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NO. COA01-1021

NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2002

OLD REPUBLIC SURETY COMPANY,
Plaintiff,

v.

RELIABLE HOUSING, INC.
d/b/a OAKCREEK VILLAGE
and RICHARD M. PEARMAN, JR.,
Defendants/Third
Party Plaintiffs,

v.

Guilford County
No. 00 CVS 8477

DAVID L. MINTZER, JR.;
WILLIE HARGROVE d/b/a
WILLIE HARGROVE ELECTRIC,
and JAMES PENDERGRASS,
Third Party
Defendants.

Appeal by defendant Richard M. Pearman, Jr. from order entered 8 June 2001 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 16 May 2002.

Moore & Van Allen, PLLC, by Kevin M. Capalbo, for plaintiff appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Reid L. Phillips, for defendant appellant Richard M. Pearman, Jr.

TIMMONS-GOODSON, Judge.

Richard M. Pearman, Jr. ("Pearman") appeals the order of the trial court granting summary judgment in favor of Old Republic

Surety Company ("Surety"). After a careful review of the record, briefs, and arguments of counsel, we affirm the trial court.

The pertinent facts of this appeal are as follows: Pearman is President of Reliable Housing, Inc. d/b/a Oakcreek Village (hereinafter referred to as "Reliable Housing"). In his capacity as president, Pearman applied for a mobile home dealer bond ("the bond") with Surety on 10 December 1998. As an inducement for Surety to issue the bond, Pearman signed an indemnity agreement in favor of Surety, which stated the following:

[T]he undersigned agree as follows: . . . (2) to indemnify the Company and hold it harmless against all loss, liability, costs, claim damages, and expense, internal or external of whatever kind and nature including but not limited to investigative, accounting, engineering, the fee and disbursement of counsel whether on salary, retainer, or otherwise which the Company may sustain or incur for or by reason of said Company writing said bond(s).

Surety issued the bond on 11 December 1998.

On 10 February 2000, the North Carolina Department of Insurance ("Department of Insurance") notified Surety that John William Mims ("Mims") had filed a complaint against Reliable Housing and a claim against the bond. The claim was for repairs to Mims' mobile home which had been promised, but not completed. On 25 February 2000, Surety notified Pearman in writing of the claim by Mims. Surety requested that Pearman state Reliable Housing's position and defenses to the claim within ten (10) days.

On 28 February 2000, Pearman informed Surety that he had been previously unaware of Mims' claim. Pearman asserted that upon

receiving notification of the problems, he contacted David Mintzer ("Mintzer"), the general manager for Reliable Housing, and instructed him to complete the repairs. However, Pearman failed to respond to subsequent correspondence from Surety regarding the claim by Mims and further neglected to advise Surety of any possible defenses to the claim. Thereafter, Surety discovered that Reliable Housing failed to make the repairs. As a consequence of Reliable Housing's failure to repair the mobile home, Surety remitted payment to Mims in the amount of \$650.00.

On 15 March 2000, the Department of Insurance notified Surety of another claim against the bond. Kathleen Champion ("Champion") alleged that she placed a \$5000.00 deposit on a mobile home purchased from Reliable Housing, which was not refunded when the home was not delivered. The notification included copies of a receipt from Reliable Housing for a \$5000.00 deposit on a mobile home and a canceled check written to Reliable Housing for that same amount. Surety notified Pearman of Champion's claim, but neither Pearman nor any Reliable Housing representative responded. Subsequently, Surety reimbursed Champion under the bond for her deposit.

Surety filed a complaint against Pearman requesting specific performance and alleging breach of contract under the indemnity agreement. Pearman filed an answer and a third party complaint.¹ Surety, thereafter, filed a motion for summary judgment which the

¹Third party defendants failed to respond to the complaint, and a default judgment was subsequently entered against them.

trial court granted on 8 June 2001. Pearman now appeals.

In his first assignment of error, Pearman argues that the trial court erred by granting summary judgment in favor of Surety based upon the indemnification agreement. For the reasons discussed herein, we disagree.

Summary judgment is a device whereby judgment is rendered "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 any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001). "In ruling on a motion for summary judgment the evidence is viewed in the light most favorable to the non-moving party." *Hinson v. Hinson*, 80 N.C. App. 561, 563, 343 S.E.2d 266, 268 (1986). Thus, the dispositive issue on appeal is whether, as a matter of law, Surety was entitled to payment from Pearman under the indemnity agreement.

Pearman argues that in order for Old Republic to be entitled to indemnification, Old Republic must prove the following: (1) that Reliable Housing was liable for the claims; (2) that an adequate investigation was performed which showed that the claims were made in good faith; and (3) the claims were properly paid to the claimants. We disagree with Pearman's evaluation of the law concerning the interpretation of indemnity agreements.

When interpreting a contract of indemnity, the rules of contract construction apply. *Kirkpatrick & Assoc. v. Wickes Corp.*,

53 N.C. App. 306, 308, 280 S.E.2d 632, 634 (1981). Where the language of the indemnity agreement is clear and unambiguous, the Court must interpret it as written. *Id.* It follows that indemnity agreements are generally to be "construed to cover all losses, damages, and liabilities which reasonably appear to have been within the contemplation of the parties, but not those which are neither expressed nor reasonably inferrable from the terms." *Id.*

Pearman's contentions concerning Surety's obligation of the indemnity agreement do not coincide with the agreement's clear and unambiguous language. Under the contract, Pearman agreed to hold Surety harmless for expenses related to payments made under the bond. Surety is therefore entitled to recover from Pearman all expenses incurred as a result of paying claims made against Reliable Housing.

Strict indemnity provisions, such as the one in the instant case, are quite common and have been upheld repeatedly in North Carolina and a variety of other jurisdictions. See *Fidelity & Dep. Co. of Maryland v. Bristol Steel*, 722 F.2d 1160, 1163 (4th Cir. 1983) (citing several cases, in both state and federal courts, where similar contracts have been upheld). Similar to other bargained-for agreements, the exception to upholding these strict indemnity agreements occurs only in situations where "the payment has been made through fraud or lack of good faith." *Id.* (citation and internal quotation marks omitted)

In the instant case, there is no evidence that Surety committed fraud or lacked good faith in remitting payment based

upon the claims made against the bond. The evidence tends to show that Surety acted pursuant to its obligation under the bond. Although Surety promptly notified Pearman of the claims by Mims and Champion, at no time did Pearman submit any defenses to the claims, confirm repairs on the Mims home, or reimburse Champion for her undelivered home. Specifically concerning Champion's claim, Surety received ample evidence upon which it could rely as to the legitimacy of the claim, including a canceled check in the amount of \$5000.00 payable to Reliable Housing and a purchase agreement reflecting the \$5000.000 deposit payment by Champion. Furthermore, pursuant to the motion for summary judgment, an affidavit was submitted reflecting that Surety had indeed reimbursed Champion. Pearman presented no evidence contesting the validity of Champion's canceled check or the purchase agreement.

Pearman neglected to take action on or provide defenses to the claims; therefore, Surety's only recourse was to pay the claims totaling \$5650.00. Given these facts, the terms of the indemnity agreement dictate that Pearman is clearly liable to Surety. Thus, no genuine issue of fact existed as to Pearman's liability and Surety was entitled to judgment as a matter of law. This assignment of error is therefore overruled.

In the second assignment of error, Pearman alleges that the trial court erred in relying upon an affidavit containing hearsay statements in violation of Rule 56(f) of our Rules of Procedure. See N.C.R. App. P. 56(f) (2002). In order to preserve an alleged error for appellate review, the complaining party must lodge a

specific objection to that error and "obtain a ruling upon the party's request, objection or motion." N.C.R. App. P. 10(b)(1) (2002). Since the record in this case is devoid of any ruling as to allegedly objectionable admission, Rule 10(b)(1) precludes review. Being bound by the record, we dismiss this assignment of error.

We conclude that the trial court committed no error and therefore affirm its 8 June 2001 order.

Affirmed.

Judges MARTIN and CAMPBELL concur.

_____ Report per Rule 30(e).