VALLEY BANK & TRUST COMPANY VS. A. WEBSTER DOUGHERTY & CO., INC., ET AL., C.P., Franklin County Branch, No. A.D. 1989-432

Civil Action-Breach of Contract- Preliminary Objections-Motion For Judgment On The Pleadings-Demurrer

1. A motion for judgment on the pleadings may be granted in cases which are so free from doubt that a trial would clearly be fruitless exercise. Such a motion is in the nature of a demurrer, all of the opposing party's well-pleaded allegations are viewed as true but only those facts specifically admitted by him may be considered against him.

2. Where no issues of material fact remain unresolved and there exists only an issue of law as to the construction and interpretation of a statute, a judgment on the pleadings may be properly granted.

3. Joint tortfeasors means two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them. The Uniform Contribution Among Tortfeasors Act, 42 Pa.C.S.A. Section 8322.

4. The issue of whether the defendants in a contribution action are joint tortfeasors is a question of law for the court.

5. A right of contribution arises only among joint tortfeasors.

6. Indemnity is a common law equitable remedy which shifts the entire loss from one defendant to the other.

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OPINION AND ORDER

HERMAN, J., April 10, 1995:

OPINION

On December 8, 1989, the plaintiff Valley Bank & Trust Company ("Valley Bank") filed a praecipe for Writ of Summons against A. Webster Dougherty & Co., Inc. ("Dougherty") and Fidelity Bank ("Fidelity"). On December 6, 1993, Valley Bank filed a complaint against Dougherty and Fidelity alleging that the defendants breached their contracts regarding the sale, delivery, and custody of misidentified municipal revenue bonds purchased by Valley Bank through its broker, Dougherty. On February 7, 1994, Dougherty filed a praecipe for Writs to join five additional defendants: Chase Manhattan Bank ("Chase"), Citibank, Newman & Associates, Inc. ("Newman"), Bank of America National Trust & Savings Association, Inc. ("Bank of America")[1], Security Pacific Clearing & Services Corp. and BA Security Services, Inc., (these last two collectively known as "Security Pacific Clearing").

On March 7, 1994, Dougherty filed a complaint against the additional defendants seeking contribution and/or indemnification in connection with Valley Bank's suit against Dougherty. On June 3, 1994, Citibank filed a motion for judgment on the pleadings, and on June 7, 1994, Newman filed a motion requesting that same relief. On June 19, 1994, Chase filed preliminary objections to Dougherty's complaint, objecting on the same grounds as those asserted by Citibank and Newman in their respective motions for judgment on the pleadings. On July 1, 1994, Bank of America and Security Pacific Clearing filed a combined motion for judgment on the pleadings, asserting the identical grounds as raised by the other additional defendants. On July 25, 1994, Dougherty submitted a responsive memorandum of law to the additional defendants' motions for judgment on the pleadings and preliminary objections.

The parties submitted memoranda of law to the Court and argument was held on November 29, 1994. The preliminary objections are now before the Court for decision.

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[1] Successor in interest to Security Pacific National Bank.

The standard for adjudicating a motion for judgment on the pleadings is set forth in *Gallo v. J.C. Penney Casualty Insurance Company*, 328 Pa. Super. 267, 270, 476 A.2d 1324 (1984) as follows:

> [A] motion for judgment on the pleadings may be granted in cases which are so free from doubt that a trial would clearly be a fruitless exercise. Such a motion is in the nature of a demurrer; all of the opposing party's well-pleaded allegations are viewed as true but only those facts specifically admitted by him may be considered against him.

Pennsylvania Rule of Civil Procedure 1034. Where no issues of material fact remain unresolved and there exists only an issue of law as to the construction and interpretation of a statute, a judgment on the pleadings may be properly granted. *Trembath v. Barbieri*, 29 Commonw. 338, 370 A.2d 1245 (1977). Furthermore, where there is a reasonable possibility that a pleading's defects could be cured, the Court should allow amendation. However, where there is no such possibility, the Court may refuse to allow amendation. *Williams by Williams v. Lewis*, 319 Pa. Super 552, 466 A.2d 682 (1983).

This case involves a breach of contract action brought by Valley Bank against Dougherty and Fidelity arising out of Valley Bank's purchase in December 1985 of interest-bearing municipal bonds. Valley Bank purchased the bonds through Dougherty, its broker, and Fidelity acted as Valley Bank's bonds custodian. In its complaint, Valley Bank alleges that Dougherty and Fidelity breached their respective contracts with Valley Bank regarding the sale, delivery and custody of the bonds, causing them to eventually be misidentified as zero coupon bonds, which bear no interest, rather than as 8% bonds. Valley Bank alleges that the actions of Dougherty and Fidelity constituted breach of contract, and that it suffered over $175,000.00 in damages, the amount of interest which it would have been paid had the contracts been correctly performed.

In its March 1994 complaint, Dougherty seeks contribution and/or indemnification from the five additional defendants on the theory that these latter breached various duties to Valley Bank through a series of events involving the printing, sale, distribution,

inspection and safekeeping of the bonds. The additional defendants argue that Dougherty has failed to state a cause of action for either contribution or indemnification and its complaint should be dismissed without opportunity to amend.

On October 5, 1994, Dougherty filed a Praecipe to Withdraw its complaint against the additional defendants. At oral argument, Fidelity requested to be allowed to assume Dougherty's position on the issues raised by the preliminary objections and motions for judgment on the pleadings. All parties agreed and Fidelity utilized the brief filed by Dougherty.

The Uniform Contribution Among Tortfeasors Act, 42 Pa.C.S.A. §8321 *et seq.*[2] (the "Act") provides as follows:

§8324. Right of Contribution

> (a) General Rule. - The right of contribution exists among joint tortfeasors... §8322. Definition
> As used in this subchapter, "joint tortfeasors" means two or more persons jointly or severally liable *in tort* for the same injury to person or property, whether or not judgment has been recovered against all or some of them.

(emphasis added). The issue of whether the defendants in a contribution action are joint tortfeasors is a question of law for the court. *Harka v. Nabati*, 337 Pa. Super. 617, 487 A.2d 432 (1985).

The additional defendants argue that because Valley Bank sued Dougherty only for breach of contract, Dougherty is not subject to tort liability for the claimed injuries, and therefore the additional defendants cannot be held partly responsible for a tort which is not alleged. The additional defendants argue that in order for a defendant to assert a contribution claim against an additional defendant, the defendant and additional defendant must be subject to concurrent tort liability for the underlying injury suffered by the plaintiff. Since Valley Bank has brought suit in contract only, and the statute of limitations has run as to any tort claim it may have had, Dougherty cannot obtain contribution from the additional defendants as a matter of law.

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[2] 1976, July 9, P.L. 586, No. 142 § 2, effective June 27, 1978

Dougherty contends that the purpose of the Act is to fairly apportion liability among all responsible parties, and that it would be inequitable to restrict a party's right to contribution from a third party simply because the plaintiff sued the defendant in contract only. Dougherty contends that "nowhere is the Act limited by the cause of action pleaded by the plaintiff. Instead, the Act focuses on the relative conduct of each of two or more parties in contributing to the injury or harm claimed by a plaintiff." (Omnibus Memorandum of Law of Dougherty, p. 12).

A careful review of the case law in this area indicates that a right of contribution arises only among joint tortfeasors. Where a defendant is sued in contract only, he may not assert a contribution claim. Although the defendant may allege that a third party's conduct contributed to the plaintiff's damages, such an allegation does not make the defendant and the third party "joint tortfeasors" under the Act if no tort claim has been brought against the defendant. *Richardson v. John F. Kennedy Memorial Hospital*, 838 F. Supp. 979, (E.D. Pa. 1993); *Higgins Erectors & Haulers v. E.E. Austin & Son*, 714 F. Supp. 756 (W.D. Pa. 1989). The Act, which provides for a right of contribution for "two or more persons jointly or severally liable *in tort* . . .", does not recognize a right of contribution among successive or independent tortfeasors. The Court is bound by the statutory language in determining whether a party is entitled to seek contribution. *Kemper National v. Smith* 419 Pa. Super. 295, 615 A.2d 372 (1992).

We do not take issue with the fact that the purpose of the Act is the fair apportionment of liability among all parties responsible for a plaintiff's harm. However, we cannot agree with Dougherty that this should be interpreted as providing relief under general principles of equity. Dougherty cites several cases in support of the proposition that "contribution is not a recovery for the tort, but the enforcement of an equitable duty to share liability for the wrong done." *Puller v. Puller*, 380 Pa. 219, 221, 110 A.2d 175 (1955); *Svetz for Svetz v. Land Tool Co.*, 355 Pa. Super. 230, 513 A.2d 403 (1986); *Oviatt v. Automated Entrance System*, 400 Pa. Super. 493, 583 A.2d 1223 (1990). We must point out that Dougherty's focus on these references to "equity" is unduly

narrow and ignores the full context of the cases. The cases address the issue of whether the Act permits contribution between parties liable under different tort theories such as negligence and strict liability, and not under non-tort causes of action. As such, they do nothing to advance Dougherty's position.

Dougherty correctly notes the unfairness in compelling a defendant to plead its own negligence in an effort to preserve its right to assert a contribution claim against an additional defendant. *Wnek v. Boyle* 374 Pa. 27, 96 A.2d 859 (1953). Once again, however, Dougherty takes language from the opinion out of its proper context, which is a dispute between tortfeasors.[3] Dougherty has not offered any basis for us to depart from the plain language of the Act. Where the language of a statute is clear and unambiguous, it must be given effect in accordance with its plain meaning and common usage. 1 Pa.C.S.A. §1903(a).

In so far as a claim for contribution may not be asserted by a party who has been sued in contract only and not in tort, we are constrained to find that the claim is deficient as a matter of law and must be dismissed.

The additional defendants also argue that Dougherty has failed to state a claim for indemnification. Indemnity is a common law equitable remedy which shifts the entire loss from one defendant to the other. *Richardson v. John F. Kennedy Memorial Hospital*, 838 F. Supp. 979 (E.D. Pa. 1993). Indemnity is available only in the following situations: (1) where primary as opposed to secondary or vicarious liability exists, or (2) where there is an express contract to indemnify. *Id; TVSM, Inc. v. Alexander & Alexander, Inc.*, 583 F. Supp. 1089 (E.D.Pa. 1984).

> [S]econdary as distinguished from primary liability rests upon a *fault that is imputed or constructive only*, being based on some legal relation between the parties, or arising from some positive rule of common or statutory law or because of a

[3] The *Wnek* court found that a defendant could phrase its complaint against a second tortfeasor so as to preserve the contribution claim should it, the defendant, be found negligent as claimed by the plaintiff, by setting forth in detail how the second tortfeasor contributed to the plaintiff's injury, and this could be achieved without forcing the defendant to admit to the plaintiff's allegations.

> failure to discover or correct a defect or remedy a dangerous condition caused by the act of the one primarily responsible.

Builders Supply Co. v. McCabe, 366 Pa. 322, 328, 77 A.2d 368, 371 (1951) (emphasis supplied). In *Sirianni v. Nugent Brothers, Inc.*, 509 Pa. 564, 506 A.2d 868 (1986), the court concluded that

> . . .[U]nlike comparative negligence and contribution, the common law right of indemnity is not a fault sharing mechanism between one who was predominantly responsible for an accident and one whose negligence was relatively minor. Rather, it is a fault shifting mechanism, operable only when a defendant who has been liable to a plaintiff *solely by operation of law,* seeks to recover his loss from a defendant who was actually responsible for the accident which occasioned the loss.

Id. at 570-571 (emphasis supplied). Where a party seeks indemnification, the question is whether that party "had any part in causing the injury." *Id.* at 571; *Walton v. Avco Corporation*, 530 Pa. 568, 610 A.2d 454 (1992). Defendants who were actively negligent (as opposed to those whose negligence is merely imputed) are precluded from obtaining indemnification. *Vattimo v. Lower Bucks Hospital, Inc.*, 502 Pa. 241, 465 A.2d 1231 (1983); *Builders Supply Co. v. McCabe*, 366 Pa. 322, 325, 77 A.2d 368 (1951). "[Indemnity] 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." *Id.* at 325.

Dougherty argues that it is entitled to indemnification from the additional defendants because their liability is primary rather than secondary as evinced by their more active role in the printing, issuance, transfer, inspection and re-registration of the bonds purchased by Dougherty on behalf of Valley Bank. Dougherty argues that its involvement in these processes was "passive" only, and that it acted as "mere conduit" for Valley Bank's acquisition of the bonds.

Dougherty relies on language in *Burch v. Sears, Roebuck & Co.*, 320 Pa. Super. 444, 467 A.2d 615 (1983) which refers to a defendant's conduct as being "passive" and therefore its liability

"secondary" as opposed to "active" and therefore "primary". Relying on *Builders Supply Co. v. McCabe*, the *Burch* court differentiates the two types of liability by considering the degree to which the defendants had control over, knowledge of or the opportunity to discover or prevent the harm. *Burbage v. Boiler Engineering and Supply Co.*, 433 Pa. 319, 249 A.2d 563 (1969); *Mixter v. Mack Trucks, Inc.*, 244 Pa. Super. 313, 308 A.2d 139 (1973).

The "mere conduit" theory has been applied in chain-of-distribution cases involving principles of strict liability where a plaintiff was killed or injured by a defective product. The original defendant (either the seller or the manufacturer whose product was composed of parts from another manufacturer) was found strictly liable and then indemnified by the manufacturer who initially placed the product in the stream of commerce.

Dougherty argues that its position is analogous to the original defendants in these cases in that it had no possession of the bonds and no opportunity to inspect them. Dougherty argues that such access rested solely with the additional defendants and it would be unfair to lay the entire blame for the misidentification at its doorstep.

Despite the initial appeal of this argument, we are compelled to reject it. The case at bar does not involve issues of strict liability, and an extensive review of the law indicates that indemnification has been permitted only where a defendant is *first* found liable by operation of a rule of law, and once constructive or imputed fault attaches, the Court then looks to whether that defendant's role in the plaintiff's harm was active or merely passive, with an eye toward shifting full liability onto the party actually responsible for that harm. *Walton v. Avco Corp., Merrill Lynch, Pierce, Fenner & Smith v. Staiman*, 771 F. Supp. 102 (M.D. Pa. 1991); *Burbage v. Boiler Engineering & Supply Co.; Burch v. Sears, Roebuck & Co.; Mixter v. Mack Trucks.*

Dougherty cites *Moscatiello v. Pittsburgh Contractors Equipment Co.*, 407 Pa. Super. 378, 595 A.2d 1198 (1991), for the proposition that an original defendant found liable to a plaintiff for breach of contract may nevertheless be entitled to indemnification from a second defendant whose actions played a

greater role in the plaintiff's loss, where the original defendant was a mere conduit between the second defendant and the plaintiff. *Moscatiello*, as well as the cases on which it relies, arose under various warranties of fitness and merchantability available to buyers of defective consumer products under the Uniform Commercial Code. In that case, two warranty agreements exsted: one between the plaintiff-buyer and the retailer, and one between the retailer and the manufacturer. The retailer had already been found liable to the plaintiff under a warranty of merchantability, and it was this warranty which provided a basis for the retailer's right to indemnification from the manufacturer. Given the warranties existing in *Moscatiello* it was inappropriate for the Court to analyze the plaintiff's right to indemnification on the basis of the active versus passive role of the defendant in causing an original plaintiff's harm. In this respect, we must agree with the additional defendants that *Moscatiello* is inapposite since it involved a seller or retailer *initially* held liable *only* through operation of law.

The bonds were underwritten by Citibank and Newman, whose duties included the printing, inspection, sale and distribution of the bonds. The bonds were sold and maintained in Newman's account at Citibank. Pursuant to an agreement with Valley Bank, Dougherty arranged with Security Pacific Clearing to receive the bonds from Citibank and deliver them to Fidelity, which was to serve as custodian. Dougherty alleges that by agreement Security Pacific Clearing was to provide Dougherty with clearance and draft collection services, entailing the receipt, inspection, and delivery of the bonds to Fidelity. Dougherty alleges that if Valley Bank received the wrong bonds, it was the direct result of Security Pacific Clearing's failure to inspect the bonds for accuracy and to deliver the correct bonds to Fidelity.

The second phase of events occurred as a result of Fidelity's transfer of the bonds to Chase for safekeeping pursuant to a custodian agreement between the two institutions of which Dougherty was allegedly unaware. Chase re-registered the bonds with Trustee Security Pacific National Bank. Dougherty alleges that any misidentification of the bonds occurred during this re-registration process, and that Fidelity and the additional

defendants thereafter breached their duties by failing to timely discover the error and redeem the misidentification bonds.

Valley Bank alleges that Dougherty breached its contract to deliver 8% bonds to Fidelity for Valley Bank's benefit. Valley Bank must prove that Dougherty was under an obligation to deliver the bonds, and that it breached this contractual duty. Valley Bank may pursue Dougherty in contract only, since the statute of limitations has expired on any strict liability theories Valley Bank may have had against either Dougherty, the additional defendants, or any other entity. Therefore, to be found liable, Dougherty must be found to have breached its *own* duty to Valley Bank. If it is found so liable, it may not demand indemnification from Citibank, Newman, Chase and Bank of America (successor in interest to Security Pacific National Bank) because its fault will not be constructive or imputed only but will arise directly from the contract. *Richardson v. John F. Kennedy Memorial Hospital* 838 F. Supp. 979 (E.D. Pa. 1993); *Higgins Erectors & Haulers v. E. E. Austin & Son*, 714 F. Supp. 756 (W.D. Pa. 1989). Consequently, we are constrained to grant the motions for judgment on the pleadings filed by Citibank, Newman, and Bank of America, as well as the preliminary objections filed by Chase.

Dougherty also argues that it has stated a cause of action for indemnity against Citibank and Security Pacific Clearing based on express contract. Attached to Dougherty's complaint as exhibit D are written confirmations of the bonds' delivery to Fidelity. Dougherty contends that these confirmations constitute a contract between it and Citibank sufficient to compel us to deny Citibank's motion for judgment on the pleadings. We disagree. There is nothing in these one-page confirmations which creates an explicit contractual right to indemnification in Dougherty, either against Citibank or Security Pacific Clearing, and it is well-established that where no common law right of indemnity exists, only a contractual provision which clearly sets forth the right of indemnity will afford a party the basis for recovery. *Richardson v. John F. Kennedy Memorial Hospital; Higgins Erectors & Haulers v. E. E. Austin & Son*, supra; *P.H. Glatfelter Co. v. Lewis*, 746 F. Supp. 511 (E.D. Pa. 1990). Dougherty has failed

to demonstrate any grounds for the allowance of discovery on this issue.

Regarding Security Pacific Clearing, paragraph 33 of Dougherty's complaint avers the following:

> By agreement, Security Pacific Clearing provided Dougherty with clearance and draft collection services. Security Pacific Clearing's duties included but were not limited to the receipt, inspection and delivery of $250,000 of 8% Bonds in a form allowing for good delivery to Valley Bank's custodian Fidelity.

In its answer with new matter filed May 27, 1994, Security Pacific Clearing's reply to this averment was: "Denied. Paragraph 33 is a conclusion of law to which no answer need be filed. To the extent an answer needs to be filed, the factual allegations are all specifically denied." Paragraph 35 of Dougherty's complaint states:

> As set forth in written confirmations provided by Security Pacific Clearing to Dougherty, Security Pacific Clearing purchased from Citibank $250,000 of 8% Bonds and subsequently delivered these same securities..... to Fidelity. Copies of these written confirmations are attached hereto as Exhibit "D".

Security Pacific Clearing responded: "Admitted. Admitted that Exhibit "D" to complaint of A. Webster Dougherty contain written confirmations."

Pennsylvania Rule of Civil Procedure 1019(h) provides:

> A pleading shall state specifically whether any claim or defense set forth therein is based upon a writing. If so, the pleader shall attach a copy of the writing, or the material part thereof, but if the writing or copy is not accessible to him, it is sufficient so to state, together with the reason, and to set forth the substance of the writing.

Dougherty's complaint refers only in general terms to an "agreement" between itself and Security Pacific Clearing. No mention is made of whether this agreement was written, no copy of any agreement between the two was attached to the complaint. No reason was given for its absence as an exhibit, and no

allegation was made that the agreement was in Security Pacific Clearing's possession alone. Furthermore, Security Pacific Clearing expressly denied that any agreement existed.

In its brief submitted to the Court, Dougherty again alleges that it had an agreement with Security Pacific Clearing, and states "Upon obtaining a copy of the agreement through discovery, Dougherty may ascertain that it is entitled to indemnification under a yet identified provision contained within the agreement." Omnibus Memorandum of Law of Defendant A. Webster Dougherty, p. 20. As Security Pacific Clearing notes in its brief, it strains credulity to accept Dougherty's assertion that it does not possess its own copy of any supposed agreements it may have had with Security Pacific Clearing. Furthermore, in deciding this matter, we may consider only the pleadings and relevant documents attached to the pleadings under Pennsylvania Rule of Civil Procedure 1071(a) which states: "...[T]he pleadings in an action are limited to a complaint, an answer thereto, a reply if the answer contains new matter or a counterclaim, a counter-reply if the reply to a counterclaim contains new matter, a preliminary objection and answer thereto."

If a written contract exists, Dougherty has failed to adequately plead this fact in a manner placing it before us for consideration. We are not at liberty to consider material other than pleadings and attached documents. *Jones v. Van Norman*, 513 Pa. 572, 522 A.2d 503 (1987); *Di Andrea v. Reliance Savings and Loan Association*, 310 Pa. Super. 537, 456 A.2d 1066 (1983).

The court is disturbed by Dougherty's failure to elaborate on this alleged agreement in its complaint and in subsequent pleadings. However, the granting of a motion for judgment on the pleadings is appropriate only where no material facts are in dispute. *Groff v. Pete Kingsley Building, Inc*, 374 Pa. Super. 377, 543 A.2d 128 (1988). Despite the deficiencies in Dougherty's complaint and pleadings we nevertheless feel compelled to afford Dougherty an opportunity to amend its pleading to meet the requirements of Rule 1019(h) following discovery limited to this issue. Pa.R.C.P. 4009; 4011. *Commonwealth by Creamer v. Monumental Properties, Inc.*, 10 Commonw. 596, 314 A.2d 333 (1973); *O'Brien v. Zurich*

Insurance Co., 46 D & C 2d 151 (1968); *I.W. Levin & Co. v. Oldsmobile Division of General* Motors Corp., 8 D & C 3d 36 (1978).

The motions and objections of the remaining additional defendants are granted.

For the reasons stated herein an appropriate Order of Court will be entered as part of this Opinion.

ORDER OF COURT

NOW this 10th day of April, 1995, the Motions for Judgment on the Pleadings filed by Citibank, Newman & Associates, Inc., and Bank of America National Trust & Savings Association, Inc. are GRANTED.

The Preliminary Objections in the nature of a Demurrer filed by Chase Manhattan Bank are GRANTED.

The Motion for Judgment on the Pleadings filed by Security Pacific Clearing & Services Corp. and BA Security Services, Inc. are DENIED.

Defendant A. Webster Dougherty & Co., Inc. may proceed with discovery limited to a request that Security Pacific Clearing & Services Corp. and BA Security Services, Inc. furnish A. Webster Dougherty & Co. with a copy of any written contract, agreement or other documentation pertaining to the receipt, inspection and delivery of the Bonds at issue in this action.