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This 8th day of October, 2019, upon consideration of the Motion to Dismiss of Defendant Adam McMillan Construction, LLC, (“AMC”), the Responses of Plaintiff Jactinto DeSousa (“DeSousa”) and Defendant D.R. Horton, Inc. – New Jersey (“Horton”), oral argument, and the record in this case, it appears to the Court that:

1. DeSousa brought this personal injury action for a work related construction site injury against Station Builders, Inc. (“Station Builders”), which had engaged his employer Wellington Nunez;¹ AMC, the general contractor, which had hired Station Builders; and the property owner Horton, which had hired AMC.² The Court entered a default judgment against Station Builders on September 24, 2018.³

2. The parties agree that AMC, the general contractor, provided workers’ compensation insurance coverage for DeSousa.⁴ Citing a Pennsylvania Superior Court case construing Delaware’s workers’ compensation law - *Sheard v. J. J. Deluca, Co.*⁵ – AMC moves to dismiss this tort action under Superior Court Civil

¹ Wellington Nunez may also be known as Wellington Silva.

² Pl.’s Third Amend. Compl., D.I. 23.

³ D.I. 45.

⁴ AMC’s Mot. Dismiss, D.I. 64; Pl.’s Resp. Mot. Dismiss, D.I. 69; Horton’s Resp. Mot. Dismiss, D.I. 70. In his response, DeSousa explains that AMC provided workers’ compensation insurance coverage because Station Builders failed to do so and AMC failed to obtain a certificate of workers’ compensation insurance coverage as required by 19 *Del. C.* § 2311(a)(5). As a result, § 2311(a)(5) required AMC to provide that coverage. D.I. 69.

⁵ 92 A.3d 68 (Pa. Super. 2014).

Rules 12(b)(1) and/or 12(b)(6).⁶ It argues that Delaware law deems AMC to be DeSousa's employer, and, as a result, workers' compensation is the exclusive remedy available to DeSousa for personal injury by accident arising out of or in the course of employment, and, thus, this tort action is barred.⁷ It also argues that the failure to treat AMC as any other employer who provides workers' compensation insurance by permitting it to be sued in tort would result in an equal protection violation.⁸

3. DeSousa opposes the Motion to Dismiss.⁹ Horton joins in DeSousa's opposition.¹⁰ Together they argue that AMC's motion ignores relevant statutory and case law authority. Specifically, citing 19 *Del. C.* § 2311(a)(5), they argue that AMC is not deemed DeSousa's employer despite being required to provide workers' compensation coverage.¹¹ Further, they cite *McKirby v. A&J Builders, Inc.*¹² for the proposition that an injured worker who received workers' compensation benefits, despite the lack of an employer-employee relationship with the entity required to insure the claim, is permitted to proceed in tort and is not barred by the exclusivity

⁶ AMC's Mot. Dismiss, D.I. 64.

⁷ *Id.*

⁸ *Id.*

⁹ Pl.'s Resp. Mot. Dismiss, D.I. 69.

¹⁰ Horton's Resp. Mot. Dismiss, D.I. 70.

¹¹ D.I. 69, D.I. 70.

¹² 2009 WL 713887 (Del. Super. 2009).

provisions of the Workers' Compensation Act (the "Act").¹³ They also dispute that allowing AMC to be sued in tort would result in an equal protection violation because the statute upon which DeSousa relies applies to all contractors.¹⁴ Additionally, Horton points out that it maintains crossclaims against AMC for breaches of various duties and obligations under contractual and common law.¹⁵

4. Delaware's Workers' Compensation Act provides:

Every employer and employee, adult and minor, except as expressly excluded in this chapter, shall be bound by this chapter respectively to pay and to accept compensation for personal injury or death by accident arising out of and in the course of employment, regardless of the question of negligence and to the exclusion of all other rights and remedies.¹⁶

It is by this exclusivity provision that AMC seeks dismissal of the Third Amended Complaint. But, DeSousa points out that under 19 *Del. C.* § 2311(a)(5), a contracting party deemed to have insured workers' compensation claims because it failed to obtain a certificate of insurance from an independent or subcontractor is not deemed

¹³ *Id.*

¹⁴ *Id.*

¹⁵ D.I. 70.

¹⁶ 19 *Del. C.* 2304.

the employer of an independent contractor or subcontractor or their employees.¹⁷ Thus, according to DeSousa, because he was not deemed to be in an employer – employee relationship with AMC, the § 2304 exclusivity provision is inapplicable and he may sue AMC in tort. As a result, if DeSousa is correct, AMC was not only required to insure DeSousa’s workers’ compensation claim, but also, it is liable to him in tort. DeSousa believes *McKirby* sanctions this result, as, at least implicitly, the court did in *Estevam v. Silva*.¹⁸ But, a close reading of *McKirby* reveals that it does not explicitly green-light tort suits against those contractors who have been deemed to have provided workers’ compensation insurance.

5. In *McKirby*, McKirby, who was employed as a carpenter by A & J Builders, Inc. “(A & J)”, was injured while working on a home being constructed in North Bethany Beach, Delaware.¹⁹ The general contractor on the job was R. A. Bunting & Company, Inc. (Bunting”). It was alleged that A & J did not have

¹⁷ (5) Any contracting entity shall obtain from an independent contractor or subcontractor and shall retain for 3 years from the date of the contract the following; a notice of exemption of executive officers or limited liability company members and/or a certificate of insurance in force under this chapter. If the contracting entity shall fail to do so, **the contracting entity shall not be deemed the employer of any independent contractor or subcontractor of their employees** but shall be deemed to insure any workers’ compensation claims under this chapter. (Emphasis added.).

¹⁸ C.A. No. S11-08-004 ESB, *See* Pl’s Resp. Mot. Dismiss at Ex. C (transcript of bench ruling of March 8, 2013).

¹⁹ *McKirby* at *1.

workers' compensation insurance, but that Bunting did.²⁰ In analyzing the then-recent changes to 19 *Del. C.* § 2311(a)(5), the court noted that the change in section (a)(5) clarified the lack of an employer-employee relationship with the contracting entity in order to preserve tort liability claims by injured workers against third parties in the position of A & J. Aligning the parties in *McKirby* with the parties here, A & J (which the court ruled could be sued in tort) corresponds to DeSousa's employer Station Builders. Bunting corresponds to AMC. *McKirby* does not address Bunting's, and thus AMC's, liability in tort directly.²¹

6. The Act removed workplace injuries from traditional personal injury law.²² The philosophy of the Act is "to obviate the need for litigation and to give an injured employee, irrespective of fault, prompt compensation."²³ More broadly stated the Act is intended "to eliminate questions of negligence and fault in industrial accidents, and to substitute a reasonable scale of compensation for common-law remedies, which experience has shown to be, generally speaking, inadequate to the interest of those who had become casualties of industry."²⁴ In order to effectuate

²⁰ *Id.*

²¹ Indeed, the issue in *McKirby* was whether Bunting was required to provide workers' compensation insurance under § 2311(a)(5), a proposition AMC does not contest. *See McKirby* at *4.

²² *See generally*, Christopher P. Baum, *Uncovering the Roots: A Brief Discussion of the History, Policy, and Purposes of Delaware's Workers' Compensation Act*, 16 *Del. L. Rev.* 1 (2016).

²³ *Histed v. E.I. Du Pont de Nemours & Co.*, 621 A.2d 340, 341 (Del. 1993).

²⁴ *Hill v. Moskin Stores, Inc.*, 165 A.2d 447, 451 (Del. 1960).

that purpose, workers' compensation was designated the exclusive remedy for such injuries.

7. Here, AMC provided the worker's compensation insurance by which DeSousa apparently was compensated. Thus, it would appear that the purpose of the Act has been fulfilled. Nonetheless, DeSousa seeks further compensation in tort. He points to two statutes. One, § 2304, limits the exclusivity provision of the Act to employers, and the other, § 2311(a)(5), specifically deems contractors in AMC's position not to be employers. In the Court's view, there is a tension, at least under the facts here, between the purpose of the Act and § 2311(a)(5). Nonetheless, the language of §§ 2304 and 2311(a)(5) is clear – AMC is not deemed an employer, and only employers are afforded the exclusivity of § 2304. Since it is not in the Court's purview to resolve such legislatively created tension (to the extent that the Court correctly perceives any tension), AMC is not entitled to dismissal on exclusivity grounds, and DeSousa may proceed in tort under the Act.

8. *Sheard* is not dispositive. Pennsylvania courts describe litigants in AMC's position as "statutory employers" entitled to tort immunity due to the exclusivity provision of the act.²⁵ But, *Sheard* cites no provision under the Pennsylvania's Workers' Compensation Act akin to § 2311(a)(5). Further, while *Sheard* cites that section, it does not address the language at issue here deeming

²⁵ *Sheard* at 74,75.

contractors who provide default workers' compensation insurance not to be employers of the injured employer.²⁶

9. AMC's equal protection claim is also unavailing. AMC argues that exposing it to tort liability after it had provided DeSousa with workers' compensation coverage would be treating it differently than other employers who provided workers compensation coverage, but have no potential tort liability.²⁷ Such disparate treatment would violate the Equal protection Clause of the 14th Amendment to the United States Constitution according to AMC.²⁸ Absent a suspect classification or a fundamental right, neither of which AMC alleges, AMC has the burden of showing a lack of a rational basis for treating it differently than other employers who provided workers' compensation benefits.²⁹ When considering statutory distinctions not involving suspect classification or fundamental rights, this Court's inquiry "is confined to whether the legislative decision is rationally related to *any* legitimate governmental objective or purpose" (emphasis in original).³⁰ Further, it is not necessary that the conceivable legislative objective be the actual

²⁶ *Id.* at 77.

²⁷ AMC's Mot. Dismiss, D.I. 64.

²⁸ *Id.*

²⁹ *Cheswold Volunteer Fire Co. v. Lambertson Const. Co.*, 489 A.2d 413, 418 (Del. 1984).

³⁰ *Prices Corner Liquors, Inc. v. Delaware Alcoholic Control Com'n.*, 705 A.2d 571, 574 (Del. 1998).

basis used by the legislature.³¹ All that is necessary for a statute to withstand constitutional challenge is that there be some rational relationship between a classification and a legitimate state interest.³²

10. If the General Assembly intended for those who have provided workers' compensation insurance to be liable in tort also, is there a rational basis for that intention? In the case of AMC and other general contractors similarly situated to it there is. AMC was required to provide workers' compensation insurance to DeSousa only because DeSousa's employer did not do so in the first instance. Had AMC been more diligent in determining the status of Station Builders' compliance with its obligation to provide workers' compensation insurance, it might have escaped a need for it to provide that insurance. Thus, exposing general contractors to liability both in tort and secondarily for workers compensation insurance incentivizes general contractors to be diligent in employing only subcontractors who comply with the Workers' Compensation Act, resulting in greater compliance with the Act. Accordingly, the Court finds a rational basis for exposing AMC to tort liability after it had provided workers' compensation insurance.


11. Finally, Horton's crossclaims against AMC survive in any event.

³¹ *Id.*

³² *Id.* at 575-76.

THEREFORE, Defendant Adam McMillan Construction, LLC's Motion to Dismiss is **DENIED**.

IT IS SO ORDERED.



Ferris W. Wharton, J.