IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

CARPENTER CO.	:	JUNE TERM, 2012
	:	
	:	NO. 00019
v.	:	
	:	COMMERCE PROGRAM
GALLAGHER TIRE, INC.	:	
	:	CONTROL NOS. 13032872,
	:	13032266

ORDER

AND NOW, this 29th day of April, 2013, upon consideration of the motion for summary judgment of plaintiff, Carpenter Co., and the cross motion for summary judgment of defendant, Gallagher Tire, Inc., it is hereby

ORDERED

as follows:

1. Plaintiff's motion for summary judgment in respect to the claim for breach of contract for indemnification is **GRANTED**.
2. Count II of the complaint alleging breach of contract for failure to procure insurance is **DISMISSED WITHOUT PREJUDICE**.
3. Defendant's motion for summary judgment is **DENIED**.

Judgment is entered in favor of plaintiff and against defendant in the amount of $1,445,461.43.

BY THE COURT:

Glazer, J.

GLAZER, J.

Carpenter Co. Vs Gallag-ORDOP

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	:	CONTROL NOS. 13032872, 13032266

OPINION

GLAZER, J. April 29, 2013

Before the court are cross motions for summary judgment of the plaintiff, Carpenter Co. and defendant, Gallagher Tire, Inc. For the reasons set for the below, plaintiff's motion for summary judgment as to indemnification is granted, plaintiff's claim for failure to procure insurance is dismissed without prejudice, and defendant's motion for summary judgment is denied.

FACTS AND PROCEDURAL BACKGROUND

Plaintiff commenced the present action in June of 2012 alleging two counts of breach of contract for indemnification and failure to procure insurance. Plaintiff, Carpenter Co. ("Carpenter") entered into a lease agreement with defendant, Gallagher Tire, Inc. ("Gallagher") in which plaintiff agreed to supply defendant with a Carpenter Rely® Tire Fill System which included a CAW-107 Rebuilt Lincoln Powerfill Flushless Type Pump (the "Equipment") in May of 2003. The lease agreement is governed by the laws of the Commonwealth of Virginia and includes two clauses in which provide that defendant is obligated to indemnify plaintiff and

procure insurance naming plaintiff as an additional named insured. Specifically, the indemnification clause states:

> **Indemnification**. Customer shall Indemnify, defend and hold Carpenter harmless from and against any and all claims, actions, damages, liability, and expense in connection with any loss, destruction of or damage to the equipment; for defective production resulting from improper use of the Equipment; for any accident or injury to Customer, its employees, or anyone else; and for any damages, consequential or otherwise, as a result of the improper use, adjustment, repair, or operation of the Equipment, or any part.

See plaintiff's complaint, Exhibit A, ¶ 13.

Additionally, the insurance provision provides:

> **Insurance**. Throughout the term of this Lease Customer shall carry full and adequate insurance covering risk of loss or damage by fire, extended coverage perils and other risks generally, provided for, in an amount not less than the maximum insurable value of the Equipment. Customer shall provide Carpenter with a certificate evidencing such insurance coverage, and providing that such insurance may not be modified or canceled except upon at least thirty days advance notice to Carpenter. Customer shall also maintain liability insurance coverage, for bodily injury and property damage liability resulting from operation, use and maintenance of the Equipment for amounts not less than $1,000,000. Customer's policy shall name Carpenter as an additional named insured, and Customer shall provide Carpenter with certificates of insurance evidencing such coverage. All certificates of insurance required hereunder shall be provided to Carpenter prior to installation of the Equipment. Customer acknowledges value of equipment to be $6,000.

Id. at Exhibit A, ¶ 12.

In or around May 4, 2003 defendant entered into an agreement with Ohio Casualty Insurance Company ("Ohio Insurance"). Ohio Insurance issued a commercial general liability policy bearing the policy number BKW 04 53030970 ("insurance agreement") identifying Gallagher Tire Inc. as the named insured. This policy was effective from May 4, 2003 until May

4, 2004. The policy was delivered in Pennsylvania and is regulated by Pennsylvania law. Pursuant to the lease agreement entered into by the plaintiff and defendant, defendant was required to name plaintiff as an additional named insured. Defendant did not name plaintiff as an additional named insured. However, the insurance agreement provides:

> 1. **BLANKET ADDITIONAL INSURED (OWNERS, CONTRACTORS, or LESSORS)**
>
> **Who Is An Insured (Section II)** is amended to include as an insured any person or organization whom you are required to name as an insured on this policy under a written contract or agreement...
>
> The insurance provided to an additional insured is limited as follows:
>
> ii. The person or organization is only an insured with respect to liability:
>
> 1. Arising out of real property, as described in a written contract or agreement, that you own, rent lease or occupy; or
> 2. Resulting from your ongoing operations performed for that insurance.

See defendant's answer in opposition to plaintiff's motion for summary judgment, Exhibit G.

Subsequent to entering into the lease agreement and the insurance agreement, an employee of defendant, Ben Carroll ("Carroll"), was injured on or around July 30, 2003, while operating the Equipment. Carroll then initiated a suit, Benjamin Carroll v. Michelin Tire Corporation et al., in the Dauphin County Court of Common Pleas, Pennsylvania, docket no. 2005-CV-022140-CV ("underlying action"), against multiple defendants including plaintiff who is the manufacturer of the equipment.[1] Id. at Exhibit B. The underlying action alleged multiple claims of products liability, negligence, and breach of warranty against plaintiff. Carroll asserted that, in the scope of his employment, he used the equipment leased by plaintiff and sustained

[1] Gallagher was not named as a defendant in the underlying action.

serious injuries because the equipment was defectively manufactured, designed, and lacked adequate warning. Carroll claimed his damages were in excess of $2,000,000.

During discovery in the underlying action, it was revealed that defendant was negligent and actually the cause of the incident that injured Carroll. John Gallagher, defendant's president, testified in his deposition that an internal investigation showed that it was not the fault of the equipment but rather an "operation error." See plaintiff's motion of summary judgment, Exhibit B. Moreover, John Gallagher said, "the tire was not vented properly to release the pressure." Id. Subsequent to this discovery, plaintiff notified Mr. Gallagher by mail that pursuant to the lease agreement and the recent discovery indicating that it was an operational error, defendant had a duty to defend, indemnify, and hold Carpenter harmless. See plaintiff's complaint, Exhibit C. Moreover, plaintiff advised defendant that, according to the lease agreement, defendant was obligated to procure insurance naming plaintiff as an additional insured and requested that the insurance be provided, and that all information evidencing Gallagher's insurance claim and notice of claim regarding Carpenter and Gallagher's liability under the lease agreement, be produced. Id.

On or around August 28, 2008, Ohio Insurance initiated a suit against Carpenter and Zurich American Insurance Company.[2] See U.S.D.C. E.D.Pa. Case No. 08-cv-0481. Ohio Insurance is seeking a declaratory judgment pursuant to 28 U.S.C.A. § 2201 for the purpose of determining the relative rights, liabilities, and obligations, if any, of Ohio Casualty and Carpenter under the policy. This matter is currently pending in district court.

Although plaintiff contends that the accident was the fault of defendant Gallagher, the parties ultimately settled the underlying Dauphin County action on or around September 23,

[2] Zurich American Insurance Company has since been dismissed from the suit.

2008. In the settlement, plaintiff agreed to pay to Carroll the total sum of $800,000.[3] See plaintiff motion for summary judgment, Exhibit J. Moreover, defendant's workers compensation insurer compromised its lien, in exchange for $500,000, with the obligation to pay ongoing medical care. Id. Plaintiff further alleges that it spent $466,049.64 in attorney's fees and $179,411.79 in costs, including experts, which totaled $645,461.43. Id. at Exhibit K. Thus, the total costs of the underlying litigation resulted in expenditures totaling $1,445,461.43, which plaintiff now seeks from defendant through indemnification. Id. at Exhibit J & K. Before the court are the cross motions for summary judgment of plaintiff and defendant.

DISCUSSION

I. Standard of Review

The court shall enter judgment whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense that could be established by additional discovery. Pa.R.C.P. 1035.2. A motion for summary judgment is based on an evidentiary record that entitles the moving party to a judgment as a matter of law. Note to Pa.R.C.P. 1035.2. When considering the merits for summary judgment, a court views the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Jones v. SEPTA, 565 Pa. 211, 772 A.2d 435, 438 (Pa. 2001). Further, the court may grant summary judgment only where the right to such a judgment is clear and free from doubt. Marks v. Tasman, 527 Pa. 132, 589 A.2d 205, 206 (Pa. 1991).

The Restatement (Second) of Conflict of Laws § 187(1) states that, "[t]he law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could have resolved by an explicit provision in their

[3] Defendant does not dispute the reasonableness of the settlement amount.

agreement directed to that issue." Restatement (Second) of Contracts of Law § 187(1). Further, in applying this section, choice of law provisions of a contract will be given effect. See Howard Savings Bank v. Cohen, 414 Pa. Super. 555, 607 A.2d 1077, 1078 (Pa. Super. 1992). Although Pennsylvania generally respects the party's choice of law, "Pennsylvania's conflict of law rules direct that a Pennsylvania court apply Pennsylvania's procedural laws when it is serving as the forum state regardless of which state's substantive law applies." Branca v. Conley, 2001 WL 1807403 (Pa. Com. Pl. Ct. 2001)(citing Larrison v. Larrison, 750 A.2d 895, 898 (Pa. Super. Ct. 2000)). The lease agreement has a choice of law provision which states, "[t]his lease shall be governed by the laws of the Commonwealth of Virginia." See plaintiff's complaint, Exhibit A, p. 3.[4] Therefore, the court will look to Virginia substantive law in interpreting and enforcing the lease agreement and Pennsylvania procedural law.

II. Breach of Contract – Indemnification

Under Virginia Law, the elements of a breach of contract action are (1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant's violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of obligation. Brown v. Harms, 251 Va. 301, 306, 467 S.E. 2d 805, 807 (1996).

Plaintiff has established and satisfied all elements for a breach of contract claim. The parties entered into an agreement and agreed to paragraph 13, the indemnification clause.

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[4] Defendant alleges that it did not initial the second and third pages which was a condition required by the lease agreement and therefore pages two and three of the contract are invalid. However, the court finds this argument meritless. The lease agreement states: "[i]f this Agreement is satisfactory, please indicate your acceptance by signing in the space provided below and initialing pages two and three at the bottom of the page." See plaintiff's complaint, Exhibit A, p 1. In addition to the initialing requirement, the lease agreement states on page one, "Carpenter Co. hereby leases to you the equipment described below under the terms and conditions set forth and on pages two and three, attached." Id. Defendant signed the first page but did not initial pages two and three. This court finds that pages two and three are incorporated by express reference. Moreover, "[b]oth the offer and acceptance may be by word, act or conduct which evince the intention of the parties to the contract." Green's Ex'ors v. Smith, 146 Va. 442, 452, 131 S.E. 846, 848 (1926). The parties performed under the terms and conditions set forth on pages two and three and, therefore, the contract is valid.

Pursuant to paragraph 13 of the lease agreement, defendant was obligated to indemnify plaintiff, "for any accident or injury to Customer, its employees, or anyone else; and for any damages, consequential or otherwise, as a result of the improper use, adjustment, repair or operation of the Equipment, or any part thereof." See plaintiff's complaint, Exhibit A, ¶ 13. The duty to indemnify was triggered when Carroll, an employee of the defendant, was injured as a result of an operation error. As referenced above, Mr. Gallagher admitted in sworn testimony that the accident happened, not because of the pump, but instead because of an operation error. See plaintiff's motion of summary judgment, Exhibit B. Defendant did not indemnify plaintiff in the underlying action and thus damages resulted.

Defendant first argues that the indemnification clause fails as a matter of law because indemnification clauses that require indemnification for the acts of another party's negligence must be clear and unequivocal. This argument initially fails because, according to Mr. Gallagher, president of defendant Gallagher Tire, Inc., the negligence is the fault of the defendant and not of the plaintiff. Additionally, the indemnity clause does specifically provide that Customer (Gallagher) shall indemnify Carpenter "for any accident or injury to Customer, its employees, or anyone else; and for any damages, consequential or otherwise, as a result of the improper use, adjustment, repair or operation of the Equipment, or any part thereof." See plaintiff's complaint, Exhibit A, ¶ 13. The underlying action clearly falls within this description.

Moreover, Virginia law allows for parties to contract for indemnification covering their own negligence. See Estes Express Liens, Inc., et al. v. Chopper Express, Inc., 641 S.E.2d 476, 479-480 (Va. 2007). The indemnification clause in Estes provided:

> [Chopper] agrees to indemnify, defend and hold [Estes] harmless from:

> Any and all loss, costs, claim, expense, cause of action, loss of use and liability by reason of injury (including death) to persons or damage to property arising out of use, operation, ownership, maintenance or control of a [leased] Vehicle whether covered by insurance or not, including claims in excess of insurance limits and all claims determined not to be covered by insurance irrespective of who, among [Chopper] or its insurance carrier or others, may be the cause for such failure of coverage or recovery in excess of coverage.

Id. at 361. The court held that the agreement was, "enforceable even to the extent that it would entitle Estes to be reimbursed from Chopper in the amount of its loss as a result of ... injuries caused by Estes' alleged negligence." Id. at 367. This indemnification clause closely resembles the clause in the current matter and therefore, defendant's argument fails.

Defendant further argues that the lease does not contain a waiver of immunity provided to defendant under the Workers Compensation Act as required by law and is thus unenforceable. Virginia's Workers Compensation Act provides an exclusive remedy for employees injured in the course of employment. See Va. Code § 65.2-307. However, the "the exclusivity provision of their respective workers' compensation statutes do not prohibit the enforcement of an express indemnity agreement by a third party against an employer." Safeway, Inc. v. DPI Midatlantic, Inc., 270 Va. 285, 289 (Va. 2005)(citation omitted). In Safeway, the indemnification clause stated that the indemnification encompassed any person, "including but not limited to employees of [Safeway]." Id. at 287. The court found the indemnification clause to be valid and enforceable. Id. at 290. The indemnification clause in the current matter specifically references employees and thus the argument is meritless. Therefore, plaintiff's motion for summary judgment, in reference to the breach of contract for indemnification is granted. Moreover, defendant's motion for summary judgment, as to the breach of contract for indemnification is denied.

III. Breach of Contract – Failure to Procure Insurance

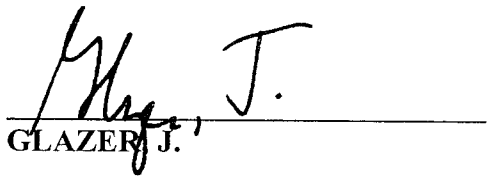
Although the issue was neither raised nor briefed by either party, this court finds that plaintiff's claim for breach of contract for failure to procure insurance is not yet ripe and is therefore dismissed without prejudice. In deciding whether the doctrine of ripeness bars our consideration of an issue, the court considers "whether the issues are adequately developed for judicial review and what hardships the parties will suffer if review is delayed." Alaica v. Ridge, 784 A.2d 837, 842 (Pa. Cmwlth. 2001) (quoting Treski v. Kemper Nat'l Ins. Cos., 449 Pa. Super. 620, 674 A.2d 1106, 1113 (Pa. Super. 1996)). The factor to consider under the "adequately developed" requirement include: whether the claim involves uncertain and contingent events that may not occur as anticipated or at all; the amount of fact finding required to resolve the issue, and whether the parties to the action are sufficiently adverse. Id. Ohio Insurance is seeking a declaratory judgment pursuant to 28 U.S.C.A. § 2201 for the purpose of determining a question in actual controversy between the parties as to the relative rights, liabilities, and obligations, if any, of Ohio Casualty and Carpenter under the policy. This matter is currently pending in district court. In Ohio Casualty's federal complaint, they seek a declaratory judgment as to whether it has a duty to defend and indemnify as an additional insured. This matter is directly related to the current count for breach of contract for failure to procure insurance and the district court's determination on whether the blanket insurance provision provides insurance to plaintiff will affect the outcome of this claim. Therefore, this matter is not yet ripe and is dismissed without prejudice.

CONCLUSION

In light of the evidence, plaintiff's motion for summary judgment for breach of contract, in regards to indemnification is granted. Moreover, based on the foregoing, defendant's motion

for summary judgment is denied. Count II for breach of contract for failure to procure insurance is dismissed without prejudice. Judgment is entered in favor of plaintiff and against defendant in the amount of $1,445,461.43.

BY THE COURT:



GLAZER, J.