

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

JASON PATTON,)	
)	
Plaintiff,)	
)	C.A. No. N12C-01-177 CLS
v.)	
)	
24/7 CABLE COMPANY, LLC,)	
)	
Defendant/Third-Party Plaintiff,)	
)	
)	
DOUGLAS C. RILEY and)	
)	
Third-Party Defendant,)	
)	
DANELLA LINE SERVICES)	
COMPANY, INC.)	
)	
Third-Party Defendant/Fourth-)	
Party Plaintiff.)	
)	
MELCAR, LTD, INC. and SUSSEX)	
PROTECTION SERVICE, LLC)	
)	
Fourth-Party Defendants.)	

Date Submitted: September 28, 2012
Date Decided: January 30, 2013

On Motion of Fourth-Party Defendant, Melcar, LTD, Inc. to Dismiss Fourth Party
Complaint. **DENIED.**

ORDER

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Service, LLC.

Scott, J.

Introduction

Before the Court is Fourth-Party Defendant Melcar, LTD, Inc.'s ("Melcar") Motion to Dismiss Fourth-Party Complaint of Danella Line Services Company, Inc. ("Danella"), or in the alternative, Fourth-Party Defendant's Motion for Summary Judgment. Fourth Party Defendant Sussex Protection Service, LLC ("Sussex") has joined Melcar's motion. For the reasons that follow, the motion to dismiss is DENIED.

Background

On January 24, 2012, Plaintiff Jason Patton ("Plaintiff") filed a Complaint¹ against Defendant 24/7 Cable Company, LLC ("24/7 Cable") alleging that 24/7 Cable was responsible for injuries that Plaintiff suffered while traveling on his motorcycle on the evening of June 10, 2011. In particular, Plaintiff alleged that, while 24/7 Cable was performing construction activities, it had construction equipment in the median of Route 13 and lights and cones blocking part of the Southbound lane of Route 13. Plaintiff claimed that, in addition to the open median crossover, the lights and equipment caused a driver to collide into Plaintiff on Southbound Route 13.

¹ Plaintiff has since filed an Amended Complaint.

Thereafter, 24/7 Cable filed a Third-Party Complaint for contribution and indemnification against Douglas C. Riley, who was the driver of the vehicle, and against Danella.

Danella filed a Fourth-Party Complaint against Melcar and Sussex for contribution and indemnification. In the Fourth-Party Complaint, Danella stated that Melcar was contracted to engage in various projects at Danella's request. Based on this contractual relationship, Danella argued that "[i]f any of the Plaintiff's contentions arising out of the occurrence that is alleged in the Plaintiff's Complaint are proven, any alleged injuries and/or damages sustained by the Plaintiff are due solely to the negligence of Melcar."² Danella based this assertion on an indemnification provision, "Article X," of the contract between Melcar and Danella ("Melcar/Danella Contract").³

Also in the Fourth-Party Complaint, Danella sought contribution and indemnification against Sussex based on the same grounds contained in its claims against Melcar: that a contractual relationship between Danella and Sussex existed ("Danella/Sussex Contract"), that any alleged injuries and/or damages sustained by Plaintiff were due to Sussex's negligence, and that Sussex had agreed to indemnify

² Fourth-Party Compl., at ¶ 4.

³ *Id.* at ¶ 5; Melcar Mot., Ex. D.

Danella based on “Article X,” an indemnification provision identical to the provision contained in the Danella/Melcar Contract .⁴

On August 24, 2012, Melcar moved to dismiss the Danella’s Fourth Party Complaint and moved in the alternative for summary judgment. On September 5, 2012, Sussex joined Melcar’s motion.

Parties’ Contentions

Melcar and Sussex argue that the indemnification provisions (herein, “Article X”) contained in their respective contracts with Danella require them to indemnify Danella for Danella’s own negligence and, therefore, the provisions are void and unenforceable pursuant to 6 *Del. C.* § 2704. Melcar and Sussex further contend that no portion of Article X⁵ is severable; thus, the provisions are void in their entirety.

Danella opposes the motion by arguing that Danella does not seek indemnification for its *own* negligence since it denies any negligence; instead, Danella argues that any negligence alleged in Plaintiff’s complaint is solely that of Melcar and/or Sussex.⁶ Although Danella argues that neither Article X nor its sections violate § 2704, Danella insists that, should the Court sever Section 10.2, the remaining sections of the provision still support the indemnification claims.

⁴ Fourth-Party Compl., at ¶ 6; Sussex Joinder, Ex. A.

⁵ Melcar and Sussex specifically oppose Sections 10.1 and 10.2 of Article X.

⁶ Danella Opp. to Sussex Joinder, at ¶2.

Standard of Review

A motion to dismiss, brought pursuant to Superior Court Rule 12(b)(6), for failure to state a claim upon which relief can be granted is appropriate only when there appears to be no reasonably conceivable set of circumstances susceptible of proof under the complaint.⁷ When determining whether to grant the motion, the Court must accept all well-pled allegations in the complaint as true.⁸ In addition, the Court is limited to the allegations in the complaint; “[i]f the moving party provides documents with the motion to dismiss, and the Court considers those materials in addition to the complaint, the motion to dismiss is converted to a motion for summary judgment, and the parties may expand the record.”⁹ Where those documents are integral to the plaintiff’s claims and incorporated into the complaint, the motion to dismiss will not be converted into a motion for summary judgment.¹⁰

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.¹¹ If the record before the Court “reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify

⁷ *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

⁸ *Id.*

⁹ *Spector v. Melee Entertainment LLC*, 2008 WL 362125, *2 (Del. Super.); *Eden v. Oblates of St. Francis de Sales*, 2006 WL 3512482, *3 (Del. Super.).

¹⁰ *Willis v. City of Rehoboth Beach*, 2004 WL 2419143, *1, n.1 (Del. Super.).

¹¹ Del. Super. Ct. R. 56(c).

the application of the law to the circumstances”,¹² summary judgment is improper. On a motion for summary judgment, the Court must consider the facts stated in a light most favorable to the nonmoving party.¹³ Once the moving party satisfies its initial burden of demonstrating that the undisputed facts support his legal claims, the burden shifts to the non-moving party to show that there are material issues of fact for resolution by the ultimate fact-finder.¹⁴ Although Melcar and Sussex have submitted the contracts with their motions, the Court will not convert Melcar’s motion into a motion for summary judgment. The Fourth-Party Complaint included quotes from the indemnification provisions in the contracts as a basis for its claims against Melcar and Sussex.¹⁵ Therefore, the contracts were integral to the claims in the Fourth-Party Complaint and not the type of additional documents which would convert a motion to dismiss into a motion for summary judgment.

Discussion

The Court must determine whether Article X, or any portion thereof, is void and unenforceable pursuant to 6 *Del. C.* § 2704. If the Court finds that any portion of Article X runs afoul of § 2704, the Court must then determine whether to sever the invalid portion and enforce the remaining parts.¹⁶

¹² *Hull v. Heritage Homes, Inc.*, 2010 WL 2010 WL 3447641, *2 (Del. Super.).

¹³ *Id.*

¹⁴ *Spector*, 2008 WL 362125 at *3.

¹⁵ Fourth-Party Compl., at ¶¶ 5, 8.

¹⁶ *Menkes v. Saint Joseph Church*, 2011 WL 1235225, *3 (Del. Super.).

A party may seek indemnification based on “(1) an express contract; (2) a contract implied-in-fact; or (3) equitable concepts arising from the tort theory of indemnity, i.e. indemnification implied in law.”¹⁷ When the language in a contract for the “construction, alteration, repair or maintenance”¹⁸ of a state structure purports to insulate a party from his own liability by requiring indemnification from another party, such language is prohibited by 6 *Del. C.* § 2704(a)¹⁹ and is against public policy and is void and unenforceable, even where such covenant, promise, agreement or understanding is crystal clear and unambiguous in obligating the promisor or indemnitor to indemnify or hold harmless the promisee or indemnitee from liability resulting from such promisee's or indemnitee's own negligence. [...]”²⁰

Where an indemnification provision allows a contracting party to “assign its liability for its own wrongdoing to a third party”,²¹ but is accompanied with a severability provision, the Court may sever the language that it finds inconsistent with § 2704, and enforce the remaining portions.²² However, if the language cannot be stricken from the indemnification provision without the Court rewriting the indemnification clause, then the provision will be held invalid.²³

¹⁷ *Lagrone v. American Mortell Corp.*, 2008 WL 4152677, *6 (Del. Super.).

¹⁸ 6 *Del. C.* § 2704(a).

¹⁹ *J.S. Alberici Construction Company, Inc. v. Mid-west Conveyor Company, Inc.*, 750 A.2d 518,521 (Del. 2000); *Delmarva Power & Light Co.*, 2004 WL 2191026, *4 (Del. Super.).

²⁰ 6 *Del. C.* §2706(a).

²¹ *Menkes*, 2011 WL 1235225 at *3.

²² *Id.* at *4.

²³ *Id.* at *3 (discussing *Kempski v Toll Bros., Inc.*, 582 F. Supp. 2d 636, 644 (D.Del. 2008)).

In *Handler Corp. v. State Drywall Co., Inc.*, 2007 WL 3112466 (Del. Super.), this Court invalidated the portions of an indemnification agreement which expressly required a subcontractor to indemnify a general contractor for all claims resulting from the general contractor's own negligence.²⁴ Despite the invalid language, the Court did not nullify the remainder of the indemnification agreement because it contained a severability clause and since the remainder of the agreement explicitly provided that the subcontractor indemnify the general contractor for vicarious liability.²⁵ In *Menkes v. Saint Joseph Church*, 2011 WL 1355225 (Del. Super.), this Court considered an indemnification contract, in conjunction with its severability provision, and found that "the provision expressly requiring [the subcontractor] to indemnify the negligence of other parties to the contract (including [the general contractor] and [the owner of the construction site]) is a separate and distinct portion of the indemnification provision and can be easily removed without affecting the legal requirement that [the subcontractor] indemnify for its own negligence." The Court struck the following language from the relevant section of the agreement:

[A]nd whether caused by the negligent, or other, acts or omissions of the Contractor, the Subcontractor, the Subcontractor's subcontractor's and/or suppliers, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether any

²⁴ *Handler*, 2007 WL 3112466 at *2.

²⁵ *Id.* at *3.

such claims, demands, etc. are caused in part, by a party indemnified hereunder.²⁶

Here, Article X states:

10.1 To the fullest extent permitted by law, the Subcontractor shall indemnify, defend, and hold harmless Contractor and Customer and each of their respective officers, directors, employees, and agents, and each of their respective heirs, successors, and assigns (collectively, the “Indemnified Parties”), from and against all claims, demands, complaints, suits, causes of action, damages, liabilities, losses, costs, fines, liens, including mechanics’ liens, penalties, and expenses, including, without limitation, attorneys’ fees and expenses (individually, a “Claim,” and collectively, “Claims”), whether such Claims are attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property, including loss of use or economic loss resulting there from, arising out of or resulting from (a) the performance of the Work, (b) the acts or omissions of Subcontractor, or any employees or agents of Subcontractor, or any of Subcontractor’s subcontractors or suppliers of any tier, or anyone else for whom Subcontractor is responsible (collectively, the “Subcontractor Parties”), (c) the failure to pay any Subcontractor Parties for any portion of the Work (d) a violation of any applicable Legal Requirements by Subcontractor or any Subcontractor Parties, or (e) any breach or default by Subcontractor of Subcontractor’s duties and obligations under the Master Subcontract. [...]

10.2 Subcontractor’s obligation to indemnify, defend, and hold harmless the Indemnified Parties shall apply and pertain regardless of whether a Claim is caused or alleged to be caused in part by one or more of the Indemnified Parties.

[...]

10.7 If any word, clause or provision of this Article 10 is determined not to be in compliance with applicable or is otherwise not enforceable, it shall be stricken and the remaining words, clauses and provisions shall remain in full force and effect. It is the intent of the

²⁶ *Menkes*, 2011 WL 1235225 at *4.

parties that this Article 10 be construed in a manner as necessary to comply with applicable law, in all respects.²⁷

Reading the contracts as a whole,²⁸ the Court finds that Section 10.1 of Article X is not invalid based on § 2704(a). Section 10.1 requires Melcar and Sussex to indemnify Danella for acts or omissions arising out of their own duties pursuant to the contracts. On its own, the portion of 10.1 which states that

[...] [Melcar and Sussex] shall indemnify, defend, and hold harmless [Danella and the other “Indemnified Parties”] from and against all [Claims] whether such Claims are attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property, including loss of use or economic loss resulting there from[.]”

appears to require Melcar and Sussex to indemnify Danella for all claims without indicating whether the subcontractors must indemnify Danella for its own negligence. However, that portion cannot be read without the portion that states that the aforementioned claims must

aris[e] out of or result[] from (a) the performance of the Work, (b) the acts or omissions of Subcontractor, or any employees or agents of Subcontractor, or any of Subcontractor’s subcontractors or suppliers of any tier, or anyone else for whom Subcontractor is responsible (collectively, the “Subcontractor Parties”), (c) the failure to pay any Subcontractor Parties for any portion of the Work (d) a violation of any applicable Legal Requirements by Subcontractor or any

²⁷ Melcar Mot., Ex. D; Sussex Joinder, Ex. A.

²⁸ *Kuhn Const., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396-97 (Del. 2010) (“We will read a contract as a whole and we will give each provision and term effect, so as not to render any part of the contract mere surplusage”).

Subcontractor Parties, or (e) any breach or default by Subcontractor of Subcontractor's duties and obligations under the Master Subcontract. [...]

Therefore, the Court finds that 10.1 requires indemnification from Sussex and Melcar regarding only those claims which arise from or result from those actions enumerated in parts (a) through (e). For example, Section 10.1 requires that Melcar and Sussex are required to indemnify Danella for all claims arising out of "the performance of the Work". In each contract, "the Work" is defined as the subcontractor's "labor, supervision, administration, and other services, along with the equipment, tools and materials".²⁹ Therefore, this language demonstrates that Section 10.1 required indemnification for the actions of the subcontractors, not of Danella. Section 10.1 also requires that Melcar and Sussex indemnify Danella for all claims arising out of the "acts or omissions of either [Melcar or Sussex] or any employees or agents of Subcontractor, or any of Subcontractor's subcontractors or suppliers of any tier, or anyone else for whom Subcontractor is responsible". In contrast to the indemnity agreements in *Menkes* and *Hardel*, Section 10.1 does not explicitly require Melcar or Sussex to indemnify Danella for Danella's negligence or claims arising out of Danella's duties.

The Court finds that Section 10.2 of Article X is void and unenforceable under §2704(a). This section of the Article X states that the "[s]ubcontractor's

²⁹ Melcar Mot., Ex. D, ¶ 1; Sussex Joinder, Ex. A, Art. III, § 3.1.

obligation to indemnify, defend, and hold harmless the Indemnified Parties shall apply and pertain **regardless of whether a Claim is caused or alleged to be caused in part by one or more of the Indemnified Parties.**³⁰ To the extent that this section is intended to require Melcar or Sussex to indemnify Danella for claims based on Danella's own negligence, it is void as against the public policy. Nevertheless, the existence of the severability provision permits the Court to sever Section 10.2 and to retain Section 10.1 of Article X without violating 6 *Del. C.* § 2704.

Conclusion

Based on the forgoing, Fourth-Party Defendant Melcar's Motion to Dismiss is **DENIED.**

IT IS SO ORDERED.

/S/CALVIN L. SCOTT
Judge Calvin L. Scott, Jr.

³⁰ Emphasis added.