STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

(Filed: November 9, 2012)

ROLAND ANDERSON, INDIVIDUALLY AND ON BEHALF OF ALEXIS ANDERSON, a minor	:	
v.	:	**C.A. No. KC 11-0441**
CARDI CORPORATION, and BARTOLINI BROS. CONSTRUCTION CO., INC.	:	
v.	:	
CASHMAN EQUIPMENT CORPORATION & C.R.C. COMPANY, INC.	:	

DECISION

RUBINE, J. This matter arises out of a worksite injury sustained by Roland Anderson (hereinafter "Plaintiff" or "Anderson") while working on construction at the Sakonnet River Bridge. The Defendants, Cardi Corporation ("Cardi") and Bartolini Bros. Construction Co., Inc. ("Bartolini"), and Third-Party Defendants, Cashman Equipment Corporation ("Cashman") and C.R.C. Company, Inc. ("CRC"), are contractors and subcontractors involved in the work on the site where Plaintiff was injured. Each contract and subcontract contains indemnification provisions that prompted many of the instant dispositive motions. The Court heard argument on the parties' motions on September 10, 2012, and this Decision constitutes the Court's resolution of all pending dispositive motions. The pending motions before the Court are:

1. Cashman's Motion for Partial Summary Judgment based upon the contention that Cashman is entitled to contractual indemnification from CRC under the terms of the Cashman-CRC subcontract;

2. Cashman's Motion for Partial Summary Judgment with respect to whether CRC is entitled to indemnification from Cashman because Mr. Anderson's injury occurred as a result of CRC's own acts or omissions;
3. Cashman's Motion for Partial Summary Judgment with respect to whether CRC is entitled to contribution from Cashman because, as a matter of law, Cashman may not be deemed a joint tortfeasor as Mr. Anderson made an election to recover under the Rhode Island Workers' Compensation Act;
4. Cashman's Motion for Summary Judgment with respect to Cardi's Third-Party Complaint for contribution in which Cashman contends that it may not be deemed a joint tortfeasor with respect to Mr. Anderson's injuries, in that Anderson made an election to recover under the Rhode Island Workers' Compensation Act;
5. CRC's Motion for Summary Judgment against Cardi with respect to Cardi's third- party claims for indemnification from CRC, in that it is contended that such claims are barred due to a purported "Full and Final Release of Claim" as well as the language of the Cashman-CRC subcontract; and
6. CRC's Motion to Dismiss Cashman's Cross-Claim based upon the Prior Pending Action Doctrine.

I

FACTS AND TRAVEL

On October 23, 2009, Plaintiff sustained a worksite injury while working on renovations to the Sakonnet River Bridge. It is undisputed that on or about April 2009, the Rhode Island Department of Transportation awarded Cardi the "prime contract" to complete renovations and

construction of the Sakonnet River Bridge (the "Project"). It is further undisputed that Cardi executed a subcontract with Cashman, whereby Cashman would perform certain subcontract work on the Project, including the installation of the land-based and water-based piers which would support the new bridge. On or about April 28, 2009, Cashman executed a subcontract with CRC ("Cashman-CRC subcontract"), whereby CRC would perform certain work on the Project—primarily all of the land-based foundation work. Under the Cashman-CRC subcontract, CRC agreed to furnish all supervision, labor, tools, equipment, materials (except sheet pile, wales and struts, H-pile, and concrete materials which were to be provided by Cashman), and supplies necessary to complete its subcontract work. The Cashman-CRC subcontract contained an insurance provision that required CRC to procure and maintain workers' compensation benefits for its employees.[1] The Cashman-CRC subcontract contained an additional provision requiring CRC to indemnify and defend Cashman, Cardi, and the State of Rhode Island from all claims, suits, or liability for "damages to property . . . injuries to persons, including death, and from any other claims, suits or liability on account of acts or omissions of [CRC] . . . to the extent that damages and/or injuries arise from such acts or omissions of [CRC]."

On October 21, 2009, Anderson, a union pile driver and welder, began work on the Project as a CRC employee. His work consisted of welding and driving sheet piles. On October 23, 2009, Plaintiff was injured in the course of assisting with unloading new fifty to sixty-foot I-beams from a flatbed trailer. A crane was used initially to move the I-beams off the trailer. After he returned to welding, the CRC foreman instructed Anderson to move three cut-off I-beam sections to an area where additional work would be done to prepare them for installation.

[1] It is uncontested that CRC procured a workers' compensation policy affording benefits for its employees. It is also undisputed that Anderson, at the time of his injuries, was an employee of CRC, and elected to receive workers' compensation benefits with respect to his injuries.

At that time, the crane previously used to unload the new I-beams had been moved by CRC to assist with driving sheet piles. Instead of moving the crane back, the foreman directed Plaintiff to use a Caterpillar 350 Excavator to move the cut-off I-beam sections.

Justin Paoloni ("Paoloni"), a Cardi employee, operated the excavator. Plaintiff wrapped two three-inch-wide nylon web slings around a thirty-two-foot section of I-beam, weighing 117 pounds per foot, and attached the slings to the teeth of the excavator bucket. Paoloni then proceeded to raise the I-beam to a height of four to five feet and swing it to the left while Anderson was walking alongside, guiding it by hand and without the use of taglines. Thereafter, the beam began to swing back and forth at the level of Anderson's head. At his deposition Plaintiff testified that he tried to protect himself, but the I-beam struck his hand and jaw before falling on his leg and knocking him to the ground. Emergency response crews were summoned, and Anderson was treated for his injuries at Rhode Island Hospital.

Following his injury, Plaintiff applied for and received workers' compensation benefits under the workers' compensation policy procured by his employer, CRC. On April 4, 2011, Plaintiff filed the instant complaint against Cardi and Bartolini Bros. Construction Co., Inc., alleging that Cardi had a duty to, among other things, supervise the construction site, that Cardi breached its duty by failing to supervise Plaintiff, and as a result of that breach, Plaintiff sustained injury. Plaintiff asserted two negligence claims against Cardi.

On June 30, 2011, Cardi filed a Third-Party Complaint joining CRC and Cashman as third-party defendants. The claims set forth in the Third-Party Complaint included claims that both CRC and Cashman agreed to indemnify Cardi for Plaintiff's personal injury claims. Specifically, Cardi, in its Third-Party Complaint, asserted claims against Cashman for contribution, contractual indemnification, and breach of contract; Cardi also asserted claims

against CRC for contractual indemnification and breach of contract. On October 3, 2011, Cashman answered Cardi's Third-Party Complaint. Cashman's Answer included a Cross-Claim against CRC for contractual indemnification. CRC answered Cashman's Cross-Claim on October 27, 2011; in its Answer, CRC asserted a Cross-Claim against Cashman for indemnification and contribution arising from the Cashman-CRC subcontract.

This tangled web of contracts and subcontracts each containing indemnification provisions has led to the aforementioned dispositive motions. This Court will discuss each motion seriatim.

II

STANDARD OF REVIEW

A

Summary Judgment

This Court will grant a motion for summary judgment only if "'after reviewing the admissible evidence in the light most favorable to the nonmoving party[,]'" Liberty Mut. Ins. Co. v. Kaya, 947 A.2d 869, 872 (R.I. 2008) (citation omitted) "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as matter of law." Super. R. Civ. P. 56(c).

In opposing a motion for summary judgment, the nonmoving party "'has the burden of proving by competent evidence the existence of a disputed issue of material fact and cannot rest upon mere allegations or denials in the pleadings, mere conclusions or mere legal opinions.'" Liberty Mut., 947 A.2d at 872 (quoting D'Allesandro v. Tarro, 842 A.2d 1063, 1065 (R.I.

2004)). To meet this burden, "'[a]lthough an opposing party is not required to disclose in its affidavit all its evidence, he [or she] must demonstrate that he [or she] has evidence of a substantial nature, as distinguished from legal conclusions, to dispute the moving party on material issues of fact.'" Bourg v. Bristol Boat Co., 705 A.2d 969, 971 (R.I. 1998) (quoting Gallo v. Nat'l Nursing Homes, Inc., 106 R.I. 485, 489, 261 A.2d 19, 21-22 (1970)).

B

Motions to Dismiss

In reviewing a Rule 12(b)(6) motion to dismiss, "[the] Court examines the allegations contained in the plaintiff's complaint, assumes them to be true, and views them in the light most favorable to the plaintiff." Ellis v. Rhode Island Pub. Transit Auth., 586 A.2d 1055, 1057 (R.I. 1991); see also Builders Specialty Co. v. Goulet, 639 A.2d 59, 60 (R.I. 1994); Rhode Island Affiliate, ACLU, Inc. v. Bernasconi, 557 A.2d 1232, 1232 (R.I. 1989). "[T]he sole function of a motion to dismiss is to test the sufficiency of the complaint," and thus, this Court need not look further than the complaint in conducting its review. See Bernasconi, 557 A.2d at 1232. The motion will only be granted "when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief from the defendant under any set of facts that could be proven in support of the plaintiff's claim." Ellis, 586 A.2d at 1057; see also Builders, 639 A.2d at 60.

III

ANALYSIS

A

Cashman's Motion for Partial Summary Judgment as to Cashman's Cross-Claim against CRC for Contractual Indemnification

Cashman argues that, as a matter of law, it is entitled to contractual indemnification from CRC under the express terms of the Cashman-CRC subcontract. CRC reads the Cashman-CRC subcontract to limit CRC's liability to only those injuries arising from CRC's acts or omissions. CRC contends that its liability for Anderson's injury is a disputed question of material fact such that summary judgment on Cashman's claim for contractual indemnification is premature.

In Cosentino v. A.F. Lusi Construction Co., Inc., the Rhode Island Supreme Court held that an action seeking to enforce a contractual indemnification provision is not statutorily barred by the exclusivity of the Rhode Island Workers' Compensation Act. 485 A.2d 105, 107-08 (R.I. 1984). The Lusi Court explained that

> "[a]lthough G.L. 1956 § 28-29-20 states that the Workers' Compensation Act 'shall be in lieu of all rights and remedies as to such injury now existing, either at common law or otherwise against an employer [. . .],' it is generally agreed that a third-party action for contract indemnification from the employer is not an action based upon the employee's injury but rather is an action for reimbursement based upon an expressed contractual obligation between the employer and a third-party plaintiff." Id.

Additionally, the Court observed that a contractual indemnification agreement is independently enforceable irrespective of any statutory duty the employer may owe an employee. Id. at 108; see also Ferguson v. Marshall Contractors, Inc., 707 A.2d 660, 661 (R.I. 1998) (holding that Section 28-29-20 does not bar a third-party's action against the employer for contractual

indemnification because such a claim is not based upon the employee's injury but upon an express contractual obligation between the employer and the third party).

Lusi is instructive. In that case, A.F. Lusi Construction Co., Inc. ("Lusi"), the general contractor, entered into a subcontract with Otis Elevator Co. ("Otis") to install elevators at an apartment building in Providence, Rhode Island. Lusi, 485 A.2d at 106. Under the terms of the subcontract, Otis, the promissor, agreed to indemnify Lusi, the promisee, against all claims or demands

> "arising out of or resulting from the performance of the Subcontractor's [Otis's] Work under this subcontract [. . .] to the extent caused in whole or in part by any negligent act or omission of the Subcontractor [Otis, the promissor] or anyone directly or indirectly employed by him or anyone for whose act he may be liable, regardless of whether it is caused in part by a party [Lusi, the promisee] indemnified hereunder." Id. at 107.

Acknowledging that G.L. 1956 § 6-34-1[2] barred the enforcement of that portion of the indemnification claim that attempted to indemnify Lusi for its own negligence, the Lusi Court held that there was nothing in § 6-34-1 that barred Lusi from attempting to secure contractual indemnification from Otis for "claims resulting from negligence on the part of Otis or of any subcontractor employed by Otis." Id.

Here, Section 11 of the Cashman-CRC subcontract, entitled "INDEMNIFICATION," reads in pertinent part:

> "The Subcontractor [CRC] further specifically obligates itself to the Contractor, Prime Contractor, Owner and any other party

[2] Section 6-34-1 states in pertinent part: "A covenant . . . in, or in connection with or collateral to, a contract or agreement relative to the . . . construction . . . of a building, structure, highway, road, appurtenance, and appliance, . . . pursuant to which contract or agreement the promisee or the promisee's independent contractors, agents, or employees has hired the promisor to perform work, purporting to indemnify the promisee . . . against liability for damages arising out of bodily injury to persons . . . proximately caused by or resulting from the negligence of the promisee, . . . is against public policy and is void[.]"

> required to be indemnified under the Prime Contract, jointly and separately, in the following respects, to-wit:
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> . . .
>
> (b) to defend and indemnify them against and save them harmless from any and all claims, suits or liability for damages to property including loss of use thereof, injuries to persons, including death, and from any other claims, suits or liability on account of acts or omissions of Subcontractor [CRC], or any of its subcontractors, suppliers, officers, agents, employees or servants, to the extent that damages and/or injuries arise from such acts or omissions of Subcontractor."

The express language of Section 11 evidences the parties' intention to limit CRC's indemnification obligation to only those "damages and/or injuries" that arose from CRC's acts or omissions. While the first phrase of Section 11(b) imposes a broad obligation upon CRC to "defend and indemnify" against "any and all claims, suits or liability . . . on account of acts or omissions of [CRC]," this obligation is subsequently limited by the phrase "to the extent that damages and/or injuries arise from such acts or omissions of [CRC]." The Court is satisfied that this limiting language expresses the parties' intent to confine CRC's indemnity obligation to damages and/or injuries that CRC actually caused. See Shovel Transfer and Storage, Inc. v. Pennsylvania Liquor Control Board, 559 Pa. 56, 739 A.2d 133, 138 (1999) ("It is firmly settled that the intent of the parties to a written contract is contained in the writing itself."). Further, by specifying "damages" and/or "injuries," the parties confirmed that CRC's obligation would only arise after the indemnitee made payments or suffered actual loss. See 3 Burn & O'Connor, Construction Law § 10:33 ("Indemnity however against loss or damage does not accrue until the indemnitee has made payment or has otherwise suffered actual loss or damage.").

Here, whether Mr. Anderson's injuries "arise from such acts or omissions" of CRC is an open fact question. Importantly, at the hearing on September 10, 2012, Cashman withdrew the

affidavit of Mr. John McNulty, Cashman's Project Manager, which had originally been filed in support of Cashman's summary judgment motion. The withdrawal of the McNulty affidavit leaves the Court with Mr. Anderson's deposition testimony as the exclusive source of facts, tending to establish the applicability of the aforementioned indemnification provision. Even a cursory review of Mr. Anderson's deposition testimony reveals that any number of factors may have caused or contributed to his injury, including his own negligence. For example, Mr. Anderson first testified that John McNulty was his immediate supervisor on the worksite. Anderson Dep. 17. Later in his deposition he testified that he did not know who his immediate supervisor was, nor could he identify the foreman or the entity that employed the foreman who directed Anderson to move the I-beam that eventually struck him, causing his injury. Anderson Dep. 18, 47. Thus, exactly which entities or persons directed Mr. Anderson's worksite activities on the day of his injury remains an unresolved fact question. Moreover, Mr. Anderson testified that he personally retrieved and attached the two slings used to hoist the I-beam that struck him. Anderson Dep. 41-43. He stated that he could not remember whether he attached the slings to a single tooth of the excavator that hoisted the I-beam or to two separate teeth as he had done in the past to balance the material being lifted. Anderson Dep. 45, 48-49. Further, Mr. Anderson testified that he made the decision not to use a guide rope during the lift. Anderson Dep. 51. Given these facts, the trier of fact could find that Mr. Anderson's own negligence contributed to his injury. Therefore, while the Court finds that Cashman has a viable claim for contractual indemnification against CRC, under our Supreme Court's holding in Lusi, the Court also finds that a number of material facts are in dispute as to whether CRC's acts or omissions caused or contributed to Mr. Anderson's injury.[3]

[3] The Court notes that Cashman stated an additional policy ground in its Motion for Partial

Accordingly, this Court denies Cashman's Motion for Partial Summary Judgment on Count I of Cashman's Cross-Claim against CRC for contractual indemnification.

B

Cashman's Motion for Partial Summary Judgment with Respect to CRC's Claims for Indemnification

Cashman next argues that CRC may not seek indemnification from Cashman because Anderson's worksite injury arose from CRC's acts or omissions. CRC counters that liability for Anderson's injury is an open fact question that cannot be resolved on a motion for summary judgment.

Our Supreme Court's decision in Lusi clarified that by its express terms, G.L. 1956 § 6-34-1 invalidates any agreement in which a party seeks indemnification from another for the consequences of its own or its agent's negligence. Lusi, 485 A.2d at 105. While the Cashman-CRC subcontract contains an indemnification provision obligating CRC to indemnify Cashman for CRC's acts or omissions, it is undisputed that the subcontract does not contain a contractual indemnification provision obligating Cashman to indemnify CRC for CRC's own negligence or the negligence of one of its agents. Such a provision would be invalid on its face as contrary to public policy. See § 6-34-1. However, it is well settled that a party's right to indemnification can rest not only on an express contract, but also from equitable concepts arising from the tort

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Summary Judgment at the September 10 hearing. However, as the Court is able to dispose of Cashman's Motion on grounds unrelated to the additional policy considerations it need not reach the question of whether Rhode Island should adopt the majority view that general contractors enjoy immunity when their subcontractor carries workers' compensation insurance as required by the subcontract.

theory of indemnity, often referred to as common law or equitable indemnification. See Helgerson v. Mammoth Mart, Inc., 114 R.I. 438, 441-42, 335 A.2d 339, 341 (1975).

As the Court previously stated, whether Mr. Anderson's injuries were in fact caused by CRC's acts or omissions is an open fact question. See supra, § A. Thus, it is premature at this juncture for the Court to rule as a matter of law that CRC may not seek equitable indemnification from Cashman.[4]

Accordingly, this Court denies Cashman's Motion for Summary Judgment that Count I of CRC's Cross-Claim against Cashman for indemnification is barred as a matter of law.

C

Cashman's Motion for Partial Summary Judgment with Respect to Count II of CRC's Cross-Claim for Contribution

Cashman further argues that CRC may not seek contribution from Cashman because Cashman may not be deemed a joint tortfeasor as Anderson made an election to recover under the Rhode Island Workers' Compensation Act. Accordingly, Cashman contends, Anderson's election acts as a statutory bar to a tort claim against his employer, CRC.

In Rhode Island, a right to contribution exists by operation of statute. The Uniform Contribution Among Joint Tortfeasors Act, codified in Rhode Island as General Law 1956 § 10-6-3, provides that "[t]he right of contribution exists among joint tortfeasors; provided however, that when there is a disproportion of fault among joint tortfeasors, the relative degree of fault of the joint tortfeasors shall be considered in determining their pro rata shares." Sec. 10-6-3. In Cacchillo v. H. Leach Machinery Co., our Supreme Court held that:

[4] Clearly, whether CRC may eventually recover indemnification from Cashman will turn on the trier of fact's apportionment of liability.

> "[A]n important purpose of [§ 10-6-3] is to establish a right of contribution among joint tort-feasors which did not exist at common law. However, even under the statute, liability must be common to warrant contribution. 'This common liability may be either joint or several, **but there can be no contribution unless the injured person has a right of action in tort against both the party seeking contribution and the party from whom contribution is sought**. The right of contribution is a derivative right and not a new cause of action.'" 111 R.I. 593, 595, 305 A.2d 541, 542 (1973) (quoting Rowe v. John C. Motter Printing Press Co., 273 F. Supp. 363, 365 (D.R.I. 1967)). (Emphasis added.)

The Court recently reaffirmed the principle that "[c]ontribution may be had if the aggrieved party has a cause of action 'against both the party seeking contribution and the party from whom contribution is sought.'" Franklin Grove Corp. v. Drexel, 936 A.2d 1272, 1277 (R.I. 2007) (quoting R & R Assocs. v. City of Providence Water Supply Bd., 724 A.2d 432, 434 (R.I. 1999)).

The Rhode Island Workers' Compensation Act establishes a statutory framework which insures a fixed rate of compensation to an injured employee without requiring any showing of employer negligence. Cacchillo, 111 R.I. at 595, 305 A.2d at 542. Concomitantly, § 28-29-20 provides that this right to compensation is the exclusive remedy available to an injured employee and is in lieu of all rights and remedies now existing, either at common law or otherwise. Id. at 595-96, 305 A.2d at 542. In National India Rubber Co. v. Kilroe, our Supreme Court explained that the Workers' Compensation Act is designed to provide simple and expeditious recovery for injured employees and their dependents outside the rigid, costly framework of litigation. 54 R.I. 333, 336, 173 A. 86, 87 (1934). Thus, while in some cases, the employee or her dependents may receive less compensation under the act than they may at common law, in other cases the employee may receive compensation to which at common law he/she would not be entitled. Id. Importantly, the Kilroe Court explained that "one statutory remedy is substituted for another.

The election of the remedy is made by the employee when he enters his employment and his election is binding on himself and his personal representatives." Id. Once the employee elects coverage under the Workers' Compensation Act, that remedy becomes the exclusive remedy of the employee and obviates any common law claim of negligence against the employer.

Extending the Court's holding in Kilroe to the facts before it, the Cacchillo Court concluded that if a plaintiff has no common law tort action against his employer, then the employer is not a joint tortfeasor against whom contribution can be claimed as provided in § 10-6-2. Cacchillo, 111 R.I. at 597, 305 A.2d at 543. Thus, the election of a remedy by the employee under the Workers' Compensation Act bars a common law right of action against the employer. Id.

In the instant case, it is undisputed that Mr. Anderson has been compensated under the Workers' Compensation Act. His election to pursue a claim under the Act means that his statutory recovery operates as a bar to a tort claim against his employer, CRC. See § 28-29-20. Under Rhode Island law, an injured party must have a cause of action in tort against both the party seeking contribution and the party from whom contribution is sought. See Cacchillo, 111 R.I. at 595, 305 A.2d at 542. Here, it is undisputed that Plaintiff is barred from recovering a tort claim against CRC by operation of the Workers' Compensation Act. Thus, it follows that CRC may not seek contribution from Cashman. See id.

Accordingly, this Court grants Cashman's Motion for Summary Judgment dismissing Count II of CRC's Cross-Claim against Cashman for contribution.

D

Cashman's Motion for Summary Judgment with Respect to Count I of Cardi's Third-Party Complaint for Contribution

As noted above, the right to contribution in Rhode Island is established by operation of § 10-6-3. See supra, § C. For a contribution action to survive summary adjudication, the party seeking contribution must produce affirmative evidence that the injured person has a right of action in tort against both the party seeking contribution and the party from whom contribution is sought. See Rowe v. John C. Motter Printing Press Co., 273 F. Supp. 363, 365 (D.R.I. 1967). As the Court stated earlier, the parties' decision to withdraw the McNulty affidavit at the hearing leaves the Court with Mr. Anderson's deposition testimony as the exclusive source of facts with reference to liability for his injuries. Mr. Anderson's deposition testimony suggests that any number of parties and their actions may have caused or contributed to his injuries, including his own. See supra, § A. Therefore, it follows that to the extent the trier of fact finds both Cardi and Cashman liable for Mr. Anderson's injuries, Cardi may pursue a claim for contribution against Cashman.

Accordingly, this Court denies Cashman's Motion for Summary Judgment dismissing Count I of Cardi's Third-Party Complaint against Cashman for contribution.

E

CRC's Motion for Summary Judgment as to Cardi's Third-Party Claims for Indemnification

CRC maintains that Cardi released its claims against CRC by executing a release dated July 10, 2010 that CRC interprets as unambiguously a general release.[5] The release is titled "Full and Final Release of **Claim**." (Emphasis added.) This Court finds that the use of the singular noun "claim" and the language of paragraph 1 give rise to ambiguity as to whether the release was intended by the parties to free CRC and Cashman of all Project liability or merely liability with respect to the work done at West Abutment Piers 1, 2, 3, 7 & 8. See Garden City Treatment Ctr., 852 A.2d at 541. The Court further finds that there is sufficient ambiguity so as to allow the Court's consideration of parol evidence. Ultimately, the ambiguity of the release precludes this Court from ruling as a matter of law that the document was sufficiently clear to insulate CRC from liability to Cardi for Anderson's injury.

Next, CRC argues that it is not contractually obligated to indemnify Cardi under the terms of the Cashman-CRC subcontract. Specifically, CRC points to the limiting language "to the extent" that "damages and/or injuries arise from such acts or omissions of the Subcontractor [CRC]" to reduce CRC's indemnity obligation only to those costs related to damages or injuries CRC actually caused. Cardi reads the broad language "defend and indemnify . . . from any and all claims, suits or liability for damages to property including . . . injuries to persons" to impose a contractual indemnification obligation on CRC. CRC contends that there are no undisputed facts showing that CRC's acts or omissions caused or contributed to Mr. Anderson's injuries. Again, this Court finds from Mr. Anderson's deposition testimony that liability for his injuries is an

[5] The existence and content of said release is not disputed. The parties, however, dispute the legal effect of said release.

open fact question to be resolved by the trier of fact. Therefore, CRC may not at this time claim that the limiting language of the Cashman-CRC subcontract insulates CRC from Cardi's indemnification claim, as CRC's potential liability is an unresolved fact question.

Finally, CRC argues that Cardi was not an intended third-party beneficiary of the Cashman-CRC subcontract and therefore has no standing to assert claims for indemnification against CRC. Simply stated, if this Court finds that Cardi was not an intended third-party beneficiary of the Cashman-CRC subcontract, then Cardi has no standing to enforce the terms of the subcontract. See Forcier v. Cardello, 173 B.R. 973 (D.R.I. 1994). Conversely, a finding that Cardi was an intended third-party beneficiary of the Cashman-CRC subcontract would allow Cardi's claim for contractual indemnification.

The Rhode Island Supreme Court's decision in Ferguson v. Marshall Contractors, Inc. is instructive. In Ferguson, Marshall Contractors, Inc. ("Marshall") was the general contractor on a project to build a manufacturing facility in Dartmouth, Massachusetts. 707 A.2d 660, 661 (R.I. 1998). Marshall entered into a contract with Bennington Iron Works ("Bennington") to provide the steel for the project. Bennington in turn contracted with Ajax Construction Company ("Ajax") to do the steel-construction work. After a worksite injury gave rise to a negligence action in which Marshall was a named defendant, Marshall asserted an indemnification claim against Ajax, arguing that it was a third-party beneficiary of a purchase order between Bennington and Ajax. Ultimately, our Supreme Court held that Marshall's claim for indemnification from Ajax must fall because "the parties themselves ha[d] no direct agreement between them that so provide[d for indemnification between Ajax and Marshall], and nothing in the Bennington-Ajax purchase order contain[ed] an express promise by Ajax to indemnify Marshall." Id. at 663.

Here, however, Section 11 of the Cashman-CRC subcontract, entitled "INDEMNIFICATION," reads in pertinent part:

> "The Subcontractor [CRC] further **specifically obligates itself to the** Contractor, **Prime Contractor**, Owner and any other party required to be indemnified under the Prime Contract, jointly and separately, in the following respects, to-wit:
>
> . . .
>
> (b) to defend and indemnify them against and save them harmless from any and all claims, suits or liability for damages to property including loss of use thereof, injuries to persons, including death, and from any other claims, suits or liability on account of acts or omissions of Subcontractor [CRC], or any of its subcontractors, suppliers, officers, agents, employees or servants, to the extent that damages and/or injuries arise from such acts or omissions of Subcontractor. Subcontractor's obligation hereunder shall not be limited by the provisions of any Workers' Compensation act or similar statute." (Emphasis added.)

The Cashman-CRC subcontract language is critically different from the Bennington-Ajax purchase order because the instant subcontract specifically obligates CRC, the Subcontractor, to Cardi, the Prime Contractor. See Ferguson, 707 A.2d at 663. Unlike in Ferguson, where the parties had "no direct agreement between them," here, CRC expressly promised to indemnify Cardi under the terms of the Cashman-CRC subcontract. See id.; see also Haggins v. Verizon New England, Inc., 648 F.3d 50, 57 (1st Cir. 2011) ("It must appear from the 'language and the circumstances of the contract' that the parties to the contract 'clear[ly] and definite[ly]' intended the beneficiaries to benefit from the promised performance."). CRC acknowledges the express contract language cited above, which the Court believes demonstrates a direct and unequivocal intent for the performance of the Cashman-CRC subcontract to benefit Cardi.

Accordingly, this Court denies CRC's Motion for Summary Judgment dismissing Cardi's third-party claim for indemnification.

F

CRC's Motion to Dismiss Cashman's Cross-Claim based upon the Prior Pending Action Doctrine

CRC urges this Court to dismiss Cashman's Cross-Claim seeking indemnification from CRC because Cashman has allegedly asserted the same claim against CRC in a prior pending action currently pending in Providence County Superior Court—C.R.C. Company, Inc. v. Cashman Equipment Corporation, et al., PC-2010-7045. In Rhode Island, the pendency of a prior action in the same court between the same parties and for the same cause of action may be asserted as a "bar" to the prosecution of the second action. Elmasian v. Daley, 87 R.I. 431, 433, 142 A.2d 542 (1958). In 1996, our Supreme Court formally adopted the analytical framework found in the Restatement (Second) of Judgments to determine whether a cause of action is sufficiently identical to one previously asserted for purposes of res judicata—a framework applicable to the instant matter. See ElGabri v. Lekas, 681 A.2d 271, 276 (R.I. 1996). The Restatement takes a "transactional" approach: a previous judgment extinguishes "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." 1 Restatement (Second) Judgments § 24(1) (1982). The Restatement continues:

> "What factual groupings constitute a 'transaction,' and what groupings constitute a 'series,' are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." Id. § 24(2).

Here, CRC's action pending in Providence County Superior Court names a number of defendants; the claims against Cashman sound in breach of contract, breach of the covenant of

good faith and fair dealing, unfair and deceptive trade practices, estoppel, and negligent or intentional misrepresentation. Mr. Anderson is not a party to the Providence action, and no reference to Mr. Anderson's employment or alleged injury at the Sakonnet River Bridge appears in the Complaint filed in Providence County. Conversely, the action before this Court sounds in tort, and the operative facts giving rise to the alleged liability in the instant matter are limited to the injuries sustained by Mr. Anderson and any potential liability that may arise in connection therewith.

Applying the Restatement language, the material facts giving rise to the breach of contract action pending in Providence County constitute a distinct "transaction" because they involve contract negotiations over a site-specific contractual agreement. Restatement (Second) Judgments, supra, § 24(2). Conversely, the instant action involves a worksite injury to Mr. Anderson, the operative facts of which give rise to a second "transaction" because those facts derive their essence from Plaintiff's personal injury. Id. This Court is satisfied that the two "transactions" are sufficiently different to render them an inharmonious "series." Id. Specifically, the two actions involve distinct parties, claims, and factual predicates that would not easily form a convenient trial unit. Id. Because the two actions are so distinct, this Court finds that dismissal on the basis of the Prior Pending Action Doctrine is inappropriate.

Accordingly, this Court denies CRC's Motion to Dismiss/Abate Cashman's sole Cross-Claim.

IV

CONCLUSION

For the foregoing reasons, this Court:

1. Denies Cashman's Motion for Summary Judgment on Count I of Cashman's Cross-Claim against CRC for contractual indemnification;

2. Denies Cashman's Motion for Summary Judgment dismissing CRC's Cross-Claim (Count I) against Cashman for indemnification;

3. Grants Cashman's Motion for Summary Judgment dismissing CRC's Cross-Claim (Count II) against Cashman for contribution;

4. Denies Cashman's Motion for Partial Summary Judgment dismissing Count I of Cardi's Third-Party Complaint against Cashman for contribution;

5. Denies CRC's Motion for Summary Judgment dismissing Cardi's Third-Party Complaint; and

6. Denies CRC's Motion to Dismiss/Abate Cashman's sole Cross-Claim due to the Prior Pending Action Doctrine.

The parties shall prepare and present a form of Order reflecting the disposition of these motions.