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FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN, pursuant to the provisions of Pennsylvania's "Fictitious Names Act," 54 Pa. C.S.A. §§ 301 et seq., of the filing of an Application for Registration of Fictitious Name under the said Act. The fictitious name is FLYING M FARM. The address of the principal office or place of business to be carried on, under or through the fictitious name is 360 Littlestown Road, Littlestown, Pennsylvania 17340. The name and address of the persons who are parties to the registration are Steven R. Mall and Joni L. Mall, of 716 Parkway Drive, Littlestown, Pennsylvania 17340. An application for registration under the Fictitious Names Act of the said fictitious name was filed in the Office of the Secretary of the Commonwealth of Pennsylvania on October 27, 2011.

Campbell & White, P.C.
112 Baltimore Street
Gettysburg, PA 17325
Attorneys for Applicant

11/18

FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN, that an Application for Registration of Fictitious Name was filed in the Commonwealth of Pennsylvania on October 19, 2011 for Wire and Whizdom located at 180 Cherry Street, Biglerville, Pennsylvania 17307. The name and address of each individual interested in the business is Shannon M. Hurley, 180 Cherry Street, Biglerville, Pennsylvania 17307. This was filed in accordance with 54 Pa. C.S.A. 311.

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OLD FRIENDS AT NEW OXFORD VS. HALLER ENTERPRISES ET AL

1. The law has been well settled in this Commonwealth that if parties intended to include within the scope of their indemnity agreement a provision that covers losses due to the indemnitee's own negligence, they must do so in clear and unequivocal language. No interference from words of general import can establish such indemnification.

2. Accordingly, based on the *Perry-Ruzzi* rule, indemnification provisions are given effect only when clearly and explicitly stated in the contract between two parties. Said rule is applied with a force that requires the parties to state in express terms that the active negligence of the indemnitee will be assumed by the indemnitor.

In the Court of Common Pleas of Adams County, Pennsylvania, Civil, No. 09-S-995, OLD FRIENDS AT NEW OXFORD, LP, AND MERCER INSURANCE COMPANY AS SUBROGEE OF OLD FRIENDS AT NEW OXFORD, INC., VS. HALLER ENTERPRISES, INC. AND E.G. STOLTZFUS CONSTRUCTION, LLC, DEFENDANTS; AND UPSTREET ARCHITECTS, INC., ADDITIONAL DEFENDANT; AND MEP ASSOCIATES DESIGN GROUP, INC., ADDITIONAL DEFENDANT.

William E. Sylianteng, Esq., for Plaintiff

John Flounlacker, Esq., for Defendant Haller Enterprises, Inc.

Stephen L. Banko, Jr., Esq., for Defendant E.G. Stoltzfus Construction, LLC

Bruce D. Lombardo, Esq. and Christopher P. Allen, Esq., for Additional Defendant, UpStreet Architects, Inc.

Nicholas Noel, III, Esq., for Additional Defendant, MEP Associates Design Group, Inc.

Campbell, J., June 20, 2011

OPINION

Before this Court is Plaintiff, Old Friends at New Oxford's ("Old Friends"), Preliminary Objections to Additional Defendant, UpStreet Architects, Inc.'s ("UpStreet"), Amended Counterclaim. Old Friends alleges that UpStreet's Amended Counterclaim fails to state a cause of action for indemnification against Old Friends, and, therefore, UpStreet's Amended Counterclaim against Old Friends should be stricken with prejudice.

BACKGROUND

On October 19, 2009, Old Friends filed a First Amended Complaint against Haller Enterprises, Inc. ("Haller"), and E.G.

Stoltzfus Construction, LLC (“Stoltzfus”). According to Old Friends’ First Amended Complaint, Old Friends hired Stoltzfus as a general contractor to build and erect Old Friends’ senior living complex (“Project”). Construction of the Project included installation of a closed loop geothermal HVAC System (“HVAC System”). Stoltzfus then subcontracted with Haller to build the HVAC System. Old Friends alleges that on June 29, 2007, the HVAC System failed due to the negligence of Haller and Stoltzfus in constructing the unit, causing significant damage to Old Friends’ building and business personal property.

On December 14, 2009, Defendant, Stoltzfus, filed an Answer and New Matter with Counterclaim to Old Friends’ First Amended Complaint. On January 12, 2010, Defendant, Haller, filed its Answer with New Matter and New Matter Cross-Claim to Old Friends’ First Amended Complaint. Haller’s Answer to Old Friends’ First Amended Complaint denied liability and asserted that it performed the work in accordance with the plans and specifications for the HVAC System, that another party was retained to design the HVAC System, and that Old Friends’ damages, if any, were caused by other individuals as may be revealed by future discovery.

Subsequently, Haller sought leave of Court to join UpStreet as an Additional Defendant. The request for leave was uncontested and, as a result, on May 7, 2010, Haller filed a Joinder Complaint against Additional Defendant, UpStreet. Haller’s Joinder Complaint against UpStreet alleges that the failure of the HVAC System was due to the negligence of UpStreet in performing its obligations in overseeing construction and installation of the HVAC System. Haller alleged that, pursuant to the contract documents, UpStreet was to visit the site at appropriate intervals to inspect the work being done, and that UpStreet had the ability to reject any and all work it felt did not conform to the contract. Haller further alleged that UpStreet is solely liable to Old Friends or liable with Haller to Old Friends, as a result of UpStreet’s own negligence, via contribution and/or indemnity.

In response, UpStreet filed an Answer with New Matter and Cross-Claims and a Counterclaim against Old Friends asserting that Old Friends is contractually obligated to indemnify and defend UpStreet pursuant to Paragraph 8.1 of the parties’ agreement because Old Friends’ loss, if any, actually arises from the negligence of Old

Friends' own contractors as asserted in Old Friends' Amended Complaint.

UpStreet's Answer to the Joinder Complaint included a Counterclaim against Old Friends. UpStreet was hired by Old Friends to provide architectural services for the project, and the two parties entered into an agreement for UpStreet's provision of architectural services for Old Friends' project. UpStreet's Counterclaim against Old Friends is premised upon Section 8.1 of its agreement with Old Friends, which provides in pertinent part:

8. INDEMNIFICATION

8.1 To the fullest extent permitted by law, Client shall indemnify and save harmless UpStreet Architects and its consultants, and each of their officers, directors, shareholders, employees and servants against any and all claims, liability or costs (including reasonable attorney[']s fees and other costs of litigation[]) to the extent actually arising from 1, the negligence of the Client or its agents, employees or contractors; or 2, the breach by Client of any term or condition of this Agreement.

(Ex. A to UpStreet's Answer to Haller's Joinder Compl.)

In response, Old Friends filed Preliminary Objections to UpStreet's Counterclaim for indemnification pursuant to Pennsylvania Rule of Civil Procedure 1028(a)(4) alleging that UpStreet has failed to state a cause of action for indemnification against Old Friends.¹ By Opinion and Order dated March 1, 2011, this Court sustained Old Friends' Preliminary Objections, and UpStreet's Counterclaim against Old Friends was stricken without prejudice.

On March 21, 2011, UpStreet filed its Answer with New Matter and Cross-Claims to Haller's Joinder Complaint and its Amended Counterclaim. In its Amended Counterclaim, UpStreet again asserts that it was retained by Old Friends to provide limited and specific architectural services for the Project pursuant to an agreement it entered into with Old Friends. Moreover, UpStreet alleges that Old Friends was to indemnify and hold harmless UpStreet pursuant to

¹ On February 14, 2011, UpStreet also filed a Joinder Complaint against Additional Defendant, MEP Associates, wherein UpStreet alleged that Stoltzfus sub-contracted the engineering and design for the HVAC System to MEP Associates.

Section 8.1 of the agreement, containing the same indemnification language as stated above. According to UpStreet, pursuant to the indemnification language in the contract, Old Friends is required to indemnify and hold harmless UpStreet for “all sums awarded to any party and against [UpStreet] including reasonable attorney’s fees and costs to the extent actually arising from the negligence of Old Friends, or its agents, employees or contractors, including, but not limited to, Haller and Stoltzfus who at all time (sic) material were acting as the contractors for the owner.” (**Add’l Def. UpStreet’s Am. Countercl. ¶ 6**).

On April 6, 2011, Old Friends filed Preliminary Objections to UpStreet’s Amended Counterclaim under Pennsylvania Rule of Civil Procedure 1028(a)(4), alleging that UpStreet has failed to state a claim for indemnification. In response to Old Friends’ Preliminary Objections, UpStreet filed its Response and Brief in Opposition on April 28, 2011. Oral argument was held on May 27, 2011.

DISCUSSION

It is well established under Pennsylvania law that when ruling on preliminary objections, a court must accept as true all well-pleaded allegations of material fact as well as all inferences reasonably deducible from those facts. *Ballroom, LLC v. Commonwealth*, 984 A.2d 582, 586 n.3 (Pa. Cmwlth. 2009) (citations omitted). Preliminary objections will be sustained only where the case is clear and free from doubt. *Rambo v. Greene*, 906 A.2d 1232, 1235 (Pa. Super. 2006).

To determine if a complaint fails for legal insufficiency (demurrer), a court may only determine whether, on the basis of the allegations the plaintiff pleaded, the plaintiff possesses a cause of action recognizable at law. *Adoption of S.P.T.*, 783 A.2d 779, 782 (Pa. Super. 2001). A court may not consider factual matters, no testimony or other evidence outside the complaint may be adduced, and a court may not address the merits of the matters represented in the complaint. *Id.*

Instantly, Old Friends argues that UpStreet has failed to state a claim for indemnification. In support of its position, Old Friends asserts that the *Perry-Ruzzi* rule controls the interpretation of the indemnification clause at issue. In *Ruzzi*, the Pennsylvania Supreme Court held that:

[t]he law has been well settled in this Commonwealth for 87 years that if parties intended to include within the scope of their indemnity agreement a provision that covers losses due to the indemnitee's own negligence, they must do so in clear and unequivocal language. No inference from words of general import can establish such indemnification.

Ruzzi v. Butler Petroleum Co., 588 A.2d 1, 4 (Pa. 1991).

The *Ruzzi* holding affirmed the Supreme Court's previous ruling in *Perry v. Payne*, 66 A.2d 553 (Pa. 1907), wherein the Supreme Court held that:

a contract of indemnity against personal injuries, should not be construed to indemnify against the negligence of the indemnitee, unless it is expressed in unequivocal terms. The liability on such indemnity is so hazardous, and the character of indemnity so unusual and extraordinary, that there can be no presumption that the indemnitor intended to assume the responsibility unless the contract puts it beyond doubt by express stipulation. No inference from words of general import can establish it.

Perry, 66 A.2d at 557; see also *Ocean Spray Cranberries, Inc. v. Refrigerated Food Distrib., Inc.*, 936 A.2d 81, 84 (Pa. Super. 2007).

Together these standards comprise the *Perry-Ruzzi* rule. See *Ruzzi*, 588 A.2d at 4; *Perry*, 66 A.2d at 557. Accordingly, based on the *Perry-Ruzzi* rule, indemnification provisions are given effect only when clearly and explicitly stated in the contract between two parties. *Greer v. City of Phila.*, 795 A.2d 376, 379 (Pa. 2002); see also *Topp Copy Products v. Singletary*, 626 A.2d 98, 101 (Pa. 1993) (stating that the *Perri-Ruzzi* rule is "applied with a force that requires the parties to state in express terms that the active negligence of the indemnitee will be assumed by the indemnitor").

Instantly, UpStreet has not stated a valid claim for indemnification based on the *Perri-Ruzzi* rule. The indemnification clause at issue does not clearly and explicitly state that Old Friends would be liable to UpStreet as pleaded by UpStreet in its Amended Counterclaim. Initially, it is important to note that Old Friends did not bring

UpStreet into the instant litigation; rather, UpStreet became a party to the instant litigation by a Joinder Complaint filed by Defendant Haller. UpStreet's current claim seeks indemnification for "all sums awarded to any party and against [UpStreet] including reasonable attorney's fees and costs to the extent actually arising from the negligence of Old Friends, or its agents, employees or contractors, including, but not limited to, Haller and Stoltzfus who at all time (sic) material were acting as the contractors for the owner" (**Add'l Def. UpStreet's Am. Countercl. ¶ 6**). As pleaded by UpStreet, it appears that UpStreet still seeks indemnification for all sums awarded to Old Friends and against UpStreet including sums awarded as a result of UpStreet's own negligence, including attorney's fees. Under UpStreet's theory of indemnification, if Old Friends was entitled to judgment, and there was some marginal contributory negligence found on the part of UpStreet, Old Friends would still be required to indemnify UpStreet for its attorney's fees even though those attorney's fees could exceed the entire judgment awarded to Old Friends. Certainly such an interpretation of the indemnification clause would discourage plaintiffs like Old Friends from pursuing a cause of action against its contractors. Again, Plaintiff Old Friends has not filed any claim against UpStreet. Other parties, beyond Plaintiff's control, have alleged that UpStreet was negligent. Any theory of joinder of UpStreet by Haller is only based on Haller's theory that Old Friends' damages are a result of UpStreet's negligence, and no other theory of liability has been asserted by Haller against UpStreet. Accordingly, because Haller's claim arises out of allegations of UpStreet's negligence, there should be no indemnification by Old Friends for UpStreet's attorney's fees or liability.

UpStreet's suggestion that if at the end of the day it is found to be not negligent in contributing to Old Friends' damages then it should be indemnified for its attorney's fees is also unpersuasive. It is enough that the *claims* bringing UpStreet into the litigation are based on its own alleged negligence. Here, there is no express and unequivocal language in the indemnification clause that indicates that Old Friends would be required to indemnify UpStreet for UpStreet's attorney's fees incurred in defending itself against claims raised against UpStreet which are based on UpStreet's own negligence. Without such express language in the indemnification clause

at issue, UpStreet's indemnification claim must fail under the *Perry-Ruzzi* rule. Accordingly, Old Friends' Preliminary Objections to UpStreet's Amended Counterclaim are sustained. Additional Defendant, UpStreet's, Amended Counterclaim is stricken with prejudice.

ORDER

AND NOW, this 29th day of June 2011, Plaintiff's Preliminary Objections to Additional Defendant, UpStreet Architects, Inc.'s Amended Counterclaim are sustained. UpStreet's Amended Counterclaim is stricken with prejudice.

ESTATE NOTICES

NOTICE IS HEREBY GIVEN that in the estates of the decedents set forth below the Register of Wills has granted letters, testamentary or of administration, to the persons named. All persons having claims or demands against said estates are requested to make known the same, and all persons indebted to said estates are requested to make payment without delay to the executors or administrators or their attorneys named below.

FIRST PUBLICATION**ESTATE OF MYRTLE L. HETRICK, DEC'D**

Late of Oxford Township, Adams County, Pennsylvania

Executrix: Patricia A. Sterner, 1010 Alvin Street, Hanover, PA 17331

Attorney: Elinor Albright Rebert, Esq., 515 Carlisle Street, Hanover, PA 17331

ESTATE OF LAURA D. MARTZ, DEC'D

Late of Conewago Township, Adams County, Pennsylvania

Ronald E. Martz, 164 Branch Circle, East Berlin, PA 17316

Attorney: Thomas R. Nell, Esq., 340 Nell Road, East Berlin, PA 17316

ESTATE OF FANNIE B. NACE, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executor: Mary Susan Miller, c/o Sharon E. Myers, Esq., CGA Law Firm, PC, 135 North George Street, York, PA 17401

Attorney: Sharon E. Myers, Esq., CGA Law Firm, PC, 135 North George Street, York, PA 17401

ESTATE OF CASSIE A. NUTTER, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania

Executors: Ronald M. Roache, 18 Kenneth Drive, Walkersville, MD 21793; Sarah F. Roache, 18 Kenneth Drive, Walkersville, MD 21793

Attorney: Puhl, Eastman & Thrasher, 220 Baltimore Street, Gettysburg, PA 17325

ESTATE OF EDNA V. REEVER, a/k/a EDNA VIOLA REEVER, DEC'D

Late of Reading Township, Adams County, Pennsylvania

Executrix: Janet L. Sheffer, c/o Sean M. Shultz, Esq., Law Office of Sean M. Shultz, P.C., 4 Irvine Row, Carlisle, PA 17013

Attorney: Sean M. Shultz, Esq., Law Office of Sean M. Shultz, P.C., 4 Irvine Row, Carlisle, PA 17013

ESTATE OF ROBERT J. ROELKER, DEC'D

Late of Latimore Township, Adams County, Pennsylvania

Executrix: Stephanie J. Roelker, 220 Roelker Road, York Springs, PA 17372

Attorney: John R. White, Campbell & White, P.C., 112 Baltimore Street, Gettysburg, PA 17325

SECOND PUBLICATION**ESTATE OF FREEMAN BIXLER, DEC'D**

Late of the Borough of Gettysburg, Adams County, Pennsylvania

Executor: Paul D. Bixler, c/o Jared S. Childers, Esq., R. Thomas Murphy & Associates, P.C., 14 N. Main Street, Suite 306, Chambersburg, PA 17201

Attorney: Jared S. Childers, Esq., R. Thomas Murphy & Associates, P.C., 14 N. Main Street, Suite 306, Chambersburg, PA 17201

ESTATE OF CHARLES J. CARNAGGIO, DEC'D

Late of Straban Township, Adams County, Pennsylvania

Personal Representative: Dominic Carnaggio, 8211 Poplar Mill Road, Nottingham, MD 21236-5581

Attorney: G. Steven McKonly, Esq., 119 Baltimore Street, Hanover, PA 17331

ESTATE OF WILLIAM R. COLVARD, DEC'D

Late of Straban Township, Adams County, Pennsylvania

Executrix: Dawn L. Keller, 1050 Hoffman Rd., Gettysburg, PA 17325

Attorney: Gary E. Hartman, Esq., Hartman & Yannetti, 126 Baltimore Street, Gettysburg, PA 17325

ESTATE OF WILLIAM P. L. DECKER, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania

Executor: ACNB Bank, Trust Department, 16 Lincoln Square, Gettysburg, PA 17325

Attorney: Teeter, Teeter & Teeter, 108 W. Middle St., Gettysburg, PA 17325

ESTATE OF LOUIS ALBERT HOOVER, DEC'D

Late of the Borough of New Oxford, Adams County, Pennsylvania

Personal Representative: Harriet L. Gillan, 4813 Hillock Lane, Hampstead, MD 21074

ESTATE OF CARL LEROY RUCKER, DEC'D

Late of Germany Township, Adams County, Pennsylvania

Debra R. Hopkins, 2780 Florence Road, Woodbine, MD 21797; Charles E. Carter, Jr., 92 East Main Street, Westminster, MD 21157

Attorney: David K. James, III, Esq., 234 Baltimore Street, Gettysburg, PA 17325

ESTATE OF ALMA M. SMITH, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania

Executor: Tim G. Guise, 1445 Brysonia-Wenksville Rd., Biglerville, PA 17307

Attorney: Gary E. Hartman, Esq., Hartman & Yannetti, 126 Baltimore Street, Gettysburg, PA 17325

THIRD PUBLICATION**ESTATE OF VIRGINIA D. EPLEY, DEC'D**

Late of Straban Township, Adams County, Pennsylvania

Donald Dubbs, Jr., 835 Centennial Road, Gettysburg, PA 17325

Attorney: John A. Wolfe, Esq., Wolfe & Rice, LLC, 47 West High Street, Gettysburg, PA 17325

ESTATE OF CHARLES F. MORRIS, DEC'D

Late of Conewago Township, Adams County, Pennsylvania

Executrix: Judith Koper Morris, 845 Hostetter Road, Hanover, PA 17331

Attorney: Judith K. Morris, Esq., Mooney & Associates, 230 York Street, Hanover, PA 17331

ESTATE OF VIOLET H. PFALTZGRAFF, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executor: John R. Gibbel, c/o John R. Gibbel, Esq., Gibbel Kraybill & Hess LLP, P.O. Box 16, Lititz, PA 17543

Attorney: John R. Gibbel, Esq., Gibbel Kraybill & Hess LLP, P.O. Box 16, Lititz, PA 17543

ESTATE OF GEORGE E. SHEALER, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania

Executor: Sally Ann Hertzog, c/o Robert G. Teeter, Esq., Teeter, Teeter & Teeter, 108 W. Middle St., Gettysburg, PA 17325

Attorney: Robert G. Teeter, Esq., Teeter, Teeter & Teeter, 108 W. Middle St., Gettysburg, PA 17325

