IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JOHN SLATTERY, Plaintiff, v. PETTINARO CONSTRUCTION, CO. INC, and COURT HOUSE LLC, Defendants, And PETTINARO CONSTRUCTION, CO. INC, and COURT HOUSE LLC, Third-Party Plaintiff, v. DELCARD ASSOCIATES, INC. Third-Party Defendant.	)	C.A. No. N12C-11-252 FSS

Date Submitted: November 7, 2014
Date Decided: November 12, 2014

COMMISSIONER'S REPORT AND RECOMMENDATION THAT

THIRD-PARTY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED

AND

DEFENDANT/THIRD-PARTY PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED.

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MANNING, Commissioner

Before the Court are two motions for summary judgment. The first was filed by Delcard on October 14, 2014 and the second was filed by Pettinaro and Court House LLC., on October 15, 2014. Both parties filed a response on October 31, 2014. A hearing was held on November 7, 2014. Plaintiff's counsel was present at the hearing but is not a party to either motion for summary judgment. Per the Court's scheduling Order dated September 24, 2013, all dispositive motions were due October 15, 2014. A pretrial conference is scheduled for November 18, 2014, and trial is scheduled for December 1, 2014. Aside from the pending motions, the parties indicated that the case is ready for trial and that mediation was unsuccessful.

At the hearing on November 7, 2014, Delcard advised the Court that it also recently became aware of another basis to move for Summary Judgment that was not presented in the written pleadings.[1] The Court instructed Delcard to file an expanded Motion for Summary Judgment by November 12, 2014 and for Pettinaro to file a Response by November 17, 2014. Because the issue raised by Delcard at the hearing was

[1] Delcard also sought to argue that the indemnification clause encompassed by the AIA Document is inapplicable as to Delcard, as Subcontractors are not covered by the AIA. It was Delcard's position that only the Owner (Court House LLC) is indemnified from a Contractor's negligence (Pettinaro), not a Contractor from a Subcontractor's negligence. Obviously, Pettinaro disagreed.

not made in a written pleading prior to the motion deadline giving opposing counsel an opportunity to respond, it is not properly before the Court and is not part of this Report.

After fully and thoroughly reviewing the parties' respective positions, the Court has determined that the issues presented herein cannot be decided on the record presented. For the reasons that follow, it is hereby recommended that both Motions for Summary Judgment be denied.

FACTS

On January 27, 2011, Plaintiff John Slattery was working as a pipefitter for Delcard Associates on the roof of the old Family Court building in Wilmington, Delaware. Delcard was a subcontractor for Pettinaro Construction who was acting as the general contractor and construction manager for the owner of the building, Court House LLC. Court House LLC. is owned by Pettinaro Construction. The night prior to the incident it had snowed three to four inches and that snow remained on the roof of the building. While working on the roof, Plaintiff slipped and fell as he attempted to walk-up a small incline using a wooden shipping pallet as a type of step or ramp. It is unknown who put the wooden pallet on the roof, but it was covered, to a certain extent at least, by snow. Plaintiff's job was to "pull measurements" and to drill holes in pipes on the roof. Plaintiff's work area was located in a small metal shed located on the rooftop that housed building mechanical components. The building had two such sheds located a short distance apart. The area where Plaintiff fell was located somewhere between the two small buildings. At the hearing, counsel for Delcard and Pettinaro gave conflicting accounts as to how much, if any, of the snow had been removed and from what part of

the roof. Plaintiff had been working up on the roof for most of the morning prior to the fall. Plaintiff finished work on the day of the fall and did not report his injury until he arrived at work the next day with worsening pain.

PROCEDURAL HISTORY

Plaintiff brought suit against Pettinaro and Court House LLC., on November 30, 2012, alleging that their negligence was the direct and proximate result of the injuries he sustained while working on the roof. Pettinaro filed its Answer and a Third-Party Complaint against Delcard on March 15, 2013. Pettinaro denied liability, asserted various affirmative defenses and, in the event found liable to Plaintiff, sought contractual indemnification from Delcard pursuant to a Subcontact Agreement.

On October 14, 2014, Delcard moved for Summary Judgement against Pettinaro "based on the inability of Pettinaro to prove the most essential element of its case against Delcard namely, that Delcard had a duty to clear the snow and ice on the rooftop of the courthouse." Additionally, Delcard claims that the indemnification clause of the Subcontract Agreement is void and unenforceable under 6 Del. Code § 2704(a), as against public policy. Delcard argues that the agreement, in effect, allows Pettinaro to indemnify itself from its own negligence.

On October 15, 2014, Petinaro moved for Summary Judgment against Delcard. Pettinaro argues, in essence, that Delcard was negligent and breached a duty of care owed to Plaintiff as a matter of law. Pettinaro argues that Delcard breached the Subcontract Agreement by not taking reasonable safety precautions to prevent injury to its employees. Pettinaro also claims that it is entitled to contractual indemnification from Delcard as to

any damages awarded to Plaintiff from the accident. Both parties filed a Response on October 31, 2014, moving the Court to deny the opposing Motion.

II. STANDARD OF REVIEW

The Court's principal function when considering a motion for summary judgment is to examine the record to determine whether genuine issues of material fact exist.[2] Summary judgment will be granted if, after viewing the record in a light most favorable to a non-moving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.[3] If, however, the record reveals that material facts are in dispute, or if the factual record has not been developed thoroughly enough to allow the Court to apply the law to the factual record *sub judice*, then summary judgment will not be granted.[4]

The Court's function is not to weigh the evidence or to accept that which appears to have greater weight.[5] Summary judgment is not appropriate when the Court determines that it does not have sufficient facts in the record to enable it to apply the law to the facts before it.[6]

[2] Super.Ct.Civ.R. 56(c); *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del.Super. 1973).
[3] *Id.*
[4] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).
[5] *Oliver B. Cannon & Sons, Inc.*, 312 A.2d at 325.
[6] *Savor, Inc. v. FMR Corp. and Upromise, Inc.*, 2003 WL 21054394 (Del.Super. 2003).

III. ANALYSIS

The facts before the Court, as gleaned from the arguments of counsel at the hearing on November 7, 2014, and the pleadings and exhibits, make it clear that there are material issues of fact that are unknown and in dispute, making summary judgment premature at this point. The terms of the Subcontract Agreement (thru incorporation of the AIA Document § 3.18.1) required Delcard to indemnify the Owner (in this case Court House LLC., and Pettinaro) for bodily injury of its workers, "but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them…" Thus, Delcard is required to indemnify Pettinaro, but only to the extent Delcard may be found negligent. Assuming a jury finds both Defendants' negligent, it will be a jury question as to the percent of liability each party will share.

Delcard was required to take reasonable safety precautions for the protection and safety of its workers on the jobsite per the Subcontract Agreement. Facts in the record show that everyone on the jobsite was aware that it had snowed and that the roof was covered in snow. The facts also show that Pattinaro knew, or at least reasonable should have expected, that Delcard employees would be going up to work on the roof that morning. Deposition testimony reveals that Pettinaro employees understood that part of their job was snow removal, and that included the roof.[7]

At the November 7, 2014, hearing, Delcard argued that its duty to make the jobsite safe for its employees only applied to the very specific locations in (or on, in this case) the building where they were actually working. Delcard's position is that the area in which plaintiff fell was not part of its work area, thus it had no duty to make the area,

[7] Delcard's Motion for Summary Judgment, depo. testimony of Cantiello at 18: 10-14.

including the wooden pallet, between the two rooftop sheds, safe. The facts available to the Court at this point seem to indicate that plaintiff slipped and fell as he walked from one shed to the other, but he was only actively working in one of the two sheds at the time. For obvious reasons, Delcard would like to draw its area of safety responsibility as small as possible – perhaps as small as the specific pipe being worked on and the spot the worker was standing at that same moment!

On the other hand, it is apparent that Pettinaro employees knew that removing the snow from the rooftop, to make it safe, was part of their job. What is unknown however, is how much snow, if any, had been removed by the time of the *fall*. It is also unclear if it would have even mattered, as plaintiff was attempting to walk up an incline using a wooden pallet. Numerous questions remain that only a jury can decide. For example: (1) did Delcard expose Plaintiff to a hazardous work environment, or is working in a few inches of snow common practice in the industry, (2) was Pettinaro negligent in not removing the snow from the wooden pallet itself, (3) did Plaintiff take an unnecessary risk by stepping onto the snow covered pallet, (4) was the pallet inside or outside of what could reasonably be considered Delcard's area of safety responsibility?

Upon review of the record, the Court is satisfied that entry of judgment at this time would be premature. Summary judgment is not appropriate when the Court determines that it does not have sufficient facts in the record to enable it to apply the law to the facts before it.[8] Such is the case here. Because the record needs to be more fully developed and because material issues of fact exist, and it is not the Court's function to weigh the evidence, this matter is not ripe for decision on the merits.

IV. CONCLUSION

For the reasons set forth herein, the motions for Summary Judgment should both be DENIED.

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Bradley V. Manning,
Commissioner

[8] *Savor, Inc. v. FMR Corp. and Upromise, Inc.*, 2003 WL 21054394 (Del.Super. 2003).