

RENDERED: JULY 5, 2002; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001593-MR

SIMP-A-LEX, INC. AND
NATIONAL UNION FIRE INSURANCE COMPANY

APPELLANTS

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE CHARLES E. LOWE, JR., JUDGE
ACTION NO. 01-CI-00151

PREMIER ELKHORN COAL COMPANY, INC.

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: BARBER, COMBS AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Simp-A-Lex, Inc. and its insurer, National Union Fire Insurance Company, have appealed from an order of the Pike Circuit Court entered on July 10, 2001, which granted summary judgment to Premier Elkhorn Coal Company, Inc (Premier). Having concluded that there is no genuine issue as to any material fact and that Premier is entitled to a judgment as a matter of law, we affirm.

On July 3, 1997, Simp-A-Lex entered into a sub-contracting agreement with Premier to provide mining support services at one of Premier's facilities, located in Myra, Pike County, Kentucky. Specifically, the contract required Simp-A-Lex to perform line-boring and welding services. Line-boring is described by Simp-A-Lex, in its brief, as the "repair and replacement of bushings, bearings and pins located on large equipment used by [Premier] in its mining operations."

The agreement signed by the parties employed standardized language used by Premier in all of its sub-contracting agreements. The contract was distinguishable only by the purchase orders, which detailed the specific work to be performed by Simp-A-Lex, and which were incorporated into the general agreement by reference. Paragraph 10 of the contract set forth Premier's standard "Hold Harmless" provision:

Contractor [Simp-A-Lex] assumes the entire responsibility for performance of the work described above. Contractor agrees to indemnify Premier Elkhorn Coal Company and hold it harmless of and from any and all claims for personal injury, death or property damage, and any other loses, damages, charges or expenses, including attorney's fees, which arise or are alleged to have arisen out of or in connection with performance of the work described on the face hereof.

The scope of this contractual language is the crux of this case. Simp-A-Lex contends that "[t]he purpose of the indemnity agreement was to protect [Premier] from problems associated with the line boring and maintenance[;]" and that it "did not agree to indemnify [Premier] for all conceivable claims which could be

made against Premier." Premier argues that "[t]he language is crystal clear in it's [sic] meaning and purpose and unequivocally provides that Simp-A-Lex will indemnify Premier for any damages which are alleged to have arisen out of or in connection with the performance of the work contemplated under the agreement between the parties."

On December 30, 1999, Homer Dale Roberts, an employee of Simp-A-Lex, was performing line-boring operations on Premier-owned mining equipment at its Myra facility. Both parties agree that Roberts had reported to the Myra facility that day to perform work under the sub-contracting agreement between Simp-A-Lex and Premier. According to Simp-A-Lex, Roberts had just finished his line-boring operations for the day and was returning to the machine shop when a service vehicle he was driving skidded off a roadway and crashed, causing his death.

Roberts's parents filed a lawsuit against Premier alleging that its negligence in maintaining the roadway caused their son's death. Following court-ordered mediation between the parties, Premier and the Robertses entered into a settlement, which awarded \$800,000.00 in damages to the plaintiffs.

On January 29, 2001, Premier filed a lawsuit against Simp-A-Lex for indemnification for the costs incurred due to the Robertses' claim. On March 6, 2001, just 14 days after Simp-A-Lex answered the complaint, Premier filed a motion for summary judgment. Premier argued that since "Roberts was an employee of Simp-A-Lex on December 30, 1999, and during the course and scope

of his employment with Simp-A-Lex, Inc., he was killed while operating a service truck belonging to Simp-A-Lex, while on Premier Elkhorn Coal Company's property" that pursuant to the terms of the indemnity language contained in the contract, it was entitled to a summary judgment as a matter of law. The Pike Circuit Court agreed with Premier and entered a summary judgment on July 10, 2001. This appeal followed.

The standard of review on appeal of a summary judgment is whether the trial court correctly found that there was no genuine issue as to any material fact and that the moving party was entitled to a judgment as a matter of law.¹ There is no requirement that the appellate court defer to the trial court since factual findings are not at issue.² "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in [its] favor."³ Summary "judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances."⁴ "After the moving party has made a prima facie showing that would entitle [it] to summary judgment, . . . the adverse party has an obligation to do something more than rely

¹CR 56.03.

²Goldsmith v. Allied Building Components, Inc., Ky., 833 S.W.2d 378, 381 (1992); Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996).

³Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991).

⁴Id. (citing Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985)).

upon the allegations of [its] pleading.'"⁵ It is incumbent upon the non-moving party "to make some showing in response to the affidavit that [it] could produce proof, on the trial, in support of [its] allegations[.]"⁶ Consequently, summary judgment must be granted "only when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in [its] favor...."⁷

Simp-A-Lex argues that a genuine issue of material fact exists as to whether Roberts was performing activities sufficiently connected with line-boring work to be encompassed by the hold-harmless provision in its contract with Premier. In support of its position, Simp-A-Lex argues that the sentence "Contractor assumes the entire responsibility for performance of the work described above" and the phrase "any and all claims . . . which arise or are alleged to have arisen out of or in connection with performance of the work" limit its duty to indemnify Premier. In other words, Simp-A-Lex claims that in order for the indemnification agreement to apply, Simp-A-Lex must have been engaged in the "performance" of line-boring work at the time the claim arose; and that any claim falling outside the time period of actual "performance" of line-boring work would not be

⁵Hill v. Fiscal Court of Warren County, Ky., 429 S.W.2d 419, 423 (1968) (citing Clay, Kentucky Practice, vol. 7, p. 166).

⁶Tarter v. Arnold, Ky., 343 S.W.2d 377, 379 (1960) (citing Mullins v. Weatherly, Ky., 298 S.W.2d 673 (1957)).

⁷Huddleston v. Hughes, Ky.App., 843 S.W.2d 901, 903 (1992) (citing Steelvest, supra).

covered by the indemnification agreement. Thus, Simp-A-Lex argues that summary judgment was inappropriate because it was prohibited from developing discovery in support of its claim that extrinsic evidence would support its interpretation of the term "performance," and that it was entitled to a factual finding as to the parties' intentions under the contract. We disagree.

In interpreting the "hold harmless" agreement between Simp-A-Lex and Premier, we must first determine whether the terms of the contract are ambiguous.⁸ "If they are, then extrinsic evidence may be resorted to in an effort to determine the intention of the parties; if not, then extrinsic evidence may not be resorted to."⁹ In determining the intentions of the parties, courts must first look to the actual language of the contract. Unless there is more than one reasonable interpretation of the contract, it is not ambiguous.¹⁰ In reviewing the terms of the hold-harmless provision, we are unable to find any ambiguity within its broad language. We believe that the language, "Contractor agrees to indemnify Premier Elkhorn Coal Company and hold it harmless of and from any and all claims . . . , which arise or are alleged to have arisen out of or in connection with performance of the work" [emphasis added], resolves all doubt in favor of Premier. As Premier points out, Simp-A-Lex has failed

⁸Central Bank & Trust Co. v. Kincaid, Ky., 617 S.W.2d 32, 33 (1981).

⁹Id.

¹⁰Id.

to assert any reason that Roberts would have been driving a vehicle on its roadway at the time he was killed other than the fact that he was there "in connection with" the performance of line-boring work. Since no ambiguity exists, the use of extrinsic evidence is not allowed, and any effort by Simp-A-Lex through further discovery to produce extrinsic evidence relevant to the parties' intentions would have been futile.

Accordingly, summary judgment was properly granted, and the order of the Pike Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
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BRIEF AND ORAL ARGUMENT FOR
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