

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

STEVEN C. WILSON and)
KRISTEN V. WILSON,) C.A. No. 01C-02-027 WLW
)
Plaintiffs,)
)
v.)
)
ACTIVE CRANE RENTALS, INC.,)
a Delaware corporation,)
)
Defendant and)
Third-Party Plaintiff,)
)
v.)
)
COLBY ENTERPRISES OF)
PEMBERTON, INC.,)
)
Third-Party Defendant.)

Submitted: May 30, 2003
Decided: August 11, 2003

Upon Consideration of Third-Party Defendant's
Motion to Dismiss Third-Party Complaint. Denied.

I. Barry Guerke, Esquire, Parkowski & Guerke, Dover, Delaware, Attorneys for Plaintiffs.

Norman H. Brooks, Esquire, Marks, O'Neill, O'Brien & Courtney, Wilmington, Delaware,
Attorneys for Defendant.

David L. Baumberger, Esquire, Chrissinger & Baumberger, Wilmington, Delaware,
Attorneys for Third-Party Defendant.

WITHAM, J.

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I. Introduction

Before this Court is Third-Party Defendant's Motion to Dismiss the Third-Party Complaint. Upon consideration of the parties' submissions and the oral arguments, it appears to this Court that the Motion to Dismiss should be *denied*.

II. Background

On February 23, 1999, Steven Wilson ("Wilson" or "Plaintiff") sustained personal injury during an accident that occurred at a construction site. The accident occurred after Active Crane Rentals, Inc. ("Active Crane" or "Defendant") rented a crane to the Third-Party Defendant, Colby Enterprises of Pemberton Inc. ("Colby" or "Third-Party Defendant"), for use during a construction project at Burger King in Glasgow, Delaware. The crane was provided to lift roof trusses. While Defendant's employee operated the crane, the crane came in contact with the wooden trusses causing them to fall, thus, injuring the Plaintiff.

Plaintiff filed the complaint on February 15, 2001, alleging many acts of negligence committed by the Defendant. After the Plaintiff filed a motion for default judgement, Active Crane filed its answer on April 9, 2001. On February 14, 2002, Defendant filed a motion for leave to file a third-party complaint which was granted on March 15, 2002. Active Crane claims that if it is considered liable then, by the terms of the rental contract, Colby should indemnify Active Crane. In addition, Active Crane claims that Colby was negligent and that it was Colby's negligence that proximately caused this accident. The Third-Party Defendant failed to answer the third-party complaint. In the absence of a responsive filing,

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Defendant's motion for default against the Third-Party Defendant was granted. On September 26, 2002, the Court entered the fourth revised Case Scheduling Order setting December 12, 2002 as the deadline to add or amend. At some point after receiving a default judgement, the Defendant realized that it had erroneously named the Third-Party Defendant.¹ On December 16, 2002, after the deadline to amend had passed, Defendant filed an amended third-party complaint to name Colby Enterprises of Pemberton Inc., the correct Third-Party Defendant.

Active Crane brought Colby into this action alleging that Colby owes Active Crane indemnity and defense to the Plaintiff's claim for personal injury. After service of the amended third-party complaint, Colby filed a motion to dismiss asserting that Active Crane based its indemnification claim solely upon a one page boiler plate rental agreement containing standard indemnity language² which is prohibited by title 6, section 2704 of the Delaware Code and contrary to public policy. This Court heard oral arguments on Colby's motion to dismiss the third-party complaint for failure to state a claim and Active Crane's motion to amend its third-party complaint to clarify its cause of action. This Court granted Active Crane's motion to amend, and took Colby's motion under advisement. After taking the matter under advisement, this Court allowed Colby to supplement its motion to

¹ It had named Colby Enterprises Inc. instead of Colby Enterprises of Pemberton Inc.

² The contract in question states in relevant part: "Lessee agrees to hold lessor harmless for loss, damage and expense resulting from the operation of the above mentioned equipment either bodily injury or property damage including damage or loss of equipment leased herein and agrees to defend lessor from all suits resulting from above operation."

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take into consideration Active Crane's amendment. Colby submitted its supplemental memorandum on May 20, 2003, and Active Crane rested upon its previous response on May 30, 2003.

III. Analysis

A. Superior Court Rule 12(b)(6) Standards

The Third-Party Defendant filed this motion pursuant to Superior Court Civil Rule 12(b)(6) for failure to state a claim upon which relief can be granted.³ Under Rule 12(b)(6), the court must accept all well-plead allegations as true.⁴ Then the court must then apply a broad sufficiency test: whether a plaintiff may recover under any "reasonable conceivable set of circumstances susceptible of proof under the complaint."⁵ Dismissal will not be granted if the complaint "gives general notice as to the nature of the claim asserted against the defendant."⁶ Further, a complaint will not be dismissed "unless it is clearly without merit, which may be either a matter of law or fact."⁷ Vagueness or lack of detail, by itself, is insufficient

³ SUPER. CT. CIV. R. 12(b)(6).

⁴ *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978); see also *A.G. Barr p.l.c. v. Agribusiness Partners Int'l, L.P.*, 2003 Del. Super. LEXIS 123.

⁵ *Id.* (citing *Klein v. Sunbeam Corp.*, 94 A.2d 385 (Del. 1952)).

⁶ *Diamond State Tel. Co. v. Univ. of Del.*, 269 A.2d 52, 58 (Del. 1970).

⁷ *Wilmington Trust Co. v. Politzer & Haney, Inc.*, 2003 Del. Super. LEXIS 148, *7-*8 (citing *Diamond*, 269 A.2d at 58).

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to dismiss a claim.⁸ If there is a basis upon which the plaintiff may recover, the motion is denied.⁹

B. Alternative Grounds for Dismissal
1. Title 6, Section 2704 of the Delaware Code

Pursuant to title 6, section 2704 of the Delaware Code exculpatory clauses in certain contracts are void. Specifically, § 2704 (a) states in relevant part:

A covenant, promise, agreement or understanding in, or in connection with . . . a contract . . . relative to the construction, alteration, repair or maintenance of a . . . building, [or] structure . . . including without limiting the generality of the foregoing, the moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee or indemnitee . . . for damages arising from liability for bodily injury or death to persons or damage to property . . . arising partially or solely out of the negligence of such promisee or indemnitee . . . or its subcontractors, agents, servants or employees, 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. This section shall apply to all phases of the preconstruction, construction, repairs and

⁸ *Id.*

⁹ *Id.*; see also *Spence v. Funk*, 396 A.2d 967 (Del. 1978).

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maintenance described in this subsection . . . ¹⁰

Section 2704 is clear that in a construction contract it is against public policy for a party to require indemnification for its own negligence.¹¹ In the case at bar the contract at issue provided equipment for a construction project. Active Crane agreed to provide the crane as well as an operator. It was during the operation of the crane that the crane's arm came in contact with the wooden trusses. Contractual indemnification under these circumstances is antithetical to the "clear legislative statement of public policy";¹² therefore, the contractual indemnification aspect of the third-party complaint is dismissed. However, contractual indemnification is not the only theory for recovery under the third-party complaint; Active Crane also asserts additional theories of negligence on the part of Colby. Specifically, Active Crane asserts that Colby negligently failed to train its employees in the proper setting of roof trusses and negligently failed to supervise its employees. Given the standards for dismissal under Rule 12(b)(6), the non-contractual aspects of the third-party complaint have been pled with sufficient detail and as such will not be dismissed.

¹⁰ DEL. COD. ANN. tit. 6, § 2704.

¹¹ The Supreme Court has "construed § 2704(a) as expressing a 'legislatively defined public policy' precluding contractual indemnification for a party's own negligence." *Chrysler Corp. v. Merrell & Garaguso, Inc.*, 796 A.2d 648, 650 (Del. 2002) (citing *J.S. Alberici Constr. Co. v. Mid-West Conveyor Co.*, 750 A.2d 518, 519 (Del. 2000)).

¹² *Alberici*, 750 A.2d at 521.

2. Timeliness of the Amendment Adding Third-Party Claim

The purpose of Superior Court Civil Rule 15 is to encourage the disposition of litigation on its merits, so the decision to allow or deny an amendment is left within the sound discretion of the judge.¹³ The Third-Party Defendant argues that the presently amended third-party complaint should be dismissed because the original third-party complaint was not filed within 10 days after service of the original answer as required by Rule 15. However, Defendant was granted leave to file the original third-party complaint on March 15, 2002.

The original third-party complaint was filed against Colby Enterprises, Inc. and the Defendant was granted a default judgment against Colby Enterprises, Inc. It was not until after that default judgment that the Defendant realized that it filed the third-party complaint against the wrong party. This issue was raised at the pre-trial conference on September 24, 2002. The Defendant filed an amended third-party complaint naming the correct party. It is true that the Defendant filed its amended third-party complaint four days after the date set forth in the case scheduling order and Defendant should have moved for leave of this Court to file the amended complaint. Nevertheless, this Court finds that those four days did not prejudice any party involved. Additionally, this Court has granted Active Crane leave to amend the third-party complaint a second time, which was filed on May 3, 2003. Therefore, the Motion to Dismiss the third-party complaint on the grounds that it was not timely is denied.

¹³ *Grand Ventures, Inc. v. Whaley*, 632 A.2d 63, 72 (Del. Super. Ct. 1993).

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IV. Conclusion

In conclusion, based on the standards for dismissal under Rule 12 (b)(6) and the facts of this case, the Third-Party Defendant's Motion to Dismiss shall be *denied*.¹⁴

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Judge

oc: Prothonotary
cc: Order Distribution
File

¹⁴ On July 25, 2003, the Third-Party Defendant's attorney sent this Court a letter requesting that it be allowed to file a second supplemental memorandum in support of its Motion to Dismiss detailing additional factual developments. After careful consideration this Court has determined that the additional facts that are being offered do not have a bearing on the Motion to Dismiss presently before the Court. The request to file a supplement is denied; thus, there is no need for the attorneys to appear on August 15th to discuss this matter.