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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000140-MR

WARD EDISON'S PROFESSIONAL
CLEANING SERVICES, LLC APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU STEVENS, JUDGE
ACTION NO. 11-CI-004016

LIBERTY LANDMARK GROUP, LLC APPELLEES

OPINION
REVERSING

** ** ** ** **

BEFORE: DIXON, D. LAMBERT AND THOMPSON; JUDGES.

D. LAMBERT, JUDGE: This matter is before the Court on appeal from an order entered by the Jefferson Circuit Court, which granted the motion of the Appellee, Liberty Landmark Group, LLC (hereinafter "Liberty"), for summary judgment on its amended cross-claim against the Appellant, Ward-Edison's Professional Cleaning Services, LLC (hereinafter "Ward-Edison"), and awarded attorney fees

and litigation expenses to Traveler's Insurance Company (hereinafter "Traveler's"), Liberty's liability insurance carrier and a non-party to both the action below and to this appeal. We reverse the trial court's order.

I. Factual and Procedural History

Liberty is the owner of the Landmark Building, an office building located in Jefferson County, which is managed through Liberty's agent, RML Property Management, LLC (hereinafter "RML"). Ward-Edison is an entity engaged in the business of providing cleaning services.

On January 15, 2007, Ward-Edison entered into a contract to provide janitorial services at the Landmark Building. This contract was executed on Liberty's behalf by RML. This contract contained language requiring Ward-Edison to purchase liability insurance and name Liberty as an insured party. It is undisputed that Ward-Edison did obtain liability insurance coverage, but failed to name Liberty as an insured party thereunder.

RML later entered into a contract with Coit Services Krish, Inc. (hereinafter "Coit"), another cleaning contractor, to clean and shampoo the carpets in the hallways of the Landmark Building. These services were performed on June 15, 2010.

On the day of the carpet cleaning by Coit, a tenant of the building, Gant Hill, (hereinafter "Hill") was injured. Hill had walked across the recently cleaned carpets on his way to the restroom. The restroom floor was apparently slick from being recently mopped by an agent of Ward-Edison. The combination

of the wet restroom floor and the residue of the carpet shampoo caused Hill to slip and fall. Consequently, he suffered a broken ankle.

Hill initiated this civil action below, seeking damages for personal injury against Liberty, Ward-Edison, and Coit, but not RML. Liberty filed a cross-claim, and later an amended cross-claim against Ward-Edison. The bases for this claim were found in the contractual indemnity provisions in Ward-Edison's contract with Liberty. Liberty moved for summary judgment as to Hill's claims for damages against it, which the trial court granted. This judgment is not at issue in this appeal.

The matter proceeded to a jury trial with Ward-Edison and Coit as defendants in July of 2013. The jury returned a verdict in favor of Hill against Coit and Ward-Edison. Further, the jury apportioned the fault at 65 percent to Coit, and 35 percent to Ward-Edison.

After trial, Liberty moved for summary judgment on its amended cross-claim, which alleged that Ward-Edison had breached its contract with Liberty. Specifically, the cross-complaint alleged that Ward-Edison had failed to name Liberty as an additional insured party on its liability policy, as required in the contract. Liberty sought, as its measure of damages, the amount expended in its defense by Traveler's. The trial court granted this motion as well, though it reserved ruling until such time as Liberty produced documentation of damages. After the submission of evidence of Liberty's fees and expenses, the trial court

entered an order directing Ward-Edison to remit payment of $33,750.43 directly to Traveler's, which had provided for Liberty's ultimately successful defense.

This appeal followed, wherein Ward-Edison asserts multiple claims of error. Ward-Edison contends the trial court misinterpreted the contract in concluding it had breached. It contends the award of damages was inappropriate as Liberty had suffered no damages. It contends that Liberty is not entitled to damages because the collateral source rule does not apply in the context of breach of contract actions. It contends that Liberty lacks standing because Traveler's is the real party in interest in the cross-claim. Finally, Ward-Edison contends that Kentucky public policy demands that the contract be strictly construed against the application advocated by Liberty.

II. Analysis

A. Standard of Review

Though Appellant pointed to several issues in its brief, the most salient issues raised concerned the trial court's interpretation of the contract and the award of damages.

The interpretation and meaning of contractual language is a matter of law for the trial court, rather than a jury, to resolve. *McMullin v. McMullin*, 338 S.W.3d 315, 320 (Ky.App. 2011). The appropriate standard of review for matters of law in contract interpretation is *de novo*. *Speedway Superamerica, LLC v. Erwin*, 250 S.W.3d 339, 341 (Ky.App. 2008).

This appeal also presents an issue of fact in the award of damages. Issues of fact are reviewed under a clear error standard. *CertainTeed Corp. v. Dexter*, 330 S.W.3d 64, 72 (Ky. 2010). Clear error is not present when the findings are supported by substantial evidence. *Id.* "Substantial evidence" has previously been defined as such evidence that, being taken alone or in light of all the evidence, has sufficient probative value to induce a reasonable person to convict. *Sec'y, Labor Cabinet v. Boston Gear, Inc.*, 25 S.W.3d 130, 134 (Ky. 2000).

B. The Trial Court Did Not Err in Finding Ward-Edison Breached the Contract

Ward-Edison contends that the trial court ignored a portion of the contract in reaching its conclusion that the contract "clearly and unambiguously" required Ward-Edison to purchase liability insurance and to name Liberty as an insured party in such policy. Ward-Edison argues that two provisions should be read in conjunction with each other to arrive at the parties' intent, and the trial court only considered one of the two.

The "Agreement to Provide Labor, Supervision, and Materials" executed by Ward-Edison and RML, is that contract. Paragraph 7 of this agreement states as follows:

> 7. Indemnification. Contractor agrees to protect, indemnify, hold harmless and defend Owner, its subsidiaries and related companies, and the officers, directors, employees, workmen, agents, servants, and invitees of Owner, from all losses, damages, demands,

claims, suits, cost, expenses, or other liabilities, including attorney fees and other expenses of litigation arising out of or in connection with (i) performance of Janitorial Services work.

Paragraph 9 addresses the issue of liability insurance:

> 9. Insurance. Without limiting Contractors' undertaking to protect, indemnify, hold harmless and defend Owner and other parties as provided in Paragraph 7 hereof, Contractor agrees at its own cost and expense to procure and keep in force and effect the insurance listed below with insurance carrier(s) acceptable to Owner. Before commencing any Services, Contractor shall furnish Agent with Certificates of Insurance attested by a duly authorized representative of the insurance carrier(s) evidence that insurance required hereunder is in force and effect and that such insurance will not be cancelled or materially changed without giving to agent at least thirty (30) days prior written notice. In the event Contractor fails to furnish agent with acceptable Certificates before the time named in the Agreement for commencing the performance of Services, Agent shall have the right to terminate this agreement immediately.
>
> [….]
>
> (c) Endorsements:
>
> The policy or policies providing for such insurance shall be endorsed to specifically include the liability assumed by Contractor under this Agreement in the amounts listed above. In addition, such insurance shall specifically name Agent and Owner and other parties as provided in paragraph 7 as an additional named insured party and shall be primary to any and all other insurance of Owner and other parties as described in paragraph 7 with respect to any and all claims and demands which may be made against owner for (1) bodily injury or death resulting therefrom, including injury or death to Contractor and its

> employees, workmen, agents, subcontractors, and servants, and (2) property damages, including damage to Contractor's property, caused by, or alleged to have been caused by, any act, omission or default, negligent or otherwise, of contractor or Owner by reason of operations or services hereunder. Such insurance shall specifically provide that it applies separately to each insured against which claim is made or suit is brought, except with respects to the limits of the insurer's liability, and that subrogation rights against Owner and other parties are waived.

It is undisputed that Ward-Edison purchased such insurance, and equally unquestioned that Ward-Edison failed to name Liberty, RML, or anyone else, as a named insured on the policy. The clear and unambiguous terms of the contract state that Ward-Edison's liability carrier was to be primary. Reading these provisions in conjunction, the clear intent of the parties was to have Ward-Edison held responsible for injuries resulting from the performance of its duty to perform cleaning services, while the insurance provision was to protect Liberty from liability for Ward-Edison's negligent performance.

In order to recover for a breach of contract claim, an injured party must offer proof of three crucial facts. First it must be shown that a valid contract exists between the parties. Second, it must be shown that one party failed to perform a duty created by the contract. Third, the injured party must show damages flowing from the breach. *Barnett v. Mercy Health Partners-Lourdes, Inc.*, 233 S.W.3d 723, 727 (Ky.App. 2007).

Here, only two elements were met. The existence of a contract between the parties was never disputed. The failure of Ward-Edison to name any

other insured constituted a breach, and defeated the purpose of both paragraphs 7 and 9 in that it rendered Liberty's insurer primary for the claims asserted against Liberty by Hill, which arose from the combined negligence of Ward-Edison and Coit. The trial court correctly determined that a breach had occurred. Proof was presented that damages were suffered as a consequence of the breach. However, as those damages represented an amount expended in attorney fees pursuant to a contract between Liberty and Traveler's, such damages are not recoverable from Ward-Edison. *Mo-Jack Distributor, LLC v. Tamarak Snacks, LLC*, 476 S.W.3d 900, 906 (Ky.App. 2015) (attorney fees not are recoverable absent contract or statute expressly allowing such recovery, nor are attorney fees recoverable as compensatory damages.) Liberty did not prove all three elements required for recovery for breach of contract, and therefore may not recover.

C. The Amount of the Trial Court's Award of Damages Was Clearly Erroneous

Assuming a breach is proven, the measure of damages in a breach of contract action is the amount that will make the injured party whole, that is, to put the injured party in the same position as if the breach had not occurred and the contract fully performed. *Perkins Motors, Inc. v. Autotruck Fed. Credit Union*, 607 S.W.2d 429 (Ky.App. 1980).

The trial court considered evidence that a sum of money was expended by Traveler's, pursuant to its contractual duty to defend Liberty, as its insured, against Hill's claims. Ward-Edison argued that Liberty had suffered no

actual damages as it had not expended any money as a consequence of the breach. The trial court disagreed, and took the highly unusual step of ordering Ward-Edison to pay Traveler's directly, setting the recovery at the amount of attorney fees expended in litigation on Liberty's behalf.

This was reversible error for two reasons. First, as discussed above, Liberty failed to make the requisite showing of entitlement to recovery. Second, the damages awarded by the trial court were not damages suffered by Liberty, nor did they put Liberty in the same position as it would have been if the contract had been performed. Having expended nothing in its own defense, Liberty is already in the same position it would have been absent Ward-Edison's breach.

While Liberty asserts that it has been damaged in terms of its future insurability and increased premium costs, no such specific sums were presented at trial. Damages must be proven with reasonable certainty, and "contingent, uncertain and speculative damages generally may not be recovered." *Curry v. Bennett*, 301 S.W.3d 502, 506 (Ky.App. 2009).

This Court concludes that the trial court's findings as to the award of damages to be awarded were not supported by substantial evidence. Therefore the trial court's findings of fact related to damages were clearly erroneous.

D. Ward-Edison's Collateral Source Argument is Obviated by this Court's Ruling on Damages

Ward-Edison contends that the collateral source rule does not apply to breach of contract actions. It cites *Asher v. Unarco Material Handling, Inc.*, 862

F.Supp.2d 551 (E.D.Ky. 2012), to stand for the proposition that Kentucky public policy does not permit a non-breaching party to reap a windfall beyond the damages resulting from a breach. True though this statement of law may be standing on its own, it has no applicability here, as this Court discussed above, Liberty is not entitled to recovery for the breach where there were no actual damages suffered by Liberty. This allegation of error is thus obviated by this Court's other rulings herein.

E. Ward-Edison's Standing Argument Fails

Ward-Edison argues Liberty lacks standing because Traveler's is the real party in interest. A real party in interest is a "party who will be entitled to the benefits of the action upon a successful termination thereof, one who is actually and substantially interested in the subject-matter, as distinguished from one who has only a nominal interest." *Taylor v. Hurst*, 216 S.W. 95, 96 (Ky. 1919). Liberty is not merely a nominally interested party. Liberty asserted a legitimate claim for damages resulting from a breach of contract. That Liberty asserted a measure of damages that this Court ultimately determined it cannot recover renders Liberty no less a party than otherwise. Traveler's is not a real party in interest here as, at best, its recovery would be indirect from Ward-Edison under Liberty's contract with Ward-Edison.

A more appropriate label for Traveler's interest in this dispute is "third party beneficiary." It is well-settled in Kentucky that "…no stranger to a contract may sue for its breach unless the contract was made for his benefit."

Sexton v. Taylor County, 692 S.W.2d 808, 810 (Ky.App. 1985) (citing *Long v. Reiss*, 160 S.W.2d 668 (Ky. 1942)). Plaintiffs must show they are either creditor beneficiaries or donee beneficiaries in order to have standing to sue for the breach of the contract. *Id.* "In order to be either a donee or creditor beneficiary, it must be proven that the contract in question was made for the actual and direct benefit of the third party." *Id.* An incidental beneficiary does not acquire the right to enforce a contract by virtue of their indirect benefit therefrom. *Presnell Constr. Managers, Inc. v. EH Constr., LLC*, 134 S.W.3d 575, 580 (Ky. 2004).

The language of the contract clearly contemplates that the insurance policy obtained by Ward-Edison was to be primary. In other words, in the event of a claim against Ward-Edison and Liberty, Traveler's was to directly benefit in that it would be relieved of its obligation to defend Liberty. Traveler's, though not specifically named, was the intended third-party beneficiary of that language. "Such intent need not be expressed in the agreement itself; it may be evidenced by the terms of the agreement, the surrounding circumstances, or both." *Olshan Foundation Repair and Waterproofing v. Otto*, 276 S.W.3d 827, 831 (Ky.App. 2009) (citing *Sexton v. Taylor County*, 692 S.W.2d 808 (Ky.App. 1985).

As a third-party beneficiary, Traveler's would have the right to enforce the terms of the contract which inure to its benefit. However, that is not the situation here. Traveler's failed to participate in the action below to enforce its interest, and more importantly, the attorney fees it expended may not be recovered as compensatory damages. *See Mo-Jack.*

E. The Indemnity Provisions of the Contract Do Not Violate Public Policy

Ward-Edison's final contention is that the indemnity provisions of the contract between itself and Liberty violate Kentucky public policy. Ward-Edison relies on *Speedway Superamerica, LLC v. Erwin*, 250 S.W.3d 339 (Ky.App. 2008), to stand for the proposition that public policy forbids using an indemnity provision in a contract to defend against a claim for the indemnitee's own negligence. However, a closer reading of that case reveals just the opposite rule, that "…such provisions, whether pre-injury releases or indemnification provisions applied to defend against the indemnitee's own negligence, are not against public policy generally, but they are when agreed to by a party in a clearly inferior bargaining position." *Id.* at 334.

Here, we have an arms-length transaction between two corporate entities with equal bargaining power, resulting in a contract with reasonable terms. Liberty did not attempt to use the contract to protect itself from its own negligence; rather, it attempted to use the contract to protect itself from liability for the negligence of Ward-Edison.

II. Conclusion

For the reasons herein described, the judgment of the trial court is hereby REVERSED.

ALL CONCUR.

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