

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

CAPITAL TERMINAL COMPANY :
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 v. : C.A. No. 03-047-ML
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 GETTY PROPERTIES CORP. and :
 GETTY REALTY CORP. :

REPORT AND RECOMMENDATION

Lincoln D. Almond, United States Magistrate Judge

This matter comes before the Court on cross-motions for summary judgment pursuant to Fed. R. Civ. P. 56(c) filed by Plaintiff and Counterclaim Defendant Capital Terminal Company (“Capital”), Counterclaim Defendant Robert Eder (“Eder”) and Defendants and Counterclaim Plaintiffs Getty Properties Corporation and Getty Realty Corporation¹ (“Getty”). The following Motions are pending: (1) Getty’s Motion for Summary Judgment and Partial Summary Judgment (Document No. 25); (2) Capital’s Motion for Partial Summary Judgment (Document No. 21); (3) Capital’s Cross-Motion for Summary Judgment (Document No. 36); and (4) Eder’s Cross-Motion for Summary Judgment (Document No. 38). These Motions have been referred to me for preliminary review, findings and recommended disposition. 28 U.S.C. § 636(b)(1)(B); Local Rule 32(a). A hearing was held on November 2, 2004. After reviewing the Memoranda submitted, listening to the arguments of counsel and conducting independent research, I recommend that Getty’s

¹ At Oral Argument, Counsel for Capital and Eder informed the Court that it was withdrawing its claims against Getty Realty Corporation. Counsel for Getty confirmed that Getty Realty Corporation was no longer a party to the suit. Therefore, the only remaining Getty party is Getty Properties Corporation.

Motion for Summary Judgment be GRANTED and its Motion for Partial Summary Judgment be DENIED (Document No. 25); Capital's Motion for Partial Summary Judgment be DENIED (Document No. 21); Capital's Cross-Motion for Summary Judgment be GRANTED (Document No. 36) and Eder's Cross-Motion for Summary Judgment be GRANTED (Document No. 38).

Statement of Facts

For decades, the parties to this action or their predecessors-in-interest have owned and/or used the Wilkesbarre Pier ("the Pier") and its berthing facilities in East Providence, Rhode Island for offloading petroleum products. Because the parties share use and ownership of the Pier, they have executed many written agreements in efforts to organize their normal business relationships and, often, in order to resolve specific conflicts.

The parties are presently before this Court seeking reimbursement for attorneys' fees and expenses ("legal expenses") they incurred while litigating a previous dispute. The previous litigation, Getty Petroleum Marketing, Inc. and Getty Properties Corp. v. Capital Terminal Co., C.A. No. 00-281ML (the "2000 Litigation"), arose from a disagreement among the parties regarding the rights and obligations established through certain written agreements with respect to the maintenance, repair and use of the Pier. In that case, Getty Petroleum Marketing, Inc. and Getty Properties Corporation brought a six-count complaint against Capital, seeking declaratory and injunctive relief, as well as damages for breach of contract. Capital, in turn, countersued for equitable relief and for damages. A jury trial was conducted in December 2002, and a bench trial

was held in June 2003 after which District Judge Mary M. Lisi issued a written decision on September 5, 2003 (the “Memorandum and Decision”).²

Capital filed the present action seeking reimbursement for legal expenses incurred in defending the 2000 Litigation while that case was still pending. Getty answered the claims, and filed a counterclaim against Capital and Capital’s Chairman, Robert Eder, seeking its legal expenses. The suit was originally filed in the United States District Court for the Eastern District of New York, but was subsequently transferred to the District of Rhode Island in February 2003. The parties no longer contest the issues presented or the results reached in the 2000 Litigation, however, the parties attempt to persuade the Court that agreements executed nearly twenty years ago entitle them to reimbursement for legal expenses incurred during the 2000 Litigation.

Summary Judgment Standard

A party shall be entitled to summary judgment “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.” Fed. R. Civ. P. 56(c). When deciding a motion for summary judgment, the Court must review the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in the nonmoving party’s favor. Cadle Co. v. Hayes, 116 F.3d 957, 959 (1st Cir. 1997).

² At the time the hearing was held in this matter, there was a single issue from the 2000 Litigation on appeal before the First Circuit Court of Appeals. On December 10, 2004, the First Circuit Court of Appeals affirmed Judge Lisi’s decision. Getty Petroleum Marketing, Inc. v. Capital Terminal Co., 391 F.3d 312 (1st Cir. 2004). Therefore, assuming no U.S. Supreme Court review is sought, this action represents the latest (and hopefully final) battle in this long-running conflict.

Summary judgment involves shifting burdens between the moving and the nonmoving parties. Initially, the burden requires the moving party to aver “an absence of evidence to support the nonmoving party’s case.” Garside v. Osco Drug, Inc., 895 F.2d 46, 48 (1st Cir. 1990) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986)). Once the moving party meets this burden, the burden falls upon the nonmoving party, who must oppose the motion by presenting facts showing that a genuine “trialworthy issue remains.” Cadle, 116 F.3d at 960 (citing Nat’l Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 735 (1st Cir. 1995); Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 581 (1st Cir. 1994)). An issue of fact is “genuine” if it “may reasonably be resolved in favor of either party.” Id. (citing Maldonado-Denis, 23 F.3d at 581).

To oppose the motion successfully, the nonmoving party must present affirmative evidence to rebut the motion. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57, 106 S. Ct. 2505, 2514-2515, 91 L. Ed. 2d 202 (1986). “Even in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, [or] unsupported speculation.” Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990). Moreover, the “evidence illustrating the factual controversy cannot be conjectural or problematic; it must have substance in the sense that it limns differing versions of the truth which a factfinder must resolve.” Id. (quoting Mack v. Great Atl. & Pac. Tea Co., 871 F.2d 179, 181 (1st Cir. 1989)). Therefore, to defeat a properly supported motion for summary judgment, the nonmoving party must establish a trialworthy issue by presenting “enough competent evidence to enable a finding favorable to the nonmoving party.” Goldman v.

First Nat'l Bank of Boston, 985 F.2d 1113, 1116 (1st Cir. 1993) (citing Anderson v. Liberty Lobby, 477 U.S. at 249).

At the hearing, neither party argued that there was any genuine issue of material fact which would preclude the Court from resolving these disputes under Rule 56, Fed. R. Civ. P. Both parties have submitted parol and other extrinsic evidence in support of their respective motions. Although they tender divergent interpretations of them, both parties agree that the agreements presented to this Court for interpretation are unambiguous and may be interpreted according to their plain language and applicable legal principles of contract interpretation. Thus, this Court will only look to the parol and other extrinsic evidence submitted by the parties for general background or historical purposes and will interpret the agreements in dispute pursuant to the plain language contained within their four corners.

Analysis

I. Capital's Claim For Indemnity Under the 1986 Guaranty and Indemnity Agreement

Capital's basis for seeking its legal expenses is an indemnification clause contained in the Guaranty and Indemnity Agreement dated January 3, 1986 between Getty Petroleum Corporation; and Union Oil Company of California, Northeast Petroleum Corporation, Capital Properties, Inc. and Providence and Worcester Railroad Company.

The Guaranty and Indemnity Agreement states in paragraph 2 that Getty Petroleum Corporation agrees to indemnify and hold harmless:

the Group³ their successors and assigns, from, against and with respect to any and all liability, loss, damage or expense arising out of any cause of action, suits, claims, equitable and administrative proceedings, including reasonable legal expenses in connection with defending against any such proceeding, which grow out of the occupation and use by Realty or Getty Terminals of the premises covered by the Lease and the Wilkesbarre Pier Operating Agreement or any improvements or facilities located thereon, and shall, if so requested by the Group, enter and defend at Getty's sole expense, any lawsuit or proceeding filed against or naming the Group as a party as a result of such occupation or use.

The Guaranty and Indemnity Agreement must, by its terms, be construed and governed by New York law. See Guaranty and Indemnity Agreement ¶ 5.

Capital argues that each of the claims Getty advanced during the course of the 2000 Litigation grew out of the "occupation and use" of the Pier, and therefore provide a right of recovery under the indemnity clause of the Guaranty and Indemnity Agreement. Getty offers three defenses to Capital's claims. First, Getty argues that the indemnification clause contained in the Guaranty and Indemnity Agreement was replaced or superseded by the indemnification clause contained in the 1991 Pier Operating Agreement. Second, Getty asserts that the Guaranty and Indemnity Agreement lapsed in 1998. Finally, Getty claims that the Guaranty and Indemnity Agreement was not intended to apply to claims between the parties, but is instead only applicable to third-party claims. The Court considers each argument in turn.

First, Getty's assertion that the indemnification clause contained in the 1986 Guaranty and Indemnity Agreement was terminated and replaced by the indemnification clause contained in the 1991 Pier Operating Agreement is unavailing. In support of this claim, Getty presented evidence that

³ The Guaranty and Indemnity Agreement defines the Group as Union Oil Company of California, Northeast Petroleum Corporation, Capital Properties, Inc. and Providence and Worcester Railroad Company.

the parties executed the Guaranty and Indemnity Agreement in 1986, and the Amended and Restated Pier Operating Agreement five years later in 1991, and that both agreements contain indemnification clauses. Getty presented absolutely no evidence that the later agreement (or its indemnification clause) was meant to supersede or replace the earlier agreement or its indemnification clause. Getty did not provide the Court with any testimony, contemporaneous agreements or documents, or any parol evidence whatsoever that suggests the later indemnity clause was intended to replace the earlier one. In fact, the 1991 Pier Operating Agreement contains no reference to the Guaranty and Indemnity Agreement, and it is evident that the Agreements were executed for entirely different reasons. Therefore, the argument that the indemnity clause from the 1986 Guaranty and Indemnity Agreement was superseded by the indemnity clause contained in the 1991 Pier Operating Agreement fails.

Getty's second argument, that the Guaranty and Indemnity Agreement lapsed prior to the 2000 Litigation is also unpersuasive. Getty contends that the Guaranty and Indemnity Agreement lapsed in 1998 because the 1991 Pier Operating Agreement terminated upon the withdrawal of all but one of the parties to the Pier Operating Agreement. Getty's argument on this point is one of semantics. The Guaranty and Indemnity Agreement states that the indemnity clause applies to "the premises covered by the ...Wilkesbarre Pier Operating Agreement." Getty argues that when the 1991 Pier Operating Agreement terminated in 1998, the 1986 Guaranty and Indemnity Agreement also terminated, because the Guaranty and Indemnity Agreement's duration was governed by the 1991 Pier Operating Agreement. The Court is persuaded that Capital has presented a more sensible argument that the language quoted from the Guaranty and Indemnity Agreement defines the area (or premises) covered by the indemnity clause, but does not define the duration of that Agreement.

Accordingly, Getty's argument that the Guaranty and Indemnity Agreement lapsed prior to the 2000 Litigation is rejected.

Getty's final argument is deserving of more scrutiny. Getty argues that Capital may not recover its legal expenses because the Guaranty and Indemnity Agreement was not intended to apply to claims between the parties, but was instead only applicable to third-party claims. Getty points out that certain language in the Guaranty and Indemnity Agreement would be meaningless or absurd if the clause were applied to inter-party claims. Getty did not cite any cases in support of its claim that the clause would not apply to inter-party claims. After reviewing the applicable case law, the Court is persuaded that the indemnification clause contained in the Guaranty and Indemnity Agreement does not apply to inter-party claims. An analysis of the law on this point is in order.

A. Recoverability of Legal Expenses

As a first step to analyzing whether Capital may recover its legal expenses, the Court notes that New York follows the "American Rule" on attorneys' fees, which provides that, "attorneys' fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule." Hooper Assocs. v. AGS Computers, Inc., 548 N.E.2d 903, 904 (N.Y. 1989). See also Campbell v. Citibank, N.A., 755 N.Y.S.2d 367, 371 (N.Y. App. Div. 2003) ("[I]t is a well-settled rule in New York that attorneys' fees are considered an incident of litigation and, unless authorized by statute, court rule or written agreement of the parties, are not recoverable. In the absence of an explicit statutory or contractual authority therefor, a right to attorneys' fees will not be inferred.") (citations omitted). Capital seeks to overcome the American Rule by arguing that the language of the Guaranty and Indemnity

Agreement, a written agreement of the parties, provides indemnification for legal expenses that were incurred in the 2000 Litigation.

B. General Principles of Contract Interpretation

In the present case, Capital's entitlement to recover legal expenses is dependent on the language contained in the Guaranty and Indemnity Agreement. This Court looks to the plain language of the indemnity, as well as applicable New York law, in order to determine if Getty is entitled to reinstatement of its legal expenses.

Under New York law, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. W.W.W. Assocs., Inc. v. Giancontieri, 566 N.E.2d 639, 642 (N.Y. 1990). The language of a written agreement is unambiguous if it has a definite and precise meaning, unattended by danger of misconception in the purpose of the agreement itself, and over which there is no reasonable basis for a difference of opinion. Breed v. Insurance Co. of N. Am., 385 N.E.2d 1280, 1282-1283 (N.Y. 1978). Whether an agreement is ambiguous is a question of law for the court and is "determined by looking within the four corners of the document, not to outside sources." Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998). When deciding whether an agreement is ambiguous courts should examine the entire contract, "particular words should be considered, not as if isolated from the context, but in light of the obligation as a whole," and "[f]orm should not prevail over substance." Id. at 180-181. (citation omitted). Contract provisions are not ambiguous simply because the parties interpret them differently as in this case. Mount Vernon Fire Ins. Co. v. Creative Hous., Ltd., 668 N.E.2d 404, 407 (N.Y. 1996). Ultimately, the court's "aim is a practical interpretation of the expressions of the

parties to the end that there be a realization of [the parties'] reasonable expectations.” Sutton v. East River Sav. Bank, 435 N.E.2d 1075, 1078 (N.Y. 1982). (citations omitted).

In the present case, the Court must interpret the plain language of the Guaranty and Indemnity Agreement to determine whether the provision for indemnification of the “Group” is intended to apply in the event that one party to the Agreement sues the other in direct litigation. Because the parties agreed that the Guaranty and Indemnity Agreement “shall be construed and governed” by New York law, the Court will consider New York case law bearing directly on this issue.

C. “Inter-Party” Indemnity

Although the cases were not cited by either of the parties, New York courts have addressed whether parties to an indemnity clause can recover fees and expenses under an indemnity clause as a result of litigation directly between those parties. This concept has been often referred to as “inter-party” indemnity. See Richard L. Levine & S. Christian Wickwire, Indemnifying Claims Between Contracting Parties, N.Y.L.J., Oct. 19, 2000, at 1, col. 1.

In Hooper Assocs. v. AGS Computers, Inc., 548 N.E.2d 903 (N.Y. 1989), the New York Court of Appeals considered whether the plaintiff was entitled to recover attorneys’ fees incurred in successfully suing the defendant for breach of contract. The plaintiff argued it was entitled to attorneys’ fees under the indemnity clause of the contract at issue in the suit. The indemnity clause provided:

AGS shall at all times indemnify and hold harmless HLTD [Hooper], its successors and assigns and any of its officers, directors, employees representatives, and/or agents, and their heirs, executors, administrators, successors and assigns or each of them against and from any and all claims, damages, liabilities, costs and expenses, including reasonable counsel fees arising out of: (i) Any breach by AGS of any express or implied warranty hereunder and any express

representation or provision hereof; (ii) The performance of any service to be performed hereunder...

In its analysis, the court noted that an indemnity clause “must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed.” Id. at 905. (emphasis added). The court reasoned because “a promise by one party to a contract to indemnify the other for attorney’s fees incurred in litigation between them is contrary to the well-understood rule that parties are responsible for their own attorney’s fees, the court should not infer a party’s intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise.” Id. (emphasis added). In applying these principles, the court determined that the indemnification clause only “contemplate[d] reimbursement when the indemnitee is required to pay damages on a third party claim.” Id. The court stated that the indemnity language was not clear regarding whether it was intended to be “limited to attorney’s fees incurred by plaintiff in actions involving third parties or also includes those incurred in a suit prosecuting against defendant for claims under the contract.” Id. at 904.

Next, the court applied general contract interpretation principles, and noted that the indemnity clause contained language that “unmistakably relate[d] to third-party claims” such as a requirement that the plaintiff “promptly notify” defendant of a claim and another clause providing that the defendant “may assume the defense of any such claim or litigation.” Id. at 905. Because of the clauses requiring notification of a claim, and providing that the defendant “may” enter and defend, the court reasoned that “[c]onstruing the indemnification clause as pertaining only to third-party suits affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect.” Id.

The heightened “waiver-like” standard established in the Hooper case has been applied in subsequent cases construing indemnification clauses under New York law. See Bridgestone/Firestone, Inc. v. Recovery Credit Serv., Inc., 98 F.3d 13, 20-21 (2nd Cir. 1996) (“Under New York law, the intent to provide for counsel fees as damages for breach of contract must be ‘unmistakably clear’ in the language of the contract”); Promuto v. Waste Mgmt., Inc., 44 F. Supp. 2d 628, 650 (S.D.N.Y. 1999) (applying “unmistakably clear” standard); and Bonnie & Co. Fashions, Inc. v. Bankers Trust Co., 955 F. Supp. 203, 218 (S.D.N.Y. 1997) (“[W]hen courts are confronted with attorneys’ fees provisions which do not make ‘unmistakably clear’ the indemnification of the contractual parties, courts read the provisions to apply only to legal expenses incurred through litigation with non-contractual, or third, parties.”).

Applying the principles established in Hooper, the indemnification clause contained in the Guaranty and Indemnity Agreement fails to make it “unmistakably clear” that the parties intended for inter-party indemnity. Further, similar to the clause at issue in Hooper, the Guaranty and Indemnity Agreement contains a provision requiring Getty, upon the indemnitee’s request, to “enter and defend at Getty’s sole expense, any lawsuit or proceeding filed against or naming the Group as a party...” In fact, the “enter and defend” clause in this case provides a stronger argument against interpreting an inter-party indemnification duty than existed in Hooper. In Hooper, the indemnitor had the option as to whether to “enter and defend” and it could reasonably be inferred that an indemnitor would not voluntarily choose to “enter and defend” against itself. However, in this case, the indemnitor is not given any discretion under the Guaranty and Indemnity Agreement as to whether to “enter and defend.” Rather, it must “if so requested” by the indemnitee. Based on the Hooper standard, the absence of an “unmistakably clear” provision for inter-party indemnity, coupled

with language evidencing limitation of the duty to third-party claims, this Court concludes that Capital is not entitled, under the 1986 Guaranty and Indemnity Agreement, to recover from Getty its legal expenses incurred in the 2000 Litigation.

II. Getty's Claim for Indemnity Under the 1985 Settlement Agreement

Having determined that Capital is not entitled to recover any legal expenses from Getty under the Guaranty and Indemnity Agreement, the Court next considers whether Getty is entitled to recover its legal expenses from Capital. Getty argues that it is entitled to reimbursement for its legal expenses under the Settlement Agreement dated January 29, 1985 between Providence and Worcester Railroad Company (“P&W”), Capital Properties, Inc. (“CPI”), Robert H. Eder, Texaco Refining and Marketing Inc. (“Texaco”), and Edgar M. Masinter and Linda Eder, both in their capacity as Trustees (the “1985 Settlement Agreement”).⁴

Getty, as successor-in-interest to Texaco, argues that the 1985 Settlement Agreement provides a clear right of indemnification in this case. The applicable language states:

CPI and P&W (i) hereby release Getty from and against any and all claims, demands, obligations, liabilities, suits and damages which each has or may have against Getty as of the date hereof, and (ii) hereby agree to indemnify and hold Getty harmless from and against any and all claims, suits, obligations, liabilities and damages, including attorneys fees, arising in connection with any Claims asserted by CPI or P&W.

The parties agreed in the 1985 Settlement Agreement that Getty “has an unqualified right to permanent, unimpeded use of the” Pier, the Barge Dock and the Pipelines. (emphasis added).

⁴ The 1985 Settlement Agreement does not include a choice of law provision. In the absence of any briefing by either party on the issue, this Court assumes that Rhode Island law should apply in construing this Agreement. Furthermore, unlike the Guaranty and Indemnity Agreement, there is no dispute regarding the applicability of inter-party indemnity since the 1985 Settlement Agreement by its plain terms requires Eder and Capital to indemnify Getty in connection with certain claims asserted by Eder or Capital. Thus, the issue is whether or not Capital and/or Eder have made a “Claim” against Getty as defined in the 1985 Settlement Agreement.

“Claims” are then defined in the 1985 Settlement Agreement as any claim “affecting Getty’s unqualified right to permanent, unimpeded use of the Pier, the Barge Dock and the Pipelines for all material handled by Getty.”

Getty asserts that Capital, a successor to CPI, made a “Claim” under the 1985 Settlement Agreement in two ways: first, Getty asserts that, through a letter dated April 27, 2000, Capital, as assignee of P&W, indicated its “present intent” to terminate its 1997 Agreement with Getty Petroleum Marketing Inc. (the “Throughput Agreement”) and that terminating that Agreement would ultimately leave Getty Petroleum Marketing Inc. (Getty’s tenant or lessee) with no right to use the Pier. Thus, Getty argues that the April 2000 lawyer’s letter written on behalf of Capital constitutes a “Claim” against Getty’s right to unimpeded use of the Pier.

The flaw in Getty’s argument is that the April 2000 letter was directed to Getty Petroleum Marketing, Inc. and not to it. Getty Petroleum Marketing, Inc. is not an original party to, or claimed successor-in-interest under, the 1985 Settlement Agreement. In fact, Capital argued in the 2000 Litigation that Getty Petroleum Marketing, Inc., as a lessee, did “not have standing to assert” any claim as to the Pier in that context. See Memorandum and Decision at p. 25. Getty provides absolutely no contractual support for its assertion that Capital’s claimed “threat” to cut off Getty Petroleum Marketing Inc.’s access to the Pier by terminating the Throughput Agreement was “directly contrary” to Capital’s obligations to Getty. Getty’s argument that the April 2000 letter was a “threat” against its property rights also strains to expand the letter well beyond its content – notice to Getty Petroleum Marketing, Inc. of Capital’s present intent to exercise its contractual right to terminate the Throughput Agreement at its expiration over thirty months in the future on December 31, 2002. The letter says nothing about any of Getty’s rights vis-a-vis the Pier. The fact that Getty

interpreted the letter to be the opening salvo in a renewed assault on its Pier rights does not of itself convert the April 2000 letter into a “Claim” within the meaning of the 1985 Settlement Agreement.

Secondly, Getty asserts that Capital made a “Claim” against it when Capital answered and defended the allegations set forth in Getty’s Amended Complaint in the 2000 Litigation. Capital disputes Getty’s assertions by pointing out that the 1985 Settlement Agreement memorialized Getty’s rights as of 1985. Capital agrees with Getty that as of 1985, Getty enjoyed – or had at that time – an “unqualified right to permanent, unimpeded use of the Pier” as provided in the 1985 Settlement Agreement, and that it never made a “Claim” against that 1985 right. In fact, Judge Lisi found that the parties had no dispute as to Getty’s rights to use the Pier “up until, at least, 1997.” See Memorandum and Decision at p. 12. Capital, however, asserts that prior to Capital sending the April 2000 letter, Getty evidenced an intent to abandon its “permanent” right, and that Getty’s indication of an intent to abandon prompted Capital to take further action. After reviewing the exhibits, as well as Judge Lisi’s 2003 Memorandum and Decision, this Court finds that Getty did evidence, at the least, an intent to abandon its right to use the Pier. Because Getty articulated an intent to abandon, Capital’s defense in the 2000 Litigation that Getty had abandoned its use of the Pier in 1997 was not a “Claim” as defined in the 1985 Settlement Agreement.

Judge Lisi’s decision supports this conclusion. Judge Lisi found that, at a minimum, Getty evidenced an intent to withdraw from the 1991 Pier Operating Agreement by its letter dated October 1, 1997. In her Memorandum and Decision, Judge Lisi noted that in December 1997, the parties agreed to resolve a number of disputes by entering into a Settlement Agreement. One of the issues resolved in the 1997 Settlement Agreement pertained to Getty’s initial decision to abandon. Because the 1997 Settlement Agreement resolved the issue, Getty “never followed through with its initial

decision to abandon operations on the Pier.” Therefore, although Getty never actually abandoned its right to use the Pier, it at least made an “initial decision to abandon operations...” See Memorandum and Decision at pp. 12, 26. Getty’s initial decision, though it never ripened into actual abandonment, changed the circumstances from as they had existed on January 29, 1985 – the execution date of the 1985 Settlement Agreement. In short, Getty, by its own actions, provided Capital with some doubt as to whether Getty itself was still claiming a right to use the Pier. Given that Getty instilled the doubt, it cannot now claim that Capital’s actions constituted a “Claim” within the meaning of the 1985 Settlement Agreement. Furthermore, it was Getty and not Capital who initiated the 2001 declaratory judgment action based on the existence of an “actual controversy” between the parties. See 28 U.S.C. § 2201(a). This placed Capital in the position of asserting or forever losing any potential arguments it had based on post-1985 conduct.

Getty asks this Court essentially to ignore the word “has” (third-person singular, present tense of “to have,” i.e., to be in possession of something) and rather to focus on the word “permanent” contained in paragraph 1 of the 1985 Settlement Agreement. This Court must, however, interpret the Agreement as a whole in order to bring reasonable meaning to all of its terms and bring realization to the parties’ original intentions as expressed therein. Getty argues that the word “permanent” creates in it a permanent and, in its counsel’s words at Oral Argument, “an absolute unchallengeable right to use the Pier.” Applying Getty’s argument that it obtained such a right in 1985, Getty could theoretically seek indemnification from Capital in a case where Getty sold all of its property rights in the Pier to a third party, but continued to use the Pier, forcing Capital to bring some form of eviction action against Getty. Getty’s argument, taken to its logical conclusion, is

unreasonable and not supported by the plain and unambiguous language of the 1985 Settlement Agreement.

The 1985 Settlement Agreement does not provide Getty with “absolute” protection from claims that it relinquished or altered the rights provided therein based on post-1985 conduct. It confirms that Getty “has” certain “permanent” rights regarding usage of the Pier, Barge Dock and Pipelines. It does not say that Getty “permanently has” those rights or “forever has” those rights. It does not say that the rights can never be impacted in the future by the party holding the right or a third-party. In fact, it says that the paragraph defining Getty’s rights “is not intended to and does not create any new or additional rights in Getty in the use of the Pier, Barge Dock or Pipelines.” It simply memorializes Getty’s rights as they existed at that time and provides for indemnity in the event Capital later made claims against those rights.

In light of Getty’s “initial decision to abandon,” Capital’s defense asserted in the 2000 Litigation does not constitute a “Claim” as defined in the 1985 Settlement Agreement. Getty, therefore, is not entitled to recover its attorneys’ fees or expenses from Capital.

III. Robert Eder’s Individual Liability Under the 1985 Settlement Agreement

In addition to seeking legal expenses from Capital, Getty asserts that Robert Eder, Chairman of the Board of Capital Terminal Company, is also liable under the 1985 Settlement Agreement in his personal capacity for Getty’s legal expenses. Getty’s claim against Eder also fails.

First, in order to recover, Getty must demonstrate that Eder, individually, made a Claim under the 1985 Settlement Agreement. Eder was a party to the 1985 Settlement Agreement in his personal capacity, and the 1985 Settlement Agreement provides that Eder will be obligated to indemnify Getty under the exact same conditions as CPI and P&W. Specifically, Eder must provide indemnity to

Getty for any “claims, suits, obligations, liabilities, and damages, including attorneys’ fees, arising in connection with any Claims asserted by Eder.” Getty asserts that Eder made a “Claim” in his individual capacity during the 2000 Litigation because he “devised and directed” Capital during the events underlying the dispute leading to the 2000 Litigation.

Getty does not assert that Eder took any action separate and distinct from his role at Capital, but merely claims that Eder, as the person “calling the shots” at Capital, is liable for the actions the Corporation took. This argument fails for two reasons: first, as previously stated, the Court does not find that Capital asserted any “Claims” under the 1985 Settlement Agreement, and second, the Court has determined that any action Eder took was on behalf of Capital, and not in any individual role.

Under Rhode Island law, the corporate veil will be pierced only when it is “unjust and inequitable” not to do so. Doe v. Gelineau, 732 A.2d 43, 48 (R.I. 1999). Rhode Island courts have noted that it would be unjust not to pierce the corporate veil when the corporation is being used to “defeat public convenience, justify wrong, protect fraud, or defend crime.” Id. Getty bears the burden of proving that Eder’s acts as the Chairman of Capital were so egregious that he should incur individual liability. Id. at 49. Getty has not met its burden. Eder was not a party to the 2000 Litigation, and his role as a decision-maker at Capital does not expose him to personal liability. Finally, this Court finds no contractual basis for Getty’s argument that Eder’s July 12, 2001 deposition testimony and June 24, 2003 trial testimony in the 2000 Litigation constitute Claims triggering an indemnity obligation, and concludes that it would be a violation of public policy to make such a finding based upon an individual’s sworn testimony in the course of legal proceedings. Accordingly, this Court recommends that Eder’s Cross-Motion for Summary Judgment on Getty’s claim for legal expenses be GRANTED.

Conclusion

For the reasons stated, I recommend that Getty's Motion for Summary Judgment be GRANTED and its Motion for Partial Summary Judgment be DENIED (Document No. 25); Capital's Motion for Partial Summary Judgment be DENIED (Document No. 21); Capital's Cross-Motion for Summary Judgment be GRANTED (Document No. 36) and Eder's Cross-Motion for Summary Judgment be GRANTED (Document No. 38). In view of this recommended disposition, I also recommend that the District Court direct the entry of final judgment (1) against Plaintiff (Capital) and Counterclaim Plaintiffs (Getty) on all claims asserted by them in this action; and (2) in favor of the Defendants (Getty) and Counterclaim Defendants (Capital and Eder) on all claims asserted against them in this action. Any objection to this Report and Recommendation must be specific and must be filed with the Clerk of the Court within ten (10) days of its receipt. Fed. R. Civ. P. 72(b); Local Rule 32. Failure to file specific objections in a timely manner constitutes a waiver of the right to review by the District Court and the right to appeal the District Court's Decision. United States v. Valencia-Copete, 792 F.2d 4 (1st Cir. 1990).

LINCOLN D. ALMOND
United States Magistrate Judge
January 14, 2005