STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

STATE OF NEW YORK
Plaintiff,

-vs-

ALL AROUND STORAGE, L.L.C., d/b/a
ALL AROUND EXCAVATING,
Defendant.

Index No.: L-00009-19

ALL AROUND STORAGE, L.L.C., d/b/a
ALL AROUND EXCAVATING,
Defendant and Third-
Party Plaintiff,

-vs-

RUSTON PAVING CO., INC.,
Third-Party Defendant.

RUSTON PAVING CO., INC.,
Third-Party Defendant and
Fourth-Party Plaintiff,

-vs-

HANSON AGGREGATES NEW YORK, LLC and
BARRETT PAVING MATERIALS, INC.,
Fourth-Party Defendants.

RUSTON PAVING'S MEMORANDUM OF LAW IN OPPOSITION TO HANSON AGGREGATES' MOTION TO DISMISS FOURTH-PARTY COMPLAINT

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Factual and Procedural Summary.

The Plaintiff New York State, through its Office of Parks ("State") hired All Around Storage, LLC ("All Around") to perform certain work on the Taughannock Falls Overlook in Trumansburg, NY, Tompkins County ("the Project"). The work included, among other things, installation of standard asphalt pavement in some areas and permeable asphalt (sometimes referred to as "porous asphalt") pavement in another area, each per an "asphalt mix design" specified by the State.

All Around subcontracted the asphalt paving portion of its contract to Ruston Paving Co., Inc. ("Ruston Paving"). Ruston Paving purchased the permeable/porous asphalt mix required by the State from Hanson Aggregates New York, LLC ("Hanson Aggregates") and Barrett Paving Materials, Inc. ("Barrett Paving").

The State commenced this action against All Around, claiming that the Project's porous asphalt lot has "failed" and is "defective" and "non-functional". In its Bill of Particulars the State alleges that the Project's porous asphalt lot failed because the porous asphalt mixes furnished by Hanson Aggregates and Barrett Paving were defective or did not comply with the proposed job mix formulas that each of them had submitted and which the State had approved. In the Third-Party action All Around seeks indemnity from Ruston Paving for damages it may incur for the alleged defect if it ultimately is proven at trial. In the Fourth-Party action Ruston Paving seeks indemnity from Hanson Aggregates and/or Barrett Paving as the case may be in the event that, after adjudication of all of the claims and defenses at trial, the State ultimately proves that the porous asphalt lot failed because the porous asphalt mixes furnished by them were defective or did not comply with the proposed job mix formulas that each of them had submitted and which the State had approved. The principle of common-law, or implied, indemnification permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party (*Curreri v. Heritage Prop. Inv. Trust, Inc.*, 48 A.D.3d 505).

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Hanson Aggregates has moved to dismiss Ruston Paving's indemnification claim on the ground that Ruston Paving allegedly had only one year from the date of delivery of the asphalt mix to assert its claim for indemnification. Hanson Aggregates delivered its porous asphalt mix on August 10, 2015 (Stokes Affidavit, paragraph "5"). It claims that at some undisclosed time it became an undisclosed subsidiary of Lehigh Hanson, Inc. and under the terms of a 2011 Credit Application that Ruston Paving had sent to the "Lehigh Hanson HeidelbergCEMENT Group", no legal action may be brought against the unidentified subsidiaries of Lehigh Hanson, Inc. "for any claim with respect to any goods or services" sold by a subsidiary more than one year after delivery of such goods or services.

POINT I

THE ALLEGED ONE-YEAR CONTRACTUAL STATUTE OF LIMITATIONS IS UNCONSCIONABLE AND UNENFORCEABLE

Apart from the fact that a one-year contractual claim limitation provision was not part of Ruston Paving's contract with Hanson Aggregates for the porous asphalt mix, for reasons which will be separately addressed in detail below, it should be noted from the outset that a one-year limitation on Ruston Paving's indemnification claim measured from the date Hanson Aggregates delivered its porous asphalt mix on August 10, 2015 would be unconscionable and unenforceable as a matter of law.

Generally, parties to a contract may agree to limit the period of time within which an action must be commenced to a shorter period than that provided by the applicable Statute of Limitations (see, CPLR 201; *Kassner & Co. v City of New York*, 46 N.Y.2d 544; *Certified Fence Corp. v Felix Indus.*, 260 A.D.2d 338; *Krohn v Felix Indus.*, 226 A.D.2d 506; *Wayne Drilling & Blasting v Felix Indus.*, 129 A.D.2d 633). However, the corollary rule is equally well established that the contractual limitation must not be so short as to be unreasonable. It has long been the law of New York that an unreasonably short limitation period is against public policy and

unenforceable. *Planet Construction Corp. v. Board of Education of City of New York*, 7 N.Y.2d 381, 385; *Sapinkopf v. Cunard Steamship Co.*, 254 N.Y. 111; *Brown & Guenther v. North Queensview Homes, Inc.*, 18 A.D.2d 327; *Staff v. Lido Dunes, Inc.*, 47 Misc. 2d 322.

In this case, the alleged one-year contractual limitation period on Ruston Paving's indemnification claim is not merely unreasonable short, it is non-existent. It is not merely a shortening of the statute of limitations applicable to an indemnity claim. Rather, it is a disguised substantive change of the law of New York concerning the time of accrual of an indemnity claim. The alleged contract Terms and Conditions state that the one-year limitation period for all claims began to run from the date of delivery of the goods. That means Ruston Paving's indemnification claim would be time-barred even before the State reported the alleged failure of the porous asphalt lot. In its Bill of Particulars the State claims that it first reported the alleged failure to All Around on October 26, 2016 (paragraph "7" of Exhibit "B" to Kogut Affirmation). It also means that Ruston Paving's indemnification claim would be time-barred even before an action was commenced in which Ruston Paving could assert an indemnity claim. A claim of indemnity is not permitted where the primary action which might be the source of the right to indemnity is not even pending. *Burgundy Basin Inn, Ltd. v. Watkins Glen Grand Prix Corporation*, 51 A.D.2d 140. The State commenced this action against All Around on February 20, 2019. All Around commenced its Third-Party action against Ruston Paving on May 16, 2019. And most significantly it would mean that Ruston Paving's indemnification cause of action would be barred several years before it even accrued under New York law. A cause of action cannot be time-barred before it accrues. *Harrell v. Koppers Co., Inc.*, 118 A.D.2d 682.

A cause of action for indemnification accrues on the date payment is made by the party seeking indemnity. *Bay Ridge Air Rights, Inc. v. State of New York*, 44 N.Y.2d 49, 54. Where no judgment has been entered, a claim for indemnity has not yet accrued. Bay *Ridge Air Rights, Inc. v. State of New York, Id.* at 56. The Court of Appeals has noted that it is an "unambiguous principle of law" that claims for indemnification do not accrue until the party seeking

indemnification has made payment. *McDermott v. City of New York*, 50 N.Y.2d 211; *Bay Ridge Air Rights, Inc. v. State of New York, supra*; *Klinger v. Dudley*, 41 N.Y.2d 367.

Although technically a claim for indemnity does not arise until the prime obligation to pay has been established, for the sake of fairness and judicial economy, the CPLR allows third-party actions to be commenced in certain circumstances before they are technically ripe, so that all parties may establish their rights and liabilities in one action. CPLR 1007 permits a third-party defendant such as Ruston Paving to implead any person "who is or may be liable" to it. *Krause v. American Guarantee & Liability Ins. Co.*, 22 N.Y.2d 147; *McCabe v. Queensboro Farm Products, Inc.*, 22 N.Y.2d 204.

It is respectfully submitted that a contractual shortening of the statute of limitations that would time-bar a claim before it accrued, before it even was possible to assert it, is unconscionable and unenforceable. Ruston Paving's fourth-party action claim for indemnification should not be dismissed based upon the alleged one-year contractual claim limitation period for such claims measured from a date before such claims accrue under New York law.

POINT II

RUSTON PAVING'S CONTRACT WITH HANSON AGGREGATES DID NOT INCLUDE TERMS IN A 2011 CREDIT APPLICATION SENT TO THE LEHIGH HANSON HEIDELBERG CEMENT GROUP

Hanson Aggregates sent Ruston Paving a Sales Proposal (Stokes Affidavit, Exhibit "C") for the asphalt mixes required for the Project. Its proposal for the porous asphalt mix was based upon the State's approval of Hanson Aggregates' standard porous asphalt mix as a permissible alternate to the mix formula that the State had specified. After Ruston Paving entered into its subcontract with All Around, it accepted Hanson Aggregates' sales proposal offer and requested its job mix formula submittal for the porous asphalt mix so that it could be sent to the State for its review and approval. Hanson Aggregates complied by providing its job mix formula submittal

and the State accepted the proposed alternate mix formula for the porous asphalt. All this took place in 2014-2015. (Stokes Affidavit, paragraph "6"). A contract was thus formed on the terms set forth in Hanson Aggregates' Sales Proposal. Pursuant to §2-204 of the New York Uniform Commercial Code, a contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such contract.

The Sales Proposal that Hanson Aggregates made, which Ruston Paving accepted, was the complete and exclusive statement of the terms of Ruston Paving's agreement with Hanson Aggregates concerning the asphalt mix that was sold. (Stokes Affidavit, paragraph "15"). Its terms, which did not include a shortened statute of limitations for indemnity claims and a bar to such claims before they accrue, cannot be contradicted by evidence of a prior agreement. (Uniform Commercial Code §2-202).

Hanson Aggregates claims that there was a prior "agreement" in a Credit Application that Ruston Paving sent to the "Lehigh Hanson HeidelbergCEMENT Group" in 2011 which should be considered part of the contract formed between Ruston Paving and Hanson Aggregates in this case. No one on behalf of the "Lehigh Hanson HeidelbergCEMENT Group" signed the alleged "agreement". There is no evidence that the "Lehigh Hanson HeidelbergCEMENT Group" was a legal entity capable of entering into legal contracts. Lehigh Hanson, Inc. is a foreign corporation not authorized to do business in New York State. Most importantly, the Terms and Conditions of Sale on the back of the 2011 Credit Application were not attached to Hanson Aggregates' Sales Proposal in 2014, or on the back of it, nor were they incorporated by reference in the Sales Proposal. The subsidiaries of Lehigh Hanson, Inc. were not identified in the Terms and Conditions of Sale that appear on the back of the 2011 Credit Application, nor was Hanson Aggregates ever disclosed as a subsidiary at any time.

After Hanson Aggregates sold and delivered its hot porous asphalt mix FOB at its plant on August 10, 2015 for immediate placement by Ruston Paving that same day, Hanson

Aggregates' billing agent, the "Lehigh Hanson HeidelbergCEMENT Group", sent Ruston Paving an Invoice, dated August 12, 2015, for the materials that Hanson Aggregates had sold and delivered two days earlier. A copy of the Invoice is attached hereto as Exhibit "E".

The billing agent's Invoice states at the bottom that "**This Invoice** is subject to the terms set forth in the Credit Application and/or General Terms and Conditions of Sale . . . ." (bold added for emphasis). It is respectfully submitted that the additional terms which the billing agent sought to impose unilaterally on the contract between Hanson Aggregates and Ruston Paving after it had been formed and fully performed, and which expressly apply only to "the Invoice" itself, did not and could not modify the contract that Ruston Paving had entered into with Hanson Aggregates itself.

POINT III

HANSON AGGREGATES IS NOT A SUBSIDIARY OF LEHIGH HANSON, INC.

Hanson Aggregates contends that because at some unidentified time it became an undisclosed subsidiary of Lehigh Hanson, Inc. it is entitled to enforce the alleged "agreement" in the 2011 Credit Application that Ruston Paving sent to the "Lehigh Hanson HeidelbergCEMENT Group". However, based upon Hanson Aggregates' refusal to provide documentary evidence of ownership, there is no competent evidence on this motion that it is a subsidiary of Lehigh Hanson, Inc. Indeed, and more importantly, based upon disclosures made by Hanson Aggregates' own attorneys it is not a subsidiary of Lehigh Hanson, Inc. at all, as a matter of law.

According to Hanson Aggregates' own attorneys, Lehigh Hanson, Inc. allegedly owns "various holding companies" which allegedly own HBMA Holdings, LLC ("HBMA"), which allegedly owns Hanson Aggregates. It is respectfully submitted that as a matter of law Lehigh Hanson, Inc.'s alleged ownership of various companies which own a company that owns Hanson

Aggregates does not make Hanson Aggregates its "subsidiary". The Court of Appeals has stated that a subsidiary is defined as an "[e]nterprise that is controlled by another by owning more than 50 % of voting stock" (citing Black's Law Dictionary). *Bankers Trust Corporation v. New York City Department of Finance*, 1 N.Y.3d 315. A company in which over 50% of the voting ownership interest is owned by a subsidiary is a "second-tier subsidiary"; a company in which over 50% of the voting ownership interest is owned by a second-tier subsidiary is a "third-tier subsidiary", and so on. *Bankers Trust Corporation v. New York City Department of Finance, Id.* The definition of a "subsidiary" is not the same as the definition of a "second-tier subsidiary" or the definition of a "third-tier subsidiary". A second-tier subsidiary is not a "subsidiary"; a third-tier subsidiary is neither a "subsidiary" nor a "second-tier subsidiary".

According to Hanson Aggregates' attorneys, the "various holding companies" would be a subsidiary of Lehigh Hanson, Inc.; HBMA would be a considered a subsidiary of the "various holding companies" and a second-tier subsidiary of Lehigh Hanson, Inc.; and Hanson Aggregates would be considered a subsidiary of HBMA, a second-tier subsidiary of the "various holding companies" and a third-tier subsidiary of Lehigh Hanson, Inc. In short, based upon information provided by its own attorneys, Hanson Aggregates is not a "subsidiary" of Lehigh Hanson, Inc. as that term is defined and recognized by the New York Court of Appeals.

To be enforceable an agreement to limit the statute of limitations must be clear and unambiguous. *Smile Train, Inc. v. Ferris Consulting Corp.*, 117 A.D.3d 629. The alleged prior "agreement" in 2011 purports to limit claims against "subsidiaries"; not second or third-tier subsidiaries. The definitions of second and third-tier subsidiary are different than the definition of a subsidiary. Ambiguities must be construed against the drafter and in favor of the party who had no voice in the selection of its language. *Guardian Life Insurance Co. Of America v. Schaefer*, 70 N.Y.2d 888; 4 Williston, Contracts, §621; 10 N.Y. Jur., Contracts, § 223. The alleged 2011 prior "agreement" is not enforceable by Hanson Aggregates whose own attorneys have disclosed that it is not a subsidiary of Lehigh Hanson, Inc.

Moreover, adding the voting ownership interest of "various holding companies" together to equal more than 50% of the voting ownership interest in HBMA does make them an enterprise of which HBMA could be a subsidiary or of which Hanson Aggregates could be a second-tier subsidiary. Identifying various combinations of owners whose voting shares of, for example, AT&T, added together does not make AT&T a subsidiary of each such combination of shareholders because such mere combinations are not enterprises capable of having a subsidiary.

POINT IV

THE 2011 CREDIT APPLICATION IS INCOMPLETE

As appears from Exhibit "C" to the Kogut Affirmation, and the alleged 2011 Credit Application itself, the Credit Application consists of pages 2 and 3 of a 5-page fax transmission. Pages 1, 4 and 5 of the document are missing. Hanson Aggregates has not identified or produced the missing pages. Because the Credit Application is incomplete it cannot be deemed evidence of an "agreement" between Ruston Paving and the "Lehigh Hanson HeidelbergCEMENT Group".

CONCLUSION

Hanson Aggregates has offered an incomplete Credit Application as evidence of a prior "agreement" that wasn't signed by both parties to the alleged "agreement" and which may not be considered under §2-202 of the Uniform Commercial Code. There is no evidence that the "Group" with which the prior "agreement" was made was even an entity capable of entering into a contract.

The alleged prior "agreement" is unenforceable in any event as a matter of law for two additional reasons: (1) By its own terms the alleged prior "agreement" applies to "subsidiaries" of Lehigh Hanson, Inc. Based upon information provided by its own attorneys, Hanson

Aggregates is at most a possible third-tier subsidiary of Lehigh Hanson, Inc. rather than a subsidiary of it, although there is no evidence on this motion that it even is a third-tier subsidiary; and (2) The alleged prior agreement's bar to indemnity claims before they accrue under the guise of a contractual shortened statute of limitations is unconscionable and unenforceable under New York law.

By reason of the foregoing, Hanson Aggregates' motion to dismiss the Fourth-Party Complaint against it should be denied.

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