ORIGINAL

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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BETHPAGE WATER DISTRICT,

Plaintiff,

-against-

LAYNE CHRISTENSEN COMPANY, PHILIP ROSS INDUSTRIES INCORPORATED, and SAFECO INSURANCE COMPANY OF AMERICA,

Defendants.

----------x

TRIAL/IAS PART: 12
NASSAU COUNTY

Index No: 604116-17
Motion Seq. No. 1
Submission Date: 11/6/17

Papers Read on this Motion:

Notice of Motion, Affidavit in Support and Exhibit.....x
Memorandum of Law in Support.....x
Affirmation in Opposition and Exhibits.....x
Affirmation in Further Support.....x

This matter is before the court on the motion filed by Defendant Layne Christensen Company ("Layne") on July 13, 2017 and submitted on November 6, 2017. For the reasons set forth below, the Court grants the motion and dismisses the first, second and third causes of action asserted against Layne in the Amended Complaint.

BACKGROUND

A. Relief Sought

Defendant Layne moves for an Order, pursuant to CPLR §§ 3211(a)(1), (5) and (7), dismissing with prejudice Plaintiff Bethpage Water District's tort and breach of contract claims, Counts I, II and III, as asserted against Layne in Plaintiff's Amended Complaint.

Plaintiff Bethpage Water District ("District" or "Plaintiff") opposes the motion.

B. The Parties' History

The Amended Complaint (Ex. 1 to Vita Aff. in Supp.) alleges as follows:

The District received bids for a project ("Project") known as the Well Head Treatment for the Removal of Nitrates at Wells 7 & 8. On August 10, 2010, Defendant Philip Ross Industries Incorporated ("Philip Ross") entered into a contract with the District to install eight Layne Advanced Amberpack Ion Exchange Systems ("Systems") at the District's nitrate removal facility. Layne manufactured the Systems. The purpose of the Systems is to purify and treat raw water before public consumption.

As per the Conformed Contract, Philip Ross warranted and agreed to, *inter alia*, accept, complete, and furnish all of the material and perform all of the work required under the plans and specifications. As per the agreement between Philip Ross and the District, Philip Ross obtained a maintenance bond ("Maintenance Bond") from Safeco Insurance Company of America ("Safeco Insurance") in favor of the District in the sum of $2,735,934.50. As per the Maintenance Bond, Philip Ross and Safeco Insurance guaranteed the District that the Systems would be free of "all defects in workmanship and materials" (Am. Comp. at ¶ 3) for the period up to and including February 12, 2015. Additionally, Philip Ross made the following express warranties: 1) that the work required by the Conformed Contracts, the Plans, and Specifications can be satisfactorily constructed and used for the purpose for which the District intended and that such construction will not injure any person or damage any property; 2) that Philip Ross carefully examined the Plans, Specifications, and the work site, and that from its own investigation it has satisfied itself as to the nature and location of the work; the character, location, quality and quantity of surface and subsurface materials; and the character of equipment; and 3) that the work shall be free from any defects in materials or workmanship, and Philip Ross agrees to correct any defects which may appear within one year following the date of the final payment request.

After Philip Ross installed the Systems, patent and latent defects manifested in the Systems, including but not limited to vessel leaks and vessel corrosion, piping leaks and/or corrosion, damage to the framing and supports, failure to properly filtrate the water, and other problems which comprised the structural integrity of the Systems and obligated the District to

remove the Systems from service. As a result, the District and its public are losing critical water supply. These defects manifested within the period of February 12, 2014 through February 12, 2015, and they continue to manifest to date.

The Amended Complaint asserts separate causes of action against Philip Ross, Safeco Insurance, and Layne. Plaintiff asserts a single cause of action against Safeco Insurance alleging breach of contract and seeking indemnification under the Maintenance Bond. Plaintiff asserts three (3) causes of action against Philip Ross: 1) breach of the Conformed Contract, 2) breach of contract under the Maintenance Bond, and 3) negligence. Plaintiff asserts five (5) causes of action against Layne, which are as follows:

1) breach of the contract entered into by Layne pursuant to which it would manufacture and supply the Systems for the express and direct benefit of the District, of which the District is a Third-Party Beneficiary;

2) strict products liability for the defective nature of the Systems;

3) negligence in performing the work under the Contract, causing defects to appear within the Systems;

4) breach of implied warranty of merchantability; and

5) breach of implied warranty of fitness for a particular purpose.

Layne moves to dismiss the first, second and third causes of action. Layne submits that the District's strict product liability and negligence claims are barred by both the statute of limitations and the economic loss doctrine. Layne contends, further, that the District's breach of contract claim is legally insufficient because there was no contract between Layne and the District, and the District has failed to plead or demonstrate the required elements to sustain a viable breach of contract against Layne under a third-party beneficiary theory.

In opposition to the motion, counsel for Plaintiff ("Plaintiff's Counsel") submits, preliminarily, that in light of Layne's failure to submit documentary evidence, there is no basis for Layne's motion pursuant to CPLR § 3211(a)(1), and the Court's standard of review should be pursuant to CPLR § 3211(a)(7). Plaintiff submits, further, that assuming the facts alleged as true, the Amended Complaint is legally sufficient and not-time barred.

Plaintiff's Counsel provides a time line of the relevant events (McAndrew Aff. in Opp. at p. 2), which includes that on August 10, 2010, Philip Ross entered into a contract with the

District to install the Layne Systems and that, prior to the installation of the Systems, Philip Ross and Layne entered into a contract ("Layne-Ross Contract"), pursuant to which Layne would "manufacture and supply the Systems for the express and direct benefit of the District" (McAndrew Aff. in Opp. at ¶ 4, quoting Am. Comp. at ¶ 52). Plaintiff's Counsel also affirms that Layne, prior to its manufacture and supply of the Systems, knew that the District required the Systems to purify and treat raw water before public consumption, and that a failure of the Systems would cause direct harm to the public by way of loss to critical water supply, citing the Amended Complaint at paragraph 5.

Plaintiff's Counsel affirms that "[t]he precise date on which the damage alleged in this lawsuit first manifested itself was in January of 2015" (McAndrew Aff. in Opp. at p. 3), and submits that this was confirmed in the February 6, 2015 letter ("2015 Letter") from the Law Firm of Carman, Callahan & Ingham on behalf of the District to Defendants Philip Ross and Safeco formally advising Safeco that a potential claim exists under its maintenance bond with the District (Ex. 2 to McAndrew Aff. in Opp.). The 2015 Letter states that at a Board meeting on February 5, 2015, the Superintendent reported that substantial defects appeared in Philip Ross' work under the contract.

Plaintiff's Counsel affirms that Layne was apprised of the defects and performed an inspection of the damage for the District in February 2015, followed by substantial repairs done by Layne in March of 2015 and confirmed in a report issued by Lane directly to the District in April 2015. Plaintiff's Counsel provides a copy of the report dated in April 2015 (Ex. 3 to McAndrew Aff. in Opp.), and notes that the Form R-1 Report of Repair, attached to that report, states that the work was performed by Layne under a "warranty."

Plaintiff also provides an affidavit of Michael Boufis ("Boufis") (Ex. 4 to McAndrew Aff. in Opp.), the Superintendent of the Bethpage Water District. Boufis affirms that his duties and responsibilities include the daily operations of the Water District in supplying water to the residents of Bethpage, and that he oversees the multiple pump stations used by the District. He monitors the water for water quality, and monitors contaminant levels in the water system. Boufis affirms that pursuant to the Safe Drinking Water Act passed by Congress in 1974, the Environmental Protection Agency ("EPA") has established guidelines for contaminant levels in drinking water. The New York State Department of Health enforces those guidelines in New

York, including in the Bethpage Water District. One such contaminant is nitrates, and excessive levels of nitrates have been found to cause serious illness in individuals.

Boufis affirms that wells 7A and 8A were found to have significant levels of nitrates. The District sought to virtually eliminate the nitrates by installing a nitrate filtration system. In January 2010, the District retained the services of an independent engineering company, H2M, to recommend a system for nitrate removal. H2M supplied the water testing results for wells 7A and 8A to Layne, a company involved in the manufacture and design of water filtration systems and, specifically, nitrate filtration systems for municipal water plants. As part of a report generated by H2M in January 2010, Layne submitted diagrams and drawings for a nitrate filtration system for the District, and Plaintiff provides copies of those drawings.

Boufis affirms that the contract for the installation of the Layne nitrate filtration system was awarded to Philip Ross in 2010. Safeco Insurance issued a bond guaranteeing the materials and workmanship pursuant to the contract issued to Philip Ross, extending from February 12, 2014 to February 12, 2015. Boufis affirms that in January of 2015, defects in the system manifested themselves when several vessels were observed to be leaking and on February 6, 2015, the 2015 Letter was sent to Philip Ross and Safeco. In response, Layne sent representatives to the water district to perform an inspection of the damage in February 2015, and then sent representatives in March 2015 to attempt to perform repairs on the system. In April 2015, Layne issued a report directly to the water district which "outlines that repairs were made for the water district pursuant to warranty directly by Lane" (Boufis Aff. at ¶ 6).

Boufis disputes Layne's contention that the District was not a third-party beneficiary of the contract between Layne and Philip Ross for the nitrate filtration system. Boufis submits that this assertion is incorrect in light of the fact that 1) Layne prepared the drawings and designed the system specifically for the District in 2010; 2) Layne then supplied the system to Philip Ross and shipped the system to the District plant for installation; 3) the documents reflect that Layne was aware that this system was designed specifically for the District; 4) Layne, through its engineers, was aware that the purpose of the system was to eliminate the nitrates from the drinking water being supplied by the water district to Bethpage residents, and that the failure to eliminate the nitrates could harm those residents; and 5) Layne was advised that the defects became apparent in January of 2015, performed an inspection using its own workers in February 2015, and attempted repairs in March 2015. Under these circumstances, Boufis submits, it is clear that Layne was aware that the District was the intended beneficiary of the contract between Layne and Philip

Ross. Boufis contends, further, that, Layne is aware that the defects occurred in January of 2015 and, therefore, that the statute of limitations had not expired when Plaintiff filed its initial complaint in May 2017. [1]

Boufis affirms that, because of the defects that occurred in the system, the system had to be taken off line. In addition, the water distributed to Bethpage residents from Wells 7A and 8A had to be blended with water from other sources in order to decrease the nitrate levels. In addition, there have been occasions on which Well 8A had to be closed, which also necessitated the closing of Well 7A. When this occurs, there is a significant drop in the water pressure which affects all residents of the District. In addition, the reserve wells are significantly decreased, creating concerns in the event that full pressure is needed during a fire or other emergency. Boufis affirms that the public has been affected by receiving water with concentration of nitrates that would not have been present if the system installed by Layne had been properly installed and was functioning properly. The public has also been affected by the decreased water pressure resulting from the inability to use certain wells, due to the failure of the Layne system.

In response, Layne submits that Plaintiff's opposition to the instant motion "pivots from the allegations made in its Amended Complaint, now picking a claimed manifestation date for defects in light of Layne's Motion; one that is unverified and conspicuously absent from both its original and amended pleadings" (Vida Aff. in Further Supp. at p. 1). Layne submits that the Amended Complaint, as well as Plaintiff's opposition papers to the instant motion, demonstrate that Plaintiff is attempting to "dress up" their contract-based actions as tort claims (Vita Aff. in Further Supp. at p. 2).

C. The Parties' Positions

Layne submits that 1) the second and third causes of action asserted against Layne, based on strict liability and negligence, are barred by the three (3) year statute of limitations in light of Plaintiff's allegation in the Amended Complaint that the alleged defects "appeared prior to and within the period of February 12, 2014 up to and including February 12, 2015, and defects have continued to appear to date" (Am. Comp. at ¶ 56), and the fact that the initial complaint was filed on May 10, 2017, more than three years after the District alleges the defects began to appear; 2) the District's products liability and negligence claims are also barred by the economic loss doctrine in light of the fact that the District "unequivocally pleads" (Layne Memo. of Law in

[1] A review of the electronically filed documents in this action reveals that Plaintiff filed its initial complaint on May 10, 2017.

Supp. at p. 8) that the Systems are the subject of a contract, and that its tort claims seek economic losses resulting from alleged injury to the Systems themselves, and the District's allegation that the failure of the Systems "seriously subjects the public to losing critical water supply" (Am. Comp. at ¶ 64) is insufficient in light of the fact that there is no allegation that the water supply has, in fact, been lost or that anyone has been injured; and 3) the District's breach of contract claim fails because Plaintiff has not alleged the necessary element of the existence of a contract between the District and Layne, and the District's conclusory assertion that it is a third party beneficiary of the contract between Layne and Philip Ross is insufficient because only an intended beneficiary of a contract may sue as a third party, and the District does not allege facts to support that assertion.

Plaintiff opposes the motion submitting that 1) the economic loss rule does not bar the negligence and strict products liability claims because, in light of the Boufis affidavit which states that Layne was aware that the purpose of the system was to remove contaminants from the public's drinking water, questions of fact exist as to whether the project to manufacture and supply the systems was so affected with public interest that the failure to perform may affect the public; 2) the District alleges a viable breach of contract claim as a third-party beneficiary to the Layne-Ross Contract by alleging that Layne entered into a contract with Philip Ross, pursuant to which Layne would "manufacture and supply the Systems for the express and direct benefit of the District" (Am. Comp. at ¶ 52), and in further consideration of Layne's failure to produce documentary evidence in support of its contention that the District is an incidental, rather then an intended, beneficiary of the Layne-Ross Contract; and 3) the negligence and products liability claims are not time-barred because the precise date on which the damaged alleged in the Amended Complaint first manifested itself was in January of 2015, as confirmed in the 2015 Letter, and, affording the District all possible inferences, the Amended Complaint asserts that the defects to the System first appeared in January and or February of 2015 and, therefore, the negligence and products liability claims would not be time barred if true.

In reply, Layne submits that Plaintiff's negligence and strict products liability claims concerning Layne's alleged failure to perform contractual repair and warranty work are clearly barred by the economic loss doctrine because the Amended Complaint and affirmation in opposition to Layne's motion allege only damage to the product and seek only economic loss. Layne submits that Plaintiff alleges only injury to the product itself, specifically the System, and does not allege in any of its filings that any person or property beyond the product itself was

damaged. Moreover, the Boufis affidavit, while describing the potential harm that could result if the System was defective, also concedes that no one in the public was actually harmed by the alleged defect, and the Amended Complaint alleges only potential future harm that could occur. In addition, Plaintiff seeks only economic losses in the form of amounts to repair and replace the System, as well as related consequential damages. Under these circumstances, Layne submits, the economic loss doctrine bars recovery in tort.

Layne contends, further, that while Plaintiff now asserts that the damages manifested in January 2015, the Amended Complaint alleges that defects manifested within the period of February 12, 2014 through February 12, 2015. Layne submits that Plaintiff's reliance on documentation outside the pleadings, including the 2015 Letter and report issued by Layne in April 2015, does not alter the fact that the Amended Complaint alleges that defects were noted in February 2014. Layne submits that, in light of Plaintiff's allegation that the damages were first observed in February 2014, and the initial complaint was filed in May 2017, the causes of action for negligence and strict liability are time-barred.

Layne also submits that Plaintiff has not adequately pleaded that it is an intended third-party beneficiary of the contract between Layne and Philip Ross. Layne contends that the District does not allege facts to support its assertion that it is an intended third-party beneficiary, and that its conclusory assertion that it is a third-party beneficiary of that contract is insufficient.

RULING OF THE COURT

A. Dismissal Standards

In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Bivona v. Danna & Associates, P.C.*, 123 A.D.3d 956, 957 (2d Dept. 2014), quoting *Alva v. Gaines, Gruner, Ponzini & Novick, LLP*, 121 A.D.3d 724 (2d Dept. 2014) (internal quotation marks omitted) and citing *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

A motion to dismiss a cause of action pursuant to CPLR § 3211(a)(1) may be granted only if documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law. *Bivona v. Danna & Associates, P.C.*, 123 A.D.3d at 957, citing *Indymac Venture, LLC v. Nagessar*, 121 A.D.3d 945 (2d Dept. 2014), quoting *Whitebox Concentrated Convertible Arbitrage Partners, L.P. v. Superior Well Servs.*,

Inc., 20 N.Y.3d 59, 63 (2012).

On a motion pursuant to CPLR § 3211(a)(5) to dismiss a complaint as barred by the applicable statute of limitations, the moving defendant must establish, *prima facie*, that the time in which to commence the action has expired. *Beroza v. Sallah Law Firm, P.C.*, 126 A.D.3d 742 (2d Dept. 2015), quoting *Kitty Jie Yuan v. 2368 W. 12th St., LLC*, 119 A.D.3d 674 (2d Dept. 2014). The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is tolled or is otherwise inapplicable. *Beroza v. Sallah Law Firm, P.C.*, 126 A.D.3d at 742 citing, *inter alia*, *Kitty Jie Yuan v. 2368 W. 12th St., LLC*, 119 A.D.3d at 674.

B. Breach of Contract

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694 (2d Dept. 1986).

C. Economic Loss Doctrine

Purely economic loss resulting from a breach of contract does not constitute injury to property within the meaning of New York's contribution statute, CPLR Section 1401. *Eisman v. Village of E. Hills*, 149 A.D.3d 806, 809 (2d Dept. 2017), citing *Board of Educ. of Hudson City School Dist. v. Sargent, Webster, Crenshaw & Folley*, 71 N.Y.2d 21, 26 (1987), quoting CPLR § 1401. Accordingly, under the so-called economic loss doctrine, contribution under CPLR § 1401 is not available where the damages sought are exclusively for breach of contract. *Eisman v. Village of E. Hills*, 149 A.D.3d at 809, citing *Sound Refrig. & A.C., Inc. v. All City Testing & Balancing Corp.*, 84 A.D.3d 1349, 1350 (2d Dept. 2011), quoting *Tower Bldg. Restoration v. 20 E. 9th St. Apt. Corp.*, 295 A.D.2d 229 (1st Dept. 2002). The existence of some form of tort liability is a prerequisite to application of CPLR § 1401. *Eisman v. Village of E. Hills*, 149 A.D.3d at 809, citing *Sound Refrig. & A.C., Inc. v. All City Testing & Balancing Corp.*, 84 A.D.3d at 1350, quoting *Board of Educ. of Hudson City School Dist. v. Sargent, Webster, Crenshaw & Folley*, 71 N.Y.2d at 28.

Where the plaintiff is merely seeking the benefit of its agreement, it is limited to a contract claim. *Dormitory Auth. of the State of N.Y. v. Samson Constr. Co.*, 137 A.D.3d 433, 434 (1st Dept. 2016), citing *Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540, 551-52 (1992). Where, however, the particular project is so affected with the public interest that the failure to perform competently can have catastrophic consequences, a professional may be subject to tort liability as

well. *Dormitory Auth. of the State of N.Y. v. Samson Constr. Co.*, 137 A.D.3d at 434, quoting *Trustees of Columbia Univ. v. Gwathmey Siegel & Assocs. Architects*, 192 A.D.2d 151, 154 (1st Dept. 1993). Indeed, this is one of the most significant elements in determining whether the nature of the type of services rendered gives rise to a duty of reasonable care independent of the contract itself. *Dormitory Auth. of the State of N.Y. v. Samson Constr. Co.*, 137 A.D.3d at 435, quoting *Trustees of Columbia Univ. v. Gwathmey Siegel & Assocs. Architects*, 192 A.D.2d at 154, citing *Sommer v. Federal Signal Corp.*, 79 N.Y.2d at 553. It is policy, not the parties' contract, that gives rise to a duty of care. *Dormitory Auth. of the State of N.Y. v. Samson Constr. Co.*, 137 A.D.3d at 435, quoting *Sommer v. Federal Signal Corp.*, 79 N.Y.2d at 552. The nature of the injury, the manner in which the injury occurred and the resulting harm are also considered. *Dormitory Auth. of the State of N.Y. v. Samson Constr. Co.*, 137 A.D.3d at 435, quoting *Sommer v. Federal Signal Corp.*, 79 N.Y.2d at 552, citing *Bellevue S. Assoc. v. HRH Constr. Corp.*, 78 N.Y.2d 282, 293-95 (1991).

D. Third-Party Beneficiary

A third party seeking to enforce a contract must establish that he was an intended beneficiary of the contract rather than merely an incidental beneficiary. *Cole v. Metropolitan Life Ins. Co.*, 273 A.D.2d 832, 833 (4th Dept. 2000), citing *Fourth Ocean Putnam Corp. v. Interstate Wrecking Co.*, 66 N.Y.2d 38, 43-44 (1985); *Stainless, Inc. v. Employers Fire Ins. Co.*, 69 A.D.2d 27, 33-34 (1st Dept. 1979), aff'd 49 N.Y.2d 924 (1980). One is an intended beneficiary if one's right to performance is appropriate to effectuate the intention of the parties to the contract and either the performance will satisfy a money debt obligation of the promisee to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. *Cole v. Metropolitan Life Ins. Co.*, 273 A.D.2d at 833, citing *Lake Placid Club Attached Lodges v. Elizabethtown Bldrs.*, 131 A.D.2d 159, 161 (3d Dept. 1987), quoting Restatement (Second) of Contracts § 302(1)(a), (b). On the other hand, an incidental beneficiary is a third party who may derive a benefit from the performance of a contract through he is neither the promisee nor to the one to whom performance is to be rendered. *Cole v. Metropolitan Life Ins. Co.*, 273 A.D.2d at 833, quoting *Airco Alloys Div. v. Niagara Mohawk Power Corp.*, 76 A.D.2d 68, 79 (4th Dept. 1980), citing 2 Williston, Contracts § 402 (3d ed.).

E. Applicable Statute of Limitations Principles

The limitations period applicable to causes of action sounding in negligence and strict products liability is the three-year limitation period set forth in CPLR § 214-c. *Frumento v. On*

Rite Co., Inc. ("*Frumento*"), 66 A.D.3d 828, 829 (2d Dept. 2009). It is well settled that in an action predicated upon a claim of strict products liability, a three-year statute of limitations is applicable. *O'Halloran v. Toledo Scale Co.*, 135 Misc. 2d 1098, 1100 (Sup. Ct. N.Y. Cty. 1987), *aff'd* 137 A.D.2d 427 (1st Dept. 1988), citing *Thornton v. Roosevelt Hosp.*, 47 N.Y.2d 780 (1979); *Victorson v. Bock Laundry Mach. Co.*, 37 N.Y.2d 395 (1975). In latent injury cases, where an injured party may have been exposed to a harmful substance over a period of time, the cause of action accrues on the date of plaintiff's last exposure to the harm. *O'Halloran v. Toledo Scale Co.*, 135 Misc. 2d at 1100-01, citing *Schmidt v. Merchants Desp. Transp. Co.*, 270 N.Y. 287 (1936); *McKee v. Johns Manville Corp.*, 94 Misc. 2d 327 (Sup. Ct. Erie Cty. 1978), *mod. sub nom. Matter of Steinhardt v. Johns Manville Corp.*, 78 A.D.2d 577 (4th Dept. 1980), *aff'd* 54 N.Y.2d 1008 (1981), *mot. to amend remittitur granted* 55 N.Y.2d 802 (1982).

Frumento involved a plaintiff hairstylist /technician who allegedly began to develop symptoms resulting from her exposure to specified chemicals that she used in the course of her employment. 66 A.D.3d at 828. The Second Department held that, given the nature of the claims at issue, specifically that the plaintiff sustained personal injuries caused by exposure to a substance or a combination of substances, the causes of action sounding in negligence and strict products liability were to be commenced within three years of the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier. *Id.* at 830-31, quoting CPLR § 214-c(2). The Second Department concluded that the trial court had properly dismissed these causes of action as time-barred because the defendant established that the plaintiff had commenced the action more than three years after she began to suffer the manifestations and symptoms of her physical condition. 66 A.D.3d at 830, quoting *Searle v. City of New Rochelle*, 293 A.D.2d 735, 736 (2d Dept. 2002).

F. Application of these Principles to the Instant Action

The Court grants the motion and dismisses the first, second and third causes of action asserted against Layne in the Amended Complaint. The Court so rules based on its conclusion that 1) the first cause of action, alleging breach of contract with respect to the contract between Layne and Philip Ross and further alleging that the District is a third-party beneficiary of that contract, is legally insufficient because Plaintiff has not set forth sufficient allegations to support its contention that it is an intended third-party beneficiary of that contract, and its conclusory assertions are insufficient; and 2) the second and third causes of action, based on negligence and

strict liability, are precluded by the economic loss doctrine in light of the fact that the Systems are the subject of a contract, Plaintiff seeks economic losses resulting from alleged injury to the Systems themselves, and Plaintiff does not allege that any person or property beyond the product itself was damaged. The Court notes that it also appears that the second and third causes of action are also time-barred, in light of the allegations in the Amended Complaint that defects first appeared in February 2014 and the fact that the initial complaint was filed in May 2017, more than three years after that date.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Preliminary Conference on January 11, 2018 at 9:30 a.m.

ENTER

DATED: Mineola, NY
December 14, 2017

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
DEC 22 2017
NASSAU COUNTY
COUNTY CLERK'S OFFICE