

John J. Ferguson Jr. and John Lattanzi died while working at an oil refinery owned and operated by Premcor Refining Group, Inc. and Valero Energy Corporation (collectively “Premcor”). This litigation arises from settlement payments made by Premcor to resolve wrongful death claims by the estates of Ferguson and Lattanzi.

Turn-Around Project at the Oil Refinery and Insurance Coverage

Premcor contracted with Matrix Service Company (“Matrix”) for turnaround work at the oil refinery. Ferguson and Lattanzi were employed by Matrix as boilermakers. Premcor also contracted with Pro-Tech Engineering, Inc. (“Pro-Tech”) as a contract administrator. Pro-Tech was responsible for coordinating the work of other contractors working at the oil refinery, including Matrix.

The Pro-Tech contract required that Pro-Tech “maintain a system of internal controls sufficient to provide reasonable assurance” that personnel had the requisite training to perform the work.¹ Pro-Tech also agreed to provide a safe workplace, specifically:

[Pro-Tech] agrees that it has assumed the sole obligation and duty to provide a safe place to work for its employees and its subcontractors’ employees in the WORK area on premises, and agrees that [Premcor] has no responsibility therefore, and that any claim for damages by employees of [Pro-Tech] or its subcontractors against [Premcor] alleging that [Premcor] failed to furnish a safe place to work shall not be construed as relieving [Pro-Tech] of its indemnity obligations to

¹ Pls.’ Op. Brief, p. 4.

[Premcor] . . .²

Further, Pro-Tech agreed to perform the work in a “manner protective of the site, its employees, the public and the environment” by taking all reasonable steps to follow site work rules, industry practices and duties required by law.³ In the contracting agreement, Pro-Tech also agreed to maintain \$10 million liability insurance naming Premcor as an additional insured, which was to be primary to any insurance held by Premcor.⁴

To fulfill the contract requirements, Pro-Tech held an insurance policy with Maryland Casualty Insurance Company (“Maryland Casualty”) for July 23, 2005 – July 23, 2006 which provided limits of \$1 million per occurrence and \$2 million total (“Primary Policy”) and included umbrella liability coverage with a limit of \$10 million per occurrence (“Umbrella Policy”).

The Primary Policy defines an additional insured as follows:

Any person or organization with whom you agree, because of a written contract to provide insurance such as is afforded under this policy, but only with respect to liability arising out of your operations, “your work” or facilities owned or used by you.

“Your work” means:

- a. Work or operations performed by you or on your behalf; and

² *Id.*

³ *Id.*

⁴ *Id.*

- b. Materials, parts or equipment furnished in connection with such work or operations.

“Your work” includes:

- a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of “your work”; and
- b. The providing of or failure to provide warnings or instructions.⁵

The Umbrella Policy provides coverage for:

[a]ny person . . . for which you have agreed in writing to include as an insured, however, (1) only in connection with liability arising out operations of business, (2) only to the extent that coverage is afforded to that person or organization by “underlying insurance,” and (3) only to extent of limits of liability required by such contract.⁶

November 25, 2005 Accident

On November 5, 2005, the project manager assigned the boilermaker unit to install an elbow pipe on the 36-R-1 reactor. A Pro-Tech employee, William Pyatt, was the night shift coordinator for the hydrocracker unit at which Ferguson and Lattanzi were working at the time of their deaths. Lattanzi, the boilermaker foreman, instructed boilermakers Ferguson and Roy Spears to install the elbow pipe.

While installing the elbow pipe, Ferguson and Spears discovered a roll of

⁵ Pls.’ Ex. M-1.

⁶ Pls.’ Ex. M-2.

duct tape in the reactor. Although the installation of the pipe was safe, the reactor itself had been purged with nitrogen, making it unsafe for a person to break the plane and enter. Ferguson attempted to “fish” the duct tape out with a wire while Spears went to seek help from Lattanzi. When Spears approached Lattanzi for help, Pyatt was standing next to Lattanzi. When Lattanzi arrived at the reactor, Ferguson had either climbed or fell into the reactor. Lattanzi climbed into the reactor in an attempt to rescue Ferguson. At some point after Lattanzi entered the reactor, Pyatt went up to the reactor deck and observed Lattanzi and Ferguson in the reactor. It was only after both men were in the reactor that Pyatt called for help. As a result of entering the nitrogen-filled reactor, Lattanzi and Ferguson both asphyxiated to death.

The Federal Wrongful Death Actions

Two lawsuits were filed in federal court by the estates of Lattanzi and Ferguson against Premcor in February 2006 alleging, *inter alia*, that Premcor was negligent when Pyatt, as Premcor’s representative, failed to take appropriate steps to prevent the accident when Pyatt authorized the crew to do the work and oversaw employees. Premcor settled the Lattanzi lawsuit in October 2008 and settled the Ferguson lawsuit in July 2010.

2007 Insurance Coverage Litigation

On January 10, 2007, Premcor commenced the litigation presently before the

Court. Specifically, Premcor sued various contractors and their insurance carriers, including Maryland Casualty, in this action seeking indemnification, contribution, and additional insurance coverage for the federal lawsuit settlements. Maryland Casualty filed a Motion for Summary Judgment on the duty to defend in October 2008. In a March 19, 2009 opinion, this Court found that it was bound by the four corners of the complaint and, because Pro-Tech was not specifically named in the complaint, Maryland Casualty, as its insurer, had no duty to defend.⁷ The Court did not resolve the issue of whether Maryland Casualty had a duty to indemnify ruling that a decision on the duty to indemnify was premature at that time.⁸

I. DUTY TO INDEMNIFY

Premcor's Motion for Summary Judgment seeks a legal ruling on the question that was premature when the Court issued its decision on the duty to defend in March 2009. Does Maryland Casualty have a duty to indemnify Premcor for the settlements of the underlying wrongful death actions?

Standard of Review

Summary judgment may be granted only where the moving party can "show that there is no genuine issue as to any material fact and that the moving party is

⁷ *Premcor Refining Grp., Inc. v. Matrix Service Indus. Contractors, Inc.*, 2009 WL 960567, at *8 (Del. Super. Jan. 8, 2009).

⁸ *Id.* at *12.

entitled to a judgment as a matter of law.”⁹ Thus, the moving party bears the initial burden of proof, and once that is met, the burden shifts to the non-moving party to show that a material issue of fact exists.¹⁰ In connection with a motion for summary judgment, the Court must view the facts “in the light most favorable to the non-moving party.”¹¹

The Legal Standard for Indemnification

In determining whether a duty to indemnify exists, the Court must consider “actual facts developed through discovery or at trial.”¹² When a policyholder settles and seeks indemnification, it only needs to show the existence of “a potential liability on the facts known to [it] . . . , culminating in a settlement in an amount reasonable in view of the size of possible recovery and degree of probability of claimant’s success against the insured.”¹³ Stated differently, the insured only needs to establish the potential for a covered liability on the facts known at the time of settlement.¹⁴ The potential for a covered liability may be demonstrated by the pleadings, pre-trial discovery, evidence, and testimony existing before settlement.¹⁵ The duty to indemnify can exist even if the duty to

⁹ Super. Ct. R. Civ. P. 56.

¹⁰ *Moore v. Sizemore*, 405 A.2d 679, 680-81 (Del. 1979).

¹¹ *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

¹² *Pike Creek Chiropractic Ctr., P.A. v. David Robinson, D.C.*, 637 A.2d 418, 421 (Del. 1994).

¹³ *Luria Bros. and Co., Inc. v. Alliance Assurance, Co., Ltd.*, 780 F.2d 1082, 1091 (2d Cir. 1986).

¹⁴ *Id.* at 1091-92; *New Century Mortg. Corp. v. Great Northern Ins., Co.*, 2009 WL3444759, at *7 (D. Del. Oct. 26, 2009).

¹⁵ *Luria Bros. and Co., Inc.*, at 1091-92; *New Century Mortg. Corp.*, 2009 WL3444759, at *7.

defend has not been triggered.¹⁶

Maryland Casualty Owes a Duty to Indemnify Premcor

In this case, the duty of Maryland Casualty to indemnify Premcor depends on whether Premcor's liability "arose out of" Pro-Tech's operations. This Court, in its 2009 summary judgment opinion on the duty to defend in this case, recognized that the "arising out of" standard "is a typically low and relatively easy standard to meet."¹⁷ The phrase "arising out of" in an insurance clause defining coverage for an additional insured is "broadly construed to require some meaningful linkage" between the work or operations and the additional insured's risk.¹⁸ A meaningful link between the work and the additional insured can be proven by vicarious liability, although that is not the only way.¹⁹ Moreover, any doubt about whether a person is considered an additional insured under the policy should be construed in favor of the insured.²⁰

The insurance policy issued to Pro-Tech by Maryland Casualty specifically contains an additional insured clause, indicating that coverage is provided for those whose injuries or death "arises out of" Pro-Tech's work or operations. Ferguson and Lattanzi's deaths arose out of Pro-Tech's work. The undisputed facts indicate

¹⁶ *Brooks-McCullum v. State Farm Ins. Co.*, 2008 WL 2048055, at *3 (D. Del. May 13, 2008); *Capano Mgmt. Co. v. Transcontinental Ins. Co.*, 78 F. Supp. 2d 320, 324 n. 1 (D. Del. 1999).

¹⁷ *Premcor Refining Grp.*, 2009 WL 960567, at *7.

¹⁸ *Pacific Ins. Co. v. Liberty Mutual Ins. Co.*, 956 A.2d 1246, 1256-57 (Del. 2008).

¹⁹ *Id.* at 1257.

²⁰ *Id.*

that Pro-Tech's duties included overseeing the workspace, giving the assignments to each worker, and overseeing general safety for the workplace.

Maryland Casualty contends that it was not Pyatt's job responsibility to provide safety training or possess specialized safety knowledge of the boilermaker department. However, Pyatt states in his deposition that it was common industry practice and fundamental knowledge that a person cannot break the plane of a confined space, such as the reactor, without a confined space permit.²¹ Further, Pyatt indicated that he was aware that Ferguson's attempt to remove the roll of duct tape was improper protocol, but that it was "a way to get on with the job."²² Maryland Casualty contends that Premcor had safety personnel responsible for safety training and that Pyatt was not trained in nitrogen safety, and had no safety guidelines or specialized knowledge. According to Maryland Casualty, the deaths did not arise out of Pro-Tech's operations.

Although it may be true that Pro-Tech employees did not possess specialty training in every aspect of Premcor's work, Pyatt, as the overseer of operations, stated that he was aware of the general safety guidelines and procedures involved in operating the oil refinery. He admitted that he knew it was a rule not to break the plane of a reactor and it would be "somewhat" unsafe to fish out the duct tape with a hook fashioned from wire. In his undisputed deposition testimony, Pyatt

²¹ Pls' Ex. E-1.

²² *Id.*

stated that no steps were taken to make the reactor safe to enter to remove the duct tape, but rather indicated that fishing the duct tape out was a way to “get on with the job.”

Through Pyatt, Premcor has established a meaningful link between the accident that occurred and Pro-Tech’s work, sufficient to meet the “arising out of” standard. Pro-Tech was specifically contracted to oversee the operations of the refinery. Although this may not have included specific safety training or specialized safety knowledge of each department or job within the refinery, Pro-Tech employees were charged with some safety knowledge, as they were overseeing a work site with very dangerous chemicals and equipment. Moreover, Pyatt indicated that he was, in fact, aware that it was dangerous to breach the nitrogen plane and that a permit was required to do so. He also knew that if the nitrogen plane needed to be breached, there were protocols and a specialized safety team to call in order to remove the nitrogen from the reactor and safely enter the reactor. Thus, the degree to which Pyatt knew of the specific specialized safety requirements of a boilermaker’s job is irrelevant. It is uncontested that Pyatt was aware that it was unsafe to enter into the reactor and break the plane without following certain safety protocols.

Although the duty to defend and the duty to indemnify usually go hand-in-hand, they are not mutually exclusive. Maryland Casualty argues that the duty to

indemnify requires facts to be clearly established and meet a two-part test, citing to cases interpreting Illinois and New York law.²³ The two-part test is not the established law in Delaware, and the Court will not now adopt the law from these jurisdictions.

When reviewing a duty to indemnify under a settlement, the Court must look at the facts as established in pre-trial discovery before the settlement, as it has done here. The undisputed facts demonstrate that Pyatt, as Pro-Tech's employee, was responsible for overseeing Premcor's refinery and had safety knowledge of the workplace as a whole. These facts form a meaningful link between the deaths of Lattanzi and Ferguson and Pro-Tech's work at the site. Accordingly, Premcor is an additional insured of the Maryland Casualty policy. Therefore, Maryland Casualty has a duty to indemnify Premcor for the federal lawsuit settlements.

II. MOTION TO DISMISS THIRD AMENDED COMPLAINT

This insurance coverage lawsuit was filed on January 10, 2007. Trial is scheduled for February 24, 2014. Almost six full years after this litigation was commenced, on December 11, 2012, Premcor filed a motion requesting leave to file a Third Amended Complaint asserting new claims against Maryland Casualty. The Court granted leave to file the Third Amended Complaint. Maryland Casualty filed a Motion to Dismiss the Third Amended Complaint.

²³ See Def.'s Reply Br., p. 11-12 (discussing the two-part test).

The claims set forth in the Third Amended Complaint by Premcor against Maryland Casualty involve Premcor's settlement with Matrix and Matrix's insurer Chartis. Specifically, Premcor claims that part of its settlement agreement with Matrix and Chartis – made on September 22, 2011 – is the assignment of all rights that Matrix and Chartis had against any other parties, including Maryland Casualty. However, Matrix and Chartis had never asserted claims in this litigation against Maryland Casualty.

Standard of Review for Motion to Dismiss

“A motion to dismiss must be decided solely upon the allegations in the complaint.”²⁴ In reviewing a motion to dismiss, the Court must take all well-pleaded allegations as true and all reasonable inferences must be made in favor of the non-moving party.²⁵ If factual allegations are vague, they are considered “well-pleaded” if they provide notice of the claim to the other party and the court should deny the motion unless the claimant “could not recover under any reasonably conceivable set of circumstances susceptible to proof.”²⁶ However, the Court will not “blindly accept conclusory allegations unsupported by specific facts, nor does [it] draw unreasonable inferences in the plaintiffs’ favor.”²⁷

²⁴ *American Bottling Co. v. Crescent/Mach I Partners, L.P.*, 2009 WL 3290729, at *2 (Del. Super. Sept. 30, 2009).

²⁵ *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978); *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998).

²⁶ *Id.*

²⁷ *Gantler v. Stephens*, 965 A.2d 695, 704 (Del. 2009) (citation omitted).

Maryland Casualty's Arguments in Favor of Dismissal

Maryland Casualty argues that Premcor cannot now stand in the shoes of Matrix and Chartis in this action by filing a Third Amended Complaint. Specifically, Maryland Casualty argues that the Third Amended Complaint does not add any new claims against Maryland Casualty, nor does it specify an additional damage amount being sought, but only makes reference to the assignment of rights from Chartis and Matrix.²⁸ Moreover, Maryland Casualty argues that no cross-claims had been asserted against Maryland Casualty by Matrix or Chartis and there is not enough pled in the Third Amended Complaint sufficient to meet the notice-pleading standard required.²⁹

The Claims Against Maryland Casualty Arising from the Purported Assignment Must be Dismissed

Maryland Casualty was not on notice of any rights or claims that may have been asserted by Chartis and/or Matrix. No cross-claims were asserted. This case has been pending since January 10, 2007 and trial is scheduled to take place in February 2014. Although Chartis and/or Matrix may have claims against Maryland Casualty, no such claims had been asserted in this litigation. There is no reason to further delay resolution of this case that has been pending since 2007 by

²⁸ Pls.' Third Amend. Complaint, ¶ 34.

²⁹ In its Motion to Dismiss, Maryland Casualty also contends argued that an equitable subrogation claim was not sufficiently pled and even if it was properly pled, any claim of equitable subrogation has been waived. Having ruled on other grounds, the Court will not address the claims of equitable subrogation and waiver.

allowing entirely new claims to be asserted within this litigation six years after it was commenced.

Since this case has been pending since 2007 with no notice that Chartis or Matrix would seek recovery of any potential claims against Maryland Casualty, allowing these claims to go forward would be unfair to Maryland Casualty and the other parties that Maryland Casualty would seek to bring back into the litigation. Furthermore, there is no prejudice to Premcor in granting the motion to dismiss. Premcor is not barred from bringing its claims in a separate lawsuit.

III. CONCLUSION

The deaths of Ferguson and Lattanzi arose out of the work of Pro-Tech, because the contract entered into between Premcor and Pro-Tech gave Pyatt, Pro-Tech's employee, responsibility for overseeing the work site; for following company, industry and legal protocols; and for ensuring a safe workplace. The undisputed facts developed through discovery show that Maryland Casualty, based on its insurance policy with Pro-Tech, the Pro-Tech contract, and Pyatt's testimony demonstrate the existence of a potential liability sufficient to create a duty to indemnify Premcor for the settlements in the underlying lawsuits. Accordingly, Premcor is entitled to judgment as a matter of law as to indemnity.

Premcor's Third Amended Complaint, attempting to assert claims on behalf of Matrix and Chartis, does not plead sufficient facts to place Maryland Casualty

on notice of the claims and the claims were not asserted in a timely manner within this litigation. Maryland Casualty should not be required to defend against entirely new claims when this lawsuit has been pending since January 2007 and trial is scheduled for February 2014. Accordingly, the new claims against Maryland Casualty must be dismissed.

NOW, THEREFORE, this 18th day of November, 2013, Plaintiff Premcor Refining Group, Inc. and Plaintiff Valero Energy Corporation's Motion for Summary Judgment on the Duty to Indemnify is hereby GRANTED and Defendant Maryland Casualty's Motion to Dismiss the Third Amended Complaint is hereby GRANTED.

IT IS SO ORDERED.

Andrea L. Rocanelli

The Honorable Andrea L. Rocanelli