

**Perron v Hendrickson/Scalamandre/Posillico (TV)**

2004 NY Slip Op 30073(U)

September 7, 2004

Supreme Court, Suffolk County

Docket Number: 0004668/4668

Judge: Denise F. Molia

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**SUPREME COURT - STATE OF NEW YORK  
I.A.S. Part 39 - SUFFOLK COUNTY**

PRESENT:

Hon. **DENISE F. MOLIA**,  
Justice

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DAVID PERRON and LINDA PERRON,

Plaintiffs,

- against -

HENDRICKSON/SCALAMANDRE/POSILLICO (TV),  
HENDRICKSON BROS., INC., PETER  
SCALAMANDRE & SONS, INC., J.D. POSILLICO,  
INC., URS GREINER CONSULTANTS, INC.,  
ESCHBACHER & ASSOCIATES, SCI ENGINEERING  
AND SURVEYING PC, A&H ENGINEERS PC, JAC  
PLANNING CORP. and MABEY BRIDGE, INC.,

Defendants.

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HENDRICKSON/SCALAMANDRE/POSILLICO, A  
TRI-VENTURE,

Third-Party Plaintiff,

- against -

RICE MOHAWK U.S. CONSTRUCTION CO., LTD.,

Third-Party Defendant.

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CASE DISPOSED: NO  
MOTION R/D: 5/15/02  
SUBMISSION DATE: 7/2/04  
MOTION SEQUENCE No.: 017 MG

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Upon the following papers filed and considered relative to this matter:

Notice of Motion dated May 9, 2002; Affidavit in Support dated May 9, 2002; Affirmation in Opposition dated August 30, 2002; Exhibit A annexed thereto; Reply Affidavit dated September 10, 2002; Third-Party Defendants Memorandum of Law; and upon due deliberation; it is

**ORDERED**, that the motion by third-party defendant, Rice Mohawk U.S. Construction Co., Ltd., pursuant to CPLR 3212, for an Order directing the entry of summary judgment in favor of third-party defendant dismissing the complaint and the third-party complaint, is granted solely to the extent that the third-party complaint is hereby dismissed. In all other respects the motion is denied.

The third-party defendant seeks a dismissal of the third-party complaint, in which the third-party plaintiff seeks common law indemnification against the third-party defendant, the employer of the plaintiff, who was injured while working on a bridge reconstruction project, the particulars of which have been recounted in prior Orders of the Court.

The Court has previously found that the plaintiff did not sustain a grave injury as defined by Worker's Compensation Law section 11. The only issue left to be determined in consideration of the instant motion is whether the third-party defendant was contractually obligated to indemnify the third-party plaintiff for the plaintiff's injuries.

Where a party is not under a legal duty to indemnify, a contract assuming such obligation must be strictly construed so as to avoid reading into it a duty which the parties did not intend to be assumed, and the promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances. Hooper Assocs. v. AGS Computers, 74 N.Y.2d 487, 492-93; Szalkowski v. Asbestospray Corp., 259 A.D.2d 867, 868-69; Altchek v. DiGenarro, 214 A.D.2d 527, 528; Cassidy v. County of Nassau, 182 A.D.2d 608, 609.

The language contained within an indemnity provision should be construed so as to encompass only that loss and damage which reasonably appear to have been within the contemplation of the parties, and should not be extended to include damages which are neither expressly within its terms nor of such character that it is reasonable to infer that they were intended to be covered under the contract. Tokyo Tanker Co. Ltd. v. Etra Shipping Corp., 142 A.D.2d 377; Niagara Frontier Transportation Authority v. Tri-Delta Construction Corp., 107 A.D.2d 450, *aff'd*, 65 N.Y.2d 1038. "An indemnity clause must reflect the unmistakable intent of the parties as to the scope of its coverage." Redding v. Gulf Oil Corp., 38 A.D.2d 850, 851. Where the scope of coverage is not demonstrated by such unmistakable intent, the clause cannot be enforced to cover damages that may not have been intended. (See, e.g., Solomon v. City of New York, 111 A.D.2d 383, *aff'd*, 70 N.Y.2d 675.

In the instant matter, the subcontract between the third-party plaintiff and the third-party defendant contained the following indemnification agreement:

The Subcontractor shall hold the Contractor harmless and indemnify the Contractor against all debts, claims or demands for materials, labor, equipment, liens,

attachments, suits, garnishment liens, claims for damages for whatever reason arising out of this Subcontract, and agree to reimburse the Contractor for any expenses including attorney's fees in connection therewith and the Contractor is authorized to withhold payment to the Subcontractor for his failure to comply herewith.

The subject clause contains no mention of bodily or personal injury at all, whether as to the employees of the third-party defendant, other construction workers, or members of the general public. There is no reference to "injuries" whatsoever, whether personal or otherwise. The clause seems to be limited to coverage for economic losses. It is well-settled that economic losses are distinct from damages arising from injury to persons or property. (See, e.g., Dormitory Authority of the State of New York v. Scott, 160 A.D.2d 179.) Thus, it cannot be said that the unmistakable intent of the parties was to provide indemnification for bodily injuries to any person, and the clause cannot be enforced to cover damages that may not have been intended. (See, Solomon v. City of New York, 111 A.D.2d 383, *aff'd*, 70 N.Y.2d 675.)

Had the parties to the subcontract intended to require indemnification against the type of injuries alleged by the plaintiff, such language could have been drafted and included within the agreement. The absence of such language seems to confirm that such indemnification was not envisioned or agreed to. At the very least, any ambiguity or uncertainty as to what was intended by the parties pursuant to the subject indemnification clause renders same inapplicable to the claims at issue here, and requires the dismissal of Tri-Venture's claims for contractual indemnification against Rice Mohawk. (See, Ruhland v. John W. Cowper Co., 72 A.D.2d 907, *aff'd*, 52 N.Y.2d 756.)

Accordingly, the third-party complaint must be dismissed.

With respect to that portion of the motion seeking summary judgment dismissing the complaint, the Court finds that there are issues of fact concerning the happening of the accident and the possible liability and negligence of the respective parties, thereby rendering summary judgment inappropriate at this juncture.

The foregoing constitutes the Order of this Court.

Dated: September 7, 2004

**DENISE F. MOLIA**  
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HON. DENISE F. MOLIA J.S.C.