STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

STATE OF NEW YORK,
Plaintiff,

Index No.: L61-13

-against-

DIANA L. FLORA, Individually and doing business as RICHMOND AUTOMOTIVE CENTER, RAYMOND D. WOLINSKI, Individually and doing business as RICHMOND AUTOMOTIVE CENTER, RICHMOND AUTOMOTIVE CENTER, PEERLESS INSURANCE COMPANY, KIRKWOOD HEATING OIL, INC., and UTICA MUTUAL INSURANCE COMPANY,
Defendants.

UTICA MUTUAL INSURANCE COMPANY,
Third-Party Plaintiff,

-against-

OKAR EQUIPMENT CO., INC., STARNET INSURANCE COMPANY, KEMPER INSURANCE COMPANY, FIREMAN'S FUND INSURANCE COMPANY, ARCH INSURANCE,
Third-Party Defendants.

KIRKWOOD HEATING OIL, INC.,
Third-Party Plaintiff,

-against-

HOMETOWNE ENERGY CO., INC., formerly known as OKAR EQUIPMENT CO., INC.,
Third-Party Defendant.

KIRKWOOD HEATING OIL, INC.,
Third-Party Plaintiff,

-against-

MONROE MECHANICAL SERVICES INC.,
Third-Party Defendant.

APPEARANCES:

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Connolly, J.:

In this action under article 12 of the Navigation Law to recover clean-up and removal costs with regard to an alleged discharge of a petroleum product, defendants, third-part plaintiffs and third-party defendants move for, *inter alia*, orders granting summary judgment dismissing the relevant claims as against them.

Background

Plaintiff State of New York seeks to recover costs and penalties incurred with regard to an alleged discharge of a petroleum product at and in the vicinity of the Richmond Automotive Center ("Richmond") from an underground petroleum storage and dispensing system (the "System") located at 8598 Main Street, Town of Richmond, County of Ontario, New York (the "Spill Site") which allegedly contaminated groundwater and soil in the area. In the initial action plaintiff has sued Richmond along with defendants Diana L. Flora and Raymond D. Wolinski, individually and doing business as Richmond, Peerless Insurance Company ("Peerless"), an insurer of Richmond[1], Kirkwood Heating Oil, Inc. ("Kirkwood"), a company who supplied petroleum products to Richmond, and Utica Mutual Insurance Company ("Utica"), an insurer of Kirkwood[2].

On or about April 30, 2007 the New York State Department of Environmental Conservation

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[1]Peerless was dismissed via a Stipulation of Discontinuance of December 30, 2013.

[2]Navigation Law §190 provides the State with a direct cause of action against the insurer of a discharger.

("DEC") was notified by the Honeoye Well District Well #2 that water samples revealed petroleum contamination. Plaintiff contends that from on or about April 30, 2007 through August 20, 2012, plaintiff has, through DEC, investigated, cleaned up, remediated, removed, mitigated and contained the petroleum discharges and contamination at and in the vicinity of the Spill Site and seeks recoupment of related costs in the amount of $921,904.41.

Plaintiff alleges that defendant Flora owned both the real property upon which the Spill Site was located and the System, that defendant Flora was a partner doing business as Richmond along with defendant Wolinski and they both operated the System located at the Spill Site, that their acts or omissions resulted in a discharge of petroleum at the Spill Site and that they are strictly liable for cleanup and removal costs. Plaintiff argues against defendant Richmond that such defendant operated the System and that its acts and omissions resulted in a discharge and that such defendant (along with defendants Flora and Wolinski) failed to take all measures necessary to clean up and remove said discharge.

As to defendant Peerless, plaintiff argues that defendant Richmond was insured by Peerless under a liability policy(ies) and accordingly, such defendant is strictly liable for all costs incurred to remediate the Spill Site. As to defendant Kirkwood, plaintiff alleges that Kirkwood periodically supplied petroleum products to the System located at Richmond and that its acts or omissions during the supply of petroleum products to the Spill Site resulted in discharges of petroleum products at the Spill Site, that Kirkwood failed to take all necessary clean-up and removal measures and is strictly liable. As against defendant Utica, plaintiff alleges that Kirkwood was insured by Utica and that such defendant is accordingly, liable for the clean-up and removal costs.

Defendants Kirkwood and Utica have each moved for summary judgment dismissal of the

complaint as against them. Defendant Utica has filed a third-party action against third-party defendants Okar Equipment Company, Inc. (now known as Hometowne Energy Co., Inc.) ("Hometowne"), which allegedly designed, manufactured and/or maintained certain parts of the System at the Site, and third-party defendants StarNet Insurance Company ("Starnet"), Kemper Insurance Company[3], Fireman's Fund Insurance Company ("Fireman's") and Arch Insurance Company ("Arch") - insurers who provided insurance coverage to Kirkwood during the following time periods in which the contamination allegedly occurred: Utica Mutual (8/8/05-8/8/07); Starnet (8/4/04-8/4/05); Arch (8/8/02-8/8/04); Kemper (8/8/97-8/8/02); and Fireman's (8/8/90-8/8/97) in which the contamination allegedly occurred. As against such third-party defendants, Defendant Utica seeks common law contribution and/or indemnification. Each of the third-party defendants sued by Utica has moved for summary judgment dismissal of the third-party complaint.

Defendant Kirkwood has also brought third-party actions against Hometowne and Monroe Mechanical Services Inc. ("Monroe") seeking contribution and/or common law indemnification, alleging that, in approximately 1989, Hometowne and Monroe performed work, labor, services and materials at the Site which was a cause of the discharge. Both Hometowne and Monroe have each brought summary judgment motions seeking dismissal of the third-party complaints.

Standard

The Court is mindful that summary judgment is a drastic remedy which should only be granted when there clearly are no triable issues of fact (*see Andre v. Pomeroy*, 35 NY2d 361, 364 [1974]). It is well-settled that "the proponent of a summary judgment motion must make a prima

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[3] The parties contend that Kemper is insolvent and has not appeared in the action.

facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once the movant has established a right to judgment as a matter of law, the burden shifts to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of material fact *(see Zuckerman v City of New York*, 49 NY2d 557 [1980]). It is well established that on a motion for summary judgment, the court's function is issue finding, not issue determination (*see Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]), and all evidence must be viewed in the light most favorable to the opponent to the motion (*see Crosland v. New York City Transit Auth.*, 68 NY2d 165 [1986]).

Navigation Law §173(1) prohibits the discharge of petroleum (*see Snyder v Jessie*, 164 AD2d 405, 408 [4th Dept 1990], *lv dismissed* 77 NY2d 940 [1991]; *Gendron v State*, 161 AD2d 936, 936 [3d Dept 1990]). When a discharge occurs, the DEC has the authority to undertake the removal of the discharge or to retain agents or contractors to do the same (*see* Navigation Law § 176 [1]; *State v Stewart's Ice Cream Co.*, 64 NY2d 83, 87 [1984]). Further, Navigation Law § 181 (1) provides that "[a]ny person who has discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained" (*see State of New York v Speonk Fuel Inc.*, 3 NY3d 720, 723 [2004]). In addition, "Navigation Law § 172 (8) ... defines the word 'discharge' as 'any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping' of petroleum into the state's waters" (*id.*, quoting Navigation Law § 172 [8]).

As the Third Department has recently reiterated:

> "The Navigation Law provides that 'any person who has discharged petroleum shall be strictly liable, without regard to fault' for the costs of remediation. Reading this provision together with Navigation Law § 172 (8), which defines a 'discharge' as 'any intentional or unintentional action or omission resulting in the spilling of petroleum,' the Court of Appeals has held that an owner of contaminated property who has control over activities occurring on the property and reason to believe that petroleum products are stored there may be liable as a discharger. Although liability may not be premised solely on ownership of contaminated property, 'proof of fault or knowledge' is not required. Nor is liability predicated on ownership of the tanks or petroleum system from which the spill issued. Rather, the question of whether an otherwise faultless owner is liable as a discharger turns on the owner's 'capacity to take action to prevent an oil spill or to clean up contamination resulting from a spill'" (*State of New York v B & P Auto Serv. Ctr., Inc.*, 29 AD3d 1045, 1046-1047 [2006], lv dismissed 7 NY3d 864, *quoting Speonk Fuel, Inc.*, 3 NY3d at 724).

The Third Department has held that "the owner of the legal title . . . can control the use of the property, and the activities which occur there, through the terms of the land contract. This degree of control is all that is required for liability" (*State of New York v Dennin*, 17 AD3d 744, 745 [2005], lv dismissed 5 NY3d 824; *see B & P Auto Serv. Ctr., Inc.*, 29 AD3d at 1047).

Further, Navigation Law §190 provides that "[a]ny claims for costs of cleanup and removal, civil penalties or damages by the state and any claim for damages by any injured person, may be brought directly against the bond, the insurer, or any other person providing evidence of financial responsibility". Accordingly, Navigation Law §190 provides the State with a direct cause of action against the insurer of a discharger.

Kirkwood's Motion for Summary Judgment

Defendant/Third Party Plaintiff Kirkwood argues that it is entitled to summary judgment dismissal of the plaintiff's complaint on the grounds that: (i) its acts or omissions during the supply of petroleum products to the Spill Site did not result in discharges of petroleum products; (ii) that

the alleged discharge was the result of the failure to properly maintain the underground storage tanks ("USTs") and their spill buckets by defendants Richmond, Flora and Wolinski; and (iii) that the discharge was the result of the failure by the State through DEC to order a halt of fuel delivery to Richmond after it learned that the spill buckets were defective and, under the defense of governmental negligence provided by the Navigation Law, Kirkwood cannot be found liable because the State contributed to and was responsible for the discharge (and therefore is precluded from bringing a Navigation Law claim).

Kirkwood initially argues that it is not a discharger because it was not in a position to prevent the discharge or effect a cleanup and that the manner and means of delivery were dictated by Richmond. Kirkwood argues that delivering fuel into an UST and its spill bucket is different than being responsible for and maintaining the same. Kirkwood argues that Richmond controlled the on-site USTs and their spill buckets and should have been aware if the USTs or their spill buckets were not working.

In support of its motion for summary judgment, Kirkwood has submitted, *inter alia*, the depositions of a number of individuals, including Mr. Kirkwood, the majority stockholder in Kirkwood, who testified, *inter alia*, that Kirkwood began supplying gasoline to Richmond in or around 1989 or 1990 through at least December 17, 2012. He testified that Kirkwood did not have any procedures regarding fuel inventory maintenance or loss reconciliation or leak detection at Richmond, and that Richmond would tell Kirkwood the amount of gasoline they needed. Mr. Kirkwood testified that he became aware of a discharge related to Richmond when he received a call from DEC. After the call from DEC, a Kirkwood employee reported that a fitting was leaking a little and a discharge of gasoline occurred while someone from DEC was watching. Additionally

Kirkwood has submitted the deposition testimony of Peter Miller, a DEC employee who witnessed Kirkwood discharge gasoline during delivery.

Kirkwood has also submitted the deposition testimony of defendant Wolinski who testified, *inter alia*, that Richmond is presently branded as a Gulf gasoline station. Mr. Wolinski testified that three underground storage tanks ("USTs") are located on the property and he is the only Richmond employee who operates and has responsibility for the USTs. He testified the storage capacity of the USTs consist of "one super which is 4,000" and "two regulars which are 6,000 a piece". He testified that the three USTs have always been in the same location on the property and that there are pumps and dispensers on the property along with three above ground storage tanks. Mr. Wolinski testified that the USTs are double wall steel tanks which were installed in 1989 though he did not remember when the dispensers were installed. He testified that defendant Hometowne (formerly known as Okar) installed the USTs and that the whole station was refitted in 1989, which was also when he first obtained a bucket containment system (known as "spill buckets") with respect to the USTs. He testified that each UST had a spill bucket associated with it.

He further testified that when the spill buckets were installed they were originally incorrectly placed under water level and the buckets needed to be raised up. Mr. Wolinski testified that a Hometowne (formerly Okar) representative "totally screwed the whole concrete job up" (Wolinski, Dep., pg. 24) when attempting to raise the buckets up and performed work on the concrete pad where water was collecting (Wolinski Dep., pgs. 63; 90; 102). He testified that the spill buckets didn't look "in too good of shape" (Wolinski Dep., pg. 25) and, in fact, one was replaced because it was "mangled" (Wolinski Dep., pg. 63). He further testified that as far as he was aware, no one tested the integrity of the spill buckets at any time between 1989 and 2007 (Wolinski, Dep., pg 64). He

testified that two of the spill buckets were dug out of the ground in May of 2007 and when they were removed, "they were missing clamps" (Wolinski Dep., pg. 94).

Mr. Wolinski also testified that all three of the USTs have had "quick-connect rings" from the time they were first installed which need to be replaced if they started leaking and they couldn't be sealed. He testified that a quick-connect ring is a round fitting located on top of the fill pipe which clamps the hose from the delivery vehicle onto the UST. He testified that such quick-connect rings are replaceable and that Kirkwood had replaced one and he estimated it was at a time before the spill. He testified that the "quick-connect rings" included a gasket located directly underneath and that it was his understanding that if such a gasket was missing fuel would leak out around it, however, the product would go into the spill bucket.

As to Kirkwood deliveries, Mr. Wolinski testified that Kirkwood deliveries would come at night so he wouldn't really see a driver though he has witnessed some Kirkwood deliveries and he "didn't really go out there and watch what they're doing because I figured they know what they're doing" (Wolinski Dep., pg. 29).

Kirkwood has also submitted the deposition testimony of Jeremy A. Giordano, an employee of the Office of the NYS Comptroller assigned to the Oil Spill Fund. He testified, *inter alia*, "that based on the information about the spill containment system it looks like the release may have taken place over a very long period of time. In other words, it was ongoing. It appeared to be an ongoing release" (Giordano Dep., pg. 63). Mr. Giordano testified that it appeared there was a malfunction with the spill containment system whereby an overflow during a fill event of the tanks was not being appropriately contained within the containment system.

Kirkwood has also submitted the deposition testimony of Mr. Didion, a DEC employee who

testified, *inter alia*, that the spill bucket on the western most UST at Richmond did not appear to be properly seated in the gasket when it was uncovered and removed (*see* Didion Dep., pg. 30). Further, Kirkwood has submitted the deposition testimony of Mr. Dake, a DEC employee, who testified that on May 9, 2007, Pete Miller of DEC reported that the spill buckets tested as unable to hold water. He further testified that on May 18, 2007 he observed that the upper and lower sections of one of the spill buckets appeared to not be seated properly and that a result of an improperly seated spill bucket would be that it would not be able to hold liquids as it was designed to do. (*see* Dake Dep., pg. 143-144).

Finally, Kirkwood submitted the deposition testimony of DEC employee Pete Miller who testified, *inter alia*, that spill buckets are designed to catch releases of contamination products (see Miller, pg. 33) however, upon a test of the Richmond spill buckets, when water was poured around the three UST's fill ports to check the integrity of their spill buckets, neither of the unleaded UST's spill buckets retained water (though the super unleaded UST's spill bucket did). Further, he testified as to a DEC Spill Report which noted that on May 16, 2007 he observed fuel being delivered by Kirkwood entering into the spill bucket, and that after the driver from Kirkwood left the site, he concluded that the spill bucket was the potential cause of the groundwater contamination.

Mr. Miller further testified that the spill bucket on the western most tank did not appear to be properly seated in the gasket (noting that the spill bucket is a two piece assembly with a gasket between the upper and lower pieces) when it was uncovered and removed and that the bucket was not engaged; there was a gap between the upper and lower part of the bucket, so there was not a complete seal (*see* Miller Dep., pgs. 77-79). He testified that ordinarily the top of the spill bucket would be flush with the pavement.

He additionally testified that there were no gaskets present under the brass quick-connect ring or under the fill pipe insert that contains the automatic shutoff where it meets the fill pipe. His notes reflected that there were two missing gaskets in the western tank and one in the center tank.

Kirkwood argues that the evidence submitted to the Court demonstrates that Kirkwood only delivered fuel at Richmond into its USTs and their spill buckets and that any discharge was a result of defective spill buckets for which Kirkwood was not responsible. Kirkwood argues that any discharge was a result of the means of storage and not the manner of delivery. Kirkwood argues that while its delivery of fuel was observed to have rippled into the western tank's spill bucket, it was not observed to have fallen into the ground. Accordingly, Kirkwood argues that its sole involvement was delivering fuel into the USTs and their spill buckets.

Based upon the record, Kirkwood has not met its *prima facie* burden necessary for summary judgment dismissal of the complaint against it. While Kirkwood has cited to cases in which it has been held that where the only connection to a discharge was the role of a party as a deliverer of gasoline such connection is too attenuated to impose liability as a discharger, such cases are distinguishable from the facts as presented herein where, *inter alia*, a DEC employee witnessed gasoline entering the spill bucket during a delivery by Kirkwood to the Site, (*see State v Avery-Hall Corp.*, 279 AD2d 199 [3d Dept 2001]; *State v Cronin*, 186 Misc2d 809 [Alb. Cty., 2000]). Further, the testimony of Mr. Wolinski provides that he did not supervise the manner or method of delivery of gasoline by Kirkwood.

Kirkwood argues that it is not a discharger because it did not discharge fuel within the meaning of the Navigation Law as the fuel it was delivering went into the spill bucket which constituted the means of storage of the petroleum. Where a discharge occurs as a result of the means

of storage rather than the means of delivery, and the supplier has no involvement in the storage of the product, such supplier will not be held liable as a discharger (*see State of New York v Joseph*, 29 AD3d 1233 [2006]). Kirkwood has not demonstrated as a matter of law however, that a spill bucket, a containment system used to aid in the collection of any overflow/spillage, constitutes a means of "storage" for purposes of the Navigation Law nor that delivery is proper and that it is not a "discharger" as a matter of law where the petroleum it is delivering is not properly entering into the UST but is entering into a containment system used to aid in the collection of any overflow/spillage. Kirkwood failed to establish that the gasoline in the spill bucket was not due to improper delivery. Further, Kirkwood bears the burden of proof at this juncture and it has not established as a matter of law, that such discharged fuel did not in fact leak into the soil, particularly as the evidence it has also presented demonstrates that the spill buckets were not effectively containing such petroleum products.

Accordingly, at this juncture, Kirkwood has not demonstrated as a matter of law that it was not a "discharger" for purposes of the Navigation Law and the Court need not consider the opposition of the plaintiff.

Even were the Court to consider the opposition, however, such submissions raise triable issues of fact as plaintiff has submitted, *inter alia*, the affidavit of DEC employee Miller who averred that on May 16, 2007, he observed a discharge of gasoline during Kirkwood's delivery to the Spill Site. He averred that he "saw gasoline enter the spill buckets and migrate out of the spill buckets which would contaminate the soil and groundwater surrounding the spill buckets. The gasoline was discharging from the hose fitting connecting Kirkwood's tanker truck hose to the fill port at the top of the tank which gasoline was being delivered to the tank" (Miller Aff., pg. 7, ¶27).

He further avers that the spill buckets were not holding liquid and that he observed the discharge of petroleum from Kirkwood into the spill buckets. Additionally, he averred that within days of his witnessing the discharge of fuel into the spill buckets by Kirkwood, a contractor removed the spill buckets and the spill bucket around the western most UST appeared to be improperly seated in its gaskets. Accordingly, plaintiff has raised a triable issue of fact with respect to whether Kirkwood is a "discharger" for purposes of the Navigation Law.

Kirkwood also argues that it is entitled to dismissal of the claims as against it based upon the defense of "governmental negligence" as the discharge was allegedly caused by the failure of DEC to take action to halt further fuel deliveries after being on notice that the spill buckets were defective on May 9, 2007 (but allowed and watched fuel deliveries take place). Kirkwood cites both Navigation Law §§181(4) and 176(b)(2) in support of such assertion, though 176(b)(2) is a provision that provides the State immunity against claims brought against it. Initially, Kirkwood has failed to demonstrate that it properly raised such governmental negligence defense, however, even considering such defense, Kirkwood has failed to demonstrate that the assertion of such defense warrants dismissal of the action against it.

Navigation Law §181(4) provides for certain limited affirmative defenses in a Navigation Law action. Navigation Law §181 (4)(a) provides that "[t]he only defenses that may be raised by a person responsible for a discharge of petroleum are: an act or omission caused solely by (i) war, sabotage, or governmental negligence...". Navigation Law §176(2)(b) provides the plaintiff broad immunity from any acts or omissions with respect to its remediation of spills provided it has not acted unlawfully, willfully or maliciously (*see State v Robin Operating Corp.*, 3 AD3d 767 [3d Dept 2004]).

In this case, Kirkwood has not demonstrated that any alleged improper actions of the plaintiff were the sole cause of the contamination at the Spill Site. The record indicates that DEC tested the spill buckets as a result of a report to DEC on or about May 1, 2007, when contamination was discovered in the Honeoye Well District Well #2, prior to any testing of the spill buckets on May 9, 2007. Further, the record indicates that subsequent to the testing of the spill buckets, a Kirkwood employee delivered gasoline which was spilling out of the UST. As to any assertion by plaintiff of immunity, Kirkwood has failed to demonstrate as a matter of law plaintiff would not be entitled to such immunity as it has failed to demonstrate as a matter of law that plaintiff's alleged actions were "unlawful, willful or malicious". Based upon the record, Kirkwood has not demonstrated entitlement to dismissal of the action against it based upon such alleged defense.

Utica Mutual Insurance Company's Motion for Summary Judgment

Utica has moved for summary judgment dismissing the complaint as against it arguing that if Kirkwood's motion is granted, there is no liability against Utica. Based upon the Court's determination with respect to Kirkwood's motion for summary judgment, Utica's motion is in all respects denied.

Hometowne Energy Co., Inc.'s (Okar's) Motion for Summary Judgment

Hometowne moves for summary judgment dismissing Kirkwood's third-party complaint against it on the ground that it is not a discharger within the meaning of the Navigation Law. In support of its motion, Hometowne has submitted the affidavit of John R. Campbell, its president, who avers, *inter alia*, that Hometowne installed three USTs and associated equipment at Richmond in 1989 which included the installation of fill ports and spill buckets for each of the three tanks. Hometowne argues that it is purely speculative and unreasonable to conclude that the problems

identified with Richmond's equipment in 2007 were present when the equipment was installed in 1989, particularly as the problems identified by DEC of missing gaskets in two fill ports and improper seating of two spill buckets could have arisen any time after the equipment was installed. Mr. Campbell avers that based on Hometowne's records of the installation work, Hometowne returned to Richmond on two occasions shortly after the original installation to reinstall the tank-top equipment (including fill ports and spill buckets) in a new concrete slab to address a surface water drainage issue and make further adjustments to one spill bucket. He avers that the need to perform such additional work did not indicate any problem or defect in the original installation of the spill buckets and that the subsequent work is unrelated to the problems DEC identified in 2007.

Hometowne has also submitted the expert affidavit of Charles A. Norris, the founder and owner of a construction and service company that specializes in the installation, maintenance and removal of retail gasoline equipment including, *inter alia*, USTs, spill prevention and control systems and related components. He opines, *inter alia*, that there is no evidence that the alleged discharges of petroleum in the environment at or near Richmond are attributable to any action or omission by the installer of the USTs, spill buckets, fill port components or any other equipment at the site.

Mr. Norris avers that the fill port of the UST includes multiple components. The fill pipe is a pip through which fuel is delivered to the tank. At the top of the fill pipe is a quick-connect ring, which the delivery hose attaches to during fuel deliveries. The Spill bucket is a mostly sub-surface basin that surrounds the fill pipe and is designed to collect small spills that may occur during fuel deliveries. The top of the spill bucket extends slightly above the ground surface and typically consists of a metal ring containing a protective cover that is removed during fuel deliveries. He

avers that the condition, seating and other relevant attributes of the spill buckets at Richmond as documented by DEC in 2007 does not reflect the spill bucket's condition, seating or attributes at the time of their installation. He opines that properly installed spill buckets can become unseated, damaged, or otherwise compromised after installation due to various causes such as impacts from snow plows or vehicles, pressure from vehicles driving or parking over them, lack of maintenance, exposure to the elements and freeze-thaw cycles. He opines that such occurrences are not uncommon as the spill bucket is among the most vulnerable parts of a UST as it extends above the ground surface and that maintenance and monitoring is essential for their continued integrity after installation. He opines that it would be "mere unsupported speculation to assert that any of the recorded observations [concerning the Richmond spill buckets] reflect a problem attributable to the installation or original condition of the spill buckets or related equipment" (Norris Aff., ¶9).

Mr. Norris further opines that the spill buckets installed at Richmond in 1989 consisted of separate upper and lower parts with a gasket located where the upper and lower parts met. He opines that the pieces are not field-assembled during installation. The spill buckets come from the factory as one unit consisting of multiple parts and if one or more of the spill buckets or said gaskets were improperly seated at the time of installation, the problem would have been readily apparent to the installer and the installer would not have been able to properly backfill around the spill bucket or pour concrete for the installation until the issue was resolved.

He opines that the reported absence of gaskets does not indicate a failure by the original installer as such gaskets are removable and replaceable and could have been removed or replaced at any time after installation. He notes that based upon his review of the deposition testimony of Mr. Wolinski concerning gaskets he replaced in 1999, the reportedly missing gaskets at Richmond were

either: (i) associated with system components that were not part of the equipment originally installed in 1989 or (ii) removed or replaced one or more times as part of system maintenance after the original installation, or (iii) both.

Hometowne has also submitted a portion of Mr. Wolinski's deposition testimony which Hometowne argues indicates that he replaced the gaskets at issue in the westernmost UST where DEC found gaskets missing. Mr. Norris opines that it cannot be determined from a review of the photographs of the spill buckets removed from Richmond in May 2007 whether any problem with their performance or integrity was attributable to their installation. Hometowne also points to the deposition testimony of various DEC employees who testified to the vulnerability of spill buckets over time.

While not a part of Hometowne's motion, the record before the Court includes the deposition testimony of, *inter alia*, Mr. Wolinski who testified to the fact that, unlike in *State of New York v Tarrytown*, 208 AD2d 1009 [3d Dept 1994] (a case relied heavily upon by Hometowne with respect to the instant motion), allegations are not being brought against Hometowne solely because they originally installed three USTs and associated equipment at Richmond (including spill buckets for each of the three tanks), but that there were issues with Hometowne's installation which involved remediation work involving the spill buckets.

The expert affidavit of Mr. Norris does not in any way address the remediation work that was necessary by Hometowne at the Site and the affidavit of Hometowne's President only conclusorily states that while remediation work was required on two occasions shortly after the original installation, the need to perform such work "does not indicate any problem or defect in the original installation of the spill buckets, and this subsequent work is unrelated to the problems that the DEC

identified at Richmond Automotive in 2007".

Based upon the record, Hometowne has failed to meet its *prima facie* burden necessary to warrant dismissal of the third-party complaint against it at this juncture and, accordingly, the Court need not consider the opposition.

Even had Hometowne met its *prima facie* burden, Kirkwood has demonstrated the existence of triable issues of fact which preclude summary judgment[4]. Kirkwood argues, as discussed above, that Mr Wolinski's deposition testimony concerning the subsequent remediation work performed at Richmond by Hometowne raises triable issues of fact concerning whether the spill buckets were improperly installed or damaged by Hometowne. Kirkwood also asserts that the affidavits of Mr. Campbell and Hometowne's expert are insufficient as Mr. Campbell's deposition testimony demonstrates that he did not start working for the company until 1990, a year after the work at Richmond and accordingly, had no personal knowledge of the installation of the spill buckets at Richmond. As to the affidavit of Hometowne's expert, Kirkwood argues, *inter alia*, that he fails to mention that Mr. Wolinski testified that clamps to hold the two pieces of the outer shell of the spill buckets were missing. Kirkwood asserts that the issue of the missing clamps should have been addressed. Based upon the foregoing, triable issues of fact exist concerning Hometowne's installation and remediation work with respect to the equipment at the Site. To the extent Hometowne attempts, in reply, to argue that it need not address Mr. Wolinski's claims concerning missing clamps on the spill buckets, while DEC may not have noted such issue, such issue still raises triable issues of fact that exist and upon which application, Hometowne bears the burden and cannot point to gaps in proof or the failure of plaintiff to be able to prove its case at trial to satisfy such

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[4]Utica adopts and incorporates by reference the opposition papers and arguments submitted by Kirkwood with respect to Hometowne's motion.

burden. Further, while Hometowne's expert provides a supplemental expert affidavit concerning the remediation work performed by Hometowne following the original installation, such submission offered upon reply is not properly before the Court and it is unclear why such matter was not addressed in the expert's initial affidavit as the subsequent work, after installation, was certainly known by all the parties prior to the making of such motion.[5] Accordingly, third-party defendant Hometowne's motion is denied.

Monroe Mechanical's Motion for Summary Judgment

Third-Party Defendant Monroe seeks an order dismissing the third-party complaint of Kirkwood as against it. Kirkwood, as Third-Party Plaintiff, alleges in its third-party complaint, that in approximately 1989, Monroe performed work, labor, services and materials for Richmond and that if plaintiff recovers judgment in the primary action then any liability on the part of Kirkwood will have been caused by the primary negligence, carelessness or fault of Monroe in their negligent performance of work. In support of its motion, Monroe has submitted, *inter alia*, the deposition testimony of Mr. Wolinski, who testified that he hired Dale and Dusty Wheaton directly to install some equipment at the property. Mr. Wolinski testified that Dale and Dusty Wheaton performed such work "on the side" and were paid with a fishing charter and beer. He confirmed that he did not hire Monroe for any of the work that is the subject of the lawsuit. Additionally submitted was the

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[5] Even considering such reply expert affidavit's opinion, such opinion is conclusory and does not demonstrate the absence of questions of fact where such opinion provides that "[i]t is possible to raise the level of a spill bucket after its original installation without compromising its integrity or liquid-tightness" and "..., if properly performed, [such re-installing the spill buckets in a raised concrete slab and subsequently raising the level of one spill bucket a second time] "could have been completed without causing the spill buckets to lose their integrity or become non-liquid-tight". Such affidavit essentially provides that if the work was done properly it could have been completed without issue however, such affidavit does not address the actual work that was performed nor the reason that it was performed in any specific manner.

deposition testimony of John Campbell, President of Hometowne (formerly Okar) who testified that Dale and Dusty Wheaton worked for Hometowne in the 1990's and that they did not work for Hometowne at Richmond while employed by Hometowne. Further, while a memorandum from DEC employee, Wendy Stevenson, documents a phone call with Mr. Wolinski, and provides that Mr. Wolinski believed that Monroe replaced piping, Ms. Stevenson's deposition testimony reflects that no one from DEC verified such information. Further, a second report from a DEC employee, Mr. Didion, which documents an interview with Mr. Wolinski, provides that Monroe installed equipment and that "Rusty Wheaton" did the work however, at deposition, Mr. Didion testified that there was nothing to connect Monroe to Richmond. Further, the only document in his file referencing work at Richmond was signed by Dale and Dusty Wheaton only.

Based upon the record before the Court, Monroe has met its *prima facie* burden and is entitled to summary judgment dismissal of the Third-Party Complaint against it. In opposition, Kirkwood has failed to raise a triable issue of fact necessary to prevent dismissal. To the extent Kirkwood points to the deposition testimony of Mr. Wolinski and the documents based upon Mr. Wolinski's statements, it is clear from such deposition testimony that while he initially testified that Monroe performed work, he clarified that Dale and Dusty Wheaton performed work for him on the side, that he hired them directly and that he did not hire Monroe for any work which is the subject of the lawsuit. Based upon the record, Third-Party Defendant Monroe's motion for summary judgment dismissal is granted.

Starnet's Motion for Summary Judgment

Third-party defendant Starnet seeks dismissal of Utica's Third-party complaint as against it and a declaration that Starnet has no obligation to defend or indemnify Kirkwood under Starnet

policy number 2PUMP4C8P05631 ("Policy"), effective August 8, 2004 to August 8, 2005 for the claims asserted against Kirkwood by plaintiff and has no obligation to contribute or indemnify Utica under such policy. Starnet asserts that the Policy contains an exclusion which precludes coverage for, among other things, property damage "arising out of the ownership, maintenance [or] use ... of any ... 'auto' ... owned or operated by ... any insured." Starnet argues that the sole basis for identifying Kirkwood as a potentially responsible party is that discharges occurred during the supply of petroleum products to the Site. Starnet argues that the tanker trunk from which the gasoline was unloaded constitutes an "auto" and accordingly, the claims fall within the scope of the auto exclusion. Further, Starnet argues that the Policy contains a pollution exclusion which excludes coverage for property damage "which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'Pollutants' at any time".

In opposition, Utica asserts that StarNet's motion is disingenuous and presents an incomplete picture as Starnet has represented to Utica that it issued a Business or Commercial Auto Policy or Coverage Part to Kirkwood for the same time period that contains no Pollution exclusion. In reply, StarNet does not dispute such assertion, which it did not address in its motion, but argues that it is entitled to summary judgment as to the Policy at issue, as "the existence of [another policy] does not compel denial of StarNet's motion as to a separate, distinct policy that does not provide coverage to Kirkwood by virtue of the auto and pollution exclusions contained in the policy" (Reply Memo of Law, pg. 1). A party is not entitled to declaratory relief where such judgment will result in a piecemeal determination of the dispute (*see generally, Smith v. Western Union Tel. Co.*, 276 AD 210 [1st Dept 1949]). While StarNet has not brought a declaratory judgment action, they are looking for

piecemeal declaratory relief which the Court will not provide. StarNet has not disputed that another policy exists with respect to Kirkwood for the exact time of coverage at issue herein, which it has not provided, the provisions of which may impact a determination of StarNet's overall liability and may collide with the provisions of the Policy that StarNet has submitted to the Court for review. It is unclear how the second (unproduced) policy may interplay with the first and accordingly, the Court will not make a determination regarding the Policy. Further, while Starnet argues it is only seeking judgment as to the Policy it has produced, the third-party complaint alleges that Starnet insured Kirkwood for a period of time, including those relating to petroleum and petroleum product contamination and damages, and that Utica will be entitled to either common law contribution and/or indemnification and judgment over and against such defendant. StarNet has demonstrated no legal right to a piecemeal determination nor how such piecemeal determination adequately addresses the overall contentions of the third-party complaint that Utica is entitled to contribution and/or indemnification against it. Starnet's motion is in all respects denied.

Fireman's Motion for Summary Judgment

American Automobile Insurance Company ("AAIC") and National Surety Corporation ("NSC") (allegedly sued incorrectly as Fireman's Fund Insurance company) seek summary judgment dismissing the third-party complaint as against them on the grounds, *inter alia*, (i) of late notice of the accident, loss and claim at issue in this matter, (ii) that there was no property damage during the AAIC and NSC policy periods, (iii) that all claims against AAIC and NSC must be dismissed and that a declaration be issued that AAIC and NSC are not obligated to pay any sum to any person or party as a result of such late notice and lack of property damage during their policy periods.

AAIC and NSC assert that Kirkwood and Utica had notice of the accident, loss and claim at

issue in May and June 2007 but failed to provide AAIC and NSC with notice until August 2010 at the earliest- more than three years later. AAIC and NSC argue that even if they had received timely notice, such policies afford coverage only if the accident resulting in the release of gasoline and the resulting property damage occurred during the AAIC and NSC respective policy periods. Here, they assert, the contamination did not occur until many years after the AAIC and NSC policies had expired. They assert that the alleged discharges at Richmond and the contamination of the Honeoye Municipal Well #2 could only have happened between 2004 and 2006, or between six to eight years after the expiration of the last of the six policies issued by AAIC and NSC to Kirkwood.

AAIC and NSC have submitted the testimony of James Kirkwood, a principal of Kirkwood, who testified at deposition that he received notice of the May 2007 discharge at Richmond via telephone call from DEC shortly after the incident. Further they have submitted the Accord General Liability Notice of Occurrence/Claim form dated June 6, 2007, which notes that David Kirkwood, James' son, called Kirkwood's broker, J.D. Chapman Agency, Inc. on May 22, 2007. AAIC and NSC assert that both the June 6, 2007 Notice of Occurrence/Claim form and a letter dated May 29, 2007 from the DEC notifying Kirkwood's broker J.D. Chapman Agency, Inc. that Kirkwood was a responsible party for the contamination discovered at Richmond, were sent to Utica. A submitted letter from a Utica representative dated July 25, 2007 demonstrates that they were on notice of the incident/claim.

AAIC and NSC assert, however, that neither Utica nor Kirkwood provided timely notice of the accident, loss or claim to them, but, rather, that Utica's counsel provided notice to AAIC and NSC three years after the initial notice of claim was provided to Utica via letter dated August 12, 2010, whereby counsel sought and obtained information regarding the AAIC and NSC (Fireman's

Fund) policies. Via letter dated September 3, 2010, AAIC and NSC assert that they acknowledged notice of the accident, loss and claim from defense counsel appointed by Utica and via letters dated September 27, 2010 and October 24 2012 via their answer, AAIC and NSC disclaimed coverage on grounds including late notice of accident, loss and claim.

AAIC and NSC assert that Utica's assigned defense counsel did not provide notice of the Richmond incident involving Kirkwood until, at the earliest, August 12, 2010, over three years after Kirkwood and Utica were both aware of the discharges of gasoline at Richmond and resulting contamination and just under three years after Utica began to seek contribution from Kirkwood's other historic insurers.

AAIC and NSC assert that they issued six primary liability policies that issued both commercial general liability and business auto insurance coverage to Kirkwood and that the policies required prompt notification of any accident or loss. AAIC and NSC assert that notice over three years after the May 2007 incident at Richmond and Kirkwood's and Utica's knowledge of it does not constitute prompt notice.

Historically, New York law provided that an insurer that does not receive timely notice in accordance with a policy provision may disclaim coverage, whether it is prejudiced by the delay or not. Recent legislation amending the Insurance Law requires an insurer to show prejudice, however, the new statutory language does not apply in this case as the policies at issue were issued before the effective date of the statute (Jan. 17, 2009). (*see Waldron v N.Y. Cent. Mut. Fire Ins. Co*, 88 AD3d 1053 [3d Dept 2011]; *see also Briggs Av. LLC v Insurance Corp. of Hannover*, 11 NY3d 377 [2008]; *Argo Corp., v Greater NY Mut. Ins. Co.*, 4 NY3d 332 [2005]). The AAIC and NSC policies at issue covered periods from 8/8/1991-8/8/1997, prior to the effective date of the new statutory language.

As noted by AAIC and NSC, New York courts have held that shorter periods of delay in providing notice than the three years at issue here have precluded any coverage obligation (*see generally, Deso v London & Lacashire Indemnity Co. of America*, 3 NY2d 127 [1957]; *1700 Broadway Co. v Greater N.Y. Mut. Ins. Co.*, 54 AD3d 593 [1st Dept 2008]; *Heydt Contracting Corp. v American Home Assur. Co.*, 146 AD2d 497 [1st Dept 1989]). Further, the same notice requirements have been applied among successive insurers and where an insured gives only one of multiple insurers timely notice of a claim, the insurer that received notice may obtain reimbursement from the other insurer only if it gives the other insurer notice of the claim that is reasonable under the circumstances (*see Continental Casualty Co. v Employers Ins. Co. of Wausau*, 85 AD3d 403 [1st Dept 2011; *see also Crum & Forster Org. v Morgan*, 192 AD2d 652 [2nd Dept 1993]). In this case, the failure to provide AAIC and NSC notice for approximately three years from the date of the incident is unreasonable in the absence of any adequate excuse. Based upon the record, AAIC and NSC have established their entitlement to dismissal of Utica's claim for reimbursement and contribution of defense and indemnity expenses based upon the failure of Kirkwood and Utica to provide timely notice of the incident/loss/claim.

In opposition, Utica and Kirkwood assert that they only learned of the actual existence of the AAIC and NSC policies in August 2010 and that such discovery is the reason for the three year delay in providing notice. Utica asserts that it continued to look for additional policies issued to Kirkwood as reflected in a letter dated July 10, 2010 to Kirkwood's broker/agent and that it only learned via a letter dated August 12, 2010 from such broker/agent of the existence of three Fireman's Fund insurance policies. Utica has acknowledged that it knew of insurance policies with Arch and Starnet pursuant to a letter dated July 25, 2007. Such assertion, however, fails to demonstrate a triable issue

of fact as to whether such excuse is reasonable under the circumstances. "It is also well settled that the reasonableness of a delay, where mitigating circumstances such as absence from the State or lack of knowledge of the occurrence or its seriousness are offered as an excuse, is usually for the jury. On the other hand, absent an excuse or mitigating circumstances, courts have assumed the function of determining fulfillment of the condition" (*Deso*, *supra* at 890-91). In this case, Utica acknowledges that it knew of the claim in 2007 and has provided no explanation as to what took place (i.e. what research or search efforts were made) between its knowledge of the claim in 2007 and the letter requesting additional information of July 10, 2010 regarding additional insurers, approximately three years later.

Finally, to the extent Utica contends that AAIC agreed to defend Kirkwood notwithstanding its defense of untimely notice, such assertion is belied by the record. While AAIC and NSC agreed to participate in the defense of Utica, the letter of May 2, 2012 agreed to participate in the defense subject to a continuing reservation of rights and a disclaimer. Further, this is not a case in which estoppel would preclude such defense, as Utica has been defending Kirkwood and there is no evidence that Kirkwood relied upon the defense of AAIC and NSC to its detriment (*c.f. Schiff v Flack*, 51 NY2d 692 [1980]; *see Village of Waterford v Reliance Inc. Co.*, 226 AD2d 887 [3d Dept 1996]). While the Court notes the February 8, 2011 letter of an AAIC representative agreeing to participate in the defense, such letter did not disclaim any assertion of AAIC's rights or defenses with respect to the policies. Further, the record also includes letters from September 3, 2010 and September 24 and 27, 2010 in which AAIC and NSC reserved their rights with respect to all policies at issue (not just the CGL portions), a letter of May 2, 2012 whereby they agreed to participate in the defense but such participation was subject to a reservation of rights, and further letters of October

24, 2012 and January 17, 2013 whereby AAIC and NSC withdrew from their participation in the defense and affirmed such withdrawal, in which they confirmed that they continued to reserve all rights and defenses available. Based upon the record, AAIC and NSC are entitled to dismissal of the claim against them based on untimely notice. Further, the Court need not consider any remaining arguments of the parties in support or opposition of such motion.

Arch's Motion for Summary Judgment

Third Party Defendants Arch argues that summary judgment dismissal of Utica's claims for contribution and indemnification must be dismissed as the undisputed material facts establish that any potential liability of Utica Mutual is excluded by the MTBE exclusion in the Arch insurance policies.

In support of its motion, Arch has submitted copies of the commercial liability policies that had been issued to Kirkwood (KSPKG00435 effective 8/8/02 to 8/8/03; and KSPKG00649 effective 8/8/03 to 8/8/04). Arch notes that the terms of the two policies are materially identical and include Commercial Auto Liability Coverage. The policies contain an MTBE Exclusion which provides that such endorsement modifies insurance provided under the Business Auto Coverage Form and Commercial General Liability Coverage Form. Arch argues that Utica's claims for contribution and indemnification must fail because the factual predicate for the claims against Kirkwood fall within the Arch policies' MTBE exclusion.

The policies do not cover "bodily injury" or "property damage" arising out of or contributed to or by or resulting from, directly or indirectly from "MTBE"; or "any loss, cost or expense arising out of any : (1) request, direction, demand or order than any insured or others test for, monitor, clean up, remove, contain, treat, detoxify, neutralize, remedy or abate, or in any way respond to, or assess the effect of "MTBE"; or (2) claim, or suit by or on behalf of a governmental authority and arising out of, seeking or involving the testing for, monitoring, cleaning up, removing, containing, treating,

detoxifying or neutralizing or in any way responding to, or assessing the effects of "MTBE". MTBE is defined in the endorsement as "any substance consisting of methyl tertiary butyl ether/ethyl ("MTBE"), including all other chemicals blended together to formulate the product or degredation products thereof". Arch argues that the MTBE Exclusion bars coverage for "property damage" arising out of "MTBE". As noted by Arch, "[i]n the context of a policy exclusion, the phrase 'arising out of' is unambiguous, and is interpreted broadly to mean 'originating from, incident to, or having connection with'" (*Scottsdale Indem. Co. v Beckerman*, 120 A.D.3d 1215 [2nd Dept 2014][internal citations omitted]). Arch further argues that the exclusion applies if MTBE "contributes" to the property damage, and, accordingly, it is unnecessary for MTBE to be the sole contaminant causing the "property damage". Arch also notes that the exclusion excludes the lawsuit commenced by the State.

Arch also argues that Utica has admitted that MTBE was the primary contaminant. It points to the verified answers in Utica's responses to interrogatories in which Utica has asserted that the cause of any groundwater and water supply contamination at issue here is pre-2004 MTBE in gasoline potentially from Richmond's tanks and notes that the expert report prepared by Earthworks Environmental dated April 4, 2011 for the Town of Richmond stated that MTBE is the primary contaminant affecting the Honeoye Well No. 2.

Arch has also submitted the deposition testimony of DEC employee Peter Miller who testified that MTBE was the sole contaminant detected in samples taken on January 10, 2007, April 18, 2007 and May 7, 2007 and that no volatile organic compounds other than MTBE were detected in those samples. He further testified that the contamination at Richmond consisted largely of MTBE and BTEX (benzene, toluene, ethlybenzene and xylene). Additionally, another DEC employee, David Dake, testified at deposition that MTBE was the sole contaminant detected in Well No. 2 and that MTBE was the primary contaminant, along with BTEX.

In further support, Arch has submitted an expert report in which their expert, John Rhodes, a Professional Engineer, opines, *inter alia*, that the damage to the groundwater at Richmond and the consequential damage to the Richmond water supply arose directly out of MTBE. Arch argues that such opinion supports their argument that any alleged property damage or any alleged liability for costs sought in the litigation are wholly encompassed by the MTBE exclusion.

A claim under Navigation Law is subject to policy exclusions (*see State v Capital Mut. Ins. Co.*, 213 AD2d 888 [3d Dept 1995]). The duty to indemnify requires a covered loss *(see Servidone Constr. Corp., v Security Ins. Co.*, 64 NY2d 419, 425 [1985]). Further, third-party contribution lawsuits (as well as indemnification claims) may be subject to clear and unambiguous policy exclusion language (*see generally, Commissioners of State Ins. Fund v Insurance Co. Of North America*, 80 NY2d 992 [1992]). Based upon the record, Arch has established its *prima facie* entitlement to judgment as a matter of law by demonstrating that Utica's claims for contribution and indemnification concern claims arising out of situations that are expressly excluded from coverage by the clear language of the policies at issue which contain MTBE Exclusions.

In opposition, Utica does not dispute that the language of the MTBE Exclusion in Arch's policies applies to exclude coverage for the State's underlying claims against Kirkwood, if enforceable. Utica, however, initially argues that there is a question of fact as to whether the MTBE Exclusion is enforceable as it was not approved pursuant to Insurance Law §2307(b). Insurance Law §2307(b) provides, in pertinent part, that "[e]xcept as otherwise provided herein, no policy form shall be delivered or issued for delivery unless it has been filed with the superintendent and either he has approved it, or thirty days have elapsed and he has not disapproved it as misleading or violative of public policy."

Such contention however, fails to raise a triable issue of fact as a failure to file under Insurance Law §2307 does not, by itself, void such substantive provision(s), but "carries its own

penalties for nonfiling." (*National Union Fire Ins. V Ambassador Group, Inc.*, 157 AD2d 293 [1st Dept 1990]). Such substantive provision(s) are void only if they are inconsistent with other statutes or regulations (*see Id.* at 298).

Additionally, Utica argues that a question of fact exists as to whether the MTBE exclusion was ever validly added to its policies and therefore is unenforceable as Utica alleges conclusorily that such provision is void as it is inconsistent with other statutes or regulations. Utica argues that such exclusion is unenforceable as it is not one of the exclusions listed in 11 NYCRR §60-1.2, however, Utica has failed to demonstrate the applicability of the statute upon which such regulations are based to the circumstances of this case nor has Utica provided any legal analysis of the Arch insurance policies at issue (specifically the MTBE exclusions) and their inconsistency with the Navigation Law or alleged inconsistencies with any other governing statutes or regulations. Based upon the record, Utica's conclusory arguments have failed to demonstrate the existence of a triable issue of fact sufficient to warrant denial of Arch's motion. Accordingly, Arch's motion for summary judgment is granted.

Otherwise, the Court has reviewed the parties' remaining arguments and finds them either unpersuasive or unnecessary to consider given the Court's determination. The requests for oral argument are denied.

Based upon the foregoing, it is

ORDERED that Kirkwood's motion for summary judgment is denied; and it is further

ORDERED that Utica's motion for summary judgment is denied; and it is further

ORDERED that Hometowne's motion for summary judgment is denied; and it is further

ORDERED that Monroe Mechanical's motion for summary judgment is granted; and it is further

ORDERED that StarNet's motion for summary judgment is denied; and it is further

ORDERED that AAIC and NSC's motion for summary judgment is granted; and it is further

ORDERED that Arch's motion for summary judgment is granted.

This shall constitute both the decision and order of the Court. This original decision and order is being returned to the attorney for plaintiff. The below referenced original papers are being mailed to the Albany County Clerk. The signing of this decision and order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provisions of that section relating to filing, entry and notice of entry.

SO ORDERED.
ENTER.

Dated: July 11, 2017
Albany, New York

Gerald W. Connolly
Acting Supreme Court Justice

Papers Considered:

1. Stipulation of Discontinuance as to Peerless Insurance Company dated December 30, 2013;
2. Notice of Motion dated April 5, 2017; Attorney Affirmation in Support of Motion for Summary Judgment dated April 5, 2017 with accompanying exhibits A-Y; Memorandum of Law in Support of Motion for Summary Judgment dated April 5, 2017;
3. Affirmation of Rebecca A. Valk, Esq. dated April 21, 2017;
4. Attorney Affirmation in Opposition to Defendant Kirkwood's Motion for Summary Judgment dated April 21, 2017 with accompanying exhibit A; Plaintiff State of New York's Memorandum of Law in Opposition to Defendant Kirkwood's Motion for Summary Judgment dated April 21, 2017 with accompanying exhibits A-B; Affidavit of Peter R. Miller dated April 20, 2017 with accompanying exhibits A-C; Affidavit of R. Brauksieck dated April 21, 2017;
5. Reply Memorandum of Law in Support of Motion for Summary Judgment dated April 26, 2017; Reply Affirmation in Support of Motion for Summary Judgment dated April 26, 2017 with accompanying exhibit A;
6. Notice of Motion dated April 18, 2017; Affirmation of Alan J. Pierce, Esq dated April 18, 2017 with accompanying exhibit A;
7. Attorney Affirmation in Opposition to Utica's Motion for Summary Judgment dated April 27, 2017;
8. Notice of Motion for Summary Judgment dated April 11, 2017; Memorandum of

Law in Support of Third-Party Defendant Hometowne Energy Co., Inc.'s Motion for Summary Judgment dated April 11, 2017; Affidavit of John R. Campbell dated April 10, 2017; Expert Affidavit of Charles A. Norris dated April 10, 2017; Attorney Affirmation in Support of Hometowne Energy Co., Inc.,'s Motion for Summary Judgment dated April 11, 2017 with accompanying exhibits A-O;

9. Attorney Affirmation in Opposition to the Motion for Summary Judgment by Hometowne Energy Co., Inc., dated April 19, 2017 with accompanying exhibits A-K;
10. Affirmation in Reply to Kirkwood Heating Oil, Inc's Opposition to Hometowne Energy Co., Inc.'s Motion for Summary Judgment dated April 26, 2017 with accompanying exhibits A-D;
11. Notice of Motion for Summary Judgment dated March 20, 2017; Affirmation of Rebecca A. Valk in Support of Motion for Summary Judgment dated March 9, 2017 with accompanying exhibits A-N; Memorandum of Law dated March 9, 2017;
12. Opposition to the Motion for Summary Judgment by Monroe Mechanical Services, Inc. dated April 7, 2017 with accompanying exhibits A-E;
13. Affirmation of Rebecca A. Valk In Reply dated April 13, 2017;
14. Notice of Motion dated April 11, 2017; Memorandum of Law dated April 11, 2017; Affirmation of Justin N. Kinney, Esq. In support of Starnet Insurance Company's Motion for Summary Judgment dated April 11, 2017 with accompanying exhibits A-H; Affidavit of Matthew Schutter in Support of Starnet Insurance Company's Motion for Summary Judgment with accompanying exhibit A;
15. Affirmation of Alan J. Pierce, Esq. dated April 21, 2017 with accompanying exhibits 1-5; Utica Mutual's Memorandum of Law in Opposition to Third-Party Defendants' Motions for Summary Judgment dated April 21, 2017;
16. Memorandum of Law in Further Support of Starnet Insurance Company's Motion for Summary Judgment dated April 26, 2017;
17. Notice of Motion dated April 7, 2017; Affirmation of Robert A. Maloney, Esq. dated April 7, 2017 with accompanying exhibits A-H; Expert Affidavit of A. Murtaugh, P.G. dated April 7, 2017; Affidavit of P. Kasbohm dated April 5, 2017 with accompanying exhibits 1-9; Memorandum of Law dated April 7, 2017;
18. Expert Affidavit of D. Sullivan dated April 20, 2017 with accompanying exhibit A; Attorney Affirmation in Opposition to the Motion for Summary Judgment by AAIC and NSC of K. Krajewski, Esq. dated April 21, 2017 with accompanying exhibit A submitted by Brown & Kelly LLP and by Hancock Estabrook, LLP;
19. Reply Affidavit of A. Murtgaugh, P.G. dated April 27, 2017; Affidavit of P. Kasbohm in Further Support dated April 26, 2017 with accompanying exhibit A; Reply Memorandum of Law dated April 28, 2017;
20. Notice of Motion dated April 10, 2017; Affidavit of P. Sullivan dated April 3, 2017 with accompanying affidavits A-C; Affidavit of J. Fortier dated April 7, 2017 with accompanying exhibits A-J; Affirmation of Alan R. Lyons Esq. dated April 10, 2017 with accompanying exhibits A-T including as exhibit H an expert report of John A. Rhodes, P.E. dated April 7, 2017; Memorandum of Law dated April 10, 2017;
21. Third-Party Defendant Arch Insurance Company's Reply Memorandum of Law dated April 27, 2017.