels of N.Y. v SIG Greenebaum Inc.*, 164 AD2d 820, 822 [1st Dept 1990]. In commercial transactions, consequential damages disclaimers are presumptively conscionable (*Siemens Credit Crop. v Marvik Colour, Inc.*, 859 F Supp 686, 695 [SD NY 1994] [granting summary judgment barring consequential damages]; *see also Laidlaw Transp. v. Helena Chem. Co.*, 255 AD2d 869, 870 [4th Dep't 1998]. In cases like the one at issue here, which involve commercial transactions, "courts have rarely found unconscionability" (*Roneker v Kenworth Truck Co.*, 944 F Supp 179, 186 [WD NY 1996]).

Moreover, the UCC permits parties to limit recoverable damages to the purchase price of the product (UCC § 2-719 [1] [a] [seller may limit or alter the measure of damages recoverable under this Article, as "by limiting the buyer's remedies to return of the goods and repayment of the price"]; *Laidlaw*, 255 AD2D at 870.

Here, Trane's express warranty explicitly states that "***[i]n no event shall Trane be liable for any incidental or consequential damages.***" The provision further states that "[t]his exclusion applies whether such damages are sought based on breach of warranty, breach of contract, negligence, strict liability in tort, or any other legal theory." It is undisputed that Trane's incidental and consequential damages disclaimer is unequivocal and arises in a commercial setting. Thus, to the extent Trane is found liable for any damages, its liability is limited to the purchase price of the HVAC units that are shown to be defective: "Should Trane nevertheless be found liable for any damages, they shall be limited to the purchase price of the equipment." As such, pursuant to the Express Warranty's conspicuous language, plaintiff cannot recover incidental or consequential damages from Trane, and any recoverable damages are limited to the original price of the HVAC units.

In opposition to the motion, plaintiff contends that the limitations of liability in the Express Warranty are not enforceable because the Express Warranty for each unit was issued after the Centrifugal purchase order, and the limitations materially alter the terms of the purchase order, which does not disclaim any implied warranties or limit remedies.

However, these limitations of liability do not constitute material alterations, and are enforceable. Pursuant to NY UCC § 2-207, additional terms become part of the contract unless the additional terms materially alter the contract. Comment 5 to NY UCC § 2-207 specifically states that limitations of liability are examples of terms that do not materially alter an agreement: "Examples of clauses which involve no element or unreasonable surprise and which therefore are to be incorporated in the contract unless notice of objection is seasonably given are: . . . a clause . . . limiting remedy in a reasonable manner (*see* NY UCC §§ 2-718 and 2-719)." As recognized by the case law cited by plaintiff, a clause that limits a party's remedies in a reasonable manner does not materially alter a contract, and may be considered part of the parties' agreement (*Laidlaw*, 255 AD2d at 870; *see also Suzy Phillips Originals, Inc. v Coville, Inc.*, 939 F Supp 1012, 1017 [ED NY 1996], *affd* 125 F3d 845 [2d Cir 1997] [finding that a clause that limited the plaintiff's damages to the costs of the goods and disclaimed liability for lost profits and consequential damages did not materially alter the initial agreement, which did not contain any limitations on damages]).

Plaintiff also argues that the limitations of liability in the Express Warranty are unenforceable because the Express Warranty fails of its essential purpose. Specifically, plaintiff argues that the remedy of replacing the defective heat pump units fails of its essential purpose in providing plaintiff with a remedy for the damages that the Hotel has sustained. However, this argument is misplaced.

Under New York law, a limited or exclusive remedy provision will be enforced unless it fails of its essential purpose (*Cayuga Harvester v Allis-Chalmers Corp.*, 95 AD2d 5, 10 [4th Dept 1983]; NY UCC § 2-719). A limited or exclusive remedy provision constitutes the remedy that the warrantor is promising to provide in the event the product fails to satisfy the terms of the warranty (*see id.*). For instance, in the event that the HVAC units were not "free from defects in material and workmanship" or did not have "the capacities and ratings set forth in the Company's catalogs and bulletins" as provided for by the Express Warranty, then the exclusive remedy available to plaintiff was "replacement equipment (or at the option of the Company parts therefor) for all Company products not conforming to this warranty."

Whether an exclusive remedy provision fails of its essential purpose has no effect on whether a limitation of liability provision is enforceable (*Cayuga*, 95 AD2d at 14-16). It is well settled that "where a contract contains both an exclusive remedy provision and a provision limiting consequential damages, the provision limiting consequential damages will be enforced so long as it is not found to be unconscionable, even where a question of fact exists concerning the enforceability of the exclusive remedy provision" (*Scott v Palermo*, 233 AD2d 869, 870 [4th Dept 1996]). As such, even if a plaintiff establishes that a limited or exclusive remedy failed of its essential purpose (or a question of fact exists as to that issue at the summary judgment stage), a provision limiting the damages available in the event of a breach is nevertheless enforceable (*id.*; *see also Piper*

Acceptance Corp. v Barton, 1987 WL 5801, * 3 [SD NY 1987]) [finding that even if the plaintiff "successfully shows that the limited remedy of repair or replacement failed of its essential purpose, he is still barred from recovering consequential damages"]).

Accordingly, regardless of whether the remedy provided by the Express Warranty failed of its essential purpose, pursuant to the Express Warranty's conspicuous language, plaintiff cannot recover incidental or consequential damages from Trane pursuant to the Express Warranty, and any recoverable damages are limited to the original price of the HVAC units.

Finally, plaintiff contends that the limitations of liability in the Express Warranty are not enforceable because statements made in a Trane sales brochure (which plaintiff allegedly saw prior to the Express Warranty) – i.e., that the heat pump units were particularly suitable for high rise buildings, including hotels – constitute express warranties and do not have any such limitations. However, the statements in the Trane sales brochure are not actionable because they are no more than puffery. Under New York law, "an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty" (NYUCC § 2-313 [c] [2]). Moreover, generalized or vague statements about a product that "should not have been relied upon as an inducement to purchase" the item are non-actionable puffery (*Matter of Scotts EZ Seed Litig.*, 2013 WL 2303727, * 1, 7 [SD NY 2013] [finding statements that the produce was "revolutionary" and "takes care of the

seed for you, so you can grow thick, beautiful grass ANYWHERE," were either too be vague to be actionable or are "so exaggerated as to preclude reliance by consumers"]). As such, the statements made in the Sales Brochure are not actionable.

Accordingly, Trane's motion for partial summary judgment barring plaintiff's recovery of consequential and inconsequential damages, and limiting plaintiff's damages (if any) to the original price of any HVAC units that are shown to be defective, is granted.

II. Vigilant's Motion for Summary Judgment (Motion Sequence No. 010)

In support of its motion for summary judgment, Vigilant argues that the express condition precedent to any obligation under Vigilant's Performance Bond is that Centrifugal, its principal, must be in default. Vigilant contends that plaintiff cannot satisfy this fundamental condition to trigger the Performance Bond because: (1) there is no evidence of a default by Centrifugal, given that plaintiff, its architect and Bovis approved and accepted Centrifugal's installation of the HVAC units as 100% completed and installed in accordance with plaintiff's specifications, and that plaintiff certified that there was no default by Centrifugal; (2) plaintiff and its own consultants expressly specified the use of Trane HVAC units and Trane testified that Centrifugal properly installed the units in accordance with the manufacturer's instructions; (3) plaintiff cannot establish that Centrifugal defaulted on or deviated from any of plaintiff's contract specifications; (4) plaintiff and its consultants expressly acknowledged that the HVAC system design change increased costs for additional maintenance; and (5) at best,

plaintiff's admissions demonstrate that its HVAC problems are attributable to plaintiff's failure to maintain or properly operate the HVAC units.

Plaintiff argues that the summary judgment motion must be denied, arguing that it has established, through its expert report, that the failure of Centrifugal to properly seal the backs of the heat pump unit cabinets created a condition that allowed air to bypass the inside coils of the units. According to plaintiff's expert report, the air bypass has been a direct cause of the high incidence of heat pump unit freeze-ups, which has prevented the heat pump units from supplying cool air to the guest suites at the Hotel.

As more fully set out below, Vigilant is entitled to summary judgment as a matter of law because it demonstrated that Centrifugal was not in default under the Subcontract, and that plaintiff could not satisfy the fundamental condition of default in order to trigger Vigilant's Performance Bond.

On the face of Vigilant's Performance Bond, the penultimate requirement is that Centrifugal, its principal, must "be . . . in default." It is well settled that a "default" of the principal is a fundamental pre-condition to trigger any obligation under a surety performance bond as a matter of law (*Elm Haven Constr. Limited Partnership v Neri Constr. LLC*, 376 F3d 96, 100 [2d Cir 2004]). Thus, in any form of guaranty, "liability accrues only after default" by the principal under the contract (*Madison Ave. Leasehold, LLC v Madison Bentley Assoc. LLC*, 30 AD3d 1, 10-11 [1st Dept 2006]. Where, as here, "[t]here has been no demonstration that the principal . . . . defaulted on its contract . . .

the guarantors' liability has not accrued" (*Active Retirement Community, Inc. v Tritec/Klewin Constructors, LLC*, 2011 WL 2600763 [Sup Ct, Suffolk County 2011]).

In a construction defect case, an owner, like plaintiff here, must prove that a contractor had deviated and breached specific terms of the owner's contract specifications (*John John, LLC v Exit 63 Dev., LLC*, 35 AD3d 539, 540 [2d Dept 2006]; *Szatkowski v Turner & Harrison, Inc.*, 184 AD2d 504, 505 [2d Dept 1992]; *J. Tortorella Swimming Pools, Inc. v Gans*, 33 Misc 3d 1214[A], 2011 NY Slip Op 51932[U], * 2 [Sup Ct, Suffolk County 2011].

Moreover, where, as here, an owner or its agents certified that a defendant-contractor's work "had been completed in accordance with all of the contract documents," the defendant-contractor is entitled to summary judgment (*Stevens v Bast Hatfield, Inc.*, 226 AD2d 981, 981-982 [3d Dept 1996]; *see e.g. Gray v R.L. Best Co.*, 78 AD3d 1346, 1350-51 [3d Dept 2010] [proof contractor's work was approved by owner's agents according to owner's specifications and contractor-expert's affidavit "was sufficient to demonstrate [contractor's] entitlement to summary judgment"]; *Gee v City of New York*, 304 AD2d 615, 616 [2d Dept 2003] [owner-DOT letter "approved" contractor's work in accordance with DOT's "plans and specifications" and "thereby established [defendant-contractor] is . . . entitl[ed] to judgment as a matter of law"]).

Here, there is no evidence of a default by Centrifugal. Rather, it is undisputed that plaintiff, its architect and Bovis approved Centrifugal's installation of the HVAC units,

and certified that the installation was 100% completed and performed in accordance with plaintiff's Contract Documents when the Hotel was turned over to plaintiff. Plaintiff also certified that there was "no default," including by Centrifugal. Indeed, plaintiff admits that, since December 2005, it has been continuously operating its hotel with average occupancy rates of over 90% per year.

It is also undisputed that plaintiff and its own consultants expressly specified the use of the Trane HVAC units and that Trane testified that Centrifugal properly installed the Trane HVAC units. Trane physically examined the units, and specifically found that Centrifugal's installation of the sealing in or around the units was "typical" in accordance with Trane's instructions. Trane also determined that there is always air leakage around Trane's units, and found that the air leakage or "air bypass" at the Hotel was "typical," and " not to the extent that it would cause freeze-ups or low pressure trip problems."

In the context of an alleged construction defect claim, a plaintiff-owner, like plaintiff here, must prove that the defendant-contractor actually "cause[d] or create[d]" a defective condition during its work (*Levine v City of New York*, 101 AD3d 419, 420 [1st Dept 2012]; *O'Connor v Circuit City Stores, Inc.*, 14 AD3d 676, 677 [2d Dept 2005]). Where, as here, the owner "accepted the completed [installation of the HVAC] work," and there is "no[] . . . evidence [the contractor] damaged the [HVAC] units during installation or otherwise improperly installed them," the contractor is "not liable . . . when

the [HVAC] system failed to work properly" (*John & Grace Co. v State Univ. Constr. Fund*, 99 AD2d 860, 860-861 [3d Dept], *affd as modified* 64 NY2d 709 [1984]).

Plaintiff has presented no evidence that Centrifugal "defaulted" on or deviated from any of plaintiff's contract specifications. To the contrary, all witnesses testified that they had no knowledge of any specific installation issue causing plaintiff's HVAC problems. As to alleged freeze-ups, it is significant that Bovis' head HVAC manager Abraham Pitsirilos personally observed that plaintiff's units had excessive dirt on them, and opined that these dirty filters caused the freeze-ups of the coils.

Accordingly, the evidence produced by Vigilant that plaintiff, its architect, and Bovis approved Centrifugal's work, and Trane's testimony that the HVAC units were installed in accordance with the manufacturer's instructions demonstrates that Centrifugal was not "in default" under the Subcontract. Thus, plaintiff cannot satisfy the fundamental condition of a default to trigger Vigilant's bond. Consequently, this evidence entitles Vigilant to summary judgment dismissing plaintiff's complaint and dismissing Bovis' cross-claims for breach of the performance bond, and breach of warranty.

In opposition to the motion, plaintiff's sole support for its contention that Centrifugal's installation caused its HVAC problems is its expert report. Plaintiff's expert's contention that Centrifugal failed to comply with proper installation standards is wholly conclusory, as Shapiro fails to set forth any specific contract specifications or industry standards from which Centrifugal allegedly deviated, or any engineering,

technical or scientific basis for his conclusion that Centrifugal's installation of the Trane HVAC units caused, contributed or is attributable to any alleged or perceived problems with plaintiff's HVAC system.

It is well settled that "conclusory assertions" by plaintiff's expert are "insufficient to defeat defendants' motion for summary judgment" (*Gonzalez v 98 Mag Leasing Corp.*, 95 NY2d 124, 129 [2000]; *Rizzo v Sherwin-Williams Co.*, 49 AD3d 847, 849 [2d Dept 2008]). "It is axiomatic that 'opinion evidence must be based on facts in the record'" (*Santoni v Bertelsmann Property, Inc.*, 21 AD3d 712, 714-715 [1st Dept 2005] [citation omitted]). An expert's speculation that a contractor "may" have caused the alleged condition damaging the owner's project is "insufficient," warranting summary judgment dismissing all claims against the contractor (*Katz v Eastern Constr. Dev. & Custom Homes, Inc.*, 2011 WL 2283768, * 4-5 [Sup Ct, Suffolk County 2011], *affd* 100 AD3d 830 [2d Dept 2012]).

Here, plaintiff's expert report provides no contract specifications, actual industry standards or manufacturer instructions as to which Centrifugal allegedly "defaulted" on or deviated from under the Subcontract. Instead, plaintiff's expert merely make conclusory statements that have no support from plaintiff's contract documents, or from the actual facts in the record. As such, plaintiff cannot trigger Vigilant's Performance Bond (*Bohan v F.R.P. Sheet Metal Contr. Corp.*, 58 AD3d 781, 781 [2d Dept 2009] [plaintiff's expert "did not sufficiently 'identify any specific industry standard upon which he relied' nor . . .

any specific statutory or code violations"] [citation omitted]); *Levy v Kung Sit Huie*, 54 AD3d 731, 731-732 [2d Dept 2008] [plaintiff's expert provided no specific "industry standards", and only alleged "general" or "non specific" duties that cannot defeat summary judgment]; *Active Retirement Comm., Inc. v Tritec/Klewin Constr., LLC*, 2011 WL 2600763 [because plaintiff's engineer's report provided no "terms of the contract" on which the contractor allegedly defaulted, there was no liability under the guaranty]).

Shapiro's opinion is also speculative as he "did not identify the basis for" or "demonstrate that the testing he performed" was "sufficient[]" to rule out other alleged causes of the claimed problem or defect (*Rizzo*, 49 AD3d at 849).

Moreover, even if Shapiro had identified contract specifications or industry standards, his conclusions "lack foundation" and cannot "raise a triable issue of fact" as there is "no evidence in the record, beyond the expert's speculation" that the alleged defective condition was purportedly caused as a result of Centrifugal's work (*Santoni*, 21 AD3d at 715; *Phillips v McClellan St. Assoc.*, 262 AD2d 748, 749-750 [3d Dept 1999] [expert "conclusory opinion" that there was a "deviation" from an alleged "industry wide practice" is the "sole evidence" on which plaintiffs "base their case"; this is "insufficient" to defeat "summary judgment"]).

As to Centrifugal's Subcontract balance, plaintiff has admitted that it is holding $429,194 in escrow as the final payment due under Centrifugal's Subcontract and that Centrifugal's work was approved as "100%" installed in accordance with plaintiff's

contract documents. It is well settled that Vigilant as payment bond surety completes its obligations under the bond where, as here, all claims by its principal's subcontractors or materialmen have been discharged (*Matter of RLI Ins. Co. v New York State Dept. of Labor*, 97 NY2d 256, 264-265 [2002], ["(u)nder equitable subrogation principles, where a surety has fully satisfied its obligations under a payment bond and the owner has retained funds to be used in completion of the improvement, 'the (owner) had a right to use the retained fund to pay laborers and materialmen; *** the laborers and materialmen had a right to be paid out of the fund; *** the contractor, had (it) completed (its) job and paid (its) laborers and materialmen, would have become entitled to the fund; and *** the surety, having paid the laborers and materialmen, is entitled to the benefit of all these rights to the extent necessary to reimburse it"'], quoting *Pearlman v Reliance Ins. Co.*, 371 US 132, 141 [1962]). Plaintiff does not dispute that Vigilant fully discharged its obligations under the payment bond, as Vigilant has paid the laborers and materialmen, and has fully discharged the obligations of both the owner and Centrifugal to pay Striker for furnishing work to the hotel. Vigilant is therefore entitled to an award of the contract balance of $429,194 currently being held in escrow by plaintiff.

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

In accordance with the foregoing, it is

ORDERED that the motion by defendant Trane U.S. Inc. (s/h/a American Standard Inc., d/b/a The Trane Company, American Standard Companies Inc., d/b/a The Trane Company, and the Trane Company) for partial summary judgment dismissing the fifth cause of action for breach of implied warranty of merchantability and the sixth cause of action for breach of implied warranty of fitness for a particular purpose (motion seq. no. 009) is granted in accordance with the decision and order placed on the record on May 28, 2014; and it is further

ORDERED that the motion by defendant Trane U.S. Inc. (s/h/a American Standard Inc., d/b/a The Trane Company, American Standard Companies Inc., d/b/a The Trane Company, and the Trane Company) for partial summary judgment barring plaintiff's recovery of consequential and inconsequential damages, and limiting plaintiff's damages (if any) to the original price of any HVAC units that are shown to be defective (motion seq. no. 009) is granted; and it is further

ORDERED that the motion of defendant Vigilant Insurance Company for summary judgment dismissing the complaint and dismissing Bovis' cross-claims for breach of the performance bond and breach of warranty (motion seq. no. 010) is granted, and the complaint and Bovis' cross-claims for breach of the performance bond and breach of warranty are dismissed; and it is further

ORDERED that the motion of defendant Vigilant Insurance Company for summary judgment dismissing Bovis and Trane's cross-claims for indemnification and

contribution (motion seq. no. 010) is granted without opposition, and Trane's cross-claims against Vigilant for indemnification and contribution are dismissed, and Bovis' cross-claims against Vigilant for indemnification and contribution are dismissed; and it is further

ORDERED that the motion of defendant Vigilant Insurance Company for summary judgment for an award of the contract balance in the amount of $429,194, which is currently held in escrow by plaintiff (motion seq. no. 010) is granted, that claim is severed and judgment on the claim will be entered at the conclusion of the action; and it is further

ORDERED that counsel are directed to appear for a status conference at 60 Centre Street, Room 208, on November 12, 2014 at 2:15pm.

This constitutes the decision and order of the Court.

Date: New York, New York
October 21, 2014

ENTER:

Saliann Scarpulla, J.S.C.