Travelers Prop. Cas. Co. of Am. v Crane Constr. Co., L.L.C.
2016 NY Slip Op 30719(U)
April 18, 2016
Supreme Court, New York County
Docket Number: 150161/10
Judge: Ellen M. Coin
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

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TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA a/s/o Ann Taylor Retail Inc. d/b/a Ann Taylor and other interested insureds under the applicable policy of insurance,

Plaintiff,

-against-

CRANE CONSTRUCTION COMPANY, L.L.C., DONNELLY MECHANICAL CORP., DYNAMIC AIR CONDITIONING COMPANY, INC., MARLIN MECHANICAL INC., MARLIN MECHANICAL SERVICES, INC., MICRON GENERAL CONTRACTORS, INC., CONBRACO INDUSTRIES, INC., HENNICK-LANE, INC., ARTMARK PRODUCTS, CORP., LIBERTY CONTRACTING INC., TISHMAN SPEYER HOLDINGS, INC., RCPI LANDMARK PROPERTIES, L.L.C., JFKM ENGINEERS, JFK&M CONSULTING GROUP, LLC, TSC DESIGN ASSOCIATES, JMV CONSULTING ENGINEERING, P.C, ROBERT DERECTOR ASSOCIATES, WALTER T. GORMAN, P.E., P.C., ZAG GROUP, DON PENN CONSULTING ENGINEER, AXIS DESIGN GROUP INTERNATIONAL and BONSIGNORE ARCHITECTS,

Action No. 1
Index No. 150161/10
Mot. Sequence Nos. 023 & 024

Defendants.

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MARLIN MECHANICAL INC. and MARLIN MECHANICAL SERVICES, INC.,

Third-Party Plaintiffs,

Third-Party Index No. 590465/11

-against-

TISHMAN SPEYER HOLDINGS, INC. and RCPI LANDMARK PROPERTIES, L.L.C.,

Second Third-Party Plaintiffs,

-against-

Second Third-Party Index No. 590286/10

ESPRIT US RETAIL LIMITED,

Second Third-Party Defendant.

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TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA a/s/o Ann Taylor Retail Inc. d/b/a Ann Taylor and other interested insureds under the applicable policy of insurance,

Action No. 2

Plaintiff,

Index No. 159207/12

-against-

SANCO MECHANICAL, INC.,

Defendant.

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ELLEN M. COIN, J.S.C.:

Motion sequence numbers 023 and 024 are consolidated for disposition.

In these related subrogation actions, plaintiff Travelers Property Casualty Company of America seeks to recover, as subrogee of its insured, Ann Taylor Retail, Inc. d/b/a (Ann Taylor) and other interested insureds, for extensive water damage allegedly sustained at the Ann Taylor store located in Rockefeller Center (600 Fifth Avenue, New York, New York) on May 31, 2010.

Defendant Conbraco Industries, Inc. (Conbraco) moves pursuant to CPLR 3212 for an order: (1) granting it summary judgment dismissing plaintiff's complaint and all cross-claims against it; and (2) granting it summary judgment on its cross-claims for contractual

indemnification and common law indemnification against defendant Artmark Products Corporation (Artmark) (motion sequence no. 023).

Defendant Artmark moves pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint and all cross-claims against it (motion sequence no. 024).

BACKGROUND

Plaintiff alleges that on May 31, 2010, a valve from one of the chiller lines located in the ceiling of the mezzanine level of the Ann Taylor store failed, allowing pressurized water to discharge and flood the store. Ann Taylor was the commercial tenant on the first floor and mezzanine level of the premises. As a result, the Ann Taylor store allegedly sustained significant water damage to the elevator, merchandise, fixtures, walls, and floors throughout the premises in an amount exceeding $1,426,337.49. Plaintiff reimbursed its insured, Ann Taylor, for the property damage.

It is undisputed that the valve was an Apollo® 94A series three-quarter inch brass valve manufactured by nonparty Ningbo Huaping Metalwork Co., Ltd. (Ningbo) in China. Artmark imported the valve. Artmark then sold the valve to Conbraco, which then marketed it downstream. The 94A series Apollo® valves are not serialized, and therefore, it is impossible to determine to whom or on what date the valve was sold.

Prior to the opening of the store, the premises owner defendant Tishman Speyer Properties, L.P. (Tishman) retained various contractors and design engineers to complete work on: (1) a demolition phase; and (2) a build-out phase. The purpose of the two-phase construction was to create two tenant spaces, one of which became the Ann Taylor store. The valve was

installed during the demolition phase.

In June 2006, prior to the demolition and partition of the premises, Tishman retained a design engineer, Robert Derector Associates (RDA), to provide mechanical, electrical and plumbing engineering design services in connection with the removal of tenant improvements installed by the prior tenant.

Micron General Contractors, Inc. (Micron) was retained as the general contractor to oversee the demolition phase of the construction, undertaken in early 2007 (Affirmation of Scott Haworth, dated March 23, 2015, Ex. Q). Micron was required to "[f]urnish and install all work in accordance with drawings by . . . [RDA] dated 7/28/06" (*id.*).

Micron hired Marlin Mechanical Corp. (Marlin) as a subcontractor to furnish HVAC work as per drawings (*id.*, exhibit T).

RDA's mechanical and sprinkler specifications dated July 28, 2006 provide as follows:

> Ball: Use for shut off services for sizes 2" and below for non-corrosive service. Extended stems and handles shall be provided on insulated piping systems to coordinate with insulation thickness. Ball valves for 250 psig service and below shall be provided with *bronze* bodies, stainless steel ball, stem and seat ring, TFE brushing and ring gasket. Ball valves rated above 250 psig shall be carbon or 316 stainless steel body with 316 stainless ball. Full port ball valves shall be used

(*id.*, exhibit R [emphasis added]).

RDA's engineer, Michael Lonigro (Lonigro), testified at his deposition that brass valves were not specified for the project, and that "[i]f it was brass, it wouldn't have met the spec" (Lonigro tr at 74-75).

Plaintiff's complaint alleges the following four causes of action against Conbraco and Artmark: (1) negligence (first cause of action); (2) breach of contract (second cause of action);

(3) breach of warranty (third cause of action); and (4) strict products liability (fourth cause of action).[1]

Conbraco asserts cross-claims for contractual and common law indemnification against Artmark (Conbraco's answer, first and fourth cross-claims).

Artmark, Tishman, Micron, Marlin, and Sanco Mechanical, Inc. (Sanco) allege cross-claims for common law indemnification, breach of contract, and contribution against Conbraco. The parties also assert various cross-claims against Artmark.

DISCUSSION

It is well established that "[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law" (*Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551, 553 [1st Dept 2012] [internal quotation marks and citation omitted]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citation omitted]). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 224, 226 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

[1]The fifth and sixth causes of action are directed at other defendants.

The Parties' Contentions as to Plaintiff's Claims

Conbraco and Artmark move for summary judgment dismissing the complaint, arguing that: (1) plaintiff cannot demonstrate that the valve was defectively designed; (2) there is no evidence of a manufacturing defect in the valve; (3) plaintiff cannot demonstrate that either Conbraco or Artmark were negligent for the same reasons that it cannot demonstrate strict products liability claims against either entity; and (4) plaintiff cannot establish breach of contract or breach of warranty claims against Conbraco or Artmark.

Specifically, Conbraco and Artmark point out that plaintiff's expert, Joseph P. Crosson (Crosson), a professional engineer who examined the valve and its sister valve in December 2012, states:

> To the extent that a discontinuity was observed in the subject valve under high optical magnification, such discontinuity was superficial to the valve body and the V-shaped appearance did not coincide with the fracture surface. . . . In fact, a discontinuity is not deemed a defect until it is evaluated against manufacturing quality acceptance criteria. In the subject case, to a reasonable degree of certainty, it is [his] opinion that since the observed discontinuity did not intersect the fracture surface and was indeed remote from the fracture path, it was determined that the observed discontinuity did not in any way contribute to the observed failure of the valve body

(Affidavit of Joseph P. Crosson, dated June 24, 2014, ¶ 7).

Plaintiff does not offer any "substantive opposition" to either motion, but relies on an affidavit from Micron's expert, Anthony Storace, P.E. (Storace), who also attended the inspection of the valve on December 12 and 13, 2012 (Affidavit of Anthony Storace, dated September 19, 2013, ¶ 5). Plaintiff contends that Conbraco and Artmark's motions for summary judgment

should be denied to the extent that Storace's affidavit raises an issue of fact.[2] Storace states that he noted, under high optical magnification, a manufacturing defect "in the form of a narrow, V-shaped sharp edged crack, beginning at the surface of the valve body and progressing inwardly toward the center of the valve" (*id.*, ¶ 6). Storace further indicates that "[a]lthough the crack does not coincide with the fracture surface at the particular angle at which the valve body was cut, it is a latent defect that provides evidence of defective manufacturing relevant to the failure of the subject valve" (*id.*). Storace states that

> [m]etal fails under stress when the stress level exceeds the metal's ultimate stress capacity. Although the sister valve's brass body material was capable of sustaining the stress of the chilled water line pressure, the subject valve was not because it contained a latent manufacturing defect in the form of a crack that weakened the valve body. Such defects are known as 'stress risers' as they cause the material stress resulting from internal pressure to increase beyond what a non-defective valve would be exposed to. Such increase results in premature failure. In this case, although the valve was proper for the service, the presence of the stress riser rendered it susceptible to failure

(*id.*, ¶ 7).[3]

In reply, Conbraco argues that Storace is not a metallurgical engineer, and that plaintiff has not adopted Storace's opinion.[4] Artmark points out that Storace does not contend that the alleged defect was part of the fracture site of the valve.

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[2]Plaintiff also maintains that if the Court were to preclude Storace from taking such a position, then it would have no opposition to the motions for summary judgment.

[3]Micron opposes Conbraco's motion for essentially the same reasons set forth in its motion for summary judgment, i.e., that Micron did not launch a force or instrument of harm. In opposition to Artmark's motion, Micron argues that Storace's opinion is well supported, and creates an issue of fact as to the failure of the valve.

[4]Contrary to Conbraco's position, there is no requirement that plaintiff adopt Storace's opinion (*see* CPLR 3212 [b]).

As a preliminary matter, the court notes that plaintiff has apparently abandoned its breach of contract and breach of warranty claims against Conbraco and Artmark.[5] Accordingly, these claims are dismissed.

Strict Products Liability and Negligence Based on a Manufacturing Defect

"[I]n strict products liability cases involving manufacturing defects, the harm arises from the product's failure to perform in the intended manner due to some flaw in the fabrication process" (*Denny v Ford Motor Co.*, 87 NY2d 248, 257 n 3 [1995], *rearg denied* 87 NY2d 969 [1996]). "In order to succeed on such a claim, a plaintiff must establish that the product was not built to specifications or that the product, 'as constructed, deviated from any such specifications or design'" (*McArdle v Navistar Intl. Corp.*, 293 AD2d 931, 932 [3d Dept 2002], quoting *Searle v Suburban Propane Div. of Quantum Chem. Corp.*, 263 AD2d 335, 340 [3d Dept 2000]).

"On a motion for summary judgment, a defendant seeking the dismissal of a strict products liability claim based on a manufacturing defect must submit admissible proof establishing, as a matter of law, that the product was not defective" (*McArdle*, 293 AD2d at 932 [citation omitted]). "If the defendant presents such proof, the burden shifts to the plaintiff to demonstrate the existence of a triable issue as to whether, in fact, there was a defect" (*id.*). "To meet that burden, plaintiff cannot rely solely upon the occurrence of the accident, but must

[5]Plaintiff does not argue that Ann Taylor was in privity of contract with Conbraco or Artmark or that it was a third-party beneficiary of any contract with Conbraco or Artmark. Thus, plaintiff's breach of contract claim fails (*see Lake Placid Club Attached Lodges v Elizabethtown Bldrs., Inc.*, 131 AD2d 159, 161 [3d Dept 1987]). Moreover, plaintiff does not argue that Ann Taylor relied on any express warranties (*see Mangano v Town of Babylon*, 111 AD3d 801, 802 [2d Dept 2013]), or that there was privity of contract between Ann Taylor and these entities, an essential element of a claim for breach of implied warranty (*see id.*). As a result, plaintiff's claims for breach of implied warranty and breach of express warranty must be dismissed.

submit direct evidence that a defect existed" when it left the manufacturer (*Brown v Borruso*, 238 AD2d 884, 885 [4th Dept 1997] [citation omitted]), or may raise an issue of fact by "exclud[ing] all other causes for the product's failure that are not attributable to defendant[ ]" (*Speller v Sears, Roebuck & Co.*, 100 NY2d 38, 41 [2003][citation omitted]).

In this case, Conbraco and Artmark have met their burden of demonstrating that the valve was not defective. Plaintiff's expert, Crosson, and defendants' experts, Pietropaolo, Gashinski, Stevenson, and Latanision, opine, based upon inspections of the valve, that the valve failed due to stress corrosion cracking, and that any discontinuity in the valve was superficial to the valve surface and did not intersect the fracture surface and was remote from the fracture path (Crosson 6/24/14 Aff., ¶¶ 6-7; Stevenson Aff., ¶¶ 8, 17; Gashinski Aff., ¶ 7; Pietropaolo Aff., ¶¶ 7, 8; Latanision Aff., ¶¶ 5, 6, 11, 13).

Conbraco and Artmark challenge Storace's qualifications to testify as an expert, and argue that his conclusions are not supported by the record. An expert "should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or that the opinion rendered is reliable" (*Matott v Ward*, 48 NY2d 455, 459 [1979]). The determination of whether a particular witness is qualified to testify as an expert rests within the sound discretion of the trial court, and "will not be disturbed in the absence of a serious mistake, an error of law, or an improvident exercise of discretion" (*Pignataro v Galarzia*, 303 AD2d 667, 667-668 [2d Dept 2003] [citation omitted]). Although Conbraco and Artmark argue that Storace is not qualified to proffer an opinion as to the cause of the valve failure, Storace's affidavit has sufficiently demonstrated that his opinion is

reliable; he states that he is a professional engineer, and has 45 years of experience in the fields of mechanical and manufacturing engineering, stress and failure analysis and metallurgical analysis and evaluation (Storace Aff., ¶ 1). In addition, Storace states that he has consulted on matters involving the design and manufacture of products, including fluid valves, and the analysis of product failures (*id.*).

It is well settled that "[o]pinion evidence must be based on facts in the record or personally known to the witness" (*Santoni v Bertelsmann Prop., Inc.*, 21 AD3d 712, 714-715 [1st Dept 2005] [internal quotation marks and citation omitted]). An expert "cannot reach his [or her] conclusion by assuming material facts not supported by evidence" (*Cassano v Hagstrom*, 5 NY2d 643, 646 [1959], *rearg denied* 6 NY2d 882 [1959]). "In the absence of record support, an expert's opinion is without probative force" (*Guzman v 4030 Bronx Blvd. Assoc. L.L.C.*, 54 AD3d 42, 49 [1st Dept 2008] [citation omitted]).

Here, contrary to Conbraco and Artmark's contention, Storace's opinion is not conclusory, and is based on facts known to Storace. Storace states that he noted upon inspection of the valve, under high optical magnification, a manufacturing defect "in the form of a narrow, V shaped, sharp edged crack, beginning at the surface of the valve body and progressing inwardly toward the center of the valve" (Storace Aff., ¶ 6). According to Storace, metal fails under stress when the stress level exceeds the metal's ultimate stress capability (*id.*). Storace further states that the crack in the valve was a "stress riser," which caused the stress resulting from internal pressure to increase beyond that to which a non-defective valve would have been exposed (*id.*, ¶ 7).

Furthermore, it cannot be determined as a matter of law that the crack in the valve did not cause the failure of the valve. "Where causation is disputed, summary judgment is not appropriate unless only one conclusion may be drawn from the established facts" (*Speller*, 100 NY2d at 44 [internal quotation marks and citation omitted]). Here, Storace states that the crack in the valve was a "stress riser" that rendered it susceptible to failure (Storace Aff., ¶ 7). In light of Storace's affidavit, it cannot be said that only one conclusion may be drawn from the established facts. Thus, summary judgment on the issue of causation is unwarranted.

In light of the above, there are issues of fact as to whether the valve was defective, and was a proximate cause of the damages on plaintiff's strict products liability claim.

Since there is almost no difference between a prima facie case in negligence and one in strict liability, plaintiff's proof also raises issues of fact as to its negligence claim (*see Preston v Peter Luger Enters., Inc.*, 51 AD3d 1322, 1325-1326 [3d Dept 2008] [dismissal of products liability claim triggers dismissal of negligent design and manufacturing]). "Proof that will establish strict liability will almost always establish negligence" (*Saunders v Farm Fans, div. of ffi Corp.*, 24 AD3d 1173, 1174-1175 [4th Dept 2005] [internal quotation marks and citation omitted]).

Conbraco's Contractual Defense and Indemnification Claim Against Artmark

Conbraco moves for contractual defense and indemnification against Artmark, pursuant to the indemnification provision on the reverse side of its purchase orders.[6] Conbraco argues that although the purchase order for the valve cannot be located, Conbraco used its form purchase order for the purchase of the 94A series valves from Artmark, relying on a redacted vendor spreadsheet for the year 2005, the year in which the valve was purchased, and three prior purchase orders for 94A series valves dated December 1, 2003, November 22, 2004, and December 9, 2004 (Haworth Aff., Exs. W, Z, AA). Conbraco further maintains that even though the purchase orders are unsigned, the front side of every purchase order makes clear that absent a signature from Artmark, the terms and conditions were accepted by Artmark, based upon the following language:

> THIS ORDER EXPRESSLY LIMITS ACCEPTANCE TO THE TERMS AND CONDITIONS OF THE ORDER ANY ADDITIONAL TERMS PROPOSED BY THE SELLER ARE REJECTED UNLESS AGREED TO IN WRITING BY THE BUYER. ADDITIONAL TERMS AND CONDITIONS ON THE REVERSE SIDE OF THIS DOCUMENT. WE REQUEST A PROMPT ACKNOWLEDGMENT TO THIS PURCHASE ORDER. IF NO ACKNOWLEDGMENT IS RECEIVED WITHIN 10 DAYS IT WILL CONSTITUTE ACCEPTANCE OF THE PURCHASE ORDER

(*id.*, Ex. Z).

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[6]Section 9 of the terms and conditions, the indemnification provision, provides that:

> "Seller [Artmark] agrees to indemnify, defend, save, keep and forever hold harmless Conbraco . . . against any and all claims, demands, liabilities, costs, suits or actions, including all reasonable expenses, attorney fees, consequential damages or any other type of damage . . . alleged to have been caused, in whole or in part, by or resulting from the goods and/or services covered by this purchase order or any breach hereof, or negligence of seller [Artmark] or its employees, agents, or subcontractors"

(Haworth Aff., Ex. Z).

In opposition, Artmark argues that there is no oral or written agreement stating that Artmark would defend or indemnify Conbraco for any loss arising from the brokering of the valves sold by Artmark to Conbraco. As support, Artmark relies on a letter dated November 11, 2003 from Artmark's president Frank Kiernan to Conbraco's purchasing manager John Thomas about details concerning the importation of the valves; however, indemnification and procurement of insurance are not mentioned (Affirmation of John D. Morio, dated May 11, 2015, Ex. A). Artmark asserts that pursuant to section 12.0 of the purchasing specifications, entitled "Bid Package Requirements," proposed vendors were only required to "[d]efine replacement policy" (*id.*, Ex. B).

Artmark also notes that on September 9, 2004, Artmark sent a letter to Conbraco advising of its insurance coverage and enclosing its certificate of liability insurance; however, Conbraco was not named as an additional insured on the certificate (*id.*, Ex. C). Additionally, Artmark contends that the very first purchase order from Conbraco to Artmark, purchase order number 704454-0 dated December 1, 2003, demonstrates that the purchase order was sent via facsimile and that the reverse side of the purchase order was not included (*id.*, Ex. D). Finally, Artmark claims that when Conbraco included the terms and conditions in its purchase order for the first time on March 16, 2010, Artmark responded by letter that it was "unable to accept Item 9.0 as stated in your Terms and Conditions of purchase" (*id.*, Ex. E).

In *Kay-Bee Toys Corp. v Winston Sports Corp.* (214 AD2d 457, 458 [1st Dept 1995], *lv denied* 86 NY2d 705 [1995]), which Conbraco cites, the First Department held that the defendant was contractually obligated to indemnify the plaintiff based on an indemnification provision

contained on the reverse side of the parties' purchase orders. According to the Court, "[t]he record reveals that the argument that only one side of the purchase order was faxed was not supported by an affidavit by a person with personal knowledge of the facts" (*id.* at 459). The First Department continued, stating that, "[t]he record also reveals a prior course of dealing between the parties as well as the defendant's actions in purchasing insurance on plaintiff's behalf, and thus established that defendant was aware of and had assented to the terms of the hold harmless, indemnity and insurance provisions in the purchase order" (*id.*).

However, in *Miller v Mott's Inc.* (5 AD3d 1019, 1020 [4th Dept 2004]), the Court held that the trial court properly denied a third-party plaintiff's motion for contractual indemnification against a third-party defendant, explaining that:

> [Third-party plaintiff] established that it faxed to [third-party defendant] only the front side of a purchase order that contained an indemnification provision on the reverse side, and it failed to establish as a matter of law that [third-party defendant] agreed to the terms on the reverse side of the purchase order through past practice or course of conduct between the parties"

(*id.*, citing *Kay-Bee Toys Corp.* supra).

Here, as in *Miller*, Conbraco has failed to demonstrate that Artmark agreed to the terms and conditions on the reverse side of the purchase order, including the indemnification provision, for the purchase of the valve. As Conbraco notes, the purchase order for the subject valve cannot be located. However, Conbraco has not pointed to any evidence of the parties' past practice that would indicate that Artmark agreed to the terms and conditions. Although Conbraco relies upon three prior purchase orders dated December 1, 2003, November 22, 2004, and December 9, 2004 (Haworth Aff., Ex. AA), these purchase orders are not signed by a representative of Artmark, and

Conbraco has not submitted an affidavit or any other evidence showing that it ever transmitted the reverse sides of these purchase orders to Artmark. Accordingly, Conbraco's request for contractual defense and indemnification against Artmark is denied (*see Auchampaugh v Syracuse Univ.*, 67 AD3d 1164, 1165 [3d Dept 2009] [motion for contractual indemnification properly denied where movant did not show that proposed indemnitor acted in conformity with terms of purchase order or point to any evidence of parties' past practice that would permit an inference that they agreed to terms of document and indemnification clause]).

Conbraco's Claim for Common Law Defense and Indemnification Against Artmark

Conbraco also moves for common-law indemnification against Artmark, arguing that it is entitled to indemnification because Artmark is upstream of Conbraco as the importer of the valve in the chain of distribution.

In response to Conbraco's motion, Artmark contends that Conbraco is not entitled to common law indemnification from Artmark because Conbraco is not a downstream entity, relying on Conbraco's responses to Artmark's request for admissions in a North Carolina declaratory judgment action captioned *Conbraco Indus., Inc. v Artmark Prods. Corp.*, Case No. 09-CV-13758 (Morio Aff. 5/11/2015, Ex. F).[7] According to Artmark, Conbraco admitted in that case that Conbraco was primarily responsible for the design specifications of the valve; that Conbraco met with and approved the manufacturer of the valve; performed testing on the valve, and received test results from the manufacturer (*id.*). Conbraco also admitted, Artmark argues,

[7]Artmark notes that Conbraco's response to Artmark's notice to admit dated September 11, 2012 in this action contradicts many of the responses in the North Carolina action (*id.*, Ex. G).

that Conbraco received the 94A series valves in a sealed container directly from the manufacturer (*id.*).

"Common-law indemnification requires proof not only that the proposed indemnitor's negligence contributed to the causation of the accident, but also that the party seeking indemnity was free from negligence" (*Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 484 [1st Dept 2010] [citation omitted]).

"[A] seller or distributor of a defective product has an implied right of indemnification as against the manufacturer of the product" (*Godoy v Abamaster of Miami, Inc.*, 302 AD2d 57, 62 [2d Dept], *lv dismissed* 100 NY2d 614 [2003]). In addition, "as among the parties to an action, a party/distributor lower in the chain of distribution is entitled to common-law indemnification from the one highest in the chain of distribution, due to the latter's closer, continuing relationship with the manufacturer and superior position to exert pressure to improve the safety of the product" (*Lowe v Dollar Tree Stores, Inc.*, 40 AD3d 264, 265 [1st Dept] [citation omitted], *lv dismissed* 9 NY2d 891 [2007]). "The right to indemnification [] includes the right to recover attorneys' fees, costs and disbursements" in defending against plaintiff's action (*id.*).

Here, Conbraco has demonstrated that as the seller/distributor of the valve, it may be entitled to common-law indemnification from Artmark, the importer of the valve, given Artmark's "closer, continuing relationship with [Ningbo] and superior position to exert pressure to improve the safety of the product" (*id.*).

Moreover, Artmark's reliance on Conbraco's responses to Artmark's request for admissions in the North Carolina action is misplaced. Rule 36 of the North Carolina Rules of

Civil Procedure provides as follows:

> (a) A party may serve upon any other party a written request for the admission, *for purposes of the pending action only*, of the truth of any matters within the scope of Rule 26 (b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact[.] . . . Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter . . . .
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> * * *
>
> (b) Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. . . Any admission made by a party under this rule is *for the purpose of pending action only* and is not an admission by him for any other purpose *nor may it be used against him in any other proceeding*. [8]

([emphasis added]). The Full Faith and Credit Clause of the United States Constitution, as well as the federal Full Faith and Credit Act (28 USC § 1738), provides that "judicial proceedings of any court of any [] State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." It is the law of the rendering state that determines the effect of a prior state court proceeding on a federal or sister state proceeding (*e.g., Conopco, Inc. v Roll International and Paramount Farms, Inc.*, 231 F3d 82, 87 [2d Cir 2000][citations omitted]). Thus, New York's equitable principle of judicial estoppel will not apply, and Rule 36 precludes Conbraco's admissions in the North Carolina action from having any effect in this action.

Accordingly, Conbraco is entitled to an award of conditional indemnification from Artmark, even before entry of the final judgment (*see Martins*, 72 AD3d at 485 [awarding

[8]The court may take judicial notice of "private acts and resolutions of the congress of the United States and of the legislature of the state; ordinances and regulations of officers, agencies or governmental subdivisions of the state or of the United States . . ." (CPLR 4511 [b]).

distributor conditional indemnification from manufacturer]; *German v Morales*, 24 AD3d 246, 247 [1st Dept 2005] [same]). Conditional indemnification serves the interest of justice and judicial economy in awarding the indemnitee "'the earliest possible determination as to the extent to which he may expect to be reimbursed'" (*Lowe*, 40 AD3d at 265, quoting *McCabe v Queensboro Farm Prods., Inc.*, 22 NY2d 204, 208 [1968]).

Conbraco also requests a hearing to determine the amount of attorneys' fees owed by Artmark to Conbraco. However, since Conbraco is only entitled to conditional indemnification from Artmark, Conbraco's request for a hearing as to its defense costs is premature. There has been no determination of liability as against Conbraco at this juncture. If the jury determines that there was no manufacturing defect in the valve or that the defect did not cause plaintiff's loss, then Conbraco would not be entitled to recover its defense costs from Artmark (*see generally Nieves-Hoque v 680 Broadway, LLC*, 99 AD3d 536, 537 [1st Dept 2012] ["Absent liability, vicarious or otherwise, there is no basis for indemnification"]).

Cross-Claims Against Conbraco and Artmark

Conbraco and Artmark seek dismissal of all cross-claims against them. Conbraco argues that Artmark, Tishman, Micron, Marlin, and Sanco allege cross-claims for common law indemnification, breach of contract, and contribution. For its part, Artmark contends that since plaintiff's claims fail, it should also be awarded summary judgment on all claims as a matter of law. Artmark does not otherwise address the cross-claims in its brief. Marlin argues in opposition to Artmark's motion, that there are triable issues of fact as to whether there was a defect in the valve which caused the plaintiff's loss.

Upon searching the record and for the reasons set forth above, the Court dismisses Conbraco's fourth cross-claim for contractual indemnification against Artmark. As to the balance of cross-claims, sounding in contribution and indemnification, "[c]ommon-law indemnification requires proof . . . that the party seeking indemnity was free from negligence" (*Martins*, 72 AD3d at 484). "Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person" (*Godoy*, 302 AD2d at 61 [internal quotation marks and citation omitted]). As discussed previously, there are issues of fact as to whether Conbraco and Artmark were negligent. Therefore, Cornbraco and Artmark are not entitled to summary judgment dismissing these cross-claims as against them.

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 023) of defendant Conbraco Industries, Inc. is granted to the extent of dismissing plaintiff's second and third causes of action (breach of contract and breach of warranty) as against it, and granting said defendant conditional common law indemnification against defendant Artmark Products Corporation, and is otherwise denied; and it is further

ORDERED that the motion (sequence number 024) of defendant Artmark Products Corporation is granted to the extent of dismissing plaintiff's second and third causes of action

(breach of contract and breach of warranty), as well as Conbraco Industries Inc.'s fourth cross-claim, as against it, and is otherwise denied.

Dated: April 18, 2016

ENTER:

Ellen M. Coin, A.J.S.C.