IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

AMERICAN HOME ASSURANCE CO., *et al.*	*	
v.	*	**Civil No. PWG 12-817**
SUI ENTERPRISE CO., Ltd.	*	

REPORT AND RECOMMENDATION

This case was referred to me pursuant to 28 U.S.C. § 636(b) and Local Rule 301.6 for review of Plaintiffs' motion for default judgment and supplemental motion for damages. ECF Nos. 34, 35, 37. For the following reasons, I recommend that Plaintiffs' motion for default judgment be granted.

I. Introduction.

This case arises out of an industrial accident that caused the death of Marcelo Alvarez. On November 26, 2008, his wife Jeanna Silva, individually, as personal representative of his estate, and on behalf of his two minor children, filed a wrongful death and products liability action against The Victaulic Company (Victaulic) in the Circuit Court for Prince George's County. ECF No. 37-9, Ex. I. On April 8, 2009, the parties settled that lawsuit for $3 million. ECF No. 37-11, Ex. K. Plaintiff Victaulic paid $500,000 towards the settlement (the amount of its deductible), and its insurance company, Plaintiff American Home Assurance Company (AHAC), paid the remaining $2.5 million. *Id.*

Victaulic and AHAC filed this action on March 15, 2012, asserting that the underlying industrial accident was caused solely by Defendant, SUI Enterprise Company, Ltd. (SUI), a Korean company that allegedly manufactured and distributed faulty suction diffusers, including end caps, for certain commercial hot water piping systems. ECF Nos. 1, 4. SUI filed an

unsigned answer that failed to indicate whether SUI was represented by counsel. ECF No. 22. On April 2, 2013, the court ordered SUI to show cause why the answer should not be stricken for non-compliance with Federal Rule of Civil Procedure 11(a) and Local Rule 101.1a. ECF No. 23. On April 29, 2013, the court concluded that SUI had been properly served "[b]ecause Plaintiffs made a good faith effort to serve Defendant in accordance with the Hague Convention and through a private process server, and Defendant received actual notice" as evidenced by SUI's filing of its answer on March 25, 2013.[1] ECF No. 26. The court again ordered SUI to show cause why its answer should not be stricken for non-compliance with the Rules. *Id*. SUI failed to respond to the court's orders or file a proper answer, and on June 18, 2013, the court struck SUI's deficient answer.[2] ECF No. 30. On October 17, 2013, the Clerk entered an Order of Default, ECF No. 33, which SUI has made no effort to set aside.

II. Factual Background.

The following facts are taken from Plaintiffs' complaint, ECF No. 4, and affidavits and other documentary evidence attached to Plaintiffs' supplemental motion for default damages. ECF No. 37.

Victaulic provided SUI with material specifications for the design and manufacture of the Series 731-G suction diffusers, requiring SUI to use ductile iron to manufacture the products. ECF No. 4 at ¶¶ 13, 15; ECF No. 37-5, Ex. E at ¶¶ 6-7. However, instead of using ductile iron, SUI used gray iron—a more brittle iron with a greater tendency to fracture—without Victaulic's knowledge. ECF No. 4 at ¶¶ 13-17; ECF No. 37-5, Ex. E at ¶¶ 10-11. In October 2007, SUI sent a shipment of the Series 731-G suction diffusers, including end caps, to Victaulic for

[1] Later, on June 6, 2013, Plaintiffs filed an Affidavit of Service executed by the Korean Central Authority demonstrating that it had completed service pursuant to the Hague Convention. ECF No. 29.

[2] At various points throughout Plaintiffs' supplemental motion for damages in support of their motion for default judgment, they rely on the substance of SUI's (now stricken) answer to support their arguments. *See, e.g.*, ECF No. 37 at 4. I have not considered these stricken statements in preparing this Report and Recommendation.

distribution and use in a hot-water piping system in the mechanical equipment room of the Gaylord Hotel located in National Harbor, Maryland. ECF No. 4 at ¶¶ 9, 10. On November 1, 2007, Marcelo Alvarez was working as a pipe insulator in the equipment room and, at approximately 6:30 a.m., one of the suction diffusers fractured, releasing a powerful stream of 185 degree water. *Id.* at ¶ 11. Mr. Alvarez suffered severe burns from the accident and, on November 6, 2007, died from his injuries. *Id.* at ¶ 12. Following the accident Victaulic ascertained that the end caps were manufactured with improperly processed iron, and issued a recall bulletin. ECF No. 37, Ex. A at ¶¶ 9, 10.

Plaintiffs paid $3 million to settle the underlying lawsuit. ECF No. 37-1, Ex. A at ¶ 12; ECF No. 37-11, Ex. K. To justify this amount, Plaintiffs submit Mr. Alvarez's medical records, death certificate, and an expert economic loss report from Thomas Borzilleri, Ph.D. Ex. J, Ex. M. The medical records indicate that Mr. Alvarez experienced extreme pain and suffering. His "pain rating" on the EMS report from approximately 20 minutes after the accident was a level 10, which is equivalent to the "worst pain possible." ECF No. 37-10, Ex. J. He experienced burns from head to toe and remained hospitalized in a conscious state for six days following his injury. *Id.* The death certificate records the cause of death as "thermal burns over approximately 97% of the body surface." *Id.* Mr. Alvarez died at the age of 33, leaving behind a wife, a three-year old child and a two-year old child. ECF No. 37-10 at 8, Ex. J.

III. Standard for Entry of Default Judgment.

In reviewing a motion for default judgment, the court accepts as true the well-pleaded factual allegations in the complaint as to liability. *Ryan v. Homecomings Fin. Network*, 253 F.3d 778, 780-81 (4th Cir. 2001). It remains for the court, however, to determine whether these unchallenged factual allegations constitute a legitimate cause of action. *Id.*

If the court determines that liability is established, the court must then determine the appropriate amount of damages. *Id.* "The court does not accept factual allegations regarding damages as true, but rather must make an independent determination regarding such allegations." *Agora Fin., LLC v. Samler*, 725 F. Supp. 2d 491, 494 (D. Md. 2010) (citation omitted). In so doing, the court may conduct an evidentiary hearing, Fed. R. Civ. P. 55(b)(2), or determine damages without a hearing, relying "on affidavits or documentary evidence in the record to determine the appropriate sum." *Entrepreneur Media, Inc. v. JMD Entm't Grp., LLC*, 958 F. Supp. 2d 588, 593 (D. Md. 2013) (citations omitted). "In sum, the court must (1) determine whether the unchallenged facts in plaintiffs' complaint constitute a legitimate cause of action, and, if they do, (2) make an independent determination regarding the appropriate amount of damages." *Agora*, 725 F. Supp. 2d at 494.

IV. Discussion.

The amended complaint claims contribution (Count I), indemnification (Count II), products liability (Count V), a breach of an implied warranty of merchantability (Count III), a breach of an implied warranty of fitness for a particular use (Count IV) and negligence (Count VI).[3]

A. Indemnification.

1. Tort Indemnification (Count II).

"A claim for indemnification may be based on an express contract or may be implied by law." *Max's of Camden Yards v. A.C. Beverage*, 172 Md. App. 139, 147 (2006). Here, no express contract is alleged. The right to implied indemnity "exists when there is a disparity between the levels of fault of each tortfeasor that produces an unjust result, and the less culpable

[3] Plaintiffs' independent claim for negligence was absorbed by and serves as the basis of their claim for tort indemnification in their supplemental motion for damages. ECF No. 37 at 9.

tortfeasor, said to be passively or secondarily negligent, pays or is held liable for damages which are properly attributable to the conduct of the more culpable co-defendant, who is primarily or actively negligent." *Id.* However, if both parties were actively negligent, indemnification is not available to either party. *See Kelly v. Fullwood Foods, Inc.*, 111 F. Supp. 2d 712, 714 (D. Md. 2000). To determine whether a party's negligence is active or passive, courts refer to the allegations in the underlying complaint filed against the party seeking indemnification. *Id.* "If the conduct attributed to the party seeking indemnification constitutes active negligence, or if it is clear from the complaint that this party's liability would only arise from proof of active negligence, then there is no valid claim for indemnity." *Id.*

Here, the underlying complaint alleged that "Victaulic manufactured, marketed, sold, or distributed the end cap at issue in this lawsuit in a defective and unreasonably dangerous condition in that the End Cap contained a latent manufacturing flaw that resulted in its failure while Mr. Alvarez was working in front of the Suction Diffuser." ECF No. 37-9, Ex. I at ¶ 6. According to the underlying complaint, and consistent with the allegations in the present complaint, the end caps "were manufactured with material that was subject to fracture" and thus "not suitable for their intended use." *Id.* at ¶ 6. "Mr. Alvarez would not have been injured and [killed] . . . [i]f the End Cap had not had the defect." *Id.* at ¶ 13. The underlying complaint also alleged that "the 731-G Suction Diffusers and End Caps were manufactured in South Korea and shipped to Victaulic for distribution and sale in the United States." *Id.* at ¶ 5.

A right to indemnity exists "where the indemnitee's negligence is based upon a failure to inspect and thereby discover a defect in an article manufactured by the indemnitor." *Pyramid Condo. Ass'n v. Morgan*, 606 F. Supp. 592, 596 (D. Md. 1985) (quoting *Jennings v. United States*, 374 F.2d 983, 987 n.7 (4th Cir. 1967); *see also Pulte Home Corp. v. Parex, Inc.*, 403 Md.

367, 383 n.1 (2008) (quoting Restatement (Second) of Torts § 886B (1979) ("Instances in which indemnity is granted . . . include [situations in which] . . . The indemnitor supplied a defective chattel . . . as a result of which both were liable to the third person, and the indemnitee innocently or negligently failed to discover the defect.")). Here, the underlying complaint alleges that Victaulic unwittingly sold a product, manufactured elsewhere, with a latent defect. This renders Plaintiffs' negligence passive and entitles them to indemnification from SUI for the damages incurred as a result of SUI's active negligence.

2. Products Liability (Count V).

Plaintiffs also seek indemnification on a strict products liability claim. On this claim, they must establish that "(1) the product was in [a] defective condition at the time that it left the possession or control of the seller, (2) that it was unreasonably dangerous to the user or consumer, (3) that the defect was a cause of the injuries, and (4) that the product was expected to and did reach the consumer without substantial change in its condition." *Gourdine v. Crews*, 405 Md. 722, 740 (2008). Moreover, "as opposed to a traditional negligence action, the plaintiff need not prove any specific act of negligence on the part of the seller," *id.* at 740, "[p]roof of a defect in the product at the time it leaves the control of the seller implies fault on the part of the seller sufficient to justify imposing liability for injuries caused by the product." *Id.* at 741. Recovery is allowed only for injuries that proximately result from the breach. MD. CODE. ANN. COM. LAW (CL) § 2-715(2)(b) (1975, 2013 Repl. Vol.) ("Consequential damages resulting from the seller's breach include . . . [i]njury to person or property proximately resulting from any breach of warranty."). "Where the injury involved follows the use of goods without discovery of the defect causing the damage, the question of 'proximate' cause turns on whether it was reasonable for the buyer to use the goods without such inspection as would have revealed the

defects." CL § 2-715 cmt. 5. "If it was not reasonable for him to do so, or if he did in fact discover the defect prior to his use, the injury would not proximately result from the breach of warranty." *Id.*

Here, the court must accept the alleged facts that SUI created a defective product and that Victaulic was not informed of the defect and could not have discovered it through visual inspection. ECF No. 37-5, Ex. E at ¶¶ 10-11. SUI's failure to manufacture end caps in conformance with Victaulic's specifications proximately caused Mr. Alvarez's injuries and thus Plaintiffs' loss, so that Plaintiffs are entitled to judgment on their claim for products liability.

B. Damages.

An action for tort indemnity "is brought to recover the total amount of the payment by the plaintiff, on the ground that the plaintiff's conduct was not as blameworthy as the defendant's." Restatement (Second) of Torts § 886B cmt. a (1979). Damages in a products liability action in Maryland are awarded pursuant to CL § 2-715(2):

> (a) Any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
>
> (b) Injury to person or property proximately resulting from any breach of warranty.

See Joel A. Dewey & Leslie Hayes Russo, *Maryland Product Liability Law* § 10.1 (2d ed. 2003). "Compensatory damages need not be capable of exact or precise measurement, but must be estimable by the trier of fact." *Id.* A typical jury instruction directs the jury to evaluate:

> the plaintiff's condition and health prior to the accident as compared with his present condition and health in consequence of the injuries sustained as a result of the accident; his medical and hospital expenses, if any, incurred for treatment of such injuries; to what extent, if any, said injuries disabled him and prevented him from engaging in his usual employment and activities and any loss of earnings suffered thereby; whether the injuries were permanent in nature; to what extent, if at all, they were calculated to disable the plaintiff from engaging in those employments or activities for which, in the absence of such injuries, he would

> have been qualified; and the physical pain and suffering and mental anguish, if any, to which he had been subjected in the past and might be subjected to in the future as a result of said injuries.

Id.

In this case, the actual loss to Plaintiffs is the amount they paid to settle the underlying case. The evidence also supports a judgment in that amount. Mr. Alvarez died at the age of 33, leaving behind a wife and two young children. Before his eventual death, Mr. Alvarez experienced six days of extreme pain and suffering from burns to his entire body. The pain and suffering of Mr. Alvarez and his surviving family justifies an award of the statutory cap for non-economic damages.[4] This amount equals $1,042,500.[5] As for economic damages, Mr. Borzilleri calculated the present value of Mr. Alvarez's lost future earnings and benefits to be between $1,926,999 and $2,232,135 based on Mr. Alvarez's employment and tax documents. ECF No. 37-13 at 2, Ex. M. According to Mr. Borzilleri's report:

> [Mr. Alvarez's] hourly rate was $27.88 per hour for an annual pay of $57,990. According to his Federal income tax returns, he actually earned $65,427 in 2006 and $52,268 in 2007 to the date of his death. I used his W-2 earnings from his primary employer only, Thomas Rawlings Associates, earnings of $52,268 to the

[4] In 1986, the Maryland legislature instituted a cap on non-economic damage awards. CJP § 11-108(b) currently provides:

> (2) (i) Except as provided in paragraph (3)(ii) of this subsection, in any action for damages for personal injury or wrongful death in which the cause of action arises on or after October 1, 1994, an award for noneconomic damages may not exceed $500,000. (ii) The limitation on noneconomic damages provided under subparagraph (i) of this paragraph shall increase by $15,000 on October 1 of each year beginning on October 1, 1995. The increased amount shall apply to causes of action arising between October 1 of that year and September 30 of the following year, inclusive.
>
> (3) (i) The limitation established under paragraph (2) of this subsection shall apply in a personal injury action to each direct victim of tortious conduct and all persons who claim injury by or through that victim.
>
> (ii) In a wrongful death action in which there are two or more claimants or beneficiaries, an award for noneconomic damages may not exceed 150% of the limitation established under paragraph (2) of this subsection, regardless of the number of claimants or beneficiaries who share in the award.

[5] Plaintiffs claim that the statutory cap for non-economic damages in a combined wrongful death and survival action is $1,737,500. ECF No. 37 at 15 n.1. It is not clear how Plaintiffs arrive at this number. The statutory cap was originally set at $500,000 on October 1, 1994. The cap rises by $15,000 each year. This cause of action arose on November 6, 2007, thirteen years after October 1, 1994. This would set the statutory cap for a single claimant at $695,000 ($500,000 + $15,000 x 13). Where there are multiple claimants, under CJP § 11-108(b)(3)(ii), the total award may not exceed 150% of $695,000. Thus, the maximum award for noneconomic damages is $1,042,500 ($695,000 x 1.5).

> date of his death. Annualized he would have been expected to earn $62,603, somewhat less than he earned in 2006.

Id. at 3. Mr. Borzilleri also calculated the present value of lost household services to be between $341,961 and $355,639. *Id.* at 17. The sum of the lowest economic damage figures and the non-economic damages cap is $3,311,460. The payment of $3 million is thus both an actual and a reasonable measure of the loss to Plaintiffs.

C. Other Claims.

Given their entitlement to indemnification, Plaintiffs' other claims are duplicative. The right of contribution among joint tortfeasors is statutory. MD. CODE ANN., CTS. & JUD. PROC. (CJP) § 3-1402(a) (1973, 2013 Repl. Vol.). The plaintiff must show that: (1) there is a common liability to an injured person in tort; and (2) the joint tortfeasor has by payment discharged the common liability or has paid more than his or her pro rata share thereof. *Richards v. Freeman*, 179 F. Supp. 2d 556, 560-61 (D. Md. 2002) (citations omitted). "[A] party will be considered a joint tortfeasor when it admits joint tortfeasor status in a settlement agreement . . . or if a default judgment has been entered against a party." *Hollingsworth & Vose Co. v. Connor*, 136 Md. App. 91, 139-40 (2000). The right of contribution may be enforced in a separate action. *Mercy Med. Ctr. v. Julian*, 429 Md. 348, 378 n.16 (2012). Here, SUI negligently manufactured and supplied the defective end caps which caused Mr. Alvarez's death. ECF No. 4 at 4. According to the settlement agreement, Plaintiffs discharged SUI's shared liability. ECF No. 37, Ex. K. However, as a contribution award would be duplicative of the indemnification award, it should not be ordered.

Similarly, although SUI breached an implied warranty of merchantability (Count III), *see, e.g., Lloyd v. Gen. Motors Corp.*, 397 Md. 108, 157 (2007) the damages analysis for an implied warranty claim is the same as that which governs a products liability claim. *See Pulte*

Home Corp. v. Parex, Inc., 403 Md. 367, 384-85 (2008) (concluding that, in an "action[] for breach of implied warranty in which consequential damages are sought," section 2-715(2)(b) of the Commercial Law Article is "the theory under which recovery may be allowed when the immediate buyer of defective goods sustains a loss or liability to a third party because of a resale or installation of the defective goods"). Thus, while Plaintiffs would be entitled to recover under this claim, any award would be duplicative of the award already recommended.

Finally, there is an implied warranty of fitness claim (Count IV). It has three elements: "(1) The seller must have reason to know the buyer's particular purpose; (2) The seller must have reason to know that the buyer is relying on the seller's skill or judgment to furnish appropriate goods; [and] (3) The buyer must, in fact, rely upon the seller's skill or judgment." *Ford Motor Co. v. Gen. Acc. Ins. Co.*, 365 Md. 321, 342 (2001) (citations omitted). "[T]he particular purpose must be distinguishable from the normal use of the goods; the purpose must be peculiar to the buyer as distinguished from the ordinary or general use to which the goods would be put by the ordinary buyer." *Id.* at 343 (citations and quotation marks omitted).

Here, Plaintiffs have not alleged a particular purpose for the end caps, distinguishable from their normal use. *See Gricco v. Carver Boat Corp.*, Civ. No. JFM 04-1854, 2005 U.S. Dist. LEXIS 33108, at *5 (D. Md. 2005) ("A 'particular purpose' differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business" while "[a]n 'ordinary purpose,' in contrast, is that envisaged in the concept of merchantability and goes to uses which are customarily made of the good in question.") (citations and quotations marks omitted). Accordingly, Plaintiffs are not entitled to recovery as to this claim.

V. Conclusion.

Plaintiffs, Victaulic and AHAC, are entitled to a default judgment against SUI in the amount of $3 million under theories of indemnification, products liability and breach of an implied warranty of merchantability.

Date: May 5, 2014

/s/
JILLYN K. SCHULZE
United States Magistrate Judge