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At a Term of the Supreme Court held in and for the County of Wayne at the Hall of Justice in the Village of Lyons, New York on the 17th day of December, 2014.

PRESENT: Honorable Daniel G. Barrett
Acting Supreme Court Justice

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WAYNE

VILLAGE OF SODUS,

Plaintiff

DECISION
Index No. 69697
2014

-vs-

M.C. HOPKINS & SONS, INC. and
WINTER INDUSTRIAL WATER TREATMENT, INC.

Defendants

The Defendants, M.C. Hopkins & Sons, Inc. And Winter Industrial Water Treatment, Inc., have moved for partial summary judgment for so much of the Plaintiff's action that seeks to recover damages arising from the waste water discharges that occurred prior to December 2, 2006.

The Plaintiff, Village of Sodus, has cross-moved for an Order granting Plaintiff leave to amend Plaintiff's Amended Complaint to contain two causes of action: Indemnification and Restitution.

The Plaintiff has commenced this action on December 2, 2009, to recover for damages caused to its concrete sewer pipelines which have allegedly deteriorated due to the exposure of the pipes to acidic and highly caustic discharges which caused latent or delayed physical damage to the sanitary sewer lines over a long period of time. The Plaintiff indicated that the damage was caused by waste waters with pH levels less than 5.5 and greater than 9.5.

Richard Clayton, from 2001 until August, 2011, was Severn Trent's area manager and one of his responsibilities was the wastewater treatment plant in the Village of Sodus. He indicated that there were out of range pH levels in that time frame but they were sporadic and did not give any reason to believe that the Village's sewer pipes were sustaining damages.

Paul Badman was the chief operator of the Village Treatment Plant either as an employee of Severn Trent or the Village for the period 2000 to 2011. He indicated that the pH levels were very sporadic and there was no consistency when they would occur. Upon obtaining an out of range pH reading, Mr. Badman would, many times, take another pH reading just a few minutes later. The second reading would then be a pH level that was not out of range, indicating that the out of range reading came from a relatively short term discharge of water. He did not suspect that any damage was being done to the sew pipelines until the discovery of the damage in May, 2009 on Spring Street.

The records of the pH readings indicate that from January 5, 1998 until September 25, 2006, there were 65 readings outside the range (lower than 5.5 or greater than 9.5). Defendants argue Plaintiff should have exercised due diligence in inspecting for damage.

The independent professional engineer, Robert J. Elliott, opined that an operator of a municipal waste water treatment plant would not know that the sewer pipes would be damaged because of the out of range pH levels.

Traditionally, the injury is deemed to occur upon impact or exposure to the defective product, even if the harm or illness is not manifested or discovered until years later, Consorti v. Owens-Corning Fiberglass Corp., 86 N.Y. 2d 449, 634 N.Y.S. 2d 18, 657 N.E. 2d 1301 (1995).

The accrual on impact rule was modified by the 1986 Enactment of CPLR 214-c, which generally provides a three year statute of limitations, measured from the Plaintiff's accrual or imputed discovery of injury, in actions to recover for personal injuries or property damage "caused by the latent effects of exposure to any substance or combination of substances, in any form upon or within the body or upon or within property," see Rothstein v. Tennessee Gas Pipeline Co., 87 N.Y. 2d 90, 637 N.Y.S. 2d 674, 661 N.E. 2d 146 (1995); Jensen v. General E.C. Co., 82 N.Y. 2d 77, 603 N.Y.S. 2d 420, 623 N.E. 2d 547 (1993) (CPLR 214-c applies to property damage actions caused by all substances, including hazardous wastes emanating from continuing trespass and continuing nuisance conditions).

"Exposure" for the purpose of CPLR 214-c means direct or indirect exposure by absorption, contact, ingestion, inhalation, implantation or injection, CPLR 214-c (1). The term "injury" in CPL 214-c refers to an actual illness or physical condition or other similarly discoverable objective manifestation of the damage caused by previous exposure to an injurious substance, Whitney v. Agway, Inc., 238 A.D. 2d 782, 656 N.Y.S. 2d 455 (3rd Dep't. 1997).

CPLR 214-c's 3-year limitations commences to run on "the date of discovery of the injury by the plaintiff" or "the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier", see Pfohl v. Amax, Inc., 222 A.D. 2d 1068, 635 N.Y.S. 2d 880 (4th Dep't. 1995).

Based upon the materials presented in this application a question of fact exists as to whether the Plaintiff exercised reasonable diligence in discovering the injury to the sewer pipe lines. Consequently, Defendants' motion for partial summary judgment is denied.

The Plaintiff has moved to amend the Complaint to add a cause of action for indemnification and the Defendants oppose this application. To properly make out a claim for implied-in-fact-indemnity a Plaintiff must allege that "both parties... are subject to a duty to a third person under such circumstances that one of them, as between themselves, should perform it rather than the other." City of New York v. Lead Industries Ass'n., 644 N.Y.S. 2d at 922, 222 A.D. 2d at 125. The classic case for such indemnification "is where one, without fault on its part, is held liable to a third party by operation of law (frequently statutory) due to the fault of another." Id. at 922-923, 222 A.D. 2d at 125. In its Complaint, the Plaintiff fails to allege a critical element necessary to make out a valid indemnification claim-that it had a duty or obligation under the law to correct the damage caused to the sewer system. See, e.g., Id. at 922-925, 222 A.D. 2d at 124-130 (Id. at 922-925 222 Id. at 124-130) (the City of New York sufficiently pled an indemnification claim by alleging that it had a statutory and regularity duty to its residents which was imposed on the City at the fault of the plaintiff); Hickey's v. Carting, 380 F. Supp. 2d at 120 (the state properly pled an indemnification cause of action against the defendant by alleging that it had a duty to indemnify the town for 75% of its abatement costs and the defendant, if found liable, would also have

a duty to indemnity the town all of the abatement costs); State v. Stewart's Ice Cream Co., 64 N.Y. 2d 83, 88 484 N.Y.S. 2d 810, 812, 473 N.E. 2d 1184, 1186 (1984) (Court of Appeals found that in an indemnification action was proper where the State has a statutory duty to remediate petroleum contamination).

Since the Plaintiff never identified and alleged in its Complaint that it had a duty or legal obligation to correct the damage to its sewer system, its indemnification claim fails as pled. Without such obligation, the Plaintiff could never be at risk for incurring liability to a third party obligee for which the Plaintiff would be entitled to indemnification upon satisfaction of the jointly-owed obligation. Even accepting all factual allegations as true, the Plaintiff has failed to advance a claim for indemnification upon which relief can be granted. The motion to amend the Amended Complaint is denied, but with leave to re-plead within thirty (30) days of the date that the Order for this application is filed with the County Clerk's Office.

Likewise, the Plaintiff seeks to amend the Complaint for a cause of action for restitution which the Defendants oppose. Section 115 of the Restatement of Restitution defines the cause of action for restitution as follows:

> A person who has performed the duty of another by supplying things or services although acting without the other's knowledge or consent, is entitled to restitution from the other if (a) he acted unofficiously and with intent to charge therefore, and (b) the things or services supplied were immediately necessary to satisfy the requirements of public decency, health or safety.

Restatement of Restitution, §115. "Unlike a claim for indemnity, a plaintiff seeking restitution need not have been under a duty to perform that for which restitution is sought but, rather, that such party because there was an immediate necessity to protect "public decency, health or safety," took action to fulfill a duty actually owed by the defendant. While traditionally, it was necessary that the Plaintiff have acted voluntarily, it has been held that it is not fatal to a cause of action for restitution that the Plaintiff may have also had a statutory duty to act." City of New York v. Lead Industries Ass'n., 644 N.Y.S. 2d 919, 903, 222 A.D. 2d 119, 126 (1st Dep't. 1996).

The Plaintiff alleges that Defendants are responsible for repairs and a had a duty to undertake such repairs to the sewer system. By discharging Defendants' duty to repair the sewer system, Plaintiff alleged that they have unjustly enriched the Defendants. The Plaintiff has stated a valid cause of action for restitution and is permitted to add this cause of action to its pleading.

This constitutes the Decision of the Court.

Dated: January 14, 2015
Lyons, New York

Daniel G. Barrett
Acting Supreme Court Justice