NOT DESIGNATED FOR PUBLICATION

CATHY SMITH WIFE OF/AND JOSEPH LOUIS EADY	*	**NO. 2001-CA-0804**
	*	**COURT OF APPEAL**
VERSUS		
	*	**FOURTH CIRCUIT**
DWAYNE LEWIS D/B/A LEWIS ENTERPRISES,	*	**STATE OF LOUISIANA**
SPARTAN BUILDING CORPORATION, NAVAL AIR STATION/NAVAL AIR	*	
SUPPLY, AND XYZ COMPANY	*	

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2000-9491, DIVISION "K14"
Honorable Richard J. Ganucheau, Judge
* * * * * *
Judge Miriam G. Waltzer
* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Miriam G. Waltzer, Judge David S. Gorbaty)

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REVERSED

Plaintiffs, Cathy Smith, wife of/and Joseph Louis Eady, filed a Petition for Damages naming Dwayne Lewis d/b/a Lewis enterprises ("Lewis"), Spartan Building Corporation ("Spartan"), and Naval Air Station as defendants. Spartan answered the plaintiffs' Petition and subsequently filed a Third Party Demand against Lewis and Certain Underwriters at Lloyd's, London ("Underwriters") seeking defense and indemnification for the claims asserted by plaintiffs.

In response to the plaintiffs' petition, Lewis filed an exception of No Cause of Action maintaining that as the employer of Joseph Louis Eady, Lewis was tort immune. Lewis and Underwriters filed an exception of No Cause of Action in response to Spartan's Third Party Demand. Lewis maintained that Spartan's cause of action for defense and indemnity would not arise until the suit filed against Spartan by the plaintiffs

had been concluded.

The trial court maintained both Exceptions of No Cause of Action. Spartan instituted this timely devolutive appeal seeking to reverse the trial court's granting of the exception as to Spartan's third party demand. The granting of the exception as to plaintiffs' Petition for Damages has not been appealed and is now a final judgment.

Plaintiffs allege that on 17 June 1999, Joseph Louis Eady was operating a manlift at the Naval Air Station within the course and scope of his employment with Lewis. Lewis was a subcontractor of Spartan. Plaintiff maintains that while being lifted in the basket to the manlift, the ground on which the manlift was placed gave way, causing the manlift and the basket to fall to the ground. According to the plaintiff, the basket fell approximately three stories. As a result of this fall, plaintiff claims that he sustained severe personal injuries. Plaintiff filed suit against Lewis, Spartan, and the Naval Air Station.

The Third Party Demand filed by Spartan alleges that it is entitled to contractual defense and indemnity pursuant to a Sub-Contract Agreement between Spartan and Lewis. The Agreement provides in pertinent part:

> NINTH: Sub-Contractor shall hold harmless, indemnify and defend General Contractor, its officers, employees, agents and representatives from all claims for property damage and for injuries to or death of any and all persons, including without limitation, employees, agents and representatives of Sub-Contractor or its Sub-Contractors, arising
> out of or in connection with or by reason of work done by Sub-Contractor, its employees, agents, representatives, or sub-contractors under this contract, expressly including claims for property damage, injuries or death cause by the joint negligence of General Contractor, its officers, employees, agents, and representatives.

Lewis and Underwriters excepted to the Third Party demand maintaining that a cause of action for defense and indemnity does not arise until the suit for which defense

and indemnity is being sought has been concluded and the party claiming indemnification has actually made payment or sustained a loss.

La. C.C.P. art. 1111 provides:

> The defendant in a principal action by petition may bring in any person, including a codefendant, who is his warrantor, or who is or **may be liable** to him for all or part of the principal demand.
>
> In such cases the plaintiff in the principal action may assert any demand against the third party defendant arising out of or connected with the principal demand. The third party defendant thereupon shall plead his objections and defenses in the manner prescribed in Articles 921 through 969, 1003 through 1006, and 1035. He may reconvene against the plaintiff in the principal action or the third party plaintiff, on any demand arising out of or connected with the principal demand, in the manner prescribed in Articles 1061 through 1066.

(emphasis added.)

Here, the relator, a defendant in the principal action, has brought in a co-defendant who **may be liable** to him for part of the principal. As such, it has properly asserted a third party demand.

The respondent cites this court to cases which hold that a cause of action for defense and indemnity does not arise until the suit upon which indemnification is being sought has concluded and the party claiming indemnification has actually made payment or suffered a loss. Meloy v. Conoco, Inc., 504 So.2d 833 (La. 1987); Coleman v. Transit Management of Southeast Louisiana, Inc., 98-1511 (La. App. 4 Cir. 11/10/98), 723 So.2d 495; Webb v. Shell Offshore, 557 So.2d 276 (La. App. 4 Cir. 1990). This argument may well be a valid one, but it is one properly argued pursuant to an exception of prematurity.

In Williams v. Touro Infirmary, 578 So.2d 1006, 1008 (La. App. 4th Cir. 1991), this court stated:

> The peremptory exception of no cause of action tests the legal sufficiency of the petition. For purposes of the validity of the exception, all well-pleaded allegations of fact are accepted as true. La.C.C.P. Art. 927; Darville v. Texaco,

Inc., 447 So.2d 473 (La. 1984), cert. den. 459 U.S. 969, 103 S.Ct 298, 74 L.Ed.2d 280 (1982); Cupp v. Federated Rural Electric Insurance Company, 459 So.2d 1337 (La. App. 3rd Cir. 1984). The exception must be decided upon the face of the petition and any attached documents. Mott v. River Parish Maintenance, 432 So.2d 827 (La. 1983).

The exception of no cause of action raises the question of whether the law affords a remedy to anyone based only upon the allegations of fact in the petition under any theory of the case. Mitchell v. Crane, 485 So.2d 613 (La. App. 4th Cir. 1986). No evidence is admissible to support or controvert the exception. La. C.C.P. Art. 931; Kirkpatrick v. Young, 456 So.2d 622 (La. 1984); Evans v. Detweiler, 466 So.2d 800 (La. App. 4th Cir. 1985).

As was stated in Kuebler v. Martin, 578 So.2d 113, 114 (La. 1991):

Pleadings must be construed reasonably so as to afford litigants their day in court, to arrive at the truth, and to do substantial justice. La.C.C.P. art. 865. When it can reasonably do so, the court should maintain a petition against a peremptory exception so as to afford the litigant an opportunity to present his evidence. [Citations omitted.]

Here, the relator has stated a cause of action. We reverse the trial court's ruling maintaining the exception.

REVERSED