IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

INTEGRATED PRODUCT SERVICES,	:	MARCH TERM, 2001
	:	
Plaintiff,	:	No. 01789
	:	
v.	:	COMMERCE PROGRAM
	:	
HMS INTERIORS, INC., THE PMA INSURANCE GROUP, and JOSEPH LLOYD,	:	Control No. 030274, 030409
	:	
	:	
Defendants.	:	

ORDER AND OPINION

AND NOW, this 13th day of June, 2005, upon reconsideration of defendant HMS Interiors, Inc.'s ("HMS") Motion for Judgment on the Pleadings, both parties' Motions for Disposition of Unresolved Issues, the responses thereto, the memoranda in support and opposition, and all other matters of record, and in accordance with the opinion filed contemporaneously herewith, it is hereby **ORDERED** that said Motion for Judgment on the Pleadings is **GRANTED**, and Count I of the Complaint against HMS is **DISMISSED**.

BY THE COURT,

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ABRAMSON, HOWLAND, W., J.

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OPINION

The court hereby reconsiders defendant HMS Interiors, Inc.'s ("HMS") Motion for Judgment on the Pleadings in light of the Supreme Court's opinion in Bernotas v. Super Fresh Food Markets, 863 A.2d 478 (Pa. 2004). This case arises out of an accident at a construction site, and it concerns whether the prime contractor or the subcontractor should, ultimately, pay the damages connected with that accident.

Plaintiff Integrated Project Services ("IPS") contracted with non-party Wyeth-Ayerst, Inc. (the "Owner") to perform certain construction management work at the Owner's Marietta facility (the "Prime Contract"). IPS sub-contracted with HMS to perform a portion of that work (the "Sub-Contract"). During the course of performing the Sub-Contract work, an employee of HMS, nominal defendant Joseph Lloyd, was injured. Mr. Lloyd brought suit against the Owner and IPS and eventually recovered $1,440,000 from IPS and $360,000 from the Owner (the "Underlying Tort Action").

In this litigation, IPS claims that, pursuant to the terms of the Sub-Contract and the Prime Contract, HMS must indemnify IPS and the Owner for the amounts they paid in connection with

the Underlying Tort Action.[1] In the present motions, HMS argues that it never agreed to indemnify IPS for IPS' own negligence nor to waive its immunity as Mr. Lloyd's employer under the Workers' Compensation Act.

In deciding the parties' Motions, the court is called upon to interpret the terms of the Prime Contract and the Sub-Contract and to determine what is meant by them. Interpretation of the terms of a contract is a matter of law for the court. *See* Madison Const. Co. v. Harleysville Mut. Ins. Co., 557 Pa. 595, 606, 735 A.2d 100, 106 (1999). "[W]hen a contract refers to a separate document, a court may examine the language of the other document to ascertain the intent of the parties." West Development Group, Ltd. v. Horizon Financial, F.A., 405 Pa. Super. 190, 197, 592 A.2d 72, 75 (1991).

The indemnification provision of the Sub-Contract attempts to incorporate by reference the indemnification provision of the Prime Contract. The Sub-Contract between IPS and HMS provides as follows:

> [HMS] assumes entire responsibility and liability for any and all claims and/or damages of any nature or character whatsoever for which [IPS] shall be liable under the [Prime Contract] . . . with respect to the work covered by this Subcontract and agrees to indemnify and save [IPS] and Owner harmless from and against all claims, . . . occurring in connection therewith to the same extent and obligation to which [IPS] has assumed towards Owner under the [Prime Contract] . . . limited to the scope of the subject matter of this Subcontract.

Complaint, Ex. B, ¶ 7.[2] IPS' obligation under the Prime Contract is as follows:

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[1] The Pennsylvania Manufacturer's Association Insurance Company ("PMA") is also named as a defendant in this action. PMA apparently issued an insurance policy to HMS, which IPS claims did cover, or should have covered, IPS and the Owner as well. As a result, IPS has brought claims against HMS for failure to obtain, and against PMA for failure to provide, such coverage. Such issues are not presently before this court.

[2] The Prime Contract is also incorporated by reference in other provisions of the Sub-Contract. *See, e.g.*, Complaint, Ex. B, ¶ 6 (HMS agrees to "be bound to [IPS] by the terms of this Sub-Contract and of the Contract Documents between the Owner and [IPS] and shall assume towards [IPS] all of the obligations and responsibilities with respect to the work to be performed hereunder by [HMS] which [IPS], by the Contract Documents, assumes toward the Owner.")

> [IPS] shall indemnify, defend and hold harmless the Owner from and against claims . . . arising out of or resulting from performance of the Work . . . but only to the extent caused in whole or in part by negligent acts or omissions of [IPS] or any Subcontractor . . . regardless whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

Complaint, Ex. A, ¶ 3.12.1.

IPS asks the court to read the two contracts' clauses together to find that HMS has agreed to indemnify and save IPS harmless from and against all claims, including those caused by the negligent acts or omissions of IPS. However, the Supreme Court recently held that

> unless expressly stated, pass through indemnification clauses violate the long standing policy underlying the rule narrowly construing indemnification provisions. When the provision sought to be 'passed through' involves indemnification for acts of another party's negligence, the theory will not be applied unless the contract language is clear and specific. Sound public policy requires an unequivocally stated intention to be included in the subcontract for this particular type of provision to pass through from the general contract. The general language of a standard incorporation clause cannot trump the specific language of the subcontract, when the former supports indemnification for negligent acts but the latter is ambiguous regarding the circumstances under which indemnification will occur.

Bernotas v. Super Fresh Food Markets, 863 A.2d 478, 484 (Pa. 2004). *See also* Greer v. City of Philadelphia, 568 Pa. 244, 248-9, 795 A.2d 376, 379 (2002) ("An indemnifying party may be held liable for the damages attributed to [another's] negligence only if the language of the [indemnification provision] clearly and unequivocally demonstrates that [the indemnifying party] intended to provide such indemnification. . . . [Such a rule is] carefully designed to ensure that no party is unwittingly subjected to liability that [is] hazardous, unusual and extraordinary."); Ruzzi v. Butler Petroleum, 527 Pa. 1, 7, 588 A.2d 1, 4 (1990) ("if the parties intend to include within the scope of their indemnity agreement a provision that covers losses due to the indemnitee's own negligence, they must do so in clear and unequivocal language. No inference from words of general import can establish such indemnification.")

In this case, the Sub-Contract does not contain an unequivocally stated intention to have HMS indemnify IPS for IPS' own negligence; instead of being clear and specific, the Sub-Contract is, at best, ambiguous on the issue. Therefore, HMS need not indemnify IPS for IPS' own negligence.

In addition, HMS claims that it is not required to indemnify IPS for any harm that befell Mr. Lloyd because Mr. Lloyd was one of HMS' employees, and HMS is immune from such liability under the Workers' Compensation Act ("WCA"). Specifically, the WCA provides that

> In the event injury or death to an employee is caused by a third party, . . . the employer . . . shall not be liable to a third party for damages, contribution or indemnity . . . unless liability for such damages, contribution, or indemnity shall be expressly provided for in a written contract . . .

77 P.S. § 481(b). The courts have construed the WCA to mean that

> a third party may not seek contribution or indemnity from the employer, even though the employer's own negligence may have been the primary cause of the employee's injury, absent an express provision for indemnity in a written contract. . . . Case law has established that the indemnity provision in the Workmen's Compensation Act must be construed strictly, and general indemnity language such as "any or all" or "any nature whatsoever" is insufficient. . . . [I]n 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 express provision for this contingency in the indemnification clause.

Bester v. Essex Crane Rental Corp., 422 Pa. Super. 178, 183-8, 619 A.2d 304, 306-8 (1993).

In this case, the Sub-Contract does not contain an express waiver of HMS' WCA immunity. Instead, as set forth above, the Sub-Contract attempts to pass through to HMS the indemnification responsibilities outlined in the Prime Contract. The Prime Contract's indemnification provisions include what purports to be a waiver by IPS of its and HMS' WCA

immunity vis-à-vis the Owner.[3] However, under the reasoning set forth in Bernotas and the strict requirements of Bester, the Sub-Contract's pass-through indemnification clause is not specific enough to create a waiver by HMS of its own WCA immunity vis-à-vis IPS.[4]

CONCLUSION

For all the foregoing reasons, defendant's Motion for Judgment on the Pleadings is granted.

BY THE COURT,

ABRAMSON, HOWLAND, W., J.

[3] The Prime Contract states that:

> In claims against any person or entity indemnified under this paragraph 3.12 by an employee of [IPS or] a Subcontractor . . ., the indemnification obligation under this 3.12 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for [IPS] or a Subcontractor under workers' or workmen's compensation acts, disability benefit acts or other employee benefit acts.

Complaint, Ex. A, ¶ 3.12.2.

[4] In its earlier ruling on HMS' Preliminary Objections, the court found that the waiver of WCA immunity did pass through from the Prime Contract to the Sub-Contract. However, the court did not have before it the Supreme Court's views on pass-through provisions, which were only recently set forth in Bernotas. Therefore, this court may revisit the issue in light of the change in the law. *See* Zane v. Friends Hosp., 575 Pa. 236, 243, 836 A.2d 25, 29 (2003) ("This general prohibition against revisiting the prior holding of a judge of coordinate jurisdiction, however, is not absolute. Departure from the rule is allowed in 'exceptional circumstances' when there has been a change in the controlling law or where there was a substantial change in the facts or evidence.")