

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

**JAMES D. MORRISSEY, INC.**

Plaintiff,

v.

**FEDEX GROUND PACKAGE SYSTEM, INC.**

Defendant,

v.

**BARTON MALOW COMPANY**

Additional Defendant.

**MAY TERM, 2018**

**No. 01742**

**COMMERCE PROGRAM**

**2709 EDA 2019**

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FIRST JUDICIAL DISTRICT OF PA

**OPINION**

Appellant, Barton Malow Company, (“BMC”) appeals this Court’s Order dated August 19, 2019 (“the 8/19/19 Order”), sustaining in part and overruling in part BMC’s preliminary objections to the Joinder Complaint. For the reasons which follow, this Court respectfully requests that its ruling be affirmed.

**BACKGROUND**

This dispute arose out of and involves the construction of a new package distribution facility for FedEx on approximately 250 acres of land in Northampton County, Pennsylvania (hereinafter the “Project”) (Complaint ¶¶ 6, 8; Joinder Complaint ¶ 5). FedEx and Additional Defendant BMC entered into a Construction Management Agreement (hereinafter the “Prime Contract”) on May 1, 2016 to develop and construct the Project (Complaint ¶¶ 6, 8, 15; Joinder Complaint ¶ 5). The Prime Contract includes a lengthy dispute resolution section requiring Barton and FedEx to resolve disputes between them with mediation and then arbitration pursuant to the American Arbitration Association (hereinafter “AAA”) Construction Industry Arbitration Rules (Joinder Complaint Ex. C, General Conditions to the Prime Contract, § 1.31).

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On June 29, 2016, Morrissey and Barton entered into a subcontract (hereinafter the “JDM Subcontract”) wherein Morrissey was to perform the site development for the Project, including the removal of excess topsoil, sitework/earthwork, grading, and site utilities (Complaint ¶¶ 22-23, 30; Complaint Ex. D, JDM Subcontract). The JDM Subcontract includes a dispute resolution procedure that requires Morrissey and Barton to resolve any dispute relating to the subcontract with mediation and then mandatory arbitration pursuant to the AAA Construction Industry Arbitration Rules (Complaint Ex. D, JDM Subcontract § 23).

### **PROCEDURAL HISTORY**

Morrissey filed the Complaint in the instant case on May 17, 2018 against FedEx seeking to recover damages arising out of FedEx’s alleged non-disclosure of the arsenic contamination. Defendant FedEx filed the Joinder Complaint on January 18, 2019, which joined BMC as an additional defendant. BMC, the general contractor on the project, was a party to both the Prime Contract between itself and FedEx, and the Subcontract between itself and Morrissey. The Joinder Complaint contains claims for breach of contract, contractual indemnity, and common law indemnity. On March 13, 2019, BMC filed preliminary objections to the Joinder Complaint. FedEx also filed a Motion to Stay Pending Litigation on May 3, 2016. The Court denied that Motion on June 11, 2019, and FedEx appealed that order, which is currently pending.

In the August 19, 2019 Order, the Court sustained BMC’s preliminary objections in part and overruled them in part. The instant appeal followed.

## DISCUSSION

BMC, in its preliminary objections, sought dismissal of the joinder complaint because of mandatory arbitration provisions which exist in both the Prime Contract (with FedEx) and the Subcontract (with Morrissey). It argued that arbitration is the proper place for all of these claims to be heard, especially because a prior arbitration action with identical claims was already pending.

The Court granted BMC's preliminary objections as to the contractual claims in the Joinder Complaint, dismissing the breach of contract and contractual indemnity from this action as more appropriate to be handled in arbitration. However, it overruled the preliminary objections as to the common law indemnity claim. BMC appeals this ruling, arguing that the common law indemnity claim arises out of or relates to the Prime Contract and therefore arbitration is the appropriate forum.

The Court's ruling was appropriate because common law indemnity claims are tort claims, and do not arise out of a contractual relationship.<sup>1</sup> Accordingly, the appropriate forum for the resolution of this claim is before this Court, rather than in arbitration.

BMC further argues that the common law indemnity claim should have been dismissed because that claim is not ripe for consideration due to the absence of any payment by FedEx to Morrissey. This argument was not raised in the initial Preliminary Objections, and is therefore waived.<sup>2</sup>

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<sup>1</sup> "The right of *indemnity* rests upon a difference between the primary and the secondary liability of two persons each of whom is made responsible by the law to an injured party. It is a right which enures to a person who, without active fault on his own part, has been compelled, by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable." Builders Supply Co. v. McCabe, 366 Pa. 322, 325, 77 A.2d 368, 370 (1951)

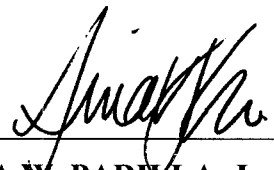
<sup>2</sup> Pa.R.A.P. 302(a).

### CONCLUSION

For the foregoing reasons, this Court did not err as a matter of law and properly overruled the preliminary objections as to the common law indemnity claim. Accordingly, this Court respectfully requests that its ruling be affirmed.

BY THE COURT:

DATE: October 25, 2019

  
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NINA W. PADILLA, J.