IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

BUILDERS AND MANAGERS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CA No. 00C-11-111-JEB
	)	
DRYVIT SYSTEMS, INC.,	)	
STEVE COOK, INC.,	)	
COURTNEY BUILDERS, INC., and	)	
SAUNDERS ROOFING CO.,	)	
	)	
Defendants.	)	

Submitted: December 2, 2003
Decided: February 13, 2004

OPINION

Defendant Dryvit's Motion to Dismiss.
Denied.

Appearances:

William J. Cattie, III, Esquire, Cattie and Fruehauf, Wilmington, Delaware. Attorney for Plaintiff.

Daniel F. Wolcott, Jr., Esquire, Potter Anderson & Carroon, LLP, Wilmington, Delaware. Attorney for Defendant Dryvit Systems, Inc.

Richard D. Abrams, Esquire, Heckler & Frabizzio, Wilmington, Delaware. Attorney for Defendant Steve Cook, Inc.

JOHN E. BABIARZ, JR., JUDGE.

This is the Court's decision on Defendant Dryvit System, Inc.'s motion for judgment on the pleadings or motion to dismiss for failure to state a claim on which relief can be based. Plaintiff Builders and Managers, Inc. (BMI) seeks contribution and/or indemnification from Dryvit and other defendants for the repairs Dryvit has made to homes in the Highlands Place development. For the reasons explained below, Dryvit's motion is Denied.

FACTS

Plaintiff BMI was the general contractor for construction of the Highland Place residential development located in Wilmington, Delaware. BMI contracted with Defendant Steve Cook, Inc. to apply an Exterior Insulation Finish System ("EIFS") manufactured by Dryvit as the exterior surface on the buildings. BMI also allegedly entered into contracts with Defendants Courtney Builders, Inc. and Saunders Roofing Company.

Following the sale of the homes, certain unidentified owners contacted BMI complaining of water infiltration and consequential damage to the buildings. BMI investigated the homes and determined that the water was in fact entering the homes and was collecting in the walls, causing structural damage. Based on the opinion of its insurance carrier, CNA, that BMI would most likely be held liable for the damage, Plaintiff undertook repairs. Defendant Dryvit was made aware of the problem but

chose not to participate in the remediation work.

Plaintiff filed suit in this Court asserting claims for contribution and indemnity against all defendants to recover repair costs for the alleged water invasion. Defendant Dryvit moves for dismissal or for judgment on the pleadings.

STANDARD OF REVIEW

A motion to dismiss for failure to state a claim upon which relief can be granted made pursuant to Superior Court Civil Rule 12(b)(6) will not be granted if the plaintiff may recover under any conceivable set of circumstances susceptible of proof under the complaint.[1] All well-pled allegations are taken as true,[2] and all reasonable inferences are to be construed in favor of the non-moving party.[3]

DISCUSSION

The first issue is procedural. Dryvit has brought a motion for judgment on the pleadings (Rule 12(c)) and for dismissal for failure to state a claim upon which relief can be granted (Rule 12(b)(6)). Plaintiff BMI argues that the motion should be treated a motion for summary judgment (Rule 56) because of the extensive discovery which has already taken place.

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[1]*Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998).

[2]*Precision Air, Inc. v. Standard Chlorine of Del., Inc.*, 654 A.2d 403, 406 (Del. 1995).

[3]*Ramunno v. Cawley*, 705 A.2d at 1034.

When a motion to dismiss is supported by affidavits or other matters outside the pleadings, the motion shall be resolved as a summary judgment motion.[4] The exception to this general rule arises when documents are considered which are the "very documents that are alleged to contain the various misrepresentations or omissions and are relevant not to prove the truth of their contents but only to determine what the documents state."[5] Under these circumstances, the motion will be decided as a motion to dismiss despite consideration of additional documentation, such as a contract.[6]

In this case, Defendant has not submitted or relied on anything outside the record, but Plaintiff has attached to its response a Dryvit product warranty, documentation of repair costs, and a report on invasive moisture allegedly due to Dryvit's EIFS material. Although cognizant of these submissions, the Court finds that they are not necessary to the resolution of the issues raised by Defendant's motion. Plaintiff's request that the motion be considered as a motion for summary judgment is therefore denied.

The first substantive issue pertains to the right to contribution. Defendant

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[4]*Chrysler Corp. v. Airtemp Corp.*, 426 A.2d 845, 847 (Del. Super. 1980).

[5]*Great American Assurance Co. v. Fisher Controls Inc.*, 2003 WL 21901094 (Del. Super.) (quoting *In re Santa Fe Pacific Corp. S'holder Litig.*, 669 A.2d 59, 69-70 (Del. 1995.))

[6]*Id.*

Dryvit argues that the contribution claim should be dismissed because Plaintiff has not alleged facts sufficient to state a claim under Delaware's Uniform Contribution Among Tort-feasors Law ("the UCATL"). More specifically, Defendant argues that (1) there can be no common liability between the parties; (2) Plaintiff has not discharged the alleged liability or paid more than its *pro rata* share; (3) Plaintiff did not enter into a settlement which extinguished Dryvit's liability; (4) the homeowner's underlying claim expired years ago; (5) Plaintiff voluntarily undertook the repairs; and (6) the economic loss doctrine does not permit Plaintiff to recover against a mere supplier. Plaintiff responds that it has met all the pleading requirements of the UCATL, that the alleged expiration of the underlying claim has no bearing on the right to contribution and that the voluntarily nature of the repair work is irrelevant under the UCATL.

The right to contribution is triggered when it is appropriate for liability to be apportioned among codefendants.[7] In Delaware, contribution is governed by the UCATL, which provides the parameters for determining when contribution is appropriate and how it is to be decided.[8] The inherent requirement is that the parties are joint tortfeasors who share a "common liability." Defendant Dryvit argues that

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[7] *American Inc. Co. v. Material Transit, Inc.*, 446 A.2d 1101,1103 (Del. Super. 1982).

[8] *Lutz v. Boltz*, 100 A.2d 647, 648 (Del. Super. 1953).

Plaintiff cannot show any common liability. Section 6302(b) of the UCATL provides as follows:

> A joint tort-feasor is not entitled to a money judgment for contribution until he or she has by payment discharged the common liability or has paid more than his or her pro rata share thereof.

This Court has previously stated that a finding of common liability is supported if the facts alleged in the Complaint support "some theory of negligence" against the defendant.[9] In this case, the Complaint alleges numerous instances of negligence on Dryvit's part in regard to its installation system, including, *inter alia*, failing to provide for drainage of water that could potentially seep behind the system, failing to provide a water barrier behind the system, failing to insure that the installer was properly trained, and failing to warn that a Dryvit rep should have been present for the installation.[10] Viewing these allegations in the light most favorable to Plaintiff, the Court concludes that the Complaint survives the UCATL requirement that a showing of common tort liability be made.

Assuming the possibility of a common liability, section 6302(b) provides for

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[9]*Shiles v. Reed Trucking Co.*, 1995 WL 79074 at *2 (Del. Super.). *See also New Zealand Kiwifruit Marketing Bd. v. City of Wilmington*, 825 F. Supp. 1180, 1186 (D.Del. 1993). (observing that under Delaware law "[i]ndispensable to a joint tortfeasor relationship is a 'common liability' either 'joint' or 'several' that two or more parties have to the person injured. Without this dual liability. . . no right of contribution can exist").

[10]Complaint at ¶ 14 through ¶ 16.

a judgment for contribution under either of two circumstances: discharge of the liability by payment, or payment of more than a party's *pro rata* share of the amount of liability. Dryvit argues that Plaintiff cannot under any circumstances make this showing. Paragraph 11 of the Complaint acknowledges that the precise cost of the repairs is unknown but is expected to exceed $1 million. Plaintiff's response to the motion to dismiss states that the remediation work is 99 percent complete and certain tasks are incomplete.[11] Thus Plaintiff cannot aver that he has discharged the total remediation cost. On the other hand, assuming but not deciding that the parties share a common liability, Plaintiff has paid more than its share of the remediation costs in that it has absorbed all the costs. The Court finds that Defendant has not shown that there is no set of facts under which Plaintiff could prevail under this section of the UCATL.

Dryvit also argues that Plaintiff has failed to show that it has entered into a settlement with the homeowners or that Dryvit's liability has been extinguished by any such settlement. This argument is based on section 6302(c), which provides as follows:

> A joint tort-feasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tort-feasor whose liability to the injured person is not extinguished by the

[11] Response at 4.

settlement.

Defendant's argument assumes that this section mandates a settlement agreement as one of the prerequisites for contribution. However, the obvious purpose of this section is to protect a joint tortfeasor in the event that one tortfeasor settles with an injured party. If the settlement extinguishes another tortfeasor's liability, that tortfeasor may be liable for contribution but not directly liable to the injured party. In cases such as this one, where no settlement has been reached, extinguishment of a joint feasor's liability is not at issue.

Dryvit also argues that there is no right to contribution because any claim the homeowners might have had expired years ago and therefore Dryvit cannot be indirectly liable for a contribution claim when it cannot be directly liable to the homeowners. In other words, BMI and Dryvit cannot share a common liability if the statute of limitations has run on the homeowners' claim. Delaware courts have rejected this argument. In *New Zealand Kiwifruit Marketing Bd. v. City of Wilmington*, the District Court of Delaware differentiated between cases where there is a common liability at the time of accrual and cases where there is absolute immunity from contribution by the operation of law.[12] The latter includes suits filed under the guest statute or workers' compensation. The former includes cases barred

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[12] 825 F. Supp. 1180 (D.Del. 1993).

by the statute of limitations, where courts have found that the obligation underlying contribution is shared liability for the damage. As the district judge stated, there is "no reason why the law should let action or inaction of the injured party defeat a claim for contribution."[13]

In *Shiles v. Reed Trucking Co*, this Court relied on *New Zealand Kiwifruit* and held that "[i]t is irrelevant that the original plaintiffs never filed suit against [the third-party defendant], or that they would now be precluded from doing so by the statute of limitations. All that matters for the purpose of finding a 'common liability' is that they could have, at one time, made a negligence claim against [the third party defendant]."[14] For these reasons, the Court in this case finds that Dryvit is not excused from contribution liability simply because a direct suit was never filed by the homeowners.

Dryvit also argues that Plaintiff is not entitled to contribution because it undertook the repairs voluntarily and that the right of contribution is not triggered until a legal obligation exists. However, the UCATL creates no such requirement, and Defendant offers no precedent other than cases decided before the UCATL's

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[13] *Id.* at 1187.

[14] 1995 WL 790974 at *2 (Del. Super.).

enactment in 1949, prior to which there was no right to contribution in Delaware.[15] Plaintiff asserts that it undertook the repair work at the behest of its insurance carrier, CNA Insurance Company, which had determined that BMI would more than likely be found liable for consequential damages stemming from the EIFS. Plaintiff further alleges that Dryvit was advised of the damages at Highland Place but chose not to participate in the remediation. The Court finds no legal basis for dismissing the suit against Dryvit based on the voluntary nature of its remediation.

Defendant also argues that it is protected by the economic loss doctrine, a judicially created doctrine which prohibits recovery in tort where a product has damaged only itself and there is neither personal injury or other property damage.[16] Essential to this argument is Defendant's further contention that Delaware's Home Owner's Protection Act does not apply to Dryvit because it was merely a supplier. This Act expressly extinguishes the economic loss doctrine in certain residential construction cases:

> No action based in tort to recover damages resulting from negligence in the construction or manner of construction of an improvement to residential real property and/or in the designing, planning, supervision and/or observation of any such construction or

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[15] *Clark v. Teeven Holding Co.*, 625 A.2d 869 (Del. Ch. 1992).

[16] *Danforth v. Acorn Structures, Inc.*, 608 A.2d 1194, 1199 (Del. 1992); *Council of Unit Owners of Sea Colony East v. Carl M. Freeman Assoc., Inc.*, 1990 WL 177632 at *3 (Del. Super.).

> manner of construction shall be barred solely on the ground that the only losses suffered are economic in nature.[17]

This Court has held that since the enactment of the Home Owner's Protection Act in 1996, the economic loss doctrine no longer precludes negligence actions in cases involving the construction of residential dwellings.[18]

Nevertheless, Dryvit argues that suppliers are not subject to the terms of this statute. This argument is based on similar wording in the so-called Builder's Statute of Repose, which provides in part as follows:

> (b) No action, whether in or based upon a contract (oral or written, sealed or unsealed), in tort, or otherwise, to recover damages or for indemnification or contribution for damages, resulting:
>
> (1) From any alleged deficiency in the construction or manner of construction of an improvement to real property and/or in the designing, planning, supervision and/or observation of any such construction or manner of construction. . . .
>
> . . .shall be brought against any person performing or furnishing, or causing the performance or furnishing of, any such construction of such an improvement or against any person performing or furnishing, or causing the performing or furnishing of, any such designing, planning, supervision, and/or observation of any such construction or manner of construction of such an improvement, after the expiration of 6 years from [certain] dates. . . .[19]

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[17] DEL. CODE ANN. tit. 6, § 3652.

[18] *Marcuculli v. Boardwalk Builders, Inc.*, 1999 WL 1568612, *4 (Del. Super.).

[19] DEL. CODE ANN. tit. 10, § 8127.

Because of similar phrasing in the Home Owner's Protection Act, Defendant relies on case law finding that the Builder's Statute of Repose does not pertain to materials suppliers[20] to argue that the Home Owner's Protection Act also does not pertain to suppliers. Plaintiff contends that Dryvit was not a mere supplier and had a duty to participate in the installation.

In *Marcucilli v. Boardwalk Builders, Inc.*, this Court addressed a motion to dismiss a third party complaint against five defendants, one of which was Dryvit Systems.[21] Although the Court did not explicitly state that the Home Owner's Protection Act allows recovery from suppliers, the Court denied Dryvit's motion to dismiss the tort claims because of the Home Owner's Protection Act.[22] The Court also found that the record raised questions about the presence of a Dryvit representative at the installation, and the extent and adequacy of the installation instructions. In the case at bar, similar questions exist, and the motion to dismiss the tort claims based on the economic loss doctrine is therefore denied.

The second substantive issue is indemnification. Dryvit argues for dismissal of the issue because the record is devoid of evidence showing either an express or

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[20] *Becker v. Hamada*, 455 A.2d 353 (Del. 1982).

[21] 1999 WL 1568612 (Del. Super.).

[22] *Id.* at *4.

implied contract under which the right to indemnification could arise. Plaintiff argues that courts recognize partial indemnification and that dismissal of this claim would be contrary to the policy of Delaware courts.

As a threshold matter, no express contract exists between BMI and Dryvit. Thus, even construing every reasonable inference in Plaintiff's favor, the Court finds that Dryvit has not breached any express warranties.

Dryvit also argues that there is no basis for a finding that it breached any implied warranties. In *SW (Del.), Inc. v. American Consumers Indus.,*[23] the Delaware Supreme Court addressed a third-party indemnification claim in a products liability case where there was no express contract between the manufacturer and the purchaser. The Court held that the manufacturer was not entitled to indemnification from purchaser because the record showed no basis for a finding of an implied contract or a special relationship warranting indemnification.[24] The purchaser had bought and installed an ice-making machine which had caused injury to one of the purchaser's employees, who received worker's compensation. The employee then filed suit against the manufacturer, who in turn sought contribution and/or indemnification from the purchaser. Because joint tort liability is not available in a

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[23] 450 A.2d 887 (Del. 1982).

[24] *Id.* at 889.

third party suit brought by an injured employee who has received workers' compensation benefits, the Court dismissed the contribution claim. As to indemnification, the Court found no evidence of either an implied contract or a special relationship sufficient to warrant indemnification. Because the purchaser had simply bought and installed the ice-making machine, the Court affirmed this Court's finding that the parties' relationship was that typically found between a buyer and seller which entailed no right to indemnification on any legal theory.

In the case at bar, Plaintiff asserts indemnification based on implied contract rather than a special relationship. In its response to the motion to dismiss, Plaintiff asserts that the facts show a basis for indemnification but does not point to any such facts. The record does raise questions about whether Dryvit was required to train the installer (Defendant Steve Cook) or oversee and/or be present during the installation. Although no specifics are alleged, the Complaint offers a simple and direct factual basis for indemnification and thereby meets the requirements of notice pleading under Rule 8(f). The motion to dismiss the claim for indemnification is therefore denied.

CONCLUSION

For the foregoing reasons, Defendant Dryvit's motion for judgment on the pleadings and motion to dismiss is **Denied.**

It Is So ORDERED.

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Judge John E. Babiarz, Jr.

JEB,jr/rmp/bjw
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