

STATE OF NEW YORK

SUPREME COURT

COUNTY OF ST. LAWRENCE

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**A. EILEEN HOPPE,**

Index No. 101627

Plaintiff,

**DECISION  
&  
ORDER**

- against -

**YAWGA ENERGY PRODUCTS, f/k/a  
AGWAY ENERGY PRODUCTS,**

IAS #44-1-98-0792

Defendant.

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Appearances: Thomas B. Wheeler, Esq., attorney for Plaintiff; Menter, Rudin & Trivelpiece, P.C. (Julian B. Modesti, Esq. of counsel), attorneys for Defendant.

**DEMAREST, J.**

Plaintiff is the owner of a residence in St.

Lawrence County which sustained a fuel oil discharge into its basement in 1992. The Defendant's predecessor had a fuel oil delivery contract with the Plaintiff and allegedly caused the discharge. As the owner, Plaintiff has been determined to be a "discharger," as that term is defined in the New York Navigation Law, by the Department of Environmental Conservation. New York State remediated the spill and has sought recovery of damages in excess of \$55,000 from Plaintiff in a lawsuit venued in Albany County. That lawsuit has languished and no final judgment has been entered.

This action alleges two causes of action - one seeks damages pursuant to New York Navigation Law §181, and the second alleges breach of contract. Defendant

moves for summary judgment, dismissing both claims.<sup>1</sup> For the reasons stated below, the motion must be granted.

As the owner of the property at the time the discharge was discovered, Plaintiff is strictly liable for clean-up costs pursuant to Navigation Law §181(1), regardless of fault. Popolizio v. City of Schenectady, 269 A. D. 2d 670 (3d Dep't 2000). As a "discharger," Plaintiff cannot bring a strict liability claim under Navigation Law §181(1) against the Defendant, but may sue in negligence and for indemnification under §181(5). White v. Long, 85 N.Y. 2d 564 (1995); Calabro v. Sun Oil Co., 276 A.D. 2d 858 (3d Dep't 2000). There is no claim here sounding in negligence.

The Defendant alleges that any claim for indemnification will not lie until the Plaintiff has actually incurred costs for the clean-up. It is undisputed that the State of New York has borne all the costs to date and that Plaintiff has not incurred any actual expense. While she may eventually be liable to the State as a result of the Albany County lawsuit, she cannot currently prove damages. Absent proof of actual damages, the Plaintiff's claim under Navigation Law §181(5) is premature and should be dismissed. Niagara Mohawk Power Corporation v. Consolidated Rail Corporation, 291 F. Supp. 2d 105 (Dist. Ct. NDNY 2003).

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<sup>1</sup>Consideration has been given to the following submissions:

1. Notice of Motion, dated March 21, 2006.
2. Affidavit of Julian B. Modesti, Esq., dated March 21, 2006.
3. Defendant's Memorandum of Law, dated March 21, 2006.
4. Affidavit in Opposition of Thomas B. Wheeler, Esq., dated May 5, 2006.
5. Reply Affidavit of Julian B. Modesti, Esq., dated July 5, 2006.
6. Defendant's Reply Memorandum of Law, dated July 5, 2006.

The Plaintiff is not without a remedy, should she actually incur damages. The statute of limitation for indemnification accrues at the time a plaintiff suffers a loss by paying the costs allegedly the responsibility of a defendant. Fisher v. Preston, 251 A.D. 2d 843, (3d Dep't 1998).

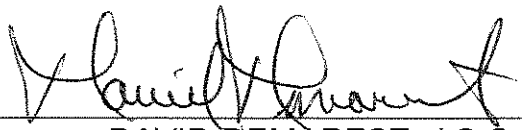
Defendant's motion to dismiss the breach of contract claim is not opposed and thus must also be granted. In any event, the contract bars the type of damages sought here, and any claims for diminution in value of the property or damages to the premises are barred by the applicable statute of limitations.

It is therefore, the Decision of this Court and it is hereby,

ORDERED, the motion of the Defendant granting summary judgment dismissing the complaint is, in all respects, granted.

**SO ORDERED**

DATED: July 18, 2006, at Chambers, Canton, New York.

  
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DAVID DEMAREST, J.S.C.

**ENTER:**

{Decision & Order, and moving papers filed}