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

JAY HAWTHORNE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 01C-09-183 HLA
	)	
EDIS COMPANY, EDIS BUILDING SYSTEMS INC., ERNEST DISABATINO & SONS, INC., CONSTRUCTION SAFETY CONSULTANTS, INC., ATLAS LAB ASSOCIATES, ATLAS POINT, LLC, and CRYSTAL HOLDINGS, INC.,	)	
Defendant/	)	
Third-Party Plaintiff,	)	
	)	
v.	)	
SUMMIT STEEL, INC.,	)	
	)	
Third-Party Defendant,	)	
	)	
	)	
	)	

Date Submitted: December 31, 2002
Date Decided: January 15, 2003

ORDER
UPON THIRD-PARTY DEFENDANT'S APPLICATION
OF INTERLOCUTORY APPEAL
DENIED

Christian J. Singewald, Esquire, White and Williams, LLP, 824 Market Street, Suite 902, P.O. Box 709, Wilmington, DE 19899. Attorney for Third-Party Defendant.

Dawn Courtney Doherty, Esquire, Norman H. Brooks, Jr., Esquire, and Megan T. Mantzavinos, Esquire, Marks, O'Neill, O'Brien & Courtney, P.C., 913 North Market Street, #800 , Wilmington, DE 19801. Co-counsel for Third-Party Defendant.

Joseph J. Rhoades, Esquire, and A. Dale Bowers, Esquire, 1225 King Street, #1200, Wilmington, DE 19801. Attorneys for Plaintiff.

Mark J. LeWinter, Esquire, Anapol, Schwartz, Weiss, Cohan, Feldman and Smalley, P.C., 1900 Delancey Place, Philadelphia, PA 19103. Attorney for Plaintiff.

Louis J. Rizzo, Jr., Esquire, Reger and Rizzo, LLP, Legal Arts Building, #900, 1225 North King Street, Wilmington, DE 19801. Attorney for Defendant/Third-Party Plaintiffs EDIS Company, EDIS Building Systems, Inc. and Ernest DiSabatino and Sons, Inc.

This 15th day of January 2003 upon review of the record below, it appears to the Court that:

STATEMENT OF FACTS

Before the Court is an application filed by Third-Party Defendant Summit Steel, Inc. ("Summit") for certification of an interlocutory appeal to the Supreme Court of the State of Delaware from this Court's November 25, 2002, Order which denied Summit's Motion for Summary Judgment.

On April 6, 2000, Jay Hawthorne ("Plaintiff") was working on a roof as an ironworker for Summit when he fell and became severely injured. An unsecured sheet of metal decking was carried by a gust of wind and became airborne, striking the Plaintiff in

the back causing him to lose his balance and fall to the decking below. Plaintiff was rendered a quadriplegic as a result of the fall. Plaintiff was an employee with Summit, which was under contract with EDIS Company ("EDIS") for the erection of structural steel, including, but not limited to, metal decking. Plaintiff filed a lawsuit on September 25, 2001, alleging negligence. Defendants, EDIS Company, EDIS Building Systems, Inc., Ernest DiSabtino and Sons, Inc., Atlas Lab Associates, Atlas Point, LLC and Crystal Holdings, Inc. filed an answer to plaintiff's Complaint and a Third-Party Complaint against Summit on December 13, 2001. On April 22, 2002, paragraphs three and four of the Third-Party Complaint were stricken, leaving only a contractual indemnification claim against Summit.

On December 17, 1999, EDIS and Summit entered into a Subcontract Agreement ("Agreement") which contains the provisions that are the subject of the Third-Party Complaint. Article VII of the Agreement expressly sets forth Summit's indemnity liability to EDIS. On August 28, 2002, the Court ruled that Article VII violated title 10, section 2704 of the Delaware Code finding that it was an attempt to make Summit responsible for EDIS's negligent acts or omissions. Thus Article VII was determined to be void and unenforceable. However, the Court did not agree with Summit's contention that the entire contract is void. A Renewed Motion for Summary Judgment was filed by Summit on October 16, 2002. Summit argued that the language of Article VI is

ambiguous and therefore should be struck as it should be construed against the drafter.

However the Court found the following language unambiguous:

> ARTICLE VI. Subcontractor hereby assumes entire responsibility and liability in and for any and all damage or injury of any kind or nature whatever to all persons and to all property growing out of or resulting from the act or omission of the Subcontractor in the performance of the work provided for in this Subcontract.

The Renewed Motion for Summary Judgment was denied on November 25, 2002. After Summit was granted an extension of time, a Notice of Application for Certification of Interlocutory Appeal was filed on December 16, 2002. Third-Party Plaintiff, EDIS, filed its Response on December 30, 2002 and filed an Amended Response on December 31, 2002. Summit's Application for Certification of Interlocutory Appeal is now before the Court.

STANDARD OF REVIEW

In order for an interlocutory decision of this Court to be certified for an interlocutory appeal pursuant to Supreme Court Rule 42, the decision must 1) determine a substantial issue, 2) establish a legal right, and 3) satisfy one or more of the five alternative criteria set out in subpart (b) to Supreme Court Rule 42.

ANALYSIS

The Court agrees that the order denying Summit's motion for summary judgment with respect to the ambiguity of Article VI of the Agreement determines a substantial issue and establishes a legal right. The Court's determination that Article VI of the Agreement is unambiguous involved a substantial issue in the instant case, as it allows the third-party claim to continue against Summit. The Court's finding that the language in Article VI of the Agreement is not overbroad, but establishes a possible legal right in that it allows EDIS the possibility of indemnification for the negligence of Summit. However, it does not allow EDIS to be indemnified for its own negligence as Summit contends.

Pursuant to Supreme Court Rule 42(b) Summit must also demonstrate that the order meets one or more of the additional criteria set forth at Rule 42(b)(i)-(v). Of those five possible criteria, Summit asserts that Rule 42(b)(iii)applies. That provision states as follows:

> An order of the trial court has reversed or set aside a prior decision of the court, a jury, or an administrative agency from which an appeal was taken to the trial court which had determined a substantial issue and established a legal right, and a review of the interlocutory order may terminate the litigation, substantially reduce further litigation, or otherwise serve considerations of justice;...

Summit argues that the trial court's order of November 25, 2002, set aside the decision of *Precision Air, Inc. v. Standard Chlorine of Delaware, Inc.*[1] In that case the Court held that the exclusivity provision of the Worker's Compensation Act precludes the imposition of joint tort liability upon an employer in a suit brought by an employee against a third party where the employer has paid compensation benefits to an employee.[2] *Precision Air* further held that an employer can be held liable to a third party where a contract between the employer and the third party contains provisions requiring the employer to (i) perform in a workman like manner and (ii)indemnify the third-party indemnitee for any claims arising out of the employer-indemnitor's own negligence.[3] However, Summit maintains that because such provisions must clearly, or expressly, appear in the terms of the governing agreement[4] then Precision Air would hold a party which has paid Worker's Compensation benefits to an injured employee liable to a third-party only where the intent to indemnify clearly appears in the governing agreement.

---

[1]654 A.2d 403 (Del. Supr. 1995).

[2]*Precision Air, Inc. v. Standard Chlorine of Delaware, Inc.*, 654 A2d 403, 407 (Del. Supr. 1995)*(citing Howard, Needles, Tammen & Bergendoff v. Steers, Perini & Pomeroy*, 321 a.2d 621, 623 (Del. Supr. 1973)).

[3]*Precision Air,* 654 A.2d at 407.

[4]*Precision Air, Inc. v. Standard Chlorine of Delaware, Inc.*, 654 A2d 403, 407 (Del. Supr. 1995)*(citing State v. Interstate Amiesite Corp.,* 297 A.2d 41, 44 (Del. Supr. 1972) *and Hollingsworth v. Chrysler Corp.,* 208 A.2d 61, 65 (Del Supr. 1965)).

Summit argues that the Court read such an agreement into a portion of a provision addressing the obligation to maintain insurance, and which did not clearly establish its agreement to undertake a duty in derogation of its statutory protection from tort liability to its own employees under the Worker's Compensation Act. Summit thus contends that the Court disregarded the rule of law in *Precision Air*. Further, Summit states that the Court's decision leaves room for EDIS to obtain indemnification for its own negligence.

EDIS argues that the third-party Complaint is solely based in breach of contract pleading for indemnification from Summit for any negligence attributable to Summit in the underlying action, and that the Complaint does not include a count for contribution. EDIS maintains that this distinguishes the instant case from *Precision Air* because in *Precision Air* the Supreme Court held that the exclusivity provision of the Workmen's Compensation Act precluded the owner from asserting a contribution claim against the contractor, which had paid benefits to the employee, but the provision did not preclude the contractual indemnification claim.[5]

EDIS argues that Summit misinterprets *Precision Air* as the Supreme Court specifically held that if there is a basis for finding an *implied* promise of indemnity, then the exclusivity provision of the Workmen's Compensation Law is no bar to a third party

---

[5] *Precision Air, Inc. v. Standard Chlorine of Delaware, Inc.*, 654 A2d 403 (Del. Supr. 1995)(emphasis added).

suit against an employer.[6] EDIS argues that the basis of finding of indemnification in the instant case is Article VI of the Agreement.

This Court's November 25, 2002, ruling neither disregarded, nor set aside the rule of law as propounded by the Supreme Court in *Precision Air*.[7] As EDIS correctly points out, *Precision Air* is not a bar to this indemnification claim.

The Court does not agree that the interpretation of Article VI is so broad as to allow EDIS to obtain indemnification for its own negligence, nor is the language in Article VI strictly related to a requirement to obtain insurance as Summit contends.

Summit further states that the defendants, EDIS Company, EDIS Building Systems, Inc., Ernest DiSabatino and Sons, Inc., Atlas Lab Associates, Atlas Point, LLC, and Crystal Holdings, Inc., all filed the Third-Party Complaint for contractual indemnification against Summit even though the Agreement is only between EDIS Company and Summit. Since only EDIS was a party to the Agreement, Summit requested summary judgment as a matter of law on the contractual indemnification claims asserted by the other Third-Party plaintiffs. The Court addressed this issue when ruling on

---

[6] *Id*. at 407(citing *SW (Del.), Inc. v. American Consumers Indus.*, 450 A.2d 887, 888-89 (Del. Supr. 1982))(emphasis added).

[7] *Id.*

Summit's second motion for summary judgment and decided to wait before dismissing these parties.

For the forgoing reasons Third-Party Defendant's application for entry of an order certifying an interlocutory appeal to the Supreme Court of the State of Delaware is hereby **DENIED**. Thus, Defendant's Application for Certification of Interlocutory Appeal filed on December 16, 2002 is **DENIED.**

IT IS SO ORDERED.

_____

ALFORD, J.

Original: Prothonotary's Office - Civil Division