IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

HOME INSURANCE COMPANY, CADILLAC FAIRVIEW SHOPPING CENTER PROPERTIES (DELAWARE), INC., JMB RETAIL PROPERTIES COMPANY, a/k/a JMB RETAIL PROPERTIES CO., a/k/a JMB RETAIL PROPERTIES CO., INC., JMB RETAIL PROPERTIES COMPANY, INC. JMB PROPERTIES COMPANY, a/k/a JMB PROPERTIES CO., a/k/a JMB PROPERTIES CO., a/k/a JMB PROPERTIES CO., INC., a/k/a JMB PROPERTIES COMPANY, INC., and CFUS PROPERTIES, INC.	)	C.A. No.: 97C-04-024
Plaintiffs,	)	
v.	)	
AMERICAN INSURANCE GROUP, a/k/a AIG, a/k/a AIAC, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, and ABACUS CORPORATION, t/a ABACUS SECURITY SERVICES,	)	
Defendants.	)	

Submitted: October 19, 2001
Decided: January 30, 2002

ORDER

On Defendants' Partial Motions for Summary Judgment. Denied.

William D. Sullivan, Esquire, and Mark L. Reardon, Esquire, of Elzufon, Austin, Reardon, Tarlov & Mondell, P.A., Wilmington, Delaware for the Plaintiffs.

William J. Cattie, III, Esquire, of Cattie & Fruehauf, Wilmington, Delaware for the Defendants.

WITHAM, J.

Upon consideration of the briefs and oral arguments of the parties, it appears to the Court that Defendants have submitted two motions for partial summary judgment, one of which requests dismissal of certain Plaintiffs and the other seeks proper defense cost allocation. Because there are genuine issues of material fact regarding the rights of the plaintiffs sought to be dismissed (and further inquiry into these facts is warranted), and for the reason that the issue of defense cost allocation is not ripe for decision, Defendants are not entitled to judgment as a matter of law and the partial motions for summary judgment are denied.

Background

1. This case arises as a declaratory action for defense costs and indemnification related to the underlying tort actions of *Rose v. JMB.*[1] and *Rouse v. CFUS Properties, Inc.*[2] The tort claims in these cases were filed against the Dover Mall Defendants[3] ("Plaintiffs" herein) and Abacus Security Services, the security company for Dover Mall ("Abacus" or "Defendant" herein), for damages the tort plaintiff suffered as a result of being abducted and raped. Some of the Dover Mall Defendants were dismissed from the underlying cases, and the remaining Dover

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[1] C.A. No. 94C-03-024.

[2] C.A. No. 94C-08-043.

[3] The tort plaintiff brought suit against JMB Realty Corporation, manager of the Dover Mall, and CFSCP (Del.) Inc., owner of the Dover Mall, as well as CFUS Properties, Inc., and other JMB entities. These other JMB entities were later dismissed from the underlying action. Collectively, these are the "Plaintiffs" in the instant case and will be referred to as the "Dover Mall Defendants" when referring to the original action.

Mall Defendants settled.

2. In the case *sub judice*, Plaintiffs have alleged a right to indemnity and defense costs under the provisions of two contracts: (1) an indemnity clause in the security agreement between Abacus and "Client;"[4] and (2) a contract for insurance which specifically names two Plaintiffs as named or additional insureds.[5]

3. Under either of these provisions, the Plaintiffs seek reimbursement for defense costs and indemnification related to both this present declaratory action and the underlying tort lawsuits. Previously, the Plaintiffs moved for summary judgment, which was granted by this Court. Defendant appealed, and the Delaware Supreme Court remanded the case for further proceedings.

4. This Court has been instructed to determine "whether the tortious conduct asserted against Dover Mall arose out of security operations performed by Abacus,"[6] and to hear "the issue of defense cost allocation [not] effectively raised

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[4] The applicable passage in the Security Agreement states that Abacus Security Services would: "defend, indemnify and hold harmless client from any and all claims against client alleging that injury to person or property was directly caused by Abacus Security Services or its employees."

[5] The insurance agreement lists certain Plaintiffs as named and additional insureds "but only with respect to liability arising out of security operations agreed to be performed for such insured by or on behalf of the named insured." The policy language as to extent of liability, indemnity, or the duty to defend (other than the quoted language) has not been submitted.

[6] *American Ins. Group v. Risk Enter. Management, Ltd.*, 761 A.2d 826, 829-30 (Del. Supr. 2000).

below."[7]

5. Prior to trial, Abacus now moves for partial summary judgment on the issue of defense cost allocation, and seeks to remove certain Plaintiffs from the case.

Summary Judgment Standard

6. Superior Court Rule 56(c) provides that judgment "shall be rendered forthwith 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 the moving party is entitled to a judgment as a matter of law."[8] The burden is on the moving party to show, with reasonable certainty, that no genuine issue of material fact exists and judgment as a matter of law is permitted.[9] When considering a motion for summary judgment, the facts must be construed in the light most favorable to the non-moving party.[10] Further, if the record indicates that a material fact is disputed, or if further inquiry into the facts is necessary, summary judgment is not appropriate. Judgment must also be denied if there is a dispute as to the inferences that can be drawn from the facts.[11]

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[7] *Id.* at 830.

[8] Super. Ct. Civ. R. 56.

[9] *See Celotex Corp. v. Cattret*, 477 U.S. 317 (1986); *Martin v. Nealis Motors, Inc.*, 247 A.2d 831 (Del. Supr. 1968).

[10] *McCall v. Villa Pizza, Inc.*, 636 A.2d 912 (Del. Supr. 1994).

[11] *Schagrin v. Wilmington Med. Ctr., Inc.*, 304 A.2d 61, 63 (Del. Super. 1973) (citing *Vanaman v. Milford Mem'l Hosp., Inc.*, 272 A.2d 718 (Del. Supr. 1970)).

Dismissal of Parties

7. Defendant seeks to dismiss certain JMB Plaintiffs, as well as CFUS Properties Inc. ("CFUS"), for the reason that these Plaintiffs have no rights arising under the indemnity agreement between Abacus and "client," because the service proposal letter (i.e. indemnity agreement) did not name them as the "client" in the indemnity and insurance section. Furthermore, it is alleged that the attorney for CFSCP (Del.) admitted ownership of the mall in a motion to dismiss in the underlying tort action; therefore, by negative implication, CFUS and the other JMB entities are not owners of the mall nor are they, impliedly, Abacus' "client." With respect to rights under the insurance policy, it is maintained that CFUS and certain of the JMB entities have no rights under this contract because they are not either named insureds or additional insureds on the policy.[12]

8. The Plaintiffs argue that there remains a material question of fact as to which corporate entities are considered the "client" under the indemnity agreement, and regarding what parties are covered under the insurance policy. The JMB Plaintiffs respond that, as corporately-linked entities, they are, in fact, named

[12] Note that it does not appear to the Court that Abacus is alleging that Home Insurance Company ("Home") is not entitled to indemnification or defense costs *per se* (as Plaintiffs seem to suggest). Rather, it appears that Abacus has alleged that Home has no right to indemnity for any liability *associated* with CFUS, or with the JMB entities Abacus seeks to remove. At the present time, the Court is not dismissing these Plaintiffs; therefore, Home may still seek indemnity and cost of defense as to these Plaintiffs. Moreover, the parties in this case have stipulated to the fact that Home, in its position as liability insurer, is the true party in interest (instead of Risk Enterprise Management, Home's third-party administrator). For this reason, the Court agrees with Plaintiffs that Home may be subrogated to any rights which exist on behalf of its insureds.

insureds or additional insureds (or at least the 'additional insureds' category is broad enough to include them). Moreover, the nature and extent of the actual relationship is not in the record before this Court and it is therefore premature to grant summary judgment.

9. It is apparent to the Court that a genuine issue of material fact exists regarding the rights of the various Plaintiffs under the applicable contracts. When considering a motion for summary judgment, the Court must construe the facts in the light most favorable to the non-moving party.[13] If material facts are disputed, or if further inquiry into the facts is necessary, summary judgment is not appropriate. The Court has determined that the Plaintiffs must be given the opportunity to develop the record further as to the nature and extent of their rights under the indemnity agreement and insurance policy. It is noted, however, that Plaintiffs have the burden to show that Defendants "owe[] them a duty to provide litigation insurance under the policies [or indemnity agreement] and [to] defend the actions brought against them."[14]

Defense Cost Allocation

10. At the present juncture, Abacus also seeks resolution of the defense cost allocation issue and submits that:

> [i]n its Opinion reversing and remanding this case, the

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[13] *McCall, supra.*

[14] *Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, Del. Super., C.A. No. 89C-SE-35, 1994 WL 721618 at *2, Gebelein, J. (Apr. 8, 1994) (Mem. Op.).

> Supreme Court indicated the Court should consider the issue of whether defense costs incurred by the Plaintiffs before a demand for defense was made to the [D]efendants and after discovery was completed and some of the [Dover Mall] [D]efendants in the underlying case had already filed Motions for Summary Judgment, could be recovered by the [P]laintiffs. The Supreme Court noted that the Delaware Courts had not yet decided if mere notice of litigation against an additional insured would trigger the duty to defend or whether an actual demand for defense has to be made before the duty is triggered.

11. This is a correct statement; however, upon remand cost allocation is implicated only if Abacus is found, *first*, to have a duty to defend or indemnify at all. The Delaware Supreme Court's first directive to this Court was to "determine whether the tortious conduct asserted against Dover Mall arose out of security operations performed by Abacus."[15]

12. In the instant case, Plaintiffs have alleged a right to indemnity and defense costs under two contracts. The Delaware Supreme Court noted that regardless of which one is invoked, both contain the "arising out of" language. If Plaintiffs' liability did not "arise out of" Abacus' security services or operations, neither contract provision is triggered, and the Court does not need to determine when a hypothetical duty to defend would have arisen under either.

13. Even if liability arises out of Abacus' security operations so as to

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[15] *American Ins. Group*, 761 A.2d at 829-30.

trigger either one of the applicable agreements, analysis of the indemnity provisions (and the negligence of the parties) is still needed before the duty to defend is reached. As noted by the Delaware Supreme Court, "[w]hile a contract for indemnification may provide for indemnification for the indemnitee's own negligence, that intention must be evidenced by unequivocal language."[16]

14. The Court must also determine the relevancy and identity of "the client," the "named insured," and the "additional insureds" language under the two contracts. If a duty to *indemnify* arises from either of these agreements then the Court may not reach the issue of cost allocation (if the duty to pay defense costs is subsumed within the duty to indemnify).[17]

15. On the other hand, if Plaintiffs simply have "litigation insurance," the Court will need to ascertain if, or when, "the client" or the "insureds" provided notice (and/or what notice was required by the policy language). If either contract is applicable and the identity of the parties determined, the Court will need to review the facts surrounding notice, demand and prejudice.[18] It may be only at that

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[16] *American Ins. Group*, 761 A.2d at 829 (citing *Precision Air, Inc. v. Standard Chlorine of Del.*, 654 A.2d 403 (Del. Supr. 1995)

[17] *See e.g. Mount Vernon Fire Ins. Co. v. Pied Piper Kiddie Rides, Inc.* 445 A.2d 949, 954 (Del. Super. 1982) (finding that "duty to defend on the alleged non-warranty claim in the [underlying] complaint ha[d] been subsumed into the holding on the contractual liability provision").

[18] *See State Farm Mut. Auto. Ins. Co. v. Johnson*, 320 A.2d 345 (Del. Supr. 1974); *Homsey Architects, Inc. v. Harry David Zutz Ins., Inc.*, Del. Super., C.A. No. 96C-06-082, 2000 WL 973285, Herlihy, J. (May 25, 2000).

point that the Court will need to decide the cost allocation issue. Obviously, at the present time the issue is not ripe.

Wherefore Defendants' motions for partial summary judgment are ***DENIED.*** IT IS SO ORDERED.

/s/ William L. Witham, Jr.
J.

dmh
oc: Prothonotary
xc: Order Distribution
File