SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN **PART** IAS MOTION 58EFM

Justice

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HUNT CONSTRUCTION GROUP, INC.,

Plaintiff,

- v -

MATTHEW L. ROSSETTI, ARCHITECT, P.C., ROWAN WILLIAMS DAVIES & IRWIN, INC., BIRDAIR, INC., WSP FORMERLY KNOWN AS WSP CANTOR SEINUK, and WSP USA BUILDINGS INC. D/B/A WSP USA CORP.,

Defendants.

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INDEX NO. 654365/2019

MOTION SEQ. NO. 003 and 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 78, 80, 82, 84, 87, 90, 91, 92

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 79, 81, 83, 85, 86, 88, 89

were read on this motion to/for DISMISSAL.

In this breach of contract action commenced by plaintiff Hunt Construction Group, Inc. ("Hunt"), defendant WSP formerly known as WSP Cantor Seinuk and WSP USA Buildings Inc. d/b/a WSP USA Corp. ("WSP") moves, pursuant to CPLR 3211(a)(1) and (a)(7) (motion sequence 003) to dismiss the first amended complaint. Additionally, defendant Rowan Williams Davies & Irwin, Inc. ("Rowan") moves, pursuant to CPLR 3211(a)(7) (motion sequence 004), to dismiss the complaint. Plaintiff opposes the motions. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

This action arises from a contractual dispute regarding the design and construction of a new tensile fabric roof for Arthur Ashe Stadium ("Ashe"), a facility owned by the "United States

Tennis Association National Tennis Center Incorporated" ("the NTC"). Docs. 1, 63. Ashe is world famous as it is center court for the annual United States Open Tennis Championships ("the Open"). Hunt commenced the captioned action by filing a summons with notice against defendants Matthew L. Rossetti, Architect, P.C. ("Rossetti"), Rowan, and WSP on July 31, 2019. Doc. 1. Hunt subsequently amended the summons with notice to name Birdair, Inc. ("Birdair") as a defendant. Doc. 2.

Hunt filed a complaint on July 1, 2020. Doc. 17. It then filed a first amended complaint ("FAC") on October 21, 2020. Doc. 45. In the FAC, Hunt alleged that, in 2010, the United States Tennis Association developed plans to improve the NTC following the 2013 Open, and concluding by the 2018 Open, by, inter alia, adding a retractable roof to Ashe by July 31, 2016. Id. at pars. 17-21.

Hunt alleged that the defendants acted as its "design/engineering consultants or subconsultants . . . in connection with the design and construction of the retractable roof" for Ashe pursuant to a contract with the NTC (Doc. 89), and that their breaches of contract and/or negligence resulted in "two separate failures of the [r]oof in two consecutive winters" due to "routine and foreseeable snow load conditions." Doc. 45 at pars. 2-3. Hunt claimed that, when these failures occurred, it had to take emergency measures to stabilize the roof to prevent further damage, and to devise "an acceptable long-term remedial design" for the roof. Id. at par. 4. As a result of the foregoing, Hunt claims that it is entitled to damages in excess of $7 million, and that it continues to incur expenses as a result of taking ongoing necessary measures due to the damage. Id. at par. 6.

In June 2010, the NTC entered into a Master Services Agreement with Rossetti ("the NTC/Rossetti MSA"), an architectural firm, pursuant to which Rossetti was to design a roof to

cover the stadium ("the project").[1] Doc. 37; Doc. 45 at pars. 27-28; Doc. 61. The project was to consist of three design phases: 1) a schematic design by Rossetti; 2) the drafting of design development documents adjusting Rossetti's schematic designs to fit the size and character of project; and 3) detailed construction documents, including drawings and specifications. Doc. 45 at par. 33. Plaintiff alleged that, although Rossetti was to retain subcontractors pursuant to the NTC/Rossetti MSA to perform certain services during the project, it (Rossetti) was to remain responsible for any acts and/or omissions by such subcontractors. Id. at par. 31. Rossetti retained Birdair, WSP, and Rowan as subcontractors for the project. Id. at par. 32.

In or about 2012, Hunt was retained to provide pre-construction services in connection with the project. Id. at par. 38.[2] Hunt was retained with the understanding that, after a roof design was selected, it would "novate the Rossetti design contract with [the] NTC and become the design/builder for the [r]oof with a direct contract with [the] NTC (and also a direct downstream contract with Rossetti)." Id. at par. 39. During the preconstruction phase of the project, Hunt worked directly with the NTC, Rossetti, WSP and Birdair to evaluate different roof designs. Id. at par. 41.

Hunt alleged that, since Ashe was built on a "natural wetland swamp", it was critical to minimize the weight of the roof and that this could be done by using a tensile membrane fabric as the cover of the roof. Id. at pars. 35-36. In or about April 2013, Rossetti, which had never designed a tensile membrane structure, hired Birdair, which described itself as a "leading specialty contractor for tensile architecture throughout the world", as a roof consultant pursuant to an "Agreement for Pre-Construction Services" ("the Rossetti/Birdair contract"). Id. at pars. 50-51.

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[1] Ashe was originally constructed without a roof in 1997 but, after rain delayed the Open several years in a row, the NTC decided to build a roof over it. Doc. 17 at pars. 20-21.

[2] Although Hunt alleges that it was retained in 2012, the agreement between the NTC and Hunt was dated March 19, 2014. Docs. 89 and 91.

Pursuant to the Rossetti/Birdair contract, Birdair was to design a feasible tensile membrane structure for the roof based on a "saddle dome" or "spoke wheel" design. Id.

Despite the Rossetti/Birdair contract, Rossetti and the NTC agreed to build a roof without a saddle dome or spoke wheel design. Id. at par. 53. Rather, they chose an "umbrella-like structure" with a "translucent fabric membrane stretched over a lightweight steel frame" with a roof which would retract to reveal a 250 square foot opening over center court. Id. at pars. 54-55. Each of the two retractable roof panels was to weigh 800 tons and consist of 210,000 square feet of lightweight PTFE membrane.[3] Id. at par. 57. The roof was to be supported by columns resting on concrete bases which were to be driven deep into the ground. Id. at par. 56. Birdair and Rossetti issued schematic design drawings for the project in September 2013 and, in October, 2013, Birdair and Rossetti re-issued the drawings as the design development documents for the project. Id. at pars. 58-59.

Rossetti also retained WSP to act as its structural engineering consultant on the project ("the Rossetti/WSP agreement"). Id. at par. 60.[4] Pursuant to the Rossetti/WSP agreement, WSP agreed, inter alia, to coordinate with all consultants; prepare structural plans and specifications for the foundation and superstructure, including drawings issued at the end of each design phase; assist architects; review shop drawings relating to "structural portions of architectural and/or pre-engineered components"; assist in testing and inspections; and assist in selecting sub-consultants. Id. at par. 63. In furtherance of its obligation to select sub-consultants, WSP identified Rowan as an environmental consultant on the project and, in August 2013, WSP helped Rowan prepare a proposal for submission to Rossetti regarding "snow load analysis." Id. at pars. 69, 76, 79, 88.

[3] PTFE, or polytetrafluoroethylene, is a Teflon®-coated woven fiberglass membrane that is extremely durable, weather resistant and lightweight.
[4] The documents filed on NYSCEF reflect that Rossetti entered into contracts with WSP on June 1, 2010 (Doc. 36) and March 19, 2014. Doc. 38.

WSP was particularly concerned about the weight of the snow which could slide or move on the roof after construction. Id. at par. 80.

In September 2013, Rowan submitted a proposal to Rossetti to perform wind engineering services at the project, including a snow load study to explore snow drifting conditions on the roof, and Rossetti in turn submitted Rowan's proposal to the NTC for approval. Id. at pars. 81-82. The same month, the NTC and Rossetti approved Rowan's proposal. Id. at par. 85.

In or about October 2013, Birdair and Rossetti, relying on Rowan's preliminary snow load analysis, issued their fabric roof drawing for the design development package. Id. at par. 88.

As Rowan developed snow load information for Rossetti, the latter shared this information with Birdair and WSP which, in turn provided Rossetti with advice on the roof design, including how snow could shift and/or accumulate on the structure, how snow loads could vary based on shifting snow loads and ponding on the structure, what fabric should be used for the roof, and whether "ponding cables" should be used to support the roof based on snow load information provided by Rowan. Id. at par. 90. In November 2013, WSP and Birdair provided Rowan with information about "fabric deflection", including how snow can slide off of a roof, to assist Rowan in issuing a report. Id. at par. 91.

On November 15, 2013, Rowan provided WSP with a draft report which addressed snow loads for the project based on its wind tunnel testing and other analysis. Id. at par. 59. WSP questioned some of the data in the draft report, discussed it with Rowan, and Rowan issued another report on November 21, 2013. Id. at par. 92. On or about November 21, 2013, WSP received information regarding fabric panel deflection from Birdair and supplied it to Rowan so that the latter could use it to make its snow and wind load calculations. Id. at par. 93.

On December 19, 2013, WSP issued a memorandum entitled "Snow and Wind Loading" which provided a summary and analysis of changes in the "design loads for snow and wind as determined through testing [by Rowan]." Id. at par. 94.

After the NTC chose a design option for the roof, it designated Hunt as the project's "design-builder", entered into an agreement directly with Hunt, and, on March 19, 2014, Hunt contracted with Rossetti, which continued to work with Rowan, WSP, and Birdair. Id. at pars. 96-97; Doc. 38.

Hunt alleged that, at the NTC's request, it (Hunt), the NTC, and Rossetti "entered into a series of agreements pursuant to which the [NTC]/Rossetti MSA was novated and Rossetti contracted with Hunt to complete the design and perform construction administration for the [p]roject." Id. at par. 98; Doc. 38 at par. 1.12. As a result of the novation, claimed Hunt, and as provided for in its agreements with the NTC and Rossetti, Hunt stepped into the NTC's shoes vis-à-vis Rossetti, contractually undertaking all of Rossetti's design obligations to [the] NTC going back to the beginning of the [p]roject and assuming all of [the] NTC's rights against Rossetti and its subconsultants with respect to their design work." Id. at par. 99. Thus, alleged Hunt, it (Hunt) became contractually liable to the NTC for design work performed by Rossetti, WSP, Birdair, and Rowan from the beginning of the project, and Rossetti, WSP, Birdair, and Rowan then owed to Hunt the obligations they previously had to the NTC. Id. at par. 100. Additionally, claimed Hunt, Rossetti undertook as to Hunt all design obligations it previously owed to the NTC under the prior direct agreement between Rossetti and the NTC and, therefore, Rossetti's subconsultants, WSP, Birdair, and Rowan, owed Hunt all of the obligations they had previously owed to the NTC. Id. at par. 101.

On March 19, 2014, Hunt contracted with the NTC to become the project's design builder ("the Hunt/NTC contract") (d/b). Id. at par. 102; Doc. 38. As of that date, Hunt and Rossetti also entered into a professional services agreement ("the Hunt/Rossetti PSA") novating the NTC/Rossetti MSA and establishing Rossetti's design obligations to Hunt with respect to the project. Id. at par. 103; Doc. 38 at par. 1.12. Hunt alleged that all of Rossetti's subconsultants, including WSP, Rowan, and Birdair, were aware that Hunt was to become the design-builder on the project and would be relying on the work of those entities, as well as Rossetti's, in completing the roof. Id. at par. 104. The phases of the project pursuant to the Hunt/Rossetti PSA were essentially identical to those in the NTC/Rossetti MSA. Id. at par. 105.

Rossetti represented at section 1.6 of the Hunt/Rossetti PSA that it had "experience and expertise in providing professional architectural and engineering services for sports facilities" and it agreed that all of its services pursuant to the contract would be "in accordance with the standards of professional practice exercised by practicing design professionals performing similar services under similar conditions ('Standard of Care')." Id. at par. 107. At section 1.12.2 of the Hunt/Rossetti PSA, Rossetti agreed to prepare "design development documents" to establish final design criteria as required by the Hunt/NTC contract. Id. at par. 108. Section 8.1 of the Hunt/Rossetti PSA provided that:

> To the fullest extent permitted by law, [Rossetti] shall indemnify, defend and hold harmless [Hunt and the NTC], their respective officers and employees, from and against all claims, damages, losses and expenses to the extent caused by the negligent or wrongful performance of [Rossetti's] Services hereunder or any negligently caused error or omission of [Rossetti] or anyone for whom [Rossetti] is liable, and whether or not, but in no event to the extent that, any such damage, loss or expense is caused in part by a party indemnified hereunder.

Id. at par. 112.

Exhibit A to the Hunt/Rossetti PSA defined the scope of Rossetti's services, including the services set forth at Article 1 of the said agreement, as well as wind and environmental analysis. Id. at par. 109. Hunt alleged that snow loads for the fabric roof were part of the final design criteria which Rossetti was to perform during the design development phase of the project. Id. at par. 114. However, section 1.1 of Exhibit A provided that:

> Preparation of Construction Drawings and Specifications for the roof mechanization work, the fabric roof work, and connections of structural steel are to be provided by others and are specifically excluded from [Rossetti's] Basic Services. [Rossetti] shall fully cooperate and coordinate with those entities providing said services.
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> Doc. 38; Doc. 45 at par. 111.

In May 2014, Rowan, with assistance from Birdair and WSP, issued a "Snow Load Assessment – Final Report" ("Rowan's final report") which, Hunt alleged, Rowan knew Hunt would rely on in completing the project. Id. at pars. 125-127. Rowan's final report reflected that the snow loads on the roof of Ashe would be "relatively uniform, with the exception of a few localized accumulations" near the upper portions of the fixed part of the roof. Id. at par. 128.

Additionally, in May 2014 Hunt subcontracted directly with Birdair ("the Hunt/Birdair subcontract") for the latter to provide design and detailing for the fabric of the roof, as well as supplying material for and installing the roof. Id. at pars. 133-136. Rowan's final report was incorporated by reference into the Hunt/Birdair subcontract as Attachment 3. Id. at par. 137. The Hunt/Birdair subcontract further provided that:

> [Birdair] shall defend, indemnify and hold harmless Hunt, the [NTC] and such other persons or entities as the Contract Documents or this Subcontract may require against any and all claims arising directly or indirectly out of the Subcontract Work or other involvement with the Project, the Project Materials, or any system, component, equipment, product or material supplied or delivered by or on behalf of [Birdair] pursuant to or in connection with this Subcontract, including, but not limited to, claims for:

* * *

(c) damage to property;

(d) defects in materials or workmanship;

* * *

(j) any breach by [Birdair] of this Subcontract or the Contract Documents;

(k) any other act or omission of Subcontractor, its officers, agents, employees, servants, sub-subcontractors or material suppliers; or

(l) damage to other contractors, subcontractors, suppliers or any other person or entity.

It is the intent of this Subcontract that [Birdair] defend, indemnify and hold harmless Hunt, the [NTC] and such other persons or entities as the Contract Documents may require to the fullest extent permitted by law, even if it is alleged that Hunt, the [NTC], or such other persons or entities individually or collectively contributed to the alleged wrongdoing, were individually or collectively, actively or passively negligent or are individually or collectively liable because of a nondelegable duty. [Birdair] is not obligated to defend, indemnify and hold harmless Hunt or [NTC] Owner for their sole negligence or willful misconduct if such indemnification is, contrary to law, but if such indemnification is not contrary to law, then Subcontractor shall defend, indemnify and hold harmless Hunt, the [NTC] and such other persons or entities as the Contract Documents and this Subcontract may require for any liability arising directly or indirectly out of the Subcontract Work or other involvement with the Project to the fullest extent permitted by law, including indemnification for the sole negligence of Hunt, the Owner and/or such other persons or entities as this Subcontract or the Contract Documents may require. [Birdair] has included these indemnification obligations in its Subcontract Sum.

Doc. 45 at par. 138.

Hunt alleged that, in completing its roof design, Birdair relied on Rowan's final report, which failed to account for all of the factors affecting snow loads on the roof including, but not limited to, deflection of the roof fabric from localized loads and the impact on lower fabric panels from snow sliding down the roof. Id. at pars. 140, 144. It further claimed that Rowan's final report was based on erroneous assumptions by WSP and Birdair regarding snow movement, loading, and

ponding, and, thus, the report severely underrepresented the actual snow loads the roof would bear. Id. at pars. 141-142. Further, Hunt alleged that Birdair provided to Rossetti, and Rossetti approved, certain submissions including, inter alia, construction drawings and engineering calculations. Id. at pars. 145, 147, 149.

The roof was substantially completed by August 2016 and, on or about March 14, 2017, snow accumulated on the roof in a manner not considered by Rossetti, WSP, Birdair or Rowan, causing two of the fabric panels to tear and damage inside Ashe, creating a dangerous condition, and forcing Hunt to make emergency repairs. Id. at pars. 165-168. Following the storm, Hunt asked Rossetti, WSP, Rowan and Birdair to investigate the cause of the damage. Id. at par. 169. In January 2018, Rowan provided Hunt with a report entitled "Additional Snow Loading Cases for Consideration", in which Rowan's revised snow load projections exceeded those in Rowan's final report. Id. at pars. 172, 175.

On March 21, 2018, before any remedial roof design was approved, another snowstorm damaged a roof panel when snow slid from a higher portion of the roof down to a lower one. Id. at pars. 180-182. Hunt then demanded that Rossetti, Birdair, WSP, and Rowan reimburse it for the damage caused to the roof in 2017 and 2018 but none of the said defendants did so. Id. at pars. 184-186. Hunt alleged that the 2017 and 2018 roof tears were caused by the failure of Rossetti, WSP, Rowan and Birdair to provide it with accurate information regarding snow movement and snow loads when developing the proper design criteria to be used by Birdair in its design and construction of the roof. Id. at par. 183.

In July 2018, Birdair, taking into consideration revised snow load information provided by Rowan to Rossetti, provided Hunt with a proposal for redesigning parts of the roof for $113,850, Id. at par. 187. Hunt also had to install ponding cables and hire a contractor to shovel the snow

off the roof to prevent it from accumulating and damaging the roof further during the winters of 2018-2019 and 2019-2020. Id. at par. 188. During the same winters, the roof had to remain in an open position to prevent accumulating snow from damaging it, causing Hunt to incur expense for wrapping the machinery which retracted the roof as well as for inspections of the machinery in the spring of 2019 and 2020. Id. at par. 189.

Hunt commenced the captioned action in July 2019. Doc. 1. In its amended complaint dated October 21, 2020, Hunt alleged as a first cause of action breach of contract and contractual indemnification against Rossetti. Doc. 45 at pars. 193-198. As a second cause of action, Hunt alleged negligence against Rossetti. Id. at pars. 200-205. As a third cause of action, Hunt alleged breach of contract and contractual indemnification against Birdair. Id. at pars. 207-212. As a fourth cause of action, Hunt alleged negligence against Birdair. Id. at pars. 214-217. As a fifth cause of action, Hunt alleged negligence against Rowan. Id. at pars. 219-232. As a sixth cause of action, Hunt alleged negligence against WSP. Id. at pars. 234-247. As a seventh cause of action against all defendants, Hunt alleged negligent misrepresentation. Id. at pars. 249-262. As an eighth cause of action, Hunt alleged common law indemnification against WSP and Rowan. Id. at 264-270. As a ninth cause of action against Rossetti and Birdair, Hunt alleged breach of express warranty. Id. at pars. 272-279. Hunt also alleged that it was "in no way negligent with respect to the design and construction of the [r]oof" and that its obligations to NTC were "contractual and in no way dependent upon any negligent act or omission" by it. Doc. 45 at pars. 266-267.

In June 2020, the NTC wrote to Hunt to demand that it provide the NTC with a formal plan regarding the repair of the roof by July 10, 2020. Id. at par. 191. The NTC threatened that, if Hunt did not replace the roof at its own expense which, the NTC estimated, would cost $2.935 million, it would hire another contractor to perform the work and that Hunt would ultimately have to pay

for it. Id. at 190-191. As of the date the motions *sub judice* were argued, the NTC had not commenced litigation against Hunt.

WSP's Motion to Dismiss (Motion Sequence 003)

WSP moves, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss the complaint. Docs. 51-63. In support of the motion, WSP argues that: Hunt's claim for common-law indemnification must be dismissed because the NTC seeks to recover for breach of contract against Hunt for its own active wrongdoing and Hunt did not delegate exclusive responsibility for the design/construction of the roof to WSP; Hunt's claims of negligence and negligent misrepresentation are duplicative of the common law indemnification claim; Hunt's negligence and negligent misrepresentation claims are tantamount to contribution claims, which are not available for pure economic loss; and the negligence and negligent misrepresentation claims must be dismissed pursuant to the economic loss doctrine since there was no privity between Hunt and WSP. Doc. 65.

In opposition to the motion, Hunt argues that its negligence and negligent misrepresentation claims are not barred by the economic loss doctrine. Doc. 84. Relying on *Ossining Union Free School Dist. v Anderson*, 73 NY2d 417, 424 (1989), Hunt argues that it is entitled to recover for pecuniary loss arising from WSP's negligent representations since its relationship with WSP was "so close as to approach that of privity." Doc. 84. Specifically, Hunt, citing the factors in *Ossining*, maintains that WSP was aware that its representations were to be used for the purpose of constructing the roof of Ashe; that Hunt relied on its representations; and that WSP's conduct in helping to design the roof linked it to Hunt and reflected that WSP understood that Hunt relied on it. Doc. 84. Hunt further asserts that its common-law indemnification claim is not duplicative of its claims of negligence and negligent

misrepresentation. Doc. 84. Hunt also maintains that its negligence and negligent misrepresentation claims are not actually improper contribution claims seeking to recover for breach of contract. Doc. 84. Finally, Hunt asserts that it is entitled to common-law indemnification from WSP since it is being compelled to pay for WSP's wrongdoing. Doc. 84.

In reply, WSP argues that Hunt is not entitled to common-law indemnification since it has failed to demonstrate that it did not cause or contribute to the any damages arising from the design of Ashe's roof. Doc. 90. WSP further asserts that Hunt's negligence claim is duplicative of its claim for common-law indemnification and that its negligence and negligent misrepresentation claims are actually contribution claims, which cannot be asserted where, as here, Hunt is seeking damages for pure economic loss. Doc. 90. Finally, WSP maintains that *Ossining* is inapposite herein since it provided its design services for the sole benefit of Rossetti and the NTC and, since "Hunt cannot establish the functional equivalent of privity between [it] and WSP, its claims for negligence and negligent misrepresentation against WSP must be dismissed. Doc. 90.

Rowan's Motion to Dismiss (Motion Sequence 004)

Rowan moves, pursuant to CPLR 3211(a)(1), to dismiss the complaint against it. Docs, 67-76. In support of the motion, Rowan argues that Hunt's claim against it for common-law indemnification must be dismissed since the NTC seeks damages against Hunt based on the latter's alleged wrongdoing. Doc. 68. Next, Rowan maintains that Hunt's negligence and negligent misrepresentation claims must be dismissed as duplicative of its claim for common-law indemnification. Doc. 68. Additionally, Rowan asserts that Hunt's negligence and negligent misrepresentation claims should be dismissed since they are actually claims for common-law indemnification and contribution, which are unavailable where, as here, Hunt seeks damages against Rowan purely for economic loss. Doc. 68. Finally, Rowan argues that Hunt's negligence

and negligent representation claims must be dismissed pursuant to the economic loss doctrine since the relationship between Hunt and Rowan did not approach the functional equivalent of privity. Doc. 68.

In opposition, Hunt substantially reiterates the arguments which it made in opposing WSP's motion. Doc. 85.

In reply, Rowan substantially reiterates the arguments it made in its moving papers. Doc. 88.

LEGAL CONCLUSIONS

WSP's Motion to Dismiss (Motion Sequence 003)

The claims Hunt has alleged against WSP are negligence (sixth cause of action), negligent misrepresentation (seventh cause of action), and common law indemnification (eighth cause of action). These claims are addressed seriatim below.

Negligence/Negligent Misrepresentation

"In order to prevail on a negligence claim, 'a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom'" (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016], quoting *Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]). "In the absence of a duty, as a matter of law, there can be no liability" (*id.*) (*CB v Howard Sec.*, 158 AD3d 157, 164 [1st Dept 2018]). Here, Hunt alleged that WSP owed it a duty to ensure that it (WSP) evaluated the snow loads related to the design of the roof, that WSP breached this duty of care, and that Hunt sustained damages as a result of the breach.

"For a plaintiff to state a cause of action for negligent misrepresentation based on the existence of the functional equivalent of privity[5], three conditions must be satisfied: the defendant must have been aware that its representations were to be used for a particular purpose or purposes; the defendant must have intended that the other party rely on the representations for such purpose or purposes; and there must have been some conduct on the part of the defendant linking it to the other party which evinces the defendant's understanding of that party's reliance" (*Beck v Studio Kenji, Ltd.*, 90 AD3d 462, 462-463 [1st Dept 2011] [citations omitted]).

Here, Hunt alleged that it justifiably relied on WSP's recommendations; that it had a special relationship of trust or confidence with WSP insofar as they were part of a small group of entities collaborating on the roof project; WSP knew that its recommendations would be relied upon by Hunt; and WSP provided its suggestions regarding the roof construction for Hunt's use.

Although Hunt has adequately pleaded the elements of causes of action for negligence and negligent representation, WSP argues that those claims must be dismissed since they are tantamount to contribution claims, which are not available for pure economic loss, i.e., damages for breach of contract, and are thus barred by the economic loss rule. Under the economic loss rule, contribution is not available under CPLR 1401 for economic damages. The determinative factor is the measure of damages sought, rather than the theory behind the underlying claim (*See Trump Vill. Section 3, Inc. v N.Y. State Hous. Fin. Agency*, 307 AD2d 891 [1st Dep't 2003]). The rule has been applied to bar contribution in purely contractual actions (*see, e.g., Board of Education v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21 [1987]; *Ruby Land Dev. v Toussie*, 4 AD3d 518 [2d Dept 2004], as well as in actions in which a plaintiff alleges tortious

[5] The issue of privity is discussed in further detail immediately below.

conduct but actually seeks economic damages (*see, e.g., Westbank Contr., Inc. v Rondout Val. Cent. Sch. Dist.*, 46 AD3d 1187 [3d Dept 2007]).

Here, Hunt, which did not have a direct agreement with WSP, is not seeking damages for purely economic loss as against the latter. Rather, it is seeking damages resulting from WSP's deviation from the professional standard of care in failing to properly design the roof. Therefore, the economic loss rule does not bar Hunt's negligence and negligent misrepresentation claims against WSP (*See Structure-Tone, Inc. v Ignelzi Interiors, Inc.*, 40 AD3d 234 [1st Dept 2007] [economic loss rule did not bar contribution where damages sought by plaintiff were not solely attributable to defendant's work product, but also to the work product of the architect and other subcontractors, which damages could qualify as tort damages and injury to property within the meaning of CPLR 1401]; *see also Greenstreet of N.Y., Inc. v Davis*, 166 AD3d 470, 471 [1st Dept 2018]).

In *Greenstreet*, the facts of which are analogous to those herein, the main issue was whether plaintiff sufficiently alleged a relationship of privity, or the functional equivalent of privity, to impose a duty owed to it by defendant Gibson, an architect and/or defendant Seinuk, an engineer. The Appellate Division, First Department held that the IAS court:

> properly determined that the amended complaint, as amplified by the affidavit from plaintiff's president . . . adequately asserted such a relationship. Plaintiff alleges that defendants were aware that the drawings submitted were incorrect as Gibson failed to reference structural insulated panels (SIPs); that Seinuk negligently advised plaintiff to back the SIPs with plywood out of concern for wind shear and failed to advise plaintiff that doing so would violate the New York City Building Code; that Gibson and Seinuk knew that plaintiff would rely on their drawings and representations; and that plaintiff reasonably relied on these representations (*see Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417, 425 [1989]).

(*Greenstreet*, 166 AD3d at 471).

In its amended complaint, Hunt did not specifically allege that it was in privity with WSP or that it had a relationship with WSP which was the functional equivalent of privity. Rather, it alleged that it was in privity with Rossetti, which in turn was in privity with WSP. Nor did Hunt submit an affidavit from a member or principal amplifying its claims, as the plaintiff did in *Greenstreet*. Nevertheless, this Court, viewing the FAC in the light most favorable to plaintiff, finds that Hunt adequately alleged that it had a relationship with WSP which approached the functional equivalent of privity (*See Credit Alliance Corp. v Arthur Andersen & Co.*, 65 NY2d 536, 554 [1985] [Court of Appeals found parties' relationship was practically equivalent to privity where they remained in direct communication, both orally and in writing, and met together throughout the course of EAB's lending relationship with Majestic Electro, for the very purpose of discussing the latter's financial condition and EAB's need for S & K's evaluation, and S & K made repeated representations directly to representatives of EAB concerning the value of Majestic Electro's assets]; *cf. Americon Constr., Inc. v Cirocco & Ozzimo, Inc.*, 205 AD3d 568 [1st Dept 2022] [negligent construction claim dismissed where parties had no contractual relationship and third-party plaintiff failed to allege parties had the "functional equivalent of contractual privity"]).

Here, Hunt alleged that: WSP knew Hunt would be the general contractor/construction manager on the project; during the design and preconstruction phase, it worked directly with NTC, Rossetti, WSP and Birdair to evaluate different designs; Rossetti's subconsultants, including WSP, Rowan, and Birdair, were aware that Hunt was to become the design-builder on the project and that Hunt would be relying on the work of those entities, as well as Rossetti, in completing the roof; NTC was the owner; Hunt met with WSP dozens of times regarding all aspects of the project; it met directly with Rowan and WSP so that those entities could apprise Hunt of various aspects of snow movement on the roof; WSP knew that Hunt and NTC were relying on its calculations

and work product in designing the roof; WSP was in "almost constant communication by email" (Doc. 45 at par. 68) directly with Hunt about all aspects of the project, including the work being done by WSP and Rowan to determine appropriate wind and snow loads for the roof; and the respective agreements entered into by WSP and Rowan required communication, cooperation, and a coordinated effort by all parties involved in building the roof; and that the construction of the roof was discussed by Hunt and WSP during regularly scheduled structural and design meetings run by Hunt and held at WSP's offices. Hunt's detailed allegations are sufficient to plead the functional equivalent of contractual privity.

Common-Law Indemnification

"Since the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine" (*Trustees of Columbia Univ.v Mitchell/Giurgola Associates*, 109 AD2d 449, 453 [1st Dept 1985]; *see also 17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 A.D.2d 75, 80 [1st Dept 1999]). "Thus, to be entitled to indemnification, the owner or contractor seeking indemnity must have delegated exclusive responsibility for the duties giving rise to the loss to the party from whom indemnification is sought (*see, 17 Vista Associates*, 259 AD2d at 80). Here, since there has been no finding yet with respect to any party's liability, the dismissal of Hunt's claim for common-law indemnification against WSP would be premature *(Dautaj v Alliance El. Co.*, 110 AD3d 839, 841 [2d Dept 2013])[6].

[6] Indeed, as noted previously, NTC has not commenced litigation against Hunt.

Rowan's Motion to Dismiss (Motion Sequence 004)

The causes of action Hunt has asserted against Rowan are identical to those alleged against WSP: negligence (fifth cause of action), negligent misrepresentation (seventh cause of action), and common-law indemnification (eighth cause of action). Additionally, the factual allegations by Hunt against Rowan are virtually identical to those alleged by Hunt against WSP, and the grounds for dismissal proffered by Rowan are virtually identical to those set forth by WSP. Further, Rowan's relationship with Hunt was essentially identical to WSP's. Therefore, Rowan's motion to dismiss is denied on the same grounds as those set forth in the discussion of WSP's motion.

Accordingly, it is hereby:

ORDERED that the motion by WSP Cantor Seinuk and WSP USA Buildings Inc. d/b/a WSP USA Corp. to dismiss the amended complaint pursuant to CPLR 3211(a)(1) and (a)(7) (motion sequence 003) is denied; and it is further

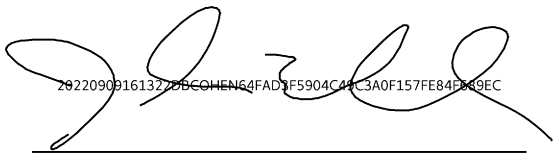
ORDERED that the motion by defendant Rowan Williams Davies & Irwin, Inc. seeking to dismiss the amended complaint pursuant to CPLR 3211(a)(7) (motion sequence 004) is denied; and it is further

ORDERED that plaintiff Hunt Construction Group, Inc. is to serve this order on all parties, with notice of entry, within 5 days after this order is uploaded to NYSCEF, and it is further

ORDERED that defendants WSP Cantor Seinuk and WSP USA Buildings Inc. d/b/a WSP USA Corp. and Rowan Williams Davies & Irwin, Inc. shall file and serve their answer to plaintiff's amended complaint dated October 21, 2020 within 30 days after such service by plaintiff of this order with notice of entry; and it is further

ORDERED that the parties are to submit an agreed upon proposed preliminary conference order to the Court by email to SFC-Part58-Clerk@nycourts.gov by September 23, 2022 and, if the

parties cannot reach agreement by that date, they are directed to request a preliminary conference by email to the same email address.



9/9/2022
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE