

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

MOHAMMAD S. KHAN : CIVIL ACTION
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 v. :
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 ACCURATE MOLD, INC. :
 :
 :
 v. :
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 :
 T & L PERSONNEL SERVICES, INC and :
 TAHN V. LAM TEMPORARY SERVICES : NO. 99-764

ORDER - MEMORANDUM

AND NOW, this 25th day of August, 1999, the motion to dismiss of third-party defendants T & L Personnel Services, Inc. and Tahn V. Lam Temporary Services is denied.¹ Fed. R. Civ. P. 12(b)(6). Jurisdiction is diversity. 28 U.S.C. § 1332. Pennsylvania law governs.²

According to the complaint, on June 2, 1997 plaintiff Mohammad S. Khan, an employee of T & L Personnel, lost his right hand while using Accurate Mold's punch press. Defendant Accurate Mold, Inc.'s third-party complaint alleges that third-party defendants agreed to indemnify Accurate Mold for plaintiff's injuries.

¹Under Rule 12(b)(6), the allegations of the complaint are accepted as true, all reasonable inferences are drawn in the light most favorable to the plaintiff, and dismissal is appropriate only if it appears that plaintiff would prove no set of facts that would entitle her to relief. See Weiner v. Quaker Oats Co., 129 F.3d 310, 315 (3d Cir. 1997).

²Third-party defendants contend that Pennsylvania law governs. Accurate Mold's position is that the result is the same under either Pennsylvania or New Jersey law.

Under the indemnity agreement, T & L Personnel³ was to provide temporary employees to Accurate Mold. It also states that:

T & L Personnel Services assumes and agrees to indemnify the customer from any claims and expense (including reasonable attorney fees and other costs and expenses of litigation [sic]) for bodily injury or property damage asserted by the employees [sic] of the customer, by employees of T & L Personnel Services, or by members of the general public, which are based in whole or in part upon any act or omission on the part of T & L Personnel Services[,] its agents or employees while acting within the scope of their duties.

Pennsylvania employers who provide workers' compensation benefits are generally immunized from suits by injured employees. See Workers' Compensation Act, 77 Pa. Cons. Stat. Ann. § 501. "The legislative intent to bar the joinder of an employer in a third-party civil action is well established." Kennedy v. Shuwa Invs. Corp., 825 F. Supp. 712, 713 (E.D. Pa. 1993). Under the Workers' Compensation Act, a third-party tortfeasor can obtain indemnification or contribution from the employer only where "expressly provided for in a written contract entered into by the party alleged to be liable." 77 Pa. Cons. Stat. Ann. § 481(b). To be effective, the waiver of immunity must be "clear and unequivocal." Kiewit E. Co. v. L&R Constr. Co., 44 F.3d 1194, 1199 (3d Cir. 1995).

The Pennsylvania Superior Court has stated in an en banc decision that "in order for an employer to be held liable in indemnification for injuries to its own employees caused by the negligence of the indemnitee there must be an

³T & L Personnel Services, Inc. appears to be Tahn V. Lam Temporary Services' successor company.

express provision for this contingency in the indemnification clause.” Bester v. Essex Crane Rental Corp., 422 Pa. Super. 178, 187, 619 A.2d 304, 308 (1993). General indemnity language is insufficient. See id. at 184, 619 A.2d at 307. For example, in Bester the court held that an indemnification agreement applying to “the negligence of lessor, his servants or agents or any other person or persons whatsoever”⁴ did not cover actions against lessee. Id. at 186-88, 619 A.2d at 308-09; see also Snare v. Ebensburg Power Co., 431 Pa. Super. 551, 637 A.2d 296 (1993) (holding that indemnification provision covering “any and all claims” insufficient to waive the employer’s rights).

In contrast, in Hackman v. Moyer Packing, 423 Pa. Super. 378, 382, 621 A.2d 166, 168 (1993), the Superior Court enforced an indemnity agreement that provided:

[Currie] . . . agrees to indemnify, save and hold harmless Moyer Packing Company . . . against any and all claim or claims brought by the agents, workmen, servants or employees of [Currie] for any alleged negligence or condition, caused or created, [in] whole or in part, by Moyer Packing Company.

Currie was held to have waived its Workers’ Compensation Act rights having specifically agreed to indemnify Moyer in employee actions based on Currie’s negligence.

Here, the indemnification clause covers claims brought by T & L Personnel’s employees but not those arising from Accurate Mold’s negligence.

⁴This indemnification clause is from Szymanski-Gallagher v. Chestnut Realty Co., 409 Pa. Super. 323, 331, 597 A.2d 1225, 1229 (1991).

Under the agreement, T & L Personnel will indemnify Accurate Mold for “any act or omission on the part of T & L Personnel Services[,] its agents or employees.” This language does not state – or even imply – that it applies to claims related to Accurate Mold’s acts or omissions.

Nevertheless, the third-party complaint cannot be dismissed at this time. The pleadings do not allege that plaintiff has received benefits from a workers’ compensation insurance policy issued to T & L Personnel.⁵ Absent such payment, T & L Personnel would not be entitled to the Act’s immunity from third-party indemnity claims. See Passman v. Rigging Int’l, Inc., Civ.A.No. 98-4953, 1999 WL 387279, at *6 (E.D. Pa. June 8, 1999).

Edmund V. Ludwig, J.

⁵Third-party defendants’ assertion that plaintiff has received workers compensation benefits is not supported by evidence and, in any event, cannot be considered in ruling on this motion. If, however, such benefits were paid, a motion under Fed. R. Civ. P. 56, given the requisite proffer, would no doubt be granted.