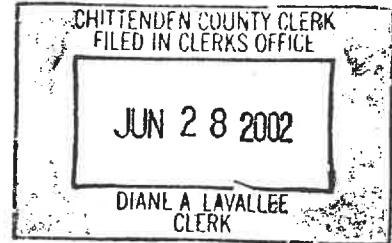


**STATE OF VERMONT
CHITTENDEN COUNTY, SS.**

GREEN MOUNTAIN PROPANE GAS,)
 Plaintiff)
)
 v.)
)
JESSE KIMBALL, DENISE KIMBALL, and)
KINGDOM SERVES,)
 Defendants)

Chittenden Superior Court
Docket No. S-486-01 CnC



MEMORANDUM OF DECISION

Defendants' Motion for Summary Judgment, filed August 14, 2001

This matter is before the Court on Defendants' Motion for Summary Judgment filed August 14, 2001. Plaintiff's response was filed on September 24, 2001, and Defendants' reply was filed on October 15, 2001. Oral argument was heard on January 29, 2002. Defendants are represented by Richard Windish, Esq. Plaintiff is represented by John Davis Buckley, Esq.

There are no disputes of material fact. The court adopts as facts all of the facts set forth in both parties Statements of Material Facts.

Plaintiff's insurer, Ranger, and Defendant's insurer, Peerless, both contributed substantial sums to settle claims of the Bailey and Hunt families against one or both parties arising out of a single incident in which a child died and others were injured from carbon monoxide poisoning at a camp where Plaintiff and Defendant had installed and serviced a propane refrigerator. Plaintiff has filed a two count complaint against Defendants in this action, alleging breach of contract.

The contract relied on is a contract between Plaintiff (GMPG) and Jesse Kimball, d/b/a Kingdom Services (Kimball) entered into in May of 1996, shortly before the accident. Under the contract, Kimball agreed to provide 24 hour on call service response to GMPG customers, to perform work in a workmanlike manner, to provide at least \$500,000 of insurance coverage, to provide a certificate of insurance naming GMPG as additional insured prior to commencing work under the contract, and to indemnify, defend, and hold harmless GMPG from losses and claims, including attorneys fees, connected with work performed under the agreement. At all relevant times, Kimball had obtained \$1,000,000 of insurance coverage through Peerless, but had not added GMPG as a named insured under its insurance contract with Peerless. GMPG had its own insurance coverage through Ranger.

Defendants argue that they have defenses that bar Plaintiff's claims. They argue that this

case has been brought as a subrogation action based on an indemnity clause to recover insurance proceeds paid, and that Ranger is not entitled to recover any more than GMPG could recover; that neither GMPG nor Ranger have suffered losses from the alleged breach, as there was double the required amount of insurance; that Peerless would have had to defend and pay anyway because damages were indivisible between the two defendants; and that the statute of limitations on the underlying indemnity claim has expired. Plaintiff argues that it had damages in the form of administrative costs, attorneys fees, expenses of experts, and costs of settling the claims; that it has a right to indemnity based upon an express agreement and not just circumstances of an indivisible injury; and that since the claim is based on breach of contract, the statute of limitations is six years and not three and the case is not time-barred.

The claim in Count I is for breach of contract for the Defendants' failure to defend and indemnify under the parties' contract of May 1996. The facts show that Peerless was given notice and an opportunity to provide defense, and declined to do so. The claim in Count II is for breach of contract for the Defendants' failure to obtain insurance in the name of GMPG.

It is unclear to the court whether Plaintiff seeks recovery of money paid out to the Bailey and Hunt families to settle the claims, or whether it is only seeking administrative costs, attorneys fees, and other costs of settling the claims, over and above settlement funds paid. To the extent that Plaintiff seeks reimbursement for funds paid in direct settlement proceeds, the court agrees with the Defendants that they are entitled to summary judgment. First, although the Plaintiff's cause of action is based on contract, to the extent it is being pursued as a claim under a contract *to indemnify*, the nature of the claim underlying the indemnity right governs the applicable statute of limitations. *Investment Properties Inc. v. Lytle*, 169 Vt. 487 (1999). The basis of the Bailey family claim was wrongful death, and the case was filed on August 19, 1997. Therefore, the statute of limitations expired on August 19, 1999; since this case was filed April 17, 2001, the indemnity claim was filed out of time. The basis of the Hunt family claim was personal injury, with a three year statute of limitations. Although no case was filed, the pertinent date for the statute was the date the Bailey family claim was filed, because of the indivisible nature of the Defendants' conduct. Therefore, the statute of limitations expired on August 19, 2000, and the claim for indemnity in this case was filed after that date, out of time.

The policy of this application of the statute of limitations is readily apparent from the tragic circumstances of this case. If there were going to be litigation at any time, it should have happened within the period after the claim was filed, when witnesses' memories were fresh and the family members could reasonably expect to have to deal with the pressures of a lawsuit. To permit insurance companies to settle cases, and then call the family members as witnesses years later to sort out liability issues between insurance companies in an indemnity action does not promote prompt and fair resolution of claims, nor does it promote public trust and confidence in the judicial system.

Furthermore, to the extent the claim is one for indemnity for settlement funds paid, it is brought as a subrogation claim for the proceeds paid by Ranger, and Ranger is the real party in

interest, as GMPG itself did not pay those funds (except possibly to the extent of a deductible). As such, Ranger is unable to show loss as the amount of insurance coverage available and paid through Peerless to settle the claims exceeded the amount required under the contract.

For these reasons, Defendants' Motion is granted to the extent Plaintiff seeks reimbursement for funds paid directly to settle the claims.

To the extent this case is being pursued as a claim *for breach of a contract to defend*, or *for breach of a contract to acquire insurance in the name of GMPG*, the nature of the claim is breach of contract between the parties themselves. It is not necessary to involve the Bailey and Hunt family members as witnesses to the underlying tort. The statute of limitations is six years, and the claim has been timely filed. GMPG may have some direct costs of its own, which are not part of a subrogation claim. In addition, Ranger may have a claim for the amounts it was obliged to pay with respect to the claims, including administrative costs, attorneys fees, and costs of settlement. Defendants argue that this portion of the Plaintiff's claim is a subrogation claim, and Ranger's recovery is limited by the amount for which GMPG had liability.

Plaintiff argues that because Peerless was offered the opportunity to defend and declined to do so, any subrogation claim should not be so limited as Kimball should have foreseen the claim, or alternatively that Ranger may pursue the claim as the third party beneficiary of the contract between GMPG and Kimball. There may well be rulings of law to be made on such issues, but at this stage, Defendants' argument that Plaintiff has no claim as a matter of law for this category of damages is premature. The facts presently before the court do not contain sufficient detail as to the nature of the specific categories of damages claimed for the court to be able to address such issues of law. It is not clear as a matter of law that Plaintiff has *no* claim, either a direct claim or a subrogation claim, on which relief could be granted.

Therefore, Defendants' Motion is denied to the extent Plaintiff claims relief based on breach of contract for damages other than funds paid directly to the Bailey and Hunt families to settle their claims.

ORDER

For the foregoing reasons,
Defendants' Motion for Summary Judgment is *granted in part and denied in part*.
A status conference will be scheduled to determine the scheduling needs of the case.

Date at Burlington, Vermont this 28 day of June, 2002.

Mary Miles Teachout
Hon. Mary Miles Teachout
Presiding Judge