

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

KRISTEN BEHRENS, as Guardian Ad Litem for
ZAIR MARTIN

Plaintiff

vs.

DAYS INN HOTEL d/b/a DAYS HOTEL WEST
CHESTER BRANDYWINE VALLEY,
VASANT PATEL,
DINESH PATEL,
PRAVIN PATEL,
WYNDHAM WORLDWIDE CORPORATION,
WYNDHAM HOTEL GROUP, LLC,
DAYS INN WORLDWIDE, INC.,
WEST CHESTER LODGING, LLC,
SAGE-W.C. CORPORATION, and
CHERYL HEYWARD

Defendants

BUCKMAN'S INC.,
CORTZ, INC. d/b/a IN THE SWIM, INC.,
CLEARON CORPORATION d/b/a NAVA CHEMICALS,
CHEM-WAY CORPORATION d/b/a NAVA CHEMICALS,
MEGA, AN UNKNOWN BUSINESS ENTITY AND
MEGA CHEMICALS d/b/a OMEGA CHEMICALS
POOL AND SPA CHEMICALS, and
ELAM POOL SUPPLIES, INC. d/b/a ELAM POOLS
AND SPAS

Additional Defendants

BRIAN HEYWARD

Additional Defendant

JUNE TERM, 2013

NO. 1177

DOCKETED

OCT 23 2015

N. ERICKSON
DAY FORWARD

Martin Etal Vs Days Inn-ORDER



13060117700251

ORDER

And Now, this ^{23rd} day of October, 2015, after consideration of the Motion for Summary Judgment filed by the Defendants Days Inn Worldwide, Inc., Wyndham Hotel Group, LLC and Wyndham Worldwide Corporation, and the Responses thereto from Defendants Days Inn Hotel d/b/a Days Hotel West Chester Brandywine Valley, West Chester Lodging, LLC, Vasant Patel, Dinesh Patel and Pravin Patel, and after oral argument held on September, 21, 2015, and, for the reasons set forth in Court Exhibit "A", attached hereto, it is hereby **ORDERED** that the Motion for Summary Judgment is **DENIED**.

BY THE COURT:

Frederica A. Massiah-Jackson
FREDERICA A. MASSIAH-JACKSON, J.

Court Exhibit “A”

In this litigation the Wyndham Defendants contend that the Franchise Agreement they executed with the West Chester Lodging Defendants “unequivocally” obligates the franchisees to defend and indemnify and pay all expenses which may be incurred by the Wyndham Defendants related to the catastrophic injuries suffered by Zair Martin. Further, Wyndham Defendants argue that individual defendants Pravin Patel, Vasant Patel and Dinesh Patel have personally guaranteed to pay all amounts that West Chester Lodging, LLC fails to pay.

The Wyndham Defendants have filed a Motion for Summary Judgment seeking Court approval as a matter of law. New Jersey law applies to the interpretation of the Franchise Agreement. After careful consideration of the relevant evidence and case law, this Court is unable to conclude that the Franchise Agreement specifically, expressly and unequivocally provides indemnification to an indemnitee against losses resulting from its own negligence. Further, New Jersey’s expansive approach to the use of extrinsic evidence to interpret the contract does secure light for this Court to conclude that the Patels did not intend to create a personal guarantee. Summary judgment is Denied.

In Celanese Ltd. v. Essex County Improvement Authority, 962 A.2d 591 (N.J. Superior Ct., App. Div. 2009), the Court considered summary judgment in the jurisdiction, at 962 A.2d 600-601:

“Certain principles guide our analysis. The interpretation of a contract is ordinarily a legal question for the court and may be decided on summary judgment unless ‘there is uncertainty, ambiguity or the need for parol evidence in aid of interpretation. . . .’ *Great Atl. & Pac. Tea Co. v. Checchio*, 335 *N.J.Super.* 495, 502, 762 *A.2d* 1057 (App.Div.2000). ‘The interpretation of the terms of a contract are decided by the court as a matter of law unless the meaning is both unclear and dependent on conflicting testimony.’ *Bosshard v. Hackensack Univ. Med. Ctr.*, 345 *N.J.Super.* 78, 92, 783 *A.2d* 731 (App.Div.2001).

In interpreting a contract, a court must try to ascertain the intention of the parties as revealed by the language used, the situation of the parties, the attendant circumstances, and the objects the parties were striving to attain. *Onderdonk v. Presbyterian Homes of N.J.*, 85 *N.J.* 171, 183–84, 425 *A.2d* 1057 (1981) (citing *Atl. N. Airlines v. Schwimmer*, 12 *N.J.* 293, 301, 96 *A.2d* 652 (1953)); *Driscoll Constr. Co. v. State*, 371 *N.J.Super.* 304, 313, 853 *A.2d* 270 (App.Div.2004). Thus, in ruling on a summary judgment motion that involves the interpretation of a contract, a court must necessarily determine whether there is any genuine issue of material fact regarding the parties’ intentions.”

See also, Manahawkin Convalescent v. O’Neill, 85 A.3d 947, 958-959 (N.J. 2014).

Ordinarily, a claim for indemnity requires that the claimant is free from fault. Accordingly, a contract will not be construed to indemnify an indemnitee against losses resulting from its own negligence if there are ambiguities and inconsistencies. Further, where

as here the Franchise Agreement was drafted by the Wyndham Defendants the contract is to be strictly construed against the drafter. See, Celanese Ltd. v. Essex County Improvement Authority, *supra*, 962 A.2d at 601:

“ . . . a contract will not be construed to indemnify the indemnitee against losses resulting from its own negligence unless such an intention is expressed in unequivocal terms.’ *Ramos v. Browning Ferris Indus. of S. Jersey, Inc.*, 103 N.J. 177, 191, 510 A.2d 1152 (1986). ‘[T]o bring a negligent indemnitee within an indemnification agreement . . . the agreement must specifically reference the negligence or fault of the indemnitee.’ *Englert v. Home Depot*, 389 N.J.Super. 44, 52, 911 A.2d 72 (App.Div.2006) (quoting *Azurak v. Corp. Prop. Investors*, 175 N.J. 110, 112–13, 814 A.2d 600 (2003)), *certif. denied*, 192 N.J. 71, 926 A.2d 855 (2007).”

The Franchise Agreement states in part at Paragraph 8.1:

“8. Indemnifications.

8.1. Independent of your obligation to procure and maintain insurance, you will indemnify, defend and hold the Indemnitees harmless, to the fullest extent permitted by law, from and against all Losses and Expenses, incurred by any Indemnitee for any investigation, claim, action, suit, demand, administrative or alternative dispute resolution proceeding, relating to or arising out of any transaction, occurrence or service at, or involving the operation of, the Facility, any payment you make or fail to make to us, any breach or violation of any contract or any law, regulation or ruling by, or any act, error or omission (active or passive) of, you, any party associated or affiliated with you or any of the owners, officers, directors, employees, agents or contractors of you or your affiliates, including when you are alleged or held to be the actual, apparent or ostensible agent of the Indemnitee, or the active or passive negligence of any indemnitee is alleged or proven.”

The Wyndham Defendants point to the reference that West Chester Lodging will have responsibility to indemnify for losses “. . . including when . . . the active or passive negligence of any indemnitee is alleged or proven.” The problem with such a conclusion is that the phrase does not expressly answer whether such indemnification would include the Wyndham Defendants’ own share of fault or negligence.

The Supreme Court of New Jersey has held that “a contract will not be construed to indemnify the indemnitee against losses resulting from its own negligence unless such an intention is expressed in unequivocal terms.” Ramos v. Browning Ferris Industries of South Jersey, Inc., 510 A.2d 1152 (N.J. 1986) at 1159, and numerous cases cited. Again, in Azurak v. Corporate Property Investors, 814 A.2d 600 (N.J. 2003), the New Jersey Supreme Court relied on Ramos, supra, and reaffirmed Manilla v. NC Mall Associates, 770 A.2d 1144 (N.J. 2001) and affirmed the Appellate Division decision that an indemnification provision did not encompass an indemnitee’s negligence. The Supreme Court strongly concluded at 814 A.2d 600:

“Finally, in order to allay even the slightest doubt on the issue of what is required to bring a negligent indemnitee within an indemnification agreement, we reiterate that the agreement must specifically reference the negligence or fault of the indemnitee.”

The lessons of Englert v. The Home Depot, 911 A.2d 72 (N.J. Superior Ct., Appellate Div. 2006) are applicable here. The two “critical phrases” of the Englert indemnification agreement at issue were “to the extent caused” and “regardless of”. The critical phrase in the

Wyndham Agreement is “including when . . .” Here, as in Englert, the phrase “including when” could be interpreted to mean that it does not create an indemnity that does not exist. Rather, the phrase will not void the indemnity obligations that do exist. 911 A.2d at 80.

Finally, the parties have expended great resources in their written submissions and at oral argument to comment on the meaning and applicability of Sayles v. G & G Hotels, Inc., 57 A.3d 1129 (N.J. Superior Ct., Appellate Div. 2013). This Court, sitting as a New Jersey Trial Court, is bound by the rulings and precedents of the highest court of the State. The apparently divergent decisions between and/or among Appellate Division panels do not provide a mandate. Rather, where the Supreme Court of New Jersey provides clarity “to allay even the slightest doubt” of the requisite specificity needed in the language of an indemnity agreement, this Trial Court is bound to accept the thoughtful and well-reasoned decisions of the Supreme Court. Summary judgment is not appropriate on this indemnification issue.

The Wyndham Defendants also argue that “All of West Chester Lodging’s obligations under the Franchise Agreement were personally guaranteed by Pravin Patel, Vasant Patel and Dinesh Patel”. Wyndham Memorandum, dated June 1, 2015, page 10. The Patels vigorously deny that was their intention when they signed the document. This Court is unable to conclude as a matter of law that the record supports Wyndham’s interpretation.

The Guaranty signed by the Patels states in pertinent part:

“[the Patels] . . . (ii) guaranty that Franchisee’s obligations under the Agreement, including any amendments, will be punctually paid and performed.

Upon default by Franchisee and notice from you we will immediately make each payment and perform or cause Franchisee to perform, each unpaid or unperformed obligation of Franchisee under the Agreement.”

Where one contract refers to and incorporates another, they will be read together. This is done so that the instruments will be interpreted as a whole. Accordingly, New Jersey law applies to the Guaranty Agreement. Southwestern Energy Production Co. v. Forest Resources, LLC, 83 A.3d 177, 187 (Pa. Superior Ct. 2013).

In New Jersey when a Trial Court considers a motion for summary judgment “ambiguity is not a prerequisite to introducing circumstances surrounding a contract.” Driscoll Construction Co., Inc. v. New Jersey, Dept. of Transportation, 853 A.2d 270, 278 (N.J. Superior Ct., Appellate Div. 2004). That Appellate Court explained that it is appropriate and proper for a Trial Court to accept evidence of the surrounding circumstances of a contract to gain the meaning of what has been written. The Affidavit of Paul Breslin and the Affidavit of Rich Gandhi provide “light” to measure the terms of the Guaranty.

The Driscoll Court determined that a Trial Court erred in refusing to consider evidence of circumstances surrounding the signing of a construction contract. The Court held at 853 A.2d 278:

“When the meaning of an integrated contract is ambiguous, the surrounding circumstances may be introduced for the purpose of elucidation. *New York Sash & Door Co., Inc. v. National House & Farms Ass’n, Inc.* 131 N.J.L. 466 [36 A.2d 891] (E. & A.1944). Even when the contract on its face is free from ambiguity, evidence of the situation of the parties and the surrounding circumstances and conditions is admissible in aid of interpretation. [*Atl. N. Airlines Inc., supra*, 12 N.J. at 301–02, 96 A.2d 652.]

‘The admission of evidence of extrinsic facts is not for the purpose of changing the writing, but to secure light by which to measure its actual significance. Such evidence is adducible only for the purpose of interpreting the writing -- not for the purpose of modifying or enlarging or curtailing its terms, but to aid in determining the meaning of what has been said.’ *Casriel v. King*, 2 N.J. 45 [65 A.2d 514] (1949).

Accordingly, whether the clause under consideration is regarded as clear and certain, or ambiguous and uncertain, if the intention of the parties is not to be gleaned from a reading of the instrument as a whole, the plaintiff should have had the opportunity of presenting evidence of the facts and circumstances surrounding the execution of the lease.

[*Great Atl. & Pac. Tea Co., Inc., supra*, 335 N.J.Super. at 501, 762 A.2d 1057 (citations omitted).]”

See also, Atlantic Northern Airlines v. Schwimmer, 96 A.2d 652, 656 (N.J. 1953) evidence of the circumstances, the situation of the parties, and the intent is always admissible; YA Global Investments, L.P. v. Cliff, 15 A.3d 857, 863 (N.J. Superior Ct., Appellate Div. 2011), New Jersey follows an expansive use of extrinsic evidence.

Guarantee agreements must be strictly construed and their language must be interpreted “most strongly” against the party at whose insistence such language was included. Center 48 Ltd. Partnership v. May Department Stores, 810 A.2d 610, 619 (N.J. Superior Ct., Appellate Div. 2002). That Court added:

“The terms of a guarantee agreement must be read in light of commercial reality and in accordance with the reasonable expectations of persons in the business community involved in transactions of the type involved.”

In the case at bar Mr. Rich Gandhi acted as a liaison on behalf of the Patels. He was involved in the discussions with the Wyndham Defendants. His Affidavit sets forth the commercial reality of a Franchisor-Franchisee hotel business transaction. The Wyndham Defendants drafted the non-negotiable Franchise Agreement. Mr. Paul Breslin’s Affidavit sheds light on the reasonable expectations of persons in the hotel business community. He explained that with transactions such as the Wyndham/West Chester Lodging/Patel agreements:

“The guarantee signed by the Patels is not interpreted in the industry as a personal guarantee to pay a verdict or settlement to a third party for personal injury.”

When considering the intent and circumstances of the contract, this Court concludes the Motion for Summary Judgment filed by the Wyndham Defendants must be Denied.

A handwritten signature in black ink, appearing to be 'RJG', is written over a horizontal line.