2021 WL 3828898

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Waterbury, Complex Litigation Docket at Waterbury.

Robert KELLEY

v.

CITY OF DANBURY

X10UWYCV186051612S

|

April 13, 2021

Bellis, J.

FACTS AND PROCEDURAL HISTORY

***1** On July 2, 2018, the plaintiffs,[1] Robert Kelley and Jennifer Kelley,[2] commenced this action by service of process against the defendant, the city of Danbury (city). In the operative pleading, the amended complaint filed on August 23, 2018, the plaintiffs allege the following relevant facts. On August 9, 2016, during the course of his employment with C.J. Fucci, Inc.[3] (C.J. Fucci), and following authorization to begin work from a city employee, the plaintiff Robert Kelley was working in a trench located in the city's water utility infrastructure. As part of his duties that day, Robert Kelley was cutting out and capping a water main. While Robert Kelley was in the trench removing a portion of the water main, a valve failed. Thereafter, an object struck Robert Kelley's knee, the trench filled with water, and he hit his head while leaving the trench. According to the plaintiffs, Robert Kelley's physical injuries were caused by the city's negligence when it failed, *inter alia*, to: (1) determine whether the valve was completely closed before authorizing C.J. Fucci to begin work on it; (2) maintain the valve in a proper working order; (3) inspect the valve and (4) shut off the water before authorizing C.J. Fucci to commence work. Accordingly, in count one of the plaintiffs' complaint, Robert Kelley brings a negligence cause of action against the city. Count two sounds in loss of consortium and is brought by Jennifer Kelley.

After this case was filed, on July 31, 2018, C.J. Fucci filed a motion to intervene as a party plaintiff. C.J. Fucci sought intervention in the case in order to recover funds that it paid to Robert Kelley pursuant to the Workers' Compensation Act, General Statutes § 31-275 et seq. This motion was granted by the court, Shaban, J., on September 7, 2018. Subsequently, on November 15, 2018, pursuant to General Statues § 52-102b,[4] the city filed an apportionment complaint against Gannett Fleming, Inc. (Gannett Fleming).[5] Thereafter, on July 1, 2019, the city filed an indemnification[6] counterclaim against C.J. Fucci.

***2** In its counterclaim, the city alleges the following facts. At relevant times, C.J. Fucci "through its agents, servants and employees, including the plaintiff Robert Kelley, was performing work in the North Street Road Improvement/Drainage Project known as 'CT DOT/North Street Project-34-313' ... pursuant to a contract with the [s]tate of Connecticut." In the summer of 2018, employees in the city's public utilities department were contacted by representatives from the state and a Gannett Fleming employee named Brian MacAllister. MacAllister requested that the city agree to the removal of a dead end section of its water line/pipe by the state's contractor, C.J. Fucci, in order to allow for the installation of a replacement storm drain pipe. The city's employees informed MacAllister that it agreed to the removal of the pipe provided that all joints within fifty feet to the north of the pipe were properly restrained and there was no pressure in the pipe. Gannett Fleming then indicated to C.J. Fucci that it was its responsibility to perform these activities. According to the city, in the event that the plaintiffs sustained their alleged injuries, they were caused by C.J. Fucci's acts and omissions in that, *inter alia*, it: (1) failed properly to supervise Robert Kelley during his removal of the pipe; (2) did not instruct its employees to restrain every joint fifty feet to the north of the pipe before removing it; (3) failed to instruct its employees to drill a hole before removing the pipe in order to confirm the absence of pressure and (4) failed to take reasonable and necessary actions to ensure the safe removal of the pipe. The city further alleges that it had no reason to know of C.J. Fucci's negligence and that its negligence, if any, is passive or secondary to that of C.J Fucci.

With respect to the relationship between the city and C.J. Fucci, the city alleges that "an independent relationship arose between [it] ... and ... [C.J.] Fucci, pursuant to [C.J.] Fucci's contract with the [s]tate pursuant to which [C.J.] Fucci was required to use due care with attention to safety considerations in the performance of the removal of the [c]ity's pipe."

Furthermore, the city alleges that C.J. Fucci "had possession and control of the trench Robert Kelly was working in as well as the portion of the pipe he was removing, pursuant to the aforementioned contract between [C.J.] Fucci and the [s]tate of Connecticut" and that "pursuant to said contract ... [C.J.] Fucci agreed to perform its work ... in a workmanlike manner and to use due care with attention to safety considerations." Finally, the city alleges that C.J. Fucci "was in sole possession and control of the area where the incident occurred ..."

On November 7, 2019, C.J. Fucci filed a motion to strike the city's indemnification counterclaim and a memorandum of law in support of its motion. The city filed a memorandum of law in opposition to C.J. Fucci's motion on January 7, 2020. On February 24, 2020, C.J. Fucci filed its reply memorandum. The court conducted a remote oral argument on C.J. Fucci's motion on March 8, 2021. Following oral argument, the court allowed the parties to submit additional briefs, which the city did on March 10, 2021 and C.J. Fucci did on March 11, 2021, respectively.

DISCUSSION

"The purpose of a motion to strike is to contest ... the legal sufficiency of the allegations of any complaint ... to state a claim upon which relief can be granted." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC v. Alves,* 262 Conn. 480, 498, 815 A.2d 1188 (2003). "The role of the trial court in ruling on a motion to strike is to examine the [complaint], construed in favor of the [plaintiff], to determine whether the [pleading party has] stated a legally sufficient cause of action." (Internal quotation marks omitted.) *Coe v. Board of Education,* 301 Conn. 112, 117, 19 A.3d 640 (2011). "If any facts provable under the express and implied allegations in the plaintiff's complaint support a cause of action ... the complaint is not vulnerable to a motion to strike." *Bouchard v. People's Bank,* 219 Conn. 465, 471, 594 A.2d 1 (1991). Nevertheless, "[a] motion to strike admits all *facts* well pleaded; it does not admit *legal conclusions or the truth or accuracy of opinions* stated in the pleadings." (Emphasis in original; internal quotation marks omitted.) *Faulkner v. United Technologies Corp.,* 240 Conn. 576, 588, 693 A.2d 293 (1997). "A motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged." (Internal quotation marks omitted.) *Santorso v. Bristol Hospital,* 308 Conn. 338, 349, 63 A.3d 940 (2013).

C.J. Fucci moves to strike the city's indemnification counterclaim on the ground that it is barred by the exclusivity provision of the Workers' Compensation Act, General Statutes § 31-284(a). Specifically, C.J. Fucci argues that the counterclaim is legally insufficient because the city fails to allege the existence of an independent legal duty between it and the city. C.J. Fucci contends that in cases where a party seeks indemnification from a plaintiff's employer for injuries that the plaintiff sustained while at work, there must be an independent legal relationship between the proposed indemnitor and indemnitee. C.J. Fucci believes that the contract between it and the state, to which the city was not a party or intended beneficiary, is insufficient to maintain this indemnification counterclaim.

***3** In response, as framed at oral argument and in its March 10, 2021 supplemental memorandum, the city argues that the motion to strike should be denied for three reasons. First, the city contends that C.J. Fucci's independent legal duty arises from a bailor-bailee relationship that C.J. Fucci had with the city.[7] Second, the city argues that the separate legal duty arises out of C.J. Fucci's contract with the state and its corresponding obligation to perform that contract with due care. Finally, the city believes that pursuant to the contract between C.J. Fucci and the state, the city possesses an implied right to contractual indemnification. Accordingly, the city argues that it has set forth a legally sufficient indemnification counterclaim.

"[A]n action for indemnification is one in which one party seeks reimbursement from another party for losses incurred in connection with the first party's liability to a third party ... [A] loss in the context of indemnity is the payment that discharges a liability ... In the absence of an express contract for indemnification or statutory provisions authorizing actions for indemnification ... a party may nonetheless assert an implied right to indemnification as a measure of restitution ... The theory of common-law indemnification is an implied right to indemnification and is considered a means of achieving restitution between the parties." (Citations omitted; internal quotation marks omitted.) *Chicago Title Ins. Co. v. Accurate Title Searches, Inc.,* 173 Conn.App. 463, 480-81, 164 A.3d 682 (2017). "Generally, there is no right to indemnification between joint tortfeasors. *Kaplan v. Merberg Wrecking Corp.,* [152 Conn. 405, 412, 207 A.2d 732 (1965)]. Our Supreme Court in *Kaplan* recognized an exception to this general rule ... *Kaplan* teaches that indemnification is available from a third party on whom a primary exposure of liability is claimed to rest ... To hold a third party liable to indemnify one tortfeasor for damages awarded against it

to the plaintiff for negligently causing harm to the plaintiff, a defendant seeking indemnification must establish that: (1) the third party against whom indemnification is sought was negligent; (2) the third party's active negligence, rather than the defendant's own passive negligence, was the direct, immediate cause of the accident and the resulting harm; (3) the third party was in control of the situation to the exclusion of the defendant seeking reimbursement; and (4) the defendant did not know of the third party's negligence, had no reason to anticipate it, and reasonably could rely on the third party not to be negligent." (Citations omitted.) *Valente v. Securitas Security Services, USA, Inc.,* 152 Conn.App. 196, 203-04, 96 A.3d 1275 (2014).

Pursuant to the Workers' Compensation Act, "[a]n employer ... shall not be liable for any action for damages on account of personal injury sustained by an employee arising out of and in the course of his employment or on account of death resulting from personal injury so sustained ..." § 31-284(a). "The Workers' Compensation Act ... provides the sole remedy for employees and their dependents for work-related injuries and death ... Its purpose is to provide a prompt, efficient, simple and inexpensive procedure for obtaining benefits related to employment ... The exclusivity provision in § 31-284(a) manifests a legislative policy decision that a limitation on remedies is an appropriate trade-off for the benefits provided by workers' compensation." (Internal quotation marks omitted.) *Stearns & Wheeler, LLC v. Kowalsky Brothers, Inc.,* 289 Conn. 1, 10-11, 955 A.2d 538 (2008). "Under the statute, the employee surrenders his right to bring a common law action against the employer, thereby limiting the employer's liability to the statutory amount ... In return, the employee is compensated for his or her losses without having to prove liability." (Internal quotation marks omitted.) *Gonzalez v. O&G Industries, Inc.,* 322 Conn. 291, 304, 140 A.3d 950 (2016). For this reason, "[i]n view of the exclusivity of workers' compensation relief, indemnity claims against employers as joint tortfeasors warrant the special additional limitation of an independent legal relationship." *Skuzinski v. Bouchard Fuels, Inc.,* 240 Conn. 694, 699, 694 A.2d 788 (1997).

***4** In the seminal case of *Ferryman v. Groton,* 212 Conn. 138, 561 A.3d 432, 561 A.2d 432 (1989), our Supreme Court examined the interplay between indemnification claims and workers' compensation exclusivity. In *Ferryman,* the plaintiff's decedent, while in the course of his employment with Electric Boat, was electrocuted to death when working at an electrical substation within the city of Groton (Groton). The plaintiff's decedent brought suit against Groton. Thereafter, Groton impleaded Electric Boat, which was both the plaintiff's decedent's employer as well as "an alleged co-owner of the substation ..." *Id.*, 140, 561 A.3d 432, 561 A.2d 432. In Groton's third party complaint, it alleged that "[t]he electrical substation was owned, operated, maintained and controlled by Electric Boat and that Groton owned only the transformers and the metering equipment at the electrical substation. The complaint further alleged that Electric Boat controlled access to the electrical substation and that ... an employee and agent of Electric Boat, unlocked the gate surrounding the electric substation, making it possible for [the plaintiff's decedent] to enter the area of the substation." (Internal quotation marks omitted.) *Id.* The trial court struck the third party complaint on the basis of the exclusive remedy provisions of the Workers' Compensation Act.

On appeal, the Supreme Court reversed the trial court, and it reasoned as follows. "When the third party, in a suit by the employee, seeks recovery over against a contributorily negligent employer, contribution [or indemnification] is ordinarily denied on the ground that the employer cannot be said to be jointly liable in tort to the employee because of the operation of the exclusive-remedy clause. But if the employer can be said to have breached an independent duty toward the third party, or if there is a basis for finding an implied promise of indemnity, recovery in the form of indemnity may be allowed. The right to indemnity is clear when the obligation springs from a separate contractual relation, such as an employer-tenant's express agreement to hold the third-party landlord harmless, or a bailee's obligation to indemnify a bailor, or a contractor's obligation to perform his work with due care; but when the indemnity claim rests upon the theory that a primary wrongdoer impliedly promises to indemnify a secondary wrongdoer, the great majority of jurisdictions disallow this claim." (Internal quotation marks omitted.) *Id.*, 144-45, 561 A.3d 432, 561 A.2d 432. When applying this law to the allegations found in the *Ferryman* case, our Supreme Court noted that "we see allegations by an owner whose property, while in the possession of another, is alleged to have caused the death of a third person whose access to the property has been furnished by the agent of the party in possession. When viewed in the light most favorable to the pleader, as required in addressing a motion to strike ... the complaint discloses the essentials of either a co-owner relationship, a bailor-bailee relationship or a lessor-lessee relationship, any one of which could contain the express or implied independent, legal duty that would serve

to preclude the operation of the exclusive remedy provisions of § 31-284." (Citation omitted.) *Id.*, 145-46, 561 A.3d 432, 561 A.2d 432.

In the present case, the city first argues that it alleges a bailor-bailee relationship between it and C.J Fucci. A bailor-bailee association certainly qualifies as one of the independent legal relationships recognized under *Ferryman.* Under Connecticut law, "[a] bailment involves a delivery of the thing bailed into the possession of the bailee, under a contract to return it to the owner according to the terms of the agreement ... A relationship of bailor-bailee arises when the owner, while retaining general title, delivers personal property to another for some particular purpose upon an express or implied contract to redeliver the goods when the purpose has been fulfilled, or to otherwise deal with the goods according to the bailor's directions. In a bailment, the owner or bailor has a general property [interest] in the goods bailed ... The bailee, on the other hand, has mere possession of items left in its care pursuant to the bailment." (Citations omitted; internal quotation marks omitted.) *B.A. Ballou & Co., Inc. v. Citytrust,* 218 Conn. 749, 753, 591 A.2d 126 (1991).

***5** Upon examination of the city's counterclaim, it immediately becomes apparent that there are only two potential types of property that the city, as the putative bailor, gave to C.J. Fucci, the supposed bailee. The first is the water line/pipe. Importantly, however, in paragraph eight of its counterclaim, the city alleges that it "agree[d] to the removal of a dead end section of its water line/pipe by the [s]tate's contractor, [C.J.] Fucci, to allow for the installation of a new storm drain pipe." "A bailment ... contemplates redelivery of goods entrusted to the bailee ... [A] bailment may not exist when the goods entrusted to a party properly are intermingled or commingled with goods belonging to others ... If the purported bailee is not bound to return the same items that were delivered to him by the bailor, but may deliver any other item or items of equal value, there is no bailment." (Citations omitted.) *Mystic Color Lab, Inc. v. Auctions Worldwide, LLC,* 284 Conn. 408, 420, 934 A.2d 227 (2007). Given that the city alleges that C.J. Fucci's employee was supposed to remove a section of the water line/pipe and replace it with a new one, there cannot be a bailor-bailee relationship based on the city allowing C.J. Fucci to exercise dominion over it.

The second piece of property that may potentially form a bailment between the city and C.J. Fucci is the trench where the subject pipe was located and Robert Kelly suffered his personal injuries. In paragraph twelve of the counterclaim, the city alleges, in a conclusory manner, that C.J. Fucci "had possession and control of the trench Robert Kelly was working in ... pursuant to the aforementioned contract between [C.J.] Fucci and the [s]tate of Connecticut." "[A]lthough establishing that an implied promise to indemnify or an independent duty existed between proposed third-party plaintiffs and those sought to be impleaded may overcome the workers' compensation exclusivity bar, courts have construed this exception very narrowly ... *Ferryman* makes clear that the key concern is preservation of the integrity of the Workers' Compensation Act." (Internal quotation marks omitted.) *Dutton v. Adams,* Superior Court, judicial district of New Haven, Docket No. CV-10-6010073-S (September 26, 2011, Burke, J.) (52 Conn. L. Rptr. 650, 652). For this reason, "[m]ultiple ... Superior Court judges have held that simply alleging possession or control of the property where the plaintiff employee suffered his injuries is insufficient to state an indemnification claim against an employer." *Recimos v. Beneson Capital Partners, LLC,* Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-10-6007024-S (February 29, 2012, Adams, J.T.R.). This court agrees that merely alleging "possession and control" over property is not enough to satisfy the standards enunciated in *Ferryman.* Moreover, the city does not allege anywhere in its counterclaim that C.J. Fucci's supposed control over the trench constituted a bailment relationship.[8] Accordingly, the court determines that the city insufficiently alleges a bailor-bailee relationship with C.J. Fucci.

Next, the city argues that C.J. Fucci's independent duty towards it arises out of C.J. Fucci's contract with the state of Connecticut to perform its work with due care. This very argument was addressed and rejected by the court in *Rivera v. Meriden,* Superior Court, judicial district of New Haven, Docket No. CV-04-4000526-S (March 23, 2006, Corradino, J.) (41 Conn. L. Rptr. 98). In *Rivera,* the plaintiff's decedent, in the course of his employment with Milestone Restoration, Inc. (Milestone) was working on property owned by the city of Meriden (Meriden). The plaintiff's decedent was electrocuted when he came into contact with power lines owned by the Connecticut Light and Power Company and Northeast Utilities (CL&P/NU). Milestone intervened in the case and then CL&P/NU filed an indemnification counterclaim against it. In opposition to the motion to strike filed by Milestone, CL&P/NU relied on a contract between Milestone and Meriden.

***6** When analyzing *Ferryman* and the various cases that have interpreted it, Judge Corradino noted that "if an

employer A signs a contract agreeing to perform work safely and with due care with a third party B and an employee of A is injured and sues B or B is sued by another co-defendant, B can bring an action over against the employer which will not be barred by the [W]orkers' [C]ompensation [A]ct. The independent duty allowing such a result is created by the explicit agreement not merely to perform the contract in a workmanlike manner per contract specs but also to use due care with attention to safety considerations ... With such an explicit contractual agreement, the party whom the injured employee sues for negligence should be able to implead the employer, and in effect say, you, the employer, agreed with me to do the work safely and with due care. You did not live up to your part of the bargain, and your lack of due care was what caused injury to your worker ...” (Citation omitted; internal quotation marks omitted.) *Id.*, 100. “This comment underlines, at least for the court why the counterclaim plaintiff's cannot, under the independent duty theory, advance a claim against Milestone. The obligation of due care and safety assumed by Milestone were set forth in the contract Milestone had with ... Meriden. Milestone assumed no independent duty toward CL&P/NU.” *Id.* The court finds Judge Corradino's decision in *Rivera v. Meriden* to be highly persuasive. It makes sense that C.J. Fucci did not undertake a separate legal duty to the city in a contract that it signed with a different party, the state of Connecticut.

In an attempt to avoid this result, the city relies on *Maslansky v. First Assembly of God,* Superior Court, judicial district of Danbury, Docket No. CV-01-0343545-S, 2003 WL 1090578 (February 25, 2003, White, J.) along with a series of cases that *Maslansky* cites. *Maslansky*, however, is distinguishable from this matter because in that case “the defendant allege[d] that the defendant and the intervening plaintiff entered into a contract whereby the intervening plaintiff agreed to 'perform its work with due care and in a reasonably safe and workmanlike manner.' ” *Id.* Therefore, in *Maslansky,* there was a direct contractual relationship between the defendant and the plaintiff's employer and that contract allowed the defendant to seek indemnification. Additionally, all of the cases cited in *Maslansky* are in a similar posture in that there was some type of direct relationship, either contractual or a duty imposed by law, between the parties.[9] In contrast, in the present case, the city fails to allege any such connection between it and C.J. Fucci. The city simply relies on a contact between C.J. Fucci and the state of Connecticut to which the city was not a party. Moreover, the city does not allege that it was an intended third party beneficiary of said contact. Accordingly, the court rejects this argument as a sufficient basis to deny the motion to strike.

Lastly, the city argues that its counterclaim “alleges an independent duty based upon the [c]ity's implied right to contractual indemnification pursuant to [C.J.] Fucci's contract with the [s]tate to which the [c]ity is a third-party beneficiary.” “Under Connecticut law, to state a contract-based indemnification claim, the claimant must allege either an express or implied contractual right to indemnification ... Therefore, [a] claim of indemnity may be based on an implied contract theory.” (Citation omitted; internal quotation marks omitted.) *A&G Contracting v. Design/Build Collaborative, LLC,* Superior Court, judicial district of New Haven, Docket No. CV-10-6008755-S (August 2, 2012, Wilson, J.). Importantly, however, “[a]n implied contract depends upon *the existence of an actual agreement between the parties*.” (Emphasis added; internal quotation marks omitted.) *Burns v. RBS Securities, Inc.,* 151 Conn.App. 451, 457, 96 A.3d 566, cert. denied, 314 Conn. 920, 100 A.3d 851 (2014). “A[n implied] contractual promise cannot be created by plucking phrases out of context; there must be a meeting of the minds between the parties.” (Internal quotation marks omitted.) *Morrissey-Manter v. St. Francis Hospital & Medical Center,* 166 Conn.App. 510, 521, 142 A.3d 363, cert. denied, 323 Conn. 924, 149 A.3d 982 (2016). For this reason, “implied contractual indemnity claims require proof of a contract to indemnify ...” 41 Am. Jur. 2d, Indemnity § 2. In the present case, the city does not allege that there was a contract between it and C.J. Fucci or that it was an intended third party beneficiary of C.J. Fucci's contract with the state of Connecticut. Therefore, the city has not alleged a legally sufficient implied contractual indemnification claim. Accordingly, the city cannot avoid having its indemnity counterclaim stricken on the basis of an implied contractual indemnification theory.

CONCLUSION

***7** For all of the reasons stated above, the court grants C.J. Fucci's motion to strike the city's indemnification counterclaim.

All Citations

Not Reported in Atl. Rptr., 2021 WL 3828898, 71 Conn. L. Rptr. 262

Footnotes

1 The plaintiffs will both be known collectively as “the plaintiffs” and separately by their names when appropriate.

2 When this action was originally filed, Jennifer Kelley was not named as a party plaintiff. On August 23, 2018, the plaintiff Robert Kelley filed a motion to cite in Jennifer Kelley as an additional plaintiff. This motion was granted by the court, Shaban, J., on October 16, 2018.

3 Earlier pleadings in this case referred to this entity as C.J. Fucci Construction, Inc. On January 26, 2021, however, this court, Bells, J., granted a motion to change C.J. Fucci Construction, Inc.'s name to C.J. Fucci, Inc. Therefore, for the sake of convenience, the court will use C.J. Fucci, Inc. throughout this decision.

4 General Statutes 52-102b provides in relevant part: “A defendant in any civil action to which section 52-572h applies may serve a writ, summons and complaint upon a person not a party to the action who is or may be liable pursuant to said section for a proportionate share of the plaintiff's damages in which case the demand for relief shall seek an apportionment of liability. Any such writ, summons and complaint, hereinafter called the apportionment complaint, shall be served within one hundred twenty days of the return date specified in the plaintiff's original complaint.”

5 This entity's name is spelled inconsistently throughout the pleadings. As “Gannett Fleming” is the spelling used by its counsel, the court will also use this spelling.

6 The city characterizes its indemnification counterclaim as a “hybrid” common law and contractual indemnification claim.

7 Notably, the city did not make this argument in its original memorandum of law in opposition to the motion to strike. The city first stated that it had a bailor-bailee relationship with C.J. Fucci during the March 8, 2021 oral argument before this court. Thereafter, the city then briefed this legal issue in its March 10, 2010 supplemental memorandum.

8 It is worth noting that paragraph fourteen of the counterclaim quite clearly alleges that the source of the city and C.J. Fucci's purported independent legal relationship is C.J. Fucci's contract with the state as opposed to a bailor-bailee relationship.

9 The same is true of the principal case relied on by the city in its original memorandum of law in opposition to the motion to strike, *Galaz v. Wojnarowski & Sons Builders, LLC,* Superior Court, judicial district of Fairfield, Docket No. CV-12-6025633-S (October 15, 2013, Sommer, J.).