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

INTEGRATED PROJECT SERVICES, Plaintiff	:	March Term, 2001
	:	No. 1789
v.	:	
	:	Commerce Case Program
HMS INTERIORS, INC., et al., Defendants	:	Control No. 050599

OPINION

Defendant HMS Interiors, Inc. ("HMS") has filed preliminary objections ("Objections") to the complaint ("Complaint") of Plaintiff Integrated Project Services ("IPS"). For the reasons set forth in this Opinion, the Court is issuing a contemporaneous order overruling the Objections.

BACKGROUND

On November 15, 1996, IPS entered into a contract ("Contract") with Wyeth Ayerst ("Wyeth") to renovate Wyeth's facility in Marietta, Pennsylvania ("Facility"). The Contract included an indemnification provision that required IPS to indemnify Wyeth for the negligence of IPS and any subcontractor. Also in the Contract was a provision requiring IPS to incorporate the Contract's terms into any subcontract.

IPS subsequently entered into a subcontract agreement ("Subcontract") with HMS under which HMS agreed to perform certain work assigned to IPS under the Contract. The Subcontract incorporated the terms of the Contract and transferred IPS's indemnification obligations to HMS. HMS also supplied IPS with a certificate of insurance from Pennsylvania Manufacturer's Insurance Company ("PMA"), HMS's insurer.

On January 22, 1998, Joseph Lloyd ("Lloyd"), an HMS employee, was injured while working at the Facility and later filed a personal injury suit against Wyeth and IPS.[1] Selective Insurance Company ("Selective"), IPS's insurance carrier, took over Wyeth's defense in the Lloyd Action pursuant to the Contract. Selective also notified PMA of the Lloyd Action and asked PMA, as HMS's insurer, to defend IPS. In response, PMA's litigation specialist acknowledged in a November 10, 1999 letter that IPS had additional insured status under HMS's insurance policy. PMA refused to accept an indemnification tender, however, and contended that, because PMA's and Selective's policies provided concurrent coverage, it would agree only to share defense costs on a 50-50 basis.

At some point thereafter, the PMA litigation specialist originally responsible for the Lloyd Action was replaced by Darryl Zimmerman ("Zimmerman"). In a letter dated June 13, 2000, Zimmerman repudiated PMA's earlier position and denied that IPS was an additional insured under HMS's policy. Even if IPS were entitled to coverage, Zimmerman stated, such coverage would be provided on an excess basis only. It appears that Selective then continued its defense of IPS and Wyeth in the Lloyd Action.

Around the time that Selective received Zimmerman's letter, IPS attempted to join HMS as an additional defendant in the Lloyd Action based on the Subcontract's indemnification provision. HMS's preliminary objections to IPS's joinder complaint ("Joinder Complaint") were sustained, however, when IPS failed to respond to them, and the Joinder Complaint was dismissed with prejudice.[2] On

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[1] Lloyd v. Wyeth Ayerst, June Term, 1999, No. 1351 (C.P. Phila.). This action is referred to as the "Lloyd Action."

[2] The Parties later filed a stipulated agreement dismissing HMS from the Lloyd Action.

April 27, 2001, the jury in the Lloyd Action found that Lloyd had suffered $2,000,000.00 in damages, with 35 percent attributable to Lloyd's negligence, 55 percent attributable to IPS's negligence and 10 percent attributable to Wyeth's negligence.

In the Complaint, IPS asserts causes of action against HMS for contractual indemnity, breach of contract, unjust enrichment, negligent misrepresentation and breach of the duty of good faith and fair dealing.[3] In response, HMS has filed the Objections, which contend that IPS claims are legally insufficient.

DISCUSSION

Each of the Objections contests the legal sufficiency of IPS's claims. When a court is presented with preliminary objections asserting legal insufficiency,

> [I]t is essential that the face of the complaint indicate that its claims may not be sustained and that the law will not permit recovery. If there is any doubt, it should be resolved by the overruling of the demurrer. Put simply, the question presented by demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible.

Bailey v. Storlazzi, 729 A.2d 1206, 1211 (Pa. Super. Ct. 1999). For the purposes of reviewing the legal sufficiency of a complaint, "all well-pleaded material, factual averments and all inferences fairly deducible therefrom" are presumed to be true. Tucker v. Philadelphia Daily News, 757 A.2d 938, 941-42 (Pa. Super. Ct. 2000).

[3] IPS has also asserted claims against PMA for contractual indemnity, breach of contract, unjust enrichment, negligent misrepresentation and breach of the duty of good faith and fair dealing.

I. IPS's Claim for Contractual Indemnification Is Legally Sufficient

A. Neither Res Judicata Nor Collateral Estoppel Bars IPS from Bringing a Claim Against HMS for Contractual Indemnification

HMS first argues that IPS's claim for contractual indemnification is barred by res judicata and collateral estoppel. Because the order dismissing the Joinder Complaint is not a final judgment on the merits and because the issues raised in the Complaint and the Joinder Complaint are not the same, the Court cannot agree.

In Pennsylvania, the doctrine of res judicata is applied as follows:

> Pursuant to the doctrine of res judicata, a final judgment on the merits by a court of competent jurisdiction will bar any future suit between the parties or their privies in connection with the same cause of action. The purposes behind the doctrine, which bars the relitigation of issues that either were raised or could have been raised in the prior proceeding, are to conserve limited judicial resources, establish certainty and respect for court judgments, and protect the party relying upon the judgment from vexatious litigation. In keeping with these purposes, the doctrine must be liberally construed and applied without technical restriction. Furthermore, we note that the application of res judicata requires the concurrence of four conditions between the present and prior actions: 1) identity of issues; 2) identity of causes of action; 3) identity of parties or their privies; and 4) identity of the quality or capacity of the parties suing or being sued.

Yamulla Trucking & Excavating Co. v. Justofin, 771 A.2d 782, 784 (Pa. Super. Ct. 2001) (citations omitted). See also Chada v. Chada, 756 A.2d 39, 43-44 (Pa. Super. Ct. 2000) ("[w]hen the cause of action in the first and second actions are distinct, or, even though related, are not so closely related that matters essential to recovery in the second action have been determined in the first action, the doctrine of res judicata does not apply").

Similarly, the doctrine of collateral estoppel, also known as claim preclusion, "operates to prevent a question of law or issue of fact which has once been litigated and fully determined in a court

of competent jurisdiction from being relitigated in a subsequent suit." Spisak v. Margolis Edelstein, 768 A.2d 874, 876-77 (Pa. Super. Ct. 2001) (quoting Incollingo v. Maurer, 394 Pa. Super. 352, 356, 575 939, 940 (1990)). The doctrine requires the satisfaction of four elements:

> Collateral estoppel applies when the issue decided in the prior adjudication was identical with the one presented in the later action, there was a final judgment on the merits, the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication, and the party against whom it is asserted has had a full and fair opportunity to litigate the issue in question in the prior adjudication.

In re Iulo, __ Pa. __, 766 A.2d 335, 337 (2001) (citing Safeguard Mut. Ins. Co. v. Williams, 463 Pa. 567, 574, 345 A.2d 664, 668 (1975)).

According to HMS, IPS's failed attempt to join it in the Lloyd Action bars IPS from proceeding against it for indemnification here. In the Joinder Complaint, IPS asserted claims for indemnification and contribution based on the Subcontract. When IPS filed no response to HMS's preliminary objections to the Joinder Complaint, the Honorable William J. Manfredi, Jr. issued an order dismissing the Joinder Complaint with prejudice ("Lloyd Order").

Although there are similarities between the issues raised in the Joinder Complaint and those raised here, there are also significant differences. The Joinder Complaint focuses only on HMS's responsibilities under the Subcontract; nowhere is there any substantive reference to the Contract, let alone to the obligations that it imposes on HMS. Thus, the Lloyd Order does not meet the requirement of both res judicata and collateral estoppel that there be an identity of the issues.

Furthermore, the Lloyd Order is not a final judgment on the merits of the case. It appears that the Joinder Complaint was dismissed solely because IPS failed to file a response to HMS's preliminary objections. In Pennsylvania, "a dismissal, even with prejudice, for failure to prosecute a claim is not

intended to be res judicata of the merits to the controversy." Municipality of Monroeville v. Liberatore, 736 A.2d 31, 34 (Pa. Commw. Ct. 1999), app. denied, 561 Pa. 704, 751 A.2d 195 (2000). See also Hatchigian v. Koch, 381 Pa. Super. 377, 381, 553 A.2d 1018, 1020 (1989) ("[s]ince a non pros is not a judgment on the merits, it cannot have res judicata effect," and "where plaintiff has suffered a judgment of non pros, he may later commence a new action between the selfsame parties and alleging the selfsame cause of action so long as the second action is commenced within the applicable statute of limitations"). A judgment of non pros also cannot serve as a basis for a collateral estoppel argument. See Brower v. Burlo Vending Co., 254 Pa. Super. 402, 406, 386 A.2d 11, 13 (1978) (a judgment of non pros does not support a claim of collateral estoppel because it does not involve a final judgment on the merits). While the Lloyd Order is not a judgment of non pros,[4] it is similar in the sense that it stems from inaction on the part of IPS, the complaining party, making these cases persuasive.

Although HMS has cited a number of cases for the proposition that the Lloyd Order is a final judgment on the merits, these cases are inapposite, as they address default judgments and stipulated settlements, not dismissals based on uncontested preliminary objections. See Zimmer v. Zimmer, 457 Pa. 488, 326 A.2d 318 (1974) (addressing conclusiveness of default judgment in res judicata context); Sustrick v. Jones & Laughlin Steel Corp., 413 Pa. 324, 197 A.2d 44 (1964) (claim was barred by stipulated settlement and discontinuance); Chamberlin of Pittsburgh, Inc. v. Fort Pitt Chem. Co., 237 Pa. Super. 528, 352 A.2d 176 (1975) (stipulated order of dismissal with prejudice served as a final

[4] Pennsylvania Rule of Civil Procedure 237.1(a) defines a judgment of non pros as "a judgment entered by praecipe pursuant to Rules 1037(a) and 1659."

judgment on the merits).[5] Accordingly, neither res judicata nor collateral estoppel precludes IPS from proceeding on its claim for contractual indemnity.[6]

B. IPS's Claims Against HMS Are Not Barred by Employer Immunity

The central substantive question raised by the Objections to IPS's contractual indemnification claim is whether HMS is immune from the contract's indemnification requirements by virtue of Section 481(b) of the Pennsylvania Workmen's Compensation Act ("Section 481(b)").[7] Based on the allegations in the Complaint and the attached documents, the Court must conclude that it is not.

Section 481(b) limits the liability of an employer when an employee is injured by a third party:

> In the event injury or death to an employe is caused by a third party, then such employe, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to receive damages by reason thereof, may bring their action at law against such third party, but the employer, his insurance carrier, their servants and agents, employes, 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 prior to the date of the occurrence which gave rise to the action.

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[5] HMS's reliance on Municipality of Monroeville v. Liberatore, 736 A.2d 31 (Pa. Commw. Ct. 1999), app. denied, 561 Pa. 704, 751 A.2d 195 (2000), and Kaller's, Inc. v. John J. Spencer Roofing, Inc., 388 Pa. Super. 361, 565 A.2d 794 (1989), is similarly misplaced. As stated supra, the Liberatore court held that a judgment of non pros is not a final judgment on the merits, even where it is entered with prejudice. 736 A.2d at 34. Kaller's, Inc. is also unpersuasive, as it does not address prejudice or the weight accorded either a judgment of non pros or dismissal based on uncontested preliminary objections.

[6] Because the Lloyd Order is not a final judgment on the merits, the Court need not address IPS's nascent argument that the stipulated dismissal of HMS in the Lloyd Action softened the Lloyd Order's impact.

[7] 77 Pa. C.S. § 481(b).

Section 481(b) (emphasis added).[8]

As illustrated by Bester v. Essex Crane Rental Corp, 422 Pa. Super. 178, 819 A.2d 304 (1993), general language of indemnification is insufficient to meet the standard set forth in 481(b). In Bester, an injured employee brought a negligence claim against a third party. The third party then attempted to join the employee's employer based on an indemnification provision in a lease agreement between the employer and the third party. This provision required the employer to indemnify the third party against "all loss, negligence, damage, expense, penalty, legal fees and costs, arising from any action on account of personal injury" and stated that the third party would not be "liable in any event for any loss, delay or damage of any kind of character. . . ." 422 Pa. Super. at 183, 619 A.2d at 306.

Sitting en banc, the Superior Court noted 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." 422 Pa. Super. at 184, 619 A.2d at 307 (citing Pittsburgh Steel Co. v. Patterson-Emerson-Comstock, Inc., 404 Pa. 53, 171 A.2d 185 (1961)). On this basis, the court concluded that the indemnification language did not expressly provide for employer liability and did not overcome the presumption of immunity in Section 481 (b):

> We apply today the requirement in the law 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 express provision for this contingency in the indemnification clause. . . .

[8] Given the verdict in the Lloyd Action, both IPS and HMS's focus on Section 481(b) in their arguments and IPS's failure to allege that HMS was negligent, the Court has inferred for the purposes of the Objections that the injury to Lloyd was caused by IPS's negligence.

> 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 own 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 Workmen's Compensation Act precludes any liability on the part of the employer.

422 Pa. Super. at 187, 619 A.2d at 308-09 (footnote omitted).

In contrast, the court in Hackman v. Moyer Packing Co., 423 Pa. Super. 378, 621 A.2d 166 (1993), held that the indemnification provision in a service contract adequately expressed the intent that the employer indemnify the third party. In Hackman, the contract stated that the employer would indemnify the third party against "any and all claim or claims brought by the agents, workmen, servants or employees of [the employer] for any alleged negligence or condition, caused or created, [in] whole or in part, by" the third party. 423 Pa. Super. at 382, 621 A.2d at 168. According to the court, this met the requirements set forth in Bester two months earlier.

The language in the Subcontract alone does not meet the standards required by Pennsylvania law. Paragraph Seven of the Subcontract reads as follows:

> Subcontractor assumes entire responsibility and liability for any and all claims and/or damages of any nature or character whatsoever for which Contractor shall be liable under the Contract Documents, or by operation of law, with respect to the work covered by this Subcontract and agrees to indemnify and save Contractor and Owner harmless from and against all claims, demands, liabilities, interest, loss, damage, attorneys' fees, costs and expenses of whatsoever kind or nature, whether for property damage, personal injuries (including death) to any and all persons, whether employees of Contractor or others, or otherwise, caused or occasioned thereby, resulting therefrom, arising out of or therefrom, or occurring in connection therewith to the same extent and obligation to which Contractor has assumed towards Owner under the Contract Documents, or as imposed by law, limited to the scope of the subject matter of this Subcontract.

Subcontract at ¶ 7 (capitalization removed and emphasis added). There is no specific language that requires HMS to indemnify IPS from liability to HMS employees arising from HMS's negligence. As a result, the Subcontract is of no assistance to IPS.

The language in the Contract, however, falls in the narrow gap between Bester and Hackman. Although HMS is not a signatory to the Contract, Paragraph Six of the Subcontract states that HMS "shall assume toward Contractor all of the obligations and responsibilities with respect to the work to be performed hereunder by Subcontractor which Contractor, by the Contract Documents, assumed toward the Owner." Subcontract at ¶ 6 (capitalization removed). See also Id. at ¶ 7 (HMS will indemnify IPS "to the same extent and obligation" IPS has agreed to indemnify Wyeth) [9] As part of its obligations to Wyeth, IPS is to indemnify Wyeth against certain claims:

> 3.12.1. To the fullest extent permitted by law, the Contractor shall indemnify, defend and hold harmless the Owner, its agents and employees from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expenses is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, but only to the extent caused in whole or in party by negligent acts or omissions of the Contractor or any Subcontractor, or anyone directly or indirectly employed by them or anyone for whose acts they may be liable for regardless whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall no[t] be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in Paragraph 3.12.1.
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> 3.12.2. In claims against any person or entity indemnified under this [P]aragraph 3.12 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under

[9] HMS argues that the Subcontract incorporates the terms of the Contract but does not address HMS's agreement to assume toward IPS all of IPS's responsibilities to HMS.

> this Paragraph 3.12 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers' or workmen's compensation acts, disability benefit acts or other employee benefit acts.

Contract at ¶ 3.12 ("Paragraph 3.12").

Based on the allegations in the Complaint, the Court believes that this language is sufficiently specific to waive Section 481(b) immunity. Contract Paragraph 3.12.2 contains a clear reference to claims by HMS employees and purports to nullify workers' compensation act limitations with regard to such claims, to the extent that they conflict with the remainder of Paragraph 3.12. This provision thus meets the requirements of Bester and supports a waiver of HMS's immunity in the event that its indemnification obligations were implicated elsewhere in Paragraph 3.12.

The plain language of Paragraph 3.12, combined with the incorporation language in the Subcontract, requires HMS to indemnify IPS in cases like the Lloyd Action. According to its express terms, IPS's indemnification obligations to Wyeth, and thus HMS's obligations to IPS, extend to those damages "caused in whole or in party by negligent acts or omissions of the Contractor or any Subcontractor. . . ." Although there may be questions as to the wisdom of agreeing to this provision, the Objections do not present any grounds why this indemnification provision should not be taken at face value. Consequently, the Complaint's allegations, combined with the language of the Contract and Subcontract, do not allow HMS to invoke its immunity under Section 481(b) or permit the Court to sustain the Objections to IPS's contractual indemnification claim.[10]

[10] Similarly, HMS's arguments based on general principles of contract must be rejected. HMS is correct that, "if 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

II. IPS's Remaining Counts Are Legally Sufficient

In contesting the legal sufficiency of the remaining counts against it, all of which are based on HMS's alleged failure to name IPS as an additional insured under its general insurance policy,[11] HMS argues that the Contract and the Subcontract do not require HMS to name IPS as an additional insured.

Paragraph 9.2.7 of the Contract states that the comprehensive general public liability insurance required of IPS "shall name [Wyeth] as an additional insured in matters covered by this Agreement." This coverage obligation became a duty that HMS owed to IPS through the language of the Subcontract. Subcontract at ¶ 6. In addition, the Contractor's Statement of Insurance Conditions, part of the documentation IPS allegedly sent to HMS, mandated that "[a]ll certificates of insurance . . . be issued to [IPS] naming [IPS] and [Wyeth] as additional insured. . . . Complaint at ¶ 28.[12] If correct,

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language. No inference from words of general import can establish such indemnification." Ruzzi v. Butler Petroleum Co., 527 Pa. 1, 7, 588 A.2d 1, 4 (1991) (citing Perry v. Payne, 217 Pa. 252, 66 A. 553 (1907)). As stated supra, however, HMS agreed in the Subcontract to assume toward IPS those obligations IPS assumed toward Wyeth. Among these are IPS's indemnification obligations, which include indemnification for claims arising from HMS's negligence.

[11] The remaining counts against HMS are for breach of contract, unjust enrichment, negligent misrepresentation and breach of the duty of good faith and fair dealing.

[12] Although IPS asserts that the Contractor's Statement of Insurance Conditions is attached to the Complaint as Exhibit I, HMS contends that it is not, as is required by Pennsylvania Rule of Civil Procedure 1019(i). Where the court and the defendant are both in possession of the document in question, however, an objection based on Rule 1019(i) will be overruled. McClellan v. Health Maint. Org. of Pa., 413 Pa. Super. 128, 145 n.10, 604 A.2d 1053, 1061 n.10 (1992) (objections based on a failure to attach a document were without merit where the complaint alleged that the document was in the possession of the defendants and set forth the substance of the document). See also Pa. R. Civ. P. 126 (allowing the rules of civil procedure to be "liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable" and allowing a court "to disregard any error or defect of procedure which does not affect the substantial rights of the

this establishes that HMS had a duty to name IPS as an additional insured under its general insurance policy and is sufficient to sustain IPS's remaining claims.[13]

CONCLUSION

IPS's claims, as set forth in the Complaint, are legally sufficient. As a result, the Court has overruled the Objections and has directed HMS to file an answer to the Complaint.

BY THE COURT:

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JOHN W. HERRON, J.

Date: July 2, 2001

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parties"); St. Hill & Assocs., P.C. v. Capital Asset Research Corp., May 2000, No. 5035, slip op. at 3 (C.P. Phila. Sept. 2, 2000) (Herron, J.) (overruling objection based on 1019(i) where plaintiff supplied both the court and the defendant with a copy of the missing document as attachment to its response to objections) (available at http://courts.phila.gov/cptcvcomp.htm). Because IPS has attached a copy of the Contractor's Statement of Insurance Conditions to its response to the Objections, the Complaint need not be dismissed based on an alleged failure to comply with 1019(i), although the Court recommends that IPS file a praecipe to add this document to the Complaint.

HMS also contends that there is no allegation that the Contractor's Statement of Insurance Conditions was made part of the Subcontract. While the Court shares HMS's concerns, the language in the Contract, as incorporated by the Subcontract, is sufficient to support IPS's arguments at this stage.

[13] Because HMS's res judicata and collateral estoppel arguments have been rejected, the Court need not consider whether Pennsylvania Rule of Civil Procedure 1020(d)(1) serves as a bar to IPS's claims.

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HMS INTERIORS, INC., et al., Defendants	:	Control No. 050599

ORDER

AND NOW, this 2nd day of July, 2001, upon consideration of the Preliminary Objections of Defendant HMS Interiors, Inc. to the Complaint of Plaintiff Integrated Project Services, and the Plaintiff's response thereto, and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED that the Preliminary Objections are OVERRULED. Defendant HMS Interiors, Inc. is directed to file an answer to the Complaint within twenty days of the date of entry of this Order.

BY THE COURT:

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JOHN W. HERRON, J.