SUPERIOR COURT OF NEW JERSEY

HUDSON VICINAGE

CHAMBERS OF
PATRICK J. ARRE, J.S.C.

Brennan Courthouse
583 Newark Avenue
Jersey City, New Jersey 07306

December 4, 2014

NOT FOR PUBLICATION WITHOUT THE WRITTEN APPROVAL OF THE COMMITTEE ON OPINIONS

Re: **Slatina v. D. Construction et al.**
Defendants' Motion for Summary Judgment, Plaintiff's Cross-Motion for Partial Summary Judgment; Third Party Defendant's Motion for Summary Judgment
Docket No. HUD-L-1182-08

RELEVANT FACTS

This Court has received a motion for summary judgment on behalf of Defendants Newport Associates, Shore Club North Urban Renewal Company, Shore Manager Corporation, Short North Construction Company, MWB Newport Management Corporation and Shore North Urban Renewal (hereinafter "LeFrak Defendants"). This Court has received Plaintiff, Dashi Slatina's opposition and cross-motion for partial summary judgment, Defendants' reply and Plaintiff's sur reply. This Court has also received third party Defendant, D. Construction's motion for summary judgment and third party Plaintiff, LeFrak's opposition.

This matter arises out of injuries sustained by Plaintiff on January 6, 2007, while working on construction project at the "Shore Club" in Jersey City, New Jersey. The construction site in question was originally obtained by LeFrak Organization, an entity in the business of purchasing land for development and subsequently conveying it to its subsidiaries for construction, development, and resale. After purchasing the subject premises, LeFrak conveyed the land to its

subsidiary, Defendant Newport Associates Development Company (hereinafter "Newport"). Newport then conveyed the premises to its subsidiary, Shore North Urban Renewal Company, LLC (hereinafter "Shore North Urban Renewal"), formally known as Shore Club North Urban Renewal Company (hereinafter "Shore Club North"). Shore North Urban Renewal owned the land during the construction and appears to be the entity charged with overseeing the construction premises. Another subsidiary of LeFrak, Shore North Construction Company, LLC, was appointed general contractor through a Construction Contract dated March 6, 2006. Through the general conditions of the contract, the general contractor was responsible for managing safety, supervising subcontractors, and compliance with applicable laws and regulations.

Shore Manager Corporation acted as a member of the general contractor, and MWB Newport Management Corporation was the management company on the project. It was Shore North Urban Renewal that retained third party Defendant D. Construction as a mason subcontractor.

Plaintiff was performing masonry work at the premises pursuant to his employment with D. Construction. Plaintiff was injured when a cinderblock wall over eight feet high collapsed and caused him to fall from an elevated scaffold. Plaintiff was immediately transported to Jersey City Medical Center and sustained extensive and severe injuries.

Plaintiff has retained the expert services of Domenick Salvatore, P.E. and Vincent A. Gallagher, P.E. who together offered two reports and opined that building unbraced walls over eight feet high was unsafe and a violation of OSHA and ANSI standards; and that those standards imposed a responsibility for safety on the general contractor. D. Construction was issued a citation and penalty for OSHA violations for building walls over eight feet tall that were inadequately braced to prevent overturning and collapse.

LeFrak moves for summary judgment on the basis that it owed no duty to Plaintiff as an employee of a subcontractor because LeFrak was not involved with the manner and means of the work performed, and Plaintiff's accident was not foreseeable. Plaintiff opposes and cross-moves for summary judgment on the basis that LeFrak was, for all intents and purposes, the general contractor owing a non-delegable duty to its subcontractors to maintain a safe construction site, and that the risk presented by the concrete walls was open, obvious and provided Defendants with actual knowledge of foreseeable harm. Additionally, D. Construction has cross-moved for summary judgment with respect to LeFrak's third party claim for indemnification.

SUMMARY JUDGMENT STANDARD

New Jersey law provides that summary judgment shall be granted when there are no genuine issues of material fact in dispute. R. 4:46. Summary judgment is designed to provide a prompt, businesslike, and inexpensive method of disposing of any case which clearly shows no present factual issue requiring disposition at trial. Judson v. People Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1955). While "genuine" issues of material fact preclude the granting of summary judgment, those that are "of an insubstantial nature" do not. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 530 (1995).

To overcome a motion for summary judgment the opposing party must "demonstrate by competent evidential material that a genuine issue of fact exists." Robbins v N.J., 23 N.J. 229, 241 (1957). The motion judge should consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 540. It is insufficient to merely deny facts; rather the opponent must

make an affirmative demonstration as to the existence of the facts at issue. Judson v People's Bank and Trust Comp. of Westfield, 17 N.J. 67, 74 (1954).

ANALYSIS

I. LeFrak's Motion for Summary Judgment

This Court will first consider LeFrak's motion for summary judgment. LeFrak argues that neither it, nor any of its subsidiaries can be held liable for the acts of its independent contractor, D. Construction. Second, LeFrak argues it had no duty to protect Plaintiff as an employee of an independent contractor. Third, LeFrak argues OSHA does not provide a basis to impute liability to LeFrak.

Plaintiff responds with the argument that as the General Contractors LeFrak had a non-delegable duty to maintain safety and enforce OSHA standards and that OSHA and the Federal Workplace Safety statutory scheme were passed to prevent the injury that occurred in this case.

LeFrak relies on Wolczak v. National Electric Products Corp., 66 N.J. Super. 64 (App. Div. 1961) and Muhammad v. New Jersey Transit, 176 N.J. 185 (2003) for the proposition that, "absent control over the job location or direction of the manner in which the delegated tasks are carried out, the general contractor is not liable for injuries to employees of the subcontractor resulting from either the condition of the premises or the manner in which the work is performed." Wolczak, 66 N.J. Super. At 71. Certain exceptions apply to this general rule where: (a) the landowner retains control of the manner and means of the doing of the work, which is the subject of the contract; (b) he engages an incompetent contractor, or (c) the activity contracted for constitutes a nuisance *per se.* Muhammad, 176 N.J. at 197. LeFrak's submits that as an employer it is not responsible for the negligent acts of its independent contractor committed

during the performance of the contract because LeFrak maintained no involvement in the manner and means of the work performed. Muhammad v. New Jersey Transit, 176 N.J. 185 (2003).

LeFrak also relies on the Appellate Division's recent decision in Tarabokia v. Structure Stone, 429 N.J. Super. 103 (App. Div. 2012), where a plaintiff's complaint against a general contractor was dismissed on summary judgment upon a finding that defendant did not owe a duty to plaintiff. In Tarabokia, the plaintiff was employed by a subcontractor to install wiring for fixtures. Plaintiff suffered permanent injuries in both arms through the repeated use of a specialized power tool. The Appellate Division affirmed summary judgment because it found under the circumstances the scope of the duty owed by the general contractor did not encompass the manner and means of the equipment selected, supplied and controlled by the subcontractor. The Court noted that plaintiff's work using the specialized hand tool required discrete occupational skills that the general contractor exercised no control over.

In 1962, the year following the decision in Wolczak, the Legislature adopted the Construction Safety Act, N.J.S.A. 34:5-166, expressly designed to protect the health and safety of all construction employees by requiring all construction employers to comply with safety rules and regulations promulgated under the act. N.J.S.A. 34:5-168. Such rules and regulations were consequently codified as the Construction Safety Code, N.J.A.C. 12:180-1.1. With the enactment of the NJAC, OSHA, and the seminal cases of Bortz v. Rammel, 151 N.J. Super. 132 (App. Div. 1977), Kane v. Hartz Mountain, 278 N.J. Super. 129 (App. Div. 1994), and Alloway v. Bradlees Inc., 157 N.J. 221 (1999), the law changed away from the Wolczak general contractor non-liability rule in favor of the non-delegable duty rule. The Appellate Division in Bortz recognized that non-liability of the general contractor could no longer remain a viable common law rule

because it has been "substantially qualified by subsequent legislative action." Bortz, 151 N.J. Super. at 319.

A general contractor on a work site has a non-delegable duty to maintain a safe workplace. Alloway, 157 N.J. at 237-38. Under Federal OSHA standards, "in no case shall the prime contractor be relieved of overall responsibility for compliance with the requirements of this party for all work to be performed under the contract." 29 C.F.R. § 1926.16. All places where employees are permitted to perform any kind of construction work must be constructed and equipped to provide reasonable and adequate protection to the lives, health and safety of employees. N.J.A.C. 12:180-3.1, 3.2.

However, it remains that no duty of care can be based solely on a finding of OSHA violations; rather a general contractor's duty of care is determined under general negligence principles, and OSHA violations are only one factor in that analysis. Tarabokia, at 112; Alloway, at 236. Violations of OSHA, although not conclusive on the issue of negligence, remain relevant in assessing liability. Bortz, at 230. Specifically, a statutory standard of conduct and/or a deviation is relevant to determining a duty owed and a potential breach. Id.

LeFrak's argues it cannot be liable for Plaintiff's injuries based solely on a finding of an OSHA violation. The New Jersey Supreme Court has explicitly held that violation of OSHA regulations, "without more" does not constitute a basis for an independent or direct tort remedy. Alloway, 157 N.J. at 236. The "more" courts consider include factors such as the foreseeability and actual knowledge of the harm, the relationship between the parties, and the opportunity and capacity to take corrective actions. Id. at 233. Since Wolczak, the more modern approach to the traditional common law rule is for courts to identify, weigh, and balance a combination of these factors in determining the existence of a general contractor's duty of reasonable care. Tarabokia,

at 113; Alloway, at 230. A major consideration is the foreseeability of the risk of injury measured by the general contactor's actual knowledge, as well as the nature and severity of the injury. Alloway, at 231-32. Additional considerations include the relationship of the parties, the nature and extent of the risk, the opportunity and ability to exercise control, and the public interest in the proposed solution. Alloway, at 230. Ultimately, principles of basic fairness under all of the circumstances and in light of public policy guide the duty of reasonable care analysis. Id.

In Tarabokia, the Appellate Division first found that none of the Wolczak exceptions to the general rule against liability were implicated. Although Plaintiff presents a persuasive argument as to the incompetency of LeFrak's general contractor with respect to safety, for purposes of analysis the following exploration continues as if there still remains a genuine issue of material fact on that point. The Tarabokia Court noted that survival of these exceptions did not end the inquiry, and it applied the modern approach balancing the above-mentioned factors. First, the general contractor and the sub-contractor that employed plaintiff did not have a formal contractual relationship, but had an arrangement governed by a series of work orders with no mention of responsibility for worker safety. Further, the overall site-specific safety management plan placed the responsibility for safety directly on the subcontractors. With respect to foreseeability, the Court noted there was no proof that the general contractors knew plaintiff was using the particular tool that caused the stress injury, knew that plaintiff was using it improperly over a long period of time, or knew that use of that tool could result in severe permanent injury. Unlike the circumstances here, the Court also noted that the risk did not involve an unsafe work condition or hazardous physical condition on the premises. Therefore, the Tarabokia court found that the general contractor had no actual or constructive notice of the risk, and it was neither

reasonably or objectively foreseeable. Tarabokia, at 117-118. Based on the latent injury not readily apparent, the relationship of the parties, and principles of fairness and public policy, summary judgment was affirmed. Id.

This is in contrast to the facts leading to the New Jersey Supreme Court's findings in Alloway v. Bradlees, 157 N.J. 221 (1999), and Carvalho v. Toll Brothers and Developers, 143 N.J. 565 (1996). In Alloway, a truck driver employed by a subcontractor was injured while delivering stone. The court considered that there was no written contract between the subcontractor and the contractor, the driver was injured due to a defective mechanical component on the truck, and that the driver had brought the defect to the attention of a general contractor supervisor the day before. Moreover, the court found the injury was "clearly foreseeable," inasmuch as there was knowledge on the part of at least three of the general contractors employees. The Court found the general contractor had the capacity and opportunity to exercise control over the subcontractors to address safety concerns, in that there was evidence that the general contractor's supervisors could dismiss the subcontractor's trucks if they had any problems. Control was further reflected in the general contractors attempt to fix the defective truck the day before the accident. Thus, a duty was imposed on the general contractor for the safety of the employee of the subcontractor.

Likewise in Carvalho, a project engineer was found to owe a duty of care to the employee of a subcontractor who was killed when a trench collapsed on him. The Court found that foreseeability was critical, in that the danger of collapse posed by the deep trenches was open and apparent, especially considering the engineer's contractual duty to address safety of the trenches. Further, the Court noted the engineer's contractual duty to observe the actual performance of the work performed on the site, his presence during the underlying accident, and

the fact that similar trenches had previously collapsed. The Court deemed these factual circumstances sufficient to impose a duty of care upon the defendant for the safety of the subcontractor's employee.

In the instant matter, the land in question was transferred in the spring of 2006 from Newport to Shore North Urban Renewal, formally known as Shore Club North. Another subsidiary of Lefrak, Shore North Construction, was contracted to act as general contractor on the site. At all relevant times, LeFrak Organization and/or Richard LeFrak owned Shore Club North, Shore North Urban Renewal, and Shore North Construction. For all intents and purposes, LeFrak Organization and various subsidiaries and affiliates acted as both owners and general contractors of the Shore Club Project.

Plaintiff argues the evidence reflects LeFrak had the opportunity and ability to have significant control over the performance of work at Shore Club based on the contractual relationship of the parties, the general contractor's actual knowledge of the risk of harm, and their involvement with construction. David Jenkins, a long-time employee of LeFrak, was hired as "General Superintendent" for the Shore Club project. Working below Mr. Jenkins were three superintendents responsible for overseeing the construction: Sheila Mason, Daniel Gale, and Scott Rushkin. Both Mason and Jenkins testified in their depositions to watching everything and having the ability to stop work immediately if they observed danger on the job site. (Mason Dep. Trans. at 51-52; Jenkins Dep. Trans. at 54). Jenkins testified that he was on site essentially 100% of the time on a daily basis, and was responsible for overseeing and monitoring the activities of the subcontractors. (Jenkins Dep. Trans. at 19-21, 33-36). Jenkins also testified to the fact that LeFrak selected, scheduled and coordinated the subcontractors on the project. (Jenkins Dep. Trans. at 30).

The LeFrak Organization Construction Contract for the project provides in General Conditions, Paragraph 3, Section 3.2:

> Supervision. Contractor shall supervise and direct the Work, using its best skill and attention. It shall be solely responsible for all construction means, methods, techniques, sequences and procedures and for coordinating all portions of Work under the Contract.

Paragraph 3, Section 3.7 provides:

> Compliance with Law. Contractor shall give all notices and comply with all laws, ordinances, rules, regulations, and orders of any public authority bearing on the performance of the Work, at owner's expense.

Paragraph 3, Section 3.11 addresses safety precautions and programs, and includes the following provisions:

> 3.11.1 Contractor shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the Work.
>
> 3.11.2 Contractor shall take all reasonable precautions for the safety of, and shall provide all reasonable protection to prevent damage, injury or loss to:
>
> (a) all employees used for the Work and all other persons who may be affected thereby;
>
> (c) all the Work and all materials and equipment to be incorporated therein, whether in storage on or off site, under the care, custody or control of Contractor or any of its Subcontractors or sub-subcontractors;
>
> 3.11.3 Contractor shall comply with all applicable laws, ordinances, rules, regulations and lawful orders of any public authority having jurisdiction for the safety of persons or property or to protect them from damage, injury or loss, at Owner's expense. It shall erect and maintain, as required by existing conditions and progress of the Work, at Owner's expense, all reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent utilities.
>
> 3.11.5 All scaffolding, ramps, runways, platforms, guards, rails stairs and ladders as necessary for the Work, shall meet all safety requirements

> of applicable standards, codes, ordinances, and insurance agencies, with lights and signs to prevent injury. Contractor shall protect all vertical shafts and floor perimeter with safe, temporary railings and supports, adequately braced, shall cover trenches and holes when not in use.
>
> 3.11.7 Contractor shall designate a responsible member of its organization at the site whose duty shall be the prevention of accidents.

Yet, Jenkins stated that neither he nor LeFrak took any affirmative actions to ensure safety and compliance with OSHA, or do anything to manage safety with respect to its subcontractors on the project. (Jenkins Dep. Trans. at 38-40). Jenkins testified he was in charge of safety on the Shore Club project, but provided he had neither OSHA nor any other workplace training and that there was no safety manual in place. (Id. at 16, 59). Mason and Rushkin also testified that they did not know who was responsible for safety on site, and that there were no safety trainings, meetings, or rules. (Rushkin Dep. Trans. at 83, 91; Mason Dep. Trans. at 60, 62).

Additionally, Plaintiff points to the obvious and open safety hazard of the unbraced construction walls evident to the superintendents before the underlying accident occurred. Sheila Mason testified that she had seen D. Construction building the concrete walls and that she did not recall ever seeing bracing on these walls. (Mason Dep. Trans. at 14-15). There is also photographic evidence of similar walls being built without any kind of bracing.

Plaintiff argues that together, these facts implicate each of the factors courts must balance in finding a duty of care pursuant to Alloway, and Carvalho, while Lefrak continues to rely on Wolczak and Tarabokia. However, unlike Tarabokia, here a formal contractual agreement existed between the parties that explicitly placed responsibility for safety and regulatory compliance on the general contractor. Furthermore, the risk of injury was open and obvious and not latent. Defendants here knew and observed the method by which D. Construction was

building the concrete walls, and, similar to Alloway, at least three self-proclaimed LeFrak employees had actual knowledge of the risk. Moreover, like the engineer in Carvahlo, Jenkins was frequently present on the site, had observed similar walls being built in the same manner, and was responsible for supervision of the work as a whole and of the subcontractor's performance. Mason was also on site shortly after the wall collapse and photographed the injured men on the ground in the rubble. (Mason Dep. Trans. 20-23).

Finally, in Defendants reply they cite Slack v. Whelan, 327 N.J. Super. 186 (App. Div. 2000), for the position that as property owners, LeFrak did not owe a duty of care as a general contractor. In Slack, a husband and wife were forced to take over as general contractors on the construction of their home when the general contractor they hired abandoned the job. The issue was whether as property owners who assumed administrative control over their home construction project they owed a duty to an employee of one of the individual contractors hired to complete the scaffolding. Slack, 327 N.J. at 188. The Court applied the analytical framework of Alloway, and considered that there was no contractual agreement between the parties, there was no agreement to supervise work or ensure safety, the defendants were not frequently on site, and the defendants had no knowledge of the method being used to scaffold, nor were they able to appreciate the risk that it posed. As a result, the Court found the defendants did not have the opportunity or capacity to exercise control, and the harm was not sufficiently foreseeable to impose a duty on defendants. The Court further noted that the defendants had no training or experience in construction.

Following Slack, a similar issue was addressed in Costa v. Gaccione, 408 N.J. Super. 362 (App. Div. 2009), where the defendant acted as general contractor by assuming control over operation and work performance, visiting the site daily, purchasing materials, and actively

discussing plans. The Court took into consideration defendant's history as a real estate developer and his involvement on site, despite the fact that he listed another entity as general contractor on the building permits. The Appellate Division reversed and remanded the Trial Court's grant of summary judgment finding that it did not give enough weight to the distinguishing facts between Slack and its current case. Importantly, the Court provided that "Slack represents an exceptional situation where [the Appellate Division] held that the property owners could not be held liable as general contractors due to the specific factual circumstances." Costa, 408 N.J. Super. at 375.

Accordingly, Slack v. Whelan is a limited decision and the facts here are removed. By its own admission, LeFrak Organization is in the business of purchasing tracts of land for development and subsequently conveying it to its subsidiaries for construction and development. (Defendants' Brief at 3). The underlying project included construction of two 27 story high rise towers with a nine level parking garage; construction of each building cost several million dollars. Each of the building permits listed Shore Club North as owner, but two listed Shore Club Construction as general contractor, one listed Newport as general contractor, and another listed Shore Club North as both owner and general contractor. Unlike Slack, the facts here support a finding that LeFrak and its subsidiaries contracted for the responsibility of safety and had actual knowledge of the masonry work being performed and the walls being built without bracing, whereby a duty of care was created.

Therefore, the facts viewed in the light most favorable to Plaintiff support a finding that LeFrak and its subsidiaries, as the general contractor, owed a duty of care to Plaintiff. LeFrak employees were hired to supervise and did in fact observe the unbraced walls being built and a jury could reach a conclusion of negligence and hence liability on the part of LeFrak. LeFrak's

election to limit its involvement with the subcontractors work will not insulate it from its contractual and statutory obligation to maintain a safe project site.

II. Plaintiff's Cross-Motion for Summary Judgment on the Issue of Breach

This Court will now address Plaintiff's cross-motion for summary judgment against LeFrak on the issue of breach. Plaintiff argues there is no issue of fact that LeFrak breached a duty of care owed to Plaintiff which resulted in his injuries, and that LeFrak breached by hiring a "safety incompetent contractor."

The engagement of an "incompetent contractor" is one of the three exceptions to the general rule that a contractor is not liable for the negligent acts of its independent contractor. Majestic Realty Associates, Inc. v. Tori Contracting Co., 30 N.J. 425, 431 (1959). However, the mere happening of an accident at a construction site is insufficient to establish that an incompetent subcontractor was retained. Id.

Although there is sufficient evidence by which a jury could impose a duty on LeFrak and its subsidiaries, there remains genuine issues of material fact with respect to a breach.

III. D. Construction's Cross Motion for Summary Judgment

This Court will now address third party Defendant, D. Construction Corp.'s cross-motion for partial summary judgment and third party Plaintiff LeFrak's opposition. Following the accident, Mr. Slatina filed a claim for worker's compensation benefits against D. Construction and received those benefits from D. Construction's worker's compensation carrier.

D. Construction cross-moves for summary judgment on the basis that it cannot be liable as a third party defendant when Plaintiff's direct claims against it were dismissed by virtue of the Worker's Compensation bar, and when there is no express contractual provision requiring D. Construction to indemnify LeFrak for acts of its own negligence. LeFrak argues that D.

Construction may be held liable for defendants' negligence through the contract terms or through implied indemnity, and that such claim is not barred by the Workers' Compensation Act.

D. Construction first relies on Ramos v. Browning Ferris Industries of South Jersey, Inc., 103 N.J. 177 (1986), where Plaintiff employee was injured in an accident on third party defendant employer's land, which was caused by damage to the land by the general contractor. After collecting worker's compensation benefits from employer, plaintiff brought a personal injury action against the contractor, who impleaded the employer for indemnification, on the basis of an indemnity clause in their service contract. Ramos, 103 N.J. at 180. The Court found that the Workers' Compensation Act was the exclusive remedy against an employer, and the language of the Act preempted contractor's statutory right to join employer as tortfeasor. Id.

Second, D. Construction argues the language of the indemnification provision is insufficient to warrant indemnification of defendants for their own negligence. The agreement between D. Construction and Shore North consists of a purchase order dated January 23, 2009. Paragraph two includes an indemnity provision which provides:

> The Vendor [D. Construction] agrees to (i) indemnify and save harmless the Vendee [Shore North] and the Owner [Urban Renewal] of the subject building an all of their respective affiliates, agents and employees against all damages, claims, losses and expenses, including without limitation attorney's fees which any of them may incur or suffer by reason of anything to be supplied hereunder, and (ii) defend at the sole cost of the Vendor [D Construction] any action brought against Vendee [Shore North] and/or any of the work foregoing, founded upon such claim.

The general rule in New Jersey is that an indemnitor will not be required to indemnify an indemnitee against losses arising from the indemnitee's own negligence, absent an unequivocal expression of this intent and reference to the indemnitee's negligence. Azurak v. Corporate Property Investors, 175 N.J. 110, 111-12 (2003); Mantilla v. N.C. Mall Associates, 167 N.J. 262,

272-73 (2001). In other words, the parties must agree in express terms and make reference to the negligence of the indemnitee. Id. This rule is supported by the strong public policy against forcing an indemnitor to hold harmless an indemnitee for the indemnitee's own negligence where the indemnitee is solely at fault. Carvalho, 143 N.J. at 578.

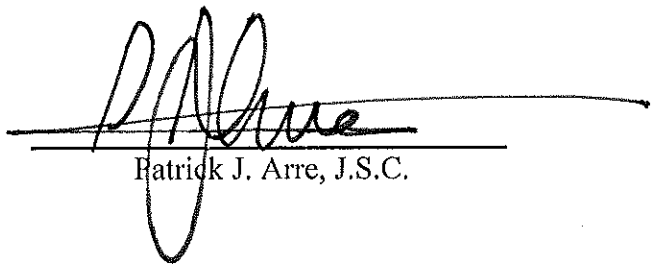
Here, Paragraph 2 of the purchase order conditions between D. Construction and Shore North does not contain an unequivocal expression of the parties' intent to have D. Construction indemnify Shore North and Urban Renewal against losses arising from Shore North and Urban Renewal's own negligence. Therefore, there is no basis for D. Construction's indemnification of defendants for their own negligence based on the contract.

Third, LeFrak asserts defendants are entitled to implied indemnity, independent of the contract language. A third party may recover on a theory of implied indemnity from an employer only when a special legal relationship exists between the employer and the third party, and the liability of the third party is vicarious. Ramos, 103 N.J. at 188-189. Relying on its arguments set forth in its brief for summary judgment, LeFrak contends that any liability it may be exposed to is vicarious through D. Construction, because neither LeFrak nor its subsidiaries owed or breached a duty to Plaintiff. Therefore, LeFrak argues it is entitled to implied indemnity from D. Construction. However, LeFrak's motion for summary judgment on that issue has been denied, and a jury could find that LeFrak owed and breached a duty to Plaintiff. Based on its contractual and statutory responsibilities, LeFrak faces direct liability for Plaintiff's injuries, and not vicarious liability as is required for implied indemnity from an employer. Therefore, LeFrak's argument in this respect fails, and they are not entitled to implied indemnity from D. Construction.

Here, there is insufficient evidence to support a finding that D. Construction must indemnify Defendants for their own negligence. The indemnity provision in the purchase order is devoid of the unequivocal language necessary to mandate D. Construction to indemnify LeFrak for their own negligence, and there is no basis for implied indemnity.

CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment is DENIED. Plaintiff's motion for partial summary judgment is DENIED. D. Construction's motion for summary judgment is GRANTED.



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