IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JOHN O'NEAL, Plaintiff, v. MERCANTILE PRESS, Defendant/Third-Party Plaintiff, v. HONEYCUTT'S LAWN MAINTENANCE, INC. & MCFOY REFRIGERATION, INC., Third-Party Defendants.	)	C.A. No. 08-11-070 JRJ

Submitted: August 10, 2009
Decided: October 8, 2009

Upon Third-Party Defendant McFoy Refrigeration Inc.'s Motion to Dismiss Mercantile Press' Third-Party Complaint: **GRANTED.**

OPINION

David L. Baumberger, Esquire, Three Mill Road, Suite 301, Wilmington, DE 19806, Attorney for Third-Party Defendant, McFoy Refrigeration, Inc.

Gary H. Kaplan, Esquire and Melissa E. Cargnino, Esquire, 1220 North Market Street, 5th Floor, P.O. Box 8888, Wilmington, DE 19899, Attorneys for Defendant/Third-Party Plaintiff, Mercantile Press.

Jurden, J.

I. INTRODUCTION

Before the Court is McFoy Refrigeration Inc.'s ("McFoy") Motion to Dismiss Mercantile Press' ("Mercantile") Third-Party Complaint pursuant to Superior Court Civil Rule 12(b)(6).[1] In its Motion, McFoy argues that the exclusivity provision of the Workers' Compensation Act is the exclusive remedy in this case, that it precludes any suit from being filed against McFoy, and thus, McFoy cannot be held liable as a joint tortfeasor. McFoy further argues that it cannot be held liable for indemnity and/or contribution. For the reasons set forth below, the Motion to Dismiss is **GRANTED.**

II. BACKGROUND

On November 10, 2008, Plaintiff, John O'Neal (O'Neal) filed a negligence suit against Mercantile. O'Neal, an employee of McFoy, claims he twisted his ankle when stepping off a ladder while performing work for Mercantile pursuant to a contract between McFoy and Mercantile.

Mercantile filed a Third-Party Complaint against McFoy claiming that Mercantile is entitled to contribution and/or indemnification from McFoy because: the negligence of McFoy proximately caused the injuries and damages alleged by O'Neal in the Complaint; McFoy is responsible under respondeat superior for all damages caused by its agents, employees or servants; and McFoy breached its

[1] Superior Court Civil Rule 12(b) allows the following defenses to be made by motion: "... (6) failure to state a claim upon which relief can be granted".

implied contract and implied duties to have its employees perform work at the subject property in a workmanlike manner.

III. STANDARD

In deciding a motion to dismiss a complaint for failure to state a claim, the Court must accept all well-pleaded allegations in the complaint as true.[2] A complaint is considered to be "well pleaded" if it provides the opposing party with notice of the claim being brought against it.[3] "Delaware Courts, however, will not accept mere conclusory allegations as true."[4]

IV. DISCUSSION

Accepting as true the allegations set forth in Mercantile's Third-Party Complaint, the Court finds the allegations therein insufficient to survive a motion to dismiss.

The exclusivity provision of the Workers' Compensation Act requires an injured employee to accept compensation for personal injury caused by an accident during the course and scope of employment, regardless of the question of negligence, and excludes all other rights and remedies.[5] As such, the exclusivity provision precludes the imposition of joint tort liability upon an employer in a suit

[2] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).
[3] *Precision Air, Inc. v. Standard Chlorine of Delaware, Inc.*, 654 A.2d 403, 406 (Del. 1995).
[4] *Great American Assur. Co. v. Fisher Controls Intern., Inc.*, 2003 WL 21901094, at *5 (Del.Super. Aug. 4, 2003) (citing *Criden v. Steinberg*, 2000 WL 35 4390 (Del. Ch. Mar. 23, 2000)).
[5] 19 *Del.C.* § 2304 states: "Every employer and employee . . .shall be bound by this chapter respectively to pay and to accept compensation for personal injury or death by accident arising out of and in the course of employment, regardless of the question of negligence and to the exclusion of all other rights and remedies."

brought by an injured employee against a third party.[6] "Because the employer cannot be held liable as a joint tortfeasor, it is not obligated to provide contribution to the third party."[7] There is an exception, however, to the exclusivity provision. In *Precision Air Inc., v. Standard Chlorine of Del., Inc.*,[8] the Delaware Supreme Court held that an employer could be contractually liable to a third-party, despite the payment of workers' compensation benefits to an injured employee, where the contract between the employer and the third-party contains provisions requiring the employer to perform work in a workmanlike manner and to indemnify the third-party indemnitee for any claims arising from the employer-indemnitor's own negligence.[9] Even in instances where a contract is silent with respect to indemnification and has no express indemnity provision, implied indemnification may be established by a party seeking indemnity.[10]

While the exclusivity provision of the Workers' Compensation Act precludes Mercantile from bringing its negligence claim against McFoy, it is possible that McFoy could be contractually liable to Mercantile for indemnification if McFoy failed to perform the work in a workmanlike manner. However, Mercantile's Third-Party Complaint fails to allege facts to establish such a claim.

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[6] *Precision* at 407-408 (citing *Howard, Needles, Tammen & Bergendoff v. Steers, Perini &Pomeroy*, 312 A.2d 621 (Del.Super. 1973)).
[7] *Id* at 407; 10 *Del.C.*§ 6301 which provides: "For the purposes of this chapter, 'joint tort-feasors' means 2 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."
[8] 654 A.2d 403 (Del. 1995).
[9] *Id.*
[10] *Davis v. Peoples, Inc.*, 2003 WL 21733013, at *4 (Del.Super. July 25, 2003).

Mercantile avers that it had an agreement with McFoy which required McFoy to perform work at the subject property in a workmanlike manner.[11] Paragraph 8 of Mercantile's Complaint asserts a breach of implied contract claim against McFoy, but this paragraph is wholly conclusory. Nowhere in the Complaint does Mercantile plead facts establishing or supporting a breach of contract or implied indemnity claim against McFoy.[12] The Complaint fails to give the requisite notice to McFoy of the claim being made against it.[13]

V. CONCLUSION

For these reasons, McFoy's Motion to Dismiss Mercantile's Third-Party Complaint is **GRANTED.**

IT IS SO ORDERED.

Jan R. Jurden, Judge

cc: Prothonotary - Original

[11] Third-Party Compl., at ¶4, D.I. 12

[12] Mercantile's Third-Party Complaint against McFoy incorporates O'Neal's Complaint by reference. Although O'Neal's Complaint does set forth some factual basis for his negligence claims, neither O'Neal's Complaint nor Mercantile's Third-Party Complaint against McFoy provides a factual basis to support an implied indemnity claim against McFoy, which is the only viable claim Mercantile would have in light of the Workers' Compensation Act.

[13] In response to the Court's specific inquiry at oral argument as to whether there are sufficient facts to overcome the Workers' Compensation exclusivity provision, Mercantile's counsel stated ". . . it is uncertain at this point going forward whether the facts will indicate that McFoy did behave in a negligent fashion or have some sort of conduct." Tr. 7:16-19.