

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

LILLIAN C. HIMBRICK, and	:	
SAMUEL C. HIMBRICK,	:	
	:	C.A. No: 08C-05-035 (RBY)
Plaintiffs,	:	
	:	
v.	:	
	:	
DOVER HOSPITALITY GROUP,	:	
LLC, ASTRA MANAGEMENT AT	:	
DOVFI, LLC, DHG2, LLC, all three	:	
t/a FAIRFIELD INN & SUITES,	:	
and OTIS ELEVATOR COMPANY,	:	
	:	
Defendants.	:	

Submitted: February 3, 2012  
Decided: May 1, 2012

*Upon Consideration of Fairfield Defendants’  
Motion for Summary Judgment of Cross Claim*  
**DENIED**

**OPINION AND ORDER**

I. Barry Guerke, Esq., Parkowski, Guerke & Swayze, P.A., Dover, Delaware for Plaintiffs.

Phillip Thomas Edwards, Esq., Murphy & Landon, Wilmington, Delaware for Fairfield Defendants.

J.R. Julian, Esq., Wilmington, Delaware for Otis Elevator.

Young, J.

## SUMMARY

\_\_\_\_\_Plaintiffs instituted this action seeking relief from personal injury from Fairfield Defendants and Defendant Otis together as joint tortfeasors. Soon thereafter, Fairfield Defendants asserted a cross claim for indemnification or contribution. This is the Court's decision regarding Fairfield Defendants' motion for summary judgment of their cross claim. The cross claim seeks indemnification based upon a theory that one defendant is primarily liable for Plaintiffs' injury while the other defendant is secondarily liable. As such, summary judgment is not ripe at this juncture. Fairfield Defendants' motion for summary judgment of their cross claim is **DENIED**.

## FACTS

Lillian and Samuel Himbrick (Plaintiffs) are husband and wife. On May 27, 2008, they filed a complaint seeking damages for personal injuries. Dover Hospitality Group, LLC, Astra Management at DOVFI, LLC and DGH2, LLC (collectively grouped as Fairfield Defendants) are named as defendants to the action.<sup>1</sup> Fairfield Defendants are the owners and operators of the Fairfield Inn & Suites at 655 North DuPont Highway in Dover, Delaware. Also named as a defendant is Otis Elevator Company (Otis). Otis designed, manufactured and installed an elevator inside the Fairfield Inn. Pursuant to a service contract, Otis serviced the elevator exclusively and on a routine basis.

On July 25, 2006, Plaintiffs, who were guests at the Fairfield Inn, allegedly sustained injury when Mrs. Himbrick's arm became stuck in the door to the Otis elevator on Fairfield Defendants' premises. As Mrs. Himbrick intentionally

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<sup>1</sup> Fairfield Defendants trade, collectively, as the Fairfield Inn & Suites.

obstructed the door from closing, intending to carry on a conversation with an exiting passenger, the door closed on her right arm and shoulder, pinning her for a period of time. The door did not bounce open upon confrontation with the obstruction. A warning buzzer did not sound to indicate that the doors would not bounce open. Mrs. Himbrick's arm remained pinned for a brief period of time before she was able to remove it, by force, without the door's opening. The elevator did not move while her arm was stuck.

Prior to July 25, 2006, there were no incidents involving the elevator door. Moreover, there was no indication that the door, itself, was susceptible to malfunction. That is not to say, however, that the elevator did not have problems. The record is replete with testimony indicating that the elevator became overheated repeatedly. Further, the record suggests that, despite Otis' recommendation, Fairfield Defendants declined to take steps to alleviate the overheating issue. The overheating would cause the elevator to go offline until it would cool down. Upon cooling down, while being checked by a technician, it would show no evidence of malfunction.

\_\_\_\_\_Against Fairfield Defendants, Plaintiffs' complaint alleges negligence. Against Otis, Plaintiffs' complaint alleges breach of implied warranty of merchantability, breach of implied warranty of fitness for particular purpose and negligence. In their answer, Fairfield Defendants filed a cross claim seeking contribution and indemnification from Otis.

On November 7, 2011, Fairfield Defendants filed the instant motion for summary judgment of their cross claim. Plaintiffs filed a response. Soon thereafter, Otis joined Plaintiffs' response, adopting it as its own. The response does not address the cross claim asserted against Otis.

### **STANDARD OF REVIEW**

Summary judgment is appropriate where the record exhibits no genuine issue of material fact so that the movant is entitled to judgment as a matter of law.<sup>2</sup> “Summary judgment may not be granted if the record 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 the law to the circumstances.”<sup>3</sup> The movant bears the initial burden of establishing that no genuine issue of material fact exists.<sup>4</sup> Upon making that showing, the burden shifts to the non-movant to show evidence to the contrary.<sup>5</sup> When considering a motion for summary judgment, the Court considers the facts in the light most favorable to the non-movant.<sup>6</sup> \_\_\_\_\_

### **DISCUSSION**

\_\_\_\_\_ Fairfield Defendants seek summary judgment of their cross claim against Otis. Therein, they seek indemnification or, in the alternative, contribution. In regard to the former, Fairfield Defendants contend that, in the event that they are not dismissed from the case, they are only secondarily liable for Mrs. Himbrick’s injury. As a corollary to that assertion, they suggest that Otis is primarily liable. In the alternative to their argument for indemnification, Fairfield Defendants suggest that, should they be held primarily liable, they are entitled to contribution from Otis. The amount of contribution would be equal to Otis’ relative degree of fault.

\_\_\_\_\_ “‘Indemnification’ and ‘contribution’ differ in the extent to which a defendant

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<sup>2</sup> *Tedesco v. Harris*, 2006 WL 1817086 (Del. Super. June 15, 2006).

<sup>3</sup> *Id.*

<sup>4</sup> *Ebersole v. Lowengrub*, 54 Del. 463 (Del. 1962).

<sup>5</sup> *Id.*

<sup>6</sup> *Tedesco*, 2006 WL 1817086 at \*1.

is able to rid himself of liability. Where the entire burden of liability shifts from one defendant to another, indemnification has been invoked. On the other hand, where liability is shifted only proportionally with a sharing of the burden among the defendants contribution exists instead.”<sup>7</sup> The remedies are mutually exclusive, because they address alternative circumstances.<sup>8</sup>

\_\_\_\_\_Regarding indemnification, the right thereto arises, often times, from contract.<sup>9</sup> On the other hand, a defendant may enjoy a right to common law indemnity. That equitable remedy may be available where two defendants, as joint tortfeasors, are liable to the same person for a joint wrong.<sup>10</sup> In such cases, the primary wrongdoer may have a duty to indemnify the secondary wrongdoer for the recovery made by the injured party.<sup>11</sup>

\_\_\_\_\_Such is the situation here, where Fairfield Defendants seek indemnification from Otis on a primary/secondary liability basis. However, Fairfield Defendants’ claim is not ripe for determination. A cause of action for common law indemnification does not accrue until after the party seeking indemnification has made payment to the injured party, and the dispute between those parties is concluded.<sup>12</sup>

At this juncture, in light of this Court’s opinion regarding Fairfield Defendants’

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<sup>7</sup> *American Ins. Co. v. Material Transit, Inc.*, 446 A.2d 1101, 1103 (Del. Super. 1982).

<sup>8</sup> *Levy v. HLI Operating Co.*, 924 A.2d 210, 221 (Del. Ch. 2007).

<sup>9</sup> *Id.* at 1104.

<sup>10</sup> *Diamond State Telephone Co. v. Univ. of Del.*, 269 A.2d 52, 56 (Del. 1970).

<sup>11</sup> *Id.*

<sup>12</sup> *Quereguan v. New Castle County*, 2006 WL 2522214, at \*5 (Del. Ch. Aug. 18, 2006).

motion for summary judgment of Plaintiffs' claims against them, it makes sense to deny Fairfield Defendants' motion for summary judgment of their cross claims against Otis. It may be the case that Fairfield Defendants are secondarily liable to Otis for Mrs. Himbrick's injury. That is a fact issue not appropriate for summary judgment. On the other hand, it may be that Fairfield Defendants are primarily liable for Mrs. Himbrick's injury, in which case they may be entitled to contribution from Otis. Again, that is a factual matter not appropriate for summary judgment.

**CONCLUSION**

Fairfield Defendants' motion for summary judgment of their cross claim against Otis is **DENIED**.

**SO ORDERED** this 1<sup>st</sup> day of May, 2012.

\_\_\_\_\_  
/s/ Robert B. Young

J.

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cc: Opinion Distribution  
File

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