SHORT FORM ORDER **INDEX NO. 32858/1992**

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:
Hon. Paul J. Baisley, Jr.

ORIG. RETURN DATE: March 30, 2007
FINAL RETURN DATE: June 8, 2007
MTN. SEQ. #: 001-MD, #002-MD

STATE OF NEW YORK

Plaintiff(s),

-against-

JAMES B. HOPPING, JR.

Defendant(s).

PLTF'S ATTORNEY:
ANDREW M. CUOMO, ESQ.
ATTY GEN OF STATE OF NEW YORK
by JENNIFER DENTINGER, ESQ.
THE CAPITOL
ALBANY, NY 12224

JAMES B. HOPPING, JR.

Plaintiff(s),

-against-

MARDER'S NURSERIES, INC.

Third Party Defendant(s)

DEFT'S ATTORNEY for Third Party :
FARRELL FRITZ, PC
1320 RECKSON PLAZA, WEST TOWER
UNIONDALE, NY 11556

Upon the following papers numbered 1 to 21 read on this motion and cross motion for summary judgment: Notice of Motion and supporting papers 1 - 2; Notice of Cross Motion and supporting papers 3 - 4; Affirmation in opposition and supporting papers 5 - 9; Reply Affirmation 10 - 21; it is,

ORDERED that the motion (001) by the assignee of the third-party plaintiff for summary judgment is denied; and it is further

ORDERED that the cross motion (002) by the third-party defendant for summary judgment is denied; and it is further

ORDERED that, pursuant to 22 NYCRR 202.8(f), the parties are directed to appear for a preliminary conference on December 14, 2007 at the Supreme Court Annex, DCM Part, Room 203A, One Court Street, Riverhead, New York at 10:00 a.m.

This is a third-party action for common law indemnification based upon the alleged negligence of the third-party defendant, Marder's Nurseries, Inc. (hereinafter Marder's) which arose out of a main action between the State of New York (hereinafter the State) and the defendant/third-party plaintiff James B. Hopping, Jr. (hereinafter Hopping) in which the State sought reimbursement from Hopping for costs incurred in an environmental cleanup.

Hopping owned certain land in Bridgehampton which consisted of farmland and an adjacent gas station. The gas station had been in operation since 1952 when his aunt owned the land. In 1952, three underground gasoline storage tanks were installed and a fourth tank was installed in 1960.

Subsequently, in April of 1986, after Hopping had acquired the property through inheritance in 1970, the four tanks were inspected for the first time and one of the tanks failed a tightness test and had to be repaired. The gasoline storage system then passed a followup test about a week later.

In February of the following year (1987), Hopping entered into a lease (effective through 1992) with a nursery company, Marder's, which was interested in using the farmland but Hopping made it a requirement of the lease that Marder's would continue to operate the gas station as well. This was required by Hopping in order to preserve his non-conforming use of the property as a gas station. Marder's agreed to this condition.

As part of a rider to the lease, Hopping represented that the four tanks were "fit for use up to and including February of 1988" (Second Rider to Lease, ¶ 33).

In January 1988, the New York State Department of Environmental Control (hereinafter the DEC) received a complaint of fumes from a neighboring home and required Hopping to immediately pump out the tanks and have them inspected. This inspection revealed two small holes in one of the tanks as well as evidence of discharge as the source of the fumes. Hopping was required to repair the storage system and was responsible for the cleanup.

Hopping undertook these obligations at his own expense, as required, until he could not afford any further work. The DEC then took over the remediation work and commenced the main action in June 1991 for reimbursement of its costs. In September 1991, Hopping brought his third-party action for indemnification against Marder's.

The main action was resolved in December 1999 by a settlement agreement which allowed Hopping to make payments over a four-year period ending in August 2003. As part of that settlement, Hopping assigned his right in the third-party action to the State.

The State now moves for summary judgment in the third-party action on the basis of its contention that Marder's, as a lessee which was operating the storage system at the time of the discharge, was a "discharger" pursuant to the applicable provision of the Navigation Law and, thus, was strictly liable for the costs incurred regardless of fault.

Marder's, by cross motion, opposes the State's motion and seeks summary judgment in its favor based upon the third-party complaint seeking indemnification upon a theory of common law negligence which, it contends, precludes such relief if the party bringing the action was at fault and/or the party being sued was without fault. In opposition to the State's motion, Marder's also points out that the State bases its motion upon the erroneous position that the third-party action is based upon Article 12 of the Navigation Law which imposes strict liability regardless of fault. Indeed, in response to the cross motion, the State concedes it erred in this regard but, nevertheless, still seeks summary judgment as to the common law cause of action.

On a motion for summary judgment, the moving party has the burden of making a prima facie showing of entitlement to summary judgment as a matter of law and must offer sufficient evidence to show the absence of material issues of fact (*Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York,* 49 NY2d 557, 427 NYS2d 595 [1980]). If the moving party fails in meeting this burden, the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial On a motion for summary judgment, the moving party has the burden of making a prima facie showing of entitlement to summary judgment as a matter of law and must offer sufficient evidence to show the absence of material issues of fact (*Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York,* 49 NY2d 557, 427 NYS2d 595 [1980]). If the moving party fails in meeting this burden, the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see Zuckerman v City of New York, supra*).

In support of its motion, the State makes a persuasive argument which would be pertinent to a third-party complaint claiming indemnification upon the strict liability provisions in Article 12 of the Navigation Law but as the third-party defendant points out - and as the State concedes - this is not the situation here. The State's arguments premised upon strict liability thus fail to make out a prima facie entitement to summary judgment and its motion must be dismissed. Accordingly, the opposition to this application submitted by the third-party defendant need not be considered in this denial.

Turning now to the third-party defendant's (Marder's) cross motion, the court finds that a prima facie entitlement to summary judgement has been shown. In support of this application, Marder's contends, inter alia, that the third-party action seeks indemnification for any judgment against Hopping and since there was no actual judgment - there was merely a settlement agreement which was not so-ordered by the court - that the relief sought is not applicable; that Hopping was not without fault and, thus, could not seek indemnification; Hopping could not seek indemnification from a third party which was not sued directly in the main action; and, that the State was guilty of spoliation in its destruction of the tanks..

Three of these four contentions are clearly without merit. The issue as to a "judgment" as opposed to a "settlement" fails because such a defect is curable at trial (*see Clifford v Clifford Rental Mgt.,* 198 AD2d 790, 791, 604 NYS2d 380, 381 [4th Dept 1993]) and, in any event, the third-party complaint also asks for "such other relief as may seem proper." The inclusion of this language provides the court with the latitude to entertain this third-party complaint (*see City of Binghampton v Serafini,* 8 AD3d 835, 838, 778 NYS2d 547, 549 [3d Dept 2004]).

As to Marder's contention that the main action had to have contained a direct claim against it in order for the third-party action to be viable, this contention is based upon a misreading of *Garrett v Holiday Inn, Inc.* (86 AD2d 469, 450 NYS2d 619 [4th Dept 1982], *mod* 58 NY2d 253, 460 NYS2d 774 [1983]) which requires that both the third-party plaintiff and the third-party defendant have a duty to the plaintiff in the main action which they breached; not that a direct claim be made in the main action pertaining to the third-party defendant (*id.* at 471, at 621; *see also Rosado v Proctor & Schwartz, Inc.*, 66 NY2d 21, 24, 494 NYS2d 851, 853 [1985]).

As to the claim of spoliation, the existence of photographs, reports, witnesses and other documents allow Marder's to establish its defense without any prejudice resulting from the destruction of the tanks (*see Bjorke v Rubenstein,* 38 AD3d 580, 833 NYS2d 115 [2d Dept 2007]).

The issue of fault, however, is indeed relevant to the consideration of this application. In this regard there are clearly material issues of fact requiring a trial. One possibility here, as put forward by Marder's, is that the tanks were damaged before the lease to Marder's and that Marder's was not at fault whatsoever. Indeed, the tanks, although supposedly repaired in 1986, were 36 years-old (three tanks) and 28 years-old (one tank) in 1988 when the underlying discharge was discovered and had not been inspected until 1986. This alone, according to Marder's, raises questions as to their condition before Marder's entered into its lease.

On the other hand, there is evidence of the possibility that one or both of the holes discovered in 1988 could have been caused by Marder's by a careless probing with the dipstick used for measuring the amount of gasoline left in the tank.

Accordingly, although Marder's does make out a prima facie entitlement to summary judgment, in opposition the State raises material issues of fact regarding the matter of negligence sufficient to deny the cross motion for summary judgment.

This decision constitutes the order of the court.

Dated: December 4, 2007

HON. PAUL J. BAISLEY, JR.

HON. PAUL J. BAISLEY, JR., J.S.C.