

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN and SHIRLY WEINBERG, : CIVIL ACTION
 :
 v. :
 :
 J.S. CORNELL & SON, INC. et al : NO. 01-5706
 :
 :

Diamond, J.

MEMORANDUM

Plaintiffs John Weinberg and Shirley Weinberg bring this negligence action against Defendants J.S. Cornell & Son and the Wagner Free Institute for injuries sustained by Mr. Weinberg as a result of an accident. Cornell asserts a Third Party Complaint against Keystone Contractors, Mr. Weinberg's employer at the time of the accident. Keystone has filed a Motion to Dismiss the Third Party Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that the Workmen's Compensation Act's exclusivity provision bars Cornell's recovery. I agree, and grant Keystone's Motion.

Background

A. **Factual Background**

Plaintiffs allege that on October 14, 1999, Mr. Weinberg, an employee of Keystone, was performing roofing work on the Wagner Free Institute. Cornell, the general contractor, subcontracted with Keystone to perform the work. Mr. Weinberg sustained injuries when he slipped on wood allegedly left on the roof by Cornell.

In their six count Complaint, the Weinbergs allege that Cornell and Wagner were negligent both in the training and supervision of their employees and agents, and in the design, upkeep, and

operation of the rooftop premises. In addition, Mrs. Weinberg sues for loss of consortium.

In its Third Party Complaint, Cornell alleges that pursuant to the terms of the subcontract agreement, Keystone is required to indemnify Cornell and Wagner for damages claimed by the Weinbergs.

B. Procedural History

On November 13, 2001, Cornell removed this case from the Philadelphia Common Pleas Court. Cornell filed its Third Party Complaint against Keystone on January 29, 2002. The matter was placed in civil suspense on April 3, 2002. On June 21, 2004, Keystone filed its Motion to Dismiss the Third Party Complaint, and the matter was taken out of suspense on June 23, 2004.

Legal Standards

Because this Court's jurisdiction is based on diversity, I am bound to analyze Pennsylvania law and predict how the Pennsylvania Supreme Court would decide this case. 2-J Corporation v. Tice, 126 F.3d 539, 541 (3d Cir. 1997); see also U.S. Underwriters Ins. Co. v. Liberty Mutual Ins. Co., 80 F.3d 90, 93 (3d Cir. 1996).

In deciding a Rule 12(b)(6) motion, a District Court may look only to the facts alleged in the complaint and its attachments and must accept as true all well pleaded allegations in the complaint, viewing them in the light most favorable to the plaintiff. See Jordan v. Fox, Rothschild, O'Briend & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994); Angelastro v. Prudential-Bache Securities, Inc., 764 F.2d 939, 944 (3d Cir. 1985). A Rule 12(b)(6) motion will be granted when a plaintiff cannot prove any set of facts, consistent with the complaint, that would entitle him to relief. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988). In deciding Keystone's motion, I am obligated to consider the facts alleged in Cornell's Third Party Complaint, and the provisions of the subcontract which are the

basis of the allegations against Keystone (and which Cornell appended to its pleading). Jordan, 20 F.3d at 1261.

Discussion

Keystone argues that the Pennsylvania Workmen's Compensation Act bars Cornell's indemnification claim. When an employee is injured on the job, the Act usually provides the exclusive means of recovery against the employer, unless the parties have agreed otherwise:

In the event injury or death to an employee is caused by a third party, then such employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to receive damages by reason thereof, may bring their action at law against such third party, but the employer, his insurance carrier, their servants and agents, employees, representatives acting on their behalf or at their request shall not be liable to a third party for damages, contribution, or indemnity in any action at law, or otherwise, *unless liability for such damages, contributions or indemnity shall be expressly provided for* in a written contract entered into by the party alleged to be liable prior to the date of the occurrence which gave rise to the action.

77 P.S. § 481(b) (emphasis added).

The indemnification language in the subcontract between Cornell and Keystone provides:

SUBCONTRACTOR assumes entire responsibility and liability and agrees to indemnify and save harmless CORNELL and/or owner from any loss, liability, expense, including attorneys fees, damages or injury caused or occasioned directly or indirectly, by its failure to comply with any of the following:

...

c) The payment of any and all loss or damage, direct or consequential, and claims of any kind or nature whatsoever, for property damage or personal injury, including death, *to any and all persons, whether employees of CORNELL or others*, caused by, resulting from, arising out of or from, or occurring in connection with the performance of the work undertaken by SUBCONTRACTOR, hereunder, including, but not limited to any defect in material, equipment or workmanship whenever the same may develop.

(Th. Par. Compl. Ex. C.) (Emphasis added).

Keystone contends that this "general indemnity language" is insufficient to waive the Act's

exclusivity provision. Cornell counters that the subcontract's indemnification language is, indeed, such a waiver, and that Keystone is now fully liable for the damages the Weinbergs seek here.

The Act states that waivers of exclusivity must be “expressly provided for.” 77 P.S. § 481(b). Although the Pennsylvania Supreme Court has not yet determined how “express” an exclusivity waiver must be, the Superior Court has held that the waiver must be unequivocal. Snare v. Edensburg Power Co., 637 A.2d 296, 298 (Pa. Super. Ct. 1994) (the Act requires that “every intendment must be construed against the party seeking protection from liability or indemnification from the employer”); Bohus v. Beloff, 950 F.2d 919, 924 (3d Cir. 1991) (stating that in diversity cases based on Pennsylvania law, the decisions of lower Pennsylvania courts are not controlling but are “‘indicia of how the [Pennsylvania Supreme Court] might decide’ the issue”). Although waivers need not refer explicitly to the Act, such clauses must include language that “demonstrates that a named employer agrees to indemnify a named third party from liability for acts of that third party’s own negligence which result in harm to the employees of the named employer.” Bester v. Essex Crane Rental Corp., 619 A.2d 304, 307-09 (Pa. Super. Ct. 1993); see also, Kiewit E. Co. v. L & R Constr. Co., 44 F.3d 1194, 1198-99 (3d Cir. 1995) (requiring indemnification where the contract stated that the “[s]ubcontractor’s obligation hereunder shall not be limited by the provisions of any Workers’ Compensation Act or similar statute”); Hackman v. Moyer Packing, 621 A.2d 166, 168 (Pa. Super. Ct. 1993) (finding language in the indemnification agreement providing for indemnification “against any and all claim or claims brought by the agents, workmen, servants or employees of [the indemnitor] for any alleged negligence or condition . . . by [the indemnitee]” was sufficient to require indemnification).

Both Pennsylvania state and federal courts have deemed language similar to Keystone’s

indemnification clause insufficient to overcome the immunity provided by the Workmen's Compensation Act. See e.g., Jones v. S.E. Pa. Transp. Auth., No. CIV. A. 91-7179, 1993 WL 410222, at *3 (E.D. Pa. 1993); Pittsburgh Steel Co. v. Patterson-Emerson-Comstock Inc., 171 A.2d 185, 189 (Pa. 1961) ("In the instant case the indemnity clause is expressed in broad general terms. However there is no clearly expressed or unequivocal language in the clause of indemnity to show that indemnification for its own negligence was intended."). In Jones, the Court held that an agreement "to indemnify and hold harmless the Lessor. . . against all loss, damage, theft, expense and penalty arising from any action on account of any injury to any person, entity, property or thing or object of any character whatsoever" was insufficient to waive the exclusivity provision of the Act. Jones, 1993 WL 410222 at *9-11.

The Philadelphia Common Pleas Court has held that language in an indemnification clause that renders the employer liable for "personal injuries (including death) to any or all persons, whether employees of Contractor *or others*, or otherwise" is insufficient to overcome the Act's exclusivity provisions. Integrated Project Servs. v. HMS Interiors, Inc., No. 1789, 2001 WL 1807887 at *5 (Pa. Com. Pl. 2001) (emphasis added). Although the Integrated Project Court went on to hold that the employer was obligated to indemnify the contractor, its ruling was based on language in another agreement that expressly waived Workmen's Compensation Act immunity. Id. (noting that a separate contract, that was incorporated by the subcontract, provided that "the indemnification obligation...shall not be limited by a limitation on amount or type of damages...under workers' compensation or workmen's compensation acts.").

As in Jones and Integrated Project, the language in the subcontract here does not explicitly provide that Keystone is required to indemnify Cornell if one of Keystone's employees is injured as

a result of Cornell's negligence. The subcontract generally provides for indemnification for personal injuries "to any and all persons, whether employees of Cornell or others." I believe the Pennsylvania Supreme Court would rule that this language lacks the specificity necessary to overcome the Act's exclusivity provision.

Accordingly, I grant Keystone's Motion to Dismiss the Third Party Complaint. An appropriate order follows.

BY THE COURT:

PAUL S. DIAMOND, J.

Dated: September 21, 2004