

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

COOPER INDUSTRIES, LLC,)
)
) Plaintiff,)
))
) v.) C.A. No.: N18C-03-175 WCC CCLD
))
CBS CORPORATION,)
)
) Defendant.)

Submitted: August 15, 2018
Decided: January 10, 2019

Defendant’s Motion to Dismiss – DENIED

MEMORANDUM OPINION

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CARPENTER, J.

Before the Court is Defendant CBS Corporation's ("CBS" or "Defendant") Rule 12(b)(6) Motion to Dismiss. For the reasons set forth in this Opinion, Defendant's Motion to Dismiss is denied.

I. FACTUAL & PROCEDURAL BACKGROUND

This litigation arises out of a 1982 agreement for the sale of the lighting products business of Westinghouse Electric Corporation's ("Westinghouse" or "Seller") Lighting Business Unit (the "1982 Agreement" or the "Agreement").¹ Specifically, the 1982 Agreement gave Cooper Industries, Inc. ("CII" or "Purchaser") ownership of "[a]ll real estate owned or used in the business, including plants and buildings [such as the Vicksburg Facility, now known as Cooper Lighting - Vicksburg ("Vicksburg Facility")]."² The Agreement contains a forum selection clause, which indicates it is governed by Ohio law.³

The 1982 Agreement was originally between CII and Westinghouse.⁴ Plaintiff Cooper Industries, LLC ("Cooper" or "Plaintiff") and Defendant CBS Corporation both inherited the Agreement as respective successors-by-merger to CII and Westinghouse.⁵ Presently, the parties dispute Defendant's indemnity obligations under the 1982 Agreement for the disposal of hazardous substances at the Vicksburg

¹ Compl. ¶ 11.

² *Id.* (quoting Pl.'s Ex. A, § 1.4 [hereinafter 1982 Agreement]). *See also* ¶ 20.

³ *Id.* ¶ 17.

⁴ *Id.* ¶ 1.

⁵ *Id.*

Facility.⁶

A. THE TERMS OF THE 1982 AGREEMENT

The 1982 Agreement, among other things, specified liabilities that CII would assume as part of the sale, as well as the liabilities Westinghouse would retain.⁷ The Agreement also included “standard indemnification provisions in connection with liabilities that were assumed or retained, subject to certain time and dollar limitations prescribed by Section 14.4.”⁸

During negotiations for the 1982 Agreement, CII was allegedly concerned about Westinghouse’s disposal of chemical and toxic substances.⁹ Through due diligence, CII had discovered that the waste disposal site at the Vicksburg Facility contained hazardous solvents, like TCE (trichloroethylene).¹⁰ CII was also worried about the presence of toxic substances, such as PCBs (polychlorinated biphenyls), at the Vicksburg Facility.¹¹

To alleviate its concerns, CII proposed an additional indemnification provision, now contained in Section 14.5 of the 1982 Agreement, which is explicitly

⁶ *Id.*

⁷ For instance, “Westinghouse retained ‘any liability under Federal, State or local laws, regulations, rules or provisions relating to the protection of the environment, including but not limited to discharge of material into the environment arising out of any matter or that part of any matter, incident, occurrence, or set of facts or circumstances taking place prior to the Closing date’ of October 1, 1982.” Compl. ¶ 12.

⁸ *Id.* ¶ 13.

⁹ *See id.* ¶¶ 14–15.

¹⁰ *Id.* ¶ 14.

¹¹ *Id.* ¶ 15.

not subject to Section 14.4's time or dollar limitations.¹² Westinghouse agreed to this additional provision, and Section 14.5 reads:

Seller hereby extends to Purchaser a separate indemnification, not subject to any of the limitations described in 14.4 above, with respect to the disposal by Seller of any chemical or toxic substance on or off the premises of the Vicksburg facility, including but not limited to the substance Trichloroethylene, which Seller acknowledges to have been buried in an underground waste disposal site on the premises at Vicksburg, and with respect to the disposal by Seller of PCB's (polychlorinated biphenyls) on or off said premises. Seller shall indemnify, defend and hold Purchaser harmless from all liability, costs, damages and attorney's fees which Purchaser may sustain or become subject to as a result of said disposal. Purchaser agrees to cooperate with Seller to a reasonable extent by permitting access by Seller to the waste disposal site in Vicksburg for clean-up. Seller shall control the defense of any lawsuit with respect to said underground waste disposal site. Purchaser agrees not to use said underground waste disposal site.¹³

In the fall of 1995, Westinghouse merged with CBS.¹⁴ CBS subsequently assumed Westinghouse's obligations and liabilities under the 1982 Agreement.¹⁵ Ten years later, CII merged with Cooper, which similarly assumed all rights and responsibilities of CII under the 1982 Agreement.¹⁶

B. THE VICKSBURG FACILITY

The Vicksburg Facility, located in Vicksburg, Mississippi, is situated on 53.5 acres of land, and is presently used "to manufacture lighting fixtures and poles for

¹² *Id.* ¶ 16.

¹³ 1982 Agreement § 14.5.

¹⁴ Compl. ¶ 18.

¹⁵ *Id.*

¹⁶ *Id.* ¶ 19.

distribution to the industrial and construction markets.”¹⁷ When Westinghouse was owner, it was used to manufacture “fluorescent and incandescent light fixtures, including light ballasts with PCB compounds.”¹⁸ Westinghouse also used and disposed of a variety of other chemicals and toxic substances at the Vicksburg Facility.¹⁹ Since CII took ownership in 1982, PCBs have not been used at the Vicksburg Facility.²⁰

C. CONTAMINATION OF VICKSBURG FACILITY

In August 1999, CII discovered PCB contamination affecting the engineering offices, cafeteria aisle-way, hallway, and former photometrics laboratory at the Vicksburg Facility.”²¹ CII determined that the affected walls and floors had to be remediated, and sought indemnification from CBS pursuant to Section 14.5 of the 1982 Agreement.²²

After a series of discussions, CII completed the required remediation and “[i]n early 2000, CBS reimbursed CII ... for an agreed-upon amount of \$167,000.”²³ CBS never disputed its obligation to indemnify CII for this remediation under Section

¹⁷ *Id.* ¶¶ 20, 22.

¹⁸ *Id.* ¶ 21 (“Westinghouse’s operations there included punch presses, assembly, porcelain enamel coating (including a pickling process), acid sealing, alkaline cleaning, rinsing, zinc phosphate coating, chromate coating, painting (dip and spray), paint stripping, industrial wastewater treatment, and sanitary wastewater treatment.”).

¹⁹ *Id.*

²⁰ Compl. ¶ 23.

²¹ *Id.* ¶ 24.

²² *Id.* ¶¶ 24-25.

²³ *Id.* ¶ 26.

14.5 of the 1982 Agreement.²⁴ Defendant also never took the position that “the indemnification covered by Section 14.5 was limited only to the disposal of chemicals or toxic substances associated with the ‘underground waste disposal site’ mentioned in Section 14.5.”²⁵ Plaintiff further contends that “CII’s PCB remediation in late 1999 and early 2000 had nothing to do with [the] underground waste disposal site[,]”²⁶ but Defendant still indemnified Cooper.

In 2012, Plaintiff conducted an investigation of the environmental conditions at the Vicksburg Facility.²⁷ Cooper discovered “that [the] soil and groundwater in certain areas beneath and to the west of the manufacturing facility building [were] contaminated with a variety of chemicals and toxic substances, including PCBs and TCE.”²⁸

Cooper subsequently entered into a November 2015 agreement with the Mississippi Department of Environmental Quality (“MDEQ”) “to review and agree upon a site investigation work plan for remediation of the identified contamination at the Vicksburg Facility.”²⁹ In 2016 and 2017, Cooper and its environmental

²⁴ *Id.* ¶ 27.

²⁵ *Id.*

²⁶ Compl. ¶ 27.

²⁷ *Id.* ¶ 28.

²⁸ *Id.*

²⁹ *Id.* ¶¶ 29-30.

engineering firm, Golder Associates Inc. (“Golder”), collaborated with MDEQ to create this plan.³⁰

Based on its work with MDEQ and Golder, Plaintiff believes “the potential environmental liability costs for the identified contamination are estimated to be approximately \$4 million ... [and] the future potential cost of PCB remediation alone is estimated to be approximately \$2 million.”³¹ At the time Plaintiff’s Complaint was filed, Cooper had already spent about \$660,000 to help remediate the contamination,³² which it alleges is only attributable to the actions of Westinghouse.³³

D. THE INSTANT LITIGATION

In response to these remediation costs, Cooper asked CBS, in a letter dated February 9, 2017, “to indemnify, defend, and hold [it] harmless against any loss, damage, liability ... or expense (including attorney’s fees and court costs) arising from the identified contamination at the Vicksburg Facility pursuant to Section 14.5 of the 1982 Agreement.”³⁴

CBS subsequently refused to indemnify Cooper in a February 28, 2017 email.³⁵ In the email, Defendant claimed that Section 14.5 only required CBS to

³⁰ *Id.* ¶ 30.

³¹ *Id.* ¶ 31.

³² Compl. ¶ 30.

³³ *Id.* ¶ 31.

³⁴ *Id.* ¶ 32.

³⁵ *Id.* ¶ 33.

provide indemnification “for costs, liabilities or damages ... associated with the subject underground disposal site.”³⁶ Plaintiff believes that Defendant’s interpretation of Section 14.5 of the 1982 Agreement is flawed and cannot be reconciled with its prior conduct or with the plain language of the Agreement.³⁷

Because Cooper has been unable to resolve this issue with CBS, Plaintiff filed the instant litigation on March 20, 2018.³⁸ Plaintiff has asserted breach of contract and declaratory judgment claims against CBS, seeking recovery for the “... hundreds of thousands of dollars in indemnifiable costs ... at the Vicksburg Facility.”³⁹ Defendant responded by filing the instant Motion to Dismiss on May 23, 2018, pursuant to Superior Court Civil Rule 12(b)(6).⁴⁰

II. STANDARD OF REVIEW

In considering a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), the Court must assume the truthfulness of the complaint’s well-pleaded allegations,⁴¹ and afford a plaintiff “the benefit of all reasonable inferences that can

³⁶ *Id.*

³⁷ *See id.* ¶¶ 34–38.

³⁸ *See* Compl.

³⁹ *Id.* ¶ 5.

⁴⁰ *See* Def.’s Mot. to Dismiss.

⁴¹ *See Solomon v. Pathe Commc’ns Corp.*, 672 A.2d 35, 38–39 (Del. 1996). *See also VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 611 (Del. 2003) (noting that the complaint is to be liberally construed and under “Delaware’s judicial system of notice pleading, a plaintiff need not plead evidence” but must “only allege facts that, if true, state a claim upon which relief can be granted.”).

be drawn from [their] pleading.”⁴² Certain documents that are “integral to a plaintiff’s claims ... may be incorporated by reference without converting the motion to a summary judgment.”⁴³ At this preliminary stage, dismissal will be granted only when the Court is able to determine with “reasonable certainty” that the plaintiff would not be entitled to relief “under any set of facts that could be proven to support the claims asserted” in the complaint.⁴⁴

III. DISCUSSION

CBS moves to dismiss Cooper’s Complaint on the grounds that its breach of contract and declaratory judgment claims are time-barred under the applicable Delaware statute of limitations.⁴⁵ The Court would like to note that, as Defendant CBS argued and Plaintiff Cooper conceded in their respective briefs,⁴⁶ Delaware procedural law will be applied. Any substantive issues regarding “the construction, validity, and interpretation” of the 1982 Agreement will be governed by Ohio law.⁴⁷

A. BREACH OF CONTRACT CLAIM

Defendant argues that “a breach of Article 14.5 [in the 1982 Agreement], if any, would occur upon the disposal of any chemical/toxic substance on or off the

⁴² *In re USACafes, L.P. Litig.*, 600 A.2d 43, 47 (Del. Ch. 1991) (noting, however, that the Court is not required to blindly accept all allegations or draw all inferences in a plaintiff’s favor).

⁴³ *Furnari v. Wallpang, Inc.*, 2014 WL 1678419, at *3–4 (Del. Super. Ct. Apr. 16, 2014).

⁴⁴ *See id.* (citing *Clinton v. Enter. Rent–A–Car Co.*, 977 A.2d 892, 895 (Del. 2009)).

⁴⁵ Def.’s Opening Br. Mot. to Dismiss at 1.

⁴⁶ *See id.* at 7-9; *see also* Pl.’s Opp’n Br. Mot. to Dismiss at 7-8.

⁴⁷ 1982 Agreement § 34.

Vicksburg Facility.”⁴⁸ Because Plaintiff “had full knowledge, or at the very least, inquiry notice, of alleged hazardous substance disposals at the Vicksburg Facility at the time of the closing of the [1982 Agreement], ... in 1999, and then once again in 2012[,]”⁴⁹ Defendant believes “the statute of limitations on Cooper’s claims for indemnification expired, at the latest, in 2015.”⁵⁰

Plaintiff contends that Defendant’s breach of Section 14.5 occurred on February 28, 2017, when CBS refused to indemnify Cooper for remediation costs related to the contamination.⁵¹ For this reason, Cooper argues that its breach of contract claim “is well within the [three year] statute of limitations” and cannot be dismissed as untimely.⁵²

In Delaware, the statute of limitations for a breach of contract claim is three years.⁵³ The cause of action begins to accrue at the time of the alleged breach.⁵⁴ Under Ohio law, when confronted with an issue of contract interpretation, the Court must give effect to the intent of the parties.⁵⁵ The Court should examine “the contract as a whole and presume that the intent of the parties is reflected in the language of

⁴⁸ Def.’s Opening Br. Mot. to Dismiss at 12.

⁴⁹ *Id.* at 12-13.

⁵⁰ *Id.* at 17.

⁵¹ Pl.’s Opp’n Br. Mot. to Dismiss at 8.

⁵² *See id.* at 7-13.

⁵³ 10 Del. C. § 8106.

⁵⁴ *Bank of Delmarva v. South Shore Ventures, LLC*, 2014 WL 53903889, at *3 (Del. Super. Ct. Oct. 21, 2014).

⁵⁵ *See Sunoco, Inc. (R & M) v. Toledo Edison Co.*, 953 N.E.2d 285, 292 (Ohio 2011).

the contract.”⁵⁶ Additionally, “[it] will look to the plain and ordinary meaning of the language used in the contract unless another meaning is clearly apparent from the contents of the agreement. When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties. ‘As a matter of law, a contract is unambiguous if it can be given a definite legal meaning.’”⁵⁷

In examining the 1982 Agreement, the Court believes that a breach of contract presumably occurs when CBS denies a request for indemnification pursuant to Section 14.5 since that is the moment “the contract is broken.”⁵⁸ Because CBS denied Cooper’s indemnification request in February 2017 and Cooper filed this action in March 2018, the Court believes that Plaintiff has asserted its breach of contract claim within the applicable three-year statute of limitations.⁵⁹ Therefore,

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Smith v. Mattia*, 2010 WL 412030, at *3 (Del. Ch. Feb. 1, 2010) (noting that “[f]or breach of contract, a cause of action accrues ‘at the time the contract is broken, not at the time when actual damage results or is ascertained.’”)

⁵⁹ Even if the Court found that the statute of limitations on Cooper’s breach of contract action began to run when the indemnification claim accrued, as CBS argues it should, the motion to dismiss would still be denied. If the Court accepted Defendant’s argument, it would have found that the claim for indemnification under Section 14.5 accrued when the disposal clean-up or remediation process started. The mere discovery of toxic substances at the Vicksburg Facility did not trigger Defendant’s indemnification responsibilities. Instead, the 1982 Agreement states that CBS “shall indemnify ... all liability, costs, damages, and attorney’s fees which [Cooper] may *sustain or become subject to* as a result of said disposal.” (1982 Agreement § 14.5 (emphasis added)). Cooper did not necessarily “sustain or become subject to” remediation costs upon the simple discovery of toxic substances or contamination. Even considering the facts in the light most favorable to CBS, the Court would find it is when the clean-up or remediation process is set in motion that Cooper “sustain[s] or become[s] subject to” the costs covered by Section 14.5.

Defendant's Motion to Dismiss Plaintiff's breach of contract claim is denied.

B. DECLARATORY JUDGMENT CLAIM

CBS also argues that Cooper's declaratory judgment claim is time-barred for the same reasons as its breach of contract claim.⁶⁰ It also contends that the declaratory judgment claim is simply a recasting of the breach of contract claim and should be dismissed as superfluous.⁶¹

Cooper argues that its declaratory judgment claim "is intended to resolve a dispute that CBS raised regarding the interpretation of Section 14.5."⁶² Plaintiff believes that its two claims are distinct because the "breach claim seeks damages for CBS's violation of its duty to indemnify Cooper, [and] the declaratory judgment claim seeks a determination that CBS had a duty to indemnify and seeks a resolution of the interpretive dispute CBS has raised regarding the scope of CBS's indemnity obligation under Section 14.5."⁶³

For the reasons discussed above, Cooper's declaratory judgment claim is not

Based on the facts pleaded in Plaintiff's Complaint, the Court believes that, even under CBS' assertions, the clean-up or remediation process was set in motion when Cooper entered into an agreement with MDEQ in November 2015 to conduct a remedial investigation of the Vicksburg Facility, and that is also the earliest time the indemnification claim at issue could have accrued. (*See* Compl. ¶ 29). If the Court had accepted CBS' position, Plaintiff still would have asserted its breach of contract claim within the applicable three-year statute of limitations because Cooper's agreement with MDEQ occurred in November 2015 and Cooper filed its suit in March 2018.

⁶⁰ *See* Def.'s Opening Br. Mot. to Dismiss at 17-18.

⁶¹ *See id.* at 18-19.

⁶² Pl.'s Opp'n Br. Mot. to Dismiss at 14.

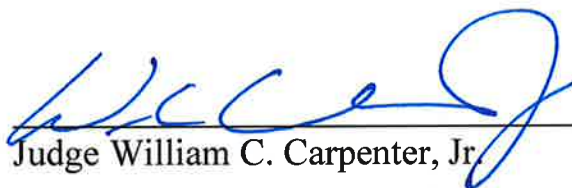
⁶³ *Id.* at 15.

time-barred. The Court also finds at this stage of the litigation that Plaintiff's declaratory judgment claim is not duplicative of its breach of contract claim. The contract interpretation issues raised in Cooper's declaratory judgment claim are entirely different from the issues raised in the breach claim and, if not resolved, would ultimately open the door to future endless litigation between the parties. Therefore, Defendant's Motion to Dismiss Plaintiff's declaratory judgment claim is denied.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss is **DENIED**.

IT IS SO ORDERED.



Judge William C. Carpenter, Jr.