

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. RICHARD TSAI **PART** **21**

Justice

-----X

PETER MALERBA and JANET MALERBA,

Plaintiffs,

- v -

NEW YORK CITY TRANSIT AUTHORITY,
METROPOLITAN TRANSPORTATION AUTHORITY (MTA),
ANSUL INCORPORATED, E.A. TECHNOLOGIES, INC.,
TYCO INTERNATIONAL, LTD,
E.A. TECHNOLOGIES/PETROCELLI and
E.A. TECHNOLOGIES/PETROCELLI, J.V., LLC.,

Defendants.

-----X

ANSUL INCORPORATED and TYCO INTERNATIONAL, LTD.,

Third-Party Plaintiffs,

- v -

AMERON GLOBAL, INC., d/b/a AMERON GLOBAL PRODUCT
SUPPORT,

Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document numbers (Motion 016) 429, 476- 501, 528, 554-587

were read on this motion to/for AMEND CAPTION/PLEADINGS.

The following e-filed documents, listed by NYSCEF document numbers (Motion 017) 502- 527, 529, 531- 553, 563-564, 566, 588-602, 604

were read on this motion to/for RENEWAL.

In this personal injury action, third-party defendant Ameron Global, Inc. d/b/a Ameron Global Product Support (Ameron) moves for leave to amend its answer to assert the defense of federal preemption and 18 other affirmative defenses to the cross-claims of defendants of New York City Transit Authority (NYCTA) and Metropolitan Transportation Authority (MTA) (collectively, the Transit Defendants) (Seq. No. 016). The Transit Defendants oppose the motion.

Ameron also separately moves to dismiss all cross-claims against it on the ground of federal preemption and failure to state a cause of action, and to renew a motion for summary judgment dismissing all cross-claims against it (Seq. No. 017).¹ Plaintiffs and the Transit Defendants oppose the motion.

This decision addresses both motions.

BACKGROUND

The relevant facts of this personal injury action were set forth in *Malerba v New York City Transit Authority* (232 AD3d 91 [1st Dept 2024]):

“Plaintiff Peter Malerba was injured during the course of his employment for third-party defendant Ameron Global, Inc. As relevant here, Ameron was responsible for performing maintenance on compressed gas tanks from the fire suppression system of defendants New York City Transit Authority and Metropolitan Transit [sic] Authority (collectively, the Transit Authority). Ameron performed this work pursuant to an unwritten agreement with the Transit Authority’s contractor, defendants E.A. Technologies, Inc., E.A. Technologies/Petrocelli, and E.A. Technologies/Petrocelli, J.V., LLC (collectively, EA Tech). The cylinder and valve of the compressed gas tank at issue were manufactured by Tyco. As plaintiff worked with the compressed gas tank, it suddenly actuated and struck him, causing severe injuries.”

On or about January 29, 2014, Transit defendants asserted cross-claims against Ameron for contribution and common-law indemnity (see Exhibit I in support of motion, third-party cross claim [NYSCEF Doc. No. 486]). On October 1, 2014, Ameron served an answer to Transit defendants’ cross-claims (see *id.*, verified answer to third-party cross-claims).

On August 6, 2019, Ameron moved for summary judgment dismissing all claims and cross-claims asserted against it, on the ground that the claims are barred under Workers’ Compensation Law § 11 (see NYSCEF Doc. Nos. 38-58 [Seq. No. 008]), which was opposed. By a decision and order dated October 28, 2020 and entered November 2, 2020, which also decided other motions, the Supreme Court justice previously assigned to this action denied Ameron’s motion for summary judgment (see NYSCEF Doc. No. 223). The court reasoned that there was an issue of fact as to whether plaintiff suffered a “grave injury” as defined in Worker’s Compensation Law § 11 (see *id.* at 11-12).

¹ Although the notice of motion seeks dismissal of all “claims and cross-claims,” Ameron is not a direct defendant. Ameron clarifies that “[t]his motion pertains solely to the state tort contribution and common-law indemnification based third-party negligence cross claims brought by NYCTA and MTA against Ameron” (affirmation of Ameron’s counsel in support of motion ¶ 11 [NYSCEF Doc. No. 503]).

On May 11, 2022, plaintiffs filed the note of issue (see NYSCEF Doc. No. 230).

Thereafter, Tyco Fire Products LP (sued herein as defendants Ansul Inc. and Tyco International Ltd.) (collectively, Tyco) moved for leave to amend its answer to add five additional affirmative defenses, the thirteenth through seventeenth affirmative defenses (Seq. No. 011). The seventeenth affirmative defense asserted that plaintiffs' claims are preempted by federal law, as the product at issue was allegedly designed, manufactured, and labeled in compliance with the U.S. Department of Transportation's Hazardous Materials Regulations (HMR).

Meanwhile, Tyco also moved for summary judgment dismissing the complaint as them, on the ground that plaintiffs' claims against them were preempted by federal law, the Hazardous Materials Transportation Act (HMTA) (49 USC 5013 et seq.) (Seq. No. 012).

In a pair of decisions and orders dated September 8, 2023 and entered September 11, 2023, the Supreme Court justice previously assigned to this action granted Tyco's motion for leave to amend its answer (see NYSCEF Doc. No. 429), but denied Tyco's motion for summary judgment, finding significant questions of fact (see NYSCEF Doc No. 430, at 2).

Tyco appealed the denial of summary judgment (see NYSCEF Doc. No. 433).

By a decision entered August 29, 2024, the Appellate Division, First Department reversed the motion court and granted summary judgment dismissing the complaint as against Tyco (232 AD3d at 104). The Appellate Division stated,

"Plaintiffs' claims sounding in negligence and strict liability based on defective design and inadequate warnings are accordingly preempted as against Tyco. Therefore, plaintiffs' complaint, including the claims for breach of warranties and loss of consortium (see *id.* [affirming dismissal of implied warranty claim, among others]), should be dismissed as against Tyco" (232 AD3d at 103-104 [internal citation omitted]).

Like Tyco, Ameron now moves for leave to amend its answer to add the affirmative defense of federal preemption, in light of *Malerba*.

Ameron also separately moves to dismiss all cross-claims against it and for leave to renew its prior motion for summary judgment. Although this motion was initially referred to the justice who had previously decided Tyco's motion for summary judgment, the motion was referred back to this court by a decision and order dated and entered March 11, 2025 (NYSCEF Doc. No. 604).

DISCUSSION

I. Ameron's motion to dismiss and to renew its motion for summary judgment (Seq. No. 017)

A. The branch of Ameron's motion to renew summary judgment

The branch of Ameron's motion to renew its motion for summary judgment is denied.

As the Transit Defendants correctly point out, Ameron did not previously move for summary judgment dismissing all cross-claims against it on the ground of federal preemption. Rather, Ameron had previously moved for summary judgment dismissing all cross-claims on the ground that they were barred under Workers' Compensation Law § 11 (see NYSCEF Doc. Nos. 38-58, Motion Seq. No. 008). Thus, there is no prior order or determination for which a motion to renew pursuant to CPLR 2221 (e) would properly lie (see David D. Siegel & Patrick M. Connors, *New York Practice* § 253 [6th ed., Dec 2024 update] ["To fall under CPLR 2221, the second motion must 'affect' the earlier order"]).

In light of the court's denial of the branch of the motion for leave to renew, the court need not address Ameron's remaining arguments in favor of granting summary judgment (see *Charalabidis v Elnagar*, 188 AD3d 44, 49 [2d Dept 2020] ["Courts may dispose of one or more branches of lesser importance as being without merit or rendered academic by other aspects of the order"]).

B. The branch of Ameron's motion seeking dismissal pursuant to CPLR 3211

As a threshold matter, the Transit Defendants point out that Ameron does not identify which subsection of CPLR 3211 under which it seeks relief (affirmation of Transit Defendants' counsel in opposition ¶ 29 [NYSCEF Doc. No. 531]). They also argue that Ameron did not assert preemption as an affirmative defense in its answer (*id.* ¶ 34). In reply, Ameron mentions in passing that its motion was pursuant to CPLR §3211(a) (2), lack of subject matter jurisdiction (see reply affirmation of Ameron's counsel in support of motion ¶ 12 [NYSCEF Doc. No. 588]).

Given that Ameron's moving papers clearly indicated that it was arguing that the Transit Defendants' cross-claims against it were preempted under federal law, and the Transit Defendant addressed that issue on the merits, the court will disregard Ameron's non-prejudicial omission of the particular subdivision of CPLR 3211 under which it seeks dismissal (see CPLR 2001).

"Pursuant to CPLR 3211 (a) (2), a party may move to dismiss a cause of action on the ground that the court lacks subject matter jurisdiction as the cause of action is preempted by federal law" (*Klingsberg v Council of School Supervisors and*

Administrators-Local 1, 181 AD3d 949, 950 [2d Dept 2020]). “[A] court’s lack of subject matter jurisdiction is not waivable, but may be [raised] at any stage of the action, and the court may, *ex mero motu* [on its own motion], at any time, when its attention is called to the facts, refuse to proceed further and dismiss the action” (*Financial Indus. Regulatory Auth., Inc. v Fiero*, 10 NY3d 12, 17 [2008]; see e.g. *Matter of Natalie P. v Steven L.R.*, —AD3d—2026 NY Slip Op 02458 [1st Dept 2026]). Thus, the Transit Defendants’ argument that Ameron failed to plead lack of subject matter as an affirmative defense is unavailing.²

Turning to the merits, Ameron appears to argue that Transit Defendants’ cross-claims for common-law indemnification and contribution against Ameron are preempted by federal law, citing *Malerba v New York City Transit Authority* (232 AD3d 91, *supra*).

In *Malerba*, the Appellate Division, First Department ruled that the HMTA preempted plaintiffs’ claims against Tyco, reasoning that the HMTA’s express preemption provision “encompasses state law claims ‘about’ ‘the designing, manufacturing, fabricating, inspecting, marking, maintaining, reconditioning, repairing, or testing [of] a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce” (232 AD3d at 92).

Although *Malerba* involved state law claims about “defective design and inadequate warnings” of a compressed gas tank covered under the HMTA, *Malerba* also ruled that 49 USC § 5125 (b) (1) (E) encompassed state law claims “about” all the activities enumerated in that provision, such as “inspecting . . . maintaining, reconditioning, repairing, or testing” the compressed gas tank. As these were the activities that plaintiff Peter Malerba was performing at the time of the incident, Ameron therefore appears to argue that the Transit Defendants’ cross-claims for common-law indemnification and contribution against Ameron are similarly preempted (see Exhibit W in support of motion, affirmation of Ameron’s counsel in support of motion ¶¶ 26, 38-39 [NYSCEF Doc No. 526]).

In opposition, the Transit Defendants contend that courts have recognized an “End User” exception to preemption, and that there is no evidence that the valve assembly met federal requirements (see affirmation of Transit Defendants’ counsel in opposition ¶¶ 37-40; 41-46).

In opposition, plaintiffs argue that: (1) the cross-claims against Ameron are not preempted because they are not based specifically upon a prescribed subject area; (2) Ameron did not establish that it complied with federal law; (3) “Congress did not intend for defendants to benefit from preemption when the claim(s) arise out of Defendant(s)[] violating the law”; and (4) a defendant cannot benefit from preemption when its acts

² As a motion to dismiss for lack of subject matter jurisdiction can be raised at any time, the court therefore rejects the Transit Defendants’ argument that Ameron’s motion to dismiss was later, or that Ameron was bringing an untimely motion for summary judgment under the guise of a CPLR 3211 motion to dismiss.

constitute intentional torts (see affirmation of plaintiffs' counsel in opposition ¶ 10 [NYSCEF Doc No. 541]).

For the first time in reply, Ameron argues that the Transit Defendants' cross-claims for common-law indemnification must be dismissed "because they failed to allege any basis upon which NYCTA or MTA can be held vicariously liable for any negligence of Ameron" (reply affirmation of Ameron's counsel ¶ 5 [NYSCEF Doc. No. 588]). The court does not consider this argument, as it was raised improperly for the first time in reply (see *e.g. Jain v New York City Tr. Auth.*, 27 AD3d 273, 273 [1st Dept 2006] ["The court's consideration of these claims, raised for the first time in reply, was an improvident exercise of discretion"]; *Givoldi, Inc. v United Parcel Serv.*, 286 AD2d 220, 220 [1st Dept 2001]).

As relevant here,

"Section 5125(b)(1) [of the HTMA] contains two requirements for preemption. First, there is a subject-matter requirement—the nonfederal law must be 'about' one of the subjects enumerated in § 5125(b)(1)(A)–(E). . . . Second, there is a substantive-similarity requirement—the nonfederal law must not be 'substantively the same as a provision' of the HMTA or an associated regulation" (*Buono v Tyco Fire Products, LP*, 78 F4th 490, 493 [2d Cir 2023]; see also *Malerba v New York City Tr. Auth.*, 232 AD3d at 99 n 4).

Contrary to plaintiffs' argument, it cannot be seriously disputed that any theory of liability for common-law indemnification or contribution against Ameron would be "about" a proscribed subject area under 49 USC § 5125 (b) (1) (E), i.e., about "inspecting . . . maintaining, reconditioning, repairing, or testing" a compressed gas tank covered under the HMTA. Indeed, the proscribed subjected area at issue in this motion was the same provision interpreted in *Malerba*.

Thus, the issue presented is whether the Transit Defendants' claims of contribution and common-law indemnification are substantively the same as a provision of the HMTA or an associated regulation.

In *DCC Propane, LLC v KMT Enterprises, Inc.* (147 F4th 171, 183 [2d Cir 2025]), the United States Court of Appeals for the Second Circuit held that the HMTA did not preempt a plaintiff's common-law negligence claims against a trucking business that delivered heating oil to the plaintiff's property, which were premised on alleged violations of the HMRs. Because the allegations were premised on violations of a duty of care expressly defined with reference to HMRs, the defendant was foreclosed from contending that the plaintiff sought to impose requirements beyond those provided by federal law (*id.* at 178).

However, unlike *DCC Propane, LLC*, the court agrees with Ameron that the Transit Defendants' cross-claims of contribution and common-law indemnification

against Ameron are not based on violations of federal regulations, or substantively similar state requirements. Tellingly, neither the Transit Defendants nor plaintiffs claim that the elements of Ameron's negligence under state law to support a claim of common-law indemnification or contribution, such as a theory of negligent training, would be substantively the same as the HMTA, or based on a violation of the HMRs.³

The Transit Defendants' and plaintiffs' arguments in opposition are unavailing.

The federal preemption recognized in *Malerba* was express preemption, which "occurs where Congress ... withdraw[s] specified powers from the States by enacting a statute containing an express preemption provision" (*Art and Antique Dealers League of Am., Inc. v Seggos*, 121 F4th 423, 428 [2d Cir 2024], *cert denied sub nom. Art and Antique Dealers League of Am., Inc. v Lefton*, 145 S Ct 2732, 222 L Ed 2d 1012 [2025], quoting *Arizona v United States*, 567 US 387, 399 [2012]). Express preemption does not require proof of compliance with federal law as a condition of its applicability. "As long as the subject-matter and substantive-similarity requirements are satisfied, a nonfederal claim is expressly preempted" (*Buono*, 78 F4th at 500). Thus, Ameron "does not need to show that it is or may be held liable under the HMTA or HMR before raising an express-preemption defense under the HMTA" (*id.* at 501-502).

Finally, *Malerba* ruled that "there is no 'end user' exception to preemption under the HMTA" (*Malerba*, 232 AD3d at 100). The Appellate Division had also ruled that, "since a cylinder lacks utility as a package or container for compressed gas without a valve, plaintiffs' valve-related claims are subject to preemption under 49 USC § 5125, whether the valve is considered part of the fully-assembled 'package [or] container' or as an independent 'packaging component'" (*id.* at 102). Thus, the Transit Defendants' valve-related cross-claims against Ameron are similarly preempted.

In sum, the branch of Ameron's motion to dismiss the Transit Defendants' cross-claims for contribution and common-law indemnification against Ameron is granted, due to lack of subject matter jurisdiction.

II. Ameron's motion for leave to amend its answer (Seq. No. 016)

Ameron's original answer to the cross-claims of Transit contained no affirmative defenses (see Exhibit I in support of motion [NYSCEF doc. No. 486]). Pursuant to CPLR 3025, Ameron now moves to amend that answer to assert 19 affirmative defenses, including the defense of federal preemption.

"Leave to amend pleadings should be freely granted in the absence of prejudice or surprise so long as the proposed amendment is not palpably insufficient as a matter of law" (*Mashinsky v Drescher*, 188 AD3d 465, 466 [1st Dept 2020] [citation omitted]).

³ 49 USC § 5107 established a requirement for hazmat employers to provide training to their employees, in accordance with regulations to be prescribed by the Secretary of Transportation (see 49 CFR 172.704).

Ameron argues that its motion is timely because it was filed in response to the decision in *Malerba* (232 AD3d 91), the preemption defense is not waivable, no trial date has been set, and similar relief was granted to Tyco (see affirmation of Ameron's counsel in support of motion ¶ 2 [a] [1], [2], [4] [NYSCEF Doc No. 477]).

In opposition, plaintiffs argue that they are surprised and would be prejudiced by the amendment (affirmation of plaintiffs' counsel in opposition ¶ 5 [NYSCEF Doc. No. 554]). Plaintiffs maintain that "[t]here was no discovery regarding the HMTA and the related sections of the Code of Federal Regulations on DOT qualified cylinders" (*id.*). Alternatively, if amendment is granted, plaintiffs request that the court direct "Ameron [to] produce a witness who is familiar with the Federal DOT requirements 4BW cylinders contained and familiar regarding the servicing with the HMTA and the related sections-laws in the Code of Federal Regulations" (*id.* n 1).

In opposition, the Transit Defendants argue that leave to amend should be denied because Ameron waived the affirmative defense of federal preemption because it waited two years after the note of issue was filed to seek leave to amend, and more than ten years have passed since Ameron served its original answer (affirmation in opposition of Transit's counsel ¶ 10 [NYSCEF Doc. No. 555]). Lastly, Transit contends that if leave to amend were granted, it should be limited solely to the affirmative defense of preemption, not the other 18 affirmative defenses (*id.* ¶ 14).

In reply, Ameron reiterates that the federal preemption defense is not waivable (reply affirmation of Ameron's counsel ¶¶ 12, 14-19 [NYSCEF Doc. No. 568]). Ameron appears to argue that further discovery is not necessary, because the depositions of witnesses that already took place in this case could definitively determine the issue of whether Peter Malerba received adequate training to inspect and repair Halon 1301 tanks (*id.* ¶ 12 [a]-[cc]). Nevertheless, Ameron asserts that it is amenable to providing non-duplicative discovery as to the defenses raised (*id.* ¶ 13).

As discussed above, federal preemption is a matter of subject matter jurisdiction, and the lack of subject matter jurisdiction is a defense that cannot be waived and can be raised at any time (see *Financial Indus. Regulatory Auth., Inc.*, 10 NY3d at 17). As to the other 18 affirmative defenses, "[m]ere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side" (*Edenwald Contr. Co. v. City of New York*, 60 NY2d 957, 959 [1983] [internal quotation marks and citation omitted]; *Robinson v Day*, 103 AD3d 584, 584 [1st Dept 2013]).

Plaintiffs' claim of prejudice is unpersuasive. Prejudice is "some special right lost in the interim, some change of position or some trouble or expense that could have been avoided had the original pleading contained what the amended one wants to add" (*Williams v Tompkins*, 132 AD3d 532, 533 [1st Dept 2015] [quotation marks and citation omitted]). "[T]here must be some indication that the [party claiming prejudice] has been hindered in the preparation of his case or has been prevented from taking some

measure in support of his position” (*Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981]).

However, as discussed above, in light of the dismissal of the Transit Defendants’ cross-claims against Ameron, this motion for leave to amend is denied as academic. It is undisputed that there are no other claims against Ameron (see affirmation of Ameron’s counsel in support of motion for summary judgment ¶ 11 [NYSCEF Doc. No. 503]).

CONCLUSION & ORDER

Accordingly, it is

ORDERED that third-party defendant Ameron Global, Inc. d/b/a Ameron Global Product Support’s motion for leave to amend its answer (Seq. No. 016) is **DENIED**; and it is further

ORDERED that third-party defendant Ameron Global, Inc. d/b/a Ameron Global Product Support’s motion to dismiss and for summary judgment (Seq. No. 17) is **GRANTED IN PART TO THE EXTENT** that the branch of the motion to dismiss the cross-claims of defendants New York City Transit Authority and Metropolitan Transportation Authority against third-party defendant Ameron Global, Inc. d/b/a Ameron Global Product Support is granted, and those cross-claims are severed and dismissed, with costs and disbursements to third-party defendant Ameron Global, Inc. d/b/a Ameron Global Product Support as taxed by the Clerk, upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of third-party defendant Ameron Global, Inc. d/b/a Ameron Global Product Support against defendants New York City Transit Authority and Metropolitan Transportation Authority accordingly; and it is further

ORDERED that the remainder of the motion is denied; and it is further

ORDERED that the action shall continue.

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7/8/2026

DATE

CHECK ONE:

SEQ NO. 016

SEQ NO. 017

APPLICATION:

CHECK IF APPROPRIATE:

☐	CASE DISPOSED		
☐	GRANTED	☒	DENIED
☐	GRANTED	☐	DENIED
☐	SETTLE ORDER		
☐	INCLUDES TRANSFER/REASSIGN		

☒	NON-FINAL DISPOSITION		
☐	GRANTED IN PART	☐	OTHER
☒	GRANTED IN PART	☐	OTHER
☐	SUBMIT ORDER		
☐	FIDUCIARY APPOINTMENT	☐	REFERENCE

RICHARD TSAI, J.S.C.