IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

JUSTINE BROOKEY,	)	
	)	C.A. No. K12C-02-022 JTV
Plaintiff,	)	
	)	
v.	)	
	)	
CW DOVER, LLC, d/b/a CENTRO PROPERTIES, a Delaware Corporation, ACME MARKETS, INC., a Delaware Corporation, and DELAWARE LANDSCAPING, INC., a Delaware Corporation,	)	
	)	
Defendants.	)	

Submitted: July 2, 2012
Decided: October 22, 2013

Sean A. Dolan, Esq., Law Office of Cynthia G. Beam, Wilmington, Delaware. Attorney for Defendant CW Dover.

Nicole T. Whetham, Esq., Marshall, Dennehey, Warner, Coleman & Goggin, Wilmington, Delaware. Attorney for Defendant Acme Markets.

Upon Consideration of Defendant Acme's
Motion for Summary Judgment on Cross-claim
GRANTED

VAUGHN, President Judge

Brookey v. CW Dover, LLC, et al.
C.A. No. K12C-02-022 JTV
October 22, 2013

OPINION

This case commenced as a personal injury suit brought by the plaintiff, Justine Brookey, stemming from a slip and fall on ice in an Acme parking lot located in Dover. The defendants in the case are Acme Markets, Inc. ("Acme"), CW Dover, LLC d/b/a Centro Properties ("CW Dover"), and Delaware Landscaping, Inc. ("Delaware Landscaping"). During the litigation, the plaintiff settled her claims against all of the defendants. The remaining issue in this case is whether Acme is entitled to defense costs from its landlord, CW Dover, pursuant to their Lease Agreement.

FACTS AND PROCEDURAL HISTORY

Acme is a tenant in a large shopping center owned by the lessor, CW Dover. In the Lease Agreement between Acme and CW Dover, CW Dover agreed to maintain the parking lot, including keeping it clear of snow and ice. CW Dover, in turn, contracted with Delaware Landscaping, who agreed to provide snow and ice removal services in the Acme parking lot for CW Dover.

On February 13, 2010, the plaintiff allegedly slipped and fell on ice in the Acme parking lot when she was exiting the passenger side of a vehicle operated by her husband to enter the store. The plaintiff later sued Acme, CW Dover, and Delaware Landscaping, claiming that she sustained "great pain, suffering, and discomfort of the body and mind" as a result of the fall and incurred significant costs in medical expenses and lost wages. The plaintiff alleged in Count I of the complaint that all three defendants were negligent for failing to: "[k]eep the premises safe from hazardous or dangerous conditions;" "[a]ct reasonably to protect persons from

hazardous or dangerous conditions;" "[w]arn persons of concealed dangers;" and "[m]ake reasonable inspections to discover dangerous conditions."

On March 29, 2012, Acme answered the complaint and asserted a cross-claim for indemnification against CW Dover pursuant to an indemnification provision in their Lease Agreement. On May 17, 2012, CW Dover answered the plaintiff's complaint and denied Acme's cross-claim for indemnification.

On June 15, 2012, and several more occasions thereafter, Acme sent a letter to CW Dover requesting that it be defended by CW Dover's insurance provider pursuant to a clause in the Lease Agreement requiring CW Dover to name Acme as an additional insured for injuries occurring in its parking lot. Acme was denied coverage each time.

In an attempt to establish that CW Dover was required to insure Acme in this matter, Acme requested on July 18, 2012, August 28, 2012, and January 18, 2013 that CW Dover produce a copy of its insurance policy naming Acme as an additional insured. CW Dover failed to produce its insurance policy on each occasion. On February 22, 2013, Acme filed a motion to compel CW Dover to produce its insurance policy and this Court granted that motion on March 22, 2013.

On May 6, 2013, nearly a year after the initial discovery request, CW Dover produced a partial copy of its insurance policy, but the policy did not include a list of additional insureds that was referred to in the policy. Counsel for CW Dover, however, informed Acme that it was not named as an additional insured despite the fact that other tenants were so named. Trial in this case was set for June 10, 2013.

In the meantime, Acme moved for summary judgment on its cross-claim

against CW Dover seeking indemnification under the indemnification clause in their Lease Agreement. On May 28, 2013, this Court denied that motion, because the Court could not find as a matter of law that CW Dover was negligent or that it failed to carry out maintenance of the parking lot as required by the Lease Agreement.

On May 14, 2013, the plaintiff settled her claims against all of the defendants. What remains is Acme's cross-claim for indemnification against CW Dover. Specifically, Acme seeks to recover the costs it expended in defending this lawsuit because, Acme contends, CW Dover and its insurance provider were required to defend it in lawsuits that arise from injuries occurring in its parking lot. Acme now moves for summary judgment again, but this time under the provision in the Lease Agreement that requires CW Dover to name Acme as an additional insured under its general liability insurance policy.

STANDARD OF REVIEW

Summary judgment should be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[1] The moving party bears the burden of establishing the non-existence of material issues of fact.[2] If a motion is properly supported, the burden shifts to the non-moving party to establish the existence of material issues of fact.[3] In considering the motion, the facts

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[1] Super. Ct. Civ. R. 56(c).

[2] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

[3] *Id.* at 681.

must be viewed in the light most favorable to the non-moving party.[4]

CONTENTIONS

Acme contends that it is entitled to summary judgment because the Lease Agreement unambiguously imposes an absolute duty on CW Dover to name Acme as an additional insured in its insurance policy and that CW Dover breached the Lease Agreement when it failed to do so. As a result, Acme contends, CW Dover's insurance company denied Acme's request to be defended in this lawsuit, and consequently, Acme wrongfully incurred significant legal expenses defending this lawsuit.

CW Dover contends that it was required to insure Acme for injuries caused by CW Dover's negligence, misconduct, or breach of its maintenance obligation only and not for injuries alleged to have been caused by Acme's negligence. Because the plaintiff alleged in its complaint that Acme was negligent, CW Dover contends, CW Dover was not required to insure Acme in this matter.

DISCUSSION

The interpretation of a contract is purely a determination of law.[5] When interpreting a contract, the court will give priority to the parties' intentions, and will construe the contract as a whole, giving effect to all provisions therein.[6] Clear and

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[4] *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992).

[5] *Hudson v. State Farm Mutual Ins. Co.*, 569 A.2d 1168, 1170 (Del. 1990).

[6] *GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012).

unambiguous language will be given its ordinary and usual meaning.[7] A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction.[8] Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible to two or more different interpretations.[9]

Section 20.2 of the Lease Agreement, entitled "Landlord's Indemnification," is broken down into three pertinent clauses: the "common areas indemnification clause," the "demised premises indemnification clause," and the "additional insured clause." The first sentence of the indemnification provision is the common areas indemnification clause, which applies to injuries occurring in Acme's parking lot. It states:

> During all terms of this Lease, *except insofar as same is due to Tenant's negligence*, Landlord shall Indemnify and save Tenant harmless from all loss caused to Tenant by, or liability of Tenant for, death of or injuries to any person or persons or damage to property occurring on the Shopping Center common areas, *if it is caused by the negligence or misconduct of Landlord, its agents or employees, or which results from Landlord's failure to carry out repairs or maintenance of the Shopping Center common areas*

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[7] *Johnston v. Tally Ho, Inc*., 303 A.2d 677, 679 (Del. Super. 1973).

[8] *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

[9] *Id.*

> *required of it by this Lease*.[10]

That sentence is followed by the demised premises indemnification clause, which applies to injuries occurring in Acme's building during construction and is not applicable in this case. It states in pertinent part:

> Landlord also shall indemnify and save Tenant harmless from all loss caused to Tenant by, or liability of Tenant for, death of or injuries to any person or persons or damage to property occurring on the Demised Premises during the preliminary term of this Lease. . . .[11]

The clause at issue in this case, *i.e.*, the additional insured clause, follows the demised premises indemnification clause and it states:

> In connection with the foregoing, Landlord shall maintain during all terms of this Lease, comprehensive general liability insurance with a contractual liability endorsement with at least a single limit of Five Million Dollars ($5,000,000.00) for bodily injury and property damage on an occurrence basis, with Tenant being named as an additional insured, if such designation can be obtained. During the preliminary term of this Lease the aforesaid insurance shall be maintained on the Demised Premises

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[10] Lease Agreement, Section 20.2 (emphasis added). As mentioned, Acme previously moved for summary judgment under this clause, but the Court denied that motion because it could not find as a matter of law that the plaintiff's injury was caused by CW Dover's negligence or failure to carry out repairs or maintenance of the parking lot.

[11] *Id.* Pursuant to Section 2.3 of the Lease Agreement, CW Dover retained possession of the demised premises during the preliminary term of the lease in order to construct the building, and Acme was given permission to enter the building to inspect the progress of the work done by CW Dover and to install fixtures.

> and Shopping Center common areas, and after the commencement of the initial term, said insurance shall be maintained only on the Shopping Center common areas.[12]

As mentioned, CW Dover contends that it was required to insure Acme for injuries caused by CW Dover's negligence only and not for injuries alleged to have been caused by Acme's negligence. This is so, CW Dover contends, because the qualifying language set forth in the common areas indemnification clause—limiting indemnification only to when the injury was caused by CW Dover's negligence, misconduct, or breach of its maintenance obligation, and not by Acme's negligence – also applies to the additional insured clause.

I disagree with CW Dover's interpretation and I find that Section 20.2 of the Lease Agreement is unambiguous and imposes on CW Dover an absolute duty to insure Acme under its comprehensive general liability insurance. There is no express language in the additional insured clause that limits CW Dover's obligation to insure Acme—and thus entitling Acme to be defended in a lawsuit—to only when the injury allegedly resulted from CW Dover's negligence and not that of Acme.

CW Dover contends that the common areas indemnification clause and the additional insured clause must be read together because they are located in the same provision entitled "Landlord's Indemnification." This interpretation, however, conflates what are two independent and distinct legal concepts. The indemnification clause requires the *landlord* to hold the tenant harmless for injuries occurring in the

[12] *Id.*

parking lot. In this case, the common areas indemnification clause explicitly limits the landlord's obligation to indemnify Acme to only when the injury was not caused by Acme's negligence and was caused by CW Dover's negligence, misconduct, or failure to carry out repairs or maintenance of the parking lot.

The additional insured clause on the other hand requires CW Dover to obtain insurance so that its *insurance provider* will defend Acme against lawsuits arising from injuries occurring on its premises. It, unlike the common areas indemnification clause, does not explicitly limit CW Dover's duty to insure Acme to only when the injury was caused by CW Dover's negligence and not by Acme's negligence.

Contrary to the indemnification provision in this case, the named additional insured clause in *American Ins. Grp. v. Risk Enter. Mgmt., Ltd.*[13] provides an example of language that does explicitly limit one party's obligation to insure another party. In *American Ins. Grp*., Dover Mall and Abacus Security Services entered into a contract whereby Abacus agreed to provide security services for Dover Mall. In the contract, Abacus agreed "to defend, *indemnify*, and hold harmless [Dover Mall] from any and all claims against [Dover Mall] *alleging that injury to person or property was directly caused by Abacus*."[14] The agreement also required Abacus to "obtain liability coverage from its respective liability insurance carrier *effectuating the indemnity terms of this paragraph* and keep the same in force [during] the life of the

[13] 761 A.2d 826 (Del. 2000).

[14] *Id.* at 828 (emphasis added).

agreement."[15] Abacus then purchased the required insurance from its insurance provider and named Dover Mall as an additional insured, "but only with respect to liability arising out of security operations agreed to be performed for [Dover Mall] by or on behalf of [Abacus]."[16]

The Court notes that the additional insured clause in this case starts with the phrase "[i]n connection with the foregoing." When the Court asked counsel for both parties as to their interpretation of that phrase's meaning, CW Dover did not argue that that language qualified CW Dover's duty to insure Acme only to the extent that CW Dover was required to indemnify Acme for injuries occurring in the common areas.[17] Even accepting that interpretation as a reasonable one, the indemnification provision would be rendered ambiguous at best, in which case, the Court would "apply the doctrine of *contra proferentem* against the drafting party and interpret the contract in favor of the non-drafting party."[18] The parties agreed that the landlord, CW Dover, was the drafting party.

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[15] *Id.* (emphasis added).

[16] *Id.*

[17] Counsel for Acme argued that the additional insured clause requires CW Dover to insure Acme's common areas during the preliminary and initial terms of the lease and the demised premises during the preliminary term only, and that the "in connection with the foregoing" language simply refers to the first two sentences of the indemnification provision, which also apply to the common areas and demised premises.

[18] *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010). The Court notes that counsel for CW Dover agreed that the interpretation that CW Dover had an absolute duty to insure Acme was not unreasonable.

It is undisputed that CW Dover did not name Acme as an additional insured under its general liability insurance policy and that Acme has been denied coverage by CW Dover and its insurance company in this lawsuit. As a result, Acme has incurred legal expenses in defending itself, which but for CW Dover's breach, it would not have incurred. Therefore, I find that Acme is entitled to recover from CW Dover its legal expenses and costs in defending and litigating this case.

Counsel for Acme should prepare a form of final order for the amount which it seeks. After CW Dover has received such form of order, the Court will determine from counsel whether a dispute exists concerning such amount and whether a hearing is necessary.

CONCLUSION

For the foregoing reasons, Acme's Motion for Summary Judgment on Cross-claim is ***granted***.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.

cc: Order Distribution
File