SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x	**TRIAL/IAS PART: 16**
LEON HOLDINGS, LLC and LEON PETROLEUM, LLC,	**NASSAU COUNTY**
Plaintiffs,	**Index No: 601536-12**
	Motion Seq. No. 2
- against -	**Submission Date: 10/15/13**
NORTHVILLE INDUSTRIES CORP.,	
Defendant.	
----------x	

The following papers having been read on this motion:

Notice of Motion, Affidavit in Support and Exhibits.....x
Memorandum of Law in Support.....x
Affirmation in Opposition and Exhibits.....x
Memorandum of Law in Opposition.....x
Reply Memorandum of Law in Further Support.....x

This matter is before the Court for decision on the motion to dismiss filed by Defendant Northville Industries Corp. ("Defendant" or "Northville") March 4, 2013 and submitted on October 15, 2013, following oral argument before the Court. For the reasons set forth below, the Court denies the motion.

A. Relief Sought

Defendant moves for an Order, pursuant to CPLR §§ 3211(a)(1), (3) and (7), dismissing the First Amended Verified Complaint ("Amended Complaint").

Plaintiffs Leon Holdings, LLC ("Leon Holdings") and Leon Petroleum, LLC ("Leon Petroleum") ("Plaintiffs") oppose the motion.

B. The Parties' History

The parties' history is outlined in the prior order ("Prior Order") of the Court dated July 22, 2013 in which the Court directed that there would be oral argument on the motion. The Court conducted that oral argument, and the motion was subsequently submitted on October 15, 2013. The Court incorporates the Prior Order by reference as if set forth in full herein.

As noted in the Prior Order, the Amended Complaint describes the nature of this action as follows:

> This action arises under § 181 of the New York State Navigation Law ("Navigation Law"), the common law of indemnification, contribution and subrogation, breach of contract, and seeks reimbursement of the costs of clean up and removal of petroleum contamination, and of direct and indirect damages caused by Northville's discharge of petroleum at, onto, or in the vicinity of, a gasoline station property previously leased, supplied and operated by Northville. As a result of the discharges caused by Northville, and the failure of Northville to adequately remediate the discharges, Plaintiffs have incurred additional damages in connection with obligations requiring them to defend and indemnify parties that have been unjustly targeted as defendants in multiple actions commenced by certain Water Districts on Long Island, alleging that releases of Methyl Tertiary Butyl Ether ("MTBE"), a former gasoline additive, by Northville caused contamination of public drinking water wells.
>
> Am. Compl. at ¶ 1.

The Amended Complaint contains factual background regarding 1) the February 16, 1954 lease between Sinclair Refining Company ("SRC") as Lessee and Rainbow Petroleum Products, Inc. ("Rainbow") as Lessor of the property located at 345 Old Country Road, Carle Place, New York ("Carle Place Station") and subsequent assignments, 2) the Northville spills and remediation, including an Environment Assessment of the Carle Place Station performed in 1990 by ERM Northeast ("ERM") on behalf of Northville Station ("1990 Assessment"), Northville's failure to make a petroleum spill report in 1990 to the New York State Department of Environmental Conservation ("NYSDEC"), Northville's spill report made to the NYSDEC on January 17, 1992 ("1992 Northville Spill") and the NYSDEC's assignment of a new spill report number to the Carle Place Station of 99-25412 following Northville's advising the NYSDEC that it would not agree to restart operation of the Remediation System ("1999 Spill Case"), 3) the dissolution of Tartan Oil Corp. ("Tartan") and its affiliated company CP Service Station

Operating Corp. ("CP"), which Leon Petroleum acquired in 1999 and agreed to release from environmental liabilities associated with the Carle Place Station, and continuing environmental liability of Leon Petroleum for the 1992 Northville Spill and 1999 Spill Case, 4) the implication of Carle Place Station in four (4) actions as a result of the environmental conditions relating to the 1992 Northville Spill and the 1999 Spill Case, and because of the Carle Place Station's proximity to the water district water supply wells ("Federal MTBE Actions"), 5) Northville's alleged failure to contain and remediate the 1992 Spill or provide a defense and indemnification to Tartan, and a settlement agreement ("Settlement Agreement"), and 6) the terms of relevant assignment and assumption agreements.

The Amended Complaint contains the following four (4) causes of action: 1) Navigation Law - Strict Liability, in which Plaintiffs allege that, pursuant to Navigation Law §§ 181(1) and (5), Northville is strictly liable for all cleanup and removal costs, and all direct and indirect damages, incurred by Plaintiffs and/or Tartan or Cp, 2) common law indemnification and subrogation, in which Plaintiffs allege that Northville has failed to fulfill its obligations to defend, indemnify and hold harmless Tartan and CP in connection with the claims asserted in the Federal MTBE Actions and costs incurred in connection with the 1992 Northville Spill, 3) a request for contribution from Northville, pursuant to the Settlement Agreement, equal to the percentage amount of any monetary liability incurred by Plaintiffs that is attributable to the acts and omissions of Northville arising from the 1992 Northville Spill and Federal MTBE Actions, and 4) breach of contract based on Northville's breach of the 1995 Assignment Agreement which required Northville, *inter alia*, to defend, indemnify and hold CP harmless with respect to the Federal MTBE lawsuits and remediate the environmental condition existing at the Carle Place Station

In the December 20, 2010 Opinion and Order of the Honorable Shira A. Scheindlin, U.S.D.J. in the Federal MTBE lawsuits (Ex. 5 to Rothberg Aff. in Opp.) ("Federal Decision"), Judge Scheindlin ruled on the motion by Northville for dismissal of the third-party complaints ("TPCs") filed against it by Tartan and its affiliate CP. Judge Scheindlin observed that the TPCs asserted a variety of state law claims, including common law indemnity, strict liability under the New York Navigation Law, declaratory judgment, breach of contract and indemnification and contribution (Fed. Dec. at p. 2).

In the Federal Decision, Judge Scheindlin ruled, *inter alia*, that 1) as the "thrust" of the TPCs was that any MTBE waterway contamination occurred during Northville's ownership of the Station, and Northville is contractually bound to indemnify Tartan for any damages and other moneys which may be recovered by plaintiff or the State in the underlying action, Tartan's third-party claims for indemnification and contribution were appropriate (Fed. Dec. at p. 17); 2) the facts underlying the third-party claims overlapped sufficiently with the direct claims to form a part of the same case or controversy and, therefore, the Federal Court had subject matter jurisdiction over the third-party claims (*id.* at pp. 18-19); 3) in light of the fact that the third party declaratory judgment claims would involve an investigation of the "same facts surrounding the same spill," the Court could exercise supplemental jurisdiction over the declaratory judgment claims (*id.* at p. 19); and 4) as Northville's alleged breach of its obligations under the Assignment Agreement "arose out of the spill that instigated the underlying litigation," the Court's exercise of supplemental jurisdiction over that claim was appropriate (*id.* at pp. 19-20).

C. The Parties' Positions

Defendants submit *inter alia* that 1) the Court must dismiss the causes of action seeking the recovery of costs incurred in connection with defending and indemnifying Tartan and CP in the Federal MTBE actions in light of the fact that Tartan and CP, which are Delaware corporations, were dissolved more than three (3) years before the Federal MTBE actions were commenced and their dissolved status constituted an absolute defense to the Federal MTBE actions which Plaintiffs failed to raise on behalf of Tartan and CP; 2) Plaintiffs effort to "plead around" the consequences of Tartan and CP's dissolved status by filing the Amended Complaint (D's Memo. of Law at p. 6) by alleging, *e.g.*, that Tartan and CP were only permitted to dissolve because they had made provisions for environmental liabilities through their agreements with Leon Petroleum (*see* Am. Compl. at ¶¶ 64 and 66) does not alter the fact that Tartan and CP could not legally be sued in the Federal MTBE lawsuits which were commenced more than three (3) years after their dissolution; 3) even if the 1999 spill file was a "proceeding" under Delaware Code Title 8, Section 278 that continued Tartan and CP's corporate existence beyond the statutory 3 year winding-up period, it would, at most, only have extended CP's corporate existence solely for the purpose of addressing the NYSDEC's inquiries and/or requests regarding the Carle Place property within the confines of the 1999 spill file, and for no other purpose;

4) the Court must dismiss Plaintiffs' claims under Navigation Law § 181 because Plaintiffs have no right to seek damages incurred by Tartan or CP in light of their dissolution, and because the Amended Complaint does not allege a valid basis on which Plaintiffs may recover costs incurred by Tartan or CP prior to their dissolution; 5) Plaintiffs may not assert a Navigation Law claim to recover alleged damages and costs to which they are not entitled under the Assignment Agreement; 6) Northville had no obligation to defend or indemnity Tartan and CP in the three Federal MTBE actions which did not assert a claim or demand for relief involving the Carle Place Station; 7) the same grounds for dismissal of the common law indemnification claim require dismissal of Plaintiffs' claim for contribution; 8) the Court should dismiss any claims by Plaintiffs for recovery of consultant and attorney's fees and costs in connection with the prosecution of the third-party actions in the Federal MTBE actions because Tartan and CP had no authority to maintain the federal third-party actions against Northville and, therefore, Plaintiffs had no right to commence the federal third-party action on behalf of Tartan or CP; and 9) in light of the fact that the indemnity provision of the Assignment Agreement between Northville and CP does not provide for an award of attorney's fees in an action against Northville for breach of that contractual provision, Plaintiffs are not entitled to attorney's fees.

In opposition, Plaintiffs submit *inter alia* that 1) there has been a judicial determination that Tartan and CP's corporate existence continued for the purpose of defending against the liability associated with the 1999 spill file proceedings and Federal MTBE Actions, specifically the Opinion and Order dated December 20, 2010 issued in the Federal Actions by the Honorable Shira A. Scheindlin in the United States District Court, Southern District of New York (Ex. 5 to Aff. in Opp.); 2) in light of the judicial determination in the Federal Actions that a) the prior 1992 and 1999 spill proceedings and remediation, b) the claims of the water districts against Tartan and CP, and c) the Tartan defendants' claims against Northville, are to be treated as the same case and controversy, Tartan and CP could not have asserted a defense of corporate dissolution in the Federal Actions; and 3) the Amended Complaint states a cause of action under the Navigation Law by alleging that a) Northville actually caused a discharge of petroleum during its operation of the Carle Place Station, resulting in the 1992 Northville Spill proceeding, injury to the Carle Place Station and off-site contamination; and b) no discharge of petroleum occurred during the time that Tartan and CP owned or operated the Carle Place Station, and there

was no subsequent discharge of petroleum when Plaintiffs owned or operated the Carle Place Station.

RULING OF THE COURT

A. Standards of Dismissal

A complaint may be dismissed based upon documentary evidence pursuant to CPLR § 3211(a)(1) only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby. *Yew Prospect, LLC v. Szulman*, 305 A.D.2d 588 (2d Dept. 2003); *Sta-Bright Services, Inc. v. Sutton*, 17 A.D.3d 570 (2d Dept. 2005).

A motion interposed pursuant to CPLR § 3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

B. Navigation Law § 181

Pursuant to Navigation Law § 181(1), "[a]ny person who has discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained." *State of New York v. Joseph*, 29 A.D.3d 1233, 1234-1235 (3d Dept. 2006), *lv. app. den.*, 7 N.Y.3d 711 (2006).

Navigation Law § 181(5) provides as follows:

> Any claim by any injured person for the costs of cleanup and removal and direct and indirect damages based on the strict liability imposed by this section may be brought directly against the person who has discharged the petroleum, provided, however, that damages recoverable by any injured person in such a direct claim based on the strict liability imposed by this section shall be limited to the damages authorized by this section.

The elements of a claim under Navigation Law § 181(5) are that the defendant caused or contributed to a discharge of petroleum and that no discharge occurred during the period in which the plaintiff owned the property. *Route 104 & Route 21 Development, Inc.* v. Chevron U.S.A., Inc., 96 A.D.3d 1491, 1492 (4th Dept. 2012), citing *1093 Group, LLC v. Canale*, 72 A.D.3d 1561, 1562 (4th Dept. 2010).

C. Subrogation, Indemnification and Contribution

Subrogation is an equitable doctrine that allows an insurer to stand in the shoes of its insured and seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse. *Kaf-Kaf, Inc. v. Rodless Decorations*, 90 N.Y.2d 654, 658 (1997).

A party's right to indemnification may arise from a contract or may be implied based on the law's notion of what is fair and proper as between the parties. *McCarthy v. Turner Construction, Inc.*, 17 N.Y.3d 369, 374-375 (2011), quoting *Mas v. Two Bridges Assocs.*, 75 N.Y.2d 680, 690 (1990). Implied, or common law, indemnity is a restitution concept which permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other. *McCarthy v. Turner Construction, Inc.*, 17 N.Y.3d at 375, quoting *Mas v. Two Bridges Assocs*, 75 N.Y.2d at 690, citing *McDermott v. City of New York*, 50 N.Y.2d 211, 216-217 (1980), *reh. den.*, 50 N.Y.2d 1059 (1980).

A party seeking contractual indemnification must establish the existence of a written agreement between itself and the party from whom it is seeking indemnification. *Moss v. McDonald's Corp.*, 34 A.D.3d 656 (2d Dept. 2006). A party is entitled to contractual indemnity if the agreement specifically so provides, or if the intention to indemnify can be clearly implied from the language and purpose of the entire agreement, and the surrounding facts and circumstances. *Margolin v. New York Life Ins. Co.*, 32 N.Y.2d 149, 153 (1973); *Watral & Sons, Inc. v. OC Riverhead 58, LLC*, 34 A.D.3d 560 (2d Dept. 2006).

The rules governing contribution, as set forth in *Dole v. Dow Chem Co.*, 30 N.Y.2d 143, 147-153 (1972) and codified in CPLR Article 14, enable a joint tortfeasor who has paid more than his or her equitable share of damages to a plaintiff to recover the excess from the other torfeasor. *O'Gara v. Alacci*, 67 A.D.3d 54, 57 (2d Dept. 2009). Ordinarily, the other tortfeasor's liability for contribution flows from a breach of a duty owed to the plaintiff. *Id.*

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694 (2d Dept. 1986). *See also JP Morgan Chase v. J.H. Electric*, 69 A.D.3d 802 (2d Dept. 2010) (complaint sufficient where it adequately alleged existence of contract, plaintiff's performance under contract, defendant's breach of contract and resulting damages, citing, *inter alia*, *Furia v. Furia*, *supra)*.

D. Continuation of Delaware Corporation after Dissolution

8 Del. C. § 278, titled "Continuation of corporation after dissolution for purposes of suit and winding up affairs," provides as follows:

> All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of 3 years from such expiration or dissolution or for such longer period as the Court of Chancery shall in its discretion direct, bodies corporate for the purpose of prosecuting and defending suits, whether civil, criminal or administrative, by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, to discharge their liabilities and to distribute to their stockholders any remaining assets, but not for the purpose of continuing the business for which the corporation was organized. With respect to any action, suit or proceeding begun by or against the corporation either prior to or within 3 years after the date of its expiration or dissolution, the action shall not abate by reason of the dissolution of the corporation; the corporation shall, solely for the purpose of such action, suit or proceeding, be continued as a body corporate beyond the 3-year period and until any judgments, orders or decrees therein shall be fully executed, without the necessity for any special direction to that effect by the Court of Chancery.
>
> Sections 279 through 282 of this title shall apply to any corporation that has expired by its own limitation, and when so applied, all references in those sections to a dissolved corporation or dissolution shall include a corporation that has expired by its own limitation and to such expiration, respectively.

Under Delaware common law, the dissolution of a corporation terminated its existence as a legal entity. *Doucot v. IDS Scheer, Inc.*, 734 F. Supp. 2d 172, 184 (D. Mass. 2010), quoting *City Investing Co. Liquidating Trust v. Continental Casualty Co.*, 624 A.2d 1191, 1194 (Del. 1993), citing *In re Citadel Industries, Inc.*, 423 A.2d 500, 503 (Del. Ch. 1980). To formalize the continued existence of corporate assets and to provide a mechanism for the assertion of claims as part of the winding up process, the Delaware General Corporation Law continues the corporation's existence by operation of law. *Doucot v. IDS Scheer, Inc.*, 734 F. Supp. 2d at 184,

quoting *City Investing Co. Liquidating Trust v. Continental Casualty Co.*, 624 A.2d at 1194. In tandem, 8 Del. C. §§ 278 and 279 insure that whether a corporation is dissolved voluntarily by its shareholders or for nonpayment of taxes, it remains a viable entity authorized to possess property as well as sue and be sued incident to the winding up of its affairs. *Doucot v. IDS Scheer, Inc.*, 734 F. Supp. 2d at 184, quoting *City Investing Co. Liquidating Trust v. Continental Casualty Co.*, 624 A.2d at 1195, citing *Addy v. Short*, 47 Del. 157 (Del. Supr. 1952). The intention of § 278 is to balance the public policy interest of ensuring that claimants have adequate time to bring claims against the corporation. *Doucot v. IDS Scheer, Inc.*, 734 F. Supp. 2d at 184, quoting *In re Down Chemical International Inc. of Delaware*, 2008 Del. Ch. LEXIS 147, 2008 WL 4603580, * 2 (Del. Ch. Oct. 14, 2008), citing *In re RegO Co.*, 623 A.2d 92, 95 (Del. Ch. 1992).

E. Application of these Principles to the Instant Action

The Court denies the motion in light of the Court's conclusions *inter alia* that 1) Northville has not established, as a matter of law, that there was a viable defense of corporate dissolution to be asserted in the Federal Action, as the 1999 Spill File Case was arguably a "proceeding" under 8 Del C. § 278 which prolonged the corporate existence of TOC and CP beyond the three-year winding down period; 2) in light of Judge Scheindlin's rejection of Northville's argument that CP, but not TOC, had the right to assert claims against Northville, there has arguably been a prior judicial determination that Tartan and CP have the capacity to sue, and standing to assert these claims against Northville; 3) in light of the determination in the Federal Decision regarding all the matters that should be treated as the same case and controversy, Tartan and CP were arguably foreclosed from asserting a defense based on the alleged corporate dissolution of Tartan and CP in 2000; 4) the Amended Complaint properly alleges the elements of a claim under Navigation Law § 181, and that Northville is strictly liable for all cleanup and removal costs, and all direct and indirect damages incurred by Plaintiffs and/or Tartan or CP, by alleging that a) Northville caused a discharge of petroleum during the operation of the Site, which resulted in the 1992 Northville Spill proceeding and injury to the Site and its vicinity; and b) no discharge of petroleum occurred during the time that Tartan and CP owned or operated the Site, nor was there a discharge of petroleum subsequently when Leon owned or operated the Station; 5) the documentary evidence, including the dissolution documents and operative agreements, do not conclusively establish a defense as a matter of law, *e.g.*, because that evidence arguably supports the conclusion that Leon assumed all of Tartan and CP's rights and burdens under the 1995 Assignment Agreement and may enforce the

remediation, defense and indemnification obligations of Northville under that Agreement; 6) the Amended Complaint statues viable causes of action for common law indemnification by virtue of its allegations, *inter alia* that a) Leon Petroleum provided a defense and indemnification to Tartan and CP in connection with the Federal MTBE Actions, as a result of Northville's failure to fulfill its duty to defend and indemnify Tartan and CP; b) Tartan and CP were without fault with respect to the contamination at the Site; and c) pursuant to the 2012 Settlement Agreement, Plaintiffs preserved their rights to indemnification for liability incurred by Plaintiffs and/or Tartan or CP with respect to the contamination caused by the 1992 Northville Spill (*see* Am. Compl. at ¶¶ 119-123); and 7) in light of the fact that the Federal Decision sustained the TPCs in all four of the water district Federal Actions, there is support for Plaintiffs' claims that Northville has defense and indemnification obligations with respect to those Actions.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Preliminary Conference on January 10, 2014 at 9:30 a.m.

ENTER

DATED: Mineola, NY
December 5, 2013

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
DEC 13 2013
NASSAU COUNTY
COUNTY CLERK'S OFFICE