IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

CARLOS PEREZ and LEYDY PEREZ,
Plaintiffs,
v.

NVR, INC. and
CREATIVE TOUCH INTERIORS, INC.,
Defendants/Third-Party Plaintiffs,
v.

TOP FLOORING & CONSTRUCITON, INC. AND DIPPOLD MARBLE AND GRANITE, INC.,
Third Party Defendants,

and

TOP FLOORING & CONSTRUCTIONS, INC.,
Third-Party Defendant/
Fourth-Party Plaintiff,
v.

DIEGO MOYA,
Fourth-Party Defendant.

C.A. No.: CPU4-13-003321

Submitted: October 10, 2014
Decided: November 5, 2014

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MEMORANDUM OPINION AND ORDER ON THIRD-PARTY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

On September 8, 2014, Third-Party Defendant Dippold Marble and Granite, Inc. (hereinafter "Dippold") filed a Motion for Partial Summary Judgment (hereinafter "the Motion") in the above-captioned matter. The Court heard legal argument on the Motion on October 10, 2014. At the end of the hearing, the Court reserved decision. This is the Court's Decision and Order.

I. Facts

On October 24, 2013, Plaintiffs Carlos and Leydy Perez (collectively, "Plaintiffs") filed this personal injury action against Defendants NVR, Inc. and Creative Touch Interiors, Inc. (hereinafter "NVR" and "Creative Touch," respectively).[1] Plaintiffs allege in their Complaint that on November 11, 2011, Plaintiff Carlos Perez (hereinafter "Mr. Perez") sustained injuries while he was working at a construction site for a residential home in Maryland.[2] Mr. Perez was injured when he was carrying a granite countertop into the home and fell through an air-condition vent hole in the floor, which was allegedly improperly covered. After the incident, Mr. Perez filed a claim for and received worker's compensation benefits.

On March 6, 2014, NVR and Creative Touch filed an Answer and Third Party Complaint against Top Flooring & Construction, Inc. (hereinafter "Top Flooring") and Dippold.[3] In its Third-Party Complaint, NVR and Creative Touch claim, *inter alia*, that Dippold "contracted with one or both of the Third-Party Plaintiffs to perform work" at the construction site involved in this

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[1] Plaintiffs are husband and wife, and included within this action is Mrs. Perez's claim for loss of consortium.
[2] NVR was the general contractor for the project, and Creative Touch was one of its subcontractors.
[3] Both Top Flooring and Dippold were subcontractors on the building project. Dippold was contracted by NVR to install granite countertops in homes being built by NVR.

matter.[4] NVR and Creative Touch also claim that to the extent they are found responsible for Plaintiffs' claims, Dippold is responsible to indemnify and provide contribution to NVR and Creative Touch "pursuant to Statute, Common Law and Contract based liability."[5]

II. Discussion

In this Motion for Summary Judgment, Dippold seeks to dismiss any common law claims or contribution claims brought by NVR, and all claims brought by Creative Touch. First, with regard to NVR's claims, Dippold argues that Delaware law does not permit claims for contribution against Dippold because Mr. Perez received benefits under worker's compensation. Dippold claims that it cannot be liable to Mr. Perez and therefore cannot be held liable as a joint tortfeasor with NVR. Dippold concedes that NVR's claims for express indemnification are properly before the Court, as the contract between NVR and Dippold includes a provision on indemnification;[6] however, Dippold argues that all of NVR's common law claims must be dismissed. Second, with regard to Creative Touch's claims, Dippold argues that it did not have a contractual relationship with Creative Touch, and therefore, any claims brought by Creative Touch should be dismissed.

In response to the Motion, NVR and Creative Touch argue that that Dippold's Motion is premature because "...it remains to be seen whether the factual circumstances surrounding the incident will support Creative Touch's implied indemnity claim" under Delaware law.[7]

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[4] NVR and Creative Touch's Third-Party Complaint, ¶ 28.
[5] NVR and Creative Touch's Third-Party Complaint, ¶ 34.
[6] Dippold's Motion for Partial Summary Judgment, Ex. C.
[7] NVR and Creative Touch's Response to Dippold's Motion for Partial Summary Judgment, ¶ 6.

III. The Law

A. Summary Judgment Standard

In order to prevail on a Motion for Summary Judgment, the moving party must prove that there are no genuine issues as to any material fact within the record, and that it is entitled to judgment as a matter of law.[8] In reviewing the record, the Court must review all facts and reasonable inferences in a light most favorable to the nonmoving party.[9] When the moving party produces sufficient evidence in support of its motion, the burden shifts to the nonmoving party to show that there is a material issue of fact.[10] If the Court finds that there is a material fact in dispute, or if the record has not been fully developed to allow the Court to apply the law, then summary judgment must be denied.[11]

B. Contribution and Indemnification

Under 19 *Del. C.* § 2304, the exclusive remedy for an employee who has a work-related accident resulting in personal injury is worker's compensation benefits.[12] This "exclusivity provision" precludes an injured employee from bringing a suit for negligence against his employer.[13] As a result, "...in a suit brought by an injured employee against a third party where the employer has paid compensation benefits to the employee," the imposition of joint tort liability upon the employer is also precluded;[14] joint tortfeasors must be liable to the same person asserting the claim.[15] In a similar vein, employers are also precluded from liability as a joint tortfeasor when an employee's spouse brings a claim for loss of consortium because the spouse's

[8] CCP Civil Rule 56(c).
[9] *Wells Fargo Financial Nat. Bank v. Lucas-Caple*, 2011 WL 809710, at *1 (Del. Com. Pl. Jan. 24, 2011).
[10] *Johnson v. Benchmark Builders, Inc.*, 20018 WL 867950, at *1 (Del. Com. Pl. March 17, 2008).
[11] *Waterhouse v. Hollingsworkth*, 2010 WL 8250801, at *2 (Del. Super. May 3, 2010) (citations omitted).
[12] *Stayton v. Clariant Corp.*, 10 A.3d 597, 599 (Del. 2010).
[13] *Id.* at 599-60
[14] *Precision Air, Inc. v. Standard Chlorine of Delaware, Inc.*, 654 A.2d 403, 406-07 (Del. 1995).
[15] *Diamond State Telephone Co. v. University of Del.*, 269 A.2d 52, 55 (Del. 1970).

claim "stands on the merits of [the employee's] entitlement to sue his employer."[16] Consequently, "[b]ecause the employer cannot be held liable as a joint tortfeasor, it is not obligated to provide contribution to the third party."[17]

However, under a narrow exception to § 2304, an employer may be obligated to indemnify a third party where a contract, either express or implied, between the employer and third party requires the employer to: "(i) perform work in a workmanlike manner; and (ii) indemnify the third-party-indemnitee for any claims arising from the employer-indemnitor's own negligence."[18] Although an employer can be held liable for express or implied indemnification, a third-party tortfeasor may not bring claims for both express and implied indemnification;[19] "[t]he law will not imply a right of indemnity where the parties have entered into a written contract with express indemnification provisions."[20] A third-party tortfeasor may only hold an employer liable for implied indemnity where the employer:

> (1) creates a dangerous condition on the third party's premises and injury results; (2) . . . knowingly permits the employee to work under dangerous conditions caused by the third party and injury results, and; (3) . . . activates a latent dangerous condition created by the third party and injury results.[21]

Thus, when the *actual cause* of the employee's injury is *the result* of the employer's breach of its contractual duty, a third-party tortfeasor may assert against the employer.[22]

IV. Opinion

First, the Court will address Dippold's arguments concerning NVR and Creative Touch's claims for contribution. In reviewing the record in a light most favorable to NVR, it is clear that

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[16] *Farrall v. Armstrong Cork. Co.*, 457 A.2d 763, 771 (Del. Super. Jan. 7, 1983).
[17] *Precision Air*, 654 A.2d at 407.
[18] *Id.*
[19] *Davis v. R.C. Peoples, Inc.*, 2003 WL 21733013, at *4 (Del. Super. Ct. July 25, 2003).
[20] *Rock v. Delaware. Elec. Co-op., Inc.*, 328 A.2d 449, 455 (Del. Super. Ct. 1974); *see also Delle Donne & Associates, LLP v. Millar Elevator Service Co.*, 840 A.2d 1244, 1251 (Del. 2004)
[21] *Diamond State*, 269 A.2d at 55.
[22] *Laugelle v. Bell Helicopter Textron, Inc.*, 2014 WL 2621675, at *6 fn. 48 (Del. Super. Ct. June 11, 2014) (citing *Precision Air*, 654 A.2d at 407) (emphasis added).

all claims for contribution against Dippold are barred under 19 *Del. C.* § 2304. The record indicates that at the time of the alleged accident, Mr. Perez was working as a granite installer for Dippold. Mr. Perez then filed for and received workers compensation benefits, which Dippold paid as Mr. Perez's employer. Therefore, under Delaware law, Dippold cannot be held liable as a joint tortfeasor, and is not obligated to provide contribution to NVR or Creative Touch[23]. Accordingly, NVR and Creative Touch's contribution claims against Dippold are dismissed.

The Court will now address Dippold's arguments concerning NVR and Creative Touch's claims for express and implied indemnification.[24] With respect to NVR, it is clear that all implied indemnification claims asserted by NVR are barred because NVR and Dippold expressly agreed to an indemnification provision in Section Nine of the "NVR Master Agreement." Therefore, Dippold can only be indemnified to the extent of the indemnification provision. Accordingly, NVR's claims for implied indemnification against Dippold are dismissed.

Turning to Dippold's argument concerning Creative Touch, in reviewing the record in a light most favorable to Creative Touch, it is unclear as to whether the factual circumstances surrounding Mr. Perez's alleged accident will support Creative Touch's implied indemnity claim. Although Dippold asserts that it does not have any contractual relationship with Creative Touch, the Third-Party Complaint alleges that Dippold "contracted with one or both of the Third-Party Plaintiffs to perform work" at the construction site involved in this matter.[25] Consequently, an issue of material fact exists as to whether Dippold and Creative Touch are in privity of contract. Accordingly, Creative Touch's claims for implied indemnification will remain before the Court.

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[23] This applies to both Mr. Perez and Mrs. Perez's claims as Mrs. Perez's claims stand on Mr. Perez's ability to sue Dippold.

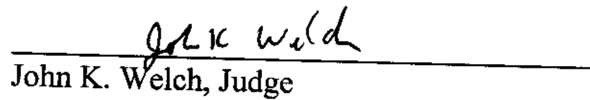
[24] The Court will not address Dippold's liability under an express indemnification theory as Dippold concedes to its liability as the contract between the parties clearly provides for indemnification.

[25] NVR and Creative Touch's Third-Party Complaint, ¶ 28.

V. Order

Third-Party Defendant Dippold Marble and Granite, Inc.'s Motion for Partial Summary Judgment is hereby **GRANTED in part and DENIED in part.** The Court grants summary judgment with respect to NVR and Creative Touch's claims for contribution, and NVR's claim for implied indemnity. The Court denies summary judgment with respect to Creative Touch's claim for implied indemnity.

IT IS SO ORDERED this 5th day of November, 2014.



John K. Welch, Judge

cc: Ms. Tamu White, Civil Case Manager