

**Heraeus Metal Processing, Inc. v PGP Industries,
Inc.**

2006 NY Slip Op 30085(U)

October 31, 2006

Supreme Court, New York County

Docket Number: 0600428/0428

Judge: Richard B. Lowe

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SCANNED ON 11/8/2006
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. RICHARD B. LOWE, Justice

PART 52

Heracus Metal Processing

INDEX NO. 600 428/06

MOTION DATE 7/18/06

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

- v -

PGP Industries

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILE
NOV 08 2006
NEW YORK
COUNTY CLERKS OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 10/31/06

HON. RICHARD B. LOWE, III

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

-----X
HERAEUS METAL PROCESSING, INC., and
HERAEUS INCORPORATED,

Plaintiffs,

Index No. 600428/06

- against -

PGP INDUSTRIES, INC., GERALD METALS, INC., and
DOES 1 THROUGH 50,

Defendants.

-----X
Hon. Richard B. Lowe, III:

Plaintiffs purchased defendants' precious metal refining and manufacturing business for about \$23 million. Plaintiffs brought this action, alleging that defendants breached various warranties and covenants in the asset purchase agreement, and intentionally misled plaintiffs about the condition of the business. Defendants now move to dismiss the action, pursuant to CPLR 3211 (a) (1), based on documentary evidence, CPLR 3211 (a) (5), based on the statute of limitations, and CPLR 3211 (a) (7), based on failure to state a cause of action.

Background

Plaintiff Heraeus Incorporated (Heraeus) created plaintiff Heraeus Metal Processing, Inc. (HMPI) as a vehicle to acquire the business, which has facilities in California, Connecticut, South Carolina, and Tennessee. Heraeus and HMPI entered the agreement as surety and purchaser, respectively, and defendants PGP Industries, Inc. (PGP) and Gerald Metals, Inc. as the seller and guarantor, respectively. May 1, 2000 was the signing date and May 23, 2000 the

closing date for the transaction. Heraeus paid the purchase price to PGP.

In 2003, plaintiffs allegedly discovered that, at the time of the purchase, the business was not in compliance with various state and federal environmental regulations, that its wastewater had illegally high levels of certain pollutants, that it lacked certain permits required in regard to discharge of waste products, and that it had never paid a sewerage surcharge fee for increased wastewater discharge. Plaintiffs allege that it will cost them millions of dollars to fix the violations and faulty procedures left by defendants. Plaintiffs brought this suit for breach of warranties, representations and covenants (first cause of action by HMPI), breach of warranties and representations (second cause of action by HMPI), breach of contract (third cause of action by HMPI), breach of contract (fourth cause of action by HMPI), fraudulent misrepresentation (fifth cause of action by both plaintiffs), fraudulent concealment (sixth cause of action by both plaintiffs), negligent misrepresentation (seventh cause of action by both plaintiffs), indemnification (eighth cause of action by HMPI), indemnification (ninth cause of action by HMPI), and violation of Connecticut General Statute (CGSA) §§ 22a-134 *et seq.*, referred to as the Connecticut Transfer Act, governing the transfer of property that generates hazardous waste (tenth cause of action by HMPI).

Defendants make the instant motion to dismiss on several grounds, including: the defense that the action is barred based by the Agreement's indemnification clause, the action is barred by the statute of limitations, and that the complaint otherwise fails to state a cause of action.

Discussion

On a motion to dismiss for failure to state a cause of action, the pleading is liberally construed. The court accepts the facts as alleged in the complaint as true, accords the plaintiff

the benefit of every possible favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). A motion to dismiss on the ground that the action is barred by documentary evidence may be granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

I. The Indemnification Clause

First, in support of their motion to dismiss, defendants argue that the asset purchase agreement bars plaintiff's claims. Article 8 of the agreement provides, in pertinent part, that the seller and the guarantor indemnify the purchaser against all damages, losses, deficiencies, and liabilities:

- (a) required to be paid by the Purchaser or the Seller to third parties ... arising out of ... actions or inactions of the Seller affecting any third party ... or
- (b) resulting from any breach or violation of, or failure to properly perform, any covenant, agreement or obligation, or any untruth, inaccuracy or breach of any of the representations or warranties made by the Seller ... in this Agreement ... or ...
- (d) relating to or arising out of the business, operations or assets ... of the Seller prior to the Closing Date or the actions or omissions of the Seller's ... agents prior to the Closing Date, including without limitation any liability or obligation relating to, and any claim which arises out of or is based upon, (1) negligence, (2) strict liability or (3) any other legal theory or any statute, rule or regulation or
- (d) [*sic*] incident to any of the foregoing or to the enforcement of this Section 8.2

(Agreement, ¶ 8.2.1, at 52).

The remedies in Article 8 are the parties' "exclusive remedies ... in connection with any breach of a representation or warranty, or non-performance ... of any covenant or agreement contained herein The provisions of this Article 8 shall apply to claims for indemnification asserted as between the parties hereto as well as to third-party claims" (*id.*, ¶ 8.7, at 56).

Defendants claim that the foregoing provisions limit plaintiffs to causes of action which sound in indemnification. Plaintiffs claim that the provisions relate only to remedies and do not preclude any causes of action. They also argue that section (d) expressly allows them to bring suits based on any legal theory.

In a strictly commercial setting, a provision limiting recovery is enforceable according to its terms, unless a public policy imposes liability (*Arbegast v Board of Educ. of S. New Berlin Cent. School*, 65 NY2d 161, 169-170 [1985]; *Florence v Merchants Cent. Alarm Co.*, 51 NY2d 793, 795 [1980]). Public policy dictates that a party cannot contract to indemnify itself against willful or intentional acts, such as gross negligence and fraud (*Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 384-385 [1983]; *Great Northern Assoc., Inc. v Continental Cas. Co.*, 192 AD2d 976, 978 [3d Dept 1993]).

The agreement limits the kind of damages that plaintiffs can recover from defendants. It provides that plaintiffs may only be indemnified by defendants, regardless of the legal theory or cause of action on which the right to indemnification is based. Plaintiffs may allege what facts they please to prove their right to recover from defendants, but they cannot receive damages other than indemnification, except in the case of fraud. Breaches of contract are generally not regarded as intentional wrongdoing, unless accompanied by malice or a scheme to deliberately inflict harm (see *Kalisch-Jarcho*, 58 NY2d 384-385; *Metropolitan Life Ins. Co. v Noble Lowndes Intl., Inc.*, 192 AD2d 83, 90 [1st Dept 1993], *affd* 84 NY2d 430 [1994]). The complaint does not allege facts tending to show such a scheme or motivation. Therefore, any damages for breach of contract are limited to indemnification. Only in the case of fraud may plaintiffs recover other damages.

II. The Fraud Cause of Action

Second, defendants argue for dismissal of the fraud causes of action. The allegations on which the fraud claims are based are alleged to be identical to the allegations concerning defendants breaching the agreement and the warranties. A fraud claim that merely restates a breach of contract claim will be dismissed (*First Bank of Americas v Motor Car Funding, Inc.*, 257 AD2d 287, 291 [1st Dept 1999]).

The first cause of action is for breach of warranties, representations, and covenants in the agreement. The second is for breach of warranties and representations in the agreement. The third and fourth are for breach of contract. All are asserted by HMPI, not by Heraeus, and allege the following.

Defendants made numerous representations, warranties, and covenants, regarding, among other things, the status of environmental compliance at the Santa Fe Springs facility in California, the fitness of certain equipment there, and the clean up of the Waterbury, Connecticut facility. Defendants failed to disclose and concealed that defendant PGP had been discharging excess amounts of certain pollutants in its Santa Fe Springs wastewater, that it was on notice by a government entity that it was not in compliance with federal pretreatment standards; that it had a long history of non-compliance with regulations for wastewater, that it had failed to pay its sewer connection discharge fee, and that its wastewater treatment equipment was archaic and lacked capacity. Defendants thereby violated the representations and warranties that the equipment was in good repair, that the business complied with all laws and regulations, including those concerning hazardous materials, and that the business was not on notice of violations. Defendants allegedly entered into the agreement knowing that these representations were false.

Lastly, it is alleged that defendants breached Section 7.5 of the Agreement, requiring them to investigate and remediate the Waterbury facility so as to render it compliant with the Connecticut Transfer Act.

The fraud causes of action are pleaded by both plaintiffs. The fifth cause of action for fraudulent misrepresentation contains the same allegations as the breach of contract causes of action. It also states that defendants engaged in these acts in order to raise the perceived value of the business and to induce plaintiffs into buying it. The sixth cause of action for fraudulent concealment alleges that defendants possessed superior knowledge, not equally available to plaintiffs regarding the status of the business and its compliance with environmental regulations. It also alleges that defendants actively concealed critical documents regarding PGP's compliance with wastewater discharge and other laws. Plaintiffs claim that they lacked access to these material facts and had no reason to know of their existence, and that defendants had a duty to tell them these facts. The seventh cause of action is for negligent misrepresentation, based on defendants' duty to exercise reasonable care to ensure that their statements were truthful.

The complaint also states that defendants made oral representations to plaintiffs in the weeks before the transaction closed, related to environmental issues and equipment. They told plaintiffs that the wastewater treatment facility and the equipment at Santa Fe Springs was in compliance with the latest state of the art and with all regulations (Complaint, ¶¶ 28-29).

A claim for fraud consists of the following elements: (1) a material representation or omission of material fact; (2) that is false or misleading; (3) made with knowledge or reckless disregard of its falsity; (4) reliance on the misrepresentations by the complainant; and (5) injury by reason of the reliance (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]);

Clark-Fitzpatrick, Inc. v Long Island R. R. Co., 70 NY2d 382, 389 [1987]). A cause of action for fraudulent concealment requires, in addition to the foregoing elements, an allegation that the defendant had a duty to disclose material information and that it failed to do so (*P.T. Bank Cent. Asia v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [1st Dept 2003]).

To plead both fraud and breach of contract, the plaintiff must allege that defendant breached a duty distinct from, or in addition to, the breach of contract (*First Bank of Americas*, 257 AD2d at 291-292). An allegation that a party did not intend to perform a contract when he entered it does not state a claim for fraud but for breach of contract (*id.* at 291).

Generally, fraud must be based on misrepresentations of present fact (*id.*). Because “[a] warranty is not a promise of performance, but a statement of present fact,” a fraud claim may be based on a breach of warranties claim, notwithstanding the existence of a breach of contract claim (*id.* at 292). Moreover, a party who is fraudulently induced to enter into a contract may join a cause of action for fraud with one for breach of the same contract (*id.* at 291-292).

Here, plaintiffs allege that the warranties and representations in the agreements were false, and that defendants misrepresented and concealed facts to make it seem as if the warranties and representations were true. Plaintiffs have a cause of action for fraudulent inducement and for breach of representations made in the agreement (*see Freedman v Pearlman*, 271 AD2d 301, 304 [1st Dept 2000]; *RKB Enterprises v Ernst & Young*, 182 AD2d 971, 972 [3^d Dept 1992]). In addition, they allege that defendants intentionally omitted from their disclosure schedules material information. The allegations sufficiently establish breaches of legal duties extraneous to and distinct from the contract. The breach of contract claim is based on the allegation that defendants did not comply with their contractual obligations to remediate the Waterbury facility,

while the fraud claims are based on falsehoods in the agreement and in conversation. Hence, plaintiffs' fraud causes of action are sustainable.

Defendants argue that the complaint fails to sufficiently allege scienter and misrepresentation. The court does not agree. The complaint states that defendants knew that their representations were false and that plaintiffs relied upon them in purchasing the business. Whether the reliance was justifiable is a question that cannot be determined at this stage of the proceedings. For the purposes of a CPLR 3211 motion, the allegations sufficiently state causes of action for fraud and fraudulent concealment.

A cause of action based on negligent misrepresentation requires proof that a defendant had a duty to use reasonable care to impart correct information due to a special relationship existing between the parties (*Grammar v Turits*, 271 AD2d 644, 645 [2d Dept 2000]). In the commercial context, "liability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified" (*Kimmell v Schaefer*, 89 NY2d 257, 263 [1996]; see also *River Glen Assoc., Ltd. v Merrill Lynch Credit Corp.*, 295 AD2d 274, 275 [1st Dept 2000]). Although plaintiffs allege that defendants had knowledge which plaintiffs did not, there is no allegation that it was specialized or that a trusting relationship existed between the parties. Therefore, the cause of action for negligent misrepresentation may not be maintained.

III. The Statute of Limitations

Third is defendants' argument that the breach of contract and fraud claims are barred by the applicable statute of limitations. The discussion will center on the fraud claims, because the

damages for any breaches of contract are limited to indemnification. The parties do not raise the statute of limitations for indemnification.

The complaint alleges that HMPI was incorporated in Delaware and has its principal place of business in Santa Fe Springs, California. Defendants urge the application of CPLR 202 to HMPI's fraud causes of action on the ground that HMPI is not a resident of New York and cannot receive the benefit of New York's statute of limitations for fraud. Rather, HMPI must be subject to California's shorter statute of limitations, under which the fraud claims are untimely. CPLR 202 provides that in the case of a non-resident whose cause of action accrues outside of New York, the shorter limitation period of either (a) New York or (b) the state in which the cause of action arose applies.

According to the California Code of Civil Procedure (CCP) 338 (d), a cause of action for fraud accrues upon "the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." The aggrieved party has three years after the accrual to commence an action. In New York, an action based upon fraud must be commenced within "the greater of six years from the date the cause of action accrued or two years from the time the plaintiff ... discovered the fraud, or could with reasonable diligence have discovered it" (CPLR 213 [8]).

Defendants allege that the fraud causes of action accrued upon the date that the agreement was signed, May 1, 2000, and, as this action was commenced in New York on February 9, 2006, more than three years after the accrual, it is untimely as to HMPI, a California resident. This argument is not applied to Heraeus, which the parties agree is a New York resident.

Plaintiffs posit several objections to defendants' reasoning. They argue that the New York limitations period of six years applies to HMPI, because the fraud causes of action accrued

in New York, where the parties entered into the agreement. Purportedly, from April 18, 2000, when Heraeus created HMPI, to May 23, 2000, the closing date of the transaction, HMPI's residence was New York, the same as Heraeus.

In *Global Fin. Corp. v Triarc Corp.* (93 NY2d 525, 528-529 [1999]), the non-resident plaintiff argued that New York's statute of limitations applied because its claims accrued in New York, where the contract was negotiated, executed, substantially performed, and breached. The Court disagreed. The Court determined that "accrued" means the time when, and the place where, the plaintiff first had the right to bring the cause of action (*Global Fin. Corp.* 93 NY2d at 528). For the purposes of CPLR 202, where an injury to a nonresident was purely economic, as it was in that case, the cause of action accrued where the injury was sustained, and that was the plaintiff's principal place of business, generally its residence, or place of incorporation (*id.* at 529; see also *Williams v Infra Commerc Anstalt*, 131 F Supp 2d 451, 455 [SD NY 2001]; *Proforma Partners, LP v Skadden Arps Slate Meagher & Flom, LLP*, 280 AD2d 303, 303 [1st Dept 2001]).

HMPI has even less reason to claim that its cause of action accrued in New York than the plaintiff in *Global Fin. Corp.* The agreement at issue in this case was not breached or performed in New York. Indeed, from the moment the agreement was signed, HMPI became a business with its principal place of business in California. "The principal place of business determines residency under CPLR § 202" (*Shamrock Assoc. v Sloane*, 738 F Supp 109, 113 [SD NY 1990]). The economic harm to HMPI, the only kind of harm it alleges, was sustained in California and the statute of limitations of California must apply here.

In support of their argument that the New York statute of limitations applies, plaintiffs

point to a provision in the agreement entitled “Governing Law,” which provides:

[t]he interpretation and construction of this Agreement, and all matters relating hereto, shall be governed by the laws of the State of New York applicable to agreements executed and to be performed solely within such State

(Agreement, ¶ 11.3, at 58).

In addition, “any dispute arising out of this Agreement or any matter related hereto may be brought in the courts of the State of New York ...” (Agreement, ¶ 11.4, at 58).

Plaintiff contends that these provisions show that the parties did not intend to be subject to CPLR 202, and that they intended to be treated exactly as New York residents. But neither a choice of law or a choice of forum provision overrides CPLR 202 (*see Global Fin. Corp.* 93 NY2d at 530, citing *Insurance Co. of N. Am. v ABB Power Generation, Inc.*, 91 NY2d 180, 183 [1997] [although parties’ contract chose the forum and law of New York, CPLR 202 operated to make California the place of accrual]).

Now that it has been determined that HMPI is subject to California’s three-year statute of limitations for fraud, the next question is whether California law tolls the limitations period. California provides that the fraud statute of limitations begins to run when the plaintiff has information which would put a reasonable person on inquiry (CCP 338 [d]; *Kline v Turner*, 87 Cal App 4th 1369, 1374 [4th Dist 2001]). Plaintiffs allege that since HMPI did not discover the fraud until November 2003, at the earliest, it had until November 2006 to commence an action. This action commenced in February 2006, so under California law, the fraud claims would be timely, assuming plaintiffs are correct.

Discovery in the context of CCP 338 (d) means when the plaintiff suspected or should have suspected that an injury was caused by wrongdoing (*Kline*, 87 Cal App 4th at 1374). Under

this rule, constructive and presumed notice or knowledge are equivalent to knowledge (*id.*). The accrual period begins to run when the plaintiff has the opportunity to obtain knowledge from sources open to it, such as corporate books (*Parsons v Tickner*, 31 Cal App 4th 1513, 1525 [2d Dist 1995]).

Defendants point out that the agreement provides that plaintiffs may review the properties, books, and records of the seller as they deem necessary before the closing date (Agreement, ¶ 4.3, at 37). However, the agreement also says that “such review shall not, however, ... affect the representations and warranties made by the Seller ... or the remedies of the purchaser for breaches of those representations and warranties” (*id.*).

The agreement indicates that HMPI hired all of PGP’s employees as part of the transaction, including its director of environmental health and safety (*id.*, ¶ 4.5, at 38). Because HMPI employed the same personnel as PGP, defendants argue that HMPI had constructive knowledge that the warranties or covenants in the agreement were fraudulent. HMPI could have obtained relevant information from its own employees.

The complaint states that plaintiffs could not have learned of deceit “[s]hort of perhaps reviewing each one of the millions of pages of environmental documents the Business had accumulated over the years ...” (Complaint, ¶ 31). In June 2004, the government authorities notified plaintiff that the Santa Fe Springs facility was discharging excessive pollutants (*id.*, ¶ 32). Before that, plaintiffs allegedly had no knowledge and no reason to suspect these violations (*id.*, ¶ 34).

Whether plaintiff had adequate information to perceive the alleged fraud cannot be determined now. The complaint as it stands is sufficient to withstand the motion to dismiss (*see*

Lavin v Kaufman, Greenhut, Lebowitz & Forman, 226 AD2d 107, 109 [1st Dept 1996]).

California law leads to the same conclusion (*Vega v Jones, Day, Reavis & Pogue*, 121 Cal App 4th 282, 298 [2d Dist 2004]).

IV. Heraeus' Standing

Defendants claim that Heraeus does not belong in this action, since it did not suffer any loss. Plaintiffs allege that Heraeus paid PGP for the business, and that Heraeus suffered by being made to pay too much for the business as a result of defendant's fraudulent statements regarding PGP's compliance with environmental laws and the adequacy of its wastewater treatment systems. This states a claim for fraudulent inducement to enter an agreement by Heraeus.

Generally, a guarantor or surety may not assert claims belonging to its principal (*see Ettliger v National Sur. Co.*, 221 NY 467, 469 [1917]). The exceptions to this rule need not be discussed here (*see Cinema N. Corp. v Plaza at Latham Assoc.*, 867 F2d 135, 139 [2d Cir 1989]), because Heraeus is asserting a claim for fraud only. The other causes of action belong to HMPI, the principal. Therefore, no reason is presented to dismiss Heraeus from this action.

V. The Notice Provision in the Agreement

Section 8.5 (b) of the Agreement provides that the one seeking indemnification must notify the party from whom indemnification is sought within 45 days after becoming aware of any damages that the indemnified party has determined has given or could give rise to a claim for indemnification.

Plaintiffs gave defendants written notice of indemnification claims by letter dated December 16, 2004. However, the complaint states that plaintiff received notice of certain violations in June 2004 and others in November 2003 (Complaint, ¶¶ 32, 60). More than 45 days

passed between plaintiffs' awareness and the notice to defendants. Defendants contend that this untimely notice is a reason to dismiss the complaint.

Plaintiffs argue that the 45-day provision does not operate to preclude their right to maintain this claim. They maintain that, because the provision does not clearly state that it is intended as a condition precedent to bringing suit, it is a mere promise, the breach of which will allow the other party to recover damages, but which would not otherwise bar the breaching party's claim. The court agrees with plaintiffs. Defendants fail to show that the notice required in the agreement was "an express condition precedent" to bringing a suit, rather than a promise (*Oppenheimer & Co., Inc. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 691 [1995]). The provision does not employ the "the unmistakable language of condition ('if,' 'unless and until')" (*id.*). The provision does not require dismissal of the action.

VI. Indemnification as to the Waterbury facility

Sixth is whether HMPI's claim for indemnification regarding the Waterbury, Connecticut facility fails. Defendant PGP agreed to implement the environmental investigation and remediation work needed to comply with the Connecticut Transfer Act (Agreement, ¶ 7.5, at 45, ¶ 8.2.3, at 52). The complaint alleges that defendant PGP refused to satisfy its obligations to investigate and remediate the Waterbury property as required by the agreement. Defendants contend that the agreement does not state when remediation should occur and, absent a specific time within which to complete the remediation, HMPI's claim must be dismissed.

Plaintiffs argue that the Connecticut Transfer Act requires investigation and remediation within three years of the transfer of property, which in this case would be by mid-2003. In any event, when a contract does not specify a time of performance, the law implies a reasonable time

(*Webster's Red Seal Publ. v Gilberton World-Wide Publ.*, 67 AD2d 339, 343 [1st Dept 1979], *aff'd* 53 NY2d 643 [1981]). What constitutes a reasonable time for performance depends upon the facts and circumstances of the particular case (*Savasta v 470 Newport Assoc.*, 82 NY2d 763, 765 [1993]). At this time, the court cannot determine when PGP should have performed the provision. For the purposes of this motion, the provision does not fail for lack of a specific date.

Defendants also argue that the indemnification claim concerning Waterbury is premature because plaintiffs do not identify any costs expended to address the environmental problems at that site. There is therefore nothing to indemnify. The complaint, however, alleges that plaintiffs have already incurred costs and expenses addressing the problems. That is a sufficient allegation of loss for indemnification.

VII. Connecticut Transfer Act claims

The Connecticut Transfer Act allows a transferee to recover damages from the transferor for all remediation costs (CGSA § 22a-134b). The Act does not apply in this case, defendants allege, because they are already contractually obligated to perform and pay for any investigation and remediation of the Waterbury facility. However, such is not the holding of the case to which defendants cite to bolster their argument, *Alcoa Composites, Inc. v BTI Tech.* (Connecticut Sup Ct Middlesex, September 11, 2003, Wolven, J. [35 Conn. L. Rptr. 646] [2003 WL 22206238]). The case held that the parties could contractually shift responsibilities for a cleanup, even though the statute made one party responsible (*Alcoa Composites*, 2003 WL 22206238, *5). Nothing in that case vitiates plaintiffs' rights to pursue the private cause of action provided by statute.

VIII. Punitive Damages

The eighth argument is that plaintiffs may not recover punitive damages for breach of

contract. It has been established that plaintiffs may only be indemnified for such a breach. Whether the fraud claims may lead to punitive damages is another question. The prayer for relief asks for punitive damages for willful, gross, reckless, and wanton conduct (Complaint, at 36). Punitive damages are allowable in tort cases if the offending conduct amounts to a "very high threshold of moral culpability" (*Giblin v Murphy*, 73 NY2d 769, 772, [1988]). Defendants do not address punitive damages for tort. Therefore, the request will not be dismissed.

The seventh cause of action for negligent misrepresentation is dismissed. Regarding the fraud causes of action, plaintiffs may recover any appropriate types of damages. Regarding the other causes of action, plaintiffs are entitled to indemnification alone.

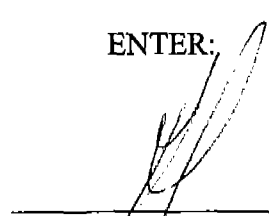
Conclusion

In conclusion, it is

ORDERED that defendants' motion to dismiss the complaint is granted as to the seventh cause of action for negligent misrepresentation and is otherwise denied; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry.

Dated: October 31, 2006

ENTER: 
 COUNTY CLERKS OFFICE
 NEW YORK
 NOV 08 2006
 FILE
 HON. RICHARD B. LOWE, III