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SUPERIOR COURT OF NEW JERSEY
MIDDLESEX COUNTY
LAW DIVISION, CIVIL PART
DOCKET NO. L-6171-15

LAKE ESTATES CONDOMINIUM ASSOCIATION, INC.,

Plaintiff,

v.

FALCON ENGINEERING, LLC; FALCON ARCHITECTURAL SERVICES LLC; WB CONTRACTING, JOHN AND JANE DOES 1-100 AND ABC AND XYZ CORPORATIONS 1-100,

Defendants.

AMENDED OPINION

Argued: June 16, 2017
Decided: June 16, 2017
Supplemental Opinion: July 31, 2017
Amended Opinion: August 31, 2017

Paul A. Sandars, III, Esq. and Bernadette H. Condon, Esq., Lum, Drasco & Positan LLC, attorneys for Plaintiff.

Andrew J. Carlowicz, Esq, Hoaglan, Longo, Moran, Dunst & Doukas, LLP, attorney for Defendants Falcon Engineering, LLC and Falcon Architectural Services, LLC.

Michael R. Strauss, Esq., Hollander Law Group, attorney for Defendant WB Contracting.

HON. ARNOLD L. NATALI, JR., P.J.Ch.

The issue presently before the Court on this summary judgment application filed by Falcon Engineering, LLC and Falcon

Architectural, LLC (the "Moving Defendants" or "Falcon") is whether Lake Estates Condominium Association, LLC's ("Plaintiff" or "Lake Estates") tort and contract claims alleging injury to property are barred by the six-year statute of limitations prescribed in N.J.S.A. § 2A:14-1, et seq.[1] For the reasons that follow, the Court denies Moving Defendants' application as both genuine and material questions of fact exist, see Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995), regarding the accrual date of Plaintiff's claims and whether, and to what extent, Plaintiff released Falcon from liability for the property damage at issue.

A party's claims against architects and others involved in the design and construction of building projects generally accrue upon "substantial completion" of the project. However, that general rule remains subject to equitable principles, such as the discovery rule. If applicable, the discovery rule mandates that Plaintiff's tort and contract claims would not accrue until Plaintiff discovers "... or by an exercise of reasonable diligence and intelligence should have discovered that [it] may have a basis for an actionable claim." See Lopez v. Swyer, 62 N.J. 267, 272 (1973).

[1]Plaintiff has asserted claims for negligent construction (Count I), breach of contract (Count II), breach of implied warranties (Count III), negligent misrepresentation (Count IV), professional malpractice (Count V); third party beneficiary (Count VI) and Consumer Fraud (Count VII).

Simply because the discovery rule may be applicable to a claim does not translate into an automatic tolling of the applicable limitation period. Rather, a party seeking to invoke the equitable doctrine of the discovery rule has the burden of proof to establish that it is entitled to the benefit of the rule. In this regard, the Court concludes that the motion record establishes a genuine and material factual question regarding the date of accrual of Plaintiff's claims and, consistent with Lopez, supra, 62 N.J. 267, the Court shall conduct a plenary hearing to determine when Plaintiff discovered, or should have discovered, it had an actionable claim against Falcon.

Further, the Court concludes that a party who successfully invokes the discovery rule, and who therefore seeks a tolling of the applicable statute of limitations, is ordinarily afforded the entire limitation period after accrual. At the Lopez hearing, the Court shall also address whether equity supports deviation from that general rule. See Fox v. Passaic Gen. Hosp., 71 N.J. 122, 126 (1976). The Court notes that cases that have truncated the statutory period for a party to file suit involve claims of equitable estoppel and are inapposite factually and legally to the accrual issue presented in this motion record.

Finally, the Court concludes that genuine and material

facts exist in this record regarding Plaintiff's "release" of Falcon for the property damage claims plead. The single deposition provided to the Court does not establish the absence of genuine and material factual questions regarding the scope of any release or indemnity. Further, discovery is incomplete and, in fact, remains in its relative infancy.

I. Procedural and Factual Background

Plaintiff is the homeowners' association for Lake Estates (formerly known as The Courts at East Brunswick), a condominium complex consisting of 22 buildings and 291 units located in East Brunswick, New Jersey. The complex was originally constructed as rental property, changing to cooperative residential units and finally in 2009 to a condominium form of ownership.

The gravamen of Plaintiff's October 16, 2015 Complaint against Defendants Falcon and W.B. Contracting is that after each performed work (actual construction or plan and specification preparation) at the complex, water and condensation infiltrated, or continued to infiltrate, the units causing property damage. See Complaint at paragraph 19. Plaintiff further avers that after it advised Falcon and W.B. Contracting of the condensation issues, it requested they remediate the issues further. Falcon and W.B. Contracting allegedly offered design solutions "in the form of modifications to Falcon's original specifications," but the condensation

issues continued even after implementation of the design changes. Complaint at paragraphs 21-22.

In March 2005, and prior to the condominium conversion, Falcon submitted a proposal to provide architectural and engineering services to Plaintiff's predecessor. Falcon proposed to evaluate the existing conditions at the buildings. Falcon understood that the property owners "contemplated the possibility of various repair, reconstruction and/or replacement work in [the] common elements." Falcon's Unopposed Statement of Material Fact at paragraph 3. Section B of the proposal details the services Falcon would provide relative to the initial condition analysis and any cost estimate preparation. After consultation and agreement with Plaintiff, the next phase of the project included preparing construction plans, specifications and related inspections. See Agreement at Section C; Unopposed Statement of Material Fact at paragraph 4. In September 2005, Falcon issued a General Conditions and Assessments Survey. Id. at paragraph 6. Next, Falcon provided engineering and architectural plans outlining the work that W.B. Contracting would perform, the contractor selected by Plaintiff. Id. at paragraph 7.

As noted, Plaintiff's predecessor retained Defendant W.B. Contracting for a sum in excess of $7.2 million to perform the construction work at the complex in accordance with the plans

issued by Falcon. Id. at paragraphs 7-8. W.B. Contracting began its work in 2007. Id. at paragraph 9. During the course of construction, W.B. Contracting submitted payment applications to Plaintiff. Falcon maintains that the payment applications and related documents (and the sole deposition of Plaintiff's property manager submitted to the Court) establish that the project was substantially completed in July 2009. Although Toni-Lee Frisone, Plaintiff's property manager from 2006-2013, identified a July 22, 2009 application for payment as the last payment to be made to WB Contracting, Ms. Frisone stated that all work at the complex was not completed. See Certification of Plaintiff's counsel, Exhibit E T:52:10 – T:53:17. Ms. Frisone stated that "[t]here were still little things that needed to be done[,]" a task list to be completed, identified as a punch list. Id. at T:53:16 – T:54:1.

Plaintiff does not dispute that it had some knowledge that tenants were experiencing problems with condensation and its effects well prior to its filing of its October 16, 2015 Complaint. Indeed, it appears Plaintiff had knowledge of condensation problems in certain units as early as March 26, 2008. In a letter from Ms. Frisone, she stated "[t]he Board of The Courts of East Brunswick was aware of condensation issues as of March 26, 2008." Id. at paragraph 14. The March 26th letter, which also forms the basis of Falcon's claims that Plaintiff

released it from the property damage claims at issue, provides in pertinent part:

> Falcon understands that this analysis is time consuming and time and weather sensitive. We understand that the board would like us to abort the rest of our analysis and concentrate on the units that were damaged by excessive condensation in Buildings 6, 7, and 13 and move forward with the roof installations noted above on the remaining buildings. Falcon cannot guarantee that the above method of installation will resolve the condensation issue without having performed the rest of our analysis. That being said we would like the Board of Directors to sign off on this proposed method of installation indemnifying Falcon of any future claims of damage due to condensation.

Further, Plaintiff conceded that "unit owners became aware of 'condensation and water infiltration' at the subject properties as early as 2009", see Falcon's Uncontested Statement of Material Facts at paragraph 27, and that the issue was raised at January 21, 2010, February 4, 2010 and March 18, 2010 board meetings.

Plaintiff's Counterstatement of Material Facts offers that at the time Falcon provided its General Conditions Assessment, it noted a "pervasive 'major structural deficiency' as well as numerous deficiencies in the roofs, exterior veneers and windows and floors." Plaintiff's Counterstatement of Material Facts at paragraph 2-3. Plaintiff agrees that Falcon recommended remediation of the deficiencies and in this regard prepared specifications for potential remedial work, ultimately awarded

to W.B. Contracting. In addition to assisting Plaintiff's predecessor in the cooperative to condominium conversion, Falcon also prepared an engineering survey. In that survey, Falcon stated that it "observed deficient structural condition [that] are in the process of being corrected as part of the currently underway renovation project" and that "the existing structural system... as repaired will be in good condition." Id. at paragraph 6-7.

However, despite Defendants' work on the project, condensation issues persisted within the units, as indicated in the January 13, 2009 letter from the Falcon Group. See Certification of Anthony Volpe, P.E., Exhibit H at pgs. 1-2. Specifically, the Falcon Group documented high levels of humidity and temperature within apartments 4B and 5B of Building 7, as well as the crawl spaces under apartments 4A and 5A. Id. at pg. 1. The high levels of relative humidity within the apartments was traced to the moisture emanating from the crawlspaces below 7-4A and 7-5B, an area in which the relative humidity was "excessively high." Ibid. Further, the letter states that "[b]ased upon recent observations and measurements, the dehumidifiers and the sump pumps have reduced the moisture in the crawlspaces." Ibid. As a result, it was noted that the status of Building 7 had improved, as the humidity levels were substantially lower in apartments 4B and 5B. Id. at pg. 2.

Based on the observations of the Falcon Group, it made the following recommendations:

> We will continue to monitor this issue and comment on our findings. We suggest bringing in a contractor who specializes in the installation of dehumidification and ventilation systems to review the existing conditions along the crawlspaces to develop a proposal for an adequately sized system to maintain satisfactory levels of relative humidity. A mechanical engineer should then be consulted to verify the proposed system prior to installation. Based on our observations to date of Building 7 as well as other buildings throughout the community we feel that the environmental conditions within the crawlspaces have resulted in the observed condensation along the roof framing.

Ibid.

Following this recommendation, WB Contracting sent correspondence to Ms. Frisone on March 26, 2009, stating that the company had "prepared and installed some louvered air vents on the roofs of buildings 4, 6, 7 and 17." See Certification of Anthony Volpe, P.E., Exhibit I at pg. 1. Based on the humidity readings taken by Falcon Engineering, WB Contracting indicated that the vents had been successful in reducing the humidity in the attic space. Ibid. Despite WB having been unable to confirm that such action would entirely resolve the condensation problem, WB Contracting noted that it appeared to be "making a huge difference." Ibid.

According to Plaintiff, work consistent with Falcon's specifications continued "through the end of 2009." Id. at

paragraph 7. Again, the condensation problem was apparently not resolved. In a January 21, 2010 Board Meeting, Plaintiff reported receiving "a few calls about condensation starting again." Plaintiff reported it was "in contact with WB Contracting Corp. and they have 3 more vents ready to be installed. They should be on the property within a week." Id. at paragraph 8-9. Shortly thereafter, the Board in February 2010 noted that "WB Contracting Corp. has been to the property 3 times and is installing vents where needed." Ibid. A month later, Plaintiff begin to prepare for W.B. Contracting to blow insulation into the roof cavities to address the recurring condensation issues. Id. at paragraph 11.

Some eight months later, Plaintiff advised Falcon in the Fall of 2010 that its proposed remedial efforts did not address the condensation issues. Id. at paragraph 12. Falcon allegedly re-inspected the property and made recommendations. Ibid. According to Plaintiff, Falcon continued to inspect the property with respect to the condensation and water infiltration problems in February and March 2011 and continued such inspections through January 2012. Id. at paragraph 14.

Specifically, an inspection of Buildings 7, 8 and 10 was conducted on September 24, 2010, as detailed in the October 15, 2010 letter to Ms. Frisone, for the purpose of "observ[ing] the existing conditions and provide a professional opinion regarding

[its] observations." See Certification of Anthony Volpe, P.E., Exhibit J at pg. 1. After conducting the aforementioned inspection, the Falcon Group made the following observations:

> [W]e observed a layer of dried silt on the concrete slab. We observed an exterior stair well with similar silts on the concrete slab, which may indicate the stair as a water infiltration source. The heavy silt deposits on the concrete slab may indicate that fines are being brought into the basement by a high volume of water. The large volume of silt may have caused the sump pump to fail. Typically water that is penetrating a CMU will not have the volume of silt that we see here. This indicates to us that the water is entering at the stair well in high volumes.
>
> ... ...
>
> We were informed by the maintenance contractor that the basement gets several inches of water during particular rain storms. We observed a non functioning sump pump and pit that was filled with water.
>
> ... ...
>
> During the visual inspection of the Building 8 basement we observed a horizontal crack in the exterior mechanical room CMU wall (see photo on the next page). ... There is an existing sump pump at the left side of the wall that appears to be functioning properly. We observed water marks at the basement window that appear to be a water infiltration location.
>
> ... ...
>
> We observed water marks on the wall (see photo on the next page). We observed several water puddles on the concrete slab floor.

Id. at pgs. 1-2.

Based on the observations detailed in the October 15, 2010 letter, the Falcon Group made the following recommendations for

resolution of the aforementioned issues: (1)"the location of the water entering the basement in Building 7 be confirmed during the next heavy rain[;]" (2) "a dehumidifier be installed in the basement set to drain to the existing sump pump" for Buildings 7 and 10; and (3) "that plans and specifications be developed for Building 8 to reduce the amount hydrostatic pressure from the exterior of the wall and construct a pilaster system to be installed to shore up the existing wall deflections." Id. at pg. 3.

With respect to the inspection of the exterior walls that was similarly conducted on September 24, 2010, it was discovered that there were "drywall cracks near the stairs [that were] relatively small but [were] located at structural points in the wall[.]" See Certification of Anthony Volpe, P.E., Exhibit K at pgs. 1-2. Based on that observation, it was recommended that an "invasive inspection" be conducted to "remove the drywall and verify that the framing [was] functioning properly." Id. at pg. 2.

Again, an onsite inspection of the property was performed on February 18, 2011 and the observations and recommendations were confirmed by way of correspondence dated February 21, 2011. See Certification of Anthony Volpe, P.E., Exhibit L at pg. 1. Specifically addressing the interior basement wall observations, the Falcon Group stated:

> The floor joists were running parallel to the cracked wall and were not bearing directly on the cracked wall. There were three (3) separate temporary columns. We were told that these supports were installed by the Association's maintenance personnel.
>
> There was water staining on the cracked wall and mud stains on the floor at the lower right side of the wall. There was a sump pit with a pump that was full of water near the subject area but the pump was not operational at the time of our observations.

Id. at pg. 2.

Based on the visual observations noted during the February 18, 2011 inspection, Falcon stated:

> The existing grade indicated that storm water runoff is directed towards the building in this area and appears to be concentrated at an inside corner of the foundation wall. This inside corner corresponds to the location where we observed heavy mud staining on the interior side. The bulging of the foundation wall is likely due to poorly drained soils exerting pressure on the wall during and after rain events (and snow melting). The unsupported span length of the wall may also be too long for the amount of lateral pressure that is being exerted on the wall.

Id. at pg. 4.

Because the condensation issues persisted after Falcon's "recommendations and modifications to its designs in 2011", see Complaint, paragraph 15-16, plaintiff alleges it retained Jeffrey Kusmic in December 2011 to evaluate the condensation issues. Mr. Kusmic issued a report and concluded:

- "Falcon and WB's recommendation to add thicker insulation, blown-in insulation and/or to add 1.4 thick poly-iso roof insulation does not prevent condensation from forming at the interior of the

plywood roof sheathing;

- the drawing and actual construction improvement made do not met the code minimum;
- Falcon breached their standard duty of care owed to Lake Estates and are negligent of malpractice in failing to provide the code required minimum attic ventilation and for their failure to identify and solve the condensation issues when they had prior knowledge of excess moisture;
- Falcon and WB's recommendation to eliminate all remaining roof vents and soffit vents only exacerbated the condensation issue by completely blocking all air ventilation within the roof cavity;
- Had Falcon performed simple thermal and vapor calculations utilizing the "Dew Point Method" as described in ASHRAE, they would not have recommended modifications to the roofing insulation which did not resolve the condensation issue and only resulted in increased project costs to the detriment of Lake Estates ultimately benefitting Falcon through their hourly billings and their 8% construction administration fee charge to Lake Estates against their increased construction costs."

See Counterstatement of Material Facts at paragraph 17. Plaintiff maintains that it was not until receipt of Mr. Kusmic's December 2011 report that the "Association became aware that the condensation issue was actually caused and/or exacerbated by Falcon's design and WB's implementation." Id. at paragraph 18.

The Court issued an oral decision and coincident Order after oral argument, and in accordance with R. 1:6-2(f), on June 16, 2017 denying Falcon's motion. At oral argument, the Court advised counsel that it intended to supplement its oral decision with a written opinion. In addition, while the parties were before the Court for the June 16, 2017 oral argument, the Court

indicated that it would permit the parties to conduct further limited discovery in preparation for the Lopez hearing and requested that counsel send the Court a proposed form of order setting new discovery dates and deadlines. Accordingly and with the consent of the parties, the Court entered a Case Management Order on July 5, 2017, setting the following discovery deadlines, in relevant part: (1) the parties were required to serve all supplemental, written discovery demands related to Falcon's statute of limitations defense on or before July 14, 2017; (b) the parties were required to respond to the aforementioned supplemental written discovery demands on or before August 4, 2017; and (3) the discovery end date was extended to December 31, 2017.

On July 11, 2017, Falcon sought interlocutory review of the Court's June 16, 2017 Order. On July 31, 2017, the Court supplemented its oral decision with a written opinion filed with the Clerk of the Appellate Division in accordance with R. 2:5-1(b). On August 21, 2017, the Appellate Division denied Falcon's motion for leave to appeal the Court's June 16th interlocutory Order. On August 31, 2017, the Court issued this Amended Opinion to address and correct non-substantive matters in its July 31st Opinion.

II. Contentions of the Parties

Falcon contends that Plaintiff's claims are time-barred

because Plaintiff filed its Complaint more than six years after substantial completion of the project, the date Falcon maintains Plaintiff's claims accrued. Falcon contends that Plaintiff was definitively aware of some harm caused by condensation prior to July 22, 2009, and the work at the condominium complex was substantially completed by this time. According to Falcon, "Plaintiff had six years from that date (actually from an earlier date) in which to file its complaint." See Falcon's Moving Brief at 12.

As noted, Defendant also relies on the March 2008 letter from Ms. Frisone in which Plaintiff allegedly waived all claims relating to the remedial efforts that were taking place at that time. Falcon maintains the March 2008 letter is an "agreement between plaintiff and the Falcon Defendants constitut[ing] a novation or an accord and satisfaction." See Falcon's Moving Brief at p. 13. Further, in its reply brief, Defendant raises an additional, or more nuanced statute of limitations argument; specifically, that Plaintiff may not seek relief under the discovery rule because its opposition papers admit that it knew of the potential causes of action against Falcon in 2011 when it received the Kusmic report, yet Plaintiff failed to initiate suit based on such claims until four years later.

In opposition, Plaintiff contends that it timely filed its claims against Falcon and no New Jersey case stands for the

proposition that all claims filed against a contractor or architect accrue on the date of substantial completion. It disputes Falcon's claims of substantial completion and points out that the authority relied upon by Plaintiff is distinguishable because unlike the cases cited by Falcon, no contract exists between the parties that the time "within which claims could be brought begins to run when the Certificate of Substantial Completion was issued." Opposition Brief at p. 3. Here, Plaintiff avers there is no contractual provision that "uses substantial completion as a trigger to start the six year statute of limitations of the Plaintiff's claims."

Next, Plaintiff maintains that its claims against Falcon did not accrue until receipt of the Kusmic Report, which at that time established its admitted knowledge of condensation and the actions of the Defendants that caused and/or exacerbated the issues. In support of its arguments, Plaintiff primarily relies on the unpublished decision of the New Jersey Superior Court, Appellate Division in The Palisades at Fort Lee Condominium Association, Inc. v. 100 Old Palisades, LLC, et al., 2016 N.J. Super. Unpub. LEXIS 193 (February 1, 2016), certif. granted, 227 N.J. 1 (2016).[2]

[2]The Court is mindful of the proscriptions noted in R. 1:36-3. In this regard, the Court does not cite the Palisades decision as binding authority in its decision but rather solely for the purpose to recite and distinguish accurately the positions of the parties and the authorities relied upon by counsel. The Court's decision and its legal analysis are based on the

As to the alleged accrual date, Plaintiff makes an additional argument that it did not suffer damages until late 2011 when it began having to pay for repairs. Until that time, Plaintiff alleges that it was unaware of the causal relationship between the condensation experienced and the work that Falcon and WB had done previously, but for receipt of Kusmic's report. Further, because many of the unit owners had purchased the units directly from previous owners, Plaintiff contends that the association did not suffer an ascertainable loss until it began making repairs and hiring professionals in response thereto.

Finally, Plaintiff contends that summary judgment would be premature and improper before completion of party depositions. In this regard, Plaintiff maintains Falcon omitted key facts that demonstrate the existence of genuine and material disputes.

III. Conclusions of Law

a. *Summary Judgment*

Pursuant to R. 4:46, "[s]ummary judgment must be granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the 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). In assessing

published authority cited in this Opinion and in its oral decision.

whether a genuine issue of material fact exists, the trial court must "consider whether competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter;" rather, the trial court should limit its determinations to whether a genuine issue for trial exists. Id. (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986)).

Further, "[a] trial court should not grant summary judgment when the matter is not ripe for such consideration, such as when discovery has not yet been completed." Driscoll Const. Co., Inc. v. State, Dept. of Transportation, 371 N.J. Super. 304, 317 (App. Div. 2004). The court should be sure to "afford every litigant who has a bona fide cause of action or defense the opportunity for full exposure of his case." Osalacky v. Borough of River Edge, 319 N.J. Super. 79, 87 (App. Div. 1999) (quoting Velantzas v. Colgate-Palmolive Co. Inc., 109 N.J. 189, 193 (1988)). In order to defeat a motion for summary judgment by arguing the motion is premature, plaintiff will bear the obligation of "demonstrat[ing] with some degree of particularity the likelihood that further discovery will supply the missing

elements of the cause of action." Auster v. Kinoian, 153 N.J. Super. 52, 56 (App. Div. 1977). However, if the ruling on a summary judgment motion is solely dependent upon a question of law, "or if further factual development is unnecessary in light of the issues presented, then summary judgment need not be delayed." United Sav. Bank v. State, N.J. Super. 520, 525 (App. Div. 2005). See also Pressler & Verniero, Current N.J. Court Rules, comment on R. 4:46-2 (2017).

b. Statute of Limitations and Accrual Date of Claims

The statute of limitations applicable to claims for tortious injury to real or personal property is six years and is set forth in N.J.S.A. § 2A:14-1:

> [E]very action at law for trespass to real property, for any tortious injury to real or personal property, for taking, detaining, or converting personal property, for replevin of goods or chattels, for any tortious injury to the rights of another not stated in sections 2A:14-2 and 2A:14-3 of this Title, or for recovery upon a contractual claim or liability, express or implied, not under seal, or upon an account other than one which concerns the trade or merchandise between merchant and merchant, their factors, agents and servants, shall be commenced within 6 years next after the cause of any such action shall have accrued. N.J.S.A. §2A:14-1.

Because the statute does not define when a cause of action accrues, the definition of accrual has been left to judicial interpretation. Rosenau v. City of New Brunswick, 51 N.J. 130, 137 (1968). Traditionally, the accrual of a cause of action

occurs on the date when "'the right to institute and maintain a suit first arises.'" Russo Farms, Inc. v. Vineland Bd. of Ed., 144 N.J. 84, 98 (1996) (citing Rosenau, supra 57 N.J. at 137; quoting Fredericks v. Town of Dover, 125 N.J.L. 288, 291 (E. & A. 1940)). The time at which this right arises "refers to the combination of facts or events which permit maintenance of a lawsuit; the time of occurrence of the last of these requisite facts is thereby made the critical point of inquiry." Id. (citation and internal quotation omitted).

In the context of construction cases, courts have held that such claims generally accrue, and the statute of limitations triggered, at the time that the project is substantially complete. Russo Farms, Inc. v. Vineland Bd. of Ed., 144 N.J. 84, 92-93 (1996). As stated by the Supreme Court in Russo, the term "substantial completion" has a precise meaning within the construction industry. Id. at 117 (citation omitted). Generally, the term is defined as:

> the date when construction is sufficiently complete . . . so the owner can occupy or utilize the building. Substantial completion occurs when the architect certifies such to the owner and a certificate of occupancy is issued attesting to the building's fitness. At that point, the building is inhabitable, and only touch-up items and disputed items, the 'punch list,' remain. The punch list is a final list of small items requiring completion, or finishing, corrective or remedial work.

Ibid. (internal quotations and citations omitted).

When assessing whether a particular project is substantially completed, "the issue is not whether the construction has defects but whether a certificate of occupancy has been issued such that the property can be used for its intended purpose." Trinity Church v. Lawson-Bell, 394 N.J. Super 159, 176 (App. Div. 2007).

It should be noted that in addition to the statute of limitations, construction claims are also subject to the statute of repose, see N.J.S.A. 2A:14-1.1, after which a potential cause of action extinguishes. Trinity Church, supra, 394 N.J. Super. at 175. N.J.S.A. 2A:14-1.1 was enacted with the purpose of "protect[ing] architects and other construction professionals from the potential 'liability for life' posed by the discovery rule." Id. at 176. "The substantial completion clause insulates architects and other construction professionals from the operation of the discovery rule during the four-year gap between the statutes[,]" thereby precluding application of the discovery rule to the statute of repose. Id. at 175-76. With these principles in mind, the Russo court rejected the argument that accrual in construction cases for statute of limitations purposes did not commence until the final "punch list item" was completed, concluding that:

> if liability were to be measured from the date the last retainage is released and all disputed

> and punch list items are completed, a contractor's exposure to suit might be prolonged unreasonably. Disputes over workmanship and compensation for services can continue for years. Under the Appellate Division's analysis, a contractor would remain liable and the commencement of the statute of repose could be delayed indefinitely. Such a result is inconsistent with the statutory purpose to provide repose and allow contractors and architects to walk away from liability at a certain point in time; indeed, it would, all too often, provide 'liability for life.'

Russo Farms, Inc., supra, 144 N.J. at 117-18.

c. *The discovery rule and equitable estoppel*

The discovery rule is an equitable doctrine and provides that "in an appropriate case a cause of action will be held not to accrue until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim." Lopez v. Swyer, 62 N.J. 267, 272 (1973). The rule was developed to mitigate "the often harsh and unjust results which flow from a rigid and automatic adherence to a strict rule of law." Id. at 273-74.

As Falcon cites extensively to cases addressing the related doctrine of equitable estoppel, a brief discussion of the fundamental differences between the discovery rule and the tolling of limitation periods under estoppel principles is necessary. As stated in Villalobos v. Fava, 342 N.J. Super. 38, 45-46 (App. Div. 2001):

> There is a significant distinction between the two equitable doctrines affording relief from unfair and unnecessarily harsh results. The discovery rule avoids the mechanical application of a statute of limitations by postponing the accrual of a cause of action so long as a party is unaware either that he has been injured or that the injury was due to the fault or neglect of an identifiable person. Equitable tolling assumes the accrual of the action but intercepts and delays the bar of the statute of limitations because the plaintiff lacked vital information, which was withheld by a defendant.

Determining whether the discovery rule is applicable is "center[ed] upon an injured party's knowledge concerning the origin and existence of his injuries as related to the conduct of another person." Torcon, Inc. v. Alexian Bros. Hosp., 205 N.J. Super. 428, 435 (Ch. Div. 1985). In some instances, "the fact of the wrong lay hidden until after the prescribed time had passed[,]" while "[i]n other cases damage may be all too apparent, but the injured party may not know that it is attributable to the fault or neglect of another." Lopez, supra, 62 N.J. at 274.

Thus, the knowledge required is of both injury and fault. Torcon, Inc., supra, 205 N.J. Super. at 435(emphasis supplied). Specifically, "once a party knows it has been injured and the injury is the fault of another it has the requisite knowledge for the applicable period of limitations to commence running." Ibid. The injured party need not be aware of the exact cause of the injury before the applicable statute of limitations may commence; "[i]t is only the identity of the party causing the

injury and the fact of injury that must be known." Ibid. Further, "[i]t is not necessary that the injured party have knowledge of the extent of the injury before the statute begins to run." Id. at 436 (citation and internal quotation omitted).

As the above cases make clear, the discovery rule is not boundless. Indeed, it contemplates that it may be "unjust, [...], to compel a person to defend a law suit long after the alleged injury has occurred when memories have faded, witnesses have died and evidence has been lost." Id at 274. Therefore, New Jersey courts have held "that the equitable claims of the parties must be weighed against each other and that not every belated discovery will justify application of the rule." County of Morris v. Fauver, 153 N.J. 80, 109 (1998). With this in mind, the discovery rule imposes an affirmative duty on plaintiffs "to use reasonable diligence to investigate a potential cause of action, and thus bars from recovery plaintiffs who had reason to know of their injuries." Ibid.

Where the competing equitable claims of the parties cannot be reconciled, a just resolution must be reached, preferably by the judge, rather than the jury. Lopez, supra, 62 N.J. at 274. Typically, the best approach for the judge is to hold a preliminary hearing outside of the presence of the jury to make the determination of whether equity should preclude the statute of limitation's bar. Id. at 275. If credibility is an issue,

the court should avoid resolving the issue solely on the basis of affidavits. Ibid. However, the manner in which the hearing proceeds remains within the discretion of the trial court. Ibid. The Lopez court instructed that the following factors may appropriately be considered by the judge:

> the nature of the alleged injury, the availability of witnesses and written evidence, the length of time that has elapsed since the alleged wrongdoing, whether the delay has been to any extent deliberate or intentional, whether the delay may be said to have peculiarly or unusually prejudiced the defendant. The burden of proof will rest upon the party claiming the indulgence of the rule. Id. at 276.

In response to Plaintiff's contention that the discovery rule applies and mandates denial of Falcon's summary judgment motion, Falcon contends that "[i]t is well established that [...] a plaintiff no longer can endeavor to toll the statute of limitations based upon either the discovery rule, or equitable estoppel, if there remains a reasonable amount of time under the [...] limitations period to commence a cause of action the action will be barred if not filed within the remaining time." Defendants' Reply Brief at pg. 2 (emphasis supplied). Relying on that purported proposition of law, Falcon essentially contends, putting to one side any factual questions regarding the accrual date, that Plaintiff is not entitled to the benefit of the discovery rule and the full six years after accrual because it still waited four years to file a lawsuit after

Plaintiff admits (from its receipt of the Kusmic report) to have been made aware of the harm and its cause.

Falcon also maintains that the Palisades court's holding permitting a party the entire six-year period after accrual to file a claim is erroneous and in contravention of "at least five (5) controlling Appellate Division and Supreme Court cases." See Falcon Reply Brief at p. 2 (citing Torcon, Inc. v. Alexian Bros. Hosp., 205 N.J. Super. 428, 437 (Ch. Div. 1985), aff'd, 209 N.J. Super. 239 (App. Div. 1986), certif. denied, 104 N.J. 440 (1986); Evernham v. Selected Risks Ins. Co., 163 N.J. Super. 132, 137 (App. Div. 1978); Ochs v. Federal Insurance Co., 90 N.J. 108, 117-18 (1982); Mosior v. Insurance Co. of North America, 193 N.J. Super. 190, 197 (App. Div. 1984); Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572, 589-90 (1993). Although at oral argument the Court addressed these cases and noted that the holdings in those matters did not support the relief requested, the Court provides further amplification of its reasoning.

First, as noted, in each of the cases cited, the courts addressed the equitable doctrine of estoppel and not the relief requested here by Falcon; namely, that after accrual a court should truncate the permitted statutory period as a matter of law, and assumedly, under the facts in the motion record. Indeed in Torcon, the trial court, after remand and a Lopez

hearing (like the hearing ordered here) concluded that the discovery rule was inapplicable to the facts before it, as plaintiff knew of the injury and the only defendant that could have caused the harm. Torcon, supra, 205 N.J. Super. at 436. Only after it determined the date of accrual, and the discovery rule's inapplicability, did the Torcon, court examine the equitable doctrine of estoppel. Id. at 436-47. The court defined that doctrine as:

> [c]onduct amounting to a misrepresentation or concealment of material facts, known to the party estopped and unknown to the party claiming estoppel, done with the intention or expectation that it will be acted upon by the other party and on which the other party does in fact rely in such a manner as to change his position for the worse is essential to a finding of equitable estoppel.

Id. at 437.

The court next recognized the well-established exception to the equitable remedy of estoppel that Falcon attempts to rely upon here in the context of limiting the statutory period after accrual. Judge Wertheimer noted that even if equitable estoppel applies to a given action, "[i]t is well established that if, after the cessation of any basis for continued reliance by a plaintiff on the conduct of a defendant there remains a reasonable time under the applicable limitations period to commence a cause of action, the action will be barred if not filed within the remaining time." Ibid. The Torcon court did

not, as Falcon asserts, limit a party's statutory period to file a claim after accrual under the discovery rule.

Rather, the court specifically held in that case that the discovery rule did not apply. And, it concluded in rejecting plaintiff's equitable estoppel claim, that it would not delay the application of the statute of limitations because plaintiff had sufficient time to file its claim within the statutory period after the perfidious conduct ceased. The remaining cases cited by Falcon are in accord. In Evernham, the court held, among other reasons, that the discovery rule was inapplicable as the limitation period in that case began "from a fixed event." Evernham, supra, 163 N.J. Super. at 136. After rejecting plaintiff's request to delay accrual under the discovery rule, the court similarly dismissed any attempt to rely on equitable estoppel principles. Id. at 137. See also Ochs, supra, 90 N.J. at 116-117; Mosior, supra, 193 N.J. Super. at 197 (equitable estoppel inapplicable based on insurer's failure to furnish certificates of insurance and because reasonable time remained within the statutory period to file a claim after cessation of the objectionable conduct); Kaprow, supra, 131 N.J. at 589-590 (equitable estoppel inapplicable as the alleged misconduct at issue occurred prior to commencement of the limitations period and there remained sufficient time after cessation of the conduct to file a claim).

Thus, as the Torcon, Evernham, Ochs, Mosior and Kaprow holdings clearly state, those courts did not shorten a party's time to file a claim after accrual under the discovery rule, and therefore criticism of the Palisades decision on that basis is misplaced. Those courts so held because, as noted, there is a fundamental, substantive distinction in equity between the delayed accrual of a claim and the abbreviation or temporal curtailing of the statutory period once a claim has accrued. As the Villalobos court explained, the discovery rule postpones the accrual of a cause of action while equitable tolling "assumes the accrual of the action but intercepts and delays the bar of the statute of limitations because the plaintiff lacked vital information, which was withheld by defendants." Villalobos, supra, 342 N.J. Super. at 45-46.

Further, Falcon's claims that Plaintiff, as a matter of law and on this factual record, is not entitled to the full statutory period to file a claim after accrual is inconsistent with the New Jersey Supreme Court's holding in Caravaggio v. D'Agostini, 166 N.J. 237 (2001) and Fox v. Passaic Gen. Hosp., 71 N.J. 122 (1976). In Caravaggio, the Supreme Court held, in the context of a medical malpractice action that "'notwithstanding that plaintiff discovers his cause of action for malpractice prior to the expiration of two years from the date of actionable conduct, he nevertheless will ordinarily be

allowed two full years from the date of such discovery to bring this action." Caravaggio, supra, 166 N.J. at 250(quoting Moran v. Napolitano, 71 N.J. 133, 134 (1976) and citing Fox v. Passaic Gen. Hosp., 71 N.J. 122, 126 (1976)).

In Fox, the Supreme Court explicitly held that a plaintiff whose claim first accrued upon application of the discovery rule is ordinarily afforded the entire statutory period. In its holding, the Court affirmed the majority decision of the Appellate Division and rejected the lower court's dissent that opined that a plaintiff should not automatically be permitted the entire statutory period upon accrual of a cause of action under the discovery rule. The Supreme Court specifically held:

> In our view, the principles governing administration of the discovery rule should be as simple and uncomplicated as is consistent with the achievement of justice for both claimants and defendants in this area. We reaffirm the views expressed in Lopez v. Swyer, supra, calling for an equitable approach to the question of the bar of limitations when discovery by plaintiff of the cause of action is delayed and an action is begun more than two years after the actionable occurrence. But we see no utility in a rule which would add to the difficulties already faced by a trial judge in determining, under *Lopez*, the date of 'discovery' of the cause of action by the plaintiffs, the task of resolving in every case the 'reasonableness' *vel non* of the time left for the commencement of an action between the date of discovery and the expiration of the two years from the actionable occurrence. It is convenient as well as logical to take the position that since the cause of action does not accrue until discovery thereof, under the rationale of the discovery principle, the plaintiff should

> normally have the benefit of the legislative policy determination that he may institute his action at any time within two years from the date of such accrual.
>
> Subject to administration of this concept with an eye to justice for the defendant as well as the plaintiff -- a matter presently to be addressed -- we see no reason why it should be required of the plaintiff that he bring his action with any degree of 'expedition' after discovery of his cause of action, as intimated in some of the earlier cases. In principle, he should ordinarily have the full statutory two years after accrual, just as he does when discovery is contemporaneous with the actionable conduct. The position we espouse has the virtue of reducing the uncertainty as to when the bar of limitation cuts off the cause of action to the maximum extent consistent with the nature of the discovery rule. It should therefore be helpful to lawyers counselling plaintiffs as well as defendants.

Id. at 126-27 (internal citations omitted).

However, the Fox court recognized that as an equitable principle, the discovery rule must be administered in a manner not to "unduly ... affect a defendant's right to equitable treatment" as the principle has the "inherent capacity for prejudice to a defendant since the principle of repose inherent in the statute of limitations is necessarily diluted when an action is instituted beyond the statute period after the defendant's actionable conduct." Id. at 127-28 (citation omitted). Thus, courts are empowered to consider circumstances that would support exception to the general rule. In this regard, the Fox court held:

> We therefore are of the view, and hold, that if a defendant can establish (a) that the lapse of time between the expiration of two years after the actionable event and the date of institution of the suit 'peculiarly or unusually prejudiced the defendant'; and (b) that there was a reasonable time for plaintiff to institute his action between discovery of the cause of action and expiration of said two years after the actionable event, the cause of action may be dismissed on limitation grounds.

Id. at 128 (internal citations omitted).

d. *Release*

For a contract to be valid and enforced pursuant to its terms, an essential element is a showing that there was a meeting of the minds. Center 48 Ltd. Partnership v. May Dept. Stores Co., 355 N.J. Super. 390, 406 (App. Div. 2002) (citation omitted). Waiver is defined as "the intentional relinquishment of a known right." Cty. of Morris v. Fauver, 153 N.J. 80, 104 (1998) (citations omitted). Thus, waiver must be done voluntarily and there must be an affirmative act that accompanies the waiver to show such intent. Id. (citation omitted). Waiver is "a voluntary act, and implies an election by the party to dispense with something of value, or to forego some advantage which he might at his option have demanded and insisted on." Allstate Ins. Co. v. Howard Sav. Institution, 127 N.J. Super. 479 (Ch. Div. 1974) (citation and internal quotation omitted). "A waiver cannot be divined but, instead, must be the product of objective proofs: the intent to waive need not be

stated expressly, provided the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference." Sroczynski v. Milek, 197 N.J. 36, 63-64 (2008) (internal citations and quotations omitted). Additionally, waiver of a right "must be supported by an agreement founded on a valuable consideration, or the act relied on as a waiver must be such as to estop a party from insisting on performance of the contract or forfeiture of the condition." Aron v. Rialto Realty, 100 N.J. Eq. 513 (Ch. 1927), aff'd, 102 N.J. Eq. 331 (E&A 1928).

Generally, it is "improper to grant summary judgment when a party's state of mind, intent, motive or credibility is in issue." In re Estate of DeFrank, 433 N.J. Super. 258, 266 (App. Div. 2013) (citation omitted). For example, New Jersey courts have concluded that granting summary judgment is improper when the genuine issues of fact remaining in the case relate to a party's waiver, whether a party acted in bad faith, and willful acts of fraud. Id. at 266-67 (citations omitted).

Because an exculpatory clause operates to relinquish one party from a legal right, while relieving the other party of owing a duty of reasonable care, "an exculpatory release agreement must, on its face, reflect the unequivocal expression of the party giving up his or her legal rights that this decision was made voluntarily, intelligently and with the full

knowledge of its legal consequences." Gershon, Adm'x Ad Prosequendum for Estate of Pietroluongo v. Regency Diving Center, Inc., 368 N.J. Super. 237, 247 (App. Div. 2004) (citations omitted). Generally, exculpatory clauses are disfavored and often receive close judicial scrutiny. Stelluti v. Casapenn Enters, LLC, 203 N.J. 286, 303 (2010). Examples of such contractual provisions include the following: "forfeitures, penalties, provisions limiting a party's legal rights, and provisions that depend for their validity or enforceability on the subjective judgment of one of the parties." Id. (citation omitted). New Jersey courts will enforce an exculpatory release if:

> (1)it does not adversely affect the public interest; (2) the exculpated party is not under a legal duty to perform; (3) it does not involve a public utility or common carrier; or (4) the contract does not grow out of unequal bargaining power or is otherwise unconscionable.

Gershon, Adm'x Ad Prosequendum for Estate of Pietroluongo v. Regency Diving Center, Inc., 368 N.J. Super. at 248 (citation omitted).

These four factors are considered by the court in addition to determining whether the signing party entered into the contract intentionally and freely. Id. Unless the release agreement evidences the unequivocal intention to subject third parties to the release, only the signing parties of the contract will be bound by the terms of the release agreement. Id. at 247.

Moreover, under the law of New Jersey, "a contract will not be construed to indemnify the indemnitee against losses resulting from its own negligence unless such an intention is expressed in unequivocal terms." Mantilla v. NC Mall Associates, 167 N.J. 262, 272-73 (2001) (quoting Ramos v. Browning Ferris Indus. of S. Jersey, Inc., 103 N.J. 177, 191 (1986)). Following this precedent, the court in Azurak v. Corporate Property Investors, 347 N.J. Super. 516 (App. Div. 2002), concluded that "the absence of the requisite clear and explicit language addressing indemnification for the [indemnitee's] negligence precludes recovery for its portion of the judgment for defense costs." 347 N.J. Super. 516, 523 (App. Div. 2002). "Any doubts or ambiguities as to the scope of the exculpatory language must be resolved against the drafter of the agreement and in favor of affording legal relief." Gershon, Adm'x Ad Prosequendum for Estate of Pietroluongo, supra, 368 N.J. Super. at 247 (citation omitted).

IV. Analysis

As noted, based on the motion record, the Court concludes that genuine and material factual questions exist regarding the date of accrual of Plaintiff's claims. Defendant maintains that the project was substantially complete six years before the Complaint was filed, while Plaintiff disputes that predicate fact asserting that the construction project could not have been

substantially completed in 2009 because the Falcon Defendants had returned to the property several times between 2009 and 2012 to further investigate the condensation-related complaints Plaintiff was receiving from the unit owners and performing the work that was necessary to correct related defects.

Even if the Court were to assume substantial completion of the project occurred on July 22, 2009, Plaintiff correctly maintains that the discovery rule is applicable in the instant matter. See Trinity Church, supra, 394 N.J. Super. at 175, fn. 3; Caravaggio, supra, 166 N.J. 237 (2001); Fox, supra, 71 N.J. 122 (1976). The authority relied upon by Falcon addressed the equitable concept of estoppel. Under that equitable principle, any tolling of a limitations period ceases when a defendant's misrepresentations or concealment stops and the plaintiff does not rely on the defendant's action or statements. In contrast, the discovery rule operates as a trigger to a statute of limitations period and upon accrual of the claim, a plaintiff is ordinarily entitled to the full statutory period. See Caravaggio, supra, 166 N.J. at 250 (concluding that a plaintiff will typically be permitted the full statutory period in which the plaintiff may bring the cause of action, even if it was discovered prior to the expiration of the statute of limitations) (citation omitted). To the extent that an exception to this general principle entitling Plaintiff to the

full six-year statutory period is applicable in the instant matter, thereby shortening the time in which Plaintiff was required to act with respect to its cause of action, that matter should be appropriately resolved at the Lopez hearing. See Fox, supra, 71 N.J. at 128 (citation omitted).[3]

The central inquiry in determining whether the equitable discovery rule applies to Plaintiff's claims pertains to the time when Plaintiff became aware of "the origin and existence of his injuries." See Torcon, Inc., supra, 205 N.J. Super. at 435. To support the contention that the discovery rule should apply to this matter, Plaintiff contends that it was unaware of the cause or extent of the damage until the assessment and report was rendered by Kusmic in 2011. However, as Falcon correctly observes, a claim's accrual is not dependent on whether the plaintiff was knowledgeable with respect to the full extent of the harm inflicted. See Torcon, supra, 205 N.J. Super. at 436. Nevertheless on this record, there remains a genuine issue of material fact with respect to whether Plaintiff had knowledge of a potential claim against Falcon for the property damage caused by condensation and a Lopez hearing is necessary to resolve that issue.

[3] The current motion record is insufficient for a finding "that the lapse of time between the expiration of [the statutory period]... and the date of institution of the suit 'peculiarly or unusually prejudiced the defendant[.]'" Fox, supra, 71 N.J. at 128 (citation omitted).

First, factual questions exist regarding whether the condensation problems were caused by Defendants' construction and design efforts such that Plaintiff had sufficient reason to know a cause of action existed against Defendants prior to July 2009. Indeed, on this record, and without further discovery, the Court is unable to conclude that Plaintiff was aware as of July 2009 or earlier that Defendants' actions were the cause of the condensation and the related property damage. For example, while Defendants attempted to resolve the condensation problems both before and after July 2009, there were previous construction and structural problems that existed on the property prior to Defendants being hired. Specifically, the Falcon group noted specific conditions that had existed within the apartments, such as defective sump pumps, water infiltrating with the possible source being through the stairways and several puddles of water within the basements. See Certification of Anthony Volpe, P.E., Exhibit J at pgs. 1-2. It is unclear what role Falcon or WB played in addressing this issue.

Further, Exhibit L of the Anthony Volpe, P.E. Certification states that water concentrated at an inside corner of a wall and bulging of a foundation wall were likely a result of the soil having failed to drain efficiently after rain or the melting of snow. Ms. Frisone also testified during her deposition that the condensation issues would typically only occur during the winter

months, see Certification of Plaintiff's counsel Exhibit E, 37:3 – 37:8, which is substantiated by the opinion identified in the February 21, 2011 letter, see the Anthony Volpe, P.E. Certification Exhibit L, opining that the runoff water having been contained in the foundation was likely caused by the weather, such as melting of snow. Moreover, Ms. Frisone indicated that a letter dated March 12, 2008, sent by the Falcon Group states that as a result of the investigations, a possible source of the condensation was due to the particular residents of the apartment and the functioning of their individual thermostats and/or heat valves. See Certification of Plaintiff's counsel Exhibit E, 35:3 – 35:24. Therefore, a factual question exists with respect to whether Plaintiff first had knowledge, or should have known, that Defendants were allegedly the cause of the harm inflicted on its property and if it was related to any of the existing condensation issues or if it was caused by a third party or other force unrelated to the actions of Defendants.

Second, the Volpe Certification and attached documents do not establish the absence of factual questions as to precisely which of the noted construction defects recommended by Falcon were actually performed by W.B. Contracting and what role those recommendations had on the subsequent condensation. For example, the Falcon Group had noted numerous cracks within the

foundation, walls and flooring. See Certification of Anthony Volpe, P.E., Exhibit L at p. 2; Exhibit K at pgs. 1-2. The Falcon Group noted specific conditions that had existed within the apartments, such as defective sump pumps, water infiltrating with the possible source being through the stairways and several puddles of water within the basements. See Certification of Anthony Volpe, P.E., Exhibit J at pgs. 1-2.

Based on the correspondence set over a three-year period between Ms. Frisone and the Falcon Group, it is evident that the Association had experienced difficulties with several aspects of the residential units. Although the Volpe Certification and exhibits indicate that numerous construction tasks were performed by the defendants, the Court is unable to glean sufficiently from the record the extent to which Falcon and WB Contracting participated in the actions that allegedly caused the property damage plaintiff claims to have experienced. Further, the evidentiary record was insufficient to permit the Court to determine the interplay between each of the issues Plaintiff had experienced within the apartments and the effect each problem had on the viability of a claim against either of the Defendants.

As the evidentiary record, giving Plaintiff all reasonable inferences, establishes that genuine issues of material fact exist with respect to the causal source of the property damage,

granting Falcon's motion for summary judgment would be improper. Indeed, based on the evidentiary gaps pertaining to the direct cause of the Plaintiff's property damage, the extent to which Defendants played a role in the resulting damage, as opposed to an extraneous source, the date on which Plaintiff's cause of action accrued and the diligence that was undertaken by Plaintiff in learning of the viable cause of action against Falcon, the Court concludes that it is proper to resolve the aforementioned questions of fact by holding a Lopez hearing.

Likewise, genuine material factual questions exist with respect to the purported "release" of Plaintiff's claims to Falcon based on the March 26, 2008 letter. The vague terms of the "agreement" preclude a finding that Plaintiff intentionally and unambiguously waived its right to maintain a cause of action against Defendant for damages incurred as a result of their actions and what the scope of the "release" that was intended by the parties. For instance, the alleged "release" provision does not indicate whether the release would encompass future or past claims and/or whether it was intended to pertain to any and all claims or certain claims alleged to have arisen as a result of the condensation issues regardless of cause or limited to the actions specified in the March 28, 2008 letter. It also does not explain what claims are being "indemnified" and based on which party's conduct. Without having evidence to resolve such

ambiguities within the motion record, the Court is unable to conclude that there was a meeting of the minds between the parties when stipulating to the alleged release, a requirement that must be shown before the Court is permitted to enforce such a contractual clause. See Center 48 Ltd. Partnership, supra, 355 N.J. Super. at 406 (citation omitted). Finally, discovery is not yet complete.

Similarly, such ambiguities impede the Court's ability to determine that Plaintiff had the requisite knowledge of the specific right it was waiving and an intent to abandon such a right. See Sroczynski, supra, 197 N.J. at 63-64; Gershon, Adm'x Ad Prosequendum for Estate of Pietroluongo, supra, 368 N.J. Super. at 247. Moreover, until the Court has been provided with additional information with respect to the intended scope of the alleged release, the Court must resolve the exculpatory language "... in favor of affording legal relief." Gershon, Adm'x Ad Prosequendum for Estate of Pietroluongo, supra, 368 N.J. Super. at 247.

V. Conclusion

Based on the aforementioned analysis the Court denies Falcon's motion for summary judgment and concludes that further discovery and testimony are required, by way of a Lopez hearing, for the Court to determine the specific date upon which Plaintiff's claims against Falcon accrued. The Lopez hearing

shall be scheduled after a brief, and limited, period of discovery to address the issues raised in this Opinion.