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Construction Law Alert



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RUSH v. NORFOLK ELEC. CO. - APPEALS COURT RULES ON COMPETING INDEMNITY CLAUSES AND REAFFIRMS COMPARATIVE INDEMNITY LANGUAGE

Incorporation clauses within subcontract agreements that impose upon the subcontractor each and every term and obligation of the general contract, including indemnity obligations, are commonplace. Disagreements and ultimately litigation results when the terms of the general contract and the subcontract conflict. In Rush v. Norfolk Elec. Co., et al, the Appeals Court addressed this issue in assessing a general contractor's indemnity rights against a subcontractor in the context of a personal injury claim brought by an injured employee of a subcontractor.

Modern Continental ("Modern") was the general contractor on a construction project and subcontracted the electrical work to Norfolk & Electric and the plumbing work to Harding & Smith. Harding & Smith entered into a sub-subcontract with New England Insulation Co. ("NEI"). The plaintiff, Michael Rush, worked for NEI and was injured in the course of his work for NEI. He brought suit against Modern and NEI. Norfolk & Electric's insurer assumed the defense of, and agreed to indemnify, Modern pursuant to an indemnity agreement. A jury found both Modern and Norfolk Electric 37.5% negligent, while the plaintiff was 25% negligent. The jury assessed damages in the amount of \$1,153,445; that amount then reduced by 25% for the plaintiff's negligence.

Modern had asserted a third-party claim for complete indemnification against Harding & Smith pursuant to the indemnity provision contained in the subcontract agreement. Harding & Smith in turn sought indemnity against NEI., plaintiff's employer. The parties agreed to submit the indemnity issues to the trial judge after trial. The trial judge denied Modern's indemnity claim and Modern appealed.

Modern argued that the controlling indemnity provision was not the one contained in the subcontract agreement but one in the general contract between Modern and the owner that was incorporated within the subcontract agreement. The indemnity in the general contract would require Harding & Smith to indemnify Modern for any damages arising out of the work and caused by any negligent act or omission of Harding & Smith or any of its subcontractors or employees regardless of

whether the damages were caused in part by Modern. In contrast, the indemnity provision in the direct subcontract agreement required Harding & Smith to indemnify Modern from all liabilities for personal injuries arising out of or in consequence of the performance of Harding & Smith's work "but only to the extent caused in whole or in part by the acts or omissions of the Subcontractor, its subcontractors, anyone directly or indirectly employed by it, or anyone for whose acts it may be liable". The indemnity provisions differ in two respects. First, the indemnity provision in the general contract required a causal connection between the injury and Harding & Smith's work to trigger the indemnity obligation while the indemnity in the direct subcontract required a negligent act on the part of Harding & Smith. Second, the indemnity in the general contract was a broad form indemnity and obligated Harding & Smith to indemnify Modern in full while the indemnity in the direct subcontract was a comparative indemnity and obligated Harding & Smith to indemnify Modern "only to the extent" that a negligent act or omission Harding & Smith caused the loss.

Modern, in reality the insurer for Norfolk Electric, sought to enforce the indemnity in the general contract in order to recover the full amount of the judgment. Noting that the clause in the general contract applied when the injury was caused by a negligent act or omission while the clause in the subcontract applied when there was a causal connection between the work and the injury, Modern argued that both clauses were not in conflict and thus it could pick and choose which one to enforce. The Court rejected this argument reasoning that the general contract applied to all of the work performed on the project and was drafted to reflect the needs and desires of the owner while the subcontract focused on the work of one particular trade and was influenced by the needs and desires of Modern. As such, the Court found that the clauses were in conflict. Where the clause in the subcontract was more limited and specific in its coverage, the "conflicting clause" rule dictated that this clause controls.

Turning to the language of the indemnity clause, the Court determined that the phrase "to the extent caused in whole or in part" limited the indemnity obligation to losses caused by Harding & Smith. Reasoning that the only conduct for which Harding & Smith was responsible was the contributory negligence of the plaintiff, an employee of its sub-subcontractor NEI, Harding & Smith's proportional contribution to Modern Continental's loss was equal to the percentage of negligence of the plaintiff as found by the jury, or twenty-five percent. Because Modern Continental had incurred no loss with respect to that 25% contributory negligence by virtue of the application of G. L. c. 231, § 85, and the consequent reduction of the damage award, nothing was left to indemnify and Harding & Smith was not responsible for any portion of the judgment in favor of the plaintiff.

Although not presented below, the Court concluded by commenting on the indemnity claim of Modern and the real party in interest, Norfolk Electric's insurer. This insurer paid the judgment on behalf of defendants and could justifiably claim reimbursement for the amount that it paid on behalf of Modern on a subrogation theory. Although it made the payment in the name of Modern only, this did not give it any greater rights of recovery against Harding & Smith. Norfolk & Electric had no right of indemnity against Harding & Smith. Thus, the insurer would be limited to

recovery of only that part of the judgment it paid on behalf of Modern not that paid on behalf of Norfolk & Electric.

This case is significant in that it a specific and limited indemnity clause within a subcontract agreement will control over an indemnity provision in a general contract that is incorporated within the subcontract agreement and it reaffirms the holding in North Am. Site Developers, Inc. v. MRP Site Dev., Inc., 63 Mass. App. Ct. 529 (2005)¹ that the use of the phrase “to the extent caused by” creates a comparative indemnity obligation. Moreover, the Court commented that the insurer for a subcontractor that took over and assumed the defense and indemnity of the general contractor and had paid part of the judgment on the general contractor’s behalf had a right to pursue a subrogated claim on behalf of the general contractor.

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(Morrison Mahoney LLP successfully handled this case on appeal.)

¹ Morrison Mahoney LLP successfully represented MRP in the case.