

FILED

**IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION**

AM 10:26

JOSEPH M. RUCKI

**COVESTRO, LLC
Plaintiff,**

v.

**Civil Action No.: 18-C-202
Presiding Judge: Wilkes
Resolution Judges: Carl and Nines**

**AXIALL CORPORATION,
ALLTRANSTEK, LLC, and
RESCAR COMPANIES,
Defendants,**

and

**AXIALL CORPORATION,
Third-Party Plaintiff,**

v.

**SUPERHEAT FGH SERVICES, INC.,
Third-Party Defendant.**

---CONSOLIDATED WITH---

**AXIALL CORPORATION,
Plaintiff,**

**Civil Action No. 18-C-203
Presiding Judge: Wilkes
Resolution Judges: Carl and Nines**

v.

**ALLTRANSTEK LLC, RESCAR, INC.
t/d/b/a RESCAR COMPANIES, and
SUPERHEAT FGH SERVICES, INC.,
Defendants.**

**ORDER GRANTING AXIALL'S MOTION FOR SUMMARY JUDGMENT
TO DISMISS THE COUNTERCLAIMS OF DEFENDANTS ALLTRANSTEK LLC AND
RESCAR COMPANIES**

This matter came before the Court this 6th day of January 2021 upon Defendant and Third-Party Plaintiff Axiall Corporation's Motion for Summary Judgment to Dismiss the Counterclaims of Defendants AllTranstek LLC and Rescar Companies. Defendant and Third-Party Plaintiff Axiall Corporation (hereinafter "Axiall"), by counsel, Antoinette C. Oliver, Esq., and Defendants and Counterclaimants AllTranstek LLC and Rescar, Inc., t/d/b/a Rescar Companies (hereinafter "Defendants" or "AllTranstek" or "Rescar"), by counsel, Michelle L. Gorman, Esq., have fully briefed the issues necessary. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

FINDINGS OF FACT

1. This civil action consists of two consolidated cases¹ containing causes of action surrounding a chlorine leak at Defendant and Third-Party Plaintiff Axiall Corporation's facility, which produces chlorine and other products, in Marshall County, West Virginia. *See* Def's Reply to Mot. to Refer, p. 3; *see also* Def. and Th. Pty. Pl's Mem. p. 2.
2. On August 24, 2018, Axiall filed its Complaint asserting causes of action against AllTranstek, Rescar, and Superheat FGH Services, Inc. *See* Def. and Th. Pty. Pl's Mem. p. 3.
3. On March 28, 2019, AllTranstek and Rescar filed their Answer and Affirmative Defenses, and also filed a counterclaim against Axiall, claiming it was negligent in failing to structurally enhance the railcar which ruptured and leaked chlorine. *Id.* at 4.

¹ *See* Order of Court consolidating cases entered 2/28/19.

4. On April 19, 2019, Axiall filed a Rule 12 Motion to Dismiss Counterclaims of Defendants AllTranstek and Rescar or, In the Alternative, Motion for More Definite Statement. *Id.*

5. A hearing was held before the undersigned August 30, 2019. On September 4, 2019, the Court entered an Order granting in part and denying in part Axiall's Rule 12 Motion to Dismiss Counterclaims of Defendants AllTranstek and Rescar or, In the Alternative, Motion for More Definite Statement. *Id.* Relevant to the instant motion, the Order granted Axiall's request for AllTranstek and Rescar to file a more definite statement of their Counterclaims. *Id.*

6. The Court notes the Order directed AllTranstek and Rescar to file a more definite statement of their Counterclaims within thirty (30) days of the entry of the September 4, 2019 Order. *Id.* However, this was not done, and therefore, on July 16, 2020, Axiall filed its Rule 12 Motion to Strike Counterclaim of AllTranstek and Rescar, or in the Alternative, Rule 41 Motion for Involuntary Dismissal of Counterclaim of Defendants AllTranstek and Rescar. *Id.* This motion was fully briefed. By Order entered August 27, 2020, this Court granted in part and denied in part Axiall's Rule 12 Motion to Strike Counterclaim of AllTranstek and Rescar, or in the Alternative, Rule 41 Motion for Involuntary Dismissal of Counterclaim of Defendants AllTranstek and Rescar, and allowed the Rescar Defendants to file a more definite statement with regard to their Counterclaims of indemnity and contribution. *Id.*

7. On September 4, 2020, AllTranstek and Rescar filed their more definite statement. *Id.*; *see also* court file.

8. On September 18, 2020, Axiall filed the instant Axiall Corporation's Motion for Summary Judgment to Dismiss the Counterclaims of Defendants AllTranstek LLC and Rescar Companies, requesting the Court grant summary judgment in its favor and against Defendants

“as it pertains to their counterclaims”. See Def. and Th. Pty. Pl’s Mot., p. 2. Specifically, Axiall sought to dismiss the counterclaims of indemnity and contribution, because of Defendants’ failure to “offer averments of evidence necessary to establish their claims”, after having been granted leave by this Court to provide a more definite statement. See Def. and Th. Pty. Pl’s Mem. p. 2, 5.

9. On November 20, 2020, AllTranstek and Rescar filed their Memorandum in Opposition to Axiall’s Motion for Summary Judgment on Counterclaim of AllTranstek and Rescar, requesting the Court deny the instant motion. See Def’s Resp., p. 12.

10. On or about November 30, 2020, Axiall filed its Reply Memorandum in Further Support of Axiall Corporation’s Motion for Summary Judgment to Dismiss the Counterclaims of Defendants AllTranstek LLC and Rescar Companies, reiterating its position that the Court should enter summary judgment in its favor and against Defendants, and averring the Response did not address the legal authority put forth by Axiall. See Def. and Th. Pty. Pl’s Reply, p. 2.

11. The Court now finds the instant Motion is ripe for adjudication.

STANDARD OF LAW

12. Motions for summary judgment are governed by Rule 56, which states that “judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” W. Va. R. Civ. P. 56(c). West Virginia courts do “not favor the use of summary judgment, especially in complex cases, where issues involving motive and intent are present, or where factual development is necessary to clarify application of the law.” *Alpine Property Owners Ass’n, Inc. v. Mountaintop Dev. Co.*, 179 W.Va. 12, 17 (1987).

13. Therefore, “[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syl. Pt. 3, *Aetna Cas. and Surety Co. v. Fed. Ins. Co. of New York*, 148 W.Va. 160, 171 (1963); Syl. Pt. 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992); Syl. Pt. 1, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52 (1995). A motion for summary judgment should be denied “even where there is no dispute to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom.” *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59 (internal quotations and citations omitted).

14. However, if the moving party has properly supported their motion for summary judgment with affirmative evidence that there is no genuine issue of material fact, then “the burden of production shifts to the nonmoving party ‘who must either (1) rehabilitate the evidence attacked by the movant, (2) produce additional evidence showing the existence of a genuine issue for trial or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f).’” *Id.* at 60.

CONCLUSIONS OF LAW

15. In this matter, Axiall requests summary judgment in its favor and against Defendants “as it pertains to their counterclaims”. *See* Def. and Th. Pty. Pl’s Mot., p. 2. Specifically, Axiall seeks to dismiss the counterclaims of indemnity and contribution. *See* Def. and Th. Pty. Pl’s Mem. p. 2. Axiall argues the claims should be dismissed because Defendants’ failure to “offer averments of evidence necessary to establish their claims”, after having been granted leave by this Court to provide a more definite statement. *Id.* at 2, 5. The Court will address Axiall’s arguments as they apply to indemnity and contribution in turn.

Indemnity

16. First, the Court examines Axiall's arguments in the instant motion as to the dismissal of AllTranstek and Rescar's indemnity cause of action. Axiall argues the indemnity claim contained in the more definite statement must be dismissed for failure to aver or produce any evidence to establish a right to indemnity under West Virginia law. *See* Def. and Th. Pty. Pl's Mem., p. 7. Axiall avers that although AllTranstek and Rescar have failed to specify whether they claim contractual indemnity or implied indemnity, they have not established a claim under either theory. *Id.*

17. In response, AllTranstek and Rescar argue that genuine issue of material fact remains as to their indemnity cause of action contained in the more definite statement because liability by at least one other third party is pending in another action, the related Pennsylvania action. *See* Def's Resp., p. 10.

18. As an initial matter, the Court finds no evidence of any contractual indemnification. The Court notes that in the Response, AllTranstek and Rescar only analyze and argue implied indemnity. *See* Def's Resp., p. 10-11.

19. The general principle of implied indemnity arises from equitable considerations. *Ruckdeschel v. Falcon Drilling Co., L.L.C.*, 225 W. Va. 450, 452, 693 S.E.2d 815, 817 (2010), at Syl. Pt. 6. "At the heart of the doctrine is the premise that the person seeking to assert implied indemnity--the indemnitee--has been required to pay damages caused by a third party--the indemnitor." *Id.*

20. The requisite elements of an implied indemnity claim in West Virginia are a showing that: "(1) an injury was sustained by a third party; (2) for which a putative indemnitee has become subject to liability because of a positive duty created by statute or common law, but whose independent actions did not contribute to the injury; and (3) for which a putative indemnitor should

bear fault for causing because of the relationship the indemnitor and indemnitee share.” *Harvest Capital v. West Virginia Department of Energy*, 211 W. Va. 34, 560 S.E.2d 509 (2002), Syl. Pt. 4.

21. Axiall argues AllTranstek and Rescar have failed to the requirements of West Virginia law to sustain a common law implied indemnity claim by: failing to aver or present evidence of any material facts to support their claim implied indemnity, failing to aver or present evidence of the existence of any third party to which they have actually incurred any liability or been caused by pay a judgment, and failing to present evidence Axiall owes AllTranstek and Rescar positive duty created by statute or common law. *See* Def. and Th. Pty. Pl’s Mem., p. 8-9.

22. The Court does not find AllTranstek and Rescar’s Response arguments persuasive. First, AllTranstek and Rescar’s claim that genuine issue of material fact remains as to their indemnity cause of action contained in the more definite statement because liability by at least one other third party is pending in another action, the related Pennsylvania action, fails because such a finding would be premature. *See* Def’s Resp., p. 10. AllTranstek and Rescar’s assertions read more like a comparative negligence defense rather than a cause of action for indemnity. In fact, in the Response, AllTranstek and Rescar aver that Axiall caused the chlorine rupture. However, after the related Pennsylvania action determines which parties are liable for the rupture of AXLX 1702, the nature and extent of Covestro’s damages will be determined in this civil action. To the extent any liability for damages is attributed to Axiall, that finding can be applied to AllTranstek and Rescar’s *cross-claim* against Axiall. For these reasons, Axiall is entitled to summary judgment in its favor as to the indemnity *counterclaim*.

23. Further, the Court agrees that the more definite statement does not proffer evidence showing Axiall owes AllTranstek and Rescar a positive duty created by statute or common law.

24. The Court further notes and considers that by Order entered September 3, 2020, identical claims for contribution and indemnity were dismissed by Judge Ward in the related Pennsylvania action.

25. For all of these reasons, the Court finds summary judgment should be granted in Axiall's favor as to the indemnity counterclaim. Accordingly, the instant motion is granted in part as to the indemnity cause of action.

Contribution

26. Next, the Court examines Axiall's arguments in the instant motion as to the dismissal of AllTranstek and Rescar's contribution cause of action. Axiall has averred that AllTranstek and Rescar have failed to aver or produce any evidence to establish a right to contribution. *See* Def. and Th. Pty. Pl's Mem., p. 10. Specifically, Axiall alleges AllTranstek and Rescar have failed to satisfy the requirements of West Virginia law by: failing to aver or present any evidence to support their claim for "common law" contribution, failing to allege that AllTranstek or Rescar discharged a common liability by being compelled to pay more than their *pro rata* share, failing to present any evidence that Axiall is a joint tortfeasor with AllTranstek and Rescar, and failing to produce any evidence that Axiall combined to produce any injury to a third party. *Id.* at 11-12.

27. Syllabus Point 4 of *Sydenstricker v. Unipunch Prod., Inc.* states as follows:

The doctrine of contribution has its roots in equitable principles. The right to contribution arises when persons having a common obligation, either in contract or tort, are sued on that obligation and one party is forced to pay more than his *pro tanto* share of the obligation. One of the essential differences between indemnity and contribution is that contribution does not permit a full recovery of all damages paid by the party seeking contribution. Recovery can only be obtained for the excess that such party has paid over his own share.

169 W. Va. 440, 441, 288 S.E.2d 511, 513 (1982).

28. The touchstone of the right of inchoate contribution is this inquiry: Did the party against whom contribution is sought breach a duty to the plaintiff which caused or contributed to the plaintiff's damages? *Bd. of Educ. of McDowell Cty. v. Zando, Martin & Milstead, Inc.*, 182 W. Va. 597, 603, 390 S.E.2d 796, 802 (1990). The fundamental purpose of inchoate contribution is to enable all parties who have contributed to the plaintiff's injuries to be brought into one suit. *Id.*

29. As an initial matter, the Court notes that as with their indemnity claim, AllTranstek and Rescar's contribution claim reads more like a comparative negligence defense. The Court considers AllTranstek and Rescar are free to present evidence at trial regarding any of their alleged fault as to any alleged harm to Covestro. *See* Def. and Th. Pty. Pl's Mem., p. 12.

30. Like the indemnity claim, the Court considers that in the event the Pennsylvania action were to attribute liability to Axiall as to the rupture, such a finding could be applied in Covestro's suit when apportioning damages. *See* Def. and Th. Pty. Pl's Reply, p. 4-5.

31. The Court also considers AllTranstek and Rescar have separately asserted a *cross-claim* for contribution against Axiall. *See* Def. and Th. Pty. Pl's Mem., p. 12. However, a review of the more definite statement reveals AllTranstek and Rescar have failed to establish a basis for which they can also state a contribution *counterclaim* against Axiall.

32. The Court further notes and considers that by Order entered September 3, 2020, identical claims for contribution and indemnity were dismissed by Judge Ward in the related Pennsylvania action.

33. For all of these reasons, the Court finds summary judgment should be granted in Axiall's favor as to the contribution counterclaim. Accordingly, the instant motion is granted in part as to the contribution cause of action.

34. In sum, with findings that the motion must be granted in part as to both the contribution cause of action (see paragraph 33) and the indemnity cause of action (see paragraph 25), the Court concludes that the instant motion must be GRANTED. Defendants AllTranstek LLC and Rescar Companies' Counterclaims against Axiall for indemnity and contribution must be dismissed with prejudice.

CONCLUSION

WHEREFORE, it is hereby **ORDERED** and **ADJUDGED** that Defendant and Third-Party Plaintiff Axiall Corporation's Motion for Summary Judgment to Dismiss the Counterclaims of Defendants AllTranstek LLC and Rescar Companies is hereby **GRANTED**. It is further **ORDERED** and **ADJUDGED** that Defendants AllTranstek LLC and Rescar Companies' Counterclaims for indemnity and contribution are hereby **DISMISSED WITH PREJUDICE**. The Court notes the objections of the parties to any adverse ruling herein. The Clerk shall enter the foregoing and forward attested copies hereof to all counsel, and to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

January 6, 2021
date of entry



JUDGE CHRISTOPHER C. WILKES
JUDGE OF THE WEST VIRGINIA
BUSINESS COURT DIVISION