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CARILLON AT LIVINGSTON TOWN CENTER MASTER ASSOCIATION, INC. and THE CONDOMINIUMS AT CARILLON CONDOMINIUM ASSOCIATION, INC, *Plaintiff*, v. LTC RESIDENTIAL, L.L.C. et al., *Defendants*.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: CIVIL PART ESSEX COUNTY Major Docket No.: L-3693-16 Civil Action **MEMORANDUM OPINION**
EXTERIOR SOLUTIONS, LLC, *Defendant/Third-Party Plaintiff*, v. GREEN VALLEY CONSTRUCTION CORP. and JOIA CONSTRUCTION CORP., *Third-Party Defendants.*	
FEINBERG & ASSOCIATES P.C., *Defendant/Third-Party Plaintiff*, v. OMEGA POOL STRUCTURES INC., *Third-Party Defendant.*	
HACKENSACK STEEL CORP., *Defendant/Third-Party Plaintiff*, v. PRAVO INC., *Third-Party Defendant.*	

LTC RETAIL OWNER, LLC c/o ONYX MANAGEMENT GROUP, *Plaintiff*, v. FEINBERG ASSOCIATES, P.C. et al., *Defendants*.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: CIVIL PART ESSEX COUNTY Minor Docket No.: L-5006-16 Civil Action
CARILLON AT LIVINGSTON TOWN CENTER MASTER ASSOCIATION, INC., *Plaintiff*, v. WILLIAM RENZO, *Defendant*.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: SPECIAL CIVIL PART ESSEX COUNTY Minor Docket No.: DC-5878-17 Civil Action

For Plaintiffs Carillon at Livingston Town Center Master Association, Inc. and The Condominiums at Carillon Condominium Association, Inc.: Brian J. McIntyre (argued and on the brief), Hueston McNulty, P.C.

For Plaintiff LTC Retail Owner, LLC: Ashling A. Ehrhardt (argued and on the brief); Lane F. Kelman (on the brief); Mary Catherine Emert (on the brief), Cohen, Segalias, Pallas, Greenhall & Furman, P.C.

For Defendant Feinberg & Associates P.C.: Martin J. McAndrew (argued and on the brief) and Glen D. Kimball (on the brief), O'Connor Kimball LLP

For Defendant Nordic Contracting Company: Benjamin J. Hochberg (argued and on the brief), Cullen and Dykman LLP

For Defendant O'Donnell & Naccarato, Inc.: Adam E. Levy (argued and on the brief), Marshall, Dennehey, Warner, Coleman & Goggin, P.C.

Decided: March 25, 2019

HON. KEITH E. LYNOTT, J.S.C.[1]

In these consolidated actions alleging construction defects in connection with a mixed-use residential and commercial development known as Carillon at Livingston Town Center, the Court has before it multiple motions for summary judgment and partial summary judgment. The Plaintiffs in one of the actions, Carillon at Livingston Town Center Master Association, Inc. and The Condominiums at Carillon Condominium Association, Inc. (collectively, the "Association"), cross-moves for leave to amend its Second Amended Complaint to identify a fictitious defendant.

More specifically, O'Donnell & Naccarato, Inc. ("O&N") moves for summary judgment as to the claims asserted against it by LTC Retail Owner, LLC ("LTC"), the Plaintiff in the action docketed as L-5006-16 and relating to the separately owned parking garage (the "Parking Garage") serving both retail customers and residents at the complex. Feinberg & Associates, P.C. ("Feinberg") also moves for summary judgment as to the Complaint of LTC. Both O&N and Feinberg assert the actions against them are barred by the Statute of Repose, N.J.S.A. 2A:14-1.1.

Nordic Contracting, Inc. ("Nordic") moves for partial summary judgment as to the Association's Second Amended Complaint in the action docketed at L-3693-16. As noted, the Association seeks to amend its Second Amended Complaint to name O&N as a Defendant in place of a fictitious party and to pursue as against O&N its own claims pertaining to the Parking Garage.

[1] This Statement of Reasons amends and supersedes the Statement of Reasons accompanying the Order issued on March 25, 2019. In connection with this motion, O&N placed in the record deposition testimony of a representative. Although the Court had reviewed this testimony, it incorrectly noted in its prior Statement of Reasons that there had not been a deposition of O&N (and attributed the argument of lack of adequate discovery to LTC as opposed to the Association). This Amended Statement of Reasons corrects these oversights.

For the reasons set forth herein, the Court denies the motions of O&N and Feinberg, but without prejudice to the moving parties' right to renew at a later time. It grants in part and denies in part—without prejudice—Nordic's motion. It denies the Association's motion.

I

The facts pertinent to all motions, viewed from the perspective of the non-moving parties, are as follows. Carillon at Livingston Town Center is a large, mixed-use residential and retail complex. It consists of seventeen single-family homes, sixty-six townhouse-style homes, a condominium building known as the Condominiums at Carillon, and various common elements, including internal roadways, sidewalks, pedestrian paths, parking areas and recreational facilities.

The parking structure is located at 1100 Town Center Way. It is a single helix, precast "filigree" parking garage. The garage is part of a mixed-use building (referred to as Building E) that includes both commercial and retail space. The garage consists of four levels, including a slab-on-grade level. The garage has two sections—one for reserved residential parking and one for retail customer parking. The residential section is located on the first level. The garage has separate entrances for residential and retail users. Each level is approximately 17,000 square feet, save for the fourth level, which is 13,500 square feet.

The Parking Garage now has separate ownership from the rest of the complex. LTC acquired the Parking Garage after it was constructed.

Initially, Feinberg, as the architect of record for the entire project, had responsibility for designing the Parking Garage. Feinberg engaged O&N to perform certain structural engineering services for the Parking Garage.

On or about August 4, 2004, the developer and the general contractor, Roseland Contracting, LLC ("Roseland"), undertook a different approach to the Parking Garage. Roseland entered a Design/Build Contract with Nordic for construction of a precast "filigree" concrete structure.

As a result, Feinberg ceased to function directly as the architect for the Parking Garage. However, the motion record, viewed in the light most favorable to LTC, permits the inference that Feinberg remained involved in the design and construction of the Parking Garage and was consulted from time to time about elements of this part of the project.

Upon Roseland's engagement of Nordic, O&N ceased to function as a subcontractor of Feinberg with respect to the Parking Garage. However, Nordic promptly engaged O&N to provide structural engineering services for the Parking Garage. The motion record permits the conclusion that this role was not limited to specific tasks, but required O&N to remain involved throughout the construction phase.

A Preliminary Expert Report, dated July 24, 2017, of O&S Associates ("O&S") prepared for LTC concludes that the Parking Garage, in service for approximately ten years, has sustained a premature structural failure. O&S states that the design and construction of the Garage "were not commensurate with the standard of care primarily because of the lack of joint sealants on the control joints." It concludes the joint sealants were not detailed in the structural and architectural drawings and specifications and were omitted by Nordic after creating the control joints. It finds that Nordic ignored the recommendations from its fabricator, Midstate, to include joint sealants and that Nordic, along with the design professionals, including O&N, "ultimately adopted a deficient design."

O&S concludes that the design professionals "should have been aware of the ramifications of the omission of sealants and the impact of water on the structure." It finds that the design professionals failed "to either address this omission and/or provide adequate consultation regarding this omission." Instead, they "explicitly and tacitly approved an inadequate design and construction."

The O&S Report states that the design professionals "did not specify any products for the sealants, nor did either party explain the implication of the lack of waterproofing." By doing so, the design professionals approved a design "that was not commensurate with the standard of care." In particular, the specifications "fall short of the minimum recommended requirements for a parking structure." Furthermore, the design professionals "provided insufficient construction supervision."

The Report notes that it was critical to ensure the structure was watertight. It concludes that the design professionals "neglected their responsibilities by designing and building a structure that was not watertight and therefore should be responsible for the restoration cost of the structure and the related costs."

The Township of Livingston Building Department (the "Township") issued a Temporary Certificate of Occupancy ("TCO") for the "Parking Garage Only" on May 28, 2006. Although the parties opposing the motions of O&N and Feinberg contend that the provenance of the document and the date of issuance are open to question, the Court concludes there is no meaningful question of authenticity or date. That the Exhibit presented with the moving papers indicates there is a missing page to the Exhibit is also of no moment, as the TCO itself is plainly a one-page instrument. In all events, following oral argument on the motion, Feinberg submitted

a more legible copy of the TCO, obtained via an Open Public Records Act request, that clearly contains the March 28, 2006 date.

The TCO does not set forth any conditions. The section providing for the recitation of such conditions is blank. Although the opposing parties assert this too establishes a genuine dispute of fact requiring denial of the motions—contending the blank indicates the possibility of unstated conditions—the Court finds it plainly establishes there were no conditions imposed. Likewise, despite protestations of the opposing parties as to the absence of text in the TCO setting forth what parts of the Garage are subject to the TCO, it is readily apparent that the document relates to the Garage as a whole. The opposing parties have not submitted any evidence to the contrary.

The applicant for the TCO asked for the document to permit use of the Parking Garage by retail customers, even though the residential portions of Building E were not yet completed or occupied. The record reflects that, upon issuance of the TCO, the Parking Garage opened to the public.

The Township did not issue a Certificate of Occupancy ("CO") until September 2007. LTC filed its Complaint in July 2016—more than ten years after the issuance of the TCO, but less than ten years after the issuance of the CO.

II

Rule 4:46-2(c) expressly provides that a party is entitled to summary judgment "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." An issue of fact is genuine "only if, considering the burden of persuasion at trial, the evidence submitted by the

parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c).

In Brill v. Guardian Life Insurance Co., 142 N.J. 520, 529 (1995), the Supreme Court stated that "Rule 4:46-2 dictates that a court should deny a summary judgment motion only where the party opposing the motion has come forward with evidence that creates a genuine issue as to any material fact challenged" (internal quotations omitted). Moreover, "a determination whether there exists a genuine issue of material fact that precludes summary judgment requires the motion judge to 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 factfinder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 540. The Court must conduct "a kind of weighing that involves a type of evaluation, analysis and sifting of evidential materials." Id. at 536. The essence of the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a [finder of fact] or whether it is so one-sided that one party must prevail as a matter of law." Id. at 533 (internal quotations omitted).

III

In its motion, O&N contends that the action against it is time-barred under the Statute of Repose. N.J.S.A. 2A:41-1.1 provides as follows:

> No action, whether in contract, in tort, or otherwise, to recover damages for any deficiency in the design, planning, surveying, supervision or construction of an improvement to real property, or for any injury to property, real or personal, or for an injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury, shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction or construction of such improvement to

> real property, more than 10 years after the performance or furnishing of such services and construction. This limitation shall serve as a bar to all such actions, both governmental and private, but shall not apply to actions against any person in actual possession and control as owner, tenant, or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury or damage for which the action is brought.

O&N contends that it completed its work on the Parking Garage in September 2005 and received its final payment in November 2005. It attaches proof of that payment to its motion papers and avers there is no evidence of any subsequent work on the Parking Garage. It asserts that, had it performed any such work, it would have billed for the work and received payment.

O&N thus contends that there is no genuine dispute that it did not perform any work on the Parking Garage after that time. Noting that payment records state that O&N performed work on trusses as late as October 2006, O&N contends this had nothing to do with the Parking Garage, as that structure, including the swimming pool located on the top level, did not employ trusses.

O&N further contends that, in all events, the issuance in March 2006 of the TCO marked substantial completion of the Parking Garage. It asserts that the Statute of Repose began to run, at the latest, upon issuance of the TCO in March 2006. As LTC did not file its action against O&N until July 2016, O&N contends the action is barred.

LTC questions the origin, date and content of the document proffered as the TCO, although the Court finds no basis for such questions. But LTC also asserts that the Township did not issue a final CO for eighteen months, suggesting further work of a significant nature may have been performed. Moreover, LTC cites the deposition testimony of Dennis Mordan, a representative of O&N, that O&N provided "support to [Nordic] during the construction process." From this LTC asserts O&N had continuing responsibilities during the construction of

the complex, further suggesting that O&N performed substantial work following November 2005 and the issuance of the TCO in March 2006.

In a separately filed opposition, the Association contends the motion is premature, as the parties have not had an opportunity for sufficient discovery. It points out that depositions of several of the main parties in the action have not yet occurred. It asserts that discovery may yield information about additional work performed by O&N on the garage after November 2005 and March 2006.

Town of Kearny v. Brandt, 214 N.J. 76 (2014), is instructive as to the application of the Statute of Repose in circumstances such as those present here. In that case, the Supreme Court affirmed a denial of a motion for summary judgment sought by an architectural firm, which motion was grounded in the Statute of Repose. In so holding, the court determined that the issuance by the municipality of a temporary certificate of occupancy for the project at issue commenced the running of the statute.

Brandt involved the construction of a municipal public safety facility housing the police and fire departments. The Town sued the project architects, as well as the soils and structural engineers, contending they were responsible for a variety of defects that caused the project to fail. The trial court granted summary judgment as to the structural and soils engineers on the basis of the Statute of Repose, after concluding that the statute began to run as against each of these defendants when they concluded their work on the project.

The trial court denied summary judgment to the project architects. It concluded that, as to them, the Statute of Repose began to run when the Town issued the first temporary certificate of occupancy. As the Town filed its action within ten years of that date, the trial court held the action was timely.

The Supreme Court affirmed. It agreed with "the trial court's finding that the ten-year period prescribed in N.J.S.A. 2A:14-1.1(a) commenced when the first Temporary Certificate of Occupancy was issued for the Town's public safety facility." 214 N.J. at 83.

In so holding, the court noted that the Legislature "enacted the statute [of repose] in response to the expanding application of the 'discovery rule' to new types of tort litigation, the abandonment of the 'completed and accepted rule' . . . and the expansion of strict liability in tort for personal injuries caused by defects in new homes to builder/sellers of those homes." Id. at 92 (internal quotation marks omitted). It concluded that "[t]he statute of repose is construed broadly to serve its legislative objective of providing a reasonable measure of protection against expanding liability for design and construction professionals." Id. at 93 (internal quotation marks omitted). It observed that the Statute of Repose is "unlike the typical statute of limitations [because t]he time within which suit may be brought under [the Statute of Repose] is entirely unrelated to the accrual of any cause of action." Ibid. (internal quotation marks omitted).

In determining when the Statute of Repose began to run as to the project architect, the court stated that "[o]ur case law distinguishes between defendant contractors who are hired to perform limited services and defendants with supervisory responsibilities that span the entire project, in determining the date upon which the ten-year period begins for purposes of N.J.S.A. 2A:14-1.1(a)." Ibid. As to those with a limited role in a project, "the ten-year period begins to run at the conclusion of the contractor's specific task." Ibid. However, with respect to those "whose responsibilities for the Kearny public safety facility continued throughout its design and construction," the ten-year period set forth in N.J.S.A. 2A:14-1.1(a) "commences on the date of the project's substantial completion." Id. at 94.

The court then noted that the trial and appellate courts "agreed that the ten-year period prescribed by the statute of repose commenced on April 9, 1996, when the first Temporary Certificate of Occupancy was issued for the facility." Id. at 95. The trial court had determined that "this certificate indicated that the building was sufficiently complete so that it could be occupied and used." Ibid. The Supreme Court agreed and held that "the issuance of that certificate triggered the running of the ten-year period for purposes of the statute of repose under N.J.S.A. 2A:14-1.1(a)." Ibid.

The court stated that "a stipulated date of substantial completion"—such as a Certificate of Substantial Completion issued by a project participant—"may also be relevant to a court's analysis of the statute of repose." Ibid. But, in the case before the court, the date of substantial completion was missing from the Certificate of Substantial Completion signed on November 15 and 24, 1995, and the document did not bear an official date of execution. Ibid. "Moreover, as the trial court found, in November 1995, substantial work remained to be completed before the building could be used." In the circumstances, the court determined that the incomplete Certificate signed in November 1995 "is irrelevant to the statute of repose in this case." Ibid.

In this case, the present record establishes that O&N submitted an invoice for payment for its work on the Parking Garage in September 2005 and received payment in November 2005. There is no clear indication in the current record that O&N performed material work on the Parking Garage after that date.

Moreover, the Township issued a TCO in March 2006 for the Parking Garage. There were no conditions imposed in the TCO as to the operation of this facility. On its face, the document authorizes use of the Garage in its entirety. The record reflects that the Garage was

thereafter open to the public in connection with the operation of retail establishments in the complex.

As noted above, the opposition to O&N's motion is two-fold. First, the Association asseverates that the motion is premature as there has not been adequate discovery. In particular, it points out that it has not yet deposed representatives of Feinberg, Nordic or other entities that performed work on the Parking Garage. Second, LTC asserts there are unresolved questions concerning the TCO. It contends the TCO does not contain a date of issuance, does not set forth any conditions in the space provided for conditions, and does not specifically identify the portions of the Garage that the Township was authorizing to open for use.

LTC points out that, in Brandt, the court declined to find that the issuance of a Certificate of Substantial Completion initiated the ten-year period because the instrument lacked a date of substantial completion and an official date of execution. LTC contends there are similar deficiencies in the TCO in the present record.

LTC also notes that the Township did not issue a final CO until September 2007. It suggests in these circumstances that there could have been material work performed on the facility between the issuance of the TCO and the final CO.

The holding in Brandt makes clear the issuance of a Temporary Certificate of Occupancy commenced the running of the period for repose because "this certificate indicated that the building was sufficiently complete so that it could be occupied and used." 214 N.J. at 95. The present record permits the same conclusion here—that by March 2006, at the latest, the Parking Garage was sufficiently complete so that it could be occupied or used. There is no evidence to the contrary submitted at this time.

Contrary to LTC's contentions, there is, as discussed above, no basis on this record to question: 1) whether a TCO was issued in March 2006; 2) that the TCO authorized the occupancy and use of the Parking Garage by the public; or 3) that the TCO did not impose any conditions or limitations on use of the facility. Indeed, the record reflects that the designated spaces in the Parking Garage for use by the public were located in the upper levels.

Even examining the motion record in the light most favorable to the non-moving parties, it is readily apparent from the record on this motion that the Township official issuing the TCO understood the Parking Garage would be opened for public use to enable operation of the retail facilities. Had conditions or limitations been necessary to ensure public safety, it is reasonable to presume that the TCO would have included them. There is simply no basis in the present record to conclude to the contrary.

That said, the Court is mindful that, as of the date of disposition of this motion, the Plaintiff has not had a full opportunity for discovery. This includes discovery to examine whether, between March 2006—when the Township issued the TCO—and September 2007—when it issued the CO—O&N performed any substantial additional work relating to the parking garage. Even though the present record indicates that O&N completed its work on the facility in or about September 2005, it is also true that the record, examined in the light most favorable to LTC, permits the conclusion that O&N's responsibilities in relation to the Parking Garage were not limited to a specific task, but included providing support on the project through the construction phase. As it is conceivable that, during the period after September 2005 or March 2006 and before September 2007, additional work occurred that might establish that the Court should employ a later date than March 2006 for commencement of the period for repose, the

Court concludes it is appropriate to afford LTC (and the other parties) an opportunity for discovery.

For these reasons, the Court denies O&N's motion without prejudice to the right to renew it at a later time. The Court will permit a period for additional, focused discovery into whether O&N performed material additional work on or in relation to the Parking Garage after it submitted its September 2005 invoice and/or after the Township issued the TCO, such that it would be appropriate to employ a date after the March 2006 issuance of the TCO as the date from which to measure the period for proper application of the Statute of Repose. The Court observes that, given the issuance of the TCO in March 2006 indicating substantial completion of the structure, and in light of the holding in Brandt, work of an immaterial nature, such as work to satisfy a punch list, would not suffice to require a later starting date for the operation of the Statute.

IV

Feinberg likewise asserts that LTC's claim against it is barred by the Statute of Repose. It asserts that, after it was replaced by Nordic on the Parking Garage portion of the project in August 2004, it had no further role in the Parking Garage. Like O&N, it also contends that the issuance of the TCO in March 2006, at the latest, commenced the running of the ten-year repose period, as the Parking Garage was substantially complete at that time.

LTC asserts that discovery as to Feinberg's role is also incomplete. It relies on records showing that, even after the change in direction as to the design and construction of the Parking Garage in August 2004, Feinberg remained involved in the design and construction of the structure in its role as overall project architect. It points to communications showing that Feinberg was consulted as to details of the Parking Garage design well into 2005. It avers that

documents show that, as late as December 2006, Feinberg was reporting the engineering work was only 64% complete.

Feinberg rejoins these documents relate to continuing work on Building E, as to which it remained architect of record. It asserts the work reflected in these documents does not relate in any way to the Parking Garage.

The Court reaches the same conclusion as to Feinberg's motion as it does with respect to O&N's motion. The present record, viewed in the light most favorable to LTC, permits the trier of fact to conclude that Feinberg did participate in the design work concerning the Parking Garage after the decision to engage Nordic for the Design/Build work in August 2004. Moreover, the Court concludes that LTC (and other parties) are entitled to develop a more complete record concerning what, if any, work Feinberg performed in relation to the Parking Garage after the issuance of the TCO in March 2016.

For these reasons, the Court denies Feinberg's motion, also without prejudice. It will permit the parties to engage in focused discovery as to work, if any, performed on the Parking Garage from August 2004 until September 2007.

V

Nordic is a defendant in the action brought by the Association and assigned Docket No. L- 3693-17. The Association's First Amended Complaint named Nordic as a Defendant alleging claims relating to the planning, design and construction of the project. In a Second Amended Complaint, filed on May 23, 2016, the Association specifically asserted claims pertaining to the Parking Garage. Nordic filed its Answer to the Second Amended Complaint, Cross-Claims and Jury Demand on June 24, 2016.

The Second Amended Complaint lodges claims against Nordic in thirteen of the fifteen Counts. Two Counts allege negligence by Nordic and other defendants. Count Five alleges negligence as to all elements of the project. Count Fourteen alleges negligence as to the Parking Garage. As to Nordic, the Association alleges that it "negligently, carelessly, and recklessly, planned, designed, developed, constructed and/or maintained the buildings, parking garage, facades, roofs and comment elements."

The Association asserts it may be required to bear certain costs of necessary repairs relating to the Parking Garage. Indeed, in its action relating to the alleged design and construction defects affecting the Parking Garage, docketed as noted above at L-5006-16, LTC has sued both Nordic and the Association.

Nordic asserts that, because the Association claims that Nordic was negligent in connection with the design of the Parking Garage, the Association is perforce asserting, at least in part, a claim of professional negligence. It contends that such claim for professional negligence fails as a matter of law inasmuch as the Association has failed to tender a timely Affidavit of Merit as to Nordic. More specifically, Nordic contends that, insofar as it participated in the design of the Parking Garage—and it claims it did pursuant to its subcontract with Roseland—the claims of negligence against it fail, as such claims sound in professional negligence by a "licensed person" within the ambit of the Affidavit of Merit statute and requires an Affidavit of Merit. As a result, it seeks partial summary judgment barring any claim by the Association against Nordic in relation to the design of the Parking Garage.

Nordic also asserts that the Subcontract Agreement it entered with Roseland (the general contractor), dated as of August 1, 2004, is the only source of a duty of care owed by Nordic to

the Association. It contends that the pertinent provision of that Agreement, set forth in Paragraph Three, states that Nordic was required to:

> furnish in accordance with the terms and conditions of this agreement, all supervision, labor, materials, equipment, hoisting . . . supplies and services . . . in order to complete, in a good and workmanlike manner, all Design/Build Cast-in Place Concrete Work in accordance with the Contract Documents and the additional information set forth in Schedule 4 attached hereto and made a part hereof (hereinafter the "Work"). The Work shall be performed in accordance with the drawings and specifications set forth in Schedule C attached and made a part hereof (hereinafter called the "Plans").

Accordingly, Nordic asseverates that the Court can and should determine as a matter of law that the terms of this Subcontract Agreement between Nordic and Roseland define in full the scope of Nordic's duties to the Association for purposes of its claims for negligence.

The Affidavit of Merit statute, N.J.S.A. 2A:53A-27, provides as follows:

> In any action for damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, within 60 days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices. The court may grant no more than one additional period, not to exceed 60 days, to file the affidavit pursuant to this section, upon a finding of good cause.

Section 29, N.J.S.A. 2A:53A-29, in turn, provides that if the plaintiff fails to provide an affidavit, "it shall be deemed a failure to state a cause of action." As used in the statute, "licensed person" includes any person who is licensed as "an engineer pursuant to P.L.1938, c.342 (C.45:8-27 et seq.)." N.J.S.A. 2A:53A-26.

Nordic contends that, in order for the Association to pursue a claim against it for negligence in the design of the Parking Garage, it was required to tender an Affidavit of Merit within 120 days of its initial Answer to the Association's Complaint. It asserts that the Association failed to do so and, accordingly, that the Court must dismiss this claim. Nordic notes that the only Affidavit of Merit served by the Association to date—and prepared by Mark Yanchuk, AIA, PE—is directed solely to Feinberg and does not contain any averments as to professional negligence by Nordic. Moreover, Nordic points out that the 120-day period for tendering an Affidavit of Merit as to Nordic ran in October 2016 at the latest, as Nordic answered the Second Amended Complaint in June 2016.

The Association asserts that it did not have any obligation to obtain and serve an Affidavit of Merit as to Nordic. It contends there is no showing by Nordic that a "licensed person" affiliated with Nordic—namely, a licensed engineer—ever participated in the work that is the subject of the Association's complaint against Nordic.

Moreover, the Association asserts that, in its action against Nordic and other defendants (including the Association), LTC did serve an Affidavit of Merit of Suchith Jayasena directed to Nordic's role in the engineering work on the Parking Garage. It argues that such Affidavit was timely as LTC served it on Nordic in October 2016, within 120 days of Nordic's Answer to LTC's Complaint (and also within the 120-day period following Nordic's Answer to the Association's Second Amended Complaint). In opposition to this motion, the Association states that it now adopts the same Affidavit of Merit as its own.

The Court concludes that the Association's Second Amended Complaint against Nordic does state a claim, in part, against Nordic for professional negligence. It alleges negligence by Nordic in failing to properly design the Parking Garage as part of its duties to perform all

Design/Build Cast in Concrete Work under its contract with Roseland. Performance of such design work would necessarily cause Nordic to engage in the practice of engineering, via a "licensed person." In such circumstances, the Affidavit of Merit Statute requires an Affidavit of Merit to proceed with such a claim.

The Court concludes that the Association, unlike LTC, has not satisfied the requirement to tender an Affidavit of Merit as to Nordic in a timely manner. Even granting the Association the benefit of the full 120-day period for serving the Affidavit of Merit, the Association was required to serve the same no later than October 2016.

The Court holds that the belated adoption of the Affidavit of Merit of Suchith Jayasena does not satisfy the statutory requisites. Contrary to Nordic's contention, the Court sees no reason why one party cannot adopt the Affidavit of Merit of another party that is pursuing the same claim against the "licensed person," provided the Affidavit otherwise complies with the statutory requirements and the party adopts the Affidavit within the prescribed time period. As the purpose of the statute is to cull out frivolous claims for professional negligence, the timely adoption by one party of an Affidavit of Merit served by another party and directed to the same professional and the same alleged deviation for the standard of care satisfies the statutory objective.

However, in this case, Nordic did not adopt the Affidavit of Merit submitted by LTC and directed to Nordic's design work on the Parking Garage until it filed its opposition to this motion—approximately two years beyond the last possible date for service of the Affidavit of Merit. To permit the Association now to proceed with its claim for professional negligence as against Nordic would, in effect, relax the 120-day requirement imposed by the Legislature. There

is no statutory authority for such a result, and the Association has not pointed to any case holding otherwise.

Nor can the Court conclude that the record here permits a conclusion that the Association substantially complied with the requirement for timely service of the Affidavit of Merit. That LTC took action within the 120-day period to serve an Affidavit of Merit does not give rise to a basis on which to conclude that the Association substantially complied with the statutory requirement. In all events, the Association did not adopt the Jayasena Affidavit of Merit as its own until more than two years after the bar date.

For these reasons, the Court grants Nordic's motion for partial summary judgment as to the Association's claim for negligence in the design of the Parking Garage. It dismisses that portion of the Association's Complaint.

As to Nordic's motion seeking to limit, as a matter of law, its duty of care to matters explicitly set forth in its contract with Roseland, the Court finds the motion is premature. As the Association points out, it has not yet taken a deposition of a representative of Nordic, among other discovery. It is at least conceivable that further discovery will yield information that Nordic undertook to perform other work on the project, and thus assumed additional duties, beyond those explicitly covered by the Nordic/Roseland contract or any amendments to the same. Before the Court grants the requested relief, it finds that the Association is entitled to take additional discovery in order that the Court may consider the contention advanced by Nordic on the basis of an adequate record.

For these reasons, the Court denies Nordic's motion at this time. Nordic may renew the motion at a later time should it wish to do so.

VI

The Association seeks leave to amend its Second Amended Complaint to identify O&N as a party defendant on that element of its claim relating to alleged improper design and construction of the Parking Garage. Its initial and Amended Complaints allege causes of action against fictitious parties. Invoking R. 4:26-4, the Association seeks to identify O&N based on the O&S Report obtained by LTC identifying alleged negligence by O&N and LTC's subsequent naming of O&N in its Complaint.

R. 4:26-4 provides in pertinent part:

> In any action, irrespective of the amount in controversy, other than an action governed by R. 4:4-5 (affecting specific property or interest), if defendant's true name is unknown to the Plaintiff, process may issue against the defendant under a fictitious name, stating it to be fictitious and adding an appropriate description sufficient for identification. Plaintiff shall on motion, prior to judgment, amend the complaint to state the defendant's true name, such motion to be accomplished by an affidavit stating the manner in which that information was obtained.

As noted in Greczyn v. Colgate Palmolive Co., 183 N.J. 5, 11 (2004), "[t]he purpose of the rule is to render timely the complaint filed by a diligent plaintiff, who is aware of a cause of action against an identified defendant but does not know the defendant's name." See Pressler & Verniero, Rules Governing the Courts (2017 ed.). This Rule "addresses the situation in which a Plaintiff is aware of a cause of action against the defendant, but does not know that defendant's identity." Cmt. 1 to R. 4:26-4 at 1795.

Pressler & Verniero point out:

> Where a defendant is sued in a fictitious name, because of the Plaintiff's inability to ascertain his identity despite diligent efforts, the complaint may be amended after the statute of limitations has run to substitute the defendant's true name and effect service on him, particularly where the defendant can show neither prejudice resulting from nor reliance upon the lapse of time.

[Cmt. 2 to R. 4:26-4 and cited cases.]

However, the Rule "will not protect a Plaintiff who had ample time to discover the unknown defendant's identity before the running of the statute of limitations." Ibid. As the court in Greczyn, 183 N.J. at 11, stated: "[F]or the rule to operate, a specific claim must be filed against a described, though unnamed party, within the statute of limitations and plaintiff must diligently seek to identify the fictitiously-named defendant."

In Claypotch v. Heller, Inc., 360 N.J. Super. 472 (App. Div. 2003), the Appellate Division reversed a trial court's refusal to permit the plaintiff to amend his complaint to add as a direct defendant, in place of a fictitiously named defendant, the manufacturer of a machine the plaintiff claimed was defective and caused his injury. The defendant distributor of the machine had named the manufacturer as a third-party defendant some nine months earlier.

In reversing the trial court, the Appellate Division rejected the manufacturer's argument that the plaintiff should have ascertained the identity of the manufacturer prior to filing his complaint on the eve of the running of the limitations period. It further held that no prejudice to the manufacturer resulted from the plaintiff's delay in naming it as a direct defendant after the distributor filed its third-party complaint.

In so holding, the court stated that, under R. 4:26-4, "[i]f a defendant is properly identified by a fictitious name before expiration of the applicable limitations period, an amended complaint substituting a fictitiously named defendant's true name will relate back to the date of filing of the original complaint." 360 N.J. Super. at 480. However, "[t]he identification of a defendant by a fictitious name, as authorized by Rule 4:26-4, may be used only if a defendant's true name cannot be ascertained by the exercise of due diligence prior to filing the complaint." Id. at 479. The court declared that "to be entitled to the benefit of this rule, a plaintiff must

proceed with due diligence in ascertaining the fictitiously identified defendant's true name and amending the complaint to correctly identify that defendant." Id. at 480. It further stated that "[i]n determining whether a plaintiff has acted with due diligence in substituting the true name of a fictitiously identified defendant, a crucial factor is whether the defendant has been prejudiced by the delay in its identification as a potentially liable party and service of the amended complaint." Ibid.

Even though the machine itself contained a plate identifying the actual name of the manufacturer, the court concluded the plaintiff did not fail to exercise diligence in naming the manufacturer as a defendant when filing his complaint. It concluded the plaintiff had a reasonable basis to believe a different entity—the distributor—the name of which was more prominently displayed on the machine, was actually the manufacturer.

The court then determined that, even though there was a lack of diligence by the plaintiff in promptly naming the manufacturer as a direct defendant after it had been joined as a third-party defendant, there was no undue prejudice to this defendant from that lapse. The court stated that "even though a defendant suffers some prejudice merely by the fact that it is exposed to potential liability for a lawsuit after the statute of limitations has run[,] absent evidence that the lapse of time has resulted in a loss of evidence[,] impairment of ability to defend or advantage to plaintiffs, [j]ustice impels strongly towards affording the plaintiffs their day in court on the merits of their claim." Id. at 482 (internal quotation marks and citation omitted).

Although noting that a delay in naming a defendant would implicate the "policy of repose a statute of limitations is designed to serve," the court determined that the manufacturer had notice of the potential liability from the time it was named as a third-party defendant. Id. at 483.

The court found that the manufacturer should have "reasonably anticipated that it would be named as a direct defendant sooner or later." Ibid.

Moreover, after entering the case as a third-party defendant, the manufacturer had participated in discovery, including the plaintiff's deposition. The manufacturer had not suggested any discovery or pre-trial preparation it could have taken earlier. In such circumstances, the court concluded that, "[i]n short, [the manufacturer] has not shown that it suffered any prejudice as a result of plaintiff's delay in moving to name it as a direct defendant." Ibid.

In this case, the Court concludes that the Association did not proceed with the requisite diligence to avail itself of R. 4:26-4. It has sought to identify O&N as a defendant in its action well more than two years after LTC named O&N in its Complaint in July 2016, alleging the very same conduct by O&N that forms the basis for the Association's claim against it. As the Association is itself a party to the LTC action, there is no basis on which it can contend (nor does it contend) that it did not have reason to know of O&N's possible role in the defects identified in the Parking Garage as of the time LTC named O&N as a Defendant in its action. As that event occurred in July 2016, when LTC initiated its action against O&N, there is no reason why the Association could not have moved at that time to identify O&N as a party to its case or why it waited more than two years to do so.

This is not a case like Claypotch in which the Court concluded the plaintiff had a reasonable basis to believe the manufacturer of the machine at issue was another entity. In this case, even granting that the Association could not have identified O&N as an entity that participated in the design and construction of the Parking Garage when it first initiated its action, it certainly had the ability to do so from the moment LTC identified O&N and its role in that

project. Moreover, here, unlike Claypotch, in which the plaintiff acted to name the manufacturer within nine months of its joiner as a third-party defendant in the same case, the Association waited more than two years after O&N became a party to LTC's action to name O&N in its separate action.

Whether or not O&N might at one time have reasonably expected to be named in this action, at some point it was entitled to conclude that the Association had determined not to do so. To find in the circumstances here that the Association can now amend its Second Amended Complaint to name O&N as a defendant in this case—and thus require it in effect to face two lawsuits and two plaintiffs instead of one—would be entirely at odds with the purpose of R. 4:26-4 to permit a party that cannot identify the party that caused it injury or harm to preserve its rights by naming a fictitious party and later name the actual party, provided it acts with reasonable diligence in identifying such party. Here, the Court concludes the Association waited so long to act that O&N is entitled to rely on the principles of repose.

For these reasons, the Court denies the Association's motion for leave to amend its Second Amended Complaint. An Order accompanies this Statement of Reasons.