IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

EILEEN STEWART, Plaintiff v. RTP HOLDINGS, INC., a Delaware Corporation and CONCORDIA HOLDING CORPORATION, a Delaware Corporation, Defendants/Third Party Plaintiffs v. JGS CONSULTANTS, INC., t/a CORNER BISTRO, Third-Party Defendant	)	CA. No.: 07C-10-177 FSS (E-FILED)

Submitted: March 26, 2009
Decided: May 20, 2009

ORDER

Upon Third-Party Defendant's Motion for Summary Judgment – DENIED

The core issue here is whether a tenant was obligated to carry liability insurance naming the landlord as an additional insured. The parties clash over an indemnification clause's validity. That clause, however, whether enforceable or not,

does not speak to the tenant's contractual obligation to obtain insurance. Simply put, JGS is not entitled to summary judgment against the landlord because JGS failed to obtain insurance, as called for by its lease, and the landlord did not waive the requirement.

I.

In 2003, Third-Party Defendant, JGS Consultants, leased restaurant space from Third-Party Plaintiff, Concordia Holding Corporation, a wholly-owned subsidiary of RTP Holding, Inc.[1] The lease contained the following pertinent clauses:

> 12. Indemnity – Torts:
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> A. Landlord shall not be responsible . . . for any . . . cause of action . . . whatsoever, arising from . . . any injury to Tenant, its . . . employees . . . which may arise from any cause including . . . defects or other conditions in, on or about the Demised Premises . . . or any sidewalks, streets, driveways, right-of-way or roadways adjacent thereto . . . excepting only gross negligence of Landlord . . . . Tenant hereby accepts and assumes such liability and agrees to protect, indemnify and save Landlord harmless from and against all of the aforesaid.
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> B. Tenant agrees to take out and maintain . . . public liability insurance naming Landlord and Tenant as insureds with limits of not less than $500,000/$1,000,000 in case of

[1] There was dispute about Concordia being RTP's alter-ego, but that has been resolved. For present purposes, the corporate defendants are interchangeable.

> bodily injury . . . . Tenant shall, prior to taking physical possession of the Demised Premises, deliver to Landlord certificates . . . that such insurance is in effect . . . .
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> 18. Events of Default – Remedies:
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> K. No waiver by Landlord of any breach by Tenant . . . shall be a waiver of any subsequent breach or of any other obligation . . . nor shall any forebearance by Landlord to seek a remedy for any breach by Tenant be a waiver by Landlord of its rights and remedies with respect to such or any subsequent breach.

On February 12, 2006, Plaintiff, a JGS employee, allegedly slipped on "black ice" while taking out the trash. Plaintiff filed suit against Concordia on October 18, 2007. In turn, on January 8, 2008, Concordia sued JGS for contribution and indemnification under the lease.

On February 25, 2009, JGS filed for summary judgment on four grounds. First, JGS claims that RTP was not privy to the lease and, as a matter of law, RTP's third-party complaint must be dismissed. Second, JGS claims that Concordia cannot seek contribution under a joint-tortfeasor theory. Third, JGS alleges that the lease's indemnification clause was invalid under 6 *Del. C*. § 2704(a). That statute reads, in pertinent part:

> [an] . . . agreement . . . in . . . a contract . . . relative to the . . . maintenance . . .of a road, highway, driveway, street . . . or entrance . . . purporting to indemnify or hold harmless the promisee or indemnitee . . . for damages arising from

> liability for bodily injury . . . to persons . . . caused . . . by . . . the negligence of such promisee or indemnitee . . . is against public policy and is void and unenforceable, even where such . . . agreement . . .is crystal clear and unambiguous . . . .

Lastly, JGS claims that the insurance clause in the parties' lease was never "enforced" by Concordia and is, therefore, waived.

Oral argument was held on March 25, 2009. The issues were narrowed to the indemnification and insurance clauses' validity. The court preliminarily granted summary judgment. The parties, however, were granted leave to submit supplemental memoranda addressing § 2704's rationale. Concordia filed a short response on March 26, 2009.

II.

Summary judgment is granted if, after the court examines the full record, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[2] The court accepts all undisputed facts and the non-movant's version of any disputed facts.[3] From those facts, the court draws all rational inferences favoring the non-moving party.[4]

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[2] Super. Ct. Civ. R. 56.

[3] *Merrill v. Crothall-American Inc.*, 606 A.2d 96, 99-100 (Del. 1992).

[4] *Id*. at 100.

III.

A. The Indemnification Clause

In context here, 6 *Del. C*. § 2704(a) does not apply. Section 2704(a) has uniformly been applied to construction contracts.[5] Apart from that, indemnification from one's own negligence may be enforced, although such clauses are generally disfavored.[6]

For indemnification to be valid in this landlord/tenant situation, the contract language must be "crystal clear and unequivocal" to show that the parties specifically intended the indemnitee to be relieved from its own liability.[7] An essential factor is that the contract must contain "a reference to the negligent wrongdoing of [the] party protected."[8] A general reference to "negligence" is

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[5] *J. S. Alberici Constr. Co v. Mid-West Conveyor Co.*, 750 A.2d 518, 521 (Del. 2000); *Chrysler Corp. v. Merrell-Garaguso, Inc.*, 796 A.2d 648, 651 (Del. 2002) ("A majority of states have adopted statutory restrictions similar in format to § 2704, with the intended effect of preventing one party to a construction contract from agreeing to indemnify the other party for the latter's own negligence."); *Wilson v. Active Crane Rentals, Inc.*, 2003 WL 22290069, *2 (Del. Super. Aug. 11, 2003) ("Section 2704 is clear that in a construction contract it is against public policy for a party to require indemnification for its own negligence.").

[6] *See Clemmons v. Whiting-Turner Contracting Co.*, 2000 WL 33113924 (Del. Super. Oct. 31, 2000).

[7] *All-State Investigation & Sec. Agency, Inc. v. Turner Constr. Co.*, 301 A.2d 273, 275 (Del. 1972); *State v. Interstate Amiesite Corp.*, 297 A.2d 41, 44 (Del. 1972); *J. A. Jones Constr. Co., v. City of Dover*, 372 A.2d 540, 553 (Del. Super. 1977); *see Clemmons*, 2000 WL 33113924 at *2, n. 4 (collected cases).

[8] *J. A. Jones Constr.*, 372 A.2d at 553; *see also Warburton v. Phoenix Steel Corp.*, 321 A.2d 345, 347 (Del. Super. 1974), *aff'd*, 334 A.2d 225 (1975).

insufficient.[9]

In *Interstate Amiesite*, the indemnification clause failed to specify the protected party's negligence.[10] The contract specified the State's indemnification from Amiesite's negligence.[11] The contract, however, failed to reference the State's own torts.[12] Therefore, *Interstate Amiesite* held that the contract between the State and Interstate Amiesite was not "crystal clear and sufficiently unequivocal to require Amiesite to indemnify the State . . .for the State's own negligence."[13]

In contrast to *Interstate Amiesite*, *All-State Investigation* held that an unequivocal indemnity clause did not offend public policy.[14] All-State Investigation and Turner's contract specifically indemnified Turner for negligence claims, "whether or not such claims [were] based upon Turner's alleged active or passive negligence or participation in the wrong or upon any alleged breach of any statutory

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[9]. *J. A. Jones Constr.*, 372 A.2d at 553 ("It is not the reference to 'negligence' generally, but a reference to the negligent wrongdoing of [the] party protected by the limitation which is required.").

[10] *Interstate Amiesite*, 297 A.2d at 44.

[11] *Id*. at 43.

[12] *Id*.

[13] *Id*. at 44.

[14] *All-State*, 301 A.2d at 275.

duty or obligation on the part of Turner . . . ."[15] *All-State Investigation* holds that, in sharp contrast to *Interstate Amiesite*'s facts, All-State Investigation and Turner "unequivocally" stated their intention for indemnification.[16] Thus, the indemnification clause was enforceable.

The agreement here does not contain a mere "general reference" to negligence, or elucidate enumerations for indemnification. Rather, the parties have explicitly carved-out Concordia's gross negligence as an exception from the enumerated indemnification situations. Excepting Concordia's "gross negligence" from indemnification exhibits the parties' clear intent to indemnify Concordia for its own negligence. The parties' intent is "crystal clear and unequivocal" and, therefore, does not offend public policy.

B. The Insurance Clause

Even if the indemnity clause were unenforceable, the insurance clause is good. Insurance procurement clauses requiring a promisor to obtain insurance in the promisee's name are generally valid.[17] Unlike indemnity clauses, insurance

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[15] *Id*. at 274.

[16] *Id*. at 275.

[17] *See Pacific Ins. Co. v. Liberty Mut. Ins. Co.*, 956 A.2d 1246 (Del. 2008); *McClements v. Savage*, 2007 WL 4248481 (Del. Super. Nov. 29, 2007); *Delmarva Power & Light Co. v. Parsons EC Constructors, Inc.*, 2004 WL 2191026 (Del. Super. Aug. 30, 2004). *But see, Chrysler Corp. v. Merrell & Garaguso, Inc.*, 796 A.2d 648 (Del. 2002) (The Court alluded to

clauses are a promise to obtain insurance and do not require the promisor to assume the promisee's responsibility and liability.[18] Basically, "a promise to obtain insurance is not the same as a promise to indemnify."[19]

The lease here clearly called for a policy in JGS's and Concordia's names, with "limits of not less than $500,000/$1,000,000 in case of bodily injury." That express clause is intended to supply the funds for indemnification, thereby covering *both* parties. So, even if JGS were not obligated to indemnify Concordia, it still had an obligation to buy insurance for Concordia. That was the deal.

Moreover, Concordia's alleged failure to "enforce" the insurance clause does not relieve JGS from its obligation. Besides, JGS has not explained how Concordia failed to enforce the clause, other than that Concordia did not demand to see the insurance certificate. It cannot be said that by failing to ask for proof of insurance, Concordia waived its entitlement to the insurance itself. Moreover, Concordia's failure to verify JGS's insurance does not amount to a waiver since the

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instances where the requirement to purchase insurance may be unenforceable, but failed to specify those instances).

[18] *Daimlerchrysler Corp. v. Penn Nat'l Mut. Casualty Ins. Co.*, 2003 WL 1903766, *3 (Del. Super. Mar. 17, 2003) (quoting *Zettel v. Paschen Contractors, Inc.*, 427 N.E.2d 189, 191-92 (Ill. App.Ct. 1981))

[19] *Id.*

lease contained a waiver clause clearly preserving Concordia's rights.[20]

IV.

In short, indemnification is a subordinate issue here. JGS was obligated to carry liability insurance in both its and Concordia's names, whether or not indemnification was enforceable. JGS undisputably failed to do that. Therefore, Third-Party Defendant JGS Consultant's motion for summary judgment is **DENIED**.

IT IS SO ORDERED.

/s/ Fred S. Silverman
Judge

cc: Prothonotary (civil)
Matthew Fogg, Esquire
Matthew O'Byrne, Esquire
Mary Sherlock, Esquire

[20] *See Rehoboth Mall Limited Partnership v. NPC International, Inc.*, 953 A.2d 702 (Del. 2008) ("[A] no waiver provision actually anticipates one or more waivers, and protects the waiving party by stating that those individual waivers shall not operate as permanent waivers.").