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SCANNED ON 4/12/2012

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. SHERRY KLEIN HEITLER

Index Number : 112195/2011

THERMWELL PRODUCTS, INC.

vs

NITTO DENKO AMERICA, INC.

Sequence Number : 001

DISMISS

(LOCKHEED / MARTIN MARIETTA)

PART 30

INDEX NO. 112195/11

MOTION DATE _____

MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is Granted

As per the annexed decision & 4.5.12.

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

FILED

APR 12 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4.5.12

_____, J.S.C.

HON. SHERRY KLEIN HEITLER

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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THERMWELL PRODUCTS, INC.,

Plaintiff,

- against -

NITTO DENKO AMERICA, INC.,
NITTO DENKO AUTOMOTIVE, INC.,
PERMACEL KANSAS CITY, INC.,
MARTIN MARIETTA MATERIALS, INC.,
LOCKHEED MARTIN CORPORATION,

Defendants.

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Index No. 112195/11
Motion Seq. #'s 001, 002, 003

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.:

Motion sequence Nos. 001, 002, and 003 are consolidated herein for disposition.

Defendants Martin Marietta Materials, Inc. ("Martin Marietta"), the Lockheed Martin Corporation ("Lockheed"), Nitto Denko America, Inc., Nitto Denko Automotive, Inc., and Permacel Kansas City, Inc. (collectively "Nitto Denko") (hereinafter, "Defendants"), respectively, move pursuant to CPLR 3211(a) to dismiss plaintiff Thermwell Products, Inc.'s ("Thermwell") complaint against each of them. Defendants also seek, respectively, costs and fees, and the imposition of sanctions against Thermwell for initiating this action in violation of court order. In addition, defendant Martin Marietta moves to dismiss the complaint against it on the ground of improper service of process.

BACKGROUND

In or about August 2009, Roberta and Stuart Friedman filed an asbestos-related personal injury action in this court under Index No. 190263/09 (the "Friedman Action") against various

defendants. In December 2009, the Friedmans amended their complaint to add Thermwell as a defendant, alleging that it was liable for Ms. Friedman's exposure to asbestos from a product called "Frost King Rope Caulk." On or about April 6, 2011, Thermwell filed a third-party complaint in the Friedman Action against Nitto Denko, alleging that Frost King Rope Caulk was sold through the Nitto Denko owned trademark "Presstite," and against Martin Marietta, alleging that it was a successor-in-interest to the company that manufactured Frost King Rope Caulk. Thermwell sought to recover from these companies under principles of common-law indemnification.

Thereafter, Nitto Denko and Martin Marietta moved pursuant to CPLR 3211(a) to dismiss the third-party complaint as untimely under the New York City Asbestos Litigation Case Management Order, as amended May 26, 2011 ("CMO"), which governs asbestos related litigation in this court. Martin Marietta also moved therein to dismiss for defective service pursuant to CPLR 3211(a)(8). In the alternative, both defendants sought summary judgment pursuant to CPLR 3212. Thermwell cross-moved pursuant to CPLR 3025(b) for leave to amend its third-party complaint to add Lockheed, as alleged successor to Martin Marietta, as an additional third-party defendant.

By decision and order dated October 17, 2011 ("Oct. 17 Order")[1], this court dismissed Thermwell's third-party complaint in light of its extended violation of the CMO, which outlines specific procedures for the filing of third-party complaints. *See* CMO § XV.E.2.f. Such dismissal was "without prejudice and with leave to refile its indemnification action in the proper form in the event that a judgment is entered against Thermwell in the underlying action" (Oct. 17 Order, p. 6).

[1] The Oct. 17 Order is incorporated herein by reference and made a part hereof.

On October 26, 2011, less than ten days later, Thermwell initiated the within separate plenary action, which asserts claims against the Defendants that are substantively the same as the claims asserted by Thermwell in the third-party action, which was conditionally dismissed by this court on October 17, 2011.

As set forth above, the consolidated motions seek dismissal of the within complaint primarily on the ground that Thermwell violated the express terms of the Oct. 17 Order by filing this action prematurely.

DISCUSSION

Indemnification actions may be filed after the complaining party suffers some kind of pecuniary loss. *See McDermott v New York*, 50 NY2d 211, 216 (1980) ("Indemnification claims generally do not accrue for the statute of limitations purposes until the party seeking indemnification has made payment to the injured person"). By its express terms, the Oct. 17 Order conditioned Thermwell's permission to file a new indemnification action upon entry of an adverse judgment against it in the Friedman Action,[2]

Notwithstanding the Oct. 17 Order, Thermwell filed the within indemnification action on October 26, 2011 without satisfying the condition upon which this court permitted any such new filing (*see* CPLR 1010). In this regard, Thermwell admits in the complaint herein that at the time of filing of this action, there had been no recovery against it in the Friedman Action, either

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[2] Thermwell could have also satisfied the terms of the Oct. 17 Order upon proof that it had obtained a settlement in the Friedman Action. *See McDermott v New York*, 50 NY2d 211, 220 (1980) ("one who settles a tort action against him may continue to pursue a cause of action for indemnification").

by way of judgment or settlement (Affirmation of Adam D. Smith, dated November 15, 2011, Exhibit A, ¶ 61; emphasis added):

> That by reason of the foregoing, *if the plaintiffs in the underlying action recover a judgement or settlement against Thermwell* for the injuries they allege to have suffered at the time and place mentioned in the complaint in the underlying action, such damages and liability imposed on THERMWELL has been caused and brought about by reason of the primary and active negligence of NITTO DENKO AUTOMOTIVE . . . NITTO DENKO AUTOMOTIVE is bound to defend, indemnify, and pay any and all judgments, settlement, costs, attorneys' fees, costs of investigations and disbursements incurred by THERMWELL in the underlying action.

It appears, however, that a settlement of some kind may have been reached shortly after this action was commenced. By letter dated January 11, 2012 to the Hon. Martin Shulman of this court, plaintiff's counsel advised that "Roberta Friedman's action against Thermwell (Index No. 190263/09) has been resolved."

In that same letter Thermwell asserted that such resolution of the Friedman Action obviated all of the Defendants' objections set forth in the within motions. To the contrary, the central fact, ultimately dispositive of the instant motions to dismiss, is that Thermwell knowingly filed the present action in contravention of the Oct. 17 Order. Any settlement Thermwell may have thereafter entered into with the Friedmans does not excuse its conduct in not following this court's order by prematurely commencing this action and does not relieve it from liability for the Defendants' costs and attorneys fees in responding thereto.

The Defendants should not have been required to defend against this action before any judgment was entered or before any settlement was reached. Moreover, it has not been made clear whether the resolution of the Friedman Action concluded in the form of a settlement agreement, whether such agreement included Thermwell, or if any settlement proceeds have

been transferred.[3] As such, in light of all the circumstances herein and in the interests of justice, this action must once again be dismissed without prejudice.[4] *See* CPLR 8106, 8108. Defendants' requests for sanctions is denied.

Accordingly, and in light of the foregoing, it is hereby

ORDERED that the issue of reasonable costs and legal fees on these motions is hereby referred to a Special Referee to hear and report, except that, in the event of and upon the filing of a stipulation of the parties, the Special Referee shall determine the aforesaid issue. Plaintiff shall serve a copy of this decision with notice of entry on the Office of Special Referee (Room 119 at 60 Centre Street) within 30 days from the date of entry so that the issue may be placed on Special Referee's calendar at the earliest possible date; and it is further

ORDERED that counsel shall immediately consult one another and counsel for defendants shall, within 15 days from the date of entry, submit to the Special Referee Clerk by fax (212-401-9186) or email (spref@courts.state.ny.us) an Information Sheet (which is posted on the website for this court at www.nycourts.gov/supctmanh at the "References" link under

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[3] In response to Thermwell's January 11, 2012 letter, counsel for Martin Marietta indicated that Thermwell "has refused to provide us with any settlement documentation." *See* Letter from David S. Pegno, Esq. to the Hon. Martin Shulman, dated January 13, 2012.

[4] Accordingly, the court need not decide the improper service portion of Martin Marietta's motion. However, in as much as this issue was raised by the parties in the Friedman Action, and the court anticipates its ripeness in the future, the court notes that Thermwell's evidence appears to be insufficient for the purposes presented. *See* NY Bus. Corp. § 307(b); *Stewart v Volkswagen of Am., Inc.*, 81 NY2d 203, 208 (1993); *Flick v Stewart-Warner Corp.*, 76 NY2d 50, 57 (1990); *Low v Bayerische Motoren Werke, A.G.*, 88 AD2d 504, 505-506 (1st Dept 1982); *Donley v Gateway 2000, Inc.*, 266 AD2d 184 (2d Dept 1999); *See Volkswagenwerk Aktiengesellschaft v Beech Aircraft Corp.*, 751 F2d 117, 120-122 (2d Cir. 1984); *SST Foundation v International Footnotes*, Ltd., 2010 NY Misc. LEXIS 2152, at *6 (Sup. Ct. NY Cty. May 13, 2010).

"Courthouse Procedure") containing all of the information called for therein and, as soon as practical thereafter, this court requests the Special Referee Clerk to advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that Defendants shall serve a pre-hearing memorandum upon plaintiff within 24 days of entry and the plaintiff shall serve objections thereto within 20 days from service upon plaintiff of Defendants' papers. The foregoing shall be filed with the Special Referee Clerk at least one day prior to the original appearance date in the Special Referee Part fixed by the Clerk as set forth above; and it is further

ORDERED that the hearing shall be conducted in the same manner as a trial before a Justice without a jury (*see* CPLR 4318), and that the parties shall appear for the reference hearing, including with all such witnesses and evidence as they may seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part, and it is further

ORDERED that, except as otherwise directed by the assigned Special Referee for good cause shown, the hearing of the issue specified above shall proceed from day to day until completion, and it is further

ORDERED that the portion of the motions which seek dismissal of this action is granted without prejudice to plaintiff to refile such action upon filing with the court and serving Defendants with proof that Thermwell suffered some pecuniary loss arising from its defense of the Friedman Action; and it is further

ORDERED that the disposition of the costs and fees portion of the motions is held in abeyance pending receipt of the Special Referee's report and a motion pursuant to CPLR 4403; and it is further

ORDERED that the Clerk is directed to enter judgement accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED: 4.5.12

SHERRY KLEIN HEITLER
J.S.C.