CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Morlin Asset Management LP v Murachanian 8/8/16

Contracts of Indemnity; Interpretation of Indemnification Provisions

Plaintiff was an employee of Arax Carpet Co. Cross-defendant Murachanian, the tenant, engaged plaintiff's employer, Arax, to clean the carpets in his dental suite. Arax sent plaintiff and another man to do the work on October 4, 2012. As he walked up a flight of stairs, plaintiff slipped, falling forward and suffering severe injuries. Plaintiff sued the landlord, Morlin Asset Management, claiming the stairs presented a dangerous condition because the treads and risers did not conform to the building code or industry standards in various respects. During discovery, additional facts came to light that plaintiff spilled some soapy water which contributed to his fall. Plaintiff maintained in discovery that he fell due to violation of statutes or industry standards related to dangerous conditions on the stairs.

Ivan Bell, the landlord's building engineer for the property, was deposed and testified that he told the tenant he wanted to be notified "whenever Arax comes out" so that he could "make sure the hoses were run properly." (This was because of a previous occasion when he "caught them (Arax) with the hose going up the stairs," and he told the tenant that "it was a problem the way they were putting the hose" on that occasion.) Mr. Bell testified that he "saw them (Arax) do it wrong," and he told the tenant that " 'you have to let me know every time they come.' "

In April and May 2014, Morlin, the landlord, filed a cross-complaint against the tenant, Murachanian, for **equitable indemnity** (alleging any injuries to plaintiff were caused by the tenant); apportionment of fault; declaratory relief; and express indemnity under the terms of the lease. Morlin alleged the lease required the tenant to **defend and indemnify** it, and to purchase liability insurance naming the land owner as an additional insured.

In June 2014, the tenant, Murachanian, **moved for summary judgment**. He contended the lease agreement did not provide express indemnity for plaintiff's alleged injuries because the accident did not occur within his leased premises (the dental suite), but instead within the common areas (the stairs); he did not cause or contribute to plaintiff's alleged injuries, so there was no basis for implied or equitable indemnity; and at all times he procured the necessary liability insurance naming the landlord as an additional insured.

Murachanian's evidence included a copy of the lease, containing this indemnification clause:

"8.7 Indemnity. Except for Lessor's gross negligence or willful misconduct, ***Lessee shall indemnify, protect, defend and hold harmless*** the Premises, ***Lessor and its agents***, partners and Lenders, ***from and against any and all claims, loss of rents and/or damages, liens, judgments, penalties, attorneys' and consultants' fees expenses and/or liabilities arising out of, involving or in connection with, the use and/or occupancy of the Premises by Lessee.*** If any action or proceeding is brought against Lessor by reason of any of the foregoing matters, Lessee shall upon notice defend the same at Lessee's expense by counsel reasonably satisfactory to Lessor and Lessor shall cooperate with Lessee in such defense" (Italics and boldface added.)

Murachanian was deposed six days after he filed his motion for summary judgment. He testified that several years before plaintiff's accident, Mr. Bell "asked us to inform his when we were going to have any work done such as a

carpet cleaning or air conditioning service when we were having somebody come over onto the premises." "We'd notify Ivan Bell. So if he had any concerns or needed to be there when any of this work was being done by any of the contractors he had ample time and notice to be there." The tenant did not know whether his office staff notified Mr. Bell about the carpet cleaning that took place on the date of plaintiff's accident.

Morlin opposed the motion for summary judgment, contending the evidence established "that plaintiff created the condition which caused his fall"; that plaintiff was acting as an agent for the tenant; and that the tenant was responsible for plaintiff's actions. As landlord, it contended there were triable issues, including the extent of the agency and whether the tenant was negligent for creating the condition that caused or contributed to plaintiff's fall and injuries.

The trial court granted the tenant's motion for summary judgment on the landlord's claim for express indemnity, finding the lease obligated the tenant to indemnify the landlord only against claims "involving the Premises, which has a limited definition and does not include 'stairwells.' " Because it was undisputed that plaintiff was injured on the stairwells, within the common areas (defined as "all areas and facilities outside the Premises," including stairwells, the control of which is expressly reserved to the landlords), the trial court concluded the tenant had no obligation to provide indemnification.

The court also granted summary judgment on the landlord's claims for equitable indemnity and apportionment of fault, reasoning it was undisputed that the tenant did not exercise any control over the common areas. The court rejected Morlin's agency theory, finding no law or facts to support the existence of an agency relationship between the tenant and plaintiff. Judgments were entered in Murachanian's favor on the cross-complaints, and the trial court awarded the tenant $12,000 in attorney fees. The landlord filed timely appeals

from the judgments and the attorney fee order.

Along with its opening brief, Morlin requested judicial notice of documents showing plaintiff settled with Morlin and his complaint was dismissed with prejudice on June 2, 2015.

The Second District Court of Appeal reviewed the indemnity clause in the parties' lease, requiring the tenant to indemnify and defend the landlord and its agents (except for their gross negligence or willful misconduct) against all claims and liabilities "arising out of, involving or in connection with, the use and/or occupancy of the Premises by tenant." Both parties variously invoked several other provisions of the lease, and both pointed out that the lease must be construed as a whole. (Civ. Code, § 1641)

The tenant points to the definitions of lease terms, including the **leased premises**, which are limited to suite No. 204; the **common areas**, which are outside the suite and include the stairwells; and **provisions giving the landlord exclusive control and management of the common areas and the responsibility for keeping the common areas in good condition and repai**r. The landlord points to a provision exempting it from all liability for injury or damage to the person or property of the tenant or the tenant's employees, contractors or others "in or about the Premises," from any cause, whether the injury results from conditions arising "upon the Premises . . . or from other sources or places," and a provision requiring the tenant to maintain specifically described liability insurance. The landlord also points to the rules and regulations appended to the lease and initialed by the parties. These include a rule stating that the tenant "shall not employ any service or contractor for services or work to be performed in the Building except as approved by landlord."

The tenant agreed to indemnify the landlord for claims "arising out of, involving or in connection with" his use or occupancy of the dental suite. The

landlord contends the term "arising out of" should be liberally construed in favor of the promisee (here, the landlord). For this proposition, the landlord cites *Vitton Construction Co., Inc. v. Pacific Ins. Co.* (2003) 110 Cal.App.4th 762, 766, where the court observed that " 'California courts have consistently given a broad interpretation to the terms "arising out of" or "arising from" in various kinds of insurance provisions.' " Here, the landlord says, "were it not for Murachanian's use of the leased premises to operate his dental office, including his hiring of Arax to clean the carpet within the leased premises, plaintiff would not have been ascending the stairwell and would not have been injured."

But this is not an insurance case. **And as the Supreme Court instructs, "though indemnity agreements resemble liability insurance policies, rules for interpreting the two classes of contracts do differ significantly."** (*Crawford v. Weather Shield Mfg., Inc.* (2008) 44 Cal.4th 541, 552) "For example, it has been said that if one seeks, in a noninsurance agreement, to be indemnified . . . regardless of the indemnitor's fault . . . language on the point must be particularly clear and explicit, and will be construed strictly against the indemnitee."

Of course, "in a remote sense," the accident would not have occurred if the tenant had not hired Arax to clean the carpets in his dental suite, and in that sense, the accident could be said to arise from the tenant's use of the suite. (See *Hollander v. Wilson Estate Co.* (1932) 214 Cal. 582, 584, 585; see also *City of Oakland v. Oakland etc. Sch. Dist.* (1956) 141 Cal.App.2d 733, 735, 737)

To say the accident would not have occurred if the tenant had not hired Arax to clean the carpets does not mean the standard indemnity clause applies here. At oral argument, counsel for the landlord conceded that the landlord could not seek indemnity if a defect in the stairs for which it was responsible caused the accident. Morlin points out that cases such as *Hollander* and *City of Oakland* involve circumstances where the accident is indisputably caused by the lessor's negligent maintenance of the common area over which the lessor had

exclusive control. This case is different, they say, because the tenant "offered no evidence that the landlord negligently maintained the stairwell or that a defect in the stairwell caused the accident." Further, Morlin contends, it offered evidence the accident was caused by plaintiff's negligence, Arax's negligent supervision of plaintiff, or Murachanian's negligence in failing to notify the landlord of the carpet cleaning.

The Justices note the distinctions the landlord proffers have no relevance to the scope of the indemnification clause, **an issue of contract interpretation** that is unaffected by the ultimate cause of the accident. The factual questions the landlords raise about plaintiff's negligence and Arax's negligent supervision relate only to the dispute between plaintiff and the landlord, which the parties have settled – not to the scope of the tenant's contractual indemnification obligation. Nor do the factual issues about the tenant's failure to notify Mr. Bell about the carpet cleaning have any relevance to the scope of the tenant's obligation to indemnify the landlord under the lease. At most, the failure to notify could arguably constitute breach of a rule in the lease, but no breach of contract claim is presented.

Finally, the landlord suggests it has a right to equitable indemnification. The Supreme Court has held otherwise: **"When parties by express contractual provision establish a duty in one party to indemnify another, 'the extent of that duty must be determined from the contract and not from the independent doctrine of equitable indemnity.' "** (*E. L. White, Inc. v. Huntington Beach* (1978) 21 Cal.3d 497, 508,; see also 5 Witkin (10th ed. 2005) Summary of Cal. Law, Torts, § 123, p. 225 ["An express indemnity clause, rather than the equitable principles behind comparative indemnity, governs the scope of any duty to indemnify."].)

Accordingly, the Justices hold that under the indemnity clause in this case, the injury to a third party that occurred outside the dental suite, in a common

area over which the landlord has exclusive control, did not arise out of the tenant's use of the dental suite. It does not matter that the accident would not have happened but for the tenant hiring the third party to clean the carpets in the dental suite, and that the third party may have been at fault. The connection between the tenant's use of his suite and the accident in the stairwell over which the tenant had no control is too remote to have been within the contemplation of the parties when they entered into the lease. This construction of the indemnity clause is fully consistent with the law governing the interpretation of indemnification provisions (*Crawford*, at p. 552), and with the *Hollander* and *City of Oakland* cases construing similar language, albeit in distinguishable circumstances. The trial court properly granted summary judgment.

The only basis the landlords assert for reversal of the attorney fee order is that the summary judgments were erroneous. Because we have concluded otherwise, we likewise affirm the attorney fee order. The judgments and the order awarding attorney fees are affirmed. Respondent Murachanian shall recover his costs on appeal.

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