

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

HILSTON PETERS,

Plaintiff,

vs.

**VIRGIN ISLANDS WATER AND POWER
AUTHORITY, COMBUSTION ENGINEERING,
INC., and GE INTERNATIONAL,
CORP.,**

Defendants.

CASE NO. ST-11-CV-219

**VIRGIN ISLANDS WATER AND POWER
AUTHORITY,**

Third-Party Plaintiff,

vs.

ALSTOM POWER, INC.,

Third-Party Defendant.

MEMORANDUM OPINION

Pending before the Court is Alstom Power, Inc.'s motion to dismiss Virgin Islands Water and Power Authority's ("WAPA") Third-Party Complaint. For the following reasons, Alstom's motion will be granted.

STANDARD

Fed. R. Civ. P. 12(b), made applicable to the Superior Court through SUPER CT. R. 7, provides that upon motion by the pleader, a claim, counterclaim, cross-claim, or third party claim shall be dismissed when there is a "failure to state a claim upon which

relief can be granted” to the claimant. When determining whether the allegations in a complaint are sufficiently pled, a court must engage in a three step inquiry:

First, the court must “tak[e] note of the elements a plaintiff must plead to state a claim.”.... Second, the court should identify allegations that, “because they are no more than conclusions, are not entitled to the assumption of truth”.... Finally, “where there are well pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief.”¹

A motion to dismiss a complaint should be denied if the factual allegations are “enough to raise a right to relief above the speculative level.”²

ANALYSIS

I. Contractor Liability

WAPA has made the following relevant allegations in the Third-Party Complaint:

- 1) Since 2000, Alstom has performed various services on Boiler 13, including “inspections ... providing technical assistance services ... maintenance and performing testing”;³
- 2) Alstom had “full knowledge of the dangers associated with the creation of high temperature soot material from the combustion process ... needed to operate ... [the] Boiler, as well as the risks associated with the manual collection and removal of said soot material ... [and] owed a duty to warn, which it failed to do”;⁴
- 3) “Alstom had a duty to provide adequate services and/or maintenance instructions and/or manuals with proper safety instructions and warnings regarding the dangers of collection and removal of waste soot materials for Unit 13 Boiler, to [WAPA], which it failed to do”;⁵

¹ *Santiago v. Warminster Tp.*, 629 F.3d 121, 130 (3d Cir. 2010) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 881 (2009)).

² *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008). See also *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

³ Third Party Complaint, at paragraphs 13 and 14.

⁴ *Id.*, at paragraph 15.

⁵ *Id.*, at paragraph 16.

- 4) “Alstom had a duty to recommend safe practices to [WAPA] with respect to alleviating the potential dangers and risks of manual collecting and removing waste materials, which it failed to do”;⁶
- 5) “As a direct and proximate result of the negligent acts and/or omissions of Alstom ... Plaintiff was injured”;⁷
- 6) WAPA “relied on Alstom’s skill and judgment in the maintenance and inspection of the boiler ... and in providing safety recommendations and/or training [concerning] the operation and procedure of soot collection and removal.”⁸

The parties argue that the sections of the Restatement that are applicable to the facts of this case are Restatement (Second) of Torts are §§ 323, 324A, 403 and 404.

Restatement (Second) of Torts § 403 provides that:

[o]ne who as an independent contractor makes, rebuilds, or repairs a chattel for another and turns it over to the other, knowing or having reason to know that his work has made it dangerous for the use for which it is turned over, is subject to the same liability as if he supplied the chattel.

Restatement (Second) of Torts § 404 establishes that: “[o]ne who as an independent contractor negligently makes, rebuilds, or repairs a chattel for another is subject to the same liability as that imposed upon negligent manufacturers of chattels.” Under Restatement of Torts § 323:

[o]ne who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if: (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

Similarly, Restatement (Second) of Torts § 324A states that:

⁶ *Id.*, at paragraph 17.

⁷ *Id.*, at paragraph 18.

⁸ *Id.*, at paragraph 19a. Considering that there are two paragraphs numbered 19 in the Third-Party Complaint, the Court will designate them as paragraphs 19a and 19b.

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if: (a) his failure to exercise reasonable care increases the risk of such harm, (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Restatement (Second) of Torts § 324A, the good samaritan rule, requires a showing that the “defendant specifically has undertaken to perform the task that he or she is charged with having performed negligently” and “specifies three circumstances in which the injury may be proximately caused by the negligent performance of an undertaking.”⁹ Section § 324A “applies to any undertaking to render services to another, where the actor's negligent conduct in the manner of performance of his undertaking, or his failure to exercise reasonable care to complete it, or to protect the third person when he discontinues it, results in physical harm to the third person or his things.”¹⁰

WAPA has not adequately pled a claim of action under Restatement (Second) of Torts § 403 as WAPA has made no factual allegations that Alstom’s inspections, technical assistance services, maintenance and performance testing made the boiler dangerous. Similarly, WAPA has not stated an action under Restatement (Second) of Torts § 404 as WAPA has made no factual allegations that “because of [Alstom’s] negligence, [the boiler was] not in that safe condition in which a competent contractor would have put it.”

⁹ *Patentas v. United States*, 687 F.2d 707, 716 (3d Cir. 1982).

¹⁰ Comment B to § 324A.

Instead, the allegations in the Complaint suggest that Alstom's failing was one of omission, not of commission. Specifically, WAPA asserts that Alstom failed to warn of the dangers of the boiler.

However, in order to state a claim under Restatement (Second) of Torts § 323, WAPA needed to make factual allegations indicating that Alstom failed to adequately render services for the protection of WAPA's person or things that resulted in physical harm to WAPA. As WAPA has only alleged that physical harm was experienced by Plaintiff, and not WAPA, § 323 is inapplicable.

Restatement (Second) of Torts § 324A initially appears to be applicable to the facts of this case because this section establishes that a party may be liable for injuries suffered by a third party. However, although WAPA claims that Alstom owed WAPA a duty to warn and failed to perform that duty, WAPA asserts no facts suggesting that WAPA had a duty to warn to Plaintiff which Alstom undertook to perform as required under § 324A(b). In addition, WAPA has pled no facts suggesting that Alstom's failure to warn WAPA "create[d] or increase[d] a risk of harm" to Plaintiff as required by § 324A(a).¹¹ As the Third Circuit has indicated, "the comment to section 324A(a) makes clear that an increased risk means some physical change to the environment or some

¹¹ Comment C to § 324A. Illustration 1 to § 324A describes that a party is subject to liability when it repairs a fixture, but does not attach the fixture properly and the fixture falls upon a third party. This circumstance, which describes a cause of action under § 324A(a), differs from a situation where a party fails to warn a third party of a danger because the failure to warn does not increase a danger, but instead masks the original danger.

other material alteration of circumstances.”¹² Accordingly, WAPA’s allegation does not state a claim under § 324A(a).

WAPA does allege that it relied on Alstom’s “skill and judgment in the maintenance and inspection of the boiler ... and in providing safety recommendations and/or training [concerning] the operation and procedure of soot collection and removal.” However, in order to state a claim under § 324A(c), WAPA must state some facts suggesting that it was “induced ... to forgo other remedies or precautions against ... a risk.”¹³ For instance, illustration four of § 324A(c) imposes liability on an inspector who negligently makes an inspection of an item and reports that the item is in good condition despite the item having defects. Similarly, illustration five of § 324A(c) imposes liability on a party who was hired to give warning of a danger and fails to give such a warning that results in harm to a third party.

As presented, WAPA’s allegation that it relied on Alstom is a legal conclusion. Noticeably absent from WAPA’s Complaint are facts that indicate Alstom was hired to warn WAPA of the danger that resulted in Plaintiff’s injuries.¹⁴ Although WAPA alleges that Alstom had full knowledge of the danger associated with the operation of the boiler and the collection of the soot materials, WAPA has not alleged any facts suggesting that WAPA was unaware of the dangers associated with the collection of the soot materials

¹² *Patentas v. United States*, 687 F.2d 707, 716-17 (3d Cir. 1982). See also *Turbe v. Gov’t of Virgin Islands*, 938 F.2d 427, 432 (3d Cir. 1991) (“to prevail under a theory of increased risk of harm a plaintiff must identify sins of commission rather than omission”).

¹³ Comment E to § 324A.

¹⁴ See *Sheridan v. NGK Metals Corp.*, 609 F.3d 239, 264 (3d Cir. 2010) (affirming trial court’s dismissal of an amended complaint because it failed to allege that defendant “negligently performed its contractual duty” and thus failed “to match an allegation of a specific duty owed to plaintiffs with an allegation of negligent performance of that duty”)

due to some act of Alstom, such as a report that the boiler was in good condition. Because WAPA has pled no facts showing that it was induced to forgo precautions or other remedies,¹⁵ WAPA has failed to properly state a claim under § 324A(c).

II. Successor in Interest Liability

WAPA also asserts that it has alleged specific facts that Alstom conducted business as, and in continuation of, Combustion Engineering (“CE”), and because Alstom did not address these facts in its brief, “Alstom has admitted it assumed liability for the actions and/or omissions related to CE design (sic) and manufacture of the Boiler.”¹⁶ The sections in the Third-Party Complaint that WAPA cites for this proposition are paragraphs 11 and 12 which state that: “Combustion Engineering, Inc. designed and manufactured the Unit 13 Boiler, hopper and chute” and that “ABB Alstom Power, Inc. purchased certain assets of CE, including CE’s process boiler and fossil fuel division ... and changed its name to Alstom Power, Inc.,” respectively.

Generally, a party “admits for the purposes of the consideration of [a motion to dismiss] that all facts well pleaded in the ... complaint are true,”¹⁷ but despite which, the complaint fails to state a claim upon which relief can be granted. Accordingly, the fact that Alstom did not specifically challenge paragraphs 11 and 12 of the Complaint does not mean that the Complaint survives the motion to dismiss.

In addition, the Court notes that although successor liability can be proved under the theory of strict liability or negligence, WAPA has only pled facts associated with a

¹⁵ *Patentas v. United States*, 687 F.2d 707, 717 (3d Cir. 1982) (affirming trial court’s dismissal of an action because the plaintiff failed to allege that its knowledge of the defendant’s undertaking induced it to forgo other remedies or precautions against the risk presented).

¹⁶ WAPA’s opposition to Alstom’s motion to dismiss, at page 7.

¹⁷ *Olin’s, Inc. v. Avis Rental Car Sys. of Fla., Inc.*, 104 So. 2d 508, 510 (Fla. 1958).

theory of negligence in its Third-Party Complaint.¹⁸ A party may be subject to liability under the theory of successor liability as a supplier of chattel under Restatement (Second) of Torts § 388, which provides that:

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

While WAPA has pled facts indicating that the boiler was dangerous, WAPA has pled no facts indicating that it was unaware of the dangerous nature of the boiler, or facts otherwise suggesting Alstom had no reason to believe WAPA would realize the dangerous condition of the boiler. As a result, WAPA has failed to state a claim under Restatement (Second) of Torts § 388.

III. Indemnification and Contribution

Finally, WAPA opposes Alstom's motion on the ground that Alstom did not address WAPA's claims for contribution and indemnity. Restatement (Third) of Torts: Apportionment of Liability § 23(a) provides as follows:

[w]hen two or more persons **are or may be liable** for the same harm and one of them discharges the liability of another by settlement or discharge of judgment, the person discharging the liability is entitled to recover contribution from the other, unless the other previously had a valid settlement and release from the plaintiff.

¹⁸ The only count in the Third Party Complaint is entitled "negligence," and paragraphs 18, 19(b), 20, and 21 assert that Alstom was negligent. The other paragraphs in the pleadings allege facts indicating that Alstom breached its duty to WAPA, which sounds in negligence and not in strict liability.

Similarly, Restatement (Third) of Torts: Apportionment Liab. § 22 provides that:

- (a) When two or more persons **are or may be liable** for the same harm and one of them discharges the liability of another in whole or in part by settlement or discharge of judgment, the person discharging the liability is entitled to recover indemnity in the amount paid to the plaintiff, plus reasonable legal expenses, if:
- (1) the indemnitor has agreed by contract to indemnify the indemnitee, or
 - (2) the indemnitee
 - (i) was not liable except vicariously for the tort of the indemnitor, or
 - (ii) was not liable except as a seller of a product supplied to the indemnitee by the indemnitor and the indemnitee was not independently culpable.

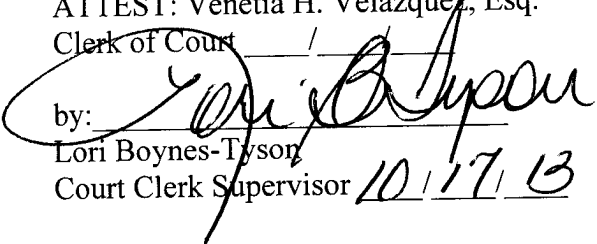
Given that WAPA has not stated a claim upon which relief can be granted in its Third-Party Complaint, Alstom is not subject to liability in this case and WAPA is not entitled to recover contribution or indemnity from Alstom.

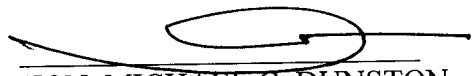
As a result, WAPA's Third-Party Complaint will be dismissed. An Order consistent with this Opinion shall follow.

Dated: October 7, 2013

ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court

by:


Lori Boynes-Tyson
Court Clerk Supervisor 10/17/13


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS