THE EFFECT OF AN INDEMNITY AGREEMENT EXECUTED POST-PERSONAL INJURY

Course of Dealing Matters

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Called upon to represent a major Boston-based General Contractor in a suit brought by a Plaintiff injured on-the-job, Sutton & Sakakeeny, LLP lawyers Stephen W. Sutton and Christopher J. Connolly asserted that an indemnity agreement contained in a contract signed after a Plaintiff was injured, required the Subcontractor to indemnify, defend and hold harmless the General Contractor. Mr. Sutton and Mr. Connolly used the prior course of dealing between the General and Subcontractor to demonstrate that the Subcontractor was aware that its oral contract with the General Contractor contained an implied-in-fact indemnity agreement at the time of the Plaintiff's injury.

The facts that gave rise to the dispute are as follows: Having successfully worked together on a number of previous occasions, each under an identical contract containing an indemnity clause, the General and Subcontractor entered into an oral contract whereby the Subcontractor was to install an HVAC system into a building undergoing extensive renovations. The rehabilitation project was managed and directed by the General Contractor. Other Subcontractors were already on-site, including the Plaintiff's employer.

While the Sub and General Contractors were working under this oral contract, the Plaintiff suffered a personal injury when he accidently stepped with his right foot into an uncovered hole while in the process of moving scaffolding. Mr. Sutton and Mr. Connolly argued that the course of dealing between the parties imputed to the Subcontractor knowledge that the General Contractor's "Subcontract Purchase Order" contained an indemnification clause. This "Subcontractor Purchase Order," was sent from the General to the Subcontractor 15 days after the Plaintiff's accident. It was labeled, "Confirming Subcontract," which Mr. Sutton and Mr. Connolly indicated was further evidence that the General and Subcontractor were operating under an oral contract at the time of the Plaintiff's injury.

Once an oral contract was recognized, the next step was to ascertain the terms of that contract. Mr. Sutton and Mr. Connolly analyzed the case law in this novel area and found support for their legal argument that the oral contract, coupled with the "Confirming" written subcontract, provided the General Contractor a right to indemnity.

Three situations give rise to a right to indemnity: (1) an express contract for indemnification; (2) a contractual right to indemnification implied from the relationship between the parties; and (3) a tort based right to indemnification. Araujo v. Woods Hole, 693 F.2d. 1,2 (1st Cir. 1982). Under Massachusetts case law, the particular facts of each case must be analyzed to determine whether there are unique factors or circumstances which indicate that the parties fairly intended, in a particular case, an agreement to indemnify. Boston Gas Company v. Miller Pipeline Corp., 1995 WL 1146820 *1 (1995).

Suffolk Construction Co., Inc. v. Lanco Scaffolding Co., Inc., 47 Mass.App.Ct. 726 (1999) involved a suit for indemnity arising out of a work-site accident in which the Appeals Court held that the subcontract, which was the basis for the contractor's indemnity claim, was not effective until two days post-accident. Suffolk, 47 Mass.App.Ct. at 731. The facts in the Suffolk case are distinguishable from those addressed by Mr. Sutton and Mr. Connolly. First, Suffolk and Lanco had never worked together. Lanco had never seen Suffolk's standard from contract. Here, the General Contractor and the Subcontractor had worked together on numerous occasions. Second, Suffolk and Lanco had never discussed

indemnification; specifically, prior to May 24, 1991, they did not discuss the subcontract's written provisions concerning indemnification and insurance. Id. In this case, in the course of their previous dealings, the General and Subcontractor had discussed indemnification.

The Suffolk Court reached its holding because there was "insufficient evidence that the written subcontract constituted a memorialization of an earlier agreement by Lanco to indemnify Suffolk." Suffolk, 47 Mass.App.Ct. at 728. While the evidence in Suffolk did not permit a reasonable inference that the May 24, 1991 contract "memorialized" an earlier oral agreement concerning indemnity, Mr. Sutton and Mr. Connolly demonstrated in this case the existence of sufficient evidence to establish that the written subcontract constituted a memorialization of an earlier agreement by the Subcontractor to indemnify the General Contractor. Id. In this case, "there was sufficient evidence of the memorialization of the oral contact that had been negotiated between Subcontractor and General Contractor at the time of the Plaintiff's accident," said Mr. Sutton.

The "Subcontract Purchase Order" sent to the Subcontractor 15 days post-accident was merely a confirmation of the pre-existing oral contract. Numerous prior contracts had been entered into by the General and Subcontractor following the same process; an oral contract followed by a Purchase Order serving as a "Confirming Subcontract." Moreover, the contractors had previously discussed indemnification in forming similar contractual arrangements.

In Orlando v. Boston Edison Co., 1998 WL 930583 (Mass.Super.) the plaintiff, an employee of J.J. O'Brien & Sons, Inc. ("O'Brien") working on a construction project for Boston Edison Company ("Edison"), filed an action against Edison after suffering a work-site accident. Edison joined O'Brien, claiming it had agreed to indemnify Edison. Orlando, 1998 WL 930583 at *1. In Orlando, after O'Brien received the purchase order, O'Brien began to perform. O'Brien did not expressly state its acceptance of the Order containing the indemnification agreement, nor did O'Brien object to the indemnity provision. Id. It appeared to the Court that no one at O'Brien ever read the indemnity provision or otherwise discussed indemnification. Id.

In granting Edison's motion for summary judgment as to the indemnification agreement, the court looked to the fact that O'Brien had previously performed work for Boston Edison pursuant to fourteen (14) separate purchase orders issued between August of 1987 and August of 1990. Orlando, 1998 WL 930583 at *4. All but one of the earlier purchase orders related to conduit construction work and each prior purchase order bore the same terms and conditions as the purchase order in question. Id. Pursuant to the purchase order, O'Brien performed and billed Edison for its work. Id. at 2.

It is difficult to imagine conduct more indicative of a contract than performance and billing. See Polaroid v. Rollins Environmental Services, 416 Mass. 684 (1993). The Orlando Court said that "by completing performance under the terms of the purchase order without objecting to the indemnity clause, and by accepting payment from Boston Edison, [the third party defendant] recognized the existence of a contract pertaining to the services referenced in the...purchase order and accepted the terms contained on the reverse side of the purchase order. Orlando, 1998 WL 930583, *4 (Mass.Super.).

In this case, the Subcontractor performed pursuant to an oral contract, billed the General for such work, subsequently signed a confirming written subcontract and completed performance. Mr. Connolly said that, "The subcontractor cannot now claim that no contract existed with the General Contractor at the time of the Plaintiff's accident." Here, "performance of an oral contract is coupled with an extensive

course of dealing between the parties, including prior discussions relating to indemnification," added Mr. Sutton. Similarly, considering its billing, performance and the course of dealing, the Orlando Court said that "O'Brien failed to raise a genuine factual dispute as to whether O'Brien accepted the purchase order, thereby assenting to the indemnification clause." Id. Following the reasoning in Orlando, the Court in this case should clearly determine that Worcester assented to the indemnification of Higgins.

The facts surrounding the court's decision is Greater Boston Cable Corporation v. White Mountain Cable Construction, 414 Mass. 76 (1992) are different from those in the present case. The Greater Boston Court held that a construction agreement which contained an indemnification clause that became effective three days after a construction accident did not apply retroactively to require White Mountain to indemnify Greater Boston Cable for damages from an accident involving White Mountain's worker. Greater Boston, 414 Mass. at 79.

In Greater Boston, the cable installation work proceeded on April 8, 1995, the day of the accident, without a formal written contract between Greater Boston Cable and White Mountain. Id. at 78. Following the accident, Greater Boston Cable prepared and sent to White Mountain a "Construction Agreement" containing a clause whereby White Mountain agreed to hold harmless Greater Boston Cable against claims for injuries on the job. Id. This contract was not, by its terms, effective until April 11, 1985, three days after the accident, and was not signed until April 23, 1987. Id. at 80.

Three factors distinguish this case, handled by Sutton & Sakakeeny, LLP, from Greater Boston. Greater Boston, 414 Mass. at 76, 80. First, in this case, an oral contract existed between the parties at the time of the accident. Second, the subcontract merely constituted a confirmation of a pre-existing contractual relationship, rather than an entire "Construction Agreement" as in Greater Boston. Id. at 80. Therefore, unlike the agreement in Greater Boston which led Judge Nolan to rule that the retroactive agreement "would fail for lack of consideration," the subcontract in this case was supported by present consideration. Third, extensive prior dealings between the General and Sub Contractors is indicative of the fact that the Subcontractor understood the process of following an oral contract with a confirmatory subcontract containing an indemnity provision.

Suttonlawyers, Mr. Sutton and Mr. Connolly, were able to use the existing state of the law to formulate a compelling argument in an area of first impression to obtain a favorable result for their client.