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. 030930
	:	
	:	
Defendants.	:	

ORDER AND MEMORANDUM

AND NOW, this 21st day of October 2004, upon consideration of defendant HMS Interiors, Inc.'s ("HMS") Motion for Judgment on the Pleadings and Motion for Partial Summary Judgment, plaintiff's response thereto, the memoranda in support and opposition, and all other matters of record, and in accordance with the memorandum opinion filed contemporaneously herewith, it is hereby **ORDERED** that said Motions are **DENIED**.

BY THE COURT,

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GENE D. COHEN, J.

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MEMORANDUM OPINION

Before the court are defendant HMS Interiors, Inc.'s ("HMS") combined Motion for Judgment on the Pleadings and Motion for Partial Summary Judgment. 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 demands that HMS indemnify it and reimburse it for the full $1,440,000 pursuant to the terms of the Sub-Contract and the Prime Contract. In the present motions, HMS claims that it is not required to indemnify IPS for IPS' own negligence, and HMS

also claims that it has not waived its immunity as Mr. Lloyd's employer under the Workers' Compensation Act.[1]

I. The Court Shall Determine the Meaning of the Contract Terms at Issue.

In deciding the present Motions, the court is called upon to interpret the terms of the Prime Contract and the Sub-Contract and to determine whether there is any ambiguity or conflict when the indemnity provision of the two contracts are read together. 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). "The intent of the parties to a written contract is deemed to be embodied in the writing itself; when the words are clear and unambiguous the intent is to be gleaned exclusively from the express language of the agreement." Delaware County v. Delaware County Prison Employees' Independent Union, 552 Pa. 184, 189, 713 A.2d 1135, 1137 (1998). "[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).

Both parties agree that the Sub-Contract refers to, and incorporates by reference, the Prime Contract. However, HMS contends that, when read together, the indemnification provisions of the Sub-Contract and the Prime Contract conflict. HMS further asserts that, due to this conflict, under the Supremacy Clause of the Sub-Contract, the indemnification provisions of the Sub-Contract prevail, and HMS is not required to indemnify IPS. This court disagrees and finds no conflict between the two contracts' indemnification provisions.

[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. Such issues are not presently before this court.

II. HMS Has Agreed to Indemnify IPS for IPS' Own Negligence.

The indemnification provision of the Sub-Contract incorporates 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]

Such a "flow-through" or "conduit" clause that "requires the subcontractor to stand in the shoes of the prime contractor with regards to the rights and obligations encompassed in the prime contract to the extent they arise within the purview of the subcontract" is enforceable. Bernotas v. Super Fresh Food Markets, Inc., 816 A.2d 225, 231 (Pa. Super. 2002). *See also* American Contractors Ins. Group v. Harleysville Mut. Ins. Group, 2003 WL 22389428 (Phila. Co. Sept. 17, 2003) (subcontractor assumed contractor's indemnification obligations to project manager)

Since there is no inherent problem with IPS attempting to pass on its liability to HMS in this manner, the question is whether the terms of the Prime Contract's indemnification clause, as incorporated into the Sub-Contract's indemnification clause, are sufficiently clear to make HMS

[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.")

liable for IPS' negligent acts occurring in connection with the work covered by the Sub-Contract.[3] An indemnifying party such as HMS 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.

Greer v. City of Philadelphia, 568 Pa. 244, 248-9, 795 A.2d 376, 379 (2002). *See also* 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.")

If the Sub-Contract simply stated that "[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] . . . and agrees to indemnify and save [IPS] and Owner harmless from and against all claims," then such language would not be deemed specific enough to require HMS to indemnify IPS for IPS' own negligence. *See* Ruzzi, 527 Pa. at 7, 588 A.2d at 4 (court found that clause wherein indemnitor agreed to indemnify indemnitee "from any and all liability for claims . . caused or occasioned by any . . . explosion . . . occurring by reason of the installation" of a gas tank was not specific enough to make indemnitor indemnify indemnitee for the indemnitee's own negligence during the installation of the gas tank.)

[3] The parties apparently do not dispute that Mr. Lloyd's accident occurred during the course of his employment with HMS and that the work he was doing was within the scope of the work covered by the Sub-Contract. The court has been given no reason to believe that IPS is trying to obtain indemnification with respect to activities occurring outside the scope of the Sub-Contract, to which it would not be entitled. *See* Bernotas v. Super Fresh Food Markets, Inc., 816 A.2d 225, 233 (Pa. Super. 2002) ("It is axiomatic that [a subcontractor] cannot be held responsible for injuries that occur beyond the scope of its subcontract.")

However, the Sub-Contract's indemnification clause further requires HMS to indemnify IPS "to the same extent and obligation to which [IPS] has assumed towards Owner under the [Prime Contract]." Complaint, Ex. B, ¶ 7. IPS' obligation under the Prime Contract, which HMS thereby assumed, is as follows:

> [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. When one reads the two contracts' clauses together, it is clear that 'HMS has agreed to indemnify and save IPS harmless from and against all claims, but only to the extent caused by the negligent acts or omissions of IPS and HMS.' Therefore, the Sub-Contract's incorporation by reference of the Prime Contract's indemnification provision is sufficiently specific to satisfy the standards set forth by the Supreme Court in Ruzzi and Greer.[4] The indemnification provisions of the Prime Contract and the Sub-Contract are neither in conflict nor ambiguous,[5] and they require HMS to indemnify IPS for IPS' own negligence.

[4] It is not, as HMS implies, inherently unfair to make HMS ultimately liable for the negligence attributed to IPS.

> The contractual chain that enables an exculpatory clause to pass from owner to contractor to subcontractor serves an important function. It places the ultimate responsibility to maintain a safe environment on the party who can most effectively prevent accidents. The subcontractor is closest to the actual operation and can most effectively recognize and remove potentially dangerous conditions.

Bernotas v. Super Fresh Food Markets, Inc., 816 A.2d 225, 232 (Pa. Super. 2002). HMS was not a party to the Underlying Tort Action, so it has never been determined whether any of the negligence attributed to IPS is actually attributable to HMS.

[5] This is not to say that such provisions are well written.

III. HMS Has Waived Its Workers' Compensation Act Immunity.

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

> In the event injury or death to an employee is caused by [IPS], . . .[HMS] . . . shall not be liable to [IPS] for damages, contribution or indemnity . . . unless liability for such damages, contribution, or indemnity shall be expressly provided for in a written contract entered into by [HMS]. . .

77 P.S. § 481(b). *See also* Hackman v. Moyer Packing, 423 Pa. Super. 378, 382, 621 A.2d 166, 168 (1993) (employer waived WCA immunity when it agreed to "indemnify [indemnitee] . . . against any and all claims brought by the . . . employees of [employer] for any alleged negligence or condition caused or created in whole or in part by [indemnitee]"); Bester v. Essex Crane Rental Corp., 422 Pa. Super. 178, 184, 619 A.2d 304, 307 (1993) ("the indemnity provision in the [WCA] must be construed strictly, and general indemnity language such as 'any or all' or 'any nature whatsoever' is insufficient.")

As set forth in more detail in the previous section, the indemnification terms of the Prime Contract are incorporated by reference into the Sub-Contract and are applicable to HMS. The Prime Contract's indemnification provisions contain an express waiver of the indemnitor's WCA protections:

> 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. As a result of the previously discussed pass-through provisions of the Sub-Contract, IPS is a "person or entity indemnified" and HMS is the entity who has an "indemnification obligation."[6] By agreeing to be governed by the terms of the Prime Contract, HMS' has agreed that its indemnification obligation to IPS is not "limited by a limitation on . . . damages . . . payable by or for [HMS] under the [WCA]." As the court previously ruled with respect to HMS' Preliminary Objections to the Complaint in this action, HMS has thereby waived its WCA indemnification immunity.[7]

CONCLUSION

For all the foregoing reasons, defendant's Motion for Judgment on the Pleadings and Motion for Partial Summary Judgment are denied.

BY THE COURT,

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GENE D. COHEN, J.

[6] In Bester v. Essex Crane Rental Corp., the Superior Court sitting *en banc* stated in dicta:

> In order to avoid the ambiguities which grow out of the use of general language, contracting parties must specifically use language which demonstrates that a named employer agrees to indemnify a named third party from liability for acts of that third party's negligence which result in harm to the employees of the named employer. Absent this level of specificity in the language employed in the contract of indemnification, the [WCA] precludes any liability on the part of the employer.

422 Pa. Super. 178, 184, 619 A.2d 304, 307 (1993). Although HMS is not specifically named in the Prime Contract's clause waiving WCA immunity, this court believes that the applicability of the waiver provision to HMS is sufficiently clear to satisfy the WCA's requirements.

[7] *See* Integrated Project Services v. HMS Interiors, Inc., March Term, 2001 No. 01789 (July 2, 2001) (Herron, J.)