

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

MICHAEL C. OTTAVIANO

Plaintiff

vs.

GENEX COOPERATIVE, INC., ET AL.

Defendants

**MEMORANDUM
DECISION**

Index No. 10365/99

GENEX COOPERATIVE, INC.

Third-Party Plaintiff

vs.

PRAXAIR, INC.

Third-Party Defendant

BEFORE:

HON. JOHN M. CURRAN, J.S.C.

APPEARANCES:

Ford, Marrin, Esposito, Witmeyer & Gleser, LLP
Attorneys for Genex Cooperative, Inc.
Stuart C. Levene, Esq., of Counsel
Michael J. Tricarico, Esq., of Counsel

Andrews, Bernstein & Maranto, LLP
Attorneys for Praxair, Inc.
Benjamin J. Andrews, Esq., of Counsel

CURRAN, J.

This action initially arose out of devastating personal injuries suffered by the plaintiff. Plaintiff's claims against the various defendants and third-party defendants have now

been settled. The only issue remaining is the extent to which Praxair may be obligated to reimburse Genex for attorneys' fees and litigation costs incurred in connection with Genex's defense.

Pursuant to a Stipulation and Order granted February 28, 2007, the parties have agreed to submit for the Court's determination the issue of whether Praxair is obligated to pay the attorneys' fees and other defense costs incurred by or on behalf of Genex in connection with this action to the extent that such attorneys' fees and defense costs were paid by the insurer for Genex. If the Court answers this question in the affirmative, the Court will conduct a hearing on Genex's motion to award attorneys' fees and litigation expenses. If the Court answers this question in the negative, the Court will deny Genex's motion.

This action was commenced in 1999. Genex commenced its third-party action seeking common law and contractual indemnification from Praxair in August of 2000. Genex moved for summary judgment on its contractual indemnification claim against Praxair and, in May of 2001, Justice Fahey issued his Memorandum Decision granting the motion. The decision was memorialized in an Order granted in June of 2001 which stated: "Praxair shall reimburse Genex for the fees (including, but not limited to, attorneys' fees), costs and expenses which have been incurred on Genex's behalf in connection with the claims asserted in this action."

This Order was appealed to the Appellate Division, Fourth Judicial Department, and affirmed with the exception that the Fourth Department indicated that Praxair was not required to pay the fees, costs and expenses incurred by Genex in establishing its right to

indemnification. In September of 2003, the Court of Appeals dismissed Praxair's motion for leave to appeal. In January of 2004, counsel for Praxair represented to Justice Fahey that Praxair would forego any further appeals on the issue of indemnification and would provide indemnification to Genex. During the next few months, the parties litigated concerning the extent of the billings from Genex's counsel. In a letter dated May 20, 2004, Justice Fahey indicated that he would determine the issue concerning Genex's attorneys' fees and costs after the underlying claim was resolved by judgment or settlement. Plaintiff's claims were ultimately settled in March of 2006 with a clear understanding that the issue concerning Genex's attorneys' fees and litigation costs was still open.

Genex has now moved for an Order setting the amount of attorneys' fees and litigation costs to be awarded pursuant to the previous affirmed Order. Praxair opposes that relief in part because it asserts that Genex is not entitled to recover any attorneys' fees or litigation costs because all such fees and costs have been paid by Genex's insurer as opposed to Genex. While this fact is not disputed, Genex responds that any issue concerning the source of the payment has been resolved by the Court's previous affirmed Order. Genex in particular points to the language in the Order which says that fees incurred "on behalf of" Genex shall be reimbursed.

This Court has taken judicial notice of the Record on Appeal and related motion papers with respect to Genex's motion for summary judgment seeking contractual indemnification (*See* Prince, Richardson on Evidence § 2-209 [Farrell 11th ed]). It is notable that neither party, either before Justice Fahey or on appeal, raised the issue concerning the

payment of attorneys' fees by Genex's insurer as opposed to Genex itself. While it cannot be doubted as a practical matter that everyone involved in the case at the time must have understood that there was insurance coverage for both Genex and Praxair (including for attorneys' fees and litigation expenses), it also is clear that the issue concerning reimbursement of fees and expenses paid for by Genex's insurance carrier was not in fact actually litigated.

Nevertheless, as Genex points out, the affirmed Order specifically states that Genex is entitled to indemnification for attorneys' fees and costs incurred on its behalf. While the indemnification clause at issue does not contain this "on behalf of" language, it is in the Order. On this basis, the issue of reimbursement for attorneys' fees and litigation expenses incurred "on behalf of" Genex by its insurance carrier is law of the case, *res judicata* and/or an issue barred by the doctrine of collateral estoppel (*People v Evans*, 94 NY2d 499 [2000]; *Mobil Oil Corp. v City of Syracuse Indus. Dev. Agency*, 224 AD2d 15, 19 [4th Dept 1996]; *See Siegel*, NY Prac §§ 287, 443, 445 [4th ed]). At a minimum, the issue of payments by Genex's carrier as opposed to by Genex itself is one which "might have been litigated" as part of Genex's summary judgment motion and is therefore equally entitled to preclusive effect (*Barber v Rowe*, 200 AD 290, 295 [3d Dept 1922], *affd* 235 NY 549 [1923]; *Siegel*, NY Prac § 447 [4th ed]).

Even if this Court were to conclude that Praxair was not given a full and fair opportunity to litigate the pending issue, the Court concludes that Praxair's position is without merit. Praxair relies upon a 1940 decision from the Supreme Court of Connecticut to support its claim that Genex cannot recover its attorneys' fees and litigation expenses on its

indemnification claim because Genex itself has not incurred those fees (*State of Connecticut v Bloomfield Const. Co., Inc.*, 126 Conn. 349, 11 A2d 382 [1940]). While that case and the others cited by Praxair seem to support that abstract concept (*See Schneider v Natl. R.R. Passenger Corp.*, 987 F2d 132 [2d Cir 1993]; *First New Haven Natl. Bank v Rosenberg*, 33 Conn. Supp. 1, 355 A2d 319 [Conn. Super. Ct 1975]), it is ultimately a distinction which makes no difference and a distinction which would undermine the obligation of insurance contracts and common law principles of insurance.

The point raised by Praxair cannot carry the day because Genex's insurance carrier would have a right of subrogation, either by contract or under common law, to pursue the attorneys' fees and litigation expenses the carrier paid on behalf of Genex (*See Westport Ins. v St. Paul Fire & Marine Ins. Co.*, 375 F Supp 2d 4 [US Dist Ct, Conn 2005]; 22 Holmes' Appelman on Insurance 2d § 141.1). Thus, even if this Court were to conclude that the law of the case doctrine did not apply and were to agree with Praxair with respect to its interpretation of controlling Connecticut law, Genex's insurer would still have the right under principles of subrogation to seek from Praxair the fees and expenses it paid on behalf of Genex. Praxair would then presumably tender the claim for subrogation to its own insurance carrier which would in turn indemnify and defend Praxair on the subrogation claim.

All of the arguments raised by Praxair cannot change the previous determination that Praxair is obligated to indemnify Genex for attorneys' fees and litigation costs incurred by it or on its behalf. The end result is the same no matter how one arrives at it.

The Court will conduct a telephone conference with counsel on **April 17, 2007**
at 2:00 p.m. or such other time as counsel can agree, to schedule dates to conduct a hearing.

DATED: March 20, 2007

HON. JOHN M. CURRAN, J.S.C.