IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CHRISTOPHER GIERY and BRIDGET GIERY, h/w	)	
Plaintiffs,	)	
v.	)	C.A. No. 08C-04-146 JAP
STOVER HOMES, L.L.C. and K & S DRYWALL, INC.	)	
Defendants.	)	
v.	)	
STOVER HOMES, L.L.C.	)	
Third-Party Plaintiff	)	
v.	)	
JOHNNY RAY MILLER CONSTRUCTION L.L.C. and CUSTOM CABINET SHOP, INC.,	)	
Third-Party Defendants	)	

Submitted: March 03, 2009
Decided: March 24, 2009

MEMORANDUM OPINION

Michael A. Pedicone, Esquire, Wilmington, Delaware – Attorney for Plaintiffs Christopher Giery and Bridget Giery, h/w.

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Mary E. Sherlock, Esquire, Wilmington, Delaware – Attorney for K & S Drywall, Inc.

Jeffrey A. Young, Esquire, Dover, Delaware – Attorney for Johnny Ray Miller Construction L.L.C.

Timothy S. Martin, Esquire, Wilmington, Delaware – Attorney for Custom Cabinet Shop, Inc.

Third party defendant Custom Cabinet Shop, Inc. has moved to dismiss K & S Drywall's third party complaint against it on the ground that (1) Drywall's claim for contribution is barred by the Workers Compensation Act and (2) Drywall's claim for indemnification fails because there is no contractual relationship between Custom Cabinet and Drywall. For the following reasons the Court agrees with Custom Cabinet and Drywall's third party complaint against it is **DISMISSED.**

FACTS

Plaintiff Christopher Giery was employed by Custom Cabinets in June, 2006 when he was delivering cabinets to a construction site in Stone Ridge Development in Dover.[1] While Mr. Giery was carrying a sink base up to the second floor of the project he slipped on a board and fell twelve feet to the floor below injuring himself.[2] Mr. Giery and his wife brought suit against Stover Homes (the general contractor) and Drywall (a subcontractor). Both defendants brought third party complaints against Custom Cabinets (a subcontractor of Stover Homes) and Johnny Ray Miller Construction (another subcontractor of Stover Homes) seeking contribution

[1] Complaint, ¶¶ 11, 12, 6. The Court may refer to the underlying complaint brought by the plaintiffs because Drywall referred to it in its Third Party Complaint against Custom Cabinet. And is inextricably intertwined with the Third-Party Complaint. *See In re Santa Fe Pacific Corp. Shareholder Litigation*, 669 A.2d 59, 60-1 (Del. 1995) discussing limited circumstances in which courts can consider materials other than Complaint in determining whether to dismiss the Complaint). In any event, references to the underlying complaint are made solely for the purpose of providing background information.
[2] *Id.* ¶¶ 18, 24.

or indemnification. There is the usual assortment of cross-claims and claims of contributory fault, none of which are pertinent to the issue presently before the Court.

ANALYSIS

Drywall's claim for contribution must be dismissed because, by virtue of the Workers' Compensation Act, Custom Cabinet cannot be a joint tort-feasor with Drywall. That act provides that payment of workers compensation to an injured employee is the employee's exclusive remedy against his or her employer.[3] Because the act is the employee's exclusive remedy, the employee cannot bring suit against the employer for his or her injuries, and the employer cannot therefore be liable to the employer as a tort-feasor. But the Joint Tort-feasors Act[4] "requires that in order to enforce contribution, joint tort-feasors must be liable to the same person asserting the claim."[5] Consequently, third party tort-feasors have no right of contribution against the non-tortfeasor employer. Drywall's claim for contribution against Custom Cabinet must therefore be dismissed.[6]

Drywall's claim for indemnification requires a somewhat different analysis. Because of the exclusivity rule embodied in the Workers'

[3] 19 *Del.C.* § 2304.
[4] 10 *Del.C.* § 6301, *et seq.*
[5] *Diamond State Telephone Co. v. University of Delaware*, 269 A.2d 52, 55 (Del. 1970).
[6] *Id.*

Compensation Act, Drywall's claim for indemnity "must be stated in terms of a contractual cause of action rather than a claim based in tort."[7] A long-recognized exception to the exclusivity rule arises when an employer has contractually obligated itself to indemnify third parties for claims arising from injuries to its employees.[8] In order to establish such a claim, therefore, Drywall must allege some contract or "special relationship" between it and Custom Cabinets.[9] Usually such "special relationship" exists in instances in which there is a bailment.[10] Drywall admits that it had no contractual relationship with Custom Cabinets.[11] Nor does it argue that a "special relationship" existed between it and Custom Cabinets.

In an effort to circumvent the rule that absent a contractual or special relationship there is no right to indemnity, Drywall seizes upon certain language in *Diamond State Telephone v. University of Delaware,*[12] wherein an employee of Diamond State was electrocuted while installing telephone lines at the University of Delaware. The employee's widow and estate brought suit against the University which in turn brought a third party claim

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[7] *S W (Delaware) Inc. v. American Consumer Industries, Inc.*, 450 A.2d 887, 888 n.1 (Del. 1982).
[8] *Id.*
[9] *Id* at 890; *Howard, Needles, Tammen and Bergendorf v. Steers, Perini and Pomeroy, 312 A.2d 621 (Del. 1973) (*finding third party had no claims for indemnification against employer when third party had no contractual relationship with the employer*).*
[10] A. Larson, Larson's Workers' Compensation Law, §121.05 (2004 ed.)
[11] In its response to Custom Cabinet's motion, Drywall states that "[Drywall] and Custom Cabinet admittedly did not have a contract between them for any work performed on the construction site in question" (Response ¶6).
[12] 269 A.2d 52 (Del. 1970).

against Diamond State for indemnification. On interlocutory appeal the Delaware Supreme Court held that by reason of the exclusivity doctrine the University could not proceed on a tort theory against Diamond State. The Court ruled that if there is a contractual relationship with an express or implied obligation of indemnification a party may seek indemnification from the injured plaintiff's employer.

Drywall points to the following language in *Diamond State*:

> In 2A Larson, Workmen's Compensation Law s 76.43(a) (1970) at page 250.44, Et seq. the author examines and classifies the numerous cases handed down within the past 20 years in this field. He distinguishes between those cases which deal with an express written contract between the parties which contain an express covenant to perform in a workmanlike manner, or from which such a covenant may be implied. With respect to the others, he breaks them down into four categories which may be stated as follows:
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> The first category is that in which the employer coming upon the premises to perform his services creates a dangerous condition and the third party fails to discover that dangerous condition and injury results. In that circumstance, the employer is liable to indemnify the third party for any damages obtained against it.
>
> In this category falls the Ryan case which allowed indemnification for the failure of the employer to correct a dangerous condition it, itself, had created and which had not been discovered by the third party, in that case a ship owner.
>
> * * *
>
> The third category is that in which the third party creates a dangerous condition on its premises and the employer, coming on the premises to perform its services, discovers the dangerous condition but continues to work, and injury results. In that circumstance, a majority of the reported decisions holds the employer liable to indemnify the third party for damages collected against it.[13]

It argues there is a factual issue whether Custom Cabinet removed a stair rail which would have kept its employee from falling, thus bringing this case

[13] *Id.* at 58-59.

within the first category described by Professor Larson. Alternatively, Drywall asserts the plaintiff (Custom Cabinet's employee) proceeded to use the stairway even though a railing was missing, thus bringing this case within the third aforementioned category. Drywall concludes that having satisfied (for purposes of a motion to dismiss) at least one of these conditions, it may proceed with its claim for indemnification against Custom Cabinet.

Drywall has misread the *Diamond State's* summarization of the Larson treatise. As the progeny of *Diamond State* demonstrate, the language upon which Drywall relies does not create an obligation to indemnify in the absence of a contractual relationship. Rather it merely explains when, in the presence of a contractual relationship, an obligation to indemnify may be inferred from the facts of the case. Three years after *Diamond State* the Supreme Court was again called upon to consider a claim for indemnification against the employer of an injured plaintiff. In *Howard, Needles, Tammen and Bergendorf v. Steers, Perini and Pomeroy,*[14] a design engineering firm was sued as a result of injuries to the contractor's employees during the construction of the second span of the Delaware Memorial Bridge. The engineering firm sought indemnification from the

[14] 312 A.2d 621 (Del. 1973).

contractor. Like the present case -- and unlike *Diamond State* -- there was no contractual relationship between the engineering firm and the contractor. The *Howard* court ruled that "any claim for indemnity must be based upon a contract, express or implied."[15] The engineering firm, like Drywall, argued that the aforementioned language in *Diamond State* entitled it to bring a claim for indemnity. The Court in *Howard* rejected this argument, holding that the *Diamond State* language was of "no consequence" in the absence of an express or implied contract:

> Contractor concedes, and we agree, that a jury might, depending upon the facts adduced at trial, conclude that Engineers' only negligence was failing to discover a dangerous condition created by Contractor. However, that conclusion is of no consequence unless one also finds that there existed an implied Contractual duty to Engineers to perform the work in a workmanlike manner, and an implied Contractual promise of indemnification. Diamond, supra.[16]

Drywall also argues Custom Cabinets may have some "equitable obligation" to indemnify it. Drywall points to language in *Diamond State* that the "court below also ruled that if a contract is not proven between University and Diamond, there still may be an equitable obligation on Diamond to indemnify University."[17] Drywall has taken this language out of context. When the entire paragraph in which this sentence appeared is considered, it becomes clear that the *Diamond State* court was not endorsing the concept of some undefined "equitable obligation" to indemnify.

[15] 312 A.2d at 623.
[16] *Id.*
[17] *Diamond State Telephone Co. v. University of Delaware*, 269 A.2d 52, 56 (Del. 1970).

Contrary to Drywall's position, the *Diamond State* rejected the notion that an "equitable obligation" arose in the case before it:

> The court below also ruled that if a contract is not proven between University and Diamond, there may still be an equitable obligation on Diamond to indemnify University. *We think, however, that this has no application in the case at bar because it assumes the existence of an underlying fact that two individuals have become jointly liable for harm caused to a third person because of negligent failure to make safe a dangerous condition.* * * *
>
> It follows, therefore, that if Diamond is to be held liable to indemnify University, it must be upon some theory other than tortuous conduct on its part.[18]

As discussed above, Custom Cabinets cannot be jointly liable with Drywall for the injuries to plaintiff because of the exclusivity doctrine arising from Delaware's workers' compensation laws. Thus, just as in *Diamond State*, the notion of an equitable obligation to indemnify "has no application in the case at bar."[19]

Finally, even though there is no contractual relationship between them, Drywall asks this Court to find an implied contract between it and Custom Cabinets which obligates Custom Cabinets to indemnify Drywall. But Drywall fails to cite a single case in which a Delaware court (or any other court, for that matter) has found such an implied contract in the absence of an existing contractual relationship. Lacking any controlling

[18] *Id*. (emphasis added; internal citation omitted).
[19] *Id.*

authority, this Court is unwilling to extend the exception to the exclusivity doctrine beyond its present bounds.

For the foregoing reason, Custom Cabinet's motion to dismiss Drywall's third party complaint is **GRANTED.**

John A. Parkins, Jr.

oc: Prothonotary