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NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2021CV0501

UNIVERSITY OF MASSACHUSETTS BUILDING AUTHORITY & ANOTHER[1],

PLAINTIFFS,

vs.

ADAMS PLUMBING & HEATING, INC. & OTHERS[2],

DEFENDANTS.

OMNIBUS MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

The plaintiffs, the University of Massachusetts Building Authority ("UMBA") and the University of Massachusetts Amherst ("UMass"), brought this action against the defendants: Adams Plumbing & Heating, Inc. ("Adams"); Bruner/Cott & Associates, Inc. ("Bruner/Cott"); Garcia, Galuska & DeSousa, Inc. ("Garcia"); Halton Group Americas, Inc. ("Halton"); Lee Kennedy Company, Inc. ("Lee Kennedy"); Leftfield, LLC ("Leftfield"); Tekon – Technical Consultants, Inc. ("Tekon"); and WSP Group and WSP USA Buildings, Inc. (together, "WSP") (collectively, "Defendants"), alleging negligence and breach of contract against all defendants. Additionally, the plaintiffs assert indemnification claims against Bruner/Cott, Lee Kennedy,

[1] University of Massachusetts Amherst

[2] Bruner/Cott & Associates, Inc.; Garcia, Galuska & DeSousa, Inc.; Halton Group Americas, Inc.; Lee Kennedy Company, Inc.; Leftfield, LLC; Tekon – Technical Consultants, Inc.; WSP Group; and WSP USA Buildings, Inc.

Leftfield, WSP, and Tekon. The defendants have each filed a motion to for summary judgment.[3] The plaintiffs oppose the motions. (Paper Nos. 71, 84, 89). There was a hearing on the motions on October 6, 2021, and the court took the motions under advisement. For the following reasons, the defendants' motions for summary judgment are **ALLOWED**.

BACKGROUND[4]

This action arose out of the renovation of the Blue Wall Dining Hall on the UMass campus ("the Project") in 2013-2014. Am. Comp. ¶ 1; Halton SOF ¶ 1; Lee Kennedy SOF ¶ 1; Tekon SOF ¶ 1; WSP SOF ¶ 1; Bruner/Cott SOF ¶ 1.[5] UMBA is a public entity established by

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[3] Paper Nos. 38 (Adams), 46 (Garcia), 56 (Halton), 67 (Leftfield), 77 (Tekon), 82 (Bruner/Cott) and 88 (WSP)

[4] The facts set out in this section are either undisputed or, in the case of disputed facts, are viewed in the light most favorable to the plaintiffs as the non-moving parties.

[5] References to the Amended Complaint are denoted by the abbreviation, "Am. Comp.," followed by a paragraph citation. References to the "Statement of Undisputed Material Facts Concerning Defendant Adams Plumbing & Heating, Inc.'s Motion for Summary Judgment" are denoted by the abbreviation, "Adams SOF," followed by a paragraph citation. References to the "Statement of Material Facts in Support of Defendant Garcia, Galuska & DeSousa, Inc.'s Motion for Summary Judgment" are denoted by the abbreviation, "Garcia SOF," followed by a paragraph citation. References to the "Defendant Halton Group Americas, Inc.'s Statement of Material Facts in Support of Its Motion for Summary Judgment" are denoted by the abbreviation, "Halton SOF," followed by a paragraph citation. References to the "Defendant Lee Kennedy Company, Inc.'s Statement of Material Facts in Support of Its Motion for Summary Judgment" are denoted by the abbreviation, "Lee Kennedy SOF," followed by a paragraph citation. References to the "Defendant Leftfield, LLC's Statement of Material Facts in Support of Its Motion for Summary Judgment" are denoted by the abbreviation, "Leftfield SOF," followed by a paragraph citation. References to the "Tekon-Technical Consultants, Inc.'s Statement of Undisputed Material Facts in Support of Motion for Summary Judgment" are denoted by the abbreviation, "Tekon SOF," followed by a paragraph citation. References to the "WSP Group and WSP Buildings, Inc,'s Statement of Undisputed Facts" are denoted by the abbreviation, "WSP SOF," followed by a paragraph citation. References to Bruner/Cott's "Joint Statement of Undisputed Facts" are denoted by the abbreviation, "Bruner/Cott SOF," followed by a paragraph citation. References to the "Plaintiffs' Combined Response to Moving Defendants' Statements of Material Facts" are denoted by the abbreviation, "Plaintiffs' SOF Response," followed by a page and paragraph citation. References to the "Memorandum of Law in Support of Defendant,

the Legislature to serve UMass in the planning, financing, design, construction, acquisition, capital maintenance, and replacement of UMass buildings, infrastructure and real estate. Am. Comp. ¶ 2; Adams SOF ¶ 1; Garcia SOF ¶ 2; Halton SOF ¶ 2; Lee Kennedy SOF ¶ 2; Leftfield SOF ¶ 1; Tekon SOF ¶ 2; WSP SOF ¶ 2; Bruner/Cott SOF ¶ 2. In 2013, the plaintiffs sought to renovate the Blue Wall Dining Hall in the Lincoln Campus Center at the University of Massachusetts' Amherst campus (the "Project"). Am. Comp. at ¶¶ 17-18; Garcia SOF ¶ 1. UMBA approved the renovation. Am. Comp. at ¶ 17. On February 15, 2013, UMBA entered into a contract with Leftfield. Am. Comp. at ¶ 19; Garcia SOF ¶ 3; Halton SOF ¶ 6; Leftfield SOF ¶ 10; Bruner/Cott SOF ¶ 5. Under the contract, Leftfield was to be the project manager for the planning, design, construction, and commissioning of the dining center. Am. Comp. at ¶ 19; Garcia SOF ¶ 3; Halton SOF ¶ 6; Bruner/Cott SOF ¶ 5.

In March 2013, UMBA requested proposals to renovate the dining center. Am. Comp. at ¶ 21; Halton SOF ¶ 7; Bruner/Cott SOF ¶ 6. On June 21, 2013, UMBA contracted with Bruner/Cott for architectural and engineering services for the Project. Am. Comp. at ¶ 22; Garcia SOF ¶ 4; Halton SOF ¶ 8; Bruner/Cott SOF ¶ 7. Thereafter, Bruner/Cott sub-contracted with Garcia for Garcia to be the mechanical, electrical, and plumbing engineer on the Project. Am. Comp. at ¶ 24; Garcia SOF ¶ 5. On November 26, 2013, UMBA awarded Lee Kennedy the contract to act as general contractor on the Project. Am. Comp. at ¶ 25; Adams SOF ¶ 4; Garcia SOF ¶ 6; Halton SOF ¶ 9; Lee Kennedy SOF ¶ 2; Tekon SOF ¶ 3; Bruner/Cott SOF ¶ 8. Under the contract with Lee Kennedy, Lee Kennedy was to furnish all pre-construction and construction phase work necessary to complete the Project. Am. Comp. at ¶ 25; Bruner/Cott SOF

Garcia, Galuska & DeSousa, Inc.'s Motion for Summary Judgment" are denoted by the abbreviation, "Garcia Memo," followed by a page number.

¶ 8. The Project commenced in Fall 2013. Am. Comp. at ¶ 29; Lee Kennedy SOF ¶ 3; Leftfield SOF ¶ 2; Tekon SOF ¶ 4.

On January 15, 2014, WSP contracted with UMBA to perform engineering and commissioning agent services, including the design and commissioning of the heating, ventilating, and air conditioning systems, air handling units, and exhaust fans. Am. Comp. at ¶ 30; Garcia SOF ¶ 7; WSP SOF ¶ 4. On February 11, 2014, Lee Kennedy entered into a sub-contract with Adams under which Adams was to fabricate and install the ductwork for the Project's kitchen exhaust system. Am. Comp. at ¶ 31; Adams SOF ¶ 5; Garcia SOF ¶ 8; Halton SOF ¶ 10; Bruner/Cott SOF ¶ 9. On March 4, 2014, Adams entered into a contract with Tekon, under which Tekon was to perform testing, adjusting, and balancing at the Project. Am. Comp. at ¶ 34; Garcia SOF ¶ 9; Halton SOF ¶ 11; Bruner/Cott SOF ¶ 10. The Amended Complaint alleges that Lee Kennedy entered into a sub-contract with Halton, under which Halton was to install the Project's exhaust system controls. Am. Comp. at ¶ 38. Halton asserts, however, that it was retained by Adams "to provide and install the MARVEL ventilation system and associated sensor and control systems for the Project." Halton SOF ¶ 12. The plaintiffs do not dispute that Adams retained Halton[6] but dispute Halton's assertion that it did not enter into a sub-contract with Lee Kennedy. Plaintiffs' SOF Response, p. 17, ¶ 12; p. 18, ¶ 14. The Amended Complaint alleges that Lee Kennedy also entered into a contract with Garcia under which Garcia was to design the kitchen exhaust systems, including the ductwork. Am. Comp. at ¶ 39. Garcia, however, contends that it did not enter into a sub-contract with Lee Kennedy at any point and

[6] Plaintiffs' response to Halton's statement of fact reads "[u]ndisputed only to the extent that Halton retained Adams to work on the Project." Plaintiffs' SOF Responses, p. 17, ¶ 12. Halton does not assert, however, that it retained Adams to work on the Project. Rather, Halton asserts that it was retained by Adams to work on the Project.

that no such sub-contract exists. Garcia Memo, pp. 14-15. On August 26, 2014, Garcia employees executed several Final Construction Control Documents relating to the mechanical design plans, the electrical design plans, the fire protection design plans, and the plumbing design plans. Garcia SOF ¶¶ 12-15.

On September 2, 2014, the Blue Wall Dining Hall opened for use. Adams SOF ¶ 7; Garcia SOF ¶ 16; Halton SOF ¶ 15; Lee Kennedy SOF ¶ 4; Leftfield SOF ¶ 4; Tekon SOF ¶ 5; WSP SOF ¶ 6. A UMass news article dated September 9, 2014, indicated that UMass "[f]ormally reopened the Blue Wall dining facility in the Lincoln Campus Center after a nine-month, $19 million renovation that brought major changes to the venerable eatery but kept its revered name." Leftfield Ex. C; Adams Ex. 3; Halton SOF ¶ 16 The article further reported that the Blue Wall Dining Hall "opened for the first day of the fall 2014 semester, Sept. 2." Leftfield Ex. C; Halton SOF ¶ 17. UMass held a ribbon cutting ceremony for the renovated dining hall on September 9, 2014. Adams SOF ¶ 10; Garcia SOF ¶ 17; Lee Kennedy SOF ¶ 5; Tekon SOF ¶ 6; WSP SOF ¶ 7. The plaintiffs do not dispute that UMass held a ribbon cutting ceremony on September 9, 2014. Plaintiffs' SOF Responses, p. 5, ¶ 10; p. 25, ¶ 5; p. 32, ¶ 6. Heath Dinsmore, a representative from Lee Kennedy, attended the ribbon cutting ceremony. Adams SOF ¶ 11; Lee Kennedy SOF ¶ 6; Tekon SOF ¶ 7. Dinsmore observed members of the public patronizing the Blue Wall dining hall and eating, drinking, and congregating. *Id.*[7]

On January 22, 2015, Tekon submitted its final balancing report regarding the exhaust system. Am. Comp. at ¶ 40. The report indicated that "[t]he system has been balanced but some

[7] The plaintiffs deny this contention Plaintiffs' SOF Responses p. 5, ¶ 11; p. 26, ¶ 6; p. 32, ¶ 7. The plaintiffs' denial, however, appears to dispute only the contention that the dining hall was open to the public for use when Dinsmore was present and observed members of the public using it. See *id.*

deficiencies could not be resolved . . . ." *Id.*; Plaintiffs' Ex. P3. Garcia submitted Tekon's final balancing report to Lee Kennedy on February 13, 2015, and Garcia approved the report on February 23, 2015. Am. Comp. at ¶ 41.

In Spring 2018, Plaintiffs found that the ductwork in the Blue Wall Dining Hall's kitchen exhaust system had collapsed. Halton SOF ¶ 22; Lee Kennedy SOF ¶ 7; Leftfield SOF ¶ 5; Tekon SOF ¶ 8; WSP SOF ¶ 8. The system also exhibited other deficiencies including seam leaks, joint separations, duct panel damage, and irregularities with control systems. Halton SOF ¶ 24; WSP SOF ¶ 8. The plaintiffs had the exhaust system deficiencies repaired between June 8 and August 26, 2019. Halton SOF ¶ 25; WSP SOF ¶ 9. The Blue Wall Dining Hall was closed while the repairs were made. WSP SOF ¶ 9.

DISCUSSION

Summary judgment is appropriate if there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law. See Mass. R. Civ. P. 56; *Cassesso* v. *Commissioner of Corr.*, 390 Mass. 419, 422 (1983); *Community Nat'l Bank* v. *Dawes*, 369 Mass. 550, 553 (1976). The moving party bears the burden of demonstrating the absence of a triable issue. See *Pederson* v. *Time, Inc.*, 404 Mass. 14, 16-17 (1989). The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of his case at trial. See *Flesner* v. *Technical Commc'ns Corp.*, 410 Mass. 805, 809 (1991); *Kourouvacilis* v. *General Motors Corp.*, 410 Mass. 706, 716 (1991).

I. STATUTE OF REPOSE

A statute of repose is "an absolute limitation which prevents a cause of action from accruing after a certain period which begins to run upon occurrence of a specified event." *Bridgwood* v. *A.J. Wood Constr., Inc.* 480 Mass. 349, 351-352 (2018), citing *Rudenauer* v. *Zafiropoulos*, 445 Mass. 353, 358 (2005). "A statute of repose eliminates a cause of action at a specified time, regardless of whether an injury has occurred or a cause of action has accrued as of that date." *Id.* at 352.

Pursuant to G. L. c. 260, § 2B:

> Actions of tort for damages arising out of any deficiency or neglect in the design, planning, construction, or general administration of an improvement to real property of a public agency . . . shall be commenced only within three years next after the cause of action accrues; provided, however, that in no event shall actions be commenced more than six years after the earlier of the dates of: (1) official acceptance of the project by the public agency; (2) the opening of the real property to public use; (3) the acceptance by the contractor of a final estimate prepared by the public agency . . .; or (4) substantial completion of the work and the taking possession for occupancy by the awarding authority.

"Like all statutes of repose, '[t]he effect [of G. L. c. 260, § 2B]. . . is to place an absolute time limit on the liability of those within [its] protection and to abolish a plaintiff's cause of action thereafter, even if the plaintiff's injury does not occur, or is not discovered, until after the statute's time limit has expired.'" *Nett* v. *Bellucci*, 437 Mass. 630, 635 (2002), quoting *McGuinness* v. *Cotter*, 412 Mass. 617, 622 (1992).

The defendants argue that the renovated dining hall opened to the public on September 2, 2014. In support of their position, the defendants point to an article published by UMass on September 9, 2014, announcing the opening of the renovated dining hall. Additionally, Defendants point to the ribbon cutting ceremony UMass held for the Blue Wall dining hall on September 9, 2014, and the fact that members of the public were seen using the dining hall on

that date. The plaintiffs respond that the Blue Wall dining hall did not open to the public for purposes of the statute of repose until August 26, 2019. Opp., p. 44.[8] The plaintiffs contend that August 26, 2019, is the operative date for the purposes of the statute of repose because the Blue Wall dining hall had to be closed on June 8, 2019, for repairs. *Id.*

UMass announced the re-opening of the dining hall for public use and held a ribbon cutting ceremony marking the re-opening of the dining hall for use in September 2014. The plaintiffs' argument that the Blue Wall dining hall did not open for public use until August 26, 2019, because the dining hall had to be closed for two-and-a-half months for repairs is unavailing. Prior to the dining hall being closed for repairs in June 2019, the dining hall was open to the public and serving its intended function for nearly five years. In their Opposition, Plaintiffs acknowledge that "[d]ining hall operations *resumed* . . . in August 2019." Opp., p. 44 (emphasis added). Dining hall operations could not have "resumed" had they never begun. A conclusion that the dining hall had not been opened to the public for use for nearly five years due to a two-and-a-half-month closure would be illogical. The date of the opening of the Blue Wall dining hall to the public is not a dispute of material fact, as the plaintiffs argue, because there is no question that the Blue Wall dining hall opened for public use on September 2, 2014.

Under the statute of repose, therefore, any actions for negligence in the renovation of the Blue Wall dining hall must have been brought by September 2, 2020, six years after the dining hall opened for public use. This action was filed on December 1, 2020, in Hampshire County. The statute of repose, therefore, precludes negligence claims against the defendants related to the

[8] References to the "Plaintiffs' Omnibus Memorandum of Law in Support of Their Opposition to Moving Defendants' Motions for Summary Judgment and Their Rule 56(f) Motion to Continue and Request for Hearing" (Paper No. 71) are denoted by the abbreviation, "Opp.," followed by a page citation.

renovation of the Blue Wall dining hall, and Count I, alleging negligence against all defendants, therefore fails.

II. BREACH OF CONTRACT

The statute of repose in G.L. c. 260, § 2B, governs only actions in tort. Contract actions are governed by G.L. c. 260, § 2, which provides that an action must be brought within six years of the date the cause of action accrued. The discovery rule applies to contract claims, so a cause of action for breach of contract begins to accrue only when a party knew or should have known of the breach. See *Anthony's Pier Four, Inc.* v. *Crandall Dry Dock Engineers, Inc.*, 396 Mass. 818, 825-826 (1986).

a. THIRD-PARTY BENEFICIARY STATUS

The plaintiffs allege breach of contract against all defendants. The plaintiffs were parties to contracts, however, with only Leftfield, Bruner/Cott, Lee Kennedy, and WSP. The plaintiffs were not parties to contracts with Garcia, Adams, Tekon, or Halton but argue they were a third-party beneficiary of their contracts with other parties. Because the plaintiffs' claims against Garcia, Adams, Tekon, and Halton (collectively, "the Sub-contractors") fail for the reasons set out in Section II, b., below, the court need not address the plaintiffs' argument that they were third-party beneficiaries of the sub-contracts to which they were parties. The court addresses the issue, however, because it provides a separate basis for summary judgment.

"In order to recover as a third-party beneficiary, the plaintiffs must show that they were intended beneficiaries of the contract . . . ." *Spinner* v. *Nutt*, 417 Mass. 549, 555 (1994). "[A] contract does not confer third-party beneficiary status unless the 'language and circumstances of the contract' show that the parties to the contract 'clear[ly] and definite[ly]' intended the beneficiary to benefit from the promised performance." *Cumis Ins. Soc'y, Inc.* v. *BJ's Wholesale*

Club, Inc., 455 Mass. 458, 466 (2009), citing *Anderson* v. *Fox Hill Homeowners Corp.*, 424 Mass. 365, 366-367 (1997). However, "[w]here the parties have expressly and unambiguously stated an intention to exclude third-party beneficiaries, that intent is controlling." *Id.* at 464.

Although the sub-contracts to which Adams, Tekon, and Halton were parties might well be construed as establishing that the plaintiffs were third-party beneficiaries of the sub-contracts, the same is not true of Garcia. Bruner/Cott and Garcia entered into a sub-contract on June 21, 2013. Garcia JA Ex. 4. Section 10.4 of that sub-contract provides that "[n]othing contained in this Agreement shall create a contractual relationship with, or a cause of action in favor of, a third party against either [Bruner/Cott] or [Garcia]." The inclusion of this section in the contract evidences Bruner/Cott and Garcia's intention to exclude third-party beneficiaries. The language is express and unambiguous. The parties' intent is therefore controlling. See *Cumis Ins. Soc'y, Inc.*, 455 Mass. at 464. As a result, the plaintiffs are not third-party beneficiaries under the sub-contract. Even if the plaintiffs had a viable contract claim against Bruner/Cott (but see Section II, b., below), therefore, they could not maintain an action for breach of contract against Garcia.

b. BREACH OF CONTRACT VS. NEGLIGENCE

"A plaintiff may not . . . escape the consequences of a statute of repose or statute of limitations on tort actions merely by labelling the claim as contractual." *Anthony's Pier Four, Inc.*, 396 Mass. at 823. General Laws c. 260, § 2B, "would bar a breach of implied warranty claim where the elements for breach of implied warranty and for negligence claims are the same." *Id.* A breach of *express* warranty claim, however, differs from a negligence claim. A breach of express warranty claim requires "the plaintiff . . . [to] demonstrate that the defendant promised a specific result." *Id.* The plaintiffs contend that each of the contracts in question contains express warranties and, therefore, the breach of contract claims are not subject to the

statute of repose. The defendants respond that the plaintiffs' breach of contract claims against them are simply negligence claims labeled as contract claims.

In their oppositions, the plaintiffs point to portions of the contracts in question, arguing that those portions constitute express warranties. The following are examples of those passages:

- Lee Kennedy promised to "furnish all Pre-Construction and Construction Phase work, services, labor, materials, tools, equipment, scheduling, supervision, and administration required by this Agreement and any other Contract Documents" and provide Plaintiffs "with a Project that is complete in accordance with the Contract Documents and fully operational in all respects . . . ." Lee Kennedy Ex. B.

- Leftfield promised to "continually monitor construction work so as to assist the designer in determining, in general, that the work is in accordance with the requirements of the Contract Documents; [and] endeavor to guard the Owner against defects and deficiencies in the work . . . ." Leftfield Ex. G

- Adams promised to "[c]omplete all of the work specified in Division 1 and Sections 230001 of the specifications for HVAC work and the plans referred to therein . . . ." Adams Ex. 2.

- Halton promised to provide PCU units and controls "per plans, specs and addenda for the Project" and conduct site visits. Halton Ex. 6.

- Tekon promised to furnish all work in "full and complete accordance with the General Contract Documents." Plaintiffs' Ex. 25.

- Bruner/Cott was required "to determine the completeness, accuracy, and coordination of drawings, specifications, and other data and documentation;" "develop formal design intent documents that establish the performance goals and design guidelines of the Project", "keep the Owner informed about the progress and quality of the portion of the Work completed, and report to the Owner (1) known deviations from the Contract Documents and from the most recent construction schedule, and (2) defects and deficiencies observed in the Work" and "conduct a post-construction evaluation." Bruner/Cott Ex. 5.

- WSP was required to perform "independent engineering and commissioning agent services" and perform "a thorough review of all design documents . . . and confirm their completeness, coordination among design disciplines, and

adherence to the original design intent, performance standards and any applicable regulatory requirements." WSP Ex. E.

- Garcia promised to "provide [Bruner/Cott] with the same professional services for This Portion of the Project as [Bruner/Cott] is required to provide to the Owner under the Prime Agreement" and "assist [Bruner/Cott] in determining whether [Bruner/Cott] shall reject Work for This Portion of the Project which does not conform to the Contract Documents or whether additional inspection or testing is required." Garcia Ex. 4.

None of the provisions cited by the plaintiffs constitutes an express warranty by any of the defendants. In most instances, the provisions lay out the responsibilities of the defendant under the contract. In agreeing to perform certain acts, none of the defendants promised a specific result aside from "impliedly promis[ing] to exercise that standard of care required for members of [their] profession[s]." *Klein* v. *Catalano*, 386 Mass. 701, 719 (1982).

In its opposition, the plaintiffs argue that the holding in *Anthony's Pier Four, Inc.* supports its contention that the contracts at issue in this case included express warranties. The court does not agree. In *Anthony's Pier Four, Inc.*, the defendant was responsible for designing a mooring system in Boston Harbor for a specific ship. 396 Mass.at 820-821. The plaintiff raised specific concerns regarding the design and suggested modification. *Id.* at 828. The defendant rejected the modification and assured the plaintiff that the mooring system would be fit for its intended purpose of permanently mooring the ship. *Id.* The SJC concluded that this specific promised result, that the mooring system would be sufficient for a specific ship in certain conditions, constituted an express warranty. *Id.* Contrast *Bridgwood* v. *A.J. Wood Construction, Inc.*, 480 Mass. 349, 856 (2018) (claim defendants failed to perform work in compliance with standards set forth by statute "indistinguishable from a claim of negligence" and barred by statute of repose); *Jordan's Furniture, Inc.* v. *Carter & Burgess, Inc.*, 92 Mass. App. Ct. 1102 (2017) (Rule 1:28 opinion) (statute of repose applicable to breach of contract and breach of

express warranty claims because defendant agreed only to exercise standard of care required of profession). The express warranty conveyed in *Anthony's Pier Four, Inc.*, however, differs from the language of the contracts in this case. The defendant in *Anthony's Pier Four, Inc.*, promised a specific result; the defendants in this case did not. Rather, the defendants in this case only committed to exercise the standard of care required by their profession.

As the Supreme Judicial Court stated in *Klein*, "[t]he Legislature enacted G.L. c. 260, § 2B, to limit the liability of architects, engineers, contractors, or others involved in design, planning, construction, or general administration of an improvement to real property." *Id.* at 720. The SJC found that the purpose of the statute would be frustrated if a plaintiff could maintain a breach of contract action based on implied warranty when G.L. c. 260, § 2B, bars recovery on a negligence claim. *Id.* "When a party binds himself by contract to do a work or to perform a service, he agrees by implication to do a workmanlike job and to use reasonable and appropriate care and skill in doing it." *Id.*, quoting *George* v. *Goldman*, 333 Mass. 496, 497 (1956). In this case, the defendants agreed to undertake certain actions consistent with their roles and impliedly agreed to exercise the standard of care required of their profession. See *id.* The breach of contract claims are, therefore, based on implied warranties. The elements of the negligence claims and the breach of contract claims are, consequently, the same. As a result, the breach of contract claims are subject to, and precluded by, the statute of repose.

III. INDEMNIFICATION

A right to indemnification arises under three circumstances: (1) by an express contractual provision for indemnification; (2) by implication from the contractual relationship of the parties; and (3) by application of the common law, which creates indemnification because a party is exposed to liability due to the negligent act of another. *Rathbun* v. *Western Mass. Elec.*, 395

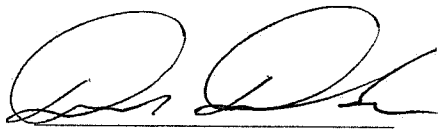
Mass. 361, 363-365 (1985); *Yanis* v. *Paquin*, 96 Mass. App. Ct. 134, 140 (2019). The plaintiffs were parties to contracts with Leftfield, WSP, Lee Kennedy, and Bruner/Cott, that contain indemnification clauses. The plaintiffs also seek indemnification under the relevant clause of the sub-contract between Adams and Tekon.

Despite that the indemnification clauses upon which the plaintiffs rely are set out in express contracts, the plaintiffs' claims, as previously discussed, are tort-based, and the contract-based claims merely recast the negligence claims. Consequently, the statute of repose precludes the breach of contract claims against the defendants. Plaintiffs, therefore, cannot maintain an action for indemnification.

Plaintiffs rely on *Gomes* v. *Pan American Associates*, 406 Mass. 647 (1990), for the proposition that contractual indemnification claims survive the statute of repose. In *Gomes*, however, the Supreme Judicial Court addressed "whether the statute of repose bars a *third-party action* based entirely on an express indemnification," concluding that it does not. 406 Mass. at 647-648 (emphasis added). In this case, however, only first-party indemnification claims are at issue. The purpose of and intent behind the statute of repose would be defeated if a claim for first-party indemnification, as part of an action the gist of which is negligence, survived beyond the statute of repose. Plaintiffs' claims for first-party indemnification in this action are thus precluded by the statute of repose.

ORDER

For the foregoing reasons, the defendants' motions for summary judgment are **ALLOWED**.



David A. Deakin
Associate Justice

Dated: February 2, 2022