IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

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| LISA LEE and DANIEL LEE, | ) |
| | ) C.A. No. 99C-04-025 JTV |
| Plaintiff, | ) |
| | ) |
| 5. | ) |
| | ) |
| BRENTON ENGINEERING CO., | ) |
| | ) |
| Defendant / Third-Party Plaintiff, | ) |
| | ) |
| 5. | ) |
| | ) |
| KRAFT FOODS, INC., | ) |
| | ) |
| Third-Party Defendant. | ) |

*Submitted: July 3, 2001*
*Decided: October 30, 2001*

Stephen A. Hampton, Esq., Dover, Delaware. Attorney for Plaintiff.

Jeffrey M. Weiner, Esq., Wilmington, Delaware. Attorney for

Kevin J. Connors, Esq., Wilmington, Delaware. Attorney for Brenton.

*Third-Party Defendant's*
*Motion To dismiss the Third-Party Complaint,*
**GRANTED in Part**
**DENIED in Part**

**VAUGHN, Resident Judge**

***Lee v. Brenton et al.***
C.A. No. 99C-04-025 JTV
October 30, 2001

**ORDER**

Upon consideration of the motion of third-party defendant, Kraft Foods, Inc., to dismiss the third-party complaint, the response of the third-party plaintiff, Brenton Engineering Co., and the record of the case, it appears that:

1. The plaintiff, Lisa Lee, was an employee of Kraft Foods, Inc. ("Kraft"). She was injured on the job while using a piece of machinery which Kraft had bought from Brenton Engineering Co. ("Brenton"). On April 21, 1999, she and her husband brought this action against Brenton alleging that her injuries were proximately caused by various forms of negligence on Brenton's part, including, but not limited to, negligent design, manufacture and assembly of the machine.

2. On February 21, 2001 Brenton, with leave of court, filed a third-party complaint against Kraft. In a three-count complaint, it alleges, respectively, that (1) the plaintiff's injuries were caused by various acts of negligence on the part of Kraft, (2) that it should receive contribution and/or common-law indemnification from Kraft pursuant to 10 *Del. C.* § 6301 et seq., and (3) that it is entitled to indemnification pursuant to a contractual indemnification clause in the agreement of sale which Kraft and Brenton entered into at the time that Kraft bought the machinery.

3. Kraft responded by filing a motion to dismiss the third-party complaint. In its motion, it contends that: (1) Brenton cannot state a claim against Kraft based on negligence, (2) Brenton cannot state a claim against Kraft based on joint tortfeasor contribution and/or common-law indemnification, (3) the indemnification provision which Brenton claims was part of the agreement for the sale of the machinery in fact was not part of the agreement, (4) even if it was, it does not cover claims made by

Kraft employees, (5) the boiler plate indemnification clause is unconscionable and violative of public policy, and (6) Brenton's claim is barred by laches.

4. In support of its motion to dismiss, Kraft has submitted a "General Conditions for Purchase Order" form, an affidavit of Darren Harmon, and electronic records relating to the purchase of the machinery. When matters outside the pleadings are considered, the motion must be considered a motion for summary judgment.[1]

[1] *Schultz v. Delaware Trust Co.*, Del. Super., 360 A.2d 576 (1976).

5. **Summary judgment is appropriate if, after viewing the record in the light most favorable to the nonmoving party, the court finds no genuine issue of material fact.[2] If the movant supports the motion with the proper affidavits or other proper parts of the record, the burden shifts to the nonmoving party to show, using support taken from the developed record or with opposing affidavits, that a material issue of fact exists.[3] If there is a reasonable indication that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law, summary judgment will not be granted.[4] However, when the facts permit a reasonable person to draw but one inference, the question becomes one for decision as a matter of law.[5]**

**6.** Count I of the third-party complaint is a straightforward claim that the plaintiff's injuries were proximately caused by the negligence of Kraft and that Kraft is solely liable for the harm allegedly sustained by the plaintiffs.[6] Putting aside the

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[2] *Guy v. Judicial Nominating Comm'n,* Del. Super., 659 A. 2d 777, 780 (1995), *appeal dismissed,* Del. Supr., 670 A.2d 1338 (1995).

[3] *Moore v. Sizemore*, Del. Supr., 405 A.2d 679, 681 (1979); Del. Super. Civ. R. 56(e).

[4] *Ebersole v. Lowengrub,* Del. Supr., 180- A.2d 467, 479 (1962), *rev'd in part and aff'd in part,* 208 A.2d 495 (1965).

[5] ***Wooten v. Kiger*, Del. Supr., 226 A.2d 238 (1967).**

[6] Although the alleged contractual indemnification clause is mentioned in an introductory paragraph of the third-party complaint and is incorporated by reference into each count, I interpret the three counts as setting forth, respectively, claims based upon (1) Kraft negligence, (2) contribution and/or common-law indemnification, and (3) contractual indemnification.

fact that Count I does not allege a basis upon which Kraft may be liable to Brenton for all or part of the plaintiff's claim, it is well settled in this jurisdiction that an employer who has paid workers' compensation benefits to an employee cannot be subjected to a third-party claim arising from the employee's injuries based upon alleged employer negligence.[7] Therefore, summary judgment in favor of Kraft is granted as to Count I.

[7] *Precision Air, Inc. v. Standard Chlorine of Delaware*, Del. Supr., 654 A.2d 403 (1995); *SW (Del.), Inc. v. American Consumers Indus.*, Del. Supr., 450 A.2d 887 (1982); *Diamond StateTel. Co. v. University of Del.*, 269 A.2d 52 (1970).

7. In Count II Brenton claims that Kraft is liable for contribution and/or common-law indemnification pursuant to the provisions of 10 *Del. C.* § 6301 et seq., because the negligence of Kraft was the primary and/or contributing cause of plaintiff's alleged harm. However, it is well settled that an employer cannot be held liable as a joint tortfeasor.[8] In addition, Chief Justice Wolcott's analysis in *Diamond State Tel. Co. v. University of Del.*[9] rules out any liability based upon common-law indemnification. He there discusses the concept of common-law indemnification, although not by name, as one in which a person who is liable to an injured party but whose negligence is secondary, or passive, to the negligence of another more actively or primarily responsible for the injury, may seek indemnification from the more negligent party. For the reasons given by him there, an employer who has paid workers' compensation cannot be held liable to a third-party based upon common-law indemnification. An employer cannot be held liable either to the employee or a third-party "on any common-law theory."[10] The Supreme Court has most recently stated that an employer cannot be held liable for contribution, and "[t]he particular legal

[8] *See* cases cited *supra* note 7.

[9] 269 A.2d at 56.

[10] *Id*.

theory that the third-party employs in attempting to recover from the employer does not affect this result."[11] Therefore, summary judgment is granted to Kraft as to Count II.

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

8. In Count III, Brenton claims that Kraft is liable for any liability adjudged against Brenton based on an express, contractual, indemnification clause contained in the agreement of sale created when Brenton sold the piece of machinery to Kraft. Delaware law does recognize a claim made on this basis. An employer may be held liable to a third-party for an injury to an employee based upon an express or implied contractual duty which the employer owes a third-party.[12]

9. Therefore, if I conclude that the indemnification clause is part of the contract, or at least that there is a question of fact as to whether it is or not, I should then consider Kraft's arguments that the indemnification clause as written does not apply to this plaintiffs' claims, or that the clause is unconscionable or violative of public policy. If I conclude, however, as a matter of law, that the indemnification clause is not part of the contract, then it may well be that summary judgment should be granted on Count III to Kraft, and it would not be necessary to consider whether the clause applies to this employee's injury or whether it violates public policy. I would like to make an informed judgment as to whether it can be said that the indemnification clause never became part of the agreement, as a matter of law, before turning to these other issues.

10. The indemnification clause is contained in a "General Terms and Conditions" form which Brenton claims was part of the contract between it and Kraft

[12] *See* cases cited *supra* note 7.

when the equipment was sold. Kraft claims that the governing contractual document is a "General Conditions for Purchase Order" which it sent to Brenton when the equipment was purchased. The Kraft form purports to exclude from the contract any terms that are in addition to or different from the ones in its form. The indemnification clause in the Brenton form is an additional or different term, Kraft argues, which, therefore, never became a part of the contract. The Brenton form also purports to exclude from the contract any terms that are in addition to or different from that form. We thus have a "battle of the forms."

11. The record on this issue consists of a copy of the one page Kraft form, a copy of the one page Brenton form, an affidavit of a Kraft employee which says, among other things, that the Kraft form was sent on February 7, 1994, and Kraft's electronic record of the transaction. The affidavit and electronic record are contained in the reply brief. Kraft filed its motion in lieu of a responsive pleading, and any discovery that may have taken place concerning the Kraft-Brenton sales contract, if any, is not part of the record. Brenton urges that discovery be allowed so that it can explore the facts and circumstances surrounding the exchange of the "General Terms and Conditions" form and the "General Conditions for Purchase Order" form, assuming they were exchanged, as well as the facts and circumstances generally of the Kraft-Brenton transaction. Based upon the slender record presented, I am persuaded that this is an issue on which it is desirable to allow Brenton, as well as Kraft, to inquire more thoroughly into the facts. Accordingly, Kraft's motion for summary judgment is denied as to Count III, without prejudice. A new scheduling order will be issued with cut off dates for discovery, dispositive motions and other pertinent dates.

Kraft's motion can be renewed in the context of that scheduling order, if desired.

11. In the second argument contained in its brief, Brenton contends that Kraft does, or may, owe it implied contractual obligations to have used proper techniques and materials, to have observed and corrected any failure of employees to use safe techniques, and to have compelled the use of applicable safety procedures. None of the three counts of the third-party complaint allege any such implied promise of indemnity. If Brenton believes it has such a claim, it should move to amend its complaint to allege such.

12. The final issue raised by Kraft's motion is its claim that Brenton's third-party complaint is barred by laches. This claim is based on a passage of 18 months from the time that Brenton filed is its responsive pleading to the original complaint to the time that it moved for leave to file the third-party complaint. Assuming, *arguendo*, that the doctrine of laches can be a viable affirmative defense to a third-party complaint in this Court, Kraft offers no facts to show how it has been prejudiced by not having been brought into this litigation earlier. Summary judgment cannot be granted on this basis on the current record.

13. Therefore, summary judgment in favor of Kraft is ***granted*** as to Counts I and II of the complaint and ***denied*** as to Count III.

**IT IS SO ORDERED.**

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Resident Judge

***Lee v. Brenton et al.***
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oc: Prothonotary
cc: Order Distribution