

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

**PHILIPPINE AMERICAN LIFE)
INSURANCE AND PHILAM)
INSURANCE COMPANY,)
Plaintiffs,)**

CIVIL ACTION

No. 02-2068-CM

v.)

**RAYTHEON AIRCRAFT COMPANY,)
Defendant)
and)
Third-Party Plaintiff,)**

v.)

**C.E. MACHINE CO., INC.,)
Third-Party Defendant)
and)
Fourth-Party Plaintiff,)**

v.)

**METAL IMPROVEMENT COMPANY,)
INC.,)
Fourth-Party Defendant)
and)
Fifth-Party Plaintiff,)**

v.)

**BODYCOTE LINDBERG)
CORPORATION, successor to)
Lindberg Corp.; AIR CAPITAL)
PLATING, INC.; and METAL)
FINISHING CO., INC.,)
Fifth-Party Defendants.)**

_____)

MEMORANDUM AND ORDER

Plaintiffs Philippine American Life Insurance (PALI) and Philam Insurance Company (Philam) filed suit against defendant Raytheon Aircraft Company (Raytheon) alleging various contract and tort claims. Defendant Raytheon asserted a third-party complaint, adding C.E. Machine Co., Inc. (CE Machine) as a third-party defendant. CE Machine asserted a fourth-party complaint, adding Metal Improvement Company, Inc. (Metal Improvement) as a fourth-party defendant. Metal Improvement asserted a fifth-party complaint, adding Bodycote Lindberg Corporation (Bodycote) as a fifth-party defendant. This matter is before the court on defendant Bodycote's Motion for Summary Judgment (Doc. 119) and defendant Metal Improvement's Motion to Strike Fifth-Party Defendant Bodycote Lindberg Corporation's Motion for Summary Judgment as Untimely, Premature and for Failure to Comply with Federal Rule 56 and Local Rule 56.1, or Alternatively, to Stay and Defer all Rulings Pending Completion of Discovery and the Determination of Fact and Liability Issues (Doc. 128).

I. Motion to Strike

Metal Improvement first argues that Bodycote's Motion for Summary Judgment should be stricken because, Metal Improvement claims, Bodycote merely recites controverted allegations, conclusions, and arguments identified by the parties in their various pleadings. Foremost, the court points out that a party may refer to allegations contained in the pleadings to support a motion for summary judgment. Moreover, Bodycote submitted a certain Asset Purchase Agreement, thereby introducing materials beyond the pleadings. As such, Bodycote has not "merely" recited to allegation, conclusions,

and arguments set forth in the pleadings. The court denies Metal Improvement's motion to strike on this basis.

Metal Improvement next argues that Bodycote's Motion for Summary Judgment is both untimely and premature because there has been no opportunity for discovery. Federal Rule of Civil Procedure 56(b) states: "A party against whom a claim . . . is asserted . . . may, *at any time*, move with or without supporting affidavits for a summary judgment . . ." (emphasis added). In light of this express language, and considering Metal Improvement's failure to cite any legal authority in support of its position, the court denies Metal Improvement's motion to strike on the basis that the motion is untimely and premature.

Finally, Metal Improvement contends that the factual contentions set forth in Bodycote's Motion for Summary Judgment are without support in the record and that, as a result, the summary judgment motion should be stricken. Paragraphs 1 through 7 of Bodycote's Statement of Material Facts cite to various pleadings in this case and are, as such, properly cited to the record. Further, paragraph 10 properly cites to the above-mentioned Asset Purchase Agreement. Paragraphs 8 and 9, however, contain no citation to the record. Accordingly, the court will not consider those factual contentions in ruling on this motion.

II. Motion for Summary Judgment

A. Background

This action arises out of an incident occurring on October 19, 2000, involving plaintiff PALI's airplane, a Super King Air 350, which plaintiff Philam insured. On that day, the airplane departed from the Seletar Airport in Singapore. After taking off, the control tower informed the pilot that the left main landing gear had not retracted. After unsuccessfully trying to recycle the gear, the crew performed an

emergency landing with the nose and right gear in the down and locked position, but with the left gear unsafe. Upon touchdown, the left gear completely collapsed and caused damage to the gear and the rest of the plane.

Plaintiffs claim that the left gear actuator clevis caused the landing gear failure. As alleged by plaintiffs, Raytheon had issued a Mandatory Service Bulletin (MSB) in June 1997 for replacement, under warranty, of the main landing gear actuator clevis on the left and right main landing gear of the airplane. Each actuator clevis was to be strengthened to prevent fatigue cracking. In March 1998, pursuant to the MSB, the replacement clevis on both the left and right main landing gear were installed on the airplane by Raytheon's authorized service center. Plaintiffs assert that the clevis was defectively manufactured or improperly and negligently installed, or both.

Raytheon brought a third-party complaint against third-party defendant CE Machine, alleging that it entered into a contract with CE Machine to manufacture landing gear clevises for installation in Raytheon Model King Air airplanes and that CE Machine actually manufactured the landing gear clevis at issue. CE Machine, in turn, filed a fourth-party complaint against fourth-party defendant Metal Improvement, alleging that it entered into a contract with Metal Improvement, pursuant to which Metal Improvement was to heat treat the landing gear clevises for installation in Raytheon Model King Airplanes, and that Metal Improvement heat treated the clevis that purportedly failed in plaintiffs' airplane. CE Machine further alleged that, if the landing gear clevis was not properly heat treated, it was through the fault of Metal Improvement, that Metal Improvement expressly and impliedly warranted the landing gear clevis, and that Metal Improvement expressly and impliedly agreed to indemnify CE Machine for any manufacturing defects associated with Metal Improvement's heat treatment of the clevis.

Metal Improvement filed a fifth-party complaint against Bodycote, claiming that it is entitled to indemnification from Bodycote. Specifically, Metal Improvement alleged that it and Bodycote entered into a contract, pursuant to which Bodycote was to heat treat the landing gear clevises for installation in Raytheon Model King Airplanes, and that Bodycote heat treated the clevis that purportedly failed in plaintiffs' airplane. Metal Improvement further alleged that, if the landing gear clevis was not properly heat treated, it was through the fault of Bodycote, that Bodycote expressly and impliedly warranted the landing gear clevis, and that Bodycote expressly and impliedly agreed to indemnify Metal Improvement for any manufacturing defects associated with Bodycote's heat treatment of the clevis.

Pursuant to the terms of the Asset Purchase Agreement attached to Bodycote's Motion for Summary Judgment, Metal Improvement purchased Bodycote's Wichita heat treatment facility on December 19, 2001. That agreement provides that Bodycote would indemnify Metal Improvement against any claims that arise out of Bodycote's operation of the Wichita facility prior to the asset purchase.

B. Standard

Summary judgment is appropriate if the moving party demonstrates that there is "no genuine issue as to any material fact" and that it is "entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In applying this standard, the court views the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). A fact is "material" if, under the applicable substantive law, it is "essential to the proper disposition of the claim." *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). An issue of fact is "genuine" if

“there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way.”

Id. (citing *Anderson*, 477 U.S. at 248).

The moving party bears the initial burden of demonstrating an absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *Id.* at 670-71. In attempting to meet that standard, a movant that does not bear the ultimate burden of persuasion at trial need not negate the other party’s claim; rather, the movant need simply point out to the court a lack of evidence for the other party on an essential element of that party’s claim. *Id.* at 671 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).

Once the movant has met this initial burden, the burden shifts to the nonmoving party to “set forth specific facts showing that there is a genuine issue for trial.” *Anderson*, 477 U.S. at 256; *see Adler*, 144 F.3d at 671 n.1 (concerning shifting burdens on summary judgment). The nonmoving party may not simply rest upon its pleadings to satisfy its burden. *Anderson*, 477 U.S. at 256. Rather, the nonmoving party must “set forth specific facts that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant.” *Adler*, 144 F.3d at 671. “To accomplish this, the facts must be identified by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein.” *Id.*

Finally, the court notes that summary judgment is not a “disfavored procedural shortcut”; rather, it is an important procedure “designed to secure the just, speedy and inexpensive determination of every action.” *Celotex*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

C. Discussion¹

Foremost, the court finds there exists a genuine issue of fact regarding which company heat treated the clevis that purportedly failed in plaintiffs' airplane. CE Machine alleges that Metal Improvement heat treated the clevis, and Metal Improvement alleges that it was Bodycote who performed the heat treatment. Bodycote argues, however, that such a factual dispute is not material to the resolution of Metal Improvement's claims against it and that, as such, summary judgment is proper.

Bodycote contends that, no matter how the issue is resolved, there is no basis for Metal Improvement's claim for indemnification against Bodycote. Bodycote cites Federal Rule of Civil Procedure 14(a) for the proposition that the procedural device of impleader may only be used when the third-party defendant's potential liability is dependent upon the outcome of the main claim. Rule 14(a) provides that "a defending party, as the third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff." Fed. R. Civ. P. 14(a). However, the court is somewhat perplexed by Bodycote's argument since it appears from the language of Rule 14(a) that the circumstances at hand are precisely what Rule 14(a) is intended to cover.

¹The court points out that Metal Improvement wholly failed to address the substance of Bodycote's arguments. Rather, Metal Improvement merely reasserted in its reply and surreply briefs that Bodycote's Motion for Summary Judgment should be stricken.

Bodycote asserts that there is no scenario, based upon the pleadings as they now stand, under which Metal Improvement could be liable to CE Machine on the fourth-party complaint if it is ultimately determined that Bodycote or some other entity performed the heat treatment. Bodycote argues that Metal Improvement's claim against Bodycote is not "dependent" on the outcome of the fourth-party complaint because CE Machine is attempting to hold Metal Improvement liable as the entity that actually performed the allegedly defective heat treatment. However, in light of the successor relationship between Metal Improvement and Bodycote, as evidenced by the Asset Purchase Agreement, the court concludes that Metal Improvement's claim against Bodycote is indeed dependant on the outcome of CE Machine's claim against Metal Improvement.

"Essential to such a cause of action is the existence of a claim by the defendant against the third party defendant for any liability that the defendant may owe to the principal plaintiff. The third party claim must be derivative of the plaintiff's claim" *EEOC v. Gard Corp.*, 795 F. Supp. 1070, 1072 (D. Kan. 1992). Therefore, in these circumstances, to comply with Rule 14(a), Metal Improvement must assert a claim against Bodycote for any liability that Metal Improvement may owe to CE Machine.

The court turns to the terms of the Asset Purchase Agreement. Bodycote argues that, under the express terms of the Asset Purchase Agreement, Metal Improvement has no claim for indemnification. However, the court has reviewed the Asset Purchase Agreement and finds otherwise.

Section 11.1 of the Asset Purchase Agreement, entitled "Indemnification by Seller," provides in pertinent part: "[Bodycote] hereby agrees to defend, indemnify and hold [Metal Improvement] . . . harmless from and against and in respect of (i) any claim, demand, liability or obligation . . . asserted or enforced against [it] with respect to or arising out of any of the liabilities or obligations of [Bodycote]

which arise out of [Bodycote's] conduct of its business at the Facility prior to the Closing Date.” (Asset Purchase Agreement § 11.1). The Asset Purchase Agreement then provides that Metal Improvement would indemnify Bodycote for claims arising out of Metal Improvement's operation of the facility after the closing date. (*Id.* § 11.2). Obviously, the heat treatment of the landing gear clevis occurred prior to December 2001. Accordingly, pursuant to the Asset Purchase Agreement § 11.1, Bodycote may be legally required to indemnify Metal Improvement if Bodycote did in fact perform the heat treatment.

Bodycote next asserts that the Asset Purchase Agreement provides that the indemnification agreements contained therein only survived for twelve months after the closing date. Bodycote, however, fails to mention the express exception to this provision. More specifically, § 11.3 states in relevant part: “The parties hereto agree that the representations and warranties, *except to the extent such representations and warranties relate exclusively to an earlier or later date*, . . . shall survive for a period of twelve (12) months after the Closing Date.” (*Id.* § 11.3(c) (emphasis added)). The indemnification provision at issue provides that Bodycote would indemnify Metal Improvement for claims arising out of Bodycote's operation of the facility “prior to the Closing Date.” As such, this representation clearly relates to an earlier date, thereby falling within the exception to the one-year survival provision.

The court therefore concludes that summary judgment is not appropriate. There remains a dispute as to which company heat treated the allegedly defective landing gear clevis. This dispute is material in that, if Bodycote in fact performed the heat treatment, which would have been prior to Metal Improvement's acquisition of Bodycote, Bodycote may be required under terms of the Asset Purchase

Agreement to indemnify Metal Improvement for CE Machine's claim against Metal Improvement.

Accordingly, the court denies summary judgment.

IT IS THEREFORE ORDERED that defendant Metal Improvement's Motion to Strike Fifth-Party Defendant Bodycote Lindberg Corporation's Motion for Summary Judgment as Untimely, Premature and for Failure to Comply with Federal Rule 56 and Local Rule 56.1, or Alternatively, to Stay and Defer all Rulings Pending Completion of Discovery and the Determination of Fact and Liability Issues (Doc. 128) and Bodycote's Motion for Summary Judgment (Doc. 119) are denied.

Dated this 12 day of November, 2003, at Kansas City, Kansas.

s/ Carlos Murguia

CARLOS MURGUIA
United States District Court Judge