To commence the 30-day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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FRANCIS HAYES and FRANCES HAYES,

Plaintiffs,

-against-

IBRAHIM VAZQUEZ ENTERPRISES, INCORPORATED and GREAT DIVIDE INSURANCE COMPANY,

Defendants.

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IBRAHIM VAZQUEZ ENTERPRISES, INCORPORATED and GREAT DIVIDE INSURANCE COMPANY,

Third-Party Plaintiffs,

-against-

ECONOMY FUEL,
BOTTINI FUEL,

Third-Party Defendants.

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DECISION AND ORDER

Index No.: 2020-52632

Motion Seq. Nos. 1 & 2

ACKER, J.S.C.

The below listed papers, numbered 1 to 24, were read on the following motions: (1) motion of Third-Party Defendants Economy Fuel and Bottini Fuel (hereinafter "Third-Party Defendants" and/or "Oil Company Parties") for an Order pursuant to CPLR 3211(a)(7) and (8) dismissing the Third-Party Complaint in its entirety and with prejudice; and (2) cross-motion of Defendants/Third-Party Plaintiffs Ibrahim Vazquez Enterprises, Incorporated and Great Divide

Insurance Company (hereinafter "Defendant Vazquez" and "Defendant Great Divide" respectively or "Defendants" collectively) for an Order pursuant to CPLR §3025(b) granting leave to file an amended Third-Party Complaint and denying Third-Party Defendants' motion to dismiss:

Notice of Motion-Affirmation of Kristin Carter, Esq.- Exhibits A-E-
Memorandum of Law in Support-Exhibits A-F-Affidavit of Mark Bottini 1-15
Notice of Cross-Motion-Affirmation of David H. Walsh IV, Esq.-Exhibits A-C-
Memorandum of Law in Support of Cross-Motion.....16-22
Reply Affirmation of Kristin Carter, Esq.-Memorandum of Law in Reply 23-24

Plaintiffs Francis Hayes and Frances Hayes (hereinafter "Plaintiffs") commenced this action against Defendants on or about August 27, 2020 seeking reimbursement for environmental investigation, cleanup, removal, remediation and response costs incurred by Plaintiffs, as well as compensation for all direct and indirect damages sustained as a result of the discharges and releases of petroleum by Defendant Vazquez as defined in New York Navigation Law §172. On or about December 10, 2020, Defendants commenced a Third-Party action against the Oil Company Parties alleging causes of action under the Navigation Law and for common law contribution and indemnification.

Facts

According to the Complaint, on or about September 19, 2019, Defendant Vazquez, doing business as "Vaz-Co Reclaiming Service" (hereinafter "Vaz-Co"), installed a new above ground oil storage tank system ("AST") in the basement of Plaintiffs' home at 146 All Angels Hill Road, Wappingers Falls, New York ("Property"). It is alleged that on and/or continuing after September 20, 2019, petroleum was discharged, leaked, spilled and/or released from the AST and contaminated the air, soil, groundwater, surface water and natural resources, as well as the personal property of the Plaintiffs. The discharge was discovered by Plaintiffs on or about October 20,

2019 and was reported to Defendant Vaz-Co that same day. It is further alleged that the discharges and contamination resulted from the actions, omissions, wrongful conduct and/or fault of Vaz-Co in its installation of the AST, including Vaz-Co's failure to properly install said system. Plaintiff asserts nine causes of action against Defendants, with seven asserted solely against Defendant Vaz-Co – strict liability pursuant to Navigation Law §181(5), contribution pursuant to Navigation Law §176(8), negligence, nuisance, common law contribution and indemnification, restitution and breach of contract.

Defendants thereafter commenced the Third-Party action against the Oil Company Parties asserting claims of strict liability under Navigation law §181(5), contribution pursuant to Navigation Law §176(8) and common law contribution and indemnification. Notably, Defendants incorporate the alleged facts surrounding the incident at issue as detailed in Plaintiff's Complaint into the Third-Party Complaint, without admitting the truth of said allegations (*see* ¶14). In addition to those allegations, Defendants claim that Plaintiffs contacted the Oil Company Parties for a delivery of No. 2 fuel oil on September 20, 2019 and that the delivery was made that same day. It is further alleged that Plaintiffs informed the Oil Company Parties that the prior AST had been replaced and that the driver refused to inspect the system before or after delivering the oil. The failure to inspect before or after the delivery is alleged to have caused and/or contributed to the fuel oil leak. In the alternative, Defendants contend that prior to and after the delivery was made, the driver inspected the AST and ensured that it was not leaking any oil. As such, it is alleged that having performed these inspections and failed to detect the alleged leak, the Oil Company Parties' driver caused and/or contributed to the fuel leak.

The Oil Company Parties now move to dismiss the Third-Party Complaint in its entirety arguing that (1) Defendants fail to allege a Navigation Law claim against them; (2) Defendants, as dischargers, cannot state a claim under §181(5) of the Navigation Law; (3) Defendants cannot state a claim under §176(8) of the Navigation Law as they did not cleanup the property or incur any costs; and (4) Defendants cannot seek common law contribution or indemnity. The Oil Company Parties also move to dismiss the Third-Party Complaint for failure to properly name parties who are amenable to suit.

On a motion to dismiss a complaint pursuant to CPLR 3211, the pleading shall be liberally construed and the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc.*, 37 NY3d 169, 175 [2021], *reargument denied*, 2021 WL 4189227, *quoting Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]. "Dismissal under CPLR 3211(a)(7) 'is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery' [citation omitted]." *Himmelstein, supra.*

As noted above, Defendants specifically incorporated the facts surrounding the alleged incident from the original Complaint into the Third-Party Complaint. *See* ¶14, Third-Party Complaint. The incorporated facts, as well as the new facts alleged in the Third-Party Complaint, are accepted as true on this motion to dismiss. Therefore, it is uncontested that Defendant Vaz-Co installed a new AST at Plaintiff's property on or about September 19, 2019 and that Plaintiffs ordered a fuel delivery from Third-Party Defendants the next day. The alleged discharge was not

discovered until one month after the fuel delivery. Plaintiff's Complaint does not reference the September 20, 2019 oil delivery and neither pleading alleges that the leak at issue herein was the result of Third-Party Defendants overfilling the oil tank. Instead, the crux of the Third-Party Complaint is that the Oil Company Parties either failed to inspect the AST or that if they did inspect it, they failed to discover the leak.

"Navigation Law §181(1) provides that '[a]ny person who has discharged petroleum' is strictly liable, 'without regard to fault, for all cleanup and removal costs and all direct and indirect damages.' Navigation Law §181(5) provides that '[a]ny claim by any injured person for the costs of cleanup and removal and direct and indirect damages based on the strict liability imposed by this section may be brought against the person who has discharged the petroleum' 'Discharge' is defined as 'any intentional or unintentional action or omission resulting in the ... spilling [or] leaking ... of petroleum' (Navigation Law § 172[8])." *Fuchs & Bergh, Inc. v. Lance Enterprises, Inc.*, 22 AD3d 715, 716–17 [2d Dept. 2005].

First, the Oil Company Parties contend that the pleadings fail to establish that they are "dischargers" under the Navigation Law, which would be fatal to Defendants' Navigation Law causes of action. The Court of Appeals has held that nothing in the statutory language of the Navigation Law requires proof of fault or knowledge. *State of New York v. Green*, 96 NY2d 403, 407 [2001]. However, "[l]iability under Navigation Law article 12 is predicated on a potentially responsible party's capacity to take action to prevent an oil spill or to clean up the resulting contamination [citation omitted]." *Kramer v. Oil Servs., Inc.*, 56 AD3d 730, 731 [2d Dept. 2008].

The Third-Party Complaint alleges that the Oil Company Parties owed a duty to inspect the newly installed AST. It is further alleged that Third-Party Defendants breached this duty by

failing to perform an inspection or by conducting the inspection without detecting the alleged leak. Thus, as acknowledged by the Defendants, the leak did not occur as a result of the manner in which the Oil Company Parties delivered the oil. "[I]f a discharge from an underground storage tank occurs as a result of the means of storage rather than the manner of delivery and the supplier has no involvement in the storage of the product, that supplier is not in a position to halt or prevent a spill or clean up the resulting contamination from the spill and will not be held liable as a discharger." *State of New York v. Joseph*, 29 AD3d 1233, 1235 [3d Dept. 2006].[1] Here, the pleadings are devoid of any allegation that the Third-Party Defendants had any involvement in the storage of the fuel oil.

In addition, the Third-Party Complaint contains no allegation that the Oil Company Parties had a contractual obligation to inspect the AST before or after their delivery of fuel oil, or that they were on notice of a potential leak in the newly installed system. "A supplier of residential heating fuel has no duty to check the heating system for leaks before supplying fuel to the residence absent notice to the supplier of a possible defect in the system [citation omitted]. Only when the fuel supplier has received actual or constructive notice of a leak in the system does a duty arise to inspect the heating system before making further deliveries of fuel." *Lowenthal v. Perkins*, 164 Misc2d 922, 924 [Sup. Ct., Thompkins County 1995]. Given the deficiencies in the Complaint as to any contractual obligation to inspect the AST prior or notice of a potential leak in the system, the Oil Company Parties have established that the Complaint fails to state a cause of action under Navigation Law §181(5) against them.

[1] Although the tank at issue herein was not an underground tank, it was filled from the outside of the home.

In opposition, Defendants argue that there are questions of fact as to whether the Oil Company Defendants voluntarily assumed a duty to inspect the AST and whether, in doing so, they possessed some ability to anticipate or prevent the discharge. This argument is speculative and would be more compelling if there were any allegations in the pleadings that the leak at issue occurred immediately up the delivery of oil or that it would have been discernable before or immediately after the oil delivery. However, the pleadings are silent on these issues and it is uncontested that the discharge was not discovered until a month after the oil delivery. In any event, the mere delivery of oil, without more, is not a sufficient basis to maintain a case against the Oil Delivery Companies under the Navigation Law. *See e.g. State of New York v. Joseph, supra.*

Defendants have also cross-moved to amend the Third-Party Complaint in response to the Oil Company Parties' motion to dismiss.[2] The only newly proposed factual allegation that is potentially relevant to their Navigation Law cause of action is the claim that Defendants were not at fault for the discharge (¶22 of Proposed First Amended Third-Party Complaint, Exhibit A of Walsh Affirmation). But, this new factual allegation does not provide any further support for Defendants' assertion that the Oil Company Parties are "dischargers" under the Navigation Law. Accordingly, Defendants fail state a cause of action against the Oil Company Parties under Navigation Law §181(5) and the Third-Party Defendants' motion to dismiss the First Cause of Action is granted.[3]

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[2] The bulk of the proposed amendments to the Third-Party Complaint address that portion of Defendants' cross-motion to substitute the proper Third-Party Defendant in place of the Oil Company Parties, which will be addressed below.

[3] As Defendants fail to state a cause of action against the Oil Company Parties under Navigation Law §181(5), the Court need not reach the argument that Defendants are not entitled to pursue a claim under §181(5) since Vaz-Co is a party that caused and/or contributed to the discharge. *See e.g. Gen. Cas. Ins. Co. v. Kerr Heating Prod.*, 48 AD3d 512, 514 [2d Dept. 2008] (a party pursuing a claim under Navigation Law §181(5) must be without fault).

The Oil Company Parties also seek to dismiss Defendants' second cause of action, which asserts a claim for contribution pursuant to Navigation Law §176(8). That section provides that "every person providing cleanup, removal of discharge of petroleum or relocation of persons pursuant to this section shall be entitled to contribution from any other responsible party." In support of this claim, Defendants allege that they are entitled to contribution from the Oil Company Parties as to any costs which Plaintiffs have allegedly incurred. *See* ¶36, Third-Party Complaint. However, neither the Third-Party Complaint nor its proposed amendment allege that Defendants provided cleanup, removal of discharge or relocation. In addition, as Defendants fail to establish that the Oil Company Parties are "dischargers," they are unable to demonstrate that said parties are "responsible parties" under Navigation Law §176(8) from whom they could seek contribution. Third-Party Defendants' motion to dismiss the Second Cause of Action is granted. *See ELG Utica Alloys, Inc. v. Niagara Mohawk Power Corp.*, 2019 WL 5086020, at *7 (NDNY 2019).

Finally, the Oil Company Parties move to dismiss Defendants' Third Cause of Action seeking common law contribution and indemnification. In order to sustain a claim for contribution, Defendants are required to show that the Oil Company Parties owed Vaz-Co a duty of reasonable care or that a duty was owed to the Plaintiffs as injured parties and that a breach of this duty contributed to the alleged injuries. *Castillo v. Port Auth. of New York*, 159 AD3d 792, 795 [2d Dept. 2018]. Defendants do not allege that Third-Party Defendants owed them a duty, only that the Oil Company Parties had a duty to Plaintiffs to inspect the newly installed storage system and/or that they inspected the system and failed to detect the leak. However, as discussed herein, Defendants have not established that the Oil Company Defendants had a common law duty

to inspect a system that they did not install. As such, Defendants fail to state a cause of action for common law contribution. *See also Santoro v. Poughkeepsie Crossings, LLC*, 180 AD3d 12, 17 [2d Dept. 2019].

Defendants also fail to allege a claim for common law indemnification. "The key element of a cause of action for common-law indemnification is not a duty running from the indemnitor to the injured party, but rather, is a separate duty owed the indemnitee by the indemnitor." *Desena v. N. Shore Hebrew Acad.*, 119 AD3d 631, 635 [2d Dept. 2014]. Defendants do not allege that the Oil Company Parties owed a duty to them, which an essential element of a cause of action sounding in common-law indemnification. *Razdolskaya v. Lyubarsky*, 160 AD3d 994, 997 [2d Dept. 2018]. Moreover, as the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine. *Deseana, supra.* Here, the pleadings in the instant matter demonstrate that any liability apportioned to Defendant Vaz-Co would be based on its own actual wrongdoing, not on any type of vicarious liability. *Id.*; *see also Balkheimer v. Spanton*, 103 AD3d 603, 604 [2d Dept. 2013] (the third-party plaintiffs would not be compelled to pay damages for the alleged negligent acts of the third-party defendants.). Based upon the foregoing, Third-Party Defendants' motion to dismiss the Third Cause of Action is granted.

Finally, as the Court has granted the Oil Company Parties' motion to dismiss the Third-Party Complaint in its entirety, Defendants' cross-motion to substitute Morgan Fuel & Heating Co., Inc. as the proper Third-Party Defendant is denied as moot.

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the Court, it is hereby denied. Now, therefore, it is hereby

ORDERED that Third-Party Defendants' motion is dismiss is granted in its entirety and the Third-Party Complaint is dismissed; and it is further

ORDERED that Defendants' cross-motion to amend the Third-Party Complaint is denied as moot; and it is further

ORDERED that as the parties have previously been advised, this matter is scheduled for a virtual settlement conference on **October 20, 2021 at 10:30 am**.

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York
September 27, 2021

CHRISTI J. ACKER, J.S.C.

To: All counsel via NYSCEF