New York State Thruway Auth. v. CHA Consulting, Inc.

Supreme Court of New York, Albany County

April 26, 2022, Decided

Index No. 900064-18

Reporter
2022 N.Y. Misc. LEXIS 1554 *; 2022 NY Slip Op 50330(U) **; 74 Misc. 3d 1235(A); 165 N.Y.S.3d 832; 2022 WL 1233718

[1]** New York State Thruway Authority, Plaintiff, against CHA Consulting, Inc. f/k/a Clough Harbour & Associates, LLP, Kandey Company, Inc., Vergnet S.A. a/k/a Vergnet SA, Vergnet Eolien and Vergnet Groupe, Ravi Engineering and Land Surveying, P.C. and Prudent Engineering, LLP, Defendants.

Notice: PUBLISHED IN TABLE FORMAT IN THE NEW YORK SUPPLEMENT.

THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

turbines, Specifications, Warranty, wind, site, turbulence, term agreement, installed, wind turbine, conditions, contractual, inspection, alleges, on-site, final acceptance, make and model, measurements, generators, obliged, cause of action, contract claim, Submittal, procure, professional malpractice, engineering services, claim for breach, support services, cross claim, recommendation, Subconsultant

Headnotes/Summary

Headnotes

Contracts—Construction Contracts—Action by New York State Thruway Authority arising from construction project to install wind turbine generators at five sites, where four turbines did not function properly and became unusable, was dismissed against all defendants. State—Construction Contracts—Action by New York State Thruway Authority arising from construction project to install wind turbine generators at five sites, where four turbines did not function properly and became unusable, was dismissed against all defendants.

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Judges: RICHARD PLATKIN, A.J.S.C.

Opinion by: RICHARD PLATKIN

Opinion

Richard M. Platkin, J.

This action arises from a construction project undertaken by the New York State Thruway Authority ("NYSTA") to install wind turbine generators at five sites in Western New York ("Project"). The Project was **[*2]** completed in 2015, but the four wind turbines manufactured by defendant Vergnet S.A ("Vergnet") did not function properly and became unusable by 2018.[1]

NYSTA commenced this action to recover the sum of $8,482,040, representing the cost of the failed Vergnet turbines, together with collection fee of 22% under State Finance Law ("SFL") § 18. NYSTA seeks this recovery from five defendants: (1) CHA Consulting, Inc. ("CHA"), which served as NYSTA's design engineer; (2) Kandey Co., Inc. ("Kandey"), the prime contractor; (3) Vergnet; (4) Prudent Engineering, LLP ("Prudent"), which served as an on-site inspection engineer; and (5) Ravi Engineering and Land Surveying, P.C. ("Ravi"), an engineering firm to which Prudent subcontracted certain inspection work.

The case began as two separate actions: one against CHA (*see* NYSCEF Doc No. 73 ["CHA Complaint"]), and another against Kandey, Vergnet, Prudent and Ravi (*see* NYSCEF Doc No. 74 ["Complaint"]). On October 5, 2020, the Court entered a Stipulation & Order **[**2]** consolidating the two actions for all purposes.

The parties conducted extensive fact and expert discovery over about 18 months,[2] and each defendant now moves for summary judgment dismissing NYSTA's **[*3]** claims and the codefendants' cross claims. The motions were returnable on March 11, 2022, and this Decision & Order follows.

I. CHA

A. Procedural History

NYSTA commenced suit against CHA on November 9, 2018 by filing a Summons with Notice "to recover damages for negligence, professional malpractice and breach of contract arising out of services provided with respect to wind turbine projects in western New York, pursuant to a term agreement for design support services in the Syracuse and Buffalo Divisions of the Thruway Authority, contract No. D214038" (NYSCEF Doc No. 72).

NYSTA served CHA with a complaint on February 21, 2019, alleging four causes of action: (1) breach of the term agreement for design support services; (2) negligence; (3) professional malpractice; and (4) collection costs under SFL § 18 (*see* CHA Complaint).

CHA answered NYSTA's complaint on March 18, 2019 (*see* NYSCEF Doc No. 75) and later served an amended answer (*see* NYSCEF Doc No. 78). As is pertinent here, CHA's thirteenth affirmative defense alleges that NYSTA's claims are barred by the expiration of the statute of limitations (*see id.*, ¶ 51).

Codefendants Kandey, Vergnet, Prudent and Ravi cross-claim against CHA for common-law **[*4]** indemnification and contribution (*see* NYSCEF Doc Nos. 79-82), and Kandey further alleges a cross claim against CHA sounding in "misrepresentation" (NYSCEF Doc No. 82, ¶¶ 219-259; *see* NYSCEF Doc No. 83, ¶ 13).

B. CHA's Role in the Project

On January 31, 2011, CHA entered into a "Term Agreement for Design Support Services Primarily in the Syracuse and Buffalo Divisions" (NYSCEF Doc No. 91 ["Term Agreement"]), pursuant to which CHA agreed to provide "as-directed engineering services for [NYSTA]" (*id.*, Schedule A).

The Term Agreement is a master services agreement that "provides the framework for negotiation of individual project Assignments" to be initiated by NYSTA through issuance of "specific Scopes of Services and associated work plans" (*id.*). CHA's assignments under the Term Agreement may include studies, surveys, preliminary design development, environmental assessment, plan review and the development of design documents (*see id.*).

The Term Agreement had an initial expiration date of December 31, 2013 (*see id.*, ¶ 3.1), but it was twice extended by the parties to September 30, 2015 (*see* NYSCEF Doc Nos. 92-93). CHA therefore maintains that its professional and contractual relationship **[*5]** with NYSTA terminated no later than September 30, 2015 (*see generally* NYSCEF Doc No. 90 ["DelSignore Aff."], ¶¶ 7-11).

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[1] The wind turbine at the fifth site was manufactured by a different vendor and is not at issue in this action.

[2] The Court commends all counsel for their diligent work in preparing this case for trial during the COVID-19 pandemic.

Over the life of the Term Agreement, CHA received 27 assignments, three of which pertained to the Project (*see id.*, ¶ 12). The three Project-related assignments were: (i) "Preliminary Engineering for Buffalo Wind Turbine Project Design," authorized on March 15, **[**3]** 2011 (NYSCEF Doc No. 94 ["Assignment No.2"]); (ii) "Design of Buffalo Wind Turbine Installation Project," authorized on August 11, 2011 (NYSCEF Doc No. 95 ["Assignment #4"]); and (iii) "Construction Support Services for Buffalo Wind Turbine Project" (NYSCEF Doc No. 96 ["Assignment #22"]), authorized on May 1, 2014 (*see* DelSignore Aff., ¶ 12).

Assignment #2 involved the preparation of a feasibility report for the wind turbines and recommendations for the appropriate number and size of turbine at each site (*see id.*, ¶ 13; Assignment #2, p. 4). According to CHA, the feasibility reports were completed by April 19, 2011 (*see* DelSignore Aff., ¶ 13; *see also* NYSCEF Doc No. 97), and the Vergnet turbines received CHA's "stamp of approval" on February 23, 2012 (NYSCEF Doc No. 98). Following an audit, NYSTA determined that **[*6]** Assignment #2 was complete as of May 3, 2012 (*see* DelSignore Aff., ¶ 14; *see also* NYSCEF Doc No. 99).[3]

Assignment #4 involved the preparation of design reports, including a description of existing conditions and potential impacts at the five sites, and the drafting of specifications for the procurement, construction and installation of wind turbines (*see* Assignment #4, Schedule A; *see also* DelSignore Aff., ¶ 17). CHA completed this assignment by November 9, 2012 (*see id.*), and the last record of any change to this work was on November 1, 2012 (*see* NYSCEF Doc No. 102).

Assignment #22 encompassed CHA's provision of "various construction-phase engineering services" (DelSignore Aff., ¶ 19; *see* Assignment #22, Schedule A).[4] CHA submits time and billing records showing that February 27, 2015 was the last date upon which its engineers performed any Project-related work (*see* DelSignore Aff., ¶ 20; *see also* NYSCEF Doc No. 104, pp. 76-77). After an audit, NYSTA determined that Assignment #22 was complete as of July 2, 2015 and authorized final payment to CHA (*see* NYSCEF Doc Nos. 105-106).

NYSTA advised the Office of State Comptroller on November 12, 2015 that CHA had completed all work under **[*7]** the Term Agreement as of November 10, 2015, and it "recommend[ed] acceptance of [the Term A]greement and payments of the final estimate, including all retained money" (NYSCEF Doc No. 180).

CHA's only other involvement with the Project came in March 2018, when NYSTA requested a reference for a consultant to assess the failure of the Vergnet turbines (*see* DelSignore Aff., ¶ 25). "A reference was provided as a favor to a longstanding client," but NYSTA "did not enter into any new contract with CHA, did not issue another Assignment or renew the Term Agreement, and CHA was not paid for" the reference (*id.*).

C. Statute of Limitations

1. Legal Principles

"A cause of action charging that a[n engineering] professional failed to perform services with due care and in accordance with the recognized and accepted practices of the profession is governed by the three-year Statute of Limitations applicable to negligence actions" (*Ackerman v **[**4]** Price Waterhouse*, 84 NY2d 535, 541, 644 N.E.2d 1009, 620 N.Y.S.2d 318 [1994], citing CPLR 214 [6]). The claim accrues upon the client's receipt of the engineer's work product (*see New York State Workers' Compensation Bd. v SGRisk, LLC*, 116 A.D.3d 1148, 1150, 983 N.Y.S.2d 642 [3d Dept 2014]).

CPLR 214 (6) broadly applies to claims that "arise out of the [engineering] services provided by the defendant pursuant to a contract . . . , and out of the [engineer]-client relationship which resulted **[*8]** therefrom" (*Harris v Kahn, Hoffman, Nonenmacher, & Hochman, LLP*, 59 AD3d 390, 391, 871 N.Y.S.2d 919 [2d Dept 2009]; *see Matter of R.M. Kliment & Frances Halsband, Architects [McKinsey & Co. Inc.]*, 3 NY3d 538, 542, 821 N.E.2d 952, 788 N.Y.S.2d 648 [2004]).

"Although a six-year limitations period ordinarily applies to breach of contract claims, such a cause of action will be construed as a professional malpractice claim subject to the three-year limitations period 'to the extent that the allegations are that [the defendant] failed to

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[3] CHA's final site design report, which incorporated its earlier site-suitability analysis, was completed in July 2012 (*see* NYSCEF Doc No. 100).

[4] Construction work on the Project began in Spring 2013, the four Vergnet wind turbines were commissioned between December 2014 and February 2015, and the Project was completed by Summer 2015 (*see* NYSCEF Doc No. 21 ["Provost EBT"], pp. 51-53; DelSignore Aff., ¶ 23; NYSCEF Doc No. 22, p. 193).

perform its contractual services in a professional, nonnegligent manner'" (*WSA Group, PE-PC v DKI Eng'g & Consulting USA PC*, 178 AD3d 1320, 1321, 116 N.Y.S.3d 719 [3d Dept 2019], quoting *SGRisk*, 116 AD3d at 1150). This is true even where the claimed breach is based upon an express contractual promise, so long as the promise is of the sort the professional would be expected to "accomplish using due care even in the absence of the specific term in the agreement" (*Kliment*, 3 NY3d at 543; *see Winegrad v Jacobs*, 171 AD2d 525, 525, 567 N.Y.S.2d 249 [1st Dept 1991], *lv dismissed* 78 N.Y.2d 952, 578 N.E.2d 444, 573 N.Y.S.2d 646 [1991]). "The pertinent inquiry is . . . whether the claim is essentially a malpractice claim" (*Kliment*, 3 NY3d at 542).

2. Applicability of CPLR 214 (6)

NYSTA's claim of professional negligence is founded on allegations that CHA "deviated from accepted standards of good engineering practice in its provision of engineering, design support and construction inspection support services to [NYSTA] for the [Project]" (CHA Complaint, ¶ 29).

Essentially the same allegations form the basis of NYSTA's claims for breach of contract and negligence. NYSTA alleges that CHA breached the **[*9]** Term Agreement by failing to render engineering services "that properly determined, assessed and evaluated the feasibility of the [Project], including . . . the type of wind turbine generators appropriate for the [P]roject, and the suitability of each site for the selected wind turbine generators" (*id.*, ¶ 17). And NYSTA's negligence claim similarly alleges a failure by CHA to exercise due care "with respect to its provision of engineering, design support and construction inspection support services to [NYSTA] for the [Project]" (*id.*, ¶ 23).

The essence of each of these claims is that CHA failed to render engineering services concerning the Project in a professional, nonnegligent manner (*see WSA*, 178 AD3d at 1321-1322 [applying CPLR 214 (6) to engineer's alleged failure to properly perform inspection services and supervise the professional services rendered by employees]; *City of Binghamton v Hawk Eng'g P.C.*, 85 AD3d 1417, 1418, 925 N.Y.S.2d 705 [3d Dept 2011], *lv denied* 17 N.Y.3d 713, 957 N.E.2d 1157, 933 N.Y.S.2d 653 [2011]).

The conclusion that the contractual claim essentially is a malpractice claim is reinforced by NYSTA's opposition to CHA's motion. NYSTA identifies only one section of the Term Agreement that allegedly was breached: Section 3.3, by which CHA promised that its employees "'possess the experience, knowledge, character and any . . . license necessary **[*10]** to perform the services described in [this contract]" and that "CHA shall perform such services in a competent and professional manner'" (Term Agreement, § 3.3, *quoted in* NYSCEF Doc No. 190 ["Opp Mem"], p. 9; *see also* NYSCEF Doc No. 173 ["Hurley Aff."], ¶ 37). According to NYSTA's expert, Julien Bouget, CHA breached Section 3.3 "by failing to obtain on-site measures of **[**5]** turbulence intensity at each site" (NYSCEF Doc No. 174 ["Bouget Aff."], ¶ 24; *see id.*, ¶¶ 9, 27; *see also* Hurley Aff., ¶ 42).

This alleged breach of CHA's contractual duty to properly evaluate the proposed turbine sites "in a competent and professional manner" (Term Agreement, § 3.3) is exactly the type of promise that an engineer would be "expected to accomplish using due care even in the absence of the specific term in the agreement" (*Kliment*, 3 NY3d at 543), and the legal authorities relied upon by NYSTA in arguing to the contrary are distinguishable (*see WSA*, 178 AD3d at 1322-1323 [contractual indemnity is not an ordinary obligation of a professional]; *State of NY Workers' Compensation Bd. v Madden*, 119 AD3d 1022, 1027, 989 N.Y.S.2d 156 [3d Dept 2014] [upholding contractual claim to recover payments made to professional for services not rendered]; *SGRisk*, 116 AD3d at 1151 [intentional misconduct by professional]).

The Court therefore concludes that NYSTA's substantive causes of action **[*11]** against CHA are subject to the three-year limitations period of CPLR 214 (6). The issue therefore becomes whether NYSTA's claims accrued within three years of the November 9, 2018 commencement of the action against CHA.

3. Accrual

It is "well-established . . . that a claim for professional malpractice against an engineer . . . accrues upon the completion of performance under the contract and the consequent termination of the parties' professional relationship" (*WSA*, 178 AD3d at 1321 [internal quotation marks and citation omitted]).

CHA submits proof that the last date upon which its engineers rendered services on any of the three Project-related assignments was February 27, 2015 (*see* DelSignore Aff., ¶ 20; *see also* NYSCEF Doc No. 104, pp. 76-77), and CHA was paid in full for this work by July 30, 2015 (*see* DelSignore Aff., ¶ 21; NYSCEF Doc

No. 106). CHA also has shown that the Term Agreement expired by its terms on September 30, 2015 and "did not contemplate any continuing professional responsibilities beyond that date" (*WSA*, 178 AD3d at 1322). The foregoing suffices to demonstrate, *prima face*, that NYSTA's claims accrued no later than September 30, 2015, which is more than three years before the claims against CHA were interposed.

In its **[*12]** opposition, NYSTA does not challenge the dates cited by CHA, but it does contend that CHA's work on the Project was not completed until November 10, 2015. In making this argument, NYSTA relies on the attestation of its Chief Engineer that the work covered by the Term Agreement "was completed as of November 10, 2015" (NYSCEF Doc No. 180).

As correctly observed by CHA, however, a cause of action generally accrues for purposes of CPLR 214 (6) upon the completion of the actual work, and "the date of the final certificate is not controlling" (*State of New York v Lundin*, 60 NY2d 987, 989, 459 N.E.2d 486, 471 N.Y.S.2d 261 [1983]). "The final certificate . . . may indicate the owner's acceptance of the work for purposes of contractual guarantees or equitable price adjustments, but it does not represent completion of the contractual obligations of the [professional] . . . for purposes of triggering the Statute of Limitations " (*id.*; *see City School Dist. of City of Newburgh v Stubbins & Assoc.*, 85 NY2d 535, 538, 650 N.E.2d 399, 626 N.Y.S.2d 741 [1995]).

Moreover, the Term Agreement was a master services agreement by which NYSTA could direct CHA to render engineering services on matters wholly unrelated to the Project (*see* Provost EBT, p. 495). Indeed, CHA received 27 assignments under the Term Agreement, only three of which pertained to the Project (*see* NYSCEF Doc No. 172, ¶ 6).

The Court therefore concludes **[*13]** that NYSTA's unilateral act of certifying that work under the Term Agreement was complete as of November 10, 2015 does not mark the accrual date of **[**6]** the claims against CHA or otherwise serve to raise a triable issue of fact concerning the timeliness of the claims. For purposes of CPLR 214 (6), NYSTA's claims accrued no later than the September 30, 2015 expiration of Term Agreement (*see* NYSCEF Doc Nos. 92-93), which is more than three years prior to the commencement of suit against CHA.

Finally, NYSTA has not identified any tolling provision or doctrine that would extend its time to commence suit against CHA. Any work that CHA performed for NYSTA on unrelated projects would not extend NYSTA's time to sue on any Project-related claims (*see City of Binghamton*, 85 AD3d at 1420), and CHA's act of providing NYSTA with a reference for a turbine consultant in 2018 is insufficient to trigger the "continuous" representation doctrine (*see Sendar Dev. Co., LLC v CMA Design Studio P.C.*, 68 AD3d 500, 503, 890 N.Y.S.2d 534 [1st Dept 2009]).

Accordingly, NYSTA's claims against CHA for breach of contract, negligence and professional malpractice must be dismissed as time-barred. And in the absence of any viable damages claim against CHA, NYSTA's claim under SFL § 18 for recovery of a collection fee must also be dismissed.

D. Cross Claims

Each of CHA's **[*14]** codefendants alleges cross claims for common-law indemnification and contribution (*see* NYSCEF Doc Nos. 79-82), and Kandey also sues for "misrepresentation" (NYSCEF Doc No. 82, ¶¶ 219-259; *see also* NYSCEF Doc No. 83, ¶ 13).

CHA seeks dismissal of the cross claims on the grounds that: (1) common-law indemnification does not lie because any finding of liability against the codefendants necessarily will be based on their own wrongdoing and will not be purely vicarious (*see* NYSCEF Doc No. 108, pp. 15-16); (2) the contribution claims are barred by the economic-loss doctrine (*see id.*, pp. 16-18); and (3) Kandey's misrepresentation claim is both time-barred and insufficiently pleaded (*see id.*, pp. 18-22). None of CHA's codefendants have opposed dismissal of the cross claims alleged against CHA.

The Court concludes that the evidence and arguments tendered by CHA are sufficient to demonstrate its *prima facie* entitlement to dismissal of the cross claims, and "[s]ince no opposition was filed, no triable issue of fact was raised in [opposition]" (*Flagstar Bank v Bellafiore*, 94 A.D.3d 1044, 1045, 943 N.Y.S.2d 551 [2d Dept 2012]).[5]

II. VERGNET and KANDEY

[5] The cross claims alleged against the other defendants are dismissed for essentially the same reasons.

A. Background

On January 18, 2013, NYSTA entered into a prime construction contract with Kandey to design, install, monitor and maintain **[*15]** wind turbine generators at five Thruway sites in Western New York (*see* Complaint, ¶ 7; *see also* NYSCEF Doc No. 160 ["Prime Contract"]).

Kandey, in turn, contracted with Vergnet on July 12, 2013 to supply wind turbine generators for four of the sites ("Vergnet Sites") (*see* Complaint, ¶ 8; *see also* NYSCEF Doc No. 119 ["Supply and Service Contract"]). As part of the contract, Vergnet warranted that its wind turbines would perform their intended purpose and strictly conform to the specifications and requirements of the Prime Contract (*see* Complaint, ¶ 44; Supply and Service Contract, § 6.1).

Pursuant to a Warranty Transfer Agreement signed by NYSTA, Kandey and Vergnet after completion of the Project, all of Kandey's rights under the Vergnet warranty were **[**7]** transferred to NYSTA (*see* Complaint, ¶ 45; *see also* NYSCEF Doc No. 131 ["Warranty Transfer Agreement" or "WTA"]). As a result, Kandey had "no further responsibilities with regards to the VERGNET Warranty[,] and NYSTA will deal directly with VERGNET on all matters related to the VERGNET Warranty" (Warranty Transfer Agreement, ¶ 3).

The Vergnet turbines were placed in service between December 2014 and Spring 2015 (*see* NYSCEF Doc No. 22, pp. **[*16]** 193), but NYSTA alleges that they were "inadequate and unsuitable, failed to function properly and safely[,] and [became] nonoperational" by 2018 (Complaint, ¶ 18).

NYSTA commenced suit against Kandey, Vergnet, Ravi and Prudent on December 26, 2018 through the filing of a summons with notice. The Complaint, filed on February 27, 2019, alleges claims for breach of express warranty and breach of contract against Vergnet (*see id.*, ¶¶ 43-56), and claims for breach of express warranty, breach of contract, breach of implied warranty and negligence against Kandey (*see id.*, ¶¶ 20-42).

B. The Prior Motion Practice

Vergnet moved under CPLR 7503 at the outset of the case to compel NYSTA to arbitrate, relying upon an arbitration clause in the Supply and Service Contract. In rejecting Vergnet's invocation of the direct-benefits theory of estoppel, the Court relied on NYSTA's representation that its contractual claim was "not based on broad assertions of rights" under the Supply and Service Contract, but rather is "a more expansive articulation" of the warranty claim (NYSCEF Doc No. 179 ["Prior Decision"], p. 7 [internal quotation marks omitted]).

"As affirmed by its counsel, all of NYSTA's claims against Vergnet **[*17]** are premised on the Vergnet Warranty, and the [contract claim] merely is intended to ensure the incorporation of all of the pertinent schedules and specifications from the Supply and Service Contract and the Prime Contract" (*id.* [citations omitted]). "Thus, while there may have been good reasons for Vergnet to read the [contract claim] as one by which NYSTA is suing for breaches of non-warranty provisions of the Supply and Service Contract as a third-party beneficiary, the representations made by NYSTA in opposition to the motion to compel arbitration establish[ed] that the claim was not intended, and will not be prosecuted, as such" (*id.*).

C. Warranty Claim Against Vergnet

1. The Warranty

Under Article 6 of the Supply and Service Contract, Vergnet warranted that its turbines would be free of defects in design, workmanship and materials at the time of delivery and that the turbines would perform their intended purpose in strict accordance with the specifications established in the Prime Contract (*see* Supply and Service Contract, § 6.1 ["Warranty"]).

Article 6 then goes on to establish certain exclusions from the Warranty. As is pertinent here, the Warranty excludes "any liability for defects, **[*18]** deficiencies, damages, equipment failures or breakdowns, or failure to meet performance specifications that arise from or in connection with . . . inaccurate or incomplete topographical or other Site conditions information or data provided . . . to Vergnet and specified on Schedule 1.5" *or* "operation of the [turbines] under conditions out of perimeter detailed in the Site conditions information or data provided . . . to Vergnet and specified on Schedule 1.5" (*id.*, § 6.2 [ix], [xi] ["Warranty Exclusions"]).

Schedule 1.5 is a "site assessment" document prepared by Vergnet (*see* Warranty Transfer Agreement, pp. 7-12 ["Vergnet Site Assessment"]; *see also* NYSCEF Doc No. 22, pp. 38-39, 88-90, 138). The Vergnet Site Assessment states that wind turbulence at the four

Vergnet Sites is assumed to be less than 12% (*see* § 6.3) and concludes with the following cautionary **[**8]** note:

> Assumptions made above about . . . turbulence level at the wind turbine location lead to an acceptable turbine lifespan.

However, turbine lifespan is highly sensitive to . . . wind speed and turbulence level. In case of site data being out of the above mentioned ranges, Vergnet will need to reassess the suitability of the supplied **[*19]** turbines and reserves its right to limit its contractual warranty at its sole discretion (*id.*, § 7).

2. Site Conditions

The Vergnet turbines were equipped with anemometers capable of measuring wind speed and assessing wind turbulence. Both NYSTA's expert, Julien Bouget, and Vergnet's expert, Dr. Mark-Paul Buckingham, reviewed the anemometer data collected on the Vergnet turbines and found the wind turbulence intensity at the Vergnet Sites to be between 18% and 24% (*see* NYSCEF Doc No. 137 ["Bouget Report"], pp. 7-10; NYSCEF Doc No. 133 ["Buckingham Report"], pp. 16-17). Given the high level of wind turbulence, NYSTA's expert finds it "undeniable" that the specified model of Vergnet turbine "was not suitable for the site conditions" (Bouget Report, p. 9 [emphasis omitted]; *see also* Buckingham Report, p. 10).

Once the Vergnet turbines were placed in service, NYSTA and its consultants could monitor their operation and view anemometer data through an on-board supervisory control and data acquisition ("SCADA") system (*see* Buckingham Report, p. 9). Vergnet also monitored the SCADA system and repeatedly warned NYSTA and its consultants of the excessive turbulence observed from the turbines (*see* **[*20]** NYSCEF Doc No. 142; *see also* NYSCEF Doc Nos. 115-117). Similar observations were made by NYSTA personnel (*see* NYSCEF Doc Nos. 143-145).

3. Analysis

To state a claim for breach of an express warranty, the buyer must allege that there was an "affirmation of fact or promise by the seller, the natural tendency of which [was] to induce the buyer to purchase, and that the warranty was relied upon" (*Schimmenti v Ply Gem Indus.*, 156 AD2d 658, 659, 549 N.Y.S.2d 152 [2d Dept 1989] [internal quotation marks and citation omitted]; *see* UCC 2-313). Under UCC 2-316 (1), however, contracting parties are free to negate or limit an express warranty, and their disclaimer will be given effect (*see Matter of General Motors Corp. [Sheikh]*, 41 AD3d 993, 995, 838 N.Y.S.2d 235 [3d Dept 2007])

The Vergnet Warranty clearly and unambiguously disclaims coverage for defects, deficiencies, damages, equipment failures and breakdowns that arise from or in connection with the "operation of the [turbines] under conditions out of perimeter detailed in the Site conditions information . . . specified on Schedule 1.5" (Supply and Service Contract, § 6.2 [ix], [xi]).

After examining the failure of the Vergnet turbines, NYSTA's expert opined that: (a) turbulence intensity at the Vergnet Sites greatly exceeded the design specifications for the Vergnet turbines and the turbulence assumption made in the Warranty; (b) on-site measurements of wind turbulence intensity should have been conducted **[*21]** before NYSTA specified the Vergnet turbines; (c) no contractual duty or industry custom obliged Vergnet to obtain on-site wind measurements; and (d) the damage to the Vergnet turbines was caused by their exposure to excessive turbulence (*see* Bouget Report). Vergnet's expert concurs with these opinions (*see* Buckingham Report, pp. 10-12, 16-18).

The Court concludes that the foregoing proof is sufficient to demonstrate, *prima facie*, that NYSTA's warranty claim is precluded by the clear terms of a valid and enforceable exclusion. Accordingly, the burden shifts to NYSTA to raise a triable issue of material fact or a **[**9]** legal defense.

NYSTA does not dispute the essential facts underlying Vergnet's invocation of the Warranty Exclusions. The sole argument advanced by NYSTA in opposition to this branch of the motion is that Vergnet should be equitably estopped from invoking the Exclusions "based on its complicity in the lack of onsite measurements" (Opp Mem, p. 20).

According to NYSTA, Vergnet understood the importance of wind turbulence data and was aware that CHA failed to provide it with such data. Under the circumstances, Vergnet "could have and should have insisted on getting onsite turbulence **[*22]** data," and, "[b]y failing to do so, Vergnet is partly responsible" (*id.*). NYSTA therefore contends that "the Court should exercise its equity jurisdiction to estop Vergnet from invoking the [Warranty Exclusions]" (*id.*).

"Equitable estoppel is 'imposed by law in the interest of fairness to prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon the belief that such enforcement would not be sought'" (*Readco, Inc. v Marine Midland Bank*, 81 F3d 295, 301 [2d Cir 1996], quoting *Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 184, 436 N.E.2d 1265, 451 N.Y.S.2d 663 [1982]).

None of the essential elements of an estoppel are present here. There is no proof of any words or conduct on the part of Vergnet that misled NYSTA or CHA into believing that wind turbulence measurements were not needed or that the Vergnet turbines would function properly at sites with turbulence in excess of the assumed 12% level. Nor is there any evidence that NYSTA or CHA refrained from conducting on-site wind measurements in reliance on Vergnet's words or conduct, or that any such reliance would have been justified. And NYSTA has not shown that Vergnet's enforcement of the Warranty Exclusions would be **[*23]** inequitable.

NYSTA assigned CHA the responsibility of preparing the wind turbine specifications and ensuring that on-site conditions were suitable for the specified make and model of turbine (*see* Provost EBT, pp. 366-367; NYSCEF Doc No. 147, pp. 16-20; NYSCEF Doc No. 148, pp. 45-48; NYSCEF Doc No. 124, Schedule A). Based on the design specifications prepared by CHA, NYSTA sought to procure an existing model of Vergnet wind turbine (*see* NYSCEF Doc No. 113 ["Kandey Proposal"], p. 454; Provost EBT, pp. 367-368; NYSCEF Doc No. 150, p. 73; NYSCEF Doc No. 158, pp. 3-4). No other make or model of wind turbine could be substituted (*see* NYSCEF Doc No. 158, pp. 3-4; Kandey Proposal, pp. 453-454).[6]

The record further establishes that Vergnet did not conceal or understate the limitations of its wind turbines or the assumed site conditions upon which it was proceeding. Nor did Vergnet attempt to dissuade CHA from assessing on-site wind conditions. To the contrary, in an email sent while the design process was underway, Vergnet reminded CHA "that turbulence intensity will have to be confirmed as soon as possible" (NYSCEF Doc No. 114, p. 1).

The same email discussed available rotor options for **[*24]** the Vergnet turbines and, in that connection, explained that the 32-meter rotor maximizes electrical output, but a 30-meter rotor could be "used in case of a site with . . . high wind speed and turbulence[] to maintain the **[**10]** durability of the turbine" (*id.*). CHA specified the 32-meter rotor for the Vergnet turbines (*see* Proposal, pp. 454-455), despite the fact that there had been no examination of actual wind conditions at the four Vergnet Sites (*see* NYSCEF Doc Nos. 112, 121).

Also during the design phase, Vergnet provided NYSTA with its "site assessment" (Provost EBT, p. 402). The stated purpose of this document was "to verify the matching between the selected turbine and its options with the conditions of the NYSTA wind farm site," and it was "based on data provided by [NYSTA] and/or assumptions derived from other indicated sources" (Vergnet Site Assessment, § 1)

The Site Assessment recites that Vergnet had not received wind turbulence data from NYSTA or CHA, and Vergnet was proceeding under the assumption that turbulence would be less than 12 percent (*see id.*, § 4). Further, the document expressly cautioned that "turbine lifespan is highly sensitive to . . . wind speed and turbulence **[*25]** level," and "Vergnet will need to reassess the suitability of the supplied turbines and reserves its right to limit its contractual warranty" if actual on-site conditions differed from assumed conditions (*id.*, § 7).

To be sure, NYSTA and its expert may well be correct that "Vergnet had opportunities to ensure the project success by requesting site-specific data from onsite measurements prior to finalizing the turbine supply contract," but it "did not take full advantage of these opportunities and did not make sure that [CHA] would provide onsite measurements" (Bouget Report, p. 18). Certainly, Vergnet could have been more proactive in pressing the issue and ensuring that NYSTA and its design consultant fully appreciated the implications of proceeding with a costly wind turbine Project based on assumed wind conditions. But given the parties' contractual allocation of responsibilities, which is consistent with applicable industry standards (*see id.*, pp. 14-15), the Court sees nothing unfair or inequitable in enforcing the Warranty Exclusions in accordance with

[6] As explained in Part III (B), *infra*, the specified model of Vergnet turbine was the only commercially available turbine that met all of the Project constraints imposed by NYSTA management (*see* Provost EBT, p. 246 [NYSTA had "no other option but the Vergnet (GEV MP-R 32M' 275kW) turbines"]).

the express terms.

Indeed, the estoppel sought by NYSTA would have the effect of retroactively imposing new contractual duties on **[*26]** Vergnet and holding it liable for breaching those duties under the guise of doing equity. But the simple fact remains that it was not Vergnet's task to select a model of wind turbine appropriate for actual site conditions. Nor was it Vergnet's responsibility to assess on-site wind conditions. These were tasks that NYSTA assigned to CHA.

4. Conclusion

Based on the foregoing, NYSTA's claims to recover against Vergnet under the Warranty must be dismissed based on the Warranty Exclusions.[7]

D. Kandey

1. Breach of Warranty

The second and third causes of action of the Complaint allege breach of express and implied warranties, respectively (*see* Complaint, ¶¶ 26-36). Kandey moves to dismiss the express warranty claim on two grounds: (1) the damages for which NYSTA seeks recovery fall within the Warranty Exclusions; and (2) the Warranty Transfer Agreement relieved Kandey of all duties and responsibilities concerning the Warranty (*see* NYSCEF Doc No. 169, p. 33; *see also* Part, II [A], [C], *supra*). Kandey further argues that the claim for breach of implied warranty lacks merit, as the Uniform Commercial Code is inapplicable to construction contracts **[**11]** like the Prime Contract (*see id.*, pp. 34-35, citing **[*27]** *Schenectady Steel Co. v Trimpoli Gen. Constr. Co.*, 43 AD2d 234, 237, 350 N.Y.S.2d 920 [3d Dept 1974], *affd* 34 NY2d 939, 316 N.E.2d 875, 359 N.Y.S.2d 560 [1974]).

The Court concludes that Kandey's moving papers sufficiently establish its *prima facie* entitlement to the dismissal of the warranty claims. "Since no opposition [to this branch of the motion] was filed, no triable issues of fact was raised in [opposition]" (*Flagstar Bank*, 94 AD3d at 1045).

2. Negligence

Kandey moves to dismiss the fourth cause of action, alleging negligence, on the ground that its relationship with NYSTA is governed by the Prime Contract, a binding and enforceable agreement (*see* NYSCEF Doc No. 169, p. 35). In the absence of any opposition, this branch of the motion also is granted (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389, 516 N.E.2d 190, 521 N.Y.S.2d 653 [1987]).

3. Breach of Contract

NYSTA's alleges that Kandey breached the Prime Contract "by failing to design, provide, install, monitor and maintain wind turbine generators that are fully functional, operational, effective and safe for the . . . Project" (Complaint, ¶ 22). According to NYSTA, the turbines provided by Kandey "did not comply with the contractual requirements, including, all plans and specifications in full and in all respects, and failed to function properly and safely, and have become nonoperational" (*id.*, ¶ 23).

As amplified by its interrogatory responses, NYSTA maintains that the Vergnet turbines **[*28]** supplied by Kandey did not comply with language in the specifications requiring the provision of Class A wind turbines (*see* NYSCEF Doc No. 189, pp. 2-4). The Vergnet turbines installed by Kandey originally were rated as Class B turbines, which have a lesser capacity to withstand wind turbulence than Class A turbines (*see id.*).[8]

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[7] In view of this conclusion, the Court need not consider the alternative ground for dismissal tendered by Vergnet: that NYSTA's claims were discharged in a French bankruptcy proceeding.

[8] The International Electrotechnical Commission ("IEC") 61400-1 standard defines, among other things, the ability of a wind turbine to withstand turbulence (*see* NYSCEF Doc No. 120 ["IEC Standard"]). Under the 1999 IEC standard, a Class A turbine is designed to withstand wind turbulence intensity of up to 18%, a Class B turbine is designed for turbulence of up to 16%, and a Class S turbine is designed to withstand the level of wind turbulence specified by the manufacturer (*see id.*, pp. 19-20). Under this IEC Standard, turbines must have a design life of at least 20 years if sited appropriately (*see id.*, p. 20). According to Vergnet's expert, the turbines procured by NYSTA originally were rated as Class IVB, but Vergnet described them as Class S to NYSTA and CHA based on the IEC's elimination of Class IV in versions of the standard published subsequent to 1999 (*see* Buckingham Report, pp. 13-16).

Kandey moves to dismiss the breach of contract claim on the grounds that (1) the reference to Class A in the Project specifications was an inconsequential typographical error of which NYSTA and CHA were aware at all pertinent times, (2) even Class A wind turbines could not withstand the actual levels of wind turbulence at the four Vergnet Sites, and (3) NYSTA irrevocably accepted Kandey's performance under the express terms of the Prime Contract.

a. Turbine Class Specifications

The bid specifications were prepared by CHA, which served as NYSTA's engineering design consultant (*see* NYSCEF Doc No. 148, pp. 45-46; NYSCEF Doc No. 147, pp. 102-103; Provost EBT, pp. 252-253). The specifications called for the installation of four '"Vergnet GEV **[**12]** MP R 32M' 275kW wind energy electrical power generation system[s]" (NYSCEF Doc No. 113 ["Specifications"], **[*29]** p. 454). However, the Specifications inconsistently describe the Vergnet turbines as having both Class IIA and Class S performance characteristics (*see id.*, p. 455).

On October 2, 2012, CHA, acting on behalf of NYSTA, asked Vergnet to review the portion of the draft Specifications addressing the wind turbines (*see* NYSCEF Doc No. 125, p. 1). Vergnet responded on October 9, 2012 with a markup of the draft that eliminated the Class IIA reference, leaving only the reference to Class S (*see id.*, p. 6). Vergnet transmitted the same markup to CHA again on October 18, 2012 (*see* NYSCEF Doc No. 128). CHA thanked Vergnet for its feedback and distributed the comments internally (*see* NYSCEF Doc Nos. 126-127).

Nonetheless, CHA did not correct the mistaken reference to Class IIA in the final specifications that were put out to bid, and the Specifications incorrectly refer to the Vergnet turbines as having both Class A and Class S characteristics. But when asked about this discrepancy at his deposition, CHA's project manager, Frank DelSignore, explained that the reference to Class IIA simply was an "inconsequential typographical error" — an unfortunate instance in a 578-page document "where up in one **[*30]** paragraph it says Class S and another place it says Class IIA" (NYSCEF Doc No. 23, pp. 227-228).

Another CHA engineer who participated in drafting of the Specifications, Jack Honor, also was asked about the error. He explained that CHA's failure to revise the Specifications to refer solely to Class S following Vergnet's review was nothing more than a "mere inadvertent oversight," and he had no reason to dispute DelSignore's testimony that the discrepancy merely was an "inconsequential typographical error" (NYSCEF Doc No. 148, pp. 138-140).

The Court recognizes that NYSTA's project manager, Paul Provost, testified that he would have recommended a different turbine had he known that the Vergnet turbines were not Class IIA (*see* Provost EBT, pp. 274-275). But CHA, serving as NYSTA's agent, knew full well that the Vergnet turbines were Class S, not Class A (*see Christopher S. v Douglaston Club*, 275 AD2d 768, 769, 713 N.Y.S.2d 542 [2d Dept 2000] [principal is charged with knowledge acquired by agent acting within scope of agency]). It was CHA's responsibility to inform NYSTA of the inconsistency in the Specifications identified by Vergnet (*see* Provost EBT, p. 255).[9]

Moreover, in response to NYSTA's directive obliging bidders on the Project to "provide **[*31]** [the] *Turbine manufacturers' Class S parameters* . . . in their bid submission" (Specifications, p. 455 [emphasis added]), Kandey's bid included a "commercial offer" from Vergnet to supply four GEV MP-R 32M' 275kW wind energy electrical power generation systems with *Class S parameters* (*see* NYSCEF Doc No. 159 ["Vergnet Offer"], p. 5; *see also* NYSCEF Doc No. 157, ¶ 6). The Vergnet Offer explicitly identifies the Class S performance parameters of the specified model of turbine, and, as pertinent here, recites that wind turbulence intensity at the Vergnet **[**13]** Sites was "unknown" but "[a]ssumed [to be] less than 12%" (Vergnet Offer, p. 5).

In awarding Kandey the Prime Contract, NYSTA

[9] It bears emphasis that no one at NYSTA was an expert in wind turbine technology. While Paul Provost and his colleagues undoubtedly were very knowledgeable and experienced when it came to highway and bridge construction, they had not worked with wind turbines before (*see* Provost EBT, p. 134). For this reason, Provost testified that "no one at [NYSTA] . . . selected the Vergnet turbines. We were provided a recommendation [by CHA] and as the project manager I agreed with the recommendation" (*id.*, p. 19; *see also* Part III [B], *infra* [describing other relevant Project constraints]). Indeed, Provost's deposition testimony evidences his lack of familiarity with the fundamentals of wind turbulence, the IEC rating system, the significance of the Class S rating, and the feasibility of Vergnet modifying the GEV MP R 32M' 275kW wind turbines to meet the Class A standard (*see id.*, pp. 134, 258, 263, 378).

necessarily reviewed the bid documents, including the Vergnet Offer, and found the proposal responsive to its Specifications, which called for that exact make and model of wind turbine. Moreover, after it was awarded the Prime Contract but prior to the purchase of the turbines, Kandey provided CHA with Submittal 26, which included a full set of drawings of the Vergnet GEV MP-R 32M' 275kW turbines (*see* NYSCEF Doc No. 162). Although CHA was given Submittal 26 to review (*see* Provost EBT, pp. 232-233), NYSTA eventually **[*32]** informed Kandey that formal approval was unnecessary, as the Vergnet turbines called for in the Specifications were a proprietary product (*see* NYSCEF Doc No. 24, pp. 73-76).

Finally, to the extent that the inconsistent reference to Class IIA in the Specifications left any doubt as to the performance characteristics of the Vergnet GEV MP-R 32M' 275kW turbines that NYSTA intended to procure, the Warranty Transfer Agreement corrected the discrepancy. The Warranty Transfer Agreement — a writing signed by NYSTA that represents a modification of both the Prime Contract and the Supply and Service Agreement (*see* WTA, ¶¶ 5-6) — incorporates Schedule 12 as part of the Vergnet Warranty (*see id.*, p. 3). And Schedule 12 indicates that the inconsistent reference in the Specifications to Class IIA should be understood as referring to Class S (*see id.*, pp. 47-48).

The Court therefore concludes that Kandey did not breach the Prime Contract by supplying NYSTA with the exact make and model of wind turbine called for in the Specifications (*see CGM Constr., Inc. v Sydor*, 144 AD3d 1434, 1437, 42 N.Y.S.3d 407 [3d Dept 2016]; *Fruin-Colnon Corp. v Niagara Frontier Transp. Auth.*, 180 AD2d 222, 229-230, 585 N.Y.S.2d 248 [4th Dept 1992]; *see also* Part III [B], *infra*).

b. NYSTA Irrevocably Accepted Kandey's Performance

In any event, even if the Vergnet turbines deviated from the Specifications in **[*33]** some cognizable way and some portion of NYSTA's claimed damages were caused by Kandey's failure to deliver and install Vergnet GEV MP-R 32M' 275kW turbines with Class IIA performance characteristics,[10] an entirely notional product, NYSTA's claim for breach of the Prime Contract is foreclosed by its irrevocable acceptance of Kandey's performance.

Article 9 of the Prime Contract, entitled "Final Acceptance of Work," provides:

> When in the opinion of the Thruway Division Director, a Contractor has fully performed the work under the contract, the . . . Director shall recommend to the Chief Engineer, Department of Engineering of [NYSTA], the acceptance of the work so completed. If the Chief Engineer . . . accepts the recommendation . . . , he/she shall thereupon by letter notify [Kandey] of such acceptance, and. . . release up to 70% of the money held as **[**14]** retainage. . . . Prior to the final acceptance of the work . . . , the contract work may be inspected, accepted and approved . . . .

Final acceptance shall be final and conclusive except for defects not readily ascertainable by [NYSTA], actual or constructive[] fraud, gross mistakes amounting to fraud or other errors **[*34]** which [Kandey] knew or should have known about as well as [NYSTA's] rights under any warranty or guarantee. Final acceptance may be revoked by [NYSTA] at any time prior to issuance of the final check, upon [NYSTA's] discovery of such defects, mistakes, fraud or errors in the work.

NYSTA and Prudent employees inspected Kandey's work on or about July 9, 2015, "and the same was found to be completed in reasonable conformance with the contract plans and Specifications" (NYSCEF Doc No. 165 ["Contract Final Acceptance"]). Accordingly, NYSTA's Director of Construction Management recommended that Kandey's work be accepted (*see id.*). NYSTA's Chief Engineer concurred in the recommendation and certified to the completion and acceptance of Kandey's work on August 14, 2015 (*see* NYSCEF Doc No. 165 ["Final Acceptance Letter"]).[11]

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[10] Kandey argues and submits proof that wind turbulence intensity at the four Vergnet Sites exceeded the design class of *any* turbine under IEC Standards, including Class A turbines (*see* Buckingham Report, p. 17). According to Dr. Buckingham, the turbulence intensity at Dunkirk was 23/22% (operational/non-operational), 24/25% at Eden Angola, 17/19% at Ripley and 24% (operational) at Silver Creek (*see id.*). NYSTA's expert does not dispute the foregoing turbulence figures, but he does suggest that a Class A turbine *might* have been better able to withstand the excessively turbulent conditions at the Vergnet sites, at least for *some* length of time (*see* Bouget Report, pp. 34-35).

[11] One item of work remained outstanding at the time — the installation of four new anemometers — and this task was made the subject of an Uncompleted Work Agreement (*see* NYSCEF Doc No. 165). Kandey completed this task and received payment for it on March 15, 2016 (*see* NYSCEF Doc

Eleven months later, on July 5, 2016, NYSTA issued its final payment to Kandey under the Prime Contract (*see* NYSCEF Doc No. 167).

Thus, NYSTA gave "final acceptance" to Kandey's work for purposes of Article 9 on August 14, 2015 (Final Acceptance Letter). At that point, NYSTA's acceptance was "final and conclusive except for defects not readily ascertainable . . . , actual **[*35]** or constructive[] fraud, gross mistakes amounting to fraud or other errors which [Kandey] knew or should have known about" (Prime Contract, Article 9). It is apparent that none of these exceptions are implicated by Kandey's delivery and installation of the Vergnet GEV MP-R 32M' 275kW turbines with a Class S rating described in the Vergnet Offer submitted as part of its bid to NYSTA.[12]

And once NYSTA issued its final check to Kandey in July 2016, even that limited authority for NYSTA to rescind its final acceptance was extinguished.

"Generally, the acceptance of the work and payment therefor precludes a later action by a party to the contract for defects in performance" (*Village of Endicott v Parlor City Contr. Co.*, 51 AD2d 370, 372, 381 N.Y.S.2d 548 [3d Dept 1976] [citation omitted]; *see Yeshiva Univ. v Fidelity & Deposit Co. of Md.*, 116 AD2d 49, 52, 500 N.Y.S.2d 241 [2d Dept 1986], *lv denied* 68 N.Y.2d 603, 497 N.E.2d 705, 506 N.Y.S.2d 1025 [1986]; *Town of Tonawanda v Stapell, Mumm & Beals Corp.*, 240 App Div 472, 474, 270 N.Y.S. 377 [4th Dept 1934], *affd* 265 NY 630, 193 N.E. 419 [1934]; *Matter of Buffalo Schs. Renovation Program*, 54 Misc 3d 1204[A], 2016 NY Slip Op 51846[U], *5, 50 N.Y.S.3d 24 [Sup Ct, Erie County 2016]).

The Prime Contract embraced this longstanding common-law rule and modified it in NYSTA's favor by allowing final acceptance to be withdrawn prior to final payment under **[**15]** limited circumstances. But under the clear terms of the Prime Contract, NYSTA's final acceptance became conclusive and irrevocable after final payment to Kandey in July 2016.

III. PRUDENT

A. Background

In 2013, NYSTA engaged Prudent, an engineering firm, to provide inspection services for the Project (*see* NYSCEF **[*36]** Doc No. 34 ["Inspection Contract"]). Prudent's role encompassed "the inspection of [Kandey's] work, . . . review of shop drawings and submittals, testing construction materials . . . and other related duties as assigned" by NYSTA (*id.*, Schedule A).

NYSTA alleges three causes of action against Prudent: (1) breach of the Inspection Contract; (2) negligence; and (3) professional malpractice (*see* Complaint, ¶¶ 74-90). All three claims are based on allegations that Prudent deviated from good and accepted engineering inspection practice by failing to verify and assure that the Vergnet turbines installed by Kandey had the Class IIA rating described in the Specifications (*see* NYSCEF Doc No. 20, p. 2).

Prudent moves for dismissal of NYSTA's claims on the grounds that it was not involved in the design of the Project or the review of Submittal 26, its engineering services were rendered in accordance with accepted professional standards, and NYSTA has not adduced any expert proof to the contrary.

B. Analysis

As an initial matter, the record is clear that Prudent was not involved in the design of the Project or the selection of the Vergnet turbines. The Specifications were complete by the end of 2012 **[*37]** (*see* Part I [B], *supra*), and the Inspection Contract was not signed until April 2013 (*see* Inspection Contract, p. 1). Nor was Prudent involved in the review of Submittal 26 (*see* NYSCEF Doc No. 35), a task that NYSTA assigned to CHA (*see* Provost EBT, pp. 232-233).

In seeking to refute NYSTA's contention that Prudent deviated from accepted engineering standards by failing to warn that the Vergnet turbines installed by Kandey did not have a Class A rating, Prudent relies on the expert affidavit and report of Sidney Kaine, a licensed professional engineer (*see* NYSCEF Doc No. 36 ["Kaine Aff."], ¶ 1; *see also* NYSCEF Doc No. 37).

Kaine opines that Prudent was not under any contractual or professional duty to verify the IEC class of

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No. 166).

[12] The Court rejects NYSTA's contention that the Vergnet turbines suffered from a "latent" defect. As previously discussed, Vergnet repeatedly told NYSTA and CHA that the GEV MP-R 32M' 275kW turbines described in the Specifications were Class S, not Class A. And the wind turbulence rating of the Vergnet turbines was just as discoverable by NYSTA prior to installation and acceptance as it was after the turbines failed.

the Vergnet turbines (*see* Kaine Aff., ¶¶ 17-18). He explains that NYSTA's specification of Vergnet GEV MP-R 32M' 275kW turbines with "no substitution allowed" is a "closed proprietary specification" (*id.*, ¶ 20). "Ideally, a well written closed propriety specification would not include performance criteria," such as the turbine's capacity to withstand wind turbulence, but in cases where performance criteria are included, relevant engineering principles dictate that **[*38]** "the make and model of the closed propriety specification takes precedence" (*id.*). In other words:

> [W]hen a construction engineer reviews either a submittal, or inspects a product in the field at delivery to ensure compliance with specifications, when the specification is a closed proprietary specification, no substitutions allowed, the only information that is relevant is that the make and model of the turbine procured matches the make and model of the turbine set forth in the specification. The performance criteria contained in the specification is as though it does not exist (*id.*, ¶ 21).

Kaine further opines that the model of Vergnet turbine delivered and installed by Kandey "was an exact match for the make and model Vergnet turbine called for in the specification" (*id.*, ¶ 22). As such, Prudent did not deviate from accepted standards of engineering practice by **[**16]** failing to verify its performance parameters (*see id.*).

In opposition, NYSTA insists that Prudent was obliged to "review the plans and specifications" for the Project and ensure that "Kandey installed turbines in conformity with plans and specifications" (Opp Mem, pp. 23-24). NYSTA also relies on the certification of Lou Golando **[*39]** — a field inspector employed by both Prudent and Ravi at various phases of the Project — who certified that Kandey's work was "completed in reasonable conformance with the contract plans and Specifications" (NYSCEF Doc No. 130). "Prudent, having allowed Kandey to install the wrong class of turbines, in contravention of [the Specifications] . . . was negligent and breached its contract with NYSTA" (Opp Mem, p. 24).

The Court is unpersuaded by NYSTA's arguments. First and foremost, the Court rejects NYSTA's overarching contention that Kandey "install[ed] the wrong class of turbines" (*id.*). NYSTA set out to procure a specific make and model of Vergnet turbine, and that exact make and model of Vergnet turbine was delivered and installed.

Indeed, it was imperative to the viability of the Project that Vergnet GEV MP-R 32M' 275kW turbines be installed, as NYSTA believed this to be the only commercially-available make and model of wind turbine that (1) generated sufficient power, (2) had been certified by NYSERDA as eligible for a substantial rebate, and (3) would not require the preparation of an Environmental Impact Statement, a lengthy process that would delay the Project by years (*see* Provost **[*40]** EBT, pp. 246-252, 290, 355-356). Thus, NYSTA's demand for wind turbines with a high generating capacity that were eligible for financial subsidies and could be installed quickly left "no other option but the Vergnet [GEV MP-R 32M' 275kW] turbines" (*id.*, p. 246).

And there was no model or option of the Vergnet GEV MP-R 32M' 275kW turbines suitable for use in Class A environments. The GEV MP-R 32M' 275kW turbine originally was designed to be Class IVB under the 1999 IEC Standard, but Vergnet consistently held the turbine out to NYSTA and CHA as Class S based on the IEC's elimination of Class IV from subsequent versions of the standard (*see* Buckingham Report, pp. 13-16).

Thus, while NYSTA claims that Prudent allowed the "wrong" model of turbine to be installed, there simply was no "right" model of Vergnet GEV MP-R 32M' 275kW turbines with a Class A rating — a fact that had been fully disclosed to NYSTA and CHA at all phases of the Project. NYSTA received exactly what it set out to procure — four Vergnet GEV MP-R 32M' 275kW wind turbines — and no reasonable trier of fact could find otherwise.

And even if Kandey were somehow obliged to supply a nonexistent model of wind turbine based on the **[*41]** Prime Contract's incorporation of inconsistent language from the Specifications, Prudent's professional duties as an on-site engineering inspector did not extend to examination of the performance characteristics of Vergnet's proprietary turbines. As Prudent's engineering expert observes, "the turbine procured by Kandey was an exact match for the make and model Vergnet turbine called for in the specification" (Kaine Aff., ¶ 22), and applicable engineering standards do not oblige an inspector to ensure the proprietary product's compliance with performance criteria (*see id.*, ¶¶ 20-21).[13]

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[13] NYSTA relied on essentially the same reasoning in advising Kandey that approval of Submittal 26 was not required for the proprietary Vergnet turbines (*see* NYSCEF Doc No. 24, pp.

Nor was Prudent obliged to review the Specifications or Submittal 26 for potential inconsistencies and irregularities. NYSTA did not direct Prudent to conduct this type of review, and, absent such a direction, a construction inspector's role does not extend to reviewing design documents for errors, omissions or inconsistencies (*see* NYSCEF Doc No. 193 ["Kaine Reply Aff."], ¶¶ 12-13). Prudent's role was to ensure "that contract requirements are met and documented in contract records," not to "identify purported design issues within the specifications themselves" (*id.*, ¶ 15).

Finally, insofar as NYSTA's claims **[*42]** are based on Prudent's certification to the completion of Kandey's work (*see* Opp Mem, pp. 23-24), the applicable standard was one of "reasonable conformance with the contract plans and Specifications" (NYSCEF Doc No. 130). As stated above, NYSTA set out to procure a specific make and model of Vergnet turbine, and that is exactly what it received. And even if the inconsistent reference to Class IIA in the Specifications could serve to create any doubt on this point, the "reasonable conformance" standard clearly is met.

The Court therefore concludes that NYSTA's claims against Prudent must be dismissed.

IV. RAVI

A. Background

Following its agreement with NYSTA to perform construction inspection services on the Project, Prudent entered into a subconsultant agreement with Ravi, another engineering firm (*see* NYSEF Doc No. 59 ["Roop Aff."], ¶ 3; NYSCEF Doc No. 60 ["Subconsultant Agreement"]). Under the Subconsultant Agreement, Prudent delegated to Ravi certain of the inspection services that it agreed to perform for NYSTA. In rendering these services, Ravi was obliged to comply with the obligations imposed on Prudent under the Inspection Agreement (*see* Subconsultant Agreement).

Ronald Majesky **[*43]** of Prudent was the resident inspection engineer on the Project (*see* NYSCEF Doc No. 57, p. 14), and Lou Golando served as a field inspector under Majesky's supervision (*see id.*, pp. 15-16). According to the evidence submitted by Ravi, Golando was on Ravi's payroll performing Project-related services from May 25, 2013 through September 2013 (*see* Roop Aff., ¶¶ 5-6; NYSCEF Doc Nos. 61-65).

On March 25, 2014, Ravi entered into its own term agreement with NYSTA to provide construction support services (*see* Roop Aff., ¶ 8; NYSCEF Doc No. 66 ["Term Agreement"]). However, Ravi did not receive an assignment under the Term Contract pertaining to the Project until April 4, 2016, about eight months after NYSTA's final acceptance of Kandey's work (*see* Roop Aff., ¶ 9; NYSCEF Doc Nos. 67-68; Final Acceptance Letter).

NYSTA alleges three causes of action against Ravi: (1) breach of the Term Contract; (2) negligence; and (3) professional malpractice (*see* Complaint, ¶¶ 57-73). During pretrial proceedings, NYSTA shifted the focus of its contractual claim from the Term Agreement to the Subconsultant Agreement, and NYSTA now purports to sue on the unpleaded theory that it was an intended third-party beneficiary **[*44]** of the Subconsultant Agreement (*see* Opp Mem, pp. 24-25).

As amplified by NYSTA's amended interrogatory responses, all of its claims are predicated on allegations that Ravi deviated from good and accepted engineering practice by failing to verify and assure that the Vergnet turbines installed by Kandey complied with the **[**17]** Project plans and Specifications (*see* NYSCEF Doc No. 48, pp. 3-4).

Ravi moves for the dismissal of NYSTA's Complaint on the grounds that: (1) NYSTA cannot enforce the Subconsultant Agreement because NYSTA is not in contractual privity with Ravi and is not a third-party beneficiary of that agreement; (2) the tort claims are barred by Ravi's lack of privity or a near-privity relationship with NYSTA; (3) NYSTA cannot recover in tort for purely economic losses; and (4) Ravi did not provide inspection services on the Project in 2014, when the Vergnet turbines were delivered and installed.

B. Analysis

Even assuming that NYSTA has identified a duty in contract or tort owed to it by Ravi, the claims against Ravi fail on the merits for essentially the same reason as NYSTA's claims against Prudent.

In brief, the record shows that NYSTA received the make and model of Vergnet turbine **[*45]** called for in

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73-75). And, of course, there does not appear to have been any way for an on-site inspector like Prudent to independently assess the capacity of Vergnet's proprietary turbines to withstand wind turbulence.

the Specifications, Ravi's duties as a construction inspector did not extend to examination of the performance characteristics of Vergnet's proprietary turbines, and Ravi was not directed (or otherwise obliged) to review the Specifications or Submittal 26 for potential inconsistencies or irregularities (*see* Part III [B], *supra*). Moreover, Ravi rendered inspection services in relation to the Project only from May 25, 2013 through September 2013 (*see* Roop Aff., ¶¶ 5-6; NYSCEF Doc Nos. 61-65; Hurley Aff., ¶ 114), a period that preceded delivery of the Vergnet turbines (*see* NYSCEF Doc No. 57, p. 49).

The Court therefore concludes that NYSTA's claims against Ravi must be dismissed. **CONCLUSION**

For all of the foregoing reasons, it is

ORDERED that this action is dismissed in all respects against all defendants.

This constitutes the Decision & Order of the Court, the original of which is being uploaded to NYSCEF for electronic entry by the Albany County Clerk. Upon such entry, counsel for CHA shall promptly serve notice of entry on all parties entitled thereto.

Dated: April 26, 2022

Albany, New York

RICHARD PLATKIN

A.J.S.C.
