HTRF Ventures, LLC v Permasteelisa N. Am. Corp.
2019 NY Slip Op 32095(U)
July 8, 2019
Supreme Court, New York County
Docket Number: 655970/2016
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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HTRF VENTURES, LLC,

Plaintiff,

- v -

PERMASTEELISA NORTH AMERICA CORPORATION,

Defendant.

INDEX NO. 655970/2016

MOTION DATE 09/20/2018, 09/25/2018

MOTION SEQ. NO. 008 009

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 008) 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 328, 380, 381, 382, 383, 389, 390, 391, 392, 393
were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 394, 397
were read on this motion for SUMMARY JUDGMENT.

This case relates to the construction of the Frank Gehry-designed building located at 555 West 18th Street in Manhattan (also known as the Inter Active Corporation Building or IAC Building). Specifically, Plaintiff HTRF Ventures, LLC (HTRF), the owner of the IAC Building, brings this action to enforce certain guarantees and warranties that defendant Permasteelisa North America Corporation (Permasteelisa), a curtain wall subcontractor, provided to repair and replace faulty or

defective double-glazed units (hereinafter, DGUs) and polyisobutylene (PIB) sealant that were used in creating the building's distinctive windows and façade.

In motion sequence number 008, Permasteelisa moves, by order to show cause, pursuant to CPLR 3212, for summary judgment dismissing the complaint in its entirety. For the reasons stated below, the motion is granted in part and denied in part.

In motion sequence number 009, HTRF moves, by order to show cause, pursuant to CPLR 3212, for an order: (1) awarding it partial summary judgment on the issue of liability on its breach of contract claim (Count I), common law breach of express warranties claim (Count II), and Uniform Commercial Code (UCC) claim (Count III); and (2) directing a limited trial on the issue of HTRF's damages, interest, and fees. For the reasons stated below, the motion is denied.

BACKGROUND

HTRF owns the IAC Building (NY St Cts Elec Filing [NYSCEF] Doc No. 309, HTRF's Rule 19-a Statement of Undisputed Material Facts, ¶ 4). The building serves as the headquarters for Inter Active Corporation and affiliated entities (*id.*).

HTRF alleges that the curtain wall defines the property (NYSCEF Doc No. 2, complaint, ¶ 21). Beginning on the first floor, white-fritted windows extend from the floor to the ceiling and envelop the entire building (*id.*). Some of the windows are bent or "cold-warped" to create a dramatic and unique façade (*id.*). According to HTRF, the curtain wall continues on the sixth-floor terrace and extends to the top of the building (*id.*).

On April 1, 2003, HTRF, through its authorized agent, Georgetown 19th Street Development, LLC, retained Turner Construction Company (Turner) as a construction

manager for the development and construction of the IAC Building (NYSCEF Doc No. 309, ¶ 5 [a]; NYSCEF Doc No. 289; NYSCEF Doc No. 331, Stewart Aff. in support, exhibit A).

The construction management agreement contains the following provisions concerning warranties:

> "13.1.2 Construction Manager shall, without additional cost to Owner, obtain from Trade Contractors and Sub-trade Contractors (including, but not limited to, manufacturers) warranties which meet or exceed the requirements of the Contract Documents. All such warranties shall be deemed to run to the benefit of Owner. Such warranties, with duly executed instruments assigning the warranties to Owner, shall be delivered to Owner upon the commencement of the applicable warranty period, as defined in Section 13.1.
>
> 13.1.3 All warranties provided by any Trade Contractor or Sub-trade Contractor (including, but not limited to, manufacturers) shall be in such form as to permit direct enforcement by Owner against any Trade Contractor or Sub-trade Contractor (including, but not limited to, manufactures) whose warranty is called for . . . ."

(NYSCEF Doc No. 331 at 77).

On November 30, 2004, Turner entered into a design build agreement with Permasteelisa Cladding Technologies, Ltd., now known as Permasteelisa, to provide the work and materials necessary for the construction of the curtain wall for the IAC Building (NYSCEF Doc No. 309, ¶ 5 [b]; NYSCEF Doc No. 333, Stewart Aff. in support, exhibit B).

It is undisputed that the primary components of the curtain wall system are DGUs (NYSCEF Doc No. 286, Permasteelisa's Rule 19-a Statement of Undisputed Material Facts, ¶ 4). The DGUs are windows made of two or more glass panes that are hermetically sealed with a PIB sealant as a primary seal and structural silicone as the

secondary seal (*id.*; NYSCEF Doc No. 351, Franceschet Aff., ¶ 4). The DGUs were manufactured by Zadra Vetri, S.p.A. (Zadra) (NYSCEF Doc No. 286, ¶ 5).

Article I of the design build agreement provides that:

> "[t]he Subcontractor shall perform and furnish in the manner provided herein all the work, design, engineering, labor, services, materials, plant, equipment, tools, scaffolds, appliances and other things necessary for the Curtain Wall scope of work . . . and in strict accordance with Plans, Specifications, General Conditions, Special Conditions and Addenda thereto . . . and with the terms and provisions of the Construction Manager's agreement . . . between Turner and Georgetown 19th Street Development, LLC, a Delaware Limited Liability Company . . . as authorized agent for HTRF Ventures, LLC ('Client') (hereinafter called the Owner)"

(NYSCEF Doc No. 333 at 1).

In addition, Article II states that "[t]his Agreement incorporates by reference Turner's Construction Management Agreement with the Owner" (NYSCEF Doc No. 333 at 1). Article II defines the "Contract Documents" as "[t]he Plans, Specifications, General Conditions, Special Conditions including all Performance Criteria, Addenda and Construction Manager's agreement hereinafter mentioned above . . . including this Agreement" (*id.*). That Article further provides that:

> "With respect to the Work to be performed and furnished by the Subcontractor hereunder, the Subcontractor agrees to be bound by each and all of the terms and provisions of the Construction Manager's agreement and the other Contract Documents, and to assume toward Turner all of the duties, obligations and responsibilities that Turner by those Contract Documents assumes toward the Owner . . ."

(*id.*).

Article XXI of the design build agreement, entitled "Guarantees," provides as follows:

> "The Subcontractor hereby guarantees the Work to the full extent provided in the Plans, Performance Criteria, Specifications, General Conditions, Special Conditions and other Contract Documents.

> The Subcontractor shall expeditiously remove, replace and/or repair at its own expense and at the convenience of the Owner any faulty, defective or improper Work, materials or equipment existing or discovered within one (1) year from the date of the acceptance of the Project as a whole by the Architectural Project Team, Design Architect and the Owner or for such longer period as may be provided in the Plans, Specifications including all Performance Criteria, General Conditions, Special Conditions or other Contract Documents. Subcontractor also agrees to deliver a 'Parent Company Guarantee' from the highest owner of the Permasteelisa Group, binding such owner to all of the terms of this agreement described herein.
>
> Without limiting the generality of the foregoing, the Subcontractor warrants to the Owner, the Architect and Turner, and each of them, that all materials and equipment furnished under this Agreement will be of first class quality and new, unless otherwise required or permitted by the other Contract Documents, that the Work performed pursuant to this Agreement will be free from defects and that the Work will strictly conform with the requirements of the Contract Documents. Work not conforming to such requirements, including substitutions not properly approved and authorized, shall be considered defective. All warranties contained in this Agreement shall be as specified in the Contract Documents. Failure of Subcontractor to honor and satisfy the foregoing and any other warranties or guarantees required of the Subcontractor under the Contract Documents, shall constitute a default by the Subcontractor"

(*id.* at 8).

Article XXVI of the design build agreement states that "[t]his Agreement constitutes the entire agreement between the parties hereto" (*id.* at 10).

The curtain wall performance specification dated August 13, 2004, prepared by Israel Berger & Associates, Inc., contains the following provisions:

> "**1.1 GENERAL INSTRUCTIONS**
>
> ***
>
> .2 The curtain wall portion of this project will be treated as Design-Build: Design build refers to the process where the contractor awarded this portion of the work is responsible for the structural and performance design, fabrication and installation of the curtain wall in compliance with the requirements of the Contract Documents, applicable codes at the time of the award and ordinances and requirements of local officials . . . .

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2.1 MATERIALS

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.4 Insulating Glass:

.1 Factory sealed double-glazed units (either low iron glass or normal float pending final selection) equal to Viracon VRE-59, Silkscreen insulating laminated with a minimum thickness of 1-5/16" OA. Made up of 1/4" VRE-59 on #2 with V-175 (white) ceramic frit silkscreen 40 to 50% custom gradated artwork on #2 surface exterior sheet, heat strengthened, 1/2" airspace; ¼" clear heat strengthened sheet; .060" clear pvb; ¼" clear heat strengthened sheet. Primary seal of polyisobutylene and secondary seal of Silicone shall be gray in color (thickness of glass to be verified by final design requirements)

.2 The Insulating glass seals shall be evenly applied and there shall be no breaks or narrowing of the polyisobutylene or silicone seals around the entire glass perimeter.

.3 Units shall be certified by IGCC or shall be certified by an Independent testing laboratory as complying with ASTM E 773 and 774.

.4 Insulated glass units u-value shall be: .30
Insulated glass units shading coefficient shall be: .30

***

.9 Sealant:

.1 Sealant shall be one-part silicone, Dow 795 or approved equal that will cure to a durable watertight flexible silicone rubber joint seal that can accommodate ±50% movement.

.2 Structural silicone sealant shall be Dow 983 or equivalent.

.3 Sealant color to be as selected by Architect"

(NYSCEF Doc No. 334, Stewart Aff. in support, exhibit C at 2, 28-29).

The curtain wall performance specification contains the following provision concerning warranties:

"**1.11 WARRANTY**

.1 Submit a Five (5) year warranty covering materials and labor workmanship of the curtain wall system. Without restricting the generality of the warranty, definition of defects shall include failure of the installation to meet the design requirements, leakage, failure of sealants and their ability to withstand the forces applied by the torqueing of the glass panels, failure of glass and laminated glass, delamination, haziness, paint fading, etc. Provide a Ten (10) year warranty on seal failure of the double glazed units. Provide a twenty (20) year warranty (such as Dow Corning VIP warranty) for structural glazing and silicone weather seals"

(*id.* at 21).

Turner's project manual dated April 1, 2004 provides as follows:

"**OWNER/SUBCONTRACTOR RELATIONSHIP**

"Subcontractor acknowledges and agrees that Owner shall have no liability, contractual or otherwise, to subcontractor; however, subcontractor acknowledges and agrees that the Owner is the intended beneficiary of work performed here under"

(NYSCEF Doc No. 382, Stewart aff in opposition, ¶ 6, exhibit A at 26).

It is undisputed that, on November 22, 2006, the exterior work reached substantial completion (NYSCEF Doc No. 309, ¶ 17).

Permasteelisa provided a five-year warranty dated January 1, 2007, in which it:

"warrant[ed] to the Owner that that all of its work is in general accordance with the drawings and specifications dated January 9, 2004 as prepared by Adamson Associates and Gehry Partners, LLP ('Architect']), as amended by any changes thereto authorized in writing by the Architect, and hereby

> warrants the work furnished by PCT [Permasteelisa] on the above subject job to be free from defects in materials and workmanship for a period of five (5) years from the date of installation ('Warranty Period') as required by Subcontract dated November 30, 2004, ('Subcontract') and Specification Section 08900 prepared by the Architect . . . ."

(NYSCEF Doc No. 292, Moore Aff. in support, exhibit 4). The warranty stated that "EXCEPT FOR THE EXPRESS WARRANTY AS SET FORTH HEREIN, PCT [Permasteelisa] EXCLUDES AND DISCLAIMS ALL OTHER EXPRESS OR IMPLIED, WRITTEN OR ORAL, WARRANTIES INCLUDING ANY IMPLIED WARRANTIES OF FITNESS AND MERCHANTABILITY" (*id.*).

On June 10, 2008, Zadra provided a 10-year warranty on the DGUs (NYSCEF Doc No. 293, Moore Aff. in support, exhibit 5). Dow Corning also provided a 20-year warranty on the silicone building sealants on February 5, 2008 (NYSCEF Doc No. 294, Moore Aff. in support, exhibit 6).

In October 2015, HTRF first noticed "internal drip marks of the butyl" sealant (NYSCEF Doc No. 321, Panissidi Tr.at 49-50; NYSCEF Doc No. 367, Stewart Tr. at 50-51).

On October 6, 2015, HTRF notified Permasteelisa of the sealant migration in the DGUs (NYSCEF Doc No. 337, Stewart Aff. in support, exhibit F).

On November 17, 2015 and January 15, 2016, HTRF demanded that Permasteelisa honor its warranties, guarantees, and contractual obligations, and that it locate and replace defective DGUs (NYSCEF Doc Nos. 345, 346, Stewart Aff. in support, exhibits G, H). However, Permasteelisa has not agreed to any of HTRF's demands (NYSCEF Doc No. 327, ¶ 18).

Daniel Lemieux (Lemieux), the principal and director of international operations for Wiss, Janney, Elstner Associates, Inc. (WJE), states that HTRF retained his firm to conduct surveys of the PIB sealant on the IAC Building, and to conduct a laboratory analysis of the insulated glass units (NYSCEF Doc No. 325, Lemieux Aff., ¶¶ 2, 5). From November 7, 2017 through November 9, 2017, WJE conducted a visual survey of the insulated glass units and removed a sample of four insulated glass units for testing (*id.*, ¶ 9). According to Lemieux, the PIB sealant requires fillers, antioxidants, and ultraviolet stabilizers to protect the sealant from ultraviolet radiation (*id.*, ¶ 15). In simple terms, these chemicals are similar at a molecular level to suntan lotion (*id.*). Gray PIB sealant that lacks such fillers, antioxidants, and stabilizers will deteriorate over time through a process known as "chain scission" (*id.*, ¶ 16). WJE concluded that the gray PIB sealant lacks the necessary fillers, antioxidants, and stabilizers to protect the sealant from sunlight and heat, and is consequently defective (*id.*, ¶ 25). In addition, the molecular bonds in the PIB sealant have ruptured, resulting in molecular weight loss, decreased viscosity, and migration out of the sealant's intended placement (*id.*). According to Lemieux, the chemical bonds in the PIB sealant have failed to hold it together (*id.*). Lemieux states that the PIB migration in the DGUs at the IAC Building is permanent, progressive, and irreversible (*id.*).

Permasteelisa's expert, Jerome Klosowski (Klosowski), testified that gray PIB sealant that lacks appropriate fillers, antioxidants, and stabilizers will deteriorate when exposed to sunlight over time (NYSCEF Doc No. 373, Klosowski Tr. at 110-111). Klosowski stated that he did not know whether the PIB sealant had an ultraviolet stabilizer, but admitted that he had no evidence that the PIB sealant contained an

ultraviolet stabilizer (*id.* at 128). According to Klosowski, the bonds of the PIB polymer are "being cut" at a molecular level, causing the PIB sealant to flow out of its intended placement (*id.* at 160, 243).

PROCEDURAL HISTORY

On November 15, 2016, HTRF filed its complaint, asserting the following six counts: (1) breach of contract; (2) breach of express warranty; (3) breach of express warranty under the UCC; (4) breach of implied warranty; (5) negligence; and (6) strict liability (NYSCEF Doc No. 305, complaint, ¶¶ 26-34; 35-42; 43-50; 51-55; 56-63; 64-66). The complaint seeks in excess of $500,000 in compensatory damages, in addition to costs, attorneys' fees, and interest (*id.*, ¶¶ 34, 42, 50, 55, 63, 66, wherefore clause).

Permasteelisa filed a third-party complaint against Quanex I.G. Systems, Inc. and Truseal Technologies, Inc., successors in interest to the manufacturer of the PIB sealant, asserting claims for breach of contract, breach of express and implied warranties, indemnification, and contribution (NYSCEF Doc No. 313, third-party complaint, ¶¶ 17-23; 24-29; 30-35; 36-43; 44-47). Permasteelisa alleges in the third-party complaint that the manufacturer "provid[ed] PIB sealants with serious and substantial defects" (*id.*, ¶ 21). The third-party complaint further alleges that the DGU supplier, Zadra, "fail[ed] to manufacture and supply Permasteelisa with [DGUs] that are free from defects and suitable for use in a curtain wall system" (*id.*, ¶ 39).

Permasteelisa filed a second-third-party complaint against RPM International Inc., Tremco Incorporated, and Tremco Illbruck Group GmbH, asserting claims for breach of contract, breach of express and implied warranties, indemnification, and contribution (NYSCEF Doc No. 314, second third-party complaint, ¶¶ 16-21; 22-25; 26-

29; 30-35; 36-39). Permasteelisa alleges that these entities "provid[ed] PIB sealant with serious and substantial defects" (*id.*, ¶ 20).

By decision and order dated July 5, 2018, the Court (Bransten, J.) severed the main action from the third-party actions, keeping the first and second third-party actions together (NYSCEF Doc Nos. 250-252).

DISCUSSION

The standards for summary judgment are well settled. On a motion for summary judgment, the proponent of the motion must establish its claim or defense "sufficiently to warrant the court as a matter of law in directing judgment in [its] favor" (CPLR 3212 [b]). "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985] [citations omitted]). "[W]here the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action . . . ." (*Zuckerman v City of New York*, 49 N.Y.2d 557, 560 [1980]).

I. Permasteelisa's Motion for Summary Judgment (Motion Sequence Number 008)

A. Breach of Contract and Breach of Express Warranty (Counts I and II)

1. Whether HTRF Was An Intended Third-Party Beneficiary of the Design Build Agreement

Permasteelisa argues that HTRF was not an intended third-party beneficiary of the design build agreement, and thus, cannot recover for breach of contract or breach of express warranty. Specifically, Permasteelisa contends that: (1) there is no express language indicating that HTRF was an intended third-party beneficiary; and (2) there is no evidence that Turner would have been unable to bring this litigation.

HTRF maintains, however, that the design build agreement and construction management agreement expressly indicate that HTRF was the intended beneficiary of the Work and may directly enforce the guarantees and warranties provided in the design build agreement against Permasteelisa.

"[A] third party may sue as a beneficiary on a contract made for [its] benefit. However, an intent to benefit the third party must be shown, and absent such intent, the third party is merely an incidental beneficiary with no right to enforce the particular contracts" (*Dormitory Auth. of the State of N.Y. v Samson Constr. Co.*, 30 N.Y.3d 704, 710 [2018] [internal quotation marks and citation omitted]). The Court of Appeals has held that a third party has the "right to enforce a contract in two situations: [(1)] when the third party is the only one who could recover for the breach of contract; or [(2)] when it is otherwise clear from the language of the contract that there was 'an intent to permit enforcement by the third party'" (*id.*, quoting *Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 66 N.Y.2d 38, 45 [1985]).

With respect to the latter situation, the First Department has held that "a third party cannot be deemed an intended beneficiary of a contract unless 'the parties' intent to benefit the third party . . . [is] apparent from the face of the contract" (*Commissioner of the Dep't of Social Servs. of the City of N.Y. v New York-Presbyt. Hosp.*, 164 A.D.3d 93, 98 [1st Dep't 2018], *lv denied* 33 N.Y.3d 901 [2019] [internal quotation marks and citation omitted]). "Absent clear contractual language evincing such intent, New York courts have demonstrated a reluctance to interpret circumstances to construe such an intent" (*LaSalle Natl. Bank v Ernst & Young*, 285 A.D.2d 101, 108-109 [1st Dep't 2001]).

Here, the design build agreement unambiguously evinces an intent to permit enforcement by HTRF. Article XXI of the design build agreement states that "Subcontractor [Permasteelisa] warrants to the Owner . . . that all materials and equipment furnished under this Agreement will be of first class quality and new, . . . that the Work performed pursuant to this Agreement will be free from defects and that the Work will strictly conform with the requirements of the Contract Documents" (NYSCEF Doc No. 290 at 8). In addition, Article XXI states that "Subcontractor [Permasteelisa] shall expeditiously remove, replace and/or repair at its own expense and at the convenience of the Owner any faulty, defective or improper Work, materials or equipment . . . ." (*id.*). Significantly, Article II states that "Subcontractor [Permasteelisa] agrees . . . to assume toward Turner all of the duties, obligations and responsibilities that Turner by those Contract Documents assumes toward the Owner . . . ." (*id.* at 1). The construction management agreement provides, in section 13.1.2, that "Construction Manager shall obtain from Trade Contractors and Sub-trade Contractors . . . warranties which meet or exceed the requirements of the Contract Documents. *All such warranties*

shall be deemed to run to the benefit of Owner" (NYSCEF Doc. No. 289 at 77) (emphasis added). Section 13.1.3 also states that "[a]ll warranties provided by any Trade Contractor or Sub-trade Contractor . . . *shall be in such form as to permit direct enforcement by Owner against any Trade Contractor or Sub-trade Contractor* . . . ." (*id.*) (emphasis added).

Permasteelisa's reliance on *Dormitory Auth. of the State of N.Y., supra*, is misplaced. There, the Court of Appeals held that the City of New York was not an intended third-party beneficiary of an architectural services contract because: (1) the City was not the only entity that could recover under the contract; and (2) the contract did not expressly name the City as an intended third-party beneficiary or authorize the City to enforce any obligations thereunder (*Dormitory Auth. of the State of N.Y.*, 30 N.Y.3d at 710). Here, in contrast, the parties expressly agreed that the guarantees and warranties would be enforceable *by HTRF*.

2. *Whether Permasteelisa Provided Express Warranties Other than the Five-Year Warranty Covering Labor and Workmanship in the Curtain Wall Specifications*

Permasteelisa next argues that the only warranty that it was required to submit pursuant to the contract documents was a five-year warranty covering labor and workmanship of the curtain wall system, and that there are no warranties in the design build agreement in addition to the warranty requirements of the curtain wall performance specification. Permasteelisa points out that the design build agreement specifically states that "[a]ll warranties contained in this Agreement shall be as specified in the Contract Documents" (NYSCEF Doc No. 290 at 8), and the curtain wall performance specification, one of those documents, specifically states the warranties that Permasteelisa had to provide. According to Permasteelisa, it complied with the

specification because it submitted the five-year warranty for workmanship, and Zadra provided a warranty for seal failure of the DGUs. As support for this argument, Permasteelisa offers emails purportedly indicating that Zadra was required to provide the 10-year warranty for seal failure (NYSCEF Doc Nos. 295, 296, Moore Aff. in support, exhibits 7, 8).

According to HTRF, Article XXI of the design build agreement provides for expansive warranties beyond the five-year warranty covering labor and workmanship in the curtain wall performance specification. Moreover, HTRF maintains that Permasteelisa, not Zadra, was required to provide the 10-year warranty for seal failure pursuant to the language of the design build agreement and curtain wall performance specification.

A warranty has been defined as follows:

> "an assurance by one party to a contract of the existence of a fact upon which the other party may rely. It is intended precisely to relieve the promisee of any duty to ascertain the fact for himself; *it amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue, for obviously the promisor cannot control what is already in the past*"

(*CBS Inc. v Ziff-Davis Publ. Co.*, 75 N.Y.2d 496, 503 [1990] [emphasis in original]). "The express warranty is as much a part of the contract as any other term" (*id.*).

"[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (*W.W.W. Assoc. v Giancontieri*, 77 N.Y.2d 157, 162 [1990]). Whether or not an agreement is ambiguous is an issue of law for the court (*W.W.W. Assoc.*, 77 N.Y.2d at 162). "Ambiguity arises when the contract, read as a whole, . . . fails to disclose its purpose and the parties' intent" (*Ellington v EMI Music, Inc.*, 24 N.Y.3d 239, 244 [2014]), or when "the agreement

on its face is reasonably susceptible of more than one interpretation" (*Chimart Assoc. v Paul*, 66 N.Y.2d 570, 573 [1986]). Moreover, in deciding whether an agreement is ambiguous, the court "'should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed'" (*Kass v Kass*, 91 N.Y.2d 554, 566 [1998]). "[A] contract is not rendered ambiguous just because one of the parties attaches a different, subjective meaning to one of its terms" (*Moore v Kopel*, 237 A.D.2d 124, 125 [1st Dep't 1997]).

Contrary to Permasteelisa's contention, the plain and unambiguous language of the design build agreement, when read as a whole, indicates that Permasteelisa provided express warranties concerning the Work, in addition to the five-year warranty covering labor and workmanship in the curtain wall performance specification (*cf. Coffey v United States Gypsum Co.*, 149 A.D.2d 960, 960 [4th Dep't 1989]).

While Permasteelisa relies on the language in the design build agreement that "[a]ll warranties contained in this Agreement shall be as specified in the Contract Documents" (NYSCEF Doc No. 290 at 8), Article II of the design build agreement defines the contract documents to include "[t]he Plans, Specifications, General Conditions, Special Conditions including all Performance Criteria, Addenda and Construction Manager's Agreement . . . *including this Agreement*" (*id.* at 1 [emphasis added]), i.e., the design build agreement. Moreover, Article II states that "[t]his Subcontract Agreement, the provisions of the Construction Manager's agreement and the other Contract Documents are intended to supplement and complement each other and shall, where possible, be thus interpreted" (*id.*).

Specifically, in Article XXI of the design build agreement, Permasteelisa: (1) "guarantee[d] the Work to the full extent provided in the Plans, Performance Criteria, Specifications, General Conditions, Special Conditions and Other Contract Documents"; (2) "warrant[ed] to the Owner . . . that all materials and equipment furnished under this Agreement will be of first class quality and new . . . that the Work performed pursuant to this Agreement will be free from defects and that the Work will strictly conform with the Contract Documents"; and (3) agreed "to expeditiously remove, replace and/or repair at its own expense and at the convenience of the Owner any faulty, defective or improper Work, materials or equipment existing or discovered within one (1) year from the date of the acceptance of the Project as a whole . . . or for such longer period as may be provided in the Plans, Specifications including all Performance Criteria . . . or other Contract Documents" (NYSCEF Doc No. 290 at 8). The curtain wall performance specification provides that Permasteelisa was required to "[s]ubmit a Five (5) year warranty covering materials and labor workmanship of the curtain wall system," and to "[p]rovide a Ten (10) year warranty on seal failure of the double glazed units" (NYSCEF Doc No. 291 at 21). "Failure of Subcontractor [Permasteelisa] to honor and satisfy the foregoing and any other warranties or guarantees required of the Subcontractor [Permasteelisa] under the Contract Documents, shall constitute a default by Subcontractor [Permasteelisa]" (NYSCEF Doc No. 290 at 8).

Thus, Permasteelisa agreed to remove, replace and/or repair "at its own expense" any defective Work, including materials such as PIB sealant, that existed or was discovered within one year from the project's acceptance or longer period provided by the specifications, including the five-year period for workmanship and 10-year period

for seal failure. Under the plain language of the relevant agreements, Permasteelisa's failure to honor and satisfy these warranties constituted a default by Permasteelisa. Since the language of the design build agreement is unambiguous and contains a general merger clause, indicating that "[t]his Agreement constitutes the entire agreement between the parties hereto" (NYSCEF Doc No. 290 at 10), the Court may not consider Permasteelisa's emails to vary or contradict the writing (*see Matter of Primex Intl. Corp. v Wal-Mart Stores*, 89 N.Y.2d 594, 599 [1997] ["the purpose of a general merger provision, . . . 'represents the entire understanding between the parties,' is to require full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to vary or contradict the terms of the writing"] [citation omitted]).

Permasteelisa also argues that it disclaimed all other warranties in its five-year warranty dated January 1, 2007 (NYSCEF Doc No. 292). However, Article VIII of the design build agreement provides that "[t]he Subcontractor [Permasteelisa] shall not make any changes, additions and/or omissions in the Work except upon written order of Turner as provided in Article IX hereof" (NYSCEF Doc No. 290 at 4). In addition, Article XXVI provides that "[t]his Agreement may not be changed in any way except as herein provided" (*id.* at 10). Permasteelisa has failed to demonstrate that its unilateral disclaimer of warranties constituted a modification of the terms of the design build agreement pursuant to these contract provisions (*see Town of Huntington v Long Is. Power Auth.*, 60 Misc. 3d 1222[A], 2018 NY Slip Op 51206[U], *15 [Sup Ct, Suffolk

County 2018] ["when a contract provides a procedure for amending the contract's provisions, that procedure must be followed to execute a valid amendment"]).[1]

3. *Whether HTRF's Breach of Contract and Breach of Warranty Claims Are Time-Barred*

Permasteelisa contends that HTRF's breach of contract and breach of warranty claims are time-barred, since they were not filed within the six-year statute of limitations for such claims (*see* CPLR 213 [2]). Permasteelisa argues that the statute of limitations began to run upon substantial completion of Permasteelisa's work in November 2006, and has, therefore, expired.

It is well-settled that "[a] cause of action for breach of a construction contract accrues upon substantial completion of the work" (*Superb Gen. Contr. Co. v City of New York*, 39 A.D.3d 204, 204 [1st Dep't 2007], *appeal dismissed* 10 N.Y.3d 800 [2008]). However, "'where a contract provides for continuing performance over a period of time, each breach may begin the running of the statute [of limitations] anew such that accrual occurs continuously and plaintiffs may assert claims for damages occurring up to six years prior to filing of the suit'" (*Inter-Community Mem. Hosp. of Newfane v Hamilton Wharton Group, Inc.*, 93 A.D.3d 1176, 1178 [4th Dep't 2012], quoting *Airco Alloys Div. v Niagara Mohawk Power Corp.*, 76 A.D.2d 68, 80 [4th Dep't 1980]).

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[1]Permasteelisa argues that it has not breached any of the warranties in Article XXI of the design build agreement because the PIB sealant did not begin to migrate until 2015. In addition, Permasteelisa asserts that it did not manufacture or supply the PIB sealant. However, Permasteelisa has failed to demonstrate entitlement to summary judgment on this ground. As noted above, Permasteelisa agreed to repair *any* defective Work that existed or was discovered within the remedial period *at its own expense*. In addition, HTRF presents an expert affidavit indicating that the PIB sealant lacked fillers, antioxidants, and stabilizers necessary to protect the sealant from sunlight and heat from its inception (NYSCEF Doc No. 325, ¶¶ 21-25).

Permasteelisa has failed to demonstrate prima facie that HTRF's breach of contract and breach of express warranty claims are time-barred (*see Winegrad*, 64 N.Y.2d at 853). Although Permasteelisa argues that HTRF's breach of contract and breach of express warranty claims accrued upon substantial completion of the Work, Permasteelisa was required to perform under the design build agreement after substantial completion of the Work. Pursuant to Article XXI of the design build agreement, "Subcontractor [Permasteelisa] shall expeditiously remove, replace and/or repair at its own expense and at the convenience of the Owner any faulty, defective or improper Work, materials or equipment *existing* or discovered within one (1) year from the date of the acceptance of the Project . . . or for such longer period as may be provided in the Plans, Specification including all Performance Criteria . . . or other Contract Documents" (NYSCEF Doc No. 290 at 8 [emphasis added]). The curtain wall performance specification provides that Permasteelisa was required to "[s]ubmit a Five (5) year warranty covering materials and labor workmanship of the curtain wall system," and to "[p]rovide a Ten (10) year warranty on seal failure of the double glazed units" (NYSCEF Doc No. 291 at 21). The design build agreement provides that "Failure of Subcontractor [Permasteelisa] to honor and satisfy the foregoing and any other warranties or guarantees required of the Subcontractor [Permasteelisa] under the Contract Documents, shall constitute a default by the Subcontractor [Permasteelisa]" (NYSCEF Doc No. 290 at 8). It is undisputed that HTRF requested that Permasteelisa satisfy its guarantees in November 2015 and in January 2016 (NYSCEF Doc Nos. 345, 346). HTRF filed its complaint on November 15, 2016 (NYSCEF Doc No. 305). Moreover, Permasteelisa has failed to establish that any alleged defects did not exist

within the remedial period. Therefore, Permasteelisa is not entitled to summary judgment on the ground that HTRF's breach of contract and breach of express warranty claims are untimely.

B. Breach of Express and Implied Warranties Under the UCC (Counts III and IV)

Permasteelisa argues that HTRF's causes of action for breach of express and implied warranties under the UCC must be dismissed because the UCC does not apply to service contracts such as the design build agreement. In addition, Permasteelisa maintains that its five-year express warranty disclaimed all implied warranties.

In response, HTRF contends that summary judgment is unwarranted on its UCC claims because there are issues of fact as to whether the DGUs are self-contained, separate units that are movable today.

Where a contract is predominantly for the rendition of work, labor, and services, and not the sale of goods, UCC Article 2 does not apply (*Milau Assoc. v North Ave. Dev. Corp.*, 42 N.Y.2d 482, 485-486 [1977]). Thus, courts have held that Article 2 does not apply to a construction contract (*see Schenactady Steel Co. v Trimpoli Gen. Constr. Co.*, 43 A.D.2d 234, 236 [3d Dep't 1974], *affd* 34 N.Y.2d 939 [1974]).

The design build agreement provides that "[t]he Subcontractor [Permasteelisa] shall perform and furnish in the manner provide herein all the work, design, engineering, equipment, tools, supervision, hoisting, rigging, scaffold, taxes, etc., as they become necessary for the performance of all Curtainwall Work for the IAC/InterActiveCorp project" (NYSCEF Doc No. 290 at 1). Thus, the predominant purpose of the design build agreement was to provide services, not the sale of goods. Therefore, UCC Article 2 does not apply here (*see Milau Assoc.*, 42 N.Y.2d at 488 [contract for design and

installation of a sprinkler system was not governed by the UCC, "(g)iven the predominantly service-oriented character of the transaction"]; *County of Chenango Indus. Dev. Agency v Lockwood Greene Engrs.*, 114 A.D.2d 728, 729 [3d Dep't 1985], *appeal dismissed* 67 N.Y.2d 757 [1986] [UCC Article 2 did not apply where "the pleadings establish that manufacturer of Zonolite was engaged primarily to install Zonolite and . . . any transfer of personal property was purely incidental to the performance of this service"]). Accordingly, Counts III and IV are dismissed.

C. Negligence (Count V)

Permasteelisa contends that HTRF's cause of action for negligence must be dismissed because HTRF's allegations are duplicative of its breach of contract allegations.

"It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 N.Y.2d 382, 389 [1987]). "This legal duty must spring from the circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract" (*id.*). Furthermore, "'where plaintiff is essentially seeking enforcement of the bargain, the action should proceed under a contract theory'" (*Dormitory Auth. of the State of N.Y.*, 30 N.Y.3d at 711, quoting *Sommer v Federal Signal Corp.*, 79 N.Y.2d 540, 552 [1992]).

Here, HTRF alleges that Permasteelisa "was negligent in its construction of the [c]urtain [w]all by: (i) failing to construct the [c]urtain [w]all in a workmanlike manner; (ii) failing to construct a curtain wall free from defects, including but not limited to effects in

the IGUs' PIB sealant system; (iii) failing to employ materials of good quality suitable for use as a primary sealant that can maintain its appearance, composition, viscosity, and physical integrity in service" (NYSCEF Doc No. 305, ¶ 61). HTRF's breach of contract claim similarly alleges that Permasteelisa provided a curtain wall with substantial defects (*id.*, ¶ 32). Moreover, the damages sought on HTRF's breach of contract and negligence claims are identical (*id.*, ¶¶ 34, 63).

Although HTRF argues that its negligence claim is based on Permasteelisa's judgment, skills, and expertise as a professional (*id.*, ¶¶ 57-59), HTRF's allegations make clear that HTRF is essentially seeking enforcement of the design build agreement (*see Dormitory Auth. of the State of N.Y.*, 30 N.Y.3d at 713). Therefore, Count V must be dismissed.

D. Strict Liability (Count VI)

Permasteelisa argues that HTRF's strict liability cause of action must be dismissed because: (1) the UCC does not apply to the design build agreement; and (2) even if the DGUs could be considered a good, HTRF's claims for product-related economic damages must be adjudicated exclusively based on contract and warranty theories under the economic loss doctrine.

HTRF counters that there are issues of fact as to whether the UCC applies to the design build agreement. In addition, HTRF contends that summary judgment is not appropriate based upon the economic loss doctrine. HTRF maintains that the defective PIB sealant has caused damage to other property, including the DGUs.

"The economic loss rule provides that tort recovery in strict products liability and negligence against a manufacturer is not available to a downstream purchaser where

the claimed losses flow from damage to the property that is the subject of the contract and personal injury is not alleged or at issue" (*Atlas Air, Inc. v General Elec.*, 16 A.D.3d 444, 445 [2d Dep't 2005], *lv denied* 6 N.Y.3d 701 [2005]). "The rule is applicable to economic losses to the product itself as well as consequential damages resulting from the defect" (*id.*).

Here, HTRF alleges that it sustained economic losses representing costs to investigate and repair the defective PIB sealant (NYSCEF Doc No. 305, ¶ 66). HTRF does not allege that it suffered any damage to property not covered by the design build agreement. Stated otherwise, HTRF does not allege that it sustained any property damage outside the DGUs. Therefore, the economic loss rule precludes HTRF's strict liability claim (*see Weiss v Polymer Plastics Corp.*, 21 A.D.3d 1095, 1096 [2d Dep't 2005] [tort-based causes of action against manufacturer of exterior insulation finish systems were barred by "economic loss" doctrine where claimed losses flowed from damage to property that was the subject of the contract]; *cf. 126 Newton St., LLC v Allbrand Commercial Windows & Doors, Inc.*, 121 A.D.3d 651, 653 [2d Dep't 2014] [economic loss rule did not bar building owner from recovering from fabricator/installer of glass windows and doors damages for injury to structural elements of the building, including flooring and walls, where those structural elements were not part of the parties' contract]). Accordingly, Count VI is dismissed.

II. HTRF's Motion for Partial Summary Judgment (Motion Sequence Number 009)

A. Breach of Contract (Count I)

HTRF moves for partial summary judgment on its breach of contract claim. HTRF argues that there is no dispute that the design build agreement was a valid

agreement, or that HTRF performed under the contract. Additionally, HTRF contends that Permasteelisa furnished defective DGUs containing defective PIB sealant.

To recover for breach of contract, the plaintiff must establish the following elements: (1) the existence of a contract; (2) the plaintiff's performance under the contract; (3) the defendant breached the contract; and (4) resulting damages (*see PF2 Sec. Evaluations, Inc. v Fillebeen*, 171 A.D.3d 551, 551 [1st Dep't 2019]; *Furia v Furia*, 116 A.D.2d 694, 695 [2d Dep't 1986]).

Pursuant to Article XXI of the design build agreement, Permasteelisa guaranteed "the Work to the full extent provided in the Plans, Performance Criteria, Specifications, General Conditions, Special Conditions and other Contract Documents" (NYSCEF Doc No. 333 at 8). Permasteelisa was required to "expeditiously remove, replace and/or repair at its own expense and at the convenience of the Owner any faulty, defective or improper Work, materials or equipment existing or discovered within one (1) year from the date of the acceptance of the Project . . . or for such longer period as may be provided in the Plans, Specifications including all Performance Criteria . . ." (*id.*). Permasteelisa "warranted[ed] to the Owner . . . that the Work will be free from defects" (*id.*). "Failure of Subcontractor [Permasteelisa] to honor and satisfy the foregoing and any other warranties or guarantees required of the Subcontractor [Permasteelisa] under the Contract Documents, shall constitute a default by Subcontractor [Permasteelisa]" (*id.*).

Lemieux asserts that the gray PIB sealant is defective because: (1) there is no indication that that it contains sufficient fillers, antioxidants, and ultraviolet stabilizers; (2) the chemical bonds have "failed" to hold the sealant together; (3) the sealant has not

remained "intact" as designed, and instead has flowed out of its intended location behind the spacer bars of the DGUs; and (4) this deterioration is progressive and irreversible (NYSCEF Doc No. 325, ¶¶ 21-25).

However, HTRF has failed to demonstrate that the PIB sealant or DGUs are "defective" as defined in the design build agreement. The design build agreement states that "Work not conforming to [the requirements of the Contract Documents] . . . shall be considered defective" (NYSCEF Doc No. 333 at 8). HTRF has failed to establish that the PIB sealant or DGUs did not conform to "[t]he Plans, Specifications, General Conditions, Special Conditions including all Performance Criteria, Addenda and Construction Manager's agreement . . . [and] this Agreement" (*id.*). It is undisputed that gray PIB sealant was installed as a primary sealant, as required by the curtain wall performance specification (NYSCEF Doc No. 334 at 28; NYSCEF Doc No. 325, ¶ 25). Moreover, the curtain wall performance specification required Permasteelisa to "[s]ubmit a Five (5) year warranty covering materials," in which defects are defined to include "failure of sealants and their ability [to] withstand the forces applied by the torqueing of the glass panels . . . [and] haziness", and to "[p]rovide a 10-year warranty on seal failure of the [DGUs]" (NYSCEF Doc No. 334 at 21). "Fail" has been defined as "[t]o prove deficient or lacking; perform ineffectively or inadequately" (American Heritage Dictionary of the English Language 635 [4th ed 2000]). Although Lemieux states that the chemical bonds of the PIB sealant have failed, and that the sealant has not remained intact as designed (NYSCEF Doc No. 325, ¶ 25), HTRF has not demonstrated that mere dripping or migration of the PIB sealant means that the DGU seal or PIB sealant are inadequate. In addition, HTRF does not argue that the PIB sealant is inadequate to withstand the

forces applied by the torqueing of the glass panels or that the PIB sealant is hazy. Accordingly, HTRF's motion must be denied, regardless of the sufficiency of Permasteelisa's opposition papers (*see Winegrad*, 64 N.Y.2d at 853).

Even if HTRF had met its burden, the Court finds that Permasteelisa has raised an issue of fact as to whether the PIB sealant was and is defective. Permasteelisa presents evidence that moisture has not formed inside the two panes of glass of the DGUs, indicating that the PIB sealant has maintained its seal and has not failed (NYSCEF Doc No. 366, Panissidi Tr.at 94-95; NYSCEF Doc No. 371, Rubino Tr.at 45-46).

Accordingly, HTRF is not entitled to summary judgment on its breach of contract claim (Count I).

B. Breach of Express Warranty (Counts II and III)

HTRF also moves for summary judgment on its breach of express warranty claims, arguing that Permasteelisa breached its express warranties because the sealant and DGUs are defective. HTRF further contends that Permasteelisa failed to repair, replace or remediate the defective DGUs and sealant, upon notice from HTRF within the warranty period.

"Under New York common law, upon showing that: (1) plaintiff and defendant entered into a contract; (2) containing an express warranty by the defendant with respect to a material fact; (3) which warranty was part of the basis of the bargain; and (4) the express warranty was breached by defendant, plaintiff is entitled to be indemnified for any damages incurred as a result of such breach" (*Promuto v Waste Mgt., Inc.*, 44 F Supp 2d 628, 642 [S.D.N.Y. 1999], citing *CBS*, 75 N.Y.2d at 501-506).

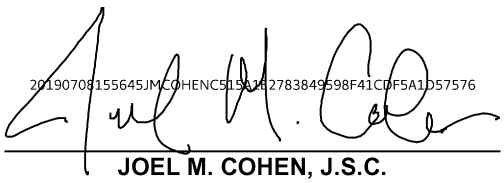
For the reasons set forth above, HTRF is not entitled to summary judgment on its breach of express warranty claims. HTRF has failed to demonstrate that the PIB sealant is defective. In any event, Permasteelisa has raised issues of fact as to whether the PIB sealant is defective and has failed (NYSCEF Doc No. 366 at 94-95; NYSCEF Doc No. 371 at 45-46). As discussed above, the UCC does not apply to the design build agreement. Therefore, HTRF is not entitled to summary judgment on Counts II and III.

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 008) of defendant Permasteelisa North America Corporation for summary judgment is granted to the extent of dismissing plaintiff's breach of express warranties claim under the Uniform Commercial Code (Count III), breach of implied warranties claim (Count IV), negligence claim (Count V), and strict liability claim (Count VI), and is otherwise denied; and it is further

ORDERED that the motion (sequence number 009) of plaintiff HTRF Ventures, LLC for partial summary judgment is denied.



7/8/2019
DATE

JOEL M. COHEN, J.S.C.

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