NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

STONINGTON CAPITAL, LLC, Plaintiff, vs. BENJAMIN OBDYKE, INC., Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION : MORRIS COUNTY DOCKET NO. MRS-L-1924-21 CIVIL ACTION – CBLP **OPINION**

Argued: February 9, 2024

Decided: February 14, 2024

Gregory J. Coffey, Esq. of Coffey & Associates, attorneys for the plaintiff.

Thomas Donnelly, Esq. of Antheil Maslow & MacMinn, LLP, attorneys for defendants.

I. BACKGROUND INFORMATION

This matter comes before the Court on a motion for summary judgment.

By way of background, Defendant Benjamin Obdyke, Inc. ("Defendant" or "BOI") designs and supplies various roofing products including Cedar Breather ventilated underlayment ("CB"). Verified Complaint, ¶ 7. BOI does not manufacture CB. Production of CB is contracted out to a supply partner who produces CB based on BOI's design and the product is then sold by independent, third-party distributors.

Plaintiff Stonington Capital, LLC ("Plaintiff") owned the property located at 30 Cherry Lane, Harding Township, New Jersey (the "Property"). In or around 2008, Plaintiff retained Mark Sauer Contracting, Inc. ("MSC") for the purpose of installing a new cedar shake roof on the property. Id. at ¶ 15. MSC obtained and installed CB for the purpose of protecting the life of the

wood through the provision of space for continuous airflow between the solid roof deck and cedar shakes. Id. at ¶ 19. In 2008, the CB specifications and guidance materials set forth and circulated by BOI provided that the CB could be rolled out over a roof deck entirely covered with ice and water shield. Id. at ¶ 21. Plaintiff and MSC relied on the specifications of the installation of CB to the roof at the property. Id. at ¶ 23. Plaintiff alleges that the installation of the CB performed by MSC in connection with the new roof installation at the property was consistent and in compliance with CB's specifications and guidance promulgated and distributed by BOI that a non-permeable membrane (ice and water shield) could be installed entirely over the roof deck. Id. at ¶ 24.

In January 2020, Plaintiff sent a letter to BOI and MSC, the contractor who installed the CB on the property's roof, regarding the purchase and installation of CB with respect to the roof of the property. Certification of Caruso ("Caruso Cert."), ¶ 2. The letter asserted that the CB was defectively installed and demanded that BOI and MSC jointly and severally remit a sum of $300,000 to Plaintiff in exchange for releases from all alleged claims against them. The letter further indicated that Plaintiff had entered into an agreement of sale for the transfer of the subject property in August 2019 and that the conditions which are the basis of Plaintiff's Complaint were discovered in pre-transfer inspections. Defendant contends that it was not offered an opportunity to inspect the real property, the installation, or the products. Id. at ¶ 3.

II. STANDARD OF REVIEW

Summary judgment must be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). The trial court's "function is not . . . to weigh the evidence and determine the truth . . . but to determine whether there is a genuine issue for trial." Brill v. Guardian

Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)). The trial judge must consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Ibid. When the facts present "a single, unavoidable resolution" and the evidence "is so one-sided that one party must prevail as a matter of law," then a trial court should grant summary judgment. Ibid.

III. ANALYSIS

a. Spoliation

Defendant argues that it is entitled to summary judgment because Plaintiff spoliated evidence permanently depriving it of the opportunity to inspect and review the product and installation out of which Plaintiff's claims arises. Defendant provides that a litigant has a duty to preserve evidence where there is "(1) pending or probable litigation involving the defendants; (2) knowledge by the plaintiff of the existence or likelihood of litigation; (3) foreseeability of the harm to the defendants, or in other words, discarding the evidence would be prejudicial to defendants; (4) evidence relevant to the litigation." Aetna Life and Cas. Co. v. Imet Mason Contractors, 309 N.J. Super. 358, 365 (App. Div. 1998).

Moreover, Defendant asserts that where a plaintiff spoliates evidence, sanctions should be imposed, which a trial court has discretion to do. Id. Defendant argues that since dismissal with prejudice is the "ultimate sanction", it is ordered only when no lesser sanction is sufficient to erase the prejudice suffered by the non-spoliating party. Hirsch v. Gen. Motors Corp., 266 N.J. Super. 222, 261 (Super. Ct. 1993). In determining whether dismissal is appropriate, that the court should

consider "(1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party." Manorcare Health Servs., Inc. v. Osmose Wood Preserving, Inc., 336 N.J. Super. 218, 231 (App. Div. 2001).

Defendant claims that Plaintiff's corporate designee, Thomas Gary Gutjahr ("Gutjahr"), acknowledged that he was informed of the roofing issues by a roofing contractor, Novalis Roofing and Siding LLC ("Novalis"), on July 26, 2018. Defendant asserts that Plaintiff was again informed about the roofing defects in July 2019 during the sale process. Defendant contends that Plaintiff did not notify Defendant of any alleged defects with the roof upon being notified of such in July 2018 or July 2019. Defendant instead asserts that it was provided with written notice of the alleged roof defects on January 31, 2020, after the closing date of the sale and after the buyer replaced the roof.

Defendant claims that Plaintiff understood that there was a potential for litigation, and it had a duty to give Defendant an opportunity to inspect the Property. Defendant contends that Plaintiff must have known that evidence of the roof's condition at the time the damages were discovered would be material to litigation. Defendant contends that given the opportunity to inspect, it would have been able "to examine, gather information relating to, and make certain determinations regarding the product and the roof as a whole, including but not limited to the extent of damages (if any), installation techniques of both the Cedar Breather and related roof systems, type and condition of the hardware used for installation, and the condition of the underlayment used." Further, Defendant submits that its expert report, published by G. Peter Vander Heide, Registered Architect ("Vander Heide"), provides that thin and rusted roofing nails and staples, installed by Sauer, indicate the true cause of the failure of the roof.

Defendant thus argues that dismissal of Plaintiff's case is appropriate under such circumstances. Defendant submits that in Manorcare Hlth. Serv., the plaintiff was sanctioned because its nonfeasance put the roofing contractor in a position where it had no choice but to rely on the authenticity of the plaintiff's witnesses and evidence. 336 N.J. Super. at 230. Defendant asserts that it is in a similar circumstance as the contractor in Manorcare Hlth. Serv. in that it will not have the opportunity to directly observe the roof that was allegedly damaged by its product and guidance. Defendant argues that it has been substantially prejudiced as Plaintiff allowed crucial evidence to be destroyed.

Defendant submits that in Hirsch, the plaintiff asserted claims arising out of a fire that damaged the plaintiff's vehicle. The plaintiff's experts inspected the vehicle and prepared a report, but the vehicle was subsequently discarded before the defendant had the opportunity to inspect the vehicle. Id. at 228. While the court recognized that the defendant was substantially prejudiced, the court declined to dismiss the complaint finding that the preclusion of the plaintiff's expert report rectified the prejudice suffered by the defendant.

Defendant also cites to Aetna in support of its argument in which the plaintiff alleged that the fire of its building was caused by a Ford van. The van was inspected by plaintiff and the van's insurer but subsequently destroyed before the defendants received notice of the claim. Id. at 183. The lower court found that plaintiff had sufficient control of the van to allow the defendants the opportunity to inspect it and without having such opportunity, the defendants were prejudiced. There, the court granted summary judgment in defendants' favor. The court's finding was affirmed because unlike in Hirsch, the plaintiff in Aetna did not have proof of the damages absent the expert testimony that would be precluded. Finally, Defendant asserts that in Manorcare, the court found

that the appropriate sanction was not dismissal of a case but exclusion of evidence since the plaintiff had evidence from the initial inspection to support their claims.

Defendant argues that the facts of the instant matter are similar to Aetna rather than Manorcare. Defendant asserts that like in Aetna, it did not receive notice of Plaintiff's claim until after Plaintiff paid the buyer the closing adjustment for the roof to be replaced. Defendant also contends that it was not provided with an opportunity to inspect the allegedly defectively installed CB product, unlike the defendant in Manorcare. Defendant thus asserts that its defense against Plaintiff's claims has been substantially prejudiced by Plaintiff's spoliation.

Defendant further asserts that at a minimum, Plaintiff should be sanctioned in the form of "excluding any and all evidence arising out of inspections of the roof prior or during repair or replacement, including but not limited to repair records, photographs, video, expert reports, expert testimony, and testimony of fact witnesses." Defendant contends that if such sanction is imposed, Plaintiff would not have evidence to establish its alleged damage. Thus, like in Aetna, any trial on the merits with its evidence would be futile and instead, dismissal of the Complaint is appropriate.

In opposition, Plaintiff reiterates the circumstances in which the duty to preserve evidence arises and the four elements required to demonstrate spoliation. Plaintiff argues that Defendant's spoliation claims are based on three "inherently flawed underpinnings that demonstrate that absence of an 'actual suppression or withholding' of evidence by Plaintiff." Plaintiff first asserts that Sauer contacted Defendant's customer service telephone line in July and August 2019 after he became aware the roof had sustained damages. Plaintiff claims that Defendant's own call-in log maintained by its customer hotline confirms that Sauer contacted it by phone on August 1, 2019. Similarly, Plaintiff asserts that Caruso confirmed the substance of the conversation and that Defendant was put on notice of the damages to the roof. Second, Plaintiff argues that Defendant

received a pre-suit notice of the claim from Plaintiff through a letter in January 2020 which presented Defendant with an opportunity to inspect the roof while the renovations and repairs were still taking place, yet Defendant failed to do so.

Finally, Plaintiff asserts that Defendant's spoliation claims "are doomed by the very nature of Plaintiff's breach of warranty claims and claims for violation of the New Jersey Consumer Fraud Act." Plaintiff contends that the Complaint is not about the quality, defectiveness, and/or integrity of the CB materials but rather Defendant's instructions that it verbally provided to Sauer. Plaintiff thus argues that there are disputed issues of material facts surrounding Defendant's knowledge of the damages at the roof at the Property.

"Spoliation of evidence in a prospective civil action occurs when evidence pertinent to the action is destroyed, thereby interfering with the action's proper administration and disposition." Aetna Life and Case. CO. v. Imet Mason Contractors, 309 N.J. super. 358, 364 (App. Div. 1993). The duty to preserve evidence arises when there is "(1) pending or probable litigation involving the defendants; (2) knowledge by the plaintiff of the existence or likelihood of litigation, (3) foreseeability of harm to the defendants, or in other words, discarding the evidence would be prejudicial to defendants; and (4) evidence relevant to the litigation." Id. at 366-67. Further, the "spoliator's level of intent, whether negligent or intentional, does not affect the spoliator's liability" but it is a factor that is to be considered. Id. at 368.

Here, it is clear that there exists a duty to preserve evidence by Plaintiff. Not only was Plaintiff aware that there was a probability that there would be litigation involving Defendant's liability in connection with the roof, but it was also foreseeable that Defendant would be prejudiced in not being allowed an opportunity to inspect the roof themselves prior to the roof's replacement. It is undisputed that Plaintiff failed to allow Defendant to inspect the roof prior to it being replaced

in October 2019. On October 23, 2019, the following text exchange between Plaintiff and Buyer took place:

> Plaintiff: When are you going to commence roof repair? I'm discussing it with manufacturer as far a[s] reimbursement for some of my loss. They may need to come take a peek. Thanks.
> Buyer: Roof replacement is half done. Come anytime.

The text exchange demonstrates that Plaintiff was on notice that Defendant needed to inspect the roof and that time was of concern as the Buyer had indicated that the roof replacement was halfway done. Despite knowing so, Plaintiff did not contact Defendant until January 2020, after the completion of the roof replacement thus failing to take the necessary action to allow Defendant to inspect the roof.

As a result of Plaintiff's failure, Defendant does not have the ability to obtain evidence disproving that its product was responsible for the roof defects as alleged by Plaintiff. As in both Aetna and ManorCare, evidence obtained by Plaintiff, including any purported photographs of the roof and reports prepared by Sauer, is not comparable to Defendant obtaining its own evidence and expert report. Here, there are no photos or video of the repair work for Defendant's expert to review. Further, having Defendant rely on Plaintiff's expert testimony and evidence would not eliminate the prejudice to Defendant. The Court finds that rather than dismiss the complaint, the appropriate sanction is to bar, at trial the admissibility of evidence, including but not limited to expert testimony, obtained by Plaintiff during the removal and replacement of the roof.

b. Breach of Express Warranties

Next, Defendant argues that it is entitled to summary judgment on Count I because Plaintiff failed to perform conditions precedent to trigger Defendant's obligations under its express warranty. Defendant claims that there is an express limited warranty for its CB product during the time that the original roof was installed. Defendant submits that under New Jersey warranty law,

"words or conduct relevant to creating an express warranty and words tending to limit such warranty shall be construed wherever reasonable as consistent with each other." N.J.S.A. 12A:2-316. Defendant further asserts that an exclusion or limitation included in an express warranty is inoperative if its terms are unreasonably inconsistent with the express warranties that are given. Gladden v. Cadillac Motor Car Div., Gen. Motors Corp., 83 N.J. 320, 339 (1980).

Defendant contends that its limited warranty clearly sets forth reasonable and conditions. Defendant asserts that Count I is a claim of breach of express warranties and in applying the limited warranty to the undisputed facts, it is entitled to summary judgment. Defendant argues that Plaintiff failed to perform its mandatory obligations under the limited warranty to avail itself of remedies contemplated in the limited warranty. The limited warranty provides the following:

> Claims under this warranty must be made in writing to [BOI] within the applicable warranty period and within thirty (30) days after the discovery of the defect. Such claims must refer to date of purchase and the installer's name and address. Claims should be addressed to: Benjamin Obdyke Incorporated, Attention: Customer Service, 400 Babylon Road, Suite A, Horsham, PA 19044.

Defendant contends that Plaintiff failed to submit a claim within thirty days of discovering a defect as required by the limited warranty. Defendant asserts that Plaintiff admit that its January 31, 2020 letter was the first written notice it provided to Defendant regarding the defective roof despite having discovered the roof before November 2019. Defendant thus argues that Plaintiff's letter was untimely under the limited warranty.

Additionally, Defendant asserts that the limited warranty requires that Defendant "shall have a reasonable opportunity to inspect the Cedar Breather involved for defects before repairs are begun." Defendant claims that it was not provided with such opportunity. Defendant thus contends that it has been prejudiced by Plaintiff depriving it of its right to inspect under the law and under the express terms of the limited warranty.

Further, Defendant argues that even if Plaintiff submitted a valid claim under the limited warranty, Plaintiff failed to establish that the limited warranty was still in force at the time it discovered the roof defects caused by CB. Defendant asserts that the duration of the limited warranty is "based upon the length of whatever warranty applies to new shingles installed contemporaneously therewith." Defendant submits that the limited warranty applies as follows:

> [BOI] warrants to you, the original owner of its [Cedar Breather], when installed in conjunction with new shingles and in accordance with [BOI]'s published installation instructions, is free from manufacturing defects for fifty (50) years after the date of installation when the new shingles installed with Cedar Breather are warranted for fifty (50) years by the shingle manufacturer, or for such shorter period of time based on the warranty period of the new shingles if less than fifty (50) years.

Defendant argues that the Complaint is silent as to whether the CB product was installed in conjunction with new shingles. Defendant also asserts that the Complaint fails to allege any warranty period applicable to any new shingles which is determinative of the duration of the limited warranty. Defendant concludes by arguing that Plaintiff has not provided such information needed to determine the duration of the limited warranty and thus it is entitled to summary judgment.

In opposition, Plaintiff asserts that there are material disputed facts surrounding the timing of Plaintiff's disclosure of damages to the roof with respect to its duty to notify Defendant of its breach of express warranty. Plaintiff contends that Sauer's disclosure on August 1, 2019 satisfied its duty of notice to Defendant pursuant to N.J.S.A. 12A:2-607(3)(a).

Plaintiff submits that a claim for a breach of express warranty provides that "[w]here a tender has been accepted, the buyer must, within a reasonable time after he discovers or should have discovered any breach, notify the seller of a breach or be barred from any remedy." N.J.S.A. 12A:2-607(3)(a). Plaintiff, however, asserts that the provision applies to merchant buyers, not

where a consumer is bringing property damages claims. Additionally, Plaintiff asserts that notice is governed by a reasonableness standard that must be analyzed under the circumstances. Plaintiff submits that the Official Comments to Section 2-607 of the UCC provides:

> The time of notification is to be determined by applying commercial standards to a merchant buyer. "A reasonable time" for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy.

U.C.C. § 2-607, cmt. 4.

Plaintiff argues that Defendant's motion for summary judgment on the breach of express warranty claim cannot succeed as there are disputed material facts suggesting that Defendant was aware of the damaged roof on August 1, 2019 and that the use of the ice and water shield with CB was the cause for the roof's failure. Plaintiff asserts that Defendant had actual notice of the claim by virtue of Sauer's communications and correspondence in August 2019 and Plaintiff's January 2020 letter. Plaintiff submits that courts construing the notice provision in express warranties from manufacturers recognize that notice is plainly sufficient even without the individual consumer providing Defendant with an individual written notice. Wallman v. Kelley, 976 P.2d 330, 333 (Colo. App. 1998). Plaintiff thus claims Defendant was on notice.

Plaintiff's express warranty claim fails as a matter of law because it has failed to adequately allege a breach of contract. To establish a breach of express warranty claim under New Jersey law, a plaintiff "must allege (1) a contract between the parties; (2) a breach of that contract; (3) damages flowing therefrom; and (4) that the party stating the claim performed its own contractual obligations." Cooper v. Samsung Elecs. Am., Inc., 374 F. App'x 250 (3d Cir. 2010) (affirming dismissal of express warranty claim on motion to dismiss where the plaintiff did not provide requisite notice). The Court finds that the express terms of the limited warranty require Plaintiff to

provide Defendant with written notice within thirty days after the discovery of the defect. While the parties dispute whether Defendant was put on notice of the damage to the roof, there is no dispute that the January 2020 letter was the first written notice that Plaintiff provided to Defendant. Plaintiff's failure to provide timely written notice does not fulfill the conditions precedent under the limited warranty. Therefore, the Court finds that Plaintiff fails to state a breach of express warranty claim and grants summary judgment in favor of Defendant on Count I.

c. Remaining Counts

Finally, Defendant contends that it is entitled to summary judgment as to the entire Complaint because its unrebutted expert discovery establishes that Plaintiff's claims are without any merit. Defendant asserts that it is undisputed that its installation instruction expressly required an underlayment of roofing felt and never identified an impermeable membrane, such as ice and water shield, as an acceptable underlayment. Defendant provides that the ice and water shield is a peel and stick membrane that is used as a roof underlayment and installed underneath the roof's shingles. Defendant asserts that Plaintiff alleges that Defendant's written instructions and guidance for CB specified that a non-permeable membrane could be applied underneath the CB. Defendant, however, asserts that the CB instructions expressly require that the CB be installed with an underlayment of 30-lb roofing felt. Defendant asserts Plaintiff decided to install ice and water shield under the CB, rather than felt so that the roof installation would not delay other aspects of construction.

Further, Defendant asserts that Sauer's claim that he received approval from Defendant to install CB over a roof covered in ice and water shield is unsubstantiated by evidence. Defendant contends that Sauer does not recall who he spoke with, what department and made no record of the phone call. Defendant claims that the Complaint does not contain an allegation that a phone

call ever occurred or that Plaintiff relied on anything other than BOI's written installation instructions and specifications. Finally, Defendant contends that Sauer's testimony is biased as he is both Plaintiff's expert witness and the individual who installed the allegedly defective roof.

Defendant argues that the evidence from its expert witness establishes that the CB did not cause the poor performance of the roof. Defendant asserts that Vander Heide used a software program, WUFI, to simulate various factors to realistically calculate moisture transport in multi-layer components exposed to natural weather. Defendant claims that Vander Heide's analysis included a water content analysis to simulate how the roof performed as installed, with the ice and water shield, versus how the roof would have performed if installed with the felt. Defendant contends that the analysis demonstrates that the average moisture content of the roof with the ice and water shield performed just slightly wetter than it would have if installed with felt. Further, Defendant contends Plaintiff did not depose Vander Heide or offer challenges to his analysis.

Defendant asserts that it has provided scientific evidence that its CB product did not contribute to the failure of the roof. Defendant also argues that its instruction for CB expressly requires the installation be over felt. Defendant therefore requests that summary judgment be granted in its favor.

In opposition, Plaintiff argues that Defendant should not be granted summary judgment because there are issues of disputed material facts surrounding the representations made by Defendant's employees relied upon by Plaintiff's roofing contractor, Sauer. Plaintiff asserts that Defendant's corporate designee, George Caruso ("Caruso"), concedes that the specifications and guidance for the installation of CB did not prohibit or preclude the use of an "ice and water shield". Plaintiff also asserts that Caruso corroborates Sauer's testimony by confirming that Defendant provided its customers with a "service telephone help line" to assist callers with installation advice

and guidance during the time period that Sauer sought assistance. Plaintiff contends Defendant cannot meet its burden in demonstrating that there are no disputed issues of material fact as Sauer testified that he was verbally assured by Defendant's representative that ice and water shield could be used with its CB material.

Plaintiff argues that there exist disputed issues of material fact with respect to the verbal guidance provided by Defendant to Sauer on the permissibility of CB used in conjunction with the ice and water shield on the roof. Plaintiff asserts that Defendant does not move for summary judgment for the claims against it for breach of the implied warranties of merchantability and reasonable workmanship and thus the claims are viable. Plaintiff contends that even had Defendant included such claims, summary judgment is precluded.

Plaintiff submits that an implied warranty of merchantability "protect[s] buyers from loss where the goods purchased are below commercial standards or are unfit for the buyer's purpose." Crozier v. Johnson & Johnson Consumer., 901 F. Supp. 2d 494, 509 (D.N.J. 2012); Henningsen v. Bloomfield Motors, 32 N.J. 358, 370 (1960). Plaintiff asserts that for the implied warranty of merchantability to be breached, the product at issue must have been defective or not fit for the general purpose for which it was manufactured and sold. Altronics of Bethlehem, Inc. v. Repco, Inc., 957 F.2d 1102, 1105 (3d Cir. 1992).

Plaintiff argues Defendant breached the implied warranties of merchantability and reasonable workmanship when it verbally advised Sauer that it was permissible for him to use ice and water shield as an underlayment. Plaintiff contends that as a result of Defendant's erroneous advice, the roof prematurely failed ten years into its life when it was guaranteed and warrantied to last at least twenty-five years. Moreover, Plaintiff asserts that Sauer was not aware of any written guidance or instructions by Defendant prohibiting the use of ice and water shield as an

underlayment. Plaintiff claims that Defendant's corporate designee witness, Caruso, testified that no written guidance prohibits the practice of combining ice and water shields as an underlayment. Plaintiff instead contends that it was only in 2014 that Defendant prohibited the use of ice and water shields in conjunction with CB, which was six years after Sauer installed the roof at the Property.

Finally, Plaintiff contend that the evidence suggests that it sustained damages as a result of Defendant's erroneous advice as it was compelled to reduce the purchase price of the Property. Plaintiff thus asserts based on such disputed facts, Defendant's motion for summary judgment must be denied.

The Court finds that there are genuine disputes of material facts as to the remaining counts of the Complaint including as to the breach of warranty of habitability and breach of warranty of reasonable workmanship. Specifically, the Court finds that there remain issues of fact as to whether the cause of the damage to the roof is a result of Defendant's guidance on installation or due to Sauer's installation itself. Further issues related to Plaintiff's expert also being the installer of the roof go to the weight of the evidence and creditability for consideration by a jury. Finally, the dispute over the instructions alleged to have been provided by Defendant to Sauer is subject to a credibility determination by the jury. As there remains a genuine dispute of material facts, the Court denies Defendant's motion for summary judgment as to Counts II, III, and IV.

IV. CONCLUSION

Accordingly, the Court grants Defendant's motion for summary judgment on Count I and denies summary judgment on Counts II, III, and IV.