Class 11 cases

78 N.Y.2d 282 (1991)

Bellevue South Associates, Respondent, v. HRH Construction Corporation et al., Respondents. Circle Industries Corp., Appellant and Third-Party Plaintiff-Appellant, and Masonite Corporation, Appellant and Third-Party Defendant-Respondent.

Court of Appeals of the State of New York.

Argued April 30, 1991.
Decided June 13, 1991.

Richard A. Rosen for Circle Industries Corporation, appellant.

Jay A. Canel and *Stephen D. Davis*, of the Illinois Bar, admitted pro hac vice, and *Lloyd I. Isler* for Masonite Corporation, appellant.

Gerald D. Roth for HRH Construction Corporation and others, respondents.

John M. O'Connor and *Donald M. Spector* for Bellevue South Associates, respondent.

Michael Hoenig and *Jay M. Smyser* for The Product Liability Advisory Council, Inc., amicus curiae.

Chief Judge WACHTLER and Judges SIMONS, ALEXANDER, HANCOCK, JR., and BELLACOSA concur with Judge KAYE; Judge TITONE dissents on Masonite's appeal only and, as to that appeal, votes to affirm in a separate opinion.

287*287KAYE, J.

This appeal — in a case seeking damages for the replacement of defective floor tiles throughout plaintiff owner's housing complex — presents two discrete issues: *first*, whether plaintiff can recover its replacement costs against the tile manufacturer in tort (strict products liability) or is limited to contract remedies and *second*, whether the flooring subcontractor should be indemnified by the tile manufacturer on a theory of breach of implied warranty.

For the reasons that follow, we conclude that plaintiff's tort claim against the tile manufacturer should have been dismissed, and that the flooring subcontractor's indemnification claim should have been submitted to the jury.

In January 1973, plaintiff (Bellevue South Associates) entered into a contract with defendant HRH Construction Corporation for the construction of Henry Phipps Plaza West in New York City. The development was to consist of eight buildings containing 894 rental units intended for middle- and lower-income tenants. Financing was provided through the State Mitchell-Lama program. Included in the terms of the construction agreement was a requirement that Hartco wood foam-backed tiles, manufactured by Tibbals Flooring Company, be used.

288*288HRH entered into a contract with defendant subcontractor Circle Industries Corporation in November 1974, calling for Circle to supply all wood flooring in the development for $702,000. Circle also agreed to indemnify and hold HRH harmless against liability arising out of performance of the subcontract.

Circle then attempted to substitute a flooring tile manufactured by Sykes Flooring Company for the specified Hartco tile. (Sykes later merged into defendant Masonite Corporation, and will be referred to as Masonite.) Prior approval of substitutions by the project architect and the Department of Housing and Community Renewal, the State supervisory authority, was required. At this time, Masonite did not manufacture a hardwood floor tile with an attached foam backing, and the sample submitted by Circle was rejected. The architect — Frost Associates — insisted that any substitution conform to the attached-backing requirement. Masonite then purchased equipment that enabled it to attach the foam backing to the tile and submitted a second sample.

The Masonite substitution was approved by Frost on condition that the adhesive coverage — binding the tile to the foam backing — match the 100% coverage of the Hartco tile. While Masonite acknowledged that its tile had only 60% adhesive coverage, Circle argued that there was no specification for adhesive coverage in the contract documents, that the only requirement was an attached foam backing. In August 1975, Frost and the Department of Housing and Community Renewal approved the Masonite tile.

At the time of discussions regarding product substitution, Circle, through a subsidiary, owned a 50% interest in Masonite. That interest — held until September 1976 — was not disclosed to HRH or Bellevue.

The first sale was made by Masonite to Circle in August 1975, and delivery took place between September 1975 and August 1976. All flooring work was completed by September 1976, when tenants began to occupy the rental units. By spring, there were problems with the tiles. A failure of the adhesion between the wood slats and foam backing — a process known as delamination — caused the slats to become loose and break free of the foam. Delamination was first reported in units occupied by wheelchair users.

In September 1977, Masonite reported that the adhesion failure was due to the wheelchair traffic, and that the tile had 289*289 never been designed to withstand such use. Masonite recommended replacement with rigid nine-inch square block tiles, which HRH completed at no cost to the owner. By January 1978, however, Masonite tiles had begun to fail throughout the complex. Frost concluded that the failures were due to defective materials. In July 1979, HRH and Circle proceeded to replace tiles that had delaminated.

In the summer of 1980, while delamination continued, HRH and Circle refused to undertake further spot replacement. At this time, a rent increase application was being filed, prompting plaintiff to solicit bids for a program to replace the Masonite tile with the Hartco tile on an ongoing basis. As of 1986, Hartco tiles had been installed in 868 units at a cost of $1.7 million. It was projected that the cost of replacing the remaining tiles would be $400,000.

This action was commenced in June 1980. Plaintiff sued HRH and Circle on theories of breach of contract, breach of express warranty, breach of implied warranty of merchantability, and negligence. Plaintiff also sued Masonite for breach of implied warranty, negligence and in strict tort liability. Circle cross-claimed against Masonite for common-law indemnification. Damages alleged included the cost of removing and replacing the defective tiles, additional design and construction costs, carting costs, loss of rental income and diminution of value of the housing project.

The trial court dismissed plaintiff's Uniform Commercial Code claims for breach of implied warranty against all three defendants on the theory that none had supplied goods to plaintiff. All claims against Masonite, except the cause of action in strict products liability, were also dismissed. In addition, the court dismissed plaintiff's negligence claim against Circle and Circle's implied warranty claim against Masonite.

In its verdict sheet, the jury answered that HRH and Circle were liable to plaintiff for breach of contract, for which the jury separately awarded damages of $310,800 against HRH, and $620,600 against Circle. As to Masonite, the jury answered that the tile was defective when it left the factory and that the defect was a proximate cause of plaintiff's damages, and it fixed damages against Masonite in the amount of $1,157,900. No indemnification was allowed by the jury, but the trial court granted judgment notwithstanding the verdict on HRH's contractual indemnity claim against Circle.

290*290The Appellate Division affirmed the judgment, holding that Circle was not entitled to indemnity from Masonite because of its relationship with that company and its involvement in the manufacture of the Masonite tile. The court also rejected Masonite's argument that strict liability could not include plaintiff's economic damages, finding that any such limitation did not extend to situations where the condition caused by the defective product is unduly dangerous. From that affirmance, both Masonite and Circle have appealed.

Plaintiff's Tort Claim Against Masonite

Masonite challenges plaintiff's verdict against it on the ground that the damages sought were not recoverable under tort law. Plaintiff responds that the floor tile was unduly dangerous, making the manufacturer strictly liable in tort for any damage resulting from the defective product.

The doctrine of strict products liability grew out of a public policy judgment that, with increasingly sophisticated, mass-marketed technologies, consumers hurt by defective products needed greater protection than that afforded by the law of warranty (*see*, *East River S. S. Corp. v Transamerica Delaval*, 476 US 858, 866; *Codling v Paglia*, 32 N.Y.2d 330, 340-341; *see generally*, 2 *American Law of Products Liability* § 16:4, at 15 [3d ed]). In developing this doctrine — which allows injured consumers to be compensated by remote manufacturers of defective products, regardless of privity, foreseeability or due care — courts of recent decades have reasoned that the manufacturers could better sustain the losses, which could be spread among all their customers (*see*, *Continental Ins. v Page Eng'g Co.*, 783 P2d 641, 648-649 [Wyo]; *Laurens Elec. Coop. v Altec Indus.*, 889 F.2d 1323, 1324 [4th Cir]).

Whether this extraordinary tort doctrine should be extended to cases where a product fails to meet the expectation of a commercial customer, where the claimed injury is solely to the product itself, and where the only damages sought are replacement costs, is a question that has concerned several courts, with varying outcomes.

In one of the earliest cases, New Jersey's Supreme Court allowed the purchaser of defective carpeting to recover from the manufacturer on a theory of strict liability (*Santor v A & M Karagheusian*, 44 NJ 52, 207 A2d 305). Plaintiff's only 291*291 injury in that case was the reduced value of the carpet — when installed it showed an unusual line.[1]

A contrary view was adopted by the Supreme Court of California in *Seely v White Motor Co.* (63 Cal 2d 9, 403 P2d 145), a case involving an allegedly defective truck. The court held that the economic loss suffered by the plaintiff — including cost of repair and lost profits — could only be recovered under contract law. In such a case, the court concluded, the manufacturer can only be charged with the risk that its products will not match the purchaser's economic expectations if it agrees to assume that risk. Finally, the court appears to have left room for a claim for property damage to the product itself in cases where that damage flows from a manufacturing defect (63 Cal 2d, at 19, 403 P2d, at 152).

The only case to present the issue to us was *Schiavone Constr. Co. v Mayo Corp.* (56 N.Y.2d 667, *revg on dissent* 81 AD2d 221, 227-234), a strict liability claim for damage to a defective truck hoist. We concluded — with the Appellate Division dissenters — that a tort cause of action could not be

sustained for product failure, choosing the approach of *Seely* over that of *Santor*.

In *Schiavone*, the truck hoist could not withstand ordinary use in the plaintiff's business and eventually had to be sold at a loss. Justice Silverman, dissenting at the Appellate Division, cited *Seely* to the effect that a manufacturer "can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands." (63 Cal 2d, at 18, 403 P2d, at 151.) The dissent concluded — and this Court agreed — that plaintiff sought to recover damages for failure of the product to function properly when used for normal business purposes, which was at best a breach of contract, not a tort.

The *Schiavone* dissent discussed a second case, which explicitly adopted the *Seely* approach but allowed recovery for 292*292 injury to the product itself under a theory of product liability. In *Dudley Constr. v Drott Mfg. Co.* (66 AD2d 368 [Hancock, Jr., J.]), involving a crane with defective bolts, the court concluded that the manufacturer could be held liable for damage to the product resulting from an "accident" caused by the defective parts. As distinguished by Justice Silverman in *Schiavone*, plaintiff in *Dudley* was not trying to enforce the benefit of its bargain. Rather, a dangerously defective product was placed into the stream of commerce and caused injury — albeit to the product itself.

Since *Schiavone*, a third, more restrictive approach has been established by the United States Supreme Court, in *East River S. S. Corp. v Transamerica Delaval* (476 US 858, *supra*). *East River* involved defective turbines that had been installed in several supertankers. Damage resulting from those defects raised the issue "whether a commercial product injuring itself is the kind of harm against which public policy requires manufacturers to protect, independent of any contractual obligation." (476 US, at 866.) The Court answered this question in the negative, holding that a manufacturer in a commercial relationship has no duty to prevent a product from injuring itself (476 US, at 872). Writing for a unanimous Supreme Court, Justice Blackmun expressly rejected the "intermediate" approach that would permit a tort action where users were "endangered" rather than merely "disappointed." (476 US, at 869-870.)

Although an admiralty case not binding on us as a matter of State tort or contract law, the *East River* analysis has had significant influence (*see, e.g.*, *Nathaniel Shipping v General Elec. Co.*, 920 F.2d 1256 [5th Cir]; *Aloe Coal Co. v Clark Equip. Co.*, 816 F.2d 110 [3d Cir], *cert denied* 484 US 853; *Florida Power & Light Co. v Westinghouse Elec. Corp.*, 510 So 2d 899 [Fla]; *Lloyd Wood Coal Co. v Clark Equip. Co.*, 543 So 2d 671 [Ala]). Courts choosing the *East River* analysis have stressed that tort law is an improper tool for resolving commercial disputes, and represents an unwarranted extension into an area reserved for contract law (*see*, *Miller v United States Steel Corp.*, 902 F.2d 573, 574 [7th Cir] [describing tort law as a "superfluous and inapt tool" for resolving commercial disputes]; *O'Brien Cos. v Challenge-Cook Bros.*, 672 F Supp 466, 471 [D Colo] [citing the need to stem the "ceaseless march toward the merger of principles of tort and contract"]).

In addition, courts following *East River* have stressed that 293*293 the theory behind products liability — the idea that the individual consumer who purchases or uses a defective product capable of inflicting injury should not have to shoulder the economic loss — is inapplicable to disputes between commercial parties over a damaged product *(see*, *Laurens Elec. Coop. v Altec Indus.*, 889 F.2d 1323 [4th Cir], *supra)*. In the case of this purely economic loss, there is no need to shift the loss to the manufacturer to be passed along to and shared by all consumers *(see*, *Continental Ins. v Page Eng'g Co.*, 783 P2d 641, 647 [Wyo], *supra)*. The *East River* approach rejects any application of tort law to these commercial disputes.

Not all State courts have adopted the *East River* analysis. Instead, courts in several jurisdictions have opted for the intermediate approach, finding that the certainty of the *East River* bright line rule "comes at too high a price." (*Washington Water Power Co. v Graybar Elec. Co.*, 112 Wash 2d 847,

864, 774 P2d 1199, 1209; *Capitol Fuels v Clark Equip. Co.*, 382 SE2d 311 [Ct of App W Va].) The intermediate or "risk of harm" approach focuses on several factors, including the nature of the defect, type of risk, and manner in which the injury occurred (*see*, *Pennsylvania Glass Sand Corp. v Caterpillar Tractor Co.*, 652 F.2d 1165 [3d Cir]; and *Consumers Power Co. v Curtiss-Wright Corp.*, 780 F.2d 1093 [3d Cir] [both pre-*East River*]). The risk of harm analysis has been used, for example, by courts in holding asbestos manufacturers liable under tort-law principles for creating a substantial and unreasonable risk of harm (*see, e.g.*, *City of Greenville v Grace & Co.*, 827 F.2d 975, 978 [4th Cir]; *Adams-Arapahoe School Dist. No. 28 v Celotex Corp.*, 637 F Supp 1207 [D Colo]; *cf.*, *Board of Educ. v A, C & S, Inc.*, 131 Ill 2d 428, 546 NE2d 580 [rejecting intermediate approach but finding asbestos manufacturer liable for marketing an unreasonably dangerous product]).

In the present case, we find it unnecessary to accept or reject Masonite's invitation to adopt *East River* as a matter of State law, for plaintiff's tort claim fails even under the intermediate approach spelled out in *Schiavone*. The nature of the defect, the injury, the manner in which the injury occurred and the damages sought persuade us that plaintiff's remedy lies in the enforcement of contract obligations, not the enlargement of strict products liability beyond its intended purposes.

Looking first to the nature of the defect, it is evident that what was involved in "intermediate approach" cases such as 294*294 *Dudley* and *Pennsylvania Glass Sand* is far different from what is at issue here. In those cases allowing tort recovery, the product was manufactured with an undiscovered hazard bound to produce a catastrophic accident or enhance the damages should such an accident occur. Here, no one has asserted that a floor tile with less than 100% adhesive coverage is such an inherently dangerous product. Unlike a crane with defective bolts, these floor tiles may be adequate for a number of uses, even if not the bargained-for use in plaintiff's apartment complex.[2]

The injury — delamination of the tile — was not personal injury or property damage, but solely injury to the product itself. The injury, moreover, was not an abrupt, cataclysmic occurrence, as in *Dudley* or *Pennsylvania Glass Sand*, but a process of failure of the product to perform as anticipated under normal business conditions — a traditional breach of contract situation. While there was indication that, over a dozen years, three residents of Phipps Plaza had fallen, plaintiff does not claim that it has been held responsible for any injuries to persons or property. Whether or not those accidents occurred, on this record plaintiff's injury and damages would be precisely the same — the cost of replacing the floor.

That this is simply a case of economic disappointment is brought home by plaintiff's statement that the "wood floor tiles should have lasted the life of the building, at least 40 to 50 years." In this situation where the bargained-for consideration has failed to meet the expectations of the purchaser — as in *Schiavone* — the remedy lies in contract-law theories such as 295*295 express and implied warranties, through which a contracting party can recover the benefit of its bargain, not in a tort-law doctrine that strictly assigns the loss to a remote manufacturer to be shared by all its customers *(see* , *Pennsylvania Glass Sand Corp. v Caterpillar Tractor Co.*, 652 F2d, at 1175, *supra)*.

Plaintiff further argues that, as a matter of policy, strict liability is necessary because there would otherwise be no incentive to fix the defective floor, making it necessary for someone to suffer a severe injury before remedial action was taken. Even without tort liability, however, a purchaser in plaintiff's circumstances has every incentive to seek a remedy for the breach of contract. Significantly, plaintiff itself stated that it sought replacement of the tile in relation to a proposed rent increase. Plaintiff would hardly forego legal action against the contractor or subcontractor because no recovery in strict liability was possible against the manufacturer. Commercial interests, together with the fear of liability for any injuries that might occur, are a powerful incentive for such plaintiffs, without the need to open another avenue of redress in the law of torts.

We hold, therefore, that plaintiff should not recover from Masonite in strict liability for failure of the tile to perform according to contract.

Circle's Indemnity Claim Against Masonite

Although Masonite is not directly liable to plaintiff in strict products liability, the issue remains whether Circle might shift its liability to Masonite on the theory of implied warranty of merchantability (*see*, UCC 2-314).[3] We conclude that Circle's indemnification claim on this theory should have been submitted to the jury.

Originally, Circle claimed over against Masonite for common-law indemnity based on two separate theories — Masonite's active negligence in manufacturing the tile (its "negligence indemnity" claim), and breach of implied warranty (its "implied warranty indemnity" claim). The trial court dismissed plaintiff's implied warranty claims against HRH and 296*296 Circle, concluding that those defendants supplied services, not goods. The court concomitantly dismissed Circle's implied warranty indemnity claim against Masonite, believing that it could not stand once plaintiff's implied warranty claims had been dismissed. Circle's negligence indemnity claim against Masonite was thus the only indemnity claim submitted to the jury, and it was rejected.

The right of one party to shift the entire loss to another — indemnification — may be based upon an express contract or an implied obligation, as is the case here. Implied indemnification claims, in turn, may rest on various independent grounds — for example, indemnity may be appropriate because of a separate duty owed the indemnitee by the indemnitor, or because one of two parties is considered actively negligent or the primary or principal wrongdoer (*see*, *Mas v Two Bridges Assocs.*, 75 N.Y.2d 680, 689-690; *D'Ambrosio v City of New York*, 55 N.Y.2d 454, 461).

In the present case, the Uniform Commercial Code creates an implied warranty between Circle and Masonite, and Circle has grounded its indemnification claims in this legal relationship as well as Masonite's active negligence in manufacturing and furnishing the floor tiles. Although the issue has never been directly addressed by this Court, courts in other jurisdictions have recognized that implied warranty may provide the requisite basis for an indemnification claim (*see, e.g.*, *Crest Container Corp. v Bishop Co.*, 111 Ill App 3d 1068, 445 NE2d 19, 23-25; *see also*, *Walker Mfg. Co. v Dickerson, Inc.*, 619 F.2d 305 [4th Cir]). It is the implied warranty theory — not concern over primary fault — that is determinative of such an indemnity claim, and that warranty must be examined on its own terms.

We first consider the trial court's dismissal of Circle's implied warranty indemnity claim against Masonite based on the contemporaneous dismissal of plaintiff's warranty claims, and conclude that Circle's claim should not have been dismissed on that basis.

Unlike HRH and Circle, Masonite supplied goods, having delivered the floor tiles to Circle in August 1976. Masonite, as the seller, warranted to the buyer, Circle, that the goods were merchantable (*see* , UCC 2-314). While the trial court apparently believed that the warranty between buyer and seller could not be invoked if warranty liability was not being passed through the chain of distribution from the consumer 297*297 through the distributor to the manufacturer, no such chain of events has been required as a precondition to warranty liability on the part of the seller to the initial purchaser. The warranty claim formed an independent basis for liability, available to the indemnitee against the indemnitor regardless of the ability of the plaintiff to assert a similar claim (*see, e.g.*, *Matter of Feehan v United States Lines*, 522 F Supp 811, 815-816 [SD NY]).

It is possible that a plaintiff's theory of liability against the indemnitee would, as a matter of law, preclude recovery against the indemnitor *(see*, *Mas v Two Bridges Assocs.*, 75 N.Y.2d 680, 689-690, *supra*; *see also*, *Codling v Paglia*, 32 N.Y.2d 330, 340, *supra)*. In *Mas*, for example, the plaintiff,

who had been injured while attempting to exit a disabled elevator, sued the owner of the building and Otis Elevator Company, the company that had contracted to maintain the elevator. The theories of liability asserted against the owner were failure to maintain and repair the elevator and failure to provide assistance. The jury apportioned 85% liability for failure to maintain and 10% liability for failure to respond. This Court upheld the owner's judgment on its indemnity cross claim against Otis for 85% of the damages, even though the owner had been found 10% liable for failure to respond. Had the only cause of action been for failure to respond, no indemnity based on the contract for repair would, as a matter of law, have been available to the owner.

Here, however, the basis for the cause of action asserted against HRH and Circle was entirely consistent with Circle's implied warranty indemnity claim against Masonite. Although falling under the general description of "breach of contract," the liability of Circle and HRH rested on the defective product. Dismissal of plaintiff's implied warranty claims should, therefore, have had no effect on Circle's claim against the supplier, Masonite *(see*, *State Univ. Constr. Fund v United Technology Corp.*, 78 AD2d 748; *Matter of Feehan v United States Lines*, 522 F Supp 811, 815-816, *supra)*.

Nor was Circle's implied warranty indemnity claim barred as a matter of law by its own conduct. The Appellate Division found that Circle's relationship with Masonite, along with the fact that Masonite did not manufacture a comparable tile until Circle obtained the subcontract, acted to bar any claim based on implied warranty, and it denied Circle's implied warranty indemnity claim because "Circle is not an 298*298 innocent party entitled to shift liability to Masonite." (160 AD2d 189, 190.)

The "innocent party" language reveals the Appellate Division's belief that Circle's two separate indemnification theories share the same elements. A finding by the jury that Circle could not recover on the negligence theory thus would preclude recovery on the warranty theory. Indeed, the Appellate Division's holding echoes the instruction given by the trial court on the indemnity claim:

"If you determine that [Masonite] is primarily responsible for the damages sustained by plaintiff and that causing the defendant Circle to pay damages to the plaintiff would result in the unjust enrichment of the defendant [Masonite], then you must return a verdict in favor of the defendant Circle on its cross-claim against the defendant [Masonite]."

The elements of a negligence indemnity claim, however, are not necessarily relevant to an implied warranty indemnity claim.

As discussed above, Masonite — as the seller of the tiles — is deemed to have made an implied warranty as to their merchantability (UCC 2-314). To recover implied warranty indemnity, Circle must show both the existence and breach of the warranty and that the breach was the proximate cause of plaintiff's damages (*see*, UCC 2-314, Official Comment 13; *see generally*, 1 White & Summers, Uniform Commercial Code § 9-9 [Practitioner's 3d ed]).

Defenses available to claims of breach of the implied warranty of merchantability include the buyer's contributory conduct, lack of privity, failure to give notice, and the Statute of Limitations[4] (*see generally*, *Special Project, Article Two Warranties in Commercial Transactions*, 64 Cornell L Rev 30, 243 [1978]). Under the first of these defenses — the buyer's conduct — the focus is on "factors that may sufficiently attenuate the causal connection between defendant's acts and plaintiff's injury to bar recovery." (1 White & Summers, Uniform 299*299 Commercial Code § 11-8, at 541 [Practitioner's 3d ed].) For purposes of this claim the analysis of Circle's conduct thus must be made from the perspective of causation rather than from the perspective charged by the trial court, which was one of primary responsibility and unjust enrichment.

Therefore, the jury's rejection of the indemnity claim that was submitted to it — rendered in response to the trial court's instructions on principles of primary responsibility and unjust enrichment — is not the final word on Circle's indemnity claim based on the implied warranty. Rather, it must be

determined whether Circle has a meritorious implied warranty indemnity claim against Masonite and whether Masonite has any valid defenses to that claim. In that the trial court erroneously dismissed this indemnity claim, Circle's request for a new trial should be granted.

Accordingly, on Masonite's appeal, the order of the Appellate Division should be reversed, with costs, and plaintiff's products liability claim dismissed.[5] On Circle's appeal, the order of the Appellate Division should be modified, with costs to Circle as against Masonite, by granting Circle a new trial on its implied warranty indemnity claim against Masonite and, as so modified, affirmed, with costs to plaintiff as against defendant Circle.

TITONE, J. (dissenting in part and concurring in part).

Faced with the question of whether New York's strict products liability doctrine permits recovery of economic loss in these circumstances, the majority has postponed decision on the point, holding instead that regardless of the analysis applied the defective product in question here was, as a matter of law, simply not within the category of those that would support a products liability claim. Since this conclusion ignores an affirmed and well-supported jury finding that the product was dangerous, I must take issue with that aspect of the majority's 300*300 analysis. Moreover, I disagree with the majority's ultimate disposition of defendant Masonite's appeal, since I conclude that a recovery in strict products liability *ought* to be permitted where, as here, the "economic injuries" for which recovery was sought consisted principally of the expenses that the plaintiff, a remote purchaser, incurred in replacing the defective product specifically to eliminate the proven risk of personal injury that the defective product posed. Such a narrow rule is, in my view, consistent with the policies underlying both tort law in general and the doctrine of strict products liability in particular. Most importantly, it represents the fairest and most sensible means of balancing those policies against the policies underlying the UCC breach of warranty remedies. Accordingly, I dissent.

Initially, there can be little doubt that the jury's verdict on plaintiff's strict products liability claim represents a finding that the tiles manufactured by Masonite's predecessor were dangerously defective. The jury was charged that "[a] product is defective if it is not reasonably safe, that is, if the product is likely to be harmful to people so that a reasonable person who had knowledge of its potential for producing injury would conclude that it should not be marketed in that condition." When asked in a special interrogatory whether the tiles were "defective," the jury answered affirmatively, thus signaling its finding that the tiles were hazardous. Since the Appellate Division did not disturb that finding and, in fact, indicated that it too would have placed the tiles within the category of products that are "unduly dangerous" (*see*, 160 AD2d 189, 190), the finding cannot be disturbed unless it is, as a matter of law, not supported by the evidence (*Cohen v Hallmark Cards*, 45 N.Y.2d 493, 499; *see*, Siegel, NY Prac § 529, at 827 [2d ed]). Certainly, that conclusion cannot be drawn here.

One representative of plaintiff, an architect by training, testified that he considered the emerging problem with the Masonite tiles to be a "dangerous and hazardous situation." An agreement between plaintiff, HRH (the general contractor) and Circle (the subcontractor) referred to the tile's condition in some areas as "hazardous." Most significantly of all, the trial evidence indicated that injuries such as a compressed and broken vertebra, an injured arm and a bruised leg and foot had been sustained as a result of accidents in which apartment occupants had tripped over defective tiles. While plaintiff was not called upon to pay personal injury damages as a result of these accidents, that fortuity does not in any 301*301 way detract from the obvious inference that the tiles were dangerous.

The majority brushes aside the finding of dangerousness on the ground that the "intermediate approach" discussed in its opinion requires a legal rather than a factual analysis based on a consideration of three factors: the nature of the defect, the type of risk and the manner in which the plaintiff's injury occurred (majority opn, at 294, n 2; *see, e.g.*, *Pennsylvania Glass Sand Corp. v*

Caterpillar Tractor Co., 652 F.2d 1165). However, the dangerousness finding is highly relevant in this three-factor analysis. Indeed, courts which have invoked that analysis have most often "reach[ed] different results depending on the hazardous or non-hazardous nature of the defective product at issue" (*Salt Riv. Project Agric. Improvement & Power Dist. v Westinghouse Elec. Corp.*, 143 Ariz 368, 377, 694 P2d 198, 207 [analyzing and applying prior "intermediate approach" decisions]; *accord*, *East River S. S. Corp. v Transamerica Delaval*, 476 US 858, 870 ["(t)he intermediate positions * * * essentially turn on the degree of risk"]). Thus, under the "intermediate approach," where the product defect "is qualitative in nature and relates to a consumer's expectations" the claim will be deemed to lie in contract not tort law; but the converse will be true where "`a product is sold in a defective condition that is unreasonably dangerous to the user'" (*Board of Educ. v A, C & S, Inc.*, 131 Ill 2d 428, 440, 546 NE2d 580, 585, quoting *Moorman Mfg. Co. v National Tank Co.*, 91 Ill 2d 69, 88, 435 NE2d 443, 448).

In this case, the majority has concluded that the product defect falls within the former category because "the bargained-for consideration has failed to meet the expectations of the purchaser" (majority opn, at 294). However, the analysis plainly cannot stop at that point since, in addition to "failing to meet the [purchaser's] expectations," the tiles failed in a way that rendered them hazardous to life and limb. Thus, this is more than a case of mere "disappointed economic expectations." Rather it is one involving the risk of actual bodily harm, a subject that the "intermediate approach" would consider well within the policies and reach of tort law (*see*, *Pennsylvania Glass Sand Corp. v Caterpillar Tractor Co.*, 652 F.2d 1165, 1174, *supra*).

The majority's observations that a wood tile with less than 100% adhesive coverage "may be adequate for a number of uses, even if not the bargained-for use in plaintiff's apartment 302*302 complex" (majority opn, at 294) clearly does not provide a persuasive ground for denying recovery under the "intermediate approach." First, the majority's observation is highly speculative and, indeed, it is difficult to imagine what other use, apart from mere display, would be suitable for tiles that could not withstand ordinary residential use. Second, the theoretical alternative uses of these tiles, if any, are irrelevant, since the tiles were, in fact, dangerous when put to use in plaintiff's apartments — *the precise use for which they were designed and fabricated*.

Similarly, the fact that the product failed through a process of deterioration rather than a "catastrophic accident" — a fact on which the majority relies almost entirely (*see*, majority opn, at 294)[1] is not decisive (*see*, *Northern Power & Eng'g Corp. v Caterpillar Tractor Co.*, 623 P2d 324, 328 [Alaska] ["(t)here is nothing magical about the phrase `sudden and calamitous'"]). As one authority has observed, the rationale for some courts' emphasis on accidents of violence and collision with external objects "is that such situations present a greater safety risk." (*Pennsylvania Sand Glass Corp. v Caterpillar Tractor Co.*, *supra*, at 1170, n 14.) In this case, the safety risk is well documented and there is thus no need to consider the nature of the occurrence that led to the product harm to determine whether the product failure implicated human safety as well as contractual expectations. In these circumstances, "[t]o prevent recovery in tort merely because the physical harm did not occur suddenly would defeat the underlying purposes of strict products liability" (*Board of Educ. v A, C & S, Inc.*, 131 Ill 2d, *supra*, at 449-450, 546 NE2d, *supra*, at 590 [applying "intermediate approach"]).

Having concluded that the so-called "intermediate approach" *would* permit tort liability under these facts, I turn now to the question the majority has declined to answer: whether that approach should be adopted in New York. I begin with the premise that under well-established tort principles strict liability recovery has not previously been limited to personal injury claims. Section 402 A of the Restatement (Second) of Torts states that strict products liability recovery 303*303 may be had where there has been injury to person or *property.* Although our Court has not explicitly adopted this aspect of the Restatement rule, other courts in this State have and there is no reason to believe that we would do otherwise if the question were squarely presented to us (*see, e.g.*, *Dudley Constr. v Drott Mfg. Co.*, 66 AD2d 368; *see also*, *Schiavone Constr. Co. v Mayo Corp.*, 81 AD2d 221, 228-229

[Silverman, J., dissenting], *revd on dissent* 56 N.Y.2d 667). Indeed, in a case decided shortly after *MacPherson v Buick Motor Co.* (217 N.Y. 382), the paradigmatic strict products liability case, this Court anticipated section 402 A by holding that a manufacturer's duty to remote purchasers includes protecting their property as well as their persons (*Genesee County Patrons Fire Relief Assn. v Sonneborn Sons*, 263 N.Y. 463, 469, 473).

Adoption of the Restatement's position on property damage, however, does not end the inquiry. As the majority notes, the Supreme Court's 1985 decision in *East River S. S. Corp. v Transamerica Delaval* (476 US 858, *supra*), an admiralty case, raised important questions about the viability of the so-called "intermediate approach" in cases where the product defect caused injury only to the product itself (*see generally*, Annotation, *Strict Products Liability: Recovery for Damage to Product Alone*, 72 ALR4th 12). Focusing on the narrow question of whether and when recovery should be permitted for injury to the defective product itself, the Court reviewed the various approaches and distinctions that had been tried elsewhere to permit recovery and concluded that none were satisfactory. The Court specifically rejected the "intermediate approach" as "too indeterminate" and instead held that, regardless of the degree or type of risk posed by the defective product, claims involving injury to the product itself are best resolved by application of "[c]ontract law, and the law of warranty in particular, [which] is well suited to commercial controversies of th[is] sort" (476 US, *supra* , at 870, 872).

The broad *East River* holding has many persuasive elements, particularly its assurance of clarity and certainty.[2] Moreover, for most cases involving product harm leading to mere economic loss, the holding results in a sensible method of drawing the often elusive line between contract and tort law. 304*304 However, in circumstances such as those presented here, the *East River* holding does not serve that salutary purpose, and instead actually operates to undermine the important public policies underlying our tort law. It is my concern for those policies that leads me to take the analysis yet one step further here.

The factor that, for me, distinguishes this case from the garden-variety injury-to-product cases discussed in the majority opinion is the nature of the damages the plaintiff here seeks. Unlike *East River* (*supra*), *Seely v White Motor Co.* (63 Cal 2d 9, 403 P2d 145) and virtually every other case in the injury-to-product line (*e.g.*, *Trustees of Columbia Univ. v Mitchell/Giurgola Assocs.*, 109 AD2d 449; *Schiavone Constr. Co. v Mayo Corp.*, *supra*; *Dudley Constr. v Drott Mfg. Co.*, *supra*), the plaintiff in this case is seeking to recover the costs it incurred in removing and replacing the dangerously defective tiles *before* further accidents — and further injury — occurred.[3] In this situation, the policies that inform tort law suggest that a strict products liability recovery should be permitted.

The traditional concerns of contract law, and warranty law in particular, are the protection of the parties' freedom of contract and the fulfillment of reasonable economic expectations. Tort law, on the other hand, is concerned with deterring carelessness, preventing accidents and distributing risk in a socially useful way. Where a product malfunctions and, as a result, is itself damaged, it can fairly be said that the product simply "has not met the customer's expectations" — a disappointment that has traditionally been addressed through the breach of warranty remedies provided in the UCC (*East River S. S. Corp. v Transamerica Delaval*, *supra*, at 872). Furthermore, as the *East River* Court observed, "[t]he tort concern with safety is reduced when an injury is only to the product itself." (*Id.*, at 871.) In contrast, where, as here, the product was provably hazardous *and the recovery sought is the cost of* 305*305 *eliminating the hazard or making the product safe*, there is clearly more at stake than mere economic disappointment or frustrated expectations and the tort law's concern for safety is directly implicated.

Those concerns point to an analysis that considers the effect of the proposed rule on the goals of accident prevention and the fair social distribution of costs. Both of these goals are advanced by a rule that would permit a remote user/owner to recover in strict products liability for the costs actually

and reasonably incurred in eliminating or ameliorating a hazard posed by a dangerously defective product. Just as "`[a] consumer should not be charged * * * with bearing the risk of physical injury when he buys a product on the market'" (*Schiavone Constr. Co. v Mayo Corp.*, 81 AD2d, *supra*, at 231 [Silverman, J., dissenting], quoting *Seely v White Motor Co.*, 63 Cal 2d, *supra*, at 18, 403 P2d, *supra*, at 151), so too should the consumer be able to shift the cost to the manufacturer when the latter's product poses an unreasonable safety risk requiring expensive repair or replacement. Indeed, the contrary rule would run directly counter to the tort aim of accident prevention, since it denies recovery to a conscientious remote purchaser who takes steps to ameliorate the risk of harm while permitting recovery by one who sits back and waits for an accident to happen (*see*, *City of Greenville v Grace & Co.*, 827 F.2d 975, 977).

Accordingly, under the facts in this case, I would hold that plaintiff may recover from Masonite the expenses it incurred in replacing the dangerously defective tiles. Since the majority's holding denies plaintiff its tort recovery, I respectfully dissent from that part of its decision.

On Masonite's appeal, order reversed, with costs, and plaintiff's products liability claim dismissed. On Circle's appeal, order modified, with costs to Circle as against Masonite, by remitting to Supreme Court, New York County, for further proceedings in accordance with the opinion herein, and, as so modified, affirmed, with costs to plaintiff as against defendant Circle.

[1] New Jersey itself has stepped away from *Santor*, more recently holding that a commercial buyer seeking damages for economic loss resulting from the purchase of defective goods may recover under a warranty theory but not in strict liability (*Spring Motors Distribs. v Ford Motor Co.*, 98 NJ 555, 489 A2d 660).

[2] The dissent rests entirely on the tile's "dangerousness" — that it was hazardous to life and limb, that the safety risk was well documented, that there was an affirmed finding to this effect. In fact, during the 12 or more years the tile had been in use in plaintiff's 894 apartments, there was a total of one documented injury and two reported slip-and-fall incidents. As for the "affirmed finding," under the intermediate approach, the determination whether a tort claim is stated is one that must be made in the first instance by the court, applying factors such as the nature of the defect, type of risk, and manner in which the injury occurred. The jury in the present case of course had no opportunity or occasion to weigh those factors, and its finding on an issue that should have been resolved as a threshold law question in no way limits our review.
The dissent's distinguishing test, moreover — that liability should be allowed where the recovery sought is the cost of eliminating the hazard or making the product safe (dissenting opn, at 304) — is no distinction at all. Whether a defective piece of equipment such as a truck hoist, or floor tiles, or virtually any other product, recovery of replacement costs always can be said to be sought for eliminating the hazard or making the product safe.

[3] Circle's claim that it should be wholly absolved for liability to plaintiff — because plaintiff's architect approved the substitution — requires little discussion. The jury's rejection of Circle's contention that this was more than design approval is amply supported by the record (*see also*, 160 AD2d, at 190).

[4] Masonite claims that the four-year limitations period — measured from delivery of the goods — expired prior to commencement of this action (*see*, UCC 2-725 [2]). It is clear, however, that Circle's quasi-contractual indemnity claim is governed by the six-year contract Statute of Limitations. Moreover, such a claim accrues upon payment by the party seeking indemnity (*see*, *McDermott v City of New York*, 50 N.Y.2d 211, 217).

[5] Plaintiff asks that the verdict against Masonite be affirmed on an alternative ground — either Masonite's breach of implied warranty, or that Masonite should have been held jointly and severally liable to plaintiff for the total amount found against all three defendants. The trial court dismissed plaintiff's implied warranty claim against Masonite, and refused plaintiff's requests for a judgment in the total amount against each defendant jointly and severally. Thus, plaintiff's present requests, which if meritorious would require reversal of the trial court's rulings and a new trial, go beyond affirmance of the judgment and cannot be awarded to a nonappealing party (*see*, *Parochial Bus Sys. v Board of Educ.*, 60 N.Y.2d 539, 545-546; *Hecht v City of New York*, 60 N.Y.2d 57).

[1] The majority first considers the fact that the tiles' defects were not "bound to produce a catastrophic accident" in connection with the first prong of the "intermediate approach," i.e., the inquiry into the nature of the defect (majority opn, at 293, 294). The majority then considers the same factor in connection with the second prong, i.e., the inquiry into the nature of the injury (*id.*, at 294 [injury "was not an abrupt, cataclysmic occurrence"]).

[2] Interestingly, the majority opinion, which attempts to avoid deciding whether or not to adopt *East River*, actually stumbles on the same indeterminacy problem that concerned the *East River* Court, i.e., the difficulty and unpredictability of making an abstract legal determination about a particular product's dangerousness.

[3] The majority's assertion that "recovery of replacement costs *always* can be said to be sought for eliminating the hazard" (majority opn, at 294, n 2 [emphasis added]) is manifestly inaccurate. In *East River* (*supra*), *Seely* (*supra*), *Trustees of Columbia Univ.* (*supra*), *Schiavone* (*supra*), *Dudley* (*supra*) and *Pennsylvania Glass* (*supra*), to name just a few, the recovery for replacement costs was sought after an accident had occurred and the product itself was either substantially destroyed or rendered nonfunctional. Thus, in none of these cases could an argument be made that the plaintiff was seeking reimbursement for the cost of making the defunct product safe.

96 N.Y.2d 280 (2001)
750 N.E.2d 1097
727 N.Y.S.2d 49

532 MADISON AVENUE GOURMET FOODS, INC., Respondent,

v.

FINLANDIA CENTER, INC., et al., Appellants.

5TH AVENUE CHOCOLATIERE, LTD., et al., Respondents,

v.

540 ACQUISITION CO., L. L. C., et al., Appellants.

GOLDBERG WEPRIN & USTIN, L. L. P., Individually and on Behalf of All Others Similarly Situated, Appellant,

v.

TISHMAN CONSTRUCTION CORP. et al., Respondents.

Court of Appeals of the State of New York.
Argued April 26, 2001.
Decided June 7, 2001.

Judges SMITH, LEVINE, CIPARICK, WESLEY, ROSENBLATT and GRAFFEO concur.

286*286 OPINION OF THE COURT

Chief Judge KAYE.

The novel issues raised by these appeals—arising from construction-related disasters in midtown Manhattan—concern first, a landholder's duty in negligence where plaintiffs' sole injury is lost income and second, the viability of claims for public nuisance.

Two of the three appeals involve the same event. On December 7, 1997, a section of the south wall of 540 Madison Avenue, a 39-story office tower, partially collapsed and bricks, mortar and other

material fell onto Madison Avenue at 55th Street, a prime commercial location crammed with stores and skyscrapers. The collapse occurred after a construction project, which included putting 94 holes for windows into the building's south wall, aggravated existing structural defects. New York City officials directed the closure of 15 heavily trafficked blocks on Madison Avenue—from 42nd to 57th Street—as well as adjacent side streets between Fifth and Park Avenues. The closure lasted for approximately two weeks, but some businesses nearest to 540 Madison remained closed for a longer period.

In *532 Madison Ave. Gourmet Foods v Finlandia Ctr.,* plaintiff operates a 24-hour delicatessen one-half block south of 540 Madison, and was closed for five weeks. The two named plaintiffs in the companion case, *5th Ave. Chocolatiere v 540 Acquisition Co.,* are retailers at 510 Madison Avenue, two blocks from the building, suing on behalf of themselves and a putative class of "all other business entities, in whatever form, including but not limited to corporations, partnerships and sole proprietorships, located in the Borough of Manhattan and bounded geographically on the west by Fifth Avenue, on the east by Park Avenue, on the north by 57th Street and on the South by 42nd Street." Plaintiffs allege that shoppers and 287*287 others were unable to gain access to their stores during the time Madison Avenue was closed to traffic. Defendants in both cases are Finlandia Center (the building owner), 540 Acquisition Company (the ground lessee) and Manhattan Pacific Management (the managing agent).

On defendants' motions in both cases, Supreme Court dismissed plaintiffs' negligence claims on the ground that they could not establish that defendants owed a duty of care for purely economic loss in the absence of personal injury or property damage, and dismissed the public nuisance claims on the ground that the injuries were the same in kind as those suffered by all of the businesses in the community. In *5th Ave. Chocolatiere,* plaintiffs' additional claims for gross negligence and negligence per se were dismissed on the ground that plaintiffs could not establish a duty owed by defendants, and their private nuisance cause of action was dismissed on the ground that they could not establish either intentional or negligent wrongdoing.

Goldberg Weprin & Ustin v Tishman Constr. involves the July 21, 1998 collapse of a 48-story construction elevator tower on West 43rd Street between Sixth and Seventh Avenues—the heart of bustling Times Square. Immediately after the accident, the City prohibited all traffic in a wide area of midtown Manhattan and also evacuated nearby buildings for varying time periods. Three actions were consolidated—one by a law firm, a second by a public relations firm and a third by a clothing manufacturer, all situated within the affected area. Plaintiff law firm sought damages for economic loss on behalf of itself and a proposed class "of all persons in the vicinity of Broadway and 42nd Street, New York, New York, whose businesses were affected and/or caused to be closed" as well as a subclass of area residents who were evacuated from their homes. Plaintiff alleged gross negligence, strict liability, and public and private nuisance.

Noting the enormity of the liability sought, including recovery by putative plaintiffs as diverse as hot dog vendors, taxi drivers and Broadway productions, Supreme Court concluded that the failure to allege personal injury or property damage barred recovery in negligence. The court further rejected recovery for strict liability, and dismissed both the public nuisance claim (because plaintiff was unable to show special damages) and the private nuisance claim (because plaintiff could not show that the harm threatened only one person or relatively few).

288*288 The Appellate Division affirmed dismissal of the *Goldberg Weprin* complaint, concluding that, absent property damage, the connection between defendants' activities and the economic losses of the purported class of plaintiffs was "too tenuous and remote to permit recovery on any tort theory" (275 AD2d 614). The court, however, reinstated the negligence and public nuisance claims of plaintiffs *532 Madison* and *5th Ave. Chocolatiere,* holding that defendants' duty to keep their premises in reasonably safe condition extended to "those businesses in such close proximity that their negligent acts could be reasonably foreseen to cause injury" (which included the named

merchant plaintiffs) (272 AD2d 23) and that, as such, they established a special injury distinct from the general inconvenience to the community at large. Two Justices dissented, urging application of the "economic loss" rule, which bars recovery in negligence for economic damage absent personal injury or property damage. The dissenters further concluded that the public nuisance claims were properly dismissed because plaintiffs could not establish special injury.

We now reverse in *532 Madison* and *5th Ave. Chocolatiere* and affirm in *Goldberg Weprin & Ustin.*

Plaintiffs' Negligence Claims

Plaintiffs contend that defendants owe them a duty to keep their premises in reasonably safe condition, and that this duty extends to protection against economic loss even in the absence of personal injury or property damage. Defendants counter that the absence of any personal injury or property damage precludes plaintiffs' claims for economic injury.[1]

The existence and scope of a tortfeasor's duty is, of course, a legal question for the courts, which "fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability" (*Hamilton v Beretta U.S.A. Corp.,* 96 NY2d 222, 232 [quoting *Palka v Servicemaster* 289*289 *Mgt. Servs. Corp.,* 83 NY2d 579, 586]). At its foundation, the common law of torts is a means of apportioning risks and allocating the burden of loss. In drawing lines defining actionable duty, courts must therefore always be mindful of the consequential, and precedential, effects of their decisions.

As we have many times noted, foreseeability of harm does not define duty (*see, e.g., Pulka v Edelman,* 40 NY2d 781, 785). Absent a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm. This restriction is necessary to avoid exposing defendants to unlimited liability to an indeterminate class of persons conceivably injured by any negligence in a defendant's act.

A duty may arise from a special relationship that requires the defendant to protect against the risk of harm to plaintiff (*see, e.g., Eiseman v State of New York,* 70 NY2d 175, 187-188). Landowners, for example, have a duty to protect tenants, patrons and invitees from foreseeable harm caused by the criminal conduct of others while they are on the premises, because the special relationship puts them in the best position to protect against the risk (*see, e.g., Nallan v Helmsley-Spear, Inc.,* 50 NY2d 507, 518-519). That duty, however, does not extend to members of the general public (*see, Waters v New York City Hous. Auth.,* 69 NY2d 225, 229). Liability is in this way circumscribed, because the special relationship defines the class of potential plaintiffs to whom the duty is owed.

In *Strauss v Belle Realty Co.* (65 NY2d 399) we considered whether a utility owed a duty to a plaintiff injured in a fall on a darkened staircase during a citywide blackout. While the injuries were logically foreseeable, there was no contractual relationship between the plaintiff and the utility for lighting in the building's common areas. As a matter of policy, we restricted liability for damages in negligence to direct customers of the utility in order to avoid crushing exposure to the suits of millions of electricity consumers in New York City and Westchester.

Even closer to the mark is *Milliken & Co. v Consolidated Edison Co.* (84 NY2d 469), in which an underground water main burst near 38th Street and 7th Avenue in Manhattan. The waters flooded a subbasement where Consolidated Edison maintained an electricity supply substation, and then a fire broke out, causing extensive damage that disrupted the flow of electricity to the Manhattan Garment Center and interrupting 290*290 the biannual Buyers Week. Approximately 200 Garment Center businesses brought more than 50 lawsuits against Con Edison, including plaintiffs who had no

contractual relationship with the utility and who sought damages solely for economic loss. Relying on *Strauss,* we again held that only those persons contracting with the utility could state a cause of action. We circumscribed the ambit of duty to avoid limitless exposure to the potential suits of every tenant in the skyscrapers embodying the urban skyline.

A landowner who engages in activities that may cause injury to persons on adjoining premises surely owes those persons a duty to take reasonable precautions to avoid injuring them (*see, e.g., Weitzmann v Barber Asphalt Co.,* 190 NY 452, 457). We have never held, however, that a landowner owes a duty to protect an entire urban neighborhood against purely economic losses. A comparison of *Beck v FMC Corp.* (53 AD2d 118, 121, *affd* 42 NY2d 1027) and *Dunlop Tire & Rubber Corp. v FMC Corp.* (53 AD2d 150, 154-155) is instructive. Those cases arose out of the same incident: an explosion at defendant FMC's chemical manufacturing plant caused physical vibrations, and rained stones and debris onto plaintiff Dunlop Tire's nearby factory. The blast also caused a loss of electrical power—by destroying towers and distribution lines owned by a utility—to both Dunlop Tire and a Chevrolet plant located one and one-half miles away. Both establishments suffered temporary closure after the accident. Plaintiffs in *Beck* were employees of the Chevrolet plant who sought damages for lost wages caused by the plant closure. Plaintiff Dunlop Tire sought recovery for property damage emanating from the blast and the loss of energy, and lost profits sustained during the shutdown.

In *Dunlop Tire,* the Appellate Division observed that, although part of the damage occurred from the loss of electricity and part from direct physical contact, defendant's duty to plaintiffs was undiminished. The court permitted plaintiffs to seek damages for economic loss, subject to the general rule requiring proof of the extent of the damage and the causal relationship between the negligence and the damage. The *Beck* plaintiffs, by contrast, could not state a cause of action, because, to extend a duty to defendant FMC would, "like the rippling of the waters, [go] far beyond the zone of danger of the explosion," to everyone who suffered purely economic loss (*Beck v FMC Corp.,* 53 AD2d, at 121, *supra*).

Plaintiffs' reliance on *People Express Airlines v Consolidated Rail Corp.* (100 NJ 246, 495 A2d 107) is misplaced. There, a 291*291 fire started at defendant's commercial freight yard located across the street from plaintiff's airport offices. A tank containing volatile chemicals located in the yard was punctured, emitting the chemicals and requiring closure of the terminal because of fear of an explosion. Allowing the plaintiff to seek damages for purely economic loss, the New Jersey court reasoned that the extent of liability and degree of foreseeability stand in direct proportion to one another: the more particular the foreseeability that economic loss would be suffered as a result of the defendant's negligence, the more just that liability be imposed and recovery permitted. The New Jersey court acknowledged, however, that the presence of members of the public, or invitees at a particular plaintiff's business, or persons traveling nearby, while foreseeable, is nevertheless fortuitous, and the particular type of economic injury that they might suffer would be hopelessly unpredictable. Such plaintiffs, the court recognized, would present circumstances defying any appropriately circumscribed orbit of duty. We see a like danger in the urban disasters at issue here, and decline to follow *People Express.*

Policy-driven line-drawing is to an extent arbitrary because, wherever the line is drawn, invariably it cuts off liability to persons who foreseeably might be plaintiffs. The *Goldberg Weprin* class, for example, would include all persons in the vicinity of Times Square whose businesses had to be closed and a subclass of area residents evacuated from their homes; the *5th Ave. Chocolatiere* class would include all business entities between 42nd and 57th Streets and Fifth and Park Avenues. While the Appellate Division attempted to draw a careful boundary at storefront merchant-neighbors who suffered lost income, that line excludes others similarly affected by the closures—such as the law firm, public relations firm, clothing manufacturer and other displaced plaintiffs in *Goldberg Weprin,* the thousands of professional, commercial and residential tenants situated in the towers surrounding the named plaintiffs, and suppliers and service providers unable to reach the

densely populated New York City blocks at issue in each case.

As is readily apparent, an indeterminate group in the affected areas thus may have provable financial losses directly traceable to the two construction-related collapses, with no satisfactory way geographically to distinguish among those who have suffered purely economic losses (*see also, Matter of Kinsman Tr. Co.,* 388 F2d 821, 825 n 8). In such circumstances, limiting the scope of defendants' duty to those who have, as a 292*292 result of these events, suffered personal injury or property damage—as historically courts have done—affords a principled basis for reasonably apportioning liability.

We therefore conclude that plaintiffs' negligence claims based on economic loss alone fall beyond the scope of the duty owed them by defendants and should be dismissed.[2]

Plaintiffs' Public Nuisance Claims

Plaintiffs contend that they stated valid causes of action for public nuisance, alleging that the collapses forced closure of their establishments, causing special damages beyond those suffered by the public.

A public nuisance exists for conduct that amounts to a substantial interference with the exercise of a common right of the public, thereby offending public morals, interfering with the use by the public of a public place or endangering or injuring the property, health, safety or comfort of a considerable number of persons. A public nuisance is a violation against the State and is subject to abatement or prosecution by the proper governmental authority (*Copart Indus. v Consolidated Edison Co.,* 41 NY2d 564, 568).

A public nuisance is actionable by a private person only if it is shown that the person suffered special injury beyond that suffered by the community at large (*see, Burns Jackson Miller Summit & Spitzer v Lindner,* 59 NY2d 314, 334 [citing Restatement (Second) of Torts § 821C, comment *b*]). This principle recognizes the necessity of guarding against the multiplicity of lawsuits that would follow if everyone were permitted to seek redress for a wrong common to the public (Restatement [Second] of Torts § 821C, comment *a*; Prosser, *Private Action for Public Nuisance,* 52 Va L Rev 997, 1007 [1966]).

A nuisance is the actual invasion of interests in land, and it may arise from varying types of conduct (*Copart Indus. v Consolidated Edison Co.,* 41 NY2d, at 569, *supra*). In the cases before us, the right to use the public space around Madison Avenue and Times Square was invaded not only by the building collapses but also by the City's decision, in the interest of public safety, to close off those areas. Unlawful obstruction of a 293*293 public street is a public nuisance, and a person who as a consequence sustains a special loss may maintain an action for public nuisance (*Callanan v Gilman,* 107 NY 360, 370). Indeed, "in a populous city, whatever unlawfully turns the tide of travel from the sidewalk directly in front of a retail store to the opposite side of the street is presumed to cause special damage to the proprietor of that store, because diversion of trade inevitably follows diversion of travel" (*Flynn v Taylor,* 127 NY 596, 600).

The question here is whether plaintiffs have suffered a special injury beyond that of the community so as to support their damages claims for public nuisance (*see, Graceland Corp. v Consolidated Laundries Corp.,* 7 AD2d 89, 91, *affd* 6 NY2d 900). We conclude that they have not.

In *Burns Jackson* we refused to permit a public nuisance cause of action by two law firms seeking damages for increased expenses and lost profits resulting from the closure of the New York City transit system during a labor strike. We concluded that, because the strike was so widespread, every person, firm and corporation conducting a business or profession in the City suffered similar

damage and thus the plaintiffs could not establish an injury different from that of the public at large.

While not as widespread as the transit strike, the Madison Avenue and Times Square closures caused the same sort of injury to the communities that live and work in those extraordinarily populous areas. As the trial court in *Goldberg Weprin & Ustin* pointed out, though different in degree, the hot dog vendor and taxi driver suffered the same kind of injury as the plaintiff law firm. Each was impacted in the ability to conduct business, resulting in financial loss. When business interference and ensuing pecuniary damage is "so general and widespread as to affect a whole community, or a very wide area within it, the line is drawn" (Prosser, *supra,* at 1015). While the degree of harm to the named plaintiffs may have been greater than to the window washer, per diem employee or neighborhood resident unable to reach the premises, in kind the harm was the same.

Leo v General Elec. Co. (145 AD2d 291) is inapposite. In *Leo,* the Appellate Division recognized a private right of action by plaintiff commercial fishermen who contended that defendant's pollution of the Hudson River with toxic polychlorinated biphenyls (commonly known as PCBs), created a public nuisance that had a devastating effect on their ability to earn a living. 294*294 Plaintiffs were able to establish that their injuries were special and different in kind, not merely in degree: a loss of livelihood was not suffered by every person who fished the Hudson. By contrast, every person who maintained a business, profession or residence in the heavily populated areas of Times Square and Madison Avenue was exposed to similar economic loss during the closure periods. Thus, in that the economic loss was "common to an entire community and the plaintiff[s] suffer[ed] it only in a greater degree than others, it is not a different kind of harm and the plaintiff[s] cannot recover for the invasion of the public right" (Restatement [Second] of Torts § 821C, comment *h*).

Accordingly, in *532 Madison Ave. Gourmet Foods v Finlandia Ctr.,* the order of the Appellate Division should be reversed, with costs, the defendants' motion to dismiss the complaint granted and the certified question answered in the negative. In *5th Ave. Chocolatiere v 540 Acquisition Co.,* the order of the Appellate Division should be reversed, with costs, the defendants' motion to dismiss the complaint granted in its entirety and the certified question answered in the negative. In *Goldberg Weprin & Ustin v Tishman Constr.,* the order of the Appellate Division, insofar as appealed from, should be affirmed, with costs.

In *532 Madison Ave. Gourmet Foods v Finlandia Ctr.:* Order reversed, etc.
In *5th Ave. Chocolatiere v 540 Acquisition Co.:* Order reversed, etc.
In *Goldberg Weprin & Ustin v Tishman Constr. Corp.:* Order, insofar as appealed from, affirmed, with costs.

[1] The "economic loss" rule espoused in *Schiavone Constr. Co. v Mayo Corp.* (56 NY2d 667, *revg on dissent at* 81 AD2d 221) and relied on by defendants has no application here. That case stands for the proposition that an end-purchaser of a product is limited to contract remedies and may not seek damages in tort for economic loss against a manufacturer (*see also, Bocre Leasing Corp. v General Motors Corp.,* 84 NY2d 685; *Bellevue S. Assocs. v HRH Constr. Corp.,* 78 NY2d 282).

[2] Plaintiff Goldberg Weprin & Ustin's bare allegation that the construction project was dangerously handled was insufficient to set forth a cause of action for strict liability based on an abnormally dangerous activity (*see, Engel v Eureka Club,* 137 NY 100, 104-105; *Doundoulakis v Town of Hempstead,* 42 NY2d 440, 448). Damage to property—one of the material elements—was not alleged (*see, Spano v Perini Corp.,* 25 NY2d 11, 18).

Honeywell International Incorporated, Plaintiff,
v.
Forged Metals Incorporated, Defendant.

No. CV-19-03730-PHX-JAT.

United States District Court, D. Arizona.

November 13, 2019.

Honeywell International Incorporated, a Delaware corporation, Plaintiff, represented by David B. Rosenbaum, Osborn Maledon PA & Joshua David R. Bendor, Osborn Maledon PA.

Forged Metals Incorporated, a California corporation, Defendant, represented by Andrew Charles Pacheco, Ryan Rapp & Underwood PLC, Derek E. Leon, Leon Cosgrove LLP, pro hac vice, John Geoffrey Ryan, Ryan Rapp & Underwood PLC & Laurie U. Mathews, Leon Cosgrove LLP, pro hac vice.

ORDER

JAMES A. TEILBORG, Senior District Judge.

Pending before the Court is Defendant Forged Metals Incorporated's ("Forged Metals") Motion to Dismiss two of Plaintiff Honeywell International Incorporated's ("Honeywell") claims pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. (Doc. 13). On September 9, 2019, Honeywell filed its Response to Forged Metals' Motion to Dismiss. (Doc. 18). On September 16, 2019, Forged Metals replied. (Doc. 19). The Court now rules on the Motion.[1]

I. FACTUAL BACKGROUND

The following facts are either undisputed or recounted in the light most favorable to the non-moving party. *See* *Wyler Summit P'ship v. Turner Broad. Sys., Inc.,* 135 F.3d 658, 661 (9th Cir. 1998). In 2014, Honeywell ordered forgings from Forged Metals for a "T55" test compressor. (Doc. 1 at 1-2). Honeywell alleges that it provided Forged Metals with engineering drawings that instructed it to apply a particular heat treatment to the forgings. (*Id.* at 2). According to Honeywell, Forged Metals later asserted that it created the forgings in accordance with the drawings. (*Id.*). On June 9, 2017, Honeywell tested the compressor with the forgings supplied by Forged Metals. (*Id.* at 3). In the process, Honeywell claims the growth compressor rig failed and damaged the attached equipment. (*Id.*). Honeywell asserts that Forged Metals caused this failure because it did not adequately strengthen the forgings with the appropriate heat treatment as instructed by Honeywell's drawings. (*Id.*). Honeywell now seeks damages and alleges breach of contract, breach of express warranty, breach of implied warranty, and, at issue here, two tort claims: one for "falsely certif[ying] that the forgings complied with Honeywell's specifications" and the other for "negligen[ce] in misreading the specifications provided by Honeywell. . . [and for] providing forgings that were not appropriate for their intended use." (*Id.* at 3-6). Forged Metals moves to dismiss those claims under the economic loss doctrine or, alternatively, it moves to dismiss the negligent misrepresentation claim for failure to state a plausible cause of action. (Doc. 13 at 1).

II. LEGAL STANDARD

A defendant may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Dismissal for failure to state a claim "is proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Davidson v. Kimberly-Clark Corp.,* 889 F.3d 956, 965 (9th Cir.), *cert. denied,* 139 S. Ct. 640 (2018). "[T]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to `state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (citation omitted). All facts are read in the light most favorable to the non-moving party. *See* *Shwarz v. United States,* 234 F.3d 428, 435 (9th Cir. 2000).

III. ANALYSIS

A. Choice of Law Dispute

The parties debate whether the General Purchase Order Provision that requires New York law to govern "[t]he construction, interpretation and performance" of the agreement and "all transactions" under the agreement, (Doc. 19-1 at 21 (§ 30.1)), also applies to Honeywell's tort claims. Forged Metals argues that this choice of law provision applies to Honeywell's tort claims because these claims "depend on interpretation of the parties' contract." (Doc. 13 at 7). Honeywell responds that resolution of its tort claims does not depend on "interpretation of a traditional contract," and thus the choice of law provision does not apply. (Doc. 18 at 2-3).

"Claims arising in tort are not ordinarily controlled by a contractual choice of law provision. . . [but] are decided according to the law of the forum state." *Winsor v. Glasswerks PHX, L.L.C.,* 63 P.3d 1040, 1043 ¶ 9 (Ariz. Ct. App. 2003) (quoting *Sutter Home Winery, Inc. v. Vintage Selections, Ltd.,* 971 F.2d 401, 407 (9th Cir. 1992)); *see also* *Patton v. Cox,* 276 F.3d 493, 495 (9th Cir. 2002) ("When a federal court sits in diversity, it must look to the forum state's choice of law rules to determine the controlling substantive law."). However, under Arizona law, "contractual choice of law provisions may apply to tort claims [when]. . . `resolution of th[ose] claims relates to interpretation of the contract.'" *Winsor,* 63 P.3d at 1044 ¶ 10 (quoting *Manetti-Farrow, Inc. v. Gucci Am., Inc.,* 858 F.2d 509, 514 (9th Cir. 1988)). In such a case, the tort claims cannot "be adjudicated without analyzing whether the parties were in compliance with the contract." *Id.* (quoting *Manetti-Farrow,*

Inc., 858 F.2d at 514).

Honeywell's tort claims rely on contract interpretation, and thus, New York law applies pursuant to the parties' contract. Honeywell states in its Complaint that "[t]he purchase orders for the forgings incorporate [the] General Purchase Order Provisions (`GPOPs') by reference." (Doc. 1 at 2). And the General Purchase Order Provisions explicitly define a purchase order as "an order issued by Honeywell for the purchase of Goods, *together with the specifications, drawings, terms and conditions, or other documents referred to, attached to, or incorporated by reference* on the face of [the] Purchase Order." (Doc. 19-1 at 2 (§ 1) (emphasis added)). Moreover, Honeywell alleges that "[e]ach purchase order incorporated the drawing for that forging." (Doc. 1 at 4). In fact, this allegation is the basis of its breach of contract cause of action. (*See id.*). Based on Honeywell's allegations, solely for purposes of deciding Forged Metals' Motion to Dismiss (Doc. 13), the Court concludes that certain specifications relating to heat treatment were incorporated into the parties' contract.

Consequently, the allegations in the Complaint indicate that the basis of Honeywell's tort claims depends on contract interpretation. Honeywell alleges, for purposes of its negligent misrepresentation tort claim, that "Forged Metals falsely certified that the forgings complied with Honeywell's specifications." (Doc. 1 at 6). Honeywell alleges, for purposes of its negligence tort claim, that "Forged Metals was negligent in misreading the specifications provided by Honeywell." (*Id.*). Thus, based on Honeywell's allegations, its tort claims cannot be resolved without deciphering what the contract's specifications required of Forged Metals. In fact, it appears Honeywell does not dispute that the drawings and specifications were incorporated into the parties' contract, but rather Honeywell claims that interpretation of what the drawings and specifications require is not "traditional" contract interpretation, and thus the contract's choice of law provision does not apply. (Doc. 18 at 2-3). Honeywell cites no authority for this assertion, and the Court is not aware of any Arizona law that draws a distinction based on the *traditionality* of the required contract interpretation. Because Honeywell's tort claims cannot "be adjudicated without analyzing whether the parties were in compliance with the contract," the Court will enforce the parties' choice of law provision, which requires the Court to apply New York law. *See Winsor,* 63 P.3d at 1044 ¶ 10 (citation omitted).

B. Economic Loss Doctrine

The Court must next decide whether, under New York law, Honeywell seeks recovery in tort for economic harms already fully recoverable by contract. Forged Metals argues that Honeywell's tort claims are barred by the economic loss doctrine because Honeywell's tort claims are based on a failure to perform the duties imposed by the parties' contract. (Doc. 13 at 7-10).

1. New York Law

New York's economic loss doctrine bars tort recovery for damage to property that is "the subject of [a] contract" so long as there are no allegations relating to personal injury. *Weiss v. Polymer Plastics Corp.,* 802 N.Y.S.2d 174, 175 (App. Div. 2005); *see also Bristol-Myers Squibb, Indus. Div. v. Delta Star, Inc.,* 620 N.Y.S.2d 196, 198-99 (App. Div. 1994) ("[D]amages arising from the failure of the bargained-for consideration to meet the expectations of the parties are recoverable in contract, not tort."). The doctrine is premised on the fact that economic loss entails losing part of a bargain, so courts must uphold contractual remedies that the parties have already negotiated. *See Bristol-Myers,* 620 N.Y.S.2d at 198-99. New York's economic loss doctrine thus bars torts claims when the product at issue caused no damages aside from failing to achieve a contractual purpose. *See Bocre Leasing Corp. v. Gen. Motors Corp. (Allison Gas Turbine Div.),* 645 N.E.2d 1195, 1199 (N.Y. 1995); *cf. Hodgson, Russ, Andrews, Woods & Goodyear, LLP v. Isolatek Int'l Corp.,* 752 N.Y.S.2d 767, 769 (App. Div. 2002). "In determining whether the economic loss doctrine applies, a court should consider the nature of the defect, the injury, the manner in which the injury occurred, and the

damages sought." *Hodgson,* 752 N.Y.S.2d at 769.

New York's economic loss doctrine does not bar claims that a product did perform as expected but still caused damages. *Id.* (allowing tort recovery for damage due to product defect that was "not the result of the failure of the product to perform its intended purpose"). Thus, plaintiffs may seek tort recovery for products that function as contracted but have unanticipated dangers or defects. *Id.* In contrast, "defects related to the quality of the product, e.g., product performance, go to the expectancy of the parties (loss of bargain) and are not recoverable in tort." *Hemming v. Certainteed Corp.,* 468 N.Y.S.2d 789, 790 (App. Div. 1983), *cited in Praxair, Inc. v. Gen. Insulation Co.,* 611 F. Supp. 2d 318, 326 (W.D.N.Y. 2009); *see also Weiss,* 802 N.Y.S.2d at 175-76 (holding that economic loss doctrine applied where tort claims were based on the failure of a product that was "the subject of the contract"). As the New York Court of Appeals has said, "where the claims at issue are, fundamentally and in all relevant respects, essentially contractual, product-failure controversies[,] [t]ort law is not the answer." *Bocre,* 645 N.E.2d at 1199.

Additionally, New York's economic loss doctrine does not bar tort recovery for damage to other property. *Elec. Waste Recycling Grp., Ltd. v. Andela Tool & Mach., Inc.,* 968 N.Y.S.2d 765, 767 (App. Div. 2013). New York courts have not, however, extended the meaning of other property to include the systems housing a defective product. *Progressive Ins. v. Ford Motor Co.,* 790 N.Y.S.2d 358, 360 (Dist. Ct. 2004) (holding that a defective electrical part that set fire to the vehicle containing it did not damage "other property"); *see Bocre,* 645 N.E.2d at 1196, 1199 (concluding that the economic loss doctrine applied to tort claims for "cost of repairs and lost profits" resulting from an engine's failure and the damage it caused to the helicopter housing it); *see also Landtek Grp., Inc. v. N. Am. Specialty Flooring, Inc.,* No. CV141095SJFAKT, 2016 WL 11264722, at *18 (E.D.N.Y. Aug. 12, 2016) ("[C]ourts have generally held that `other property' does not include `damage caused to a unit or system by a defective component.'"), *adopted,* No. 14CV1095SJFAKT, 2016 WL 8671839 (E.D.N.Y. Sept. 16, 2016). Otherwise, allowing the "over-parsing" of mechanical devices into a collection of parts "would represent an undue expansion of tort law into an area traditionally reserved for contract and warranty." *Trump Int'l Hotel & Tower v. Carrier Corp.,* 524 F. Supp. 2d 302, 312 (S.D.N.Y. 2007).

2. Analysis

Honeywell's tort claims are barred by the economic loss doctrine. Honeywell improperly seeks tort recovery for pure contractual violations, and Honeywell does not allege any damage to other property.

Honeywell's tort claims are based on the duties imposed by the parties' contract. Specifically, the gravamen of Honeywell's tort claims is that Forged Metals failed to perform according to the contract's specifications. (*See* Doc. 1 at 6). Thus, Honeywell's tort claims are "properly characterized as being for `economic loss' due to product failure" just like the tort claim in *Weiss. See* 802 N.Y.S.2d at 176. Moreover, the failure of the forgings differs from the damages in *Hodgson,* which were "not the result of the failure of the product to perform its intended purpose." *See* 752 N.Y.S.2d at 769. Nowhere does Honeywell claim that the forgings performed as contractually intended. Instead, Honeywell alleges that "catastrophic failure occurred because certain forgings, which Forged Metals had provided, were not hardened pursuant to Honeywell's specifications"—specifications that Honeywell claims were incorporated into the parties' contract. (*Id.* at 1-2; *see also* Doc. 19-1 at 2 (§ 1)).[2] Therefore, Honeywell's tort claims are barred because they allege that Forged Metals failed to meet the parties' contractually-agreed-upon expectations. *See Hemming,* 468 N.Y.S.2d at 790.

Indeed, as noted above, New York law requires that a court review "the nature of the defect, the injury, the manner in which the injury occurred, and the damages sought" when assessing whether

the economic loss doctrine applies. *Hodgson,* 752 N.Y.S.2d at 769. The nature of the defect and the manner in which the injury occurred relates to Forged Metals' alleged failure to make the forgings according to the contracted specifications. Honeywell alleges that this failure caused damage to the test compressor and the various equipment that was attached to it. (Doc. 1 at 3-4). Simply put, because the "claims at issue are, fundamentally and in all relevant respects, essentially contractual, product-failure controversies[,] [t]ort law is not the answer." *Bocre,* 645 N.E.2d at 1199.

Honeywell also fails to allege damage to other property recoverable in tort. Honeywell claims that "[t]he growth compressor rig failure caused significant damage to the T55 compressor rig and various equipment that was attached to the compressor," and Honeywell alleges that it "*incorporated* the forgings *into* the T55 test compressor." (Doc. 1 at 3 (emphasis added)). Under New York law, a defective component merges with any machinery fixed to or housing it. Honeywell integrated the forgings into the compressor—effectively making them one unit. Thus, as in both *Bocre* and *Progressive,* this integration precludes the Court from saying there was damage to other property that would allow tort recovery. Dividing the forgings from the attached equipment in order to raise claims in separate areas of law "would represent an undue expansion of tort law into an area traditionally reserved for contract and warranty." *See Trump,* 524 F. Supp. 2d at 312. In other words, the reasonable person expects that a defective component could harm the surrounding machinery, so, because the parties here have already contracted in anticipation of the forgings' performance, they have necessarily contracted for damage to the equipment attached to the forging. *See id.* at 311-13 (holding that a device integrated with absorption chiller "did not damage `other property' when it malfunctioned and caused the absorption chiller to freeze").

However, Honeywell contends that "which items of damaged property were `integrated' with the forgings" cannot be determined at this time. (*See* Doc. 18 at 6). But, Honeywell alleges that the forgings were incorporated into the T55 test compressor. (Doc. 1 at 3). And, Honeywell also claims that "[t]he growth compressor rig failure caused significant damage to the T55 compressor rig and various equipment that was attached to the compressor" and that it "had to rebuild the rig with new instruments and parts to replace the damaged components." (Doc. 1 at 3). In other words, according to Honeywell's allegations, all the property that was damaged was part of the test compressor that the alleged defective forgings were incorporated into. Hence, because Honeywell does not allege any facts showing damage to any property other than property that was attached to the test compressor, there is no basis for tort recovery as to other property that was damaged as a result of the alleged failure of the forgings.[3]

As the economic loss doctrine bars both of Honeywell's tort claims, the Court need not evaluate whether Honeywell plausibly alleged its negligent misrepresentation claim. Accordingly, the Court grants Forged Metals' Motion to Dismiss as to Honeywell's tort claims alleged in counts four and five of the Complaint (Doc. 1).

IV. CONCLUSION

IT IS ORDERED that Defendant Forged Metals Incorporated's Motion to Dismiss (Doc. 13) counts four and five of Plaintiff Honeywell International Incorporated's Complaint (Doc. 1) is GRANTED pursuant to Rule 12(b)(6).[4]

[1] Honeywell's request for oral argument, (Doc. 18 at 1), is denied because the issues have been fully briefed and oral argument would not have aided the Court's decisional process. *See Partridge v. Reich,* 141 F.3d 920, 926 (9th Cir. 1998); *Lake at Las Vegas Inv'rs Grp. v. Pac. Dev. Malibu Corp.,* 933 F.2d 724, 729 (9th Cir. 1991); *Prison Legal News v. Ryan,* No. CV-15-02245-PHX-ROS, 2019 WL 1099882, at *1 n.1 (D. Ariz. Mar. 8, 2019).

[2] The Court again notes that it accepted as true for the purpose of deciding Forged Metals' Motion to Dismiss Honeywell's allegation that the specifications relating to heat treatment were incorporated into the parties' contract. However, should Forged Metals assert, during the course of litigation, that the heat treatment specifications were *not* incorporated by the parties' contract (or that there was no contract at all), Honeywell may move for reconsideration of this Order on Forged

101 A.D.3d 1059 (2012)
956 N.Y.S.2d 496
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ARCHSTONE et al., Respondents-Appellants, v. TOCCI BUILDING CORPORATION OF NEW JERSEY, INC., et al., Defendants, PERKINS EASTMAN ARCHITECTS, INC., Respondent, and ELDORADO STONE, LLC, Appellant-Respondent. (And Third-Party Actions.)

2011-02858.

Appellate Division of the Supreme Court of New York, Second Department.

December 26, 2012.

1060*1060 Angiolillo, J.P., Dickerson, Leventhal and Chambers, JJ., concur.

Ordered that the order is reversed insofar as appealed from, on the law, and that branch of the motion of the defendant Eldorado Stone, LLC, which was for summary judgment dismissing the cause of action alleging negligence asserted against it is granted; and it is further,

Ordered that the order is affirmed insofar as cross-appealed from; and it is further,

Ordered that one bill of costs is awarded to the defendant Eldorado Stone, LLC, payable by the plaintiffs and Perkins Eastman Architects, Inc.

This appeal and cross-appeal are amongst several involving water intrusion and damage at a newly constructed apartment complex (*see* *Archstone v Tocci Bldg. Corp. of N.J., Inc.,* 101 AD3d 1057 [2012]; *Archstone v Tocci Bldg. Corp. of N.J., Inc.,* 101 AD3d 1062 [2012] [both decided herewith]). The plaintiffs, the owners of the apartment complex, contracted with the defendant Tocci Building Corporation of New Jersey, Inc. (hereinafter Tocci), to act as the general contractor on the project. The plaintiffs commenced this action against Tocci, and others, including the appellant Eldorado Stone, LLC (hereinafter Eldorado), alleging that severe water intrusion required them to reconstruct the buildings, terminate certain leases, and defend against personal injury and property claims brought by the apartment complex's tenants. Eldorado manufactured an artificial stone veneer used to clad the exterior of the buildings. The plaintiffs asserted causes of action against Eldorado sounding in, inter alia, negligence and breach of express and implied warranties.

1061*1061 Eldorado moved for summary judgment dismissing the negligence and breach of express and implied warranty causes of action asserted against it. The Supreme Court granted those branches of the motion which were for summary judgment dismissing the breach of express and implied warranty causes of action, and otherwise denied the motion. Eldorado appeals from so much of the order as denied that branch of its motion which was for summary judgment dismissing the negligence cause of action asserted against it, and the plaintiffs cross-appeal from so much of the order as granted that branch of Eldorando's motion which was for summary judgment dismissing the breach of express and implied warranty causes of action asserted against it.

"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. Co.,* 16 AD3d 444, 445 [2005]; *see* *Bocre Leasing Corp. v General Motors Corp. [Allison Gas Turbine Div.],* 84 NY2d 685, 694 [1995]; *New York Methodist Hosp. v Carrier Corp.,* 68 AD3d 830 [2009]; *Weiss v Polymer Plastics Corp.,* 21 AD3d 1095 [2005]; *Amin Realty v K & R Constr. Corp.,* 306 AD2d 230 [2003]). The rule is applicable to economic losses to the product itself, as well as consequential damages resulting from the defect (*see* *Bocre Leasing Corp. v General Motors Corp. [Allison Gas Turbine Div.],* 84 NY2d at 693; *Weiss v Polymer Plastics Corp.,* 21 AD3d at 1096).

Here, the plaintiffs claimed economic losses with respect to the reconstruction of the buildings allegedly resulting from the failure of the stone cladding system to perform properly in preventing water intrusion. Contrary to the plaintiffs' contention, their alleged losses constituted consequential damages resulting from the alleged design defect and flowing from damage to property which was the subject of the plaintiffs' contract with Tocci (*see* *Weiss v Polymer Plastics Corp.,* 21 AD3d at 1096; *Amin Realty v K & R Constr. Corp.,* 306 AD2d at 231; *Hemming v Certainteed Corp.,* 97 AD2d 976 [1983]). Those alleged damages are thus not "outside the scope of the contractually based economic losses, attendant to the particular commercial transaction and subject matter" (*Bocre Leasing Corp. v General Motors Corp. [Allison Gas Turbine Div.],* 84 NY2d at 691). Moreover, the personal injury and property damage allegedly suffered by the tenants did not create a direct tort cause of action against Eldorado on behalf of the plaintiffs, where the losses they 1062*1062 claimed were purely economic in nature (*see* *7 World Trade Co. v Westinghouse Elec. Corp.,* 256 AD2d 263, 264 [1998]). Accordingly, the economic loss rule barred the plaintiffs' negligence cause of action against Eldorado, and the Supreme Court should have granted that branch of the motion which was for summary judgment dismissing that cause of action insofar as asserted against Eldorado.

The Supreme Court properly granted that branch of the motion which was for summary judgment dismissing the breach of implied warranty causes of action, as the plaintiffs were neither in privity with Eldorado (*see* *Arthur Jaffee Assoc. v Bilsco Auto Serv.,* 58 NY2d 993, 995 [1983]; *Catalano v*

Heraeus Kulzer, Inc., 305 AD2d 356, 358 [2003]), nor were they third-party beneficiaries of Eldorado's contract with the distributor (*see* UCC 2-318; *Amin Realty v K & R Constr. Corp.,* 306 AD2d at 231-232; *Ralston Purina Co. v McKee & Co.,* 158 AD2d 969, 970 [1990]).

The Supreme Court properly granted that branch of the motion which was for summary judgment dismissing the breach of express warranty cause of action. Eldorado established its entitlement to judgment as a matter of law by demonstrating that the alleged express warranty was made subject to conditions which were not fulfilled. In opposition, the plaintiffs failed to raise a triable issue of fact (*see Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]). In light of this determination, Eldorado's remaining contention has been rendered academic.