

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 CA 1103

CHARLEAN F. COTTON

VERSUS

DOLLAR TREE STORES, INC.

Judgment Rendered: FEB 18 2014

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Docket Number C577294

Honorable Kay Bates, Judge Presiding

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BEFORE: WHIPPLE, C.J., WELCH AND CRAIN, JJ.

WAW
JAW
MJ

WHIPPLE, C.J.

In this appeal, a commercial lessee challenges the trial court's judgment, granting the motion for summary judgment filed by the lessor of the premises and ordering the lessee to pay costs and fees incurred by or on behalf of the lessor. For the following reasons, we reverse and render.

FACTS AND PROCEDURAL HISTORY

This litigation arises out of an alleged slip and fall accident occurring on April 10, 2008, outside of the Dollar Tree store in the Hammond Aire Plaza shopping center in Baton Rouge, Louisiana. Plaintiff, Charlean F. Cotton, filed suit against Dollar Tree Stores, Inc. ("Dollar Tree"), contending that she slipped on a large piece of paper on the sidewalk in front of the exit door of the Dollar Tree store, causing her to fall to the ground. She averred that Dollar Tree was negligent in: failing to inspect the sidewalk next to the entrance and exit doors properly and sufficiently; failing to observe and remove paper from the sidewalk area; allowing paper and trash to accumulate near its doors; failing to warn Cotton of paper and trash present and of the risks/damages presented thereby; and any other acts of negligence that may be proven at trial of this matter. Thus, she contended that Dollar Tree was liable to her for the injuries she sustained.

Thereafter, Cotton filed a First Supplemental and Amending Petition naming as an additional defendant "Kimco Baton Rouge 666, Inc." ("Kimco Realty").¹ Kimco Realty, as landlord of the Hammond Aire Plaza, had entered into a Lease Agreement with Dollar Tree in 2000 for the retail space in which the Dollar Tree store is located. In her

¹While Cotton listed this defendant as "Kimco Baton Rouge 666, Inc.," Kimco listed its name in its Answer as "Kimco Realty Corporation." For ease, this defendant will hereinafter be referred to as "Kimco Realty."

amending petition, Cotton contended that Kimco Realty was liable to her for the negligence of its employees in: failing to properly and sufficiently inspect the sidewalk next to the entrance and exit doors of the Dollar Tree store according to its obligations as a landlord; failing to observe and remove paper from the sidewalk area; allowing paper and trash to accumulate near its doors; failing to warn Cotton and others of the risks/dangers presented by the accumulation of the paper and trash present; and any other acts of negligence that may be proven at trial of this matter.

After Kimco Realty was named as a defendant, Kimco Realty filed a cross claim against Dollar Tree, contending that Dollar Tree was obligated under the terms of the Lease Agreement between the parties to defend, indemnify, and hold Kimco Realty harmless against Cotton's claims. Kimco Realty further alleged that despite demand upon Dollar Tree, it had refused to defend and indemnify Kimco Realty. Thus, Kimco Realty sought to enforce the defense and indemnity provisions contained in the Lease Agreement between these parties.

Thereafter, Kimco Realty filed a motion for summary judgment on the issue of Dollar Tree's obligations for defense and indemnity under the Lease Agreement. Kimco Realty contended that the broad language of Term 11(A) of the Lease Agreement obligated Dollar Tree to defend and indemnify Kimco Realty against "all losses, claims, liabilities, injuries, expenses (including legal fees), lawsuits and damages ... claimed to have been caused by or resulted from any act, omission or negligence of Tenant ... no matter where occurring...." Kimco Realty averred that, because Cotton had alleged negligence on the part of Dollar Tree, the Lease Agreement obligated Dollar Tree to defend and indemnify it against any claims by Cotton.

In response, Dollar Tree also filed a motion for summary judgment, contending that it was entitled to judgment in its favor dismissing Kimco Realty's cross claim. Specifically, Dollar Tree contended that even if the court determined that Kimco Realty was entitled to reimbursement of its defense costs and expenses under the Lease Agreement, Kimco Realty had admitted through discovery that it had not paid any expenses or costs associated with this litigation. Thus, Dollar Tree argued, Kimco Realty had no claim for reimbursement.

Additionally, Dollar Tree argued that even if Term 11(A) required it to defend Kimco Realty for the negligence claims asserted by Cotton, Term 17 of the Lease Agreement specifically released Dollar Tree from "any and all liability for loss or damage caused by any casualty."² While acknowledging that the Lease Agreement did not define "liability" or "casualty," Dollar Tree contended that the clear language of Term 17 specifically released it from any and all liability to Kimco Realty.

Subsequently, Cotton's claims against Dollar Tree and Kimco Realty were dismissed with prejudice, leaving Kimco Realty's cross claim against

²Dollar Tree had previously filed a motion for summary judgment seeking a determination that Kimco Realty had no cause of action against Dollar Tree for defense and indemnity. In the earlier motion for summary judgment, Dollar Tree had argued that while Term 11(A) of the Lease Agreement between the parties contained an indemnity provision, it further provided that "nothing contained in this Lease shall be interpreted to release Landlord from liability proximately caused by its own negligent acts." Thus, Dollar Tree argued that the Lease Agreement did not obligate it to defend and indemnify Kimco Realty against allegations of Kimco Realty's own negligence and that because Cotton had alleged specific acts of negligence on the part of Kimco Realty which were independent of the alleged acts of Dollar Tree, under the provisions of the Lease Agreement at issue, Dollar Tree was not required to defend or indemnify Kimco Realty. Following a hearing, the trial court denied Dollar Tree's motion for summary judgment, and this court subsequently denied Dollar Tree's writ application. Cotton v. Dollar Tree Stores, Inc., 2011 CW 1537 (La. App. 1st Cir. 11/21/11) (unpublished writ action).

Dollar Tree as the only remaining claim. The cross motions for summary judgment on the cross claim were then heard on March 11, 2013, and by judgment dated April 17, 2013, the trial court denied Dollar Tree's motion, granted Kimco Realty's motion, and ordered Dollar Tree "to pay all reasonable costs and reasonable fees incurred by or on behalf of Kimco Realty associated with the captioned litigation." From this judgment, Dollar Tree appeals.³ In its five assignments of error, Dollar Tree contends that the trial court erred in:

(1) finding that Kimco Realty was the proper party to bring the claim for reimbursement of defense costs when Kimco Realty has not paid any fees or costs or sustained any loss in regard to this matter;

(2) considering a statement in Glenn Brettschneider's affidavit regarding Kimco Realty's ultimate responsibility to repay its insurer for defense costs, fees and expenses, in violation of LSA-C.C.P. art. 967(A);

(3) finding that Term 17 of the Lease Agreement applied only to property damage claims, separate and distinct from the liability claims asserted by Cotton herein;

³On July 30, 2013, this court issued a rule to show cause, ordering the parties to show why the appeal should or should not be dismissed as an appeal from a partial judgment that was not designated as final by the trial court as required by LSA-C.C.P. art. 1915(B). In the rule-to-show-cause order, the court also invited the trial court to sign a judgment with a LSA-C.C.P. art. 1915(B) designation. Cotton v. Dollar Tree Stores, Inc., 2013 CA 1103 (La. App. 1st Cir. 7/30/13) (unpublished). The trial court subsequently signed an order designating its April 17, 2013 judgment as a final, appealable judgment pursuant to LSA-C.C.P. art. 1915(B)(1). This court then maintained the appeal, but noted that the propriety of the LSA-C.C.P. art. 1915(B) designation was ultimately reserved to the panel considering the merits of the appeal. Cotton v. Dollar Tree Stores, Inc., 2013 CA 1103 (La. App. 1st Cir. 10/8/13) (unpublished).

We note that the trial court's April 17, 2013 judgment addresses the final remaining claim in the case below. In a per curiam opinion accompanying its order designating the judgment at issue as final, the trial court reasoned that if this court affirms the April 17, 2013 judgment, the only remaining issue related to this claim would be the amount of costs and fees incurred by Kimco Realty, and that if this court reversed the judgment, "the reversal would effectively put [an] end to this litigation." Considering the foregoing, we find no abuse of discretion by the trial court in designating the April 17, 2013 judgment as final for purposes of immediate appeal. See R.J. Messinger, Inc. v. Rosenblum, 2004-1664 (La. 3/2/05), 894 So. 2d 1113, 1122.

(4) considering a statement in Glenn Brettschneider's affidavit regarding his interpretation of Term 17 of the Lease Agreement; and

(5) finding that Term 11 of the Lease Agreement required Dollar Tree to reimburse Kimco Realty the defense costs associated with defending Cotton's claims asserted against Kimco Realty for Kimco Realty's own negligence.

Thus, Dollar Tree urges this court: to reverse the trial court's judgment that granted Kimco Realty's motion for summary judgment and denied Dollar Tree's motion, to grant Dollar Tree's motion for summary judgment, and to dismiss Kimco Realty's cross claim with prejudice.⁴

BURDEN OF PROOF AND STANDARD OF REVIEW FOR SUMMARY JUDGMENT

A motion for summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, if any, show that there is no genuine issue as to material fact and

⁴A denial of a motion for summary judgment is an interlocutory judgment that is not appealable and cannot be certified as such. LSA-C.C.P. art. 968; Ascension School Employees Credit Union v. Provost Salter Harper & Alford, L.L.C., 2006-0992 (La. App. 1st Cir. 3/23/07), 960 So. 2d 939, 940. When an unrestricted appeal is taken from a final judgment, the appellant is entitled to seek review of all adverse interlocutory judgments prejudicial to him, in addition to the review of the final judgment. Dean v. Griffin Crane & Steel, Inc., 2005-1226 (La. App. 1st Cir. 5/5/06), 935 So. 2d 186, 189 n.3. However, this matter is an appeal from a partial summary judgment designated as final pursuant to LSA-C.C.P. art. 1915(B) and, thus, is restricted to the issue of Kimco Realty's entitlement to indemnification for defense costs.

Nonetheless, this court has held that where the issues involved in the granting of a partial summary judgment are the same as those presented in the opposing cross-motion for summary judgment denied by the trial court, the court of appeal may appropriately review the denial of the cross-motion for summary judgment. See State, Division of Administration, Office of Risk Management v. National Union Fire Insurance Company of Louisiana, 2010-0689 (La. App. 1st Cir. 2/11/11), 56 So. 3d 1236, 1242 n.6, writ denied, 2011-0849 (La. 6/3/11), 63 So. 3d 1023, and Dean, 935 So. 2d at 189 n.3. Moreover, in Hood v. Cotter, 2008-0215 (La. 12/2/08), 5 So. 3d 819, 823-824, the Louisiana Supreme Court reviewed this court's practice of considering interlocutory issues that are identical to those issues raised in a restricted appeal and concluded that the appellate court could exercise its supervisory jurisdiction to consider the identical or related interlocutory issue.

Accordingly, because Kimco Realty's entitlement to indemnification for defense costs was the issue addressed in both the grant of partial summary judgment and the denial of Dollar Tree's motion for summary, we will consider the trial court's denial of Dollar Tree's motion for summary judgment herein.

that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B)(2). The summary judgment procedure is expressly favored in the law and is designed to secure the just, speedy, and inexpensive determination of non-domestic civil actions. LSA-C.C.P. art. 966(A)(2).

The mover bears the burden of proving that he is entitled to summary judgment. LSA-C.C.P. art. 966(C)(2). However, if the mover will not bear the burden of proof at trial on the subject matter of the motion, he need only demonstrate the absence of factual support for one or more essential elements of his opponent's claim, action, or defense. LSA-C.C.P. art. 966(C)(2). If the moving party points out that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense, then the non-moving party must produce factual support sufficient to satisfy his evidentiary burden at trial. LSA-C.C.P. art. 966(C)(2). If the mover has put forth supporting proof through affidavits or otherwise, the adverse party may not rest on the mere allegations or denials of his pleadings, but his response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue for trial. LSA-C.C.P. art. 967(B).

If, on the other hand, the mover will bear the burden of proof at trial, that party must support his motion with credible evidence that would entitle him to a directed verdict if not controverted at trial. Hines v. Garrett, 2004-0806 (La. 6/25/04), 876 So. 2d 764, 766. Such an affirmative showing will then shift the burden of production to the party opposing the motion, requiring the opposing party either to produce evidentiary materials that demonstrate the existence of a genuine issue for trial or to submit an affidavit requesting additional time for discovery. Hines, 876 So. 2d at 766-767.

In ruling on a motion for summary judgment, the trial court's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. Hines, 876 So. 2d at 765. Despite the legislative mandate that summary judgments are now favored, factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion, and all doubt must be resolved in the opponent's favor. Willis v. Medders, 2000-2507 (La. 12/8/00), 775 So. 2d 1049, 1050.

In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. East Tangipahoa Development Company, LLC v. Bedico Junction, LLC, 2008-1262 (La. App. 1st Cir. 12/23/08), 5 So. 3d 238, 243, writ denied, 2009-0166 (La. 3/27/09), 5 So. 3d 146.

DISCUSSION

In Dollar Tree's first assignment of error, it asserts that because Kimco Realty has not paid any fees or costs in defending Cotton's suit against it, which expenses were instead incurred by Kimco Realty's insurer, Kimco Realty cannot establish a claim for reimbursement of such costs under the indemnity provision of the Lease Agreement. In its second assignment of error, Dollar Tree argues that any statements in Glenn Brettschneider's affidavit regarding Kimco Realty's ultimate responsibility to repay its insurer for defense costs, fees and expenses do not comport with the requirements of LSA-C.C.P. art. 967(A) and, thus, could not be considered in support of Kimco Realty's motion for summary judgment.

The purpose of an indemnity agreement is to allocate the risk inherent in the activity between the parties to the contract. Naquin v. Louisiana

Power & Light Company, 2005-2103 (La. App. 1st Cir. 9/15/06), 943 So. 2d 1156, 1161, writ denied, 2006-2476 (La. 12/15/06), 945 So. 2d 691. The law permits an indemnitor, who is not at fault, to contractually indemnify an indemnitee, who is also not at fault, but such indemnity must be expressly provided for in the indemnity agreement. Sandbom v. BASF Wyandotte Corporation, 618 So. 2d 1019, 1022 (La. App. 1st Cir.), writ denied, 625 So. 2d 1042 (La. 1993).

However, an indemnitor is not liable under an indemnity agreement until the indemnitee actually makes payment or sustains loss. Suire v. Lafayette City-Parish Consolidated Government, 2004-1459, 2004-1460, 2004-1466 (La. 4/12/05), 907 So. 2d 37, 51. Thus, a cause of action for indemnification for costs of defense does not arise, or is premature, until the lawsuit is concluded and defense costs are paid. Suire, 907 So. 2d at 51; Meloy v. Conoco, Inc., 504 So. 2d 833, 839 (La. 1987).

In Arnold v. Airborne Freight Corporation, 94-1728 (La. App. 1st Cir. 7/18/95), 667 So. 2d 1063, 1067, writ denied, 96-0220 (La. 3/15/96), 669 So. 2d 420, this court noted that while one defendant asserted a claim for indemnification of attorney's fees against another defendant pursuant to an agreement between those parties, the defendant seeking indemnity had not actually incurred those costs. Rather, the defense costs had been incurred by the defendant's insurer, which was not a party to the action. Thus, this court affirmed the trial court's dismissal of the incidental action for indemnification, noting that because the defendant did not pay attorney's fees, it had no claim for indemnification. Arnold, 667 So. 2d at 1067.

Similarly, in the instant case, Dollar Tree's evidence submitted in opposition to Kimco Realty's motion for summary judgment as well as in support of its own cross motion for summary judgment established that

Kimco Realty had acknowledged in answers to interrogatories that it had not paid any fees or expenses that had been incurred on its behalf in this suit. Rather, these defense costs had been incurred by Kimco Realty's insurer, Federal Insurance Company ("Federal Insurance"), an entity that is not a party to this suit.

Nonetheless, in a further effort to establish its claim for indemnification of defense costs, Kimco Realty submitted the affidavit of Glenn Brettschneider, who attested, in pertinent part, as follows:

1. That he is the Secretary of Kimco Insurance Company.
2. That defense costs, fees and other expenses associated with Kimco [Realty]'s involvement related to this action are ultimately paid by Kimco Insurance Company who reimburses Federal Insurance Company who initially pays such costs.
3. That Kimco Insurance Company is a wholly owned subsidiary of Kimco Realty Corporation.

Although noting in brief that there is no indication in the trial court's oral reasons that the trial court considered these statements in granting the motion for summary judgment, Dollar Tree asserts that these statements by Brettschneider do not comport with the requirements of LSA-C.C.P. art. 967(A).⁵ In particular, Dollar Tree notes that in the affidavit, Brettschneider appears to argue as to the scope of the Federal Insurance policy, *i.e.*, whether it requires Kimco Realty, or any other entity, to reimburse defense costs incurred by Federal Insurance on behalf of Kimco Realty. However, as noted by Dollar Tree, Kimco Realty did not attach a copy of the Federal Insurance policy evidencing its obligation, or the obligation of any other entity, to reimburse Federal Insurance for the defense costs incurred on

⁵Dollar Tree raised the issue of whether the affidavit comported with the requirements of LSA-C.C.P. art. 967 in the trial court below.

behalf of Kimco Realty in this litigation, and Brettschneider does not explain the basis for his conclusions about Kimco Realty's (or Kimco's Insurance Company's) obligations.

Louisiana Code of Civil Procedure article 967(A) provides that supporting affidavits shall be made on personal knowledge of the affiant, shall set forth such facts as would be admissible in evidence, and shall affirmatively show that the affiant is competent to testify to the matters stated therein. Additionally, LSA-C.C.P. art. 967(A) requires that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto and served therewith." In his affidavit, Brettschneider merely states that he is the secretary of Kimco Insurance Company and then purports to interpret the Federal Insurance policy issued to Kimco Realty without attaching a copy of the policy or setting forth the basis for his personal knowledge of the terms and obligations of the policy or his competency to interpret any reimbursement provisions therein. Thus, the affidavit did not satisfy the requirements of LSA-C.C.P. art. 967(A). Unifund CCR Partners v. Perkins, 2012-1851, pp. 6-7 (La. App. 1st Cir. 9/25/13), ___ So. 2d ___, ___; Ortego v. Howard Trucking and Construction Company, Inc., 345 So. 2d 1259, 1260-1261 (La. App. 1st Cir. 1977); cf. Regions Bank v. Louisiana Pipe & Steel Fabricators, LLC, 2011-0839 (La. App. 1st Cir. 12/21/11), 80 So. 3d 1209, 1213.

Furthermore, even if this affidavit were of sufficient evidentiary quality to establish that Kimco Insurance Company has some obligation to Federal Insurance to reimburse the defense costs incurred by Federal Insurance on behalf of Kimco Realty, we note that there is no suggestion in the affidavit that Kimco Insurance Company has actually reimbursed those costs. And, even if the record demonstrated that Kimco Insurance Company

had in fact paid Kimco Realty's defense costs, the assertions in Brettschneider's affidavit suggest that Kimco Insurance Company is a separate legal entity from Kimco Realty, whether a subsidiary or not. See Bujol v. Entergy Services, Inc., 2003-0492 (La. 5/25/04), 922 So. 2d 1113, 1127, and Horseshoe Entertainment v. Lepinski, 40,753 (La. App. 2nd Cir. 3/8/06), 923 So. 2d 929, 934-935, writ denied, 2006-0792 (La. 6/2/06), 929 So. 2d 1259 (noting that a corporation is a legal entity distinct from its shareholders, and the same principle applies where one corporation wholly owns another.). Kimco Insurance Company is not a party to this suit, and Kimco Realty has offered no factual basis that would allow it to assert any right that may belong to Kimco Insurance Company for reimbursement of those defense costs.

In sum, the payment of defense costs is an essential element of Kimco Realty's indemnity claim. By demonstrating an absence of factual support for that essential element, Dollar Tree shifted the burden of production to Kimco to produce evidence that demonstrates the existence of a genuine issue for trial. Kimco Realty has acknowledged that it has not in fact reimbursed Federal Insurance for defense costs incurred on its behalf, and it has not offered any evidence that it has reimbursed any other entity for these defense costs, thereby failing to establish that it has actually incurred those costs. Arnold, 667 So. 2d at 1067. Nor has Kimco Realty presented any evidence in support of its motion for summary judgment to demonstrate its right to assert an indemnity claim for defense costs on behalf of any other entity that is not a party to this suit. Considering the foregoing, we conclude that, in failing to establish that it has actually incurred any defense costs herein, Kimco Realty simply has not established by credible evidence its entitlement to judgment in its favor for reimbursement of defense costs

pursuant to the defense and indemnity provision of the Lease Agreement. For these reasons, the summary judgment in its favor must be reversed. Because we have found merit to the first and second assignments of error, we pretermitt consideration of the remaining assignments of error.

CONCLUSION

For the above and foregoing reasons, the trial court's April 17, 2013 judgment, denying Dollar Tree's motion for summary judgment and granting Kimco Realty's motion for summary judgment, is reversed. Judgment is hereby rendered, granting Dollar Tree's motion for summary judgment and dismissing with prejudice Kimco Realty's cross claim against Dollar Tree for defense and indemnification.⁶ Costs of this appeal are assessed against Kimco Realty Corporation.

REVERSED AND RENDERED.

⁶While Kimco Realty's evidence and argument may have raised a question as to whether some other entity not a party to this suit may be entitled to reimbursement of defense costs incurred on behalf of Kimco Realty, Kimco Realty has offered no evidence to support its entitlement to such relief, or even to raise a question of fact as to such entitlement. Accordingly, we dismiss Kimco Realty's cross claim against Dollar Tree **with prejudice**.