STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: June 27, 2014)

JAMES and NANCY WARNER	:	
	:	
v.	:	
	:	
EASTERN TANKS, INC.,	:	
GRANBY INDUSTRIES INC., and	:	**C.A. No. WC-2011-0182**
VALLEY HEATING AND COOLING	:	
INC.	:	
	:	
v.	:	
	:	
VIKING SUPPLY COMPANY	:	

DECISION

K. RODGERS, J. Before this Court are Defendant/Third-Party Plaintiff Valley Heating and Cooling Inc. (Valley) and Third-Party Defendant Viking Supply Company's (Viking) motions for summary judgment pursuant to Super. R. Civ. P. 56. Valley asserts it is entitled to judgment as a matter of law on Counts I-VI of Plaintiffs James and Nancy Warner's (Plaintiffs or the Warners) Amended Complaint alleging negligence, breach of contract, breach of implied warranty of fitness for a particular purpose, breach of implied warranty of merchantability, breach of express warranty and strict products liability. Viking asserts that it is entitled to judgment as a matter of law on Valley's Third-Party Complaint seeking indemnity. After a hearing thereon and upon consideration of the parties' memoranda, this Court will now render a Decision.

I

Facts and Travel

This case arises out of a loss resulting from an oil leak of an exterior oil tank on the Warners' property located at 161A East Beach Road in Charlestown, Rhode Island (the Property).

Located in close proximity to the Atlantic Ocean, the Warners sought to replace their old oil tank with one that could withstand the corrosive salt-air environment within which their home is situated. Thus, in or around April 2009, Valley sold and installed an Eastern Tanks, Inc. brand 275-gallon exterior oil tank to the Warners. (Pls.' Am. Compl. at ¶ 5.) Valley had initially bought the tank from Viking, a retailer for the now-defunct Eastern Tanks, Inc., a co-defendant in this suit. (Third-Party Compl. at ¶ 3.) On or about December 18, 2010, however, the oil tank "malfunctioned and/or failed, causing a loss and resulting [in] severe and substantial property damage to the [property.]" (Id. at ¶ 6.)

Thomas Dombrowski (Dombrowski), a professional engineer with Engineering Design & Testing Corp., conducted an initial investigation of the oil tank on January 13, 2011, and concluded that the leak was "the result of an unintended contact of the tank wall with a hard object such as a rock." (Viking's Mem. in Supp. of Mot. for Summ. J., at Ex. F. (Dombrowski Report)). The Warners also had John Certuse (Certuse), a professional engineer with ISE Engineering Inc., perform a second investigation on February 8, 2011. While Certuse could not definitively pinpoint the exact cause of the tank's failure, he concluded that, "[t]he common denominator for the failure of the tank, in our opinion, is due to corrosive conditions likely within the tank [.]" See Supplemental Report of ISE Engineering Inc. in Supp. of Mem. of Law in Supp. of Obj.

to Mot. for Summ. J. (Certuse Report). He further opined that the corrosive condition could have been caused by any number of events, including water that leaked from an overlap in the gutter system located directly above the tank, impurities from an older tank that transferred to the new tank, or "a manufacturer initiated condition [.]" Id. at 3.

The Warners filed suit against Eastern Tanks, Inc. and Valley alleging negligence (Count I), breach of contract (Count II), breach of implied warranty of fitness for a particular purpose (Count III), breach of implied warranty of merchantability (Count IV), breach of express warranty (Count V), and strict liability (Count VI). See Pls.' Am. Compl. Valley then filed a Third-Party Complaint against Viking seeking indemnity to the extent Valley is held liable to the Warners. See Third-Party Compl.

After conducting discovery, Viking moved for summary judgment on Valley's Third-Party Complaint. Valley similarly moved for summary judgment on the Warners' Amended Complaint. Both motions came on for hearing before this Court on June 16, 2014.

II

Standard of Review

In reviewing a motion for summary judgment, the preliminary question before this Court is whether there is a genuine issue as to any material fact which must be resolved. R.I. Hosp. Trust Nat'l Bank v. Boiteau, 119 R.I. 64, 376 A.2d 323 (1977); O'Connor v. McKanna, 116 R.I. 627, 359 A.2d 350 (1976). If an examination of the pleadings, affidavits, admissions, answers to interrogatories, and other similar matters reveals no such issue and the moving party is entitled to judgment as a matter of law, then the suit is ripe for summary judgment. Super. R. Civ. P. 56(c); see also Neri v. Ross-

Simons, Inc., 897 A.2d 42, 47 (R.I. 2006); Casey v. Town of Portsmouth, 861 A.2d 1032, 1036 (R.I. 2004). In ruling upon a motion for summary judgment, this Court must review such evidence in the light most favorable to the nonmoving party. Casey, 861 A.2d at 1036 (quoting Duffy v. Dwyer, 847 A.2d 266, 268-69 (R.I. 2004) (quotation marks omitted)).

In the face of summary judgment, the party who opposes the motion "carries the burden of proving by competent evidence the existence of a disputed material issue of fact and cannot rest on allegations or denials in the pleadings or on conclusions or legal opinions." Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1225 (R.I. 1996); see also McAdam v. Grzelczyk, 911 A.2d 255, 259 (R.I. 2006). It is not sufficient "simply [to] show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Although inferences may be drawn from underlying facts contained in material before the trial court, neither conclusory statements nor assertions of inferences not based on underlying facts will suffice. See Minuto v. Metro. Life Ins. Co., 55 R.I. 201, 179 A. 713, 715 (1935) ("[g]eneral denials or expressions of the defendant's belief, or conclusions and inferences of law, and the like" are not sufficient to withstand summary judgment).

III

Analysis

A

Valley's Motion for Summary Judgment

Valley moves for summary judgment on the ground that Plaintiffs have produced no evidence that a defect existed when Valley sold and installed the oil tank.

Additionally, Valley argues there is no evidence that they negligently installed the oil tank. For the reasons that follow, Valley is not entitled to summary judgment on either basis.

1

Breach of Contract, Breach of Implied Warranty of Merchantability, Strict Products Liability

Rhode Island General Laws § 6A-2-314 provides: "a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." This implied warranty of merchantability is breached "when a product of fair average quality does not pass in the trade and is unfit for the ordinary purpose for which it is used [.]" Thomas v. Amway Corp., 488 A.2d 716, 719 (R.I. 1985).

In order to succeed on their breach of contract, warranty and strict liability claims, the Warners bear the burden of proving the oil tank was defective, that it was in a defective condition at the time it left Valley's hands, and that the defect was the proximate cause of the oil spill. See Oberlander v. Gen. Motors Corp., 798 A.2d 376, 379 (R.I. 2002); Olshansky v. Rehrig Int'l, 872 A.2d 282, 287 (R.I. 2005).[1] At this summary judgment stage, however, the Warners' burden is not as high. To defeat Valley's Motion for Summary Judgment, the Warners need only present evidence that supports the inference of a defect, thereby creating a genuine issue of material fact.

[1] At the hearing, counsel for Plaintiffs repeatedly proffered the fact that the tank failed a mere one-and-a-half years after it was installed as probative evidence of a defect. As our Supreme Court has made clear, however, the mere fact that an injury occurred is not sufficient to prove allegations of breach of implied warranty. See Olshansky, 872 A.2d at 286. Similarly, the doctrine of res ipsa loquitor is inapplicable because it may be used as an inference in negligence claims only, not in breach of warranty and strict liability actions. Id.

a

The Dombrowski and Certuse Reports

Shortly after the tank failed, Dombrowski conducted the first investigation. Upon examination, Dombrowski concluded that an indentation in the wall of the fuel-oil storage tank wall formed as a result of unintended contact with a hard object. See Dombrowski Report, at 2. Specifically, Dombrowski noted:

> "The damage [to the tank] was observed to consist of an approximate ¼-inch diameter indentation in the tank wall surrounding an approximate 1/8-inch diameter breach of the tank wall. The indentation and markings surrounding the indentation indicate that the indentation was formed as the result of unintended contact of the tank wall with a hard object such as a rock. The indentation was also observed to have experienced corrosion. This indicates that the breach was formed as a result of corrosion over an extended period of time after the formation of the indentation." Id.

Thus, Dombrowski's report suggests there was no defect in the tank, but rather the tank's failure resulted from the tank's contact with a foreign object which caused the indentation and subsequent corrosive process.

On February 8, 2011—almost a month after the Dombrowski investigation—Certuse conducted an investigation of his own.[2] Like Dombrowski, Certuse concluded that the tank failed due to corrosion. See Certuse Report. However, contrary to Dombrowski's theory that the corrosion resulted from unintended contact with the tank,

[2] Certuse, however, did not issue a report until May 2, 2014, over three years after the investigation and only one month prior to the instant hearing. This Court makes no comment on the time lapse, but such circumstances are certainly open to further exploration if a voir dire examination of Certuse is sought to evaluate whether the proffered evidence satisfies the requirements of Rule 702 of the Rhode Island Rules of Evidence. See Kurczy v. St. Joseph Veterans Ass'n, Inc., 820 A.2d 929, 939 (R.I. 2003).

Certuse concluded the failure was the result of "an overall corrosive environment within the tank." Id. Importantly, he noted:

> "Further examination of the tank . . . identified other areas where corrosion cells were beginning to develop and as such, the failure in the tank is, in our opinion, not the result of one single corrosion event, but rather, one that had a common denominator of an overall corrosive environment within the tank.
>
> "Other locations on the tank where the paint was beginning to fail and evidence of an oxidation corrosion cell under the paint was identified, indicative of an overall condition of failure with the tank." Id.

Certuse further opined that the corrosive environment within the tank could be attributed to any number of events including, oil transferred from the old tank that contained impurities from the old tank, water that had seeped into the tank by virtue of the tank's location below an overlap in the rain gutters of the Warners' home, or "a manufacturer initiated condition." Id. Certuse directly contradicted Dombrowski, finding "no evidence of impact damages[.]" Id. Thus, Certuse's report supports the assertion that the corrosion of the tank was the result of a defect within the tank and/or the placement of the tank.

In light of these conflicting opinions, there are genuine issues of material fact that exist as to whether the tank was defective when it left Valley's control. Accordingly, summary judgment is denied on Counts II, IV and VI of Plaintiffs' Amended Complaint.

In making this ruling, however, the Court is mindful of the limited nature of Certuse's investigative report. While the report is sufficient at this early juncture to allow Plaintiffs' claims to withstand Valley's Motion for Summary Judgment, Plaintiffs still bear the burden at trial—or in a preliminary hearing if sought—to establish the reliability

of Certuse's opinion in accordance with Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993), the standard for expert opinions adopted by our Supreme Court in DiPetrillo v. Dow Chem. Co., 729 A.2d 677 (R.I. 1999), and to present Certuse for direct and cross-examination. This Court's instant Decision in no way endorses one expert's opinion over the other, but merely points out the obvious genuine issue of material fact that exists.

2

Breach of Implied Warranty of Fitness for a Particular Purpose

The above analysis does not end this Court's inquiry. In addition to the implied warranty of merchantability, Plaintiffs allege Valley breached the implied warranty of fitness for a particular purpose. Section 6A-2-315 provides:

> "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is . . . an implied warranty that the goods shall be fit for such purpose." Sec. 6A-2-315.

In this case, Plaintiffs maintain that they replaced their previous exterior oil tank with the subject oil tank because they wanted one that would better withstand the corrosive environment so near to the Atlantic Ocean. (Pls.' Supplemental Answer to Interrogs. of Valley, at ¶ 9.) They further allege that Valley knew Plaintiffs sought a new tank specifically for this purpose. While an oil tank is generally used in only one manner, the fact that Plaintiffs sought a tank with specific characteristics aside from those of any ordinary oil tank implies a more particular purpose for which Plaintiffs sought the subject oil tank. Therefore, Plaintiffs have provided sufficient evidence that Valley warranted

the oil tank for a particular purpose to defeat summary judgment on Count III of Plaintiffs' Amended Complaint.

3

Breach of Express Warranty

Separate and apart from their claims for breach of implied warranties of merchantability and fitness for a particular purpose, Plaintiffs also allege Valley breached an express warranty. Section 6A-2-313 lists three ways in which an express warranty may be created:

> "(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> "(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
>
> "(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model." Sec. 6A-2-313.

To succeed on a theory of breach of express warranty, a plaintiff "has the burden of proving that the statements or representations made by the seller induced her to purchase that product and that she relied upon such statements or representations." Thomas, 488 A.2d at 720 (citing Rogers v. Zielinski, 99 R.I. 599, 603-04, 209 A.2d 706, 708 (1965)).

In this case, Plaintiffs allege "there existed at the time of the purchase and installation . . . an express warranty of fitness." (Pls.' Am. Compl. at ¶ 28.) However, aside from this bald assertion, they have provided no evidence that Valley made any

statements or representations upon which Plaintiffs relied when they bought the tank. The absence of such evidence sounds a death knell for Plaintiffs' express warranty claim. There being no genuine issues of material fact, summary judgment shall enter for Valley on Count V.

4

Negligence

In addition to their claims relating to the condition of the tank, Plaintiffs assert Viking acted negligently when it installed the oil tank under a rain gutter overlap.

To properly set forth "a claim for negligence, 'a plaintiff must establish a legally cognizable duty owed by a defendant to a plaintiff, a breach of that duty, proximate causation between the conduct and the resulting injury, and the actual loss or damage.'" Holley v. Argonaut Holdings, Inc., 968 A.2d 271, 274 (R.I. 2009) (quoting Willis v. Omar, 954 A.2d 126, 129 (R.I. 2008)). "It is well settled that 'issues of negligence are ordinarily not susceptible of summary adjudication[,]'" id. (quoting Gliottone v. Ethier, 870 A.2d 1022, 1028 (R.I. 2005)), and this maxim holds true here.

In this case, Certuse indicated that the exterior oil tank was installed directly beneath a makeshift overlap in the rain gutters on the Property and that water leaking from the gutter onto the tank could have contributed to the corrosive environment within the tank. Such evidence serves to show that there are two genuine issues of material fact with regard to Plaintiffs' negligence claim, to wit: (1) whether Valley's placement of the oil tank under the rain gutter overlap was negligent, and (2) whether water leakage caused the corrosive environment within the tank. Such issues indeed need not be decided at this time. See O'Connor, 116 R.I. at 633, 359 A.2d at 353 ("in passing on a

motion for summary judgment, the question for the trial justice is whether there is a genuine issue as to any material fact and not how that issue should be determined"). As such, Valley's Motion for Summary Judgment on Count I is denied.

B

Viking's Motion for Summary Judgment

Viking moves for summary judgment on Valley's Third-Party Complaint seeking indemnification. Viking's Motion must also be denied.

"The purpose of an indemnity action is to require the party primarily liable to hold harmless the party secondarily liable." Muldowney v. Weatherking Prods., Inc., 509 A.2d 441, 444 (R.I. 1986). Our Supreme Court has noted that there are two instances in which an indemnity action may arise: (1) by contract, express or implied, or (2) in equity. Helgerson v. Mammoth Mart, Inc., 114 R.I. 438, 441, 335 A.2d 339, 341 (1975). In contrast to a contractual right of indemnification, a claim for equitable indemnity requires the prospective indemnitee to prove three elements. "First, the party seeking indemnity must be liable to a third party. Second, the prospective indemnitor must also be liable to the third party. Third, as between the prospective indemnitee and indemnitor, the obligation ought to be discharged by the indemnitor." Muldowney, 509 A.2d at 443 (citing Sch. Dist. No. 4 of Jackson County v. United States Gypsum Co., 65 Or. App. 570, 575, 672 P.2d 1201, 1204 (1983); Perry v. Pioneer Wholesale Supply Co., 681 P.2d 214, 218 (Utah 1984)).

Here, there is no evidence of a contractual right to indemnification, and thus, Valley must proceed under a claim for equitable indemnification. The issue of fact that dogged Valley's attempt at summary judgment, however, also affects Viking's. First, the

cause of the tank's failure is a genuine issue of material fact that bears upon Valley's liability to the Warners. Thus, it is impossible to determine whether Valley—the party seeking indemnity—will be liable to the Warners. Second, the cause of the tank's failure bears upon Viking's theoretical liability to the Warners for purposes of the second prong of equitable indemnification: Without knowing for sure what caused the tank to fail, it is impossible to know whether Viking—the prospective indemnitor—is liable to the Warners. Third, this same question also bears on the issue of by whom the obligation to the Warners ought to be discharged. If the defect was, indeed, "a manufacturer initiated condition," then Valley's liability would be derivative of Viking's act of placing the tank into the stream of commerce. Therefore, as between Valley—the prospective indemnitee—and Viking—the prospective indemnitor—it is possible that Valley's obligation ought to be discharged by Viking. However, as with the previous two prongs, this is also impossible to know at this time based upon the material facts that exist. Consequently, Viking is not entitled to judgment as a matter of law and Viking's Motion for Summary Judgment on Valley's Third-Party Complaint must be denied.

IV

Conclusion

For the foregoing reasons, this Court finds that Defendant/Third-Party Plaintiff Valley's Motion for Summary Judgment is granted with respect to Plaintiffs' Count V—breach of express warranty—but denied as to all other counts in Plaintiffs' Amended Complaint. Third-Party Defendant Viking's Motion for Summary Judgment on Valley's Third-Party Complaint is similarly denied.

Counsel for Plaintiffs shall prepare an order consistent with this Decision.

RHODE ISLAND SUPERIOR COURT
Decision Cover Sheet

TITLE OF CASE:	James Warner, et al. v. Eastern Tanks, Inc., et al. v. Viking Supply Company
CASE NO:	C.A. No. WC-2011-0182
COURT:	Washington County Superior Court
DATE DECISION FILED:	June 27, 2014
JUSTICE/MAGISTRATE:	Kristin E. Rodgers
ATTORNEYS:	
For Plaintiff:	Fred L. Mason, Jr., Esq.
For Defendant:	James H. Reilly, Esq. David W. Zizik, Esq. Michelle M. Hawes, Esq.