

SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

P R E S E N T :

**HON. IRA B. WARSHAWSKY,
Justice,**

TRIAL/IAS PART 8

ARCHSTONE f/k/a ARCHSTONE-SMITH
OPERATING TRUST and TISHMAN SPEYER
ARCHSTONE-SMITH WESTBURY, L.P. f/k/a
ASN ROOSEVELT CENTER LLC,

Plaintiffs,

INDEX NO.: 001018/2008
MOTION DATE: 03/12/2010
MOTION SEQUENCE: 014

-against-

TOCCI BUILDING CORPORATION OF NEW JERSEY,
INC., LIBERTY MUTUAL INSURANCE COMPANY,
PERKINS EASTMAN ARCHITECTS, INC., and
ELDORADO STONE, LLC,

Defendants.

TOCCI BUILDING CORPORATION OF NEW
JERSEY, INC.,

Third-Party Plaintiff,

-against-

ADJO CONTRACTING CORPORATION, AMERICAN
ENGINEERING SERVICES, P.C., APRO CONSTRUCTION
GROUP, ATLAS COMFORT SYSTEMS, USA, L.P., d/b/a
ATLAS AIR CONDITIONING, BUILDERS HARDWARE,
CLEM'S ORNAMENTAL IRON WORKS, DAVINCI
CONSTRUCTION OF NASSAU, INC. d/b/a DAVINCI
CONSTRUCTION, FOUR SEASONS INSULATION CORP.,
HAVANA CONSTRUCTION CORP, HOUSTON STAFFORD
ELECTRICAL CONTRACTORS, L.P., d/b/a HOUSTON
STAFFORD ELECTRIC, KLEET LUMBER COMPANY,
KNIGHT WATERPROOFING COMPANY, INC., MANNING
PLUMBING AND HEATING CORP., METRO PAINTING,

Third-Party Action

M.I. CONCRETE CORP., MID-ATLANTIC STONE, INC.,
PATTI ROOFING, LLC, SIDNEY B. BROWNE & SON, LLP,
SIPALA LANDSCAPE SERVICES, INC., STAT FIRE
SUPPRESSION, INC., SUPERSEAL MANUFACTURING CO.,
THREE B'S PLUMBING HEATING and AIR CONDITIONING
CORP., and UNIVERSAL FOREST PRODUCTS,

Third-Party Defendants.

FJR CONSTRUCTION, INC.

Plaintiffs,

Joined Lien Action #1

-against-

INDEX NO.: 005292/2007

ARCHSTONE-SMITH COMMUNITIES, LLC,
TOCCI BUILDING CORPORATION OF NEW
JERSEY, INC., et al

Defendants.

DAVINCI CONSTRUCTION OF NASSAU, INC.,

Plaintiffs,

Joined Lien Action #2

-against-

INDEX NO.: 006064/2007

ARCHSTONE-SMITH COMMUNITIES, LLC,
TOCCI BUILDING CORPORATION OF NEW
JERSEY, INC., et al.,

Defendants.

TOCCI BUILDING CORPORATION OF NEW
JERSEY, INC.,

Second Third-Party Plaintiff,

Amended Second Third-Party
Action

-against-

MG CONSULTING SERVICES, INC., RMS
ENGINEERING and ROBINSON, MULLER &
SCHIAVONE ENGINEERS, P.C.,

INDEX NO.: 001018/2008

Second Third-Party Defendants.

SIPALA LANDSCAPE SERVICES, INC.,

Fourth-Party Plaintiff/
Third-Party Defendant,

Fourth-Party Action

-against-

INDEX NO.: _____

THOMAS BALSLEY ASSOCIATES LANDSCAPE
ARCHITECTURE, PLLC, HINES & SAFFARESE
LANDSCAPING, INC., JD CONSTRUCTION &
LANDSCAPING, INC. and JOHN DIORIO
LANDSCAPING, INC.,

Fourth-Party Defendants.

The following papers read on this motion:

Notice of Motion	1
Affirmation of Robert F. Silkey, Esq. in Support & Exhibits Annexed	2
Affidavit of Kevin DiCello in Support & Exhibits Annexed	3
Third-Party Defendant Universal Forest Products Eastern Division, Inc.'s Memorandum of Law in Support of its Motion for Summary Judgment	4
Tocci-NJ's Affirmation in Opposition of James E. Davies, Esq., Affidavit of Sharon Lobo & Affidavit of Robert Tierney	5
Supplemental Affidavit of Sharon Lobo in Further Support of Tocci-NJ's Opposition to UFPI's Motion for Summary Judgment & Exhibits Annexed	6

Third-Party Defendant Universal Forest Products Eastern Division, Inc.’s Statement of Undisputed Material Facts	7
Tocci-NJ’s Counter-Statement of Material Facts & Tocci-NJ’s Statement of Undisputed Material Facts	8
Tocci-NJ’s Exhibits Referenced in Statement of Facts and Affirmation and Affidavits in Support of Opposition to Universal Forest Products Eastern Division, Inc.’s Motion for Summary Judgment (Exhibits A – N)	9
Reply Affidavit of Kevin DiCello in Further Support of Third-Party Defendant Universal Forest Products Eastern Division, Inc.’s Motion for Summary Judgment	10
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PRELIMINARY STATEMENT

Third party defendant, Universal Forest Products (“UFPI”), has moved for summary judgment, pursuant to CPLR 3212, seeking an order and judgment dismissing the complaint of third-party plaintiff Tocci Building Corporation of New Jersey Inc. (“Tocci”).

BACKGROUND

Tocci and UFPI were both involved in the construction of an apartment complex (“Archstone”). Tocci served as the construction manager and/or general contractor. UFPI is a manufacturer of wood and wood alternative products used in the construction industry. UFPI’s involvement in the project was limited to the manufacture and delivery of wood products. Specifically, Tocci and UFPI entered a written contract for UFPI to supply prefabricated wall panels. UFPI delivered these wall panels to the Archstone site, but had no involvement in the installation of any of the panels. UFPI began delivering the panels on July 30, 2004 and made its final delivery, at the latest, on September 4, 2005. UFPI was paid in full for all materials delivered by Tocci.

Davinci Construction of Nassau, Inc. (“Davinci”) was a subcontractor and/or agent of Tocci, which specified the specific locations at the Archstone site for UFPI to make its deliveries. Davinci accepted these UFPI deliveries in proper quantity and without patent defects. The Wall

Panels were then erected and installed to the complex by Tocci's agents and subcontractors. As part of the installation process, Tocci's subcontractors made changes to the panels, including adding holes through which piping would pass. UFPI had representatives at the site, solely to schedule the delivery of wall panels and resolve any quantity, quality or dimension concerns. While UFPI claims there were no complaints of defects during the construction process, Tocci claims it advised employees of UFPI of necessary changes to wall panels to conform to contract specifications. UFPI claims Tocci has not submitted proof that UFPI's panels were defective when they left UFPI's possession and control. Tocci claims gaps existed in and between UFPI's wall panels and that such gaps constitute a defect and contributed to the water damage at Archstone.

Each prefabricated wall panel consisted of oriented strand board and dimensional sized lumber. Oriented strand board is referred to in the industry as "OSB" and is similar to plywood. Varying sizes of OSB and dimensional lumber were manufactured and put together according to the contract specifications. (See Sharon Lobo Supplemental Affidavit, Exhibits C & D). According to Sharon Lobo's supplemental affidavit and attached specifications and/or drawings, UFPI's prefabricated wall panels are the result of a manufacturing process which attaches smaller OSB panels in a manner that effectively creates a larger OSB panel. These larger prefabricated panels are what was shipped to the Archstone site. They were then installed at the Archstone site, often adjacent to other prefabricated wall panels.

Tocci's subcontractors installed these larger panels. Tocci claims these larger panels contained gaps between the smaller OSB panels, gaps which were greater than 1/8". Because such gaps were not called for in the contract specifications or drawings, Tocci claims UFPI's panels are defective. UFPI claims any gaps greater than 1/8" exist as a result of Tocci's installation process, and are not a result of UFPI's manufacturing process.

More than two years after UFPI's final delivery, On November 21, 2007, Tocci first became aware of water infiltration problems at Archstone. In a November 30, 2007 letter, Tocci notified UFPI of these problems. This letter gave notice to UFPI that these water infiltration problems could have been caused, in part, due to gaps in or between the panels UFPI delivered.

Tocci inspected the project between April 2008 and October 2009. Tocci came to

possess many photographs showing UFPI's panels after the exterior of the complex had been removed. Tocci retained Sharon Lobo to conduct an inspection. She is a principal of Erwin Lobo & Bielinski PLLC, which is a forensic architectural and engineering firm. She is a registered architect with the American Institute of Architects and the National Council of Architectural Registration Boards.

This Court granted Tocci's request to allow Sharon Lobo to submit a supplemental affidavit during oral argument. In her first affidavit she she states she observed "several gaps in the OSB sheathing both at openings and between sheets of OSB." She referred to Exhibit L and Exhibit M of Tocci's exhibits which she identified as photos from several Archstone buildings. Absent from these photos are simple rulers to enable a viewer to determine the size of observed gaps.

She concludes, based on her personal observations and professional experience, that it is clear that some of the documented gaps resulted from the wall panel manufacturing process, not field modifications. The supplemental affidavit provides a more thorough discussion of the panelized construction method, and includes copies of detailed wall panel manufacturing specifications, additional photos, and Sharon Lobo's curriculum vitae. In her supplemental affidavit she notes that "while some gaps between the OSB appear to be a result of field modifications, certain gaps are a result of how the wall panels were manufactured, not a result of field installation or modifications." (Supp. Affidavit Para. 8, lines 1-3). She further notes that "in certain instances the only cause of these gaps was the spacing of the pieces of OSB during panel manufacture." (Supp. Affidavit Para. 9, lines 1-2). She says the gaps exist between individual pieces of OSB that were affixed to framing during the manufacturing process and not in the field, and that these exceeded 1/8 of an inch. She points to attached exhibits E and F to show six specifications and corresponding six photographs in which this exhibited condition was seen. Neither of Sharon Lobo's affidavits mention or suggest a hidden defect in UFPI's wall panels. Her supplemental affidavit makes clear, and points to, defects in spacing which were caused by "the spacing of the pieces of OSB during panel manufacture."

Sharon Lobo's supplemental affidavit makes no reference to the Wessling Report photos referenced in her first affidavit. Her supplemental affidavit contains over forty shop drawings

“prepared by UFPI, and produced by their attorneys”. (Sharon Lobo Supplemental Affidavit, Para 5, lines 1-2). Robert Silkey’s reply affirmation does not deny that these were UFPI’s shop drawings. Exhibit E and F of Sharon Lobo’s supplemental affidavit are the only places in the record where specifications(or shop drawings) are matched with photos purporting to show corresponding UFPI panels. Sharon Lobo claims the gaps between OSB panels, shown in the photos with arrows added pointing to the gaps, are wider than 1/8". No photo contains a ruler.

In consideration of this motion, over the objections of UFPI and Archstone’s Attorneys, the court has considered the document titled Executive Summary, Draft Report of Water Leaks and Damage prepared by Steven J. Wessling Architects, Inc. (“Wessling Report”). John Ducat (Plaintiff’s attorney) submitted an affirmation objecting to the Court’s consideration of the Wessling Report because Mr. Wessling is not their expert, they do not intend to call Mr. Wessling at trial, and they do not believe his report is admissible at trial. The Wessling Report indicates that both the manufacturer and the building code required gaps of 1/8" between plywood which allows for expansion and contraction of the plywood. The report also notes the observation of gaps “much wider” than 1/8". Exhibit L of Tocci’s exhibits contain photographs that appear to have been taken by the Wessling Firm.

The Contract

Article 17.1 of Tocci and UFPI’s contract states the law governing the contract is the “law of the place where [Tocci’s] principal office is located”. Tocci’s principal office is located in Woburn, Massachusetts.

Article 3.1.1 defines the “Contract Documents” to include drawings and specifications. The only specifications in the record were those attached as part of exhibits C, D, E and F of Sharon Lobo’s supplemental affidavit.

The contract included a warranty clause. Article 7.5 states the warranty as follows:

The Trade Contractor warrants to [Tocci] that all materials and equipment furnished under this Contract will be new unless otherwise specified, and that all Work will be performed in a workmanlike manner, and will be of good quality, free from faults and defects and in conformance with the Contract Documents. All Work not so conforming to these requirements including substitutions not properly approved and authorized, may be considered defective. If required by [Tocci,] [UFPI] shall furnish satisfactory evidence as to the kind and quality of

materials and equipment employed. This warranty is not limited by the provisions of Paragraph 15.2.

Causes of Action

Tocci's third-party complaint asserts the following six causes of action:

- 1) Breach of Contract
- 2) Breach of Warranty
- 3) Contribution
- 4) Indemnification
- 5) Contractual indemnification
- 6) Declaratory Judgment

DISCUSSION

In considering a motion for summary judgment, the court's function is "not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact." (*Quinn v. Krumland*, 179 A.D.2d 448, 449-450 [1st Dept.1992]); *See also*, (*S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 343, [1974]).

Summary judgment will only be granted if it is clear that no material and triable issue of fact is presented. (*Stillman v. Twentieth Century-Fox Corp.*, 3 N.Y.2d 395, 404 [1957]). Summary Judgment is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue. (*Moskowitz v. Garlock*, 23 A.D.2d 94 [3d Dept.1965]); (*Crowley's Milk Co. v. Klein*, 24 A.D.2d 920 [3d Dept.1965]).

On a motion for summary judgment, the evidence is considered in a light most favorable to the opposing party. (*Weill v. Garfield*, 21 A.D.2d 156 [3d Dept.1964]). Proof submitted in opposition is accepted as true and all reasonable inferences are drawn in favor of the opposing party. (*Tortorello v. Carlin*, 260 A.D.2d 201, 206 [1st Dept.2003]). However, the opposing party is obligated to come forward and bare his proof, and the failure to do so may lead the court to believe that there is no triable issue of fact. (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]). Such proof must be by the affidavit of an individual with personal knowledge, or with

an attorney's affirmation to which material is appended in admissible form. *Id.*

To obtain summary judgment, a movant must establish the cause of action or defense by tendering evidentiary proof in admissible form. (*Friends of Animals v. Associated Fur Mfrs.*, 46 N.Y.2d 1065 [1979]). Generally, for the non-movant to succeed, the non-movant must produce evidence in admissible form. *Id.* However, this rule for the non-movant is more flexible, and the non-movant “may be permitted to demonstrate acceptable excuse for his failure to meet the strict requirement of tender in admissible form.” *Id.* Whether the excuse is accepted depends on the circumstances in the particular case. *Id.*

Massachusetts - UCC Article 2

Article 17.1 of Tocci and UFPI’s contract states the law governing the contract is the “law of the place where [Tocci’s] principal office is located”. Tocci’s principal office is located in Woburn, Massachusetts. Massachusetts law applies.

Under §2-102 of the Massachusetts Uniform Commercial Code(“UCC”), transaction in goods are governed by the UCC. UCC §2-105 defines “goods” in relevant part as including “all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale.” The prefabricated wall panels supplied by UFPI constitute “goods” as that term is defined. UCC Article 2 applies to the contract between Tocci and UFPI.

Breach of Contract - Acceptance/Rejection

Under UCC §2-601, “if goods or the tender of delivery fail in any respect to conform to the contract, the buyer may

- a) reject the whole; or
- b) accept the whole; or
- c) accept any commercial unit or units and reject the rest.”

Under UCC §2-606, “acceptance of goods occurs when the buyer

- a) after reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity; or
- b) fails to make an effective rejection(§2-602(1)), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or
- c) does any act inconsistent with the seller’s ownership...”

UCC §2-607(2) states “Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a non-conformity cannot be revoked because of

it unless the acceptance was on the reasonable assumption that the non-conformity would be seasonably cured...”

UCC §2-607(3) states “where a tender has been accepted

a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy;”

UCC §2-605 provides that “the buyer’s failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to ... establish breach

a) where the seller could have cured if stated seasonably”

“Qualities that are apparent, such as size or color, reasonably should be inspected and complained of soon after the goods for a construction job have been delivered to the job site.” (*P & F Const. Corp. v. Friend Lumber Corp. of Medford* 31 Mass.App.Ct. 57, 60[Appeals Ct 1991]) The court held as a matter of law that notice of breach was untimely where the first mention of the flaw was three and a half months after the goods had been delivered. *Id.* The goods in *P & F Constr. Corp.* were incorrectly sized doors delivered to a construction site wrapped in clear plastic and, as the court noted, such defect was not hidden.

Under the UCC, Tocci, through the actions of its subcontractor Davinci, accepted the prefabricated wall panels delivered by UFPI. Tocci first notified UFPI of the issues regarding abnormal gaps more than two years after the final delivery. Tocci’s notice was not reasonable as a matter of law.

Breach of Warranty

Under Mass. Gen. Laws. Ann. ch. 106 §1-102(3) and (4), parties may vary the terms of the UCC by agreement. Paragraph 7.5 of the Contract contains a warranty clause. The warranty clause contains no limit on notice for a breach of warranty claim and it explicitly does not limit itself to the notice limits contained in paragraph 15. Thus, the warranty claim is only limited by the statute of limitations. Accordingly, Tocci’s notice of breach of warranty is timely.

The warranty of paragraph 7.5 states that “all materials and equipment furnished under this contract will be new unless otherwise specified, and that all Work will be performed in a workmanlike manner, and will be of good quality, free from faults and defects and in conformance with the Contract Documents.” The Court will consider UFPI’s acts of

particular defect that is ascertainable by reasonable inspection, but also supply proof of such particular defect and its causative effect. In order to create an issue of fact as to a defect, Tocci has the burden to show a deviation from the drawings and specifications of the contract documents. Tocci's claim of defect boils down to a claim that UFPI's wall panels contained gaps wider than what was allowed by the specifications and drawings of the contracts. This is a particular defect that is ascertainable by reasonable inspection.

The Wessling Report stated that "the specifications, the manufacturer and the building code require 1/8" gaps between the plywood for expansion and contraction." (Wessling Report, p. 3, lines 5-7). "The gaps we observed were much wider than 1/8". *Id.* Sharon Lobo's supplemental affidavit makes clear that she considers gaps greater than 1/8" within UFPI's manufactured panels to constitute a defect based on the specifications or drawings. The shop drawings attached to Sharon Lobo's supplemental affidavit do not appear to provide for gaps within UFPI's panels.

UFPI's actions per the contract involved manufacturing and then delivery of the wall panels to the Archstone site. Davinci, or other Tocci subcontractors, installed UFPI's wall panels. Davinci's acceptance of these UFPI's deliveries is circumstantial evidence that UFPI's panels complied with the contract specifications. During the installation process, Tocci has acknowledged its subcontractors cut holes in the UFPI's panels and otherwise made minor adjustments. UFPI's wood panels were themselves damaged, as noted in the Wessling Report, from water intrusion at the site. UFPI's wood panels were possibly exposed to additional disturbance when the building exterior was removed. Sharon Lobo, through her affidavits, does not allege facts that suggest a manufacturing defect caused these gaps to appear after delivery. The defect she describes is one that existed, and was apparent, when the panels were delivered.

Five pieces of evidence in the record address the issue of whether gaps in excess of 1/8" existed within the prefabricated panels manufactured by UFPI. First, the Wessling Report contains a statement that gaps much greater than 1/8" were observed between plywood. (Wessling Report, p. 3, line 5-7). Second, the Wessling Report contains photos which appear to show gaps between plywood greater than 1/8". (Exhibit L - Tocci's exhibits). Third, Sharon Lobo's supplemental affidavit purports to contain six photos of UFPI's panels, corresponding drawings, and her description of what is seen in the photos. She claims the photos show gaps

within UFPI's wall panels that are greater than 1/8" that are attributable to UFPI. Fourth, Tocci's exhibit M contains photos, which Sharon Lobo merely referenced, in her first affidavit which appear to show gaps between plywood greater than 1/8". Finally, Sharon Lobo claims first hand knowledge of gaps through "numerous inspections of the apartment complex." (Lobo Affidavit, Para. 2, line 2-3).

The existence of what may constitute "defects" do not necessarily constitute a breach of warranty such as to entitle a buyer to recover damages. Both the Uniform Commercial Code and common law of warranty require the buyer to establish that the damages caused are proximately caused by the seller's breach of warranty. (*Philip M. Damashe, P.C. v. Wang Laboratories, Inc.*, 150 A.D.2d 151, 152 [1st Dept. 1989]); (*Bellevue South Associates v. HRH Const. Corp.*, 78 N.Y.2d 282, 298 [1991]). The damages involved in this action are the damage to the structure as a result of the intrusion of water to the interior. Ms. Lobo opined that the "defects", that is, gaps in excess of 1/8" facilitated the ultimate damage. (February 11, 2010 Affidavit of Sharon Lobo at ¶ 3).

Ms. Lobo's statement with respect to facilitation may well be true, but it does not necessarily follow that such gaps were a proximate cause of the damages sustained. There is no evidence that a substantially similar amount of water would not have permeated the OSB boards if the openings were limited to 1/8". More importantly, it was not the purpose of this product to render the exterior walls impermeable; it is intended only to serve as the backing to which an impermeable felt product was to be applied. Once the water reached the OSB board, the damage was done.

The Court concludes that the existence of gaps in excess of 1/8" do not constitute defects which proximately caused the damage complained of in this action. Aside from the fact that there has been no showing of a particular drawing, specification, or other contract document limiting the width of gaps in OBS panels to 1/8", the purpose of the panel is not to prevent the passage of water, but to provide a surface on which to apply an impermeable seal, and there is no evidence that the panels were incapable of performing in the manner for which they were intended.

Examining all the evidence, in a light most favorable to Tocci, the court finds that any

claimed defect in the OSB panels was not such as to constitute a proximate cause of the damage .

Conclusions

UFPI's motion is granted as to each of Tocci's causes of action . The third-party action by Tocci Building Corporation against Universal Forest Products is dismissed with prejudice.

Submit Judgment.

This constitutes the Decision and Order of the Court.

Dated: April 2, 2010


J.S.C.

ENTERED

APR 09 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**