RENDERED: SEPTEMBER 20, 2002; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001774-MR

FISHER EQUIPMENT COMPANY, INC. — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 98-CI-004186

UNITED STATES FIDELITY &
GUARANTY INSURANCE COMPANY — APPELLEE

AND

NO. 2001-CA-001915-MR

EAST AND WESTBROOK CONSTRUCTION
COMPANY, INC.; and TRANSPORTATION
INSURANCE COMPANY — APPELLANTS

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 98-CI-004186

FISHER EQUIPMENT COMPANY, INC. — APPELLEE

OPINION AFFIRMING IN APPEAL NO. 2001-CA-001774-MR,
AND REVERSING AND REMANDING IN PART
IN APPEAL NO. 2001-CA-001915-MR

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BEFORE: BARBER, GUDGEL, and KNOPF, Judges.

GUDGEL, JUDGE: These consolidated appeals stem from partial summary judgments granted by the Jefferson Circuit Court in an action arising out of a construction accident. In Appeal No. 2001-CA-001915-MR, appellants East and Westbrook Construction Company, Inc. (East and Westbrook) and Transportation Insurance Company contend that the court erred by finding that a hold harmless agreement between appellee Fisher Equipment Company, Inc. (Fisher) and East and Westbrook was valid and enforceable. In Appeal No. 2001-CA-001774-MR, Fisher contends that the court erred by finding that coverage for the accident was excluded under the contractor's equipment policy issued to Fisher by appellee United States Fidelity & Guaranty Insurance Company (USF&G). We disagree with Fisher's contention in Appeal No. 2001-CA-001774-MR, but we agree that the partial summary judgment in Appeal No. 2001-CA-001915-MR must be reversed. Hence, we affirm in part, and reverse and remand in part.

For the most part, the relevant facts in both appeals are essentially undisputed. In 1997, Whip Mix Company contracted with Branscrum Construction to erect a warehouse addition in Louisville. Branscrum in turn subcontracted with East and Westbrook to do the concrete construction for the project, including the erection of the concrete panels which were to form the walls of the building. To assist in erecting the panels, East and Westbrook contracted with Fisher for the latter to provide a 140-ton hydraulic crane and the necessary personnel to operate it. Fisher obtained the necessary crane from Holloway &

Son Construction Company, Inc. (Holloway), under an agreement whereby Fisher agreed to operate, maintain, and insure the crane, and to share with Holloway the income generated by its use. Consistent with its duties under that agreement, Fisher obtained a contractor's equipment insurance policy from USF&G.

On October 31, 1997, East and Westbrook forwarded to Fisher a written purchase order reciting the terms and conditions of the parties' contract, and Fisher delivered the requisite crane to the job site. On the work's starting date of November 3, the on-site supervisor for East and Westbrook signed a hold harmless agreement in favor of Fisher. On November 4 the crane tipped over while lifting a concrete panel, causing significant damage to both the crane and the construction site. An action for damages against Fisher followed. USF&G was added as a party for the purpose of resolving the coverage issue after it denied Fisher coverage for the loss. In due course, the court granted both Fisher and USF&G partial summary judgments dismissing the claims against them. These consolidated appeals followed.

First, in Appeal No. 2001-CA-001774-MR Fisher contends that the court erred by granting USF&G a summary judgment as to the coverage issue. We disagree.

The proof shows that the crane tipped over because Fisher's employees overloaded the crane and attempted to lift more weight than it could handle. USF&G took the position that the accident was due to the negligence of Fisher's employees in attempting to lift a load which exceeded the "manufacturer's rated capacity" for that particular load, with the result that

coverage for the loss was excluded by the policy's clause which excluded coverage for any loss caused by or resulting from Fisher "exceeding the manufacturer's rated capacity" for the insured crane. Fisher, however, claimed that the exclusionary clause's use of the phrase "manufacturer's rated capacity" was ambiguous as being subject to two reasonable interpretations. More specifically, Fisher asserted that the phrase could be interpreted as referring either to the crane's total lifting capacity as determined by the manufacturer, or to 85% of the total lifting capacity as specified in the manufacturer's lifting capacity chart which was attached to the crane's cab. Fisher argued that the policy's allegedly ambiguous exclusionary clause must be construed in favor of coverage, especially since USF&G failed to define the phrase in its policy.

In resolving this coverage issue, the court determined that the policy was unambiguous and that there was only one reasonable interpretation of its use of the phrase "manufacturer's rated capacity." The court concluded that it was not reasonable to interpret the phrase as meaning 100% of the crane's lifting capacity rather than 85% thereof as listed on the chart in the crane's cab, because such an interpretation would require the crane's operator to perform independent mathematical calculations before each use of the crane, rather than using the posted figures provided by the manufacturer. The court therefore found that the only reasonable interpretation of the phrase was that coverage was excluded for any use of the crane which involved the lifting of a load in excess of the specified 85%

weight limit. Since it was admitted that the load which caused the crane to tip over exceeded that limit, the court adjudged that there was no coverage under the policy for Fisher's loss.

Fisher's argument to this court totally ignores the trial court's reasoning for finding that the policy's exclusionary clause was not ambiguous. Moreover, Fisher ignores the affidavit of the manufacturer's employee that the phrase "manufacturer's rated capacity" referred to 85% of the total lifting capacity, as well as the testimony of its own employees that the 85% capacity chart in the crane's cab provided the rated capacity for the crane and was "the bible" for such purposes. Given the evidence in the record, it is clear that the trial court did not err by finding that the phrase "manufacturer's rated capacity" must be deemed to refer to what the manufacturer believed it meant, and not to the insured's interpretation of the phrase. It follows, therefore, that the trial court did not clearly err by finding that there was no policy coverage for Fisher's loss and that US&G was entitled to a summary judgment as to the coverage issue.

In Appeal No. 2001-CA-001915-MR, appellants contend that an issue of fact exists as to whether the hold harmless agreement was supported by consideration, and as to whether the agreement itself created an ambiguity regarding whether the parties intended for Fisher to be indemnified against its own negligence. Hence, they urge that the court erred by granting summary judgment as to Fisher's right to enforce the agreement. We agree.

It is undisputed that on October 31, 1997, East and Westbrook faxed a purchase order to Fisher for an operator, oiler, and crane for tilt-up erection at an agreed price of $3,128 per day, and Fisher delivered the crane to the job site. It is also undisputed that on that date, Fisher was aware that it would be required to set up the crane on the concrete slab, as East and Westbrook could not get permission to use the preferred adjacent ditch line. Thus, as of October 31 there was a contract between the parties which addressed all the issues essential to the contract. The fact that Fisher's principal did not sign the purchase order until after the accident is of no significance, given the fact that Fisher moved the crane onto the job site on October 31 and the purchase order expressly provided alternate means for acceptance, including delivery of the materials to the purchaser. The terms and conditions of the purchase order, rather than those of the hold harmless agreement subsequently signed by East and Westbrook's on-site supervisor, therefore are controlling and the parties' rights must be determined consistent with that purchase order.

The parties agree that the purchase order permitted written modification of its terms and conditions. However, while Fisher argues that the November 3 indemnity agreement validly modified the existing purchase order, appellants assert that any such modification was unenforceable as it was not supported by any new consideration. We need not resolve this issue, however, because it is clear that genuine issues of material fact exist as to whether the individuals who executed the November 3 hold

harmless agreement were authorized to do so, and as to whether the agreement was intended only to absolve Fisher from liability if the crane's weight cracked the concrete slab, rather than to totally absolve Fisher from liability for other acts of negligence. Therefore, so much of the summary judgment as dismisses the claim against Fisher must be reversed.

For the reasons stated, the partial summary judgment in Appeal No. 2001-CA-001774-MR is affirmed, and the partial summary judgment in Appeal No. 2001-CA-001915-MR is reversed and remanded for further proceedings consistent with our views.

ALL CONCUR.

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