

Millennium Holdings Inc. v Glidden Co.

2009 NY Slip Op 31408(U)

June 24, 2009

Supreme Court, New York County

Docket Number: 600920/2008

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT **JUSTICE SHIRLEY WERNER KORNREICH** PART 54

Index Number : 600920/2008
MILLENNIUM HOLDINGS, INC.,
vs.
GLIDDEN COMPANY
SEQUENCE NUMBER : # 001
DISMISS COMPLAINT

Justice

INDEX NO. 600920-08
MOTION DATE _____
MOTION SEQ. NO. #001
MOTION CAL. NO. _____

are read on this motion to/for _____

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

PAPERS NUMBERED
<u>1-2</u>
<u>3</u>
<u>4</u>

Cross-Motion: Yes No

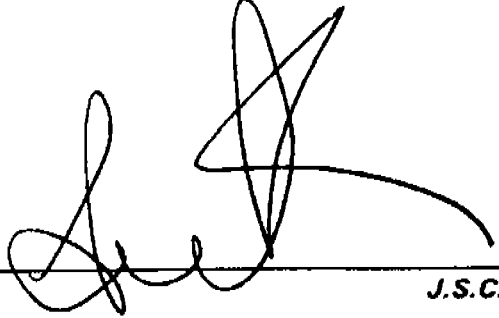
Upon the foregoing papers, it is ordered that this motion

FILED
JUN 26 2009
COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

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

Dated: 6/24/09


J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 54

MILLENNIUM HOLDINGS INC.,

Plaintiff,

- against -

THE GLIDDEN COMPANY,

Defendant.

FILED
JUN 26 2009
COUNTY CLERK'S OFFICE
NEW YORK
Index No. 600920/2008

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SHIRLEY KORNREICH, J.:

In this action seeking a declaratory judgment, and contractual and common-law indemnification with respect to certain lead-based paint and lead pigment claims, defendant moves, pursuant to CPLR 3211 (a) (1), (2) and (7), for an order dismissing the complaint insofar as it seeks: (1) common-law indemnification; (2) a declaration of contractual indemnification rights with respect to claims that may be filed in the future; and (3) a declaration of contractual indemnification rights with respect to lead-based paint, as opposed to lead pigment, claims.

FACTUAL ALLEGATIONS

In the 1930s, the company which originally had the Glidden name (Old Glidden) was involved in the business of manufacturing and selling paints and coatings, and various components thereof, including lead pigment. Old Glidden allegedly stopped manufacturing and selling lead pigment, and paints and coatings which contained it, in the 1950s or 1960s. In 1967, Old Glidden was acquired by and merged into SCM Corporation (SCM). In or about 1985 or 1986, SCM allegedly transferred a non-lead pigment making business that it was operating to a newly created subsidiary of SCM named ABC Chemicals, Inc. (ABC). In 1986, all of SCM's common stock was acquired by an entity named Hanson Trust PLC (Hanson) in a "closeout" merger. Thereafter, SCM allegedly adopted a plan of liquidation and dissolution, pursuant to which SCM transferred its assets and liabilities to 20 newly created corporate subsidiaries of Hanson, or "fan companies," named HSCM-1, Inc. through HSCM-20, Inc.

Plaintiff and defendant are successors of, respectively, HSCM-20, Inc. (HSCM-20) and HSCM-6, Inc. (HSCM-6). On or about August 12, 1986, pursuant to a "memorandum of distribution

in liquidation” between SCM and HSCM-6, HSCM-6 allegedly acquired all of SCM’s “right, title and interest ... in all of the property, rights and assets ... relating to the business (the “Business”) of developing, manufacturing, marketing, selling and distributing paints, industrial coatings, resins and adhesives ... including ‘Glidden’ ... products” (Complaint, ¶ 23). HSCM-6 also allegedly assumed “all of the obligations and liabilities relating to the Business, including all claims, whether asserted or unasserted, known or unknown, contingent or otherwise ... attributable to all periods prior to the date” of the foregoing memorandum (*id.*, ¶ 24). Pursuant to another “memorandum of distribution in liquidation,” HSCM-20 allegedly acquired the then-remaining assets of SCM -- which included the stock of HSCM-6 and the stock of ABC -- and assumed all of the obligations and liabilities relating to those assets.

Pursuant to a purchase agreement dated as of August 14, 1986 (the Purchase Agreement), HSCM-20 sold all of the outstanding stock of HSCM-6, and allegedly transferred certain liabilities, to ICI American Holdings, Inc. (ICIAH), a wholly owned subsidiary of Imperial Chemical Industries PLC (ICI; collectively, with ICIAH, the ICI Parties). Under subsections 9.1 and 9.2 of the Purchase Agreement, HSCM-20 agreed to indemnify the ICI Parties and HSCM-6 for a percentage of certain product safety, liability and warranty claims which decreased over time, from 100% for covered claims asserted before or within three years following the closing on the Purchase Agreement to 0% for covered claims asserted more than eight years following the closing. Subsection 9.3 of the Purchase Agreement provided for a reverse, or “flip,” indemnity, pursuant to which ICIAH agreed to indemnify HSCM-20 for covered claims to the extent that HSCM-20 was not required to indemnify the ICI Parties and HSCM-6 for those claims under subsections 9.1 and 9.2, such that ICIAH was obligated to indemnify HSCM-20 for all covered claims that were asserted more than eight years after the closing.

Plaintiff Millennium Holdings Inc. (Millennium) is allegedly “the indirect successor to HSCM-20” (*id.*, ¶ 26). HSCM-6, which was subsequently renamed The Glidden Company (Glidden), is the defendant herein. The complaint alleges that, in December 2000, Glidden accepted

the assignment and transfer of all of the rights, obligations, liabilities and interests of the ICI Parties arising under the Purchase Agreement, and Millennium consented to the assignment and transfer. Millennium asserts accordingly that, pursuant to subsection 9.3 of the Purchase Agreement, Glidden is obligated to indemnify Millennium, as the successor of HSCM-20, for 25% of any covered claim first asserted in the fourth year following the closing, 50% of any covered claim first asserted in the fifth through eighth years following the closing, and 100% of any covered claim first asserted more than eight years after the closing.

Millennium asserts that the covered claims include all claims relating to Old Glidden's business of manufacturing and selling lead pigment and lead-based coatings and paints. In the fourth year following the closing and thereafter, Millennium and/or its affiliates have allegedly been named as defendants in "numerous cases alleging personal injuries, property damage, and/or public nuisance resulting from the presence of old lead paint, or lead pigment from old paint, in poorly maintained inner-city housing (collectively, the 'Lead Litigation Cases')" (*id.*, ¶ 7). According to Millennium, the plaintiffs in the Lead Litigation Cases "typically allege that Millennium and/or its affiliates are liable[] as alleged successors to the past operations of ... [Old] Glidden's former ... business of manufacturing and selling (i) lead pigment for use as an ingredient in paint and (ii) lead paint" (*id.*). Millennium alleges that, although the ICI Parties and Glidden received the full benefit of the Purchase Agreement's indemnity provisions for the eight years following the closing, Glidden has refused to honor its obligation to provide reverse indemnity to Millennium with respect to the Lead Litigation Cases.

The complaint asserts two causes of action. The first alleges a claim for common-law and contractual indemnification, and seeks damages in the amount of the legal and expert fees, remediation and abatement expenses, other costs, settlement payments, judgments and other liabilities which have been or are incurred by Millennium in past, currently pending and future Lead Litigation Cases.¹ The second seeks a judgment declaring that Glidden is obligated to indemnify

¹Paragraph 10 of the Complaint states that Millennium seeks an award of such damages only "for any such amounts incurred as of the date of any judgment herein."

Millennium for the foregoing fees, costs, expenses and liabilities which have been incurred, or are incurred, in connection with past, currently pending and future Lead Litigation Cases.²

DISCUSSION

Glidden's motion is granted, in part, to the extent that the first cause of action, insofar as it seeks damages based upon common-law indemnification, and the second cause of action, insofar as it seeks a declaration of Millennium's contractual indemnification rights with respect to claims that may be filed in the future, are dismissed.

Millennium asserts that it is entitled to common-law indemnification from Glidden with respect to the Lead Litigation Cases because Glidden is "the successor to [Old] Glidden's past lead paint and lead pigment operations and sales" (*id.*, ¶ 50), and the corporate successor to Old Glidden, which "the Lead Litigation Cases plaintiffs allege was the 'actual wrongdoer'" (Pl. Mem. of Law, at 11).

However, while "[t]he principles of common-law indemnification allow [a] party held vicariously liable to shift the entire burden of the loss to the actual wrongdoer" (*Frank v Meadowlakes Dev. Corp.*, 6 NY3d 687, 691 [2006]), those principles do not permit the shifting of that burden to a party who is not the actual wrongdoer, and whose liability is also purely vicarious (*see e.g. Markey v C.F.M.M. Owners Corp.*, 51 AD3d 734, 738 [2d Dept 2008]). Millennium does not allege that Glidden itself is liable for common-law indemnification as the actual wrongdoer with respect to the injuries alleged in the Lead Litigation Cases, but only as the successor to Old Glidden, and to the lead-based paint and lead pigment businesses which were conducted and discontinued by Old Glidden before it was acquired by SCM. Glidden's alleged successor liability is a form of secondary, vicarious liability, because it is predicated upon the liability of a predecessor entity (*see e.g. R.C.M. Exec. Gallery Corp. v Rols Capital Co.*, 901 F Supp 630, 636 [SD NY 1995]; *see also Santa Maria v Owens-Illinois, Inc.*, 808 F2d 848, 851 n 5 [1st Cir 1986]). Accordingly, inasmuch

²Paragraph 10 of the Complaint states that Millennium is seeking a declaration that Glidden is obligated to indemnify Millennium for such costs and liabilities only "to the full extent [that they are] not covered by insurance."

as Glidden's purported liability with respect to the injuries alleged in the Lead Litigation Cases is purely vicarious, Millennium has failed to state a cause of action against Glidden for common-law indemnification, and the first cause of action, insofar as it asserts such a claim, is dismissed.³

The second cause of action -- insofar as it seeks a judgment declaring that Glidden is obligated to indemnify Millennium with respect to Lead Litigation Cases which, although not currently pending, may be filed against Millennium in the future -- is also dismissed.

CPLR 3001 authorizes the Supreme Court to render a declaratory judgment "as to the rights and other legal relations of the parties to a justiciable controversy." In order to be justiciable, a controversy must "involve present, rather than hypothetical, contingent or remote, prejudice" to a plaintiff (*American Ins. Assn. v Chu*, 64 NY2d 379, 383, cert denied 474 US 803 [1985]). "The dispute must be real, definite, substantial, and sufficiently matured so as to be ripe for judicial determination" (*Waterways Dev. Corp. v Lavelle*, 28 AD3d 539, 540 [2d Dept 2006]), inasmuch as "courts are not empowered to render advisory opinions, or determine abstract, ... hypothetical, remote or academic questions" (*Matter of Ideal Mut. Ins. Co.*, 174 AD2d 420, 421 [1st Dept 1991] [citation and internal quotation marks omitted]).

Under the foregoing principles, Millennium's request for a declaratory judgment with respect to Lead Litigation Cases which may be filed against Millennium in the future is premature and non-justiciable. Such possible future cases involve a prejudice to Millennium which is merely hypothetical and contingent, rather than present, and any dispute between the parties concerning Glidden's indemnification obligations with respect to such cases is, similarly, merely abstract and hypothetical, rather than sufficiently definite and matured as to be ripe for judicial determination (*see Spitzer v Schussel*, 48 AD3d 233, 234 [1st Dept 2008] ["hypothetical possibility that a lawsuit might

³Millennium's liability for the injuries alleged in the Lead Litigation Cases, like Glidden's, would be based upon its liability as a purported successor to the lead-based paint and/or lead pigment businesses that were conducted by Old Glidden in and/or before the 1960s. One Michigan state court, which considered whether there was a right to common-law indemnity as between two successor owners of an actively negligent manufacturer, determined that no such right existed because, the liability of each of the successors being vicarious, they were in *part delicto* (*cf. Liberty Mut. Ins. Co. v Curtis Noll Corp.*, 112 Mich App 182, 186-187 [Mich Ct App 1982]).

be filed is not sufficiently immediate and real to constitute a justiciable controversy”]; *Allstate Ins. Co. v Hertz Corp.*, 119 AD2d 612, 613 [2d Dept 1986]; cf. *Van Deventer v CS SCF Mgt. Ltd.*, 47 AD3d 503, 504 [1st Dept 2008]; *New York Cent. Mut. Fire Ins. Co. v Smith*, 16 AD3d 1028, 1028 [4th Dept 2005]; *Olin Corp. v Consolidated Aluminum Corp.*, 5 F3d 10, 17 [2d Cir 1993]; *Rosen v Mega Bloks Inc.*, 2009 WL 929474, *7 [SD NY 2009]; *FSP, Inc. v Societe Generale*, 2003 WL 124515, *4-*5 [SD NY], *affd* 350 F3d 27 [2d Cir 2003]).

Insofar as Glidden moves for dismissal of so much of the second cause of action as seeks a declaration of contractual indemnification rights with respect to lead-based paint, as opposed to lead pigment, claims, Glidden’s motion is denied. Glidden argues that Millennium’s request for a such a declaration should be dismissed as premature, and non-justiciable, because Millennium’s filings with the Securities and Exchange Commission (SEC) confirm that there are no lead-based paint claims currently pending against Millennium, and that all of the currently pending Lead Litigation Cases assert lead pigment claims.⁴ In support of its motion, Glidden has submitted copies of

⁴Glidden asserts that lead-based paint claims, as opposed to lead pigment claims, are not likely to be asserted against Millennium in the future because: hundreds of entities formerly manufactured paint which contained lead pigment; plaintiffs have generally been unsuccessful in suing the manufacturers of paint which contained lead pigment, because the plaintiffs have been unable to identify which particular entity or entities made the paint that was used in any particular residence; only a relatively small number of entities manufactured the lead pigment which was used in virtually all of the paints that contained lead pigment; and plaintiffs have increasingly sought to overcome their inability to identify the relevant paint manufacturer(s) by bringing actions against the pigment manufacturers, asserting that -- pursuant to theories of “enterprise” or “market share” liability -- they should not be required to identify the specific manufacturer of the lead pigment involved in a particular case, because of the small number of pigment manufacturers which shared the entire market (*see* Def. Mem. of Law, at 5).

Glidden also argues that the court should particularly refrain from rendering a declaratory judgment with respect to possible future lead-based paint claims because, as regards the extent of Glidden’s obligations to indemnify Millennium pursuant to the indemnification provisions contained in the Purchase Agreement, lead-based paint claims involve different issues than lead pigment claims. Glidden asserts that the two types of claims involve different issues because “the pigment business has a different corporate chain of ownership than the paints business” (Def. Mem. of Law, at 15), in that all of the assets and liabilities relating to Old Glidden’s paint business were allegedly transferred to HSCM-6, which became Glidden, whereas all of the assets and liabilities relating to Old Glidden’s pigment business were allegedly acquired by ABC and/or HSCM-20, both of which ultimately became Millennium (*see* Def. Reply Mem. of Law, at 7).

Millennium's Forms 10-K for 2006 and 2007, and Millennium's Form 10-Q for the quarter ending March 31, 2008. Each of those documents contains a statement that is similar in nature to a statement contained in Millennium's Form 10-Q for the quarter ending March 31, 2008, which indicates that "Millennium currently remains named a defendant in 22 cases arising from [Old] Glidden's manufacture of lead pigments" (Kiernan Affirm., Ex. C, at 38).

However, dismissal of a claim is warranted under CPLR 3211 (a) (1), on the ground that the claim is barred by documentary evidence, "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]). Here, the SEC filings submitted by Glidden do not conclusively establish that all of the Lead Litigation Cases which are currently pending against Millennium assert exclusively lead pigment, as opposed to lead-based paint, claims. For example, Millennium's Form 10-Q for the quarter ending March 31, 2008 contains not only the statement previously quoted, but other statements suggesting that there are lead-based paint claims currently pending against Millennium, e.g.: "Millennium has been named as a defendant in various legal proceedings alleging personal injury, property damage, and remediation costs allegedly associated with the use of [lead-based paint and lead pigments for use in paint];" "[l]egal proceedings relating to lead pigment or paint are in various trial stages and post-dismissal settings ...;" "Millennium believes that it has valid defenses to all the lead-based paint and lead pigment proceedings and is vigorously defending them ...;" and "[w]ith the exception of two cases, all pending lead-based paint and lead pigment litigation involving Millennium ... were filed after the eight-year [indemnification] period" provided for in the Purchase Agreement (Kiernan Affirm., Ex. C, at 16, 38).⁵ Hence, Glidden has not conclusively established that Millennium may be held liable

⁵Millennium has also submitted, in opposition to Glidden's motion, copies of what Millennium claims are "three complaints in pending Lead Litigation Cases in which Millennium, or a predecessor or affiliate of Millennium (SCM), is named alleging injuries from exposure to lead paint" (Pl. Mem of Law, at 13 [emphasis in original]; see also Levine Affirm., ¶¶ 4-6 and Exs. B-D). However, Millennium acknowledges that it was not served with the complaint in two of the actions, and Glidden has submitted copies of court documents which ostensibly indicate that those two actions have been withdrawn or dismissed as against Millennium, and asserts that the third remains

only for lead pigment claims.

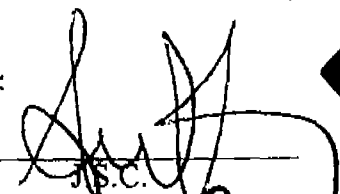
Further, Glidden may be liable for defense costs for lead-paint claims asserted against Millennium in the past. The complaint alleges that lead-based paint claims previously were asserted against Millennium (Complaint, ¶ 7). Millennium asserts that Glidden must indemnify it for defense costs paid by Millennium for claims that are no longer pending in cases that did not result in a judgment against or a settlement payment by Millennium. Attorneys' fees are among the expenses for which Millennium allegedly is entitled to indemnification pursuant to the Purchase Agreement (see Purchase Agreement, § 9.1). Therefore, Millennium's payment of defense costs would be sufficient to render ripe Millennium's request for a declaration of Glidden's indemnification obligations for lead-based paint claims that did not reach settlement or judgment (cf. *Rosen v Mega Bloks Inc.*, 2009 WL 929474 at *4 n 4). For the foregoing reasons, it is hereby

ORDERED that the motion to dismiss is granted solely to the extent that the first cause of action, insofar as it seeks common-law indemnification, and the second cause of action, insofar as it seeks a declaration as to Millennium's contractual indemnification rights with respect to claims that may be filed in the future, are dismissed, and in all other respects the motion is denied; and it is further

ORDERED that Glidden is directed to serve an answer to the complaint within 10 days after service upon it of a copy of this order with notice of entry; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on July 30, 2009 at 9:30 a.m. in Room 418 of the Courthouse located at 60 Centre Street, New York, N.Y.

Dated: 6/24/09

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J.S.C.
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_____ pending only to the extent that a lower court's dismissal of the claims in that action as against SCM, on the merits, "has not yet been affirmed on appeal" (Def. Reply Mem. of Law, at 6).