

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Anthony Allen

Plaintiff

v.

Fifth Third Bank, et al.

Appellee

[Viox Services, Inc. - Appellant]

Court of Appeals No. L-13-1143

Trial Court No. CI0201101421

DECISION AND JUDGMENT

Decided: March 28, 2014

* * * * *

Stephen C. Roach, for appellee.

Joseph J. Golian, for appellant.

* * * * *

JENSEN, J.

{¶ 1} Defendant-appellant, Viox Services, Inc., appeals the June 3, 2013 judgment of the Lucas County Court of Common Pleas granting summary judgment in favor of

defendant-appellee, Fifth Third Bank, on its cross-claim. For the reasons that follow, we affirm the trial court's judgment.

I. Background

{¶ 2} Plaintiff, Anthony Allen, filed a complaint against Fifth Third Bank on January 26, 2011, alleging that he tripped and fell over a defective ledge at the bottom of the doorway at the bank's 3053 Monroe Street location in Toledo, Ohio. Fifth Third and Viox were parties to a Facilities Management Outsourcing Services Agreement under which Viox maintained the premises at which the bank branch was located. Allen, therefore, amended his complaint to add Viox as an additional defendant and Fifth Third filed a cross-claim against Viox for indemnification. Allen ultimately dismissed his claim against Viox on July 19, 2011, but Fifth Third's cross-claim remained.

{¶ 3} Allen was deposed in connection with the underlying complaint and testified that it was not the doorway ledge over which he tripped – it was a difference in elevation between two slabs of the sidewalk just outside the doorway. There was an approximately three-quarter inch difference in the two slabs which rendered the pavement uneven. Fifth Third filed a motion for summary judgment with respect to Allen's claims against it, arguing that the condition was open and obvious, the alleged defect in the sidewalk was minor or insubstantial, and the bank lacked notice of the alleged defect. The trial court granted the bank's motion "for the reasons articulated by Defendant."

{¶ 4} On June 15, 2012, Fifth Third filed a motion for summary judgment against Viox, seeking reimbursement of \$9,207.00 for expenses incurred in defending against

Allen's claims. Fifth Third had previously tendered defense of the Allen complaint to Viox, but Viox refused to assume Fifth Third's defense. In its motion for summary judgment, Fifth Third claimed that under the parties' agreement, Viox was obligated to defend it against claims arising from allegedly hazardous conditions existing on sidewalks and entryways. Viox opposed the motion, arguing that it was responsible for providing a defense only where it had acted wrongfully or failed to perform its required services. It argued that because the alleged defect was insubstantial, it had not failed in its obligation to perform its services "free of defects in workmanship, construction, design, material, and operations." Viox contended that the trial court's ruling that the alleged defect was insubstantial or slight constituted the law of the case and precluded Fifth Third's claim for indemnification.

{¶ 5} The trial court granted Fifth Third's motion and ordered Viox to reimburse Fifth Third for expenses incurred in its defense. It reasoned that the duty to defend was not contingent on the merits or outcome of plaintiff's claim and that Fifth Third's ultimate duty to plaintiff under Ohio negligence law did not control Viox's duties under its contract with Fifth Third. Viox filed this timely appeal, assigning the following error for our review:

The Trial Court Erred When It Granted Appellee Fifth Third Bank's Motion for Summary Judgment on Its Amended Cross-Claim against Viox Services, Inc. on the issue of contractual indemnity.

II. Standard of Review

{¶ 6} Appellate review of a summary judgment is de novo, *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996), employing the same standard as trial courts. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). The motion may be granted only when it is demonstrated:

(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978), Civ.R. 56(C).

{¶ 7} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleadings, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery*, 11 Ohio St.3d 75, 79, 463 N.E.2d 1246 (1984). A

“material” fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 304, 733 N.E.2d 1186 (6th Dist.1999); *Needham v. Provident Bank*, 110 Ohio App.3d 817, 826, 675 N.E.2d 514 (8th Dist.1996), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 201 (1986).

III. Analysis

{¶ 8} Under section 14.1(a) of the Facilities Management Outsourcing Services Agreement between Fifth Third and Viox, Viox agreed to “indemnify, defend and hold harmless Fifth Third * * * from any and all Losses due to third-party claims or allegations arising from or in connection with * * * [Viox’s] breach of any of the representations, warranties and covenants set forth in Article 12.” Under section 12.3 of the agreement, Viox “represent[ed] and warrant[ed] that it [would] perform the [required] Services: (i) in a good, timely, efficient, professional and workmanlike manner using then-current Materials and Technology; * * * (iii) with due care and skill, diligence, and at a level consistent with industry best standards and practices; (iv) free of defects in workmanship, construction, structural and functional design, material and operations.”

{¶ 9} Under section 14.3(a)(1), Viox agreed to “indemnify, defend and hold harmless Fifth Third * * * from any and all Losses to the extent they arise from or in connection with * * * the negligence, gross negligence, willful misconduct, actions beyond the scope of this Agreement or breach of this Agreement by [Viox].” Schedule M of the agreement sets forth a statement of the work to be provided by Viox. Under

section 2.1.1, Viox was required to maintain exterior entryways, ensuring that “no safety or security hazards arise.” Under section 4.2.1, it was required to maintain sidewalks, and to “patch or fill holes and cracks as appropriate to service levels [and] repave or re-lay individual sidewalk slabs, curbs or small areas of fitted pavement whose condition present a safety hazard to users.”

{¶ 10} Fifth Third maintains that Allen’s allegations, whether as stated in his complaint or as modified during his deposition, fell within Viox’s service obligations and within Viox’s warranties and representations, thus requiring Viox to defend and indemnify it. Viox, on the other hand, argues that it was not required to defend or indemnify Fifth Third because it did not breach the agreement or any warranty contained in the agreement. It contends that the indemnity provisions were not triggered because the alleged defect was not known to Fifth Third, was not the subject of any previous complaints, was not noticeable to the public, and at most was slight or insubstantial. It argues that the trial court’s decision granting summary judgment to Fifth Third on Allen’s claim made clear that the defect at issue did not arise from negligence, gross negligence or willful misconduct, thus it did not owe Fifth Third a defense or indemnification.

{¶ 11} “Indemnity arises from contract, either express or implied, and is the right of a person, who has been compelled to pay what another should have paid, to require complete reimbursement.” *Worth v. Aetna Cas. & Sur. Co.*, 32 Ohio St. 3d 238, 240, 513 N.E.2d 253 (1987), citing *Travelers Indem. Co. v. Trowbridge*, 41 Ohio St.2d 11, 321

N.E.2d 787 (1975), paragraph two of the syllabus, overruled on other grounds by *Motorists Mut. Ins. Co. v. Huron Rd. Hosp.*, 73 Ohio St.3d 391, 653 N.E.2d 235 (1995), paragraph one of the syllabus. Indemnity agreements are interpreted in the same manner as other contracts and the intent of the parties to the agreement is determined by the language used. *Brown v. Gallagher*, 2013-Ohio-2323, 993 N.E.2d 415 ¶ 10 (4th Dist.). An indemnitor in an indemnity agreement is placed in the position of an insurer to the extent provided for in the agreement. *Allen v. Standard Oil Co.*, 2 Ohio St. 3d 122, 126, 443 N.E.2d 497 (1982).

{¶ 12} Where an indemnity agreement includes a duty to defend, that duty is broader than and distinct from the duty to indemnify, and it is determined by the scope of the allegations in the complaint. *Ward v. United Foundries, Inc.*, 129 Ohio St. 3d 292, 2011-Ohio-3176, 951 N.E.2d 770, ¶ 19, citing *Ohio Govt. Risk Mgt. Plan v. Harrison*, 115 Ohio St.3d 241, 2007-Ohio-4948, 874 N.E.2d 1155, ¶ 19. If the allegations state a claim that potentially or arguably falls within the terms of the indemnity agreement, the indemnitor must defend the indemnitee in the action. *Id.* The duty to defend may also arise at a point subsequent to the filing of the complaint. *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.* 112 Ohio St.3d 482, 2006-Ohio6551, 861 N.E.2d 121, ¶ 35. “The duty to defend an action is not determined by the action’s ultimate outcome or the insurer’s ultimate liability.” *Sharonville v. Am. Employers Ins. Co.*, 109 Ohio St. 3d 186, 2006-Ohio-2180, 846 N.E.2d 833, ¶ 13, citing *Motorists Mut. Ins. Co. v. Trainor*, 33 Ohio St.2d 41, 294 N.E.2d 874 (1973), paragraph two of the syllabus.

{¶ 13} Section 14.5 of the agreement sets forth the procedures to be followed by Fifth Third upon receiving notice that a third party claim has commenced or has been threatened. Under those procedures, Fifth Third must present the claim to Viox and Viox must elect within 15 days whether to assume control of the defense. Where Viox does not elect to assume control of the defense, the agreement requires it to reimburse Fifth Third for the expenses it incurs in assuming its own defense. There is no provision that conditions Viox's obligations on the success of the third party's claim or on an explicit finding that a defect exists.

{¶ 14} Viox was required to maintain the doorway and sidewalk in a manner that kept it free of safety hazards. Allen's complaint arose from an alleged failure to keep the doorway and sidewalk free of safety hazards. Under the plain language of the agreement, Viox is obligated to indemnify Fifth Third for the expenses of its defense. It was the allegations – not the ultimate outcome of the case – that triggered Viox's duty.

{¶ 15} Accordingly, we agree with the trial court that Viox must indemnify Fifth Third for the expenses it incurred in defending against Allen's complaint. We, therefore, find Viox's sole assignment of error not well-taken.

IV. Conclusion

{¶ 16} We affirm the June 3, 2013 judgment of the Lucas County Court of Common Pleas. The costs of this appeal are assessed to appellant pursuant to App.R. 24.

Judgment affirmed.

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A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See also 6th Dist.Loc.App.R. 4.

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, P.J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
