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

Merck & Co., Inc.	:	December Terms, 2005
Bovis Lend Lease, Inc. and	:	
Zurich American Insurance Company	:	
Plaintiffs	:	
v.	:	
Transcontinental Casualty Company and	:	No. 1825
Lorenzon Brothers	:	
Defendants	:	
and	:	Commerce Program
	:	
Routha Williams	:	
Nominal Defendant	:	Control No. 062291

ORDER

AND NOW, this 19th day of September 2006, upon consideration of the motion for summary judgment filed by Plaintiffs Merck & Co., Inc., Bovis Lend Lease, Inc. and Zurich American Insurance Company, the responses filed by Defendants Lorenzon Brothers and Transcontinental Casualty Company, the cross motion for summary Judgment filed by Defendant Lorenzon Brothers, the respective memoranda of law and all other matters of record, it is **ORDERED** that:

1. Plaintiffs' Motion for Summary Judgment is **GRANTED** and Defendant Lorenzon Brothers' motion for summary judgment is **DENIED**;
2. Plaintiffs may submit evidence of their underlying costs, expenses, settlement monies and attorney's fees, no later than thirty days from the date of this Order.

BY THE COURT,

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HOWLAND W. ABRAMSON, J.

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Howland W. Abramson, J. ……September , 2006

OPINION

Plaintiffs, Merck & Co., Inc., Bovis Lend Lease, Inc., and Zurich American Insurance Company, move for partial summary judgment in the nature of a declaratory judgment. Specifically, Merck & Bovis seek a declaration stating that Defendant Lorenzon Brothers ("Lorenzon") must indemnify the Plaintiffs for all costs, expenses, settlement monies and attorney's fees incurred by the Plaintiffs in an underlying suit captioned Williams v. Bovis Lend Lease, Inc. *et al.*[1] In addition, Plaintiffs move for a declaration granting them leave to submit evidence as to costs, expenses, settlement monies and attorney's fees incurred by the Plaintiffs in the same suit. For the reasons stated below, the partial motion for summary judgment is granted.

BACKGROUND

Plaintiff Bovis Lend Lease ("Bovis"), as general contractor in a construction project for Plaintiff Merck & Co. ("Merck"), hired subcontractor Lorenzon Brothers

[1] Philadelphia Court of Common Please, Case No. 04113346.

("Lorenzon") to do demolition and renovation work on Merck's premises. On 25 November 2005, an employee of Lorenzon, Mr. Routha Williams, slipped and fell while "entering the work area" within Merck's Renovation Project.[2] Claiming physical injury, Mr. Williams sued Merck and general contractor Bovis for negligence.[3] The parties in this underlying case settled in December 2005.[4] Mr. Williams also settled with his employer, subcontractor Lorenzon, under a Compromise and Release Agreement pursuant to 77 PA. STAT. ANN. § 449 (2006) known as the Worker's Compensation Act.[5]

After settling with Mr. Williams, the Plaintiffs in this case filed a complaint for declaratory relief against Lorenzon and its insurer, Transcontinental, on ground that both Defendants had refused to defend and indemnify the Plaintiffs in the underlying Williams litigation. Specifically, the Plaintiffs aver that Lorenzon breached its duty to defend and indemnify the Plaintiffs in violation of the indemnity provision in the subcontracting agreement between Bovis and Lorenzon (the "Trade Contract.")

DISCUSSION

The law on motions for summary judgment is settled. In Pennsylvania, once the pleadings have closed, any party may move for summary judgment.[6] Pennsylvania law "provides that summary judgment may be granted only in those cases in which the record clearly shows that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law."[7] "In determining whether to grant a motion for summary judgment, the court must view the record in the light most favorable to the non-

[2] Bovis Lend Lease's Incident Investigation Report, Exhibit C to Defendant Transcontinental Insurance Company's opposition to Plaintiffs' motion for partial summary judgment, 1:30.
[3] See Williams v. Bovis Lend Lease, Inc. *et al*., Philadelphia Court of Common Pleas, Case No. 04113346.
[4] See Docket Case No. 04113346.
[5] Exhibit A to Defendant Lorenzon's response and cross motion in opposition to Plaintiffs' motion for partial summary judgment.
[6] Pa. R.C.P. 1035.2.
[7] Rauch v. Mike-Mayer, 2001 Pa. Super 270, 783 A.2d 815, 821 (2001) (citing Capek v. Devito, 564 Pa. 267, 767 A.2d 1047, 1048 (2001)).

moving party and resolve all doubts against the moving party when determining if there is a genuine issue of material fact."[8] "Summary judgment is proper only where the pleadings, depositions, answers to interrogatories, admissions of record and affidavits demonstrate that there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[9] In other words, "only when the facts are so clear that reasonable minds cannot differ, may a trial court properly enter summary judgment."[10] In addition, a motion for summary judgment is appropriate under the Declaratory Judgments Act.[11]

I. The Clear and Unambiguous Indemnification Provisions Waive Lorenzon's Immunity Under the Worker's Compensation Act[12]

The Plaintiffs argue that the clear and unequivocal language in the indemnification provision demonstrates that Lorenzon intended to indemnify the Plaintiffs for injuries arising out of their negligent conduct. This court agrees. Stripped to its sinews, the indemnity provision in the Trade Contract, recites:

> Article 11. Indemnification
>
> 11.1 …[Lorenzon] hereby assumes the entire responsibility and liability for any and all damage … and injury … to all persons, whether or not employees of [Lorenzon] … occurring in connection with (i) the Work … or (iv) any occurrence which happens in or about the area where the Work is being performed by [Lorenzon] ….
>
> 11.2 … [S]hould any such damage or injury referred to in Paragraph 11.1 be sustained … by Owner, Architect/Engineer, or Contractor, or should any claim for such damage or injury be made or asserted against any of them, whether or not such claim is based upon

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[8] Potter v. Herman, 2000 Pa. Super 345, 762 A.2d 1116, 1118 (2000).
[9] Id. at 1117.
[10] Rauch, supra note 7 at 821.
[11] Mt. Village v. Board of Supervisors, 582 Pa. 605, 613, 874 A.2d 1, 5 (2005).
[12] 77 PA. STAT. ANN. § 481(b), the Worker's Compensation Act, states that "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 …."

> Owner's Architect/Engineer's or Contractor's alleged … negligence … [Lorenzon] shall indemnify and hold harmless Owner, Architect/Engineer and Contractor … against any such damages injuries, and claims … and against … all other loss, cost, expense and liability, including … legal fees … and [Lorenzon] agrees to assume … any action at law … which may be brought against any Indemnitee … by reason of such damage, injury or claim and to pay on behalf of every Indemnitee … the amount of any judgment decree, award, or order that may be entered against each said Indemnitee ….[13]

The clear and unambiguous language in this provision indicates that Lorenzon intended to indemnify the Plaintiffs for their negligence. In Pennsylvania, "a contract of indemnity against personal injuries should not be construed to indemnify against the negligence of the indemnitee, unless it is so expressed in unequivocal terms."[14] Liability assumed by the indemnitor for the negligence of the indemnitee is chancy and uncommon: only when the indemnitor unambiguously agrees to bear the liability of the indemnitee, can such a provision escape the presumption of doubt.[15]

In this case, the language in section 11.1 of the indemnification provisions shows unequivocally that Lorenzon assumed responsibility and liability for injury to all persons, including its own employees, in connection with work undertaken by Lorenzon, or in connection with the area where Lorenzon performed its work. Furthermore, section 11.2 of the indemnification provisions shows unequivocally that Lorenzon consented not only to hold harmless the Plaintiffs for any damage described in section 11.1, but also agreed to defend them, and to bear the liability, cost, expenses and legal fees, resulting from an injury caused by their negligence. Based on the unequivocal intention manifested by the indemnitor, there can be no doubt that Lorenzon waived its immunity under the Workers' Compensation Act.

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[13] Exhibit B to Plaintiffs' motion for partial summary judgment.
[14] Ruzzi v. Butler Petroleum Company, 527 Pa. 1, 8, 588 A.2d 1, 4 (1999).
[15] Id.

Nevertheless, Lorenzon argues that the indemnification provision in the Trade Contract contains boilerplate language, and that such generalized expressions are insufficient to waive the immunity afforded by Workers' Compensation Act. To test the merits of Lorenzon's argument, this court will examine a pertinent case decided by Pennsylvania Commonwealth Court, Morgan v. Harnischfeger Corporation, 791 A.2d 1273 (Pa. Commw. 2002).

In Morgan, the Pennsylvania Turnpike Commission (the "Commission"), contracted with HRI, Inc. ("HRI"), to perform certain highway repairs. Id. at 1274. In turn, HRI subcontracted with American Asphalt ("American Asphalt"). Id. At some point an employee of American Asphalt, Paul Morgan, after suffering severe injuries related to a work-site accident, sued the Commission and HRI. Id. The Commission, in its answer and new matter, asserted a cross claim against HRI on grounds that the indemnity provision had waived HRI's immunity under the Workers' Compensation Act. Id. at 1275-1279. The trial court found in favor of the Commission, and HRI appealed. On appeal, the Commonwealth Court considered whether the indemnity provisions in the primary contract between the Commission and HRI, as well as the subcontracting agreement between HRI and American Asphalt, were both enforceable. Id. at 1274.

The Morgan court began its analysis by comparing the two indemnification provisions. First, it turned its attention to the provision in the primary contract. The pertinent section recited:

> 107.14 Indemnity…
>
> [HRI] shall assume the entire responsibility and liability for any damage… to all persons, whether employees of [HRI] or otherwise… arising out of, or occurring in connection with the execution of the work of [HRI], and if any claims for such damage or injury, (including death resulting therefrom) be made or asserted, whether or not such claims are based upon the alleged… **negligence of the Commission**…; [HRI] agrees to indemnify and hold harmless

> the Commission… against any… claims, loss, costs, expense, liability, damage or injury, including legal fees… that the Commission may… sustain… and [HRI] shall assume… the amount of any judgment… entered against the Commission…. Id.

at 1275. (Emphasis supplied).

Subsequently, the Morgan court turned its attention to the indemnification provision in the subcontracting agreement between HRI and American Asphalt. The pertinent section recited:

> [American Asphalt] shall… be liable for and shall pay all loss or damage caused by him or by his… employees… for any accident to persons that may occur during the performance of the work…. [American Asphalt]… shall defend and save harmless [HRI] and the [Commission] from all suits and claims… for loss of life or injury occurring to employees of [American Asphalt]…. [**American Asphalt**] **agrees to… idemnify** [sic]… **and save harmless** [**HRI**] and the [Commission] **from liability** from all claims, loss, damage, suits and actions… and from all costs and expenses in connection with such claims, suits, and actions due to injuries to persons… whether **resulting from** accident, **negligence** or any other cause whatsoever occurring during the performance of the work….

Id. at 1275. (Emphasis supplied).

Upon examining the two clauses, the court noted a crucial dissimilarity in their language –namely, that the indemnification provision in the contract between the Commission and HRI specifically placed liability upon HRI for claims based on the Commission's own negligence. Id. at 1277. Conversely, the court also noted that the indemnification clause in the subcontracting agreement between HRI and American Asphalt failed to specifically state that American Asphalt intended to indemnify HRI for HRI's own negligence. Id. at 1279. Thus, in affirming the lower court's decision, the Morgan court found that the subcontracting agreement, unlike the primary contract, contained boilerplate language that failed to waive American Asphalt's immunity under the Workers' Compensation Act. Id.

Similarly here, this court, upon a reading of the pertinent provision in the contract between Bovis and Lorenzon, finds that its indemnification language echoes closely the words that stripped HRI of its immunity in Morgan. In short, the language in the indemnification provision between Bovis and Lorenzon leaves no doubt that Lorenzon expressed its intent to shoulder liability for the injuries caused by the negligence of Bovis. Thus, stated in syllogistic form, the instant issue is resolved as follows:

Major Premise.	The indemnification provision that expresses unequivocally the indemnitor's intent to assume liability for the negligence of the indemnitee waives the indemnitor's, immunity under the Workers' Compensation Act.
Minor Premise.	The Bovis—Lorenzon indemnification provision expresses unequivocally the indemnitor's intent to assume liability for the negligence of the indemnitee.
Conclusion.	The Bovis—Lorenzon indemnification provision waives the indemnitor's immunity under the Workers' Compensation Act.

For these reasons, the motion for partial summary judgment filed by Bovis is sustained, and Lorenzon's cross motion is dismissed.[16] The court will issue a contemporaneous Order consistent with this opinion.

BY THE COURT

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HOWLAND W. ABRAMSON, J.

[16] Lorenzon also contends that a genuine issue of material fact exists regarding whether Mr. Williams slipped, fell, and suffered injury, in or about the area where work was being performed. This court disagrees, as the record shows that Mr. Williams was found in a spot "designated as a storage area," and that although "no work was being performed directly" where Mr. Williams fell, the same area was connected by a door "[t]o a corridor **outside** of the construction project." See the Bovis Lend Lease's Incident Investigation Report, Exhibit C to Defendant Lorenzon's opposition and cross motion to Plaintiffs' motion for partial summary judgment, 1:36. See also Deposition of Michael Lentz, exhibit E to Defendant Lorenzon's opposition and cross motion to Plaintiffs' motion for partial summary judgment, 6:29:8. (Emphasis supplied).