COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

04-P-1530

RICHARD MacFARLAND

vs.

RCS GROUP, INC., & others[1];
LAMONICA CONSTRUCTION COMPANY, third-party defendant.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

At issue is the enforceability of an indemnification provision in a written agreement for construction services between RCS Group, Inc. (RCS) -- a general contractor -- and Lamonica Construction Company, Inc. (Lamonica), one of the subcontractors. Nye Lubricant, Inc. (Nye), hired RCS, and RCS in turn hired Lamonica, to perform roofing work on a building owned by Sunderbans Limited Partnership (Sunderbans) and leased to Nye for its lubricant distribution business. On April 17, 1998, Richard MacFarland, an employee of Lamonica, fell from the roof of the building in the course of his work. MacFarland was hurt and brought a tort action -- primarily alleging negligence -- against RCS,[2] which in turn filed a third-party complaint against

[1] Nye Lubricant, Inc., and Sunderbans, L.P. As is our usual practice, we take the parties' names from the operative complaint.

[2] MacFarland subsequently amended his complaint to add claims against Sunderbans and Nye. (A. I:50-54). Neither MacFarland's initial complaint nor his amended complaint sets forth specific facts on which he bases his claim that RCS was negligent.

Lamonica, alleging counts of contractual and common law indemnification, contribution, and breach of contract. (A. I:17-20). Lamonica brought a fourth-party complaint against New Bedford Thread Company, Inc., for which Nye subsequently was substituted as a fourth-party defendant. (A. I:29-32). RCS and Nye separately moved for summary judgment. After hearing, on May 1, 2002, a Superior Court judge allowed Nye's motion dismissing the fourth-party complaint (clerk's notice, A. III:608), and on May 2, 2002, allowed RCS's motion, ordering that judgment be entered "declaring that Lamonica . . . is obligated to defend and indemnify RCS . . . pursuant to the terms of its 4/9/98 subcontract" (clerk's notice, A. III:609).

Final judgments eventually were entered[3] ordering and declaring that Lamonica is obligated to defend and indemnify RCS pursuant to the terms of the subcontract, that Lamonica was to pay attorneys' fees and costs of $35,316.22 to RCS and $35,316.22 to Nye (A. V:1144-1145), and dismissing Lamonica's fourth-party complaint against Nye (A. V:1146).[4] Lamonica has appealed from

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[3] MacFarland's claims were settled by Lamonica for $900,000, and in return MacFarland signed releases of Lamonica, RCS, Nye, and Sunderbans. (A. IV:842-847). But that settlement specifically excepted from the releases Lamonica's, RCS's, Nye's, and Sunderbans's respective claims for contribution and indemnity.

[4] Because we hold that Lamonica is not contractually obligated to indemnify RCS or Nye, we do not need to decide Lamonica's appeal of the judgment dismissing its fourth-party complaint.

the latter two judgments (A. V:1147).

1. A contractual obligation to indemnify is void under G. L. c. 149, § 29C,[5] if it provides for the possible indemnification by a subcontractor regardless of the fault of the indemnitee or its employees, agents, or subcontractors. Harnois v. Quannapowitt Dev., Inc., 35 Mass. App. Ct. 286, 288 (1993). See Jones v. Vappi & Co., 28 Mass. App. Ct. 77, 81 (1989). The primary focus of review for an indemnity obligation "properly is on the language of the provision rather than the facts of the accident or assessment of the parties' fault." Bjorkman v. Suffolk Constr. Co., 42 Mass. App. Ct. 591, 592 (1997).

In this case, the subcontract states, in pertinent part:

> "5.(a) SUBCONTRACTOR agrees to defend, indemnify and hold harmless the CONTRACTOR and the Owner and their officers, agents and employees from any damages, losses, expenses penalties, attorney fees, costs, claims, causes of action, demands and judgments resulting from (i) injury or death to any person, (ii) property damage, (iii) contract claims, or (iv) other claims or damages with [sic], or arises out of, or results from any act or omission, or is caused or alleged to have been caused by (i) an act or omission of SUBCONTRACTOR or its officers, agents, employees or those with whom [sic] it controls for any part of the Work, (ii) a violation of any provision of this

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[5] G. L. c. 149, § 29C, as amended through St. 1986, c. 557, § 135, states:

> "Any provision for or in connection with a contract for construction, reconstruction, installation, alteration, remodeling, repair, demolition or maintenance work . . . which requires a subcontractor to indemnify any party for injury to persons or damage to property not caused by the subcontractor or its employees, agents or subcontractors, shall be void."

> Subcontract, or (iii) by any act or failure to act contrary to any law, order, citation, rule, regulation, standard or statute whether by SUBCONTRACTOR or * by anyone for whose [sic] acts arising solely from the negligence or willful misconduct of CONTRACTOR, its officers, agents or servants." (RA. II:291).

The asterisk denotes the insertion of the following handwritten provision, which was initialed by both parties: "ADD the following: the Subcontractor is legally responsible except [sic] damages, losses, expenses." Ibid.

The "alleged to have been caused by" language would force Lamonica to indemnify the contractor and the owner of the property for any injury or damage based on mere allegation, even if Lamonica was not in fact at fault. This runs afoul of the purpose of § 29C, which "was enacted to curtail the extent of the indemnity provisions that general contractors required of subcontractors," and which requires "some action . . . or inaction . . . that provokes the mishap. Otherwise . . . the subcontractors, just by signing up for the subcontract . . . are bound to indemnify 'come what may.'" Miley v. Johnson & Johnson Orthopaedics, Inc., 41 Mass. App. Ct. 30, 32-33 (1996). In 2005, we specifically said that "alleged to be caused" language "exceeds what is permissible" under the statute because "[a] contractor may not base a claim for indemnity upon mere allegations of the subcontractor's responsibility, because to do so could result in indemnification for injury or damage 'not caused by the subcontractor.'" Sheehan v. Modern

Continental/Healy, 62 Mass. App. Ct. 937, 938 (2005). Because of this language, unless there is an appropriate savings clause, the entire indemnity provision is void under the statute. See Harnois v. Quannapowitt Dev., Inc., 35 Mass. App. Ct. at 288-289 (voiding an entire indemnification clause because it contained a provision that might have required the subcontractor to indemnify the contractor for an injury that it did not cause). See also Musacchio, Statutory Limitations on Indemnity Agreements in Construction Contracts: The Meaning and Effect of G. L. M. c. 149, § 29C, 80 Mass. L. Rev. 54, 63 (1995) ("It is likely that the validity of such a provision will be judged, not on its most restrictive language; but rather, on its most expansive. Therefore, if any one of the disjunctive phrases violates § 29C, the entire indemnity clause may be void").

2. Even though an indemnity clause contains language that violates § 29C, the provision can be considered valid if there is a "savings clause" in the contract. See, e.g., Sheehan v. Modern Continental/Healy, 62 Mass. App. Ct. at 938 n.2 (excising the offending language and permitting the rest of an indemnity clause to stand because there was a "savings clause" in the indemnity agreement that limited its scope to the "fullest extent permitted by law"). There are two possibilities for a savings clause in the Lamonica contract: 1) the severability clause in paragraph

22 of the contract[6]; and 2) the handwritten addendum noted above.

The severability clause of paragraph 22 cannot operate as a savings clause for the indemnity provision for two reasons. First, the clause by its own terms severs an entire illegal provision from the rest of the provisions of the contract. Therefore, the severability clause would excise the entire indemnity provision and Lamonica could not be held responsible for indemnifying RCS, Nye, or Sunderbans.

Second, even if the severability clause would only excise the offending language, it cannot be applied to the indemnity provision under Massachusetts case law. In Bjorkman v. Suffolk Constr. Co., 42 Mass. App. Ct. at 594, we examined a purported savings clause that stated that the contract was enforceable against the subcontractor "except to the extent that the provisions contained [in the contract documents] are by their terms or by law applicable only to the Contractor." This language did not save the contract because it was "not located

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[6] Paragraph 22 states:

> "In the event any one or more of the provisions of this agreement or any instrument executed and delivered hereunder or pursuant hereto shall be held to be invalid, illegal or unenforceable in any respect or as to any person or party by any court or by any arbitration proceeding, the validity, legality and enforceability of the remaining provisions of this agreement or any other instrument executed and delivered hereunder or pursuant hereto, and as to all other persons and parties shall not be affected or impaired thereby." (A.II: 294).

directly within the indemnity provision" and it was "questionable whether the parties could have intended the language . . . to serve as saving language for the indemnity clause." Ibid. We further noted that the "savings clause" language tracked the form subcontract in G. L. c. 149, § 44F, which predated § 29C, and thus that it was unlikely the parties intended the language to apply to a provision that might violate § 29C. Ibid.

Here, the "savings" language was not included in the indemnity clause and it clearly applied to the entire contract. There is no evidence that the parties intended this language to apply specifically as a savings provision for the indemnity clause and to innoculate the clause from violating § 29C. Therefore, the severability clause cannot be seen as a savings clause for the purposes of the statute.

The handwritten provision added to the indemnity clause could act as a savings provision. Although it is awkwardly phrased, it seems to hold the subcontractor legally responsible for all the conditions in the indemnification clause except if the damages, losses, or expenses arise solely from the negligence or wilful misconduct of the contractor, its officers, agents, or servants. This is a significant change from the original wording of the indemnification clause, which holds the subcontractor responsible for the actions of its own agents and employees as well as acts "arising solely from the negligence or willful misconduct of Contractor, its officers, agents or servants."

(A. II: 291). The handwritten provision could be seen as specifically recognizing the problem with the indemnification clause as originally written and an effort to limit the subcontractor's responsibility to indemnify so that it does not include damages caused solely by the contractor.[7]

The handwritten provision is obtusely worded, but it does seem to serve the purpose of a valid savings clause under the case law. Indemnity provisions run afoul of § 29C only when the subcontractor must indemnify another party for damages caused solely by that party. However, the statute "does not prohibit contractual indemnity arrangements whereby the subcontractor agrees to assume indemnity obligations for the entire liability when both the subcontractor and the general contractor or owner are causally negligent." Herson v. New Boston Garden Corp., 40 Mass. App. Ct. 779, 788 (1996). See also, e.g., Transamerica Ins. Group v. Turner Constr. Co., 33 Mass. App. Ct. 446, 449 n.3 (1992) (holding that, so long as the subcontract clause prohibits indemnification for the sole negligence of the general contractor, it comports with the statute).

However, because of the peculiar placement of the handwritten language (see page 4, supra), it applies to part

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[7] It should be noted that RCS does not make this argument in its brief, instead arguing that the savings clause issue is moot because the indemnification provision does not violate the statute. (RCS Br. at 19-20). It is, however, raised by Nye and Sunderbans. (Nye and Sunderbans Br. at 16-18).

(iii) of the indemnity provision, which deals with acts or failure to act by the subcontractor or the contractor. The indemnity clause still leaves open the possibility that a subcontractor could be exposed to liability on the basis of a mere allegation. Under Harnois v. Quannapowitt Dev., Inc., 35 Mass. App. Ct. at 288, the validity of an indemnity provision in a subcontract under § 29C is determined strictly by looking at the language of the clause. See also Sciaba Constr. Corp. v. Frank Bean, Inc., 43 Mass. App. Ct. 66, 69 (1997) ("There is nothing about the case that impels us to abandon the generally trustworthy approach of interpreting a contractual provision in accordance with its plain meaning"). Thus, the possibility that Lamonica could be required to indemnify based on a mere allegation violates the statute. See Sheehan v. Modern Continental/Healy, 62 Mass. App. Ct. at 938 ("[t]he language 'alleged to be caused' exceeds what is permissible under G. L. c. 149, § 29C").

The case at bar can be distinguished from Sheehan, where we allowed the indemnity provision to stand because it contained a savings clause that limited the scope of the clause to the "fullest extent permitted by law." Id. at 938 n.2. In this case, there is no such phrase in the indemnity clause and, as discussed above, the analogous language in the severability provision of the subcontract cannot be considered a savings clause because it either operates to excise the entire indemnity

provision or cannot, under Massachusetts precedent, save the offending provision of the indemnity clause.

Nye and Sunderbans argue that, even if the indemnity clause of the contract is held to be invalid, Lamonica has a common law duty to indemnify them. At common law, "a person may seek indemnification if that person 'does not join in the negligent act but is exposed to derivative or vicarious liability for the wrongful act of another.'" Fireside Motors, Inc. v. Nissan Motor Corp. in U.S.A., 395 Mass. 366, 369 (1985), quoting from Stewart v. Roy Bros., 358 Mass. 446, 459 (1970). Neither party raised the issue below, so we do not consider it here. See, e.g., Royal Indem. Co. v. Blakely, 372 Mass. 86, 88 (1977) ("Our cases hold consistently that a nonjurisdictional issue not presented at the trial level need not be considered on appeal").

Under Fabre v. Walton, 441 Mass. 9, 10-11 (2004), we need not entertain the defendant Nye's request for attorneys' fees and costs incurred on appeal, because it failed to prevail on appeal.

The judgment, entered July 22, 2004, is reversed, and the stipulations regarding attorneys' fees and costs and dismissal, entered April 7, 2003, are set aside. The judgment of dismissal, entered July 22, 2004, is vacated. The case is remanded to the Superior Court (i) with instructions to enter an order declaring that paragraph 5(a) of the RCS/Lamonica subcontract is void as violative of G. L. c. 143, § 29C; and (ii) for further

proceedings consistent with the foregoing memorandum and order.

So ordered.

By the Court (Greenberg, Cowin & Mills, JJ.),

Clerk

Entered: March 16, 2006.