

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ENTERED

JUL 23 2004

U.S. DISTRICT COURT
INDIANAPOLIS, INDIANA

CELADON TRUCKING SERVICES,)
INC.,)

Plaintiff,)

vs.)

THE SHERWIN-WILLIAMS COMPANY,)

Defendant.)

CAUSE NO. IP02-0806-C-B/S

JUDGMENT

The Defendant's Motion for Summary Judgment is **GRANTED**, and **JUDGMENT** is now entered in favor of the Defendant and against the Plaintiff.

The costs of this action are assessed against the Plaintiff.

ALL OF WHICH IS ORDERED this 22nd day of July 2004.

Sarah Evans Barker

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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U.S. CLERK'S OFFICE
INDIANAPOLIS, INDIANA

CAUSE NO. IP02-0806-C-B/S

***ENTRY ON SHERWIN-WILLIAM'S MOTION FOR SUMMARY JUDGMENT ON
ITS AFFIRMATIVE DEFENSE OF INDEMNITY AND
MOTION TO STRIKE PLAINTIFF'S SURREPLY***

The defendant Sherwin Williams Company ("SWC") filed its Motion for Summary Judgment on June 23, 2003. SWC asserts that as a matter of law the application of an indemnity agreement between SWC and plaintiff, Celadon Trucking Services, Inc. ("Celadon"), bars Celadon from recovery. As additional grounds, SWC argues the absence of any material question of fact regarding its lack of negligence. Pursuant to a joint request of the parties, on October 3, 2003, the court bifurcated the issue of whether or not the indemnity agreement applies to allow for a decision on that issue prior to any further discovery or settlement negotiations between the parties. Following that order, Celadon filed its response brief responding to that part of the summary judgment motion based upon the affirmative defense of a written indemnity agreement.

JUL 23 2004

SWC filed a reply brief. Celadon then filed a surreply, to which SWC objected and filed a Motion to Strike. This entry will address both the Motion for Summary Judgment, insofar as it is based upon the affirmative defense of indemnity, and the Motion to Strike.

FACTUAL BACKGROUND

Celadon is a for-hire motor carrier engaged in the business of providing transportation services to the shipping public in interstate and intrastate commerce, pursuant to permissions granted by the U.S. Department of Transportation, Federal Highway Administration, and various state regulatory agencies. On November 1, 1996, SWC, as shipper, and Celadon, as carrier, entered into a Contract Carrier Transportation Agreement (“Agreement”). In order to haul SWC freight, SWC requires all carriers to enter into this form of agreement. Pertinent portions of the Agreement provide as follows:

Services to be Performed. Shipper shall tender for delivery, and Carrier shall transport, a series of shipments of Property on a regular basis as agreed to by the parties during the Term of this Agreement (the “Transportation Services”) pursuant to the terms set forth herein. ...

Indemnity. Carrier shall indemnify, defend and hold Shipper harmless from and against any and all damages, judgments, final decisions, settlements, fines, penalties, reasonable attorneys’ fees, litigation expenses, claims, demands, liabilities, costs and any expenses of any nature whatsoever arising out of any act or omission related to the performance of Transportation Services under this Agreement by Carrier, its agents, employees or subcontractors.

Miscellaneous. The validity, interpretation and performance of this Agreement shall be governed and construed in accordance with the Laws of the State of Ohio.

On May 26, 2000, when the agreement was in full force and effect, SWC engaged Celadon to transport totes of paint from the SWC facility in Columbus, Ohio to the SWC facility in Buford, Georgia. Celadon's driver, Annetta Bruxvoort, picked up 11 totes of paint, which had earlier been loaded onto a Celadon trailer by employees of SWC at its facility in Columbus, and drove the load to Celadon's terminal in Indianapolis, Indiana. Subsequently, another Celadon driver, Audrey Holzworth, picked up the load in Indianapolis and began the drive to the final destination of Buford, Georgia. While enroute to Buford, Georgia, Holzworth was involved in an accident on U.S. 231 at or near its intersection with Johnson Loop Road in Allen County, Kentucky. As Holzworth headed into a right-hand curve on a downhill grade, the tractor-trailer overturned, spilling paint, injuring Holzworth and causing damage to Celadon's tractor-trailer.

Celadon has filed this action against SWC seeking to recover for damages to its tractor and trailer, loss of use of both, the costs of cleaning up after the wreck, the loss of Hozworth's services as an employee and the costs of her worker's compensation benefits. The First Amended Complaint alleges that the contents of the load suddenly shifted, causing the tractor-trailer to overturn. Celadon claims SWC negligently loaded the trailer and failed to warn the Celadon drivers of the danger associated with the load as a result of the manner in which it was loaded. SWC responds, claiming that the indemnity

language applies to bar any liability on its part in favor of Celadon and seeks summary judgment in its favor on that issue.

MOTION TO STRIKE

In briefing the Motion for Summary Judgment, Celadon filed a Surreply Brief. Local Rule 56.1(d) allows for a surreply where, in its reply, the moving party relies upon evidence not previously cited. In such circumstances the surreply must be limited to addressing the new evidence. Along with its reply brief, SWC did submit additional deposition designations. However, Celadon's Surreply Brief was not limited to addressing this new evidence. In fact, as pointed out by SWC, the vast majority of the brief was a rehash of the arguments Celadon previously raised in its initial brief opposing the summary judgment motion. Celadon has filed no response to the Motion to Strike. Accordingly, SWC's Motion to Strike is granted as to all but part C of Celadon's Surreply Brief.¹

SUMMARY JUDGMENT STANDARD

On a motion for summary judgment, the burden rests on the moving party to demonstrate "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct.

¹Along with the Surreply Brief, Celadon submitted a Surreply Appendix containing additional deposition designations from the deposition of Susan Vidovic. Because those additional designations were provided in response to the SWC reply designations, they are appropriately submitted and may remain a part of the record.

2548, 91 L.Ed.2d 265 (1986). After the moving party demonstrates the absence of a genuine issue for trial, the responsibility shifts to the non-movant to "go beyond the pleadings" and point to evidence of a genuine factual dispute precluding summary judgment. *Id.* at 322-23, 106 S.Ct. 2548. "If the non-movant does not come forward with evidence that would reasonably permit the finder of fact to find in her favor on a material question, then the court must enter summary judgment against her." *Waldrige v. American Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir.1994) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Celotex*, 477 U.S. at 322-24, 106 S.Ct. 2548; *Anderson*, 477 U.S. at 249-52, 106 S.Ct. 2505).

Summary judgment is not a substitute for a trial on the merits, nor is it a vehicle for resolving factual disputes. *Waldrige*, 24 F.3d at 920. Therefore, in considering a motion for summary judgment, we draw all reasonable inferences in favor of the non-movant. *Venters v. City of Delphi*, 123 F.3d 956, 962 (7th Cir. 1997). If genuine doubts remain, and a reasonable fact-finder could find for the party opposing the motion, summary judgment is inappropriate. *See Shields Enters., Inc. v. First Chicago Corp.*, 975 F.2d 1290, 1294 (7th Cir.1992); *Wolf v. City of Fitchburg*, 870 F.2d 1327, 1330 (7th Cir.1989).

In this case, the question is a straight-forward issue of law: Does the

indemnity language in the Agreement bar Celadon from pursuing damages if claims were the result of negligence on the part of SWC in loading Celadon's trailer?

ANALYSIS

SWC argues that, in order to understand why the indemnity clause in the Agreement applies in this situation, it is necessary to focus on the fact that the damages at issue occurred while plaintiff was performing "transportation services". According to SWC the indemnity clause makes it clear that Celadon agreed to indemnify and hold SWC harmless "against any and all damages" that arose out of and during the course of Celadon's provision of transportation services. Since the tractor-trailer overturned while a Celadon driver was transporting its load to SWC's facility in Georgia, SWC maintains that indemnity clearly applies. Regardless of whether its employees were negligent in loading the trailer, SWC maintains that "any and all" claims includes any and all damage resulting from an accident which occurs during the process of transportation.

Celadon of course has a different take on the interpretation of the indemnity language. Celadon's focus is on that part of the indemnity clause which states "arising out of any act or omission ... by Carrier, its agents, employees or subcontractors." (emphasis added) According to Celadon, the damages SWC seeks to recover did not arise out of any act or omission on the

part of Celadon or its driver, but rather were caused by the negligence of the SWC employees who had negligently loaded the trailer. The agreement clearly requires that the damages indemnified against must result from Celadon's own actions, says Celadon, not against the negligent acts of SWC.

Celadon's attempt to read a requirement into the agreement that it be at fault before it is required to hold SWC harmless is misguided. All the Agreement requires is that the damages "arise out of" Celadon's act or omission related to its provision of transportation services. Nowhere does it provide that the damages be "caused by" an act or omission on the part of Celadon. Whether it is the "act" of transporting the paint totes or the "omission" of failing to assure that the totes were loaded properly before departure, there can be no argument that the accident and the resultant damages arose out of Celadon's provision of transportation services. Where broad language such as "any and all" is used and no requirement of negligence is specified as a trigger, under Ohio law the court is admonished not to read a negligence or fault requirement into the agreement. *City of Columbus v. Alden E. Stilson & Associates*, 630 N.E.2d 59, 62-63 (Ohio App. 1993).

Celadon also argues that SWC's superior bargaining leverage and alleged refusal to negotiate any terms outside of price terms in connection with the hauling of its freight, should require the court to read the agreement strictly as against SWC, who drafted the contract. Regardless of the acknowledged

breadth of its provisions, the plain meaning of the language in the agreement must be deemed controlling. *Id.* at 614. That is especially true where, as here, the parties to the agreement are both commercial enterprises of sufficient sophistication to allow the court to presume they are in parity with one another when it comes to negotiating their business agreements. *Glaspell v. Ohio Edison Co.*, 505 N.E.2d 264, 266-67 (Ohio 1987). Though SWC may have insisted that certain, specific provisions be included in its freight hauling contracts, there is no basis for us to conclude that Celadon lost its independent negotiating position in dealing with SWC such that, for example, without SWC's freight business, it would not stay in business. Numerous other carriers have agreed to the same terms in order to quote rates for hauling SWC freight. We assume, as well, that Celadon could have quoted higher rates to compensate for the liability it was accepting or could have simply refused to haul SWC freight unless indemnity was limited to situations where damages resulted from Celadon's fault. Instead, it apparently agreed to broadly indemnify and hold SWC harmless from any action for damages that would arise out of Celadon's provision of transportation services, because that is what the parties' Agreement provides.

CONCLUSION

We find the plain language of the indemnity agreement to require Celadon to hold SWC harmless from any damages associated with or arising

out of the accident, as described in Celadon's First Amended Complaint for Damages. Consequently, Defendant's Motion for Summary Judgment is GRANTED on the basis of SWC's affirmative defense of a written indemnity agreement. Also, the SWC's Motion to Strike Plaintiff's Surreply is GRANTED as to all portions of Plaintiff's Surreply Brief except Section C which responds to the additional evidence included by SWC in its reply.

It is so ORDERED this 22nd day of July, 2004.

Sarah Evans Barker
SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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