

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 30

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JOHN C. DUNN and MARILYN DUNN,

Plaintiffs,

DECISION AND ORDER

-against-

Index No. 107283/2008

A.O. SMITH WATER PRODUCTS, et al.,

Defendants.

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SHERRY KLEIN HEITLER, J.

This motion by defendant Long Island Tinsmith Supply Corp. ("LITSCO") seeks conditional summary judgment on its claim for common-law indemnification against defendant Karnak Corporation ("KARNAK"). While this motion was pending, plaintiffs' entire case was settled at trial in respect of all of the defendants in the case, including LITSCO and KARNAK. The settlements reached with plaintiffs by these two defendants were effected separately, and the court does not know the particulars thereof.

Underlying this motion is the asbestos personal injury action brought by plaintiffs against various, numerous defendants. Plaintiff John C. Dunn ("Plaintiff") was diagnosed with malignant mesothelioma in May 2008 as a result of his exposure to asbestos. He alleged, among other things, that he was a Long Island Railroad ("LIRR") employee from 1961 to 1993, during which time he was exposed to asbestos in the performance of his boiler-related and roofing-related work as a Laborer/Plumber/Driver for the LIRR. Plaintiff alleged that he worked with asbestos-containing Karnak brand roof cement which LIRR had purchased from retailer LITSCO. LITSCO, in turn, had purchased Karnak roof cement from manufacturer KARNAK. Plaintiff testified at his depositions that some of his roofing jobs for the LIRR entailed the removal of old

Karnak roof cement from various LIRR buildings which produced airborne asbestos fibers and dust which Plaintiff inhaled, which caused or contributed to his asbestos-related disease. As indicated above, Plaintiff named both LITSCO and KARNAK among the defendants sued in this action. LITSCO's verified answer to Plaintiff's complaint includes a cross claim for contribution and/or indemnification against its co-defendants and any third party defendants. On or about October 21, 2008, LITSCO tendered its defense and indemnification to KARNAK. KARNAK rejected LITSCO's tender of defense on October 31, 2008. This motion for summary judgment on LITSCO's common law indemnification claim ensued.

On this motion LITSCO contends it is an innocent non-negligent defendant whose exposure to liability in this action occurred solely because of its status as a seller-distributor of Karnak roof cement. In opposition KARNAK argues that the mere sale or distribution of an asbestos-containing product constitutes active negligence, as established by *Durabla Mfg. Co. V. Goodyear Tire and Rubber Company*, 992 F.Supp. 657 (SDNY 1998), which deprives LITSCO of its indemnification claim. KARNAK argues that, in the alternative, should the court find that the mere act of selling or distributing an asbestos-containing product does not in itself constitute active negligence, LITSCO's motion should nonetheless be denied. KARNAK points to Plaintiff's testimony that LITSCO modified the KARNAK product before sale by attaching a notice onto the product, and further verbally advised Plaintiff to read the notice, which modification amounts to an independent act of negligence on the part of LITSCO. This, according to KARNAK, nullifies LITSCO's claim for common-law indemnification under *Correia v. Professional Data Management, Inc.*, 259 AD2d 60, 65 (1st Dept 1999).

LITSCO disputes that Plaintiff's testimony was that LITSCO placed asbestos notices on the KARNAK product, and proffers the testimony of LITSCO's corporate representative, Harvey

C. Lucks, that LITSCO did not put any notices, labels or warnings on the product it received from the manufacturer, KARNAK, and delivered all such product to its customers in the original packaging and on the original pallets supplied by the manufacturer KARNAK.

In reliance upon *Farrell v. Gristede's Supermarkets, Inc.*, 50 AD3d 603 (1st Dept 2008) and *Felton v. A.O. Smith et al./Zurn Industries, LLC v. Mount Sinai Hospital* (N.Y. Sup. Ct., N.Y. County, Index Nos. 114005/06, 50064/07, Order dated Oct. 12, 2007) (Madden, J.) KARNAK replies that because LITSCO and KARNAK each separately settled with plaintiffs before trial there is no record and thus no factual predicate to establish KARNAK's duty to indemnify¹, and the parties' settlements with plaintiffs are thus subject to General Obligations Law §15-108 ("GOL 15-108")², which bars all contribution claims against KARNAK and all contribution claims by LITSCO. KARNAK thus argues that LITSCO's motion for common law indemnification must be treated as one for contribution, which is barred by GOL 15-108.

LITSCO responds that extensive discovery has been conducted in this case which supports its claim of indemnification without a need for a separate trial or further discovery. LITSCO further correctly asserts that although GOL 15-108 bars third party contribution claims by or against a party who has settled, it does not bar third party indemnity claims by or against a

¹On or about January 26, 2009 KARNAK served on LITSCO a Notice of Deposition and a Demand for Additional Discovery on the ground that KARNAK needed further discovery to properly address LITSCO'S indemnification claim. On February 2, 2009 LITSCO submitted a motion to the trial court for a protective order quashing KARNAK's Notice of Deposition on the ground that LITSCO had provided extensive discovery sufficient to warrant granting LITSCO's indemnification claim. While this motion was *sub judice* the plaintiffs' case was settled and the trial court deemed the applications moot.

²GOL 15-108 entitled "Release or covenant not to sue" provides, in relevant part:
(b) Release of tortfeasor. A release given in good faith by the injured person to one tortfeasor...relieves him from liability to any other person for contribution as provided in article fourteen of the civil practice law and rules.

(c) Waiver of contribution. A tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person....

settled party, and KARNAK's characterization of LITSCO's indemnification claim as one for contribution is unsupported by law or fact.

It has long been held that GOL 15-108 does not apply to indemnity claims, and LITSCO's and KARNAK's separate settlements with plaintiffs do not preclude LITSCO from seeking common law indemnification from KARNAK unencumbered by the statute. As set forth in *McDermott et al. v. City of New York*, 50 N.Y.2d 211, 216-220 (1980), the terms "indemnification" and "contribution" are not interchangeable:

This court has often pointed to the 'fundamental distinction between contribution and indemnity. The right to contribution is not founded on nor does it arise from contract and only ratable or proportional reimbursement is sought in an action for contribution. * * * The right to indemnity, as distinguished from contribution, is not dependent upon the legislative will. It springs from a contract, express or implied, and full, not partial, reimbursement is sought'...(citations omitted) * * * The fatal flaw in respondent's position is that the General Obligations Law provision [section 15-108(c)], on its face, is applicable only to contribution claims. * * * Thus, our prior holdings that section 15-108 of the General Obligations Law has no application to indemnity claims are controlling in the present circumstances....(citations omitted). In short, one who settles a tort action against him may continue to pursue a cause of action for indemnification, unencumbered by section 15-108. *McDermott et al. v. City of New York*, *supra*, 50 N.Y.2d at 216-220.

See also, *Godoy v. Abamaster of Miami, Inc.*, 302 AD2d 57, 64 (2d Dept), *lv. dismissed* 100 N.Y.2d 614 (2003)("Likewise, settlement by the indemnitor, as in this case, should have no bearing upon the indemnitee's claim.") Accordingly, while GOL 15-108 bars a defendant who has settled from seeking contribution from another defendant who has settled, GOL 15-108 does not bar a defendant who has settled from seeking indemnification from another defendant who has settled.

Further, KARNAK misapplies *Farrell v. Gristede's Supermarkets, inc.*, *supra* and *Felton v. A.O. Smith, et al/Zurn Industries, LLC v. Mount Sinai Hospital*, *supra*, in urging this court to treat LITSCO's claim for indemnification as a claim for contribution. In *Farrell v. Gristede's Supermarkets*, *supra*, the plaintiff tripped over debris on the sidewalk in front of defendant

Gristede's. Gristede's claimed that the debris originated from the Gap, which was the neighboring store. The court deemed Gristede's claim for indemnification and/or contribution against the Gap as one for contribution, reasoning that "the record fails to establish that any duty to indemnify, either contractual or otherwise, exists between the Gap and Gristede's." Thus, in the first instance, indemnification was not an option as between these otherwise unrelated joint tortfeasors. Cf., *Rosado v. Proctor & Schwartz, Inc.*, 66 N.Y.2d 21, 24 (1985) ("[A]n indemnity cause of action can be sustained only if the third-party plaintiff and the third-party defendant have breached a duty to plaintiff and also if some duty to indemnify exists between them"....[citation omitted]).

In *Felton*, Judge Madden first addressed defendant Zurn's claim for contribution on its own facts in keeping with GOL 15-108. She then separately and independently dismissed Zurn's claim for indemnification, on its own facts, holding that "Zurn fail[ed] to allege any factual or theoretical underpinning for indemnification against Mt. Sinai as to plaintiff's claims regarding failure to warn. Under these circumstances, Zurn's liability, if any, is neither vicarious nor derivative, but must be based on its own acts or omissions, and any claim for common law indemnification does not survive." (*Felton, supra, at 7.*) As in *Farrell*, the determination in *Felton* was decided on facts which did not support a claim for indemnification on Zurn's part due to Zurn's own independent acts. Neither of these cases dealt with the court's treating an indemnification claim as a contribution claim merely because the proposed indemnitor and indemnitee failed to create a trial record in favor of settlement. Indeed, "one who settles a tort action against him may continue to pursue a cause of action for indemnification unencumbered by section 15-108." *McDermott et al v. City of New York, supra*, 50 NY2d at 220.

In identifying LITSCO's claim as one for indemnification the court must look to the

theory of recovery expressed by LITSCO (*see, Glaser v. M. Fortunoff of Westbury Corp.*, 71 NY2d 643, 646 [1988]):

In the 'classic indemnification case,' the one seeking indemnity 'had committed no wrong, but by virtue of some relationship with the tortfeasor or obligation imposed by law, was nevertheless held liable to the injured party' In other words, 'where one is held liable solely on account of the negligence of another, indemnification, not contribution, principles apply to shift the entire liability to the one who was negligent' Conversely, where a party is held liable at least partially because of its own negligence, contribution against other culpable tort-feasors is the only available remedy.... Accordingly, where a party who has settled seeks to avoid the bar to reimbursement posed by [GOL 15-108], that party must show that 'it may not be held responsible in any degree' for the plaintiff's damages.... (*Id.*, Citations omitted)

Accordingly, contribution involves joint tortfeasors and indemnification involves vicarious or derivative liability. *Farrell and Felton* aside, the case at bar is more accurately compared to situations in which "a seller or distributor of a defective product has an implied right of indemnification as against the manufacturer of the product....(citations omitted.)" (*German v. Morales*, 24 AD3d 246, 247 [1st Dept 2005]; *see, also Godoy v. Abamaster of Miami, Inc., supra*; *Lowe v. Dollar Tree Stores, Inc.*, 40 AD3d 264 (1st Dept 2007); *Olivier v Kirby & Allen, Inc.*, 17 Misc.3d 1119[A], 2007 WL 3118763 [Sup Ct, NY Co. 2007]).

LITSCO's moving papers clearly articulate its legal arguments in support of an indemnity claim, and not contribution. LITSCO asserts that as a retail conduit through which manufacturer KARNAK's offending product was passively distributed to the public by LITSCO, the record is bereft of any facts or circumstances from which any active negligence on LITSCO's part may be inferred, and LITSCO's demand thus is not that a portion of the liability be shifted onto KARNAK, but that all liability be shifted onto KARNAK and as the innocent distributor of the KARNAK product LITSCO is entitled to full indemnification from KARNAK, including attorneys fees. LITSCO's claim clearly is one for indemnification and not contribution. As

such, it is not subject to the bar of GOL 15-108.

Further, KARNAK asserts, and LITSCO does not deny, that LITSCO is held strictly liable under the law as the distributor of an allegedly hazardous product. KARNAK thus asserts that any claim by LITSCO for common law indemnification must fail because, under *Durabla Mfg. Co. v. Goodyear Tire and Rubber Company, supra*³, LITSCO's strict liability based upon the mere distribution of the inherently hazardous product constitutes the necessary negligent act on LITSCO's part sufficient to bar a common law indemnification claim by it against the manufacturer. However, this court believes the *Durabla* court has interpreted the decision in *Rosada v. Proctor & Schwartz, Inc., supra*, more broadly than later decisions by the courts of this state would suggest on the question of a claim of indemnity in a products liability action. As an example, in *Lowe v. Dollar Tree Stores, Inc., supra*, 40 AD3d 264, a case in which an infant plaintiff was injured by a defective toy, the First Department, in 2007, confirmed: "It has been held that, as among the parties to an action, a party/distributor lower in the chain of distribution is entitled to common-law indemnification from the one highest in the chain of distribution, due to the latter's closer, continuing relationship with the manufacturer and superior position to exert pressure to improve the safety of the product...(citations omitted) Such policy shifts risk of loss to the party who can most efficiently control risk and distribute the attendant costs." *Id.*, at 265.

³In reliance on the Court of Appeals decision in *Rosada v. Proctor & Schwartz, Inc., supra*, the *Durabla* court opined that the mere distribution of an hazardous product constitutes negligence, precluding common-law indemnification: "Maintaining that the only exposure that led to its settlement of the underlying claims was strict liability, plaintiff contends that this 'passive' liability is akin to vicarious liability and therefore permits a claim for common law indemnification. But there is nothing passive about the role of a distributor of a defective or hazardous product, and 'any analogy' between strict liability and instances in which liability is fixed on another without regard to any volitional act...is clearly flawed." (*Durabla Mfg. Co. v. Goodyear Tire & Rubber Co., supra*, at 660.)

(See, also, *German v. Morales*, 24 AD3d 246 [1st Dept 2005]; *Godoy v. Abamaster of Miami, Inc.*, 302 AD2d 57 [2d Dept], *lv dismissed* 100 NY2d 614 [2003]; *Olivier v Kirby & Allen, Inc.*, *supra*, 17 Misc.3d 1119A [NY Sup Ct, NY Co. 2007]). These cases more closely fit within the import of *Rosado v. Proctor & Schwartz, Inc.*, in which the Court of Appeals decided, in the circumstances of that case, that indemnification may not be obtained by a manufacturer of a defective product against the purchaser-employer of such product whose employee was injured by the product. To fit itself into an indemnity claim against the employer whereby it needed to be without active fault, the manufacturer argued that the imposition of strict products liability against it should be considered liability without fault because of the purported contract the manufacturer had with the purchaser that the purchaser would install safety devices on the product. In that context, the *Rosado* Court rejected the manufacturer's argument and instructed that (*Rosado, supra*, 66 NY2d at 25-26):

A strict products liability action is not analogous to vicarious liability, resulting in the imposition of liability without regard to fault. A *manufacturer* is held accountable as a wrongdoer, and, while the proof that must be adduced by a plaintiff is not as exacting as it would be in a pure negligence action, a prima facie case is not established unless it is shown, among other things, that in relation to those who will use it, *the product was defective when it left the hands of the manufacturer because it was not reasonably safe....* (citations omitted, emphasis added). Any analogy to vicarious liability under the Labor Law..., respondeat superior, or the Vehicle and Traffic Law – instances in which liability is fixed upon another without regard to any volitional act – is clearly flawed. * * * [W]e hold that where, as here, the manufacturer is in the best position to know the dangers inherent in its product, and the dangers do not vary depending on jobsite, it is also in the best position to determining what safety devices should be employed....

The theory of liability in the cases cited above and in the case at bar (that is, there is an implied right of indemnity against the manufacturer of a defective product, or those closest to the manufacturer in the chain of distribution of such product, by a person in the chain of distribution from the manufacturer, failing an independent act of negligence on the part of the person

claiming indemnity), is in full accord with the Court's decision in *Rosado, supra*. In this regard, KARNAK's reliance on *Durabla, supra*, to achieve the opposite result is in error.

Having found that LITSCO's claim is properly one for common law indemnification under the facts of this case and the law, the court must deny LITSCO's motion for conditional summary judgment. A question of fact remains as to whether LITSCO indeed altered the KARNAK product, thereby precluding it from obtaining indemnification by reason of its own acts. Contradictory testimony exists as to whether LITSCO attached asbestos notices onto the KARNAK product. A portion of Plaintiff's July 25, 2008 deposition testimony reads:

Q: ...What did they tell you specifically about this tar containing asbestos?

A: ...the Long Island Tin had--I think they had a notice on it. And some of the people--some of the people might have said something to us.

Q: The Long Island Tin that was--refresh my memory, that was a supplier you would work with?

A: Supplier.

Q: When did this notice come out?

A: Started noticing it on the cans then they told us--the counterman would just point it out and say, look, read the can.

Then, in opposition to such testimony, Plaintiff later testified on August 12, 2008:

Q: Do you remember there ever being an asbestos warning on a Karnak roofing cement product?

A: No.

Q: Okay. Do you remember anyone ever at LITSCO warning you about asbestos?

A: No.

The deposition testimony of LITSCO's corporate representative Harvey C. Lucks was:

Q: Now, during that period of time, 1948 through the 1970's, when you sold asbestos-containing materials manufactured by Philip Carey, Johns-Manville or Karnak, do you recall any of the materials that there was [sic] warnings about the

hazards of asbestos?

A: I don't recall any label.

Q: Any type of warning on any packaging?

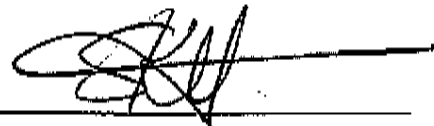
A: No.

Whether LITSCO attached asbestos warnings on Karnak roof cement, thereby altering KARNAK's product by its own independent act, is determinative of whether KARNAK should be obligated to indemnify LITSCO. (*See Lowe v. Dollar Tree Stores, supra*, at 265). On that score, there are discrepancies in the witnesses' testimony. When considering a motion for summary judgment, the court cannot weigh credibility (*Capelin Assoc. V. Globe Mfg. Corp.*, 34 NY2d 338 [1974]). A discrepancy in testimony is for the finder of fact to determine (*See Dollas v. W.R. Grace & Co.*, 225 AD2d 319 [1st Dept 1996]).

Accordingly LITSCO's motion for conditional summary judgment on the issue of common law indemnification is denied, without prejudice to renew following a hearing in the proper forum on the issue of LITSCO's purported independent acts of negligence, if any. In this regard this third party action for common law indemnity is hereby severed from the main action in which plaintiffs have settled with all parties, and this third party action shall continue under its own index number separate from the main action, without further costs payable to Clerk of the Court by the parties.

This is the decision and order of the court.

Dated: November 9, 2009



Sherry Klein Heitler, J.S.C.