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4                    No.        38  
Stephen R. Frank, et al.,  
   Plaintiffs,  
   v.  
Meadowlakes Development  
Corporation, et al.,  
   Defendants.

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Meadowlakes Development  
Corporation,  
   Third-Party Respondent,  
   v.  
Home Insulation and Supply, Inc.,  
   Third-Party Appellant.

David B. Hamm, for third-party appellant.  
John Wallace, for third-party respondent.

G.B. SMITH, J.:

The issue here is whether a tortfeasor whose liability is determined to be 50% or less can be found responsible for total indemnification of non-economic loss despite CPLR article 16.<sup>1</sup> We hold that a third-party defendant found to have only

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<sup>1</sup>This action was commenced in 1992, before the 1996 amendment to Workers' Compensation Law § 11, and thus

one-ninth of the tortfeasors' total fault should be responsible for one-ninth of the non-economic loss. The order of the Appellate Division should, therefore, be reversed and remitted to Supreme Court for further proceedings to calculate the portion of the settlement properly allocated to non-economic loss.

On April 12, 1991, Stephen Frank was working at a building site in Clarence, New York, on property owned by the Meadowlakes Development Corporation. Frank was attempting to carry a large bag of double insulation over his right shoulder up a staircase on the property. The left side of the staircase had no railing and Frank lost his balance and fell. As a result of the fall, Frank received several serious permanent injuries to his back and spine. Frank and his wife commenced an action for personal injury and loss of consortium against Meadowlakes and the general contractor, D.J.H. Enterprises Inc. Meadowlakes, in turn, filed a related third-party action for indemnification against Home Insulation and Supply, Inc., Frank's employer. After a bifurcated trial, the jury apportioned fault in the amount of 10% to Frank, 10% to Home and 80% to D.J.H. The court also directed a verdict against Meadowlakes and D.J.H. based upon a violation of Labor Law § 240(1).

On January 17, 2003, the Franks settled with D.J.H. for \$300,000. On January 24, 2003, the Franks settled with

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Meadowlakes' right to indemnification is not affected by the amendment.

Meadowlakes for \$1,424,000. Supreme Court then granted Meadowlakes' motion for common-law indemnification against Home in the sum of \$1,552,160, which included interest on the Franks settlement, accruing from January 31, 2003 until February 12, 2004.

Home appealed this judgment, arguing that Supreme Court erred (1) in denying its motion for a directed verdict to dismiss the third-party complaint against it because Home was not negligent and, thus, the jury's 10% allocation of fault to Home should not stand, and (2) in granting Meadowlakes complete indemnification against Home, even if the 10% of fault remained undisturbed, because it should be liable only for its proportionate share of negligence.

The Appellate Division held that Supreme Court properly denied the motion for a directed verdict dismissing the third-party complaint because Home's contention that there was no basis to allocate fault was without merit. The court also disagreed with Home's argument that it should not be required to indemnify Meadowlakes for 100% of the settlement. The court reasoned:

"It is well settled that 'an owner or general contractor who is held strictly liable under Labor Law § 240 (1) is entitled to full indemnification from the party actually responsible for the incident' (Gillmore v Duke/Fluor Daniel, 221 AD2d 938, 939, 634 NYS2d 588). The principles of common-law indemnification allow the party held vicariously liable to shift the entire burden of the

loss to the actual wrongdoer (citations omitted). Contrary to Home's contention, 'CPLR article 16 does not limit the owner's right of indemnification' because of the savings provision for indemnification claims set forth in CPLR 1602 (2) (ii) (Salamone v Wincaf Props., 9 AD3d 127, 129, 777 NYS2d 37, lv dismissed 4 NY3d 794, 828 NE2d 84, 795 NYS2d 168)" (20 AD3d 874, 875-876 [2005]).

Two Justices dissented, concluding that Home's liability should be limited to its proportionate share of fault. The Justices reasoned:

"Application here of the rule of joint and several liability results in precisely the 'evil' intended to be 'suppressed' by the enactment of article 16 (McKinney's Cons Laws of NY, Book 1, Statutes § 95)[,] a party whose equitable share of the fault has been adjudged to be but 10% liable is instead held liable for 100% of that loss. That is just the result that the Legislature sought to avoid by the enactment of article 16" (id. at 881).

We agree with the Appellate Division that there was sufficient evidence in the record to support the jury's determination. Therefore the motion for a directed verdict was properly denied. We disagree, however, with the majority's reasoning concerning complete indemnification. Although CPLR article 16 does not limit the right to indemnification, it does limit the amount that can be recovered when liability is 50% or less.

"A statute or legislative act is to be construed as a whole, and all parts of an act are to be read and construed together to determine the legislative intent" (McKinney's Cons Laws of NY, Book 1, Statutes, § 97). "Statutes will not be construed as to render them ineffective" (McKinney's Cons Laws of NY, Book 1, Statutes, § 144). CPLR 1602 (1) provides, in part, that article 16 "shall apply to any claim for contribution or indemnification." CPLR 1602 (2)(ii) states, "The limitations set forth in this article shall not be construed to impair, alter, limit, modify, enlarge, abrogate or restrict . . . any immunity or right of indemnification available to or conferred upon any defendant for any negligent or wrongful act or omission."

In Salamone v Wincaf Props. (9 AD3d 127 [1st Dept 2004]), the First Department addressed a substantially similar issue of whether a vicariously liable owner was limited in the amount of indemnification he could recover from a party whose proportionate share of fault was 50% or less. The court found the savings provision in CPLR 1602 (2)(ii) did not limit an owner's right of indemnification against the partially liable party. The owner argued that CPLR 1602 (2)(ii) prevented its common-law right of indemnification from being limited or abrogated by CPLR article 16. The court determined that the "plain meaning of the highlighted statutory language (quoting a portion of CPLR 1602 [2][ii]) appears to be that [the owner's] common-law right of indemnification against [defendant] should

operate just as it would have operated had CPLR article 16 never been enacted" (id. at 135). It further reasoned that "[c]onstruing CPLR 1602 (2) (ii) to leave indemnification claims unaffected by the limitations of CPLR article 16 serves to shift liability from non-culpable to culpable parties, consistent with the general intent of the article as a whole, and, presumably, the specific intent behind CPLR 1602 (2)(ii)" (id. at 138). The Salamone court saw an inconsistency between the opening clause of CPLR 1602 (1) and CPLR 1602 (2)(ii). The court viewed CPLR 1602 (2)(ii) as the Legislature's paramount intention and CPLR 1602 (1) as a subordinate provision which furthered article 16's purpose in no discernable way. The Salamone court and the Appellate Division here concluded that there was an irreconcilable conflict between CPLR 1602 (1) and 1602 (2)(ii).

"The legislative intent is to be ascertained from the words and language used, and the statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction" (McKinney's Cons Laws of NY, Book 1, Statutes, § 94). It is clear that the Legislature wanted article 16's protections to apply to indemnification actions (see CPLR 1602 [1]). The purpose of article 16 was to place the risk of a principally-at-fault but impecunious defendant on those seeking recovery and not on a low-fault, deep pocket defendant (see Rangolan v County of Nassau, 96 NY2d 42, 48 [2001] ["To construe 1602 (2)(iv) as an

exception to apportionment would defeat the legislative goal of benefitting low-fault, 'deep pocket' defendants . . .']; Insuring Our Future, Report of the Governor's Advisory Commission on Liability Insurance, at 131 [Apr. 7, 1986]. "[I]t is fundamentally unfair to require a defendant to pay a greater share of an award than corresponds to that defendant's adjudged share of the fault that caused the injury"]. The Salamone decision ignores the Legislature's intent in enacting article 16 in response to the rising costs of liability insurance "to assure that no defendant who is assigned a minor degree of fault can be forced to pay an amount grossly out of proportion to that assignment" (Insuring Our Future, Report of Governor's Advisory Commission on Liability Insurance, at 132).

In our view, there is no irreconcilable conflict between CPLR 1602 (1) and 1602 (2) (ii). In Rangolan v County of Nassau, 96 NY2d 42 (2001), this Court held that CPLR 1602(2)(iv) did not preclude apportionment when a defendant's liability arose from a non-delegable duty because the subsection was a savings provision and not an exception. We stated that CPLR 1602(2)(iv) "ensures that a defendant is liable to the same extent as its delegate or employee, and that CPLR article 16 is not construed to alter this liability" (id. at 47). CPLR 1602(2)(ii) is, likewise, a savings provision intended to ensure the courts do not read article 16 as altering or limiting the pre-existing right of indemnification. This does not, however, entitle a

party to 100% recovery. Therefore, though Meadowlakes retained its right to indemnification, Home, as a party found 10% liable, was limited to its proportionate share with respect to non-economic damages. To calculate Home's share, we divide indemnity among potential indemnitors and exclude Frank's 10% share of fault since he cannot be an indemnitor (see 4 Weinstein-Korn-Miller, NY Civ Prac § 1601.01). Home's total indemnity to Meadowlakes will, therefore, be all economic loss and one ninth of non-economic loss encompassed within the settlement, with interest.

Defendant's remaining arguments are without merit.

Accordingly, the order of the Appellate Division should be modified, without costs, by remitting to Supreme Court for further proceedings in accordance with this opinion and, as so modified, affirmed.

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Order modified, without costs, by remitting to Supreme Court, Erie County, for further proceedings in accordance with the opinion herein, and, as so modified, affirmed. Opinion by Judge G.B. Smith. Chief Judge Kaye and Judges Ciparick, Rosenblatt, Graffeo, Read and R.S. Smith concur.

Decided March 30, 2006