NOT DESIGNATED FOR PUBLICATION

JOSEPH DAVIS, HUSBAND OF/AND SUE DAVIS	*	**NO. 2001-CA-1103**
	*	**COURT OF APPEAL**
VERSUS		
	*	**FOURTH CIRCUIT**
CHERRY PICKER PARTS & SERVICE COMPANY, INC.	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
PLAQUEMINES 25TH JUDICIAL DISTRICT COURT
NO. 42-687, DIVISION "B"
Honorable William A. Roe, Judge
* * * * * *
Judge Terri F. Love
* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Steven R. Plotkin, Judge Terri F. Love)

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AFFIRMED

Cherry Picker Parts and Services, Inc. (hereinafter "Cherry Picker") appeals the judgment of the trial court granting summary judgment to Sub Sea International (hereinafter "Sub Sea"). Cherry Picker leases cranes to Sub Sea. Joseph Davis, an employee of Sub Sea International, filed a claim against Cherry Picker for injuries sustained while operating one of their cranes. Cherry Picker brought a third party demand against Sub Sea for indemnity and insurance coverage, which it claims was part of the lease agreement. Sub Sea argues that it never agreed to indemnify or insure Cherry Picker and that the lease agreement was invalid because it was unsigned. For the reasons below, we affirm the judgment of the trial court.

FACTS AND PROCEDURAL HISTORY

Plaintiff, Joseph Davis, an employee of Sub Sea, was injured acting in the course and scope of his employment while operating a crane leased to Sub Sea by Cherry Picker. Joseph Davis filed suit for personal injuries

against Cherry Picker alleging negligence. Cherry Picker denied liability and filed a third party demand for contractual indemnity against Baroid International Trading Corporation (Sub Sea's successor), basing its claim on the lease agreement of July 14, 1995, which was for the crane at issue. Cherry Picker also claims that it is entitled to insurance coverage for the underlying claims of Joseph Davis, which Cherry Picker argues was to be provided by Sub Sea. Cherry Picker bases its claims on two provisions that are located on the reverse of the lease agreement.

Cherry Picker and Sub Sea had an ongoing business relationship that involved the leasing of cranes. All transactions involved the same basic lease agreement, and there were several instances cited by Cherry Picker where lease agreements between the parties were not signed. However, lack of signature on the lease agreement has never prevented Cherry Picker from leasing cranes to Sub Sea.

Baroid International Trading Corporation (hereinafter "Baroid") filed a motion for summary judgment seeking dismissal of Cherry Picker's third party demand. The trial court granted summary judgment, finding that as a matter of law that there was no express intention of Sub Sea to indemnify Cherry Picker, nor to provide it with insurance. It is from this judgment that Cherry Picker takes the instant appeal.

DISCUSSION

Cherry Picker asserts that the trial court erred in finding that there was no issue of material fact and that Baroid's motion for summary judgment should be granted.

Appellate courts review summary judgment de novo, using the same criteria applied by trial courts to determine whether summary judgment is appropriate. *Reynolds v. Select Properties, LTD.*, 93-1480, p. 2 (La. 4/11/94), 634 So.2d 1180, 1182.

This Court in *Davis v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College*, 97-0382, p. 6 (La. App. 4 Cir. 3/18/98), 709 So.2d 1030, 1033, defined the standard of summary judgment as follows:

> A summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law.
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> The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion requires him only to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact.
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> An adverse party to a supported motion for summary judgment may not rest on the mere allegations or denials of his

> pleading, but his response, by affidavits or as otherwise provided by law, must set forth specific facts showing that there is a genuine issue of material fact for trial. (Internal citations omitted).

A contract of indemnity whereby the indemnitee is indemnified against the consequences of his own negligence is strictly construed, and such a contract will not be construed to indemnify an indemnitee against the losses resulting to him through his own negligent act, unless such an intention was expressed in unequivocal terms. *Polozola v. Garlock, Inc*., 343 So.2d 1000,1003 (La.1977). When there is anything doubtful in agreements, including indemnity agreements, we must endeavor to ascertain what was the common intention of the parties, rather than adhere to the literal sense of the terms. *Id.* Interpretation of a contract is the determination of the common intent of the parties. La. C.C. art. 2045. In case of doubt that cannot be otherwise resolved, a provision in a contract must be interpreted against the party who furnished its text. La. C.C. art. 2056.

The issue before us is whether Sub Sea intended to indemnify Cherry Picker or provide it insurance coverage, and whether that intention is evidenced in the lease agreement.

Cherry Picker argues that Sub Sea agreed to indemnify and insure it by accepting the cranes as part of the lease agreement. Cherry Picker further

argues this point on the basis of the lease history between Cherry Picker and Sub Sea. Cherry Picker claims that there were no formal requirements to indicate consent, so Sub Sea's acceptance of the cranes and payment for their rental was adequate to accept the terms of the contract, including the provisions on the reverse.

The language that Cherry Picker relies on to support its claim is paragraph fifteen and sixteen of the "Terms and Provisions of Lease" section on the reverse of the lease agreement. In two paragraphs, which are barely discernable, amongst a list of twenty-five boilerplate provisions, Cherry Picker outlines the conditions under which it is entitled to indemnity and insurance coverage. Sub Sea's purported obligation to indemnify and insure Cherry Picker is not mentioned on the face of the agreement; only at the bottom of the agreement does it make general reference to the twenty-five provisions on the reverse.

Cherry Picker did not present any evidence aside from the unsigned lease agreement that Sub Sea expressly intended to indemnify or insure Cherry Picker. However, in the affidavit from Joaquin S. Molinet, senior counsel at Sub Sea in July 1995, he states that Sub Sea did not agree to indemnify Cherry Picker and that Sub Sea was self-insured for general liability and did not intend to provide insurance to Cherry Picker.

According to well-established law, such provisions can only be enforced if it is clear that the parties to the contract expressly agree, since as here, Sub Sea would be putting itself at great risk by agreeing to indemnify and insure Cherry Picker against Cherry Picker's own negligence. Our review of the record reveals absolutely no intention on the part of Sub Sea to provide Cherry Picker with such protection. Furthermore, our position on this matter is buttressed by the fact that the agreement was unsigned. The only thing Sub Sea accepted by performance on the contract was the price for the crane itself.

The instant case is analogous to *Russel v. City of New Orleans, Dept. of Prop. Mgmt.*, 98-0927 (La. App. 4 Cir. 2/24/99), 732 So.2d 66. In that case, an attendee at a high school commencement ceremony brought a personal injury action against the City of New Orleans (hereinafter "City"). The City filed a third-party demand against the Orleans Parish School Board (hereinafter "School Board") seeking indemnity. The School Board entered into lease agreements annually with the City to lease the Municipal Auditorium and Theatre of Performing Arts for high school commencement ceremonies. The standard lease agreement contained an indemnity provision whereby the School Board agreed to indemnify the City from all claims resulting from injury on the leased premises. It also contained a provision

requiring the School Board to provide a public liability insurance policy in which the City was named as an insured. Instead of providing the liability insurance policy, the School Board would send a letter to the City stating that it was self-insured. In this particular case the lease agreement was never signed and returned to the City, and the School Board failed to provide the City with its letter of self-insurance. However, the School Board paid for the rental, scheduled the dates, and the ceremony took place.

The School Board argued that the indemnity provision was invalid because the lease was never signed and returned to the City. The City offered evidence of the annual practice of the City and School Board entering into the lease agreements, and introduced signed agreements from previous years.

This Court reversed the judgment of the trial court, finding that on the basis of the evidence presented that there was no valid written lease in which the provisions therein bound the parties. But this Court found that there was an oral lease between the City and the School Board, where they were bound only with regard to the general terms of the lease, but not the indemnity provision. The Court stated:

> Leases may be made by either written or verbal contract. To be valid, a contract of lease must have three essential elements, the thing, the price and the consent. When negotiating parties agree that a final lease agreement will be reduced to writing, then that agreement is an integral part of the

> contract itself, and until the agreement is reduced to writing there is no contract and either party may retract or refuse to abide by what had been orally agreed upon. However, if a verbal lease includes all essential elements and the parties act upon it, neither may withdraw on the pretext that the lease was not reduced to writing.
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> (Internal citations omitted).
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> After reviewing the evidence in the instant case, we cannot say the unsigned written lease agreement constituted a valid written lease contract in which all provisions therein were binding on the parties. The evidence, however, is sufficient to prove the existence of an oral lease between the City and School Board. To the extent there was a valid oral contract, we find the parties were bound with regard to the general terms of the lease only, i.e., the object of the lease, the lease price, the date(s) and duration of the lease. This would not include an onerous provision such as an indemnity clause.

Russell, 98-0927, p. 3-4, 732 So.2d at 68-69.

Here, as in *Russell*, there was an existing business relationship between the parties, and a history of lease agreements. Both cases involve an unsigned lease agreement and a third party demand for identification and insurance coverage, provisions of which were contained in the lease agreement. The Court in *Russell* found that the written agreement was invalid because it was not signed and that the parties could only be bound by the general terms of the contract.

In the instant case, we find that the lease agreement was invalid because it was unsigned. Furthermore, there is no manifestation of Sub Sea's intention to indemnify Cherry Picker or to provide it with insurance.

Sub Sea put forth evidence that it did not intend to indemnify and insure Cherry Picker. In turn, Cherry Picker put forth no evidence, save the unsigned agreement itself, that Sub Sea was even aware, much less consented to, the indemnity and insurance provisions on the reverse of the agreement. The indemnity and insurance provisions contained in the lease protected Cherry Picker from its own negligence. As such, there must be evidence of its intention to do so; otherwise, this Court cannot enforce the indemnity and insurance provisions of the lease agreement. In this case there was no evidence supporting the contention that Sub Sea accepted this burden.

In *Russell* this Court found that an oral lease existed between the City and the School Board, whereby the parties were only bound by the general terms of the agreement. In the instant case, we find the existence of an oral lease between Sub Sea and Cherry Picker where, by accepting the crane, Sub Sea was only bound by the general terms on the face of the agreement. This includes the dates, duration, and price of the rental.

Faced with the ambiguity of an unsigned agreement containing boilerplate provisions on the reverse, which place Sub Sea at a distinct disadvantage, we find that the indemnity and insurance clauses are unenforceable. Since the clauses are unenforceable, Cherry Picker's third

party demand against Sub Sea must be dismissed as a matter of law.

CONCLUSION

For the foregoing reasons we affirm the judgment of the trial court granting summary judgment in favor of Baroid and dismissing the third party claims by Cherry Picker.

AFFIRMED.