SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. ANTHONY F. MARANO
Justice.

TRIAL/IAS PART 9
NASSAU COUNTY

TASK OIL CORP.,

Plaintiff,

-against-

MOTION #001
INDEX # 5962/2010

XERXES CORP,

Defendant.

The following papers read on this motion:

Notice of Motion X
Answering Papers X
Reply..... X

Motion by defendant Xerxes Corp. for an order pursuant to CPLR § 2221 resettling or modifying the Order of Honorable Ira B. Warshawsky dated August 3, 2011 is granted, without opposition except insofar as plaintiff cross-moves to preserve the Sixth Cause of Action, and this order shall supercede the order dated 8/3/11 (Warshawsky, J.) which is hereby vacated. Cross-motion by plaintiff Task Oil Corp. pursuant to CPLR 2221 for reargument of so much of the order dated 8/3/11 which dismissed its Sixth Cause of Action

under Navigation Law §181 is granted and upon reargument the prior determination is adhered to.

Addressing the cross-motion first, a motion for reargument is designed to afford a party "an opportunity to establish that the court overlooked or misapprehended relevant facts or misapplied [a] controlling principle of law" (*Foley v. Roche*, 68 AD2d 558, 567 [1st Dept 1979]).

Plaintiff avers that the court was in error findng the Sixth Cause of Action premature. Plaintiff avers that it has suffered actual damages in the form of attorney's fees in defense of Navigation Law Article 12 actions against it by, inter-alia, New York State, which are still pending.

Under the Navigation Law only "a faultless owner" who is deemed a discharger "solely by virtue of its ownership of the property" and who "has paid for remediation", or "been held liable to the State Environmental Protection and Spill Compensation Fund" may pursue a section 181(5) claim under the Navigation Law against the party who "actually caused the discharge" (*State v. Tartan Oil Corp.*, 219 AD2d 111 [3d Dept 1996]).

Plaintiff is correct that the expense he incurred in defense of the State actions is an element of "indirect damage" under Navigation Law § 181(1) and (5), and is recoverable (*State v Tartan Oil Corp.*, 219 AD2d 111, 116 *supra*). However, plaintiff may not

recover that damage before it is possessed of a ripe cause of action under the relevant provisions of the Navigation Law (see Navigation Law § 182[1] and [5]). While counsel fees "may be recoverable as indirect damages of a discharge" the claim is "premature" until there is a finding with respect to whether or not plaintiff was at fault (*Carter v. Suburban Heating Oil Partners, L.P.*, 44 AD3d 1221, 1223 [3d Dept 2007]).

In sum a landowner may seek indemnity from an actual discharger "only if the landowner is faultless, meaning not in any way responsible for the discharge * * * . Any degree of fault would doom plaintiff's Navigation Law cause of action" (*Carter v. Suburban Heating Oil Partners, L.P.*, 44 AD3d 1221, 1222, *supra*). Unless and until plaintiff is found faultless in the Navigation Law actions against him, he is not possessed of a cause of action for indemnity. Accordingly, any possible indemnification claim for attorneys fees as indirect damages has not ripened and plaintiff's sixth cause of action was properly dismissed.

Turning to defendant's motion to resettle, Xerxes seeks correction of the 8/3/11 order which mistakenly referred to the "complaint" rather than the "Second Amended Verified Complaint". Xerxes also seeks correction of an omission, averring that the court failed to explicitly dismiss the Third Cause of Action while it clearly intended such dismissal.

The Third Cause of Action alleged that defendants caused a petroleum discharge, and that pursuant to Art. 12, § 181 (1) of the Navigation Law, defendant is liable to plaintiff for the cleanup and removal costs as well as other direct and indirect damage, including attorneys fees. The Fifth Cause of Action asserted, inter-alia, a Navigation Law Violation with damages consisting of a diminution in property value . Defendant is correct that the court clearly intended dismissal of the Third Cause of Action together with the Fifth Cause of Action which both made claims for property damage under the Navigation Law. Indeed, the court directed defendant to "submit Judgement", and plaintiff has submitted no opposition to the application with respect to the Third Cause of Action. Accordingly, the order of August 3, 2011 is superceded and amended as follows, with changes indicated by underlining:

PRELIMINARY STATEMENT

Defendant moves for summary judgment dismissing the Second Amended Verified Complaint based upon lack of privity, statute of limitations, res judicata, and failure to state a claim upon which relief can be granted.

BACKGROUND

Plaintiff operates a gasoline service station at 1210 Grand Avenue, Baldwin. Defendant is a manufacturer of underground

storage tanks (UST's) for petroleum products for sale at the service station. Pursuant to contract dated September 6, 1983, plaintiff purchased three Xerxes petroleum storage tanks from Kapco. For whatever reason, the tanks which ultimately found their way onto plaintiff's service station were apparently destined for a Gulf station on Hempstead Avenue in Malverne.

There was a tank failure on October 28, 1988. On or about October 5, 2000, the second and third tanks also failed. According to the Notice of Violation from the Nassau County Fire Marshal, dated October 20, 1988,[1] tanks numbered 2 and 3 failed. An additional spill was noted by the Department of Environmental Conservation on August 7, 2001.[2] By letter dated September 12, 2001, Xerxes advised the Nassau County Department of Fire Inspections that they had inspected and repaired an 8,000 gallon tank at 1210 Grand Avenue, Baldwin, which had been in service for 17 years. They predicted high probability that the tank would provide long continued service, despite the fact that the cause of the 36" crack at the bottom of the tank was never determined. They acknowledged their responsibility under the terms of their limited warranty.

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[1] Exh. 4 to plaintiff's memorandum of law.

[2] Exh. 5 to plaintiff's memorandum of law.

A New York State Department of Environmental Conservation (DEC) Spill Report reflected a test failure in an 8,000 gallon tank in 2005 at 1210 Grand Avenue Baldwin. By certified letter dated October 20, 2005 [3] the DEC advised that a test by Crompco Corporation on October 5, 2005 on the 8,000 gallon super unleaded gasoline tank failed a Petrotite test with a leak rate of 1 gph. Both tanks were directed to be taken out of service. By letter dated April 12, 2006, [4] Xerxes advised the service station that their inspection of the 8,000 gallon tank revealed large deflected areas, which would cause undue stresses on the tank, and, over time, could lead to a crack and other structural damage. The tank was repaired and passed a subsequent test. A Note to the letter indicated that the original warranty would continue, and the warranty of materials and workmanship connected with this repair would continue for one year. The cost for the 2006 repair was $10,020.00.

By the Second Amended Verified Complaint dated May 11, 2010, plaintiff asserts six causes of action as follows:

FIRST: Breach of Contract by Darius Corp. (successor-in-interest to Xerxes), in that UST's sold by them failed in 1988,

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[3] Exh. 7 to plaintiff's memorandum of law.

[4] Exh. 8 to plaintiff's memorandum of law.

2000 and 2005, releasing petroleum into the environment, and as a result, the premises are contaminated, for which plaintiff claims damages of $500,000.00;

SECOND: Breach of Warranty in that defendant represented that the USTs were fit for use at gasoline service stations; that the expressly and impliedly warranted that USTs they distributed were fit for use at gasoline service stations and would be usable for 30 years; defendant breached its warranties by selling and providing USTs that were not designed or manufactured to contain petroleum for at least 30 years; and only one of the three USTs purchased from defendant remains fit for use, and only after a cost of approximately $20,000.00; and that plaintiff has been damaged in the amount of $500,000.00;

THIRD: Violation of New York State Navigation Law, in that defendants caused, or contributed to the discharge of petroleum into the environment, and that pursuant to Art. 12, § 181 (1) of the Navigation Law, defendant is strictly liable to plaintiff for the cleanup and removal costs as well as other direct and indirect damage, including attorneys fees and those of expert witnesses, all of which damages exceed $500,000.00;

FOURTH: Defendant installed and repaired the USTs in a negligent manner;

FIFTH: As a result of the defendant's negligence, breach of

warranty and violations of the Navigation Law, the plaintiff has sustained a diminution in the value of its property in the amount of $500,000.00;

SIXTH: As a result of three actions in which plaintiff has been named a defendant, two by New York State and one by Exxon Mobil Oil Corp., plaintiff may be required to pay an amount to be determined to reimburse them for costs incurred in investigation and remediation of the premises and other property.

DISCUSSION

Plaintiff has been continuously seeking reimbursement from defendant over the past 22 years. Defendants contend that the current effort is barred by res judicata and the statute of limitations.

The motion to dismiss the First Cause of Action for breach of contract is granted. The plaintiff was never a party to a contract with defendant. The installer of the tanks, with whom plaintiff contracted was Kapco. A prior action in 1991 by plaintiff against Kapco and Xerxes resulted in a settlement and mutual releases. [5] The release, dated September 3, 1998, exonerated Xerxes from any liability for claims occurring prior to the date of the release, with the exception of claims for indemnity for claims made by the

[5] Exh. M to Motion.

State of New York. These actions, commenced in 2004, remain open.

Plaintiff is unable to establish that they were the intended third-party beneficiaries of the contract between Kapco and Xerxes. In order for a party to succeed on a claim as a third-party beneficiary, they must establish that they were regarded by the contracting parties as a beneficiary. Initially, it is correct, as defendant points out, that the party to whom delivery was originally to be made was a service station in Malverne. When the seller realized that they had the wrong address, they paid the shipper for an additional 10 miles to the correct location.

Even putting that aside, plaintiff would have the Court adopt a position that every sale by a manufacturer or supplier to a distributor, when they have knowledge of the ultimate user, would constitute a contract for the benefit of the end user. Such a holding would destroy the long-held requirement of privity of contract. The Court of Appeals has adopted the reasoning of the Restatement 2d, Contracts, with regard to the determination as to whether an alleged third-party beneficiary has enforceable rights. Under the adopted approach, incidental beneficiaries, as opposed to intended beneficiaries, do not have such rights. (*Fourth Ocean Putnam Corp. v. Interstate Wrecking Co.*, 66 N.Y.2d 38, 41 [1985]). The Court there concluded that the contract for the demolition of plaintiff's fire-damaged building pursuant to a contract between

Village of Atlantic Beach and Interstate, was not intended for the benefit of the plaintiff, but rather to remove an unsightly and dangerous condition for the benefit of the public.

It can hardly be reasoned that Xerxes had any particular interest in the ability of Task Oil to pump gasoline. While Task may well be considered an incidental beneficiary of the sales contract, they were not intended beneficiaries.

Plaintiff's assertion of a "quasi contract" between it and Xerxes is nothing more than a claim for unjust enrichment. (*Georgia Malone & Co., Inc. v. Ralph Rieder,* 2011 WL 2638128 [1st Dept. 2011]). In order to succeed on a claim for unjust enrichment, "plaintiff must show that the other party was enriched, at plaintiff's expense, and that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered' ". *Id.* quoting *Mandarin Trading Ltd. v. Wildenstein,* 16 N.Y.3d 173, 182 [2011]). There has been no evidence of enrichment of Xerxes at the expense of plaintiff, and Xerxes has continued to stand by its warranties, subject to statute of limitation claims, up to the present time. Plaintiff's assertion of a quasi contract is without merit and the motion to dismiss the First Cause of Action is granted.

The motion to dismiss the Second Cause of Action for breach of warranty is granted. Plaintiff asserts express and implied

warranties which are conclusively refuted by the language of the actual warranty. [6] The performance warranty states that the underground tanks will, when properly installed:

> (1) Meet our published specifications and will be free from material defects in materials and workmanship for a period of one (1) year following date of original shipment;
>
> (2) Will not fail for a period of thirty (30) years from date of original shipment to two external corrosion;
>
> (3) Will not fail for a period of thirty (30) years from date of original purchase due to internal corrosion, provided the tank is used solely for gasoline, gasohol (90% gasoline and 10% ethanol mixture), jet fuel, diesel fuel or potable water at ambient underground temperature; or use for fuel oil at temperatures not to

[6] P/O Exh.3 to Plaintiff's Memorandum of Law.

[* 12].

exceed 150° F.

Xerxes Corporation's sole liability for any defect, which determines in its sole reasonable discretion to be covered by the above warranty, shall be, at Xerxes' option, to repair the tank, to replace the tank F.O.B. place of original delivery or to refund the original purchase price. In no event, shall Xerxes liability under this warranty extend to labor, installation costs, or incidental or consequential damages or losses suffered or incurred in connection there with.

This warranty is void if oral or written installation instructions are not followed or if the tank is abused or misused in any manner.

THE WARRANTIES STATED HEREIN SHALL BE IN LIEU OF ALL OTHER WARRANTIES BY XERXES CORPORATION, EITHER EXPRESS OR IMPLIED, INCLUDING WARRANTIES OF MERCHANTABILITY AND FITNESS FOR

THE PARTICULAR PURPOSE INTENDED, ALL OF WHICH ARE HEREBY SPECIFICALLY DISCLAIMED BY XERXES. NO PERSON ACTING OR SELLING ON BEHALF OF XERXES MAY AUTHORIZE ANY WARRANTIES OTHER THAN THOSE SPECIFIED HEREIN.

The claims against defendant for spills occurring in 2000 and 2005 are not precluded by the general release, since they occurred after its execution. Rather, they are governed by the four-year statute for breach of warranty claims pursuant to UCC § 2-725. Subd. 2 of that statute provides that "(a) cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach". In this instance the leak which plaintiff for the first time complains of occurred on October 5, 2005. On the same date the DEC advised plaintiff's tenant in possession in writing dated October 20, 2005, a copy of which letter was sent to Stanley Coven, the president of Task, that the tank tightness test on an 8,000 gallon tank at the premises failed. Plaintiff's assertion that they did not become aware of the incident until less than four years prior to the service of the complaint strains credulity, and is obviated by the language of the statute which begins the running of the four-year statute from the time of the breach, irrespective of the aggrieved party's lack of knowledge of

the breach.

The warranty claim for the 2000 breach has previously been determined to be barred by the four-year statute of limitations. So too is the claim for the 2005 event. Plaintiff filed its original summons and complaint on March 25, 2010, more than four years and five months from the date of the breach.

The Fourth Cause of Action alleges that the defendant negligently installed and repaired the USTs. All such claims are barred by the three-year statute of limitations applicable to negligence.

The Fifth Cause of Action asserts that the breach of warranty, negligence and violation of the Navigation Law has resulted in damage to the plaintiff. The negligence and warranty claims have been dismissed.

Navigation Law § 181 imposes strict liability upon the owner of property for the cost of petroleum discharge emanating from their property. However "(a) property owner who is held strictly liable for the costs of a petroleum discharge is authorized to bring a claim as an 'injured person' for the cost of cleanup and removal against a prior owner or any other party who actually caused or contributed to the discharge". (*General Cas. Ins. Co. v. Kerr Heating Products,* 48 A.D.3d 512 [2d Dept.2008]). The

statute of limitations for such action is three years from the date of discovery, or the date that a party should reasonably have become aware, in the exercise of reasonable diligence. CPLR § 214-c [2]; (*Jensen v. General Elec. Co.*, 82 N.Y.2d 77 [1983]).

Plaintiff's claim under the Navigation Law is therefore barred by the statute of limitations, and the motion to dismiss the Third and Fifth Causes of action is granted.

In the Sixth Cause of Action plaintiff asserts that they may be held responsible for damages in three pending actions, two by the State of New York and one involving Exxon Mobil. Plaintiff's claims against Mobil and Xerxes based on indemnification were previously dismissed by this Court (Jonas, J.) as premature, in that there was no allegation that plaintiff had been compelled to pay damages in any action, and that public policy precluded a claim for indemnification in a separate action.

"As a general rule, a claim for indemnification does not accrue until payment has been made by the party seeking indemnification". (*State of New York v. Syracuse Rigging Co.*, 249 A.D.2d 758, 759 [3d Dept.1998])(internal citations omitted). Departure from the general rule may be warranted, and the issuance of a conditional judgment of indemnification appropriate, but only where the interests of justice and judicial economy so dictate. *Id.*

at 760. In the instant case, there is no evidence that plaintiff has had a judgment rendered against it, much less required to make payment. As such the indemnification claims are clearly premature.

The motion to dismiss the Sixth Cause of Action is granted.

Defendant is directed to submit Judgment in accordance with this Decision and Order.

DATED: April 2, 2012

J.S.C.
ANTHONY F. MARANO
JSC