

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

ALFRED CICINATO,)
) C.A. No. K10C-02-033 JTV
 Plaintiff,)
)
 v.)
)
 L&W SUPPLY CORPORATION, d/b/a)
 CHESAPEAKE DRYWALL SUPPLY and)
 BUILDING SPECIALTIES,)
)
 Defendant /)
 Third-Party Plaintiff,)
)
 v.)
)
 TIMBERLAKE HOMES, INC., TIMBER-)
 LAKE CUSTOM HOMES, LLC., TIMBER-)
 LAKE HOMES, LLC, TIMBER)
 MILLS, LLC.,)
)
 Third-Party Defendant,)
)
 v.)
)
 CHESAPEAKE DRYWALL AND PAINT,)
 INC., and MP CONTRACT FLOORING)
 d/b/a GENERAL FLOORS, INC.,)
)
 Fourth-Party Defendants.)

Submitted: November 22, 2011
Decided: March 29, 2012

Cicinato v. L&W Supply Corporation, et al.

C.A. No. K10C-02-033 JTV

March 29, 2012

James J. Lazzeri, Esq., Barros, McNamara, Malkiewitz & Taylor, Dover, Delaware. Attorney for Plaintiff.

Antranig N. Garibian, Esq., Wilbraham, Lawler & Buba, Wilmington, Delaware. Attorney for Defendant / Third-Party Plaintiff.

Carol J. Antoff, Esq., Law Office of Cynthia G. Beam, Newark, Delaware. Attorney for Third-Party Defendant.

Daniel L. McKenty, Esq., and Katherine L. Hemming, Esq., Heckler & Frabizio, Wilmington, Delaware. Attorney for Fourth-Party Defendant MP Contract Flooring d/b/a General Floors, Inc.

Roger D. Landon, Esq., Murphy & Landon, Wilmington, Delaware. Attorney for Fourth-Party Defendant Chesapeake Dry Wall & Paint, Inc.

*Upon Consideration of Fourth-Party Defendant
MP Contract Flooring d/b/a General Floors, Inc.'s
Motion For Summary Judgment*

GRANTED

VAUGHN, President Judge

ORDER

Upon consideration of MP Contract Flooring d/b/a General Floors, Inc.'s Motion For Summary Judgment, or in the Alternative to Dismiss the Fourth-Party Complaint filed against it, the fourth-party plaintiff's opposition, and the record of

Cicinato v. L&W Supply Corporation, et al.

C.A. No. K10C-02-033 JTV

March 29, 2012

the case, it appears that:

1. Fourth-party defendant, M.P Contract Flooring (“General Floors”) has filed a Motion For Summary Judgment, or in the Alternative to Dismiss the Fourth-Party’s Complaint.

2. The plaintiff’s complaint seeks damages for personal injuries which he allegedly sustained while working as an employee of General Floors. The complaint was filed against defendant L&W Supply Corporation, d/b/a/ Chesapeake Drywall Supply and Building (“Chesapeake Drywall”), whose employees allegedly caused the plaintiff’s injuries. Defendant Chesapeake Drywall filed a third-party complaint against Timberlake Homes, Inc. (“Timberlake Homes”) alleging negligence on that party’s fault. Third-party defendant Timberlake Homes then filed a fourth-party complaint against Chesapeake Drywall and General Floors alleging breach of contract against each of those parties.

3. The incident giving rise to this case occurred at a home construction site. Timberlake Homes was the general contractor. Chesapeake Drywall and General Floors were two subcontractors. The plaintiff, an employee of General Floors, was taking measurements for a custom fitted carpet runner to be installed in a stairway of the residence. At the same time, three employees of Chesapeake Drywall were delivering a cart load of drywall. They moved the cart through the front door and then down a hallway to the area where the plaintiff was working. The drywall cart tipped over and the drywall fell onto the plaintiff, causing his alleged injuries.

4. As mentioned, Timberlake Homes’ claim against General Floors is for breach of contract. The contract is the subcontract between Timberlake Homes and

Cicinato v. L&W Supply Corporation, et al.

C.A. No. K10C-02-033 JTV

March 29, 2012

General Floors. In the agreement, General Floors is referred to as Trade Partner. The contractual provision relied upon by Timberlake Homes reads as follows:

Trade Partner hereby covenants and agrees to indemnify Timberlake Homes and hold Timberlake Homes harmless from any and all claims and costs of defense including, but not limited to, attorneys' fees which may be asserted against Timberlake Homes as a result of any actions undertaken by Trade Partner at the job site and off-site in connection with or arising out of this Agreement and all work performed by Trade Partners for Timberlake Homes. This indemnification is intended to cover all costs associated with defending any and all court and administrative claims asserted against Timberlake Homes, and without limiting the generality of the foregoing, MOSH or OSHA claims brought in the State of Maryland or in any other location. Further, Trade Partner agrees that it shall give written notice of the claims to Timberlake Homes and give Timberlake Homes a reasonable and adequate opportunity to defend against the claims. Timberlake Homes shall have the right to hire counsel of its choice to defend it and Trade Partner shall cooperate fully with respect to such MOSH or OSHA claims. Further, if Timberlake Homes has to bring suit to enforce this provision or any other provision of this Agreement, then, and in such instance, Trade Partner shall likewise be obligated to pay all of Timberlake Homes; costs and attorneys' fees associated with enforcing this Agreement.

5. Timberlake Homes contends that this language is intended to be read broadly to require General Floors to indemnify it for any claim asserted against Timberlake Homes in connection with work performed by General Floors. It

Cicinato v. L&W Supply Corporation, et al.

C.A. No. K10C-02-033 JTV

March 29, 2012

contends that the claim asserted against it in this case arises from work performed by General Floors because the injured party was a General Floors employee doing General Floors work.

6. General Floors contends that the language should not be read so broadly and that it requires General Floors to indemnify Timberlake Homes for any negligence which General Floors may commit. In this case, Timberlake Homes agrees that General Floors and its employee were not negligent.

7. The contract relied upon by Timberlake Homes was not attached to the parties' pleadings. At the time that the motion was presented, both parties were afforded an opportunity to supplement the record with any additional material. Since matters outside the pleadings are being considered, and the parties have been given an opportunity to supplement the record, the motion will be considered a Motion For Summary Judgment.

8. Summary judgment should be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.¹ In considering the motion, the facts must be viewed in the light most favorable to the non-moving party.² Summary judgment is inappropriate "when the record reasonably indicates 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 law to the

¹ Super. Ct. Civ. R. 56(c).

² *Pierce v. Int'l Ins. Co. Of Ill.*, 671 A.2d 1361, 1363 (Del. 1996).

Cicinato v. L&W Supply Corporation, et al.

C.A. No. K10C-02-033 JTV

March 29, 2012

circumstances.”³

9. After consideration of the language in question, I conclude that a claim arising from Chesapeake Drywall’s alleged negligence is not a claim resulting from “actions undertaken” or “work performed” by General Floors. I conclude that the above-quoted contractual term does not make General Floors responsible to Timberlake Homes for third-party negligence committed against a General Floors employee. Any clause intended to make one party responsible for another party’s negligence should do so clearly and unambiguously, and the clause in question here does not do that.

10. Therefore, General Floors’ Motion for Summary Judgment is ***granted***.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.

President Judge

cc: Prothonotary
Order Distribution
File

³ *Mumford & Miller Concrete, Inc. v. New Castle County*, 2007 WL 404771, at *1 (Del. Super. Jan. 31, 2007).