



Landmark at Stratton Owners et al. vs. Ski Stratton Condo et al.

## Decision on Novelli Motion for Summary Judgment on Ski Stratton Crossclaim

Third-party defendant Novelli Engineering, P.C., (Novelli) has moved for summary judgment on the defendant/third-party plaintiff Ski Stratton Condos, LLC's (Ski Stratton) crossclaim against Novelli for implied indemnification. Novelli argues that Ski Stratton's claim fails for four reasons: the economic loss rule bars the claim; Ski Stratton and Novelli were not in privity of contract; Ski Stratton is a joint tortfeasor; and, in the event Novelli is liable, damages are capped at \$13,000. Ski Stratton opposes the motion, arguing that the claim is not barred under the economic loss rule, because implied indemnification is an equitable remedy which is appropriate under these specific facts, that it did have a contract with Novelli, because Ski Stratton was a "party in fact" to the contract between Novelli and Gary Juster, that there has been insufficient discovery to enable any reasoned determination as to whether Novelli and Ski Stratton are in fact "joint tortfeasors," and that the purported limitation on liability in the Juster-Novelli contract is void as against public policy.

The court concludes and orders below that the motion should be granted both because the economic loss rule bars the claim, and because there is no privity of contract between Novelli and Ski Stratton. The court accordingly does not reach the other claims made in Novelli's motion.

### Undisputed Material Facts

The agreed material facts relevant to this motion are as follows.

On January 7, 2019, as part of its answer to the fourth amended complaint in this action, Ski Stratton filed a crossclaim against Novelli and others. It alleged that Ski Stratton contracted with Novelli to provide engineering services for the Landmark project, and that "the alleged construction and design defects complained of by the plaintiffs were caused by the negligence of" Novelli and others. Ski Stratton asserted that Novelli and others were obligated to indemnify Ski Stratton, and that Novelli had a common law duty to perform its engineering services in a manner free from the design and construction defects alleged by the plaintiffs, and to indemnify and hold Ski Stratton harmless with respect to liability arising out of the work on the project. Ski Stratton alleged that to the extent there were defects in the design of the project, they resulted from the primary negligence of Novelli and others. Ski Stratton alleged, therefore, that if Ski Stratton were held liable to the plaintiffs for any damages, Novelli and others had a common law obligation to indemnify and hold Ski Stratton harmless from such damages, including attorney's fees. Ski Stratton Answer to Plaintiffs' Fourth Amended Complaint, 1/7/19, at 8-12. Novelli seeks summary judgment in its favor on this crossclaim.

Novelli is a Vermont licensed professional engineering firm. In 2004, Novelli contracted with Gary Juster, an individual, to provide structural engineering services for a part of the project to convert the Landmark Hotel at Stratton (Landmark) to condominiums. Mr. Juster operates a development company known as Juster Development Company. He is the principal and owner of this company. Mr. Juster also created Ski Stratton, LLC, as a Vermont limited liability company to manage the Landmark project.

Novelli's contract to provide engineering services for part of the Landmark project identifies Gary Juster of Juster Development as the only client. Novelli billed only Mr. Juster for the services provided for the project. However, Ski Stratton paid Novelli for much of its work on the Landmark.

Novelli's contract with Mr. Juster contains an express limitation of liability, which is an amount not to exceed Novelli's fee of \$13,000. This fee was paid in full. Mr. Juster did not seek to negotiate for additional limits of liability for an additional fee.

### Legal Conclusions

For reasons related to logical continuity, the court first addresses the issue of the contractual relationship between Novelli and Ski Stratton.

#### *Contractual Relationship*

Ski Stratton argues that Novelli's course of performance in its contract with Juster made Ski Stratton a party-in-fact to that contract. Essentially, Ski Stratton argues that since Ski Stratton was the overall manager of the Landmark project, and Ski Stratton paid many of the invoices that Novelli submitted to Mr. Juster and Juster Development Company, Novelli was working for Ski Stratton, and Ski Stratton must have been a party to the contract.

Ski Stratton does not dispute that it was not a party to the written contract with Novelli. However, it argues that "contracts may be implied by mutual performance and the facts surrounding the transaction in question," and that a contractual relationship should be implied here. Ski Stratton Opp. at 4. For this proposition, Ski Stratton cites *In re Cole* which states that "an implied contractual provision may arise through established past practices, where the conduct of the parties encompasses a continuity, interest, purpose and understanding which elevates a course of action to an implied contractual status." *In re Cole*, 2008 VT 58, ¶ 13, 184 Vt. 64 (citing *Gallipo v. City of Rutland*, 163 Vt. 83, 88 (1994)). However, *Cole* involved very different circumstances: it held that "past practices may give rise to an implied contractual provision in the collective-bargaining context." *Cole*, 2008 VT 58, ¶ 17. The court finds this decision unpersuasive here. There is no allegation that Novelli had a pattern or history of other contracts with either Mr. Juster or Ski Stratton. There is no allegation that they had a pattern of "past practices" that would support implying a contractual relationship.

Ski Stratton also cites *L.V. Appleby, Inc. v. Griffes*, 160 Vt. 601, 602 (1993), where "the conduct of the parties was found to recognize the existence of a contract and to indicate agreement as to its terms." *L.V. Appleby, Inc.* is also distinguishable, because there the parties had no formal written contract; rather, the trial court found facts supporting the formation of a contract. Those facts included the submission of a purchase order in response to a price quotation, and the filling of the order and billing

of the purchaser. *Id.* In this case, Novelli had a clear, written contract, with Mr. Juster, provided services under that contract, and billed Mr. Juster and Juster Development for those services. The fact that Ski Stratton wrote most of the checks to Novelli does not provide a sufficient basis for an implied contractual relationship between Novelli and Ski Stratton.

The court concludes that there was indeed no contractual relationship between Ski Stratton and Novelli, and therefore there is no basis for any claim of breach of contract.

### *Implied Indemnity*

Novelli argues that there is no basis for any implied obligation to indemnify Ski Stratton without any contractual relationship or other legal obligation. Ski Stratton argues that implied indemnification is warranted even if there is no contractual relationship.

Indemnification requires either an express agreement or undertaking or circumstances where the law will imply an indemnification. *Bardwell Motor Inn, Inc. v. Accavallo*, 135 Vt. 571, 572 (1977). Implied indemnification requires a legal relationship. *Peters v. Mindell*, 159 Vt. 424, 428 (1992). While a direct contract is the most obvious type of legal relationship, the phrase includes other relationships.

Vermont courts have looked to the Restatement of Restitution § 95 for the articulation of circumstances that may require indemnity. Section 95 suggests that the legal relationship required for indemnity hinges on the purported indemnitor owing a duty to make a dangerous condition safe:

Where a person has become liable with another for harm caused to a third person because of his negligent failure to make safe a dangerous condition of land or chattels, which was created by the misconduct of the other or which, as between the two, it was the other's duty to make safe, he is entitled to restitution from the other for expenditures properly made in the discharge of such liability, unless after discovery of the danger, he acquiesced in the continuation of the condition.

Restatement of Restitution § 95; *Bardwell Motor Inn, Inc.*, 135 Vt. at 573. Many courts assessing indemnity use the concept of duty to determine liability. See *Hemond v. Frontier Commc'ns of Am., Inc.*, 2015 VT 66, ¶ 13 (2015) (indemnitee must show that indemnitor had a duty to keep the work environment safe or that indemnitor's "misconduct created the dangerous condition"); *Peters*, 159 Vt. at 429 (reversing grant of summary judgment on indemnity when third-party defendants "had an implied duty to carry out their obligations with a certain degree of care"); *DiGregorio v. Champlain Valley Fruit Co.*, 127 Vt. 562, 565 (1969) (retailer and injured customer were both owed a duty by wholesaler/seller of fruit; retailer had a right to indemnity). Ski Stratton argues that this precisely the situation here, i.e. that the defects in design that the plaintiffs in this case allege were caused by Novelli, and that Novelli should therefore be required to indemnify it if Ski Stratton is found liable to the plaintiffs for these defects.

Ski Stratton also contends that even in the absence of a contract, equitable indemnity is still available to it—and equitable indemnity is imposed based on the nature of the relationship between the parties, their relative degrees of culpability, and derivative/vicarious aspects of their relationship. *Opp.* at 6 (citing *Bruner & O'Connor on Construction Law*, § 10:110). However, the three cases Ski Stratton cites for this proposition all involve claims that a third-party defendant breached a duty, that personal injury resulted, and that the defendant is liable to the third-party plaintiff as a result. In *Knisely v.*

*Cent. Vermont Hosp.*, 171 Vt. 644 (2000), an anesthesiologist claimed he got hepatitis because the hospital where he worked failed to eliminate waste gases. The hospital sought indemnity from a company, TSP, that provided preventative maintenance services and repairs on hospital equipment. The court found the hospital was not entitled to indemnity because it had a nondelegable duty to provide a safe workplace for its employees, that TSP was not assigned and did not undertake to repair the hospital's inadequate ventilation system, and that the hospital knew of its ventilation problem. "Although we have recognized implied indemnity claims in circumstances where the indemnitor assumed the same duty over which the injured party was suing, we have done so only where as a matter of equitable indemnification it could be determined that 'the violation of that duty was clearly the primary fault of the [indemnitor].'" *Knisely*, 171 Vt. at 647 (citing *Bardwell*, 135 Vt. at 573). In *Knisely*, the hospital did not show that the primary fault lay with TSP.

*White v. Quechee Lakes Landowners' Ass'n, Inc.*, 170 Vt. 25 (1999) is similar. In *White*, a woman died in a sauna, and her estate sued her health club for wrongful death. The health club in turn sought indemnity from the sauna manufacturer. The health club lost because it failed to show it was only vicariously liable. "Generally, indemnity will be imputed only when equitable considerations concerning the nature of the parties' obligations to one another or the significant difference in the kind or quality of their conduct demonstrate that it is fair to shift the entire loss occasioned by the injury from one party to another." *White*, 170 Vt. at 29. Few of the claims implicated the manufacturer. Moreover, the trial court found that the health club had acquiesced to the absence of safety features. Indeed, there was "substantial evidence" concerning the health club's independent negligence. *Id.* at 34.

In *Hemond v. Frontier Commc'ns of Am., Inc.*, 2015 VT 66, ¶ 2, 199 Vt. 259, the court found a utility company did not have an implied indemnity claim against its independent contractor for the electrocution of the utility's employee. Again, the utility had a nondelegable duty to design a safe environment. "We have acknowledged the difficulty of articulating a general rule on implied indemnity, but have explained that usually it will apply only when the party seeking indemnity is vicariously or secondarily liable to the third person because of a legal relationship with the third person or because of the party's failure to discover a dangerous condition caused by the indemnifying party, 'who is primarily responsible for the condition.'" *Hemond*, 2015 VT 66, ¶ 9 (citing *White*, 170 Vt. at 29).

The court concludes that, as Novelli argues, these cases do not support Ski Stratton's claim for indemnification, because they all involve physical injuries, and therefore the economic loss rule did not bar relief in any of them.

Arguably the leading Vermont case on implied indemnification is *Peters v. Mindell*. The Peters bought their home from Mindell. Prior to sale, Mindell had contracted with third-party defendants Schreib and General Products to design and certify a mound septic system. *Peters*, 159 Vt. at 429. There was no express obligation to indemnify, but "accompanying every contract is an implied duty to perform with care, skill, reasonable expedience and faithfulness." *Id.* (citation omitted). The court held: "If the Mindells are held liable for the defects in the mound septic system, but the defects were created by the negligence of Schreib and General Products, then the Mindells are entitled to indemnification." *Id.* This indemnification is obviously based on the contractual relationship between the Mindells and Schreib and General Products. Here, Ski Stratton argues that they are in the same position as the Mindells. However, unlike the Mindells, as the court concluded above, Ski Stratton did

not have a contractual relationship with Novelli, and is therefore not entitled to implied indemnification under the principles stated in *Peters*.

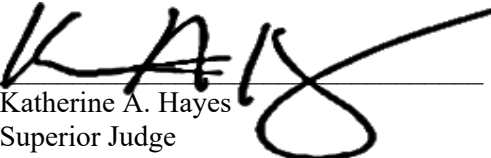
The court concludes that Novelli's argument, that in the absence of contractual privity or some other specific assumed obligation, Ski Stratton cannot prevail on its claim for economic damages, is correct. Equitable indemnification sounds in tort, and compensation for economic damages is usually barred by the economic loss rule. As stated in *Wentworth v. Crawford & Co.*, 174 Vt. 118 (2002), "absent some accompanying physical harm, there is no duty to exercise reasonable care to protect another's economic interests." *Wentworth*, 174 Vt. at 126. "Without a legal duty of care, an action for negligence cannot stand." *Id.* Here, Novelli had no contractual or other duty to Ski Stratton.

As noted in *Treetop at Stratton Condominium Assn., Inc. v. Treetop Development Co., LLC*, No. 147-3-09 Wmcv, 2011 WL 8472969 (Vt. Super. Feb. 04, 2011) (Wesley, J.), "[n]egligence actions are usually better suited for resolving claims for unanticipated physical injury; principles of contract law are generally better suited for determining claims for consequential damages that parties have or could have addressed by agreement." *Treetop at Stratton Condominium Assn., Inc.*, 2011 WL 8472969. In that case, the plaintiff condo association's negligence claims against the general contractor and a civil engineering firm were both dismissed because their damages were essentially limited to repair and reconstruction costs. *Id.*

The court has found no Vermont cases specifically holding that the economic loss rule does not apply to an equitable indemnity claim. However, based on the purely commercial relationships between Ski Stratton, Mr. Juster, and Novelli, Ski Stratton's cross claims are essentially contract claims. Accordingly, the court concludes that the economic loss rule applies to these claims, and bars Ski Stratton from pursuing them.

### Order

Based on the conclusions of law above, the court orders that Novelli Engineering P.C.'s motion for summary judgment against Ski Stratton Condos, LLC, as to its January 9, 2019 crossclaim against Novelli is GRANTED.

  
Katherine A. Hayes  
Superior Judge  
Signed electronically December 23, 2020