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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001230-MR

QUICK DELIVERY OF KENTUCKY, INC. APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE HENRY M. GRIFFIN III, JUDGE
ACTION NO. 00-CI-00406

PAYLESS SHOE SOURCE, INC. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM AND JOHNSON, JUDGES; EMBERTON, SENIOR JUDGE.[1]

JOHNSON, JUDGE: Quick Delivery of Kentucky, Inc. has appealed from the May 15, 2003, order of the Daviess Circuit Court which granted summary judgment in favor of Payless Shoe Source, Inc. Having concluded that there is no genuine issue as to any

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

material fact and that Payless is entitled to judgment as a matter of law, we affirm.

On September 23, 1991, Payless entered into a "Pool Point Service Agreement" with Quick Delivery. The agreement provided for Quick Delivery to regularly deliver merchandise on behalf of Payless to Payless's various retail outlets. The portion of the agreement at issue in this case is section 6.6 under the default and indemnification provision, which states:

> You agree to indemnify, defend, and hold harmless from and against any and all claims (whether valid or not), losses, damages, liabilities, costs (including attorney's fees), and expenses arising in any way out of your performance of this Agreement, including acts or failures to act of your employees and contractors, except that you are not responsible for damages caused solely by negligence or the willful conduct of Payless.

On November 10, 1998, an employee of Quick Delivery slipped and fell while making a delivery to a Payless store in the Towne Square Mall in Daviess County, Kentucky. The employee sued Payless for injuries she sustained, including the miscarriage of her unborn child.[2] The Daviess Circuit Court entered summary judgment in favor of Payless stating that the employee's action was barred because she had received workers' compensation benefits for her injuries, and because she had

[2] The complaint also named Towne Square Mall and Dawahares, Inc. as defendants; however, neither Towne Square Mall nor Dawahares is a party to this appeal.

failed to exercise ordinary care for her own safety. This Court affirmed the order granting summary judgment on February 22, 2002.[3]

Subsequently, Payless filed a complaint for declaratory judgment on March 23, 2000, against Quick Delivery wherein it cited the default and indemnification portion of the agreement for its position that Quick Delivery must reimburse it for its costs and attorney's fees incurred in defending the employee's claims. Quick Delivery filed its answer to the complaint on April 5, 2000.

Following this Court's affirmance of the summary judgment in the employee's case, Payless filed a motion requesting summary judgment against Quick Delivery. Payless stated that "[a]ccording to the explicit terms of the Agreement between Payless and Quick Delivery, Quick Delivery must indemnify Payless with attorney's fees from the defense of the claims by [the employee].[4] On May 14, 2003, the trial court entered its order granting summary judgment to Payless. In its order the trial court stated:

> The only exception to Quick Delivery's duty, under the terms of the Agreement, is if the

[3] Case No. 2001-CA-000489-MR, not-to-be published and made final on April 23, 2002.

[4] We note that on May 15, 2003, Payless filed a "Reply To Defendant's Response to Plaintiff's Motion For Summary Judgment." However, we do not find anywhere in the record on appeal where Quick Delivery filed a response to Payless's motion for summary judgment.

> injury is the result of the sole negligence of Payless. . . . The Court of Appeals affirmed the Daviess Circuit Court Order granting summary judgment and stated that the fall of the Quick Delivery employee "resulted from an open and obvious danger of which [she] should have been aware." Therefore, the injury could not have been "caused solely [by] negligence of . . . Payless" and as such does not fall within the exception outlined in the parties' agreement.

This appeal followed.

Quick Delivery claims that "[a] genuine issue of material fact exists as to whether the indemnity provision of the contract intend[ed] to cover [ ] alleged negligence and cost of defense in a civil action solely against [Payless] on allegations of premise liability." We disagree and conclude that no genuine issue of material fact exists and that Payless is entitled to summary judgment as a matter of law.

The standard of review governing an appeal of a summary judgment is well-settled. We must determine 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.[5] Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to

[5] Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996).

any material fact and that the moving party is entitled to a judgment as a matter of law."[6] In Paintsville Hospital Co. v. Rose,[7] the Supreme Court of Kentucky held that for summary judgment to be proper the movant must show that the adverse party cannot prevail under any circumstances. The Court has also stated that "the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor."[8] There is no requirement that the appellate court defer to the trial court since factual findings are not at issue.[9] "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 his favor" [citation omitted].[10] Furthermore, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial."

The right to contract to assume the obligation to

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[6] Kentucky Rules of Civil Procedure (CR) 56.03.

[7] Ky., 683 S.W.2d 255, 256 (1985).

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

[9] Goldsmith v. Allied Building Components, Inc., Ky., 833 S.W.2d 378, 381 (1992).

[10] Steelvest, 807 S.W.2d at 480.

indemnify another is well-established.[11] A contract of indemnity has been defined as "an obligation or duty requiring a promisor . . . to make good any loss or damage which another has incurred while acting at the request or for the benefit of the promisor" [citation omitted].[12] "[A]n indemnity contract creates a direct, primary liability between the promisor and the promisee that is original and independent of any other obligation" [citation omitted] [emphasis original].[13] In a contractual indemnity claim, an indemnitor's liability "shall be determined by the provisions of the indemnity agreement itself."[14]

Quick Delivery cites Employers Mutual Liability Insurance Co. v. Griffin Construction Co.,[15] in arguing that the trial court erred by finding that the indemnity clause required indemnification of Payless against the employee's claims of negligence. Employers Mutual involved the contractual indemnification of a power company "from any and all claims for injuries to persons or for damage to property happening by reason of any negligence on the part of the Contractor or any of the Contractor's agents or employees during the control by the

[11] Crime Fighters Patrol v. Hiles, 740 S.W.2d 936, 938 (Ky. 1986).

[12] Intercargo Insurance Co. v. B.W. Farrell, Inc., 89 S.W.3d 422, 426 (Ky.App. 2002).

[13] Id.

[14] Thompson v. Budd Co., 199 F.3d 799, 807 (6th Cir. 1999).

[15] 280 S.W.2d 179 (Ky. 1955).

Contractor of the project or any part thereof."[16] Our Supreme Court held that such terms were not "sufficiently broad or unequivocal" to impose liability on the contractor for injuries caused by the power company's negligence, and that "a contract of indemnity will not be construed to indemnify a party against his own negligence unless such intention is clearly manifest and no other interpretation fairly may be ascribed to it."[17] A similar conclusion was reached in Amerco Marketing Co. of Memphis, Inc. v. Myers,[18] cited by Quick Delivery, which involved comparable restrictive language in contractual indemnity provisions.

However, in the case before us, Payless is not claiming indemnification for its own negligence. The agreement clearly states that Quick Delivery is responsible for indemnifying Payless under the agreement "except that [Quick Delivery] [is] not responsible for damages caused solely by negligence or the willful conduct of Payless." Thus, Quick Delivery was obligated to indemnify Payless against any claim which was not solely caused by the negligence of Payless or by the willful conduct of Payless. The trial court in a summary

[16] Employers Mutual, 280 S.W.2d at 183.

[17] Id. See also Fosson v. Ashland Oil & Refining Co., 309 S.W.2d 176 (Ky. 1957).

[18] 494 F.2d 904, 914 (6th Cir. 1974).

judgment, that was affirmed by the Court of Appeals, ruled that the employee's injuries "resulted from an open and obvious danger of which [she] should have been aware[,]" and that Payless had no liability for the injuries the employee suffered as a result of the fall.

The words of a contract shall be given their ordinary meaning.[19] A contract which is unambiguous needs no construction and will be performed and enforced in accordance with its express terms.[20] Therefore, as a matter of law the parties' agreement must be construed to obligate Quick Delivery to indemnify Payless for damages, including costs and attorney's fees, relating to Payless's defense of Quick Delivery's employee's claim against it.

As for Quick Delivery's references to other provisions of the agreement as controlling this issue, we agree that the citation to those other provisions is completely irrelevant to the issue on appeal. We will not discuss any provision not related to the indemnity provision of the agreement.[21]

For the foregoing reasons, the summary judgment of the Daviess Circuit Court is affirmed.

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[19] Fay E. Sams Money Purchase Pension v. Jansen, 3 S.W.3d 752, 757 (Ky.App. 1999).

[20] Ex parte Walker's Ex'r, 253 Ky. 111, 117, 68 S.W.2d 745, 747 (1933).

[21] To conclude otherwise would violate the long-established principle that a written contract must be construed as a whole, so as to give effect to all parts and every word if possible. See Restatement (Second) of Contracts §203(a) (1981); and City of Louisa v. Newland, 705 S.W.2d 916 (Ky. 1986).

ALL CONCUR.

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