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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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2635 REALTY DEVELOPMENT CORPORATION,
and BELLESYS, INC.,

Plaintiffs,

-against-

299 MAIN ST. LLC, 19 LIBERTY LTD.,
SAMUEL PADILLA and ALEXANDER HOLUKA,

Defendants

----------x

MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 12
Index No.: 22239/09
Motion Seq. No.: 01

AMENDED
DECISION AND ORDER

Papers Read on this Motion:

Defendants' Notice of Motion	01
Plaintiffs' Summons and Complaint	xx
Plaintiffs' Affidavit in Opposition	xx
Defendants' Affidavit of Alexander Holuka	xx
Defendants' Reply Memorandum	xx
Defendants' Memorandum of Law	xx
Plaintiffs' Memorandum of Law	xx
Plaintiffs' Affidavit of Paula Scappatura	xx

The defendants 299 Main St. LLC, hereinafter referred to as ("299 Main Street"), and 19 Liberty, Ltd., and Samuel Padilla, hereinafter referred to as ("Padilla") and Alexander Holuka ("Holuka") move for an order pursuant to CPLR §3212, granting them summary judgment.

Plaintiffs herein 2635 Realty Development Corporation ("2635 Realty") and BelleSys, Inc. ("BelleSys") commenced this action for defendants' alleged breach of contract. The motion involves the sale of commercial property on March 14, 2005, located at 299 Main Street, Westbury, New York ("the premises"). The contract for sale (see Exhibit 1-A annexed to defendants' motion) between 2635 Realty, the seller and 299 Main Street, the purchaser. The premises was located within the New Cassel Industrial Area ("NCIA"). The NCIA was believed to be the source of groundwater contaminants in the

area south of NCIA . This was the belief of the New York State Department of Environmental Conservation ("NYSDEC"). At the time of the contract, 2635 Realty was involved in the environmental cleanup of the premises per a 1999 court order with the NYSDEC (see Exhibit 1-D annexed to defendants' motion). At the sale of the premises, both 2635 Realty and the purchaser 299 Main Street, were aware that the NYSDEC held 2635 Realty, as the owner of the premises, responsible for the offsite contamination via the groundwater of the Western Plume area. Pursuant to the contract of sale, the purchaser, 299 Main Street, was to take over the environmental cleanup.

299 Main Street sought a covenant in the contract wherein it, it, would not be sued nor would it be exposed to efforts of contribution by NYSDEC (see Exhibit 1-A, sec. 5.09 annexed to defendants' motion). 299 Main Street also obtained a 2006 order from NYSDEC wherein 299 Main Street would not be included in any cleanup work in the Operation Unit #3 area ("O.U. #3") of NCIA. This order involved groundwater contamination south of Old Country Road in the NCIA (see Exhibit 1-F, sec. II-A, pgs. 203 annexed to defendants' motion). Thus the 2006 order on consent (see Exhibit 1-F, g. 6, sec. G) expressly released defendants from liability for contamination in O.U. #3 and provided contribution for all response costs.

299 Main Street was to try and obtain a covenant wherein 2635 Realty was not to be sued or make contribution to NYSDEC (see Exhibit 1-A, sec. 5.10, pg. 5 annexed to defendants' motion). 299 Main Street was not able to negotiate such a consent order from NYSDEC for 2635 Realty.

299 Main Street alleges 2635 Realty could have canceled the sale due to 299 Main Street's failure to get the consent order from NYSDEC, but the sale went through. 2635 Realty did not cancel.

In June 2008, 2635 Realty notified defendants (see Exhibit 1-J annexed to defendants' motion) that New York State had named 2635 Realty as a former owner of the premises as a defendant in an

action in the Federal District Court, Eastern District involving groundwater pollution in an area bordering NCIA south of Old Country Road. Defendants herein were not named as defendants in the federal action.

Plaintiffs (BelleSys was an assignee of the mortgage and note 2635 Realty took in the sale of the premises) commenced this action to demand that defendants indemnify and defend plaintiffs for all claims asserted against plaintiffs in the federal action. Plaintiffs estimate their damages in the federal action could exceed $8 million. Plaintiffs contend that the original purchase price of the property of $1,050,000 was reduced to $963,590 so that defendants would in effect, "cover" plaintiffs for just such a contingency.

Defendants argue this request by plaintiffs contradicts the intent of the parties. Defendants allege as per the 2006 consent order, they, the defendants are in the clear for any liability in the O.U. #3 area. They, the defendants, aver they have settled with the State as evidenced by the fact that they, the defendants, are not named as defendants in the 2008 New York State action commenced in Federal Court.

Also, plaintiffs allege the individual defendants, Padilla and Holuka, are liable to plaintiffs since the individual defendants signed guarantees that guaranteed payment of the note on the mortgage and guaranteed that the defendants shall indemnify, etc. plaintiffs for all claims brought against the plaintiffs. Plaintiffs contend the 2008 Federal action brought by the State of New York is such a claim (see Exhibit 1-A, § 5.05[b], pg. 4 annexed to defendants' motion).

As to BelleSys' status as assignee, where, as here, a valid assignment of a claim is absolute on its face and the assignor is divested of all control, the assignee is the proper party in interest and has a right to commence and prosecute an action (*see Cardtronics, LP v St. Nicholas Beverage Discount*

Center, Inc., 8 AD3d 419 [2d Dept 2004]).

Based on the plaintiff's allegations, BelleSys is a proper party as assignee of the note and mortgage.

An attorney's affidavit annexed with contracts and other documentary evidence is sufficient to establish a party's entitlement to summary judgment (*Ramseur v Hudsonview Co.*, 59 AD3d 308 [1st Dept 2009]).

Thus, the attack and argument by plaintiffs that defendants' attorney's affirmation is of no moment is, by the exhibits offered by defendants' counsel, an unavailing argument.

Groundwater is the property of the State (*see Castle Village Owners Corp. v Greater New York Mut. Ins. Co.*, 64 AD3d 44, 49 [1st Dept 2009]). Thus the State's action is a "claim" by a third party, i.e., a non-party to the sale of the premises.

The Comprehensive Environmental Responses, Composition and Liability Act (CERCLA) provides that everyone who is potentially responsible who created such risks of hazardous waste contamination may be forced to contribute to the cost of cleaning (*U.S. v Bestfoods*, 524 U.S. 51, 56 [1998]).

One potentially responsible party can, potentially, be accountable for the entire amount expended to remove or remediate hazardous materials under CERCLA (*Niagra Mohawk Power Corp. v Chevron U.S.A., Inc.*, 596 F3d 112 [Second Circuit 2010]).

Some case law has held that instituting common law restrictions and indemnification action in state court could bypass the CERCLA's carefully crafted settlement system (*Bedford Affiliates v Sills*, 156 F3d 416 [Second Circuit 1998]).

However, it is clear from the language of the statute that CERLCA does not expressly pre-empt

state law (*see New York v Ametek, Inc.*, 473 2d Supp. 432).

The holding in *Bedford Affiliates v Sills*, *supra*, did not pre-empt a state's common law remedies on the basis of conflict preemption principles where the state brought a cost recovery action *(see State of New York v Next Millenium Realty, LLC,* ___F Supp 2d___, 2007 WL2362144).

Thus, CERCLA, as a whole, does not expressly pre-empt state law but simply prohibits states from recovering compensation for the same removal costs or damages under both CERCLA or other federal laws; state claims are not barred (*Hickey's Carting, Inc. v Town of Islip*, 380 F Supp. 2d 108 [Eastern District 2005]). CERCLA does ot pre-rempt state law remedies of restitution and indemnification *(Bedford Affiliates v. Sills, supra.*

To resolve contribution claims under CERCLA, the court may allocate response costs among liable parties using such equitable factors as the court determines appropriate (*Bedford Affiliates v Sills*, supra).

A potentially responsible person under CERCLA may not bring a cost recovery action but is limited to an action for contribution from any other person who is liable or potentially liable for response costs (*Bedford Affiliates v Silles*, *supra.*

Thus, is 299 Main Street a potentially responsible person? Did 299 Main Street contribute actively to the contamination?

A consent order executed by the owner of contaminated properties and New York's Department of Environmental Conservation, under which the property owner obtained a specific release of CERCLA liability qualified as an "administrative or judicially approved settlement," such that the property was entitled to such contribution under CERCLA *(Niagara Mohawk Power Corp. v Chevron U.S.A., Inc.*, supra). Thus, 299 Main Street could seek contribution.

The owner of contaminated properties could not bring an action under CERCLA for reimbursement for removal or remedial costs where the property owner acknowledged responsibility and paid for response costs and settled its CERCLA liability with New York's Department of Environmental Conservation (*Niagara Mohawk Power Corp. v Chevron U.S.A., Inc., supra)*

Neither 2635 Realty nor 299 Main Street seem to fit into this category.

The owner of contaminated properties could not maintain a contribution claim under CERCLA for property owner which it had taken no remedial action and incurred no cost to investigate or cleanup *(Niagara Mohawk Power Corp. v Chevron U.S.A., Inc., supra*).

With respect to parties contracting to indemnify each other for the costs stemming from environmental liabilities, this claim will be interpreted under traditional contract law principles *(see Horsehead Industries, Inc. v Paramount Communication, Inc.*, 258 F3d 132 [Third Circuit 2001]).

In construing the terms of a contract, the judicial function is to give effect to the parties' intentions (*see generally, Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]; *R/S Associates v New York Job Development Authority*, 98 NY2d 29, 32 [2002]; *W.W.W. Associates, Inc. v Giancontieri*, 77 NY2d 157, 162 [1990]).

A contract should be read as a whole to determine its purpose and intent (*see, W.W.W. Associates, Inc. v Giancontieri, supra).*

"It is axiomatic that a contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed" (*Breed v Insurance Co. of North America*, 46 NY2d 351, 355 [1978]). Accordingly, "[W]hen sophisticated and counseled business persons" "set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (*Reiss v Financial Performance Corp.*, 97 NY2d 195, 198 [2001]); see also *R/S*

Associates v New York Job Development Authority, supra; *W.W.W. Assocs. v Giancontieri, supra.*

Notably, " 'courts may not by construction add or excise terms, nor distort the meaning of those used and thereby "make new contract for the parties under the guise of interpreting the writing' " (*Schmidt v Magnetic Head Corp.*, 97 AD2d 151, 157 [1983], quoting from *Morlee Sales Corp. v Manufacturers Trust Co.*, 9 NY2d 16, 19 [1961]; *see also, Reiss v Financial Performance Corp., supra*, at 199-200). "Evidence outside the four corners of the document as to what was really intended but instated or misstated is generally inadmissible to add to or vary the writing" (W.W.W. Associates, Inc. v Giancontieri, 77 NY2d 157, 565 [1990]).

Rather, "[e]ffect and meaning must be given to every term of the contract" (*Village of Hamburg v American Ref-Fuel Co. of Niagara, L.P.*, 284 AD2d 85, 89 [4th Dept 2001] *see, Country of Columbia v Continental Ins. Co.*, 83 NY2d 618, 628 [1994]), and reasonable effort must be made to harmonize all of its terms *(Two Guys from Harrison-N.Y. Inc. v S.F.R. Realty Associates*, 63 NY2d 396 [1984]; *National Conversion Corp. v Cedar Bldg. Corp.*, 23 NY2d 621, 625 [1969].

The contract must be interpreted so as to give effect to, not nullify, its general primary purpose (*Williams Press, Inc. v State*, 37 NY2d 434, 335 [1975]).

To the extent that 2635 Realty seeks contractual indemnity for 2635 Realty's own negligence, the provision is not enforceable (S.O.L. § 5-321, *Danielson v Jamico Operating Corp.*, 20 AD3d 446 [2d Dept 2005]).

To invoke a right of contribution, a party must resolve the underlying, common liability toward a third party (*see N.Y. State Electric & Sons Corporation v Fistenergy Corp.*, F Supp 2nd, 2007 WL 143901). This would be New York State's claim against 2635 Realty on the issue of the groundwater.

Issues of fact exist as to whether 2635 Realty Development was negligent under CERCLA

guidelines is premature at this point since the federal action dealing with 2635 Realty's role is just commencing. Thus, 2635 Realty may be negligent, and it may not seek indemnity/contribution for defendants if 2635 Realty is ultimately found negligent.

Also, no discovery has yet to be conducted. A party should be given a reasonable opportunity to conduct discovery prior to a determination of a motion for summary judgment (*see Amico v Melville Volunteer Fire Co., Inc.*, 39 AD3d 784).

Here, clearly defendants' motion is premature in that respect (CPLR §3212[f]; *Elliot v County of Nassau*, 53 AD3d 561) and therefore **denied**. It is hereby

ORDERED, that the parties are directed to appear in DCM for a Preliminary Conference on September 23, 2010.

This constitutes the Decision and Order of the Court.

DATED: September 13, 2010
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

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