

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

DONALD COSENTINE,	:	No. 19-00638
Plaintiff	:	
	:	Civil Action – Law
vs.	:	
	:	<i>Motion in Limine</i>
SETH BURCH, THE SMITH-BURCH	:	
AGENCY, LLC t/d/b/a SMITH BURCH	:	
AGENCY and THE FARMERS FIRE	:	
INSURANCE COMPANY,	:	
Defendants	:	

OPINION AND ORDER

AND NOW, this 28th day of December 2022, the Court hereby issues the following Opinion and Order concerning the Motion in Limine filed by Defendants Seth Burch and The Smith-Burch Agency, LLC t/d/b/a Smith Burch Agency (the “Burch Defendants”) on October 3, 2022.

BACKGROUND

The procedural history of this case is summarized in this Court’s June 27, 2022 Opinion and Order. Briefly, this case arises out of a fire at a property owned by Plaintiff. Plaintiff alleges that prior to the fire he arranged with the Burch Defendants to obtain insurance coverage for the property from The Farmers Fire Insurance Company (“Farmers”) as he had done with other properties he owned. After the fire, Plaintiff submitted a claim to Farmers but was informed that no policy had ever issued for the property. Plaintiff’s Complaint contains five counts:

- 1) Negligence against Mr. Burch; 2) Negligent Representation against Mr. Burch;
- 3) Vicarious Liability against Smith-Burch; 4) Breach of Contract against Farmers;

and 5) Bad Faith against Farmers.¹ Both Farmers and the Burch Defendants responded to the Complaint by filing Answers with New Matters and Crossclaims.

After discovery, the Court initially placed the case on the trial list for January 2022, but continued trial multiple times due variously to the COVID-19 pandemic, unavailability of counsel, and outstanding motions practice. On June 27, 2022 the Court issued an Opinion and Order addressing, *inter alia*, a number of motions in limine filed by Farmers, including Farmers' Motion to Preclude the Burch Defendants' expert David Cole from testifying.²

MOTION IN LIMINE

On September 23, 2022, Farmers filed a Supplemental Pretrial Statement. In Section X addressing legal theories, Paragraphs E and F read as follows:

- "E. Defendant Burch's cross-claim for common law indemnification fails as a matter of law since common law indemnity is not available when there is a written contract between the parties, e.g. the Agency Agreement, setting forth the rights and duties of the parties.
- F. Defendant Burch's cross-claim for common law indemnification fails as a matter of law since under Pennsylvania law both contribution and indemnification require two tortfeasors, and do not apply when one defendant's liability is based on a breached contract between it and the original plaintiff."

¹ Relevant to the instant Motion in Limine, Plaintiff did not initially raise a claim for negligence against Farmers. On November 12, 2020, Plaintiff requested leave to amend the Complaint to add a negligence claim against Farmers. On February 25, 2021, the Court denied Plaintiff's motion to add a negligence claim, holding that as a matter of law Farmers did not owe Plaintiff a duty of care to timely process the endorsement request for the sought after insurance policy. Plaintiff filed an Amended Complaint, adding other claims, on March 5, 2021.

² Farmers' Motion to Preclude is relevant to the issue raised in the instant Motion in Limine.

At the pretrial conference held that same day, counsel for the Burch Defendants asserted that the crossclaim they had filed against Farmers was one for contractual indemnification rather than common law indemnification. Counsel for Farmers argued that the language in the crossclaim clearly established a claim for common law indemnification but was insufficient to support a claim for contractual indemnification. The Court granted the parties leave to file motions in limine to resolve the issue before trial.

On October 3, 2022, the Burch Defendants filed the instant Motion in Limine to Confirm their New Matter Crossclaim. The Burch Defendants first assert that Farmers had not raised the issue until it filed its Supplemental Pretrial Statement on September 23, 2022, over three years after the Burch Defendants originally filed their crossclaim against Farmers.³ The Burch Defendants argue that the failure to raise this issue in preliminary objections, a motion for summary judgment, or by some other means prior to the eve of trial is prejudicial and should therefore be disallowed. On the merits, the Burch Defendants argue that the language of the crossclaim is sufficient to support a claim for contractual indemnification, and that they should be permitted to submit the question to the factfinder.

In response, Farmers first asserts that it raised the issue of the sufficiency of the Burch Defendants' crossclaim for indemnification in its motion in limine to

³ In response to Plaintiff's March 5, 2021 Amended Complaint, the Burch Defendants filed an Amended Answer and Crossclaim on April 1, 2021; the relevant portion of the crossclaim in this filing, however, was materially identical to the Burch Defendants' original crossclaim filed on June 13, 2019.

preclude the Burch Defendants' expert David Cole from testifying. Farmers argues that the crossclaim contains quintessential common law indemnification language, and they did not previously contest the Burch Defendants' ability to raise a contractual indemnification claim because they did not understand the Burch Defendants to be making such a claim.⁴ On the merits, Farmers argues that there is no viable common law indemnification crossclaim because there is no allegation that Farmers has committed a tort against Plaintiff, which is a prerequisite to finding Farmers secondarily liable to Plaintiff. Farmers argues that any contractual indemnification crossclaim similarly fails because the indemnification in the contract between Burch and Farmers applies only in three specific scenarios, none of which is present here.

The Court held argument on the Burch Defendants' Motion in Limine on October 25, 2022. In support of their Motion, the Burch Defendants highlighted the general rule that matters not raised in preliminary objections are waived. The Burch Defendants contended that even though there is no surviving claim for negligence by Plaintiff against Farmers,⁵ the principles of common law indemnification apply between the Burch Defendants and Farmers. These principles, the Burch Defendants assert, allow the factfinder to apportion negligence in this case between

⁴ In addition to the language of the crossclaim matching common law indemnification, Farmers also cites the Burch Defendants' failure to attach the relevant contract to their crossclaim, set forth the relevant language of the contract, or even use the word "contract" at all as reasons why it believed the Burch Defendants intended their claim to sound in common law indemnification rather than contractual indemnification.

⁵ See note 1, *supra*.

the Burch Defendants and Farmers, and to compel Farmers to indemnify the Burch Defendants' for Farmers' proportional share of negligence.

In response, Farmers first reiterated its position that the language in the crossclaim did not effectively put them on notice that the Burch Defendants were trying to raise a *contractual* indemnification claim; thus, Farmers argues, it would be improper to find waiver of the issue for a failure to identify it before sufficient notice was provided. Farmers further argued that in the absence of an allegation that it was negligent toward Plaintiff – and in light of the Court's finding that it did not owe Plaintiff a duty to process the request for the insurance policy – there is no mechanism by which a factfinder can apportion liability against Farmers in this case.

ANALYSIS

A. Relevant Law

Rule of Civil Procedure 1028 permits preliminary objections to any pleading (including crossclaims) on the grounds of, *inter alia*, “insufficient specificity in a pleading” and “legal insufficiency of a pleading...” Rule 1032(a) states:

“A party waives all defenses and objections which are not presented either by preliminary objection, answer or reply, except a defense which is not required to be pleaded under Rule 1030(b),⁶ the defense of failure to state a claim upon which relief can be granted, [certain specific defenses not applicable here,] and any other nonwaivable defense or objection.”

Pennsylvania courts recognize common law indemnity, which is a “remedy which shifts the entire loss from one who has been compelled, by reason of some

⁶ The defenses excepted by Rule 1030(b) – “assumption of the risk, comparative negligence and contributory negligence” – are not at issue here.

legal obligation, to pay a judgment occasioned by the initial negligence of another who should bear it.”⁷ The Supreme Court of Pennsylvania has described the appropriate standards concerning common law indemnity as follows:

“The right of indemnity rests upon a difference between the primary and the secondary liability of two persons each of whom is made responsible by the law to an injured party. It is a right which enures to a person who, without active fault on his own part, has been compelled, by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable.”⁸

Because a lack of “active fault” is a prerequisite to an award of common law indemnification, a party to whom a factfinder attributes negligence may not recover common law indemnification.⁹ This is in contrast to a claim for contribution, which “exists when a ‘joint tortfeasor has discharged the common liability or paid more than his pro rata share,’ and the joint tortfeasor’s liability ‘to the injured persons has been extinguished by the settlement.’”¹⁰

Parties may also enter into a contract providing for indemnification.¹¹

Generally, contractual indemnity provisions “are to be narrowly interpreted in light of the parties’ intentions as evidenced by the entire contract.”¹² An indemnification

⁷ *Willet v. Pennsylvania Medical Catastrophe Loss Fund*, 702 A.2d 850, 854 (Pa. 1997).

⁸ *MIIX Insurance Co. v. Epstein*, 937 A.2d 469, 472 (Pa. Super. 2007) (quoting *Builders Supply Co. v. McCabe*, 77 A.2d 368, 370 (Pa. 1951)).

⁹ See *City of Wilkes-Barre v. Kaminski Bros., Inc.*, 804 A.2d 89, 93-94 (Pa. Cmwlth. 2002).

¹⁰ *MIIX Insurance Co.*, 937 A.2d at 472.

¹¹ See *Burlington Coat Factory of Pennsylvania, LLC v. Grace Const. Management Co., LLC*, 126 A.3d 1010, 1021-22.

¹² *Id.* at 1022 (quoting *Widmer Engineering v. Dufalla*, 837 A.2d 459, 472 (Pa. Super. 2003)).

contract will not allow a party to be indemnified for its own negligence “unless the contract clearly and unequivocally provides for such indemnification.”¹³

B. Language of Crossclaim, Contract, and Farmers’ Motion in Limine

The Burch Defendants contend that their crossclaim was sufficient to raise a claim for contractual indemnification; Farmers argues that the language of the crossclaim is sufficient only to raise a common law indemnification claim. The relevant language of the crossclaim is as follows:

“78. Farmers Fire Insurance is joined herein, as a cross-defendant, to protect Defendants Seth Burch and The Smith-Burch Agency, LLC, t/d/b/a Smith Burch Agency’s right of indemnity and contribution and it is averred that Farmers Fire Insurance is alone liable to the Plaintiff or, in the alternative, is liable over to [the Burch Defendants], or, in the alternative, is jointly and severally liable to [the Burch Defendants], the existence of any liability on the part of [the Burch Defendants], however, being expressly denied.”

Paragraph 7.3 of the “Agency Agreement” between the Burch Defendants and Farmers governs indemnification pursuant to that agreement, and reads as follows:

“7.3. [Farmers Fire] shall be primarily liable for losses arising out of claims covered under the Policies issued pursuant to this Agreement. Notwithstanding the foregoing, Agent agrees to indemnify, defend and hold harmless [Farmers Fire] and its officers, directors, agents and employees from and against all claims, liabilities, losses, penalties, costs or expenses of any kind or nature (including without limitation attorney’s fees) resulting from and to the extent that any Agent act or omission, or any act or omission of any of Agent’s representatives, in violation of: (i) any applicable law; (ii) the terms of this Agreement; or (iii) the terms, limitations or requirements of any Company procedure in effect at the time of the act or omission.

(a) [Farmers Fire] agrees to indemnify, defend and hold harmless Agent and its representatives from and against all claim, liabilities, losses, penalties, costs or expenses of any kind

¹³ *Id.* (citing *Ruzzi v. Butler Petroleum Co.*, 588 A.2d 1, 7 (Pa. 1991)).

or nature (including, without limitation, attorney's fees) resulting from and to the extent of any Company act or omission in violation of: (i) any applicable law; (ii) the terms of this Agreement; or (iii) the terms, limitations or requirements of any [Farmers Fire] procedure in effect at the time of the act or omission....”

Among the motions in limine filed by Farmers on December 9, 2021 was a Motion in Limine to Exclude the Expert Testimony of David E. Cole, Esquire, who is the Burch Defendants' expert witness. As Farmers explained in their brief, the basis for Farmers' motion was their anticipation that the Burch Defendants “will attempt to present expert testimony that Mr. Burch did not breach his duty owed to Plaintiff rather, it was Farmers Fire's ‘negligence’ that resulted in the property not being insured at the time of the fire.” Regarding contribution and indemnification, Farmers specifically argued in relevant part as follows:

“[S]ince the principle of contribution refers to the allocation of the payment of damages by and between two or more joint tortfeasors, and there being no claim that Farmers Fire was a tortfeasor, [the Burch Defendants'] request for contribution against Farmers Fire fails as [a] matter of law.

Nor do[] [the Burch Defendants] have a claim for indemnity against Farmers Fire.

Indemnification is available under Pennsylvania law in only two instances: (1) pursuant to a contractual provision, or (2) by operation of law.

‘An agreement to indemnify is an obligation resting upon one person to make good a loss which another has incurred or may incur by acting at the request of the former, or for the former's benefit.’ **No such contractual obligation has been alleged by [the Burch Defendants] against Farmers Fire in the instant proceeding.**”¹⁴

¹⁴ Emphasis added; internal citations omitted. Farmers' motion to preclude Cole's testimony sought to prevent Cole from opining to the jury that “it was Farmers Fire's ‘negligence’ that

To resolve the Burch Defendants' Motion in Limine, the Court must first determine if Farmers has waived the argument that the Burch Defendants have not satisfactorily pled a claim for contractual indemnification. If the argument is not waived, the Court must address whether Farmers is correct that the Burch Defendants' indemnification claim fails as a matter of law.

C. Waiver

As noted above, under Rule 1032 the failure to raise an objection or defense at the pleading stage, including in preliminary objections, generally results in waiver. Here, however, the Court finds that Farmers' has not waived contention that the Burch Defendants' indemnification claim fails as a matter of law, for two reasons.

First, the Court agrees with Farmers that the language of the crossclaim does not provide fair notice that the Burch Defendants intended to raise a contractual indemnification claim. The crossclaim speaks of the Burch Defendants' "right of indemnity and contribution...." The law often considers the common law claims of indemnity and contribution as interconnected: the former covers circumstances in which a party without fault seeks reimbursement by another liable party, and the latter addresses the complementary situation in which a party with some measure of

resulted in the property not being insured at the time of the fire." Farmers argued that to the extent Cole's opinions could be construed as supporting common law indemnification or contribution claims, Cole should not be permitted to testify to those opinions because neither the indemnification nor the contribution claim was viable. The Court concluded on other grounds that Cole would be permitted to testify only with regard to the bad faith claim, which would be heard outside the presence of the jury, and therefore did not have occasion to address the viability of the Burch Defendants' indemnification and contribution claims.

fault seeks reimbursement from another liable party. Because the crossclaim does not identify the relevant contractual language or even use the word “contract,” the phrase “right of indemnity and contribution” in the crossclaim is most naturally read to refer to the related common law claims. The Court cannot fault Farmers for interpreting the crossclaim this way.

Second, Farmers’ contention that the Burch Defendants’ indemnity claim “fails as a matter of law” is essentially a demurrer, contending that the Burch Defendants have failed to state a claim for indemnity upon which relief may be granted. Rule 1032 explicitly excepts the defense of failure to state a claim upon which relief may be granted from those claims which are waived by a failure to raise them in pleadings or preliminary objections.

D. Viability of Indemnification Claim

The Court holds that the language of the crossclaim cannot support a contractual indemnification claim for the reasons stated above. The Court further holds that the crossclaim does not state a viable claim for common law indemnification against Farmers.¹⁵

Common law indemnification is available only to those parties who have no “active fault” and are only liable to the plaintiff by operation of law. Thus, if the

¹⁵ No party has asked this Court to pass upon the viability of the contribution claim contained in the Burch Defendants’ crossclaim against Farmers. As Farmers notes, it is well established that “Pennsylvania only authorizes contribution among joint tortfeasors.” *Kemper National P & C Companies v. Smith*, 615 A.2d 372, 380 (Pa. 1992). Because the only claims against Farmers are contractual in nature, rather than torts, there is no means by which the Burch Defendants can seek contribution from Farmers.

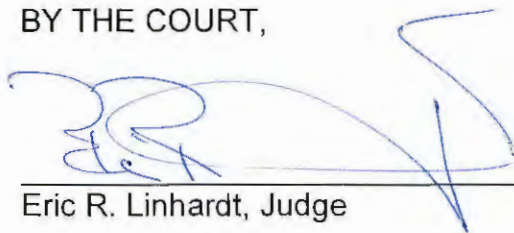
factfinder determines that either of the Burch Defendants were negligent, the Burch Defendants may not recover common law indemnity. The only claims by Plaintiff against the Burch Defendants, however, are for negligence; there is no mechanism present in this case by which the Burch Defendants may be found non-negligent yet remain liable to Plaintiff by operation of law. Thus, there is no situation in which common law indemnity may apply: either the Burch Defendants are found negligent (in which case they are precluded from seeking common law indemnity) or they are found non-negligent (in which case there is no liability against Plaintiff for which they may seek indemnity).¹⁶

CONCLUSION

For the foregoing reasons, the Court concludes that the Burch Defendants have not pled a valid claim for indemnification in their crossclaim against Farmers. The Burch Defendants are precluded from seeking indemnification from Farmers.

IT IS SO ORDERED this 28th day of December 2022.

BY THE COURT,



Eric R. Linhardt, Judge

¹⁶ Even if the Court held that the crossclaim contained a claim for contractual indemnification, the Court would similarly find that claim non-viable. The Agency Agreement does not explicitly state that any party may seek indemnity for its own negligence. Therefore, the same dilemma applies: contractual indemnification is either precluded by a finding of negligence or rendered unnecessary by a finding of zero liability.

ERL/jcr

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