

WHITEACRE CONDOMINIUM
ASSOCIATION, INC., A New Jersey
Planned Unit Development not for
profit corporation,

Plaintiff

Vs.

JOHN DOE, individually and d/b/a
GENERAL CONSTRUCTION; GENERAL
CONSTRUCTION; and RICHARD ROE,
individually and d/b/a/ ROE
MAINTENANCE COMPANY, RMC CO.;
and NJ BUILDERS COMPANIES
NORTHEAST INC. d/b/a NJ BUILDER
DEVELOPMENTS OF NEW JERSEY,
INC.; and NJ BUILDER
DEVELOPMENTS OF NEW JERSEY, INC.
d/b/a NJ BUILDERS,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
COUNTY

DOCKET NO.

CIVIL ACTION

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Whiteacre Condominium Association, Inc, in support of
its Motion for Summary Judgment against Defendants says:

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STATEMENT OF MATERIAL FACTS

Parties

1. Plaintiff Whiteacre Condominium Association, Inc. ("plaintiff" or "Whiteacre " or "the association") is a planned unit development condominium, not for profit acting on behalf of itself and its unit owners.

2. John Doe is an individual roofing contractor, who during the time in question did business as General Construction. (Hereinafter "Doe" or "General" or "General Construction" designates both defendants John Doe and General Construction. See Doe Dep. Ex. A.

3. Richard Roe is an individual who traded or did business as Roe Maintenance Company, RMC Co., Roe Management, and The Roe Group. (Hereinafter "Roe" or "Roe Management" will refer to defendants Richard Roe, Roe Maintenance Company, RMC Co., Roe Management, and The Roe Group.)

4. Defendant(s) NJ Builder Companies Northeast, Inc. and NJ Builder Developments of New Jersey do/does business in New Jersey as NJ Builders and is/are licensed builders of the State of New Jersey. (Hereinafter "NJ Builders" will refer to NJ Builders Companies Northeast, Inc. and NJ Builders Developments of New Jersey.)

Overview

5. This lawsuit relates to plaintiff's claims against defendants arising out of work done replacing plaintiff's roofs in 1993. See Complaint Ex. B.

6. NJ Builders was the original developer of Whiteacre . NJ Builders's Br. Supp. Mot. Summ. J. Re Third-party Compl. Ex. C ¶ 1.

7. Plaintiff contracted with Roe for him to act as the "exclusive property management agent" for Whiteacre . Roe Management Contract Ex. D at 1.

8. Because of problems with the original use of fire retardant treated plywood ("FRT plywood") in the roofs and firewalls of Whiteacre, plaintiff contracted with Doe to remove and replace the FRT plywood. See infra ¶¶ 12 et seq.

9. The general scope of the FRT replacement project was to replace the FRT plywood and put shingles back on the roofs. Doe Dep. Ex. A at 57 lines 9-15.

10. The FRT replacement project was generally conducted by Doe and his company General and inspected and approved by Roe and his company Custom Care. Certification of John Doe ("Doe Cert.") Ex. E ¶¶ 2, 11.

Roofing Terms

11. An understanding of the following roofing terms is necessary to understand the case in controversy. See generally RoofHelp Glossary of Roofing Terms, available at <http://www.roofhelp.com/Glossary/Glossary.htm>; M.A.C. Company, Inc., Parts of a Roof, available at <http://www.macroof.com/residential%20definitions.htm>.

- BlazeGuard/blaze guard/Blazeguard: Laminated plywood used for fire protection between walls of adjoining units. See Doe Dep. Ex. A at 68 lines 2-7). Not to be confused with FRT plywood, which was removed during the project.
- BOCA: Building Officials and Code Administrators, International, Inc.
- Drip edge: A steel flashing bent at an angle folded over the edge of the plywood, prior to installation of the ice shields that is placed along the outer perimeter of

steep sloped buildings; used to help direct runoff water away from the building.

- Eave flashing: Flashing material used at the eaves (part of the roof that overhangs the side wall).
- Felt paper: A roofing sheet made of interwoven fibers. The fibers can be wood or vegetable for Organic Felts, glass fibers for fiberglass felts, polyester, or asbestos. Roofing material is measured in units of 100 square feet called a square. The weight of the felt paper is the weight of the 100-foot square. This is the first layer of the roof that sits on the plywood.
- Flange: A projection edge of a roof component such as flashings, skylight frames, pre-manufactured curbs, etc. Usually refers to the part that sits on the roof surface.
- Flashing: Components, usually sheet metal, used at expansion joints, walls, drains, and other places where the roof sheeting is interrupted or terminated. Most flashing is installed above the felt paper and under the shingles.
- F RTP/FRT plywood: Fire retardant treated plywood.
- Ice dam: Ice formed at the transition from a warm surface to a cold surface, such as along the overhang of a house. The build-up of ice is the result of ice or snow melting on the roof area over the warmer, living area of a building and then refreezing when it runs down and reaches the overhang.

- Ice shield: A rubberized type of felt paper that is attached to the lowest few feet of the roof to prevent ice from working its way between the lower rows of shingle. This is installed contemporaneously with the felt paper.
- Racking: The method of installing asphalt shingles where the shingles are installed straight up to the ridge rather than horizontally.
- Rake: The sloped perimeter edge of a roof that runs from the eaves to the ridge.
- Ridge: The line where two planes of roof intersect, forming the highest point on the roof that runs the entire length of the roof.
- Sheathing: The bottom layer of the roof made of large squares of plywood.
- Shingle: A single piece of prepared roofing material, either asphalt or wood, for use in steep slope roof systems.
- Step flashing: Pieces of metal or other material that are used to flash roof projections such as chimneys, walls, curbs, etc. The pieces are installed between each course of roofing and generally have a vertical flange equal in length to that of the horizontal flange.
- Underlayment: A material installed over the roof sheathing prior to the application of the primary roof covering.
- Vents: An opening or device used to permit air or vapors to exit the building through the roof. Vents are usually

installed and sealed before or after installation of the felt paper.

Background and Bidding Process

12. The original construction of Whiteacre involved the use of FRT plywood, which had been used as roof sheathing on the project. Doe Cert. Ex. E ¶ 2.

13. The FRT plywood deteriorated over time necessitating its replacement. Certification of Peter S. Reinhart ("Reinhart Cert.") Ex. F ¶¶ 2, 4.

14. The FRT plywood was delaminating and was unsafe. Doe Dep. Ex. A at 57 lines 13-14, 18-19.

15. On or about August 31, 1990, plaintiff and NJ Builders entered into a settlement agreement relating to the replacement of the FRT plywood. See Settlement Agreement Ex. G.

16. The Settlement Agreement was executed by 30 condominium associations developed by NJ Builders. Reinhart Cert. Ex. F ¶ 5.

17. Plaintiff was one of those associations. Reinhart Cert. Ex. F ¶ 6.

18. The Settlement Agreement provided for the creation of a Steering Committee made up of representatives of the 30 condominium associations and NJ Builders. Reinhart Cert. Ex. F ¶ 5; see Doe Dep. Ex. A at 99-100.

19. The Steering Committee, in consultation with each association allocated funds for the roof replacements. Reinhart Cert. Ex. F ¶ 8.

20. The Steering Committee, in consultation with independent consulting engineers, prepared a form contract and project specifications for the roofing work. Reinhart Cert. Ex. F ¶ 9; Doe Cert. Ex. E ¶ 6.

21. The Steering Committee was then supposed to obtain proposals from potential roofing contractors to remove and replace the FRT plywood roofs. This included obtaining proposals from potential roofing contractors to remove and replace the roofs at Whiteacre . See Reinhart Cert. Ex. F ¶ 9.

22. The Steering Committee, through NJ Builders, arranged for the purchase of roofing materials from particular suppliers. Reinhart Cert. Ex. F ¶ 11.

23. The Settlement Agreement contained a clause that stated that it was the "final settlement between the parties as to HOVNANIAN'S responsibilities and obligations concerning the FRT issue in the Project. [Whiteacre] agrees that it will not seek any other remedies or pursue any other actions or claims relating to FRT PLYWOOD against HOVNANIAN..." Settlement Agreement Ex. G at 16, ¶ 20. Project was defined as Whiteacre . Id. at 1.

24. On or about January 1, 1993 plaintiff and Roe executed a contract ("Roe Management Contract") in which plaintiff engaged Roe Management, Roe's company, to act as manage and operate Whiteacre . See Roe Management Contract Ex. D.

25. Under the terms of that contract Roe was the "exclusive property management agent" for Whiteacre . Roe Management Contract Ex. D at 1.

26. Doe testified that he was the only contractor to bid on the project at Whiteacre . "Q. You also noted that several other contractors had bid on this job other than General. A. No. Not on this -- not on Piscataway, no. Nobody else ever bid on it. This was one that was mine." Doe Dep. Ex. A at 100 lines 3-7.

27. Doe obtained the contract meeting with plaintiff through his previous contacts with NJ Builders. "Q. How did you get the

contract meeting[?] ... Did someone contact you, reach out for you? A. NJ Builders. ... Q. And who was it who reached out for you? A. Dave Gunia ... had received my name from Mr. Bob Dorn who I had previously worked for at NJ Builders where I had done several other F.R.T. projects..." Doe Dep. Ex. A at 27 lines 17, 22-24, page 28 lines 4, 7-9. "Hovnanian took three or four primary subcontractors and divided their condominium developments up geographically to those contractors." Doe Dep. Ex. A at 100 lines 10-13.

28. Doe arrived at the amount of his bid in consultation with NJ Builders. "Q. Are you able to share with me how you arrived at ninety dollars a square for the labor? A. Well basically that was a number that was created between me and [Dave] Gunia. There were several other projects for NJ Builders and the numbers were varying between eighty and ninety dollars a square, and this was ninety just I do believe because of the geographical location." Doe Dep. Ex. A at 32 lines. 16-24.

29. Doe was able to see the form contract and the specifications before he made his bid. "Q. When you made your bid, had you had an opportunity to see the -- a written form of the contract that was going to be used and the specifications? A. Yes. Q. Of the job? A. Yes." Doe Dep. Ex. A at 29 lines 9-15.

30. Doe submitted his bid to NJ Builders. Doe Cert. Ex. E ¶ 4.

31. Doe' bid was based on the cost of labor. "Well, my pRoe was only based on the labor of physically doing the work at ninety dollars per square for labor. Then they [NJ Builders] took my number and added to it the cost for the plywood, the shingle, the dumping permits and whatever else. I'm not sure of what else they put into it. But my number that they were given was based on labor and the cost for the

felt paper and step flashing." Doe Dep. Ex. A at 31 lines. 1-8. Doe Cert. Ex. E ¶ 5.

32. Doe testified that he believed that NJ Builders approved his bid, but he was not sure and that he did not know whether the steering committee approved his bid. "I believe NJ Builders approved it. ... Well, I would assume that they did because I got the job, yeah. Q. Do you know if it was the steering committee that approved it? A. I don't know that either. ... It could have been either. I don't know." Doe Dep. Ex. A at 101 line20-25, page 102 lines 1-6, 18-19.

33. Doe testified that he considered Roe to be plaintiff's representative for the project. "Q. [D]id you consider him [Roe] to be the owner's representative for this project? A. Yes. I did." Doe Dep. Ex. A at 80 lines 21-23.

34. On or about March 1993 plaintiff and Doe executed a contract that set forth the promises, duties and obligations of both parties regarding Doe' removal and replacement of plaintiff's roofs ("Contract"). Ex. H.

35. This Contract was the one developed by the Steering Committee. Reinhart Cert. Ex. F ¶ 9; see Doe Cert. Ex. E ¶ 6.

36. The total cost of the project, including labor and materials was five hundred and sixty-two thousand four hundred and sixty-seven dollars. Contract Ex. H at BF-4.

37. Beginning about May 1993, Doe replaced the roofs and FRT plywood at Whiteacre . See Doe Dep. Ex. A at 16; Contract Ex. H at CA-6.

38. Under the terms of the Roe Management Contract Roe served as the construction manager to supervise and manage Doe' replacement of plaintiff's roofs. See Doe Dep. Ex. A at 92; Roe Management Contract.

NJ Builders's Role

39. Doe testified that NJ Builders was the coordinator of the re-roofing project. "Q. Tell me in your own words what role did NJ Builders play in the re-roofing of this job? A. In my words, they were the coordinator. ... They did all the negotiating for the settlements for the monies that were allocated to have this work done throughout the state. They dealt with the associations, the steering committee. They orchestrated the entire process here." Doe Dep. Ex. A at 56 lines 23-25, page 57 lines 3-8.

40. The Contract specified that NJ Builders was to obtain the necessary permits. Contract Ex. H at CA-15, ¶ 30.

41. Doe testified that he believed that NJ Builders obtained the building permits for the project. "Q. You testified before that you thought that NJ Builders had obtained the building permits on this project. Do you know this for a fact? A. I don't know that for a fact, but I believe they did." Doe Dep. Ex. A at 96 lines 3-7.

42. Doe testified that he discussed the scope of the Whiteacre project with representatives of NJ Builders. "Q. [D]id you ever discuss the Piscataway project scope of work with Mr. Gunia or any other representatives of NJ Builders? A. I'm sure at one time or another, yes." Doe Dep. Ex. A at 103 lines 7-10.

43. Doe testified that he never believed that Dave Gunia was a representative of plaintiff's. "Q. Did you ever believe Mr. Gunia was an agent of a representative of the condominium association for the Piscataway job? A. No." Doe Dep. Ex. A at 103 lines 11-14.

44. Doe testified that NJ Builders paid him, that the association approved labor expenditures, but NJ Builders was solely responsible for approving materials expenditures. General would pay the supplier and NJ Builders would reimburse General. "I would take that to

NJ Builders for payment, for processing. It [payment] was always approved by the association. I could never get paid prior to the association approving. Q. Okay. Was the same thing with materials, was that submitted first to the association? A. No. The materials were -- didn't go through the association. The materials would just go directly -- we would generate an invoice, and then pass it on to Hovnanian for payment." Doe Dep. Ex. A at 104 lines 2-3, 6-15. "I would physically pay the supplier with a General Construction check. Q. You were reimbursed by NJ Builders for certain materials. A. I was reimbursed by NJ Builders, yes." Doe Dep. Ex. A at 113 lines 13.

45. Doe testified that, to the best of his knowledge, NJ Builders never refused to pay an invoice on the grounds that it was not part of the original construction. "Q. On this job was there ever a time when you billed Hovnanian for materials that Hovnanian refused to pay for saying that it was not part of the original construction? A. Not that I recall." Doe Dep. Ex. A at 111 lines 16.

46. During the project Doe would submit an invoice to NJ Builders for materials. NJ Builders would give a check to General. Then General would pay the vendor. "Q. And then who paid for the materials? A. I would submit an invoice to Hovnanian. They cut a check for whatever vendor the invoice was for. Whether it be the roofing manufacturer, and then in turn General would cut a check for the material." Doe Dep. Ex. A at 31 lines 18-23.

47. NJ Builders admits that it was responsible for paying contractors for their materials. Reinhart Cert. at 4 ¶ 12.

48. Doe testified that to his knowledge the only representative to review the progress of the project during construction was Mr. Gunia, who visited the construction one or two times. "Q. Did you ever personally see any representative of NJ Builders on the site during the

construction -- during your reconstruction work, I should say? A. After or during? Q. During. A. During I think Mr. Gunia may have come out once or twice." Doe Dep. Ex. A at 89 lines 17-24.

Contract

49. Doe acknowledges that the Contract between him and plaintiff was a form contract used by multiple condominium associations for FRT replacement. Doe Cert. Ex. E ¶ 6.

50. The Contract executed between plaintiff and Doe had the following relevant provisions.

51. The Contract set forth that all work specified was to be done "in a first-class workmanlike manner." Contract Ex. H at CA-1, ¶ 1.

52. The Contract specified, "Details of the work which are not specifically covered herein or on the specifications, but which are reasonably implied or are normally considered part of the job for that trade shall not be limited to the specifications and shall be furnished at no extra cost as though it were specifically part of the contract." Contract Ex. H at CA-1, ¶ 1.

53. The Contract specified "that all materials and equipment furnished and installed shall be new unless otherwise specified... All labor and installation shall be performed in the best and most workmanlike manner and consistent with quality standards required by owner and/or industry standards, by mechanics skilled in their respective trades." Contract Ex. H at CA-6, ¶ 5. The Contract specified, "All materials, equipment labor or installation not conforming to the requirements hereof shall be considered defective."

Id.

54. The Contract specified, "Payment is not evidence of acceptance of non-conforming or defective work." Contract Ex. H at CA-9, ¶ 10.

55. The Contract specified, "Failure to agree in writing ... that an item of work shall constitute an extra shall be conclusive in any action between parties that the work so performed was intended to be within the scope of the work defined herein and does not constitute an extra." Contract Ex. H at CA-9, ¶ 11.

56. The Contract specified that Doe was responsible for understanding the scope of the project in that mistake was not a defense. Contract Ex. H at CA-9, ¶ 12.

57. The Contract specified that Doe was responsible to "schedule and pass all required inspections with the proper governmental authorities..." Contract Ex. H at CA-10, ¶ 13.

58. The Contract contained two merger clauses. First, in the general terms section in all capitals letters it stated, "NO DEVIATION FROM THE SPECIFICATIONS AFORESAID SHALL BE ALLOWED WITHOUT THE WRITTEN AUTHORIZATION OF THE OWNER AS EVIDENCED BY A WRITTEN AMENDMENT TO THIS AGREEMENT." Contract Ex. H at CA-1, ¶ 1. The second merger clause stated, "This Agreement sets forth the entire understanding of the parties hereto and supersedes all other agreements and understandings among or between any of the parties hereto relating to the subject matter hereof and may not be contradicted by evidence of prior, contemporaneous or subsequent agreements of the parties." Contract Ex. H at CA-16, ¶ 40.

59. The contract also contained a clause requiring that any alterations to it be in writing, "This Agreement cannot be changed or modified orally. Any change or termination must be in writing and signed by the parties." Contract Ex. H at CA-16, ¶ 39.

60. The Contract incorporated Doe' bid proposal. Contract Ex. H at BF-4.

61. The Contract specified that all labor and materials would be furnished "in a manner in accordance with the applicable BOCA--Basic Building Code, the National Roofing Contractors Manual on Steep Roofs, OSHA Safety and Health Standard, and all other applicable codes and standards." Contract Ex. H at SA-17.

62. As discussed infra ¶¶ 82 et seq. Doe went through the Contract and highlighted several terms. None of the aforementioned terms or clauses discussed supra ¶¶ 51-61 were highlighted by Doe. See Contract Ex. H at CA-1, CA-6-CA-15.

63. The only item highlighted in the Contract Agreement section of the Contract was the section stating, "estimates for refuse disposal, costs for materials." Contract Ex. H at CA-1; see CA-6-CA-15.

64. The Contract specified roof sheathing and BlazeGuard were to be installed in accordance with manufacturer's instructions, see Owens Corning Quality Roofing Shingles. A Guide to Installing Asphalt Roofing Shingles ("Corning manual") Ex. I, and in a manner outlined in the BOCA Code. Contract Ex. H at SB-20. This item was not highlighted. Id.

65. The Contract specified that the drip edge "be of a corrosion resistant material that extends approximately three (3) inches back from the roof edge and bent downward over the fascia. Drip edge should be directly applied to the deck along the eaves and over the underlayment along the rakes." Contract Ex. H at SB-21. This item was highlighted. Id.

66. The Contract specified, regarding the application of underlayment, at "joints with vertical surfaces, the underlayment must

extend up the side of the wall a minimum of four (4) inches." Contract Ex. H at SB-21. This item was not highlighted. Id.

67. The contract specified that eave flashing of not less than 50 lbs. per square be "installed parallel to the eaves and overhang the drip edge by 1/4 to 3/8 inch and shall extend at least twelve (12) inches inside the exterior wall below." Contract Ex. H at SB-21. This item was highlighted. Id.

68. The Contract specified that "'Racking' is not an acceptable method of shingle installation." Contract Ex. H at SB-22. This item was not highlighted. Id.

69. The Contract provided specific instructions how the valley flashing and shingles were to be applied. Contract Ex. H at SB-22. This item was not highlighted. Id.

70. The Contract provided that if nails were used as fasteners that the pneumatic equipment be calibrated in order to obtain proper penetration. Contract Ex. H at SB-22. This item was not highlighted. Id.

71. The Contract provided specific instructions regarding the installation of valley shingles. Contract Ex. H at SB-22. These instructions were not highlighted. Id.

72. The Contract specified that the "step flashing shall be ten (10) inches long and two (2) inches wider than the exposed face of the roof shingle." Contract Ex. H at SB-23. This item was not highlighted. Id.

73. The Contract provided that the step flashing would not be visible; these instructions were not highlighted. Contract Ex. H at SB-23.

74. The Contract specified that all buildings with ridge vents should have those vents "replaced." Contract Ex. H at SB-23. This item was not highlighted. Id.

75. The ridge vent specified by the Contract was from Air Vent, Inc. and was to be supplied by the contractor. Contract Ex. H at SB-23. This item was not highlighted. Id.

76. The Contract specified that all buildings with dome vents would have those vents "replaced." Contract Ex. H at SB-23. This item was highlighted. Id.

77. The Contract specified that all areas not containing a firewall "shall be replaced with 1/2" CDX plywood... in accordance with the manufacturer's directions and shall be nailed in the manner outlined in the BOCA Code." Contract Ex. H at SB-23. This item was not highlighted. Id.

78. The Contract specified that whenever the term "or equal" was used "it shall require approval from the Owner or the Owner's Representative in written form." Contract Ex. H at SB-25. This item was not highlighted. Id.

79. The Contract specified, "No substitutions will be allowed for any material unless requested in writing by Contractor and approved by the Owner." Contract Ex. H at SB-25. This item was not highlighted. Id.

80. The Contract specified that FRT plywood was to be replaced in most areas with CD-X plywood, however, FRT plywood installed in fire walls was to be replaced with Blazeguard material. Contract Ex. H at SB-27. This item was not highlighted. Id.

Doe' Review of the Contract

81. Doe testified that he read the contract before he signed it. "Q. Did you read this contract before you signed it, what we've identified as P-3? A. Yes." Doe Dep. Ex. A at 106 lines 8-10.

82. Doe testified that per Gunia's instructions, he went through the contract with a highlighter and highlighted the terms he did not agree with. "I highlighted this [the contract] prior to probably having signed this by anybody. I went through this contract when I got it, disagreed with certain things and highlighted the things I disagreed with. Basically I highlighted because I vaguely recall Mr. Gunia saying just highlight the things you don't agree with." Doe Dep. Ex. A at 46 lines 9-15.

83. Doe testified that Roe went through the highlighted items and agreed to some of the changes. "Mr. Roe was probably not present when I highlighted these items, but they're highlighted because I disagreed with them, and we had to you know, then we had our meeting with Roe, and he either said yea or nay to whatever." Doe Dep. Ex. A at 46 lines 5-9.

84. Doe testified that Roe had the final say regarding what changes to the contract would be approved. "Q. So Mr. Roe was the final say as to what was approved or not approved with the contract? A. Correct." Doe Dep. Ex. A at 88 lines 2-5.

85. Doe testified that although he may not have reviewed any highlighted changes to the contract with NJ Builders, it would have been aware of the changes because of his other dealings with it. "Q. Did you ever review the highlighted areas with NJ Builders representatives or Mr. Gunia? A. I'm sure that came about. Maybe not in a highlighting, but from reading the contracts because there -- all the developments I did it was the same basic contract with just a different

development's name in it, and these questions came up well before any of this work was done, and the way it was told to me is that we are not to upgrade the roof systems. If they have something there now, yes, we're to put it back, but if they don't have water and ice shield, no we're not putting that on. If so the association will pay for that as an extra if they want it." Doe Dep. Ex. A at 81 lines 9-25.

86. Doe testified that he prepared an addendum to the contract that stated there were items that General would not consider part of the bid pRoe. "Q. Is there anything that indicates the highlighted areas were items that were deleted? A. There was this piece of paper that followed this or was with this that said something to the effect that these are disagreements and/or were not -- are not part of the pRoe to do this." Doe Dep. Ex. A at 52 lines 11-16.

87. Doe testified that he was no longer in possession of this piece of paper. "Q. And do you have the piece of paper? A. No." Doe Dep. Ex. A at 52 lines 17-18.

88. Doe testified that Roe was shown this piece of paper. He did not state whether Roe signed it. "Q. When you generated it and likely signed it, do you know then what you did with that piece of paper? A. It was shown to Richard Roe, and that's -- that's who I negotiated most of the stuff in this contract with." Doe Dep. Ex. A at 53 lines 18-23.

89. Doe testimony never indicates that plaintiff was aware that this paper existed. See Doe Dep. Ex. A at 52-54.

90. Doe indicated that some items were paid separately from the contract. "[A]pparently somebody agreed with me because we were paid for these highlighted items as extras through the association through Richard Roe and NJ Builders." Doe Dep. Ex. A at 54 lines 3-6.

91. Doe testified that the contract was written without reference to the previous construction. "Is there anything in the contract that indicates that the specifications in the contract are to be ignored where it wasn't part of the original construction? A. Not that I'm aware of." Doe Dep. Ex. A at 65 lines 8-12.

92. Doe testified that he considered any part of the contract that was not highlighted to be part of the contract. "Q. So if you had not highlighted those several paragraphs -- A. Um-hm. Q. -- you would have considered that to be part of the contract. A. Yes. Q. Is that correct? A. Yes, correct." Doe Dep. Ex. A at 89 lines 9-14.

The FRT Plywood Replacement Project

93. The FRT replacement project was conducted by Doe and his company General and inspected and approved by Roe and his company Custom Care. Doe Cert. Ex. E ¶¶ 2, 11.

94. Doe testified that the job was to replace the FRT plywood and put shingles back on the roofs. "Q. What was the job that needed to be done in lay terms? The contract here for Whiteacre ...? A. To remove all the FRT plywood all the delaminating unsafe plywood. Install new plywood and put shingles back on the roofs." Doe Dep. Ex. A at 57 lines 9-15. "

95. Doe testified that he also replaced certain pieces of plywood. "Only certain pieces. Only pieces that were on fire walls, or if there were random sheets of FRTP that were outside the firewall area they would be replaced as an extra for that twenty five cents a square foot cost." Doe Dep. Ex. A at 58 lines 6-10.

96. Doe testified that after reinstalling the plywood he would inspect the truss, then reinstall felt paper and shingles. "And after the plywood came off, what did you do then? A. Several things. Inspect for broken truss, repair them if there were some there, reinstall

plywood. Q. And after you reinstalled plywood, what went on next? A. Felt paper, shingle, any accessories that were needed, stand pipe collars, venting." Doe Dep. Ex. A at 59 lines 1-9.

97. Doe testified that to his knowledge none of the materials used on the project were defective. "Q. [W]ere any of those materials [used on the project] to your knowledge defective? A. No." Doe Dep. Ex. A at 88 lines 16-18.

98. Doe testified that General was responsible for the costs of some of the materials as part of his bid pRoe. "Q. What were the materials General paid for as part of the ninety square pRoe? A. H. clips, nails, felt paper, flashings, miscellaneous things." Doe Dep. Ex. A at 110 lines 15-18.

99. Doe testified that NJ Builders was responsible for the costs of the shingles. "Q. And Hovnanian paid for the shingles? A. Correct." Doe Dep. Ex. A at 110 lines 19-20.

100. Doe testified that plaintiff was responsible for the costs of the ridge vents. "Q. Who paid for the ridge vents? A. Association." Doe Dep. Ex. A at 110 lines 21-22.

101. Doe testified that during the project General probably reused some of the flashings from the previous roof. "Q. Did you reuse any of the existing flashings that were there on the site? A. I would imagine so. Q. And why do you say you would imagine so? A. Because there's nothing that could -- some flashing came out during the ripping process that wasn't damaged. There's nothing wrong with it. It can be reused." Doe Dep. Ex. A at 40 lines 23-25, page 41 lines 1-6.

102. Doe testified that General was responsible to pay for the flashings. "Q. What were the materials General paid for as part of the ninety square pRoe? A. ... flashings..." Doe Dep. Ex. A at 110 lines 15-18.

103. Doe testified that during the project General probably used five by seven cards. "I can't recall [the size of the flashings]. They may be five by seven cards. I'm not sure what we used back then. Something -- we probably used similar to what was originally installed." Doe Dep. Ex. A at 41 lines 14-17.

104. Doe testified that NJ Builders applied for the permits for the project. "Q. Who got the permits? A. I believe it was NJ Builders." Doe Dep. Ex. A at 42 lines 2-3.

105. Doe testified that he did not contact code enforcement officers regarding the project. "Q. And who made called or made contact with the code enforcement officers after the project got started? A. That I'm not sure of. Q. But you didn't do that? No, I did not." Doe Dep. Ex. A at 42 lines 4-9.

106. Doe testified that there were no errors in the contract specifications. "Q. Did you find any errors in the specifications? A. Not that I can recall." Doe Dep. Ex. A at 43 lines 4-6.

107. Doe testified that there were items he did not find pertinent to the contract and did not perform. "Q. Now, when you said you did not make reference, though, to things that may not have been pertinent, can you tell me what you mean by that? A. Where the contract reads and the highlighted items. Things such as water and ice shield or -- there's -- there are instances where you can't perform some of the things they say in the contract without performing additional work. For instance, replacing running the felt paper up the interior gable walls. That cannot physically be done without removing the existing siding, therefor it wasn't pertinent to this contract. This is more of a new building contract than it is a rehab contract. Q. You gave us that example. Can you give me any other examples where it wasn't something in the contract or specification was not pertinent to the job? A. Roof

edge wasn't a situation that wasn't originally installed. It says that it should be installed in the contract, but it was considered to be by [Dave] Gunia an upgrade, and that was not to be done." Doe Dep. Ex. A at 43 lines 11-25, 44 lines 1-9.

108. Doe testified that he did not bill separately for the step flashings he replaced. "Q. Where you did replace the step flashings, did you bill separately for that? A. No." Doe Dep. Ex. A at 111 lines 2-4.

109. Doe testified that ice shields were not installed on the project. "Q. Are there and ice shields installed on this job? A. None that I'm aware of, no." Doe Dep. Ex. A at 62 lines 16-18.

110. Doe testified that he was not responsible for refuse disposal. "Q. And what was that you're saying you were not responsible for? A. The estimates for refuse disposal of garbage. I never negotiated that, so I don't know what that number is." Doe Dep. Ex. A at 45 lines 5-9.

111. Doe testified that he reused some of the existing dome vents during the project. "A. You can go to [page] SB-23 [of the contract] where I highlighted dome vents. Q. What did you disagree with? A. All buildings having dome vents originally installed shall be replaced. If they were in good shape, they could be reused, they were to be reused." Doe Dep. Ex. A at 50 lines 16-22.

112. Doe testified that he did not install the drip edge, which was contrary to the terms of the contract. "SB-21 drip edge shall be of a corrosion existent material that extends approximately three inches back from the roof edge and bent down over the fascia, and drip edge should be directly applied to the deck along the eaves and over the underlayment along the rakes. Intersections at corners shall be tightly fitted gaps shall not be acceptable. We disagreed with that. That

wasn't an original product that was on these roofs to begin with and therefore, we were not going to install it. It was considered an upgrade on NJ Builders's behalf, and it wasn't going to be done." Doe Dep. Ex. A at 50 lines 24-25, 51 lines 1-11.

113. Doe testified that the reason he did not install a drip edge was because it had not been previously installed. "It [the drip edge] was not there to begin with so, therefore, it was not to be put back because it would be considered an upgrade on NJ Builders's behalf. ... It was not physically installed on the roofs prior to us ripping them off. That I can recall." Doe Dep. Ex. A at 59 lines 15-23.

114. Doe testified that he installed the underlayment in some instances, but not others. "Q. In how many instances did you install the underlayment four inches up the side wall, vertical wall? A. I can't be one hundred percent on the exact amount, but in a couple of dozen areas. Q. And what is your explanation then for not installing the underlayment on other areas up the vertical wall? A. Because you would have to physically remove the existing siding from the buildings to do this process." Doe Dep. Ex. A at 60 lines 22-25, page 61 lines 1-7.

115. Doe testified that the contract stated that the underlayment would go up the vertical wall. "Q. Am I mistaken that the written contract that we've marked as P-3 indicates that the underlayment will go up the vertical wall four inches? A. It says that in the contract." Doe Dep. Ex. A at 61 lines 14-18.

116. Doe testified that the COBRA rolled roof ridge vent was used contrary to the contract, which specified that Care Inc. shingle vents be used. "Q. The specifications indicate that the ridge vents were to be replaced with shingle vent by Care Inc. which was to be furnished and installed by contractor. Were those particular ridge

vents used? A. No they were not? Q. Can you tell me why? A. It was agreed by both parties, General and Richard Roe, that we were going to be using COBRA rolled roof ridge vent because that was going to be paid as an extra, and it was significantly less cost to them." Doe Dep. Ex. A at 66 lines 2-13.

117. Doe testified that he believed that Richard Roe, on behalf of plaintiff, told him to install the ridge vents. "Q. Who asked for the ridge vent? A. The association. ... Do you know who it was who asked you? A. I would -- I can't remember. I dealt primarily with Richard Roe, so I would assume it was Richard Roe. ¹ I very rarely spoke to anybody other than him." Doe Dep. Ex. A at 118 lines 22-24, page 119 lines 2-7.

118. Doe testified that General was responsible for installing a blaze guard at every firewall except when an area was designated as an open perimeter by NJ Builders. "We would use it [blaze guard] at every single firewall unless we were told by NJ Builders that this was an area that was considered as an open perimeter area, therefore, we were to install C.D.X. plywood." Doe Dep. Ex. A at 68 lines 13-17.

119. Doe testified that NJ Builders told him prior to the start of the project which buildings were considered open perimeter. "Hovnanian would have determined which buildings can get an open perimeter act or not prior to starting, therefore, I would be told prior to stating..." Doe Dep. Ex. A at 69 lines 12-15.

¹ In the deposition a Q. is placed here, however, it is clear from the context that this statement was made by Doe. Additionally, another Q. follows the end of this quotation when attorney for plaintiff asked his next question.

120. Doe testified that an open perimeter is a NJ Builders term that relates to the requirements set by the municipality relating to fire safety. "That's a Hovnanian term.... The way it was described to me is that certain municipalities will allow you to put regular C.D.X. plywood back in the roof other than using blaze guard if you have the accessibility, the proper accessibility for a fire truck." Doe Dep. Ex. A at 97 lines 19-25, page 98 line 1.

121. Doe testified that he considered installing the eave flashing to be an extra, however, he was never paid for this, although NJ Builders reimbursed him for the material. "Q. With respect to the ... eve [sic] flashing what was paid for? A. Yes. Q. Who told you to -- who told you to put that in? A. I believe that was a mutual agreement between NJ Builders and the association because I've noticed I never got paid myself for anything extra for doing that, but I did get reimbursed through NJ Builders for the ... fifty pound felt paper." Doe Dep. Ex. A at 93 lines 22-25, page 94 lines 1-8.

Roe's Role

122. Doe testified that Roe or a representative of Custom Care was on site every day of the project. "Q. How often did you see Mr. Roe or a representative of Custom Care on the site? A. Every day. Q. Did they ever direct you or anyone from General on any of the work that was being done? A. Every day. Q. Did they -- do you know if the preformed inspections of the day? A. Every Day. Q. Do you know if they made any approvals of the work of General. A. Every day." Doe Dep. Ex. A at 92 lines 14-23.

123. Doe testified that Roe supervised the project and directed General when changes were to be made. "There are situations where they [Roe or his representatives] wanted more, more P-51 vents in certain locations. There were areas they wanted -- they told us how to repair a

broken truss. There were areas where they had us remove siding and fascia, and then reinstall properly. There were instances throughout every day that we'd be told, you know, what they wanted, and it was up to us to keep track as to the extras on that. Q. But if the items weren't an extra, you would just make the change or do whatever was asked of you? A. We would do the normal routine of replacing the F.R.T.P. If something was to come up where once the plywood was removed and you could physically see broken truss, it was, therefore, Roe Management's job to say, fix this, and this is how you are to fix this." Doe Dep. Ex. A at 93 lines 4-21.

124. Doe testified that Richard Roe approved partial payment all of his invoices submitted to the plaintiff and then inspected the work before final payment. "Q. When you said that you had to give it to the association, who was that, Richard Roe you meant? A. Either Roe or the girl there ... the secretary. ... She would get it, she would verify that, for instance building number eighteen I'm billing for ninety percent. They always held back ten percent, then they'd go, they'd look at the building, okay, yes, he did eighteen, pay him. Q. So you would give it to the girl in the office? A. Um-hm. Q. She would presumably give it to Roe to make the inspection? A. Correct. Q. He either approved it or asked you to do something and ultimately asked, got paid? A. He never disapproved it. He approved everything. Then for that ten percent we would walk through and walk the entire building with two representatives from my company and two reps from Roe's company, and critique every square inch of that roof before I got paid my ten percent, so we did that, and they had paid me my ten percent two months later." Doe Dep. Ex. A at 120 lines 7-25, page 121 lines 1-8. See Contract Ex. H at CA-11, ¶ 15 for an explanation of the ten percent retention.

Doe' View of the Effect of Nonperformance

125. Doe testified that in his opinion there was no effect as a result of his failing to install the drip edge. Q. What would be the effect of no ... drip edge[?] A. In my opinion? ... There is no effect." Doe Dep. Ex. A at 54 lines 17-25, page 55 line 2.

126. Doe testified that in his opinion there was no effect at a result of his failing to install the felt up the wall. "Q. What's the effect of not running the felt up the wall? A. In my opinion there is no effect." Doe Dep. Ex. A at 55 lines 3-5.

Nonperformance and Damages

127. About 1998 plaintiff became aware of several problems related to the manner in which Doe replaced the roofs at Whiteacre . See Letter from Smith to Johnson of 5/11/98 ("Smith Let. 5/11/98") Ex. J.

128. In order to assess the damages caused by defendants' fraud, nonperformance, and/or negligence plaintiff, hired Smith Associates: Professional Engineering and Planning ("Smith") to asses the state of plaintiff's roofs and to assess damages and appropriate remedies. Smith submitted various reports to plaintiff based inspections conducted on June 18, 1998. See Smith Let. 5/11/98 Ex. J; Letter from Johnson to Smith of 6/1/98 Ex. K; see generally Letter from Smith to Jones of 12/28/98 ("Smith 12/28/98 Let.") Ex. L; Letter from Smith to Johnson of 8/4/98 ("Smith 8/4/98 Let.") Ex. M; Smith Memorandum of 8/4/98 Ex. N; ²

² Smith's findings are currently in letter form. They are being presented in this form for the purposes of arbitration. Smith is available to present his findings in certification form pursuant to N.J.S.A. § 2A:53A-27.

see also Pl.'s Resp. to Doc. Demand of Richard Roe and Custom Roe Management Assoc., Inc. Ex. O ¶¶ 2, 4.

129. Smith inspected the roof installations at six representative buildings of plaintiff's complex. Smith 12/28/98 Let. Ex. L at 2.

130. Smith found "major deviations, deficiencies and defects in the roof replacement work compared to the Contract requirements, the Building Code, and roofing industry standards." Smith 12/28/98 Let. Ex. L at 1.

131. Contrary to the Contract, Doe did not install the drip edge at eave areas, nor did he install the drip edge along the rake areas extending on to the roof plane. Smith 12/28/98 Let. Ex. L at 3.

132. Doe's failure to install the drip edge was contrary to the manufacturer's specifications and the National Roof Contractors Manual on Steep Roofs ("NRCA Manual"). 1. Smith 12/28/98 Let. Ex. L at 3; Corning manual Ex. I at 9.

133. Doe's failure to install the drip edge accelerated the deterioration of the plywood sheathing of plaintiff's roofs and combined with the lack of positive seal with flashing material do not provide plaintiff's roofs with adequate protection from ice. Smith 12/28/98 Let. Ex. L at 3.

134. Contrary to the Contract, Doe did not install the underlayment up the vertical wall four inches. Smith 12/28/98 Let. Ex. L at 3.

135. The NRCA Manual and the manufacturer's specifications require installation of the underlayment four inches along vertical walls. Smith 12/28/98 Let. Ex. L at 3; Corning manual Ex. I at 10.

136. Failure to install the underlayment contributed to water infiltration problems. Smith 12/28/98 Let. Ex. L at 3.

137. Contrary to the Contract, Doe did not install eave flashing/heavyweight material with the drip edge, but rather merely installed the material on the roof. Smith 12/28/98 Let. Ex. L at 3.

138. Non-installation of the eave flashing as an ice shield is inconsistent with Section 2305.2 of the 1990 building code, the NRCA Manual, and industry standards at the time. Smith 12/28/98 Let. Ex. L at 4.

139. The non-installation of the eave flashing as an ice shield provided plaintiff's roofs with inadequate protection from ice damming. Smith 12/28/98 Let. Ex. L at 4.

140. Contrary to the Contract, Doe used the racking method to install shingles on plaintiff's roofs. Smith 12/28/98 Let. Ex. L at 4.

141. The racking method is prohibited by the NRCA Manual. Smith 12/28/98 Let. Ex. L at 4.

142. The racking method can result in the failure to install all required fasteners, incorrect color blend of shingles, and latent mat failure in the shingle panels. Smith 12/28/98 Let. Ex. L at 4.

143. Contrary to the Contract and the manufacturer's instructions, Doe used excessive air pressure to install roof fasteners, causing the nail to be driven too deep into the shingles. Smith 12/28/98 Let. Ex. L at 4; see Corning manual Ex. I at 14.

144. Improper installation of fasteners will result in greater susceptibility of the roofs to blow off damage and may void the manufacturer's warranty. Smith 12/28/98 Let. Ex. L at 4.

145. Contrary to the Contract, in some instances the valley shingles were cut backwards, i.e. the shingles of the lower sloped roofs were installed on top of the shingles of the higher sloped roofs, by Doe. Smith 12/28/98 Let. Ex. L at 4.

146. Contrary to the Contract and the manufacturer's specifications, Doe did not cut the valley shingles to the proper length. Smith 12/28/98 Let. Ex. L at 4; see Corning manual Ex. I at 11-12.

147. Contrary to the Contract, Doe did not properly install the bottom section of the valley shingles. Smith 12/28/98 Let. Ex. L at 4.

148. Doe' cutting the valley shingles backwards, failing to cut the valley shingles to the proper length, and improper installation of the valley shingles will result in water infiltration problems from the roof coverings. Smith 12/28/98 Let. Ex. L at 4.

149. Contrary to the Contract, Doe did not replace the original aluminum step flashing, which was five inches by seven inches, with ten inch by seven inch flashing. Smith 12/28/98 Let. Ex. L at 5.

150. Contrary to the Contract, Doe failed to replace the flashing on 95% of the areas examined by Smith. Smith 12/28/98 Let. Ex. L at 5.

151. Doe' failure to replace the step flashing resulted in improper alignment of the step flashing with the shingle tabs. Smith 12/28/98 Let. Ex. L at 5.

152. Doe' failure to replace the step flashing made it impossible to install the underlayment as required by the Contract. Smith 12/28/98 Let. Ex. L at 5.

153. The improper installation of step flashing promotes water infiltration problems at roof/wall intersections. Smith 12/28/98 Let. Ex. L at 5; Smith 8/4/98 Let. Ex. M at 2.

154. The improper installation of step flashing necessitates the removal and replacement of flashings and shingles in order to correct flashing details to allow for the future overlay of the existing roof functions. Smith 12/28/98 Let. Ex. L at 5.

155. Contrary to the Contract, Doe did not replace the plumbing flanges throughout the project. Smith 12/28/98 Let. Ex. L at 5; see Smith 8/4/98 Let. Ex. M at 3.

156. Doe' failure to replace the plumbing flanges will result in water infiltration problems because of the deterioration of rubber seals at the perimeter of the pipe intersection. Smith 12/28/98 Let. Ex. L at 5.

157. Contrary to the Contract, Doe did not replace the original ridge vent by installing a roll style ridge vent, but instead replaced the original with Shingle Vent by Air Vent, Inc. Smith 12/28/98 Let. Ex. L at 6.

158. Doe' substitution of the type of ridge vent may result in accelerated reduction in the useful life of the fiberglass shingles and may allow for water infiltration problems through the vent in certain wind conditions. Smith 12/28/98 Let. Ex. L at 6.

159. Contrary to the Contract, Doe reinstalled the original dome vents rather than replacing them. Smith 12/28/98 Let. Ex. L at 6.

160. The dome vents were not the proper type for the type of roof installation used for plaintiff's roof's. Smith 8/4/98 Let. Ex. M at 1.

161. Doe' failure to install new dome vents necessitates the premature replacement of the venting fixtures to prevent water infiltration problems. Smith 12/28/98 Let. Ex. L at 6.

162. Doe failure to install new dome vents necessitates their replacement. Smith 8/4/98 Let. Ex. M at 1.

163. The BlazeGuard material was improperly installed between units 515 and 516 in Building 41. The BlazeGuard between those units was partially delaminated. Smith 12/28/98 Let. Ex. L at 6.

164. Delamination of BlazeGuard material may result in the loss of the fire rating of the material. Smith 12/28/98 Let. Ex. L at 6.

165. The finding that the BlazeGuard material was improperly installed at the locations discussed infra necessitates the examination of the BlazeGuard material at other locations in order to determine whether the BlazeGuard material was generally defective. Smith 12/28/98 Let. Ex. L at 6.

166. The combined effect of the lack of installation of the drip edge, lack of installation of the underlayment up 4 inches of the vertical wall, lack of installation of eave flashing at the drip area, improper shingle application, use of excessive force on the shingle fasteners, improper installation of the shingle valleys, failure to replace the flashing, failure to replace the plumbing flash flanges, change when replacing the ridge vents, and failure to replace the dome vents necessitates the replacement of plaintiff's roofs in order to prevent roof leaks. Smith 12/28/98 Let. Ex. L at 7.

167. In 1999 the estimated cost of replacing and reinstalling plaintiff's roofs was \$590,000. Letter from Smith to Jones of 1/6/99 Ex. P.

Admitted Liability by Doe

168. Doe admitted that if the shingles were installed with valleys cut backwards [shingles of the lower roof slope were installed on top of shingles of the higher sloped roof] that General would be liable. "Q. If there were in some cases valleys cut backwards, whose responsibility would that have been? Would that have been Hovnanian's or General's? A. That would have been General's." Doe Dep. Ex. A at 64 lines 5-8, 16-20.

169. Doe admitted that if nail heads were driven too deeply then General would be liable. "Q. Would it be fair to say that if in cases

there were nail heads that were driven too deeply that would have been General's [liability]? A. Correct." Doe Dep. Ex. A at 64 lines 21-24.

170. Doe admitted that if all the plumbing flanges were not replaced then General would be liable. "Q. Do you know whether the plumbing flanges were replaced? A. They should have been replaced. Q. And if they were not, would that be the responsibility of NJ Builders or General? A. General." Doe Dep. Ex. A at 65 lines 15-20.

171. Doe admitted that in some instances if a blaze guard were not installed in the firewall then General would be liable. "Q. If blaze guard were, in fact, not installed would that be the responsibility of Hovnanian or General? A. General. If, if it was not an area that was considered an open perimeter." Doe Dep. Ex. A at 67 lines 20-24.

LEGAL ARGUMENT

SUMMARY JUDGMENT

Rule 4:46-2 provides that a court should grant summary judgment when "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." Cited in Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 528-529, 666 A.2d 146, 150 (1995). If the disputes are "of an insubstantial nature" summary judgment is appropriate. Id. at 529, 666 A.2d at 150.

[Summary judgment] is designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion clearly shows not to present any genuine issue of material fact requiring disposition Ledley v. William Penn Life Ins. Co., 138 N.J. 627, 641-42, 651 A.2d 92 (1995) quoting Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74, 110 A.2d 24, 27 (1954).

To hold a trial when there is no genuine issue regarding a material fact is a waste of judicial resources. Pierce v. Ortho Pharmaceutical Corporation, 84 N.J. 58, 65, 417 A.2d 505, 508 (1980). The New Jersey Supreme Court has noted, "To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed 'worthless' and will 'serve no useful purpose.'" Brill, 142 N.J. at 541, 666 A.2d at 156, quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986).

Summary judgment should be granted if papers pertinent to the motion show palpably the absence of any issue of material fact, even where the allegations of the pleadings, standing alone, raise such an issue. The summary judgment procedure "pierces the allegations of the

pleadings to show that the facts are otherwise than as alleged."

Judson, 17 N.J. at 75, 110 A.2d at 28, citing Wade v. Six Park View Corp., 27 N.J.Super. 469, 99 A.2d 589 (App.Div.1953).

As discussed in Points I through V, there are no material facts in dispute in this case. The only issues are ones of apportionment of damages between defendants. Therefor summary judgment should be granted for plaintiff.

POINT I: DOE' COMMITTED STATUTORY AND COMMON LAW FRAUD

Doe knowingly and willfully charged plaintiff the full consideration as recited in the written contract while failing to provide both materials and labor for which he charged and was paid. As a result of Doe' failure to supply the labor and materials for which he charged and were part of the contract, plaintiff sustained damages. The foregoing constitutes both common law and statutory fraud. Condominium Associations are protected by the Consumer Fraud Act. See Ramapo Brae Condominium Ass'n, Inc. v. Bergen County Housing Authority, 328 N.J.Super. 561, 746 A.2d 519 (App. Div. 2000); City Check Cashing, Inc. v. National State Bank, 244 N.J.Super. 304, 582 A.2d 809 (App.Div.), certif. den. 122 N.J. 389, 585 A.2d 391 (1990).

A common-law fraud action has five elements: "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages." McConkey v. AON Corporation, 354 N.J.Super. 25, 45, 804 A.2d 572, 584 (App. Div. 2002), cert. den. McConkey v. AON Corp. and Alexander & Alexander Services, Inc., 175 N.J. 429, 815 A.2d 476, and cert. den. McConkey v. AON Corp., 175 N.J. 429, 815 A.2d 476 (2003), citing Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610, 691 A.2d 350 (1997); see Jewish Ctr. of Sussex County v. Whale, 86 N.J. 619, 625, 432 A.2d 521, 524 (1981).

Statutory fraud is defined by N.J.S.A. § 56:8-2, which states in pertinent part:

The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real

estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice..

Under the Act, an offense arises from an affirmative act, an omission, or a violation of an administrative regulation. Gennari, 148 N.J. at 605, 691 A.2d at 365 (1997), citing Strawn v. Canuso, 140 N.J. 43, 60, 657 A.2d 420 (1995) and Cox v. Sears Roebuck & Co., 138 N.J. 2, 19, 647 A.2d 454 (1994). Under the Act, a defendant "who makes an affirmative misrepresentation is liable even in the absence of knowledge of the falsity of the misrepresentation, negligence, or the intent to deceive." Id. The relevant misrepresentation must be material to the transaction, a statement of fact, false, and part of the inducement. Id. at 607, 691 A.2d at 366. Although common law fraud requires that the plaintiff must have relied on the misleading statements, statutory fraud only requires that the misrepresentations misled, deceived or damaged the injured party. Id. at 607-608, 691 A.2d at 366. Consequently in a statutory fraud action, unlike a common law fraud action, one need only prove three elements: (1) a material misrepresentation, (2) intention that the other person rely on it, and (3) resulting damages. Compare Gennari, 148 N.J. at 605-608, 691 A.2d at 365-366 with McConkey, 354 N.J.Super. at 45, 804 A.2d at 584. Statutory fraud applies even when a merchant acts in good faith. Cox, 138 N.J. at 16, 647 A.2d at 461 (1994).

"Every fraud in its most general and fundamental conception consists of the obtaining of an undue advantage by means of some act or omission that is unconscientious or a violation of good faith." Jewish Ctr. of Sussex County, 86 N.J. at 624, 432 A.2d at 524. Doe made several misrepresentations to plaintiff, which induced it to hire him and General for the FRT plywood replacement project. By signing the

Contract, Doe represented that he would do the work in the Contract. The Contract required that Doe do the following: to install a drip edge, to install underlayment at joints with vertical surfaces up the side of the wall four inches, to install eave flashing/heavyweight material with the drip edge as an ice shield, not to use the racking method when installing shingles, to use appropriate pressure when installing roof fasteners, to properly install the valley shingles, to replace the aluminum step flashing, to replace the plumbing flanges, to replace the dome vents, to replace the ridge vent, and to properly install Blaze Guard material at firewalls. Contract Ex. H at SB-20-23. Doe, however, did not install a drip edge, or underlayment at joints with vertical surfaces up the side of the wall four inches, or eave flashing/heavyweight material with the drip edge as an ice shield. See Smith 12/28/98 Let. Ex. L at 3-6. Additionally, Doe failed to replace the aluminum step flashing, the plumbing flanges, the dome vents, and did not follow the Contract specifications regarding the ridge vent. See Smith 12/28/98 Let. Ex. L at 3-6. Lastly, Doe used the racking method when installing shingles, failed to use appropriate pressure when installing roof fasteners, failed to properly install the valley shingles, and failed to properly install Blaze Guard material at firewalls. See Smith 12/28/98 Let. Ex. L at 3-6.

Doe admits liability regarding the improperly cut valleys, the use of the racking method, the inappropriate pressure used when installing roof fasteners, and the failure to replace all plumbing flanges. Doe Dep. Ex. A. at 64-65. Doe also admits liability for instances where Blaze Guard was not installed in areas that were not open perimeter. Doe Dep. Ex. A. at 67.

Doe at his deposition presented two related justifications for his nonperformance of the Contract terms. First, he argued that Dave

Gunia of Hovnanian directed him to go through the Contract and highlight the terms that he did not agree with. Doe Dep. Ex. A. at 46. He testified that he did not consider the highlighted terms part of the contract, but did consider all non-highlighted terms to be part of the contract. Doe Dep. Ex. A. at 52, 81, 89. Second, Doe testified that he was told by a representative of NJ Builders to replace the roofs as they existed and that any additions were to be considered an upgrade and not part of the contract. Doe Dep. Ex. A. at 81. He also testified that he viewed the contract as a "new building contract" rather than "a rehab contract" whereas it was a rehab job. See Doe Dep. Ex. A. at 43.

Both of Doe arguments are spurious and do not justify his fraud. Although Doe did highlight some terms, he did not highlight several relevant provisions. He did not highlight the provisions regarding the areas where he admits liability, i.e. the provisions that racking was not an acceptable method of installing shingles, that detailed how valley flashings and shingles were to be installed, that required that appropriate pressure be used when installing roof fasteners, and that required replacement of the plumbing flanges. Contract Ex. H at SB-21-SB-22. He also did not highlight the contract provision that required him to apply the underlayment up the side of the wall a minimum of four inches. Contract Ex. H at SB-21. Doe also did not highlight the provision that required replacement of the ridge vents or the provision specifying the type of replacement vent. Contract Ex. H at SB-23. Lastly, Doe did not highlight the provisions requiring the installation of step flashing. Contract Ex. H at SB-22. Doe also did not highlight the provision that "all materials and equipment furnished and installed shall be new." Contract Ex. H. at CA-6 ¶ 5. Nor did Doe highlight the provision regarding the installation of Blaze Guard material at firewalls. Contract Ex. H at SB-27. Doe admits that he considered any

non-highlighted provisions to be part of the Contract. Doe Dep. Ex. A at 89. Consequently, Doe cannot justify the majority of his misrepresentations through his highlighting argument.

The highlighting argument also cannot justify Doe' failure to install eave flashing as an ice shield, his failure to replace the dome vents, or his failure to install a drip edge. Doe testified that the only indication that the highlighted sections were not part of the contract were on a piece of paper. Doe Dep. Ex. A. at 52. Doe testified that he was not in possession of the piece of paper. Doe Dep. Ex. A. at 52. He testified that Roe was shown the paper, but did not indicate whether Roe had signed it. Doe Dep. Ex. A. at 53. Doe testified that Roe found some provisions acceptable, however, did not testify that Roe accepted all the provisions he had highlighted. Doe Dep. Ex. A. at 46. Doe gave no indication that plaintiff was ever aware that this paper existed. See Doe Dep. Ex. A. at 52-54. Additionally, the contract contained provisions that required that any changes be in writing and signed and that the contract "sets forth the entire understanding of the parties hereto and supercedes all other agreements and understandings..." Contract Ex. H at CA-1, ¶1, CA-16, ¶¶ 39-40. Doe therefor argues that a piece of paper, which he cannot produce, should trump the Contract. Moreover, since Doe admits that Roe did not accept all the highlighted terms, the paper could not logically be considered part of the Contract.

Doe' second justification for his misrepresentations is based on his past dealings with NJ Builders, which led him to believe that the contract only applied to existing roof features. This argument can be proverbially boiled down to Doe' statement that the contract was a written as a "new building contract" whereas it was a "rehab" job. Doe Dep. Ex. A. at 43. Doe, however, admits that he knew that NJ Builders

developed the contract based on a settlement agreement negotiated by NJ Builders and 30 condominium associations. Doe Dep. Ex. A at 99-100; Doe Cert. Ex. E ¶ 6. Moreover, Doe testified that he obtained the contract through his work for NJ Builders on other FRT plywood replacement projects, saw the contract before making his bid, and that he was the only contractor to bid on the project. Doe Dep. Ex. A at 27, 29, 100. Doe knew that this was a contract specifically developed for FRT plywood replacement. His argument that the contract was written as a new building project rather than a rehab project is not credible. Moreover, this argument cannot logically be used to justify not replacing the dome vents and the plumbing flanges or the change when replacing the ridge vents. It also cannot be used to justify the workmanship problems in the installation of the valley shingles, the use of the racking method, or the inappropriate use of pressure when applying fasteners. Consequently, the highlighting of terms can more logically be viewed as a means of attempting to hide and justify his fraudulent misrepresentation, rather than an attempt to alter the contract before the inception of the project.

Doe made several material misrepresentations regarding the work he intended to perform during the FRT replacement project when he falsely promised to abide by the terms of the contract. He knew that those misrepresentations were false. He intended that plaintiff rely on those misrepresentations in order to induce them to sign the Contract. Plaintiff relied on those material misrepresentations to its detriment resulting in damages requiring the further replacement of its roof. Moreover, to prove statutory fraud plaintiff need only prove (1) a material misrepresentation, (2) intention that the other person rely on it, and (3) resulting damages. Gennari, 148 N.J. at 605-608, 691 A.2d at 365-366. Wherefore, Doe' actions constitute common law and statutory

fraud entitling plaintiff to damages, triple damages, punitive damages, reasonable attorney's fees, and interests and costs of suit. McConkey, 354 N.J.Super. at 45, 804 A.2d at 584; Gennari, 148 N.J. at 610, 691 A.2d at 367.

For all of the aforementioned reasons plaintiff respectfully requests that summary judgment be granted on Point I of its Complaint.

POINT II: DOE VIOLATED THE NEW JERSEY CONSUMER FRAUD STATUTE

The regulations promulgated under the New Jersey Consumer Fraud Act dealing with home improvement required Doe to obtain and follow the lawful regulations governing construction. The failure of Doe to follow the proper inspection procedure with respect to the Township of Piscataway where the work was performed resulted in payment by plaintiff to Doe for work, which was not properly done and not done. Such improper work would have been caught and corrected in a timely manner in the ordinary course of municipal or other inspections. Doe also asked plaintiff and did obtain final payment on the contract before completing the project in accordance with the terms of the contract. He also failed to furnish to plaintiff copies of or original inspection certificates. The failure of Doe to comply with the regulations promulgated under the New Jersey Consumer Fraud act constitutes statutory fraud under the act.

Under the New Jersey Consumer Fraud Act a merchant commits fraud when he has committed certain acts considered unlawful conduct. Cox, 138 N.J. at 17, 647 A.2d at 462. In Cox the New Jersey Supreme Court held that a failure to obtain necessary construction permits, in violation of N.J.A.C. 13:45A-16.2, constitutes such unlawful conduct under the Consumer Fraud Act. Id. at 21-22, 647 A.2d at 464. That regulation provides:

No seller contracting for the making of home improvements shall commence work until he is sure that all applicable state or local building and construction permits have been issued as required under state laws or local ordinances; N.J.A.C. 13:45A- 16.2(a)(10)(i).

Although the Contract specified that NJ Builders was to obtain relevant permits, see Contract Ex. H at Ca-15, ¶ 30, that did not abrogate Doe' regulatory responsibility to see that the permits were properly applied for before he began construction and that the inspections were properly

conducted. The Contract required that Doe schedule code enforcement inspections. Contract Ex. H at CA-10, ¶13. Doe' own testimony was that he never contacted such inspectors once the project began. Doe Dep. Ex. A at 42.

Additionally, Doe' collecting final payment, in violation of N.J.A.C. 13:45A-16.2(a)(10)(ii), prior to a final inspection being performed and without furnishing inspection certificates constitutes unlawful conduct deemed fraud. See Roberts v. Cowgill, 316 N.J. Super. 33, 39, 719 A.2d 668, 671 (App. Div. 1998). That regulation provides:

Where midpoint or final inspections are required under state laws or local ordinances, copies of inspection certificates shall be furnished to the buyer by the seller when construction is completed and before final payment is due or the signing of a completion slip is requested of the buyer. N.J.A.C. 13:45A-16.2(a)(10)(ii).

Parties such as contractors who are subject to regulations promulgated pursuant to the Consumer Fraud Act are assumed to be familiar with them; therefor any violation of the regulations, regardless of intent, is considered a violation of the Consumer Fraud Act. Branigan v. Level On The Level, Inc., 326 N.J. Super. 24, 28, 740 A.2d 643, 646 (App. Div. 1999), citing Cox, supra. "Proof of a regulation violation will be sufficient to establish unlawful conduct under the Act." Id. Branigan held that the failure to include a start and finish date in the construction contract (in violation of N.J.A.C. 13:45A-16.2(12)(iv)) constituted an unlawful act that constituted fraud. 326 N.J. Super. at 29, 740 A.2d at 646.

"A private plaintiff victimized by any unlawful practice under the Act is entitled to 'threefold the damages sustained' by way of 'any ascertainable loss of moneys or property, real or personal.'" Roberts, 316 N.J. Super. at 40, 719 A.2d at 671. The causal connection between the violation and the damages is clear. Compare Roberts, supra with

Josantos Construction v. Bohrer, 326 N.J.Super. 42, 740 A.2d 653 (App.Div.1999). Had Doe obtain necessary construction permits and inspections the inspector would have discovered the numerous defects in Doe' work. See generally Smith 12/28/98 Let. Ex. L. The "significant relationship" between Doe' "unlawful practices" and Whiteacre 's "ascertainable losses" is clearly evident. Roberts, 316 N.J.Super. at 44, 719 A.2d at 674. For example, the inspector would have easily determined the lack of a drip edge, which violated the Contract and Section 2305.2 of the 1990 Building Code. Id. at 4. Because the necessary permits were not obtained and final payment was made prior to inspection Doe' numerous construction errors were not discovered and plaintiff's roofs must be replaced. Smith 12/28/98 Let. Ex. L at 7. This certainly constitutes ascertainable loss under the Consumer Fraud Act. Roberts; Josantos; Cox.

An "award of treble damages and attorneys' fees is mandatory under N.J.S.A. 56:8-19 if a consumer-fraud plaintiff proves both an unlawful practice under the Act and an ascertainable loss." Cox, 138 N.J. at 24, 647 A.2d at 465. Moreover, an award of attorney's fees and costs is mandatory for "any violation of the Act, even if that violation caused no harm to the consumer." Branigan, 326 N.J.Super. at 31, 740 A.2d at 647.

For all of the aforementioned reasons plaintiff respectfully requests that summary judgment be granted on Point II if its Complaint.

**POINT III: DOE FAILED TO REPAIR PLAINTIFF'S ROOFS IN A GOOD AND
WORKMANLIKE MANNER**

Doe failed to perform his obligation to render the roofing work in a good and workmanlike manner, which caused plaintiff damages. The assumption in home improvement contracts is that the work will be performed in a "reasonably good and workmanlike manner." Aronsohn v. Mandara, 98 N.J. 92, 98, 484 A.2d 675, 678 (1984). The Contract obligated Doe to perform all work "in a first-class workmanlike manner." Contract Ex. H at CA-1, ¶ 1. Moreover, the Contract provided, "All labor and installation shall be performed in the best and most workmanlike manner and consistent with quality standards required by owner and/or industry standards, by mechanics skilled in their respective trades." Contract Ex. H at CA-6, ¶ 5. Thus the Contract held Doe to a higher standard than "a reasonably good and workmanlike manner." Doe' work, however, was not done in a reasonably good and workmanlike manner and fell below industry standards. Smith Let. 12/28/98 Ex. L at 1; see Corning manual Ex. I.

A contractor is liable for his negligent construction even when the homeowner has accepted defective performance. Juliano v. Gaston, 187 N.J.Super. 491, 497, 455 A.2d 523, 526 (App. Div. 1982), cert. den. 93 N.J. 318, 460 A.2d 709 (1983), citing Totten v. Gruzen, 52 N.J. 202, 245 A.2d 1 (1968); Rosenberg v. Town Of North Bergen, 61 N.J. 190, 198, 293 A.2d 662, 666 (1972). The test is whether there was "a negligent act with proximately resulting injury or damage." Rosenberg, 61 N.J. at 199, 293 A.2d at 667.

Doe was negligent in several aspects of his work. Doe' work violated the contract requirements, the National Roof Contractors Manual on Steep Roofs ("NRCA Manual"), the Building Code, the manufacturer's specifications, and roofing industry standards. Smith

Let. 12/28/98 Ex. L at 1; see Corning manual Ex. I. Doe failed to install the drip edge at eave areas or along the rake areas extending on to the roof plane. He did not install the underlayment up the vertical wall four inches. In addition to the Contract, a drip edge and wall underlayment are both required by the NRCA Manual and the manufacturer's specifications. Smith Let. 12/28/98 Ex. L at 3; Corning manual Ex. I at 9-10. Doe did not install fifty pound material at the eave area overhanging the drip edge. Smith Let. 12/28/98 Ex. L at 3. This violated section 2305.2 of the 1990 Building Code, the NRCA Manual and industry standards. Doe used the racking method to apply shingles contrary to the Contract and the NRCA Manual. Smith Let. 12/28/98 Ex. L at 4. Doe also used too much pressure when applying roof fasteners and improperly installed the valley shingles. Smith Let. 12/28/98 Ex. L at 4; see Corning manual Ex. I at 14. Doe reused the step flashing, dome vents, and plumbing flanges from the previous roof. Smith Let. 12/28/98 Ex. L at 5-6. Doe also replaced the ridge vents with a substantially different model than was specified by the contract. Smith Let. 12/28/98 Ex. L at 6. Doe failed to properly install Blaze Guard material at some firewalls. Smith Let. 12/28/98 Ex. L at 6.

Doe admits liability for the improper cut valleys, the improper pressure used when applying fasteners, and the nonreplacement of plumbing flanges. Doe Dep. Ex. A at 64-65. Doe also admits liability for Blaze Guard material that was not installed at areas that were not considered open perimeter. Doe Dep. Ex. A at 67.

Doe replacement of plaintiff's roofs was not done in a reasonably good and workmanlike manner. It fell below roofing standards and did not meet the NRCA Manual in many respects. He also did not follow the manufacturer's specifications. Doe admits liability for some of his substandard work. Doe' failure to install plaintiff's roofs in a

reasonably good and workmanlike manner necessitates their replacement and consequently damages plaintiff. Smith Let. 12/28/98 Ex. L at 7; Rosenberg, 61 N.J. at 199, 293 A.2d at 667.

For all of the aforementioned reasons plaintiff respectfully requests that summary judgment be granted on Point III if its Complaint.

**POINT IV: NJ Builders WAS NEGLIGENT IN ITS COORDINATION OF THE FRT
PLYWOOD PROJECT**

NJ Builders was the original developer of Whiteacre and was responsible for the original roofing that had to be removed and replaced. NJ Builders organized and arranged for the removal of the FRTTP at Whiteacre and other condominiums. This included selecting supervising engineers and contractors, preparing plans and contracts, designating vendors from which contractors had to purchase materials, and approving payments to contractors. Prior to February 1994 General Construction entered into an agreement with Whiteacre for the removal and replacement of FRTTP on its roofs. Defendant General Construction and its subcontractors performed work pursuant to the direction supervision and schedule of NJ Builders and its engineers and with materials designated by NJ Builders. When conducting these acts, NJ Builders was negligent in its duties owed to plaintiff.

NJ Builders admits that it was the original developer of Whiteacre and that it entered into a settlement agreement with plaintiff (and 29 other condominium associations) regarding the replacement of plaintiff's roofs due to deterioration of FRT plywood. NJ Builders Br. Supp. Mot. Summ. J. Re Third-Party Compl. Ex. C at 2. NJ Builders also admits that it arranged for the purchase of materials for the FRTTP replacement project. Id. at 3. The Settlement Agreement executed between plaintiff and NJ Builders did not absolve NJ Builders for negligence related to the future replacement of the FRT plywood, but only resolved the issue of NJ Builders's responsibility relating to the past installation of FRT plywood. Settlement Agreement Ex. G at 16, ¶ 20.

Doe obtained his position as contractor for the FRT plywood project through his past dealings with NJ Builders. Doe Dep. Ex. A at

27-28. In fact Doe was the only contractor to bid on the project because of the way NJ Builders divided the projects geographically among contractors. Doe Dep. Ex. A at 100. Doe arrived at the amount of his bid in consultation with Dave Gunia of NJ Builders. Doe Dep. Ex. A at 32. Doe was able to review the Contract before he made his bid because of his dealings with NJ Builders. Doe Dep. Ex. A at 29. It was Gunia, NJ Builders's employee, who recommended that Doe go through the contract to highlight the portions he did not agree with. Doe Dep. Ex. A at 46. Doe also testified that NJ Builders was aware of the portions of the contract that he found objectionable because of his prior dealings with it. Doe Dep. Ex. A at 81. Additionally Gunia told Doe that he was only to replace the roofs as they existed not to "upgrade" the roofs even if those items were in the Contract. Doe Dep. Ex. A at 81.

Unlike the bidding process, during the project, NJ Builders had a more limited role. NJ Builders's primary role during the project was to approve and pay for various materials used by Doe during the project. Doe Dep. Ex. A at 104. NJ Builders never refused to pay an invoice submitted by General. Doe Dep. Ex. A at 111. NJ Builders was also responsible, under the contract it drafted as part of the Steering Committee, for obtaining the building permits for the project. Contract Ex. H at CA-15, ¶ 30. Doe testified that he believed that it was NJ Builders that obtained the permits. Doe Dep. Ex. A at 96. Doe discussed the scope of the project with Dave Gunia of NJ Builders and Gunia visited the project twice. Doe Dep. Ex. A at 89, 103.

NJ Builders owed a duty of care to Whiteacre . Whether a party owes a duty of care to another is a question of law. City Check Cashing, Inc. v. Manufacturers Hanover Trust Company, 166 N.J. 49, 59, 764 A.2d 411, 416 (2001). To determine whether a duty of care exists

courts use a balancing test. Pfenninger v. Hunterdon Central Regional High School, 167 N.J. 230, 240-241 770 A.2d 1126, 1132 (2001).

"[W]hether a duty exists is ultimately a question of fairness." Id. at 241. The balancing test involves "the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution." Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 433-34, 625 A.2d 1110, 1116 (1993), citing Goldberg v. Housing Auth. of Newark, 38 N.J. 578, 583, 186 A.2d 291 (1962).

The foreseeability of harm is also a significant element in determining the duty of care. Carvalho v. Toll Brothers And Developers, 143 N.J. 565, 573, 675 A.2d 209, 212 (1996). Carvalho held that an engineering firm was liable for its negligence for foreseeable harm even when it was not contractually liable for supervision of the site. See Id. at 574, 675 A.2d at 213. Even though the engineers in Carvalho were more involved in the building process than the representatives of NJ Builders, it was still foreseeable that if Doe followed Gunia's instructions that plaintiff's roofs would not function properly and need replacement. NJ Builders was still involved in the building process. It was contractually obligated to obtain building permits, it paid for materials, and Gunia visited the site.

Under the balancing test, NJ Builders had a duty of reasonable care to Whiteacre . NJ Builders and Whiteacre had an existing relationship because it was the original developer of Whiteacre and under the terms of the Settlement Agreement, NJ Builders with the Steering Committee drafted the Contract. NJ Builders's Br. Supp. Mot. Summ. J. Re Third-party Compl. Ex. C ¶ 1; Reinhart Cert. Ex. F at ¶ 9. The risk was to the functionality of plaintiff's roofs, whereas the purpose of the Contract was to restore the functionality of the roofs

by replacing the FRT plywood and therefor the roofs. As a key member of the Steering Committee that drafted the Contract, NJ Builders was aware of the need to replace the roofs carefully. NJ Builders could easily have acted with reasonable care by either by not encouraging Doe to breach the Contract, by least reviewing the Contract for violations of key safety features after Doe did, or notifying plaintiff that it was encouraging Doe to change the terms of the contract. It is in the public interest for parties not to negligently encourage others to breach contracts, especially where the breach negates the essential purpose of the contract. See Hopkins, 132 N.J. at 433-34, 625 A.2d at 1116.

NJ Builders is responsible for the negligence of its employees, such as Dave Gunia. Borough of Berlin v. Remington & Vernick Engineers, 337 N.J.Super. 590, 597, 767 A.2d 1030, 1034 (App. Div.), cert. den. 168 N.J. 294, 773 A.2d 1158 (2001). NJ Builders was negligent in the following respects. NJ Builders gave the project to Doe without looking for other contractors. Doe Dep. Ex. A at 100. NJ Builders's representative told Doe to highlight the portions of the Contract that Doe disagreed with. Doe Dep. Ex. A at 46. Moreover, from Doe' past dealing with NJ Builders, it was aware of the items that Doe did not perform under the form contract and that Doe did not consider himself responsible for "upgrades" to the roofs even if they were in the Contract. Doe Dep. Ex. A at 81. Lastly, NJ Builders never refused to pay an invoice to Doe. Doe Dep. Ex. A at 111. Gunia told Doe to go through the contract and ignore the provisions, he found objectionable and told Doe not to install items not existing on the previous roof. It was foreseeable that Doe would not install the drip edge, eave flashing and other items not part of the original roof construction. See Carvalho, 143 N.J. at 573, 675 A.2d at 212. Additionally, it was

foreseeable that Doe would not perform other parts of the contract he found objectionable. Id. NJ Builders was negligent in that it gave to job to Doe without soliciting other bids. When recommending Doe and only Doe NJ Builders owed plaintiff a duty of care to recommend a competent contractor. See Pfenninger. NJ Builders also was negligent in its explanation of the job to him. See Id.

NJ Builders's negligence and breach of its duty caused plaintiff damages in that as a result of NJ Builders's actions Doe did not follow the Contract and as a result of Doe's failure to follow the terms of the Contract as discussed above plaintiff must replace their roofs. See Smith 12/28/98 Let.

For all of the aforementioned reasons plaintiff respectfully requests that summary judgment be granted on Point VI of its Complaint.

POINT V: NJ BUILDERS WAS NEGLIGENT WHEN AUTHORIZING PAYMENTS TO DOE

NJ Builders approved payments to General for work done to replace the roofs at Whiteacre . NJ Builders breached its duty of care to plaintiff when authorizing payments to General. As a result of NJ Builders's negligence plaintiff sustained damages.

One of NJ Builders's duties during the construction project was to pay Doe for materials used on the project. Doe Dep. Ex. A at 113; Reinhart Cert. at 4 ¶ 12. NJ Builders admits that it was to pay contractors for their materials. Reinhart Cert. at 4 ¶ 12. Doe testified that NJ Builders never refused to make a payment to him. Doe Dep. Ex. A at 111. Doe testified that NJ Builders's representative Dave Gunia only visited the construction site once or twice. Doe Dep. Ex. A at 89.

As discussed in Point IV, NJ Builders had a duty of care, which it owed plaintiff. NJ Builders breached that duty of care, when it made payments to Doe. As a result of its payments to Doe NJ Builders was aware or should have been aware of many of the breaches of contract made by Doe because his material expenditures would not match the materials that would have been required had Doe performed all the terms of the contract. As a result of NJ Builders negligently making payments to Doe plaintiff has incurred damages in that their roofs need to be replaced.

For all of the aforementioned reasons plaintiff respectfully requests that summary judgment be granted on Point VII if its Complaint.

CONCLUSION

Doe misrepresented to Whiteacre that he and his company General would replace the roofs at Whiteacre in accordance to the Contract that they executed. Doe breached the Contract in several respects. He did not install a drip edge or eave flashing. He improperly installed the underlayment by not installing it four inches up the vertical wall. He improperly installed the shingles by using the racking method, unsuitable installation of the valley shingles, and the use of too much pressure when applying fasteners. He also improperly installed Blaze Guard at some of the firewalls. He also failed to replace the step flashing, the dome vents, and the plumbing flanges. He did not follow the contract specifications when replacing the ridge vents. Doe admits liability for the inappropriate fastener pressure, the use of the racking method, his failure to replace the plumbing flanges, and partially admits liability for improper installation of Blaze Guard. Doe Dep. Ex. A at 64-67. Doe also failed to obtain the necessary construction permits and took final payment prior to a final inspection and did not turn over inspection certificates. Doe misrepresentations and violations of regulations promulgated under the Consumer Fraud Act constitute statutory and common-law fraud. Gennari, 148 N.J. at 605, 691 A.2d at 365; Cox, 138 N.J. at 21-22, 647 A.2d at 464 Roberts, 316 N.J.Super. at 39, 719 A.2d at 671. Doe' failure to use reasonable care also constitutes negligence. Rosenberg, 61 N.J. at 199, 293 A.2d at 667. As a result of Doe' fraudulent and negligent conduct, plaintiff must replace its' roofs. Doe' fraud entitles plaintiff to treble damages, attorney's fees, and costs. Cox, 138 N.J. at 24, 647 A.2d at 465.

NJ Builders assigned Doe to replace plaintiff's roofs, encouraged Doe to breach his contract with Whiteacre , and paid Doe for materials

without due care. NJ Builders's failure to exercise due care constitutes negligence. Carvalho, 143 N.J. at 574, 675 A.2d at 213. As a result of NJ Builders's negligent conduct plaintiff must replace its' roofs.

There are few if any facts in dispute in this case. Doe does not argue that he did the work, which plaintiff says he did not. Additionally, the evidence that Doe did not perform is overwhelming. Doe' primary argument is that he was not obligated under the contract to perform certain tasks. This is clearly contrary to the contract provisions and is in fact evidence of Doe' misrepresentations. Doe' second argument is that he was told by NJ Builders not to do certain tasks on the project. This, question, however, goes to apportionment of damages, not to the question of fault.

NJ Builders's primary argument is that it was not a party to the Contract. However, the circumstances of the FRT plywood replacement project clearly show that NJ Builders owed plaintiff a duty of care. NJ Builders's actions indicated to Doe that he was not obligated under the contract. Again the issue is apportionment of damages, not the question of fault.

For all of the aforementioned reasons plaintiff respectfully requests that summary judgment be granted on Points I, II, III, VI, and VII if its Complaint.

Respectfully Submitted

By: _____

Dated: