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

AMERICAN CONTRACTORS INSURANCE GROUP, Daniel Keating Company and Lott Constructors, Inc., Plaintiffs,	:	November Term
	:	No.: 1843
v.	:	Commerce Program
HARLEYSVILLE MUTUAL INSURANCE GROUP and Thompson Masonry Contracting Company, Defendants.	:	Control Number 030191

O R D E R

And Now this 17th day of September 2003, upon consideration of American Contractors Insurance Group, Daniel Keating Company and Lott Constructors, Inc.'s Partial Motion for Summary Judgment, Harleysville Mutual Insurance Group and Thompson Masonry Contracting Company's Cross Motion for Summary Judgment, responses in opposition, reply briefs, the respective memoranda, all matters of record, and in accordance with the contemporaneous opinion being filed of record, it is hereby **Ordered** and **Decreed** that:

1. Plaintiffs partial Motion for Summary Judgment is **granted in part and denied in part;** and

2. Defendants Motion for Summary Judgment is **Denied.**

BY THE COURT

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C. DARNELL JONES, II J

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C. Darnell Jones II.....

O P I N I O N

This dispute arises over the interpretation of indemnification provisions contained within various construction contracts between the parties. Presently before this court is plaintiffs' Daniel J. Keating Company and American Contractors Insurance Group's partial motion for summary judgment and Thompson Masonry Contracting Company and Harleysville Mutual Insurance Group's cross motion for summary judgment. For the reasons discussed below, this court will grant in part and deny in part plaintiffs partial motion for summary judgment and deny defendants motion for summary judgment.

BACKGROUND

The instant action arises from a settlement of an underlying personal injury lawsuit relating to the December 3, 1993 collapse of scaffolding during a construction project at the Roberto Clemente Middle School in Philadelphia, Pennsylvania. At the time of the underlying accident, the relevant parties were the School District of Philadelphia as the owner of the Roberto Clemente Middle School, Daniel J. Keating Company (Keating) as the construction

manager, Lott Constructors, Inc. (Lott) as the contractor, Thompson Masonry Contracting (Thompson) as the subcontractor and Donald Harnish and Robert Geist as employees of Thompson and the underlying plaintiffs.

On or about June 1993, Keating entered into a contract with the School District of Philadelphia to act as construction manager for the City of Philadelphia in the construction of the Roberto Clemente School building. The construction management agreement between the School District of Philadelphia and Keating contained an indemnification agreement. The indemnification agreement provides:

> 7.1 Notwithstanding anything to the contrary contained herein, the Construction Manager(Keating) shall release, indemnify, defend and hold harmless the School District, its officers, agents and employees from and against all claims, demands, damages, delays, losses and expenses, including, but not limited to, litigation and reasonable attorneys fees, arising directly out of or resulting from the Construction Manager's (Keating's) performance of its obligations under this agreement or through the negligence of the Construction Manager (Keating's) or caused in whole or in part by any acts or omissions of the Construction Manager, its agents, servants, subcontractors, officers, employees or servants, anyone directly or indirectly employed by the Construction Manager or anyone for whose acts the Construction Manager may be liable. Such obligation shall be construed to negate, abridge or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any other party or person described in this Article. This indemnification obligation is not limited by, but is in addition to the Performance Bond and insurance obligations contained in this Agreement. (Plaintiffs motion for summary judgment Exhibit E)

On June 14, 1993, Lott entered into an agreement with the School District of Philadelphia to perform construction work at the Roberto Clement School building. The School District/Lott contract required that Lott indemnify and defend the School District and its construction and its construction manager, Keating. The indemnification provision within the School District/Lott agreement provides:

> GC 4.17.1 The contractor shall, at his sole cost and expense, release, indemnify, defend, and satisfy all judgments and hold harmless the School District, the Construction Manager and the Architect and their respective officers, agents, representatives and employees from and against all claims, demands, actions, judgments, costs, penalties, liabilities, damages, delays, losses (including but not limited to attorneys' fees), arising out of or resulting from the

contractor's performance or non performance of the Work, or through the negligence of the Contractor or caused in whole or in part by any acts or omissions of the contractor, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable (including Sub-subcontractors and material suppliers), regardless of whether or not it is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to any party or person described in this Paragraph GC-4.17.

GC 4.17.2 In any all claims against the School District, the Construction Manager, or the Architect or any of their respective officers, agents, representatives or employees by any employee of the Contractor, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, the indemnification obligation under this Paragraph GC-4.17 shall not be limited in any way by any limitation on the amount or type of damages, compensation, or benefits payable by or for the Contractor or any Subcontractor under workers' or workmen's compensation acts, disability benefit acts, or other employee benefits acts.

The School District/Lott contract further provides:

Sub contractual Relations

GC 5.3.1 By an appropriate agreement, written where legally required for validity, the Contractor shall require each subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by the terms of the Contract documents, and to assume toward the Contractor all the obligations and responsibilities which the Contractor, by these Documents, assumes toward the School District. Said agreement shall preserve and protect the rights of the School District under the contract documents with respect to the work to be performed by the Subcontractor so that the subcontracting thereof will not prejudice such rights, and shall allow to the Subcontractor, unless specifically provided otherwise in the Contractor-Subcontractor Agreement, the benefit of all rights, remedies, and redress against the Contractor that the contractor, by these documents, has against the School District. Where appropriate, the Contractor shall require each Subcontractor to enter into similar agreements with his Sub-subcontractors. The Contractor shall make available to each proposed Subcontractor, prior to the execution of the Subcontract, copies of the contract documents to which the Subcontractor shall be bound by this Paragraph GC-5.3, and he shall identify to the Subcontractor any terms and conditions of the proposed Subcontract which may be at variance with the Contract Documents. Each Subcontractor shall similarly make copies of such Documents available to his subcontractors. The Contractor shall require each Sub contractor, to the extent of the work to be performed by the Subcontractor, to assume and perform all the obligations and responsibilities for maintenance of and access to books, records, and documents as is set forth elsewhere in these Contract Documents. (Plaintiffs motion for summary judgment Exhibit F)

On September 14, 1993, Thompson entered into an agreement with Lott to perform subcontract masonry services for Lott in connection with Lott's contract with the School District.

The Lott/ Thompson contract references the School District/Lott contract and incorporates the provisions of that contract as part of the subcontract between Lott/Thompson. (Plaintiffs motion for summary judgment Exhibit G) Additionally, Thompson expressly agreed to be bound to Lott by the terms of the School District/Lott contract and agreed to accept all the obligations and responsibilities which Lott assumed towards the School District and Keating. (Plaintiffs motion for summary judgment Exhibit G p.3) The Lott/Thompson contract also provides a covenant of indemnification as follows:

> 10(a) Subcontractor shall indemnify and hold contractor harmless from and against all claims and causes of action for damages and expenses of every kind and character (including cost of suit and reasonable attorneys fees) asserted against contractor, its subsidiaries and affiliated companies, its agents, servants and employees, by any firm, person, corporation or other legal entity arising:
>
> 1. From injury to or death from any employees of subcontractor.
> 2. From injury to or death of any person or damage to any property arising in any manner while subcontractor has complete control and use of the premises in question.
> 3. From injury to or death of any person or damage to any property occurring as a result of concurrent negligence, strict liability, breach of express or implied warranty, tortuous acts, conduct or conditions of any combination thereof: (i) contractor, its agents, servants and employees and Subcontractor, its agents, servants and employees or any other person, corporation or legal entity for which subcontractor in law would be liable or (ii) Contractor, its agents, servants and employees and Subcontractor, its agents, servants, and employees or any other person, corporation or legal entity for which Subcontractor in law would otherwise be liable and any third person, corporation or legal entity. (Plaintiffs motion for summary judgment Exhibit G)

Thompson was insured for liability and workers' compensation by Harleysville Mutual Insurance Company, Inc. (Harleysville). On September 14, 1993, a Certificate of Insurance was issued by Harleysville whereby Lott was identified as a Certificate Holder and named as an additional insured on the Policy. As an additional insured, section (II)(A)(1)(b) of this insurance policy extends coverage to and requires that Harleysville defend Lott from suits and claims of

bodily injury. Pursuant to the policy, Harleysville is required to defend and indemnify Lott and Keating pursuant to obligations assumed by its insured, Lott and Thompson, in an "insured contract." Under the policy "insured contract" is defined in section (II) (F)(6)(g) as "that part of any other contract or agreement pertaining to your business under which you assume the tort liability of another to pay damages because of "bodily injury" or "property damage" to a third person or organization, if the contract or agreement is made prior to the "bodily injury" or "property damage." Tort liability means a liability that would be imposed by law in the absence of any contract or agreement."

On December 3, 1993 Harnish and Geist were injured when they fell from a scaffold. As a result, Harnish and Geist instituted suit against the School District and Keating by writ of summons on November 27, 1995 and filed a complaint on February 6, 1996. On March 18, 1996, Keating filed a writ to join Lott as an additional defendant. Lott was insured by American Contractors Insurance Group. On June 14, 1996, Michael Creedon, Esquire filed an entry of appearance on behalf of Lott and filed a praecipe and rule to file a complaint. On August 7, 1996, Keating and Lott tendered their defense to Harleysville. (Letter dated August 7, 1996 attached as Exhibit H to plaintiffs third amended complaint) On August 21, 1996, Harleysville acknowledged receipt of the letter requesting them to accept the tender by Lott and Keating. Harleysville stated they would investigate the matter and provide a response. (Harleysville letter dated August 21, 1996 attached hereto as Exhibit I to plaintiffs third amended complaint) Harleysville never accepted or rejected the tender. On September 20, 1996, Michael P. Creedon, Esquire, withdrew his appearance on behalf of Lott and Daniel J. O'Brien Esquire entered his appearance for Lott. At the time, O'Brien represented Keating. On April 27, 1997, a

joinder complaint was filed by Keating against Lott.

The case proceeded to trial before the Honorable Anne Lazurus in Philadelphia County and a nonsuit was granted in favor of defendants on April 30, 1997. Plaintiffs appealed to the Commonwealth Court which reversed the nonsuit and remanded the case for trial. Defendants filed a Petition for Allowance of Appeal to the Supreme Court which was granted. The Supreme Court affirmed. At that point a settlement in the amount of $ 475,000.00 occurred.

Thereafter, the instant suit was filed by American Contractors Insurance Group, Daniel J. Keating Company and Lott Constructors, Inc. against Thompson Masonry Contracting Company and Harleysville Mutual Insurance Group seeking indemnification.

DISCUSSION

I. Legal Standard

A proper grant of summary judgment depends upon an evidentiary record that either (1) shows the material facts are undisputed or (2) contains insufficient evidence of facts to make out a prima facie cause of action or defense. Destefano & Associates, Inc. v. Cohen, 2002 WL 1472340,* 2 (Pa. Com. Pl. 2002) (Herron) Under Pa. R.C. P. 1035.2(2), if a defendant is the moving party, he may make the showing necessary to support the entry of summary judgment by pointing to evidence which indicates that the plaintiff is unable to satisfy an element of his cause of action. Id. The nonmoving party must adduce sufficient evidence on an issue essential to its case and on which it bears the burden of proof such that a jury could return a verdict favorable to the non-moving party. Id. When the plaintiff is the moving party, "summary judgment is proper when if the evidence, viewed favorably to the plaintiff, would justify recovery under the theory he has pled." Id; quoting Horne v. Haladay, 728 A.2d 954, 955 (Pa. Super. 1999); citing Pa. R.

Civ. P. 1035.2) Summary judgment may only be granted in cases where it is "clear and free from doubt that the moving party is entitled to judgment as a matter of law." Id.

II. American Contractors Insurance Group and Daniel J. Keating Company's Partial Motion for Summary Judgment

Plaintiffs argue that they are entitled to summary judgment because Thompson was obligated to indemnify and defend Keating in the underlying action. Thompson on the other hand argues that American Contractors is barred from seeking indemnification by the doctrine of accord and satisfaction, that plaintiffs lack standing to seek indemnification since they suffered no loss or damages, and that plaintiffs failed to prove that the payment made to the underlying plaintiffs was fair and reasonable.

The right to indemnity arises by operation of law and will be allowed where necessary to prevent an unjust result. City of Wilkes-Barre v. Kaminski Bros, Inc., 804 A.2d 89, 92 (Pa. Cmwlth. 2002) To determine whether Thompson had an obligation under the indemnification agreement to defend plaintiffs from the underlying personal injury action the court must look to the general principles of contract interpretation. Mace v. Atlantic Refining Marketing Corp., 567 Pa. 71,785 A.2d 491, 496 (Pa. 2001) A fundamental rule in construing a contract is to ascertain and give effect to the intent of the contracting parties. Id. at 496. " It is firmly established that the intent of the parties to a written contract is contained in the writing itself." Mace, supra. quoting Shovel Transfer and Storage, Inc. v. Pennsylvania Liquor Control Bd., 559 Pa. 56, 65, 739 A.2d 133, 137 (Pa. 1999)(citations omitted). When the words of a contract are clear and unambiguous, the meaning of the contract is ascertained from the contents alone. Id.

After reviewing the record in this matter, this court concludes that Thompson and

Harleysville owed Keating a duty of indemnification. The Lott/Thompson subcontract specifically and unambiguously identifies and incorporates the School District/Lott Contract as part of its contract. The Lott/Thompson subcontract provides in part:

> Specs, Volumes I & II dated 4/5/93, Bullitin #1 dated 5/4/93, Bullitin #2 dated 5/11/93, Bullitin # 3 dated 5/18/93, and related dwgs. General Conditions, GCi-GC72 of Specs, dwgs enumerated in Exhibit "A" all of which are made a part of said contract and all of which are now made a part of this subcontract, said contract, plans, specifications, addenda and other documents above set forth being hereinafter referred to as "Contract Documents." (Plaintiffs motion for summary judgment Exhibit G)(emphasis added)
>
> .....
>
> 3. Subcontractor (Thompson)has read and is thoroughly familiar with said Contract Documents(School District/Lott contract) and agrees to be bound to Contractor (Lott) by the terms of said Contract Documents (School District/Lott contract) in so far as they relate in any part or in any way to the work undertaken herein, and to assume towards contractor (Lott) in connection with the work covered by this subcontract, all of the obligations and responsibilities which Contractor (Lott) by those documents assumes towards the owner (School District) or anyone else (Keating). A copy of each Contract Document is on display and available at the office of the Contractor. (Plaintiffs motion for summary judgment Exhibit G) (emphasis added)

These provisions illustrate Thompson and Lott's intention to incorporate the terms of the School District/Lott Contract into the subcontract. Although Thompson is not a signatory to School District/Lott contract, the above provisions identify the contract between the School District and Lott as a "Contract Document" and further state that the Contract Documents are made a part of the subcontract. These provisions make it clear that Thompson agreed to perform and be bound by the subcontract in accordance with the School District/Lott contract.

The School District/Lott contract requires Lott to indemnify and defend the School District and Keating. (Plaintiffs motion for summary judgment Exhibit F) It further requires that each subcontractor, in this case Thompson, to be bound to Lott by the terms of the School District/Lott contract and for the subcontractor, Thompson, to assume toward Lott all the obligations and responsibilities which Lott assumes toward the School District. (Id.) Based on

the foregoing provision, Thompson owes Keating a duty to indemnify. Any other interpretation would distort the meaning of the language used and render the incorporation provision and paragraph 3 meaningless. See Bernotas v. Super Fresh Food Markets, Inc., 2002 Pa. Super. 225, 816 A.2d 225, 230-231 (Pa. Super. 2002) When the words of a contract are clear, we will not give them a meaning that conflicts with that of the language actually used. Id; citing Anchel v. Shea, 762 A.2d 346 (Pa. Super. 2000).

Defendants question whether the injury for which plaintiffs seek indemnification is within the purview of the subcontract. The court finds that the injury for which plaintiffs seek indemnification is within the purview of the subcontract. Here, Harnish and Geist were employees of Thompson. The subcontract between Lott/Thompson provides that Thompson shall indemnify Lott (and Keating as a result of the flow through provision) from injury to or death to any employee of the subcontractor. (Plaintiffs motion for summary judgment Exhibit G p. 2 ¶ 10 (a)(1)) This provision does not require as a prerequisite to indemnification a demonstration of culpability. Rather, under the terms of the subcontract, Thompson is to assume the obligations for the injuries.

In Bernotas v. Superfresh Food Markets, Inc., supra. the court was faced with the similar issue faced by the court here. In interpreting the contract and the subcontract, the Bernotas court found that the incorporation clause created a conduit through which the obligations embodied in the prime contract flowed from the contract to the subcontract to the extent that the obligations were within the ambit of the subcontract. Id. at 231. The court referred to the contract provision as a "flow-through" or "conduit" clause and stated that the purpose of the clause is to assure that a subcontractor is bound to the prime contractor in the same manner that the prime contractor is

bound to the owner. Id. "In essence, the provision requires the subcontractor to stand in the shoes of the prime contractor with regard to rights and obligations encompassed in the prime contract to the extent they arise within the purview of the subcontract." Id. at 231. This court finds as the court did in Bernotas that the incorporation clause and paragraph 3 contained within the subcontract act as conduit through which the obligations of Lott to Keating flow to Thompson.

In opposition to plaintiffs motion for summary judgment, Thompson argues that (1) American Contractors is barred from seeking indemnification by the doctrine of accord and satisfaction; (2) that plaintiffs lack standing to seek indemnification since they suffered no loss or damage; and (3) that plaintiffs failed to prove that the payment made to the underlying plaintiffs was fair and reasonable. This court finds merit in some of the arguments raised by Thompson.

Thompson argues that the doctrine of accord and satisfaction estops American Contractors and Keating from seeking indemnification since Harleysville accepted the reduction of Harleysville's worker's compensation lien as payment in full of any monies that Harleysville and/or Thompson may have owed. (Defendants response to plaintiffs motion for summary judgment p. 10.) In support of their position, defendants rely solely upon PNC Bank, Nat.Ass'n v. Balsamo, 430 Pa. Super. 360, 634 A.2d 645 (Pa. Super.1993). Defendants reliance upon Balsam is misplaced since it does not address the application of the doctrine of accord and satisfaction as a tool to extinguish the right to indemnification.

Moreover, defendants have not met their burden of proof in asserting the defense of accord and satisfaction. Our cases make clear that the same elements necessary to show the

existence of a contract are also necessary to show the existence of accord and satisfaction. Brunswick Corp. v. Levin, 442 Pa. 488, 276 A.2d 532, 533-534 (Pa. 1971) There must be a meeting of the minds. Id. Here, Thompson and Harleysville have not shown that a meeting of the minds existed between American Contractors and Harleysville that the compromise of the worker's compensation lien would act as payment in full. The fact that American Contractors accepted a compromise from Harleysville's worker's compensation carrier for the lien is not enough. Defendants fail to cite any depositions, affidavits, admissions , answers to interrogatories or documents that support its position. In fact, defendants do not proffer any evidence that would create a genuine issue of material fact. On the other hand, evidence exists within the record that plaintiffs' did not intend to relinquish their indemnification claim. The releases from the underlying action contain no indication of relinquishment. (Plaintiffs motion for summary judgment Exhibit H)

Defendants further maintain that Keating and Lott lack standing to seek indemnification from defendants because they did not expend any monies in the underlying action and suffered no losses or damages. "It is well established that before indemnification rights accrue, the party seeking indemnification must pay the claim or verdict damages before obtaining any rights to pursue an indemnification recovery." Chester Carriers, Inc. v. National Union Fire Ins. Co. of Pittsburgh, 2001 Pa. Super. 8, 767 A. 2d 555, 563 (Pa. Super. 2001) quoting Beary v. Container General Corp., 390 Pa. Super. 53, 568 A.2d 190, 193 (Pa. Super. 1989) In this case, the settlement amount of $475,000.00 was paid by American Contractors and not by Keating or Lott. Keating and Lott claim that the fact that American Contractors paid the defense of Lott and Keating in the underlying action does not defeat Lott and Keating's standing to sue. In support

thereof, Lott and Keating rely upon Boiler Engineering & Supply Co. v. General Controls, Inc., 443 Pa. 44, 277 A.2d 812 (Pa. 1971). Boiler held that an indemnitee may recover attorney's fees and costs from the indemnitor notwithstanding the fact that these expenses have already been paid by the indemnitee's insurance carrier. Id. The holding in Boiler however is limited to the payment of attorney's fees and costs and does not address the payment of the claim. Since a party seeking indemnification must pay the claim or verdict before pursuing any rights to indemnification and since Lott and Keating did not pay the claim, the court finds that Keating and Lott lack standing to sue to recover the claim for $475,000.00 since they suffered no losses or damages. To the extent Keating and Lott seek to recover the $50,000.00 in attorneys fees and costs paid, Boiler permits such a recovery.

Lastly, defendants maintain that plaintiffs have failed to prove an essential element of a claim for indemnification, namely that the payment made to the underlying plaintiffs was fair and reasonable. When an underlying case proceeds to trial, verdict, judgment, and payment, the party seeking indemnification must establish that the claim is within the coverage of the agreement, and that any counsel fees were reasonable. When the case is resolved by settlement, the party must also establish the reasonableness of the settlement and that the underlying claim was indeed valid against it. Martinique Shoes, Inc. v. New York Progressive Wood Heel Co., 207 Pa. Super. 404, 217 A.2d 781 (Pa. Super. 1966) Martinique Shoes first articulated the right of an indemnitor to challenge the reasonableness of a settlement agreement. The court stated that the payment pursuant to a settlement agreement must be made in good faith. Id. Therefore, a party seeking to indemnify for a settlement must establish a higher degree of proof than is necessary for indemnification for a judgment. Martinique, 217 A.2d at 783 ("the fact of

voluntary payment does not negate the right to indemnity. It merely varies the degree of proof needed to establish the liability of the indemnitor.") When an indemnitee discharges a claim against him by entering into a settlement agreement "without an adjudication of fault...he assumes the risk in the action against the indemnitor of proving not only that he was liable to the third party, but also that the settlement was reasonable." Daily Exp., Inc. v. Northern Neck Transfer Corp., 490 F. Supp. 1304, 1307 (M. D. Pa. 1980) Since the issue of reasonableness is material and factually in dispute between the parties, the court will deny plaintiffs motion for summary judgment declaring Thompson is required to fully indemnify Keating and its insurer since genuine issues of material fact exist relating to the fairness and reasonableness of the settlement agreement. Thus, plaintiffs partial Motion for Summary Judgment seeking a declaration that Thompson and Harleysville owe a duty of indemnification to Keating is granted and plaintiffs partial Motion for Summary Judgment seeking a declaration that Thompson and Harleysville is to fully indemnify American Contractors Insurance Group for injuries sustained by plaintiffs in the underlying matter is denied since genuine issues of material fact exist regarding the fairness and reasonableness of the settlement.

III. Defendants Cross Motion for Summary Judgment

Defendants filed a cross motion for summary judgment asking the court to enter judgment as a matter of law in their favor. In support thereof defendants argue that (1) the Lott/Thompson subcontract and the Harleysville insurance policy does not provide plaintiffs with any relief and (2) the indemnification clause contained within the subcontract does not provide indemnification for Lott's negligence. This court does not find Thompson and Harleysville's arguments persuasive.

The Lott/Thompson subcontract and the Harleysville insurance policy do provide plaintiffs with relief. As discussed in Section II of this opinion, the Lott/Thompson contract incorporates the contract between School District/Lott. As a result, Thompson assumed all the obligations of Lott with respect to the School District/Lott contract. Moreover, the Harleysville insurance policy specifically provides coverage to Lott and Keating as set forth in Section II (A)(1)(b) and Section II (F)(6)(g). Additionally, the indemnification clause within the Lott/Thompson contract does provide for indemnification based upon Lott's negligence as evidenced by the flow through provisions contained within the subcontract.

Based upon this court's reasoning in Section II of this opinion, this court will deny defendants motion for summary judgment as to Counts I, II, and III[1].

CONCLUSION

For these reasons, this court finds that:

1. Plaintiffs partial Motion for Summary Judgment is **granted in part and denied in part;** and

2. Defendants Motion for Summary Judgment is **Denied.**

BY THE COURT

_____
C. DARNELL JONES, II J

Dated: 9/17/03

[1]Defendants filed a motion for summary judgment asking the court to enter judgment as a matter of law in their favor on all counts. Defendants however did not address Counts IV and V in their brief and therefore the court did not consider these claims in making this determination.