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FILED & ENTERED on <u>6/23/08</u> WESTCHESTER COUNTY CLERK

**SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF WESTCHESTER**

PRESENT: W. DENIS DONOVAN, J.S.C.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

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**LAKESIDE AT BEDFORD CONDOS, NEW YORK
 CENTRAL MUTUAL FIRE INSURANCE COMPANY,
 and JOSEPHINE GIBBONS,**

Plaintiffs,

-against-

SIMPLEX INDUSTRIAL, INC.,

Defendant.

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**UNITED AUTOMOBILE SERVICES
 ASSOCIATION a/s/o RUSSELL PARET,**

Plaintiff,

-against-

**SIMPLEX INDUSTRIAL, INC., and LAKESIDE
 AT BEDFORD CONDOMINIUM, INC.,**

Defendants.

DECISION AND ORDER

**Action # 1
 Index No. 317/05
 Motion Date: 5/2/08
 Seq. No. 3**

**Action # 2
 Index No. 325/05**

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**ALLSTATE INSURANCE COMPANY as Subrogee
of MARY C. POWERS,**

Plaintiff,

**Action # 3
Index No. 749/05**

-against-

**KATONAH MANAGEMENT GROUP, INC., and
LAKESIDE AT BEDFORD CONDOMINIUM,**

Defendants/Third-Party Plaintiffs,

-against-

SIMPLEX INDUSTRIAL, INC.,

Third-Party Defendant.

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DONOVAN, J.

The following papers were read on this motion by Simplex Industrial, Inc., for partial summary judgment in each of the three actions:

PAPERS NUMBERED

Notice of Motion/Affirmation/Affidavit/Exhibits(1-8)	1
Memorandum	1A
Affirmation in Opposition/Exhibits(A-H)	2
Memorandum	2A
Affirmation in Further Support/Exhibit A	3
Reply Memorandum	3A

Upon the foregoing papers, the motion is determined as follows:

These three actions arise from a fire that occurred on February 5, 2002, at the Lakeside at Bedford Condos. The fire damaged six units in the complex, units numbered 1001 through 1006.

Simplex Industrial, Inc., is a defendant in Action # 1 and Action # 2 and a third-party defendant in Action # 3. Simplex, a builder of modular homes, sold, constructed, and assembled several of the buildings that make up the complex between 1988 and 1991. The total number of units constructed by Simplex was 64, including the six damaged by the fire.

Simplex now moves for partial summary judgment in each of the three actions. Plaintiff in Action # 2 has not submitted opposition to the motion. By decision and order of even date, this court granted a motion for summary judgment dismissing the complaint by defendants in Action # 3. As a result, the third-party action against Simplex in Action # 3 is dismissed as well.

The complaint in Action # 1 alleges three causes of action. The first cause of action seeks damages based on negligence, the second cause of action seeks damages based on strict liability, and the third cause of action seeks damages based on breach of the implied warranty of fitness for a particular purpose. In moving for partial summary judgment, defendant distinguishes between the claims of the condominium complex, Lakeside, and the claims of the unit owner and her subrogee, Josephine Gibbons and New York Central Mutual Fire Insurance Company. Lakeside seeks to recover for damage to the condominium unit itself, while the owner and her subrogee seek to recover for damage to her personal contents within the unit. Defendant's motion for partial summary judgment is directed only against the claims of Lakeside, as alleged in the first two causes of action, and against the third cause of action in its entirety.

In support of its motion, Simplex contends that it manufactured the modular sections of the units at its facility in Scranton, Pennsylvania, then shipped the sections to the condominium site, where it then assembled them. The end result was 64 units in six different buildings, each having two floors and consisting of upper and lower residential units. According to defendant, the modular sections and the condominium units were not co-extensive. Each unit consisted of one modular section plus part of another section. The units, therefore, were not complete until connected with each other.

Defendant argues that the United States Supreme Court decision in *East River SS Corp. v Transamerica Delaval*, 476 US 858 (1986), as applied by the Court of Appeals decision in *Bocre Leasing Corporation v General Motors Corp.*, 84 NY 2d 685 (1995), bars any recovery for damage to the units in the building itself under the economic loss doctrine. According to defendant, the modular sections in this case, like the turbines in *East River, supra*, were part of an "integrated package" that did not become operational until connected with each other. (In *East River*, the turbine did not become operational until connected to pipes and valves.) The decisions in both *East River, supra*, and *Bocre, supra*, (where the purchase of a used helicopter was involved) held that "tort recovery in strict products liability and negligence against a manufacturer should not be available to a downstream purchaser where the claimed losses flow from damage to the property that is the subject of the contract." [*Bocre, supra*, at 694] Defendant argues that a remote purchaser, such as plaintiff Lakeside, is barred from recovery against the manufacturer.¹

Plaintiff Lakeside, in opposition, asserts three grounds for denying summary judgment. First, it argues that, even applying the economic loss rule, plaintiff is entitled to

¹ It appears that Simplex sold the modular components to a developer, Bedford Lake Development Corporation.

consequential damages resulting from the fire. In support, it argues that defendant Simplex did not furnish fully completed units. Instead, other suppliers/contractors added the hardwood floors, external siding, and utilities systems. Damage to these portions of the property, according to plaintiff, is recoverable and presents issues of fact that preclude summary judgment.

Second, plaintiff disputes any application of the economic loss rule whatsoever. It argues that defendant has not submitted any proof to support its position that its product was the residential unit and not the modular sections that made up the unit. Therefore, it argues that a factual issue exists as to the application of the *East River* and *Bocre* holdings.

Third, plaintiff contends that defendant never asserted the economic loss rule as an affirmative defense and therefore may not assert it at this stage of the litigation as a matter of law.

The court finds that the economic loss rule, as enunciated in *East River* and *Bocre*, applies in this case. In *East River*, a remote purchaser sought recovery for damage sustained by two turbines that were connected by a faulty valve. The two turbines were part of an "integrated package" and the valve connection was necessary to create an "operational propulsion system." Based on this factual showing, the Court ruled that the plaintiff could not recover for the economic loss resulting from the damage to the turbines.

In this case, plaintiff seeks to recover for damage to one residential unit due to a defect in another residential unit. Faced with the economic loss rule, plaintiff argues that the product Simplex sold the developer was not the building that housed the six affected residential units but the units themselves or the modular sections that made up the units.

Defendant concededly has not submitted a copy of the contract for the sale of its product to the developer, which may have clarified the definition of the actual product. However, defendant does submit an affidavit from its president, who describes from personal knowledge the structural interconnection among the modular sections, the residential units, and the building. This description, supplemented by diagrams, demonstrates prima facie that each residential unit was made up of 1 ½ modular sections and that the residential units could not stand alone. Each residential unit needed to be connected to other residential units to supplement missing or shared pieces, which could be a wall, a ceiling, or a floor depending upon the unit's location in relation to other units. Plaintiff has not furnished any admissible evidence to raise any factual question on this issue.

Defendant, therefore, has demonstrated that the residential units, consisting of 1 ½ modular sections, could not become operational (i.e., habitable) until joined together with other units to form the building. Analogizing from *East River*, the unit where the fire started corresponds to the faulty valve that connected the two turbines. The building that housed the units was the "integrated package" in this case, just as the two turbines, connected by the valve, became the "integrated package" in *East River*. Just as plaintiff in *East River*

could not recover for damage to the turbines, plaintiff in this case cannot recover for damage to the units.

Furthermore, under *Bocre*, consequential damages flowing from damage to the product also are barred [*Bocre, supra*, at 693].

The court will not prevent defendant from seeking dismissal based on the economic loss rule on the ground that its was not pleaded as an affirmative defense in defendant's answer. Under CPLR 3025, leave to amend pleadings shall be freely given. In instances such as the one at bar, where no prejudice is shown an amendment to conform pleadings to proof may be made at any time, even during or after trial [*Murray v City of New York*, 43 NY 2d 400 (1977)]. Plaintiff cannot claim surprise or prejudice. As early as July, 2005, correspondence between counsel identified the economic loss rule as a defense defendant intended to pursue.

Defendant may, if necessary, seek formal leave to amend its answer by motion before the Central Calendar Part.

Finally, defendant moves to dismiss the third cause of action, which is based on a breach of warranty of fitness for a particular purpose, on the ground that the statute of limitations for bringing such a claim has expired. Both sides agree that the statutory warranty runs from the date of passing of title to the first owner [General Business Law § 777(8)] and that a successor in title would receive the benefit of any unexpired portion of the warranty period [GBL § 777-a(1)]. It would seem, since defendant has submitted undisputed proof that the modular sections were delivered to and assembled on the site between 1988 and 1991, that the warranty periods, the longest of which is six years, would have expired prior to the date of the fire in 2002. However, no proof to establish the initial warranty date has been submitted, and without such proof this court must deny this branch of defendant's motion.

Based on the foregoing it is

ORDERED that the motion by defendant Simplex Industries, Inc., for summary judgment in Action # 1 (Index No. 317/05) is granted as to the first and second causes of action and denied as to the third cause of action; and it is further

ORDERED that the third cause of action in Action # 1 Index No. 317/05) is severed and continued; and it is further

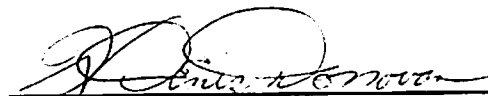
ORDERED that the motion by defendant Simplex Industries, Inc., for summary judgment on the second cause of action in Action # 2 (Index No. 325/05) is granted without opposition; and it is further

ORDERED that the remaining claims in Action # 2 (Index No. 325/05) are severed and continued; and it is further

ORDERED that the motion by third-party defendant Simplex Industries, Inc., for summary judgment dismissing the third-party complaint in Action # 3 (Index No. 749/05 is denied as moot based on the decision and order of even date that dismisses the main action; and it is further

ORDERED that counsel are directed to appear in the Central Calendar Part on July 10, 2008.

ENTER:



HON. W. DENIS DONOVAN
Justice Supreme Court

Dated: June 20, 2008
White Plains, New York

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