STATE OF MICHIGAN

COURT OF APPEALS

BONNIE LEHMANN and RICHARD LEHMANN,

Plaintiffs-Appellees,

v

T&L PARTNERSHIP, a Michigan Co-Partnership,

Defendant Third-Party Plaintiff-Appellant,

and

AMERICOR VENTURES, INC.,

Third-Party Defendant-Appellee,

and

HASPER SNOWPLOWING,

Defendant.

UNPUBLISHED
October 25, 2002

No. 230293
Clinton Circuit Court
LC No. 98-8903-NO

Before: Kelly, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Defendant and third-party plaintiff, T&L Partnership (T&L) appeals as of right from the trial court's order that granted summary disposition to third-party defendant Americor, and which also found that T&L's third-party complaint was frivolous which entitled Americor to costs and attorney fees. T&L also claims that the amount of attorney fees awarded constituted an abuse of the trial court's discretionary authority. We affirm in part and reverse in part.

I. Basic Facts and Procedural History

This case arises out of a slip and fall accident on premises leased by Americor from T&L. The premises occupied by Americor are located in a shopping center. Plaintiff Bonnie Lehmann, an Americor employee, slipped and fell on an alleged accumulation of ice and snow on the edge of the sidewalk and parking lot and injured her ankle. When plaintiff fell, she was returning to Americor's premises to continue her scheduled shift after tending to some personal business during her break time. As a result of the accident, plaintiffs[1] sued T&L, the lessor, and argued that as a direct and proximate result of T&L's failure to maintain the premises in a reasonably safe condition, plaintiff suffered serious injury.

Approximately nineteen months after plaintiff filed suit, T&L filed its third party complaint for indemnification against Americor in the event that plaintiff prevailed on the underlying claim. T&L argued that the lease agreement contained an indemnification provision obligating Americor to indemnify and hold T&L harmless from "any and all claims" arising out of the use of the premises. T&L contended that because plaintiff was "on the clock" when she slipped and fell, plaintiff was injured during the course of her employment; a situation clearly covered by the indemnification provision.

Americor moved for summary disposition on T&L's complaint. After oral argument, the trial court granted Americor's motion and further found that T&L's complaint seeking indemnification was frivolous and filed "in violation of the statute," thereby entitling Americor to sanctions in the form of costs and reasonable attorney fees. Pursuant to the trial court's order, Americor submitted a petition seeking $16,551 in attorney fees and costs in the amount of $879.12, totaling $17,430.12. After considering Americor's petition along with T&L's objections, the trial court awarded Americor $12,003.50 in attorney fees and $380.00 in costs totaling $12,383.50.

II. Standard of Review

A motion brought pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the underlying complaint. Under (C)(10), the inquiry is, when viewing all of the evidence in a light most favorable to the nonmoving party, are there genuine factual issues presented upon which reasonable minds may differ. If the proffered evidence fails to establish a genuine issue of any material fact, then the moving party is entitled to judgment as a matter of law. *Id*. Here though, the trial court did not state which court rule it relied to grant Americor's motion, a review of the record reveals that the trial court considered documentary evidence submitted aside from the pleadings. Accordingly, the trial court granted Americor's motion under MCR 2.116(C)(10).

III. The Lease Agreement

T&L argues that by the terms of the lease agreement, Americor must provide indemnification for "any and all claims" arising from Americor's use of the premises and that by

[1] Plaintiff Richard Lehman's action is a derivative claim for loss of consortium. Thus, the term "plaintiff" when referred to in the singular, refers only to plaintiff Bonnie Lehmann.

the unambiguous terms contained in the lease agreement, this includes the injuries that plaintiff sustained when she slipped and fell on the premises. We disagree.

The pertinent provisions of the lease agreement provide:

> 7. SERVICES
>
> *LESSOR shall*, subject to reimbursement by Lessee as provided herein, *maintain all of the public and common areas of the Building, such as the . . . parking lot, sidewalks* . . . in reasonably good order and condition except for damage occasioned by the acts and omissions of the LESSEE. (Emphasis added.)
>
> * * *
>
> 12. DAMAGE TO PROPERTY/INJURY TO PERSONS
>
> LESSEE shall indemnify and hold LESSOR harmless for *any and all claims arising from LESSEE's use of the premises*, of the *conduct of its business* or from *any activity, work, or thing done*, permitted or suffered by LESSEE in or about the Premises. (Emphasis added.)

Also noteworthy is that the lease agreement specifically defines the word "premises" as "13109 Schavey Road, Suite Numbers 1, 4, & 6, DeWitt, Michigan 48820."

A contract for indemnity is construed in accord with the ordinary rules for the interpretation of contracts. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 172; 530 NW2d 772 (1995). The primary objective is to interpret the contract consistent with the parties' intent. *Sherman v DeMaria Building Company, Inc*, 203 Mich App 593, 596; 513 NW2d 187 (1994). To discern the parties' intent, "the court must consider the language of the contract as well as the situation of the parties and the circumstances surrounding the contract." *Id*.

By the explicit, unambiguous terms contained in the lease agreement, T&L, as the lessor, agreed to "maintain all of the public and common areas of the Building," including the "parking lot and sidewalk" in "reasonably good order." In exchange thereof, Americor, as the lessee, agreed to reimburse T&L its pro rata share of the expenses that T&L incurred to maintain those common areas.

Plaintiff slipped and fell on ice and snow on the edge of the parking lot and sidewalk. Thus, plaintiff's underlying claim for negligence is that the party responsible for maintaining the parking lot and sidewalks failed to discharge that duty which caused plaintiff's injury. By the unambiguous terms of paragraph 7 of the lease agreement, T&L is the entity responsible for maintaining the common areas including both the sidewalk and the parking lot. Consequently, in the event that the jury determined that T&L failed to reasonably discharge its duty, T&L would be the entity liable for damages.

For purposes of the indemnification clause, plaintiff's claim "arose" from T&L's failure to maintain the parking lot and sidewalks in a reasonably safe condition and not by anything that

Americor did or failed to do. By its very terms, for the indemnification clause to apply, the injury sustained must "arise from" Americor's use of the "premises," the conduct of Americor's business, or from any work or activity undertaken by Americor in or about the "premises." The term "premises" is specifically defined in the lease agreement as suites one, four and six.

To bring plaintiff's claim within the ambit of the indemnification clause, T&L argued that plaintiff was injured during the course of her employment because at the time of the accident, plaintiff was "on the clock" and acting as an employee as she returned from her break to continue her shift. Consequently, T&L argued that plaintiff's injury thus arose out of plaintiff's employment and her "duty to be on the premises during her scheduled shift." According to T&L, plaintiff's injury arose out of Americor's use of the premises and in the conduct of its business, which would necessarily include an employee who sustains injury during the course of her employment. We reject T&L's interpretation of the indemnity clause.

T&L does not dispute that by the terms of the lease agreement, T&L had a duty to maintain the parking lot and the sidewalk in "reasonably good order." In fact, Nicholas Vlahakis, T&L's principal, admitted in his deposition that T&L had a duty to maintain the parking lot and sidewalk which included ice and snow removal. Plaintiff slipped and fell on ice and snow where the sidewalk adjoins the parking lot, an area which T&L had a duty to salt to prevent icing. Accordingly, by the terms of the indemnification clause, Americor has no duty to indemnify T&L for the injuries sustained by plaintiff.

T&L also argues that the broad, all-inclusive indemnification clause was sufficiently clear to place Americor on notice that its purpose was to absolve the indemnitee of any liability arising from its own negligence. Again, we do not agree.

An indemnity clause may be construed to provide indemnification for the indemnitee's own negligence where such an intent can be ascertained from "`other language in the contract, surrounding circumstances, or from the purpose sought to be accomplished by the parties.'" *Sherman*, *supra* at 597 (citation omitted.) Here, the language of the indemnification clause, when read in conjunction with the definition of the word "premises", does not fairly place Americor on notice that the purpose of the indemnity clause was to absolve T&L of liability for its own negligent conduct.

As previously noted, the lease agreement specifically defines "premises" as "suites one, four and six". Replacing the generic term "premises" with the specific definition provided in the lease agreement, the indemnification clause reads as follows:

> [Americor] shall indemnify and hold T&L harmless from any and all claims arising from [Americor's] use of [suites one, four and six], the conduct of its business, or from any activity, work or thing done, permitted or suffered by [Americor] *in or about* [suites one, four and six]. (Emphasis added.)

Interpreted in this manner, it is clear that the indemnification clause applies to claims arising in or about suites one, four and six. Since plaintiff sustained her injury well outside of these specific areas and in a common area, it cannot be seriously maintained that the language contained in the lease agreement and in the indemnification clause put Americor on notice that

the purpose of the clause was to absolve T&L of all claims, even those arising from its own negligence. Accordingly, we affirm the trial court's grant of summary disposition.

IV. Frivolous Pleading

T&L also argues that the trial court erred in finding that T&L's complaint was frivolous. After ruling on the motion for summary disposition, the trial court *sua sponte* stated: "The Court further finds this Third Party Complaint is a frivolous complaint filed in violation of the statute." A review of the transcript reveals that the trial court did not either specify the ground upon which it determined that T&L's third-party complaint was frivolous, or articulate the factual basis for its finding. On this record, we agree that the trial court erred.

This Court will decline to disturb a trial court's finding that an action was frivolous absent clear error. *Yee v Shiawassee County Board of Commissioners*, ___ Mich App ___; ___ NW2d ___ (2002) (Docket Nos. 226612, 226613, 226614, issued 5/22/02.) A finding is clearly erroneous when "although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *In re Attorney Fees & Costs*, 233 Mich App 694, 701; 593 NW2d 589 (1999).

We believe the trial court's use of the term "statute" refers to MCL 600.2591 which provides in pertinent part that:

> (1) [I]f a court finds that a civil action . . . was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.
>
> * * *
>
> (3) As used in this section:
>
> (a) "Frivolous" means that at least 1 of the following conditions is met:
>
> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit.

Though we are unable to determine which section of MCL 600.2591(3)(a) the trial court applied to the facts of this case, we find that T & L's claim for indemnification was not frivolous under any of the sections. T&L's legal position was not devoid of arguable legal merit given that the interpretation of indemnifications provision have "traditionally plagued both drafters and courts alike," *Pritts v J.I. Case Company*, 108 Mich App 22, 28; 310 NW2d 79 (1981), and the law is far from settled in this area. Although T&L's theory was unsuccessful, we do not find it to be completely "devoid" of legal merit and, although tenuous, T & L's theory was supported by

legal authority. Further, there is nothing in the record to support a finding that T&L's primary purpose was either to "harass, embarrass, or injure" Americor, or that T & L had "no reasonable basis to believe that the facts underlying its legal position were in fact true." MCL 600.2591(3)(a)(ii),(iii). Consequently, we reverse the trial court's decision that T&L's claim was frivolous.[2]

Affirmed in part and reversed in part.

/s/Kirsten Frank Kelly
/s/ Henry W. Saad
/s/ Michael R. Smolenski

[2] Because of our resolution on this issue, it is unnecessary to address the remaining claims.