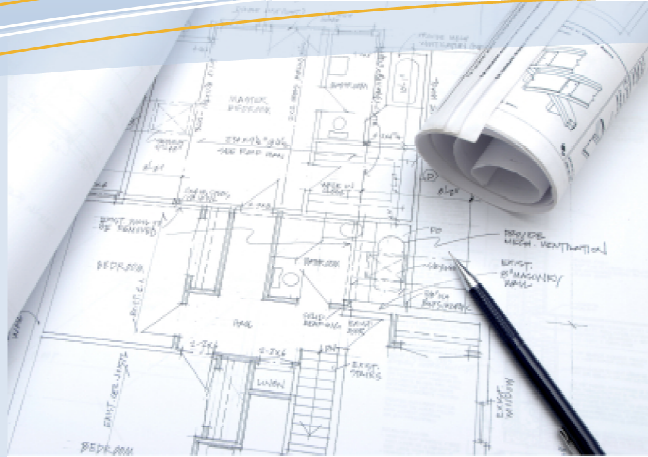


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Risk Management Tools for the Design Professional



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Case Study: No Common Law Indemnification Duty Owed by General Contractor to Project Owner for Subcontractor Employee Injuries Where GC Did Not Control and Supervise the Subcontractor's Work

By Kent Holland, Construction Risk Counsel, PLLC

In a case whose principles apply to design professionals as well as general contractors, a GC was performing a build-out for a store tenant (not the project owner) and retained the services of a subcontractor for certain work. An employee of the subcontractor was injured by falling from a ladder, and the project owner sued the contractor for common law indemnification and contractual indemnification for damages for which the Owner had been found vicariously liable under the state's statutory law.

Although the general contractor had not itself been found to be directly liable or vicariously liable for the subcontractor employee injuries, the property owners argued they were entitled to common law indemnification. They asserted the general contractor contractually assumed sole responsibility and control of the entire project, and had the contractual authority to (1) direct, supervise and control the means and methods of plaintiff's work, and (2) institute safety precautions to protect the workers.

The Owner asked the Court to adopt a general rule that a party may be liable for common-law indemnification upon a showing that the party (i.e., the proposed indemnitor) either was actually negligent or had the authority to direct, control or supervise the injury-producing work, even if it did not exercise that authority. What the Owner asked the court to do was equate a party that merely has authority to direct, control or supervise the work with a party who is actively at fault in bringing about the injury suffered by the plaintiff.

The appellate court held that in the absence of proof of any negligence or actual supervision of a general contractor, the mere authority the general contractor has to supervise the work and implement safety procedures is not a sufficient basis to require common law indemnification of the project owner. *McCarthy v. Turner Construction, Inc.*, 953 N.E. 2d 794, (New York, 2011).

Although the GC interacted with the subcontractor and the sub-subcontractor firm whose employee was injured, the GC had no supervisory authority over the sub-subcontractor's work and it provided no tools or ladders to subcontractors that worked at the site.



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No Contractual Indemnification

Citing case law that stands for the proposition that through a contractual indemnification clause, an owner who is only vicariously liable by statute may seek full indemnification from the party that is wholly responsible for the accident, the court found in this case that there was no direct contractual relationship between the project owner and the general contractor. The contract was in fact between the contractor and a store tenant of the project owner. In addition, the owner had no third party beneficiary rights under the contract between the contractor and the store tenant. For these reasons, the contractual indemnification claim was dismissed on summary judgment by the trial court, and that dismissal was affirmed on appeal.

Common law Indemnification

Even in the absence of contractual indemnification, a contractor could have an indemnification obligation that is created by common law which “imposes obligations upon those actively at fault in bringing about the injury.” Reviewing decisions by various New York appellate division courts, the Court of Appeals observed that some courts had found a common law duty to indemnify based solely on the fact that a party had contractual authority to supervise the work at a site, whereas other courts limited the duty to those who had “actually supervised and controlled the injury-producing work.” After reviewing these cases, the court concluded that a preponderance of case law reveals the courts “*have usually, consistent with the equitable principles of common-law indemnification and this Court’s teachings, imposed the obligation to indemnify on parties who were actively at fault in bringing about the injury.*”

For these reasons, the court held that because the general contractor in this case “*did not actually supervise and/or direct the injured plaintiff’s work, [Contractor] is not required to indemnify the property owners under the common law.*”

Implications for Design Professionals

Although this particular case addresses a construction general contractor and subcontractor, the principles apply generally to design professionals as well. As explained in the oft cited case of *Herczeg v. Hampton Township and Bankson Engineers*, quoting from an earlier Pennsylvania court decision,

“The great weight of authority supports the rule that an [engineer] does not, by reason of his supervisory authority over construction, assume responsibility for the day-to-day methods utilized by the contractor to complete the construction. The [engineer’s] basic duty is to see that his employer gets a finished product which is structurally sound and which conforms to the specifications and standards. Any duty that the [engineer] may have involving safety procedures of the contract must have been specifically assumed by the contract or must have arisen by actions outside the contract.”

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Depending upon the common law of the jurisdiction in which the services are performed, the design professional, therefore, may avoid responsibility and liability for the safety of individuals employed by contractors and their subcontractors by carefully drafting their contracts to make clear they have no safety responsibility for others, and then staying within the scope of their contract. The *Herczeg* court said that factors that may be relevant to determining a design professional's responsibility when an attempt is made to expand the design firm's liability beyond the specific provisions of its contract are the following:

- 1) Actual supervision and control of the work;
- 2) Retention of the right to supervise and control the work;
- 3) Constant participation in ongoing activities at the construction site;
- 4) Assumption of responsibility for safety procedures;
- 5) Authority to issue change orders and
- 6) The right to stop the work.

This list forms a good framework for a design firm to consider when negotiating their contracts and when managing their services at the project.

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